SUPREME COURT NO. 98806-4
COA NO. 79589-9-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN VALLES, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Sandra E. Widlin, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Benjamin Valles asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Valles requests review of the decision in State v. Benjamin Valles, Jr., Court of Appeals No. 79589-9-I (slip op. filed June 22, 2020), attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. In a case where identity was the central issue at trial, whether defense counsel's failure to object to testimonial hearsay bolstering the fingerprint expert's opinion linking Valles to the crimes constituted ineffective assistance of counsel?

2. Whether Valles's right to an expressly unanimous jury verdict was violated because there was insufficient evidence to prove an alternative means of committing the charged first degree robbery?

D. STATEMENT OF THE CASE

Anthony Hale lived in the Beacon Hill neighborhood of Seattle. RP[1] 286. In the early afternoon of October 16, 2017, Hale left the light rail station and walked home with wallet in hand. RP 294-95, 304-05. As

[1] The verbatim report of proceedings is cited as follows: RP - five consecutively paginated volumes consisting of 12/4/18, 12/5/18, 12/6/18, 12/10/18, 12/11/18, 12/12/18, 2/15/19.

he stepped to the sidewalk in front of his house, a man approached and asked for a cigarette. RP 296-97. Hale said he did not smoke. RP 297. The man asked if he lived there. RP 297. Hale said no. RP 297. The man yelled "bitch" and struck Hale in the head with his hand. RP 297, 302. Hale stumbled into the gate, down the steps and onto the patio. RP 297, 303. Hale initially thought he had just been punched, but then blood rushed from his mouth. RP 297. He was covered in blood. RP 297-98. The man followed him down the stairs and said "give me your fuckin' wallet or I'll kill you." RP 298, 303-04. Hale threw his wallet across the patio. RP 298, 305. The man picked it up and ran off. RP 298, 305.

Hale called 911. RP 298. He knocked on the door to his house, where his wife met him. RP 298. Blood was splattered all over. RP 282. Hale's wife pressed a towel on his neck to stop the bleeding. RP 298. In contacting Hale at the scene, one officer remembered "seeing blood everywhere." RP 538. Another officer observed blood on the sidewalk at the gate. RP 558. Hale was transported to the hospital. RP 315. Medical examination revealed a penetrating stab wound to the neck. RP 464-67.

Hale described the perpetrator as Hispanic, "six oneish," tattoos above his eyebrows, baggy jeans, dark shirt. RP 300, 310-11. Police were dispatched to the scene at about 1:30 p.m. RP 362-63, 492.

On the day in question, Louis Mousseau arrived at his church on Beacon Hill, which is near the crime scene, a few minutes after 1:00 p.m. RP 387, 391, 401. While in the parking lot, he saw a man and a woman walk by in the adjoining alley. RP 394-95. The man remarked "We have to get out of here, they're on their way." RP 394. The man was 12-15 feet away. RP 394. Mousseau saw his profile but at one point the man turned his head to look at Mousseau, who "got the full face at that point." RP 395. Mousseau did not notice any tattoos on the man's face. RP 395, 403-04. Mousseau heard sirens in the area a few minutes later. RP 406. Mousseau approached a police officer and gave a description of the man he'd seen as Hispanic, 6 to 6'2", heavy build, short hair. RP 397. He later told a defense investigator that the man was wearing a light-colored coat and a gray hoodie over it. RP 403.

Elizabeth Santiago, a Metro King County bus driver, was driving her route on Beacon Hill when she received notification to look out for a suspect matching the description given by Hale. RP 422-28. A man boarded the bus with tattoos around his eyes at 1:40 p.m. RP 429, 438. He did not wear dark clothing. RP 442. He initially looked comfortable but then started "getting a little nervous, looking around." RP 432. After a few seconds, the man asked Santiago to open the bus door because he forgot his girlfriend at the bus stop. RP 432, 444, 448. He stood at the

door and made a signal. RP 445. The driver said he would need to wait until the next stop. RP 432. He went to the back of the bus and sat down. RP 446. The driver flagged down a police officer, pointing to the man at the back of the bus. RP 363-64, 431.

When the bus stopped, police entered and saw a man who turned out to be Benjamin Valles exit out the back. RP 364-65. Police contacted Valles in the bus shelter. RP 365, 369. Valles was sweaty but calm and cooperative. RP 365. A frisk turned up no weapons. RP 366. No blood was observed on Valles's clothing or shoes. RP 376, 606-07. There was no blood on his hands. RP 607.

Police brought Mousseau to the bus stop, where police had detained Valles, for a show-up identification. RP 400, 502-03. Police asked if they recognized the man, and Mousseau said he was the person from the alley.[2] RP 400.

While at the hospital, police showed Hale a photo montage containing Valles's photo, asking him to identify the man who attacked him. RP 322-25; Ex. 12. Hale was responsive and coherent at the time. RP 583. Hale did not identify Valles but rather someone else as his attacker, saying he was 90-95 percent sure in his identification.[3] RP 326-

[2] Mousseau also identified the man as Valles in court. RP 400.

27, 348, 555-56. Police released Valles after Hale failed to identify him in the montage. RP 602.

Leo Church lives off the alley near the church where Mousseau saw the man and woman walking. RP 410. He had mounted video cameras to monitor pedestrians walking through the alley. RP 412-13. Video shows the couple walking down the alley at 1:30 p.m. RP 418-19; Ex. 23. The man in the alley wore a black jacket and blue shoes. Ex. 23.

Police searching the area for evidence found Hale's wallet on a retaining wall in the alley where Mousseau saw the couple walking.[4] RP 503, 531-32. No knife or other weapon was found. RP 510-11, 514, 612.

Valles was arrested three days after Hale's failed identification. RP 565, 569. He wore a black jacket and had bright blue shoes at the time of arrest. RP 567-68; Ex. 35. He had tattoos on the back and side of his head. RP 568-69. Police did not observe any blood on his clothing. RP 574, 585-86.

Al-Lien Ton is a latent print analyst employed by the Seattle Police Department, processed Hale's wallet and its contents for prints. RP 638. Ton identified one latent print from a credit card as matching Valles's print.

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[3] Hale was not asked if he could identify his attacker in court at trial.

[4] Mousseau did not see anything on the retaining wall and did not notice anything in the man's or woman's hands. RP 401-02.

RP 641-42, 644-45. Regarding other latent prints, they were incomplete or Valles was excluded as a contributor. RP 642-43.

Ton used the ACE-V method of comparison. RP 627. She makes an identification if "sufficient data" support the conclusion. RP 630. After an identification is made, "verification" is sought from another examiner. RP 632. As described by Ton, "they go through those step [sic] on their own, and usually they try to disprove my work, to see if I was wrong. If they cannot disprove it, then they have to agree with me." RP 633. The prosecutor asked "Was your work in this case verified by another examiner?" RP 645. Ton answered "Yes." RP 645.

On cross-examination, defense counsel elicited the fact that Ms. Ton was only a "latent print trainee," not a latent print examiner, when she received the evidence in this case. RP 648. As of trial, Ton was still not a certified as a print examiner through the International Association for Identification, which requires examiners to have at least two years of examination experience before certification is sought. RP 648. She looked for "similarity" in determining whether a print matched but admitted there was no standard number of similarities because such a number would have no scientific basis. RP 654-55. She did not rely on a certain number of similar characteristics: "We don't have a number. As I

say, number is not a scientifically standard to come up with the identification conclusion." RP 656.

On redirect examination, the prosecutor addressed Ms. Ton's trainee status at the time she did the work in Valles's case. RP 657. The following exchange occurred:

> Q: Can you tell us, once you do work and you reach a conclusion -- and let's talk specifically about this case. Once you did your work in this case and you reached a conclusion in this case, your -- was your work reviewed by another examiner?
> A. Yes, my work reviewed by another examiner.
> Q. Okay. And who did that review in this case?
> A. In this case I have Rachel Forbe, who is my supervisor, and Kelly Anderson, who was my trainer.
> Q. Okay. And which one of them did the review of your work in this case?
> A. Yes, they both -- they both verified my print, and one of them review my case.
> Q. Okay. So did -- so both of them verified the conclusions you reached in this case?
> A. Correct.
> Q. Okay. And when that verification process happens, are you involved in it in any way? Are you involved in their work in verifying your conclusion?
> A. No. They did -- they do their own independently.
> Q. Okay. And I think you mentioned earlier on direct that part of the verification process is to try to prove you wrong?
> A. Correct.
> Q. I think those were your words.
> MS. FREER: Your Honor, I'm going to object. This has been asked and answered, and actually outside of the scope of my cross.
> THE COURT: Sustained.
> MS. PETERSEN: Your Honor, Ms. Freer specifically inquired as to this witness's training and qualifications to

> reach her conclusion on cross, and so I think I'm entitled to ask some questions about her work being verified then. I think that's proper for redirect.
> THE COURT: I sustained the objection.
> Q. Are there additional quality assurance steps taken in addition to those two verifications?
> A. Yes. So after they verified my work, and then the case will go to another review by an examiner before the report is sending out.
> Q. Okay. So a third reviewer then looked at this case?
> A. That supervisor will assign the -- it can be one of the -- the examiner verify my -- verify my ID will review the case again.
> Q. Okay. And that review was done in this case again as well?
> A. Yes. RP 657-59.

The jury found Valles guilty of first degree assault and first degree robbery and returned special verdicts that he was armed with a deadly weapon. CP 51-54. The court imposed a total of 325 months in confinement. CP 58-59.

On appeal, Valles argued (1) his trial counsel was ineffective in not objecting to evidence of out-of-court statements from non-testifying fingerprint experts and (2) his constitutional right to jury unanimity was violated because sufficient evidence did not support an alternative means of committing first degree robbery. The Court of Appeals affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO OUT-OF-COURT STATEMENTS FROM NON-TESTIFYING EXPERT WITNESSES THAT CONSTITUTED INADMISSIBLE HEARSAY AND VIOLATED VALLES'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

The disputed issue was identity. The defense was that the State could not prove it was Valles that assaulted and robbed the victim. The key piece of evidence linking Valles to the crime was his fingerprint on a card in the victim's wallet. The State's fingerprint analyst testified to the fingerprint match, but her expertise was questionable. So the State elicited testimony that other analysts independently reviewed the evidence and agreed with the testifying witness's conclusion.

A person accused of a criminal offense has the right to confront the witnesses against him. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The forensic experts that reviewed the testifying expert's fingerprint conclusion and agreed with it did not testify at trial. But their statements of agreement were admitted at trial to bolster the testifying expert's opinion that there was a match. The non-testifying experts' forensic conclusions are testimonial statements because they parrot the opinion offered by the testifying expert and inculpate the accused. State v. Lui, 179 Wn.2d 457, 482-85, 315 P.3d 493, cert. denied, 134 S. Ct. 2842, 189

L. Ed. 2d 810 (2014). The out-of-court statements also violate the hearsay rule because one expert may not relay the opinion of another non-testifying expert. State v. Wicker, 66 Wn. App. 409, 411-12, 832 P.2d 127 (1992). Although the law unambiguously forbids admission of these statements into evidence, counsel failed to object on confrontation or hearsay grounds. This failure constituted ineffective assistance of counsel. Valles's case presents a significant question of constitutional law. He seeks review under RAP 13.4(b)(3).

Every defendant in a criminal case is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Deficient performance is that which falls below an objective standard of reasonableness. Id. at 688. Counsel has a duty to know the relevant law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The relevant law is that a non-testifying expert's out-of-court conclusions constitute inadmissible hearsay and impermissible testimonial statements under the confrontation clause. Wicker, 66 Wn. App. at 411-12; Lui, 179 Wn.2d at 462, 482-85.

The failure to object in egregious circumstances involving testimony central to the State's case constitutes incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989). This case is such a circumstance.

The defense in the case was identity: that the State could not prove beyond a reasonable doubt that Valles was the person who committed the crime. RP 229-30, 710. The fingerprint evidence provided a crucial evidentiary link tying Valles to the crime. The print analyst who testified at trial was only a trainee at the time she examined Valles's prints. RP 648. And she also admitted there was no scientific basis for her conclusion that there was sufficient agreement between the prints to call it a match. RP 654-56. These facts were rightly elicited by defense counsel on cross to undermine the testifying expert's believability, and they provided a basis for a reasonable juror to doubt her conclusion about the matching print. The State, however, strengthened the testifying examiner's opinion by bolstering it with evidence that at least two other examiners agreed with her. RP 645, 657-59. Counsel sat mute as a tomb when the State elicited this obvious testimonial hearsay even though there was a clear basis for objection. Failing to object in this circumstance is not a legitimate trial tactic.

The Court of Appeals agreed Ton's testimony that other examiners verified the print match was inadmissible testimonial hearsay. Slip op. at 5. The Court of Appeals however, thought counsel was not deficient in failing to object because, had a hearsay or confrontation clause objection been lodged, the State would have likely called the other experts to testify that they confirmed Ton's results. Slip op. at 5-6. This reasoning conflicts with precedent.

In In re Welfare of J.M., 130 Wn. App. 912, 915, 125 P.3d 245 (2005), the Court of Appeals reversed an order terminating parental rights because the parent's counsel was ineffective in failing to object to hearsay reports written by non-testifying experts, the contents of which were regurgitated by the social worker at trial. J.M., 130 Wn. App. at 915. Instead of defending the mother's position or attacking the Department's position, counsel simply took the Department's evidence at face value. Counsel's performance was deficient. Id. at 915; see also In re Dependency of G.A.R., 137 Wn. App. 1, 7-9, 150 P.3d 643 (2007) (counsel ineffective in failing to challenge admissibility of psychological assessments and other expert recommendations, much of it hearsay, contained in written reports and related by DSHS worker at termination trial).

In State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), aff'd, 165 Wn.2d 474, 198 P.3d 1029 (2009), counsel was ineffective for failing to object to the admission of testimonial hearsay. There was no legitimate tactical reason not to object to hearsay that enabled the State to prove elements of the crime. Id.

Cases like Hendrickson and J.M. show the failure to object to hearsay cannot be exonerated on the speculative basis that other witnesses would have been called had an objection been made. If the Court of Appeals deficiency determination in Valles's case is right, then Hendrickson and J.M. were wrongly decided. There is a conflict here. Review is warranted under RAP 13.4(b)(2).

Counsel's deficiency prejudiced the outcome. Prejudice means a reasonable probability that the result would have been different but for counsel's deficient performance. Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

In closing argument, the prosecutor attached significance to the matching fingerprint as a link in the chain of evidence against Valles. RP 701, 706. Defense counsel argued there were other explanations for why Valles's fingerprint would be there, such as he happened to come across the wallet while walking through the alley and examined its contents. RP

718-20, 722-23. In rebuttal, the prosecutor attacked this argument as not comporting with common sense in light of other evidence. RP 727-28. The fingerprint identification pointed to Valles as the perpetrator. But whether the jury would credit Ms. Ton's opinion on the matter turned on whether her expertise was compelling and her opinion believable. Ms. Ton was a mere trainee. She was not a full-fledged examiner. And her method of comparison amounted to "I know it when I see it." A reasonable juror could discount her opinion for these reasons. But when her opinion is bolstered and reinforced by evidence that fully trained examiners independently verified her results, the conclusion of a fingerprint match seems irrefutable.

The Court of Appeals thought Valles could not show prejudice because "ample evidence supports Valle's conviction, including Mousseau's identification of Valles, and the neighbor's personal surveillance video of Valles in the alleyway." Slip op. at 6. Neither Mousseau's identification nor the surveillance video place Valles at the scene of the crime, only nearby. Moreover, the Court of Appeals did not address the inconvenient fact that Hale, the victim, did not identify Valles as his attacker. saying he was as much as 95 percent sure it was someone else. RP 326-27, 348, 555-56. That by itself is the stuff of reasonable doubt. Further, when Valles was detained at the bus stop shortly after the

attack, there was no blood on Valles's clothing or shoes even though Hale bled profusely at the scene of the crime. RP 282, 376, 538, 558, 606-07. The fingerprint evidence was a crucial link in the chain of evidence against Valles. Under these circumstances, counsel's failure to object to the inadmissible expert opinions from non-testifying witnesses undermines confidence in the outcome such that reversal of the convictions is required.

2. THE EVIDENCE IS INSUFFICIENT TO PROVE AN ALTERNATIVE MEANS OF COMMITTING FIRST DEGREE ROBBERY, VIOLATING VALLES'S RIGHT TO JURY UNANIMITY AND REQUIRING REVERSAL OF THE CONVICTION.

First degree robbery is an alternative means offense. One means is that the person displays what appears to be a deadly weapon in the course of the robbery. The evidence here does not support this means of committing the crime. Reversal of the robbery conviction is required because there is no particularized expression of unanimity for the alternative means relied on by the jury. Valles seeks review under RAP 13.4(b)(3).

In criminal prosecutions, the accused has a constitutional right to "an expressly unanimous *verdict*." State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); Wash. Const., art. 1, § 21. The constitutional right to a unanimous verdict also applies to state

prosecutions under the Sixth Amendment of the United States Constitution. Ramos v. Louisiana, __U.S.__, 140 S. Ct. 1390, 1397 (2020).

"A general verdict satisfies due process only so long as each alternative means is supported by sufficient evidence." State v. Woodlyn, 188 Wn.2d 157, 165, 392 P.3d 1062, 1067 (2017). "If there is insufficient evidence to support *any* of the means, a 'particularized expression' of jury unanimity is required." Id. at 165 (quoting State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014)). The purpose of this requirement is to ensure the verdict is adequately supported when a verdict might be based on more than one alternative. Woodlyn, 188 Wn.2d at 164. "[I]f the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." Ortega-Martinez, 124 Wn.2d at 708. The sufficient evidence test is satisfied only if the reviewing court is convinced "a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

RCW 9A.56.200(1) provides in relevant part: "A person is guilty of robbery in the first degree if: (a) In the commission of a robbery or of immediate flight therefrom, he or she: (i) Is armed with a deadly weapon; or (ii) Displays what appears to be a firearm or other deadly weapon[.]"

Being armed with a deadly weapon or displaying what appears to be a deadly weapon are alternative means of committing first degree robbery. State v. Nicholas, 55 Wn. App. 261, 272-73, 776 P.2d 1385 (1989). "The legislature clearly intended to treat the two alternative means of committing robbery in the first degree as distinct." In re Pers. Restraint of Brockie, 178 Wn.2d 532, 538, 309 P.3d 498 (2013). The to-convict instruction in Valles's case includes these alternative means. CP 44.

"By enacting RCW 9A.56.200(1)(b), it appears the Legislature intended to proscribe conduct in the course of a robbery which leads the victim to believe the robber is armed with a deadly weapon." State v. Henderson, 34 Wn. App. 865, 868-69, 664 P.2d 1291 (1983). Display of what appears to be a deadly weapon creates apprehension and fear, which induces the victim to comply with the robber's demand. Id. at 869. The focus is thus "on the victim's reaction, not on whether the accused was in fact armed." Id. "Display" includes exhibiting words and actions to the victim's sight or mind, which has an effect on the fear of the victim. Id. at 867; State v. Scherz, 107 Wn. App. 427, 436, 27 P.3d 252 (2001).

There is insufficient evidence to support the display of a deadly weapon means of committing the offense. There is no evidence that the attacker displayed a weapon during the course of the robbery. Hale did not see anything in the attacker's hands as the latter moved toward Hale

from across the street. RP 301, 337. Hale never saw anything in the attacker's hands at any time. RP 301. The attacker otherwise displayed no indication that he had a weapon. Hale thought he had just been punched. RP 297, 303.

The Court of Appeals concluded Valles "made a physical manifestation indicating the presence of a deadly weapon" through his action of stabbing Hale. Slip op. at 9. It held this physical action, in combination with the subsequent verbal threat of "give me your fuckin' wallet or I'll kill you," was sufficient evidence showing display of a deadly weapon. Slip op. at 9. This reasoning impermissibly blurs the distinction between being armed with a deadly weapon and merely displaying one.

In Brockie, the State asserted that displayed what appeared to be a deadly weapon could encompass being armed with a weapon "since one has to be armed with a weapon in order to display a weapon." Brockie, 178 Wn.2d at 538. The Supreme Court rejected the State's argument not only because one may be armed with a weapon without actually displaying it (as in the case of a gun concealed in a pocket), but also "because one may display what *appears to be* a deadly weapon without being armed with an actual deadly weapon." Id.

A distinction between the two means, then, is the use of an actual deadly weapon under the "armed" means versus what only appears to be a

deadly weapon under the "display" means. When a person is struck with a weapon and suffers injury from it, as in the present case, the "armed" means of committing the robbery is satisfied because there is no doubt the weapon used was an actual weapon. The "display" means is not met in that circumstance because it is reserved for a situation where it is unknown whether an actual weapon is involved. State v. Henderson, 34 Wn. App. 865, 869, 664 P.2d 1291 (1983). The focus of the display means is "on the victim's reaction" of fear or apprehension when faced with that situation, "not on whether the accused was in fact armed." Id. at 869.

Statutes are not interpreted in a way that renders any portion superfluous. State v. Yelovich, 191 Wn.2d 774, 783, 426 P.3d 723 (2018). The interpretation used by the Court of Appeals renders the display means of committing the crime superfluous because, under its approach, striking someone with an actual deadly weapon constitutes being armed with a deadly weapon as well as displaying what appears to be deadly weapon. Courts do not interpret alternative means in a manner that allows one means to swallow up another. See State v. Roggenkamp, 153 Wn.2d 614, 626, 106 P.3d 196 (2005) (refusing to interpret vehicular homicide and vehicular assault statutes in a manner that renders one of the alternative means of committing the crime superfluous). Alternative means must remain distinct. Id. at 626-27. And the Supreme Court has so found

regarding the armed and display means of committing first degree robbery. Brockie, 178 Wn.2d at 538.

In the present case, the robber did not "exhibit or show" what appears to be a deadly weapon "to the view of the victim." State v. Kennard, 101 Wn. App. 533, 537, 6 P.3d 38, review denied, 142 Wn.2d 1011, 16 P.3d 1267 (2000). Nor did the robber "manifest by *words and actions* the apparent presence" of a deadly weapon even though it was "not actually seen by the victim." Id. There is no "apparent presence" on the facts of this case. There is an "actual" presence in the sense that the evidence establishes the robbery was armed with an actual deadly weapon. But there is no display of what only *appeared* to be a deadly weapon. In the absence of a particularized expression of jury unanimity, a conviction must be reversed where, as here, there is insufficient evidence to support an alternative means. Woodlyn, 188 Wn.2d at 165.

F. CONCLUSION

For the reasons stated, Valles requests that this Court grant review.

DATED this 22nd day of July 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

CASEY GRANNIS, WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

FILED
6/22/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BENJAMIN VALLES, JR., Appellant.	No. 79589-9-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. — Benjamin Valles appeals his conviction for first degree assault and first degree robbery. He asserts he received ineffective assistance of counsel because his trial counsel did not object to evidence of an out-of-court statement from a non-testifying expert witness that was inadmissible hearsay and violated his Sixth Amendment right to confrontation. He also claims the State violated his constitutional right to jury unanimity because evidence does not support the "display of a deadly weapon" means of committing first degree robbery included in the elements jury instruction.

Valles has not shown that his counsel's failure to object was not a legitimate trial tactic. And, the State presented sufficient evidence to support a finding that he displayed a deadly weapon. So, we affirm his conviction. But, we remand for the trial court to correct Valles's offender score and to strike the supervision fees from the judgment and sentence.

BACKGROUND

On October 16, 2017, Anthony Hale was walking home from the Beacon Hill light rail station when a man stabbed him in the neck and mouth. The man said, "give me your fuckin' wallet or I'll kill you." Hale threw the man his wallet. The man picked up the wallet and ran away. Hale called 911 and described the man as Hispanic with tattoos above his eyebrows. Hale initially thought he had only been punched. Police responded and paramedics took Hale to Harborview Medical Center.

Between 1:00 p.m. and 1:30 p.m., Louis Mousseau arrived at his church located half a block away from the crime scene. He saw a man in the alleyway tell a woman, "We have to get out of here, they're on their way." A nearby home surveillance video also captured a man and a woman walking down the alleyway at 1:30 p.m. Mousseau heard sirens and gave police a description of the man he saw in the alleyway. Mousseau did not notice if the man had any tattoos and did not see either the man or the woman holding anything in their hands.

Elizabeth Santiago, a King County Metro bus driver, was driving when she received a police alert with a description of a suspect with tattoos around his eyes. At 1:40 p.m., Santiago saw a man with tattoos around his eyes board her bus. Santiago flagged two police officers. When the officers approached the bus, Valles got off. Officers contacted Valles at a bus stop. They frisked Valles and found no weapons.

Officers brought Mousseau to the bus stop and asked if he recognized Valles. He identified Valles as the man in the alleyway. Officers showed Hale a

photomontage containing Valles's photo. When Hale identified someone other than Valles as his attacker, they released Valles. Officers found Hale's wallet in the alley. They did not find a knife. Three days later, police arrested Valles.

At trial, Ai-Lien Ton, a latent fingerprint examiner trainee for the Seattle Police Department, testified that she conducted the print analysis in this case. Ton matched Valles's fingerprint with a latent print from a credit card in Hale's wallet. After she matched the print, she sent her work to her supervisor for review. Ton testified that three individuals, her supervisor, trainer, and another examiner independently reviewed her work and verified her findings. None of these individuals testified.

The jury convicted Valles of first degree assault and first degree robbery, and returned special verdicts finding Valles was armed with a deadly weapon.

Valles appeals.

ANALYSIS

Ineffective Assistance of Counsel

Valles asserts his defense counsel provided ineffective assistance by failing to object to Ton's testimony because it violated Valle's Sixth Amendment right to confrontation and was inadmissible hearsay under Evidence Rule (ER) 802.

The Sixth Amendment to the United States Constitution, and article I, section 22 of the Washington State Constitution, each guarantee a defendant the right to effective assistance of counsel in criminal proceedings.[1] We review

[1] Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

ineffective assistance of counsel claims de novo.[2] To establish this claim, Valles must show (1) defense counsel's conduct fell below an objective standard of reasonableness, and (2) that a reasonable possibility exists that, but for counsel's deficient performance, the outcome of his trial would have been different.[3] Our scrutiny of defense counsel's performance is highly deferential, and we employ a strong presumption of reasonableness.[4] "To rebut this presumption, the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'"[5] Failure to satisfy either prong of the test defeats an ineffective assistance of counsel claim.[6]

First, we address the issue of whether defense counsel's conduct was deficient by failing to object to Ton's testimony because it was inadmissible hearsay under ER 802 or violated Valle's Sixth Amendment right to confrontation.

Hearsay is an out of court statement offered to prove the truth of the matter asserted.[7] Hearsay is inadmissible unless an exception or exclusion applies.[8] "Generally, one expert may not relay the opinion of another nontestifying expert without running afoul of the hearsay rule."[9]

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[2] In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

[3] State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

[4] Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

[5] State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting Reichenbach, 153 Wn.2d at 130).

[6] Strickland, 466 U.S. at 697.

[7] ER 801(c).

[8] ER 802.

[9] State v. Brown, 145 Wn. App. 62, 73, 184 P.3d 1284 (2008).

Valles cites State v. Wicker in where a fingerprint expert testified that a supervisor verified her fingerprint analysis.[10] In Wicker, we determined the testimony about the supervisor's verification was inadmissible hearsay because it was an assertion that the supervisor agreed the fingerprints matched.[11]

Ton's testimony was hearsay. But, we cannot say that defense counsel was deficient by not objecting on hearsay grounds. If defense counsel had successfully objected on hearsay grounds, the State would have likely called the supervisor, trainer, and other examiner to testify. The testimony would likely confirm Ton's results and bolster the State's case. It would also place greater focus on the fingerprint evidence and perhaps cause the jury to place more importance on it. It is conceivable that defense counsel's decision not to object on hearsay grounds was a "legitimate tactic."

For the same reason, it is conceivable that defense counsel's decision not to object on Sixth Amendment grounds was a legitimate tactic. The Sixth Amendment provides criminal defendants the right to confront the witnesses against them.[12] Admission of a testimonial statement violates a defendant's right to confront the witness unless the witness is unavailable and the defendant previously had an opportunity to cross-examine the witness regarding the statement.[13] Here, if defense counsel had objected on confrontation clause

[10] 66 Wn, App. 409, 411-12, 832 P.2d 127 (1992).
[11] 66 Wn. App. at 411-12.
[12] U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); WASH. CONST. art. I, § 22; State v. Hurtado, 173 Wn. App. 592, 595, 294 P.3d 838 (2013).
[13] Crawford, 541 U.S. at 68.

grounds, the State would have likely called the other experts to testify that they confirmed Ton's results. Because defense counsel's decision not to object on hearsay or confrontation grounds was a conceivable legitimate trial tactic, we cannot say their performance was deficient.

Next, even if defense counsel's performance was deficient, it did not prejudice Valles. Absent the fingerprint evidence, ample evidence supports Valle's conviction, including Mousseau's identification of Valles, and the neighbor's personal surveillance video of Valles in the alleyway.

Jury Unanimity

Valles challenges his conviction for robbery in the first degree claiming the State violated his constitutional right to jury unanimity because evidence does not support one of the three means of committing the crime described in the court's instructions, the display of a deadly weapon.

Article I, section 21 of the Washington State Constitution guarantees criminal defendants the right to a unanimous jury verdict.[14] "This right may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime."[15] Generally, an alternative means crime "is one by which the criminal conduct may be proved in a variety of ways."[16]

[14] State v. Armstrong, 188 Wn.2d 333, 340, 394 P.3d 373 (2017); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); State v. Peterson, 174 Wn. App. 828, 849, 301 P.3d 1060 (2013), review denied, In re Estate of Peterson, 178 Wn.2d 1021 (2013); RAP 2.5(a)(3).

[15] State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

[16] Owens, 180 Wn.2d at 96.

"When a crime can be committed by alternative means, express jury unanimity as to the means is not required where each of the means is supported by substantial evidence."[17] In this circumstance, "we infer that the jury rested its decision on a unanimous finding as to the means."[18] If the record does not include sufficient evidence to support one alternative means, a particularized expression of jury unanimity is required.[19] "Evidence is sufficient if after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[20]

RCW 9A.56.200(1)(a) provides that a person is guilty of first degree robbery if, in the commission a robbery or immediately after, they are (i) "armed with a deadly weapon"; or (ii) "displays what appears to be a firearm or other deadly weapon"; or (iii) "inflicts bodily injury." So, first degree robbery is an alternative means crime.

The jury was instructed that to convict Valles of first degree robbery, it needed to find all six of the following elements beyond a reasonable doubt:

> (1) That on or about October 16, 2017, the defendant unlawfully took personal property from the person or in the presence of another;
> (2) That the defendant intended to commit theft of the property;
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
> (4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
> (5) (a) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon; or

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[17] State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046 (2006).
[18] Ortega-Martinez, 124 Wn.2d at 708.
[19] Owens, 180 Wn.2d at 96.
[20] State v. Garcia Gomez, 7 Wn. App. 2d 441, 455, 434 P.3d 89 (2019).

> (b) That in the commission of these acts or in immediate flight therefrom the defendant displayed what appeared to be a deadly weapon; or
> (c) That in the commission of these acts or in immediate flight therefrom the defendant inflicted bodily injury; and
> (6) That any of these acts occurred in the State of Washington.

Element five includes three alternative means. The jury instruction stated, "To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a), or (5)(b), or (5)(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt."

Valles and the State agree that sufficient evidence supports (5)(a) and (5)(c) because Hale was stabbed and injured by a deadly weapon. But, they disagree on whether sufficient evidence supports (5)(b), "the defendant displayed what appeared to be a deadly weapon."

Valles contends insufficient evidence supports the display element because Hale did not see a weapon and thought he had only been punched. Valles asserts, "A knife can be concealed in the hand, such that it is not displayed to the victim."

While a weapon can by concealed from view, we have found that the display element may be satisfied by a "physical manifestation indicating there is a weapon," such as a gesture. The display element is also met where the defendant verbally indicates the presence of a weapon. For example, in State v. Kennard, even though the victim did not actually see the weapon, the court found sufficient evidence where the defendant said he had a gun and patted his hip.[21] In State v.

[21] 101 Wn. App. 533, 537-40, 6 P.3d 38 (2000).

Henderson, witnesses did not see a gun, but the court found sufficient evidence where the defendant said, "I have this," and held his hand in his pocket as if he had a weapon.[22]

The State contends that, by stabbing Hale, Valles made a physical manifestation indicating the presence of a deadly weapon. We agree. Valles stabbed Hale and then said, "give me your fuckin' wallet or I'll kill you." Considering the evidence in the light most favorable to the State, the combination of Valles's physical action and verbal threat are sufficient evidence to support a jury finding that he displayed a deadly weapon.

Calculation of the Offender Score

Valles challenges, and the State concedes, that the trial court should not have included a prior North Dakota conviction in the calculation of his offender score because it was a non-comparable out of state offense. RCW 9.94A.525(3) provides, "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." "The State bears the burden of proving the existence and comparability of all out-of-state convictions."[23] We accept the State's concession.

Valles asserts remand for resentencing with the corrected offender score is required, or that remand to correct the offender score is required.

[22] 34 Wn. App. 865, 867, 664 P.2d 1291 (1983).

[23] State v. Olsen, 180 Wn.2d 468, 472, 325 P.3d 187 (2014) (citing State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)).

Generally, a sentence based on "an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice"[24] and requires resentencing using the correct offender score.[25] "[W]hile remand is the appropriate remedy when the court incorrectly calculates the standard range, remand is unnecessary where 'the record clearly indicates that sentencing court would have imposed the same sentence anyway.'"[26]

Here, the trial court indicated that it would have imposed the same sentence regardless of whether the North Dakota conviction was included in the calculation. The court stated about the first degree assault conviction,

> I am imposing 277 months, which I would note is the top end if you scored an eight, if I was not counting the North Dakota conviction. And if I was not counting the North Dakota conviction and you only had an offender score of eight, I would be imposing the same sentence of 277 months, because that equated to just over 23 years in prison, which I think is an appropriate sentence given the facts of this case, which I had an opportunity to hear at trial.

And, the court stated about the first degree robbery conviction,

> the sentence on Count 2 is 144 months, which is right within the standard range of a [sic] offender score of nine, and it's at the top end had the court considered an offender score of eight. It still would have been the top end of that range. And it is what I would have -- I would have imposed, even if -- I would have imposed if I was not considering the North Dakota conviction.

The court should not have included the North Dakota conviction in its calculation. But, it stated the sentence it would have imposed if it had not included

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[24] State v. Wilson, 170 Wn.2d 682, 687-89, 244 P.3d 950 (2010) (citing In re Goodwin, 146 Wn.2d 861, 867-78, 50 P.3d 618 (2002)).

[25] Wilson, 170 Wn.2d at 690 (quoting State v. Ross, 152 Wn.2d 220, 230-31, 95 P.3d 1225 (2004)).

[26] State v. Chambers, 176 Wn.2d 573, 589, 293 P.3d 1185 (2013) (quoting State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

the North Dakota conviction. Because the court determined that it would have sentenced Valles to the same number of months regardless of the score, and because the number of months falls within the standard range for both offender scores, resentencing is not warranted. So, we remand to correct the offender score.

Supervision Fees

Valles asks this court to strike the supervision fees from his judgment and sentence. He contends, and the State concedes, the imposition of the supervision fees was a clerical error. The trial court stated, "I'm waiving all nonmandatory fees and costs, Mr. Valles, because I recognize that you're indigent." RCW 9.94A.703(2)(d) states the supervision fees are "waivable conditions." So, we accept the State's concession and remand to strike the supervision fees from the judgment and sentence.

CONCLUSION

Because Valles's ineffective assistance of counsel and jury unanimity claims fail, we affirm. But, we remand to correct Valles's offender score and to strike the supervision fees from the judgment and sentence.

Leach, J.

WE CONCUR:

Dwyer, J.

Appelwick, J.

NIELSEN KOCH P.L.L.C.

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