

No. 345773

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,  
v.  
TREVOR PRUITT, Appellant

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**BRIEF OF APPELLANT**

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**A. Assignments of Error**

**Assignments of Error**

1. The defendant was denied effective assistance of counsel because defense counsel opened the door to otherwise inadmissible inculpatory evidence (i.e. a non-testifying accomplice's hearsay statement implicating the defendant.)

2. The defendant was denied effective assistance of counsel because defense counsel proposed a jury instruction on deadly weapons which erroneously allowed the jury to consider a weapon other than the knife specified in the amended information.

3. The evidence is insufficient to support a finding that the defendant, and/or a person to whom he was an accomplice, was armed with deadly weapon at the time of the robbery of Michael Drawdy and attempted robbery of Derick Hummer.

**Issues Pertaining to Assignments of Error**

1. Whether the defendant was denied effective assistance of counsel because defense counsel opened the door to otherwise inadmissible inculpatory evidence (i.e. a non-testifying accomplice's hearsay statement implicating the defendant.)

2. Whether the defendant was denied effective assistance of counsel because defense counsel proposed a jury instruction on deadly weapons which erroneously allowed the jury to consider a weapon other than the knife specified in the amended information.

3. Whether the evidence is insufficient to support a finding that the defendant, and/or a person to whom he was an accomplice, was armed with deadly weapon at the time of the robbery of Michael Drawdy and attempted robbery of Derick Hummer.

**B. Statement of the Case**

**1. Procedural Facts**

On March 28, 2005, the State of Washington charged Trevor Pruitt in Pierce County Superior Court with one count each of attempted robbery in the first degree and robbery in the first degree. CP at 1-2. These charges were based on the following allegations: (1) on October 30, 2004, Trevor Pruitt's accomplice, Ronnie Beeler attempted to rob Paul Smith outside his residence in Milton, WA (i.e. Trevor Pruitt was the alleged "getaway driver" in that robbery); and (2) later on that same day, both Trevor Pruitt and Ronnie Beeler robbed Michael Drawdy and Derick Hummer as the pair were cleaning Michael Drawdy's truck at a car wash in Puyallup, WA. CP at 3-4. (It was alleged that Michael Drawdy gave up cash under a demand to do so. CP at 3.)

The State later amended the information on September 28, 2005 to charge *two* counts of attempted robbery in the first degree (i.e. for the attempted robberies of Derick Hummer and Paul Smith), as well as the one count of robbery in the first degree (i.e. for the completed robbery of Michael Drawdy.) CP at 9-11. In addition, the State added deadly weapon sentencing enhancement allegations to each count, stating each as follows:

[A]nd in the commission thereof, the defendant, and/or a person to whom he was an accomplice, was armed with a deadly weapon, *other than a firearm to wit: a knife*[.] (CP at 9-11) (emphasis added).

The case was called for trial on February 2, 2006 before the Pierce County Superior Court, Hon. Brian Tollefson. 1 RP (Feb. 2, 2006) at 1.

The jury was sworn in on February 6, 2006, and a CrR 3.5 hearing was begun on that date. 2 RP (Feb. 6, 2006) at 26, 31. The State called Michael Wada of the Milton Police Department as its only witness in the 3.5 hearing. 2 RP (Feb. 6, 2006) at 32-50; 3 RP (Feb. 7, 2006) at 54-71. The defense called as its only witness the defendant, Trevor Pruitt. 3 RP (Feb. 7, 2006) at 73-80.

On February 7, 2006, the trial court ruled that the all of the defendant's statements were admissible against him. 3 RP (Feb. 7, 2006) at 86-90; CP at 167-169. And on February 15, 2006, the jury convicted Mr. Pruitt of all three counts. 6 RP (Feb. 15, 2006) at 437; CP at 159-161. The jury also returned special verdicts finding that Mr. Pruitt, and/or a person to whom he was accomplice, was armed with a deadly weapon at

the time of the commission of the crimes. 6 RP (Feb. 15, 2006) at 437-438; CP at 162-164.<sup>1</sup>

Mr. Pruitt was sentenced on March 3, 2006. 6 RP (March 3, 2006) at 465; CP at 172. The trial court sentenced Mr. Pruitt to “high-end” sentences on each count: 51 months on counts I and III (each count); and 68 months on count II. 6 RP (Feb. 15, 2006) at 474; CP at 176.

The trial court further imposed deadly weapon enhancements based upon the special verdicts as follows: 12 months on counts I and III (each count); and 24 months on count II. *Id.* This resulted in a total term of confinement of 116 months. CP at 176.

This timely appeal followed. CP at 183-184.

## 2. Substantive Facts

### a. *Derick Hummer’s trial testimony*

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<sup>1</sup>The jury instruction for the special verdict appears at CP 158. It mirrors the instruction proposed by counsel for both the State and the defendant. CP at 73, 108. And it provided in pertinent part as follows:

***A firearm is a deadly weapon.*** A knife having a blade longer than three inches is also a deadly weapon. A deadly weapon is also 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 produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide. (CP at 158) (emphasis added).

On October 30, 2004, Mr. Hummer was with his brother-in-law, Michael Drawdy, at the “Mr. Sudsy’s Car Wash” in Puyallup, WA vacuuming Mr. Drawdy’s truck. 3 RP (Feb. 7, 2006) at 96. When they finished, two individuals came up on each side of the car and pushed them in forward into the car face first. 3 RP (Feb. 7, 2006) at 98.<sup>2</sup> The individual that was on Mr. Hummer said “Don’t turn around, or I’ll gut you.” Id. Mr. Hummer felt something being pushed into his back which felt sharp; however, it was not pushed hard enough to puncture his skin. Id. On cross-exam, Mr. Hummer testified that he wasn’t able to distinguish exactly what it was that was pushed into his back. 3 RP (Feb. 7, 2006) at 118. Further, Mr. Hummer was not able to see if anyone was armed; and he did not see a gun in Mr. Drawdy’s back. 3 RP (Feb. 7, 2006) at 121.

After pushing him forward in the car, the individual that was on Mr. Hummer searched his (Mr. Hummer’s) pockets and asked him if he had any dope or money. 3 RP (Feb. 7, 2006) at 99. Mr. Hummer was scared because he thought he was going to be killed. 3 RP (Feb. 7, 2006)

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<sup>2</sup> Mr. Hummer and Mr. Drawdy were pushed by different people. 3 RP (Feb. 7, 2006) at 97-98. Mr. Hummer later testified that “one was skinnier and one heavier.” 3 RP (Feb. 7, 2006) at 99. The individual that was on Mr. Hummer was the skinnier one. Id.

at 100. However, Mr. Hummer was able to get a “good” look at face of the individual who was on him. 3 RP (Feb. 7, 2006) at 100-101. Mr. Hummer identified that individual in court as the defendant, Mr. Pruitt. 3 RP (Feb. 7, 2006) at 101-102. Mr. Hummer did not give the individual that was on him anything. 3 RP (Feb. 7, 2006) at 102.

As the two individuals were leaving, they said “Don’t turn around. We’ll kill you. Stay here.” 3 RP (Feb. 7, 2006) at 103. The individuals then drove away in older car. 3 RP (Feb. 7, 2006) at 104, 112.

On March 24, 2005, Detective Tamera Pihl met with Mr. Hummer at which time Det. Pihl showed Mr. Hummer group of photographs. 3 RP (Feb. 7, 2006) at 105. Mr. Hummer recognized his brother-in-law, Mr. Drawdy, in those photographs, as well as the individual that was on him in the robbery. 3 RP (Feb. 7, 2006) at 108-109.

*b. Michael Drawdy’s trial testimony*

On October 30, 2004, at approximately 8:00 pm in the evening, Michael Drawdy was at Mr. Sudsy’s car wash in Puyallup, WA with his brother-in-law Derick Hummer vacuuming out Mr. Drawdy’s truck. 3 RP (Feb. 7, 2006) at 147. On that day, Mr. Drawdy got robbed. 3 RP (Feb. 7,

2006) at 148. He was leaning on the driver's side of his truck; people came up from behind him and Mr. Hummer. Id.

Mr. Drawdy got pushed down face first towards his speaker in the back of his truck. 3 RP (Feb. 7, 2006) at 149. They said "Give me all your money, all of your jewelry." Id. One of the individuals put his hands on Mr. Drawdy; the other individual came up from behind and grabbed Mr. Hummer. Id.

The individual that contacted Mr. Drawdy shoved something in his back, which felt like a hard metal object. Id. The individual said "Don't turn around, or I'll shoot." Id. Mr. Drawdy looked at his back approximately three to four days after October 30, 2004, and he had a bruise on it. 3 RP (Feb. 7, 2006) at 150. However, Mr. Drawdy could not describe how wide the object was. Id.

Mr. Drawdy opened his wallet up and gave the individual the only money he (Mr. Drawdy) had in his wallet—\$15<sup>3</sup>—after the individual told him "Don't turn around, or I'll shoot." Id. The individual's response to that was "That's all you have, you broke ass." 3 RP (Feb. 7, 2006) at 152.

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<sup>3</sup> Mr. Drawdy did not want to give him the \$15. 3 RP (Feb. 7, 2006) at 153.

The individual dealing with Mr. Hummer asked him where all of his money, jewelry and dope was. Id. Mr. Hummer didn't give him anything; he didn't have anything to give. Id.

After Mr. Hummer gave the individual dealing with him the money, the individuals left and said "Don't turn around. Don't look at us." Id. Mr. Drawdy did not get enough of a look at the individual dealing with Mr. Hummer to tell whether or not he saw him in the courtroom. Id. .

On cross-exam, Mr. Drawdy testified that in his written statement to the police on October 30, 2004, he did not mention anything about anyone requesting dope or making a demand for dope. 3 RP (Feb. 7, 2006) at 157. In his statement, he also did not mention anything being said to Mr. Hummer. Id. He further testified that the individuals were similar in size. 3 RP (Feb. 7, 2006) at 159.

Although Mr. Drawdy told Mr. Hummer that night there was a gun in his back, Mr. Drawdy is not sure if there was one. 3 RP (Feb. 7, 2006) at 161. He never saw a weapon; and he did not see if there was a weapon in Mr. Hummer's back. Id. He has no idea as to how the individuals escaped that night. Id.

On redirect exam, Mr. Drawdy testified that he had a little soreness associated with the bruising in his back. 3 RP (Feb. 7, 2006) at 165.

*c. Paul Smith's trial testimony*

Jillian Smith is Mr. Smith's daughter. 3 RP (Feb. 7, 2006) at 169. Mr. Smith knows Trevor Pruitt. 3 RP (Feb. 7, 2006) at 170. Mr. Smith has known Mr. Trevor Pruitt's family since 1976. Id. Mr. Smith used to work on the same block where they (Mr. Pruitt's family) lived. Id. Mr. Smith also rented a house from Trevor Pruitt's parents, Patricia Pruitt and Jim Pruitt. Id. Mr. Smith was employed at Tolt Technology in August-September of 2004, removing old computer systems and putting in new ones. Id. Trevor Pruitt also worked there doing the same type of work. 3 RP (Feb. 7, 2006) at 171. Mr. Smith and Trevor Pruitt worked together, and were close friends at that time. Id. Trevor Pruitt and Jillian Smith were just friends at that time. Id.

On October 30, 2004, Mr. Smith was arrived home in Milton, WA at roughly 6:00 pm-7:00 pm in the evening. 3 RP (Feb. 7, 2006) at 172. He had been grocery shopping because he had just gotten paid that day. Id. Milton is about 5-20 minutes from Puyallup. Id. Mr. Smith's paycheck was for a little over \$1,000. 3 RP (Feb. 7, 2006) at 173.

When he arrived home, something unusual happened: he parked his car in the driveway and walked up to the front porch; as he was walking up to the port, he heard footsteps. 3 RP (Feb. 7, 2006) at 173. He turned around and somebody was standing behind him. Id.

The individual told him that he wanted his (Mr. Smith's) wallet and his money. Id. He thought it was a Halloween joke from somebody.<sup>4</sup> Id. Mr. Smith told the individual "no" and tried to open the door. Id. The individual slapped Mr. Smith's hand which was holding the key away from the car door. Id. Mr. Smith told the individual to knock it off because he (Mr. Smith) wasn't in the mood. Id. Mr. Smith started to put the key in the car door again, and the individual slapped his hand again. Id. Mr. Smith told the individual to knock it off, or he (Mr. Smith) was going to make him lay down on the porch. Id.

The individual's face was covered. 3 RP (Feb. 7, 2006) at 174. All Mr. Smith could see was the individual's nose and part of his eyes; the rest was covered with a hood and a handkerchief or something like that. 3 RP (Feb. 7, 2006) at 173. The individual was roughly 6-foot, 250 pounds. 3 RP (Feb. 7, 2006) at 174.

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<sup>4</sup> Mr. Smith later testified that he thought it was his brother. 3 RP (Feb. 7, 2006) at 201.

The individual had a knife which looked like a steak knife; the blade looked like it was 4 or 5 inches. Id. Mr. Smith did not take out his wallet because he thought it was a prank, i.e., somebody playing a joke on him. 3 RP (Feb. 7, 2006) at 175. Plus, Mr. Smith wasn't going to give up his money; he worked hard for the money. Id. After Mr. Smith told the individual that he would be laying on the porch, the individual did it again at which point Mr. Smith knocked him off the porch. Id. The individual tripped on his daughter's Halloween pumpkin<sup>5</sup>, fell to the ground, stumbled, picked himself off the ground and ran. Id.

After Mr. Smith pushed the individual off the porch, he stumbled; Mr. Smith thought the weapon the individual was holding flew out of his hands. 3 RP (Feb. 7, 2006) at 203. However, he wasn't able to find the weapon even though he did a thorough search of his front yard for the weapon. Id. Mr. Smith did not chase the individual. Id.

Mr. Smith did not feel threatened by the weapon. 3 RP (Feb. 7, 2006) at 204. And he was not going to give up his wallet. Id.

Mr. Smith knows Ronnie Beeler; Beeler lived on the same block where Mr. Smith worked and where Trevor Pruitt's parents lived. 3 RP

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<sup>5</sup> Mr. Smith's daughter (Jillian Smith) was home at the time the attempted robbery occurred; she was right inside the door.

(Feb. 7, 2006) at 175. Ronnie Beeler and Trevor Pruitt are cousins. 3 RP (Feb. 7, 2006) at 176. Ronnie Beeler appeared to fit the same physical description as the person who tried to take his money on October 30. Id. Mr. Smith developed a suspicion of who might have been involved in the robbery after it happened; he suspected Trevor Pruitt. Id.

Trevor Pruitt knew that Mr. Smith got paid on that day, October 30, 2004. 3 RP (Feb. 7, 2006) at 177. Trevor Pruitt had a reason to be mad at Mr. Smith: Trevor Pruitt had told Mr. Smith that he (Trevor Pruitt) was hearing voices; Mr. Smith told their boss at the time, and it got back to him (Trevor Pruitt.) Id. Mr. Smith told their boss this because Trevor Pruitt had walked off the job prior to that and Mr. Smith was trying to explain why he did that, so he wouldn't get fired. Id. Trevor talked to Mr. Smith about revealing that confidence; at first Trevor was upset, but Mr. Smith thought everything was okay. 3 RP (Feb. 7, 2006) at 178.

Mr. Smith talked to Trevor after the attempted robbery occurred; his daughter put him in touch with Trevor. Id. Mr. Smith did not want to talk to Trevor at that time because he had bad blood; he couldn't believe Trevor would do something like that. 3 RP (Feb. 7, 2006) at 179. Mr. Smith confronted Trevor; Trevor said he was very sorry. Id. Trevor just kept apologizing to Mr. Smith. Id. This conversation took place

approximately 3 weeks to one month after October 30, 2004. 3 RP (Feb. 7, 2006) at 180.

On cross-exam, Mr. Smith testified that Trevor got him the job at Tolt Technology. 3 RP (Feb. 7, 2006) at 181. And that he and Trevor would ride together to work Trevor's mom's car. Id.

When Mr. Smith found out his daughter, Jillian Smith, was going out with Trevor, he was disappointed with her decision. 3 RP (Feb. 7, 2006) at 185.

Mr. Smith denied that he told Trevor during one of their rides to and from work that Trevor had better stop going out with his daughter, Jillian Smith. Id. Mr. Smith further denied that he told Trevor that he would do whatever it took in his power to prevent Trevor from going out with Jillian. Id.

Mr. Smith contacted Trevor's dad after October 30 to let him know what his son had done. 3 RP (Feb. 7, 2006) at 186.

Mr. Smith testified that he saw Trevor shortly after Thanksgiving at Jillian's mother's residence in early December. 3 RP (Feb. 7, 2006) at 199.

Mr. Smith waited until February 22, 2005 to tell the police that he suspected Trevor Pruitt was involved in the attempted robbery. 3 RP

(Feb. 7, 2006) at 208. He waited because he didn't want to accuse somebody of something they didn't do, unless he really thought they did it. 3 RP (Feb. 7, 2006) at 209.

Mr. Smith does not have a relationship with his daughter now because of Trevor. 3 RP (Feb. 7, 2006) at 213. He hasn't been able to see his daughter or granddaughter since Jillian and Trevor have been together. Id. And the fact that Trevor and Jillian are currently together hurts Mr. Smith. 3 RP (Feb. 7, 2006) at 213-214.

*d. Det. Michael Wada's trial testimony*

On March 7, 2005 at approximately 1:00 pm, Det. Wada contacted Trevor at his residence in Buckley, WA concerning Milton Police Department case 043787; Paul Smith was the victim in that case. 2 RP (Feb. 8, 2006) at 32-33, 45. Trevor denied any involvement in the robbery of Paul Smith; he said that his cousins, Ronnie and John Beeler, might be responsible for the robbery. 2 RP (Feb. 8, 2006) at 36. Trevor also said that he had seen a Crime Stoppers video on television, and that he was sure the suspect was Ronnie Beeler; this was in regards to another case. 2 RP (Feb. 8, 2006) at 37. Trevor told Det. Wada that he told Ronnie Beeler

that Paul Smith had money and he knew this because he had worked with Smith on the same job. 2 RP (Feb. 8, 2006) at 44.

On March 25, 2005—when Trevor was placed under arrest—Det. Wada talked with him again. 2 RP (Feb. 8, 2006) at 45-46. Det. Wada had a conversation with Trevor (after he was fully advised of his rights) in Wada's marked patrol unit. 2 RP (Feb. 8, 2006) at 47. During his conversation with Trevor, Wada provided Trevor with information that Ronnie Beeler admitted to. *Id.* Trevor denied any knowledge of the armed robbery before Wada told him about Ronnie Beeler. 2 RP (Feb. 8, 2006) at 48. After being provided with the information Ronnie Beeler had given Wada, Trevor said that whenever his cousins are in town that they're always getting in trouble. *Id.* Trevor also stated that his cousins were a bad influence on him. *Id.* Trevor also stated that if he was guilty of anything, it was telling Ronnie Beeler that he didn't like Paul Smith, that Smith got him fired from his job; Trevor surmised that Ronnie Beeler heard these comments by Trevor and took them seriously and meant to do some harm to Smith. 2 RP (Feb. 8, 2006) at 49.

Trevor stated that he wished that somebody would beat up Smith for getting him fired. 2 RP (Feb. 8, 2006) at 51. Trevor told this to Ronnie Beeler. 2 RP (Feb. 8, 2006) at 52.

Once Trevor and Wada arrived at the Milton Police Department, Wada again advised Trevor of his rights. *Id.*

Wada had previously contacted Stephanie Perry with regard to the Paul Smith case, and she provided Wada with information; Wada confronted Trevor with that information whereupon Trevor told Wada that he told Ronnie Beeler to go beat up Paul Smith, and that he drove Smith [sic] to the Smith's residence, or close to his residence. 2 RP (Feb. 8, 2006) at 53. Trevor also stated that "I didn't know that Ronnie was going to rob Paul [Smith]. He must have done that on his own." 2 RP (Feb. 8, 2006) at 54. Trevor stated that "I told Ronnie to beat Paul [Smith] up, kick his ass." 2 RP (Feb. 8, 2006) at 55. Trevor stated that he drove Ronnie Beeler to Paul Smith's house. *Id.* Trevor also stated that he drove Ronnie Beeler away from Paul Smith's house. 2 RP (Feb. 8, 2006) at 57.

Defense counsel's cross-exam dealt mainly with Wada's report-writing practice and the errors contained in the report that he generated in the Paul Smith case. *See generally* 2 RP (Feb. 8, 2006) at 57-98.

Det. Wada later testified that during the course of his investigation, he contacted Ronnie Beeler on March 17, 2005; that interview was tape recorded. 3 RP (Feb. 9, 2006) at 240. And a transcript of that interview with Ronnie Beeler was prepared. 3 RP (Feb. 9, 2006) at 240-241.

Det. Wada provided a copy of that transcript to Det. Pihl with regard to a Mr. Sudsy robbery that she was investigating. 3 RP (Feb. 9, 2006) at 241. Detective Farnworth and Patrol Sergeant Thompson were also present during the interview. Id.

*e. Det. Tamera Pihl's trial testimony*

Det. Pihl testified as to her investigation of a robbery that took place at the Mr. Sudsy Car Wash on October 30, 2005. 2 RP (Feb. 8, 2006) at 131. Det. Pihl contacted Derick Hummer in person on March 24, 2005. 2 RP (Feb. 8, 2006) at 131, 133. Det. Pihl showed Mr. Hummer a ground of photographs. 2 RP (Feb. 8, 2006) at 140-141. Mr. Hummer identified Trevor Pruitt as the person who was involved in the robbery. 2 RP (Feb. 8, 2006) at 141. (Mr. Hummer also recognized Mr. Drawdy, the other victim, in the photo montage. Id.)

Det. Pihl identified Trevor Pruitt in court as the person depicted in the photograph that Mr. Hummer picked. 2 RP (Feb. 8, 2006) at 142-143. Det. Pihl did not want to show Mr. Hummer a second montage after learning that Mr. Drawdy was included in the first because the second

montage would have had to have included Trevor Pruitt, and that could unfairly suggest that he is the suspect.<sup>6</sup> 2 RP (Feb. 8, 2006) at 143.

Mr. Hummer looked at all of the photographs in the montage before making a pick. 2 RP (Feb. 8, 2006) at 144. However, he made his pick very quickly, within a few seconds after looking at all of them. Id.

Defense counsel's cross-exam centered mainly on how Det. Pihl went about preparing the photo montage; and what, if any, independent investigation was conducted by Det. Pihl to determine a suspect. 2 RP (Feb. 8, 2006) at 146-172. The following exchanges occurred between Det. Pihl and defense counsel<sup>7</sup>:

Q. And what type of follow-up investigation have you done in this case?

A. I received word that there was a suspect identified, interviewed, and that confessed, and had also identified Mr. Pruitt as the co-defendant – or codefendant – or co-suspect in that case. That's how I identified Mr. Pruitt. (2 RP (Feb. 8, 2006) at 148).

...

Q. And isn't it true that the photo-montage was created as a result of another officer telling you who they thought was a suspect in this case?

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<sup>6</sup> Trevor Pruitt was a suspect. 2 RP (Feb. 8, 2006) at 138-139.

<sup>7</sup> Where an objection was made to the response, it is included above.

A. They sent me a transcription of a confession by another person.

[Defense counsel]: Objection, Your Honor, non-responsive.

THE COURT: Objection sustained. (2 RP (Feb. 8, 2006) at 155).

...

Q. And isn't it true that the first time you looked at this case was on or about the 20<sup>th</sup> of March?

A. It says March 17<sup>th</sup> is the first date that I have written down in the narrative.

Q. March 17<sup>th</sup>. And what did you do on March 17<sup>th</sup>?

A. I got a call from Detective Wada saying that the other suspect confessed and identified Pruitt as the second suspect. (2 RP (Feb. 8, 2006) at 170).

Further, on redirect exam, the following exchange took place between Det. Pihl and the deputy prosecuting attorney, without objection from defense counsel:

Q. Did you feel that there was anything else that you had to do once you received information that Beeler had confessed to the robbery and identified [Trevor Pruitt] as the co-suspect.

A. Other than showing the montage and him being picked out, no. (2 RP (Feb. 8, 2006) at 173).

*f. Ronnie Beeler's trial testimony*

Ronnie Beeler invoked his Fifth Amendment right to remain silent outside the presence of the jury. 3 RP (Feb. 9, 2006) at 183, 187.

Mr. Beeler was then declared "unavailable" for purposes of ER 804. 3 RP (Feb. 9, 2006) at 188.

*g. Jillian Smith's trial testimony*

Jillian Smith knows Ronnie Beeler as Trevor Pruitt's cousin. 3 RP (Feb. 9, 2006) at 204-205. Paul Smith is Jillian Smith's father. 3 RP (Feb. 9, 2006) at 203. Ms. Smith saw Ronnie Beeler on October 30, 2004 get up off the ground and run away from her mother's house. 3 RP (Feb. 9, 2006) at 203-204. Ms. Smith knew it Ronnie Beeler by the clothing he was wearing and his body type.<sup>8</sup> 3 RP (Feb. 9, 2006) at 204. However, at the time she saw this person running away from the area of the front porch, she did not know that it was Ronnie Beeler. 3 RP (Feb. 9, 2006) at 205.

Once she figured out that he looked like Ronnie Beeler, Ms. Smith confronted him about it in the living room of the place that they were house-sitting; Stephanie Perry was also in the living room. 3 RP (Feb. 9, 2006) at 206. Ms. Smith asked Ronnie Beeler if he had something to do with robbing her father, e.g., if he was the one that robbed her father. *Id.* Ronnie said that yes, he was the one; and that he wanted to talk to her father to tell him that he was the one that did it and to apologize for what he had done. 3 RP (Feb. 9, 2006) at 206-207.

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<sup>8</sup> At some point, Ronnie Beeler wore the same clothes as he wore on October 30<sup>th</sup>. 3 RP (Feb. 9, 2006) at 206.

On cross-exam, the following exchange occurred:

- Q. And you said that Mr. Beeler admitted that he was the one who attempted to rob your father, correct?
- A. Correct.
- Q. And at any point in time did he indicate to you that anyone else was involved?
- A. No.
- Q. Did he ever directly indicate to you that Trevor –  
[Deputy prosecuting attorney]: Objection, asked and answered.  
THE COURT: Objection overruled.
- A. No.
- Q. (By [defense counsel]) Do you remember the question that you're answering?
- A. Yes. Did he say that Trevor was involved.
- Q. And did he say that Trevor was involved?
- A. No. (3 RP (Feb. 9, 2006) at 208).

*h. Det. Roy Farnsworth's trial testimony*

On March 17, 2005, Det. Farnsworth participated in an interview of Ronnie Beeler, along with Det. Wada from Milton and Det. Thompson from Fife. 3 RP (Feb. 9, 2006) at 244.

*i. James Pruitt's trial testimony*

Trevor Pruitt is James Pruitt's son. 4 RP (Feb. 13, 2006) at 268. James received phone calls from Trevor from the Pierce County Jail in the beginning of December, 2004. 4 RP (Feb. 13, 2006) at 283. James received a collect call from Trevor during the first and second week of

December, 2004. Id. James is pretty sure he received a collect call from Trevor during the third week of December, 2004. 4 RP (Feb. 13, 2006) at 284. James does not know the exact date that Trevor was released from jail. Id.

On cross-exam, James testified that he doesn't remember if he spoke to Mr. Pruitt during the third week in December. 4 RP (Feb. 13, 2006) at 290. James saw Trevor at a family Christmas function on December 24, 2004. 4 RP (Feb. 13, 2006) at 291.

**C. Argument**

**1. The defendant received ineffective assistance of counsel.**

*a. Standard of review*

Both the federal and state constitutions guarantee an accused the effective assistance of counsel. See U.S. Const. amend VI; Wash. Const. art. I, § 22.

To prove ineffective assistance of counsel, the appellant must show both that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced him. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Counsel's performance is "deficient" when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705 (1997). Great judicial deference is given to trial counsel's performance, which is strongly presumed to be effective. *State v. McFarland*, 127 Wn.2d 322, 335 (1995). This requires the defendant to demonstrate from the record the absence of legitimate strategic or tactical reasons to support counsel's challenged conduct. *Id.* at 336.

Counsel's deficient performance "prejudices" a defendant where "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v.*

*Studd*, 137 Wn.2d 533, 551 (1999) (quoting *McFarland*, 127 Wn.2d at 335).

*b. Opening the door to Ronnie Beeler's hearsay statements implicating the defendant*

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that testimonial hearsay by a declarant absent from trial can be admitted only if the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant. *Id.* at 54.

Here, defense counsel was clearly ineffective where he failed to object to—and move to strike—testimony by Det. Pihl recounting statements made by Ronnie Beeler implicating the defendant. *See* 2 RP (Feb. 8, 2006) at 148, 155, 170, 173. Furthermore, defense counsel elicited testimony from Ms. Smith as to whether Mr. Beeler implicated the defendant in the robbery of her father. 3 RP (Feb. 9, 2006) at 208.

And counsel's errors clearly prejudiced the defendant. When defense counsel finally objected during the State's closing argument about Det. Pihl's testimony (5 RP (Feb. 14, 2006) at 415), the damage was already done.

*c. Proposed jury instruction on deadly weapons*

Where, as was done here, defense counsel proposes an instruction identical to the one actually given by the trial court, the invited error doctrine restrains a reviewing court from reversing the conviction based upon an error in that jury instruction. *Studd*, 137 Wn.2d at 546-47. However, such challenges can be reviewed through an ineffective assistance of counsel claim. *Id.* at 550-51.

Through a special verdict, the jury found that Pruitt, and/or an accomplice, was armed with a “deadly weapon.” The information specified the “deadly weapon” used by Pruitt and/or an accomplice was a knife. CP at 9-11. The trial court’s instructions to the jury, however, did not limit the jury’s deliberations on the special verdict to consideration of a knife.

An accused person must be informed of the charge he is to meet at trial, and cannot be tried for an offense not charged. Const., art. 1, § 22; *State v. Pelkey*, 109 Wn.2d 484, 487 (1987).

In *State v. Rhinehart*, 92 Wn.2d 923 (1979), the state accused Rhinehart of possessing a stolen “1974 Ford Bronco.” At trial, the evidence established only that Rhinehart had some stolen automobile parts. *Rhinehart*, 92 Wn.2d at 924-26. Nonetheless, the jury convicted Rhinehart of possession of stolen property as charged in the information.

The Washington Supreme Court reversed, reasoning that Rhinehart was not adequately informed of the charge he was to meet at trial. The court found:

The State did not charge the petitioner with possession of stolen parts of a vehicle although clearly the prosecuting attorney could have done so initially or by amendment after it became clear that there was insufficient proof that petitioner ever possessed the stolen vehicle. The information put petitioner on notice that he must answer the charge as to stolen Ford Bronco, not one part thereof. This was the charge he was prepared to meet.

*Rhinehart*, 92 Wn.2d at 928.

Similarly, in *State v. Theroff*, 95 Wn.2d 385 (1980), the petitioner argued that he was denied procedural due process because neither the (original) information nor the amended information alleged violations of either RCW 9.41.025 (armed with a firearm) or RCW 9.95.040 (armed with a deadly weapon.) *Theroff*, 95 Wn.2d at 392. Although neither information indicated an intention to seek an enhanced penalty, a separate notice of intention to seek an enhanced penalty under RCW 9.41.025 and 9.95.040 was served and filed with the (original) information *only*. *Id.*

The *Theroff* court cited *State v. Cosner*, 85 Wn.2d 45 (1975) for the following proposition:

The appellate courts of this state have held that when the State seeks to rely upon either RCW 9.41.025 or RCW 9.95.040, or both, due process of law requires that the

information contain specific allegations to that effect, thus putting the accused person upon notice that enhanced consequences will flow with a conviction. Failure of the State to so allege precludes reliance upon the statutes by the trial court or the Board of Prison Terms and Paroles.

*Theroff*, 95 Wn.2d at 392 (“When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information.”).

Finally, in *State v. Lyon*, 96 Wn. App. 447 (1999), the appellant raised the precise issue raised here, *e.g.*, whether the jury instructions on deadly weapons erroneously allowed the jury to consider weapons other than the weapon specified in the information.<sup>9</sup> *Id.* at 452. Although the court reversed on other grounds, it noted that this issue could be avoided in the future by a timely amendment to the information. *Id.*

Here, Mr. Pruitt was charged with committing three separate offenses while “armed with a deadly weapon, ***other than a firearm to wit: a knife***[.]” CP at 9-11 (emphasis added). Mr. Pruitt was therefore put on notice that he had to answer that charge. The jury, however, was instructed that:

For purposes of a special verdict on a particular count, the State must prove beyond a reasonable doubt that the defendant, and/or a person to whom he was an accomplice,

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<sup>9</sup> The deadly weapon sentencing enhancement allegation stated as follows:  
[A]nd that at the time of the commission of the crime, the defendant or an accomplice was armed with a deadly weapon other than a firearm, to wit: a wood closed dowell [sic]. (*Lyon*, 96 Wn. App. at 449).

was armed with a deadly weapon at the time of the commission of the crime charged in that count.

...

***A firearm is a deadly weapon.*** A knife having a blade longer than three inches is also a deadly weapon. A deadly weapon is also 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 produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide. (CP at 158) (Instruction No. 22) (emphasis added).

Instruction 22 does not limit the jury as to what instrument Mr. Pruitt and/or an accomplice used that constitutes a deadly weapon. This error was prejudicial, particularly in light of the evidence presented at trial. For example, Mr. Drawdy testified that the individual that contacted him shoved something in his back, which felt like a hard metal object, and said “Don’t turn around, or I’ll shoot.” 3 RP (Feb. 7, 2006) at 149. And Mr. Drawdy told Mr. Hummer that night there was a gun in his back. 3 RP (Feb. 7, 2006) at 161.

The jury should have been instructed that the only instrument it could consider for purposes of the special verdict was the knife specified in the information. Without this limitation, given the evidence, the jury’s special verdict was more likely than not based on a firearm – a deadly weapon that he was not accused of using and which he was not prepared to meet at trial.

Thus, defense counsel's deficient performance in proposing this instruction clearly prejudiced Mr. Pruitt.

2. **The evidence is insufficient to support a finding that the defendant, and/or a person to whom he was an accomplice, was armed with deadly weapon.**

a. *Standard of review*

Upon a claim of insufficiency of the evidence, a reviewing court's inquiry is whether a rational trier of fact could have found the essential elements of a the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338 (1993) (citing *State v. Green*, 94 Wn.2d 216, 221-22 (1980)). The court views the evidence in a light most favorable to the State, admitting the truth of the State's evidence and any reasonable inferences. *State v. Salinas*, 119 Wn.2d 192, 201 (1992).

In the context of deadly weapon special verdicts, the State need not introduce the actual deadly weapon at trial. *State v. Bowman*, 36 Wn. App. 798, 803 (1984). "The evidence is sufficient if a witness to the crime has testified to the presence of such a weapon[.] ... The evidence may be circumstantial; no weapon need be produced or introduced." *Bowman*, 36 Wn. App. at 803 (citing *State v. Tongate*, 93 Wn.2d 751, 754 (1980)).

*b. Mr. Hummer*

The evidence was clearly insufficient to support the deadly weapons special verdict for the attempted first degree robbery of Mr. Hummer:

The individual that was on Mr. Hummer said “Don’t turn around, or I’ll gut you.” 3 RP (Feb. 7, 2006) at 98. Mr. Hummer felt something being pushed into his back which felt sharp; however, it was not pushed hard enough to puncture his skin, and he wasn’t able to distinguish exactly what it was. 3 RP (Feb. 7, 2006) at 98, 118. Mr. Hummer was not able to see if anyone was armed. 3 RP (Feb. 7, 2006) at 121. Mr. Drawdy did not see if there was a weapon in Mr. Hummer’s back. 3 RP (Feb. 7, 2006) at 161.

*c. Mr. Drawdy*

Likewise, the evidence does not support a deadly weapon special verdict for the first degree robbery of Mr. Drawdy:

The individual that contacted Mr. Drawdy shoved something in his back, which felt like a hard metal object. 3 RP (Feb. 7, 2006) at 149. The individual said “Don’t turn around, or I’ll shoot.” *Id.* Mr. Drawdy had a

bruise on his back approximately three to four days later.<sup>10</sup> 3 RP (Feb. 7, 2006) at 150. Mr. Drawdy could not describe how wide the object was. Id. Mr. Drawdy told Mr. Hummer that night there was a gun in his back, however, Mr. Drawdy is not sure if there was one. 3 RP (Feb. 7, 2006) at 161. Mr. Drawdy never saw a weapon. Id. Mr. Hummer did not see a gun in Mr. Drawdy's back. 3 RP (Feb. 7, 2006) at 121.

Thus, assuming the truth of the State's evidence, there is insufficient evidence under *Bowman, supra*, from which a rational trier of fact could have found that Mr. Pruitt, and/or an accomplice, was "armed with a deadly weapon."<sup>11</sup> Although evidence may be circumstantial and no weapon need be produced or introduced, a witness to the crime must at least testify to the presence of such a weapon. *Bowman*, 36 Wn. App. at 803.

Neither Mr. Drawdy nor Mr. Hummer actually saw a weapon. Although both could feel objects being placed in their backs, this fact alone is insufficient to support deadly weapon special verdicts that Mr. Pruitt, and/or an accomplice, was in fact "armed with a deadly weapon."

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<sup>10</sup> He had a little soreness associated with the bruising in his back. 3 RP (Feb. 7, 2006) at 165.

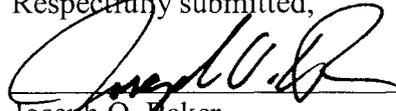
<sup>11</sup> Cases following *Tongate, supra*, have recognized that it is possible for a defendant of first degree robbery even though he is not actually armed with a deadly weapon. See *State v. Hauck*, 33 Wn. App. 75, 77 (1982).

**D. Conclusion**

For all the foregoing reasons, Mr. Pruitt respectfully requests that this Court vacate the judgment and sentence of the trial court, and remand the case for a new trial. Alternatively, if the Court determines that a new trial is not warranted, Mr. Pruitt respectfully requests that the Court vacate the deadly weapon sentence enhancements.

Dated this 11th day of January, 2007.

Respectfully submitted,



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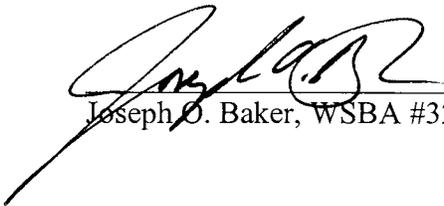
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11<sup>th</sup> day of January, 2007 at Des Moines, WA.

  
Joseph O. Baker, WSBA #32203