

67038-7

67038-7

No. 67038-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,  
Respondent/Cross-Appellant,

v.

MATISHA DAVIS,  
Appellant/Cross-Respondent.

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

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BRIEF OF APPELLANT

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2011 OCT 20 PM 4:57  
SUPERIOR COURT  
SNOHOMISH COUNTY  
DIVISION ONE

ELAINE L. WINTERS  
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

The trial court erred by instructing the jury it could convict Matisha Davis of first degree robbery under an alternative means not charged in the information. CP 69 (Instruction 7)

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires that the accused be informed of the charges against her. While the State may charge a defendant with one or more alternative means of committing an offense, the jury may not be instructed on a means not charged in the information. Ms. Davis was charged with first degree robbery based only upon her accomplice's use of a deadly weapon, but the jury was instructed it could convict Ms. Davis if she or an accomplice displayed what appeared to be a deadly weapon, and the prosecutor argued both alternatives were proved. Where no other instructions corrected the error, can this Court conclude beyond a reasonable doubt that the jury did not convict Ms. Davis of a means of first degree robbery with which she was not charged?

C. STATEMENT OF THE CASE

Shane Pantano and Vincent Doolittle were in the living room of Mr. Pantano's mother's apartment in Everett when two women they did not recognize entered through the front door and

demanded money and drugs. RP 33-34, 36, 58-59.<sup>1</sup> One woman, Irene Aguilar, stood in front of Mr. Doolittle with a screwdriver in her hand, and demanded that he stand up. RP 39, 61. As she pulled him up, Ms. Aguilar grabbed Mr. Doolittle's hunting knife from a table adjacent to where the young men were seated. RP 61. She then put the knife to Mr. Doolittle's throat and demanded money. RP 41, 61. Ms. Aguilar walked Mr. Doolittle towards the kitchen and a bedroom and then back to the living room, again demanding money and drugs. RP 43, 61-62.

Meanwhile, Mr. Pantano remained on a couch in the living room where the other woman prevented him from moving by standing over him. RP 38, 45. Ms. Aguilar told Mr. Doolittle to lie on the ground next to Mr. Pantano, and he complied. RP 63-64. Ms. Aguilar continued to demand money or drugs. RP 43. Ms. Aguilar took Mr. Pantano's savings of approximately \$290 and a PlayStation 3. RP 43-44, 64-65.

After the two women left the apartment, Mr. Pantano ran outside with a telephone, observed them leaving in a car, and gave a 911 operator the vehicle license plate number. RP 45, 46-47, 65

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<sup>1</sup> The verbatim report of proceedings of the jury trial and sentencing hearing on March 21-23 and April 12, 2011, are contained in two consecutively-paginated volumes. The volume for the pre-trial hearing on March 11, 2011, will not be cited.

Everett police officers stopped the car a few minutes later and arrested its three occupants: Ms. Aguilar, her brother Vincent Aguilar, who was the driver, and Ms. Davis, who was in the back seat. RP 84-85, 95-96. The PlayStation console was in the back seat, and Ms. Aguilar had \$210 in her pocket. RP 96-07, 107.

Officers transported Mr. Pantano and Mr. Doolittle to the vehicle. RP 51, 66, 84, 128. Both young men quickly identified Ms. Aguilar as the woman who was armed with a knife, but neither identified Ms. Davis, even after asking the police to have her step closer to their location. RP 52-53, 67, 97, 140. They also did not identify Mr. Aguilar. RP 53, 68, 96.

The Snohomish County Prosecutor charged Ms. Davis with robbery in the first degree after giving Ms. Aguilar a favorable plea bargain in exchange for testifying against Ms. Davis. CP 90, 92. The prosecutor dropped the five-year deadly weapon enhancement against Ms. Aguilar in exchange for her guilty plea to first degree robbery and agreement to testify against Ms. Davis. RP 163. Ms. Aguilar claimed the robbery was Ms. Davis's idea, and asserted she was motivated to testify because it was the right thing to do more than because of personal interest. RP 146-48, 150-52, 181-82.

Ms. Aguilar's testimony differed from that of Mr. Pantano and Mr. Doolittle in several respects. Ms. Aguilar claimed Ms. Davis entered the apartment first, asked the young men where their money and marijuana was, and took the money and PlayStation console from the apartment. RP 152-54, 177, 179. Both young men testified that Ms. Aguilar was the first one in the apartment. RP 37, 44. Mr. Pantano testified the woman who was not Ms. Aguilar did not say anything and that Ms. Aguilar was the one who took both the money and the PlayStation. RP 45, 61.

Ms. Aguilar testified she did not bring a screwdriver into the apartment and did not use the knife she found there to intimidate Mr. Doolittle; both young men said Ms. Aguilar had a screwdriver, exchanged it for Mr. Doolittle's knife, and then held the knife at Mr. Doolittle's throat. RP 41-42, 43, 61, 173-74, 175-76. Ms. Aguilar claimed Mr. Doolittle voluntarily slid to the ground, whereas he said she told him to lie on the ground while she was armed with the knife. RP 63, 154. Ms. Aguilar also said she took drug scales from the apartment, but the boys did not report the theft of scales and explained they were not drug dealers. RP 68, 155, 176-77.

Although Ms. Davis was charged with robbery in the first degree by the sole means of being armed with a deadly weapon,

the court instructed the jury she could be convicted for either being armed with a deadly weapon or displaying what appeared to be a deadly weapon. CP 69-70, 92. Ms. Davis was convicted of first degree robbery and received a standard range sentence of 46 months.<sup>2</sup> CP 15-25, 57; RP 278. This appeal follows.<sup>3</sup> CP 2-14.

#### D. ARGUMENT

MS. DAVIS'S DUE PROCESS RIGHT TO BE INFORMED OF THE CHARGE AGAINST HER WAS VIOLATED WHEN THE COURT INSTRUCTED THE JURY SHE COULD BE CONVICTED OF AN ALTERNATIVE MEANS OF COMMITTING FIRST DEGREE ROBBERY THAT WAS NOT CHARGED IN THE INFORMATION

1. The court may not instruct the jury on an uncharged alternative means of the offense. Due process requires the State to properly inform an accused person of the charges against her so that she can prepare her defense.<sup>4</sup> U.S. Const. amends. V, VI, XIV; Const. art. I, § 22; State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). Thus, "an accused person must be

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<sup>2</sup> Ms. Aguilar received a 41-month sentence. RP 274.

<sup>3</sup> The prosecutor filed a cross-appeal. CP 1.

<sup>4</sup> Article I, section 22 provides, in relevant part, "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him, to have a copy thereof . . ."

The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

The Fifth and Fourteenth Amendments each provide that people shall not be deprived of "life, liberty, or property, without due process of law."

informed of the charge he or she is to meet at trial, and cannot be tried for an offense not charged.” State v. Irizzary, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). The only exceptions permit the court to instruct the jury on lesser-included crimes or crimes that are an inferior degree of the charged offense. Irizzary, 111 Wn.2d at 592; Pelkey, 109 Wn.2d at 488; RCW 10.61.003; RCW 10.61.006.

When a statute provides alternative means under which a crime can be committed and the prosecutor charges the defendant under one or more of those means, she cannot be convicted under an alternative not charged in the information. State v. Severns, 13 Wn.2d 542, 125 P.2d 659 (1942); State v. Laramie, 141 Wn.App. 332, 342-43, 169 P.3d 859 (2007).

We are firmly of the opinion that where, as in the instant case, the information charges that the crime was committed in a particular way, under one subdivision of the statute, it is error for the trial court to instruct the jury, as was done in this case, that they might consider other ways or means by which the act charged might have been committed, regardless of the range which the court may have permitted the testimony to take.

Severns, 13 Wn.2d at 548.

An instruction that permits the jury to convict the defendant of a crime not charged in the information creates a constitutional

issue that may be raised for the first time on appeal. State v. Chino, 117 Wn.App. 531, 538, 72 P.3d 256 (2003); State v. Nicholas, 55 Wn.App. 261, 273, 776 P.2d 1385, rev. denied, 113 Wn.2d 1030 (1989). Ms. Davis was charged under one of the statutory alternative means of first degree robbery, but the jury was instructed that it could convict her under a different alternative means. Her conviction must therefore be reversed.

2. The court incorrectly instructed the jury that it could convict Ms. Davis of first degree robbery if it found she committed the crime by displaying a deadly weapon, a means not charged in the information. The Snohomish County Prosecutor charged Ms. Davis with first degree robbery. CP 92. The factor that elevated the crime from second to first degree robbery was the use of a deadly weapon.<sup>5</sup> CP 92; RCW 9A.56.200(1)(a)(i). The information charged Ms. Davis with:

FIRST DEGREE ROBBERY, committed as follows:  
That the defendant, on or about the 13<sup>th</sup> day of July, 2010, with intent to commit theft, did unlawfully take personal property of another, to wit: PS3 console, cash, and other property, from the person or in the presence of Vincent Doolittle and Shane Pantano, against such person's will, by the use or threatened use of immediate force, violence, and fear of injury to Vincent Doolittle and Shane Pantano, and in the

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<sup>5</sup> A copy of the information is attached as Appendix A.

commission of said crime and in immediate flight therefrom, the defendant was armed with a deadly weapon; proscribed by RCW 9A.56.200, a felony.

CP 92.

At trial, however, the court instructed the jury it could convict Ms. Davis under either of two alternative means of committing first degree robbery: being armed with a deadly weapon or displaying what appeared to be a deadly weapon.<sup>6</sup> CP 69-79. The “to convict” instruction, Instruction 7, lists six elements that must be proved beyond a reasonable doubt. CP 69. For the fifth element, the jury was given two options and informed it did not need to be unanimous as to which option, as long as each juror found one option beyond a reasonable doubt. CP 69-70. The instruction reads in pertinent part:

(5)(a) That in the commission of these acts the defendant, or an accomplice, was armed with a deadly weapon or

(b) That in the commission of the crime the defendant, or an accomplice, displayed what appeared to be a deadly weapon . . .

If you find from the evidence that elements (1), (2), (3), and (6) and any of the alternative elements (5)(a) or 5(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be

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<sup>6</sup> A copy of Instruction 7 is attached as Appendix B.

unanimous as to which of alternatives (5)(a) or (5)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt. . . .

CP 69-70. Ms. Davis's jury was thus instructed that it could convict her of first degree robbery based upon the uncharged alternative means of displaying what appeared to be a deadly weapon. The prosecuting attorney also argued that the jury could convict Ms. Davis under either of these alternatives because "in this case we have both." RP 224.

3. This Court must reverse Ms. Davis's conviction. The jury is entitled to rely upon the "to convict" instruction as a yardstick that lays out the elements it is to consider in determining guilt or innocence. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) ("to convict" instruction is the jury's "yardstick" in measuring the evidence); State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). An erroneous instruction given on behalf of the party in whose favor the verdict was entered is presumed prejudicial unless it is affirmatively shown to be harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977); Chino, 117 Wn.App. at 540; State v. Bray, 52 Wn.App. 30, 34-35, 756 P.2d 1332 (1998). An

instructional error is harmless only if it is “trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” Wanrow, 88 Wn.2d at 237. Thus, an erroneous jury instruction is not harmless “when the evidence and the instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.” State v. Schaler, 169 Wn.2d 274, 288, 236 P.3d 858 (2010).

Incorrectly instructing the jury on an alternative means of the crime not charged in the jury instructions may be harmless if “in subsequent instructions the crime charged was clearly and specifically defined for the jury.” Bray, 52 Wn.App. at 34 (quoting Severns, 13 Wn.2d at 549). The only other instruction to address the elements of robbery in Ms. Davis’s case was an earlier instruction, Instruction 6, which defines robbery but not first degree robbery.<sup>7</sup> CP 68. No instruction informed the jury to only consider

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<sup>7</sup> Instruction 6 reads:

A person commits the crime of robbery when he or she 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 and by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. 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 cases the degree of force is immaterial.

the alternative of being armed with a deadly weapon, and the prosecutor told the jury both alternatives were proved. CP 61-78; RP 224. Thus, this Court cannot conclude the jury unanimously concluded Ms. Davis or an accomplice was armed with a deadly weapon.

As in Chino, no jury instructions defined the crime in a manner that excluded the alternative means, and it is therefore possible the jury convicted Ms. Davis on the basis of the uncharged alternative. Chino, 117 Wn.App. at 540-41; see Severns, 13 Wn.2d at 546-47, 548 (“We seriously doubt” that an improper definition instruction could be cured by a subsequent instruction, especially if accompanied by argument); State v. Bashaw, 169 Wn.2d 133, 147-48, 234 P.3d 195 (2010) (appellate court could not conclude beyond a reasonable doubt erroneous instruction harmless where it created a “flawed deliberative process”). Ms. Davis’s conviction must be reversed and remanded for a new trial. Severns, 13 Wn.2d at 552, 563; Chino, 117 Wn.App. at 540-41.

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The court did not give WPIC 37.01, which defines robbery in the first degree.

E. CONCLUSION

Matisha Davis's right to due process was violated when the court instructed the jury it could convict Ms. Davis based upon an uncharged alternative means. Her first degree robbery conviction must be reversed and remanded for a new trial

DATED this 20<sup>th</sup> day of October.

Respectfully submitted,



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Elaine L. Winters – WSBA # 7780  
Washington Appellate Project  
Attorneys for Appellant

**APPENDIX A**

**Information**

**December 28, 2010**

FILED

2010 DEC 28 PM 4:19

SOHYA KRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH



CL14590659

SUPERIOR COURT OF WASHINGTON  
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

No. 10-1-02250-8

v.

INFORMATION

DAVIS, MATISHA MICHELLE

Defendant.

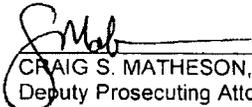
Aliases:

Other co-defendants in this case: AGUILAR, IRENE REBECCA; AGUILAR JR, VINCENT R.

Comes now MARK K. ROE, Prosecuting Attorney for the County of Snohomish, State of Washington, and by this, his information, in the name and by the authority of the State of Washington, charges and accuses the above-named defendant(s) with the following crime(s) committed in the State of Washington:

FIRST DEGREE ROBBERY, committed as follows: That the defendant, on or about the 13th day of July, 2010, with intent to commit theft, did unlawfully take personal property of another, to-wit: PS3 console, cash, and other property, from the person or in the presence of Vincent Doolittle and Shane Pantano, against such person's will, by use or threatened use of immediate force, violence, and fear of injury to Vincent Doolittle and Shane Pantano, and in the commission of said crime and in immediate flight therefrom, the defendant was armed with a deadly weapon; proscribed by RCW 9A.56.200, a felony.

MARK K. ROE  
PROSECUTING ATTORNEY

  
CRAIG S. MATHESON, #18556  
Deputy Prosecuting Attorney

.....  
Address: 13025 8TH AVE W G102      EVERETT      WA      98204  
HT: 5'6      DOB: 05/16/1987      SID: WA22808057  
WT: 220      SEX: F      FBI: 518578HC0  
EYES: Brown      RACE: Black      DOC:  
HAIR: Black      DOL: DAVISMM137KW,      WA  
ORIGINATING AGENCY: EVERETT POLICE DEPARTMENT      AGENCY CASE#: 1014728  
.....

**APPENDIX B**

**Jury Instruction 7**

**March 23, 2011**

INSTRUCTION NO. 7

To convict the defendant of the crime of robbery in the first degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of July, 2010, the defendant, or an accomplice, unlawfully took personal property from the person or in the presence of another;

(2) That the defendant, or an accomplice, intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's, or an accomplice's, use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another;

(4) That force or fear was used by the defendant, or an accomplice, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) (a) That in the commission of these acts the defendant, or an accomplice, was armed with a deadly weapon or

(b) That in the commission of these acts the defendant, or an accomplice, displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), and (6), and any of the alternative elements (5)(a) or (5)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a) or (5)(b) has been proved

beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

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

|                      |   |               |
|----------------------|---|---------------|
| STATE OF WASHINGTON, | ) |               |
|                      | ) |               |
| Respondent,          | ) |               |
|                      | ) | NO. 67038-7-I |
|                      | ) |               |
| MATISHA DAVIS,       | ) |               |
|                      | ) |               |
| Appellant.           | ) |               |

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF OCTOBER, 2011, 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:

- |     |   |   |  |
|-----|---|---|--|
| [X] | SETH FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | (X) U.S. MAIL<br>( ) HAND DELIVERY<br>( ) _____ |  |
| [X] | MATISHA DAVIS<br>348846<br>WACC FOR WOMEN<br>9601 BUJACICH RD NW<br>GIG HARBOR, WA 98332        | (X) U.S. MAIL<br>( ) HAND DELIVERY<br>( ) _____ |  |

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STATE OF WASHINGTON  
2011 OCT 20 PM 4:57

**SIGNED** IN SEATTLE, WASHINGTON, THIS 20<sup>TH</sup> DAY OF OCTOBER, 2011.

X \_\_\_\_\_  
*[Handwritten Signature]*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎ (206) 587-2711