

62939-5

62939-5

No. 62939-5-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

GAVIN JARED HAGGITH, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the court abused its discretion in denying defendant's motion for a mistrial based on a juror's statements that he worked in the jail and had day-to-day contact with the defendant where the juror also stated that he was familiar with everyone in the courtroom because he worked in the jail and any prejudice from his comments was speculative.
2. Even if defendant did not waive his objection to admission of a photograph showing needle marks on the defendant's arm by affirmatively stating "no objection" when he did not have a standing objection, admission of the photograph was harmless because other evidence of the defendant's drug use, including intravenous use, was admitted and is not contested on appeal.
3. Whether failure to include the special verdict definition of a deadly weapon where the deadly weapon definition given for robbery did not require that the weapon be capable of causing death was harmless error where the victim described the knife as a six inch switchblade and testified that the defendant jabbed the knife at her causing her to jump backward.
4. Whether reference to "knife" in the special verdict deadly weapon instruction constituted a prejudicial comment on the evidence where no definition for deadly weapon was provided but where the defense theory of the case was mistaken identity and no reasonable jury could conclude that a six inch switchblade wasn't a deadly weapon.
5. Whether the court abused its discretion in denying the defense request for an inferior degree offense instruction on robbery in the second degree where the evidence was such

that either the robbery was accomplished by use of the threat of the knife, or no robbery occurred at all.

C. FACTS

1. Procedural Facts

On April 25, 2008 Haggith was charged with one count of Robbery in the First Degree, in violation of RCW 9A.56.200, along with a deadly weapon enhancement for his acts on April 23, 2008. CP 59-60. At jury trial he was convicted as charged and subsequently was sentenced, on an agreed offender score of one, to a standard range sentence of 36 months along with the mandatory 24 months on the deadly weapon enhancement.¹ CP 15-18; RP 1/20/09 3, 10-11.²

2. Substantive Facts

At trial, the defense theory of the case was mistaken identity. The evidence showed that around 7:30 a.m. on April 23, 2008 a man dressed in very dark colors entered Smokin' Sams convenience store on Ellis Street in Bellingham. RP 120, 124, 127. The man drew the attention of the store clerk, Virginia Holtz, when he went to the beer aisle since it was so early in the morning. RP 124, 126. As he came back up by the front counter,

¹ The judge sentenced Haggith to the low end of the standard range, 36 – 48 months, in part because he was going to have to serve the 24 month deadly weapon enhancement. 1/20/09 RP 10.

² RP refers to the volumes of the report of proceedings for the trial held January 5-12, 2009. All other volumes are referred to by date.

she asked if she could help him find something. RP 124. He responded he was hungry and just looking for something to eat. Id. He picked up a bag of Doritos chips and placed them on the counter. RP 127. The clerk told him it would be 79 cents and he gave her four quarters. RP128. When she went to give him the change, instead of taking it he pulled out what the clerk later described as a six inch switchblade knife with his right hand and jabbed it at her, trying to get her with it. RP 128; Supp. CP __; Ex. 5. When she stepped back to avoid the knife, he reached into the register with his left hand. RP 128. The clerk said, “No you don’t,” and slammed the cash drawer on his hand. RP 128. It failed to close the first time, but she did it again and it closed the second time. RP 128-29. The man didn’t say anything, but ran out the door and ran south on Ellis Street. RP 128-29.

The clerk, very shaken, immediately called 911 and reported that the store had been robbed. RP 130; Supp CP __; Ex. 5. When the police arrived about five minutes later, she opened the drawer and discovered that all the \$10s were missing and she wasn’t sure if any of the \$1s were missing. RP 131-32. She had had ten \$10s in the drawer before the man entered the store. RP 131.

She described the man to police as a white male, very thin build, thin face, in his twenties, dressed all in black, wearing a waist-high coat

and a stocking cap, with no facial hair or glasses. RP 127, 354; Supp CP ___, Ex. 5. She had gotten a good look at his face when he was only three feet away from her at the counter. RP 126. She told the officers that she thought she could identify him again. RP 132.

In the meantime, Becky Eastwood, who lived on the same block of Ellis Street as Smokin' Sam's, saw a young man around 8 a.m. running really fast from the store towards the white house across the street from her. RP 153, 156; Supp CP ___, Ex. 6. He was dressed all in black with a black hat; he was tall and slender. RP 154. She thought he was running awfully fast and when she saw a police officer in the neighborhood, she reported what she saw to 911. RP 156.

Theresa Smith, another person who lived on Ellis Street about a block and a half from the store, saw a young man around 8 a.m. running down the alley into the backyard and onto the deck of the house next door to her. RP 159, 162; Supp CP ___, Ex. 6. He was tallish, a thin to medium build and was wearing dark clothes, a coat and a knit type hat. RP 159-60, 164. She also saw an officer later and told him what she had seen. RP 165.

Meanwhile, the police had started setting up a fairly large perimeter in order to try to catch the man. RP 304-05. After receiving the information from Theresa Smith, the police had some officers watch the

house she had reported seeing the man run to (the “Ellis Street house”). RP 309-11. The clerk was driven by a couple of men who were in the area, but she definitively ruled them out as being the robber. RP 253, 283, 306-07, 359-61. Nate James, one of the residents of the Ellis Street house being watched, was seen driving away from the house that morning and was also ruled out by the store clerk. RP 170-71, 179-80, 257-58, 312-14; 360-61. After finding out that there were two other guys still in the house asleep, and that one of them was Nate’s roommate, the police returned to the house. RP 180, 316.

The police knocked on the door of the Ellis Street house and Nate’s roommate, Jesse Hammond, answered the door and let them inside. RP 198, 200, 317. Jesse did not match the description given by the clerk and neither did another person, Steve, who was upstairs in the house.³ RP 213-14, 364. Haggith appeared to be sleeping on one of the couches. RP 199, 201, 317. An officer noticed one of the fingers on his left hand had a scrape and dried blood on it. RP 318-20. Haggith told the police that he had scraped his finger the night before on a nail on the back porch when he fell. RP 319, 365. However, when the officer asked Haggith to show him where he had injured his finger, the officer couldn’t find any nails in

³ Steve only had one leg and walked with crutches. RP 177.

the general area that Haggith pointed to. RP 329-30. Haggith then stated that he could have injured it on the chicken wire that was on the outside of the railing on the back porch. RP 330-31.

Except for his clothing, Haggith matched the description the store clerk had given, so he was asked to step outside onto the front porch. RP 322, 366. In the meantime the store clerk was brought to the house & had the show-up identification process explained to her. RP 261-62, 322-23. Upon arrival, the clerk said, "That sure looks like him." RP 262, 287. When he was asked to turn to face the road, she saw his face and was positive it was him, saying "That's him. That's him. I'm absolutely sure." RP 148, 263, 288.

The police obtained a search warrant for the Ellis Street house. RP 265. The house was very disorganized, with clothes everywhere. RP 270, 279, 296-97. While they did not find the knife or clothes that matched exactly what the clerk had described, they did find a pair of Puma shoes on top of a hamper in a linen closet down the hall from the living room where Haggith had been sleeping. RP 268, 279-80, 29-96, 299-300. Inside the left shoe was a wad of money, ten \$10 bills and one \$1 bill. RP 268, 292-93, 327. Both Nate and Jesse did not recognize the shoes and didn't know to whom they belonged. RP 185, 192, 211-12. The entrance to the closet was covered only partially with a curtain. RP 292, 302.

At the station, Haggith told Det. Miller that he'd been with Jesse the night before at a party and they went back to the Ellis Street house. RP 440-42. He denied consuming any drugs, but admitted to drinking. RP 443. He said they fell asleep on the couches and that two other persons had been in the house. Id. When he was asked about his finger, he said that he had scraped it on the chicken wire on the back porch when he went out to smoke and fell down. RP 444. He denied owning a knife. Id. Haggith says he shops at the store a lot and that he had been at the store a couple days earlier with Jesse and had bought Doritos and beer. RP 445. When he was told about the money that had been found at the house, Haggith said that he had known Jesse for a couple months and that Jesse was a drug dealer and that he kept money all over the house. RP 446-48. He claimed no knowledge of the shoes or money inside them. RP 447.

Jesse testified at trial that he had been with Haggith the night before, that he and Haggith had done speed and cocaine and injected heroin into their arms before they left the house to go to a party and that they had done more drugs when they got back to the house before crashing on the couches. RP 203-06; 234-36. Haggith had told Jesse that he used Neosporin to get the marks to heal faster, so they couldn't be seen. RP 206. While Jesse had been driving Haggith had shown him a knife he

used for protection. RP 207-08. Haggith had pulled it out of his pocket; the blade looked like stainless steel, with a serrated edge. RP 208-09. Jesse had described the knife to an officer as having a blade almost three inches long with a serrated edge. RP 226.

Jesse testified at the time he had possessed a black knit stocking cap, but didn't know where it was now. RP 216-17. He denied ever having been to Smokin' Sams with Haggith before, and said that night had been the first night Haggith had been to his house. RP 218. He said Haggith had bought drugs from him before, including methadone and heroin. RP 219. He testified that Haggith had not complained about injuring his finger that night. RP 220. He also said Haggith had been wearing white that night. RP 224.

The shoes Haggith wore to the jail were shoes that had been in the Ellis Street house a couple weeks before the robbery, although Jesse and Nate did not know to whom they belonged. RP 186, 212, 398. When he was being booked into jail, Haggith said that his shoe size was between a 10 ½ and 11, and the evidence showed that the shoes worn by Haggith to jail were a size 10. The Puma shoes were a size 11. RP 613; RP 367, 609.

The bag of Doritos was recovered but the partial prints on the bag were not good enough to make comparisons. RP 356, 385-86. When an officer went back the next day to look for evidence, she found a \$10 bill in

the area where Haggith had been reported to have been running. RP 370-71. The Puma shoes and one of the \$10 bills that appeared to have a blood stain on it were tested for DNA. RP 484-85. The result was inconclusive regarding the \$10 bill, but Haggith was determined to be a possible contributor to the mixture of DNA on the Puma shoelaces, with 1 in 190 persons being possible contributors to the DNA. RP 485-97. Haggith was a match for the blood stain found on the inside of the pocket of the jeans he'd been wearing when he was taken to jail. RP 396-97, 413-14, 418, 498-500.

D. ARGUMENT

- 1. The court did not abuse its discretion in denying the motion for a mistrial because any prejudice from the juror's comments was speculative.**

Haggith first asserts that the trial court erred in denying his motion for a mistrial. He asserts that his right to an impartial jury was violated and the jury venire tainted by one juror's responses that he alleges conveyed to the venire that Haggith was in jail and that the juror was prejudiced against the defense. Haggith was not prejudiced by the juror's statements, as the trial court found, because the jury was going to be exposed to the information that the defendant had been in jail and because his statement regarding his familiarity with Haggith was ambiguous. The trial court was in the best position to determine the effect of the juror's

statements and did not abuse its discretion in denying Haggith's motion to for a mistrial.

A denial of a motion for a mistrial is reviewed for abuse of discretion.⁴ State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). "An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court." State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). A trial court's decision denying a motion for mistrial will only be overturned if there is a substantial likelihood that the prejudice affected the verdict. *Id.* In the absence of proof of prejudice, a court's denial of a motion for mistrial based on an allegation of jury taint is not an abuse of discretion. State v. Tucker, 32 Wn. App. 83, 86, 645 P.2d 711 (1982).

Challenges to the entire jury venire are limited. "Challenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law for their selection." CrR 6.4. The trial court is in the best position to determine whether a juror can be impartial based on its observation of jurors' mannerisms, behavior and demeanor. State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

⁴ Haggith appears to assert that a motion to strike the venire should be treated differently than a motion for a mistrial based on the same grounds because during voir dire the trial has not started yet. Here, however, the jury was already sworn in at the time Haggith made his motion, which motion requested a mistrial. 1/6/09 RP 99-100; CP 52-54. At

In this case, during voir dire and in response to the question from the court as to whether any of the venire knew Haggith, juror no. 31 responded: "I work in the jail, so I have day-to-day contact with him." 1/5-6/09 RP 12. The judge then inquired if anyone else knew Haggith and then if anyone knew the attorneys. Id. The following exchange occurred:

Juror No. 31: I work in the jail.

The Court: Because of where you work?

Juror No. 31: I know everybody up there.

The Court: You're probably familiar with all the faces in the courtroom.

Juror No. 31 Yeah.

Later during the voir dire juror no. 31 indicated that he knew a number of the officers who were going to be witnesses, that he had been a victim of a violent crime and that he wasn't happy about having been summonsed for jury duty. 1/5-6/09 RP 14-15, 39, 42-43. Later in response to a question from the prosecutor as to whether anyone believed that a defendant must have done something wrong from the mere fact that he had been charged with a crime, juror no. 31 replied "I have probably more of that than the regular person." The prosecutor then told juror no. 31 that he was going to

any rate, whether a motion to strike the venire or a motion for a mistrial, both are reviewed for abuse of discretion.

stay away from him and that he knew why. 1/5-6/09 RP 53. At the afternoon break, juror no. 31 was excused for cause. RP 101, 104; CP 53.

Haggith first asserts that the rest of the venire was tainted by the juror no. 31's comment that he knew the defendant and that necessarily conveyed that Haggith was in jail. Even if juror no. 31's statement that he worked in the jail conveyed to the jury that he necessarily was a corrections officer, it did not necessarily convey that Haggith was in custody. His comment about having day-to-day contact with Haggith was immediately followed by his comments about knowing the prosecutor, everyone "up there," and everyone in the courtroom. As the trial court explained, there are a lot of reasons why someone might see someone at the jail on a daily basis. RP 108. The court determined it was speculative that the jury would conclude that Haggith was in custody from the comments. RP 108-09. As also noted by the judge, the jury would be instructed not to speculate and to make their decision based on the record. RP 111. Juries are presumed to follow the instructions. State v. Robinson, 146 Wn. App. 471, 483, 191 P.3d 906 (2008). Furthermore, as the prosecutor noted the jury was going to be informed anyway that Haggith was taken into custody and had been at the jail. RP 103.

Second, Haggith asserts he was prejudiced because juror no. 31's comments conveyed to the jury that he was more likely to find Haggith

guilty because of his familiarity with him. Juror no. 31's comments did not relate specifically to Haggith: his answer that he was more inclined to believe that a defendant had done something simply because he had been charged with an offense related to any, generic defendant. Contrary to Haggith's allegation, Juror No. 31 never stated that his "exposure to [Haggith] made him biased against the defense." To conclude such from 31's comments is speculative at best.

Haggith has not shown any actual prejudice from the juror's comments. The jury was specifically instructed only to consider the evidence and to reach its decision based on the facts, and not to allow emotions, prejudice or personal preference affect their verdict. CP 30-32. The comments made about the juror knowing Haggith were remote in time to when the juror was excused and no one emphasized the comments at the time. Haggith's claim of prejudice is speculative and the trial court was in the best position to determine what effect, if any, the comments had upon the venire. The trial court did not abuse its discretion in determining that the comments, taken in context and under the circumstances, did not taint the jury pool. RP 112-13.

Haggith's reliance on Mach v. Stewart, 137 F.3d 630 (9th Cir. 1997) is misplaced. In Mach, a child sex abuse case, the juror stated that she had expertise in the area of child psychology, that she had *never* been

involved in a child sex abuse case where the child's accusation had not been borne out, and that she had never known a child to lie about sex abuse. *Id.* at 633. The juror made the statement about never having been involved in a case where the accusation hadn't been true repeatedly. *Id.* That information essentially directed the venire to find that the child victim in the case would be credible and wouldn't lie. Here, the juror indicated he knew Haggith from his job at the jail, but didn't explain the nature of the contact or how that contact would affect his decision. He also indicated that he knew a lot of the other people in the courtroom as well, including the prosecutor.

The facts of this case are far more analogous to those in Tucker, where the Court of Appeals found that prejudice had not been established. In that case, the potential juror stated during the course of voir dire that he might know the defendant and would prefer not to sit on the case.⁵ Tucker, 32 Wn. App. at 86. Immediately thereafter he was excused. *Id.* The trial court denied the motion for mistrial that alleged the venire had been prejudiced. On appeal the court concluded that there was nothing in the record that demonstrated that the venire was prejudiced against the

⁵ He also stated that he had had an unpleasant encounter with a police officer. *Id.* at 86.

defendant due to the comments and found that the trial court had not abused its discretion in denying the motion for mistrial. Id.

2. **Haggith waived his objection to admission of the photograph by affirmatively stating “no objection” and any error in its admission was harmless where other evidence of Haggith’s drug use was admitted.**

Haggith asserts that the State’s introduction of a photograph depicting needle marks in his arm without the State having demonstrated relevancy unfairly prejudiced him and was in violation of the trial court’s preliminary ruling. Interestingly, Haggith does not specifically assert that the trial court erred in admitting the photograph. Haggith waived his alleged error by affirmatively stating he had no objection because while he did have a standing objection to certain evidence coming in, it did not extend to this photograph, Exhibit 34. At any rate, any error was harmless because other evidence of his drug use, including intravenous drug use, was already in front of the jury.

Failure to object to admission of evidence based on ER 403 at trial waives the issue on appeal. State v. Korum, 157 Wn.2d 614, 648, 141 P.3d 13 (2006); State v. Guloy, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985), *cert. den.*, 475 U.S. 1020 (1986). A challenge to the admissibility of evidence is waived unless it is asserted below. RAP 2.5(a); ER 103; State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995),

rev. den., 129 Wn.2d 1007 (1996). However, where the trial judge makes a *final* ruling on a motion in limine, the party losing such motion has a standing objection to introduction of the evidence that was the subject of the motion. State v. Kelly, 102 Wn.2d 188, 192-93, 685 P.2d 564 (1984) (emphasis added). If the ruling on the motion is tentative or the judge indicates that further objections are necessary, error will not be preserved unless further objections are made. *Id.* at 192. A party asserting a violation of an order in limine must object at the time of the alleged violation in order to preserve the issue for appeal. State v. Sullivan, 69 Wn. App. 167, 173, 847 P.2d 953, *rev. den.*, 122 Wn.2d 1002 (1993).

This court has explained the difference between final rulings and those that are only tentative or advisory:

If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.

... “[W]hen a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.” ...

State v. Powell, 126 Wn.2d 244, 256-258, 893 P.2d 615 (1995) (internal citations omitted).

Here, Haggith raised the issue of the admissibility of the photograph depicting needle marks, Ex. 34, in a motion in limine, subsequent to obtaining a standing objection to the admissibility of other evidence. After seeking an order excluding any testimony regarding Haggith's use of drugs the night before and any statements he made to police regarding use of drugs, the judge ruled that much of Haggith's statement to the officer was excluded, but that the State's witness, Jesse Hammond, could testify about his and Haggith's use of drugs the night before. 1/5/09 RP 55-67. Defense counsel then requested a standing objection, under ER 404(b), regarding the court's ruling on Jesse's proposed testimony of Haggith's drug use the night before, which request was granted. 1/5/09 RP 67. Defense counsel then raised the issue of the admissibility of the photograph depicting needle marks on Haggith's inside elbows. 1/5/09 RP 67. The court ruled that the State would have to lay the foundation that the marks were fresh and stated:

The Court: Yeah, I think you need to have some foundation before that can come in, and then it's only admissible for purpose of corroborating Mr. Jesse's statements of the night before, and I think there needs to be some foundation.

Mr. Hyldahl: And I would ask, Your Honor, that we, before that evidence is admitted that the jury be taken out.

The Court: Yes, if you think that's going to come up, we need to have an opportunity for an offer of proof.

Defense counsel did not request a standing objection regarding the photograph because the court reserved its ruling to determine what foundation evidence would be presented.

Later, the State presented testimony that a deputy took a photo of Haggith's arm, showing what looked like needle marks, after the deputy asked Haggith to show him any injuries. The State then offered the exhibit. RP 400. Defense counsel stated, "No objection," and the court admitted the photograph. RP 400-01. During a break during cross examination, the judge noted that they were coming close to the point at which it had been decided there needed to be additional foundational testimony before there could be further testimony regarding the nature of the needle marks. RP 402. The State indicated it was not going to solicit any additional testimony and defense counsel interjected that he assumed the exhibit was admitted subject to his standing objection. RP 403. The court agreed that it was subject to his standing objection. The prosecutor was understandably confused, inquiring as to how he would know given that defense affirmatively stated no objection at the time of the proffer. *Id.* The judge then stated that the photograph was admitted, just subject to defense's standing objection. RP 403-04.

Unfortunately the trial court erred in its recollection that defense counsel had a standing objection to the admission of the photograph. That

was not his ruling. His ruling was that there would need to be additional foundation testimony before it would be admitted. Counsel's standing objection was limited to the testimony regarding Jesse's testimony. When defense counsel affirmatively stated he had no objection, the prosecutor believed that he was relieved of the court's requirement that additional foundational testimony be presented prior to its admission. While the judge's admission of the photograph was not in accord with his prior ruling, defense counsel had previously indicated it would want to be heard outside the jury before the photograph would be admitted. At the time of the request for its admission the State certainly wasn't on any notice that defense counsel was continuing to object. While the judge's faulty recollection of his ruling exacerbated the situation, defense counsel had an obligation here not to misstate his stance with respect to the photograph and to follow through on his insistence on a hearing outside the jury prior to admission of the photograph. By failing to do so, or to move to strike the photograph at the break, defense counsel waived his objection to admission of the photograph.

Even if defense counsel did not waive his objection, any error in admitting the photograph was harmless. Admission of evidence is reviewed only for manifest abuse of discretion. Powell, 126 Wn.2d at 258. A court abuses its discretion if its decision is based upon untenable

grounds or is manifestly unreasonable. *Id.* at 258. Erroneous admission of prior misconduct requires reversal only if there is a reasonable probability that the error materially affected the outcome of the trial. State v. Halstein, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *see also*, State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980) (non-constitutional error in admitting evidence is harmless unless within reasonable probabilities the outcome of the trial would have been materially affected if the error had not occurred).

At the time of its admission the relevance of the photograph presented to the jury was that it showed what appeared to be needle marks, which marks Haggith showed to the deputy when the deputy inquired about injuries. There was plenty of other evidence of Haggith's drug use, which defense counsel conceded when he argued in closing that what the State *had* proved beyond a reasonable doubt was that Haggith was high on valium, heroin and cocaine the night before, that Haggith and Jesse had used drugs in April and that Haggith had lied to the detective about using drugs. RP 205-07, 638-39. The evidence included that Haggith had injected himself with drugs the night before and that Haggith had bought drugs, including specifically methadone and heroin, from Jesse before. RP 206, 219. This evidence has not been challenged on appeal. Defense counsel himself elicited testimony on cross that Jesse told the officers that

Haggith and he both did crack, opiates and benzodiazepines when they got back to the house, and that, specifically, they had consumed heroin intravenously. RP 234-36. The outcome of the trial would not have been materially affected if the photograph of the needle marks hadn't been admitted. As such any error in its admission was harmless.

3. **While the special verdict jury instruction omitted the definition of a deadly weapon, the error was harmless where the “six inch switchblade” was jabbed at the victim causing her to jump back.**

Haggith next asserts that the special verdict deadly weapon instruction was erroneous in that it failed to require the jury to find that the knife was likely to inflict death instead of substantial bodily injury. The State concedes that the jury instruction failed to require the jury to find that the knife was likely to inflict death, or was a deadly weapon per se, and as such was erroneous. The State submits, however, that the error was harmless where the clerk described the knife as a six inch switchblade during the 911 call, and testified she had to jump back when Haggith lunged towards her with the knife.

The State has an obligation to prove a sentencing enhancement beyond a reasonable doubt. State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980). In order to impose a deadly weapon enhancement, the jury must find that the weapon “had the capacity to cause death and death

alone.” State v. Cook, 69 Wn. App. 412, 418, 848 P.2d 1325 (1993);
accord, State v. Zumwalt, 79 Wn. App. 124, 130, 901 P.2d 319 (1995),
overruled on other grounds by State v. Bisson, 156 Wn.2d 507, 130 P.3d
820 (2006).

In order to determine if the weapon is capable of inflicting death in the manner it is used is a question of fact, for the jury, taking into consideration the defendant’s intent, present ability, the degree of force used, the part of the body to which the weapon was applied and any injury inflicted. Zumwalt, 79 Wn. App. at 130. A knife with a blade greater than three inches long is per se a deadly weapon under the statute. RCW 9.94A.602 (2008).

Here, the special verdict deadly weapon instruction omitted the necessary language defining a deadly weapon as one that is capable of inflicting death and that a knife is a deadly weapon per se if the blade is greater than three inches. CP 47 (Inst. 15). The omission was exacerbated by the fact that the instructions included a deadly weapon definition for robbery in the first degree, which definition does not necessarily require a finding that the weapon was capable of inflicting death.

While omitting the definition of a deadly weapon for purposes of the special verdict was error, the error was harmless. An instructional error is harmless where it appears beyond a reasonable doubt that the error

did not contribute to the verdict. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); *see also*, Cook, 69 Wn. App. at 418 (reversal required regarding deadly weapon special verdict instructional error only where it was prejudicial and did not affect the outcome of the case). “When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence.” Brown, 147 Wn.2d at 341.

While the knife was not recovered, the clerk told the dispatcher that the knife was a six inch switchblade that Haggith had tried to use to get her. Supp. CP ____, Ex. 5. The clerk testified that Haggith was less than three feet away from her at the cash register when he pulled the knife and jabbed it at her, causing her to step back. RP 126, 128, 280, 579. She also testified that the knife made her feel very afraid & she was concerned what he was going to do with the knife. RP 130, 144. Exhibit 10, referenced by Haggith, was a drawing of the *blade* of the knife, not the entire knife itself.⁶ RP 149. Jesse testified that Haggith showed him a knife he owned for protection the night before the store was robbed. Jesse described the knife as having a blade that was steel or stainless steel with a

⁶ Counsel has not seen Ex. 10 because it was designated and a copy does not appear in the trial file. Counsel requested a copy from defense counsel who indicated he needed to talk with appellate counsel first.

serrated edge and about three inches long. RP 207-09, 226. Haggith denied owning a knife.

Almost any knife with a sharp blade is *capable* of causing death. No one could reasonably conclude that a six inch switchblade, jabbed at someone such that they had to jump backwards, was not capable of causing or readily able to produce death. From this evidence it is clear that the knife was a deadly weapon, thus any error in the jury instruction on the special verdict was harmless.

4. The reference to “deadly weapon, knife” constituted a comment on the evidence, but it was harmless because no reasonable jury could conclude that the knife was not capable of causing death.

Haggith also contends the deadly weapon special verdict was erroneous because the reference to the knife within the instruction constituted a comment on the evidence. While the reference to the knife in the instruction in this case constituted a comment on the evidence⁷, the error was harmless for the same reason set forth in the section above, the uncontested evidence clearly showed that the knife was a deadly weapon.

⁷ The State would take a different stance on this issue, in accord with State v. Akers, 88 Wn. App. 891, 946 P.2d 1222 (1997), *aff'd*, 136 Wn.2d 641, 965 P.2d 1078 (1998), if the deadly weapon instruction had properly instructed the jury that a knife is a deadly weapon per se if the blade is greater than three inches or that a deadly weapon is one that has the capacity to inflict death.

Article IV Section 16 of the Washington State Constitution prohibits a court from commenting on the evidence. State v. Surry, 23 Wash. 655, 659, 63 P. 557 (1900). Generally, the purpose is to prevent jurors from knowing and being influenced by a trial judge's opinion of the evidence. State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.

Id.; *see also*, State v. Stearns, 61 Wn. App. 224, 231, 810 P.2d 41, *rev. den.*, 117 Wn.2d 1012 (1991) (“the prohibition prohibits only those words or actions having the effect of conveying to the jury the trial court's view of the credibility, weight, or sufficiency of the evidence.”). “[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.” State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The fundamental question regarding judicial comment in this context is “whether the mere mention of a fact in an instruction conveys the idea that the fact had been accepted by the court as true.” *Id.* at 726.

The determination is dependent upon the facts and circumstances of each case. Stearns, 61 Wn. App. at 231. The court reviews the jury

instructions de novo, within the context of the jury instructions as a whole. Levy, 156 Wn.2d at 721. If the statements constitute a comment on the evidence, the comments are presumed prejudicial, and the burden falls upon the state to show lack of prejudice unless the record affirmatively shows that no prejudice could have resulted from the comments.

In this case, the instruction stated:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed **with a deadly weapon, to wit: a knife** at the time of the commission of the crime of Robbery in the First Degree, Count I.

CP 47 (inst. 15) (emphasis added). However, here defense never disputed that the knife was a deadly weapon. The sole issue at trial was whether Haggith was the one who committed the robbery or whether the victim was mistaken in her identifying him as the one who pointed the knife at her and robbed the store; in defense counsel's words: "the issue here is the identity of the person who robbed Virginia Holtz..." RP 630, 619-644. No prejudice could have resulted from the court referring to a knife as the deadly weapon because the knife was the only weapon used, and as argued above, the knife clearly constituted a deadly weapon under the facts of the case.

5. The court did not abuse its discretion in denying the requested inferior degree instruction on robbery in the second degree because there was no evidence to support it.

Last, Haggith contends that the court erred in denying his request for an instruction on the inferior degree offense of robbery in the second degree. While Haggith argues robbery second is an inferior degree offense, he uses the lesser-included offense test.⁸ Only the factual prong, however, is at issue in this case because robbery in the second degree is both an inferior degree as well as a lesser included offense of robbery in the first degree. Haggith has failed to demonstrate that the facts of this case meet the factual test, i.e., the evidence supports a finding that *only* the inferior degree offense was committed. The trial court did not abuse its discretion in determining that the evidence did not merit an instruction on robbery in the second degree because the threat here was only accomplished by a knife, no words were spoken.

A defendant is entitled by statute to an instruction for a lesser included offense or a lesser degree offense if the lesser offenses meet both the factual and legal prongs of the tests. RCW 10.61.006, .003; State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). While the tests for lesser degree and lesser included offenses differ with respect to the legal

⁸ The two tests differ only with respect to the legal prong.

tests, they are the same for the factual test.⁹ State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Robbery in the second degree satisfies the legal test for both being a lesser included offense and a lesser degree offense of robbery in the first degree. State v. Netling, 46 Wn. App. 461, 464, 731 P.2d 11, *rev. den.*, 108 Wn.2d 1011 (1987); State v. Pacheco, 107 Wn.2d 59, 69-70, 726 P.2d 981 (1986).

A court reviews a denial of an instruction on the factual prong of a lesser degree offense for abuse of discretion. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). The evidence is reviewed in the light most favorable to the party that sought the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. Under the factual test the factual showing required is more particularized than that required for other jury instructions, and the evidence must show that *only* the lesser offense was committed, to the exclusion of the greater offense. *Id.* at 455. In addition, “the evidence must affirmatively establish the defendant’s theory of the

⁹ To be entitled to an inferior degree instruction, (1) the statutes for the charged offense and the inferior degree offense must proscribe one offense, (2) the instruction charges an offense that is divided into degrees and the lesser offense is an inferior degree of the charged offense; and (3) there is evidence that only the inferior degree offense was committed. State v. Fernandez-Medina, 141 Wn.2d at 454. A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense are a necessary element of the charged offense, and (2) the evidence supports an inference that the lesser crime was committed. *Id.*

case -- it is not enough that the jury might disbelieve the evidence pointing to guilt in the case.” Fernandez-Medina, 141 Wn.2d at 456.

In State v. Pacheco, *supra*, the court was also confronted with the question of whether robbery in the second degree instructions should have been given under the facts of the case. In that case the defendant was charged with robbery of a grocery store, in which the evidence clearly established that the owner had been threatened with a knife in the course of robbing the store. In that case, as here, the issue was a question of identification, not one of whether robbery in the first degree was committed. Pacheco, 107 Wn.2d at 70. The court there found, as the trial court did here, that because there was no question as to whether a knife was used the evidence supported “an instruction on robbery in the first degree or nothing.” *Id.*

While the defense appears not to have filed any proposed instructions, the record reflects that they requested an instruction on robbery in the second degree. RP 560. While Haggith argues that he was entitled to the instruction because he denied being the one to rob the store, no knife was recovered and there was a discrepancy in the description of the knife, either the offense was committed as the victim described, with the use of a knife, or no robbery occurred at all. The evidence does not support a finding that *only* the lesser offense of robbery in the second

degree occurred, there was only the threat with a knife. As the trial court found:

There is no testimony that he stood there and said give me the money, or I'm going to take what's in the – her testimony was he was standing there by the chips. He poked a knife at her. He reached into the drawer. She slammed the drawer on his hand, and he ran.

I don't know how we – the jury could find a set asset (sic) of facts that involved a robbery that don't (sic) involve the possession of the knife in those circumstances.

If he had, if the question was did he say give me everything and use the knife to, you know, to add force to his words, and there was some question about whether there was a knife or something that might be one thing, but there's nothing here that constitutes a robbery other than the use of the knife as the intimidation while he reaches into the drawer to grab the money. I'm having trouble seeing how without a knife there's a robbery.

RP 563-64. The trial court did not abuse its discretion in denying the defense request for an instruction on robbery in the second degree.

E. CONCLUSION

Based on the foregoing the State requests that Haggith's conviction for robbery in the first degree be affirmed. While the State concedes that the special verdict deadly weapon instruction was erroneous, the State asks the Court to affirm the deadly weapon enhancement because such errors were harmless.

Respectfully submitted this 3rd day of February, 2010.

Hilary A Thomas

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CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, DANA LIND, addressed as follows:

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Sydney A. Koss
LEGAL ASSISTANT

02/03/2010
DATE