

62939-5

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NO. 62939-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

GAVIN HAGGITH,

Appellant.

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

The Honorable Charles Snyder, Judge

REPLY BRIEF OF APPELLANT

JONATHAN M. PALMER
DANA M. LING
Attorneys for Appellant

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

2010 MAR 10 11:56 AM
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A. ARGUMENTS IN REPLY

1. THE TRIAL COURT ERRED BY DENYING HAGGITH'S MOTION FOR A NEW JURY PANEL.

In arguing that a prospective juror's remarks during voir dire of the jury panel did not prejudice Haggith, the state miscasts the conversation between the prosecutor and Juror 31.

First, the state incorrectly asserts Juror 31's remarks did not indicate he was specifically prejudiced against Haggith. Brief of Respondent (BOR) at 16-17. The state argues the "comments did not relate specifically to Haggith," and his answer "related to any, generic defendant." BOR at 16. But the specific question the prosecutor asked was whether anyone was prejudiced against "the defendant," i.e., Haggith:

Now, is there anybody here that doesn't think in their common-sensical kind of way that you know what, there's a charge. There must be smoke here. If there's smoke, there might be a little fire, and you just logically think *the defendant* must have done something, even though you heard no evidence here? Is there any of you here that thinks there must be something here?

(Emphasis added). 1RP 52-53. Juror 31 answered: "I have probably more of that than the regular person." 1RP 53. The record does not support the state's assertion that the reference to

“the defendant” was meant to refer to “any, generic defendant” rather than Haggith, the actual defendant.

Second, the state argues Juror 31’s remarks “did not necessarily convey that Haggith was in custody.” BOR at 15. However, his remark that “I work in the jail, so I have day-to-day contact with him,” must be considered together with his statement that he was more likely to believe Haggith committed the charged crime. 1RP 12, 53. The fact that Juror 31 was more likely to believe Haggith committed the charged crime strongly contravenes the notion that he knew Haggith as a colleague or co-worker. Instead, the statements, taken together, make it much more likely the jury concluded Juror 31 knew Haggith as an inmate at the jail. RP 108.

The state also asserts it is “speculative” to conclude that Juror 31’s exposure to Haggith while an inmate led to his bias. But Juror 31’s remarks revealed that he knew Haggith only from their contact at the jail, and was biased against him. Contrary to the state’s position, the conclusion that Juror 31 was biased against Haggith based on his contact with him at the jail is entirely based on the juror’s remarks, and not on speculation.

Also unpersuasive is the state's reliance on State v. Tucker, 32 Wn. App. 83, 86, 645 P.2d 711 (1982). In Tucker, a venireman stated he had an unpleasant encounter with police, he might have known the defendant, and he preferred not to serve as a juror on the case. 32 Wn. App. at 86. The remarks at issue in Tucker were much less prejudicial than those at issue here. Unlike the remarks in Tucker, Juror 31 expressly stated he knew Haggith from his work at the jail, and that he was more likely to believe Haggith was guilty simply because he had been charged. In addition, Juror 31 was a corrections officer, whose opinion would likely carry weight with other jurors, whereas the venireman in Tucker indicated he had an unpleasant encounter with officers, and therefore, would have less of an "aura of reliability." See Brief of Appellant (BOA) at 19. Because this case involved an individual with seeming reliability expressing his bias against the defendant, this case is more analogous to Mach v. Stewart, 137 F.3d 630 (9th Cir. 1997). See BOA at 16-20.

Because the trial court erred by refusing to start with a new jury panel after the prejudicial remarks occurred, this Court should reverse.

2. THE TRIAL COURT UNDERSTOOD HAGGITH'S OBJECTION TO THE PHOTOGRAPHS SHOWING NEEDLE MARKS, AND THE STATE FAILED TO PROVIDE THE REQUIRED FOUNDATION; THE ISSUE IS NOT WAIVED.

Contrary to the state's argument, Haggith did not waive his objection to the photographic evidence depicting needle marks on his arms. The trial court made a final ruling prior to trial that the evidence was admissible, provided the state established the necessary foundation.

The purpose of a motion in limine is to resolve legal matters out of the jury's presence in such a way as to permit counsel to make comments that might be prejudicial to their position; a party losing the motion in limine has a standing objection, unless the trial court indicates its ruling is tentative and further objections are required. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). Here, the trial court did not state that Haggith needed to object again in trial. On the contrary, the trial court's remarks during trial indicated both: (1) that the court admitted the photographic evidence with the understanding that the state was still required to establish an adequate foundation; and (2), that the court understood Haggith's counsel to have a standing objection to the trial court's pre-trial ruling.

The purpose of requiring an objection, in general, is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error. State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). In this case, the trial court pointed out the foundational requirement to the state at a break immediately after the photographs were admitted. The record demonstrates the trial court was well aware of the nature of the defendant's objection at the time the photographs were admitted, as the trial court raised the issue *sua sponte* at the first opportunity the jury was out of the courtroom. RP 402-04. And the court expressly indicated it was aware of the standing objection at the time, and understood Haggith's counsel was simply not re-stating the standing objection at that time. RP 403.

The facts of this case do not present the circumstances "where a defendant [went] to trial, speculat[ed] on the outcome, and then claim[ed] error raised for the first time on appeal." See, e.g., State v. Wicke, 91 Wn.2d 638, 642-43, 591 P.2d 452 (1979). In such circumstances, an appellate court rightly refuses to consider an appeal based on grounds not evident to the trial court. This is not the situation here, as the trial court was well aware of its rulings and Haggith's objection at the time the evidence was admitted. It

was the state's failure to establish the foundation that made the evidence more prejudicial than probative.

Finally, the state's argument that the error is harmless, because Hammond would testify about Haggith's drug use the night before the robbery should be rejected. The trial court's pretrial rulings as to which drug use evidence was relevant, and why, were principled, and the distinctions well-articulated. The evidence of drug use the night before the robbery was potentially relevant to Haggith's intent, opportunity, preparation, knowledge, and ability to perceive and recall the events at the relevant times. RP 63-66. But the evidence of Haggith's prior drug use was not relevant, and was unduly prejudicial. The prosecutor argued the photographs would be relevant if a properly qualified expert testified that the needle marks were "fresh" and not "old or scars," because "fresh marks" would confirm drug use during the night of April 22 and early morning of April 23, 2008. RP 68. The trial court agreed. Yet the prosecutor never presented such expert testimony, so the photographs were not probative, and were prejudicial.

The error was not harmless. The evidence allowed the jury to speculate that Haggith had a habit of injecting addictive drugs, and that he needed money to fund his habit, providing a motive for

the robbery. See BOA at 21-22. These were conclusions the jurors would not have been likely to reach absent the photographs, as Hammond testified only about one night of drug use while partying, and Haggith denied using drugs other than alcohol. This is precisely the type of unfair prejudice the trial court sought to avoid by requiring the state to introduce the evidence for the limited purpose of establishing that Haggith used drugs the night before the robbery, and not at unspecified times in the past.

The error deprived Haggith of his constitutional right to a fair trial and requires reversal of his conviction.

3. THE STATE CONCEDES INSTRUCTIONAL ERROR CONCERNING THE DEADLY WEAPON ENHANCEMENT; THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The state concedes that the trial court erred by failing to instruct the jury on the definition of a deadly weapon for sentencing

enhancement purposes,¹ noting the problem was “exacerbated by the fact that the instructions included a [different] deadly weapon definition for robbery in the first degree.” BOR at 25. Nevertheless, the state argues the error was harmless beyond a reasonable doubt. BOR at 26-27. This Court should reject the state’s reasoning.

First, given Holz’s testimony that Haggith jabbed in her direction with the knife, from the other side of the store counter, the

¹ The definition of “deadly weapon” provided by the sentencing enhancement statute is different from the definition for purposes of first-degree robbery. RCW 9.94A.602 defines “deadly weapon” for purposes of a special verdict:

For purposes of this section, a deadly weapon is 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 and readily produce death**. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, **any knife having a blade longer than three inches**, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

(Emphasis added). On the other hand, RCW 9A.04.110(6) defines deadly weapon for purposes of first-degree robbery:

(6) “Deadly weapon” means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a “vehicle” as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death **or substantial bodily harm**.

(Emphasis added).

jury might have concluded that he used the knife in a manner readily capable of causing substantial bodily harm, *but not likely to produce death*. Thus, it is impossible for the state to demonstrate, beyond a reasonable doubt, that the erroneous instruction did not contribute to the verdict obtained.

Second, that Holz described the knife as a six-inch switchblade does not render the instruction error harmless. Significantly, it is unclear from her description whether the knife as a whole, including both the handle and the blade, was six inches long, or if the blade itself was six inches long. Her description is especially ambiguous since the knife was described as a switchblade. A switchblade knife six inches in total length would likely have a blade of less than three inches in length, in order to fit inside the handle when folded and in order to accommodate a hinge. It is noteworthy that this would fit Jesse Hammond's testimony, quoted by the state, that Haggith showed him a knife with a blade that was "about three inches" in length. See BOR at 26-27. In addition, Holz acknowledged she misremembered some details, including details about the suspect's clothing. RP 148-50. Thus, Holz's description of a six-inch switchblade is not

uncontroverted evidence that the blade itself was longer than three inches.

Haggith was entitled to have the jury weigh Holz's testimony with proper instructions as to what it was required to find. See, e.g., State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998) (“[J]udgment as to the credibility of witnesses and the weight of evidence is the exclusive function of the jury.”); see, e.g., State v. Bennett, 161 Wn.2d 303, 306-07, 165 P.3d 1241 (2007) (“the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.”) (quoting Victor v. Nebraska, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)). Absent the proper jury instruction defining a knife with a blade longer than three inches as a deadly weapon, the question was not before the jury. Thus, the state cannot demonstrate, beyond a reasonable doubt, that the instructional error in this case did not contribute to the verdict, nor that the verdict was supported by “uncontroverted evidence.”

Because the State cannot establish beyond a reasonable doubt that the trial court's instructional error was harmless, this Court should remand for resentencing within the standard range. State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980).

4. THE STATE CONCEDES THE TRIAL COURT COMMENTED ON THE EVIDENCE; THE ERROR IS PRESUMED PREJUDICIAL.

The state concedes the trial court's reference to the knife as a deadly weapon in the enhancement instruction, "a deadly weapon, to-wit: a knife," was a comment on the evidence. BOR at 27. The state also concedes the comments are "presumed prejudicial," requiring the state to demonstrate lack of prejudice "unless the record affirmatively shows no prejudice could have resulted from the comment." BOR at 29; see State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Under this standard, the state must demonstrate that without the erroneous comment, "no one could realistically conclude that the element was not met." State v. Levy, 156 Wn.2d 709, 725-27, 132 P.3d 107 (2006). The state fails to make such a showing.

Indeed, it is impossible to make such a showing on the facts of this case. As argued in the previous section, the jury was not instructed that a knife with a blade longer than three inches is a deadly weapon *per se*. Nor was the jury instructed that they had to find that the knife had "the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." And the trial court instructed the jury that it

only had to find Haggith was armed with “a deadly weapon, to-wit: a knife,” and defined what it meant to be “armed.” Absent the proper instructions, the jury only had to find that Haggith had “a knife” to return the special verdict against him. That is precisely the prejudicial import of the judge’s comment on the evidence. The jury was not required to find either of the actual definitions satisfied, that is, whether the knife had a blade longer than three inches, or was used in a manner making it “likely to produce death.”

Nor does the record support a conclusion that “no one could realistically conclude that the element[s] [were] not met.” See Levy, 156 Wn.2d at 725-27. As argued in the previous section: (1) Holz’s description of a six-inch switchblade is not uncontroverted evidence that the blade itself was longer than three inches; (2) the jury was not required to accept all of Holz’s testimony, and her memory and perception were both challenged at trial by Haggith; and (3) the jury could have reasonably concluded the knife was likely to cause substantial bodily injury but not death, which is inadequate to support imposition of the deadly weapon enhancement.

The state also argues that no prejudice could have resulted from the error because “defense never disputed that the knife was not a deadly weapon.” BOR at 29. This is incorrect. As the trial

court instructed the jury in Instruction 2, Haggith's not guilty plea "puts in issue every element of each crime charged," and the state had the burden of proving every element beyond a reasonable doubt. CP 33. Haggith was not required to present any evidence, and his not guilty plea automatically put the question of whether the knife used was a deadly weapon in dispute.

For these reasons, the state cannot demonstrate the judicial comment did not prejudice Haggith. This Court should remand for resentencing within the standard range. State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980).

5. THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY ON THE INFERIOR-DEGREE CHARGE OF ROBBERY IN THE SECOND DEGREE.

The presence or absence of a deadly weapon is the only relevant distinction between the charged crime of first-degree robbery and the inferior-degree crime second-degree robbery. And there was substantial, affirmative evidence that Haggith only committed the inferior-degree crime. Accordingly, the trial court erred by refusing to give the second degree robbery instruction.

The state correctly acknowledges that in determining whether to give an inferior-degree instruction, the trial court was required to view the evidence in the light most favorable to Haggith.

BOR at 31. Yet the state fails to address the substantial evidence Haggith cited in his opening brief demonstrating the instruction should have been given. See BOA at 38.

That evidence, when viewed in the light most favorable to Haggith, as required, required the trial court to give the inferior-degree instruction. First, the state's own evidence created a legitimate factual question as to whether the knife used was, in fact, a "deadly weapon" as defined for purposes of the robbery statute. It is not clear that the knife, "under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). Second, Haggith's statement that he did not own a knife, when viewed in the light most favorable to him, is also substantial evidence that he may have robbed the store without using a knife. Especially when considered with the affirmative evidence that Holz misremembered details of the robber's clothing, the evidence is sufficient to indicate that the robber may have had an implement other than a knife in his hand.

Viewed in the light most favorable to Haggith, that evidence was affirmative, substantial evidence, from which the jury could have concluded only the inferior-degree offense was committed.

That is all that is required before he is entitled to an inferior-degree instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000); State v. McClam, 69 Wn. App. 885, 889-90, 850 P.2d 1377 (1993). Because the trial court refused to provide the requested instruction, Haggith is entitled to a new trial, based on the facts of this case. State v. Workman, 90 Wn.2d 443, 456, 584 P.2d 382, 385 (1978).

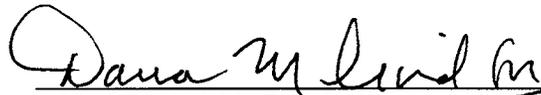
B. CONCLUSION

For the reasons stated herein and those stated in appellant's opening brief, this Court should reverse appellant's conviction for first-degree robbery, or remand for resentencing within the standard range.

DATED this 10th day of March, 2010.

Respectfully submitted,

NIELSEN BROMAN & KOCH, PLLC.



JONATHAN M. PALMER, WSBA 35324



DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	COA NO. 62939-5-I
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GAVIN HAGGITH,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURTHOUSE
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] GAVIN HAGGITH
DOC NO. 813623
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF MARCH, 2010.

x *Patrick Mayovsky*