

No. 94712-1

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Division III
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34032-5-III

STATE OF WASHINGTON, Respondent,

v.

EDWARD LEON NELSON, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Edward Nelson was convicted of attempting to rob a Rite Aid pharmacy employee. The employee threatened did not have access to or authority over the prescription medications Nelson demanded, which were kept in a locked box that only the pharmacist on duty could open. At trial, Nelson's attorney proposed several instructions pursuant to *State v. Richie* and *State v. Latham* concerning the employee's ownership, representative, or possessory interest over the medications. The trial court declined to give the proposed instructions and instead instructed the jury only that it had to find that the employee was an employee of the owner. The trial court further admonished defense counsel against arguing that the prescription medications were not in the employee's possession. And additionally, the trial court declined to give Nelson's proposed instruction on the lesser included offense of unlawfully displaying a firearm.

Despite the State's failure to present any evidence that the firearm used in the attempted robbery was a real firearm, the jury convicted Nelson of attempted robbery with a firearm enhancement. At a subsequent bifurcated trial on the charge of unlawful possession of a firearm, the jury found Nelson not guilty. Nelson was sentenced to life without the possibility of parole as a persistent offender. He now appeals, arguing that the trial court erred in declining to give his proposed

instructions; deprived him of his ability to present a defense and relieved the State of its burden of proof as to an essential element of the charge by instructing the jury that the employee had an ownership, representative, or possessory interest over the controlled substance; omitted an essential element of the firearm enhancement by failing to define a firearm to the jury pursuant to the statutory definition; and that insufficient evidence supports the conviction for attempted robbery in the first degree and the firearm enhancement.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court's "to convict" instruction omitted an essential element of the charge of first degree burglary when it did not require the jury to find that the victim had an ownership, representative, or possessory interest in the property.

ASSIGNMENT OF ERROR 2: In restricting Nelson's argument that the employee threatened did not have an ownership, representative or possessory interest in the medication demanded, the trial court deprived Nelson of the ability to present a defense and relieved the State of its burden of proof of an essential element of the charge.

ASSIGNMENT OF ERROR 3: Insufficient evidence supports the conviction for attempted first degree burglary because the State failed to prove that the employee had an ownership, representative, or possessory interest in the property sought to be taken.

ASSIGNMENT OF ERROR 4: The trial court's instruction on the firearm enhancement omitted an essential element and lessened the State's burden of proof because it did not inform the jury that a firearm must be capable of firing a projectile by means of an explosive.

ASSIGNMENT OF ERROR 5: Insufficient evidence supports the firearm enhancement because the State presented no evidence that the firearm was real and, in a bifurcated trial on a charge of unlawful possession of a firearm, the jury found Nelson not guilty.

ASSIGNMENT OF ERROR 6: The trial court erred in refusing to give Nelson's proposed instruction on the lesser included offense of unlawful display of a firearm.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When the trial court instructs the jury only that it needs to find that the victim of the attempted robbery is an employee and not that the victim had an ownership, representative, or possessory interest in the

property sought to be taken, does the trial court's instruction omit an essential element of the charge? YES.

ISSUE 2: When the trial court informs defense counsel that it would be improper to argue that the pharmacy employee who had no legal authority or physical access to the controlled substance sought to be taken did not have a legally adequate interest in the item, does the trial court impair the ability to present a defense and relieve the State of its burden of proof as to an essential element? YES.

ISSUE 3: When the employee of a pharmacy does not have physical access to or authority over a certain controlled substance sought to be taken, does she have a sufficient ownership, representative, or possessory interest in the controlled substance to support a conviction for attempted robbery in the first degree? NO.

ISSUE 4: When the trial court does not inform the jury to that return an affirmative special verdict on a firearm enhancement, it must find that the defendant used a device capable of firing a projectile by means of an explosive such as gunpowder, do the instructions omit an essential element of the enhancement? YES.

ISSUE 5: When the State does not present evidence that a real firearm was used in an attempted robbery and the jury subsequently returns inconsistent verdicts acquitting the defendant of unlawfully possessing a firearm but finding he used a firearm in the commission of the robbery, does insufficient evidence support the firearm enhancement? YES.

ISSUE 6: Was Nelson entitled to a lesser included instruction on the charge of unlawful display of a firearm when the State's evidence permitted an inference that Nelson did not commit attempted first degree robbery because the person threatened did not have an ownership, representative, or possessory interest in the property sought to be taken? YES.

IV. STATEMENT OF THE CASE

On the afternoon of August 15, 2014, Mya Meinhold was working at Rite Aid as a pharmacy tech. III RP 46-48. During her shift, she saw an African-American man in his forties come to the counter with a roll of paper towels. III RP 48, 54. When she asked him if he needed help, he handed her a piece of paper and then gestured toward his other hand where she saw a large black handgun. III RP 50. The man told Meinhold she was going to get him what he wanted or he was going to shoot her in ten seconds. III RP 52.

Meinhold did not have access to the narcotic medication he wanted and told the man that. III RP 52, 78. She went over to Thomas Newcomer, the pharmacist, and told him the man had a gun, but Newcomer never saw the gun himself and did not become aware that he had displayed a gun until later. III RP 52, 75, 80, 97. The man asked Newcomer for Oxy 30's. III RP 78. The medication the man wanted was, as a controlled substance, under Newcomer's care and direction since he was the licensed pharmacist; Meinhold did not have access to the medication, which was stored in locked box. III RP 80, V RP 335-36, 340. Indeed, not even the manager had access to the medication requested; only the pharmacist did. V RP 335.

Newcomer walked toward the cabinet with his keys but then came back and told the man they did not have that medication. III RP 52. The man then said to get him cash, and Newcomer said he did not have access to it and paged the manager to the pharmacy. III RP 53. At that point, the man turned and left, walking quickly out of the front entrance. III RP 53, 112. The Rite Aid manager followed him out to see where he went and lost sight of the man, but saw a two-tone silver and gold Mercedes pulling out of the parking lot. III RP 110, 112-13.

Police responded to Rite Aid but were unable to locate the suspect. III RP 160. Later in the day, however, Yakima Police Officer Jaime Gonzalez saw a 1990's Mercedes parked at the Yakima Valley Inn and decided to investigate it. III RP 163. As he got out to speak to the man in the car, the driver left and Gonzalez attempted to initiate a stop. III RP 164. But the man did not stop, and a pursuit ensued. III RP 141, 166. Police eventually lost sight of the vehicle outside of town on State Route 97, but recovered a hat that was thrown out of the vehicle. III RP 150, 152. DNA from three individuals was later recovered from the hat and Edward Nelson was determined to be the primary contributor. III RP 247-48.

Police eventually found the vehicle parked in Harrah and obtained a search warrant for it, where they retrieved a number of items of mail belonging to Nelson. III RP 288-90. The investigating detective obtained Nelson's photograph from a Department of Licensing database and Officer Gonzalez identified him as the man he had seen during the pursuit from the Yakima Valley Inn. III RP 291, 296. The detective also created photomontages including Nelson's photograph and both Meinhold and Newcomer subsequently identified Nelson from the photomontages as the attempted robber at Rite Aid. III RP 54, 84, 291, 299-300.

The State charged Nelson with attempted first degree robbery with a firearm enhancement, attempting to elude a police vehicle with an endangerment enhancement, and first degree unlawful possession of a firearm. CP 31-32. The information alleged that Nelson committed the attempted robbery against Meinhold and/or Newcomer, “a person or persons who had ownership, representative or possessory interest in the property.” CP 31. Before trial, the State agreed to bifurcate the unlawful possession of a firearm charge due to the necessity of presenting evidence of Nelson’s prior convictions. I RP 27.

During trial, Nelson’s counsel proposed several jury instructions incorporating the terms of *State v. Richie*, 191 Wn. App. 916, 365 P.3d 770 (2015). The proposed instructions defined the crime of robbery as taking personal property by use or threat of force from a person who has an ownership, representative, or possessory interest in the property. CP 41-44. Nelson also proposed an instruction defining a “representative interest in property” as when the person has authority from the owner of the property to act regarding the property, citing *State v. Latham*, 35 Wn. App. 862, 670 P.2d 689 (1983). CP 45. Defense counsel also moved to dismiss the attempted first degree robbery charge at the close of the State’s case on the grounds that the State failed to present sufficient evidence of a representative interest because Meinhold had no authority to act regarding

the controlled substance requested, and that Newcomer did not see the gun. V RP 401, 402, 404.

The trial court denied the motion to dismiss as to Meinhold but granted the motion to dismiss as to Newcomer, finding that there was insufficient evidence of attempted first degree robbery of Newcomer. V RP 406. The trial court further advised defense counsel that because Meinhold was an employee, it would be improper to argue to the jury that she did not have a possessory or representative interest in the narcotic. V RP 411. Thereafter, the trial court declined to give Nelson's proposed instructions and gave its own instructions instead. VI RP 415-18. The trial court's instructions advised the jury that "[a] person with a representative interest includes an agent, employee or other representative of the owner of the property" and its to-convict instruction asked the jury only to find that Meinhold was an employee of the owner of the property, not that she had an ownership, representative, or possessory interest in the property. CP 66-67. The trial court also did not define "firearm" in its instructions for purposes of the enhancement, but merely advised the jury that a firearm, whether loaded or unloaded, is a deadly weapon. CP 70.

The jury convicted Nelson of attempted first degree robbery and attempting to elude a pursuing police vehicle, and returned affirmative

special verdicts on the enhancements. CP 84-87, VI RP 488-89. During the bifurcated trial on unlawfully possessing a firearm, the investigating detective testified that no firearm was recovered so no determination was made as to the functionality of the weapon used in the attempted robbery. VII RP 507. Although the robbery attempt was captured on surveillance video, the detective was unable to ascertain a make and model from the video and acknowledged that sometimes airsoft guns can be confused for real guns. VII RP 507-09. The jury returned a verdict of not guilty on the bifurcated count. CP 112, VII RP 532.

The trial court found Nelson to be a persistent offender and sentenced him to life without the possibility of parole. CP 146-49, 153. Nelson now timely appeals. CP 160.

V. ARGUMENT

Nelson asks the court to vacate and dismiss his conviction for attempted robbery in the first degree and the associated firearm enhancement. In instructing the jury that it merely needed to find that Meinhold was an employee of Rite Aid to convict Nelson of attempted first degree robbery, the trial court omitted an essential element of the charge and created a mandatory presumption that Meinhold had an ownership, representative or possessory interest in the controlled

substance sought. This presumption relieved the State of its burden of proof as to an essential element of the charge and prevented Nelson from presenting a defense. This error requires reversal.

Moreover, insufficient evidence supports a conclusion that Meinhold had an ownership, representative, or possessory interest in the controlled substance Nelson sought. As such, the charge should be dismissed with prejudice. Similarly, insufficient evidence supports the firearm enhancement because the State never showed that the firearm was a real, operable gun rather than an airsoft or a replica. The firearm enhancement was also the subject of an inconsistent verdict from the jury, which apparently agreed that the State failed to prove the gun was an operable firearm beyond a reasonable doubt when it acquitted Nelson of unlawfully possessing a firearm. Consequently, the firearm enhancement should also be vacated and dismissed.

Lastly, in the event the court vacates Nelson's conviction for the instructional error but finds sufficient evidence supports the conviction to warrant a retrial, the court should further find that it was error for the trial court to refuse to give Nelson's proposed instruction on the lesser included offense of unlawful display of a firearm.

A. The trial court omitted an essential element and relieved the State of its burden of proof on an essential element of attempted robbery in the first degree when it declined to give Nelson's proposed definitional and to convict instructions and the instructions it gave did not include the element that Meinhold had an ownership, representative, or possessory interest in the medication.

The reviewing court evaluates jury instructions *de novo* as a whole to determine whether they allow counsel to argue the theory of the case, are not misleading, and accurately advise the jury of the applicable law. *State v. Harris*, 164 Wn. App. 377, 383, 263 P.3d 1276 (2012). Due process requires that the State prove each essential element of the charge beyond a reasonable doubt. *State v. France*, 180 Wn.2d 809, 814, 329 P.3d 864 (2014). The "to convict" instruction "must contain all of the elements of the crime because it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence." *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014) (quoting *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010)). Instructions that relieve the State of its burden to prove each element beyond a reasonable doubt are constitutionally defective and amount to reversible error. *Harris*, 164 Wn. App. at 383; *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007).

The crime of robbery has an essential, nonstatutory element that the person threatened have an ownership, representative, or possessory interest in the property taken. *State v. Richie*, 191 Wn. App. 916, 924, 365 P.3d 770 (2015); *State v. Latham*, 35 Wn. App. 862, 866, 670 P.2d 689 (1983). The implicit requirement establishes that in an absence of some meaningful relationship between the person threatened and the property taken or sought to be taken, no robbery occurs. “To constitute the crime of robbery, the property must be taken from the person of the owner, or from his immediate presence, or from some person, or from the immediate presence of some person, having control and dominion over it.” *State v. Hall*, 54 Wash. 142, 143-44, 102 P. 888 (1909). In other words, “control and dominion over the property taken in the person from whom or from whose presence the property is actually taken are necessarily implied” in a charge of robbery. *Hall*, 54 Wash. at 144.

Latham sheds light on the nature of the required relationship between victim and property to support a robbery conviction. In *Latham*, the Court of Appeals reversed a robbery conviction as to the passenger of a vehicle that was taken, on the grounds that the passenger had no authority, express or implied, to act concerning the car, and the car was not in the passenger’s possession at the time of the taking. 35 Wn. App. at 866. *Latham* establishes that mere presence and physical proximity to the

property taken does not establish a robbery; instead, some authority over the property is required.

Under appropriate circumstances, an employee who has authority to act concerning the property taken may have an adequate representative interest in the property to sustain a robbery conviction. In *State v. Long*, 58 Wn.2d 830, 832-33, 365 P.2d 31 (1961), *reversed on other grounds in Draper v. Washington*, 372 U.S. 487, 83 S. Ct. 774, 9 L.Ed.2d 899 (1963), the defendants robbed two motels by obtaining money from the night clerks and striking them in the head with a gun. In *Long*, the motel clerks plainly had physical access and authority over the cash taken. Thus, in *Long*, the necessary relationship of dominion and control existed between the motel clerks and the property taken to support the robbery charge.

This case, by contrast, presents unique facts. While there is no question Meinhold was an employee of Rite Aid at the time of the attempted robbery, it was also undisputed that she had no authority to dispense the controlled substances and did not have any physical access to them. Thus, unlike in *Richie* where the employee met the representative interest standard because she had access to and authority to sell the bottles of liquor in the store that the defendant stole, in this case, the mere status

of employment does not confer the requisite authority over the property to support a robbery conviction.

Plainly believing that employment alone was adequate to establish that Meinhold had an ownership, representative or possessory interest in the controlled substances in the pharmacy, the trial court therefore instructed the jury that to convict Nelson of attempted first degree robbery, it needed only to find that Meinhold was an employee of Rite Aid. But this was directly contrary to the requirement of *Richie*, which expressly held that the jury must be instructed that an ownership, representative or possessory interest is an essential element of the charge. 191 Wn. App. at 929 (“We hold that the to-convict instruction on first degree robbery was erroneous because it did not include an essential element of the crime of first degree robbery—the requirement that the victim have an ownership, representative, or possessory interest in the property taken.”).

In effect, the court’s instruction served to create a mandatory presumption that Meinhold had the requisite property interest to support the robbery conviction by virtue of her employment at Rite Aid. Mandatory presumptions run afoul of due process requirements when they serve to relieve the State of its burden of proof beyond a reasonable doubt. *State v. Deal*, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). The

presumption is mandatory and the burden of proof improperly shifted if the jury is required to draw a certain inference if the defendant fails to prove it should not be drawn. *Id.*

This is, in effect, what happened here. The trial court essentially instructed the jury to presume that Meinhold had a representative interest in the controlled substances unless Nelson proved she was not an employee of Rite-Aid. The jury was required to find the presumed fact – the existence of a representative interest – from the proven fact of employment. *See Deal*, 128 Wn.2d at 699. Compounding this presumption by refusing to permit Nelson to argue that Meinhold did not have an adequate interest in the property to sustain the conviction regardless of her employment status, the trial court eliminated the State's burden of proof on the element of Meinhold's interest in the property sought, requiring only that the State prove Meinhold's employment. Consequently, the instructions deprived Nelson of due process because they relieved the State of proving Meinhold's interest in the controlled substance beyond a reasonable doubt.

Instructions that omit an essential element of the crime are subject to harmless error analysis, requiring the State to show beyond a reasonable doubt that the error did not affect the verdict. *State v. Hayward*, 152 Wn.

App. 632, 646, 217 P.3d 354 (2009). This standard is met only when the omitted element is established by uncontroverted evidence. *Id.* at 646-47. Here, the evidence established that Meinhold did not have authority to dispense controlled substances or physical access to them. Indeed, she lacked the ability to comply with his demand and had to involve the pharmacist to get Nelson what he wanted. Under *Latham* and *Hall*, the touchstone of the required interest is dominion and control over the property unlawfully taken. Meinhold lacked dominion and control over the substance and could not have turned it over to Nelson if she wanted. As such, the jury could have readily concluded that the State did not meet its burden to prove she had a sufficient interest in the controlled substance Nelson requested to support the robbery charge.

Because the State cannot prove that the error in eliminating an essential element from the to-convict instruction was harmless, the conviction must be reversed. At the very least, the case should be remanded for a new trial. However, as Nelson contends in the next section, because insufficient evidence supports the element of an ownership, representative or possessory interest in the property, the charge should be dismissed.

B. The State failed to present sufficient evidence to support the attempted first degree robbery because it failed to show Meinhold had an ownership, representative or possessory interest in the Oxy 30s.

A challenge to the sufficiency of the evidence asks whether, viewing the evidence and all reasonable inferences therefrom, whether any reasonable fact finder could find all of the elements proven beyond a reasonable doubt. *State v. Cook*, 69 Wn. App. 412, 415, 848 P.2d 1325 (1993). On issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence, the reviewing court defers to the fact finder. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992). If a conviction is reversed for insufficient evidence, retrial is unequivocally barred under double jeopardy principles; instead, dismissal is required. *State v. Hickman*, 153 Wn.2d 97, 103, 954 P.2d 900 (1998).

As discussed above, an essential element of attempted robbery in the first degree is that Meinhold had an ownership, representative or possessory interest in the controlled substance Nelson demanded. *Richie*, 191 Wn. App. at 924. In explaining the evidentiary requirements to satisfy this element, the *Richie* court stated, “[A] person with a representative capacity would include a bailee, agent, employee, or other

representative of the owner if he or she has care, custody, control, or management of the property.” *Id.* at 925 (citing *Latham*, 35 Wn. App. at 865) (emphasis added). Thus, to meet its evidentiary burden, the State must show not merely that Meinhold was an employee of Rite Aid, but that she had some care, custody, control, or management of the property sought to be taken.

Contrary to this requirement, the undisputed evidence at trial established that Meinhold was legally prohibited from exercising any authority over the medication Nelson demanded. The medications were kept in a locked box that could not even be accessed by the store manager; only the licensed pharmacist on duty could obtain them. In *Richie*, the victim was an employee who had not yet clocked in. 191 Wn. App. at 920. When she attempted to confront a shoplifter, the shoplifter struck her with the bottle of liquor he was stealing and ran away. *Id.* at 921. The *Richie* court held that sufficient evidence supported the first degree robbery charge because the victim was acting in her capacity as an employee and was attempting to provide customer service at the time she reached for the bottle. *Id.* at 926. But unlike the *Richie* victim, Meinhold here did not have authority to dispense the controlled substance to Nelson by virtue of her employment and doing so, even if she were physically capable of accessing it, would have exceeded her employment authority.

Consequently, unlike in *Richie* and in cases such as *Long* where the employee has direct access to and express or implied authority over the property taken, in this case, the undisputed evidence established that Meinhold lacked “care, custody, control, or management of the property.” *Richie*, 191 Wn. App. at 925. As such, even viewing the evidence in the light most favorable to the State, the State failed to establish the necessary authority over the controlled substance Nelson demanded from Meinhold to support a conviction for attempted first degree robbery against her. Having failed to prove an essential element of the charge, the conviction must be reversed and dismissed.

C. The firearm enhancement must be vacated due to instructional error that omitted an essential element and because insufficient evidence supported the special verdict.

The Sentencing Reform Act permits additional time to be added to a standard range sentence upon a jury’s finding that the defendant used a firearm in the commission of an offense. RCW 9.94A.533(3). A firearm is defined under RCW 9.41.010(9) as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” To support a firearm enhancement, the State is required to prove that a real

firearm was used.¹ *State v. Tasker*, 193 Wn. App. 575, __ P.3d __, 2016 WL 1701530 at 1 (April 28, 2016).

As discussed above, jury instructions must contain all the essential elements of the charge and an omission that relieves the State of its burden of proof as to an element is reversible error. *Harris*, 164 Wn. App. at 383. Here, the jury instructions did not define “firearm” nor specify that a real firearm, rather than a toy or a replica, must be used. This omission served to lower the State’s burden of proof that the device used was capable of firing a projectile by use of an explosive such as gunpowder. Although Nelson’s attorney did not object to the lack of instruction defining “firearm” for purposes of the enhancement, the error may be raised for the first time on review because it implicates Nelson’s due process right to instructions that hold the State to its burden to prove each element beyond a reasonable doubt. *Harris*, 164 Wn. App. at 383.

¹ There is currently a split between the appellate court divisions concerning the State’s burden to prove that the firearm is operable. *Tasker*, 2016 WL 1701530 at 4; *see also State v. Pierce*, 155 Wn. App. 701, 230 P.3d 237 (2010). In *Tasker*, Division III held that while a device must be capable of being fired to meet the statutory definition of a firearm, “evidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm.” 2016 WL 1701530 at 10. By contrast, Division II held in *Pierce* that the State must present some proof of operability to support a firearm enhancement. 155 Wn. App. at 714, n. 11. Nelson respectfully contends that *Tasker* is wrongly decided because it permits the jury to find operability based upon speculation rather than evidence, and shifts the burden of proof to the defendant to show that what may appear to a surprised or frightened witness to be a firearm is not, in fact, capable of firing a projectile by use of an explosive such as gunpowder. RCW 9.41.010(9).

The error, moreover, is not harmless because it is highly likely a properly instructed jury would have reached a different verdict. First, and significantly, the jury *did* reach a different verdict on the bifurcated charge of unlawful possession of a firearm, which also required proof of a real firearm within the definition of RCW 9.41.010(9), when it was properly instructed on what a firearm is. CP 98. The special verdict finding that Nelson used a firearm in the commission of attempted first degree robbery is irreconcilably inconsistent with its subsequent verdict that Nelson did not unlawfully possess a firearm when Nelson's prior convictions were never disputed. This inconsistency requires vacation of the firearm enhancement, where the jury was not properly instructed.

Inconsistent verdicts alone are not manifest errors without some showing that the defendant's rights were affected. *State v. Goins*, 151 Wn.2d 728, 732-33, 92 P.3d 181 (2004). Washington courts have recognized that juries have the power to return verdicts for impermissible reasons, including lenity. *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988). However, the same courts have acknowledged that "truly inconsistent verdicts reveal that the jury somehow erred in applying the jury instructions." *Goins*, 151 Wn.2d at 733. Jury lenity should not be presumed where the jury returned one verdict when incompletely instructed, and returned a different verdict when properly advised of the

law and the facts necessary to fully and fairly evaluate the defendant's guilt.

However, even if the court believes that jury lenity is a plausible explanation for the jury's inconsistent verdicts under these circumstances, where instructional error adequately and reasonably explains the inconsistency, and where the inconsistency itself tends to show the instructional error to be prejudicial, the guilty verdict should still be vacated if it is unsupported by sufficient evidence. *Goins*, 151 Wn.2d at 734. Here, the State did not recover a firearm, did not identify a make or model, and did not present any evidence that the device Nelson used was capable of firing a projectile by using an explosive. Because the State has the burden to prove that the device meets the requirements of RCW 9.41.010(9), the court should follow *Pierce*'s reasoning that without some additional proof of operability such as a muzzle flash, recovered bullets, or gunshots overheard, the State fails to present sufficient evidence that the item used is a firearm for purposes of the enhancement. 155 Wn. App. at 714, n. 11.

The trial court's instructions on the firearm enhancement failed to hold the State to its burden of proving that the device was a real firearm, resulting in an inconsistent acquittal when the jury was properly

instructed. Moreover, the State failed to present sufficient evidence that the item Nelson displayed was a real firearm within the meaning of the statute. Accordingly, the firearm enhancement should be vacated.

D. The trial court erred in declining Nelson's proposed instruction on the lesser included offense of unlawfully displaying a firearm.

Because Nelson contends that insufficient evidence supports the conviction for attempted robbery in the first degree based upon the State's failure to prove Meinhold had an ownership, representative or possessory interest in the controlled substance Nelson demanded, retrial should be barred and the failure to give Nelson's lesser included offense instruction should be moot. However, in the event the court determines sufficient evidence supports the conviction to warrant a remand for retrial, or in the event the court determines that the to-convict instruction did not improperly omit an essential element of the charge of attempted robbery in the first degree, then the denial of Nelson's proposed instruction on the lesser included offense of unlawful display of a firearm should be reviewed.

A defendant is entitled to an instruction on a lesser included offense if two conditions are met: (1) each element of the lesser offense is a necessary element of the greater offense, and (2) the evidence must support an inference that the lesser offense was committed. *State v.*

Fernandez-Medina, 151 Wn.2d 448, 454, 6 P.3d 1150 (2000); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Unlawful display of a firearm is a lesser included offense of attempted robbery in the first degree. *Workman*, 90 Wn.2d at 448.

Here, there was evidence that Nelson displayed a firearm in a manner manifesting an intent to intimidate Meinhold or warranting alarm by Meinhold, as required under RCW 9.41.270(1). Moreover, there was evidence that he committed the lesser crime to the exclusion of the greater one because the jury could have concluded that Meinhold did not have custody and control over the controlled substance in the locked cabinet that Nelson demanded, and accordingly did not have an ownership, representative or possessory interest in the substance. Accordingly, the lesser included instruction on unlawful display of a firearm should have been given.

When a lesser included offense instruction is warranted, a defendant has an absolute right to have the jury consider the offense. *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984). Failure to give the instruction here warrants a new trial.

VI. CONCLUSION

For the foregoing reasons, Nelson respectfully requests that the court REVERSE and DISMISS his conviction for attempted robbery in the first degree and the associated firearm enhancement; or, in the alternative, to REMAND the case for a new trial on the attempted first degree burglary charge.

RESPECTFULLY SUBMITTED this 20th day of July, 2016.

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing a copy in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Edward Leon Nelson, DOC # 939164
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

And, pursuant to prior agreement of the parties, by e-mailing a copy to:

David Trefry
David.Trefry@co.yakima.wa.us,

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

Signed this 20th day of July, 2016 in Walla Walla, Washington.


Breanna Eng