

CASE NO. 39317-4

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DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

JOHN R. PEETE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable JAMES R. ORLANDO

Pierce County Superior Court Cause No. 08-1-05176-7

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence was presented at trial from which a reasonable juror could conclude that the defendant displayed what appeared to be a deadly weapon in the commission of robbery, or in immediate flight therefrom, thereby allowing the jury to convict the defendant of Robbery in the First Degree?
2. Whether the trial court properly instructed the jury as to the definition of a deadly weapon for purposes of the deadly weapon enhancement?
3. Whether sufficient evidence was presented at trial from which a reasonable juror could conclude that the defendant was armed with a deadly weapon for purposes of the deadly weapon enhancement?

B. STATEMENT OF THE CASE.

1. Procedure

On March 4, 2009, the defendant was charged by Amended Information with, *inter alia*, one count of Robbery in the First Degree with a non-firearm deadly weapon enhancement, a violation of RCW 9A.56.190, 9A.56.200(1)(a)(ii), 9.94A.310, 9.94A.510, 9.94A.370, and

RCW 9.94A.533.¹ CP 10-11. The degree of the crime was based upon the allegation that, either during or in immediate flight from the robbery, the defendant displayed what appeared to be deadly weapon. *Id.*

In a separate instruction, the jury was instructed as to the definition of a deadly weapon for purposes of the special verdict form and accompanying deadly weapon enhancement. CP 77-102, Instruction No. 22. Specifically, for purposes of the enhancement, the jury was instructed that

...[a] deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death.

Id.

On May 14, 2009, a jury convicted the defendant of Robbery in the First Degree. CP 103. They also entered a Special Verdict Form, finding that the defendant was armed with a deadly weapon during the crime. CP 105. Specifically, they found that each of three knives was a deadly weapon, and that he was armed with them during the commission of the robbery. *Id.*

¹ The defendant was also charged with one count of Assault in the Third Degree and one count of Making a False or Misleading Statement to a Public Servant, but those counts were resolved in a separate trial that is apparently not the subject of this appeal.

Defendant now appeals, arguing that: 1) the evidence presented at trial was insufficient to prove the defendant displayed what appeared to be a deadly weapon for purposes of Robbery in the First Degree, 2) the Court failed to instruct the jury of the enhancement definition of “deadly weapon, and 3) the evidence presented at trial was insufficient to prove that the defendant was armed with a deadly weapon for purposes of the enhancement. Br. App. p.1.

2. Facts

On October 31, 2008, Mark Akkerman was working as a loss prevention agent at a K-Mart store in Pierce County, Washington. RP 18, 20. He had been working in that capacity for approximately one year. RP 19. At the time, he was working in every-day normal clothes, and his responsibility was to observe people and detect shoplifting. *Id.* The purpose of not wearing a uniform was so he could blend in with customers. *Id.*

At approximately 9:00 p.m., while Mr. Akkerman was patrolling the floor, he observed the defendant enter the store. RP 22-23. As Mr. Akkerman and the defendant walked towards and past each other, the defendant stared and looked up and down at Mr. Akkerman. RP 92. Even

after they passed each other, the defendant continued staring at him. *Id.* Mr. Akkerman found that behavior odd for someone who was actually shopping at the store, so he decided to follow the defendant. RP 22.

Mr. Akkerman made his way up the stairs, to the elevated concealed surveillance area, and began watching the defendant through a one-way mirror. RP 22-23. Mr. Akkerman watched the defendant walk into the electronics section, where the cellular telephones were displayed. RP 24. The telephone packages were locked onto partial display walls that did not go all the way up to the ceiling. RP 24-25. In order to remove the packages from the display without damaging them, an employee would have to unlock the locking pegs. RP 24. The only other way to remove the packaging is by cutting it off of the locking peg. RP 25.

From his vantage point, Mr. Akkerman was not able to see the defendant completely, but Mr. Akkerman was able to observe the partial wall shaking. *Id.* Based upon his experience of having previously seen people cutting packaging off of the wall, and seeing the display shaking on this occasion, Mr. Akkerman was sure the defendant was cutting a telephone package off of the display wall. *Id.*

Mr. Akkerman went back downstairs to the sales floor to observe the defendant from a better vantage point. RP 26. At that time, Mr. Akkerman was able to see that the defendant was, in fact, cutting the item

off of the display wall and concealing it in his pocket. *Id.* Mr. Akkerman followed the defendant and maintained observation. *Id.*

The defendant then passed all points of payment and exited through the store's front doors. RP 27. At no time did the defendant make any effort to pay for the telephone. *Id.*

The exit doors consist of two sets of doors. RP 28. Once the defendant had exited through the first set of doors, Mr. Akkerman started running after the defendant. *Id.* As the defendant pushed open the second door, he turned to see Mr. Akkerman coming through the first door. *Id.* At that point, the defendant started running from Mr. Akkerman. *Id.*

Mr. Akkerman identified himself to the defendant by yelling: "K-Mart Loss Prevention....You need to stop or I am going to call the cops." RP 29. Mr. Akkerman was about ten feet from the defendant at that time. *Id.* The defendant, however continued running, so Mr. Akkerman grabbed him in the parking lot. *Id.* Both the defendant and Mr. Akkerman fell to the ground. *Id.*

The defendant rolled over onto his back, and Mr. Akkerman got on top of him. RP 30. The defendant began flailing his arms, so Mr. Akkerman tried to hold his arms to calm him down and prevent him from reaching into his pockets. *Id.* Mr. Akkerman told the defendant to: "Just

stop, or else I'm going to have to call the police.” *Id.* The defendant, however, continued pushing Mr. Akkerman and trying to get away. *Id.*

In a serious and threatening voice, the defendant then told Mr. Akkerman that he had a knife and was going to stab him. RP 31. At some point during the scuffle, the defendant had a handful of what appeared to him to be pens and a pocketknife, and the defendant again stated: “I got a knife. I am going to stab you.” *Id.* The defendant kept yelling that he had a knife. RP 46. The defendant made jabbing motions with his hand. RP 47. The defendant did not have those objects in his hand before they went to the ground. RP 36. After the threat, Mr. Akkerman held the defendant’s hands down in an effort to avoid being stabbed. RP 32, 39. The defendant was able to get the items into his hands by reaching into his pocket. RP 36.

Store Manager Santesia Warren exited the store and attempted to help Mr. Akkerman hold the defendant down. RP 33. Then Loss Prevention Manager Jerry Finch came out and assisted in helping to hold the defendant down. RP 33-34.

When the police arrived, and the defendant was picked up, Ms. Warren saw a knife on the ground beneath the defendant. RP 47. Mr. Akkerman also saw that knife, a pocketknife, on the ground. RP 32, 36. Mr. Finch testified that that knife was laying on the ground where the

defendant's left hand had been. RP 62. That was the same hand in which Mr. Akkerman had seen the defendant holding objects. *Id.* The knife was of a kind that had multiple tools on it. RP 36-37. That knife, identified and admitted as Plaintiff's Exhibit No. 2, was a black Swiss Army knife, Eddie Bauer edition. RP 61, 68. Amongst its tools were a scissors, an awl, a small blade and a small file. RP 85. Its blade was approximately 1.5 inches in length. *Id.* On the ground, a couple of feet from the struggle, Mr. Akkerman found the telephone stolen by the defendant. RP 35.

The responding officers took the defendant into custody, and searched him. RP 86. During that search, Officer Nicholas Jensen found a second knife, a closed black folding knife, in the defendant's pocket. RP 87. That knife, admitted as Plaintiff's Exhibit No. 1-A, contained a small emblem with the words: "Tacoma, Washington" inscribed on it. RP 70. That knife contained a blade, one or two bottle openers. RP 87. The blade was approximately seven-eighths ($7/8$) of an inch long. *Id.*

Officer Jensen also found yet a third knife, admitted as Plaintiff's Exhibit No. 1-B, in the defendant's pocket. RP 87. That knife had a wood handle and a single blade. RP 71, 88. That blade was approximately 2-inches in length.

At the time of this contact, Officer Jensen had been a police officer for approximately three years. RP 88. Prior to becoming a police officer, Officer Jensen had been a corrections officer in Kitsap County, and before that, he had served four years in the Marine Corp. *Id.* In his experiences, he had had occasion to see injuries resulting from knives similar in size to Plaintiff's Exhibits Nos. 1-A, 1-B and 2. *Id.* He had observed such injuries in the context of responding to aggravated assault calls. *Id.* He described them as puncture wounds to different parts of the body, including stomach, neck, and face. RP 89. He also referenced the possibility of life-threatening internal bleeding with such injuries. *Id.*

When the defendant identified himself to the officer, the defendant falsely identified himself as "Willie Peete." RP 72.

C. ARGUMENT.

1. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT FOR A REASONABLE JUROR TO CONVICT THE DEFENDANT OF ROBBERY IN THE FIRST DEGREE.

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the

State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The crime of Robbery in the First Degree is committed when:

- (1) on or about a particular date, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) the defendant intended to commit theft of the property;
- (3) the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to the other person;
- (4) the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) in the commission of these acts, or in immediate flight therefrom, the defendant was armed with a deadly weapon or displayed what appeared to be a deadly weapon; and
- (6) any of these acts occurred in the State of Washington.

RCW 9A.56.190, 9A.56.200(1)(a)(ii); WPIC 37.02; Court's Instructions No. 7.

Defendant's sole claim regarding the sufficiency of evidence deals with element (5) set out above. Brief of Appellant, 4-9. Specifically, the

defense asserts that the State failed to prove that the defendant was “armed with a deadly weapon” or “displayed what appeared to be a deadly weapon.” *Id.*

a. Armed with a Deadly Weapon.

For purposes of the substantive robbery charge, the jury was instructed that a “deadly weapon” is...

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

CP 77-102, Court’s Instruction No. 16; WPIC 2.06.01; RCW

9A.04.110(6). Defense counsel at trial did not object to that instruction.

RP 113. The trial court also instructed the jury that “substantial bodily injury” was defined as...

a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part

CP 77-102, Court’s Instruction No. 17; WPIC 2.03.01; RCW

9A.04.110(4)(b). Defense counsel at trial did not object to that

instruction. RP 113.

Whether or not a knife in the present case is a “deadly weapon” is evaluated by looking at the circumstances. RCW 9A.04.110(6). Defense counsel erroneously suggests that the only relevant circumstances are

those in which a knife is actually **used**. Brief of Appellant, 5. The statutory definition of “deadly weapon,” however, also references the circumstances in which the weapon is **threatened** to be used. RCW 9A.04.110(6).

In the present case, the defendant clearly threatened to stab Mr. Akkerman with a knife: “I got a knife. I am going to stab you.” RP 31. The defendant made that exclamation in a serious and threatening voice. *Id.* The defendant repeatedly yelled that he had a knife. RP 46.

Officer Jensen, after testifying about his experience, testified as to the potential for great harm to be caused by knives even as small as the ones in the present case: puncture wounds to such vital areas of the body as the stomach, neck, face; internal bleeding. RP 87-89. The officer further described such injuries as life-threatening. RP 89. Such testimony was uncontroverted and without objection.

Looking at the evidence in the light most favorable to the State, the defendant was armed with a deadly weapon. The knives were all readily capable of causing life-threatening injuries, which is more than the “substantial bodily injury” required to meet the “deadly weapon” definition. Furthermore, the defendant threatened to use a knife in exactly

the circumstance in which it is deadly—by stabbing. Having established that the knives were deadly weapons, the next question becomes: was he armed with them?

Both the direct and circumstantial evidence, in the light most favorable to the State, demonstrate that the defendant was armed with the knives. Mr. Akkerman observed the defendant holding what appeared to be a pocketknife in his hand, along with some pens; the police found two of the knives in the defendant's pockets. RP 31 and 87. Mr. Akkerman had also observed the defendant cutting the phone packaging from the display wall; the third knife was found on the ground, directly under where the defendant had been held down; the stabbing motions the defendant made with his hand that held the pens and apparent knife. RP 26, 47, 62. Circumstantial evidence, that based upon "...common sense and experience..." is every bit as valuable as direct evidence. CP 83 (Court's Instructions No. 4) WPIC 5.01.

b. Displaying what Appeared to be a Deadly Weapon.

"Robbery in the First Degree is committed when...in the commission of these acts...the defendant...displayed what appeared to be a deadly weapon." RCW 9A.56.190.

“Display” is satisfied by either:

- 1) actually showing an object to someone, or
- 2) by words and conduct, leading someone to believe the object is present.

State v. Kennard, 101 Wn. App. 533, 6 P.3d 38 (2000); *State v. Henderson*, 34 Wn. App. 865, 64 P.2d 1291 (1983). In the present case, the defendant certainly used words to lead Mr. Akkerman to believe he was armed. He repeatedly yelled: “I got a knife.” RP 31 and 46. Those words were buttressed by the defendant’s conduct. The defendant’s cutting action in separating the phone from the display wall indicated to Mr. Akkerman that the defendant had a cutting instrument. Then later on, during the fight, the defendant’s stabbing motions were further conduct leading Mr. Akkerman to believe the defendant was armed.

The defendant also displayed what appeared to be a deadly weapon (knife). Defense counsel suggests that “no one saw Mr. Peete with a weapon in his hand.” Brief of Appellant, 6 and 8. That claim is not accurate. While Mr. Akkerman’s testimony vacillated somewhat, he did, in fact, testify that he observed what appeared to be a pocketknife in the defendant’s hand. RP 31. Resolving factual conflicts and witness credibility is within the province of the jury. *State v. Thomas*, 150 Wn. 2d 821, 874-5, 83 P.3d 970 (2004). Again, the evidence and reasonable

inferences therefrom must be looked at in the light most favorable to the State.

Defense counsel also represents that the victim did not believe the defendant was armed. Brief of Appellant, 9. That claim is made without citation to the record and should not be considered. *S&S Const., Inc. v. ADC Properties LLC*, ___ Wn. App. ___, 211 P.3d ___ (2009); *State ex rel. M.M.G. v. Graham*, 123 Wn. App. 931, 99 P.3d 1248 (2004); *State v. Law*, 110 Wn. App. 36, 38 P.3d 374 (2002). Moreover, the record indicates that the victim did believe the defendant was armed. As stated earlier, Mr. Akkerman had earlier seen the defendant cutting the phone off of the display wall. RP 25. The defendant made stabbing motions with his hand. RP 47. Finally, Mr. Akkerman testified that he observed an apparent pocketknife, along with the pens, in the defendant's hand. RP 31.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE DEFINITION OF A DEADLY WEAPON FOR PURPOSES OF THE DEADLY WEAPON ENHANCEMENT.

Defense counsel suggests that the trial court only instructed the jury on the definition of "deadly weapon" for purposes of the substantive crime of Robbery in the First Degree. Brief of Appellant, at 11. Specifically, defense cites to Instruction No. 16, in which the trial court instructed the

jury that a deadly weapon is an instrument capable of causing either death or substantial bodily injury. *Id.*

Defense counsel is correct in stating that the trial court must also instruct on a separate definition where a deadly weapon also forms the basis of a weapon enhancement. RCW 9.94A.602. In the context of an enhancement, the trial court must instruct the jury that a “deadly weapon” must be capable of causing death alone. *State v. Cook*, 69 Wn. App. 412, 418, 848 P.2d 1325 (1993).

In citing to Instruction No. 16, which instructs the jury on the substantive crime definition of “deadly weapon,” defense counsel boldly states that that was the only definition of “deadly weapon” the jury was given. Defense counsel argues that the jury’s verdict on the enhancement must, therefore be set aside.

Defense counsel either ignores or has simply overlooked Instruction No. 22. That instruction, given by the trial court, specifically advised the jury that, for purposes of the special verdict (enhancement), a deadly weapon is defined as “...having the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death.” CP 102 (Jury Instruction 22). As the jury was properly instructed with regard to the special verdict and enhancement, the deadly weapon special verdict should stand.

3. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT FOR A REASONABLE JUROR TO CONCLUDE THAT THE DEFENDANT WAS ARMED WITH A DEADLY WEAPON FOR PURPOSES OF THE DEADLY WEAPON ENHANCEMENT.

For purposes of the deadly weapon enhancement, the jury was instructed that a special verdict of “deadly weapon” must be a unanimous decision, and based upon proof beyond a reasonable doubt that:

- 1) at the time of the commission of the crime, the object was easily accessible and readily available for offensive or defensive use, and
- 2) there was a connection between the object and the defendant, and
- 3) there was a connection between the object and the crime, and
- 4) the object had the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death.

Court’s Instructions 21 (WPIC 160.00) and 22 (WPIC 2.07.01). The jury is presumed to have abided by that instruction. *State v. Anderson*, ___ Wn. App ___, ___ P.3 ___ (2009)(2009 WL, Case No. 37325-4-II Issued 12/8/09)(citing *State v. Hopson*, 113 Wn. 2d 273, 287, 778 P.2d 1014 (1989)).

As set out above, Officer Jensen testified as to the potential for great harm to be caused by knives even as small as the ones in the present

case: puncture wounds to such vital areas of the body as the stomach, neck, face; internal bleeding. RP 87-89. Most importantly, with regard to the enhancement, the officer further described such injuries as life-threatening. RP 89. Such testimony was uncontroverted and without objection.

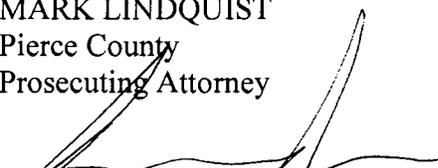
Looking at the evidence in the light most favorable to the State, and under the circumstances, the weapons had the capacity of causing death

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that the defendant's conviction and Special Verdict be affirmed.

DATED: January 20, 2010.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below

1-20-10 
Date Signature

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