IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN ROBERT PEETE, Appellant.	Consolidated Nos. 39317-4-II 39377-8-II UNPUBLISHED OPINION

Worswick, A.C.J. — John Robert Peete appeals this conviction for first degree robbery and his deadly weapon sentence enhancement. He contends that the evidence presented at trial was insufficient to prove that he possessed or displayed what appeared to be a deadly weapon for purposes of the first degree robbery charge, and that the trial court failed to instruct the jury on the proper definition of "deadly weapon" for purposes of sentence enhancement. In his statement of additional grounds (SAG), Peete also argues that he received ineffective assistance of counsel. We affirm.

Facts

On October 31, 2008, Mark Akkerman was working as a loss prevention agent at a K-Mart store in Pierce County, Washington. At about 9:00 p.m., while Akkerman was patrolling the floor, he observed Peete enter the store. Peete's behavior, including looking around at the store's associates, caught Akkerman's attention.

Akkerman went to a surveillance area concealed in the ceiling, and began watching Peete through a one-way mirror. Akkerman watched Peete walk into the electronics section where the

cellular telephones were displayed. The telephone packages were locked onto pegs on a display wall that did not go all the way up to the ceiling. In order to remove the packages from the display without damaging them, an employee would have to unlock the pegs with a key. The only other way to remove the packaging was by cutting it off of the locking peg.

From his vantage point, Akkerman was not able to see Peete completely, but he could see the display wall shaking. Based upon his experience of having previously seen people cutting packaging off of the wall, and seeing the display shaking on this occasion, Akkerman believed Peete was cutting a telephone package off of the display wall.

Akkerman returned to the sales floor to observe Peete from a better vantage point. Akkerman then observed Peete cut a cell phone off of the display wall and conceal it in his pocket. Akkerman followed Peete as he walked out of the store's front doors.

As Peete went through the front doors, Akkerman ran after him. Peete saw Akkerman and began running toward the parking lot. Akkerman twice yelled: "K-Mart Loss Prevention . . . You need to stop or I am going to call the cops." 1 Verbatim Report of Proceedings (VRP) at 29. Peete continued to run, but Akkerman caught him in the parking lot and both men fell to the ground.

Peete rolled onto his back, and Akkerman got on top of him. Peete flailed his arms as Akkerman tried to restrain him. Akkerman told Peete to "Just stop . . . or else I am going to have to call the cops." 1VRP at 30. But Peete continued to struggle.

In a threatening voice, Peete told Akkerman that he had a knife and was going to stab him. During the course of the scuffle, Peete had a handful of what appeared to be pens and a

pocketknife, and Peete again stated: "I got a knife. I am going to stab you." 1 VRP at 31. Although Peete did not have those objects in his hand before the men went to the ground, Peete was able to get the items into his hands by reaching into his pocket. As the men struggled, Peete repeatedly yelled that he had a knife and made jabbing motions with his hand. Akkerman ultimately was able to hold Peete's hands down with the aid of store manager Santesia Warren and loss prevention manager Jerry Finch, who had come out of the store to help Akkerman subdue Peete.

When the police arrived and Peete was picked up, witnesses saw a pocketknife on the ground. Finch testified that the knife was laying on the ground where Peete's left hand had been. That was the same hand in which Akkerman had seen Peete holding objects. The knife, identified and admitted at trial as Plaintiff's Exhibit No. 2, was a black Swiss Army knife containing a one-and-a-half-inch blade and several tools. On the ground, a couple of feet from the struggle, Akkerman found the stolen cell phone.

The responding officers took Peete into custody, and searched him. During that search, Officer Nicholas Jensen found a second knife, a closed black folding knife, in the defendant's pocket. That knife, admitted as Plaintiff's Exhibit No. 1-A, had the words: "Tacoma, Washington" inscribed on it and contained a blade approximately seven-eighths of an inch long. 1 VRP at 70, 2 VRP at 87.

Officer Jensen also found a third knife, admitted as Plaintiff's Exhibit No. 1-B, in Peete's pocket. That knife had a wood handle and contained a single blade that was approximately two inches long.

On March 4, 2009, the State charged Peete by amended information with one count of first degree robbery with a non-firearm deadly weapon enhancement (count I), a violation of RCW 9A.56.190, 9A.56.200(1)(a)(ii), and former RCW 9.94A.533 (2008). Clerk's Papers (CP) at 10.[1] The degree of the crime was based upon the allegation that either during or in immediate flight from the robbery, the defendant displayed what appeared to be a deadly weapon.

At trial Officer Jensen testified that at the time of the incident he had been a police officer for approximately three years. Prior to becoming a police officer, he had been a juvenile corrections officer in Kitsap County, and before that, he had served four years in the Marine Corp. He testified that in responding to aggravated assault calls he had seen injuries resulting from knives similar in size to the knives found on Peete. He described the injuries as puncture wounds to different parts of the body, including stomach, neck, and face, and he acknowledged that such wounds could result in life-threatening internal bleeding.

When instructing the jury, the trial court provided a separate instruction that specifically defined a deadly weapon for purposes of the special verdict form and accompanying deadly weapon enhancement, stating in relevant part:

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

CP at 102 (Instruction No. 22).

[1] Peete was also charged with one count of third degree assault (count II) and one count of making a false or misleading statement to a public servant (count III). A jury convicted Peete on counts II and III in his first trial, held in April 2009, but deadlocked on count I. The trial court declared a mistrial as to count I and Peete was retried on the robbery count in May 2009. Peete's arguments in the present appeal address only the retrial.

On May 14, 2009, a jury convicted Peete of first degree robbery. The jury also entered a special verdict form, finding that Peete was armed with a deadly weapon during the crime. The jury specifically found that each of the three knives was a deadly weapon, and that Peete was armed with them during the commission of the robbery. Peete appeals.

Analysis

I. Sufficiency of the Evidence

Peete first asks this court to reverse his conviction for first degree robbery and to remand for imposition of the lesser included offense of second degree robbery. He contends that the evidence was insufficient to support his first degree robbery conviction because it shows only a verbal threat "unaccompanied by the victim's believing that the defendant was armed." Br. of Appellant at 9. Peete's contentions fail.

A defendant's challenge to the sufficiency of the evidence requires us to view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007) (citing *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *Brown*, 162 Wn.2d at 428. The defendant's claim of insufficiency admits the truth of the State's evidence and all reasonable inferences. *Brown*, 162 Wn.2d at 428.

Moreover, direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. *State v. O'Neal*, 159 Wn.2d 500, 506, 150 P.3d 1121 (2007). *State v.*

Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) ("[i]n determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence"). In reviewing the evidence, we give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Here, as to the charge of first degree robbery, the State was required to prove beyond a reasonable doubt: (1) that on or about October 31, 2008, Peete unlawfully took personal property from the person or in the presence of Mark Akkerman; (2) that Peete intended to commit theft of the property; (3) that the taking was against Akkerman's will by Peete's use or threatened use of immediate force, violence or fear of injury to Akkerman; (4) that the force or fear was used by Peete to obtain or retain possession of the property or to prevent or overcome resistance to the taking; (5) that in the commission of these acts, or in immediate flight therefrom, Peete was armed with a deadly weapon or displayed what appeared to be a deadly weapon; and (6) that any of these acts occurred in the State of Washington. RCW 9A.56.190, 9A.56.200(1)(a)(i),(ii). Peete contends that only the fifth element noted above was not met.

Peete argues that although three pocket knives were found on or near his person when he was arrested after the struggle with Akkerman in the K-Mart parking lot, there is no evidence that he was armed with a deadly weapon or that he displayed a deadly weapon. He correctly contends that because none of the knives had a blade longer than three inches they did not qualify as deadly weapons per se. *Cf.* RCW 9.94A.825. But there are two categories of deadly weapons: (1) those that are per se deadly, such as firearms, explosives, and knives with blades longer than three

inches; and (2) those that, under the circumstances in which they are used, are readily capable of causing death or substantial bodily harm. *State v. Holmes*, 106 Wn. App. 775, 781-82, 24 P.3d 1118 (2001); RCW 9A.04.110(6); RCW 9.94A.825.

Here, Officer Jensen testified that the knives at issue were capable of inflicting life threatening puncture wounds. That testimony was uncontroverted and without objection.

As for whether a deadly weapon was displayed, Peete relies on *State v. Scherz*, 107 Wn. App. 427, 27 P.3d 252 (2001), and *In re Personal Restraint of Bratz*, 101 Wn. App. 662, 5 P.3d 759 (2000), for the proposition that some physical manifestation of the presence of a weapon in addition to words must be shown. *Scherz* and *Bratz* addressed prior case law on the same question at issue here. *See e.g. State v. Barker*, 103 Wn. App. 893, 14 P.3d 863 (2000) (sufficient evidence where defendant said he would shoot store clerk and he pressed hard object into her back); *State v. Kennard*, 101 Wn. App. 533, 6 P.3d 38 (sufficient evidence where defendant demanded money, stated he had a gun, patted his hip, and told teller he knew where she lived); and *State v. Henderson*, 34 Wn.App. 865, 664 P.2d 1291 (1983) (2000) (sufficient evidence where defendant had right hand concealed in pocket when demanding money).

This court distinguished *Henderson* in *Bratz*, 101 Wn. App. at 662 (threatened use of nitroglycerin unaccompanied by any physical manifestation indicating a weapon does not satisfy display element of first degree robbery). Division Three subsequently distinguished *Barker*, *Kennard* and *Henderson* in *Scherz*, 107 Wn. App. at 427 (State must show both words and actions indicating threat of a firearm or deadly weapon). The *Scherz* court explained:

> *Henderson*, *Kennard*, and *Barker* are thus all consistent in that the defendants' threats of a weapon also involved a menacing physical act in addition to words so as to justify including the display element in the first degree robbery

> instructions. In *Henderson*, the defendant indicated the presence of a weapon with his hand in his bulging pocket to the first employee. Likewise, stating, "I have this" while pointing to his pocket, implied the presence of a weapon to the second employee. In *Kennard*, the defendant patted his hip and told the victim he knew where she lived after stating he had a gun. And, in *Barker*, the defendant pointed his finger into the victim's back to make her think he had a gun.

Scherz, 107 Wn. App. at 433-34. The *Scherz* court found its facts similar to those in *Bratz* because the defendant used only menacing words without making any physical manifestations that he carried a weapon:

> We agree with Mr. Scherz that *Bratz* is controlling here. Unlike in *Henderson*, *Kennard*, and *Barker*, where the defendants' physical manifestations justified first degree robbery instructions for displaying what appeared to be a weapon, Mr. Scherz's mere statement he had a hand grenade is akin to Mr. Bratz's mere verbal threat to blow up the bank with nitroglycerin.

Scherz, 107 Wn. App. at 435-36.

Here, the circumstances of Peete's case are more similar to those in *Henderson* than in *Bratz* and *Scherz*. Akkerman testified that after he apprehended Peete and the two men fell to the ground, Peete never stopped struggling. Akkerman said it was hard to control Peete's flailing arms. During the struggle, Peete reached into his pocket and pulled out several objects. Akkerman could not completely identify all the items that Peete held as the men continued to struggle and Peete's arms flailed. Akkerman said that he assumed Peete had a knife because Akkerman had earlier observed Peete cut the phone off the wall and Peete now wielded some objects in his hand, accompanied by Peete's verbal threat that he had a knife and would stab Akkerman.

Here, Peete's menacing physical actions corroborated his verbal threat that he had a knife and was going to stab Akkerman. Moreover, Akkerman's belief that Peete had a knife was

reasonable, based on Peete's verbal threat, Peete's attempts to stab Akkerman with the objects that Peete held during the struggle, and Akkerman's earlier observation of Peete cutting the phone off the wall. Accordingly, considering the evidence in the light most favorable to the State, we hold that sufficient evidence supports Peete's conviction for first degree robbery.

II. Deadly Weapon Instruction

Peete next contends that the trial court's definition of deadly weapon, for purposes of the deadly weapon sentence enhancement, was contrary to law, thereby improperly lessening the State's burden of proof and warranting reversal of his deadly weapon sentence enhancement. We disagree.

Peete correctly argues that "deadly weapon" has distinct meanings for purposes of the first degree robbery charge and the deadly weapon sentence enhancement. As for the robbery charge, the State must prove that the instrument in question is "readily capable of causing death *or substantial bodily harm*." RCW 9A.04.110(6) (emphasis added). But for purposes of the deadly weapon sentence enhancement, RCW 9.94A.825 requires a special verdict as to whether the defendant was armed with a deadly weapon during the commission of the crime, and further requires that for such purposes "a deadly weapon is an implement or instrument which has 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." *See State v. Cook*, 69 Wn. App. 412, 418, 848 P.2d 1325 (1993) ("[w]hen seeking an enhanced sentence, the State must prove that the weapon had the capacity to cause death and death alone").

Pete's assertion of error focuses on instruction 16, which tracks the language of RCW

9A.04.110(6) and provides the definition of deadly weapon for purposes of the robbery charge.[2] Peete contends that the trial court erred because it "did not give an additional instruction defining 'deadly weapon' for purposes of the sentence enhancement."' Br. of Appellant at 11. But Peete is mistaken. The Court's instruction 22 specifically addressed the sentence enhancement, stating in part:

> For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime.
> . . . .
> A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death.

This instruction comports with the requirements of RCW 9.94A.825. Peete's contention that the court erred by not giving an appropriate instruction fails.

III. Statement of Additional Grounds (SAG)

In his SAG, Peete contends that trial counsel failed to provide effective assistance. To show that he received ineffective assistance of counsel, Peete must establish (1) that defense counsel's conduct fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced him. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). We employ a strong presumption that defense counsel's conduct was not deficient. State v. *McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Peete first contends that that his counsel had a conflict of interest because the same

[2] Instruction 16 states: "Deadly weapon means any weapon, device, instrument, substance or article which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury." RCW 9A.04.110.

counsel represented him at both of his trials and Peete filed a grievance against his counsel after the first trial. This issue concerns matters outside the record. We cannot consider matters outside the record on direct appeal. *McFarland*, 127 Wn.2d at 335.

Peete further contends that his counsel was ineffective because he never objected to the "wrong definition" of deadly weapon. SAG at 1. This appears to be a repetition of the argument presented in the Brief of Appellant, that "deadly weapon" was not properly defined for purposes of the sentence enhancement. We rejected that contention above and need not repeat our analysis except to reiterate that, for purposes of the deadly weapon sentence enhancement, deadly weapon was properly defined in Instruction 22. Counsel's failure to object to a correct instruction does not amount to ineffective assistance.

Peete also repeats the sufficiency challenge presented in his Brief of Appellant, contending that "[t]he knife in question was never used and no one ever testified that they saw a knife until the police officers arrived and picked me up off the ground." SAG at 1. We resolved the sufficiency issue above and need not discuss it further. *See* RAP 10.10(a).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

39317-4-II, 39377-8-II

Armstrong, J.

Alexander, J.