73163-7

FILED
December 8, 2015
Court of Appeals
Division I
State of Washington

NO. 73163-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LORENZO STEWART,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONALD J. PORTER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Constitutional Provisions

Federal:

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES

1. It is typically error to instruct the jury on an uncharged alternative means of committing an offense. Stewart was charged with Robbery in the First Degree, alleging only the alternative that he "displayed what appeared to be a deadly weapon, to-wit: a knife." However, he was also charged with a sentencing enhancement alleging that at the time of the commission of the crime he was "armed with a deadly weapon, to-wit: a knife." Did the language of the sentence enhancement allegation give Stewart sufficient notice of the charges such that it was not error for the court to give a "to convict" instruction that included the "armed with a deadly weapon" alternative?

2. Appellate courts generally will not consider a claim that is raised for the first time on appeal. At trial, Stewart failed to object to the jury instruction defining deadly weapon for purposes of the special verdict. On appeal, he does not argue that the alleged error is constitutional and manifest. Should this Court refuse to consider his claim that the jury instruction was erroneous? If this Court accepts review, has Stewart failed to show that the trial court abused its discretion by giving the per se deadly weapon instruction when the only weapon mentioned in the case was a knife with a four-inch blade?

3. Ineffective assistance of counsel requires a showing of deficient performance and prejudice. Stewart's trial counsel did not request a jury instruction defining "armed" for the purpose of the special verdict. The unrebutted evidence established that Stewart had actually displayed and used a switchblade knife in committing the robbery. Has Stewart failed to show that his attorney's performance in not requesting the instruction was deficient, and has he also failed to show the probability of a different outcome had the instruction been requested and given?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Lorenzo Stewart was charged by amended information with one count of Robbery in the First Degree. Supp. CP[1] ___, Sub #70 (Amended Information). Stewart was also charged with a deadly weapon sentence enhancement alleging that he was armed with a knife at the time of the commission of the robbery. Id. The jury convicted Stewart of Robbery in the First Degree, and also returned a special verdict finding that he had been armed with a deadly weapon at the time of the commission of the crime. CP 16-17.

[1] For unknown reasons the amended information did not appear in the court file. The trial court accepted the filing of the amended information and signed the order allowing the amendment. 1RP 2. Supp. CP ___, Sub #21. The amended information was filed on December 3, 2015, to complete the record for review, and was designated as a supplemental clerk's paper.

Stewart was sentenced to 57 months in custody, the low end of the standard range, plus 24 months for the deadly weapon sentence enhancement, for a total sentence of 81 months. CP 58-67.

2. SUBSTANTIVE FACTS.

Chelsea Sneed was employed as a cashier at the Shoreline Home Depot. 3RP[2] 37-38. She was trained to ring up merchandise and process returns of merchandise. 3RP 38. If a person sought to return merchandise without a receipt, store credit would be given. 3RP 39-40.

On August 27, 2014, Sneed was working at a returns register when Lorenzo Stewart brought several items to return without a sales receipt. 3RP 42. Stewart told her the items were from his employer and that he had returned some other items the day before. 3RP 43. Sneed took the returned items and gave Stewart a Home Depot store credit card loaded with $290.05, the sum of the returned items plus tax. 3RP 45. When Stewart turned to leave, Sneed saw that he was approached by Home Depot loss prevention officer Joshua Miller. 3RP 43. Miller asked Stewart to accompany him to the office. Id. Sneed saw Stewart pull his arm away and say, "Don't touch me." 3RP 47. After the two walked

[2] The verbatim report of the trial court proceedings consists of six volumes, which will be referred to in this brief 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).

away, Sneed started working with other customers and saw nothing more between the two men. 3RP 44.

Joshua Miller, at the time of the incident, had been a loss prevention officer for Home Depot for 16 or 17 months. 3RP 50. He had been promoted to a position as head trainer for all asset protection specialists for the district that included 11 Home Depot stores. Id. Miller knew that there had been a rise in refund fraud, which involved persons taking items of merchandise straight from the floor to the returns desk. 3RP 54. Miller testified that he was aware of a secondary market for Home Depot store credit; the cards are sold on Craigslist, through pawnshops, and by individual buyers on the street. 3RP 55-56.

On the date of the crime, Miller's attention was first drawn to Stewart before Stewart even entered the store. 3RP 62. Miller had seen Stewart coming from the bus stop rather than the parking area, and it raised a suspicion when Stewart got a shopping cart and entered the garden area. Id. Miller knew that persons who were traveling by bus did not typically purchase bulky items, and would therefore use baskets instead of carts. Id. Stewart selected a number of bulky items, including large rolls of garden netting and tiki torches that would be difficult to transport by bus. 3RP 63. Stewart then pushed the cart directly to the returns desk. Id.

Miller positioned himself to observe what was happening at the returns desk. 3RP 64. He saw Ms. Sneed process the return and issue the store credit card. Id. When the transaction was completed Miller approached Stewart and identified himself and asked Stewart to accompany him to the office. Id. When Miller touched Stewart to guide him toward the office, Stewart "got pretty upset" and threw his hands up and said, "Don't touch me, I can walk on my own." 3RP 64-65.

Stewart initially accompanied Miller, but when they reached a junction with the office toward the left and the garden center exit toward the right (where Stewart had entered the store), Stewart began moving toward the exit. 3RP 65. Stewart continued trying to go toward the exit despite Miller pointing toward the office, asking Stewart to move toward the office, and positioning his body between Stewart and the exit. 3RP 65. Miller testified as to what happened next:

> As he continued on, I tried to cut off his advance a little bit more with my body. At that point I will quote, he said, "I'm-a cut you, damn it." At point I heard a flick at his right waist, and I threw my body backwards and tried to kick off of his shin, and as I did that, I saw a blade pass across my face.

3RP 66. Miller reiterated that he had heard "a flick sound," and testified that the blade had passed "five or six inches in front of my face." 3RP 66.

Miller then "backpedaled" and saw Stewart run toward the garden exit. Id.

At the time of the trial, Miller had been a member of U. S. Army National Guard for five years and was a Level 1 combat instructor for the Army. 3RP 83. He believed that his training had accounted for his instinctive response in pushing away from Stewart with his foot. 3RP 83. Miller waited a few seconds to create a safety gap between himself and Stewart, then he followed Stewart out of the store so that he could report to police Stewart's direction of travel. 3RP 67. As he pursued, Miller used his cell phone to call 911 before he had even gotten out of the store. 3RP 67-68.

The jury heard Miller's call to 911.[3] 3RP 69-72. Ex. 3. The call began as follows:

> OPERATOR: 911, what are you reporting?
> MALE VOICE: My name's Joshua Miller, I'm an asset protection specialist at the Home Depot. **I just had a shoplifter pull a knife on me**.
> OPERATOR: Okay, are you injured?
> MALE VOICE: Nope.

3RP 70; Ex. 3 (emphasis added). Miller then gave the operator a description of the perpetrator and his direction of travel -- north on Aurora. 3RP 70-71. When the operator asked how big the knife was,

[3] Miller testified that he was aware that making a false report to police is against the law. 3RP 86. He also testified that Home Depot would immediately terminate any asset protection officer for making a false report. 3RP 86-87.

Miller responded: "Well, the length of my hand folded, so probably about four and a half, five inches." 3RP 71; Ex. 3. Miller testified that he had never seen the knife in the folded state, but that because of the "flick noise it made" he assumed it was a folding knife, and in talking to the 911 operator he used the length of the blade he had seen to estimate the knife's size. 3RP 86, 91-92.

After making the 911 call, Miller returned to the Home Depot store to try to locate video footage of Stewart to provide to police. 3RP 73. Home Depot has a video surveillance system that is focused on the doors, but provides only a small percentage of coverage of the store interior.[4] 3RP 73-74. The jury saw video segments that showed Stewart entering the store's garden center with an empty cart, Stewart at the returns register with Ms. Sneed, Stewart being approached by Miller at the returns register, and Stewart running out of the store through the garden center. Ex. 4; 3RP 75-84.

Edmonds Police Officer Kraig Strum was on patrol and responded to a dispatched report of an incident involving a knife at the Home Depot. 4RP 11-12. A description of the suspect had been given and it was reported that the suspect had fled on foot northbound on Aurora Avenue.

[4] The parties are in agreement that none of the video footage from Home Depot captured the interaction during which Miller testified that Stewart had pulled the knife and swiped it at his face. Brief of Appellant at 7 (citing 3RP 74, 81, 92, 124).

4RP 12. Strum then heard Edmonds Patrol Officer Bikar broadcast that he had located the suspect (later identified as Stewart) on Aurora. 4RP 12. Officer Strum went to the reported location, and as he parked he saw Bikar getting out of his patrol car and approaching Stewart. Id. He observed Stewart backing away from Bikar with his hands up, and heard him say, "I don't know you, man," before turning and running off. Id. Before Stewart turned and ran, Strum saw a silver clip in his left front pocket. 4RP 13. Strum believed it to be a knife. Id.

When Stewart ran from the officers he crossed Aurora Avenue, a busy arterial, and the two officers pursuing on foot had to stop a few times to avoid being hit by cars. Id. Stewart ran into an industrial complex, and during the pursuit, Strum, because of his knowledge of the area, realized Stewart would be reaching a dead end. 4RP 13-14. Strum moved to cut Stewart off, and, because he had seen Stewart with a knife, Strum drew his gun and held it in a low ready position. 4RP 14-15. Stewart came around a corner and was running toward Strum as Strum yelled for him to stop. 4RP 15. Stewart did not stop. Id. Because Stewart did not have a knife in his hands Strum decided not to use lethal force. Id. Instead, he backed away, let Stewart pass, holstered his weapon, and continued to chase Stewart on foot. 4RP 15-16.

Strum and Bikar pursued Stewart across a grassy field. 4RP 16. Stewart fell trying to get over a chain link fence that separated the field from a residential area. 4RP 16. Stewart got up and ran into the residential area where he fell while trying to get through hedges. 4RP 16-17. Strum got on top of Stewart, and although Stewart was physically and verbally combative, Strum and Bikar were eventually able to control and hand-cuff him. 4RP 17. Strum immediately frisked Stewart but did not find the knife. 4RP 18. An Edmonds K9 officer, Jason Robinson, had responded to the call with his dog Hobbs, and within a few minutes of detaining Stewart the officers began a backtrack of the chase route looking for the knife. 4RP 18.

Officer Bikar took Robinson and his dog to the chain link fence where Stewart had fallen. 4RP 35. Hobbs indicated he had picked up a scent. Id. Hobbs then tracked back across the grassy field and into the industrial area. 4RP 35-36. Hobbs found the knife in "the middle of a parking lot." 4RP 36. Hobbs indicated to his handler "that the trail that he was on, this knife was associated with that scent." 4RP 36-37.

Police officers had also responded to Home Depot, and after giving the officers a statement Miller was taken in the back of a patrol car to the site of Stewart's arrest for a show-up identification procedure. 3RP 85-86. Miller made a positive identification. 3RP 25-26, 86. Edmonds Police

Officer Jodi Sackville was with Stewart at the time, and she testified that as the patrol car drove by with Miller in the backseat, Stewart looked at the car and yelled, "that's the asshole that tried to stop me." 3RP 19.

King County Deputy Sheriff Josephine McNaughton was also present at the site of the arrest and she took custody of Stewart from Sackville. 3RP 26. McNaughton testified that Stewart was "very agitated," and that he was "yelling, cursing, saying that we were all racist. Very unhappy that we were there." 3RP 26. McNaughton asked Stewart why he had pulled a knife on the Home Depot clerk. 3RP 27. McNaughton made a verbatim record of Stewart's response and she read his response to the jury. Id. Stewart's response:

> 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 27-28.

The knife found with the assistance of the K9 officer was admitted into evidence. 3RP 104, 106. The knife is a spring-assisted knife, which is illegal to possess, and is also known as a switchblade. 3RP 100. The knife has a silver clip. 3RP 101; Ex. 1. The blade of the knife is approximately four inches long. 3RP 102; Ex. 12, Ex. 13. The knife was examined by a trained fingerprint examiner. 3RP 108. Although there

was evidence of fingerprints on the knife, none of the prints were of comparison value. 3RP 113-15.

C. ARGUMENT

1. THE "TO CONVICT" INSTRUCTION WAS NOT ERROR BECAUSE STEWART HAD ADEQUATE NOTICE THAT HE WOULD BE REQUIRED TO DEFEND AGAINST A CHARGE THAT HE HAD COMMITTED THE CRIME WHILE ARMED WITH A DEADLY WEAPON.

Stewart argues that his conviction for robbery in the first degree must be reversed because the jury was instructed on an uncharged alternative means of committing the crime. Stewart's claim should be rejected. Under the unusual circumstances of this case, the fact that Stewart was charged with the sentence enhancement of being armed with a deadly weapon put him on notice that he must defend against the allegation of being armed with a deadly weapon at the time he committed the crime, and, therefore, the jury instruction at issue, if error, was not reversible error.

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

(a) In the commission of a robbery or the 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).

The State acknowledges the authorities that hold that it is error to instruct a jury on an uncharged alternative means of committing an offense. Defendants must be informed of the charges against them, including the manner of committing the crime. State v. Brockie, 178 Wn.2d 532, 536, 309 P.3d 498 (2013) (citing State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988)). On direct appeal, it is the State's burden to prove that the error was harmless. Brockie, at 536 (citing Bray, 52 Wn. App. at 34-35). Erroneous instructions given on behalf of the party in whose favor the verdict was returned are presumed prejudicial unless it affirmatively appears they were harmless. Brockie, at 536 (citing State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)). However, under the circumstances of this case, the charging document provided sufficient notice to Stewart that he must be prepared to defend against the charge that he committed the robbery while armed with a deadly weapon, and thus it was not error to instruct the jury on that alternative means.

Stewart claims reversal is compelled by Brockie, which he argues is "directly on point." In fact, Brockie differs from the case at bar in a

significant way, and does not support reversal of Stewart's conviction. Brockie, like Stewart, had been charged with robbery in the first degree by displaying what appeared to be a deadly weapon. However, unlike Stewart, Brockie had not been charged with the sentencing enhancement of committing the robbery while armed with a deadly weapon.

In Brockie, the defendant was charged with two counts of robbery in the first degree. Brockie's charging information for the robberies indicated that "in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon," which is one of the alternative means of committing first degree robbery. Brockie, at 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 original).

In a personal restraint petition, Brockie alleged that it was reversible error for the jury to have been instructed on the uncharged alternative means of committing robbery in the first degree. The supreme court found it to have been error, but did not reverse Brockie's convictions because he had failed to prove actual and substantial prejudice, the standard applied in a personal restraint petition. Brockie, at 540. Here,

Stewart argues that under the standards applicable on direct review reversal of his conviction is required.

In Brockie, the supreme court rejected the State's argument that the language of the charged alternative, "displayed what appeared to be a firearm or other deadly weapon," was sufficient to encompass the uncharged alternative means, "while armed with a deadly weapon."

> The State asserts 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 deadly weapon, since one has to be armed with a weapon in order to display a weapon. 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). 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, at 538 (emphasis in original). However, fundamental to the supreme court's holding that the jury was instructed in error was Brockie's lack of notice in the charging document that he would have to defend against an allegation that he had been armed with a deadly weapon.

> By specifying the means of displaying what appeared to be a firearm or other deadly weapon, the charging information limited **Brockie's** notice to that particular means. **Nothing in the charging information put Brockie on notice that**

he might be charged with the alternative means of first degree robbery while armed with a deadly weapon.

Brockie, at 538 (emphasis added).

Here, by the language of the deadly weapon enhancement, Stewart was put on notice that he should prepare to defend against a charge that he had committed robbery in the first degree while armed with a deadly weapon. The amended information charged:

> That the defendant Lorenzo Stewart in King County, Washington, on or about August 27, 2014, did unlawfully and with intent to commit theft take personal property of another, to wit: U.S. currency (store credit), from the person and in the presence of Joshua Paul Miller, against his will, by the use or threatened use of immediate force, violence and fear of injury to such person or his property and to the person or property of another, and in the commission of and in immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon, to-wit: a knife; ...
>
> **And further do accuse the defendant, Lorenzo Stewart at said time of being armed with a deadly weapon, to-wit: a knife.**

Supp. CP ____, Sub #70 (statutory citations omitted, emphasis added).

Unlike in Brockie, Stewart's charging document contained sufficient notice to allow the jury to be instructed on the alternative means of committing robbery in the first degree by being armed with a deadly weapon. The Sixth Amendment of the United States Constitution and article I, section 22 of our state constitution require that charging documents include all essential statutory and nonstatutory elements of a

crime. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). The purpose of the requirement is to give notice to the accused of the nature of the crime in order to prepare a defense. State v. Tandecki, 153 Wn.2d 842, 846-47, 109 P.3d 398 (2005). It is not necessary to use the exact words of the statute if other words are used which equivalently or more extensively signify the words in the statute. State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989) (citing State v. Knowlton, 11 Wash. 512, 39 P. 966 (1895)). Here, the charging document alleged not only that Stewart had committed robbery by displaying what appeared to be a deadly weapon, but also that he was at the time armed with a deadly weapon. The amended information was sufficient to put Stewart on notice, and, therefore, it was not error to instruct the jury that Stewart could be convicted of robbery in the first degree by proof beyond a reasonable doubt that he committed the robbery while armed with a deadly weapon.

Even if instructing the jury on the "armed with a deadly weapon" alternative was technically error, any error was harmless beyond a reasonable doubt. Stewart cites Brockie and Bray, not only for the proposition that the "to convict" instruction was erroneous, but also for the specific harmless error test that should be applied. In uncharged alternative means cases on direct appeal, Washington courts have held that

instructing the jury on uncharged alternative means is presumed to be prejudicial unless the State can show that the error was harmless. Brockie, at 538-39 (citing Bray, 52 Wn. App. at 34-36 ("An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless."). Under this approach, to show that the error was harmless the State would have to establish that the conviction could only have been based on the charged offense, not the uncharged alternative means.

Here, the State concedes that Stewart was found guilty based on the only means on which the jury was instructed, that Stewart was armed with a deadly weapon, a knife. However, as argued above, Stewart was effectively charged with committing robbery in the first degree while armed with a deadly weapon, and, therefore, it was not reversible error to have instructed the jury on the alternative means of committing robbery in the first degree while armed with a deadly weapon.

The specific facts of this case, wherein the language of one of the alternative means of committing robbery in the first degree, that the defendant was armed with a deadly weapon, mirrors the language of the charged deadly weapon sentence enhancement, distinguishing this case from the cases relied on by Stewart, Brockie and Bray. Because Stewart had notice that he had to defend against a charge that he was armed with a

deadly weapon, any error was harmless. This court should reject Stewart's claim of reversible error.

2. THE TRIAL COURT GAVE THE CORRECT SPECIAL VERDICT DEADLY WEAPON INSTRUCTION WHEN THE ONLY WEAPON AT ISSUE WAS A DEADLY WEAPON AS A MATTER OF LAW.

Stewart claims that his 24-month deadly weapon sentence enhancement should be reversed because, he argues, the trial court failed to properly instruct the jury on the definition of a deadly weapon for the purposes of the special verdict. Stewart's argument should be rejected for two reasons. First, at trial Stewart did not object to the instruction he now complains of, and now, on appeal, he does not argue that the alleged error is constitutional and manifest. Therefore, pursuant to RAP 2.5, the Court should not address his claim on appeal. Second, if this Court were to consider his claim, there was no error in the instruction defining deadly weapon for purposes of the special verdict. The trial court gave the modified version of WPIC 2.07.01 that is recommended when the weapon is a knife with a blade over three inches in length, a per se deadly weapon.

a. Relevant Facts.

As Home Depot loss prevention officer Josh Miller attempted to escort Stewart to the store office, he suddenly heard a "flick" from around Stewart's waist. 3RP 66. Miller used his foot to push away from Stewart,

and as he threw himself backward a blade passed within five or six inches of his face. Id. Miller immediately called 911 and told the operator that a shoplifter had just pulled a knife on him. 3RP 70. Miller did not see the knife in a folded state, but assumed it was a folding knife because of the "flick noise it made." 3RP 86, 91-92.

A short time later, just before Stewart turned and ran leading two police officers on a short foot pursuit, one of the officers saw what he thought was a knife clipped to Stewart's left front pants pocket. 4RP 13. The clip was silver. Id. After chasing Stewart through a commercial area and across a grassy field, officers apprehended Stewart as he entered a residential neighborhood. 4RP 16-17. When apprehended, Stewart did not have a knife. 4RP 18. Within a few minutes, the arresting officers, with the assistance of a K9 officer and his dog, backtracked the chase route and found a knife in a parking lot in the commercial area. 4RP 36. The police dog indicated that the knife was associated with the scent he had been given. 4RP 36-37.

The knife that was recovered was an illegal switchblade knife with a silver clip and a four-inch blade. 3RP 100-02; Ex. 1, Ex. 12, Ex. 13.

At trial the court gave the following jury instruction:

> 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.

Stewart did not object to the trial court giving this instruction.

b. Stewart Is Not Entitled To Review Because He Has Not Established That The Error He Alleges Was Constitutional And Manifest.

Appellate courts generally will not consider an issue that is raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). In order to have a claim reviewed for the first time on appeal a defendant must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5. The purpose behind this rule is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011). Pursuant to RAP 2.5, Stewart's argument that the special verdict deadly weapon jury instruction was erroneous, which he attempts to raise for the first time on appeal, should not be considered by this reviewing court.

Moreover, on appeal Stewart does not even acknowledge that he failed to object to the instruction at trial, and he makes no attempt to

establish, which is his burden to do, that the alleged error was constitutional and manifest. Under such circumstances, a reviewing court should refuse even to address the matter. See State v. Lindsey, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

Our supreme court has denied appellate review in circumstances virtually identical to the case at bar. In State v. Eckenrode, 159 Wn.2d 488, 150 P.3d 1116 (2006), the defendant was convicted of drug charges with special verdicts for having been armed with a firearm at the time of the commission of the offenses. For the first time on appeal, Eckenrode alleged error that the jury instruction defining deadly weapon for the special verdict did not include nexus language. The supreme court held:

> But we have not vacated sentencing enhancements merely because a jury was not instructed that there had to be such a nexus. There is another principle that bears on our review: whether any alleged instructional error could have been cured at trial. We have found that the defendant's failure to ask for the nexus instruction generally bars relief on review on the ground of instructional error. *See, e.g., State v. Willis,* 153 Wn.2d 366, 374, 103 P.3d 1213 (2005).

Eckenrode, 159 Wn.2d at 491. The Eckenrode court then limited its review to the sufficiency of the evidence.

This Court should not accept review of this issue that Stewart raises for the first time on appeal, that the trial court failed to properly

instruct the jury on the definition of a deadly weapon for the purposes of the special verdict.

c. The Trial Court Gave The Correct Instruction For A Case Involving A Per Se Deadly Weapon.

If this Court decides to address the issue, Stewart's claim that the jury instruction defining deadly weapon for purposes of the special verdict was erroneous should be rejected. The instruction given was the standard WPIC 2.07.01, with the bracketed material of the instruction used appropriately considering the evidence admitted in the case. The only knife admitted into evidence, or even mentioned in the case, had a four-inch blade, a per se deadly weapon.

Jury instructions are reviewed de novo to ensure that they accurately state the applicable law, do not mislead the jury, and allow the parties to argue their theories of the case. Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Once those criteria are met, a trial court's decision regarding the specific wording of instructions is reviewed only for abuse of discretion. Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 44, 244 P.3d 32 (2010), aff'd, 174 Wn.2d 851, 281 P.3d 289 (2012).

The statutory definition of a deadly weapon for purposes of a special verdict provides:

> 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: . . . any knife having a blade longer than three inches . . . .

RCW 9.94A.825.

The full text of WPIC 2.07.01 states:

> 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 [in Count].
>
> [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. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant [or an accomplice]. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the [location of the weapon at the time of the crime][the type of weapon] [(fill in other relevant circumstances)].]
>
> [If one participant in a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.]
>
> [A knife having a blade longer than three inches is a deadly weapon.][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 produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.]

Here, the jury was instructed as follows:

> 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.

Stewart now argues that based on this instruction, to which he did not object at trial, "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." Brief of Appellant at 18. Stewart's argument relies on speculation that the jury may have believed that Stewart pulled a knife on Miller, but that the knife pulled was not the knife with a four-inch blade that was admitted into evidence. Therefore, according to his argument, the jury instruction should have included "manner of use" language. Stewart's argument depends on utter speculation, not on the evidence in this case.

Here, because the only weapon the jury heard about during the trial was a knife with a four-inch blade, and as a matter of law a knife with a blade longer than three inches is a deadly weapon for purposes of the special verdict, there was no reason to instruct the jury on the generic

special verdict definition that "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." Former RCW 9.94A.825; State v. Rahier, 37 Wn. App. 571, 576, 681 P.2d 1299 (1984) (where defendant is alleged to have used an instrument that is by definition a deadly weapon, generic definition of deadly weapon in special verdict WPIC should be omitted and jury should be instructed the implement is a deadly weapon as a matter of law).[5] Indeed, the comment to WPIC 2.07.01 instructs that when the weapon in question is one listed among the statutorily defined deadly weapons in RCW 9.95.040 (as is a knife with a blade longer than three inches), "the prefatory 'likely to produce death' language found in WPIC 2.07 should be omitted and that the jury should be instructed the implement is a deadly weapon as a matter of law."

Here, it is clear that the State alleged that the weapon used was the switchblade knife with a four-inch blade that was admitted into evidence. The switchblade knife admitted into evidence was consistent in size and type with the knife the victim Miller heard make the "flick" noise. The

[5] Although State v. Rahier analyzed the pre-SRA deadly weapon enhancement statute, RCW 9.95.040, it remains applicable because the Sentencing Reform Act's definition of deadly weapon for purposes of a special verdict remains the same. Comment to WPIC 2.07 (citing State v. Sullivan, 47 Wn. App. 81, 733 P.2d 598 (1987)); State v. Samaniego, 76 Wn. App. 76, 79-80, 882 P.2d 195 (1994).

recovered knife had a distinctive silver clip, consistent with Officer Strum's observation of the knife with a clip in Stewart's pocket only minutes before his arrest. The knife was found along the path that Stewart had run minutes before. The police dog indicated that the knife was associated with the scent he had been given.

The defense presented no testimony in this case. No knife other than the knife admitted into evidence, which was clearly connected to Stewart, was discussed in this case. It was not an abuse of discretion for the trial court to give the modified version of WPIC 2.07.01 that is recommended when the weapon is a knife with a blade over three inches in length, a per se deadly weapon.

3. STEWART'S TRIAL ATTORNEY'S FAILURE TO REQUEST A JURY INSTRUCTION DEFINING "ARMED" FOR PURPOSES OF THE SPECIAL VERDICT WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

Stewart argues that the 24-month deadly weapon sentence enhancement should be reversed because he received ineffective assistance of counsel by his trial attorney not requesting a jury instruction defining "armed." Stewart's claim must be rejected. He cannot show that, even if an instruction defining "armed" had been requested and given, such an instruction would have resulted in a reasonable probability that the result of the proceeding would have been different.

To prevail on a claim of ineffective assistance of counsel, Stewart must establish both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show deficient performance, he must show that his counsel's performance fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). In judging the performance of trial counsel, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

To show prejudice, Stewart must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Id. If an appellant fails to establish one prong of the Strickland test, a reviewing court need not consider the other prong. Id. at 697.

Initially, to prevail on an ineffective assistance of counsel claim for failure to propose a jury instruction, an appellant must establish that (1) the trial court likely would have given the proposed instruction had it been requested, 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). Here, Stewart cannot prove the trial court would have given an instruction defining "armed" for the purpose of the special verdict. A defendant is only entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting his theory. Powell, 150 Wn. App. at 154 (citing State v. Washington, 36 Wn. App. 792, 793, 677 P.2d 786 (1984)).

Here, Stewart cannot even establish that the trial court would have likely given the instruction he now argues for. The State proposed the version of WPIC 2.07.01 that does not include the bracketed information in the second paragraph, which defines "armed with" as having the weapon "easily accessible and readily available for offensive and defensive use." The trial court gave the State's proposed instruction, which is the approved version of WPIC 2.07.01 to be used when the weapon was actually used and displayed. (WPIC 2.07.01, "Note on Use": "Do not use the second paragraph in a case in which the weapon was actually used and displayed during the commission of the crime.") For Stewart to have been entitled to the "armed with" language there would have to have been substantial evidence in the record that Stewart did not pull the knife out of his pocket during the robbery. There was not.

The robbery victim, Miller, testified clearly that Stewart swung a knife at his face, requiring Miller to take evasive action. At trial, Stewart called no witnesses. Stewart now points to a portion of his statement to police that was admitted in the State's case in chief. An officer asked Stewart why he had pulled a knife on the Home Depot employee. 3RP 27. Stewart responded:

> 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 27-28. On appeal, Stewart mischaracterizes that response by claiming that he denied pulling the knife on Miller. He did not. To the officer, Stewart admitted to carrying a knife, he admitted having been angry at Miller for touching him, and he denied only that he had slashed his knife at Miller. His response does not encompass a denial that he displayed the knife to intimidate Miller, only that he did not try to cut him. Without any evidence that the knife had remained in his pocket, unseen by Miller, Stewart fails to establish that he was entitled to the version of WPIC 2.07.01 that includes the additional "armed with" language.

Even if Stewart were able to show that his trial counsel's performance was deficient for not requesting the "armed with" instruction, his claim on appeal fails because he cannot establish a reasonable probability that, but for his attorney's unprofessional errors, the result of the proceeding would have been different. In asking for reversal of the 24-month sentence enhancement, Stewart argues that the jury's verdict might "possibly" have been different had the jury been given the full "armed with" instruction.[6] But a mere possibility is not enough, Stewart must establish a probability that the result would have been different. This he cannot do. The evidence of Stewart's use of the knife was strong and the jury had no reason to disbelieve the testimony of the victim, Joshua Miller.

Miller testified that when he attempted to escort Stewart to the store office, he suddenly heard a "flick" from around Stewart's waist. He used his foot to push away from Stewart, and as he threw himself backward a blade passed within five or six inches of his face. At the time of the trial Miller had been a member of the United States Army National Guard for five years and was a Level 1 combat instructor for the Army.

---

[6] "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." Brief of Appellant at 24 (emphasis added).

He believed that his training had accounted for his instinctive response in pushing away from Stewart with his foot. Miller immediately called 911 and told the operator that a shoplifter had just pulled a knife on him.

Miller was a very credible witness. In addition to being a veteran, after less than a year of employment he had been promoted by Home Depot to a position as head trainer for all asset protection specialists for the district that included 11 Home Depot stores. Miller testified that he was aware that making a false report to police is against the law. He also testified that Home Depot would immediately terminate any asset protection officer for making a false report.

Jurors also heard that Stewart, after running from police and being apprehended, was combative, profane, and belligerent with officers. The defense called no witnesses. There was no rebuttal to Miller's testimony, and there was no reason for jurors to not believe his testimony that Stewart had pulled a knife on him. Giving the jury instruction at issue would not have changed that.

Stewart cannot show a probability that the result would have been different had his attorney requested the full "armed with" jury instruction.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Stewart's conviction and special verdict sentence enhancement.

DATED this 8 day of December, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
DONALD J. PORTER, WSBA #20164
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Dana M. Nelson, containing a copy of the Brief of Respondent, in STATE V.LORENZO STEWART, Cause No. 73163-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date : Dec.8, 2015

Done in Seattle, Washington