

71026-5

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COA No. 71026-5

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERTO GONZALEZ-MENDOZA,

Appellant.

COURT OF APPEALS
STATE OF WASHINGTON
2011 MAR 10
10:00 AM

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Nichole Macinnes

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF APPEAL 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE 3

 1. Procedural history. 3

 2. Facts. 4

E. ARGUMENT 7

 1. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE OF A THIRD PERSON'S BIOLOGICAL MATERIAL ON THE COMPLAINANT'S ANAL SWAB 7

 a. The defendant sought to elicit relevant evidence regarding biological material that would also have impeached the complainant's credibility. 7

 b. The court's ruling violated Mr. Gonzalez-Mendoza's evidentiary right to introduce relevant evidence and his constitutional right to impeach the complainant's credibility. 9

 2. THE TRIAL COURT VIOLATED MR. GONZALEZ-MENDOZA'S EVIDENTIARY AND CONSTITUTIONAL RIGHT TO IMPEACH THE COMPLAINANT UNDER ER 608(b). 11

 a. The defense was precluded from inquiring into misconduct by the complainant that bore on her credibility. 11

 b. The court's ruling was an abuse of discretion under ER 608. 12

3.	THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF MR. GONZALEZ-MENDOZA'S PRIOR ASSAULT CONVICTION	15
	a. <u>The court ruled that Mr. Gonzalez-Mendoza had opened the door to evidence of his prior assault.</u>	15
	b. <u>The court's ruling was an abuse of discretion.</u>	16
4.	CUMULATIVE ERROR DENIED MR. GONZALEZ-MENDOZA A FAIR TRIAL	18
	a. <u>The right to a fair trial.</u>	18
	b. <u>The prejudice of multiple errors denied Mr. Gonzalez-Mendoza a fair trial.</u>	19
5.	THE STATE WAS RELIEVED OF ITS BURDEN OF PROVING THE DEADLY WEAPON ENHANCEMENT, VIOLATING MR. GONZALEZ-MENDOZA'S SIXTH AMENDMENT AND STATE CONSTITUTIONAL RIGHTS	20
	a. <u>The jury was given a definition of "deadly weapon," appropriate for purposes of the charge of first degree rape, but which dramatically understated the requirements of proof for a deadly weapon enhancement.</u>	20
	b. <u>Mr. Gonzalez-Mendoza's Sixth Amendment and state constitutional jury trial right was violated when the court imposed a deadly weapon enhancement.</u>	23
	c. <u>The error requires reversal.</u>	25
F.	CONCLUSION	27

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) 19

State v. Barnes, 54 Wn. App. 536, 774 P.2d 547 (1989). 13

State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993) 14

State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008) 17

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995) 22

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). 23,26

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775
(1971) 11,15,18

State v. Cook, 69 Wn. App. 412, 848 P.2d 1325 (1993) 22

State v. Douglas, 128 Wn. App. 555, 116 P.3d 1012 (2005) 23

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) 13

State v. Hauck, 33 Wn. App. 75, 651 P.2d 1092 (1982) 26

State v. Holmes, 106 Wn. App. 775, 24 P.3d 1118 (2001) 25,26

State v. Jones, 25 Wn. App. 746, 610 P.2d 934 (1980). 10

State v. K.L.B., ___ P.3d ___, 2014 WL 2895451 (Wash., June 26,
2014) (NO. 88270-3) 12

State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992) 23

State v. McDaniel, 83 Wn. App. 179, 920 P.2d 1218 (1996), review
denied, 131 Wn.2d 1011, 932 P.2d 1255 (1997) 19

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). . . . 23

State v. Mendez, 29 Wn. App. 610, 630 P.2d 476 (1981) 12

<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995)	11,15
<u>State v. Roberts</u> , 25 Wn. App. 830, 611 P.2d 1297 (1980)	14
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995)	9,19,20
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988)	23
<u>State v. Simonson</u> , 82 Wn. App. 226, 917 P.2d 599 (1996).	13
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980).	27
<u>State v. Stockton</u> , 91 Wn. App. 35, 955 P.2d 805 (1998).	16,17
<u>State v. Tarman</u> , 27 Wn. App. 645, 621 P.2d 737 (1980)	17
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004)	24
<u>State v. Wanrow</u> , 88 Wn.2d 221, 559 P.2d 548 (1977).	25
<u>State v. Warren</u> , 134 Wn. App. 44, 138 P.3d 1081 (2006)	17
<u>State v. York</u> , 28 Wn. App. 33, 621 P.2d 784 (1980).	13,19
<u>State v. WWJ Corp.</u> , 138 Wn.2d 595, 980 P.2d 1257 (1999)	23
 <u>STATUTES AND COURT RULES</u>	
Former 9.94A.602	21
RCW 9.94A.825	21
RAP 2.5(a)(3)	23
RCW 9A.76.175	12
RCW 9A.76.020	12
RCW 9A.04.110(6)	22
ER 401	9

ER 402.	9
ER 403	11
ER 404(b)	17
ER 607	9
ER 608(b)	12
ER 609	14
CrR 6.15(c)	23

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 6.	9,23
U.S. Const. amend. 14.	19
Wash. Const., article 1, section 21.	23

UNITED STATES SUPREME COURT CASES

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).	23,24
<u>Davis v. Alaska</u> , 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)	9,14

UNITED STATES COURT OF APPEALS CASES

<u>U.S. v. Leake</u> , 642 F.2d 715 (4th Cir. 1981).	14
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TREATISES

5A Teglund, <u>Washington Practice, Evidence Law and Practice</u> , ' 608.11 (5 th ed. 2007).	13
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A. SUMMARY OF APPEAL

The appellant was wrongly convicted of rape where he was prevented from introducing relevant evidence and impeaching the complainant. In addition, the jury instructions relieved the State of its burden to prove the deadly weapon enhancement.

B. ASSIGNMENTS OF ERROR

1. In Mr. Gonzalez-Mendoza's trial on first degree rape, the trial court erred in excluding relevant forensic evidence.

2. The trial court erred in denying the defendant's ER 608(b) motion to impeach the complainant.

3. The trial court erred in permitting the State to impeach Mr. Gonzalez-Mendoza by inquiring into a prior conviction.

4. Cumulative prejudicial error, including constitutional error, denied Mr. Gonzalez-Mendoza a fair trial.

5. The court violated Mr. Gonzalez-Mendoza's Sixth Amendment and state constitutional rights to a jury determination of his deadly weapon enhancement, where the State was relieved of its burden of proof by the jury instructions.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State's forensic expert stated in *voir dire* examination

that there was evidence of trace biological material, not attributable to either party, found on the complainant's anal swab. This evidence impeached the complainant's credibility by refuting her assertion that she utilized condoms with all her prostitution customers, and by refuting her testimonial claim of only having one prior customer, which was also in conflict with her claim to a police detective. The evidence would not have been confusing to the jury. Did the court abuse its discretion in excluding it?

2. The complainant, in prior contacts with police when working as a prostitute, gave police officers a false name. Prior non-criminal acts, when probative of truthfulness or untruthfulness, are admissible under ER 608(b). The trial court did not allow Mr. Gonzalez-Mendoza to inquire into the complainant's conduct to impeach her credibility. Did the trial court abuse its discretion?

3. The trial court, ruling that the door had been opened, permitted the State to impeach Mr. Gonzalez-Mendoza by inquiring into his prior conviction for assault, after he stated in cross-examination that he was not an aggressive person. The State had inquired at length of Mr. Gonzalez-Mendoza, who had an interpreter at trial, whether he was irritated at his situation with his

wife, until Mr. Gonzalez-Mendoza made this statement, perhaps thinking the two words were the same. Defense counsel had touched on Mr. Gonzalez-Mendoza's upset about the circumstances with his wife only briefly in direct examination.

Did the trial court abuse its discretion?

4. Did cumulative prejudicial error deny Mr.

Gonzalez-Mendoza a fair trial?

5. Was the State relieved of its burden of proof of all facts necessary for Mr. Gonzalez-Mendoza's sentencing enhancement, by the jury instructions which defined "deadly weapon" only by use of the less-stringent definition applicable to the rape charge?

D. STATEMENT OF THE CASE

1. **Procedural history.** Mr. Gonzalez-Mendoza was charged with First Degree Rape pursuant to RCW 9A.44.040(1)(a), an offense which is committed where a person has sexual intercourse with another by forcible compulsion and used or threatened to use a deadly weapon. CP 5-6 (amended information). A jury trial was held August 6 to 16, 2007. The trial court excluded forensic evidence proffered by the defendant, precluded the defense from impeaching the complainant with her

prior misconduct, and allowed the State to raise the topic that Mr. Gonzalez-Mendoza had previously been convicted of assault. 8/6/07RP at 93-94, 110; 8/13/07RP at 64. During deliberations, the jury inquired, "At any point after [the complainant] reported the alleged crime, could she have stopped this legal process?" CP 43.

Following the verdict on the rape charge and answer on an attached deadly weapon allegation, the court imposed a standard range indeterminate sentence of up to life.¹ CP 45-56. The court also imposed an enhancement based on the jury's special answer, but the only definition of "deadly weapon" in the instructions was the definition appropriate for the underlying crime. CP 33; CP 45-56. Mr. Gonzalez-Mendoza appeals. CP 57.

2. Facts. Mr. Gonzalez-Mendoza was having marital problems at home, in January of 2007. On the 28th in the early a.m. hours he went to seek out the company of a prostitute and encountered the complainant, Chan Keo, in the downtown Seattle area. 8/13/07RP at 10. On the way, he had stopped to buy condoms. The complainant approached his truck and he rolled

¹ Before the verdict, Mr. Gonzalez-Mendoza had fled, because he was afraid he was going to lose his family. 10/3/13RP at 2-5.

down the window. Then she got into the passenger seat of his truck. She told him she would direct him to a place nearby, and also said that she would charge him \$80. 8/13/07RP at 11-14. When Mr. Gonzalez-Mendoza indicated that he only had 65 dollars, she stated that that was "ok," and Mr. Gonzalez-Mendoza gave her the money. After parking nearby, the two had intercourse and the complainant performed oral sex. 8/13/07RP at 12-16.

When Mr. Gonzalez-Mendoza was putting his clothes back on, the complainant told him, "I want some more money." 8/13/07RP at 16. When he replied that he did not have any more money and showed her his empty wallet, she became louder and started arguing. Mr. Gonzalez-Mendoza asked her to leave his truck, and pulled up in a parking area to drop her off. She then started hitting him repeatedly, and someone hit the stick shift, causing the truck to hit a wall. The complainant then grabbed Mr. Gonzalez-Mendoza's truck keys from the ignition, jumped out of the truck, and ran. 8/13/07RP at 18-21. Mr. Gonzalez-Mendoza followed her out of the passenger side of the truck; running after her, tackling and hitting her. He took his truck keys back, and then he left in a hurry and headed for home. 8/13/07RP at 22-28.

Mr. Gonzalez-Mendoza did not rape the complainant and he had no knife in the truck or anywhere. 8/13/07RP at 17, 31.

The complainant's account was different. She testified that she told Mr. Gonzalez-Mendoza that her rate was 80 dollars.

8/8/07RP at 46. When the two drove to a secluded area that she recommended, Mr. Gonzalez-Mendoza looked in his wallet and stated that he only had "fifty something" dollars. 8/8/07RP at 48.

The complainant expected Mr. Gonzalez-Mendoza to drive back to an ATM or somewhere, to get more money. 8/8/07RP at 48-49.

However, she stated, he grabbed a large kitchen knife, over a foot long, placed it near her throat, began yelling at her and pulling her pants down. Mr. Gonzalez-Mendoza put the knife down, and had forcible vaginal and oral intercourse with her, and threatened her.

8/8/07RP at 50-59. Afterward, when Mr. Gonzalez-Mendoza was dropping her off at a nearby parking lot, the complainant grabbed his keys out of the truck's ignition, and fled out the passenger door.

Mr. Gonzalez-Mendoza tackled her to the ground and took the keys back, and drove away. 8/8/07RP at 69-72.

E. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE OF A THIRD PERSON'S BIOLOGICAL MATERIAL ON THE COMPLAINANT'S ANAL SWAB.

a. The defendant sought to elicit relevant evidence regarding biological material that would also have impeached the complainant's credibility. Amy Jagmin, of the Washington State Patrol Crime Laboratory, was the State's forensic expert. She testified that vaginal swabs taken from the complainant included a mixture of biological material, including DNA, from both Mr. Gonzalez-Mendoza, and the complainant. In addition, the anal swab taken from the complainant also contained the same biological material, from both parties. 8/9/07RP at 46-47.

Prior to Jagmin's testimony, Mr. Gonzalez-Mendoza indicated that he wanted to ask the witness about the fact that the anal swab also contained the biological material of some third person. 8/6/07RP at 92.

The State sought by a motion *in limine* to preclude that inquiry. 8/6/07RP at 91-93; Supp. CP ____, Sub # 36 (State's Trial Brief, at p. 16). The trial court, which had previously ruled that the complainant's sexual activity as a prostitute on the alleged date

was relevant and admissible, initially reserved ruling, and did not endorse the State's view that the further evidence was "piling on" or prejudicial to the prosecution. 8/6/07RP at 93-94. The court also commented that the State's forensic evidence in general seemed not all that relevant in the first place, given that Mr. Gonzalez-Mendoza's defense was that intercourse occurred, but that the act was consensual. 8/6/07RP at 94-95.

Mid-trial, however, just prior to Jagmin's testimony, the court precluded the inquiry. The State, although stating that the biological material "may" confirm that the complainant had contact with multiple partners, contended that it did not show whether the material was from a male or female, or whether the contact was that evening or a few days before. 8/9/07RP at 15. After further argument, and testimony by Ms. Jagmin on *voir dire*, the court agreed with these two arguments by the prosecutor, stated the matter involved a road that there was "no need to go down," and also stated that the topic would be confusing to the jury. 8/9/07RP at 16-32.

b. The court's ruling violated Mr. Gonzalez-Mendoza's

evidentiary right to introduce relevant evidence and his constitutional right to impeach the complainant's credibility.

Relevant evidence is evidence that has any tendency to show, or disprove, a material fact, and it is admissible. ER 401; ER 402. Additionally, evidence is relevant for impeachment purposes if it tends to show a witness' bias or interest, or evidences inconsistency. State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); see ER 607 (governing impeachment evidence and providing that credibility of witness may be attacked by any party). A defendant like Mr. Gonzalez-Mendoza has not just an evidentiary entitlement, but also a constitutional right, to impeach key prosecution witnesses. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); ER 607; U.S. Const. amend. 6.

Here, Mr. Gonzalez-Mendoza's questions would have solicited a relevant matter. The State's forensic expert made clear in *voir dire* examination that there was biological material, including DNA inadequate to trace to an individual, that was not attributable to either party, found on the complainant's anal swab. 8/9/07RP at 22-23. As counsel argued, this evidence impeached the

complainant's credibility by refuting her assertion that she always utilized condoms. 8/6/07RP at 57, 94-95; 8/8/9/07RP at 16-17.

In cross-examination, the complainant had stated that she obviously uses condoms for protection with her customers.

8/8/07RP at 57, 101. Counsel argued that the evidence also impeached her credibility by refuting her testimonial claims of how many prior customers she had. 8/9/07RP at 16-17.

This inquiry should have been permitted. Mr. Gonzalez-Mendoza's right to impeach included the right to impeach the State's prime witness using an independent witness, by seeking relevant evidence. State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980). Contrary to the trial court's reasoning, this evidence was not rendered irrelevant simply on ground that the forensic scientist could not state *precisely* when the material became located where it was found, because it could be argued and reasonably be inferred that it was from the night in question. 8/9/07RP at 16-17.

Finally, this matter was not going to be confusing to the jury. ER 403 does allow a court to exclude evidence that is overly prejudicial or confusing to the trier of fact, compared to its probity.

ER 403. But this jury, throughout trial, heard multiple expert witnesses testify about spermatozoa, the complexities of DNA, fingerprints, and other complex scientific topics, all of *de minimis* relevance considering that Mr. Gonzalez-Mendoza admitted he had sexual intercourse with the complainant. The trial court abused its discretion by excluding this probative evidence. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); see also State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (similar).

2. THE TRIAL COURT VIOLATED MR. GONZALEZ-MENDOZA'S EVIDENTIARY AND CONSTITUTIONAL RIGHT TO IMPEACH THE COMPLAINANT UNDER ER 608(b).

a. The defense was precluded from inquiring into misconduct by the complainant that bore on her credibility.

The prosecution admitted that the complainant, during her previous contacts with police regarding prostitution, had given law enforcement a false name. Mr. Gonzalez-Mendoza sought to inquire and impeach her on this basis. 8/6/07RP at 107-10. Upon the State's motion *in limine*, the court precluded the

defendant's effort to impeach, stating it was not probative of credibility. 8/6/07RP at 110.

b. The court's ruling was an abuse of discretion under

ER 608. Providing a false name to police is in fact a criminal offense under several statutes. See, e.g., RCW 9A.76.175; RCW 9A.76.020; see State v. K.L.B., ___ P.3d ___, 2014 WL 2895451 (Wash., June 26, 2014) (NO. 88270-3). The complainant in this case was not convicted of any of these crimes, as defense counsel acknowledged. 8/6/07RP at 108. However, Evidence Rule 608(b) allows impeachment by instances of misconduct:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

ER 608(b); State v. Mendez, 29 Wn. App. 610, 630 P.2d 476 (1981) (explaining operation of rule). Here, the complainant specifically gave police a false name of Chantelle McBride in several instances. 8/6/07RP at 106. The court should have allowed the defense to challenge the veracity of this witness by

inquiring about this fact, which went directly to her capacity to lie. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). Under ER 608, the past conduct of the witness, probative of credibility, may be proved by questioning during examination of the witness, although not by any extrinsic evidence. State v. Simonson, 82 Wn. App. 226, 234, 917 P.2d 599 (1996).

It is true that the defense would have to "take the answer" of the complainant and could not have employed extrinsic evidence to contradict whether the credibility-impeaching incident happened. State v. Barnes, 54 Wn. App. 536, 540, 774 P.2d 547 (1989). But the inquiry may be made where the questioner, as here, certainly had a good faith basis that the prior incidents occurred. 5A Teglund, Washington Practice, Evidence Law and Practice, § 608.11 (5th ed. 2007). The inquiry, involving giving a false name to police in a criminal investigation, was highly probative of the complainant's truthfulness in testifying in a criminal matter, and here the central disputed issue was the credibility of the complainant's allegations. See also State v. Gregory, 158 Wn.2d 759, 798, 147 P.3d 1201 (2006) ("In exercising its discretion, the trial court may consider whether the instance of the witness's

misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial.”); compare State v. Benn, 120 Wn.2d 631, 651, 845 P.2d 289 (1993) (witness's drug dealing “did not impact [his] ability to relate his discussions with Benn on the witness stand”).

Furthermore, any doubts as to the probity of the conduct should have been resolved in Mr. Gonzalez-Mendoza’s favor. He was entitled to latitude in his efforts to impeach this critical prosecution witness. State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (“Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny”). The constitutional right to cross-examine witnesses that was affirmed in Davis v. Alaska, supra, requires that criminal defendants be given wide latitude, not necessarily strictly bound by a narrow interpretation of ER 608 and ER 609, to impeach critical prosecution witnesses. See U.S. v. Leake, 642 F.2d 715 (4th Cir. 1981). In this respect, the trial court’s ruling was also error of a constitutional nature beyond the evidentiary issue. Davis v. Alaska, 415 U.S. at 315-16; State v. Russell, 125 Wn.2d at 73.

The trial court abused its discretion in preventing Mr. Gonzalez-Mendoza from impeaching the complainant. State ex rel. Carroll v. Junker, 79 Wn.2d at 26; State v. Powell, 126 Wn.2d at 258.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF MR. GONZALEZ-MENDOZA'S PRIOR ASSAULT CONVICTION.

a. The court ruled that Mr. Gonzalez-Mendoza had opened the door to evidence of his prior assault. During cross-examination of Mr. Gonzalez-Mendoza, the prosecutor was permitted to inquire into his prior conviction for misdemeanor assault. 8/13/07RP at 76. The trial court ruled that Mr. Gonzalez-Mendoza had opened the door to this inquiry when the prosecutor, in cross-examining him, had asked if Mr. Gonzalez-Mendoza had been "irritated" by the fact of his marital problems with his wife. The State contended, and the court agreed, that when Mr. Gonzalez-Mendoza stated in response that he was not an "aggressive" person, this had opened the door to inquiry regarding the prior conviction. 8/13/07RP at 55-64.

b. The court's ruling was an abuse of discretion. A

passing reference to a matter during examination does not open the door for examination about prior misconduct that is otherwise inadmissible. State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). Here, the prosecutor was questioning Mr. Gonzalez-Mendoza about whether his marital problems had made him frustrated that night. 8/13/07RP at 38. The State questioned him at length about the matter. 8/13/07RP at 36-38. Mr. Gonzalez-Mendoza, who had a Spanish interpreter for trial, appeared to try to answer the State's questions with a misunderstanding of the terms being used:

- Q: And this must have, in addition to making you frustrated, it must have made you irritated, sir, these problems with your wife?
A: Yes. Well, what do you mean by irritated?
Q: Irritable.
A: I'm not a person who gets irritated or I'm not aggressive.
Q: You're not aggressive?
A: No, I'm not.

10/13/07RP at 38. This should not have been deemed an assertion that warranted injection of prior crime evidence into Mr. Gonzalez-Mendoza's trial.

Under Evidence Rule 404(b), evidence of other crimes, wrongs, or acts is inadmissible to show conformity with the alleged conduct. However, if the defendant himself introduces evidence that was initially inadmissible, the State is then permitted to explain, clarify, or contradict the evidence. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). Under this rule,

[o]therwise inadmissible evidence is admissible on cross-examination if the witness “opens the door” during direct examination and the evidence is relevant to some issue at trial.

Stockton, 91 Wn. App. at 40 (citing State v. Tarman, 27 Wn. App. 645, 650–52, 621 P.2d 737 (1980)).

In this case, the circumstances did not warrant a conclusion that Mr. Gonzalez-Mendoza opened the door to harmful propensity evidence. As this Court of Appeals held in State v. Stockton, a passing reference to a prohibited topic during examination does not open the door for further examination about prior misconduct. Stockton, 91 Wn. App. at 40. The trial court does have discretion to admit evidence that might otherwise be inadmissible if the defendant opens the door to the evidence. State v. Warren, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006). The trial court abused its

discretion. Mr. Gonzalez-Mendoza's counsel inquired briefly of him during direct examination about the fact that he had been having marriage troubles – asking one indirect question, to which Mr. Gonzalez-Mendoza responded that he was not satisfied in his marriage. 10/13/07RP at 10.

Mr. Gonzalez-Mendoza did not attempt to portray himself as a specially peaceable person, including during questioning by the State, and his apparent testimony that he was not aggressive was merely a poorly-phrased attempt to answer the prosecutor's vigorous inquiry as to whether he was frustrated or irritated.

In these circumstances, the trial court abused its discretion in concluding that the door had been opened to evidence of Mr. Gonzalez-Mendoza's prior assault. State ex rel. Carroll v Junker, supra, at 26.

4. CUMULATIVE ERROR DENIED MR. GONZALEZ-MENDOZA A FAIR TRIAL.

a. The right to a fair trial. In making the above evidentiary rulings, the trial court committed error that had a cumulatively prejudicial effect on the outcome, and therefore violated Mr. Gonzalez-Mendoza's right to a fair trial under the Fourteenth

Amendment. State v. Russell, 125 Wn.2d at 93-94; State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992); U.S. Const. amend. 14.

b. The prejudice of multiple errors denied Mr.

Gonzalez-Mendoza a fair trial. Mr. Gonzalez-Mendoza was not permitted to impeach the complainant's credibility by showing that she may have been dishonest about the number of customers she had, or her condom usage. Even more prejudicially, ER 608 should have allowed the defendant to impeach the complaining witnesses' credibility on the stand by showing that she had previously lied in a criminal context. For example, in State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980), a conviction was reversed because defense cross-examination, inquiring into past incidents going to credibility, was improperly restricted. York, 28 Wn. App. at 35. Here, the complainant's prior false statements to police were highly relevant to her credibility as the State's crucial trial witness, raising the matter to a constitutional error, which contributes greatly to reversible cumulative prejudice. See State v. McDaniel, 83 Wn. App. 179, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011, 932 P.2d 1255 (1997) (defendant should have

been allowed to impeach the victim's credibility by showing that she had committed perjury in a related civil proceeding).

Finally, Mr. Gonzalez-Mendoza was wrongly smeared with a prior assault conviction, which the jury likely employed to conclude he had a tendency to be violent. These errors were consequential in a case where the proofs essentially came down to the complainant's word against the accused's, and where the jury's inquiry during deliberations demonstrated its equivocation over who was telling the truth. CP 43. This Court should reverse. State v. Russell, 125 Wn.2d at 93-94; State v. Alexander, 64 Wn. App. at 150-51; U.S. Const. amend. 14.

**5. THE STATE WAS RELIEVED OF ITS
BURDEN OF PROVING THE DEADLY
WEAPON ENHANCEMENT,
VIOLATING MR.
GONZALEZ-MENDOZA'S SIXTH
AMENDMENT AND STATE
CONSTITUTIONAL RIGHTS.**

a. The jury was given a definition of "deadly weapon," appropriate for purposes of the charge of first degree rape, but which dramatically understated the requirements of proof for a deadly weapon enhancement. RCW 9.94A.825 defines "deadly weapon" for purposes of a sentencing enhancement as

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: . . . any knife having a blade longer than three inches.

RCW 9.94A.825; former 9.94A.602 (recodified as .825 by Laws 2009, ch. 28, § 41). In Mr. Gonzalez-Mendoza's trial, however, the only specific deadly weapon definition in the jury instructions stated, "Deadly weapon also means any weapon, device, instrument, substance, or article, which under the circumstances in which it was used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP 33 (Instruction 8).

Thereafter, in instruction 14, the special verdict form stated that 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," and stated that "A knife having a blade longer than three inches is a deadly weapon." CP 40 (Instruction 14).

As a whole, the instructions given did not require the jury to find the facts necessary for the court to impose the enhancement.

“Deadly weapon” has distinct meanings for purposes of a substantive criminal charge and the deadly weapon sentence enhancement. As for rape, the State was required to prove that the instrument in question was “readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). But for purposes of the deadly weapon sentence enhancement, RCW 9.94A.825 required that the jury determine that the defendant was armed with a deadly weapon, which 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”).

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).²

b. Mr. Gonzalez-Mendoza's Sixth Amendment and state constitutional jury trial right was violated when the court imposed a deadly weapon enhancement. The trial court violated Mr. Gonzalez-Mendoza's jury trial rights by providing the jury with instructions defining a "deadly weapon" far too broadly for specific purposes of the special allegation. U.S. Const. amend. 6; Wash. Const., article 1, section 21.

Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in the jury instructions that relieves the

² This error may be assigned because a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Constitutional errors receive special treatment under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The exception is construed narrowly and requires defendants to assert the error is manifest, prejudicial and truly of constitutional magnitude. State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) (citing McFarland, 127 Wn.2d at 333)); State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992); RAP 2.5(a)(3)).

Here, although Mr. Gonzalez-Mendoza's counsel did not object to the jury instructions at trial under CrR 6.15(c), this Court can review his contention under RAP 2.5(a)(3) because enhancing a defendant's sentence based on facts not found by a jury beyond a reasonable doubt is a Sixth Amendment violation.

State of its burden to prove every fact necessary to punishment is erroneous. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); see also Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Because the trial court here failed to instruct the jury on the definition of a deadly weapon for purposes of the special verdict – and indeed, provided an affirmatively erroneous definition -- the State was relieved of its duty to meet this burden.

Under RCW 9.94A.825, a trial court may increase a defendant's sentence where the defendant commits a crime while armed with a deadly weapon. But the definition of a deadly weapon differs from the definition of a deadly weapon used to convict a defendant of first degree rape. RCW 9A.04.110(6). Here, the trial court only provided the jury with the definition of a deadly weapon under the criminal statutes. Thus, under the court's instructions, the jury could have found that Mr. Gonzalez-Mendoza was armed with a deadly weapon when he committed the charged rape, merely if it believed he used an instrument that was "readily capable of causing death or substantial

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

bodily harm.” (Emphasis added.) RCW 9A.04.110(6). This is inadequate to enhance Mr. Gonzalez-Mendoza's sentence under the requirement that the manner in which Mr. Gonzalez-Mendoza used the knife made it “likely to produce or may easily and readily produce death.” RCW 9.94A.825.

c. The error requires reversal. First, an erroneous instruction given on behalf of the party who received a favorable verdict is presumed prejudicial and is grounds for reversal unless it is harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). A harmless error is a trivial error which in no way affected the outcome of the case. Wanrow, 88 Wn.2d at 237.

Second, the Washington Courts have specifically recognized that the enhancement standard is higher than the definition used for substantive crimes. In cases rejecting arguments about “inconsistent verdicts,” the Courts have made this clear. In State v. Holmes, 106 Wn. App. 775, 780, 24 P.3d 1118 (2001), the Court held that the jury could reasonably have concluded that the knife in question was “readily capable of causing . . . substantial bodily injury,” but that it was not “likely to produce” or would not “easily produce death;” therefore, the Court

held, the verdicts were not irreconcilably inconsistent. Holmes, at 780; see also State v. Hauck, 33 Wn. App. 75, 77-78, 651 P.2d 1092 (1982) (no inconsistency where jury found defendant guilty of first degree robbery for displaying what appeared to be a deadly weapon but found, by special interrogatory, that defendant was not armed with a deadly weapon).

Further, under a constitutional harmless standard, 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. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

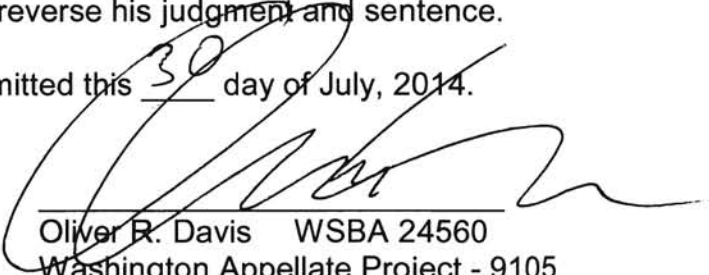
The error here is not harmless. The complainant testified that the knife in question was over a foot long and had a five inch handle, although there was no specific testimony regarding the length of the blade. 8/8/07RP at 49-51. More crucially, the complainant's account was that Mr. Gonzalez-Mendoza merely held the knife near her throat. He did not attempt to cut her, and the knife was put down during the alleged forced intercourse although implicitly threatened to be used. 8/8/07RP at 51-55. Additionally, there was no knife found at all. 8/8/07RP at 140.

Because the State cannot establish beyond a reasonable doubt that the trial court's instructional error was harmless, this Court should remand for resentencing absent the enhancement. State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980).

F. CONCLUSION

Based on the foregoing, Mr. Gonzalez-Mendoza respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 30 day of July, 2014.



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Washington Appellate Project - 9105
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 71026-5-I
)	
ROBERTO GONZALEZ-MENDOZA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JULY, 2014, 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:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] ROBERTO GONZALEZ-MENDOZA 370083 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JULY, 2014.

X _____ 

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