No. 94712-1

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Court of Appeals
Division III
State of Washington

NO. 34032-5-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWARD LEON NELSON,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

Assignments of Error

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
B. The State failed to present sufficient evidence to support the attempted first degree Robbery conviction because it failed to show Meinhold had an ownership, representative or possessory interest in the Oxv 30s
C. The firearm enhancement must be vacated due to instructional error that omitted an essential element and because insufficient evidence supported the special verdict
D. The trial court erred in declining Nelson's proposed instruction on the lesser included offense of unlawfully displaying a firearm

Response to Assignment of Errors.

1. The instructions as given correct, there was no error on in the court's denial of Appellant's proposed instruction.
2. The State presented sufficient evidence to support the charge of Attempted Robbery in the First Degree.
3. There was no error regarding the firearm enhancement.
4. The trial court properly denied Appellant's request that a lesser included offense instruction be presented to the jury.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in Appellant's brief therefore, pursuant to RAP 10.3(b); the State shall not set forth a separate facts section in this brief. The State shall refer to the record in the body of this brief as needed.

III. ARGUMENT.

Response to allegation "A" as set forth in Appellant's brief.
The instructions submitted to the jury by the trial court did not omit an essential element of attempted robbery in the first degree. The trial court properly rejected the instructions proposed by Nelson's trial counsel.

The testimony that Nelson relies on to establish his claim is that the victim, Ms. Meinhold did not have the legal ability to access the drugs demanded by Nelson during this attempted robbery. The testimony is that she did not have the key or access to the locked location were the drugs were stored. There is not one single word of testimony which would indicate that once those substances were removed from this locked area that Ms. Meinhold did not have the legal ability or right to complete the job of a pharmacy technician and give those controlled substances to a customer once they had been "legally dispensed" by the pharmacist.

State law actually states that an employee such as Ms. Meinhold has the legal ability to possess drugs. Testimony shows that she was a "pharmacy technician." (RP 47) According to the Washington

Administrative Code **WAC 246-901-035**

> **Pharmacy technician specialized functions.**
> A pharmacy technician who meets established criteria for employment, experience, training and demonstrated proficiency may perform specialized functions. The criteria shall be specified in the utilization plan of the pharmacy for pharmacy technicians performing specialized functions required in WAC 246-901-100 (2)(b). Records of pharmacy technician training and of demonstration of proficiency shall be retrievable within seventy-two hours upon request of the board.
> Specialized functions include the following:
> (1) Unit-dose medication checking. Following verification of the drug order by a licensed pharmacist, a pharmacy technician may check unit-dose medication cassettes filled by another pharmacy technician or pharmacy intern in pharmacies serving facilities licensed under chapter 70.41, 71.12, 71A.20 or 74.42 RCW. No more than a forty-eight hour supply of drugs may be included in the patient medication cassettes and a licensed health professional must check the drug before administering it to the patient.
> (2) Intravenous admixture and other parenteral preparations. A pharmacy technician may prepare intravenous admixtures and other parenteral drugs. A licensed pharmacist must check each parenteral drug prepared by a pharmacy technician.

See also;

> **WAC 246-901-010 – Definitions.**
> (5) "Pharmacy technician specialized function" means certain tasks normally reserved to a pharmacist according to WAC 246-863-095 that may be performed by a pharmacy technician who has met board requirements.

Contrary to Nelson's assertion Ms. Meinhold did have the legal ability to possess drugs and therefore even if the State had charged this as

a completed crime not an attempt the charges would stand. Once again this is an issue that is not supported by the law nor the facts.

Further, Appellant was charged with **attempted** first degree robbery, attempting to elude a pursuing police vehicle and first degree unlawful possession of a firearm. He now claims the instructions given by the trial court relieved the State of it burden to prove the "essential element that Meinhold had an ownership, representative, or possessory interest in the medication."

Because this crime was charged out as an attempt the claim that Meinhold had no legal ability to dispense the demanded item is of no consequence. As charged in the third amended information;

> On or about August 15, 2014, in the State of Washington, with intent to commit the crime of First Degree Robbery, with intent to commit theft, you took a substantial step towards unlawfully taking the property of another, from the person or in the presence of Myung B. Meinhold and/or Thomas J. Newcomer, a person or persons who had ownership, representative or possessory interest in the property, against that person's will, by use or threatened use of immediate force, violence, or fear of injury to that person or his/her property or the person or property of anyone in order to obtain or retain the property taken, and in the commission of or immediate flight therefrom, you were armed with a deadly weapon, and/or you displayed what appeared to be a firearm or other deadly weapon.

All that the State had to prove was that Nelson's actions were a substantial step towards the completed crime of First Degree Robbery. In

this case the evidence was clear; Meinhold positively identified Appellant in a photomontage after the robbery and in court during trial, two other witnesses/employees of Rite Aid also positively identified Nelson, one both in a montage and in court, Nelson robbed the store of one roll of paper towels[1], a car matching the description of the car that Nelson was positively identified as buying and driving, on the same day of the robbery was seen leaving the scene of the robbery, a hat thrown from the car driven by Nelson contained a DNA sample that had a correlation to Nelson's DNA in excess of 1 in 100 billion, this hat was identified as being the same hat that was worn by the person who attempted to rob the Rite Aid, Ms. Meinhold identified the gun that was displayed to her at the time of the robbery and stated that she knew about firearms from a firearm training class this weapon was also viewable from the surveillance videos shown to the jury and identified as accurate by the victims of this crime.

Clearly, this extensive testimony was more than sufficient to prove beyond a reasonable doubt that Nelson took a **substantial step** towards committing the crime of attempted first degree robbery as charged.

INSTRUCTIONS

[1] This theft alone could be the basis for a robbery charge, the State proved that those paper towels where in fact taken by Nelson and were recovered from the car he was driving at the time of the robbery and the elude Nelson agreed with this, "MR. DALAN: If this was any other piece of stock or even the non-controlled substances this argument wouldn't be there because Ms. Meinhold does have access to those things. RP 424),

This court will review alleged errors of law injury instructions de novo. State v. Hayward, 152 Wn. App. 632, 641, 217 P.3d 354 (2009). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. Hayward, 152 Wn. App. at 641 (quoting State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)). " Due process requires the State to bear the `burden of persuasion beyond a reasonable doubt of every essential element of a crime. "' State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996) (quoting State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994)). It is constitutional and reversible error to instruct the jury in a manner that would relieve the State of its burden to prove every essential element of a criminal offense beyond a reasonable doubt. Hayward, 152 Wn. App. at 641-42. This court will analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. Hayward, 152 Wn. App. at 642.

Appellant proposed an instruction that incorporated the specific language of Ritchie. (RP 416-17) The courts "elements" or "to convict" instruction contained the following language that was included by the trial court to cover the "Ritchie" requirements, "(2) That Myung B. Meinhold was an employee of the owner of the property;" (CP 67) The trial court

opined that this language worked better than the exact wording from Richie.

Ritchie states "We hold that the to-convict instruction improperly omitted an essential element of the crime of burglary - that the victim have an ownership, representative or possessory interest in the stolen property." Id at 930

The following discussion was had amongst counsel and the trial court regarding this instruction:

> THE COURT: It's almost to the point of saying
> that she was a bailee and letting the jury figure out what
> that means.
> MR. DALAN: Well, I understand that, your Honor.
> I think representative is a little easier for them to figure
> out. I think the best solution is to put in the language
> from the case law and then let the state argue what they
> think it means and let us argue what we think it means.
> THE COURT: Well, I don't think that's a solution.
> I define what the law is. Then the attorneys argue what the
> facts are. They don't argue what the law is.
> That's part of the problem. The term that's used in
> Ritchie is really not readily adaptable to a jury
> instruction, but it clearly is the case that Ms. Meinhold is
> an employee of the owner of the property. As an employee of
> the owner of the property, she would have sufficient
> interest to satisfy the rule in Ritchie.
> I will also in that, in paragraph four of the elements
> instruction, eliminate or that person's property or the
> personal property of another. I'll take that out.
> MR. DALAN: Thank you, your Honor.
> THE COURT: You have, a person has a
> representative interest in the property when that person has
> authority from the owner of the property to act regarding
> the property.

> MR. DALAN: Yes, your Honor. That's directly from the language from State vs.(sic) Lathem .
> THE COURT: Mr. Ramm.
> MR. RAMM: I would oppose that instruction, too. I don't think that's necessary in this case.
> THE COURT: I agree, and it is confusing. It's circular, and I think it would confuse the jury and not enlighten them. So I'm going to decline to use that instruction. (RP 417-8)

An instruction does not have to have the exact verbiage of a case, in this instance Ritchie, to meet the requirement that necessary elements be present. The elements instruction contained all that was needed to satisfy the ruling in Ritchie. Clearly it did not mirror the wording of Ritchie but the trial court is tasked with instructing the jury and doing so in a manner that will not confuse that jury, as the trial court stated "[t]he term that's used in Ritchie is really not readily adaptable to a jury instruction,…" (RP 417)

Appellant does challenge in this court and did not object to or take exception to instruction 4 the instruction defining the crime of attempted first degree robbery. (RP 511) This instruction included the specific language for an **attempted** first degree robbery;

> A person commits the crime of Attempted First Degree Robbery when, with intent to commit that crime, he does any act that is a substantial step toward the commission of that crime., (CP 63) (Emphasis added)

He did not object to instruction 5;

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation. (CP 64) (Emphasis added)

Clearly Nelson has not mention these instructions anywhere in his because they negate his argument. The law allows for the proof in an attempt such as the to be such that the victim here even if she was "legally" prohibited from dispensing these pills to be the basis of a valid conviction. Further, there are numerous instances of people who have not "legal" ability to "possess" the items they are in control of and yet the courts have found that those people can be the victims of robbery.

Bank tellers cannot "legally" possess their employer's money nor can they "possess" the money from clients but they can legally move that res from one party to the other, as can a pharmacist assistant. The argument put forward by Nelson would mean that if an "under age" employee of any of the hundreds of stores that presently sell alcohol were pushing the cart of groceries to a car and that cart contained any product that contained alcohol and someone robbed or attempted to rob them of that alcohol, by this restrictive definition that would be a "legally" impossible act. That clearly is not the intent of the law nor is it dictated by State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015) or State v. Latham, 35 Wn. App. 862, 670 P.2d 689 (1983)

He challenged instruction 7, however this instruction clearly

required the State to prove exactly what Nelson now says it was not required to prove:

> A person commits the crime of robbery when he unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will, the person had an ownership, representative or possessory interest in the property, by the use or threatened use of immediate force, violence, or fear of injury to that person. A threat to use immediate force or violence may be either expressed or implied. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial.
>
> A person with a representative interest includes an agent, employee or other representative of the owner of the property. CP 66

It is very important to note that the instruction that was submitted to the jury was crafted after the court literally had discussion with the committee on pattern jury instructions:

> THE COURT: This kind of derives somewhat from the meeting with the pattern jury instructions committee on Saturday. The term that's used in the Ritchie case, which is had an ownership, representative or possessory interest in the property is really very lawyerlike and not something that a jury is going to be able to get their minds around. The addition of the last sentence in my proposed, which is a person with a representative interest includes an agent, employee or other representative of the owner of the property, I think, is a clarification of that otherwise ambiguous, I guess, or a very lawyerlike statement. I assume the state is not agreeing that the defense proposed should be used. RP 415

State v. Johnson, 155 Wn.2d 609, 610, 121 P.3d 91 (2005), Johnson held that robbery occurs when a defendant either (1) uses force or threat of force to obtain property, (2) uses force or threat of force to retain property, or (3) uses force to overcome resistance to the taking of the property. Johnson, 155 Wash.2d at 611, 121 P.3d 91. Johnson is based on an earlier opinion State v. Handburgh, 119 Wash.2d 284, 830 P.2d 641 (1992). Handburgh articulated the legal principle that robbery occurs when a defendant uses force to retain possession of property, even if the defendant initially took the property peaceably or took it in the owner's absence. Handburgh, 119 Wash.2d at 293, 830 P.2d 641 Washington law has established that robbery requires a defendant's use or threat of force to relate to taking or to retaining another's property. Johnson, supra, (citing RCW 9A.56.190). Any force or threatened force, however slight, is sufficient to sustain a robbery conviction. State v. O'Connell, 137 Wn. App. 81, 95, 152 P.3d 349 (2007). Moreover, a perpetrator who peacefully obtains the stolen property but uses violence during flight commits robbery. See State v. Manchester, 57 Wn.App. 765, 770, 790 P.2d 217 (1990).

Nelson also glosses over the inclusion and need for instruction 12;

> If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to

> have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

This is a challenge to the sufficiency of the evidence presented. Evidence is sufficient if, when viewed in the light most favorable to the State, "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, 339, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences must be drawn in favor of the State and most strongly against the defendant. *Id*. A reviewing court gives deference to the trier of fact on the issues of conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). State v. Schapiro, 28 Wn. App. 860, 868, 626 P.2d 546 (1981) "The conflict in testimony was a matter for the trial court to resolve. This court will not substitute its judgment for that of the trier of fact upon a disputed issue of fact. Udhus v. Peglow, 55 Wn.2d 846, 350 P.2d 640 (1960); Keogan v. Holy Family Hosp., 22 Wn. App. 366, 589 P.2d 310 (1979)." State v. Johnston, 100 Wn. App. 126, 137, 996 P.2d 629 (2000)" The trier of fact is in a better position to resolve conflicts, weigh evidence, and draw

reasonable inferences from the evidence. State v. Gerber, 28 Wn. App. 214, 216, 622 P.2d 888, review denied, 95 Wn.2d 1021 (1981)."

Even if there was an erroneous instruction it is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. State v. Brown, 147 Wash.2d 330, 332, 58 P.3d 889 (2002). State v. Lundy, 162 Wn.App. 865, 871-2, 256 P.3d 466 (2011);

> An erroneous jury instruction, however, is generally subject to a constitutional harmless error analysis. State v. Brown, 147 Wash.2d 330, 332, 58 P.3d 889 (2002). We may hold the error harmless if we are satisfied " 'beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " State v. Bashaw, 169 Wash.2d 133, 147, 234 P.3d 195 (2010) (quoting Brown, 147 Wash.2d at 341, 58 P.3d 889). Even misleading instructions do not require reversal unless the complaining party can show prejudice. State v. Aguirre, 168 Wash.2d 350, 364, 229 P.3d 669 (2010).
> ...
> Because Lundy cannot show that he was prejudiced by the instruction or that it relieved the State of its burden of proof, we decline to treat this error as a structural error and instead follow the general rule that erroneous jury instructions are subject to a constitutional harmless error analysis. See Bashaw, 169 Wash.2d at 147, 234 P.3d 195; Brown, 147 Wash.2d at 332, 58 P.3d 889.

A challenged jury instruction will be reviewed de novo, evaluating it in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). It is reversible error to instruct the jury

in a manner that would relieve the State of its burden of proving every essential element of a criminal offense beyond a reasonable doubt. Pirtle, 127 Wn.2d at 656. RAP 2.5(a)(3) requires that a defendant raising a constitutional error for the first time on appeal show how the alleged error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

This court will employ a two-part analysis to determine whether an asserted error is a manifest error affecting a constitutional right. See State v. Holzknecht, 157 Wn.App. 754, 760, 238 P.3d 1233 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 623 (2011).

First, this court will determine whether the error is truly constitutional, as opposed to another form of trial error. Holzknecht, 157 Wn.App. at 759-60.

Second, this court will decide whether the error is manifest. Holzknecht, 157 Wn.App. at 760 "Manifest" error requires a defendant to demonstrate actual prejudice. Holzknecht, 157 Wn.App. at 760. Actual prejudice arises if the asserted error had practical and identifiable consequences at trial. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting Kirkman, 159 Wn.2d at 935).

To decide the actual prejudice prong, this court will examine the record to determine if it is sufficiently developed to decide the merits of

the claim. Manifest errors affecting constitutional rights are subject to harmless error analysis." A constitutional error is harmless if this court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Holzknecht, 157 Wn.App. at 760.

There is no doubt based on the evidence presented, the instruction given and that fact that this crime was charged out as an attempt that there was absolutely no harm to Nelson. Even if this court were rule that the elements instruction was deficient the jury would have come to the same conclusion with an instruction that contained a verbatim recitation of the wording of Ritchie, supra.

Further, the evidence presented does not "establish that Meinhold was legally prohibited from exercising authority over the medication Nelson demanded." (Apps Brief 19) What the testimony demonstrated was that the pharmacist was the person who legally dispensed the medication from the locked location it was stored, as shown above Ms. Meinhold in fact had the legal authority to possess or handle the controlled substance demanded by Ritchie.

RESPONSE TO ALLEGATION C – FIREARM ENHANCEMENT.

The record does not support this allegation by Nelson. The State's level of proof was set forth in one of the final paragraphs of instruction 22

commonly called the “concluding instruction” (CP 82-3) The jury was charged with the following law:

> For purposes of the special verdict as to Count One, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime of Attempted First Degree Robbery. A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder. CP 83

The State was required to present evidence that proved this instruction beyond a reasonable doubt, that evidence was presented. Nelson would have this court ignore this court’s ruling in State v. Tasker, 193 Wn.App. 575, 373 P.3d 310 (Div. 3 2016) Nelson has presented this court with no rational basis for this court to ignore its previous ruling. The facts of this case do not dictate such action.

Here, the State was required to prove that Nelson knowingly had a firearm in his possession or control on August 15, 2014, and that he was armed with a firearm at the time he committed the crime charged. RCW 9.41.010(9) defines a firearm as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." This definition was used in the jury instructions for both the firearm enhancement and the charge of unlawful possession of a firearm.

Nelson contends that this burden required the State to prove that the firearm was "operable, " and it failed to do so. He relies on the reasoning

and holding in State v. Pierce 155 Wn.App. 701, 230 P.3d 237 (2010) In Pierce, Division Two held that the State was required to present sufficient evidence that a firearm used in the commission of a crime was operable. Pierce, 155 Wn.App. at 714-15. But the same court later dismissed the operability requirement for the statutory definition of "firearm," reaffirming that "the relevant question" is whether the firearm is a 'gun in fact' rather than a 'toy gun.'" State v. Raleigh, 157 Wn.App. 728, 734, 238 P.3d 1211 (2010) (quoting State v. Faust, 93 Wn.App. 373, 380, 967 P.2d 1284 (1998)).

This court in Tasker examined the history and evolution of the operability requirement, ultimately holding that the State is not required to present "evidence specific to a firearm's operability in order to establish that a defendant was armed for purposes of a firearms enhancement." State v. Tasker, 193 Wn.App. 575, 581, 373 P.3d 310 (2016), petition for review filed, No. 93237-9 (Wash. June 13, 2016).

Even if this court were to disavow it ruling and determine that the statute requires proof of operability, previous rulings have held that operability may be inferred from the threat to use a real gun. In State v. Mathe 35 Wn.App. 572, 581-82, 668 P.2d 599 (1983), affd, 102 Wn.2d 537, 688 P.2d 859(1984) the court held the State proved the defendant "used a real and operable gun" with testimony of two robbery

eyewitnesses who described the guns and the defendant's express or implied threat to use them. Similarly, in State v. Bowman. 36 Wn.App. 798, 803, 678 P.2d 1273 (1984) eyewitness testimony describing a "real" gun and recounting a threat to use it was sufficient to establish "the existence of a real, operable gun *in fact."*

Here Ms. Meinhold testified to the following:

Myung Meinhold:

> …I told him again, this is not a prescription. He gestured over to his other hand with his eyes for me to look over there, and I saw a gun.

Q. Are you familiar with guns?
A. A little bit. I took a hunter safety course like in the seventh grade.
Q. Can you tell us what kind of gun it was?
A. I can't tell you like the actual model or anything.
Q. How long was it?
A. It was pretty long. It was still a handgun but it was pretty big. It wasn't a tiny handgun. It was pretty gig.
Q. What color was it?
A. Black.
RP 50
Q. Do you know the difference between a revolver and a pistol?
A. Not so much.
Q. A revolver has a cylinder that turns like the old west guns.
A. Okay. No, it wasn't that.
Q. It had a magazine --A. Yes.
Q. -- that comes up from the pistol grip --A. Yes.
Q. -- and then ejects the spent shell casings?
A. Yes.
Q. Okay. You would have learned that in hunter safety.
A. That was a long time ago.
Q. So it was a black pistol?
A. Yes.
Q. And did he point it at you?

A. He did not point it at me. It was held up. Can I show you?
Q. Sure.
A. It was held up more like this, and it was just pointed like towards the roof.
Q. And how did that make you feel?
A. Very scared. I stepped back, and that's when I realized that we were being robbed. I hadn't, you know, noticed or really clicked until then.
Q. Had you ever been robbed before?
A. No.
RP 51
Q. What else did he say to you, if anything?
A. He said, you're going to get this for me or I'm going to shoot you in ten seconds.
Q. And how did that make you feel?
A. Scared to death.
Q. And what did you do after he said that?
A. I froze. He said, did you hear me? You have ten seconds. So I kind of, after he said that, I unfroze. I told him, I don't have access to that medication. I have to get my pharmacist. My pharmacist was Tom at the time, and he was on the phone with a doctor's office. So I rushed over to him and told him this guy's got a gun, this guy's got a gun. He quickly hung up the phone and asked me, what did you say?
I said, this guy's got a gun. He said, what guy? I went to turn where he was at, and he was no longer there. Then we looked straight ahead and he was right there in front of us with his note. He was saying, you're going to get this for me. You have ten seconds.
Q. And what did you observe? Did Thomas Newcomer take over the situation?
A. Yes, because he's the one that had access to the medication.
Q. What did you observe Thomas do?
A. So Tom went to walk towards the cabinet with his keys. He stopped about halfway in getting there and he came back. He told him that we don't have that medication. He repeated himself multiple times, we don't have that medication. Then he said –
Q. Who's he?

A. The robber said, then give me cash; get me cash. Then Tom said, I don't have access to cash.
RP 51- 53

The testimony of Ms. Meinhold meets that standards set by the cases set forth above and specifically meets the test this court set forth in State v. Tasker, supra. The State met its burden, this allegation should be denied.

RESPONSE TO ALLEGATION "D" - LESSER INCLUDED OFFENSE.

The law regarding allowing the use of a lesser included offense is clear. Whether a defendant is entitled to a lesser included instruction is analyzed under the two-pronged test outlined in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the charged offense (the "legal prong"). State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). Second, the evidence must raise an inference that only the lesser offense was committed to the exclusion of the charged offense (the "factual prong"). State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

When analyzing the factual prong, this court will view the evidence in the light most favorable to the party who requested the instruction at trial. Id. at 455-56. However, "the evidence must affirmatively establish the defendant's theory of the case, it is not enough

that the jury might disbelieve the evidence pointing to guilt." Id. at 456.

The question would then, in this case, be does the evidence support an inference that Nelson committed only the crime of unlawful display of a firearm by displaying his hand gun and threatening to kill Ms. Meinhold? The answer to that by the trail court supported by the analysis set forth in Workman and the facts of this case is no, the facts do not support the inference that Nelson was only illegally displaying his weapon when he handed his note to Ms. Meinhold demanding "oxy" and displayed the gun while telling Ms. Meinhold that she had ten seconds to comply or he, Nelson, would shoot her. The evidence supported the State's charge of robbery not unlawful display.

The problem with the request for the lesser included offense was that the defense was not really that the offense had not occurred but that the victim could not legally be robbed because she did not have the ability to have "ownership interest in, a representative interest in, or possession of the property stolen."

As stated by trial counsel when discussing this issue with the trial court;

> MR. DALAN: Unlawful display of a firearm. The court held that because there's an inherent element of intimidation in the lesser that it's subsumed in the greater. So the legal test is clear. Then you go to the factual test.

> THE COURT: Right.
> MR. DALAN: It can't just be that the jury would disbelieve some of the state's evidence. There has to be grounds within the record for the jury to conclude that. So this goes back to the same issue we were arguing about or we were discussing before. It's our position that the jury could conclude, based on the evidence that they've heard, that although Ms. Meinhold was an employee of Rite
> Aid she did not have a sufficient possessory interest in the item. Therefore, the greater offense would fail and the jury should be allowed to conclude that the lesser offense only should be considered.
> So I think the legal basis is sound from Workman and also Dowell. Then the factual basis, the very unique facts of this case, I think you get a factual basis as well.
> RP 419-20
> …
> MR. DALAN: Well, I think the fact that it is an attempt and nothing was actually taken should also be part of the consideration, similar to the facts of Workman. Just to follow up, I'm intending to argue -- whatever instructions the court decides to give, employee or whatever, the state still has to prove possession. It's one of the elements. I think the jury could -- maybe they won't. Maybe they'll say, no; she had possession. We don't buy that argument. I think the jury could conclude there's not a sufficient possessory interest on the part of Ms. Meinhold to complete the greater crime or to justify saying it's an attempt.
> RP 421

The proposed lesser included offense meets the first part of the two-part Workman test. However, the facts of Nelson's case do not meet the second prong, the factual prong, and therefore the trial court's ruling that it would not submit a lesser included instruction to the jury was correct.

IV. CONCLUSION

The actions of the trial court should be upheld this appeal should be dismissed.

Respectfully submitted this 7th day of November 2016,

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DECLARATION OF SERVICE

I, David B. Trefry, state that on November 7, 2016, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Andrea Burkhart at andrea@burkhartandburkhart.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of November, Spokane, Washington.

__s/_David B. Trefry_____

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