

65358-0

NEK  
65358-0

NO. 65358-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JAMES PAULEY,

Appellant.

APPELLATE  
COURT OF THE  
STATE OF WASHINGTON  
JAN 10 2013

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

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APPELLANT'S OPENING BRIEF

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NANCY P. COLLINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

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A. ASSIGNMENTS OF ERROR.

1. The trial court incorrectly refused to accord James Pauley automatic standing to challenge the search of a vehicle after his arrest.

2. The police officers lacked the authority of law to search the vehicle required by Article I, section 7 of the Washington Constitution.

3. The court's imposition of deadly weapon enhancements without accurately instructing the jury about the requirement of unanimity violated Pauley's right to a fair trial by jury under the common law and Article I, sections 21 and 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

4. The trial court's refusal to sever charges stemming from two separate incidents denied Pauley a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A person has standing to challenge a search when he is accused of possessing an item that was seized without a warrant. Where Pauley was accused of possessing the items searched and seized, did the trial court incorrectly find that Pauley was not accused of a sufficiently "possessory" offense to have automatic

standing? Did the warrantless search violate article I, section 7 of the Washington Constitution?

2. A jury does not need to be unanimous in a special verdict finding when it determines that the State has not met its burden of proof. The trial court instructed the jury that it must be unanimous in deciding whether the State proved, or failed to prove, the deadly weapon enhancements. Where the deliberative process requires accurate instructions on the requirement of unanimity, did the court's incorrect instruction undermine the jury's special verdict findings as dictated by the recent Washington Supreme Court decision in Bashaw?<sup>1</sup>

3. The right to a fair trial bars the State from joining unrelated offenses in an effort to convince the jury that because the defendant committed one offense, he must have committed a separate and unrelated offense as well. Despite Pauley's efforts to sever two separate incidents from being jointly tried, the court denied his severance motions. When the prosecutor urged a conviction based on the Pauley's propensity to commit similar offenses, should the court have granted Pauley's motion to sever charged stemming from two incidents?

C. STATEMENT OF THE CASE.

In the evening of February 13, 2009, a stranger unexpectedly confronted John Donahue as he started getting into his car in a grocery store parking lot. 3/8/10RP 11, 16.<sup>2</sup> The person swung a knife at Donahue. 3/8/10RP 16. Donahue swore, yelled, and ran away when he saw the man flinch. 3/8/10RP 17. The man with the knife first started chasing after Donahue, then ran the other way. Id. Donahue called the police but they did not find any suspects. Id. at 17, 82-84.

In the middle of the day on February 14, 2009, William Stollar pulled his car into a park and ride lot so he could make a telephone call with a real estate client. 3/9/10RP 8-10. As he sat in his car with his door open, a man pointed a knife at him and ordered him out of the car. 3/9/10RP 16. Stollar complied and the man drove away with his car. 3/9/10RP 52.

Numerous police officers searched for Stollar's car. They found and followed the car as it was stuck in slow moving highway traffic on the 520 bridge and along I-5 in Seattle. 3/9/10RP 108-09; 3/10/10RP 12-13, 56, 97. When the police activated their

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<sup>1</sup> State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

<sup>2</sup> The verbatim report of proceedings ("RP") is referred to herein by the date of the proceeding.

emergency lights, the car's driver wove through traffic. Id. The car pulled into a traffic lane that was closed for construction. A police officer laid spike stripes in the car's path. 3/10/10RP 58. The car drove over the spikes and crashed, hitting a barrier then colliding into two other cars. 3/10/10RP 70-71.

The police pulled James Pauley from the car, having handcuffed him while he was inside the car. 3/10/10RP 102. Pauley was initially unconscious after the accident but was combative when he awoke. Id. After Pauley was handcuffed and taken out of the car, police officers searched him and the car, looking for the knife that Stollar described. 3/11/10RP 31-32. They found a knife inside the car. Id. at 32.

After the Stollar incident, a police officer called Donahue and told him they found "a guy" that they suspected committed both incidents. 3/8/10RP 53. A detective showed Donahue a photographic montage, and Donahue thought there was a 50% chance Pauley was the person who confronted him in the parking lot. 3/2/10RP 128; 3/8/10RP 37. The police also showed Donahue the knife they found in Stollar's car and a picture of Pauley being pulled out of Stollar's car. 3/2/10RP 130; 3/8/10RP 44-46. Donahue thought the knife and the color of the shirt Pauley wore

looked similar to the person he saw in the parking lot. 3/8/10RP 43, 46.

The State charged Pauley with first degree robbery while armed with a deadly weapon against Stollar, attempting to elude a pursuing police vehicle, and vehicular assault for injuries to the driver of another car. CP 23-25. It also charged Pauley with second degree assault with a deadly weapon against Donahue, and, over Pauley's objection, joined the charges from the two incidents in a single trial. CP 24-25; CP 58-64; 3/3/10RP 81-87; 11/10/09RP 21-30

Pauley was convicted of the charged offenses after a jury trial and received a standard range sentence. CP 133-38; CP 146-50.

D. ARGUMENT.

1. PAULEY HAD STANDING TO OBJECT TO THE WARRANTLESS SEARCH AND SEIZURE

The police seized James Pauley, handcuffed him, and pulled him out of a car. Once he was removed from the car and secured, police officers returned to the car to search for evidence of the crime of arrest. The police did not have a warrant to search the car, but the trial court judge ruled that Pauley lacked standing

to challenge the police search. Because Pauley had automatic standing, and the search was not authorized, the court's ruling should be reversed.

a. The state and federal constitutions generally require warrants before police may search another's property. The lawfulness of a search and seizure under Washington constitutional law "begins with the presumption that a warrantless search is *per se* unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement." State v. Patton, 167 Wn.2d 379, 387, 219 P.3d 651 (2009). The burden rests firmly on the State to establish the search falls under one of the carefully delineated exceptions to the warrant requirement. State v. Afana, 169 Wn.2d 169, 177, 233 P.3d 879 (2010).

The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops.

State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

These exceptions to the requirement of a search warrant are "jealously and carefully drawn." State v. Bradley, 105 Wn.2d 898, 902, 719 P.2d 546 (1986) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 454, 29 L.Ed.2d 120, 91 S.Ct. 2022 (1971)).

b. A prerequisite to the challenge to a search is the defendant must establish he or she has standing A person has “standing” to challenge a search under the Fourth Amendment or Article I, section 7 of the Washington Constitution, if she<sup>f</sup> establishes that her personal rights have been infringed; i.e., she has a legitimate expectation of privacy in the thing or place searched. See Rakas v. Illinois, 439 U.S. 128, 138, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978); State v. Simpson, 95 Wn.2d 170, 174, 622 P.2d 1199 (1980). In Washington, a person also has “automatic standing” in certain circumstances. Simpson, 95 Wn.2d at 175.

[A] defendant ‘has automatic standing’ to challenge a search or seizure if: (1) the offense with which he is charged involves possession as an ‘essential’ element of the offense; and (2) the defendant was in possession of the contraband at the time of the contested search or seizure.

Simpson, 95 Wn.2d at 181.

The trial court erroneously concluded that Pauley did not meet the first prong of the Simpson test and refused to consider his motion to suppress evidence on that basis. CP 166. The prosecution charged Pauley with first degree robbery based on accusations he took and drove away another person’s car while

having a knife in his possession as a means of effecting this taking. Thus, he was charged with possession of the item that the police seized from the car, without a warrant. State v. Grover, 55 Wn.App. 252, 259 n.15, 777 P.2d 22 (“[I]t may be arguable under Simpson that first degree robbery includes ‘possession’ of the weapon as an essential element”), rev. denied, 113 Wn.2d 1032 (1989) (citing State v. White, 40 Wn.App. 490, 699 P.2d 239, rev. denied, 104 Wn.2d 1004-05 (1985)).

In Simpson, the court held that an accused person has automatic standing to challenge an allegedly illegal search or seizure where he is charged with possession of the very item seized. 95 Wn.2d at 181; see Grover, 55 Wn.App. at 259 (assuming Grover had standing to challenge a warrantless car search for a knife used in a robbery). The trial court refused to accord Pauley standing to challenge the search because it concluded that robbery is not a possessory offense, and the other charged offenses were also not possessory. CP 166. Common sense dictates that possession is required for proof of a robbery.

The elements of robbery are: (1) an unlawful taking (2) of personal property (3) from the person or presence of another (4) against his or her will and (5) by the use or threatened use of

immediate force. RCW 9A.56.190; State v. Handburgh, 61 Wn.App. 763, 765, 812 P.2d 131 (1991), reversed on other grounds, 119 Wn.2d 284, 830 P.2d 641 (1992). The taking of personal property implicitly requires that the perpetrator must be in “possession” of the item once he or she has taken it from the victim. Thus, possession must be an element of robbery.

Furthermore, Pauley was accused of possessing a knife in the course of the robbery and the purpose of the search was to find this very knife. 3/11/10RP 31-32. First degree robbery, as charged, contains the added the element of being armed with or displaying what appeared to be a deadly weapon in the course of the robbery. RCW 9A.56.200; CP 23. A deadly weapon enhancement serves as an additional element of the offense. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d1276 (2008); Former RCW 9.94A.602 (2009) (recodified as RCW 9.94A.825, Laws of 2009, ch. 28, § 41). Consequently, Pauley’s possession of the car and knife were central elements of the charges against him and Pauley had automatic standing to challenge the officer’s search of the car.

Pauley clearly meets the second Simpson prong. 95 Wn.2d at 181. He was in possession of the knife, and car, until he was

arrested by the police. 3/11/10RP 30-32. Thus, he was in possession at the time of the warrantless search. Pauley should have been accorded automatic standing.

c. After Pauley was secured, handcuffed, and taken away, the police lacked a valid exception to the warrant requirement. Article I, section 7 requires the police have “the authority of law” to search another person’s property. Afana, 169 at 176-77. It is “always” the State’s burden to demonstrate that one of the “few jealously guarded exceptions” to the warrant requirement apply. Id. at 177.

Once handcuffed, an arrestee does not pose a safety risk to the officers and the search is not justifiable as a necessary means for preserving officer safety. See Arizona v. Gant, \_U.S.\_, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009); Afana, 169 Wn.2d at 178-79 (rejecting search of car after driver’s arrest, even though passenger present and unsecured); Patton, 167 Wn.2d at 395-96. Once a suspect is secured, officers can always obtain a warrant to search a car if there is probable cause supporting the search. See State v. Tibbles, 169 Wn.2d 364, 236 P.3d 885 (2010) (even with probable cause, police need warrant unless destruction of evidence

is “imminent” or State establishes impracticability); State v. Miles, 160 Wn.2d 236, 247, 156 P.3d 164 (2007).

Pauley was the only occupant of the car. After the police handcuffed him and removed him from the car, it was not possible for him to destroy evidence that remained in the car. 3/10/10RP 101-03.

Consistent with Gant and under article I, section 7, it is unlawful for the police to search a vehicle “incident to the arrest of a recent occupant” unless the police reasonably believe “the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.” Patton, at 175-76. Pauley did not pose a safety risk once arrested, and the police had no reason to believe evidence in the car would be concealed or destroyed before they could obtain a warrant.<sup>3</sup>

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<sup>3</sup> The Washington Supreme Court is presently considering two cases that present the issue:

Whether under the Washington Constitution police may conduct a warrantless search of a car for evidence of the crime for which the driver was arrested after the driver is secured in a patrol car.

State v. Snapp, 153 Wn.App. 485, 219 P.3d 271 (2009), rev. granted, 219 P.3d 413 (2010); State v. Wright, 155 Wn.App. 537, 230 P.3d 1063, rev. granted, 241 P.3d 213 (2010) (S.Ct. Nos. No. 84223-0, consol. w/ 84569-7) (issue statement available at: [www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues)).

The violation of Pauley's right of privacy under article I, section 7 automatically implies the exclusion of the evidence seized. Afana, 169 Wn.2d at 179. There is no "good faith" exception to the exclusionary rule under Article I, section 7. Id. at 181; State v. Adams, 169 Wn.2d 487, 490-91, 238 P.3d 459 (2010). There is no inevitable discovery exception to the exclusionary rule under our state constitution. State v. Winterstein, 167 Wn.2d 620, 634, 220 P.2d 1226 (2009). Washington's exclusionary rule is "nearly categorical." Id. at 636.

The police officers' search of the car after Pauley's arrest required a warrant or a valid exception to the warrant requirement. When a person is charged with possession of an item, such as the knife Pauley was charged with possessing, and his presence in a vehicle is used as evidence of his possession, he has automatic standing to challenge a warrantless search in which the police obtained the knife. Simpson, 95 Wn.2d at 180.

The trial court refused Pauley's request to suppress physical evidence based on its incorrect conclusion that Pauley was not charged with an offense that involves "possession" of any item. CP 166; 3/3/10RP 81. Because robbery with a deadly weapon involves possession, and the State accused Pauley of being in

possession of the weapon at the time of the police pursuit culminating in his arrest, he had automatic standing.

With this standing, the court should have found the police lacked a valid basis for conducting a warrantless search. The police did not get a warrant. Instead, they immediately searched the car, intent on locating a knife. 3/11/10RP 31-32. Because there was no risk that evidence would be destroyed or concealed before the police could obtain a warrant, the search lacked the authority of law required by Article I, section 7. This Court should reverse the trial court's ruling and order that the knife should have been suppressed. The knife was an essential element and critical component of the evidence against Pauley for both first degree robbery and second degree assault as well as the deadly weapon enhancements. Its suppression requires a new trial on both of these counts.

2. THE TRIAL COURT'S INSTRUCTION 26  
MISSTATED THE LAW ON JURY UNANIMITY  
REQUIRING THE DEADLY WEAPON  
ENHANCEMENTS BE STRICKEN

The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of

counsel. State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). The Washington Constitution requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Regarding special verdicts, the jury must be unanimous to find the State has proven the special finding beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). But, the jury does not have to be unanimous to find that the State had not proven the special finding beyond a reasonable doubt. State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010).

The Supreme Court has held that jury unanimity is not required to answer “no” to a special verdict question. Goldberg, 149 Wn.2d at 894. In Goldberg, upon discovering that jurors were not unanimous in answering “no” to a special verdict question, the trial court ordered the jurors to resume deliberations until they reached unanimity. Id. at 891. The Supreme Court concluded that the trial court erred in doing so, holding that jury unanimity is not required to answer “no” to a special verdict. Id. at 894.

Subsequently, in Bashaw, the trial court instructed the jury in precisely the same manner regarding the special verdict: “[s]ince this is a criminal case, all twelve of you must agree on the answer

to the special verdict.” 169 Wn.2d at 139. The Court in Bashaw found the instruction an incorrect statement of the law and ordered the special verdict stricken:

Applying the Goldberg rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of the special finding increasing the maximum penalty, [citation omitted], it is not required to find the absence of such a finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (emphasis added). Further, the Court ruled such an error can essentially never be harmless even where as in Bashaw, the jury was polled and the jurors uniformly affirmed their verdict:

This argument misses the point. The error here was the *procedure* by which unanimity would be inappropriately achieved.

...

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. at 147-48 (emphasis added).

The same instruction at issue in Bashaw was used in Pauley's trial. CP 37.<sup>4</sup> As in Bashaw the jury here was polled and affirmed their verdict. 3/18/10RP 103-09. Nevertheless, as in Bashaw, the use of this improper instruction by the trial court was error.

In addition, as in Bashaw, the error was not harmless since it is impossible to determine what would have occurred had the jury been properly instructed. In State v. Williams-Walker, 167 Wn.2d 889, 899, 225 P.3d 913 (2010), the Court held that guilty verdicts cannot authorize sentence enhancements.

We decline to hold that guilty verdicts alone are sufficient to authorize sentence enhancements. If we adopted this logic, a sentencing court could disregard altogether the statutory requirement that the jury find the defendant's use of a deadly weapon or firearm by special verdict. Such a result violates both the statutory requirements and the defendant's constitutional right to a jury trial.

Id.

This error also cannot be excused by virtue of the display of a deadly weapon in the assault and robbery charges. As the

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<sup>4</sup> While Pauley did not object to the concluding language the court inserted in Instruction 26, neither the defendant in Goldberg nor in Bashaw objected to the trial court's instruction or the special verdict form and raised the issue for the first time on appeal. Nevertheless, the Supreme Court addressed the issue and vacated the special finding and the enhanced sentence based upon the improper instruction. Bashaw, 169 Wn.2d at 146-47; Goldberg, 149 Wn.2d at

prosecution emphasized in its closing argument, the special verdict form governing the deadly weapon enhancement asks a separate and distinct question than the deadly weapon element of the offenses. 3/16/10RP 52. One requires either a blade length greater than three inches or that it had “the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.” Former RCW 9.94A.602. The other requires proof that the knife, “under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). The jury’s verdict on one does not control its verdict on the other.

This Court must vacate the deadly weapon enhancement special verdicts and remand for resentencing.

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892-94. As a consequence, Pauley may raise this issue for the first time on appeal.

3. THE COURT'S REFUSAL TO SEVER TWO SEPARATE INCIDENTS WHEN THE HIGH LIKELIHOOD OF PROPENSITY-BASED DECISION-MAKING COULD NOT BE ALLEVIATED DENIED PAULEY A FAIR TRIAL.

a. Severing joined offenses may be necessary to preserve a fair trial! The rules governing severance are based on the fundamental concern that an accused person receive "a fair trial untainted by undue prejudice." State v. Bryant, 89 Wn.App. 857, 865, 950 P.2d 1004 (1998); U.S. Const. amends. 5, 14; Wash. Const. Art. I, §§ 3, 22; CrR 4.4(b).

Although a severance determination is reviewed under an abuse of discretion standard, a trial court abuses its discretion when its decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 653, 71 P.3d 638 (2003). A court abuses its discretion by using the wrong legal standard or by failing to exercise discretion. Id. "Indeed, a court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

Judicial discretion “means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.”

Fisons, 122 Wn.2d at 339 (quoting State ex rel. Clark v. Hogan, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)).

An exercise of the trial court’s discretion over whether severance is appropriate rests on an evaluation of whether severance promotes a fair determination of guilt or innocence. In re Davis, 152 Wn.2d 647, 711, 101 P.3d 1 (2004); CrR 4.4(b). In the case at bar, the court refused to sever the two separate incidents despite defense counsel’s repeated warning that the jury would find Pauley guilty of both simply because there was strong evidence against him for one of the incidents, which is exactly what the prosecution argued to the jury in summation.

b. The court’s refusal to sever the charge denied Pauley a fair trial. Court rules provide that severance of offenses “shall” be granted whenever “severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). Joinder of offenses is deemed “inherently prejudicial” and, “[i]f the defendant can demonstrate substantial prejudice, the trial court’s failure to sever is an abuse of discretion.”

State v. Ramirez, 46 Wn.App. 223, 226, 730 P.2d 98 (1986). In assessing whether severance is appropriate, courts weigh the inherent prejudice against the State's interest in maximizing judicial economy. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

The principle underlying severance is "that the defendant receive a fair trial untainted by undue prejudice." Bryant, 89 Wn.App. at 865. Prejudice will result if a single trial invites the jury to cumulate evidence to find guilt or otherwise infer criminal disposition. State v. Watkins, 53 Wn.App. 264, 268, 766 P.2d 484 (1989) (citing State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968) vacated in part on other grounds, 408 U.S. 934 (1972)).

Prejudice may also occur when the accused is embarrassed or confounded in presenting separate defenses. Watkins, 53 Wn.App. at 268. "A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one." State v. Harris, 36 Wn.App. 746, 750, 677 P.2d 202 (1984).

The trial testimony and closing arguments bear out Pauley's reasons for seeking severance. Pauley was arrested inside the car he was accused of stealing from William Stollar at knife point in the

middle of the day. 3/11/10RP 23, 31-32. Stollar unhesitatingly identified Pauley as the person who robbed him. 3/2/09RP 148-49; 3/9/10RP 29.

On the other hand, John Donahue had a fleeting opportunity to observe the person who pointed a knife at him. It was dark and the unexpected incident happened in a matter of seconds.

3/8/10RP 56. When the police showed Donahue a photographic montage, he was only 50% confident that he was pointing to the person who accosted him in the dark parking lot. Id. at 37.

But the prosecution used the Stollar incident to bolster its case against Pauley due to Donahue's lack of confidence in the perpetrator's identity and his minimal opportunity to see the perpetrator. The police showed Donahue a photograph of the knife found in Stollar's car and Donahue agreed it was similar to the knife the perpetrator pointed at him. 3/2/10RP 153. The police showed Donahue a photograph of Pauley being pulled out of Stollar's car, and Donahue agreed that the perpetrator wore a similar colored shirt. 3/2/10RP 129-33. If not for the Stollar incident, there is little reason to believe Pauley would have been arrested or convicted of assaulting Donahue.

The prosecution urged the jury to use the Stollar incident as proof Pauley assaulted Donahue, claiming the two incidents could not be a coincidence. The prosecution told the jury, "There is no coincidence" that Donahue identified Pauley, even though he was uncertain of his identification. 3/16/10RP 61. When Pauley accused the prosecution of using the Stollar incident to taint the lack of evidence relating to Donahue, the prosecution admitted that looking at "this Donahue case in a vacuum," the State might not be able to prove its case. 3/16/10RP 88. But, the prosecution explained to the jurors, they are not supposed to consider the cases in "little boxes" even though they are instructed that the offenses are separate. Id. at 88-89. Instead, they should use the evidence from the Stollar case to decide whether it is possible Donahue picked the wrong guy. Id. If there is another person that could have assaulted Donahue the day before Stollar was confronted with a knife, who had a similar physique and color sweatshirt as Pauley, then the jury might think it is "some big coincidence." Id. at 89. The prosecution concluded by telling the jurors they would have to ignore a lot of evidence against Pauley in the Stollar matter to think Pauley was not Donahue's perpetrator. Id.

The trial court unreasonably refused to sever the two incidents by disregarding the principle considerations of prejudice and fairness as weighed against administrative burdens created by severance. 11/10/09RP 30; 3/3/10RP 86. Judicial economy did not weigh against severing the counts in the case at bar. The majority of the witnesses at the trial testified about the pursuit of Pauley along I-5, and the ultimate car accident. These witnesses would not offer any pertinent evidence related to Donahue. The Donahue incident was short, involved two civilian witnesses, Donahue and a passerby Brian Olmstead, and three police officers involved in the investigation. 3/8/10RP 8, 63, 73, 104; 3/10/10RP 110. A separate trial would have been a minimal burden.

The general instruction to the jury that it should consider counts separately does not alleviate the prejudice from multiple charges when the prosecution's theory rests on the idea that the two incidents are in fact the exact same thing committed by the same person. The prosecution's direct appeal to the jury to use the evidence from one incident as proof of another demonstrates the futility of this general instruction when the jurors and prosecution will draw on one incident to convince the jury that the same person must have committed both crimes. 3/16/10RP 61, 88-89.

The court's severance analysis was unreasonable and incorrect. Pauley's repeated requests for severance should have been granted to ensure that he received a fair trial.

E. CONCLUSION.

For the reasons stated above, James Paley respectfully asks this Court to hold that he had standing to challenge evidence seized from him, the unrelated assault allegation should have been separately tried, and the jury was improperly instructed on the requirement of unanimity for the deadly weapon enhancements.

DATED this 30<sup>th</sup> day of November 2010.

Respectfully submitted,



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NANCY P. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. ) NO. 65358-0-I  
 )  
 JAMES PAULEY, )  
 )  
 Appellant. )

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FILED  
COURT OF APPEALS  
DIVISION ONE

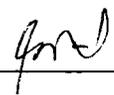
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I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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516 THIRD AVENUE, W-554  
SEATTLE, WA 98104

[X] JAMES PAULEY (X) U.S. MAIL  
887353 ( ) HAND DELIVERY  
WASHINGTON STATE PENITENTIARY ( ) \_\_\_\_\_  
1313 N 13<sup>TH</sup> AVE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2010.

x \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710