

NO. 34577-3-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TREVOR PRUITT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 05-1-01473-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the defense attorney deficient when he made a tactical decision to attack Detective Pihl's investigation as inadequate and proposed a deadly weapon special verdict jury instruction that accurately stated the law?

2. Was Mr. Hummer's testimony that the defendant pressed a sharp object into his back and threatened "to gut" him and Mr. Drawdy's testimony that the defendant's accomplice pressed a hard metal object into his back and threatened to shoot him sufficient evidence to support the jury's finding that the defendant or an accomplice was armed with a deadly weapon during the Mr. Sudsy car wash robberies?

B. STATEMENT OF THE CASE.

1. Procedure

On March 28, 2005, the State filed an information charging Trevor David Pruitt, hereinafter "defendant," with one count each of attempted first degree robbery and first degree robbery. CP 1-2. A corrected information adding Ronnie Beeler as a co-defendant was filed on April 5, 2005. CP 5-6. The State filed an amended information on September 28, 2005, charging the defendant with one count of first degree robbery and

two counts of attempted first degree robbery and charged a deadly weapon enhancement for each count. CP 9-11.

The parties appeared for trial in front of the Honorable Brian Tollefson on February 2, 2006. 1RP 1¹. A 3.5 hearing was held on February 6, 2006, and the trial court found all the defendant's statements were admissible. 1RP 32-90. At the close of the State's case, the defendant made a motion to dismiss, which was denied. 3RP 247-251. On February 15, 2006, the jury convicted the defendant of one count of first degree robbery and two counts of attempted first degree robbery and returned deadly weapon special verdicts on each count. CP 159-163. On March 3, 2006, the court sentenced the defendant to 51 months on each attempted first degree robbery count and 68 months on the first degree robbery count to run concurrently and 12 months on the two attempted first degree robbery counts and 24 months on the first degree robbery count to run consecutively for a total of 116 months. 7RP 474-75, CP 170-82. This appeal followed.

¹ There are seven volumes of VRPs that are labeled as volumes 1-7 and I have referred to them as follows:

Volume 1 is referred to as 1RP
Volume 2 is referred to as 2RP
Volume 3 is referred to as 3RP
Volume 4 is referred to as 4RP
Volume 5 is referred to as 5RP
Volume 6 is referred to as 6RP
Volume 7 is referred to as 7RP

2. Facts

a. The Paul Smith Attempted Robbery.

On October 30, 2004, at approximately 6-7 p.m., Mr. Smith parked his car in his driveway. 1RP 171, 172, 173, 202. He walked toward the front door of the house, but before he got there, someone came up from behind him and demanded his wallet and money. 1RP 173. Mr. Smith thought it was a Halloween joke and told the masked assailant to knock it off. 1RP 173. But when Mr. Smith attempted to put his key in the lock, the assailant slapped Mr. Smith's hand away. 1RP 173, 202. Mr. Smith then noticed the assailant had what looked like a steak knife in his hand. 1RP 174, 199. The blade appeared to be 4 or 5 inches in length. 1RP 174, 175. Mr. Smith did not give the assailant his money. 1RP 175. Mr. Smith knocked the assailant off the porch. 1RP 175, 199, 202, 203. The assailant tripped over a pumpkin and stumbled to the ground before running away. 1RP 175, 199, 202, 203. Mr. Smith called 911 to report the attempted robbery. 1RP 175.

Mr. Smith later suspected the defendant was involved in the attempted robbery. 1RP 176. He and the defendant had worked for the same company and Mr. Smith found out the defendant was angry with him over an incident that occurred at work. 1RP 170, 177, 209, 210. Mr. Smith's daughter, Jillian Smith, put him in touch with the defendant. 1RP 169, 178. The defendant apologized to Mr. Smith for the attempted robbery. 1RP 179, 198.

Jillian Smith is now dating the defendant and she is estranged from her father as a result. 1RP 213. Ms. Smith testified that the defendant's cousin, Ronnie Beeler, was the person who attempted to rob her father. 3RP 206. Ms. Smith was home the day of the attempted robbery. 3RP 203. She heard a scuffle on the porch and opened the door to see Ronnie Beeler get up and run away. 3RP 204. Ms. Smith did not see Ronnie Beeler's face, but later recognized him by the clothes he wore during the attempted robbery. 3RP 204, 205. In mid-November 2004, Ms. Smith confronted Ronnie Beeler about the attempted robbery and he admitted that he had tried to rob her father. 3RP 206, 207-08. He wanted to apologize to her father for the incident. 3RP 207.

When asked on cross-examination whether Ronnie Beeler ever implicated the defendant in her father's attempted robbery, Ms. Smith said that he had not. 3RP 208.

Detective Wada interviewed the defendant on March 7, 2005, about the attempted robbery. 2RP 32, 33, 34, 92. The defendant denied any involvement and suggested his cousins, Ronnie and Johnny Beeler, might be involved. 2RP 34, 36, 92. The defendant admitted to Detective Wada he had told Ronnie Beeler that Paul Smith had money. 2RP 44.

After further investigation, Detective Wada again interviewed the defendant on March 25, 2005. 2RP 45. The defendant again denied involvement in the incident, but changed his story after Detective Wada advised him Ronnie Beeler had made some admissions regarding the

attempted robbery. 2RP 47, 48, 52, 93. The defendant told Detective Wada he drove Ronnie Beeler to Paul Smith's house, or close to the house, for Ronnie Beeler to beat up Paul Smith. "I told Ronnie to beat Paul up, kick his ass." 2RP 55, 93. The defendant also told Detective Wada that he drove Ronnie Beeler away from Paul Smith's house after the incident. 2RP 57.

b. Mr. Sudsy Car Wash Robberies.

On October 30, 2004, at approximately 9:00 p.m. the defendant and an accomplice robbed Michael Drawdy and attempted to rob Derrick Hummer at the Mr. Sudsy car wash. 1RP 95-96, 147. Both Mr. Drawdy and Mr. Hummer testified at trial. 1RP 95, 96, 146. Mr. Drawdy and Mr. Hummer were at the car wash cleaning the interior of Mr. Drawdy's truck when two men approached them. 1RP 97, 103, 124, 149. The defendant placed a hand on Mr. Hummer's shoulder and pushed him face first into the passenger side of Mr. Drawdy's truck. 1RP 97, 101, 103, 124. When Mr. Hummer felt a hand on his shoulder, he turned around and got a good look at the defendant's face. 1RP 101, 124. Mr. Hummer later identified the defendant from a photomontage. 1RP 109-110. The defendant told Mr. Hummer in a rough tone of voice, "Don't turn around, or I'll gut you." 1RP 98, 100. Mr. Hummer felt a sharp object pressed into his back. 1RP 98, 100. The defendant then went through Mr. Hummer's pockets and demanded "dope or money." 1RP 98, 99. Mr. Hummer did not give

anything to the defendant because he didn't have any money or drugs to give him. 1RP 102. Mr. Hummer thought he was going to be killed. 1RP 98, 100.

At the same time, Mr. Drawdy was pushed face down onto the back seat of his truck by the defendant's accomplice. 1RP 97, 148-49. The accomplice pressed a hard metal object into Mr. Drawdy's back and said, "Don't turn around or I'll shoot." 1RP 149. The defendant and his accomplice demanded his money and jewelry. 1RP 149. Mr. Drawdy took out his wallet and gave his assailant the \$15.00 he had in his wallet. 1RP 151. The defendant's accomplice said "That's all you have, you broke ass?" 1RP 152. When the defendant and his accomplice fled, they said "Don't turn around. Don't look at us." 1RP 152. Mr. Drawdy saw only a portion of the defendant's cheek, but did not see the defendant's accomplice. 1RP 149. He could not identify the defendant or his accomplice. 1RP 152. Mr. Drawdy believed the defendant's accomplice pressed a gun to his back, but did not see a weapon and was not sure it was a gun. 1RP 160-61. A couple days after the robbery, Mr. Drawdy's back felt sore and he had a bruise on his back where the hard metal object was pushed against him. 1RP 150, 165.

In March 2005, Detective Wada called Detective Pihl and advised her that a suspect in this robbery had confessed and implicated the defendant. 2RP 148, 155, 170, 173. Detective Pihl prepared a photo montage that included the defendant's photograph and showed it to Mr.

Hummer. 2RP 133, 134. Mr. Hummer picked the defendant out of the photo montage. 1RP 137-38; 2RP 142, 161-62.

C. ARGUMENT.

1. THE DEFENSE ATTORNEY WAS NOT DEFICIENT WHEN HE MADE A TACTICAL DECISION TO ATTACK DETECTIVE PIHL'S INVESTIGATION AS INADEQUATE AND PROPOSED A DEADLY WEAPON SPECIAL VERDICT JURY INSTRUCTION THAT ACCURATELY STATED THE LAW.

A criminal defendant claiming ineffective assistance of counsel must show that counsel's performance fell below an objective standard of reasonableness and prejudice resulting from that performance. State v. Sherwood, 71 Wn. App 481, 483, 860 P.2d 407 (1993). Prejudice is established where there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable probability is "a probability sufficient to undermine confidence in the outcome." In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The reviewing court begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. State v. Israel, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002). The presumption of counsel's competence can be overcome by showing,

among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (citing State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)).

- a. The Defense Attorney Was Not Deficient When He Made a Tactical Decision Not to Object When Detective Pihl Testified that She Received Information From Detective Wada that a Suspect's Confession Implicated the Defendant as a Co-Suspect in the Mr. Sudsy Car Wash Robberies.

Defense attorneys have wide latitude and flexibility in their choice of trial psychology and tactics. State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). To do otherwise would unfairly subject an attorney to post trial scrutiny of the myriad choices he must make in the course of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off, or even whether to interview some witnesses before trial or leave them alone. Piche, 71 Wn.2d at 590. If subjected to such scrutiny, an attorney will lose the very freedom of action so essential to a skillful representation of the accused. Id.

For many reasons, therefore, the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment. Id. If a defense counsel's trial conduct can be

characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

In the present case, the defendant cannot show the defense attorney's trial strategy was deficient nor can he show that he suffered any prejudice from that strategy. The defendant asserts that his attorney was deficient because "he failed to object – and move to strike - testimony by Det. Pihl recounting statements made by Ronnie Beeler implicating the defendant." Brief of Appellant 25; 2RP 148, 155, 170, 173. The defendant argues Detective Pihl's statements were hearsay because Ronnie Beeler was unavailable to testify at trial and, as a result, the admission of this evidence violated the defendant's six amendment right to confront witnesses. These arguments fail because the defendant erroneously presumes, without analysis, that Detective Pihl's testimony was hearsay.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). In Washington v. Crawford, the Supreme Court held that "the Sixth Amendment demands what the common law required: unavailability [of a witness] and a prior opportunity for cross-examination." 541 U.S.35, 68, 124 S. Ct. 1354 (2004). Out-of-court statements not introduced to prove the truth of the matters asserted are not hearsay and thus raise no confrontation concerns. State v. Rice, 120 Wn.2d 549, 564, 844 P.2d 416 (1993); State v. Mason, 127 Wn. App. 554,

566 n.26, 126 P.3d 34 (2005); see also Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985). Therefore, Crawford is inapplicable to non-hearsay statements. Crawford, 541 U.S. at 59 n.9; State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844 (2005).

The defendant cites four instances in which Detective Pihl testified that a suspect implicated the defendant in the Mr. Sudsy car wash robberies. Brief of Appellant at 25. Detective Pihl's statements cannot be evaluated in isolation. The context of her testimony is necessary to evaluate the purpose for which the testimony was offered at trial. The four statements cited in the defendant's brief were offered during the following exchanges:

Defense Attorney: And what type of follow-up investigation have you done on this case?

Detective Pihl: I received word that there was a suspect identified, interviewed, and that confessed, and had also identified Mr. Pruitt as the codefendant – or codefendant – or co-suspect in that case. That's how I identified Mr. Pruitt.

Defense Attorney: I see. And when did that information come to your attention?

2RP 148.

Defense Attorney: You developed a photomontage, correct?

Detective Pihl: Yes, I did.

Defense Attorney: And isn't it true that the photomontage was created as a result of another officer telling you who they thought was a suspect in this case?

Detective Pihl: They sent me a transcription of a confession by another person.

Defense Attorney: Objection, Your Honor, nonresponsive.

The Court: Objection sustained.

Prosecuting Attorney: Your Honor, it's in response to the question.

The Court: It called for a yes or no answer. The objection is sustained.

Detective Pihl: Yes.

Defense Attorney: Isn't it true that you did no independent investigation to determine who the suspect in this case was?

Detective Pihl: Not until after a suspect was named.

2RP 155.

Defense Attorney: How long is the narrative portion of your report, Detective?

Detective Pihl: It may be a little more than half a page.

Defense Attorney: Half a page. It's an armed robbery and the detective who assigned the case to herself has half a page of narrative. Now, without getting into the narrative, do you see dates and times in there?

Detective Pihl: I do.

Defense Attorney: And isn't it true that the first time you looked at this case was on or about the 20th of March?

Detective Pihl: It says March 17th is the first date that I have written down in the narrative.

Defense Attorney: March 17th. And what did you do on March 17th?

Detective Pihl: I got a call from Detective Wada saying that the other suspect confessed and identified Pruitt as the second suspect.

Defense Attorney: Are you sure?

Detective Pihl: That's what my narrative said.

Defense Attorney: And are you positive that that in fact is what the case was? Did you do any independent investigation to verify that?

2RP 170.

Prosecuting Attorney: Did you feel that there was anything else that you had to do once you received information that Beeler had confessed to the robbery and identified the defendant as the co-suspect?

Detective Pihl: Other than showing the montage and him being picked out, no.

2RP 173.

Detective Pihl's statements were not hearsay because they were not offered to prove the truth of the matter asserted. Detective Pihl's statements that, on March 17, 2005, Detective Wada advised her a suspect had identified the defendant as a co-suspect in the Mr. Sudsy robberies was not offered to prove that the defendant committed the robberies or even that the co-suspect had implicated the defendant. Instead, Detective Pihl's testimony was offered to explain why she began investigating the case on March 17, 2005, how she identified the defendant as a suspect,

and why she included the defendant's photograph in the photo montage she showed to Mr. Hummer.

In this case, the defense strategy was to attack the investigations of Detectives Wada and Phil. 2RP 74-77, 155, 170. The defense pointed out several inconsistencies in Detective Wada's testimony and characterized him as 'out to get' the defendant. 2RP 74-77; 5RP 397. In closing, defense counsel argued the evidence in this case was like pieces of a puzzle that Detective Wada wanted to fit no matter what, "so much so he was willing to take a hammer and force them down to where they did not belong." 5RP 397. Similarly, when the defense attorney questioned Detective Pihl, he elicited testimony that she had done no investigation on the case until Detective Wada advised her that the defendant was a co-suspect in the robberies. 2RP 148, 155, 170.

It is clear the defense trial strategy was to show that Detective Wada was biased against the defendant and that the only evidence Detective Pihl had to link the defendant with the Mr. Sudsy robberies came from Detective Wada. The testimony the defendant complains of supports the defendant's case theory. The defense attorney is not deficient for implementing a trial strategy designed to discredit evidence linking the defendant to the Mr. Sudsy's robberies.

The defendant also argues that his trial attorney was deficient for eliciting hearsay statements from Jillian Smith denying that Mr. Beeler implicated the defendant in the attempted robbery of Paul Smith. Brief of

Appellant at 25. However, Jillian Smith's testimony supported the defendant's case theory that he was not involved in the Paul Smith attempted robbery. 2RP 207-08. The defendant cannot claim his attorney was deficient for eliciting beneficial testimony nor can he show that he was prejudiced by testimony that supported his case theory.

If the court were to find that Detective Pihl's testimony was hearsay or defense counsel's trial tactic deficient, the defendant's claim of ineffective assistance of counsel still fails because he cannot show there was any resulting prejudice. An error is harmless if there is a reasonable probability that the outcome of the trial would have been the same even if the error had occurred. State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). The test is whether the overwhelming untainted evidence is sufficient to support the verdict absent the offending evidence. State v. Hoskinson, 48 Wn. App 66, 75, 737 P.2d 1041 (1987).

In the present case, there is overwhelming evidence to support the jury's guilty verdict. Mr. Hummer identified the defendant as the assailant who attempted to rob him at Mr. Sudsy's car wash on October 30, 2004. 1RP 101-02, 109, 110. Mr. Hummer initially identified the defendant in a photo montage shown to him by Detective Pihl. 1RP 101-02, 109, 110. At trial, both Mr. Hummer and Detective Pihl testified that Mr. Hummer picked the defendant out of montage as the individual who threatened him with a knife and demanded money. 1RP 109-10; 2RP 142, 143, 166. Additionally, during trial Mr. Hummer identified the defendant as the

assailant who attempted to rob him. 1RP 101-02. Because the evidence of the defendant's guilt was overwhelming, there was a reasonable probability that the outcome of the trial would have been the same even if an error occurred. The defendant cannot show any prejudice and his claim of ineffective assistance of counsel must fail.

b. The Defense Attorney Was Not Deficient When He Proposed a Deadly Weapon Special Verdict Jury Instruction that Accurately Stated the Law and was Consistent With the Charging Document.

An information must state all the essential statutory and nonstatutory elements of the crimes charged. State v. McCarty, 140 Wn.2d 420, 424-25, 998 P.2d 296 (2000). However, surplus language – language that goes beyond the essential elements – may be disregarded in a charging document. State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005). [W]here unnecessary language is included in an information, the surplus language is not an element of the crime that must be proved *unless* it is repeated in the jury instructions. Tvedt, 153 Wn.2d at 718 (emphasis added), citing State v. Miller, 71 Wn.2d 143, 146, 426 P.2d 986 (1967); State v. Weiding, 60 Wn. App. 184, 187 n.3, 803 P.2d 17 (1991); State v. Rivas, 49 Wn. App. 677, 682-83, 746 P.2d 312 (1987); State v. McGary, 37 Wn. App. 856, 859-60, 683 P.2d 1125 (1984); *see also*, State v. Munson, 120 Wn. App. 103, 83 P.3d 1057 (2004) (fact that surplus language in an information indicated that State was intending to show

three different types of predicate offenses for leading organized crime did not preclude court from finding guilt based upon only one type). Surplusage does not render an information insufficient as a charging document. RCW 10.37.056.

In the present case, the words “other than a firearm, to wit: a knife” in the charging language of Counts I, II, and III in the amended information were surplusage. CP 9-11. The State did not repeat the language in the jury instructions. CP 158. Under Tvedt, this language did not constrain the State’s proof in any manner.

The defendant argues that his attorney was deficient for having proposed a jury instruction that included the following deadly weapon definition:

A firearm is a deadly weapon. A knife having a blade longer than three inches is also a deadly weapon. A deadly weapon is also an implement or instrument which has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.

Brief of Appellant at 26; CP 108. In support of his argument the defendant relies on three cases: State v. Rhinehart, 92 Wn.2d 923, 602 P.2d 1188 (1979); State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980); and State v. Lyon, 96 Wn. App. 477, 979 P.2d 926 (1999). All three cases are distinguishable.

In Rhinehart, the State charged the defendant with first degree possession of stolen property. 92 Wn.2d at 924. At trial, however, the State only produced evidence that Rhinehart possessed the vehicle's fender and proved no evidence of the fender's value. Id. at 928. The Court found that the defendant did not have notice of the charge to which he had to respond. Id. In contrast, the defendant in the present case was charged with one count of first degree robbery and two counts of attempted first degree robbery. CP 9-11. Each count contained language charging the defendant with a deadly weapon enhancement. CP 9-11. At trial, the State produced evidence in support of each count and the defendant was convicted as charged with special verdicts finding the defendant was armed with a deadly weapon during the commission of these crimes. CP 159-164. Unlike Rhinehart, the defendant in this case was on notice of all charges and deadly weapon enhancements to which he had to meet at trial.

Theroff is also distinguishable from the present case because in Theroff the State omitted in its entirety any language charging Theroff with a deadly weapon enhancement from an amended information. Theroff, 95 Wn.2d 385. The Supreme Court held that deadly weapon enhancements must be alleged in the information to give the defendant notice that enhanced consequences will flow with conviction. Theroff at 385. In the present case, the State included in its amended information the required language charging the defendant with a deadly weapon

enhancement on each count. CP 9-11. The defendant was on notice that enhanced consequences would follow a conviction. Id.

Finally, the defendant correctly states that the appellant in State v. Lyon raised this issue in his appeal. 96 Wn. App. 447 (1999). However, while the issue was raised in Lyon, the Court neither analyzed nor ruled on it because it reversed on other grounds. Lyon, 92 Wn. App. at 452.

The defense attorney in the present case was not deficient for proposing a jury instruction that included a firearm in the definition of a deadly weapon. Defense counsel proposed an instruction that was consistent with the evidence that was adduced at trial and, as argued above, with the charging language in the amended information.

If the court were to find that defense counsel was deficient, the defendant can show no resulting prejudice. In the Paul Smith attempted robbery, the steak knife displayed by the defendant's accomplice was the only evidence of a deadly weapon on which the jury could have found the defendant or an accomplice was armed with a deadly weapon. 1RP 174, 175. Clearly there was no prejudice with respect to that deadly weapon enhancement. In the Mr. Sudsy car wash robberies, there was evidence that the defendant was armed with a knife and his accomplice was armed with a gun. 1RP 98, 100.149. Because the overwhelming evidence adduced at trial showed the defendant was armed with a knife during the Mr. Sudsy robberies and his accomplice was armed with a knife during the

Paul Smith attempted robbery, the defendant cannot show he was prejudiced by the challenged jury instruction. 1RP 98, 174, 199.

For all of the reasons stated above, the defendant's claims of ineffective assistance of counsel are without merit and must fail.

2. MR. HUMMER'S TESTIMONY THAT THE DEFENDANT PRESSED A SHARP OBJECT INTO HIS BACK AND THREATENED "TO GUT" HIM AND MR. DRAWDY'S TESTIMONY THAT THE DEFENDANT'S ACCOMPLICE PRESSED A HARD METAL OBJECT INTO HIS BACK AND THREATENED TO SHOOT HIM WAS SUFFICIENT TO SUPPORT A FINDING THAT THE DEFENDANT OR AN ACCOMPLICE WAS ARMED WITH A DEADLY WEAPON DURING THE MR. SUDSY CAR WASH ROBBERIES.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). In a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Evidence to support a deadly weapon enhancement is sufficient if evidence is presented at trial upon which a rational trier of fact could find that the defendant or an accomplice was armed with a deadly weapon at the time the offense occurred. A person is an accomplice of another if he knowingly promotes or facilitates the commission of a crime by encouraging or aiding in its commission. RCW 9A.08.020(3)(a).

The State need not introduce the actual deadly weapon at trial for a jury to conclude that the defendant was armed with a deadly weapon during the commission of the crime. State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984). “The evidence is sufficient if a witness to the crime has testified to the presence of such a weapon... The evidence may be circumstantial; no weapon need be produced or introduced.” State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980).

In State v. Slaughter, a witness heard a scuffle and went out in the hallway to find Slaughter standing over the victim, who was lying on the floor bleeding. 70 Wn.2d 935, 937, 525 P.2d 876 (1967). It was later discovered that the victim had two parallel lacerations across his chest. Slaughter, 70 Wn.2d at 937. At trial, the doctor who treated the victim testified that the cuts were not jagged and resembled those made by a surgical knife. Id. Despite the fact that no knife was found at the scene or shown to be in the defendant’s possession, there was sufficient

circumstantial evidence to support a jury finding that the defendant was armed with a deadly weapon during the commission of this crime. *Id.* at 938, 939.

In the present case, the State presented strong circumstantial evidence that the defendant or an accomplice was armed with a deadly weapon during the Mr. Sudsy car wash robberies. Mr. Hummer testified that he had been pushed face down into the passenger side of Mr. Drawdy's truck, during the attempted robbery. Mr. Hummer felt the defendant press a sharp object into his back and heard the defendant threaten "to gut him." 1RP 97, 98, 103, 124. Mr. Hummer was afraid he was going to be killed during the robbery. 1RP 100. Mr. Drawdy testified he was pushed face down into the backseat of his truck at the same time as Mr. Hummer. 1RP 149. Mr. Drawdy testified that the defendant's accomplice pressed a hard metal object into Mr. Drawdy's back and threaten to shoot him. 1RP 149. Mr. Drawdy believed there was a gun pressed to his back, but did not see the weapon and is not sure it was a gun. 1RP 160-61.

Because Derick Hummer testified the defendant threatened to gut him and pressed a sharp object into his back and Michael Drawdy testified the defendant's accomplice pushed a hard metal object into his back and threatened to shoot him during the Mr. Sudsy car wash robberies, there was sufficient evidence, when viewed in the light most favorable to the State, for the jury to have concluded that the defendant or an accomplice

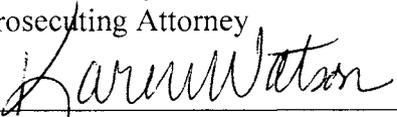
was armed with a deadly weapon. The defendant's claim that there was insufficient evidence to support a finding that the defendant or an accomplice was armed with a deadly weapon is without merit and must fail.

D. CONCLUSION.

For the above mentioned reasons, the State respectfully requests that this Court affirm the defendant's convictions below.

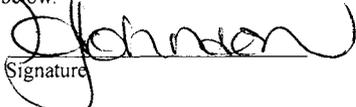
DATED: APRIL 18, 2007

GERALD A. HORNE
Pierce County
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Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/17/07 
Date Signature