

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON  
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No. 38499-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Wade Hill,**

Appellant.

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Grays Harbor County Superior Court Cause No. 08-1-00404-2

The Honorable Judges F. Mark McCauley and David L. Edwards

**Appellant's Reply Brief**

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## ARGUMENT

**I. THE COURT GAVE TWO INSTRUCTIONS DEFINING “DEADLY WEAPON,” AND DID NOT MAKE IT MANIFESTLY APPARENT THAT THE SECOND INSTRUCTION COULD NOT BE USED TO SUPPLEMENT THE FIRST.**

Juries lack tools of statutory construction. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004). Because of this, jury instructions “must make the relevant legal standard ‘manifestly apparent to the average juror.’” *State v. Watkins*, 136 Wn.App. 240, 240-241, 148 P.3d 1112 (2006) (quoting *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). Instructions that fall below this standard require reversal unless the state can show beyond a reasonable doubt that the error did not contribute to the verdict—that it was trivial, formal, or merely academic, did not prejudice the accused, and in no way affected the final outcome of the case. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); *State v. Woods*, 138 Wn.App. 191, 202, 156 P.3d 309 (2007).

The state was required to prove that Mr. Hill assaulted Mr. Brown with a weapon “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.” RCW 9A.36.021; RCW 9A.04.110(6). These “[c]ircumstances’ include ‘the intent and present ability of the user, the degree of force, the part of the body to which it was

applied and the physical injuries inflicted.”” *State v. Skenandore* 99 Wn.App. 494, 499, 994 P.2d 291 (2000) (quoting *State v. Sorenson*, 6 Wn.App. 269, 273, 492 P.2d 233 (1972)).

The trial court gave two instructions that defined the phrase “deadly weapon.” The first was consistent with the statutory definition set forth above. Instruction No. 6, CP 20. The second was derived from RCW 9.94A.602, and explained that “A knife having a blade longer than three inches is a deadly weapon.” Instruction No. 13, CP 21. The court’s instructions did not make it manifestly apparent that this second definition could not be used to supplement the first definition. Respondent’s contention that the “instructions clearly states [sic] that the [second] definition... applies to the special verdict” is incorrect for two reasons. Brief of Respondent, p. 2.

First, Instruction No. 13 does not explicitly state that the second definition applies to the special verdict. The definition’s applicability to the special verdict is implied by its inclusion in the instruction relating to the special verdict.<sup>1</sup>

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<sup>1</sup> Instruction No. 13 begins by setting forth the state’s burden (“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”)

Second, nothing limits the jury's use of the second definition to the special verdict. Since the phrase "deadly weapon" is used in both instructions, a reasonable juror could easily conclude that the definitions are equivalent, or that they are meant to supplement each other. The instructions do not clarify that the phrase "deadly weapon" has two distinct meanings.

There are many ways the trial judge could have made the correct legal standard "manifestly apparent to the average juror." *Watkins*, at 240-241. The judge could have included the following language in Instruction No. 13:

This definition of deadly weapon applies only to the special verdict. You should not use this definition when you are considering whether or not Mr. Hill is guilty of Assault in the Second Degree.

In the alternative, the judge could have inserted additional language into Instruction No. 6. For example:

Use this definition when determining whether or not Mr. Hill is guilty of Assault in the Second Degree. Do not use the definition that appears in Instruction No. 13.

Respondent's contention that "[t]here is no way to make this clearer than it was presented to the jury" is simply incorrect. Brief of Respondent, p. 2.

Standard instructions are not the law: "[j]ust because an instruction is approved by the Washington Pattern Jury Instruction Committee does

not necessarily mean that it is approved by this court.” *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Respondent’s argument that the Court of Appeals has upheld this combination of instructions is misleading. Brief of Respondent, p. 3, citing *State v. Winings*, 126 Wn.App. 75, 107 P.3d 141 (2005). In *Winings*, this court held that the second definition did not constitute a comment on the evidence in violation of Wash. Const. Article IV, Section 16. *Winings*, at 90-91. Mr. Hill has not raised Article IV, Section 16.

The instructions did not make it “manifestly apparent” that the second definition could not be used to supplement the definition set forth in Instruction No. 6. *Watkins*, at 240-241. This relieved the state of its burden to prove every element beyond a reasonable doubt, and violated Mr. Hill’s Fourteenth Amendment right to due process. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Mr. Hill’s assault conviction must be reversed, and the case remanded for a new trial. *Winship*.

**II. THE LACK OF A UNANIMITY INSTRUCTION VIOLATED MR. HILL'S RIGHT TO A UNANIMOUS JURY.**

An accused person has a right to a unanimous jury. Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005); *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). In multiple acts cases, the right is protected when the prosecutor elects a single act or the court gives a unanimity instruction. *Coleman*, at 511. Neither occurred here.

Respondent concedes that the prosecutor at trial made “one comment about an assault with the rocks” in addition to argument about the earlier incident with the knife. Brief of Respondent, pp. 1-2. Because the prosecutor referred to two different assaults, the election was required. Respondent argues that the Information mentioned only the assault with the butter knife; however, this language was not incorporated into the instructions, and the Information was not provided during deliberations. Brief of Respondent, p. 3.

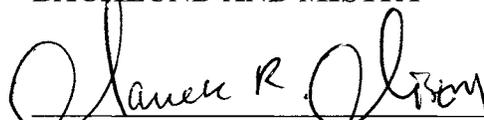
Because the prosecutor failed to make an election and the court did not give a unanimity instruction, Mr. Hill's assault conviction violated his right to a unanimous verdict. *Coleman, supra*. The conviction must be reversed and the case remanded to the superior court for a new trial.

**CONCLUSION**

Mr. Hill's conviction must be reversed, and the case remanded for a new trial. On retrial, the judge must clarify that the second definition of "deadly weapon" cannot be used to supplement the first definition. Furthermore, the court must give a unanimity instruction if the prosecutor does not elect a single act to pursue.

Respectfully submitted on August 20, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Wade Hill, DOC #741131  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

and to:

Grays Harbor Prosecuting Attorney  
102 West Broadway, #102  
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 20, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 20, 2009.



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