NO. 301664-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

NIKOLAS F. CAMPBELL, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-00425-8

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The Crimes:

Sometime before 4:07 a.m., on April 7, 2009, two men kicked open Debra Vargas's apartment door. (RP[1] 215-16). One had a gun, silver in color; one had a pipe. (CP 69, 159-60; RP 124, 130). Their faces were covered and they told Mrs. Vargas's son, James Stethem, who was sleeping on a couch, to turn away from them. (RP 124). The men tampered with the phone lines, cut several cords to a computer desk, and also severed a USB cord outside the apartment. (RP 217, 226-27).

The men stole Mr. Stethem's DVD player, Mrs. Vargas's laptop, and her van. (RP 125, 127). The police found a pipe in Mrs. Vargas's apartment on the floor outside the kitchen. (RP 228).

The defendant and co-defendant Michael Rice are linked to the crimes:

The defendant and Rice were at Mrs. Vargas's fourplex on the night in question.

The landlord of Mrs. Vargas's apartment, Kenneth Cochlin, states he saw the defendant and co-defendant, Michael Rice, on the property on the night of April 6, 2009, going between her apartment and Christina

[1] Unless otherwise stated, "RP" refers to the Verbatim Report of Proceedings for the jury trial held on February 14-16, 2011, and reported by Lisa S. Lang.

Morales's apartment. (RP 204-05). They were both wearing black sweatshirts with hoodies. (RP 204). Further piquing his interest was the fact that both Mrs. Vargas's and Ms. Morales's outside porch lights had been unscrewed, so that their apartments were not illuminated. (RP 203).

Further, Jerami Wilson, an ex-boyfriend of Ms. Morales who was staying in her apartment, stated that both the defendant and Rice came to the apartment that night with Cecilia Circo. (RP 133-35). Rice had previously spoken to Wilson about stealing items from Mrs. Vargas's apartment, specifically, a laptop. (RP 139, 150). Not wanting to be part of "the whole shindig," Wilson took some sleeping pills and went to sleep, leaving the defendant, Rice, and Ms. Circo in Ms. Morales's apartment (RP 144, 150).

Prior to the robbery, the defendants take Cecilia Circo with them to Portland in Mrs. Vargas's van and discuss the robbery.

The defendant pointed a silver gun at Ms. Circo and told her to get into a van. (Circo Interview RP 3-4). Mr. Rice was initially driving the van.[2] (Circo Interview RP 5). The defendant drove to Portland, where the van was recovered by the Portland Police Department. (Circo Interview RP 5; RP 157, 178).

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[2] Rice had driven Mrs. Vargas's van before. (RP 112). This is an important point because he was thereby aware of a safety feature regarding the van's starting mechanism. (RP 112).

On the drive, Ms. Circo stated that Mr. Rice and the defendant laughed about committing the robbery and hitting an old man (presumably Mr. Stethem) who was on the couch. (Circo Interview RP 7; RP 177).

The defendant was armed with a gun and Rice was armed with a pipe.

Mr. Wilson saw a pipe in Rice's back pocket. (RP 137). That was the pipe the police found in Mrs. Vargas's apartment. (RP 243). In addition, the defendant told Mr. Wilson he was armed with a gun and showed Wilson a portion of the gun. (RP 137, 146).

Ms. Circo also saw the defendant with a silver gun. (RP 177).

The Chucky dolls stolen from Ms. Morales's apartment and found in Ms. Vargas's van in Portland also link the defendants to the crimes.

Ms. Morales collects Chucky dolls and had a set of three dolls. (RP 112, 114). When she returned to her apartment after April 7, 2013, she found that those three dolls were missing. (RP 114-15). One of the dolls was found under Mrs. Vargas's stairs. (RP 114). The other two were found in Mrs. Vargas's van which had been recovered in Portland. (RP 160).

In addition, Ms. Circo saw the defendant with a Chucky doll tied to his side during the drive from Kennewick to Portland in Mrs. Vargas's van. (Circo interview RP 5).

The defendant's statements to Detective Davis are contradictory.

Defendant's first version: On April 19, 2009, Detective Davis asked Campbell if he was in the Tri-Cities around the 7th of April. (RP 241). Campbell initially stated, "I've been in Portland for two or three weeks" so could not have done a robbery in Kennewick. (RP 241).

Defendant's second version: When further questioned by Detective Davis, Campbell said that he was with Jerami Wilson, Cecilia Circo, and Michael Rice at Ms. Morales's apartment. (RP 242). Campbell said Jerami Wilson fell asleep at the apartment, and Ms. Circo and Mr. Rice were in a bedroom and he left the apartment. (RP 242).

II. RESPONSE TO DEFENDANT'S ARGUMENTS[3]

A. ARGUMENTS REGARDING ROBBERY IN THE FIRST DEGREE

1. Defendant's argument: "A variance between the charging language of the last Amended Information and the jury instructions violated the essential elements rule." (App. brief at 9).

State's Response:

a. There was no variance between the information and the jury instructions.

A charging document is adequate only if it includes all essential

[3] The State will not address the defendant's arguments in the exact order they were presented in the brief. However, by quoting portions of the brief, the State

elements of a crime so as to inform the defendant of the charges and to allow the defendant to prepare a defense. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). Here, the defendant was charged in the body of the Information with Robbery in the First Degree by displaying what appeared to be a firearm or other deadly weapon. *See* Appendix A[4]. (CP 73). He was also charged in the Deadly Weapon Enhancement with being armed with a deadly weapon. (CP 73-74). The jury instructions on Robbery used the phrase "armed with a deadly weapon." (CP 88-89).

The jury instruction could have included an alternative, accusing the defendant of "being armed with a deadly weapon and/or displaying what appeared to be a firearm or other deadly weapon." However, the fact that the alternative ("displaying what appeared to be a firearm or other deadly weapon") was not included in the jury instruction does not change the situation; the charging document alleged both alternatives and informed the defendant that he should prepare to defend both alternatives.

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hopes to respond to all arguments presented.

[4] The Amended Information filed on February 16, 2011, is attached as Appendix A.

b. Nevertheless, even accepting the defendant's argument that there was a variance between the instructions and the information, it would not result in a reversal.

i. Standard on Review:

The State again emphasizes that the Information alleged both alternatives. However, if the jury had been instructed on an uncharged alternative means of committing Robbery in the First Degree, it is presumed to be prejudicial unless the State can show that the error was harmless. *State v. Bray*, 52 Wn .App. 30, 34-36, 756 P.2d 1332 (1998).

ii. Any Such Error Would Have Been Harmless.

The recent case of *In re Brockie*, 86241-9, 2013 WL 5406428 (Wash. Sept. 26, 2013) is directly on point. In that case the defendant was charged by Information with committing Robbery in the First Degree by "displaying what appeared to be a firearm or other deadly weapon." However, the jury instructions described two alternative means for the crime: "armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon."

The Court held that there was no prejudice to the defendant. In that case, the evidence was consistent that the robbery displayed what appeared to be a gun. The perpetrator did not merely possess a deadly weapon in his pocket which he did not show to a victim. Furthermore,

Brockie's defense was a complete denial on any involvement in the robbery.

That is the situation here. The defendant claimed that he was totally uninvolved in the robbery. He did not claim that he committed a robbery while unarmed. Likewise, the consistent evidence was that the perpetrators were armed and displayed their arms to the victims.

The Information properly charged the defendant with both alternatives. Nevertheless, any error under the facts in this case was harmless.

2. Defendant's argument: "The State failed to prove beyond a reasonable doubt that the pipe was used as a deadly weapon. The State's failure impacts both the elements of first degree robbery and the weapon enhancement." (App. brief at 11).

State's Response:

a. Standard on Review:

Evidence is sufficient to support a conviction if, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. *State v. Hosier,* 157 Wn.2d 1, 8, 133 P.3d 936 (2006). The reviewing court should consider "whether the totality of the evidence is sufficient to prove all the required elements." *State v. Ceglowski*, 103 Wn. App. 346, 350, 12 P.3d 160 (2000).

b. The defendant was charged with committing robbery in the first degree by use of a pipe or firearm.

The defendant is incorrect in arguing that the jury could only find the defendant guilty if it found that he used a pipe. He was charged with committing Robbery in the First Degree by displaying a firearm or pipe: *See* Appendix A. (CP 73).

This is consistent with RCW 9A.56.200(1)(a)(ii), which defines Robbery in the First Degree as a robbery in which the perpetrator displays a firearm or other deadly weapon. In this case, the victims, Mrs. Vargas and Mr. Stethem, both saw the perpetrator with a firearm. (RP 124, 128). This perpetrator was probably the defendant, who told his friend, Jeramy Wilson, that he had a firearm and showed it to him. (RP 136-37).

Mrs. Vargas also saw the other perpetrator with a metal rod, or pipe. (CP 159-60).

The defendant's argument on this point is not well-taken.

3. Defendant's argument: "Since no to-convict instruction included the word 'firearm' the phrase 'deadly weapon' as used in those instructions became the law of the case." (App. brief at 12).

State's Response:

First, the jury was instructed that "[a] pistol, revolver or any other firearm is also a deadly weapon whether loaded or unloaded." (CP 111).

Second, the jury was also instructed that a "[d]eadly weapon also means any weapon [or] device...which under the circumstances in which it is used ....or threatened to be used, is readily capable of causing death or substantial bodily harm." (CP 94). The jury was explicitly instructed that a firearm is a deadly weapon. Nevertheless, the difference between a "deadly weapon" and a "firearm" is a distinction without a difference: the jury could certainly conclude that a firearm met the definition of "deadly weapon" under Instruction No. 13. (CP 94).

In addition, the "law of the case" doctrine is not applicable. The Court in *State v. Worl,* 129 Wn.2d 416, 424, 918 P.2d 905 (1996) discussed this doctrine, stating:

> Proper consideration of the law of the case doctrine begins with *Greene v. Rothschild,* 68 Wash.2d 1, 414 P.2d 1013 (1966), which is the "foundation case for modern analysis" of the law of the case doctrine. Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington,* 60 Wash.L.Rev. 805, 810 (1985). In *Greene,* this court held that the law of case doctrine is a discretionary rule that should not be applied when the result would be "manifest injustice":
>
> > Under the doctrine of "law of the case," as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are "authoritatively overruled." ... Such a holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.

> *Greene,* at 10, 414 P.2d 1013. In 1976, this court adopted RAP 2.5(c), codifying the law of the case doctrine:
>
> *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

State v. Worl, 129 Wn. 2d 416, 424, 918 P.2d 905 (1996).

4. **Defendant's argument: "Since no <u>use</u> of a 'deadly weapon' was established by the State, an essential element of first degree robbery is lacking."** (Emphasis added). (App. brief at 12).

State's Response:

Robbery in the First Degree does not require that a defendant "use" a deadly weapon during the commission of the crime. RCW 9A.56.200 states:

(1) A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or
(ii) Displays what appears to be a firearm or other deadly weapon;"

RCW 9A.56.200.

WPIC 2.07 provides that, "A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use." Here,

there is no question that both defendants were armed, one with a gun, one with a pipe. Both defendants displayed their weapons to Mrs. Vargas. (CP 159-60). Mr. Stethem saw one defendant with a gun. (RP 124). The other perpetrator ditched the pipe in Mrs. Vargas's apartment. (RP 219). To further illustrate that "use" of a deadly weapon is not required, the Washington Supreme Court Committee on Jury Instructions regarding WPIC 2.07 states that the paragraph defining when a person is armed with a deadly weapon should not be used if a weapon was displayed during the commission of the offense.

Given how the defendants were displaying their weapons, in the light most favorable to the State, a jury could reasonably conclude that the defendant was armed with a deadly weapon, either a pipe or firearm, and that either could cause death.[5]

[5] While the Information charges the defendant with "display" of a firearm and/or pipe, the jury instruction refers to the defendant "being armed" with a deadly weapon. (CP 73, 88-89). In either case, there was more than sufficient evidence for the jury to conclude that the defendant, or his co-defendant, was armed with a firearm or pipe.

B. ARGUMENTS REGARDING DEADLY WEAPON ENHANCEMENT REGARDING ROBBERY

1. Defendant's argument: "Inclusion of that sentence [that a deadly weapon also includes a firearm in instruction no. 27] constitutes a substantial variance from the enhancement language of the last Amended Information." (App. brief at 14).

a. First, the defendant is raising this argument for the first time on appeal, and it should be barred under RAP 2.5(a).

State's Response:

The defendant did not object to the jury instructions at trial. On appeal, he has not addressed RAP 2.5 and has not alleged a "manifest error affecting a constitutional right." As discussed below, the language of the Information informing him of the deadly weapon allegation contained the elements of that enhancement and the defendant did not suffer any prejudice from not stating "pipe *and/or firearm*." (Emphasis added.)

b. Regarding the merits of the argument, the standard on review is a two-pronged test:

There is a two pronged test to determine the validity of a charging document challenged for the first time on appeal: "(1) Do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so (2) can the defendant show that he ... was nonetheless actually prejudiced by the inartful language which caused lack

of notice?" *State v. Sloan*, 149 Wn. App. 736, 205 P.3d 172 (2009). An Information which is not challenged until after the verdict has been entered is liberally construed in favor of validity. *State v. Ralph,* 85 Wn. App. 82, 930 P.2d 1235 (1997).

i. Regarding the first prong, the Information sufficiently informed the defendant that he was accused of being armed with a firearm.

It would have been better if the Deadly Weapon enhancement for the defendant had stated: "(the defendant) ... was armed with a deadly weapon ... to wit: a pipe and/or firearm...."

However, the following are important points:

First, the "to-wit" portion of the Deadly Weapon Allegation is surplusage. A charging information must state all the essential statutory and non-statutory elements of the crimes charged. *State v. McCarty,* 140 Wn.2d 420, 425, 998 P.2d 296 (2000); *State v. Kjorsvik,* 117 Wn.2d 93, 105, 812 P.2d 86 (1991). But "surplusage" does not render an information insufficient as a charging document. RCW 10.37.056. "Where 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." *State v. Tvedt,* 153 Wn.2d 705, 718, 107 P.3d 728 (2005) (citing *State v. Miller,* 71 Wn.2d 143, 146, 426 P.2d 986 (1967)). In *Tvedt*, the Court held that a discrepancy between the Information and

the jury instructions in naming the victims was non-essential surplusage.

Here, the type of deadly weapon, whether a knife, gun, pipe, or other, is not an element. Specifying the type of deadly weapon was non-essential surplusage.

Second, the Information charging the crimes does allege the defendant was in possession of a firearm and/or a pipe. *See* Appendix A. (CP 73).

Under a liberal construction of the Information, this should have been adequate to advise the defendant he was charged with committing the robbery while armed with a pipe or firearm. The liberal construction of the Information was emphasized in *In re Benavidez*, 160 Wn. App. 165, 246 P.3d 842 (2011), where the Court held that the defendant was properly advised of the firearm enhancement, although the statutory citation in the Information was incorrect.

Third, the trials of the defendant and co-defendant, Michael Joseph Rice, were consolidated. Mr. Rice's Information mirrored the defendant's and included in the Deadly Weapon Enhancement Allegation that he was armed with a firearm or pipe. This would have put the defendant on notice that the jury could have answered "yes" to the deadly weapon enhancement if Mr. Rice was found to be in possession of a firearm.

ii. In addition, the defendant cannot establish the second prong of the test; he was not prejudiced.

The victim, Mrs. Vargas, told the 911 operator that one of the perpetrators had a pipe, which she described as a metal rod. (CP 159-60). A witness, Jeremy Wilson, saw one of the perpetrators with a pipe. (RP 137). The police found that pipe in Mrs. Vargas's apartment. (RP 219). The jury, therefore, could conclude that a perpetrator broke into Mrs. Vargas's apartment, was armed with a pipe, showed it to Mrs. Vargas during the robbery to intimidate her, and then left it behind so the police could not directly tie him to it.

The evidence that one perpetrator was armed with a pipe during the robbery was overwhelming.

2. Defendant's argument: "Moreover, as the weapon enhancement, Mr. Campbell asserts that *State v. Tongate*, 93 Wn.2d 751, 755, 613 P.2d 121 (1980) controls. The *Tongate* Court held: [The statute] ... appears to require the appearance of a deadly weapon *in fact* in order for the sentence enhancement provision to operate." (App. brief at 13).

State's Response:

The pipe was real. It was not a toy. It was not made of plastic. The jury could reasonably conclude that based on the pipe being used to intimidate the victim "from the manner in which it [was] used, ... [the pipe] may easily and readily produce death." (CP 111).

Moreover, whether an item is actually a deadly weapon is a jury question. That is, whether a defendant is armed with an actual firearm or a toy is for the jury to decide. *State v. Faust*, 93 Wn. App 373, 967 P.2d 1284 (1998).

C. ARGUMENT REGARDING BURGLARY IN THE FIRST DEGREE

1. Defendant's argument: "Mr. Campbell asserts that even more confusion arose based upon the instructions dealing with first degree burglary.

. . . .

No violation of the essential elements rule appears to exist insofar as Count III and Instructions 18 and 19. Nevertheless, when Instructions 13 and 27 are read together it is readily apparent that the State failed to establish, beyond a reasonable doubt, that the pipe was used as a deadly weapon." (App. brief at 16).

State's Response:

a. Standard on Review

As stated above, evidence is sufficient to support a conviction if, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. *Hosier*, 157 Wn.2d at 8. The reviewing court should consider "whether the totality of the evidence is sufficient to prove all the required elements." *Ceglowski*, 103 Wn. App. at 350.

b. The information charged the defendant with being armed with a deadly weapon, specifically a pipe or firearm, during the burglary, and the jury had more than sufficient reason to find this element proven.

The defendant was charged in Count III with committing the Burglary while armed with a pipe or firearm. (CP 73).

Therefore, the defendant's emphasis on whether or not the manner in which the defendant or co-defendant used the pipe is inapplicable. The defendant was not charged solely with using a pipe as a deadly weapon. The defendant clearly had a firearm and flashed it to Mrs. Vargas and Mr. Stethem during the burglary and robbery to intimidate them.

Also, the defendant's reliance on *State v. Williams*, 147 Wn. App. 479, 195 P.3d 578 (2008) is misplaced. *Williams* correctly held that a trial court cannot impose the penalty for a firearm enhancement if a firearm enhancement was not charged. The crime of Burglary in the First Degree does not make a distinction between a firearm and a deadly weapon. The statute provides:

> **RCW 9A.52.020.**
> **Burglary in the first degree.**
>
> (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the

> crime (a) is armed with a deadly weapon, or (b) assaults any person.

(Emphasis added.) RCW 9A.52.020.

Whether the deadly weapon with which the defendant was armed was a pipe or a firearm does not matter. In the light most favorable to the State, the defendant or an accomplice was armed with a deadly weapon, a firearm. His co-defendant was armed with a deadly weapon, a pipe. They both flashed those weapons to Mrs. Vargas in an attempt to frighten her, and they succeeded in doing so. The defendant was properly charged and the jury was properly instructed.

D. ARGUMENT REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL

1. Defendant's argument: "Mr. Campbell contends that defense counsel was ineffective when he failed to request a lesser included offense instruction on second degree robbery and misleading instructions." (App. brief at 18).

State's response:

a. Standard on Review

Ineffective assistance is a two pronged inquiry: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient

performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showing, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). When counsel's conduct can be characterized as legitimate trial strategy or tactics, the performance is not deficient. *Id.* at 863. The defendant has the burden of proof. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To satisfy the prejudice prong, the defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, at 862. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

b. Regarding the lesser included offense jury instruction, the defendant has not met the burden for either prong.

i. State v. Grier, 171 Wn.2d 17, 20, 246 P.3d 1260 (2011) held that an "all or none" tactic of not proposing a lesser included offense was a legitimate tactic.

This case demonstrates the sound reasoning in *Grier*. Although the defendant made contradictory statements to Detective Davis, he was consistent in claiming that he was innocent. It would have undermined that defense for his attorney to suggest to the jury that he was guilty of a lower charge.

Further, the evidence shows that the defendant and Mr. Rice committed First Degree Robbery, not merely Second Degree Robbery. Few attorneys, even with the benefit of hindsight, would have the chutzpah to ask for a lesser included offense with the facts in this case.

The defense attorney acted appropriately in not requesting instructions regarding Robbery in the Second Degree.

ii. The outcome would not have changed.

This Court must assume that the jury would not have convicted the defendant of Robbery in the First Degree unless the State had met its burden of proof. Therefore, the availability of a compromise verdict

would not have changed the outcome of the trial. *See Grier*, 171 Wn.2d at 43-44.

In addition, there was no evidence that a Robbery in the Second Degree was committed. Mr. Stethem and Mrs. Vargas both saw one intruder with a gun. (CP 159-60; RP 124). Mrs. Vargas also saw the other intruder with a pipe. (CP 159-60). The police recovered the pipe in her apartment. (RP 219). Both Ms. Circo and Mr. Wilson saw the defendant with a gun. So, even if the defense attorney had requested a Robbery in the Second Degree instruction, it probably would not have been given.

c. Regarding the "misleading" jury instruction, the defendant has not established either prong.

All the jury instructions were accurate statements of the law. The defendant's actual objections on appeal appear to be that the Information did not inform him of the charges.

To address each issue raised:

i. *"The instructions allowed the jury to consider 'firearm' as a basis for convicting him of first degree robbery."* (App. Brief at 20).

The Information charged the defendant with committing the robbery while armed with a firearm and/or pipe. (CP 73).

ii. *"The special verdict instruction allowed the jury to find an enhancement based upon the inclusion of language referencing firearms" although "[t]he deadly weapon enhancements did not pertain to a firearm."* (App. Brief at 20).

The specific type of deadly weapon is surplusage. Further, the defendant should rely on the Information charging the crime of Robbery, which alleged that the defendant was armed with either a gun or a pipe. Also, the defendant should rely on the Information in the co-defendant's case, since the jury could find the defendant was in possession of a deadly weapon if his accomplice was so armed.

iii. *"The to-convict instruction on first degree robbery did not include a firearm."* (App. Brief at 20).

The instruction requires that the jury find that the defendant or an accomplice was armed with a deadly weapon. A firearm meets the definition of "deadly weapon" both under WPICs and jury instructions 13 and 27 in this case. (CP 94, 111). If the jury believed Rice was armed with a pipe (which the jury did) it would have found the deadly weapon allegation against this defendant. If the jury believed the defendant was armed with a gun, it would have found the deadly weapon allegation.

The defense attorney did not make any mistakes regarding the jury instructions. All were accurate. The defense attorney could be faulted for

not pointing out that the Deadly Weapon Enhancement in the Information did not allege specifically that the defendant had a pipe or a firearm. However, this is not below any reasonable professional standard since it was clear that the defendants were charged with robbery by use of a gun and a pipe. Further, the outcome would not have been affected since it was clear that the jury found both Rice and Campbell guilty of the enhancement. (CP 119).

E. RESPONSE TO DEFENDANT'S ARGUMENT REGARDING SAME CRIMINAL CONDUCT

1. **Defendant's argument: "If Mr. Campbell's 'same criminal conduct' argument prevails, then no consecutive sentence can be imposed as to the first degree robbery and first degree burglary convictions."** (App. Brief at 28).

State's Response:

Not so. The trial court found that an exceptional sentence was appropriate on two basis: the "victim present" aggravating factor under RCW 9.94A.535 (3)(u) and the "free crimes" basis. *See* CP 171, Finding No. 6. Even if the "free crimes" basis is eliminated, the trial court still had the authority to impose an exceptional sentence on the Burglary charge. Therefore, the trial court could have imposed consecutive sentences on the Robbery and Burglary.

While the defendant's argument regarding the "same course of criminal conduct" may be relevant on the "free crimes" basis, the court properly sentenced the defendant to an exceptional sentence under the "victim present during burglary" aggravator.

2. **Defendant's argument: "Initially, the trial court is wrong that there are differing victims."** (App. brief at 21).

State's Response:

The trial court also correctly found that the Robbery and Burglary were not committed in the same course of criminal conduct, and properly cited the "free crimes" aggravator, under RCW 9.94A.535(2)(c) as an additional basis for the exceptional sentence.

a. **Standard on review: the defendant has the burden to prove "same course of criminal conduct," and the standard on review is "abuse of discretion."**

State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013) stated that the sentencing court's determination of "same course of criminal conduct" is reviewed for abuse of discretion or misapplication of law. Under this standard, when the record supports only one conclusion on whether crimes constitute the "same criminal conduct," a sentencing court abuses its discretion in arriving at a contrary result. Where the record adequately supports either conclusion, the matter lies in the court's discretion. *Id.* at

537-38. Further, the defendant has the burden of proving that the crimes occurred in the same criminal conduct.

b. The defendant has not met his burden; the trial court did not abuse its discretion in finding the robbery and burglary were not in the same course of criminal conduct.

Here, the victims in the two crimes were not the same. Both Mr. Stethem and Mrs. Vargas were residents of the apartment and both were victims of the Burglary. However, Mrs. Vargas alone was the victim of the Robbery. Mr. Stethem stated he did not wake up when the defendants broke in the door, and initially thought the men were there with his mother's permission. (RP 126, 131). Although he saw one perpetrator with a gun, it was only after one man asked where his portable DVD player was, that "it started to click a little." (RP 125, 130).

State v. Moton, 51 Wn. App. 455, 754 P.2d 687 (1988), noted the importance of the victim of a Robbery being X and the victim of the Burglary being X and Y and held that this is one factor the trial court correctly relied on in deciding those crimes were not in the same course of criminal conduct. *State v. Davison*, 56 Wn. App. 554, 784 P.2d 1268 (1990) had a similar fact pattern: The defendant broke into a home and assaulted the homeowner and his guest. The State charged the defendant with first degree burglary and one count of assault for the attack on the

guest. The court concluded that the crimes could not be the same criminal conduct because both people were victims of the burglary but only one was the victim of the assault.

3. **Defendant's argument: "The trial court is also in error when it states that the intent for the two (2) crimes differed."** (App. brief at 22).

State's Response:

The trial court found that the criminal intent was different for the two crimes. (CP 170, Finding of Fact 2 b). The intent of the Burglary was to enter the apartment and steal items. The intent of the Robbery was to take items from individuals by force or threat. The trial court is in the best position to determine if the objective intent changed from one crime to the other.

4. **Defendant's argument: "Mr. Campbell argues that the correct interpretation of RCW 9A.52.050 is contained in *State v. Dunbar*, 59 Wn. App. 447, 457, 798 P.2d 306 (1990): '... [T]he anti-merger statute does not preclude a finding that the burglary and [robbery] constitute the same criminal conduct.'"** (App. brief at 25).

State's Response:

The defendant is correct that the trial court could impose an exceptional sentence by running the Burglary consecutive to the other counts, even if it had determined that the crimes were in the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 827 P.2d 996 (1992). Please

note the trial court cited the Burglary anti-merger statute, RCW 9A.52.050, as a reason for the exceptional sentence. (CP 170, Finding of Fact No. 2).

F. OTHER ARGUMENTS

1. Defendant's argument: "[T]he trial court entered an exceptional sentence over and above what the prosecuting attorney recommended. Thus, the box checked as to that aspect of an exceptional sentence is also in error." (App. brief at 25).

The State recommended a total sentence of 312 months for the defendant. (CP 137, State's Sentencing Memorandum). The trial court sentenced the defendant to a total of 240 months. (CP 153). Obviously, that is not "over and above" the State's recommendation.

Section 2.4 of the Judgment and Sentence states that the "Prosecuting Attorney [X] did [ ] did not recommend a similar sentence." (CP 151). Since the prosecutor recommended an exceptional sentence, albeit a larger sentence that that imposed, this section is correct and need not be changed.

2. Defendant's argument: Legal Financial Obligations (LFOs):

State's Response:

First, the defendant did not object to the imposition of the LFOs at trial and should not be allowed to do so on appeal, under RAP 2.5.

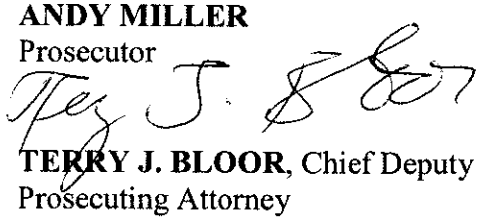
Second, the issue is not ripe. As stated in *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991), "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation."

III. CONCLUSION

The convictions and the sentence should be affirmed.

RESPECTFULLY SUBMITTED this 9th day of October 2013.

ANDY MILLER
Prosecutor



TERRY J. BLOOR, Chief Deputy
Prosecuting Attorney
Bar No. 9044
OFC ID NO. 91004

APPENDIX A

AMENDED INFORMATION

SUPERIOR COURT NO. 10-1-00425-8

JOSIE DELVIN
BENTON COUNTY CLERK
FEB 16 2011
FILED TS
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON, Plaintiff, vs.	NO. 10-1-00425-8
NIKOLAS FRANCIS GLENN CAMPBELL , DOB: 05/20/1985 , SS: 535-02-0933, SID: WA21741735, FBI: 976095AC9 , DL: CAMPBNF154K0, Defendant.	AMENDED **INFORMATION**

COMES NOW, ANDY MILLER, Prosecuting Attorney for Benton County, State of Washington, and by this his Information accuses

NIKOLAS FRANCIS GLENN CAMPBELL

of the crime(s) of:
COUNT I: ROBBERY IN THE FIRST DEGREE, RCW 9A.56.190 and RCW 9A.56.200(1)(a)(ii), WITH A DEADLY WEAPON ALLEGATION, RCW 9.94A.825 AND RCW 9.94A.533(4);

COUNT II: THEFT OF A MOTOR VEHICLE, RCW 9A.56.065;

COUNT III: BURGLARY IN THE FIRST DEGREE, RCW 9A.52.020(1)(a), WITH A DEADLY WEAPON ALLEGATION AND ENHANCEMENT, RCW 9.94A.825 AND RCW 9.94A.533(4) AND WITH A VICTIM PRESENT ALLEGATION, RCW 9.94A.535(3)(u) committed as follows, to-wit:

COUNT I

That the said **NIKOLAS FRANCIS GLENN CAMPBELL** in the County of Benton, State of Washington, on or about the 7th day of April, 2010, in violation of RCW 9A.56.190 and RCW 9A.56.200(1)(a)(ii), with intent to deprive the owner thereof, did unlawfully take personal property, to wit: cash and stereo equipment, which belonged to a person other than the accused, in the presence of Debra Vargas against such person's will by use or threatened use of immediate force, violence or fear of injury to such person or his or her property and in the commission of or immediate flight therefrom, the accused displayed what appeared to be a firearm or other deadly weapon, to wit: a pipe and/or a firearm, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

NOTICE OF DEADLY WEAPON ALLEGATION and ENHANCEMENT

That the said NIKOLAS FRANCIS GLENN CAMPBELL in the County of Benton, State of Washington, on or about the 7th day of April, 2010 , in violation of RCW 9.94A.825, during the commission of the crime of ROBBERY IN THE FIRST DEGREE, was armed with a deadly weapon and/or a weapon was easily accessible and readily available for offensive or defensive use in connection with the defendant and the crime, to-wit: A PIPE, resulting in an enhanced sentence under RCW 9.94A.533(4), contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

COUNT II

That the said **NIKOLAS FRANCIS GLENN CAMPBELL** in the County of Benton, State of Washington, on or about the 7th day of April, 2010, in violation of RCW 9A.56.065, did commit theft of a motor vehicle, to-wit: a 1996 Dodge Van, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

COUNT III

That the said **NIKOLAS FRANCIS GLENN CAMPBELL** in the County of Benton, State of Washington, on or about the 7th day of April, 2010, in violation of RCW 9A.52.020(1)(a), with intent to commit a crime against a person or property therein, did enter or remain unlawfully in the building of Debra Vargas and/or James Stethem, located at 1500 W. 14th., Apartment B, Kennewick, Wa. , and in entering such building, while in such building and/or in immediate flight therefrom the accused was armed with a pipe or firearm, a deadly weapon, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

NOTICE OF DEADLY WEAPON ALLEGATION and ENHANCEMENT

That the said NIKOLAS FRANCIS GLENN CAMPBELL in the County of Benton, State of Washington, on or about the 7th day of April, 2010 , in

violation of RCW 9.94A.825, during the commission of the crime of BURGLARY IN THE FIRST DEGREE, was armed with a deadly weapon and/or a weapon was easily accessible and readily available for offensive or defensive use in connection with the defendant and the crime, to-wit: A PIPE, resulting in an enhanced sentence under RCW 9.94A.533(4), contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

AGGRAVATING CIRCUMSTANCE ALLEGATION - BURGLARY

That the crime was aggravated by the following circumstance: the current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed, as provided RCW 9.94A.535(3)(u).

DATED at Kennewick, Washington on February 09, 2011.

ANDY MILLER
Prosecuting Attorney

Terry J. Bloor, #9044
Deputy Prosecuting Attorney
OFC ID 91004

STATE OF WASHINGTON)
ss
County Of Benton)

TERRY J. BLOOR, being first duly sworn on oath, says (s)he is the duly appointed, acting and qualified Deputy Prosecuting Attorney in and for Benton County, that (s)he has read the foregoing Information, knows the contents thereof, and believes the same to be true.

SUBSCRIBED AND SWORN to before me this 10th day of February, 2011.

SEAL OF THE SUPERIOR COURT OF BENTON COUNTY 1905 STATE OF WASHINGTON

JOSIE DELVIN
County Clerk/Clerk of Benton Co. Superior Court

By _____

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Dennis Morgan
Attorney at Law
P.O. Box 1019
Republic, WA 99166-1019

☒ E-mail service by agreement was made to the following parties: nodblspk@rcabletv.com

Nikolas F. Campbell
#871762
Washington State Penitentiary
1313 North 13th Avenue, GW-206
Walla Walla WA 99362

☒ U.S. Regular Mail, Postage Prepaid

Signed at Kennewick, Washington on October 9, 2013.

Pamela Bradshaw
Legal Assistant