

NO. 39317-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN R. PEETE,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
OCTOBER 19 7:11:10  
STATE OF WASHINGTON  
BY  
10/19/10

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

The Honorable James Orlando, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt the essential element of “display or possession of a weapon” in the first degree robbery charge.
2. The court failed to properly instruct the jury on the definition of a weapon for the deadly weapon enhancement.
3. The state failed to prove that Mr. Peete was armed with a deadly weapon for the deadly weapon enhancement.

Issues Pertaining to Assignments of Error

1. Was appellant denied his right to due process where the state failed to prove the essential element of display or possession of a weapon in the first degree robbery charge?
2. Was appellant denied his right to due process when the jury was not properly instructed on the definition of deadly weapon for the deadly weapon enhancement?

B. STATEMENT OF THE CASE

1. Procedural Facts

Mr. Peete was charged by amended information with robbery in the first degree, assault in the third degree and giving false

statements to police. CP 10-11. During his first trial he was convicted as of assault in the third degree and giving false statements to police without a firearm. CP 63-66; RP 200. The jury hung on the robbery charge. Following his second trial, Mr. Peete was convicted as charged of robbery in the first degree while armed with a deadly weapon. CP 103-104. This timely appeal follows. CP 168-182.

## 2. Substantive Facts

From a one-way mirror, Mark Akkerman a loss prevention employee at K-Mart in Tacoma observed Mr. Peete in the electronics area. RP 18, 22-24. Mr. Akkerman saw Mr. Peete cut a cell phone off of a locked wall and place the phone in his pocket. RP 26. Mr. Peete left the store without paying for the phone. RP 27. Mr. Akkerman who was wearing plain clothes yelled for Mr. Peete to stop. When Mr. Peete began to run, Mr. Akkerman tackled him to the ground. RP 28-30.

Mr. Peete yelled that he had a knife and would stab Mr. Akkerman, but Mr. Peete did not have anything in his hand while he was making these threats. RP 31. Mr. Akkerman surmised that at some point Mr. Peete must have reached into his pocket because he had what looked like pens. RP 31. Mr. Akkerman surmised that Mr. Peete must have had a knife too because he used something to cut the cell phone inside the store, but Mr. Akkerman never saw Mr.

Peete with a knife in his hands. Id. Mr. Akkerman held Mr. Peete's arm down so that he could not hit Mr. Akkerman with a pen. RP 32.

Santesia Warren another Wall-Mart employee came outside and assisted Mr. Akkerman in holding down Mr. Peete. RP 46. When Ms. Warren arrived, she heard Mr. Peete say that he had a knife while his hand was under his body and Mr. Akkerman was on top of Mr. Peete with one hand cuff already on Mr. Peete. RP 46.

When Mr. Peete got his hand free from under his body, he just had a pen in it. RP 47. Ms. Warren never saw a knife in Mr. Peete's hand, but after Mr. Peete was lifted off of the ground, a small Swiss Army pocket knife was found on the ground. RP 32, 47, 62.

After Mr. Peete was arrested, the police found two small pocket knives in his pockets. One knife blade was .78 inches long and the other was 2 inches long. The Swiss Army blade was 1.5 inches. RP 85-88.

Officer Nicholas Jensen, testified that in his experience he had seen life threatening injuries with knives like these. Mr. Jensen admitted to the court that he was not however a doctor or a medic and in essence had no ability to determine whether an injury was life threatening. RP 89.

C. ARGUMENT

1. THE STATE FAILED TO PROVE  
BEYOND A REASONABLE DOUBT  
THE ESSENTIAL ELEMENT OF

POSSESSION OR DISPLAY OF A  
DEADLY WEAPON IN THE FIRST  
DEGREE ROBBERY CHARGE.

In determining whether sufficient evidence supports a conviction, "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990), citing, State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

As charged, to prove robbery in the first degree, the state had to establish beyond a reasonable doubt that Mr. Peete: (1) intended to commit theft; (2) unlawfully took property of another; (3) against the person's will; (4) by use or threatened use of force; (5) force used to obtain or retain property; and (6) in flight therefrom, the defendant was armed with a deadly weapon. RCW 9A.56.200(1)(a)(ii).

For first degree robbery, as charged in Mr. Peete's case, there are two categories of deadly weapons, those that are per se deadly, such as firearms, and those that, under the circumstances

in which they are used, are readily capable of causing death or substantial bodily harm. RCW 9A.56.200.

A pocket knife with a blade less than 3 inches is not per se a deadly weapon. Mr. Peete had three small pocket knives in his pocket: one had a 7/8 inch blade, one had a 1.75 inch blade and the third had a 2 inch blade. None of these was a deadly weapon per se. RCW 9.94A.825.

Courts evaluate the second category of weapons to determine if they are readily capable of causing death or substantial injury. The Courts consider the circumstances in which the object is used, including 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. Holmes, 106 Wn.App. 775, 24 P.3d 1118 (2001).

a. Armed with Deadly Weapon

Mr. Peete was not armed during the taking or retention of the cell phone. However, the state argued during trial that under State v. Kennard, 101 Wn.App. 533, 6 P.3d 38 (2000) and State v. Henderson, 34 Wn.App. 865, 664 P.2d 1291 (1983) if the victims believes that a robber was armed by his threats and gestures, that

was sufficient to sustain a conviction for robbery in the first degree regardless of whether the robber was armed or not. Kennard, 101 Wn.App. at 537-538( the victims of bank robberies saw pink smoke coming from underneath Kennard's coat and believed he was armed); Henderson, 34 Wn.App. at 868-869 during bank robberies, the defendant showed a bulge in his pocket which was observed by the victims and accompanied by threats to use the weapon in his pocket).

These cases are distinguishable from Mr. Peete's case, because in each of these cases, the victims believed that the defendants were armed, whereas in Mr. Peete's case, the witnesses knew that Mr. Peete was not armed. Moreover, Kennard and Henderson are not sufficiency of the evidence cases, rather they are cases dealing with the propriety of giving the "display" instruction that was given in this case.

b. Display of Deadly Weapon

No one saw Mr. Peete with a weapon in his hand. Words alone are insufficient to constitute the "display" of what appears to be a deadly weapon, required for conviction for first-degree robbery. Some physical manifestation of the presence of a weapon

in addition to words is required. State v. Scherz, 107 Wn.App. 427, 27 P.3d 252 (2001).

In Scherz, the defendant said he had a hand grenade and later told the police that he displayed a silver toenail clipper so the bank teller would think it was a grenade. No one saw the toenail clippers, and there was no evidence that anyone saw the defendant motion toward his pocket or make any physical gesture indicating a weapon along with the verbal threat. The Court held that the statement that he had a weapon and the showing of the toenail clipper to indicate a weapon were insufficient because no one saw the toenail clipper and words alone are insufficient to establish the "display" element of robbery in the first degree. The Court remanded for imposition of robbery in the second degree. Scherz, 107 Wn.App. at

In re Bratz, 101 Wn.App. 662, 674-676, 5 P.3d 759 (2000), the defendant told a bank teller that he had nitroglycerin in his coat and would blow up the bank if she did not hand over the money. No one saw the nitroglycerin and none was found on the defendant when he was apprehended a block from the bank. *Id.* The Court reversed his robbery in the first degree conviction on grounds that the state failed that the defendant was armed with or displayed a

deadly weapon. Id.

In Mr. Peete's case, the jury was instructed that as follows:

Deadly Weapon means any weapon, device or instrument, substance or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or **substantial bodily injury**.

CP 23-36 (Jury Instruction 16) (emphasis added). The testimony revealed that no one saw a knife in Mr. Peete's hand at any time. Rather a small Swiss Army pocket knife was found on the ground near Mr. Peete. RP 68.

In this case, while Mr. Peete's arms were pinned down under Mr. Akkerman, Mr. Peete said he had a knife and would stab someone. RP 31- 32. Mr. Peete did not have a knife in his hand and was not capable of stabbing anyone because he was pinned down. RP 32, 36. Under these circumstances, Mr. Peete had no ability to inflict substantial injury upon anyone.

In the instant case, the fact that no one saw a knife in Mr. Peete's hand, and the fact that Mr. Akkerman had Mr. Peete's hand pinned down, made it impossible to find that under the circumstances in which the knife was used, closed in Mr. Peete's

pocket, was insufficient to meet the criteria for the deadly weapon element of robbery in the first degree.

The Courts in Sherz and Bratz, held that a mere verbal threat unaccompanied by the victims believing that the defendant was armed is insufficient to support a conviction for robbery in the second degree. That is what occurred in this case. For this reason, this court should reverse the first degree robbery charge and remand for imposition of the lesser included offense of robbery in the second degree. This court "may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." RAP 12.2; State v. Gilbert, 68 Wn. App. 379, 384, 842 P.2d 1029 (1993).

2. THE DEFINITION OF DEADLY WEAPON PROVIDED FOR THE DEADLY WEAPON ENHANCEMENT WAS CONTRARY TO LAW AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS BECAUSE THE INSTRUCTION IMPROPERLY LESSENE THE STATE'S BURDEN OF PROOF.

While down on the ground with Mr. Ackerman on top of him, Mr. Peete yelled that he had a knife. Both Mr. Ackerman and Ms. Warren could see his hands and only saw a pen. RP 36, 39, 47,

51. Moreover, Mr. Ackerman held down Mr. Peete's left hand which had the pen. There was no testimony that Mr. Peete ever had anything in his right hand.

RCW 9.94A.825, formerly RCW 9.94A.602 (formerly RCW 9.94A.125; see Laws of 2001, ch. 10, sec. 6) defines deadly weapon for sentence enhancement purposes:

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).

A pocket knife with a blade less than three inches long is not included in the list of per se deadly weapons. The State therefore had the burden of proving beyond a reasonable doubt that the 1.5 inch Swiss Army knife met the statutory definition of a deadly weapon. See State v. Tongate, 93 Wn.2d 751, 754-56, 613 P.2d 121 (1980); 11 Washington Pattern Jury Instructions: Criminal 2.07, at 30 (2d ed.1994). For the deadly weapon enhancement to apply

for sentencing purposes, the jury was required to find the object 'had the capacity to cause death and death alone.' State v. Cook, 69 Wn.App. 412, 418, 848 P.2d 1325 (1993).

In Mr. Peete's case the trial court gave Instruction No. 16 based upon the robbery statute, RCW 9A.56.200(1)(a)(ii) which as stated supra instructed the jury that a deadly weapon could be an instrument capable of causing death or substantial bodily injury.

The trial court did not give an additional instruction defining 'deadly weapon' for purposes of the sentence enhancement. The definition in RCW 9.94A.602 and the substantive crime definition in RCW 9A.56.200 are significantly different because the former does not contain the 'substantial bodily injury' language. Instruction No. 16 improperly allowed the jury to find Mr. Peete guilty of the deadly weapon enhancement if it determined that the small pocket knives, each with blades less than two inches were capable of causing substantial bodily injury. Cook, 69 Wn.App. at 418.

The erroneous jury instruction relieved the state of proving beyond a reasonable doubt that the pocket knives were capable of causing death alone. See, e.g., State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995) (state must prove every essential element beyond a reasonable doubt and it is reversible error to instruct the

jury in a manner that would relieve this burden).

In Cook, the instructional error was deemed harmless because the defendant held a knife to the victim's throat and the knife was deemed capable of inflicting death under the circumstances in which it was used. Cook, 69 Wn. App. at 418. In the instant case, there was no circumstance in which a knife was used that could cause death, and no one ever saw a knife in Mr. Peete's hand or on his person. The instant case is therefore distinguishable from Cook, 69 Wn. App. at 418.

Ackerman presumed that Mr. Peete used a little knife to cut the cell phone off of the wall, but there was no evidence that the little pocket knives could cause death and there was no attempt to use the knives. Under the correct jury instruction on "deadly weapons" the evidence was insufficient to support the deadly weapon enhancement. For this reason, the enhancement must be vacated.

D. CONCLUSION

Mr. Peete respectfully requests this Court reverse his conviction for robbery in the first degree and reverse and dismiss deadly weapon enhancement verdict and sentence and remand for imposition of robbery in the second degree.

DATED this 16th day of November 2009.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER

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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor 930 Tacoma Ave S. Rm. 946 Tacoma, WA 98492 and John R. Pete DOC# 872525 D W 219 Washington State Penitentiary 1313 N 13<sup>th</sup> Ave. Walla Wall, WA 99362 a true copy of the document to which this certificate is affixed, On November 17, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

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