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Court of Appeals
Division III
State of Washington

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHELLE LEE BLAIR, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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INDEX

A.	ASSIGNMENTS OF ERROR	1
B.	ISSUES	1
C.	STATEMENT OF THE CASE.....	2
D.	ARGUMENT	11
1.	THE TRIAL COURT ERRED IN DENYING MS. BLAIR’S REQUEST FOR NEW COUNSEL.....	11
2.	THE TRIAL COURT ERRED IN FAILING TO GIVE A UNANIMITY JURY INSTRUCTION REGARDING WHICH DEADLY WEAPON WAS USED IN THE CRIMES, A KNIFE OR A BAT	14
3.	THE JUDGMENT AND SENTENCE CONTAINS AN ERROR THAT SHOULD BE CORRECTED.....	19
E.	CONCLUSION	19

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE PERS. RESTRAINT OF MARTINEZ, 171 Wn.2d 354,
256 P.3d 277 (2011) 16, 17, 18

STATE V. BARTON, 28 Wn. App. 690,
626 P.2d 509 (1981) 13

STATE V. EMERY, 161 Wn. App. 172,
253 P.3d 413 (2011) 14, 18

STATE V. HANDYSIDE, 42 Wn. App. 412,
711 P.2d 379 (1985) 14

STATE V. HEALY, 157 Wn. App. 502,
237 P.3d 360 (2010) 19

STATE V. HEGGE, 53 Wn. App. 345,
766 P.2d 1127 (1989) 12

STATE V. KITCHEN, 110 Wn.2d 403,
756 P.2d 105 (1988) 15, 18

STATE V. NAILLIEUX, 158 Wn. App. 630,
241 P.2d 1280 (2010) 19

STATE V. ORTEGA-MARTINEZ, 124 Wn.2d 702,
881 P.2d 231 (1994) 14, 18

STATE V. SHILLING, 77 Wn. App. 166,
889 P.2d 948 (1995) 17

STATE V. STENSON, 132 Wn.2d 668,
940 P.2d 1239 (1997) 12

STATE V. TAYLOR, 97 Wn. App. 123,
982 P.2d 687 (1999) 17

CONSTITUTIONAL PROVISIONS

CONST ART. 1, § 21..... 14

STATUTES

RCW 9A.04.110(6)..... 16, 17, 18
RCW 9A.52.020 15
RCW 9A.56.200 15

COURT RULES

CrR 3.1 11
CrR 3.1(e)..... 12

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Ms. Blair's request for new counsel.
2. The trial court erred in failing to give a unanimity jury instruction regarding which deadly weapon was used in the crimes, a knife or a bat.
3. The judgment and sentence erroneously indicates that Ms. Blair was found guilty by a guilty plea.

B. ISSUES

1. Prior to the start of the trial, Ms. Blair asked the trial court to appoint her new counsel, and defense counsel joined in her request. Ms. Blair understood the case might be resolved without going to trial, and defense counsel had given her inaccurate information. Defense counsel told the trial court he was not ready to represent Ms. Blair. During his examination of her during trial, he exhibited confusion regarding her account of the events in question. Did the trial court err in denying Ms. Blair's request for new counsel?

2. The State alleged and argued alternative means, a knife or a bat, for the deadly weapon used in the crimes. Substantial evidence does not support both alternative means. There was no substantial evidence that the bat was a deadly weapon under the circumstances here. Did the trial court err in failing to give a unanimity jury instruction regarding which deadly weapon was used?
3. The judgment and sentence indicates that Ms. Blair was found guilty by a guilty plea. She was found guilty by a jury verdict. Should this error in the judgment and sentence be corrected?

C. STATEMENT OF THE CASE

While on duty and driving to an unrelated incident, City of Spokane Police Officer Michael Russo was flagged down by a female, who told him her friend Roger Garza was being held hostage. (RP¹ 65). Officer Russo was able to find Mr. Garza's address and went to his house. (RP 65-66). He arrived at the house along with another officer, City of Spokane Police Officer Christopher Douville, and heard males talking

¹ The Report of Proceedings consists of three volumes. The second two volumes, containing some pretrial matters and the trial, are consecutively paginated. The references to "RP" herein refer to these two volumes.

inside the house. (RP 47-48, 65). The door of the house opened, and a male, later identified as Mr. Garza, ran towards the officers. (RP 48-50, 67-68). The officers saw another male, later identified as Andrew Williamson (also known as “Ghost”), coming out of the house following Mr. Garza. (RP 57, 68, 102). Mr. Garza told the officers that someone inside had a knife, and that “[t]hey’re going to kill me. They’re holding me hostage.” (RP 67-68).

Officer Russo arrested Mr. Williamson, and found a portable house phone and a debit card in Mr. Garza’s name on Mr. Williamson. (RP 70, 73). Other than Mr. Garza and Mr. Williamson, the only person the officers saw at the house was a woman, Linda Hammer. (RP 53, 74). Michelle Blair was not in the house. (RP 58). The officers stated they heard what sounded like people running out of the house, but they did not pursue these sounds. (RP 54, 69, 73).

Officer Douville found a knife in the house, behind a couch. (RP 51, 57-58). Officer Douville also saw that a bedroom in the house was in a state of disarray, and that the phone line in the bedroom had been cut. (RP 50-51, 58-59). Officer Douville did not find a bat in the house. (RP 59).

Spokane Police Officer Brian Eckersley arrived at the house and showed Mr. Garza a photo montage. (RP 77-79). Officer Eckersley stated

that Mr. Garza immediately identified Ms. Blair as a suspect. (RP 79-80, 82-83).

The State charged Ms. Blair with one count of first degree robbery and one count of first degree burglary, as an actor or an accomplice. (CP 1-2). Prior to trial, the State amended both counts to specify the deadly weapon Ms. Blair was armed with, “a knife and/or a bat.” (CP 20-21; RP 6-7). The amended information also alleged deadly weapon sentencing enhancements for both counts. (CP 20-21; RP 6). The State provided Ms. Blair with notice that both charged crimes were most serious offenses and that if convicted, she could be sentenced as a persistent offender to life without the possibility of parole. (CP 3).

Prior to the start of the trial, Ms. Blair asked the trial court to appoint her new counsel. (RP 17-27). She told the trial court that she had thought she was going to get a deal in exchange for providing the State with information regarding a murder case. (RP 17-18). Ms. Blair told the trial court she did not know that she would be coming to trial but, instead, thought an offer would be made. (RP 17-20, 25). Ms. Blair stated she was not promised anything. (RP 19). She told the trial court she was confused, and “I’m feeling like I’m not being represented at all.” (RP 18). The State informed the trial court:

Your Honor, Ms. Blair gave a free talk concerning a homicide. She was promised nothing other than, if we would work out something, that we'd come back to her with a deal, that nothing in that free talk would be used against her. She gave information to the detective. . . . [T]he state's not prepared to make an offer to Ms. Blair on a three strikes case based on the information she relayed to us. We're in trial at this point.

(RP 20).

Ms. Blair's attorney, Dennis J. Dressler, joined in her request for new counsel. (RP 21-22). Mr. Dressler stated that his understanding, which he conveyed to Ms. Blair, "was that information was still being looked at but that the state wanted to proceed with the case at this time."

(RP 21) (emphasis added). Mr. Dressler told the trial court:

Your honor, it sounds as if there's a - - a major misunderstanding of the parties here which would add to Ms. Blair's position, if I'm not putting words in her mouth. I could see where she may believe that I led her down a path that she shouldn't have been taken down. I can see where she may not have any faith in me representing her at this particular time, which considering the nature of the sentencing range, there's only one sentence that can come out of this with a conviction. I think she may be best represented by someone other than me, because I think at this point she's given up on my ability to represent her in an adequate and helpful manner.

(RP 21-22).

Mr. Dressler then told the trial court that "[b]ased on the information I provided my client, based on the information that she perceived that I gave her," he was not ready to represent her. (RP 22).

Mr. Dressler told the trial court “the fact that I walked in believing I was ready and then finding out that what I told my client was not accurate, I have to wonder what else I may have missed.” (RP 23). He identified the inaccurate information he told Ms. Blair as “that the conversation was leading to information that was being checked out to see if it was going to be plausible, and that if it was, we could still resolve this matter even though trial had started.” (RP 23). Mr. Dressler stated that is not Ms. Blair’s understanding. (RP 23).

Mr. Dressler also stated, “[i]f this goes to a conviction, Ms. Blair is looking a possibly a flawed trial and a life conviction without parole.” (RP 26). When asked by the trial court to identify the flaws, Mr. Dressler stated:

Well, I think when you have no faith in your attorney, that that’s a major flaw in and of itself, that anything that she’s told me or that I’ve told her, that she can’t put any stock in. I think trusting your attorney is very important, and without it, the defense team of client and attorney is somewhat shattered.

(RP 26).

The trial court denied the request for new counsel, stating the request was late, and that Ms. Blair had not stated she did not have confidence in Mr. Dressler or that he was not prepared to go to trial. (RP 23-24, 26-27).

Prior to jury selection, the trial court read the charges, as stated in the amended information, to the venire. (CP 20-21; RP 29-31).

Ms. Blair testified in her own defense. (RP 203-228). She said that prior to the night in question, she went to Northern Quest Casino, along with Eric Borders (also known as “Goldy”), to look for Mr. Garza, because he owed her money for drugs. (RP 99, 138-139, 147-150, 159-160, 205, 216, 218). Ms. Blair testified that while at the casino, she spoke to Mr. Garza on the phone, and told him she needed the money he owed her. (RP 217). She said that a woman brought down part of the money Mr. Garza owed her, and gave it to Goldy. (RP 218-219). Ms. Blair testified that before she and Goldy left the casino, she slashed a tire on Mr. Garza’s vehicle, because she was upset that Mr. Garza did not give her the full amount of money he owed her. (RP 219). Ms. Blair told the court she and Goldy then left the casino, and “I let it go[,]” doing nothing further to try to get her money back from Mr. Garza. (RP 219-221).

Ms. Blair testified that on the night in question, she was driving with Mr. Borders and her car overheated. (RP 209). She said they walked to Mr. Garza’s house to get some coolant or some money for coolant, and that Mr. Williamson let them into the house. (RP 208-210). She said she had not had contact with Mr. Garza since speaking with him at the casino. (RP 219). Ms. Blair testified that Mr. Williamson shoved Mr. Garza into a

chair, pulled out a knife, and threatened to kill him. (RP 214). Ms. Blair said she did not ask Mr. Williamson to do that, and she was not aware of why he did it. (RP 214, 220-221). She testified that she stood at the kitchen door during the incident. (RP 215).

While questioning her regarding the night in question, Mr. Dressler exhibited confusion regarding Ms. Blair's account of the events:

[Mr. Dressler:] Okay. Let's go back to the incident that's later at night. Your testimony is that Ghost shoved Mr. Garza into the chair and was wanting to know where your money was?

[Ms. Blair:] No.

[Mr. Dressler:] Or TV?

[Ms. Blair:] (Moved head from side to side.)

[Mr. Dressler:] What was it you wanted to tell me about? I'm sorry. I think I got myself confused.

[Ms. Blair:] When Ghost shoved Roger into the chair, he pulled out a knife and threatened to kill him.

[Mr. Dressler:] Okay, I think now I'm back on track. Thank you

(RP 213-214).

Mr. Garza testified that on the night in question, Mr. Williamson, Ms. Blair (also known as "Mimi"), and Mr. Borders entered his house without his permission. (RP 99, 101-102, 106, 127). Mr. Garza said that Ms. Blair was holding a dark wood baseball bat, and that she put the bat to his forehead and pushed him across the room, to the middle of his living room. (RP 107-108, 127-128). He testified that "I can't say it was - - it was hard or harmful, but it certainly was intimidating." (RP 107). "She

didn't do it in a malicious way or harm - - you know, hurt me [sic].” (RP 128). Mr. Garza acknowledged there was no bruising to his forehead. (RP 129). He testified he was afraid of the bat, and that if someone would have hit him with the bat, he could have been seriously injured. (RP 139-140).

Mr. Garza said that Mr. Williamson grabbed him and threw him into his La-Z-Boy chair. (RP 108, 129). He testified that Ms. Blair and Mr. Borders were on his left. (RP 108, 129-130). Mr. Williamson pulled out a knife and started menacing him with it. (RP 108-109, 132).

Mr. Williamson then asked him where the debit cards and money were. (RP 109). Mr. Garza said that Mr. Williamson had him look for a debit card in the living room and in his bedroom, and that Mr. Williamson was grabbing debit cards and putting them in his pocket. (RP 110, 131-132). While he and Mr. Williamson were in his bedroom, Mr. Garza said that he saw the tail-end of the bat as it smashed a lamp in his living room. (RP 113). He did not see who was holding the bat at this time. (RP 136).

When Mr. Williamson, Ms. Blair, and Mr. Borders noticed a light outside the house, and asked if the cops were out there, Mr. Garza bolted for the door and ran outside to find two officers standing in his yard. (RP 111-112, 134).

Mr. Borders told the jury that on the night in question, he went into Mr. Garza's house along with Ms. Blair and Mr. Williamson. (RP 152-153). He said that Ms. Blair wanted to get her money, and that Mr. Garza owed her something. (RP 154-155). Mr. Borders said that Ms. Blair had a shiny blue bat, and that she told Mr. Garza she wanted her money. (RP 153, 162-163). Mr. Borders testified that Ms. Blair was angry, and as she asked for her money she was smacking the barrel of the bat into the palm of her hand. (RP 162-163).

Adrian Hammer testified that on the night in question, Ms. Blair was at Mr. Garza's house, but that she stood by the kitchen door, approximately twenty feet away from Mr. Williamson and Mr. Garza, the entire time. (RP 194-195, 198). He did not hear Ms. Blair say or do anything during the confrontation between Mr. Williamson and Mr. Garza. (RP 196).

The trial court instructed the jury that a deadly weapon "means any weapon, device, instrument, substance, or article, 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." (CP 96).

To-convict instructions for first degree robbery and first degree burglary both required that the jury find that the defendant or an

accomplice was armed with a deadly weapon, but the instructions did not identify a specific deadly weapon. (CP 93, 98).

In its closing argument, the State argued that the jury could find that the bat, in addition to the knife, is a deadly weapon for purposes of both charges. (RP 246, 250, 254, 268-269).

The jury found Ms. Blair guilty of first degree robbery and first degree burglary. (CP 105, 108; RP 295). The jury also returned special verdicts finding that an accomplice was armed with a deadly weapon at the time of the commission of both crimes. (CP 107, 110; RP 296).

The trial court sentenced Ms. Blair as a persistent offender, to a term of confinement of life without the possibility of early release. (CP 117; RP 306). The judgment and sentence indicated Ms. Blair was found guilty by a guilty plea, as opposed to by a jury verdict. (CP 113).

Ms. Blair appealed. (CP 127-138).

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MS. BLAIR'S REQUEST FOR NEW COUNSEL.

Pursuant to CrR 3.1, “[w]henver a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown.”

CrR 3.1(e). “Simple lack of rapport between attorney and client is not a basis for withdrawal of counsel, even where client and attorney agree withdrawal is preferred.” *State v. Hegge*, 53 Wn. App. 345, 350, 766 P.2d 1127 (1989). “However, a complete breakdown of communication which may lead to an unjust verdict is considered a good and sufficient reason for withdrawal.” *Id.* at 351.

Further, “[a] criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). “Factors to be considered in a decision to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings.” *Id.* Denial of a motion to withdraw as counsel is reviewed for an abuse of discretion. *Hegge*, 53 Wn. App. at 350; *Stenson*, 132 Wn.2d at 733.

Ms. Blair requested the trial court appoint her new counsel, and her attorney, Mr. Dressler, joined in her request. (RP 17-27). The record shows there was a complete breakdown in communication between Mr. Dressler and Ms. Blair. *See Hegge*, 53 Wn. App. at 351; *Stenson*,

132 Wn.2d at 734. Ms. Blair understood that the case might still be resolved without proceeding to trial, which according to the State, was incorrect. (RP 17-23, 25). Mr. Dressler informed the trial court that he had given Ms. Blair inaccurate information regarding a possible resolution of the case. (RP 21, 23). He acknowledged that Ms. Blair had no faith in him. (RP 26).

Ms. Blair informed the trial court she did not feel like she was being represented at all. (RP 18). Mr. Dressler agreed that Ms. Blair had given up on his ability to adequately represent her, and that she would be best represented by someone else. (RP 22). Mr. Dressler told the court he was not ready to represent her, and that the trial would be flawed. (RP 26). While questioning Ms. Blair during the trial regarding the night in question, Mr. Dressler exhibited confusion regarding Ms. Blair's account of the events. (RP 213-214). This clearly demonstrates the complete breakdown in communication between Mr. Dressler and Ms. Blair. Mr. Dressler was not able to effectively question Ms. Blair.

Although Ms. Blair's request for new counsel was made just prior to the start of the trial, Ms. Blair clearly set forth reasons for her lack of confidence in Mr. Dressler. *Cf. State v. Barton*, 28 Wn. App. 690, 695, 626 P.2d 509 (1981) (finding that the trial court did not abuse its discretion in denying the defendant's request for new counsel, where the

request was made on the day of trial, and the defendant did not give any reasons for his lack of confidence in his present counsel). These reasons are heightened by the fact that Ms. Blair was facing a possible life sentence. (CP 3). Given the high stakes, Ms. Blair should not have had to face a trial with Mr. Dressler as her counsel.

The trial court abused its discretion in denying Ms. Blair's request for new counsel. Therefore, she is entitled to a new trial.

2. THE TRIAL COURT ERRED IN FAILING TO GIVE A UNANIMITY JURY INSTRUCTION REGARDING WHICH DEADLY WEAPON WAS USED IN THE CRIMES, A KNIFE OR A BAT.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). “[T]he right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal.” *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985).

“The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged.” *State v. Emery*, 161 Wn. App. 172, 198, 253 P.3d 413 (2011) (*citing Ortega-Martinez*, 124 Wn.2d at 707). “The threshold test governing whether unanimity is required on an

underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury.” *Ortega-Martinez*, 124 Wn.2d at 707. “Unanimity is not required, however, as to the *means* by which the crime was committed so long as substantial evidence supports each alternative means.” *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). “In reviewing an alternative means case, the court must determine whether a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt.” *Id.* at 410-11.

The trial court instructed the jury that in order to find Ms. Blair guilty of first degree robbery, it had to find, among other elements, “[t]hat in the commission of these acts and in immediate flight therefrom the defendant, or an accomplice, was armed with a deadly weapon.” (CP 93); *see also* RCW 9A.56.200 (first degree robbery). The trial court instructed the jury that in order to find Ms. Blair guilty of first degree burglary, it had to find, among other elements, “[t]hat in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon[.]” (CP 98); *see also* RCW 9A.52.020 (first degree burglary). The jury instructions did not specify a deadly weapon, or require jury unanimity regarding which deadly weapon was used. (CP 93, 98).

The State alleged and argued alternative means for the deadly weapon used in the crimes. The amended information specified the deadly weapon Ms. Blair was armed with as “a knife and/or a bat.” (CP 20-21). Prior to jury selection, the trial court read these charges to the venire. (RP 29-31). In its closing argument, the State argued that the jury could find that the bat, in addition to the knife, is a deadly weapon for purposes of both charges. (RP 246, 250, 254, 268-269).

Substantial evidence does not support that the bat, as used here, was a deadly weapon. “A deadly weapon means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance . . . 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.” RCW 9A.04.110(6).

Thus, there are two categories of deadly weapons:

[1] [D]eadly weapons per se, namely “any explosive or loaded or unloaded firearm” and [2] deadly weapons in fact, namely “any other weapon, device, instrument, article, or substance . . . 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.”

In re Pers. Restraint of Martinez, 171 Wn.2d 354, 365, 256 P.3d 277 (2011).

Because the deadly weapons alleged here were not firearms, the jury was only instructed with the definition in the second category. (CP 96). If a device falls under the second category, a deadly weapon in fact, it is a question for the trier of fact to determine whether it is a deadly weapon. *State v. Taylor*, 97 Wn. App. 123, 126, 982 P.2d 687 (1999).

Whether a device is a deadly weapon in fact “rests on the manner in which it is used, attempted to be used, or threatened to be used.” *Martinez*, 171 Wn.2d at 366 (citing RCW 9A.04.110(6)). In making this determination, the totality of the circumstances must be evaluated, including “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” *Id.* at 367 (internal quotation marks omitted) (quoting *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995)).

A rational jury could not have found that the bat, as used here, was a deadly weapon. There was no evidence that the under the circumstances in which the bat was used, attempted to be used, or threatened to be used, it was “readily capable of causing death or substantial bodily harm.” *See* RCW 9A.04.110(6). Mr. Garza testified that Ms. Blair used a bat to push him across the room, by putting the bat to his forehead. (RP 107-108, 127-128). He testified that there was no bruising to his forehead, and that it was not harmful or done in a malicious way. (RP 107, 128-129). Mr.

Garza saw the tail-end of the bat as it smashed a lamp in his living room, but he was not even in the room at the time. (RP 113).

Mr. Garza did testify that if someone had hit him with the bat, he could have been seriously injured. (RP 139-140). There was, however, no evidence that the bat was used to hit him, and therefore this testimony does not make the bat a deadly weapon in fact. *See Martinez*, 171 Wn.2d at 366 (*citing* RCW 9A.04.110(6)).

Mr. Borders testified that Ms. Blair was angry, and that as she asked Mr. Garza for her money, she was smacking the barrel of the bat into the palm of her hand. (RP 162-163). Under the totality of the circumstances, this action alone is not enough to make the bat a deadly weapon. Mr. Borders did not testify that Ms. Blair threatened Mr. Garza with the bat, or tried to hit him with it.

Because substantial evidence does not support each alternative means, a knife or a bat, as the deadly weapon used in the crimes, Ms. Blair was deprived of her constitutional right to a unanimous jury verdict. *See Emery*, 161 Wn. App. at 198 (*citing Ortega-Martinez*, 124 Wn.2d at 707); *Kitchen*, 110 Wn.2d at 410-11. Thus, trial court erred in failing to give a unanimity jury instruction regarding which deadly weapon was used in the crimes. This court should order a new trial.

3. THE JUDGMENT AND SENTENCE CONTAINS AN ERROR THAT SHOULD BE CORRECTED.

The judgment and sentence indicates that Ms. Blair was found guilty by a guilty plea. (CP 113). But Ms. Blair was found guilty by a jury verdict. (CP 105, 108; RP 295). This court should remand this case for correction of the judgment and sentence to indicate that Ms. Blair was found guilty by a jury verdict. *See, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

E. CONCLUSION

The trial court abused its discretion in denying Ms. Blair's request for new counsel. The evidence would not support finding that a bat was used as a deadly weapon in the commission of the crimes, so the trial court erred in failing to give a unanimity jury instruction regarding which deadly weapon was used. For both reasons, Ms. Blair is entitled to a new trial.

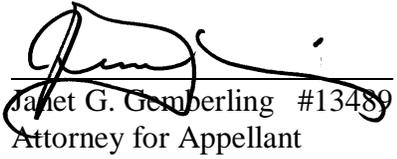
Should this court decline to order a new trial, the case should be remanded for correction of the judgment and sentence to indicate that Ms. Blair was found guilty by a jury verdict.

Dated this 25th day of November, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30961-4-III
)	
vs.)	CERTIFICATE
)	OF MAILING
MICHELLE LEE BLAIR,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on November 25, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on November 25, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on November 25, 2012.


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