90887-7

NO. 30166-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

NIKOLAS FRANCIS GLENN CAMPBELL,

Defendant/Appellant.

RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

NIKOLAS FRANCIS GLENN CAMPBELL requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Campbell seeks review of an unpublished Opinion of Division III of the Court of Appeals dated September 9, 2014. (Appendix "A" 1-21)

3. ISSUES PRESENTED FOR REVIEW

A. Does the Court of Appeals analysis of the deadly weapon enhancement language in the Fourth Amended Information, in conjunction with the jury instructions, contradict *State v. Recuenco,* 163 Wn.2d 428, 180 P.3d 1276 (2008)?

B. Does the lack of proof that the alleged firearm was operable preclude imposition of the firearm/deadly weapon enhancement on the basis set forth by the Court of Appeals?

C. If the alleged firearm cannot be used for the deadly weapon enhancement, then was the pipe used as a deadly weapon?

4. STATEMENT OF THE CASE

James Stethem lived with his mother, Debra Vargas, in Apartment B, 1500 W. 14th Ave., Kennewick, Washington. Christina Morales lived in the same complex. On April 7, 2010 the apartment door was kicked in. Mr. Stethem saw one (1) individual with what appeared to be a gun. He saw another individual taking a DVD. A laptop computer was also taken.

Their faces were covered. They told him to turn over and he did. (RP 108, l. 24 to RP 109, l. 2; RP 123, ll. 9-12; RP 124, ll. 8-18; RP 124, l. 20 to RP 125, l. 1; RP 125, ll. 22-23; RP 200, ll. 9-19)

Jerami Wilson recalls seeing a pipe in Michael Rice's back pocket. He never saw a gun, but remembers Mr. Campbell admitting that he had a gun. (RP 136, ll. 21-22; RP 137, ll. 6-10; RP 146, ll. 9-14)

Officer Kelly of the Kennewick Police Department responded to a 9-1-1 call from Ms. Vargas. He observed that the door had been kicked open and that the lock was broken. There was a footprint on the door. He found a pipe on the floor. (RP 214, ll. 22-23; RP 216, ll. 6-13; RP 219, ll. 1-5)

Detective Davis of the Kennewick Police Department interviewed Mr. Campbell on April 19, 2010. Mr. Campbell originally claimed that he had been in Portland for approximately two (2) to three (3) weeks prior to April 7. He finally admitted that he was with Mr. Wilson, Cecilia Circo and Mr. Rice at Ms. Morales's apartment on April 7. (RP 234, ll. 24-25; RP 240, l. 23 to RP 241, l. 14; RP 241, ll. 22-23; RP 242, ll. 8-9)

Ms. Vargas was unable to identify Mr. Campbell's photo from a photo montage. She said it doesn't seem to be him. Ms. Vargas died prior to trial and a limited portion of her 9-1-1 call was admitted following a CrR 3.6 motion. (RP 270, l. 15 to RP 271, l. 8; CP 6; CP 18; CP 159)

An Information was filed on April 22, 2010 charging Mr. Campbell with first degree robbery and motor vehicle theft. An Amended In-

formation was filed on May 13, 2010 adding a deadly weapon enhancement to Count I. (CP 1; CP 4)

On February 10, 2011 another Amended Information was filed which added a count of first degree burglary with a deadly weapon enhancement as well as an enhancement under RCW 9.94A.535(3)(u). (CP 63)

A final Amended Information was filed on February 16, 2011. Count I stated that the alleged victim was Ms. Vargas. Count III stated that the alleged victims were Ms. Vargas and Mr. Stethem. The deadly weapon enhancement on Counts I and III was limited to the pipe.

Defense counsel did not object to any of the jury instructions. The jury instructions did not conform to the language of the last Amended Information. (RP 300, ll. 1-5; CP 76)

The jury found Mr. Campbell guilty of all counts and entered a special verdict on both of the deadly weapon/firearm enhancements. (CP 115; CP 116; CP 117; CP 118; CP 119)

Judgment and Sentence was entered on July 22, 2011. The reason for the delay was a motion for new trial filed by Mr. Campbell's new attorney. The motion for new trial was denied. (7/22/11 RP 10, ll. 2-7; CP 176; CP 181; CP 193; CP 196)

At the sentencing hearing the prosecuting attorney conceded an error had occurred with regard to the special verdict as it relates to first de-

gree burglary. It was agreed the deadly weapon enhancement did not apply. (RP 355, l. 5 to RP 356, l. 18)

The trial court imposed consecutive sentences on Counts I and III. Findings of Fact and Conclusions of Law relating to the exceptional sentence were not entered until September 30, 2011. (CP 147)

Mr. Campbell filed his Notice of Appeal on August 15, 2011. (CP 148).

A Court of Appeals Commissioner's Ruling determined that Mr. Campbell had abandoned his appeal on June 25, 2012. (CP 201)

A Mandate was issued on August 3, 2012. (CP 203)

The Supreme Court reinstated Mr. Campbell's appeal after he filed a Personal Restraint Petition. The reinstatement order was entered on February 6, 2013. (Appendix "B")

The Court of Appeals entered its unpublished opinion on September 9, 2014. The decision not only contravenes *State v. Recuenco, supra;* but also *Personal Restraint of Brockie,* 178 Wn.2d 532, 309 P.3d 498 (2013).

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals decision is in conflict with decisions of the Supreme Court. *State v. Recuenco, supra,* controls the issue relating to enhancements. The Court of Appeals analysis on the issue was disavowed by the Supreme Court in *Recuenco* at 436:

> Curiously, the dissent erroneously analyzes the issues in this case by discussing the lack of objection to the information and the liberal standard applicable to post-verdict challenges. Dissent at 449-52. As noted above, there is no error in the information at all; the State alleged that the defendant was armed with a deadly weapon where it could have alleged a firearm enhancement or not sought any enhancement at all. That was the choice of the State at the time it filed the information.

Additionally, the State failed to prove the operability of the alleged firearm which was never recovered. Lack of proof, beyond a reasonable doubt, that a firearm is operable precludes imposition of an enhancement. *State v. Recuenco, supra,* at 437:

> ... [I]n order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a "firearm": "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." **11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01** (Second ed., Supp. 2005) (WPIC). We have held that **a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement**. *State v. Pam,* 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown,* 111 Wn.2d 124, 761 P.2d 588 (1988).

(Emphasis supplied.)

The State specifically elected a pipe as the deadly weapon for enhancement purposes. A pipe is not a deadly weapon *per se.*

> An item is a deadly weapon if, under the circumstances in which it is used, it is readily capable of causing death or substantial bodily harm. RCW 9A.04.110(6). Weapons can be *per se* deadly (*i.e.,* explosives and firearms), or deadly because capable of causing death or substantial bodily harm under the circumstances. *State v. Carlson,* 65 Wn. App. 153, 158, 828 P.2d 30, *review denied,* 119 Wn.2d 1022 (1992). ... [T]he inherent capacity and "the circumstances in which it is used" determine whether the weapon is deadly. ... **"Circumstances" include "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.**" *State v. Sorenson,* 6 Wn. App. 269, 273, 492 P.2d 233 (1972) (construing RCW 9.95.040) (quoting *People v. Fisher,* 234 Cal. App. 2d 189, 193, 44 Cal. Rptr. 302 (1965)). Ready capability is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm. ... *State v. Cobb,* 22 Wn. App. 221, 223, 589 P.2d 297 (1978), *review denied,* 92 Wn.2d 1011 (1979) ....

State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). (Emphasis supplied.)

There is no testimony in the record as to how the pipe **was used**. The only references to the pipe are that it was in Mr. Rice's pocket and it was found on the kitchen floor in the Vargas apartment.

No testimony was presented as to how the pipe **may have been used**.

No testimony was presented that the pipe caused any physical injuries.

No testimony was presented that any force or threat of force was used in connection with the pipe.

RCW 9A.04.100(1) states:

> Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.

The State failed to prove, beyond a reasonable doubt, that the pipe was used as a deadly weapon. The definitional instruction of first degree robbery (Instruction 8) included the word "firearm." However, the to-convict instruction (Instruction 9) only included the term "deadly weapon." (Appendices "C" and "D")

Moreover, Instructions 18 and 19, pertaining to the offense of first degree burglary, only used the phrase "deadly weapon." (Appendices "E" and "F")

Insofar as the definition of "deadly weapon" is concerned, Instruction 13 did not include the word "firearm." (Appendix "G")

Since no to-convict instruction included the word "firearm," the phrase "deadly weapon" as used in those instructions became the law of the case.

> The law of the case is an established doctrine with roots reaching back to the earliest days of statehood. Under the doctrine jury instructions not objected to become the law of the case.

State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998).

The trial court's instructions were not only confusing, but also erroneous. They varied significantly from the charging language of the last Amended Information.

The last Amended Information references deadly weapon allegations as to Counts I and III. It relies upon RCW 9.94A.533(4). RCW 9.94A.533(4) provides, in part:

> The following additional times shall be added to the standard sentence range for felony crimes ... if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 ....

Instruction 27, the special verdict instruction dealing with the deadly weapon enhancement, included as its last sentence "A pistol, revolver or any other firearm is also a deadly weapon whether loaded or unloaded." (Appendix "H")

Inclusion of that sentence constitutes a substantial variance from the enhancement language of the last Amended Information. Furthermore, it misinformed Mr. Campbell of a critical aspect of the case.

Since the State elected to rely upon the pipe as the "deadly weapon," Instruction 27 should have been confined to the first two (2) paragraphs and the first two (2) sentences of the last paragraph.

Additionally, as Instruction 27 pertains to the use of a deadly weapon, the jury's verdict is contrary to the evidence presented in Court.

The State did not present any evidence that the pipe was used, intended to be used or threatened to be used as a club or otherwise.

Mr. Campbell contends that substituting the phrase "deadly weapon" for the word "firearm" in the following excerpt from *State v. Williams,* 147 Wn. App. 479, 484, 195 P.3d 578 (2008) substantiates his argument:

> A sentencing court may impose a firearm sentence enhancement only when the Information alleges the firearm enhancement, the State produces evidence supporting the firearm enhancement, and the fact finder returns a firearm enhancement special verdict.

There is no way to tell whether the jury relied on the pipe or the firearm in support of its verdicts. This uncertainty cannot be countenanced and requires reversal and dismissal of the enhancements.

> ... [U]nless a complaint is properly amended, once the State elects which specific charges it is pursuing and includes elements in the charging document, it is bound by that decision.

State v. Recuenco, supra, at 435.

Finally, the Court of Appeals decision conflates the language in the last Amended Information with the instructions given to the jury. The Court's analysis contravenes *Personal Restraint of Brockie, supra.*

The *Brockie* case came before our Supreme Court as a personal restraint petition (PRP). The Court, in an *En Banc* decision took great pains to distinguish between the burden of proof on a PRP and the burden of proof on a direct appeal.

The State has the burden of proof to establish that error in jury instructions is harmless error. The State failed to establish harmless error.

The confusion created by the jury instructions, insofar as they pertain to "firearms" and "deadly weapons" can be seen in the State's own brief and the Court of Appeals analysis concerning that issue. The final Amended Information relied upon the "pipe" as the "deadly weapon." Yet, the Court of Appeals contends that the jury could have found that the "firearm" was a "deadly weapon."

QUERY: If both the State and the Court of Appeals are confused, then what must the jury have understood the instructions to mean?

The Court of Appeals asserts that Mr. Campbell's failure to cite RAP 2.5(a) somehow detracts from his ability to raise this issue on appeal. There is no need to cite the rule when case law is clear. A RAP 2.5(a) analysis is not needed unless it is an issue that has not previously been decided by an appellate court.

As presented to the jury the State had to prove, beyond a reasonable doubt, that a "pipe" was used, attempted to be used, or threatened to be used as a deadly weapon in the commission of the robbery and the burglary.

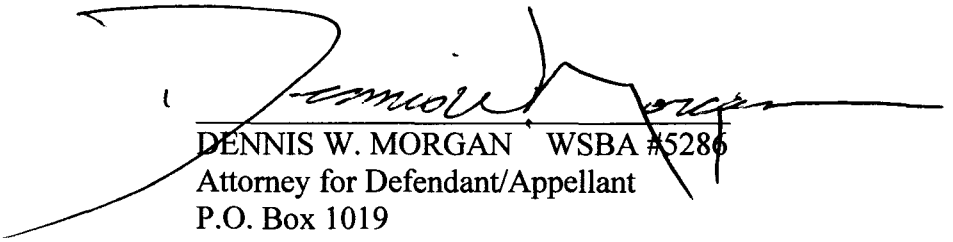
Since the "pipe" is not a *per se* deadly weapon, the evidence presented is insufficient to establish that the "pipe" was used as a deadly weapon, attempted to be used as a deadly weapon, or threatened to be used as a deadly weapon.

6. CONCLUSION

Mr. Campbell respectfully requests that the Court accept review based upon the fact that the Court of Appeals decision is in direct conflict with two (2) cases of the Supreme Court. The Court of Appeals analysis of Mr. Campbell's argument is fatally flawed.

DATED this 7TH day of October, 2014.

Respectfully submitted,



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APPENDIX "A"

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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. NIKOLAS FRANCIS GLENN CAMPBELL, Appellant.	)	No. 30166-4-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Nikolas Campbell and another man allegedly entered a woman's apartment, took some items, and left in her vehicle. The State charged Mr. Campbell with one count of first degree robbery with a deadly weapon enhancement, one count of theft of a motor vehicle, and one count of first degree burglary with a deadly weapon enhancement. Mr. Campbell was convicted by a jury, sentenced, and he then appealed.

Among other errors, he contends that (1) the charging information impermissibly varied from the jury instructions, (2) the State failed to prove the deadly weapon element of first degree robbery, first degree burglary, and the deadly weapon enhancements, and

(3) the trial court erred, for sentencing purposes, in not considering the first degree robbery and the first degree burglary as encompassing the same criminal conduct. We determine that the charging document, as a whole, provided fair notice to Mr. Campbell of the allegations he faced, and reject Mr. Campbell's first argument. We also determine that the undisputed evidence showed that either Mr. Campbell or his accomplice was armed with a firearm, which is a deadly weapon and, therefore, reject Mr. Campbell's second argument. We also determine that the burglary anti-merger statute, among other reasons, supports the trial court's decision of treating the offenses separate for sentencing purposes. We therefore affirm the convictions and the sentence and remand for correction of a scrivener's error.

FACTS

On April 7, 2010, two men kicked open the door of Debra Vargas's apartment. Ms. Vargas was home at the time. Also in the apartment was Ms. Vargas's son, James Stethem, who was sleeping in a separate room. Mr. Stethem awoke to find one of the men carrying items out of the apartment. Mr. Stethem saw that both men were masked, and that one of the men was carrying a gun. The man with the gun told Mr. Stethem to turn away. The man without the gun took Mr. Stethem's portable DVD player and his

mom's laptop. The men drove away in Ms. Vargas's van. Ms. Vargas called 911. According to her, one man had a gun and the other had a pipe.

In the same apartment complex lived Ms. Vargas's niece, Christina Morales. The night before the robbery, Mr. Campbell, Michael Rice, and Cecelia Circo were visiting Jerami Wilson at Ms. Morales's apartment. Mr. Campbell told Mr. Wilson that he had a gun. Mr. Wilson saw a black handle in Mr. Campbell's waistline and saw something shaking in Mr. Campbell's pants that he suspected was a gun. Mr. Wilson saw a pipe in Mr. Rice's back pocket. Mr. Rice asked if Mr. Wilson was interested in helping "get back" at Ms. Morales's aunt. Report of Proceedings (RP) at 139-40. Mr. Wilson remembered a laptop being mentioned in the conversation and that it could be worth the same amount of money that Ms. Vargas owed Ms. Morales.

Eventually, Mr. Wilson went to bed. He did not see the group leave. He awoke to find law enforcement in Ms. Morales's apartment. The apartment was in disarray. Law enforcement asked Mr. Wilson if he knew the apartment was robbed. Missing from the apartment was Ms. Morales's collection of three Chucky[1] dolls as well as other items. During the police investigation of the incident, Mr. Wilson was shown a photograph of

[1] "Chucky" is a fictional character from the 1988 horror movie "Child's Play." http://www.imdb.com/title/tt0094862/.

the pipe found in Ms. Vargas's apartment and identified the pipe as the same pipe carried by Mr. Rice.

Law enforcement found a Chucky doll outside Ms. Vargas's apartment. Ms. Morales identified the doll as one from her collection. Law enforcement concluded that someone broke into Ms. Vargas's apartment, based on a footprint outside Ms. Vargas's door and damage to the door frame and door. Ms. Vargas's landlord saw Mr. Campbell and Mr. Rice going between the apartments of Ms. Vargas and Ms. Morales on the night of the incident.

Ms. Circo remembered that on the night of the incident, Mr. Campbell and Mr. Rice were in Ms. Morales's apartment. Mr. Campbell had a silver gun. She did not see Mr. Rice with a pipe. Ms. Circo fell asleep at the apartment. She awoke to find Mr. Campbell pointing a gun at her, telling her to get into a van. Ms. Circo complied, and Mr. Rice drove to Portland. While in the van, Ms. Circo noticed a Chucky doll tied to Mr. Campbell. The van was recovered by law enforcement in Portland.

The State charged Mr. Campbell with one count of first degree robbery with a deadly weapon enhancement, one count of theft of a motor vehicle, and one count of first degree burglary with a deadly weapon enhancement. As to the first degree robbery charge, the victim named in the information was Debra Vargas. As to the first degree

burglary charge, the victim named in the information was Debra Vargas and/or James Stethem.

Mr. Campbell and Mr. Rice were codefendants at trial. The jury was given to-convict instructions for each crime. Pertinent here, for first degree robbery, the court instructed the jury that it needed to find that Mr. Campbell or an accomplice was "*armed* with a deadly weapon" in the commission of the crime. Clerk's Papers (CP) at 88-89 (emphasis added). This instruction differed from the information that charged Mr. Campbell of "*display*[*ing*] what appeared to be a firearm or other deadly weapon, to wit: a pipe and/or a firearm." CP at 73 (emphasis added).

For first degree burglary, the court instructed the jury that it needed to find that Mr. Campbell was "*armed* with a deadly weapon." CP at 100 (emphasis added). This language was consistent with the information that alleged Mr. Campbell was "*armed* with a pipe or firearm, a deadly weapon." CP at 73 (emphasis added).

For the jury to decide the deadly weapon enhancements, the court instructed the jury that it needed to find Mr. Campbell or an accomplice was "armed with a deadly weapon at the time of the commission of the crimes of Robbery in the First Degree and/or Burglary in the First Degree . . . even if only one deadly weapon [was] involved." CP at 111. The instruction further provided that "[a]ny metal pipe or bar used or intended to be

used as a club is a deadly weapon. A pistol, revolver or any other firearm is also a deadly weapon whether loaded or unloaded." CP at 111. This weapon enhancement instruction differed from the enhancement notice in the information. The enhancement notice alleged that Mr. Campbell "was armed with a deadly weapon and/or a weapon was easily accessible . . . to-wit: *A PIPE.*" CP at 73 (emphasis added). In short, the enhancement instruction referenced a pipe or a firearm, but the enhancement notice in the information referenced only a pipe.

Mr. Campbell did not object or take exception to the jury instructions at trial. A jury found Mr. Campbell guilty on all charges, and found that Mr. Campbell (or his accomplice)[2] was armed with a deadly weapon during the commission of the crimes.

The trial court imposed consecutive sentences on Mr. Campbell's first degree robbery and first degree burglary convictions. In addition, the trial court increased the criminal history score for first degree robbery to include the current felony conviction for first degree burglary. In doing so, the court found that the convictions did not constitute the same criminal conduct because (a) differing victims in the two crimes, (b) differing

[2] The special verdict forms state the jury's finding that Mr. Campbell was armed with a deadly weapon. However, because of the accomplice instruction, it cannot be determined which of the two men the jury determined was armed with the firearm. The accomplice instruction stated in part: "If one person is armed with a deadly weapon, all accomplices are deemed to be so armed, even if only one deadly weapon is involved."

intent of the two crimes, and (c) the State's interest in punishing a burglary separately from other crimes, as provided for in RCW 9A.52.050. The court sentenced Mr. Campbell to 153 months for the first degree robbery conviction and another 87 months for the first degree burglary conviction. Mr. Campbell appealed.

ANALYSIS

A. Whether the State properly relied on the firearm to support the deadly weapon element of first degree robbery and the deadly weapon enhancement.

Mr. Campbell challenges the State's reliance on the firearm to support the deadly weapon element of his crimes. First, he contends that the State could not use the firearm to support the deadly weapon enhancement because in the information, the State specifically alleged that the pipe was the deadly weapon used for purposes of the enhancement and cited the applicable statute. Mr. Campbell maintains that because the State specifically designated the pipe, the pipe was the only weapon that could be used to support the deadly weapon enhancement at trial.

"In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation." U.S. CONST. amend. VI. "An information must state all the essential statutory and nonstatutory elements of the crimes charged." *State v. Tvedt*, 153 Wn.2d 705, 718, 107 P.3d 728 (2005). Generally, an information must

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CP at 111 (Instruction 27).

be worded so that a person of common understanding will know what acts constitute the criminal offense. RCW 10.37.052(2). The exact words of the relevant statute need not be used if words conveying the same meaning are used to give reasonable notice to the defendant of the charge. *State v. Kjorsvik*, 117 Wn.2d 93, 108-09, 812 P.2d 86 (1991).

Where a criminal defendant challenges the sufficiency of a charging document for the first time on appeal, we construe the documents liberally in favor of validity. *Id.* at 104-05. In liberally construing the information, we apply the following two-part test, asking (1) whether the necessary facts appear in any form or can be found by liberal construction in the document, and, if so, (2) whether the defendant can show that the inartful language caused a lack of notice. *Id.* at 105-06.

The first prong of this test rests solely on the language on the face of the charging document. *Id.* at 106. We read the charging document "as a whole, according to common sense and including facts that are implied." *State v. Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010). Loosely or inartfully drawn charging documents are forgiven on appeal if the necessary elements appear in the document in any form. *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). The second prong allows us to consider whether the defendant received actual notice. *Kjorsvik*, 117 Wn.2d at 106.

Here, the information is sufficient under the *Kjorsvik* test to give Mr. Campbell notice that the pipe or the firearm could be used to support the deadly weapon enhancement. The information contained the necessary fact that a firearm and/or pipe was used in commission of the charged offenses. The State alleged in the information that a firearm and/or pipe was the deadly weapon involved in the crime for first degree burglary and first degree robbery. The deadly weapon enhancements were associated with both of these crimes. A liberal reading of the information provides Mr. Campbell with notice that the deadly weapons involved in the underlying crimes could also be used to support the deadly weapon enhancements added to those crimes.

Next, Mr. Campbell challenges the use of the firearm to support the convictions for first degree robbery and first degree burglary. He contends that the jury instructions for these crimes were unclear because the to-convict jury instructions referred to a deadly weapon and not a firearm. Thus, the deadly weapon element became the law of the case to be proven, and not the firearm.

"Generally, a party must object to an instruction at trial in order to preserve the issue for appellate review." *State v. Nicholas*, 55 Wn. App. 261, 273, 776 P.2d 1385 (1989). Jury instructions not objected to become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

To-convict jury instructions must contain all of the elements of a crime as the instruction serves as a tool for a jury to use to measure the evidence and determine guilt or innocence. *State v. Saunders*, 177 Wn. App. 259, 263, 311 P.3d 601 (2013) (quoting *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)). "'Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.'" *Id.* at 270 (quoting *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002)).

Mr. Campbell did not object to the jury instructions at trial. Nor does he claim a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Instructional errors are of constitutional magnitude only where the jury is not instructed on every element of the charged crime. *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). "As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude." *Id.*

Here, the jury instructions sufficiently state the elements of the crime including being armed with a deadly weapon. Mr. Campbell's alleged error involves use of "deadly weapon" instead of "firearm" in the elements. This error is not of constitutional magnitude and, unless objected to at trial, is not reviewable on appeal.

Even if we were to consider the merits of the argument, Mr. Campbell's contention fails. The jury instructions when read as a whole properly informed the jury that a firearm was a deadly weapon. The deadly weapon instruction defined a "deadly weapon" as "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 at 94. The definitional instruction for firearm referred to a firearm as a weapon. Also, the definitional instruction for first degree robbery includes the language "firearm or other deadly weapon." CP at 87. The definitional instruction for first degree burglary includes the language "deadly weapon." CP at 99. As a whole, the jury instructions were sufficient to inform the jury that the firearm satisfied the deadly weapon element of first degree burglary and first degree robbery.

Based on the charging information and the jury instructions, there was no error in allowing the State to rely on the firearm to establish the deadly weapon element for first degree robbery and first degree burglary.

B. Whether the defendant was adequately notified of the alternative means of committing first degree robbery so that the variance between the charging information and the trial court's instructions was harmless error.

Mr. Campbell contends that there was a variance between the information and the to-convict jury instructions for first degree robbery because the means for committing the crime differed. The information alleged that Mr. Campbell *displayed* what appeared to be a deadly weapon; whereas the jury instruction uses the phrase, "*armed* with a deadly weapon." He contends that this variance violates the essential elements rule.

Mr. Campbell confuses the issue of variance with the essential elements rule. The essential elements rule concerns whether the defendant received sufficient notice within the charging information of the elements of the charged offense. Variance concerns those situations where the charging information is sufficient, but a question arises of whether the trial court erred in instructing the jury on an alternative uncharged means of committing the charged offense. Because both the essential elements rule and variance implicate the Sixth Amendment and the Washington Constitution article I, section 22, it is not uncommon for the arguments to be muddled. However, the arguments are distinct. *See In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 536-37, 309 P.3d 498 (2013).

"[W]here the statute provides that a crime may be committed in different ways or by different means, it is proper to charge in the information that the crime was committed

in one of the ways or by one of the means specified in the statute, or in all the ways." *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942). When the charging information alleges only one alternative means of committing a crime, it is reversible error for the jury to consider other means by which the crime could have been committed. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). When challenged on direct appeal, this error is presumed to be prejudicial unless the State can show harmless error. *Brockie*, 178 Wn.2d at 538-39. For first degree robbery, the two alternatives of "displaying what appeared to be a firearm or other deadly weapon" and being "armed with a deadly weapon" are distinct alternative means and are not interchangeable. *Id.* at 538.

In *Brockie*, the court addressed a conviction for first degree robbery where a jury was instructed on the alternative means of being armed with a deadly weapon even though Mr. Brockie was charged only with displaying what appeared to be a deadly weapon. *Id.* Before applying the harmless error standard, the court held that Mr. Brockie was given notice only on one particular means charged when the State chose to specify that means in the charging document. "Nothing in the charging information put [Mr.] Brockie on notice that he might be charged with the alternative means of first degree robbery while armed with a deadly weapon." *Id.*

Here, unlike *Brockie*, Mr. Campbell had notice that he was being charged with both alternative means. The charging language for first degree robbery alleged that Mr. Campbell "displayed what appeared to be a firearm or other deadly weapon," whereas the language for the linked deadly weapon enhancement alleged the alternative means of being "armed with a deadly weapon." CP at 73. Thus, Mr. Campbell had notice that he was being charged with both "displayed what appeared to be a firearm or other deadly weapon" and "being armed with a deadly weapon." While the to-convict instruction varied from the information because the instruction stated "armed with a deadly weapon," Mr. Campbell was on notice that he was required to defend against "displayed what appeared to be a firearm or other deadly weapon," both alternative means of committing first degree robbery. The variance between the charging information and the to-convict instruction for first degree robbery therefore does not result in reversible error.

C. Whether the State proved beyond a reasonable doubt the deadly weapon element of first degree robbery, first degree burglary, and the deadly weapon enhancement.

Mr. Campbell challenges the sufficiency of the evidence to support his convictions for first degree robbery, first degree burglary, and the deadly weapon enhancements. Each contain a deadly weapon element, and Mr. Campbell contends that the State failed

to prove that he was armed with a deadly weapon. He maintains that the State did not present evidence the pipe was used as a deadly weapon.

Evidence is sufficient to support a conviction if, in 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 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). Although all jurors must agree that the crime has been committed, they are not required to be in agreement on the means by which the crime occurred. *See State v. Whitney*, 108 Wn.2d 506, 511-12, 739 P.2d 1150 (1987).

The trial court instructed the jury that "[i]f one person is armed with a deadly weapon, all accomplices are deemed to be so armed, even if only one deadly weapon is involved." CP at 111 (Instruction 27). This instruction is a correct statement of the law and was not objected to. Here, the undisputed testimony was that one of the men who broke into Ms. Vargas's apartment was armed with a firearm. We conclude that there was sufficient evidence for a jury to find that a deadly weapon was used either by Mr.

Campbell or his accomplice so as to meet the deadly weapon element of first degree robbery, first degree burglary, and the weapon enhancement allegations.

D. Whether counsel's assistance was ineffective.

Mr. Campbell argues that he received ineffective assistance of counsel. He first argues that his counsel was ineffective because he failed to request an instruction on second degree robbery. "To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The threshold for deficient performance is high; 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. *McFarland*, 127 Wn.2d at 336. The "all or none" tactic of not proposing an instruction on a lesser

included offense is a legitimate trial tactic. *State v. Grier*, 171 Wn.2d 17, 42-43, 246 P.3d 1260 (2011).

Mr. Campbell fails to establish ineffective assistance of counsel. First, defense counsel's performance was not deficient because he failed to request a lesser included instruction. Not requesting the lesser instruction was a legitimate and reasonable trial tactic because it fit with Mr. Campbell's trial theory that he did not commit the offense, as opposed to a strategy that he only committed the lesser offense. Also, Mr. Campbell did not show prejudice because proposing the lesser instruction would not have changed the outcome. The evidence supported the jury finding that Mr. Campbell or his accomplice was armed with a firearm and, therefore, Mr. Campbell committed first degree robbery.

Mr. Campbell next argues that his counsel was ineffective for failing to alert the trial court that the pipe was the only weapon relied upon in the information for the deadly weapon enhancement. However, Mr. Campbell fails to show how he was prejudiced by this error. As noted above, the trial court did not err in how it instructed the jury, and even had defense counsel raised the issue of variance, the prosecution would have been entitled to an enhancement instruction that specified "deadly weapon" or "firearm."

Similarly, defense counsel did not commit error by failing to object to any jury instruction that referenced a firearm. As previously stated, the information as a whole

alerted Mr. Campbell that a firearm could support the crimes charged and the deadly weapon enhancement. We, therefore, reject Mr. Campbell's ineffective assistance of counsel arguments.

E. Whether the first degree burglary and first degree robbery constituted the same criminal conduct and counted as one crime for sentencing purposes.

Mr. Campbell contends that the trial court was not allowed to sentence him for both first degree burglary and first degree robbery because the crimes constituted the same criminal conduct. RCW 9.94A.589(1)(a) provides:

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.[3] *"Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.*

(Emphasis added.)

A defendant has the burden of proving that the current offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). The

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[3] Here, the trial court entered a consecutive sentence for Mr. Campbell's first degree robbery and first degree burglary convictions. The consecutive sentence is

crimes will not be considered the same criminal conduct if the defendant fails to prove any of the three elements of the statute. *Id.* at 540. Crimes affecting more than one victim cannot encompass the same criminal conduct. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Crimes committed in separate rooms in the same residence are committed in "separate places." *See State v. Stockmyer*, 136 Wn. App. 212, 219-20, 148 P.3d 1077 (2006). Here, the first degree robbery and the first degree burglary affected two victims and were committed in separate rooms. Therefore, the two offenses do not constitute the same criminal conduct.

In addition, there is another independent basis to affirm the trial court: the burglary anti-merger statute, RCW 9A.52.050, which provides: "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." For multiple current convictions, a sentencing court has the discretion to separately punish a crime committed during a burglary, regardless of whether it and the burglary encompassed the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).[4]

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permitted under RCW 9.94A.535(2)(c), and is not challenged by Mr. Campbell.

[4] Mr. Campbell argues that the language we rely upon in *Lessley* is dicta. Regardless, this is a unanimous statement by our highest court that has gone unchallenged for over 20 years. We choose to follow it.

Mr. Campbell also cites *State v. Williams*, 176 Wn. App. 138, 307 P.3d 819

F. Whether the judgment and sentence contains any scrivener's errors.

Mr. Campbell also contends that section 2.4 of the judgment and sentence contains two scrivener's errors. First, he contends that this section indicates that he waived his right to a jury trial. We acknowledge this error and remand to the trial court for the purpose of making the correct notation on the judgment and sentence. Second, he contends that this same section erroneously indicates that the prosecutor recommended a similar sentence to the one imposed by the court. We find no error here. Mr. Campbell received an exceptional sentence as recommended by the prosecutor, and although the sentence was less than recommended, the sentence was "similar."

G. Whether the trial court erred when it ordered Mr. Campbell to pay legal financial obligations.

For the first time on appeal, Mr. Campbell challenges the imposition of legal financial obligations (LFOs). He contends that the court erroneously imposed special costs without a record of what those costs were, and neglected to enter findings on his ability to pay.

(2013), *review granted*, 180 Wn.2d 1001, 319 P.3d 800 (2014) for the proposition that a sentencing court lacks discretion to count *prior* convictions separately under the burglary anti-merger statute. However, in that case, this court held that the burglary anti-merger statute applies to *current* offenses. *Id.* at 143. Here, we are applying the statute to current convictions, not prior convictions. *Williams*, therefore, is distinguishable.

Challenges to LFOs must be raised at the trial court. A failure to object to a cost imposed by the trial court waives the right to challenge the issue on appeal. *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1096 (1992). Also, challenges to a defendant's ability to pay LFOs which are not raised to the trial court will not be addressed on appeal. Rather, the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the debt. *State v. Duncan*, 180 Wn. App. 245, 250-51, 327 P.3d 699 (2014).

We affirm the conviction and sentence, except we remand to the trial court to correct the scrivener's error which incorrectly states that Mr. Campbell waived his right to a jury trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Korsmo, J.

Fearing, J.

APPENDIX "B"

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of

NIKOLAS FRANCIS CAMPBELL,

Petitioner.

NO. 87848-0

ORDER

C/A No. 30166-4-III

Benton County Superior Court
No. 10-1-00425-8

Department I of the Court, composed of Chief Justice Madsen and Justices C. Johnson, Fairhurst, Stephens and González, considered this matter at its February 5, 2013, Motion Calendar and unanimously agreed that, based on the ineffective assistance of Petitioner's counsel in causing Petitioner's criminal appeal to be dismissed, the following order be entered.

IT IS ORDERED:

That the Petitioner's Personal Restraint Petition is granted. The Court of Appeals is directed to recall its mandate, reinstate the appeal, and appoint new appellate counsel to represent Mr. Campbell in the matter.

DATED at Olympia, Washington this 6th day of February, 2013.

For the Court

Madsen, C.J.
CHIEF JUSTICE

655/151

APPENDIX "C"

INSTRUCTION NO. 8

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she displays what appears to be a firearm or other deadly weapon.

APPENDIX "D"

INSTRUCTION NO. 9

To convict the defendant, Nikolas Francis Glenn Campbell, of the crime of robbery in the first degree, as charged in Count I, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2010 the defendant unlawfully took personal property from the person or in the presence of another, or was an accomplice to one who unlawfully took personal property from the person or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person, or the defendant was an accomplice to one who took property from another by use or threatened use of immediate force, violence or fear of injury.

(4) That force or fear was used by the defendant, or the defendant was an accomplice to one who used force or fear, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant, or an accomplice, was armed with a deadly weapon, and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "E"

INSTRUCTION NO. 18

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon.

APPENDIX “F”

INSTRUCTION NO. 19

To convict the defendant, Nikolas Francis Glenn Campbell, of the crime of burglary in the first degree, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2010 the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That 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; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "G"

INSTRUCTION NO. 13

Deadly weapon also 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.

APPENDIX "H"

INSTRUCTION NO. 27

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crimes of Robbery in the First Degree and/or Burglary in the First Degree as charged in Counts I and III.

If one person is armed with a deadly weapon, all accomplices are deemed to be so armed, even if only one deadly weapon is involved.

A deadly weapon is an implement or instrument that 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. Any metal pipe or bar used or intended to be used as a club is a deadly weapon. A pistol, revolver or any other firearm is also a deadly weapon whether loaded or unloaded.

NO. 30166-4-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. NIKOLAS FRANCIS GLENN CAMPBELL, Defendant, Appellant.	)	BENTON COUNTY NO. 10 1 00425 8 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 7TH day of October, 2014, I caused a true and correct copy of the *RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW* to be served on:

RENEE S. TOWNSLEY, CLERK — U.S. MAIL
Court of Appeals Division III
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BENTON COUNTY PROSECUTOR'S OFFICE — U.S. MAIL
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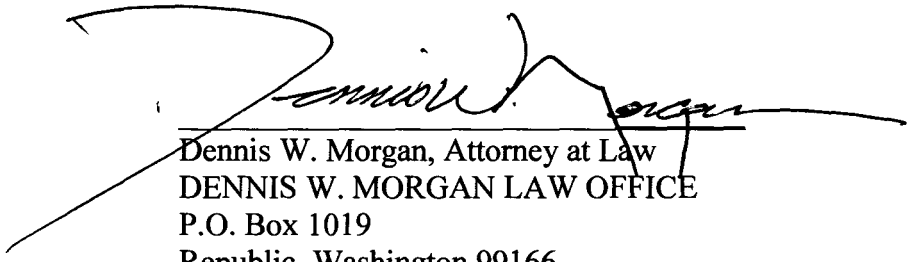

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