

62939-5

62939-5

NO. 62939-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

GAVIN HAGGITH,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's refusal to strike the jury panel after a member of the venire indicated he worked in the jail, knew appellant from jail, and was prejudiced against appellant, deprived appellant of a fair trial before an impartial jury.

2. The state's introduction of evidence of appellant's prior drug use without establishing relevance, in violation of the trial court's pre-trial ruling, unfairly prejudiced appellant.

3. The trial court's jury instructions misstated the law, thereby relieving the state of the burden of proving every element of the deadly weapon enhancement.

4. The trial court's jury instruction setting forth the state's burden of proof for the deadly weapon enhancement constituted an impermissible judicial comment on the evidence.

5. The trial court erroneously denied appellant's request for an inferior-degree instruction.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by denying appellant Gavin Haggith's motion for a new jury panel after a member of the venire stated, in the presence of the entire panel, that he had "day-to-day"

contact with Haggith at the jail due to his work as a corrections officer, and that he would likely be biased against Haggith?

2. Did the state's introduction of photographs showing needle marks on Haggith's arms without establishing the relevance of the evidence, in violation of the trial court's pre-trial ruling, unfairly prejudice Haggith?

3. Did the trial court's jury instructions misstate the law, thereby relieving the state of the burden of proving every element of the deadly weapon enhancement?

4. Did the trial court improperly comment on the evidence in the jury instruction setting forth the state's burden of proof for the deadly weapon enhancement?

5. Did the trial court err by denying Haggith's request for an inferior-degree instruction, where Haggith denied he committed the crime or possessed a knife, no knife was recovered, and the testimony of the witness who claimed to have seen the knife raised questions about her perception and memory?

B. STATEMENT OF THE CASE

Following jury trial in Whatcom County Superior Court, Gavin Haggith was convicted of first-degree robbery, with a deadly weapon enhancement. The charge stemmed from an alleged

convenience store robbery. Haggith denied any involvement to investigating officers and asserted a defense of general denial. RP 441-47.

1. Underlying Facts

Convenience store clerk Virginia Holz testified she was robbed on the morning April 23, 2008. She was alone in the store when a man entered wearing “all black” or “dark colors,” including a brown or black coat and a black stocking cap.¹ RP 120, 124, 127. He took a bag of chips from a rack, approached the checkout counter, and placed the bag on the counter. RP 127. He paid for the chips in quarters. RP 128. When Holz opened the register to make change, the man reportedly pulled out a knife and made a jabbing motion towards her, causing her to jump back. RP 128.

When the man reached into the register drawer, Holz slammed the drawer on his hand. RP 128. The man was able to grab some money from the drawer before running out the front door. RP 129-30. Holz called 911 to report the robbery. RP 130.

¹ The Verbatim Report of Proceedings (VRP) for Haggith’s jury trial consists of 5 bound volumes, consecutively paginated, referenced herein as “RP.” This brief refers to the VRP of the jury voir dire as “1RP.”

Two neighbors observed a man running away from the store. Becky Eastwood, who lived near the convenience store, testified that she was looking out one of the windows in her house at around 8:00 a.m., and saw a man run from the convenience store, and cross the street by her house. RP 153. She said the man was tall and slender and dressed in "all black." RP 154. Later that morning, she called 911 and reported what she saw. RP 156-57.

Theresa Ann Smith, another neighbor, also saw a "young man running down the alley and into the backyard of the house next door." RP 159. She described him as "medium height, tallish, [and wearing] dark clothes, and a hat." RP 159-60. She saw him climb onto the deck of the house, but did not see him enter because her view was partially obstructed. RP 162. She knew the woman who owned the house rented it to "two young men." RP 159. Later that morning, she saw a police officer and told him what she had seen. RP 164-65.

After officers arrived at the convenience store, Holz discovered that the man had taken all of the \$10 bills from the register. RP 130-31. An officer thereafter took Holz to try to identify a potential suspect. RP 352, 354, 357-62. Police had canvassed the area and detained a tall, thin man with long red hair

as the possible robber. RP 132, 359. Holz ruled him out, however, based on his red hair. RP 132, 359.

Holz thereafter ruled out another suspect, Nate James. RP 133, 361. Officers had stopped a car leaving the house identified by Smith and spoke with its driver, James, one of the two men who rented the house. RP 283-84, 303-313. James, who was on his way to work, told the officers his roommate, Jesse Hammond, and another individual, Haggith, were sleeping in the house. RP 179-80, 316. Holz was brought to James' car and confirmed James was not man who robbed the store. RP 133, 314, 362. Holz described James as a "fat guy," and ruled him out based on his build. RP 133, 361.

Thereafter, Officers Carr Lanham and Melissa Locke knocked on the front door of the house. RP 198-201, 260, 316-17. Hammond answered the door and allowed the officers in. RP 198-201, 260, 316-17. Haggith got up shortly thereafter. RP 198, 200-201. Lanham observed that Haggith had a scrape and dried blood on one finger. RP 318. Haggith explained he scraped his finger on the back porch the night before. RP 319. Officers took Haggith onto the front porch for Holz to see. RP 133. Although Holz testified that Haggith was not wearing the same clothes as the

robber,² she claimed he was the one who she saw in the store. RP 133, 148, 366.

The officers later obtained a search warrant for the house. Officers reportedly found dark clothes throughout. RP 270, 322. They did not find a black hat, although they recovered a brown knit cap. RP 266, 279-80. They did not find an entirely black jacket, although they found a dark blue jacket and a brown and black leather jacket. RP 295, 299-300, 325-26. They also found a pair of shoes atop a laundry hamper in a downstairs closet. RP 268, 292. Inside the shoes was a wad of \$10 bills. RP 268, 292. In addition, officer Locke later returned to the yard Smith saw the man run through, and found a \$10 bill on the ground. RP 371.

Officer Donna Miller spoke with Haggith. RP 441-47. Haggith asserted his innocence and denied owning a knife. RP 444-47. He also denied having knowledge of the money found in the shoe in the closet. RP 446-47. He explained that the cash found in the house was likely Hammond's, as Hammond was a drug dealer who stashed money all over the house. RP 446-47. When asked for his whereabouts the previous night, Haggith said

² At the time he was shown to Holz, Haggith wore a white jacket, while the suspect wore only dark clothing. RP 224.

he had been out drinking with Hammond. RP 443. He said he and Hammond returned to Hammond's house, played guitar, and fell asleep on the couches. RP 443. He explained his finger injury, saying that he went to the back porch for a cigarette, and stumbled because he was drunk. RP 443-444. He told Miller he scraped his finger on the chicken wire that surrounded the back porch. RP 444.

Officers later took blood and saliva samples from Haggith, and sent selected items to the state crime lab for testing. RP 395-99. The lab tested a bloodstain from Haggith's jeans, stains from a recovered \$10 bill, and skin cells from the shoes found containing the bills. RP 482-82. The state's DNA expert, Dr. Greg Frank, testified that the blood on Haggith's jeans contained DNA matching Haggith's DNA.

While there was no blood on the shoes, Frank testified that DNA recovered from the laces was a mixed sample that could have come from 1 in 190 individuals, and did not exclude Haggith as the source. RP 497. The stains on the \$10 bill were either negative or inconclusive for the presence of Haggith's DNA. RP 485-86.

Haggith's DNA expert, Dr. Donald Riley, testified that the low amount of DNA on the shoes was consistent with cross-contamination, and noted that the sample appeared to contain DNA

from three individuals, which is conducive to mistakes in the profiling process. RP 534-35.

At trial, James testified he was home the night of April 22 and the morning of April 23. RP 171-73. When he woke up between 8:15 and 9:15 a.m. on April 23, he saw Hammond and Haggith sleeping. RP 171-73. James testified that both he and Hammond had dark clothes in the house. RP 187-89. While testifying, he was shown a photograph of the shoes police found later that morning, with the \$10 bills stuffed inside. RP 184-85. He claimed that the shoes did not belong to either him or Hammond. RP 185.

Holz claimed the robber wielded a knife, and drew a picture of the knife for officers, but she did not testify about the length of the knife blade. RP 149. The picture was admitted at trial. RP 149, Trial Ex. 10. Hammond claimed that the night before the robbery, Haggith showed him a knife he carried for protection. RP 207-08. Hammond described the knife as having a polished steel blade, a black, synthetic handle, and a serrated edge. RP 208-09.

He also did not testify about the length of the blade. RP 208-09. The officers did not recover a knife matching either Hammond's or Holz's description in their search of the house, and

no knife was offered in evidence at trial. When Holz was shown several items of dark clothing officers recovered from the house, she said that all of the items were different from the clothes worn by the robber. RP 142-43.

Holz also acknowledged that she misremembered some details about the suspect's clothing. RP 148-50. For example, she initially told officers the suspect wore a coat with a "starburst" design on the back. RP 148. She later realized that one of her regular customers wears a jacket with a "starburst" design, and she admitted that she was mistaken when she described the suspect's jacket. RP 148-50.

At trial, Hammond testified that he owned "a lot" of black clothes, and kept black clothes scattered throughout the house. RP 215. He was also shown the photographs of the shoes with the money inside and claimed he had not seen the shoes before. RP 211.

2. Voir Dire / Tainted Jury Pool

During voir dire, in the presence of the entire venire, Juror 31 indicated that he worked in the jail and was familiar with Haggith from his job. In response to the trial court's question whether

anyone in the venire panel knew Haggith, Juror 31 answered: "I work in the jail, so I have day-to-day contact with him." 1RP 12.

In response to questioning by the prosecutor, Juror 31 also admitted that he was biased against Haggith. 1RP 53. The prosecutor asked whether anyone in the panel was likely to be biased against the defendant:

Now, is there anybody here that doesn't think in their common-sensical kind of way that you know what, there's a charge. There must be smoke here. If there's smoke, there might be a little fire, and you just logically think the defendant must have done something, even though you heard no evidence here? Is there any of you here that thinks there must be something here?

1RP 52-53. Juror 31 answered, again in the presence of the entire venire: "I have probably more of that than the regular person." 1RP 53.

Haggith's counsel made a timely objection and filed a written motion for a mistrial before the jury was empanelled, arguing that the entire panel was tainted by Juror 31's remarks. RP 97-99, CP 52-54. The trial court dismissed Juror 31 during a break, but did not explain Juror 31's absence or give any curative instruction to the remaining jurors. See RP 101-105, 1RP 127. The attorneys

completed voir dire, and the trial court empanelled a jury. 1RP 140, RP 99. Thereafter, the trial court heard argument. RP 99-113.

Haggith's counsel asserted that Juror 31's remarks violated Haggith's constitutional rights to a fair trial, an impartial jury and the presumption of innocence. RP 100. Counsel argued that the only remedy was to declare a mistrial and begin again with a new jury panel. RP 102.

The prosecutor argued that the suggestion Haggith was in custody was not unfairly prejudicial, as there would be evidence at trial that Haggith was arrested on April 23, 2008, and was in custody for a period of time after his arrest. RP 103-04.

The trial court concluded that the fact of Haggith's custodial status was not as prejudicial as if the jury had seen him in shackles, and that the jury might not perceive Haggith to be jailed. RP 108. Rather, the trial court reasoned, the jury might conclude he was Juror 31's co-worker at the jail. RP 108. The trial court also stated that Juror 31's statements did not refer to other crimes or unrelated charges. RP 110-11. The trial court denied Haggith's motion for a mistrial, reasoning that the dismissal of Juror 31 was the proper remedy, the panel was not tainted, and the jury would follow the court's instructions not to engage in speculation. RP 112-13.

3. Drug Evidence

Prior to trial, Haggith's counsel moved to exclude evidence of Haggith's drug use. RP 63-68. The trial court prohibited the prosecution from presenting evidence of Haggith's drug use prior to the night of April 22, 2008, but allowed the prosecutor to present evidence of Haggith's drug use that night, finding it potentially relevant to Haggith's intent, opportunity, preparation, knowledge, and ability to perceive and recall the events at the relevant times. RP 63-66. The trial court also expressly allowed Haggith's counsel to raise a continuing objection to the drug use evidence. RP 67.

Haggith's counsel also objected to the admission of certain of the state's proposed trial exhibits, comprising photographs of Haggith's hands and forearms, which showed needle marks along his veins, as well as the injury to his finger. RP 67. Haggith's counsel argued that such evidence was improper under ER 404(b) and irrelevant. RP 67. The prosecutor countered that the evidence could be relevant, provided a properly qualified expert testified that the needle marks were "fresh" and not "old or scars," because "fresh marks" would confirm drug use during the night of April 22 and early morning of April 23, 2008. RP 68. The trial court held

that the prosecutor would be required to establish that its expert was qualified to make such a determination, and that the evidence would only be admissible to corroborate Hammond's testimony³ regarding drug use the night before the robbery. RP 69.

At trial, the state offered and the court admitted the photographs showing Haggith's needle marks. RP 320-322; Trial Ex. 20-23.

Although the defense indicated it had "no objection" at the time the photos were offered, it was defense counsel's – as well as the trial court's – understanding that counsel's continuing objection was still in effect, and that it was "just not an objection that was voiced at this point in time." RP 403.

During a break in testimony and outside the jury's presence, the trial court reminded the prosecutor of its pretrial ruling, and indicated that the state still needed to establish its expert was qualified to determine whether the marks were fresh "if there's going to be further testimony about the nature of the needle marks." RP 402. The prosecutor indicated that he did not plan to introduce testimony that the needle marks were "fresh" or that they were "old," and would not establish a foundation for such opinion testimony. RP 402-04.

³ Hammond was anticipated to testify that that on the night of the April 22, he and Haggith used a variety of drugs together. RP 62.

Hammond testified that on the night of April 22, he and Haggith injected a variety of drugs together, including amphetamine, heroin and cocaine. RP 205-07.

4. Requested Inferior-Degree Instruction

Haggith requested the trial court to instruct the jury on the inferior-degree offense of second-degree robbery, arguing that the jury could reasonably conclude that Haggith robbed the store, but was not armed with a deadly weapon at the time. RP 559, 562-64.

Specifically, counsel argued there was evidence that only the lesser offense was committed, because: (1) Haggith's statements that he did not commit the crime and did not have a knife were in evidence; (2) the descriptions of the knife given by Hammond and Holz differed; (3) aspects of Holz's testimony cast doubt on her perception, giving the jury reason to doubt that she actually saw a knife; and (4) no knife was ever recovered. RP 562-64.

The trial court declined to give the instruction, holding that there was no evidence that Hammond committed the robbery, but did so without a knife, stating: "the facts are such that the you cannot separate the knife from the alleged facts of the robbery itself." RP 563-64.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING HAGGITH'S MOTION FOR A MISTRIAL AFTER A MEMBER OF THE VENIRE, A CORRECTIONS OFFICER, STATED HE HAD "DAY-TO-DAY" CONTACT WITH HAGGITH AT THE JAIL AND THAT HE WOULD BE BIASED AGAINST HAGGITH AS A RESULT.

Juror 31 revealed to the entire venire that he worked in the jail as a corrections officer, had day-to-day contact with Haggith there, and was therefore biased against the defense. The trial court erred by denying Haggith's motion to strike the jury panel, prejudicing his constitutional right to a fair trial before an impartial jury.

Both the Sixth Amendment of the United States Constitution and article 1, section 22 of our state constitution guarantee a defendant the right to a fair trial by an impartial jury. State v. Roberts, 142 Wn.2d 471, 517, 14 P.3d 713 (2000) (quoting State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995)); State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). State and Federal due process guarantees also entitle a defendant be tried by a jury capable and willing to decide the case solely on the evidence before it. Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 945-

46, 71 L. Ed.2d 78 (1982); State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994).

Although a motion to strike the jury venire is distinct from a motion for mistrial because during voir dire trial has not yet begun, courts and attorneys often conflate the two concepts and treat a motion to strike an entire prospective jury panel as a motion for mistrial. See, e.g., State v. Berty, 136 Wn. App. 74, 77, 147 P.3d 1004 (2006); In re Det. of Griffith, 136 Wn. App. 480, 482, 150 P.3d 577 (2006). Appellate courts review a trial court's denial of a motion to strike a prospective jury panel for abuse of discretion. See Roberts, 142 Wn.2d at 518-19, citing State v. Tingdale, 117 Wn.2d 595, 599-600, 817 P.2d 850 (1991); State v. Guthrie, 185 Wash. 464, 474, 56 P.2d 160 (1936); State v. Killen, 39 Wn. App. 416, 418-19, 693 P.2d 731 (1985)). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997).

An instructive case is Mach v. Stewart, 137 F.3d 630 (9th Cir. 1997). In that case, during voir dire, a potential juror stated: (a) she had expertise in child psychology and worked with children as a social worker for at least three years; (b) she had never been

involved in a case in which a child accused an adult of sexual abuse where that child's statements had not been borne out; and (c) she had never known a child to lie about sexual abuse. Mach, 137 F.3d at 632-33. Mach moved for a mistrial, and the trial court denied the motion. Mach, 137 F.3d at 632. On appeal, Mach argued that the potential juror's remarks tainted the jury pool to the extent that the court should have granted a mistrial. Finding that the potential juror's comments tainted the entire jury pool, the Ninth Circuit Court of Appeals reversed his conviction. Mach, 137 F.3d at 631.

In reviewing Mach's claims, the Ninth Circuit observed that certain trial errors are "structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." Mach, 137 F.3d at 632 (quoting California v. Roy, 519 U.S. 2, 3, 117 S. Ct. 337, 338, 136 L. Ed.2d 266 (1996)). The Mach court further observed: "The existence of such defects[. . .] requires automatic reversal of the conviction because they infect the entire trial process." 137 F.3d at 632 (quoting Brecht v. Abrahamson, 507 U.S. 619, 629-30, 113 S. Ct. 1710, 1717, 123 L. Ed.2d 353 (1993)).

The Mach court concluded that the error was "arguably" a structural error requiring automatic reversal. 137 F.3d at 633.

However, the Mach court determined that the error required reversal even under a harmless-error standard, and did not resolve whether the trial court's denial of a mistrial was such a "structural" error. 137 F.3d at 634.

Whether Juror 31's remarks constituted structural error or are subject to harmless error analysis, reversal is required here. The state bears the burden of proving constitutional error did not prejudice Haggith. State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001) (citing State v. Belmarez, 101 Wn.2d 212, 216, 676 P.2d 492 (1984)). The state cannot make the necessary showing here.

Juror 31's remarks prejudiced Haggith in two ways. First, they conveyed to the venire panel the fact that Haggith was in custody. This was highly prejudicial. See, e.g., Gholston v. State, 620 So.2d 715, 716 (Ala. Cr. App. 1992) (when defendant's incarceration is brought to jury's attention "there is a danger that the jury will convict on general principles" and the presumption of innocence is in danger of "going out the window") *aff'd*, 620 So.2d 719 (1993). Here, the jury was wrongly made aware of the need to separate Haggith "from the community at-large." The danger of unfair prejudice is especially high in a case such as Haggith's,

where a violent offense is alleged. See, e.g., State v. Finch, 137 Wn.2d 792, 845, 975 P.2d 967 (1999).

Second, the remarks conveyed Juror 31's opinion that his exposure to Haggith made him biased against the defense, and more likely to conclude Haggith was guilty. The fact that Juror 31 expressly stated that he would be prejudiced against the defense and more likely to believe that Haggith was guilty undercut the trial court's opinion that the jury might have concluded Haggith was Juror 31's co-worker, as opposed to an inmate.

The prejudice was magnified by the panel's knowledge that Juror 31 was a corrections officer. Because Juror 31 identified himself as such, the jurors were likely to accord respect and weight to his opinions. See State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) (police officers' testimony carries an "aura of reliability"). As in Mach, here a potential juror whose professional experience gave him special expertise and knowledge tainted the entire jury panel by stating prejudicial facts and opinions. As in Mach, the jury panel here was likely to accord juror 31's opinion significant weight.

And significantly, concerns of judicial economy were not implicated here, as trial had not yet started. Given the prejudice

engendered and the early stage of proceedings, the trial court should have granted Haggith's motion. This Court should reverse.

2. THE STATE'S INTRODUCTION OF PHOTOGRAPHS SHOWING NEEDLE MARKS ON HAGGITH'S ARMS WITHOUT ESTABLISHING THE RELEVANCE OF THE EVIDENCE, IN VIOLATION OF THE TRIAL COURT'S PRE-TRIAL RULING, UNFAIRLY PREJUDICED HAGGITH.

The state introduced inflammatory evidence of Haggith's drug use without establishing its relevance, contrary to the trial court's pre-trial ruling and ER 404(b). Because the evidence was unfairly prejudicial and had no probative value, Haggith was denied a fair trial.

The evidence of Haggith's prior drug use implicates ER 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Under ER 404(b), evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character or action in conformity therewith. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). When determining whether evidence is

admissible under ER 404(b), the trial court engages in a four-step analysis: it must (1) determine, by a preponderance of the evidence, whether the prior bad act occurred; (2) determine the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged or to rebut a defense; and (4) balance the probative value of the evidence and its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Haggith objected to the photographs showing his forearms with needle marks, and the trial court ruled that the state would be required to present testimony that the needle marks were “fresh” from the night before the robbery in order for the evidence to be relevant. The trial court informed the prosecutor that he would be required to lay a foundation that any witness so testifying was qualified to offer an opinion about whether the marks were “fresh” as opposed to “old” or “scars.”

Contrary to the trial court’s ruling, the state introduced the photographs at trial, but never presented the testimony that made the evidence relevant -- i.e., that the needle marks were “fresh” as opposed to “old” or “scars.” The evidence of the needle marks, and

by implication injection drug use, carried only unfairly prejudicial value.

The evidence of Haggith's drug use at unspecified times in the past, though not relevant, was unfairly prejudicial because it allowed the jury to speculate that Haggith had a habit of injecting drugs, such as heroin, cocaine, or methamphetamine, substances commonly known to be addictive. Because the jurors were likely to conclude that Haggith was a drug addict based on the photographs of his needle marks, they were also likely to speculate that Haggith needed money to fund his habit, providing a motive for the robbery.

The photos also unfairly prejudiced Haggith because the jurors were likely to draw a range of negative opinions of Haggith if they perceived him as an injection-drug addict — a conclusion they would not have been likely to reach absent the photographs, as Hammond only testified about one night of drug use while partying, and Haggith denied using drugs other than alcohol. This is precisely the type of unfair prejudice the trial court sought to avoid by requiring the state to introduce the evidence for the limited purpose of establishing that Haggith used drugs the night before the robbery, and not at unspecified times in the past.

The state may argue any error is waived because the defense indicated it had “no objection” at the time the photos were offered. This Court should reject such an argument. Before trial, the court allowed defense counsel to note a standing objection to the evidence, and the trial court expressly stated its understanding that the continuing objection was still in effect and was “just not an objection that was voiced” in the jury’s presence when the photos were offered and admitted. RP 403. During trial, the court brought the prosecutor’s failure to make the photographs relevant to his attention, noting Haggith’s continuing objection to the evidence. RP 402.

The error was not harmless, as Haggith contested the state’s version of events in his statement to officers, and denied using drugs other than alcohol. By presenting irrelevant evidence that Haggith used injection drugs at unspecified times in the past, the prosecutor unfairly prejudiced the jury against Haggith, making them less likely to believe his protestations of innocence. Haggith was deprived of his constitutional right to a fair trial as a result.

3. THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE EVERY ELEMENT OF THE DEADLY WEAPON ENHANCEMENT.

In every criminal prosecution, the state must prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). This Court will therefore reverse a conviction if the jury instructions relieved the state of its burden of proving every element beyond a reasonable doubt. State v. Cronin, 142 Wash.2d 568, 579-580, 14 P.3d 752 (2000). Reversal of the deadly weapon enhancement is required because the jury instructions relieved the state of its burden to prove the alleged knife was likely to inflict death as opposed to substantial bodily harm.

On appeal, this Court reviews instructional errors de novo. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). Due process, under both the United States and Washington constitutions, requires that the jury be instructed on all the essential elements of the crime charged. U.S. Const. amend. VI; Const. art. I, § 22; Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d

889 (2002); State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003). “Accordingly, a trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt.” State v. Williams, 136 Wn. App. 486, 493, 150 P.3d 111 (2007) (citing State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Stewart, 35 Wn. App. 552, 554-55, 667 P.2d 1139 (1983)).

When the term “sentence enhancement” describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an “element” of a greater offense than the one covered by the jury's guilty verdict. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (citing Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000)). Except in circumstances not present in this case,⁴ an erroneous jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has relieved the state of its burden to prove each element of the case. Brown, 147 Wn.2d at 344 (citing Neder v.

⁴ See Recuenco, 163 Wn.2d 441-42 (harmless error doctrine does not apply where “the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find.”)

United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed.2d 35 (1999)).

The “deadly weapon” enhancement in this case describes an increase beyond the maximum authorized statutory sentence, and is, accordingly, an “element” of a greater offense than the one covered by the jury’s verdict. Although Haggith did not object to the instruction, the “issue of omission of an element from that instruction is of sufficient constitutional magnitude to warrant review when raised for the first time on appeal.” State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

The definition of “deadly weapon” for purposes of first-degree robbery is different from the definition provided by the sentencing enhancement statute. RCW 9A.04.110(6) defines deadly weapon for purposes of first-degree robbery:

(6) “Deadly weapon” means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a “vehicle” as defined in this section, 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**.

(Emphasis added).

On the other hand, RCW 9.94A.602 defines “deadly weapon” for purposes of a special verdict:

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

(Emphasis added).

In this case, the jury was not instructed on the definition of “deadly weapon” for purposes of the special verdict. CP 47 (Jury instruction 15). Rather, the only instruction defining “deadly weapon” was that contained in jury instruction 8, which defined “deadly weapon” for purposes of robbery. CP 39. Whereas the definition applicable to the enhancement requires jurors to find that the weapon had the capacity to inflict *death* and from the manner in which it was used, was likely to produce or may easily and readily produce *death*, the definition applicable to robbery merely required the jury to find that the implement was readily capable of causing *substantial bodily harm*. Accordingly, the instructions eased the state’s burden of proving the elements of the enhancement.

The error was not harmless. No knife was admitted into evidence. Jurors therefore did not have evidence of a deadly weapon *per se* – i.e., a knife with a blade longer than three inches. There was no testimony about the length of the knife blade. The only other evidence concerning the knife’s appearance was Holz’s drawing. Trial Exhibit 10. Based on the lack of any specific evidence from which jurors could resolve the knife’s physical qualities, the jurors likely found the knife qualified as a deadly weapon due to the manner in which it was used. In resolving this issue, the jury could have concluded that the knife was capable of causing substantial bodily harm, though concluding it was not capable of causing death.

In response, the state might cite to this Court’s opinion in State v. Cook, 69 Wn. App. 412, 848 P.2d 1325 (1993). There, this Court found the same instructional error was harmless, based on the facts of that case. Cook, 69 Wn. App. at 418. However, this case is distinguishable from Cook, because Cook held the knife’s blade to the victim’s throat, a use that this Court found “[c]learly” had the capacity to inflict death. 69 Wn. App. at 418. By contrast, Holz did not allege the robber held the knife to her throat, but claimed that he simply jabbed it in her direction from the opposite

side of the store counter. Thus, the manner in which the knife was used in this case did not “clearly” have the capacity to inflict death. Moreover, in Cook, police recovered the knife, so the jury had concrete evidence of its dimensions and properties. 69 Wn. App. at 414. Here, there was no such evidence. Under the circumstances of this case -- unlike those in Cook -- there was a basis for the jury to conclude the weapon allegedly used could cause injury, but not death. This Court should reverse the sentence enhancement.

4. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE, REMOVING THE FACTUAL QUESTION OF WHETHER THE ALLEGED KNIFE MET THE STATUTORY DEFINITION OF A “DEADLY WEAPON.”

Not only did the trial court’s instructions ease the state’s burden of proof on the deadly weapon enhancement, but the instructions also amounted to a comment on the evidence, removing from the jury’s consideration altogether whether the purported knife met the statutory definition of a “deadly weapon.”

Article IV, section 16 of the Washington State Constitution provides: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Article IV, section 16 also prohibits a judge from conveying to the jury his or her personal

attitudes toward the merits of the case. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); State v. Foster, 91 Wn.2d 466, 481, 589 P.2d 789 (1979). In addition, a court cannot instruct the jury that matters of fact have been established as a matter of law. Becker, 132 Wn.2d at 64; State v. Primrose, 32 Wn. App. 1, 3, 645 P.2d 714 (1982).

The trial court's jury instruction No. 15, setting forth the state's burden of proof for the "deadly weapon" sentence enhancement, provided 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, to-wit: a knife** at the time of the commission of the crime of Robbery in the First Degree, Count I.

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. 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.

CP 47 (Emphasis added).

The trial court's instruction 15 amounted to a comment on the evidence, both because the "to-wit: a knife" language removed the factual question of whether the knife was a deadly weapon, and because the instruction did not fully and correctly set forth the legal definition of a deadly weapon.

Although Haggith did not object to the instructions, which the state proposed, the error is not waived if the instruction invaded a fundamental right of the accused. Becker, 132 Wn.2d at 64. Since a comment on the evidence violates a constitutional prohibition, a failure to object or move for a mistrial does not foreclose raising this issue on appeal. Becker, 132 Wn.2d at 64 (quoting State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968)).

In Becker, the major issue at trial was whether an institution entitled the Youth Employment Education Program [YEP] was a school within the meaning of the statute RCW 69.50.435. The trial court's special verdict form asked:

[Were] defendant[s], [Donald Becker and Nelson Gantt], within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program School at the time of the commission of the crime?

Becker, 132 Wn.2d at 63-64. The Becker court concluded that the trial court's instruction "essentially withheld" the determination of

whether YEP was a school within the meaning of the statute from the jury. Becker, 132 Wn.2d at 63. Thus, the special verdict amounted to an unconstitutional comment on the evidence:

By so identifying YEP in the special verdict form the trial court literally instructed the jury that YEP was a school. This error amounted to an impermissible comment on the evidence in violation of art. IV, § 16.

By effectively removing a disputed issue of fact from the jury's consideration, the special verdict form relieved the State of its burden to prove all elements of the sentence enhancement statute.

Becker, 132 Wn.2d at 65. Accordingly, the Becker court held the special verdict form was “tantamount to a directed verdict and was error.” 132 Wn.2d at 65.

Division One of this Court addressed the very issue at hand in State v. Akers, 88 Wn. App. 891, 946 P.2d 1222 (1997), *affirmed on other grounds*, 136 Wn.2d 641, 965 P.2d 1078 (1998). Although the facts of that case did not involve the issue of a deadly weapon instruction, the court discussed the deadly weapon enhancement in explaining when a jury instruction is a comment on the evidence. Akers, 88 Wn. App. 891. The Akers court concluded that the “to-wit: a knife” language is not necessarily a comment on the evidence, *provided that the jury has been properly instructed on the*

law defining deadly weapons in the context of a sentencing enhancement:

By asking a jury whether a defendant was “armed with a deadly weapon, to-wit: a knife” at the time of an alleged robbery, for example, we do not believe that a judge instructs the jury that the particular knife at issue is a deadly weapon as defined by law, that is, that it either had the capacity to and may readily have inflicted death, or that it had a blade more than 3 inches long, where those are disputed issues at trial, *and where the jury has been properly instructed on the law defining deadly weapons and on the burden of proof.*

88 Wn. App. 891 (emphasis added.)

In Haggith’s case, jury instruction 15 did not contain a definition of a deadly weapon in the context of the sentence enhancement. The jury was not asked to determine whether the knife blade was longer than three inches, or whether the knife had the capacity to inflict death and was likely to or may easily and readily cause death. Thus, the jury was not properly instructed on the law that would have allowed them to make the necessary factual determinations of whether the knife was in fact a deadly weapon.

On this basis, Haggith’s case is also distinguishable from State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005). In that case, Winings argued that the trial court improperly commented on

the evidence by suggesting that a sword Winnings allegedly used was *per se* a deadly weapon, regardless of its use. However, as the Winings court observed, the trial court properly instructed the jury regarding the meaning of “deadly weapon” for purposes of the special verdict. 126 Wn. App. at 90-91.

Here, the jury was not instructed that a knife with a blade shorter than three inches in not a deadly weapon *per se*. Nor was the jury instructed that in order to find such a knife qualified as a deadly weapon, jurors must find the knife had “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.” Absent these critical instructions, the jury only had to find that Haggith had “a knife” to return the special verdict against him.

Jury instruction 15 was an unconstitutional comment on the evidence. The instruction allowed the jury to answer the special verdict in the affirmative based only on the finding that Haggith was “armed” with “a knife.” Because the instruction allowed the jury to answer the special verdict affirmatively without finding the facts necessary to determine the knife was a “deadly weapon,” the state cannot demonstrate the error was harmless. See Neder, 527 U.S. at 15. (A constitutional error is harmless only if it “appears ‘beyond

a reasonable doubt that the error complained of did not contribute to the verdict obtained.”) This Court should reverse Haggith’s sentence enhancement.

5. THE TRIAL COURT ERRED BY DENYING HAGGITH’S REQUEST FOR AN INFERIOR-DEGREE INSTRUCTION, WHERE HAGGITH DENIED HE COMMITTED THE CRIME.

Haggith requested an inferior-degree instruction of second degree robbery, based on his argument that no knife was recovered, his statement he did not own a knife, and the poor credibility of the witnesses who claimed to see him with a knife. Because the trial court was required to view the evidence in the light most favorable to Haggith, and because Haggith’s evidence reasonably supported a conclusion that only the inferior degree may have been committed, Haggith was entitled to the inferior degree instruction.

To be entitled to an instruction on an inferior-degree offense, the defendant must establish: (1) that all of the legal elements of the inferior degree are included in the greater degree offense; and (2) evidence supports an inference that only the inferior-degree offense was committed. State v. Pacheco, 107 Wn.2d 59, 68-69, 726 P.2d 981, 986-87 (1986); State v. Workman, 90 Wn.2d 443,

448, 584 P.2d 382, 385 (1978). These are referred to as the “legal component” and the “factual component,” respectively. State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000).

The legal component of the test was unequivocally established. Second degree robbery is both a lesser included offense and an inferior-degree offense of first degree robbery. State v. Netling, 46 Wn. App. 461, 464, 731 P.2d 11 (1987); Pacheco, 107 Wn.2d at 69-70. The only relevant difference between the degrees is the element of whether the crime involved the use of a deadly weapon as defined in RCW 9A.04.110(6). See RCW 9A.56.200 (robbery in the first degree); RCW 9A.56.210 (robbery in the second degree).

The factual component of the test was also met. Analysis under the "factual" prong is identical for lesser-included offenses and inferior-degree offenses. Fernandez-Medina, 141 Wn.2d at 455-456. An instruction on a lesser offense is appropriate if there is evidence that affirmatively establishes the defendant's guilt of the lesser offense. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991); State v. Speece, 115 Wn.2d 360, 363, 798 P.2d 294 (1990). The mere possibility that the jury

might disbelieve a portion of the state's evidence is not sufficient. Fowler, 114 Wn.2d at 67; Speece, 115 Wn.2d at 363. Nor is an instruction warranted if the state's evidence indicates that the defendant is guilty as charged, and the defendant's evidence indicates that no crime was committed. State v. Bowerman, 115 Wn.2d 794, 806, 802 P.2d 116 (1990).

However, a defendant who denies committing any crime may still be entitled to an instruction on a lesser offense, if there is other evidence indicating that only the lesser crime was committed. Fernandez-Medina, 141 Wn.2d 448; State v. McClam, 69 Wn. App. 885, 889-90, 850 P.2d 1377 (1993). In determining whether there is sufficient evidence to support the instruction, the evidence will be viewed in a light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d 448.

As the Fernandez-Medina court held, the trial court may not deny a request for an instruction "on the basis that the theory underlying the instruction is 'inconsistent' with another theory that finds support in the evidence." 141 Wn.2d at 460. Thus, neither Haggith's defense of general denial, nor his statement that he was not present during the robbery preclude the lesser-included instruction. Furthermore, the trial court must view all of Haggith's

evidence in the light most favorable to Haggith, and “cannot weigh the evidence.” Fernandez-Medina, 141 Wn.2d at 461. Haggith need only point to “substantial evidence in the record” supporting a rational inference that he committed only the lesser included or inferior degree offense to the exclusion of the greater offense. Fernandez-Medina, 141 Wn.2d at 461.

Here, Haggith was entitled to the lesser-degree instruction for two reasons. First, although the state’s evidence indicated that a knife was used, there was a factual question as to whether the knife constituted a “deadly weapon” as defined for the substantive offense. Even if the jury concluded Haggith committed the robbery with a knife, it could have reasonably concluded that the knife, as it was used, was not a deadly weapon. The evidence must be viewed in the light most favorable to Haggith. Thus, the state’s own evidence supported a lesser-degree instruction. Second, Haggith’s statement to police denying that he owned a knife, when viewed in the light most favorable to him, as required, constitutes substantive evidence that he did not, in fact have a knife at the time of the robbery.

Haggith met his burden of demonstrating positive evidence that, viewed in the light most favorable to him, affirmatively

established guilt of only the lesser offense. Because he was denied the required lesser degree instruction, he is entitled to a new trial. Workman, 90 Wn.2d at 456.

D. CONCLUSION

For the reasons stated above, this Court should reverse Haggith's conviction or strike the deadly weapon enhancement.

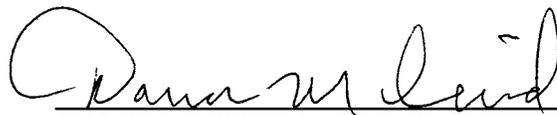
Dated this 22nd day of October, 2009.

Respectfully submitted

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62939-5-1
)	
GAVIN HAGGITH,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 22ND DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WHATCOM COUNTY PROSECUTOR'S OFFICE
 WHATCOM COUNTY COURTHOUSE
 311 GRAND AVENUE
 BELLINGHAM, WA 98227

[X] GAVIN HAGGITH
 DOC NO. 813623
 COYOTE RIDGE CORRECTIONS CENTER
 P.O. BOX 769
 CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF OCTOBER, 2009.

x *Patrick Mayovsky*