IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 62939-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
GAVIN JARED HAGGITH,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 19, 2010

Spearman, J.—Gavin Haggith appeals from his conviction and sentence for robbery in the first degree with a deadly weapon enhancement stemming from the robbery of a convenience store. The clerk was alone with one male customer when he pulled out a knife, jabbed it at her, then reached into the register and grabbed money before running out of the store. The clerk later identified Haggith as the robber. Haggith makes the following arguments: (1) the trial court erred in not granting a mistrial based on certain statements of a venire member; (2) the State's introduction of a photograph depicting track marks on Haggith's arm violated the court's pre-trial order, unfairly prejudiced him, and denied him a fair trial; (3) the trial court's jury instructions misstated the law, relieving the State of the burden of proving every element of the deadly weapon enhancement; (4) the trial court improperly commented on the evidence in its jury instruction on the deadly weapon enhancement; and (5) the trial court

erred in refusing to give an inferior-degree instruction to the jury. We find that the trial court's jury instructions misstated the law as to the deadly weapon enhancement. We therefore vacate the special verdict and sentence and remand for resentencing on that ground. Accordingly, we need not reach the issue of whether the trial court commented on the evidence in its jury instruction on the deadly weapon enhancement. We otherwise affirm.

FACTS

Following a jury trial in Whatcom County Superior Court, Gavin Haggith was convicted of robbery in the first degree, with a deadly weapon enhancement. Convenience store clerk Virginia Holtz was alone at approximately 7:30 a.m. on the morning of April 23, 2008, when a man came in and bought a bag of chips. She was handing him his change when he pulled out a knife and jabbed it at her. He reached into the register and Holtz slammed the drawer on his hand, but he was able to remove some money before he ran out of the store. Holtz called 911. She described the robber as a white male in his twenties, with a thin build, dressed in black, and wearing a waist-length coat and a stocking cap. She described the knife as a six-inch switchblade. Police arrived and Holtz discovered that the robber had taken all of the $10 bills. She said she saw the robber's face clearly and thought she could identify him again.

Neighborhood resident Becky Eastwood saw a man running from the direction of the convenience store around 8 a.m. He was tall, slender, and dressed in black. Another resident, Theresa Smith, saw a man run down the

alley and into the back yard of the house next door around 8 a.m. The man was thin, medium to tall in height, and wearing dark clothes and a hat. Both women reported what they saw to authorities.

Police canvassed the area and kept watch on the house next to Smith's. They had Holtz look at a tall, thin man with long, red hair but she ruled him out based on his hair. She also ruled out Nate James, one of the men who lived in the house near Smith, because of his build. Police officers went to the house and another resident, Jesse Hammond, allowed them inside. Haggith appeared to be asleep on the couch. Officer Lanham observed a scrape and dried blood on his hand. Haggith awoke soon thereafter, and Officer Lanham asked him about the injury on his hand. Haggith said he had scraped his hand on a nail on the porch, but could not show Lanham where. Haggith then said he could have cut his hand on chicken wire. The officers had store clerk Virginia Holtz brought to the house. She positively identified Haggith as the robber, although Haggith was wearing a white jacket.

Haggith was taken to the police station. He proclaimed his innocence and denied owning a pocket-type knife. Haggith told police that he and Hammond had gone out drinking the night before. When they came back to the house they played guitar, and then fell asleep. Haggith said he injured his finger when he went out onto the porch while drunk and stumbled into chicken wire. He said he had bought beer and chips at the convenience store recently.

Police officers obtained a search warrant for the house. They found dark

clothes scattered throughout. They also found a wad of $10 bills stuffed inside a shoe. They also found a $10 bill on the ground in the yard through which Theresa Smith had seen the man run.

On April 25, 2008, Haggith was charged with one count of robbery in the first degree and with displaying a deadly weapon. At trial, Holtz testified that the robber jabbed a knife at her. An audio recording of her 911 call, during which she described the knife as a six-inch switchblade, was heard by the jury and admitted into evidence. A sketch of the knife that she made, depicting a blade approximately 4.5 inches long, was also admitted. Holtz testified to being "very afraid" because of the knife. She acknowledged that her initial recollection of certain details of the suspect's clothing had been faulty. For instance, she initially reported that the suspect wore a coat with a "starburst" design, but later realized that one of her customers wore such a jacket.

Jesse Hammond testified that on the night of April 22, he and Haggith did speed and cocaine and injected heroin into their arms, went to a party, returned to the house and did more drugs, then fell asleep. He said Haggith was wearing white. Hammond testified that when he was driving that night, Haggith pulled a knife out of his pocket and said he carried it for protection. Hammond testified that the knife had a black, synthetic handle and a polished, serrated steel blade. He described the knife to police as having a blade about three inches long. He did not see Haggith open the knife and could not say whether it was a switchblade. Hammond was shown photographs of the shoes in which the $10

bills were found and testified that he had not seen them before.

Haggith was convicted as charged, and sentenced to 36 months for the robbery and 24 months for the deadly weapon enhancement. He appeals his conviction and sentence on five grounds.

DISCUSSION

Haggith argues that: (1) the trial court erred in not granting a mistrial based on certain statements made by a venire member; (2) the State's introduction of a photograph depicting track marks on his arm violated the court's pre-trial order, unfairly prejudiced him, and denied him a fair trial; (3) the trial court's jury instructions misstated the law, relieving the State of the burden of proving every element of the deadly weapon enhancement; (4) the trial court improperly commented on the evidence in its jury instruction on the deadly weapon enhancement; and (5) the trial court erred in refusing to give an inferior-degree instruction to the jury. We hold that the trial court's jury instruction on the deadly weapon enhancement misstated the law and relieved the State of its burden of proving every element. Therefore, we vacate the special verdict on the deadly weapon enhancement and remand for resentencing. Because we remand for resentencing on that ground, we need not reach the other issues. We otherwise affirm the trial court.

Trial Court's Jury Instructions on Deadly Weapon Special Verdict

The trial court's jury instruction for the deadly weapon special verdict stated:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon, to-wit: a knife at the time of the commission of the crime of Robbery in the First Degree, Count I.
>
> A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime.

Instruction 15. The jury was not instructed on the definition of "deadly weapon" for purposes of the special verdict:[1]

> For purposes of this section, 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. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

Former RCW 9.94A.602 (1983), *recodified as* RCW 9.94A.825 (Laws of 2009, ch. 28, § 41) (emphases added). However, in conjunction with the instruction for the robbery charge, the jury did receive the definition of "deadly weapon" under RCW 9A.04.110(6), which defines that term for purposes of first-degree robbery:

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument,

[1] Haggith did not object to the trial court's failure to instruct the jury on the definition of a deadly weapon for purposes of the special verdict. The State concedes, however, that the failure to give the instruction was error.

> article, or substance, including a "vehicle" as defined in this section, 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 harm.

(Emphasis added.)

This court reviews instructional errors de novo. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). A jury instruction that omits or misstates an element is subject to harmless-error analysis to determine whether the error has relieved the State of its burden to prove each element. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. Id. at 341.

Haggith claims that the deadly weapon special verdict instruction given to the jury relieved the State of its burden to prove that the alleged knife was likely to produce death. He argues that in the absence of an instruction defining a "deadly weapon" for purposes of the special verdict, the jury likely relied on the "deadly weapon" definition instruction given for purposes of the first degree robbery charge. If so, the State only needed to prove that the knife was capable of causing substantial bodily harm instead of needing to prove that the knife was likely to produce death. The State concedes that the omission of the definition of a deadly weapon for purposes of the special verdict constituted error, but argues that the error was harmless.

The error was not harmless. The definitions of "deadly weapon" for purposes of the special enhancement statute and the first degree robbery statute

are distinct. The former requires the State to prove that the knife blade was 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 (1983). The latter requires the State to prove 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) (emphasis added).

Here, the evidence was such that a reasonable jury could have found that the blade of the knife was not more than three inches long;[2] that it did not otherwise have the capacity to inflict death; and that, from the manner in which it was used, it was neither likely to produce, nor would it easily and readily have produced, death. A reasonable jury could have concluded that the testimony about an approximately three-inch blade was more credible, and made the finding that the knife's blade was exactly three inches long. If the jury so found, it might also reasonably have concluded that the robber's alleged action in jabbing the knife across the counter at the clerk, as described in the clerk's testimony, did not have the capacity to inflict death and was not used in a manner likely to produce death or that might easily and readily have produced death.

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[2] Evidence about the knife that store clerk Virginia Holtz saw included the following: (1) a sketch of the knife that Holtz drew for defense counsel, depicting a very thin blade approximately 4.5 inches long, and (2) Holtz's description of the knife as being a six-inch switchblade to the 911 operator immediately after the robbery. It is unclear whether this length referred to the entire knife or the blade alone.

Evidence of the knife that Jesse Hammond alleges Haggith showed him the night before the robbery included a statement to police that the knife blade was about three inches long.

In sum, we are not convinced beyond a reasonable doubt that any reasonable jury would have found the knife used to be a "deadly weapon" under the special enhancement statute. We therefore vacate the special enhancement verdict and remand for resentencing. Because we do so, we need not reach the issue of whether the trial court commented on the evidence when it gave the deadly weapon enhancement instruction.

Motion for a New Trial Based on Venire Member's Statements

During voir dire, the following exchange took place between the trial court and a member of the venire panel:

> COURT: So do any of you know the defendant, Mr. Haggith, in this case? Anybody have knowledge of Gavin Haggith? Juror number 31?
> JUROR 31: I work in the jail, so I have day-to-day contact with him.
> COURT: Okay. Anyone else know Mr. Haggith in this context? Okay.
> Do any of you know [prosecuting attorney] Mr. Setter or familiar with – 31?
> JUROR 31: I work in the jail.
> COURT: Because of where you work?
> JUROR 31: I know everybody up there.
> COURT: You're probably familiar with all the faces in the courtroom?
> JUROR 31: Yeah.
> COURT: Anybody else know Mr. Setter? Nobody? No.
> How about … [defense attorney] Mr. Hyldahl, anybody know Mr. Hyldahl in this context? Anyone know of him, have him represented you, or worked for you or anything? Okay. Very well.

Later in voir dire, the following exchange took place between the prosecutor and the same venire member:

> MR. SETTER: …
> Now, you don't know anything about this case. The

> defendant is accused of robbery. I think the judge said there's a weapon involved, and the charge certainly isn't evidence. It's just information. It's just a formal document that informs the defendant of a charge.
>
> Now, is there anybody here that doesn't think in their common-sensical kind of way that you know what, there's a charge. There must be smoke here. If there's smoke, there might be a little fire, and you just logically think the defendant must have done something, even though you heard no evidence here? Is there any of you here that thinks there must be something here? Thirty one?
>
> JUROR 31: I have probably more of that than the regular person.
>
> MR. SETTER: I'm going to stay away from you, okay?
>
> JUROR 31: Okay.
>
> MR. SETTER: You know why.
>
> So common sense will tell you if somebody brings before you a decision to be made, there must be a dispute, right, and you're called to resolve it, right? So there must be something that happened.
>
> But in a criminal case, you're asked to decide not whether something happened; you're asked to decide beyond a reasonable doubt a particular thing happened. Is that something that you all can accept, and again, as we've asked before, if I do that, I assume you have no reservations about making that decision.

The next day, defense counsel filed a motion for a mistrial, arguing that the entire panel was tainted by the comments. Voir dire was completed and a jury was empanelled and sworn in.[3] The court then heard argument on the motion. Defense counsel argued that the remarks violated Haggith's rights to a fair trial, an impartial jury, and the presumption of innocence, and his rights under ER 404(b). The State argued that the suggestion that Haggith had been in custody was not unfairly prejudicial because there would be evidence at trial that he was arrested on April 23 and was in custody for a period of time after his arrest. The court explained that the remark was not as prejudicial as if Haggith had been in shackles, and the jury might not perceive him to be jailed but rather conclude

[3] The trial court dismissed Juror 31 during a recess.

that Haggith was Juror 31's coworker. The court noted that the statements did not refer to other crimes or charges. The court denied the motion, explaining that the dismissal of Juror 31 was the proper remedy, the panel was not tainted, and the jury would follow the court's instructions not to engage in speculation.

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). In deciding whether an inadvertent remark at trial requires reversal, a court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of other admissible evidence; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). A mistrial should be granted "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Lewis, 130 Wn.2d at 707.

Haggith argues that reversal of his conviction is required whether this court applies the harmless-error standard or the "structural error" standard under Mach v. Stewart, 137 F.3d 630 (9th Cir. 1997).[4]

[4] The "structural error" standard is clearly inapplicable to the facts of this case. In Mach, a prospective juror in a case of alleged sexual conduct with a minor stated that she had expertise in child psychology, worked with children as a social worker for several years, and had never been involved in a case in which a child's accusations of sexual assault against an adult had not been borne out. Id. at 632–33. The trial court denied the defendant's motion for a mistrial. Id. at 632. The Ninth Circuit found that the error "arguably" rose to the level of a "structural error" that "severely infected the process from the very beginning." Id. at 633–34. Ultimately, however, the court declined to decide whether the statements constituted structural error, because they required reversal under the harmless-error standard. Id. at 634. The statements of the juror in Mach are much more egregious that those at issue here, which cannot to any extent be said to have "severely infected" the trial process.

Applying the Weber factors, we affirm the trial court. In context, the remarks of Juror 31 were not particularly serious. The remark about seeing Haggith on a "day-to-day" basis, while suggesting that he had been in jail, likely did not have the same effect as if he had been brought in front of the jury wearing prison coveralls or shackles. See State v. Hutchinson, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998) (defendant's appearance before jury in shackles may cause jury prejudice, but trial court has broad discretion in making determination). The remark about being more likely than the average juror to think that the defendant committed a crime merely because he had been charged was unlikely to persuade other jury members to think the same way. The jurors were probably well aware that some individuals in society hold such views toward those charged with a crime. Furthermore, the prosecutor immediately stopped the juror, and followed up with a statement that the jury would need to apply the "beyond a reasonable doubt" standard.

Second, the remark suggesting that Haggith may have been in custody at some point was cumulative of other admissible evidence. The jury would, as the State pointed out, find out that Haggith was arrested on April 23 and had been in custody. The remark did not specify when Juror 31 saw Haggith and could have been interpreted to refer to that period.

Third, although the trial court did not give a curative instruction, it determined that it was speculative to assume the jury would think Haggith was in jail for another crime, and stated that it would give the jury an instruction not to

speculate.

In sum, Juror 31's remarks, when viewed in context, were not likely to predispose the jury against Haggith or in favor of the State. Moreover, the trial court was in the best position to gauge their effect on members of the venire and to decide whether the remarks were so prejudicial that a new trial was warranted. See State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993) (testimony by a witness that defendant had been in jail were not so serious as to warrant a mistrial). We affirm the trial court's ruling denying Haggith's motion for a mistrial.

Photographs Showing Track Marks

Before trial, Haggith moved to exclude evidence of his drug use. The court prohibited testimony about drug use prior to the night before the robbery, but allowed evidence about drug use that night, finding it relevant to issues of opportunity, intent, preparation, knowledge, and Haggith's and Hammond's ability to perceive and recall events. The court granted defense counsel's request for a continuing objection, and then asked if there was any other evidence at issue. At that point defense counsel objected to the admission of photographs of the inside of Haggith's elbows.[5] The court allowed them for the purpose of corroborating Hammond's statements about the men's drug use the night before the robbery, but required the State to lay a foundation establishing that the needle marks were new or fresh.

[5] It appears from the record that only one such photo, Exhibit 34, was admitted at trial.

At trial, during the testimony of police officer Joseph Leighton, the State offered Exhibit 34, a photograph depicting needle marks on the inside of Haggith's elbow. Defense counsel stated, "No objection," and the photograph was admitted into evidence. Soon afterward, the prosecutor finished direct examination. At that point, defense counsel requested a short recess so that he could look at the evidence and speak with Leighton. During the break the court raised the issue of the motion in limine, reminding the prosecutor that there would have to be an offer of proof if there was going to be further testimony about the needle marks. The court asked, "Is that something we're headed into?" and the prosecutor responded, "No, the photographs have been admitted." Defense counsel stated that he assumed the photograph was subject to his pre-trial standing objection, and the court agreed. The prosecutor asked, "How would I ever know about it?" and asked whether the evidence was admitted. The court stated that the evidence was admitted and the continuing objection was for purposes of appeal.

On appeal, Haggith contends that the State's introduction of the photograph depicting track marks on his arm violated both the trial court's pre-trial ruling and ER 404(b), unfairly prejudicing him and denying him a fair trial. The parties dispute whether defense counsel had a standing objection to the photograph, and therefore whether the introduction of the photograph violated the pre-trial ruling. The State contends that both the court and defense counsel erred in thinking that defense counsel had a standing objection to Exhibit 34.

The State claims that the standing objection applied not to the photographs but to other evidence, and that the court's ruling on the photographs was that the State needed to lay additional foundation before they could be admitted. Furthermore, the State argues that defense counsel failed to abide by his statement at the pre-trial hearing that when the time came to admit the photographs, he would indicate that he wanted to be heard outside of the presence of the jury.

A review of the record indicates that the State was correct in its recollection of the court's pre-trial ruling. Therefore, we find that defense counsel waived his objection.

Even if counsel did not waive his objection, however, the admission of the photograph was harmless. "An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (citing Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 668 P.2d 571 (1983)). Where an error violates an evidentiary rule rather than a constitutional mandate, this Court does not apply the more stringent "harmless error beyond a reasonable doubt" standard. Instead, we apply "'the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

The admission of Exhibit 34 was not prejudicial because the photograph was cumulative of other evidence that Haggith had used drugs the night before the robbery and in the past. The outcome of the trial would not have been materially affected by its exclusion. Hammond testified that on April 22, he and Haggith used speed and cocaine, and injected heroin into their arms. He also testified that Haggith had bought methadone and heroin from him "a couple times" in the past.

Trial Court's Refusal to Instruct on Second Degree Robbery

Haggith requested the trial court to instruct the jury on robbery in the second degree, arguing that the jury could conclude he robbed the store but was not armed with a deadly weapon. The court declined.[6]

The standard of review depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. Id. at 772. Here, the parties' dispute involves only the factual component of the trial court's decision, which will therefore be

[6] The court stated:

> I don't know how we – the jury could find a set … of facts that involved a robbery that do[es]n't involve the possession of the knife in those circumstances.
>
> If he had, if the question was did he say give me everything and use the knife to, you know, to add force to his words, and there was some question about whether there was a knife or something that might be one thing, but there's nothing here that constitutes a robbery other than the use of the knife as the intimidation while he reaches into the drawer to grab the money. I'm having trouble seeing how without a knife there's a robbery.

reviewed for abuse of discretion.

> An instruction on an inferior-degree offense is proper when:
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> "(1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense."

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997)). When determining whether the evidence supported an instruction on an inferior degree of the charged offense, the appellate court must view the evidence in the light most favorable to the party requesting the instruction. Id. at 455–56.

Haggith claims that the trial court erred in refusing to give an instruction on robbery in the second-degree because there was evidence that the robber was not in possession of a knife when the crime was committed. In support of this claim Haggith relies upon his own testimony that he did not own a knife, that the witnesses who claimed to have seen him with a knife were not credible, and the fact that no knife was recovered. But the undisputed testimony of the store clerk—the sole eyewitness to the robbery—was that a knife was used in the commission of the crime. The clerk reported to 911 immediately after the robbery that the robber jabbed a knife at her and tried to assault her with it. According to her, the knife appeared to be a six-inch switchblade. She recalled being very afraid because of the knife. Haggith points to her mistaken memory of a pattern on the robber's jacket. But mistakenly recalling a detail about the

robber's clothing is not akin to manufacturing a memory about the robber having a knife and jabbing it at her.

Haggith also argues that the jury could have found that the knife used in the robbery did not rise to the level of a "deadly weapon" for purposes of the first-degree robbery statute. But where Holtz's statements to the 911 operator indicated that the knife blade was six inches long, and Hammond's statements to police officers indicated that the knife Haggith showed him had a blade approximately three inches long, even the most favorable inference still supports the court's determination that it was capable of causing substantial bodily harm.

We hold that the trial court did not abuse its discretion in denying the inferior-degree instruction based on the evidence before it.

Special verdict and sentence vacated, and remanded for resentencing. Otherwise affirmed.

Spearman, J.

WE CONCUR:

Leach, A.C.J.

Grosse, J.