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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. 93386-3

NO. 73163-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LORENZO STEWART,

Petitioner.

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

The Honorable Monica Benton, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Lorenzo Stewart asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Stewart COA No. 73163-7-I, filed April 25, 2016, and the Order Denying Motion for Reconsideration, filed May 31, 2016. The decision and Order are attached as appendices A and B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether petitioner was deprived of his Sixth Amendment and article 1, § 22 right to notice of the nature and cause of the accusation where he was necessarily convicted of an uncharged alternative means of committing robbery?

(i) Where the court of appeals decision to the contrary conflicts with this Court's decision in In re Personal Restraint of Brockie, 178 Wn.2d 532, 309 P.3d 498 (2013), should this Court accept review? RAP 13.4(b)(1).

(ii) As this case also involves a significant question of law under the state and federal constitutions, should this Court accept review? RAP 13.4(b)(3).

2. Whether petitioner was deprived of his Fourteenth Amendment and article 1, § 22 due process right to require the state to prove all elements of the sentencing enhancement where the court's instructions eased the state's burden of proof as to whether the alleged knife qualified as a "deadly weapon?"

(i) Should this Court accept review of this significant question of law under the state and federal constitutions? RAP 13.4(b)(3).

3. Whether petitioner was deprived of his Sixth Amendment and article 1, § 22 right to effective assistance of counsel where his attorney failed to request an instruction that was supported by the evidence and would have aided in petitioner's defense?

(i) Should this Court accept review of this significant question of law under the state and federal constitutions? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

1. Facts

Stewart was convicted of first degree robbery while armed with a deadly weapon, allegedly committed on August 27, 2014, against Joshua Miller. CP 1, 16-17; 1RP 2. 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 tried to leave. 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 the 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. However, he did not specify whether he was talking about the blade itself or the blade and handle together. 3RP 71.

Stewart ran from the store on foot with the gift card. CP 5. Police were notified and 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.

Deputy Josephine McNaughten and her partner Allen Long brought Miller from Home Depot to Stewart's location for a possible identification. 3RP 25. After Miller identified Stewart, Long took Miller back to Home Depot and McNaughten remained with Stewart. 3RP 25.

McNaughten asked Stewart why he 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.

Back at the precinct, an officer took a picture of the knife lying next to a ruler to show the length of the blade. 3RP 99. The officer 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. Miller never identified the knife found by the police dog as the knife he claimed Stewart pulled on him.

2. Court of Appeals Decision

(i) Violation of Right to Notice

Stewart was charged with first degree robbery on grounds he *displayed* what appeared to be a deadly weapon during the commission of the robbery. However, the state proposed and the court gave instructions that directed the jury to convict if it found Stewart was *armed* with a deadly weapon during the commission of the robbery. Due to this discrepancy, Stewart argued his constitutional right to notice was violated

and required reversal of his conviction and accompanying sentencing enhancement. Brief of Appellant (BOR) at 11-15; Reply Brief of Appellant (RPLY) at 1-4.

In deciding otherwise, the appellate court held that because Stewart was charged with the sentencing enhancement of being armed with a deadly weapon, he was on notice that he should expect to defend against the charges of "displaying" and being "armed" with a deadly weapon. Appendix A at 7.

In his motion for reconsideration, which the court denied, Stewart argued notice of the sentencing enhancement is not sufficient to give notice of an uncharged means of the underlying crime – that is because a sentencing enhancement is not a separate charge unto itself. It only comes into play if the jury finds the underlying offense proven beyond a reasonable doubt. Thus, depending on the circumstances of the case, it could be reasonable defense strategy to work on creating a reasonable doubt as to the underlying element of displaying what appeared to be a deadly weapon. If there is no conviction of the underlying offense, the enhancement is a non-issue. Motion for Reconsideration (MR) at 3.

(ii) Violation of the Right to Require the State to Prove all the Elements of the Enhancement

For purposes of the deadly weapon 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. Any knife having a blade longer than three inches is a deadly weapon. RCW 9.94A.533(4).

However, the jury here 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.

In his appeal, Stewart argued the instruction failed to inform jurors they must find the knife had a blade longer than three inches in order to answer "yes" to the special verdict. Rather, it only told jurors that one example of a deadly weapon is a knife that has a blade longer than three inches.

The instruction also failed to define "deadly weapon" for purposes of the special verdict. The only definition of "deadly weapon" the jury was given was the one pertaining to robbery, which requires jurors only to

find that the instrument "is readily capable of causing death or substantial bodily harm." CP 12 (emphasis added); WPIC 2.06.01 (2005).

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.

Stewart therefore argued the enhancement must be reversed because the instructions eased the state's burden to prove the knife qualified as a "deadly weapon." BOA at 15-20; RPLY at 5-13.

The appellate court rejected the issue, essentially finding that any error was harmless, reasoning: "If the jury concluded Stewart had a knife at the time of the robbery, it necessarily had to conclude the knife was longer than three inches based on the evidence." Appendix A at 11.

In his motion for reconsideration, Stewart argued the result espoused by the court was not a foregone conclusion. Jurors may have doubted the knife found by police dog Hobbs was in fact the knife used during the robbery. 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 from it. Nor did Miller identify

it. Moreover, although Miller testified the knife was "the length of my hand folded, so probably about four and a half, five inches," he did not say whether he was referring to the blade or the knife in its entirety, including the handle.

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 is not harmless.

(iii). Violation of Right to Effective Assistance of Counsel

Stewart argued he was denied effective assistance of counsel by his attorney's failure to request a "nexus" instruction for the sentencing enhancement, as there was evidence he was in mere possession of a weapon and not "armed" as defined under the law. BOA at 21-24; RPLY at 13-15. In disagreeing, the appellate court reasoned Stewart was not entitled to the instruction. Appendix A at 14 (footnote omitted).

In his motion for reconsideration, which the court denied, Stewart argued the court failed to look at the evidence in the light most favorable to the proponent of the instruction, as is required. MR at 6.

Stewart testified:

> I carry a knife every day, it is my God given right to carry a knife. That man had not 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.

Viewed in the light most favorable to Stewart, his statement supported an inference he merely possessed a knife and did not pull it on Miller. A person is not "armed" merely by virtue of possessing a weapon. Therefore, contrary to the court of appeals decision, it would have been appropriate for the court to instruct the jury – had defense counsel asked – there must be a nexus between the defendant, the weapon, and the crime. Eckenrode, 159 Wn.2d at 494.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE APPELLATE COURT'S DECISION CONFLICTS WITH COURT'S OPINION IN BROCKIE AND INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

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; Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); 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, this 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 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 534 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 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.

This 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. This Court 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, because under the facts of the 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 charged. Brockie, 178 Wn.2d at 539-40.

Under this Court's decision in Brockie, Stewart's due process right to notice was violated. There is no authority for the court of appeals reasoning that the enhancement allegation sufficiently apprised him he would have to defend against the uncharged alternate means of the *underlying charge*. As argued in the motion for reconsideration, it would have been reasonable defense strategy – based on the way the case was charged – to create reasonable doubt as to the underlying element of displaying what appeared to be a deadly weapon.

Moreover, in Brockie, the test for harmfulness was whether the accused could have been convicted of the uncharged means. That test is clearly satisfied here, as the jury was only instructed on the uncharged means.

Because the appellate court's decision conflicts with this Court's decision in Brockie, this Court should accept review. RAP 13.4(b)(1). Review is also appropriate because the case involves a significant question of law under the state and federal constitutions. RAP 13.4(b)(3).

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

Due process requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The same

is true of sentencing enhancements. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Jury instructions that omit essential elements of the crime charged relieve the State of this burden, for they permit the jury to convict without proof of the omitted elements. Therefore, such instructions violate due process. State v. Scott, 110 Wash.2d 682, 690, 757 P.2d 492 (1988).

In order to enhance Stewart's sentence under RCW 9.94A.533(4), the state was required to prove Stewart possessed a deadly weapon, defined as:

> [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, however, 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.

As indicated, the instruction fails to inform jurors they must find the knife had a blade longer than three inches in order to answer "yes" to the special verdict form. Worse, it contains no definition of "deadly weapon" for purposes of the special verdict. The only definition the jury received is the one pertaining to 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).

Obviously, it is easier to prove something is a deadly weapon under the robbery definition. It does not require jurors to find the instrument 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. It only requires an instrument capable of causing substantial bodily harm. These instructions therefore eased the state's burden to prove the sentencing enhancement and violated Stewart's due process rights.

Contrary to the court of appeals, the error was 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 he 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 is not harmless because there is no definitive proof that the knife had a blade longer than three inches. Miller described the knife he saw as four to five inches. However, that could have included the handle.

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. 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 accept review of this significant question of law under the state and federal constitutions. RAP 13.4(b)(3).

3. STEWART RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

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); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). 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.

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 at Home Depot 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. This Court should accept review of this significant question of law under the state and federal constitutions.

F. CONCLUSION

For the reasons stated above, this Court should accept review.

Dated this 30th day of June, 2016.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LORENZO STEWART, Appellant.	)))))))))	NO. 73163-7-I DIVISION ONE UNPUBLISHED OPINION FILED: April 25, 2016

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LEACH, J. — Lorenzo Stewart appeals his conviction and sentence for first degree robbery while armed with a deadly weapon. He argues (1) the jury was improperly instructed on an uncharged alternative means of committing the crime, (2) the trial court's instructions relieved the State of its burden of proof, and (3) he received ineffective assistance of counsel for his attorney's failure to propose a jury instruction providing the definition of "armed." We affirm because the charging information adequately notified Stewart he would face charges based on being "armed" with a deadly weapon, there was no instructional error, and he fails to establish that but for counsel's alleged error the result would have been different at trial.

FACTS

Joshua Miller, a Home Depot loss prevention officer, saw Lorenzo Stewart walk toward the store. Miller observed Stewart get a shopping cart and place a

number of bulky items in his cart. Stewart then pushed the cart to the return desk.

At the return register, Stewart told Chelsea Sneed, a cashier, that the items were from his employer and that he had returned additional merchandise the day before. After Sneed processed the return, she gave Stewart a store credit card with a balance of $290.05.

After watching this, Miller approached Stewart, identified himself, and asked him to come to the office. When Miller attempted to guide Stewart, he became upset and said, "Don't touch me, I can walk on my own." Stewart then veered toward the exit. Miller testified that he "tried to cut off his advance a little bit more with my body." But Miller explained that Stewart then pulled out a knife:

> At that point I will quote, he said, "I'm-a cut you, damn it." At [that] 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.

Miller said the blade came within five to six inches of his face.

Stewart ran toward the exit. Miller followed. Miller called 911 and told the operator, "I'm an asset protection specialist at the Home Depot. I just had a shoplifter pull a knife on me." Miller said the knife was "the length of my hand folded, so probably about four and a half, five inches." Miller described Stewart to the operator and said that Stewart was traveling north on Aurora.

Edmonds Police Officer Kraig Strum responded to the 911 call. He heard another officer radio that he had found Stewart on Aurora. When Officer Strum

arrived, he saw the officer approach Stewart. Stewart said, "I don't know you, man," and fled.

The officers pursued Stewart on foot across Aurora Avenue and into an industrial complex. Eventually, Stewart fell. Officer Strum detained and frisked Stewart. He did not find a knife.

Edmonds K-9 Officer Jason Robinson arrived and began retracing Stewart's path with his dog. The dog led Officer Robinson back through the industrial area. There he found a knife in the middle of the parking lot. The dog indicated to Officer Robinson that the knife was associated with the scent he had been following. The knife was a switchblade-style knife, had a silver clip, and was approximately four inches long.

An officer drove Miller to the site of Stewart's arrest for identification. Edmunds Police Officer Jodi Sackville was with Stewart when Miller drove by. She testified that Stewart looked at the car and yelled, "[T]hat's the asshole that tried to stop me." King County Deputy Sheriff Josephine McNaughton, who was also present, asked Stewart why he pulled his knife. 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."

The State charged Stewart by amended information with one count of robbery in the first degree. The information asserted a deadly weapon sentence

enhancement, alleging Stewart was "armed" with a knife at the time he committed the robbery. After a four-day trial, a jury convicted Stewart of the robbery charge and found by special verdict that he was armed with a deadly weapon when committing the crime. Stewart received a low-end standard-range sentence of 57 months for the robbery conviction and 24 months for the sentencing enhancement for a total sentence of 81 months.

Stewart appeals.

ANALYSIS

Uncharged Alternative Means

Stewart claims that the trial court improperly instructed the jury on an uncharged alternative means of committing first degree robbery. Specifically, he claims that the State charged him with "displaying" a deadly weapon, but the trial court instructed the jury that it could convict Stewart if it found he was "armed" with a deadly weapon.

The state and federal constitutions provide criminal defendants the right to be notified of the nature and cause of the accusation against them.[1]

> [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.[2]

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[1] WASH. CONST. art. I, § 22; U.S. CONST. amend. IV; State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

[2] State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942).

When the manner of committing a crime is an element of the offense, the defendant must be informed of this element in the information in order to prepare a proper defense.[3] We presume any instruction that allows a jury to convict on an uncharged alternative means prejudices the defendant, and on direct appeal the State must prove the error was harmless beyond a reasonable doubt to avoid reversal.[4]

RCW 9A.56.200 describes three alternative means of committing robbery in the first degree:

> (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.

Here, the State's amended information charged Stewart with robbery in the first degree on the grounds that "in the commission of and in immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon, to-wit: a knife." (Emphasis added.) The amended information also asserted a sentencing enhancement, alleging, "Lorenzo Stewart at said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW 9.94A.825 and 9.94A.533(4)." (Emphasis added.)

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[3] State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).
[4] State v. Laramie, 141 Wn. App. 332, 342-43, 169 P.3d 859 (2007).

The court's instructions to the jury, however, stated that "[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." (Emphasis added.) Stewart argues this was error.

Stewart relies principally on In re Personal Restraint of Brockie.[5] There, as here, the information alleged that Brockie committed first degree robbery on the grounds that he "displayed what appeared to be a firearm or other deadly weapon."[6] The jury instructions, however, stated two alternative means of committing first degree robbery, namely, that "he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon."[7] The court concluded this was error because "[n]othing 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."[8] But using the different standard of review for personal restraint petitions, the court found that based on the record, any juror who found Brockie was armed with the weapon would have necessarily also concluded that he displayed it.[9] The court denied Brockie's petition.

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[5] 178 Wn.2d 532, 538, 309 P.3d 498 (2013).
[6] Brockie, 178 Wn.2d at 535.
[7] Brockie, 178 Wn.2d at 535.
[8] Brockie, 178 Wn.2d at 538.
[9] Brockie, 178 Wn.2d at 539.

On direct appeal, the appellate court presumes that erroneous instructions given on behalf of the State prejudiced the defendant unless the record affirmatively shows the error was harmless.[10] Stewart claims the record does not show this because, unlike Brockie, the record here includes evidence that he was armed with but did not display the knife. For instance, he told police it was his "God given right to carry a knife." (Emphasis added.) He stated, "If I would have slashed a knife at that man, you wouldn't have been able to talk to him." Thus, in Stewart's view, it is possible the jury found he was armed with but did not display the knife. Assuming Stewart received no notice of the alternative means of being "armed" with a deadly weapon, this would be prejudicial error.

But a charging document need not use the exact words of the statute if it uses words conveying the same meaning that give reasonable notice to the defendant of the charge.[11] Here, the sentencing enhancement allegation for the robbery charge accused Stewart "of being armed with a deadly weapon" at the time he committed the robbery. Read together, the robbery charge and related sentencing enhancement allegation gave Stewart notice that he should expect to defend against the charges of "displaying" and being "armed" with a deadly weapon. Thus, the discrepancy between the charging information and the to-convict instruction did not prejudice him. It was not reversible error.

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[10] Brockie, 178 Wn.2d at 538-39.

[11] In re Pers. Restraint of Benavidez, 160 Wn. App. 165, 170, 246 P.3d 842 (2011).

Stewart replies that the language in the sentencing enhancement is insufficient to provide notice because the jury only considers the enhancement if it finds him guilty of the predicate crime. We disagree. The question is whether Stewart received fair notice of the alternative means of being "armed" with a deadly weapon in the charging information, not the order in which the jury considers the crime and sentencing enhancement during deliberations.

Stewart's alternative means challenge fails.

Instructional Error

Next, Stewart argues that the sentencing enhancement instructions relieved the State of its burden to show the knife was a "deadly weapon." He did not object to the instructions below.

At the outset, the State claims that Stewart has failed to explain why he can raise this issue. In most cases, appellate courts decline to consider issues raised for the first time on appeal.[12] RAP 2.5(a)(3) provides an exception for claims of manifest error affecting a constitutional right.[13] Stewart fails to cite or discuss RAP 2.5 and thus arguably fails to demonstrate his entitlement to appellate review. But he identified the error as constitutional in his briefing and argues that it affected the outcome at trial. Even assuming he properly raises the issue, we find no error.

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[12] RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

[13] Kirkman, 159 Wn.2d at 926.

"'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'"[14] Jury instructions must convey that the State bears the burden of proving each essential element of the offense beyond a reasonable doubt.[15] "It is reversible error if the instructions relieve the State of this burden."[16] Generally, the Sixth Amendment requires that the jury must find any fact increasing the penalty for a crime beyond a reasonable doubt.[17]

We review jury instructions de novo to ensure they accurately state the law, do not mislead the jury, and allow the parties to argue their theories of the case.[18]

RCW 9.94A.825 defines a deadly weapon for the purposes of a sentencing enhancement and states:

> For the 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.

(Emphasis added.)

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[14] State v. Sibert, 168 Wn.2d 306, 315, 230 P.3d 142 (2010) (quoting Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)).

[15] Sibert, 168 Wn.2d at 315.

[16] Sibert, 168 Wn.2d at 315.

[17] Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[18] State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

Here, jury instruction 17 stated that a knife with a three-inch blade was a per se deadly weapon for the purposes of the sentencing enhancement:

> 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.

For the first degree robbery charge, the court instructed the jury on the definition of a 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.

Stewart makes two claims. First, he contends jury instruction 17 failed to inform the jury that it had to find the knife blade was longer than three inches to answer "yes," the knife was a deadly weapon, on the special verdict form. Instead, he argues the jury instruction merely provided one example of a deadly weapon. Second, he argues the special verdict form contains no definition of deadly weapon. As a result, Stewart argues the jurors may have doubted the knife found by officers was the knife he used at Home Depot, yet still believed he used a knife not presented at trial. According to Stewart, this would allow the jury to convict him of using a deadly weapon even if it believed he used a knife blade that was less than three inches long.

Again, we disagree. Miller described the knife in his 911 call as the length of his "hand folded, so probably about four and a half, five inches." The knife

recovered after Stewart's arrest was located along the path he fled and was identified by a police dog as associated with the scent it was tracking. The four-inch knife was shown to the jury. No evidence of another knife was presented at trial. Thus, the overwhelming evidence established that Stewart brandished a four-inch knife at Miller. If the jury concluded Stewart had a knife at the time of the robbery, it necessarily had to conclude the knife was longer than three inches based on the trial evidence.

Any knife with a blade longer than three inches is a deadly weapon as a matter of law.[19] When the State alleges that the defendant used a per se deadly weapon, "[t]he jury should be instructed the implement is a deadly weapon as a matter of law."[20] The instruction does not, as Stewart contends, merely provide an example of a deadly weapon. We conclude the trial court did not err by instructing the jury that the knife was a per se deadly weapon.

Ineffective Assistance of Counsel

Stewart claims his attorney was ineffective for failing to request an instruction defining the term "armed" where there was evidence Stewart merely possessed the weapon. We disagree.

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[19] RCW 9.94A.825.

[20] State v. Rahier, 37 Wn. App. 571, 576, 681 P.2d 1299 (1984). Rahier was decided based on RCW 9.95.040, a statute predating the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW. But the case applies because the SRA's definition of deadly weapon for enhancement is unchanged. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.07 cmt. at 41 (3d ed. 2008) (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).

A defendant claiming ineffective assistance of counsel has the burden of showing that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defendant's case.[21] To show prejudice, Stewart must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[22] The claim fails if the defendant does not establish either prong.[23] Counsel's performance is deficient if it falls below an objective standard of reasonableness.[24] Our review of counsel's performance is highly deferential, and we strongly presume reasonableness.[25]

To establish deficient performance, Stewart 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.[26] Our Supreme Court has held that a person is "armed" as a matter of law if "a weapon is easily accessible and readily available for use, either for offensive or defensive purposes," and a nexus exists between the defendant, the

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[21] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
[22] Strickland, 466 U.S. at 694.
[23] Strickland, 466 U.S. at 700.
[24] State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).
[25] McFarland, 127 Wn.2d at 335.
[26] State v. Powell, 150 Wn. App. 139, 154-55, 206 P.3d 703 (2009).

weapon, and the crime.[27] "Jury instructions need not, however, expressly contain 'nexus' language."[28]

Stewart argues that his attorney's failure to request a "nexus" instruction constitutes deficient performance. He argues he told officers it was his "'God given right to carry a knife' but that he did not pull it on Miller." Based on this assertion, Stewart argues "it is possible [the jury] 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."

His argument is unpersuasive. Stewart's statement did not encompass a denial of pulling or using a knife. He claimed during his arrest that it was his "God given right to carry a knife," then stated, "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."

Furthermore, overwhelming evidence supports the conclusion that Stewart did not merely possess the knife but used it during the robbery. Miller's unrebutted testimony was that he heard a "flick," threw himself back, and saw a blade pass within five or six inches of his face. After giving chase, officers recovered the knife on the same path Stewart used to flee. The jury also heard

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[27] State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993); State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007).

[28] State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005).

Stewart's confrontational statement about Miller where he said, "[T]hat's the asshole that tried to stop me."

A defendant is entitled to a jury instruction if substantial evidence in the record supports his theory.[29] We do not find substantial evidence in the record to support the nexus instruction. To the contrary, the overwhelming evidence demonstrated that Stewart did not merely possess a knife but used it in the commission of the crime.

For the same reason, Stewart does not show a reasonable probability that but for his attorney's failure to request the instruction the result at trial would have been different. Indeed, the trial evidence clearly showed Stewart actually used the knife during the robbery. This is sufficient to establish that the knife was easily accessible and readily available for either offensive or defensive purposes and was used in connection with the robbery.

Stewart's claim for ineffective assistance of counsel fails.

We affirm.

Leach, J.

WE CONCUR:

Trickey, ACJ

Spearman, J.

[29] Powell, 150 Wn. App. at 154.

APPENDIX B

Lorenzo Stewart

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LORENZO STEWART, Appellant.	NO. 73163-7-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Lorenzo Stewart, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 31st day of May, 2016.

FOR THE COURT:

Leach J.
Judge

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Transmittal Letter

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Case Name: Lorenzo Stewart
Court of Appeals Case Number: 73163-7

Party Respresented:

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: King - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
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  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

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