73163-7-I

NO. 73163-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

LORENZO STEWART,

Appellant.

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

The Honorable Monica Benton, Judge

AMENDED BRIEF OF APPELLANT

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1. The jury was instructed on an uncharged alternative means of committing first degree robbery in violation of appellant's constitutional rights.

2. The court's instructions on the deadly weapon enhancement eased the state's burden of proof as to whether the alleged knife qualified as a "deadly weapon."

3. Defense counsel provided ineffective assistance of counsel by failing to request an instruction defining the meaning of "armed" for purposes of the deadly weapon enhancement.

Issues Pertaining to Assignments of Error

1. The state charged appellant with first degree robbery on grounds he displayed what appeared to be a deadly weapon during the commission of the robbery. CP 1; RCW 9A.56.200(1)(a)(ii). However, the state proposed, and the court gave, instructions that directed the jury to convict if it found appellant was armed with a deadly weapon during the commission of the robbery. CP 29-30, 106-107; RCW 9A.56.200(1)(a)(i).[1] The jury returned a guilty verdict. CP 17. Where – as a result of the

[1] On the first day of trial, the state was permitted to amend the information to include a deadly weapon enhancement. 1RP (11/12/14) 2. The means for the underlying robbery remained the same. 1RP 2; CP 121-22.

court's instructions – the jury necessarily convicted appellant of an uncharged alternative means, is reversal required?

2. Where the court's instructions for the enhancement allowed the jury to convict appellant of being armed with a deadly weapon without necessarily finding the knife had a blade longer than three inches – or that it was used in a manner likely to produce death – should this Court reverse appellant's 24-month sentencing enhancement?

3. Where there was evidence appellant merely possessed a weapon and therefore was not "armed" for purposes of the sentencing enhancement, did defense counsel provide ineffective assistance of counsel by failing to request that the jury be instructed it must find a nexus between the weapon, the defendant and the crime in order to convict appellant of being "armed?"

B. STATEMENT OF THE CASE

1. Overview

On September 2, 2014, the King County prosecutor charged appellant Lorenzo Stewart with first degree robbery, allegedly committed on August 27, 2014, against Joshua Miller. CP 1. The state alleged Stewart was at the Home Depot in Shoreline and put

several items in a shopping cart and fraudulently returned them for store credit on a gift card. CP 5. When loss prevention officer Joshua Miller confronted Stewart, Stewart reportedly pulled out a knife and threatened Miller before fleeing the store on foot with the gift card. CP 5.

Police were notified, and police apprehended Stewart after a "brief chase." CP 6. Stewart was frisked but no knife was found. 4RP 18. However, a police dog later located a knife along the route Stewart allegedly ran during the police chase. 4RP 36. Before trial, the state amended the information to include a deadly weapon enhancement. 1RP 2.[2]

The jury found Stewart guilty of first degree robbery while armed with a deadly weapon. CP 16-17. At sentencing, the court sentenced Stewart to a low-end standard range sentence of 57 months, plus the 24-month enhancement. CP 61. This appeal follows. CP 93-94.

[2] This brief refers to the transcripts as follows: 1RP –11/12/14; 2RP – 11/13/14; 3RP – 11/18/14; 4RP – 11/19/14; 5RP –12/12/14; and 6RP – 2/27/15.

2. Deadly Weapon Enhancement Instructions

As indicated, Stewart was charged with being armed with a deadly weapon, "to wit: a knife," as a sentencing enhancement. Supp. CP __ (sub. no. 35, Presentence Statement of King County Prosecuting Attorney, 12/10/14) (Amended Information); RCW 9.94A.533(4); RCW 9.94A.825 .

The legislature has provided the following definition of "deadly weapon" for purposes of the deadly weapon enhancement:

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

RCW 9.94A.825.

The state proposed – and the court gave – the following instructions defining "deadly weapon:"

> Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP 12; WPIC 2.06.01 (2005); Supplemental CP __ (sub. no. 20, State's Instructions to the Jury, 11/12/14).

> 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 crime.
>
> A knife having a blade longer than three inches is a deadly weapon.

CP 40; WPIC 2.07.01 (2008) (Revised); Supp. CP __ (sub. no. 20, State's Instructions to the Jury, 11/12/14).

Defense counsel did not propose, and the court did not give, an instruction defining "armed." CP 19-34; Supp. CP __ (sub. no. 20, State's Instructions to the Jury, 11/12/14).

3. Testimony

On August 27, 2014, Chelsea Sneed was working the returns register at the Shoreline Home Depot. 3RP 37-38, 58. She explained that when a customer makes a return without a receipt, it is the store's policy to give the customer a Home Depot card credited with the dollar amount of the returned merchandise. 3RP 38.

Sneed testified that Stewart brought several items to her register to return without a receipt. 3RP 42. She gave him $290.05 in store credit. 3RP 43-45.

Sneed testified that following the transaction, she observed asset protection specialist Joshua Miller approach Stewart. 3RP 46, 50. Sneed saw Stewart pull away, raise his hands and say, "Don't touch me." 3RP 46-47. Sneed did not see Stewart with a knife. 3RP 46.

Miller testified that he had been watching Stewart since he entered Home Depot. 3RP 62. According to Miller, Stewart entered the store and put several expensive items, such as weed killer and garden netting, in his cart and proceeded to the returns register. 3RP 62-63. Miller testified fraudulent returns were on the rise at Home Depot, due to its lax return policy of not requiring a receipt. 3RP 54-55.

Once the return was complete, Miller approached Stewart, identified himself and asked Stewart to accompany him to Miller's office. 3RP 64. Miller described Stewart as docile at first. 3RP 64. However, when Miller put his hand behind Stewart to guide him to the office, Stewart became upset and said, "Don't touch me, I can walk on my own." 3RP 65.

Miller testified that he continued trying to guide Stewart toward his office, but Stewart veered toward the garden exit. 3RP 65. Miller testified that when he tried to block Stewart's path,

Stewart said, "I'm a cut you, damn it." 3RP 66. Miller claimed he heard a "flick" at Stewart's waist; Miller threw his body backwards, pushing off Stewart's shin. 3RP 66. Miller claimed that as he did so, he saw a blade pass between 5 and 6 inches from his face. 3RP 66. Miller testified the knife was "the length of my hand folded, so probably about four and a half, five inches." 3RP 71.

Miller testified Stewart ran out the garden exit. 3RP 66. Miller ran after him, while calling 911. 3RP 67. Miller related what happened, described Stewart and indicated he was heading north on SR 99. 3RP 69-71. Miller later obtained the store's security footage and gave it to police, but the footage was too dark and did not show what happened. 3RP 74, 81, 92, 124.

Officers Strum and Bikar began searching the area. 4RP 12. Bikar notified dispatch he located a suspect matching the description given by Miller on the 232nd block of SR 99. 4RP 12. Strum responded to the location on the west side of SR 99 and reportedly saw Stewart backing away from Bikar with his hands in the air, saying "I don't know you, man," before turning to run. 4RP 12-13, 21-22.

Strum claimed that as he watched Stewart back up, he noticed a silver clip in his front left pocket, which Strum believed to

be a knife. 4RP 13. Strum and Bikar pursued Stewart as he ran across SR 99 and around several buildings and eventually to the south back towards Strum, who had positioned himself so as to cut Stewart off. 4RP 13-14.

Although Strum un-holstered his gun and directed Stewart to stop, Stewart kept running; Strum decided to let Stewart pass without taking lethal action, since Stewart appeared unarmed. 4RP 15. Strum testified Stewart continued south across a grassy field and over a chain link fence, but fell on the other side, allowing Strum to gain some ground. 4RP 16. Strum continued to chase Stewart eastbound on 234th Street. 4RP 17. Strum eventually apprehended Stewart after he fell near some hedges on someone's lawn. 4RP 17.

Believing Stewart had a knife, Strum frisked Stewart for weapons but found none. 4RP 18.

Jodi Sackville responded to the location where Stewart was apprehended and took custody of him while the other officers took a police dog to track where Stewart had run to search for the alleged knife Miller described. 4RP 18.

Canine handler Jason Robinson led the track with his dog Hobbs. 4RP 31, 35. Robinson testified he started at the chain link

fence and Hobbs led him northward across the grassy field. 4RP 36. At the other end, there was a concrete parking lot and a building. 4RP 36. At the parking lot, Hobbs made a left turn "which put him heading west and then there was an open knife right in the middle of that parking lot which he came to[.]"[3] 4RP 36.

Meanwhile, back at the arrest location, Sackville testified she read Stewart his constitutional rights and asked if he understood. 3RP 17. Stewart answered, "No, I don't understand. You have to speak my language." 3RP 17. Sackville claimed Stewart had been yelling at the other officers in English when she arrived; she did not hear him speak any language other than English. 3RP 17.

Deputy Josephine McNaughton and her partner Allen Long brought Miller from Home Depot to Stewart's location for a possible identification. 3RP 25. Sackville testified that when McNaughton and Miller arrived, Stewart yelled, "That's the asshole that tried to stop me." 3RP 19. McNaughton and Long testified Miller identified Stewart as well. 3RP 26, 34.

McNaughton remained with Stewart while Allen drove Miller back to Home Depot. 3RP 26. McNaugton asked Stewart why he

[3] At trial, the state presented an aerial map depicting where Stewart allegedly ran, as described by Strum, and the location where police found the knife. 4RP 18-19.

pulled a knife on Miller. 3RP 27. Stewart denied pulling a knife on Miller and stated he merely had the knife in his possession:

> I carry a knife every day, it is my God given right to carry a knife. That man had no right to put his hands on me. If I would have slashed a knife at that man, you wouldn't have been able to talk to him.

3RP 28.

When Long returned, he searched Stewart's pockets and found a Home Depot Store credit card and receipt. 3RP 35.

Deputy Leona Obstler responded to the arrest location and was informed about the dog track and knife. 3RP 96. Obstler was directed north on SR 99 to a location behind a building called "Nash Chiropractor." 3RP 97. She testified officers Bikar and Strum pointed to a knife that lay on the pavement behind the chiropractic business, which she took as evidence. 3RP 97.

Back at the precinct, Obstler took a picture of the knife lying next to a ruler to show the length of the blade. 3RP 99. She testified she measured the blade as approximately four inches long. 3RP 102. Police examined the knife for fingerprints but found none of comparison value. 3RP 111, 113.

C. ARGUMENT

1. REVERSAL OF THE FIRST DEGREE ROBBERY CONVICTION IS REQUIRED BECAUSE THE JURY WAS INSTRUCTED ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE CRIME.

This Court should reverse Stewart's first degree robbery conviction and concomitant deadly weapon enhancement because he was convicted of an uncharged alternative means in violation of his constitutional rights.

Failing to properly notify a defendant of the nature and cause of the accusation of a criminal charge is a constitutional violation. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Defendants must be informed of the charges against them, including the manner of committing the crime. State v. Bray, 52 Wn. App. 30, 34, 756P.2d 1332 (1988). Beginning with the Severns case in 1942, our Supreme Court has held it is error for a trial court to instruct the jury on uncharged alternative means. See e.g. State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942), accord In re Personal Restraint of Brockie, 178 Wn.2d 532, 537, 309 P.3d 498 (2013).

On direct appeal, it is the state's burden to prove the error was harmless. Bray, 52 Wn. App. at 34-35, 756 P.2d 1332. This is

based on the rule that "[e]rroneous instructions given on behalf of the party in whose favor the verdict was returned are presumed prejudicial unless it affirmatively appears they were harmless. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

By law, there are distinct ways – or means – to commit first degree robbery. Brockie, 178 Wn.2d at 534. A person is guilty of first degree robbery 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; or
>
> (iii) Inflicts bodily injury.

RCW 9A.56.200(1).

Stewart's charging information for robbery indicated that "in the commission of and in immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon, to wit: a knife," which is one of the alternative means of committing first degree robbery. CP 1; Brockie, 178 Wn.2d at 535. However, the jury instructions described a different alternative means for committing robbery: "A person commits the crime of robbery in the first degree when in the commission of a robbery he or she is armed with a

deadly weapon." CP 29; see also CP 30 (To convict instruction requiring jury to find: "That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon"). This was error.

The Supreme Court's opinion in Brockie is directly on point. Brockie was charged with first degree robbery for displaying what appeared to be a firearm or other deadly weapon. Brockie, 178 Wn.2d at 534at 535. However, the jury instructions described two alternative means for first degree robbery: "A person commits the crime of robbery in the first degree when in the commission of a robbery he or she *is armed with a deadly weapon or* displays what appears to be a firearm or other deadly weapon." Brockie, at 535 (emphasis in opinion).

In a personal restraint petition, Brockie argued his convictions should be reversed because of the uncharged alternative means included in the jury instructions. Brockie, at 535. In response, the state argued that the charging document's phrase "the defendant displayed what appeared to be a firearm or other deadly weapon" could mean either displaying or being armed with a firearm, since one has to be armed with a weapon in order to display a weapon. Id.

But the Supreme Court disagreed:

> But the state's argument fails because one may display what appears to be a deadly weapon without being armed with an actual deadly weapon (such as when a person displays a realistic-looking toy gun). See, e.g., State v. Hauch, 33 Wn. App. 75, 77, 651 P.2d 1092 (1982). Similarly, a person may be armed with, but not display, a deadly weapon (such as a gun hidden in a person's pocket). The legislature clearly intended to treat the two alternative means of committing robbery in the first degree as distinct, and the State's reading would improperly collapse the two.

Brockie, 178 Wn.2d at 538. The held that Brockie's notice was limited to the means specified in the charging document. Id.

Although it was error to instruct the jury on the uncharged alternative means, the court held Brockie failed to show prejudice, as required for a personal restraint petition:

> At the heart of Brockie's claim is that he may have been convicted of first degree robbery through an uncharged alternative means. Thus, the question is: Based on the evidence Brockie has presented, is it more likely than not that he was convicted of first degree robbery for being armed with a deadly weapon rather than displaying what appears to be a deadly weapon? In this case, the answer is no. Throughout the trial, the evidence consistently showed that the robber displayed what appeared to be a gun throughout the robberies. There is no indication that the trial included any discussion or claim that the robber was armed with a deadly weapon but did not display it. Thus, based on the facts of this particular case, any juror that found the robber was armed with a deadly weapon necessarily would have found that the robber displayed the weapon – the alternative

means that was properly described in the charging information.

Brockie, 178 Wn.2d at 539-40.

In this direct appeal, it is the state's burden to show harmlessness. Brockie, at 538-39. The state cannot meet that burden. In contrast to the circumstances in Brockie, there was evidence presented here that Stewart did not display a deadly weapon. He told the police it was his "God given right to carry a knife." 3RP 28 (emphasis added). He also stated, "If I would have slashed a knife at that man, you wouldn't have been able to talk to him." 3RP 28. Officer Strum noticed a silver clip in Stewart's left front pocket, which he presumed to be a knife. Based on this evidence, a jury reasonably could conclude Stewart did not display a deadly weapon, but carried a knife in a holder on his belt and therefore was armed with a deadly weapon. The circumstances here, unlike those in Brockie, therefore require reversal of the conviction and the concomitant enhancement.

2. THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ALLEGED KNIFE WAS A DEADLY WEAPON.

Assuming arguendo this Court does not reverse the underlying robbery conviction, the enhancement must still be

reversed because the instructions eased the state's burden to prove the knife qualified as a "deadly weapon."

Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous. State v. Thomas, 150 Wash.2d 821, 844, 83 P.3d 970 (2004). In Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), the United States Supreme Court held that, under the Sixth Amendment, any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. Thus, in order to increase a defendant's penalty under Washington's sentencing enhancement statutes, the state must first prove to the jury beyond a reasonable doubt that the defendant engaged in the conduct proscribed under the applicable sentencing enhancement statute.

Because the trial court here failed to properly instruct the jury on the definition of a deadly weapon for purposes of the special verdict, the state did not meet this burden.

Under RCW 9.94A.533(4), a trial court may increase a defendant's sentence where the defendant commits a crime while armed with a deadly weapon. For purposes of the sentencing enhancement:

> [A] deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.825.

Here, the jury was instructed:

> 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 crime.
>
> A knife having a blade longer than three inches is a deadly weapon.

CP 40. There are two problems with this instruction. First, it does not instruct jurors they must find the knife had a blade longer than three inches in order to answer "yes" to the special verdict form. On the contrary, it merely tells the jury that one example of a deadly weapon is a knife that has a blade longer than three inches.

Second, it contains no definition of "deadly weapon" for purposes of the special verdict. The only definition of "deadly weapon" the jury received is the one that defines "deadly weapon" for purposes of first degree robbery:

> Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP 12; WPIC 2.06.01 (2005) (emphasis added).

This definition differs markedly from the definition of "deadly weapon" for purposes of the sentencing enhancement, which requires jurors to find the weapon "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." RCW 9.94A.825.

Thus, as instructed, jurors could have convicted Stewart of the sentencing enhancement without finding the knife had a blade longer than three inches and without finding that the knife was used in a manner likely to produce death. As instructed, the jury could have convicted if it found merely that Stewart possessed a knife that was readily capable of causing substantial bodily harm. This was constitutional error.

In response, the state may argue the error in the instruction was harmless because the knife found by police dog Hobbs had a blade longer than three inches, as depicted in the photograph with the ruler. The trial court's error in failing to instruct the jury on the proper definition of a deadly weapon is subject to harmless error analysis. See State v. Johnston, 156 Wn.2d 355, 364, 127 P.3d 707 (2006) (instructional errors involving the elements of a crime may be harmless); State v. Cook, 69 Wn. App. 412, 418, 848 P.2d 1325 (1993) (applying harmless error analysis to erroneous deadly weapon jury instruction). Any such argument should be rejected, however.

The error here is not harmless because jurors may have doubted the knife Hobbs found was in fact the knife used during the robbery. As indicated, it was not in Stewart's possession at the time of his arrest. Although it was found along the route Stewart allegedly ran during the chase, no fingerprints were recovered. Nor did Miller identify it as the knife Stewart allegedly pulled on him.

Despite doubts about Hobbs' knife being the knife, however, jurors may still have believed Stewart did in fact pull a knife on Miller. And assuming jurors believed the real knife was not the one Hobbs found, the error in the instruction cannot be harmless

because there is no definitive proof – such a photograph with a ruler – that the knife had a blade longer than three inches. Moreover, it is not a foregone conclusion jurors would find the manner in which Stewart used the knife was likely to cause death. Miller testified that the blade merely passed near his face, not that Stewart held it to his throat or tried to stab him in a vital organ. The state therefore cannot prove the instructional error was harmless beyond a reasonable doubt. See State v. Cook, 69 Wn. App. 412, 848 P.2d 1325 (1993) (erroneous definition of deadly weapon harmless where it was undisputed the defendant held the knife to the victim's throat). This Court should therefore reverse the 24-month sentencing enhancement.

3. STEWART RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Alternatively, this Court should reverse the sentencing enhancement because defense counsel provided ineffective assistance of counsel by failing to request the jury be instructed on the definition of being "armed," where there was evidence Stewart was in mere possession of a weapon and not "armed" as defined under the law.[4]

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Thomas, 109 Wn.2d at 229. Defense counsel is ineffective when (1) the attorney's performance is deficient and (2) the deficiency prejudices the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226.

[4] This brief does not argue counsel's failure to request a definitional instruction of "armed" for purposes of the underlying offense constituted ineffective assistance, because Stewart was never charged with that means of committing robbery. Consequently, the jury should not have been instructed on that means in any shape or form whatsoever.

Ineffective assistance may lie where defense counsel fails to request an instruction that supports the defense case. See e.g. Thomas, 109 Wn.2d at 227-28 (counsel's failure to request an involuntary intoxication instruction where the evidence supported it constituted ineffective assistance of counsel). "Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel." In re Pers. Restraint of Hubert, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007).

To prevail on an ineffective assistance of counsel claim for failure to propose a jury instruction, an appellant must show that (1) had counsel requested the instruction, the trial court likely would have given it, and (2) defense counsel's failure to request the instruction was not a legitimate tactical decision. State v. Powell, 150 Wn. App. 139, 154–55, 206 P.3d 703 (2009). Both prongs are met here.

Under the "Hard Time for Armed Crime Act" of 1995, defendants who commit armed crime generally receive sentencing enhancements. State v. Eckenrode, 159 Wn.2d 488, 159 Wn.2d 488 (2007). Our constitution also guarantees the right to bear arms. Const. art I, § 24. To harmonize both legal commands, our state Supreme Court has held "[a] person is 'armed if a weapon is

easily accessible and readily available for use, either for offensive or defensive purposes." State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). But a person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime. Valdobinos, 122 Wn.2d at 282.

When a defendant seeks a nexus instruction, "it may well be appropriate to give it." Eckenrode, 159 Wn.2d at 494 (citing State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005)).

This is a case where it would have been appropriate to give a nexus instruction. Stewart told police he carried a knife every day, that it was his "God given right to carry a knife" but that he did not pull it on Miller. 3RP 28. Accordingly, there was evidence Stewart merely possessed a weapon, and therefore, did not qualify as "armed." However, because the jury was not instructed it must find a nexus between the defendant, the weapon and the crime, it could have convicted Stewart of being "armed" solely by virtue of his admission he was carrying a knife. To ameliorate this possibility, it is likely the court would have given the instruction, had defense counsel asked for it.

There was no legitimate tactic not to request the instruction. As indicated, there was evidence Stewart possessed a knife but was not "armed" with it. Stewart told police he did not pull it on Miller. Moreover, the only other witness (Sneed) did not see a knife and the security footage offered no corroboration of Miller's testimony. Under these circumstances, a reasonable juror could have doubted Stewart pulled the knife on Miller.

Because jurors were not instructed they were required to find a nexus between the defendant, the weapon and the crime, it is possible they answered "yes" to the special verdict based solely on Stewart's admission to carrying a knife, which is legally insufficient to qualify as being "armed." This possibility undermines confidence in the outcome of the proceeding and demonstrates Stewart was prejudiced by his counsel's failure to request the instruction. This Court should therefore reverse the sentencing enhancement.

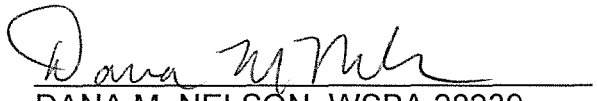
D. CONCLUSION

Because Stewart was convicted of an uncharged alternative means of committing first degree robbery, this Court should reverse his conviction and concomitant sentencing enhancement. Alternatively, the deadly weapon sentencing enhancement should be reversed because the court's instructions eased the state's burden and because defense counsel should have requested a nexus instruction.

Dated this 9th day of September, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73163-7-I
	)	
LORENZO STEWART,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 9TH DAY OF SEPTEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LORENZO STEWART
DOC NO. 332959
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF SEPTEMBER, 2015.

X Patrick Mayovsky