Supreme Court No. 92603-5
COA No. 71026-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERTO GONZALEZ-MENDOZA,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Nichole Macinnes

PETITION FOR REVIEW

OLIVER R. DAVIS
WSBA 24560

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

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A. IDENTITY OF PETITIONER

Mr. Gonzalez-Mendoza was the appellant in Court of Appeals No. 71026-5-I, in which the Court of Appeals affirmed his conviction.

B. COURT OF APPEALS DECISION

The Court of Appeals'August 10, 2015 decision is attached as Appendix A. The order of October 19, 2015 granting the State's motion for consideration, and the re-considered opinion, is attached as Appendix B.

C. ISSUES PRESENTED ON REVIEW

1. 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?

2. 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 and the evidence would not have been confusing to the jury. Did the court abuse its discretion in excluding it?

3. The complainant, in prior contacts with police when working as a prostitute, gave police officers a false name. Where prior non-criminal acts, when probative of truthfulness or untruthfulness, are admissible under ER 608(b), did the trial court abuse its discretion in excluding the evidence?

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. 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. CP 45-56. The court also imposed an enhancement based on the jury's special answer. CP 33; CP 45-56. Mr. Gonzalez-Mendoza appealed. CP 57. The

Court of Appeals affirmed. Appendix B.

2. Facts. The complainant, Chan Keo, was working as a prostitute in the downtown Seattle area. 8/13/07RP at 10. She engaged in sexual intercourse with the defendant. 8/13/07RP at 12-16.Ms. Keo stated that the act was non-consensual and that Mr. Gonzalez-Mendoza had 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.

E. ARGUMENT

1. THE STATE WAS RELIEVED OF ITS BURDEN OF PROVING THE DEADLY WEAPON ENHANCEMENT.

a. Review is warranted. Review is warranted under RAP 13.4(b)(1), (2), and (3) where the Court of Appeals departed from the case decisions of that Court, this Court, and decisions of other Courts of Appeal, and erroneously affirmed the defendant's special verdict of a deadly weapon, a knife, where there was indeed a factual challenge to the length of the knife he allegedly was armed with during the incident, and the jury instructions releived the State

of its burden of proof. U.S. Const. amend. 14.

b. 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. The Respondent and the Court recognized that the jury was not given the full definition of "deadly weapon" for purposes of the enhancement, and instead was given the definition of deadly weapon for purposes of elevating the alleged rape to the first degree under RCW 9A.04.110(6).[1]

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[1] 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).

This relieved the State of its burden of proof on the enhancement. U.S. Const. amend. 14.[2]

An omission or misstatement of the law in the jury instructions that relieves the 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).

On appeal, the State's argument and the Court's reasoning was that this did not relieve the prosecution of its burden of proof on the deadly weapon enhancement because the jury's special verdict form stated that a knife with a blade over 3 inches long is a deadly weapon *per se*, and the victim alleged that Mr. Gonzalez-Mendoza wielded a knife with an 8-inch blade. Court of Appeals Decision, Appendix B, at pp. 9-11.

Specifically, the Court reasoned that the only possible factual issue was whether the defendant had a knife, or did not

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[2] 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). 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).

have a knife; no knife was ever located. Court of Appeals Decision, Appendix B, at p. 11.

However, this is not correct – the complainant's testimony at one point that the claimed knife was of a certain size was conflicting and controverted, and the jury needed to be given the definition of deadly weapon before it could reliably find that enhancement. Mr. Gonzalez-Mendoza testified, and denied that he had any such knife. 8/13/07RP at 17, 31, 81.

And in closing argument, defense counsel urged the jury to conclude that the case lacked evidence to corroborate the complainant's claims and descriptions of the night in question. 8/14/07RP at 3. Counsel specifically argued that if the complainant had been facing a threat from a knife of the length she was alleging, she would have behaved differently and would not have reached over to grab the defendant's car keys, making it unreasonable that her details she gave in her testimony could be believed. 8/14/07RP at 6-7. Defense counsel unflatteringly, but properly argued to the jury that the complainant's claim of a knife of a foot in length was simply not credible. 8/14/07RP at 7-8.

Because the jury in Mr. Gonzalez-Mendoza's case was only given the full definition of "deadly weapon" that is appropriate for the deadly weapon element of the substantive offense, the State's burden on the enhancement was relieved, and the error was not rendered harmless beyond a reasonable doubt by the presence of any overwhelming uncontroverted evidence. State v. Brown, 147 Wn.2d at 339.

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

a. Review is warranted. Mr. Gonzalez-Mendoza argues that the Court of Appeals departed from the case decisions of that Court, this Court, and decisions of other Courts of Appeal, warranting review under RAP 13.4(b)(1), (2), and (3), when it affirmed the trial court's ruling excluding impeachment-value evidence of biological material found on the victim's person by the State's DNA expert, by erroneously relying on critiques of the evidence that went merely to the weight of the impeachment evidence rather than its admissibility, and by erroneously

categorizing the impeachment as being "on a collateral matter."[3]

b. Impeachment by asking the forensic scientist about biological material found on the complainant – the Court's reasoning relied on matters that went merely to the *weight* of the impeachment evidence, and did not warrant its exclusion.

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

In a rape case, the credibility of the complainant is "a fact of consequence to the action." See State v. Allen S., 98 Wn. App.

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[3] 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. Just prior to Jagmin's testimony, the court precluded the inquiry, agreeing with the State that, although the biological material "may" confirm that the complainant had contact with multiple partners, 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 15-32. 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.

452, 459, 989 P.2d 1222 (1999); see also State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). The type of impeachment sought by the defendant was impeachment under ER 607 by eliciting contradicting evidence. See Karl B. Tegland, Washington Practice, Evidence, § 607.17, at 407 (5th ed.2007); ER 607 (governing impeachment evidence and providing that credibility of witness may be attacked by any party).

The Court of Appeals' reasoning went to the *weight* of the impeachment evidence, but should not have properly warranted or affirmed the precluding of Mr. Gonzalez-Mendoza from making the inquiry of the forensic witness, Jagmin.

Importantly, the nature of the forensic evidence was that it tended to show recent sexual contact that impeached the complainant's repeated assertion that she always wore condoms with her customers -- a matter the State employed to portray the heightened violation caused by the alleged rape.

The Court was correct that the complainant had already testified that she was with two other prostitution customers that night. Court of Appeals Decision, Appendix B, at p. 4. However, the complainant repeatedly indicated that her practice was to use

condoms with customers, and not have sex without them. 8/8/07RP at 41, 101 (twice stating her practice including on that night was to stop having sex with customers if she ran out of condoms).

The Court also reasoned that the DNA witness Jagmin could not place the trace evidence in time in terms of when it was deposited. Court of Appeals Decision, Appendix B, at pp. 4-5. But it does not matter that the trial prosecutor might be able to question Jagmin on re-direct examination and elicit that the trace material *could* have resulted from contact with someone at a different time, rather than on the same night or the several days preceding it. The defendant is not required to prove the absence of every other possible inference from the evidence, in order to show that there is a reasonable inference from the evidence that impeaches the complainant's credibility.

Next, the Court reasoned that this was improper impeachment on a collateral matter. Court of Appeals Decision, Appendix B, at p. 4. But that rule does not apply here. The cited case of State v. Aguirre, 168 Wn.2d 350, 362, 229 P.3d 669 (2010), does not show that Mr. Gonzalez-Mendoza's proposed

inquiry was collateral; the case involves a defendant who wanted his brother to testify that the rape victim contacted the brother after the alleged incident, but the important impeaching question at trial in that case was whether the victim had contacted the *defendant* after the date in question – which was collateral.

Crucially, all of this testimony from the complainant bolstered her testimony that the fact that the intercourse with the defendant, which she was testifying was forced, was further violative and gross, for the reason that it was without a condom. 8/8/07RP at 57. The requested impeachment inquiry was fully relevant, was not on a 'collateral matter.'

Forensic scientist Jagmin's testimony regarding the additional biological material on the complainant's anal swab was evidence that Mr. Gonzalez-Mendoza was entitled to elicit under ER 607, and his right to impeach prosecution witnesses. US. Const. amend. 6; Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The impeachment should have been allowed.

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

a. Review is warranted. The Court of Appeals departed from Supreme Court and appellate court decisions under RAP 13.4(b)(1), (2) when it affirmed the exclusion of impeachment evidence, squarely admissible under ER 608(b), that the victim had previously lied in the context of a criminal investigation by giving a false name to police.

b. The defense was precluded from inquiring into misconduct by the complainant in giving a false name to police, 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.

The Court erred. The Court of Appeals in turn erred when it

affirmed, by reasoning that the matter was remote in time, and was essentially ER 404(b) propensity evidence. Court of Appeals Decision, Appendix B, at pp. 6-7.

First, there was no evidence that the matter was remote in time; rather, there was simply no evidence regarding precisely how recent the false statement to police occurred. The Court merely announces that the defendant did not prove the matter was recent. He need not do so. The incident arose in connection with the complainant's ongoing work as a prostitute, the same as the facts here. The case is not controlled by any tenable view that the incident was remote or ancient. State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991).

Further, in fact, the case involves ER 608(b), not ER 404(b). It is not a tenable argument to say that it does not. Providing a false name to police is a crime of dishonesty punished under several statutes, and certainly highly probative of the complainant's credibility in the tribunal. 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). Here, the complainant specifically gave police a false name of Chantelle McBride in

several instances, when police had contact with her regarding her prostitution activity, which was of course recent conduct. 8/6/07RP at 106; see BOR, at pp. 18-19 (arguing that the conduct was not shown to be recent). 8/8/07RP at 34-36. This witness was crucial and pivotal to the State's case – because the issue was consent, this witness needed to be impeached with evidence highly pertinent to her credibility. 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 in official circumstances where truth is required. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

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 244, 258, 893 P.2d 615 (1995).

F. CONCLUSION

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

Respectfully submitted this 10 day of November, 2015.

Oliver R. Davis WSBA 24560
Washington Appellate Project - 9105
Attorneys for Petitioner

Appendix A

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

August 10, 2015

Oliver Ross Davis
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101-3647
oliver@washapp.org

Roberto Gonzalez-mendoza
DOC # 370083
Clallam Bay Corrections Center
Clallam Bay, WA 98326

Washington Appellate Project
1511 Third Avenue
Suite 701
Seattle, WA 98101
wapofficemail@washapp.org

Nancy P Collins
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101-3647
nancy@washapp.org

Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
paoappellateunitmail@kingcounty.gov

Stephanie Finn Guthrie
King County Prosecuting Attorney's Offi
516 3rd Ave Ste W554
Seattle, WA 98104-2362
stephanie.guthrie@kingcounty.gov

CASE #: 71026-5-I
State of Washington, Respondent v. Roberto Gonzalez-Mendoza, Appellant
King County, Cause No. 07-1-01975-4 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "We affirm the conviction for first degree rape, but reverse the conviction for the enhancement and remand for resentencing"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Honorable Timothy A. Bradshaw

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. ROBERTO GONZALEZ-MENDOZA, Appellant.	)	No. 71026-5-I DIVISION ONE UNPUBLISHED OPINION FILED: August 10, 2015

TRICKEY, J. — In order to impose a deadly weapon enhancement, the statute[1] requires both that the weapon be deadly and that it be used in a deadly manner. Here, the jury was not instructed about the manner of the weapon's use. Because this instructional error involved an omission of an essential element, it was of constitutional magnitude and, under the circumstances here, the error was not harmless.

Roberto Gonzalez-Mendoza also assigns error to various evidentiary rulings made during his trial for first degree rape. The trial court did not abuse its discretion in making the evidentiary rulings challenged by Gonzalez-Mendoza.

Accordingly, we affirm the conviction for first degree rape, but reverse the deadly weapon enhancement conviction and remand for resentencing.

FACTS

The complainant was working as a prostitute in downtown Seattle. According to her testimony, she had run out of condoms and was leaving to go home when Gonzalez-Mendoza rolled down the window of his pickup truck trying to get her attention. Once a price of $80.00 was established, the complainant went

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[1] Former RCW 9.94A.602 (1983) (recodified as RCW 9.94A.825 by Laws of 2009, ch. 28, § 41).

with Gonzalez-Mendoza. On arriving at the secluded area she designated, Gonzalez-Mendoza did not have sufficient funds. When he put his wallet back, she testified that she was expecting him to either taker her back or go to an ATM (automated teller machine) to get the money.

Instead, Gonzalez-Mendoza pulled out a large kitchen knife, approximately 13-inches in length. He placed it near the complainant's throat. Gonzalez-Mendoza forced her to perform oral sex twice. He then partially put a condom on, forcing her to have vaginal intercourse.

Afterward, Gonzalez-Mendoza drove her back to a parking lot, cursing at her to get out of the truck. The complainant testified that she was worried because he had driven past the parking lot where he had picked her up. Terrified that Gonzalez-Mendoza was going to run her down, the complainant turned the truck off and grabbed the truck's keys. Gonzalez-Mendoza followed her out and tackled her to the ground. Gonzalez-Mendoza punched her and took both his keys and her keys. She immediately called 911 and reported the license plate number of the truck.

The police took the complainant to Harborview where a rape kit was taken. The complainant identified Gonzalez-Mendoza's photograph from a photomontage Detective Robert Kurosu gave her.

Gonzalez-Mendoza admitted to having sexual relations with the complainant, but contended it was consensual. He testified that he was married and had three children. Gonzalez-Mendoza said he decided to visit a prostitute because he was having trouble with his wife and that "[he] wasn't satisfied."[2] He

[2] Report of Proceedings (RP) (Aug. 13, 2007) at 10.

admitted that he had both oral and vaginal sex with the complainant, but that it was consensual. He claimed that the complainant asked for more money after they had finished having sexual relations. He testified that she grabbed his keys, but the key that was in the ignition stayed there. Gonzalez-Mendoza stated that he tackled her to recover his keys, which she had grabbed. While this was ongoing, the truck moved forward, banging into the wall. He denied having a knife.

The police arrested Gonzalez-Mendoza. The knife was not recovered.

A jury convicted Gonzalez-Mendoza of first degree rape with a deadly weapon enhancement. He contends the court made errors in its evidentiary rulings and gave an erroneous instruction on the deadly weapon enhancement.

ANALYSIS

I. Evidentiary Rulings

Gonzalez-Mendoza makes several evidentiary challenges. He contends the trial court erred in excluding trace biological material and evidence of the complainant's prior contact with police in which she gave a false name. He also asserts the trial court erred in admitting his prior assault conviction.

We review evidentiary rulings for abuse of discretion. State v. Garcia, 179 Wn.2d 828, 846, 318 P.3d 266 (2014). An appellate court will overturn the trial court's rulings on the admissibility of evidence only if its decision was manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. State, ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Trace Evidence

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

probable than it would be without the evidence." ER 401. Evidence that is not relevant is not admissible. ER 402.

The State moved in limine to preclude trace biological material found on the anal swabs under both rape shield and relevance. The trial court reserved its ruling stating:

> All right. Then I will -- at this point I really don't see that it's relevant given the DNA [(deoxyribonucleic acid)] technician or lab technician can say anything more than trace evidence. But possibly on this issue of condom use it may go to credibility of the alleged victim. So once her cross-examination and/or her examination is completed, then I think I can determine whether or not there's any relevance to that information. As I say, I still don't see that it's of any particular prejudice to the State, but I also don't at this point see any real relevance to it, and so we will have to wait and see how the alleged victim's testimony plays out. So I will reserve on that one.[3]

After the complainant testified about her interaction with Gonzalez-Mendoza, the court considered the State's motion to exclude evidence from Amy Jagmin, the forensic scientist who analyzed the DNA. Jagmin found trace material of limited genetic information. She opined that the trace material "speaks to something less recent than the current evidence that is pertaining to this case. But with regard to actual time frames, [she] can't give specific[s]."[4]

The defense sought to impeach the victim with this evidence as proof that she had multiple partners that evening, contradicting her statement to the detective that she had only had one previously. But the complainant had already testified that she had at least two partners prior to the sexual contact with Gonzalez-Mendoza. She also testified that she had had sexual relations with her boyfriend approximately two days earlier. Because the witness could not place the trace

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[3] RP (Aug. 6, 2007) at 95.
[4] RP (Aug. 9, 2007) at 16.

material in any time frame, it would be mere conjecture that it came from that evening.

Gonzalez-Mendoza argued that the evidence was admissible to show that the complainant was less than truthful because she testified that she used condoms with several of her "Johns" for various reasons. Although the complainant testified that she used condoms when working as a prostitute, she did not state that she only did so. Nor did she state that she used condoms when she had relations with her boyfriend a couple of days prior to the incident.

Although evidence offered to impeach a person is relevant if it tends to cast doubt on a person's credibility and that credibility is a fact of consequence to the action, a witness may not be impeached on a collateral manner. State v. Aguirre, 168 Wn.2d 350, 362, 229 P.3d 669 (2010). Here, the evidence of unknown trace material found on the complainant's body, although not attributable to either the defendant or the complainant, is not relevant to whether there was a rape. It does not make the existence of any fact of consequence to that determination. The trial court did not abuse its discretion in excluding this evidence.

Complainant's Prior Bad Act

The State sought to preclude the defense from soliciting information regarding the complainant's proffering a false name in her prior contact with the police. The defense argued that the evidence was admissible to impeach the complainant's credibility because she had used a false name in several instances where she had been arrested for various types of crimes. The defense agreed that the crimes which she might have been arrested for were not admissible. The

defense argued, however, that her giving a false identify to the police was relevant as to her credibility.

The State argued that there was only one verifiable instance where the complainant had given a false name in an unrelated incident. The information regarding the giving of a false name was obtained from an interview with a detective and a deputy prosecuting attorney where the complainant admitted that she once had given the police a false name, but was never charged with a crime relating to the incident. The State further argued that there was no evidence in the record that the complainant's giving a false name was close in time to the rape or trial, such that it would be probative of the complainant's credibility in this case.

The court ruled that it was disingenuous that the defense was prohibited from bringing up past crimes, but could somehow bring up the fact that the complainant gave a false name when confronted regarding one of those crimes. The court found the false name was not probative of the complainant's credibility as to her testimony regarding the rape.

ER 608 permits a party to cross-examine a witness about specific instances of past conduct in order to cast doubt on the witness's credibility.[5] Credibility impeachment questions must be relevant to the truthfulness of the witness's

[5] ER 608(b) provides:

> **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of 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, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

present testimony. State v. Benn, 120 Wn.2d 631, 651-52, 845 P.2d 289 (1993). Such evidence is relevant if it casts doubt on the witness's credibility, or the witness's credibility is a "fact of consequence" to the trial. State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). A defendant's proffered evidence "'must be of at least minimal relevance'" and he or she cannot avoid this requirement simply because that evidence is about a past crime in which the witness gave a false name. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). But a trial court may exclude evidence of specific instances of conduct for impeachment if it is remote in time. State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991).

This evidence was essentially improper propensity evidence, which is generally inadmissible under ER 404(b) and improper impeachment under ER 608(b). The trial court did not abuse its discretion in excluding the evidence.

Defendant's Prior Assault Conviction

Gonzalez-Mendoza testified on direct examination that he visited a prostitute because he was having marital problems and was not satisfied in his marriage. On cross-examination, in response to the State's question regarding his frustration (the reason he proffered for seeking a prostitute), Gonzalez-Mendoza stated: "I'm not a person who gets irritated or I'm not an aggressive [person]."[6]

The trial court ruled that the State could cross-examine Gonzalez-Mendoza about his *misdemeanor* assault conviction from May 2006, but limited it to the conviction and not the fact that it was for domestic violence of his wife.

[6] RP (August 13, 2007) at 38.

When a party introduces evidence that would be inadmissible if offered by the opposing party, that party opens the door to the explanation or contradiction of that evidence. State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). "[A] trial court has discretion to admit evidence that might otherwise be inadmissible if the defendant opens the door to [that] evidence." State v. Warren, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006). This court reviews a trial court's determination that a party has opened the door for abuse of discretion. Ortega, 134 Wn. App. at 626.

Here, Gonzalez-Mendoza put his character at issue by his own testimony, opening the door to the admission of evidence of his prior conviction. There was no abuse of discretion.

II. Deadly Weapon Enhancement

Gonzalez-Mendoza argues that his due process right was violated because the jury was not properly instructed on the definition of "deadly weapon" for purposes of the special verdict.

An appellate 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. Brown, 147 Wn.2d at 341.

When Gonzalez-Mendoza committed the offense, former RCW 9.94A.602 was in effect and defined "deadly weapon" as an instrument having the capability of inflicting death "and from the manner in which it is used, is likely to produce or

may easily and readily produce death." The statute further specified that a knife having a blade longer than three inches was included in the term deadly weapon. Former RCW 9.94A.602. In order to enhance the sentence, the jury needed to determine both that the weapon was deadly and that it was used in a manner that was capable of producing death.

The jury was given instructions with two different definitions of "deadly weapon," one to convict him of the underlying offense, and one for a deadly weapon sentencing enhancement without adequately informing the jury of the definition of a deadly weapon needed to convict for the enhancement.

Instruction 5, the "to convict" instruction, provided that the jury must find that "the defendant used or threatened to use a deadly weapon or what appeared to be a deadly weapon."[7] Instructions 6, 7, 8, and 9 defined the elements contained in the "to convict" instruction.

Instruction 8, pertaining to the deadly weapon, provided:

> Deadly weapon also 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 harm.[8]

Instruction 14 provided:

> 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 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

---

[7] Clerk's Papers (CP) at 30.
[8] CP at 33.

> reasonable doubt that there was a connection between the weapon and the crime.
>
> A knife having a blade longer than three inches is a deadly weapon.[9]

Gonzalez-Mendoza argues that the jury was given the definition of deadly weapon only pertaining to the deadly weapon element of the substantive offense, thus relieving the State of the burden of proving the enhancement.

The State argues that because the jury was instructed that a knife longer than three inches was a deadly weapon, it sufficed to support the enhancement. The State's reliance on State v. Rahier, 37 Wn. App. 571, 681 P.2d 1299 (1984), is misplaced. In Rahier, the focus was on whether or not the implement was a deadly weapon, not whether it was deadly because of "the manner in which it [was] used."

In a footnote in its brief, the State cites State v. Samaniego, 76 Wn. App. 76, 882 P.2d 195 (1994), to support its argument that the manner in which a weapon is used is not necessary when the weapon is a deadly weapon per se. Samaniego is not particularly helpful. Samaniego was a bench trial and did not involve jury instructions. Samaniego stipulated to the facts in the record and the court found that the knife was readily available. Further, a judge conducting a bench trial is presumed to know and apply the correct law. State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002); State v. Adams, 91 Wn.2d 86, 586 P.2d 1168 (1978).

The definitions of "deadly weapon" for purposes of elevating the crime to first degree rape and for purposes of the special enhancement statute are distinct.

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[9] CP at 40.

The jury was not instructed on an element of the crime, i.e., "the manner in which [the weapon was] used."

Here, there was no knife found. The evidence was not overwhelming. The only testimony regarding the knife was given by the complainant. The jury would have had to find that it believed her testimony about the manner in which the knife was used. But they were not instructed to do so.

We affirm the conviction for first degree rape, but reverse the conviction for the enhancement and remand for resentencing.

Trickey, J

WE CONCUR:

Appendix B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University
Street
98101-4170
(206) 464-7750
TDD: (206) 587-

October 19, 2015

Nancy P Collins
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101-3647
nancy@washapp.org

Oliver Ross Davis
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101-3647
oliver@washapp.org

Stephanie Finn Guthrie
King County Prosecuting Attorney's Offic
516 3rd Ave Ste W554
Seattle, WA 98104-2362
stephanie.guthrie@kingcounty.gov

Washington Appellate Project
1511 Third Avenue
Suite 701
Seattle, WA 98101
wapofficemail@washapp.org

CASE #: 71026-5-I
State of Washington, Respondent v. Roberto Gonzalez-Mendoza, Appellant
King County, Cause No. 07-1-01975-4 SEA

Counsel:

Enclosed is a copy of the opinion and the order granting motion for reconsideration, withdrawing opinion, and substituting opinion filed in the above-referenced appeal which states in part:

"We affirm the judgment and sentence"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk
ssd
Enclosure
c: The Honorable Timothy A. Bradshaw
Roberto Gonzalez-Mendoza c/o WAP

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

STATE OF WASHINGTON Respondent, v. ROBERTO GONZALEZ-MENDOZA, Appellant.	)	No. 71026-5-I ORDER GRANTING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

The respondent, State of Washington, has filed a motion for reconsideration. The appellant, Roberto Gonzalez-Mendoza, has filed an answer. The court has taken the matter under consideration and has determined that the motion for reconsideration should be granted.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is granted; and, it is further

ORDERED that the opinion in the above-referenced case filed on August 10, 2015, is withdrawn and a substitute opinion be filed in its place.

Done this 19th day of October, 2015.

FOR THE COURT:

Trickey, J.

Becker, J.

Jones, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. ROBERTO GONZALEZ-MENDOZA, Appellant.	)	No. 71026-5-I DIVISION ONE UNPUBLISHED OPINION FILED: October 19, 2015

TRICKEY, J. — Roberto Gonzalez-Mendoza challenges his judgment and sentence for his conviction of rape in the first degree. He assigns error to various evidentiary rulings and to the jury instructions.

We previously concluded that instructional error warranted reversal of a deadly weapon enhancement. We granted reconsideration to again consider whether the trial court properly instructed the jury. We now affirm.

FACTS

The complainant was working as a prostitute in downtown Seattle. According to her testimony, she had run out of condoms and was leaving to go home when Gonzalez-Mendoza rolled down the window of his pickup truck trying to get her attention. Once a price of $80.00 was established, the complainant went with Gonzalez-Mendoza. On arriving at the secluded area she designated, Gonzalez-Mendoza did not have sufficient funds. When he put his wallet back, she testified that she was expecting him to either take her back or go to an ATM (automated teller machine) to get the money.

Instead, Gonzalez-Mendoza pulled out a large kitchen knife, approximately 13 inches in length. He placed it near the complainant's throat. Gonzalez-

Mendoza forced her to perform oral sex twice. He then partially put a condom on, forcing her to have vaginal intercourse.

Afterward, Gonzalez-Mendoza drove her back to a parking lot, cursing at her to get out of the truck. The complainant testified that she was worried because he had driven past the parking lot where he had picked her up. Terrified that Gonzalez-Mendoza was going to run her down, the complainant turned the truck off and grabbed the truck's keys. Gonzalez-Mendoza followed her out and tackled her to the ground. Gonzalez-Mendoza punched her and took both his keys and her keys. She immediately called 911 and reported the license plate number of the truck.

The police took the complainant to Harborview Medical Center where a rape kit was taken. The complainant identified Gonzalez-Mendoza's photograph from a photomontage Detective Robert Kurosu gave her.

Gonzalez-Mendoza admitted to having sexual relations with the complainant, but contended it was consensual. He testified that he was married and had three children. Gonzalez-Mendoza said he decided to visit a prostitute because he was having trouble with his wife and that "[he] wasn't satisfied."[1] He admitted that he had both oral and vaginal sex with the complainant, but that it was consensual. He claimed that the complainant asked for more money after they had finished having sexual relations. He testified that she grabbed his keys, but the key that was in the ignition stayed there. Gonzalez-Mendoza stated that he

[1] Report of Proceedings (RP) (Aug. 13, 2007) at 10.

tackled her to recover his keys, which she had grabbed. While this was ongoing, the truck moved forward, banging into the wall. He denied having a knife.

The police arrested Gonzalez-Mendoza. The knife was not recovered.

A jury convicted Gonzalez-Mendoza of first degree rape with a deadly weapon enhancement. He contends the court made errors in its evidentiary rulings and gave an erroneous instruction on the deadly weapon enhancement.

ANALYSIS

I. Evidentiary Rulings

Gonzalez-Mendoza makes several evidentiary challenges. He contends the trial court erred in excluding trace biological material and evidence of the complainant's prior contact with police in which she gave a false name. He also asserts the trial court erred in admitting his prior assault conviction.

We review evidentiary rulings for abuse of discretion. State v. Garcia, 179 Wn.2d 828, 846, 318 P.3d 266 (2014). An appellate court will overturn the trial court's rulings on the admissibility of evidence only if its decision was manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. State, ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Trace Evidence

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Evidence that is not relevant is not admissible. ER 402.

The State moved in limine to preclude trace biological material found on the anal swabs under both rape shield and relevance. The trial court reserved its ruling stating:

> All right. Then I will -- at this point I really don't see that it's relevant given the DNA [(deoxyribonucleic acid)] technician or lab technician can say anything more than trace evidence. But possibly on this issue of condom use it may go to credibility of the alleged victim. So once her cross-examination and/or her examination is completed, then I think I can determine whether or not there's any relevance to that information. As I say, I still don't see that it's of any particular prejudice to the State, but I also don't at this point see any real relevance to it, and so we will have to wait and see how the alleged victim's testimony plays out. So I will reserve on that one.[2]

After the complainant testified about her interaction with Gonzalez-Mendoza, the court considered the State's motion to exclude evidence from Amy Jagmin, the forensic scientist who analyzed the DNA. Jagmin found trace material of limited genetic information. She opined that the trace material "speaks to something less recent than the current evidence that is pertaining to this case. But with regard to actual time frames, [she] can't give specific[s]."[3]

The defense sought to impeach the victim with this evidence as proof that she had multiple partners that evening, contradicting her statement to the detective that she had only had one previously. But the complainant had already testified that she had at least two partners prior to the sexual contact with Gonzalez-Mendoza. She also testified that she had had sexual relations with her boyfriend approximately two days earlier. Because the witness could not place the trace

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[2] RP (Aug. 6, 2007) at 95.
[3] RP (Aug. 9, 2007) at 16.

material in any time frame, it would be mere conjecture that it came from that evening.

Gonzalez-Mendoza argued that the evidence was admissible to show that the complainant was less than truthful because she testified that she used condoms with several of her "Johns" for various reasons. Although the complainant testified that she used condoms when working as a prostitute, she did not state that she only did so. Nor did she state that she used condoms when she had relations with her boyfriend a couple of days prior to the incident.

Although evidence offered to impeach a person is relevant if it tends to cast doubt on a person's credibility and that credibility is a fact of consequence to the action, a witness may not be impeached on a collateral matter. State v. Aguirre, 168 Wn.2d 350, 362, 229 P.3d 669 (2010). Here, the evidence of unknown trace material found on the complainant's body, although not attributable to either the defendant or the complainant, is not relevant to whether there was a rape. It does not make the existence of any fact of consequence to that determination. The trial court did not abuse its discretion in excluding this evidence.

Complainant's Prior Bad Act

The State sought to preclude the defense from soliciting information regarding the complainant's proffering a false name in her prior contact with the police. The defense argued that the evidence was admissible to impeach the complainant's credibility because she had used a false name in several instances where she had been arrested for various types of crimes. The defense agreed that the crimes which she might have been arrested for were not admissible. The

defense argued, however, that her giving a false identify to the police was relevant as to her credibility.

The State argued that there was only one verifiable instance where the complainant had given a false name in an unrelated incident. The information regarding the giving of a false name was obtained from an interview with a detective and a deputy prosecuting attorney where the complainant admitted that she once had given the police a false name, but was never charged with a crime relating to the incident. The State further argued that there was no evidence in the record that the complainant's giving a false name was close in time to the rape or trial, such that it would be probative of the complainant's credibility in this case.

The court ruled that it was disingenuous that the defense was prohibited from bringing up past crimes, but could somehow bring up the fact that the complainant gave a false name when confronted regarding one of those crimes. The court found the false name was not probative of the complainant's credibility as to her testimony regarding the rape.

ER 608 permits a party to cross-examine a witness about specific instances of past conduct in order to cast doubt on the witness's credibility.[4] Credibility impeachment questions must be relevant to the truthfulness of the witness's

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[4] ER 608(b) provides:

> **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of 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, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

present testimony. State v. Benn, 120 Wn.2d 631, 651-52, 845 P.2d 289 (1993). Such evidence is relevant if it casts doubt on the witness's credibility, or the witness's credibility is a "fact of consequence" to the trial. State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). A defendant's proffered evidence "'must be of at least minimal relevance'" and he or she cannot avoid this requirement simply because that evidence is about a past crime in which the witness gave a false name. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). But a trial court may exclude evidence of specific instances of conduct for impeachment if it is remote in time. State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991).

This evidence was essentially improper propensity evidence, which is generally inadmissible under ER 404(b) and improper impeachment under ER 608(b). The trial court did not abuse its discretion in excluding the evidence.

Defendant's Prior Assault Conviction

Gonzalez-Mendoza testified on direct examination that he visited a prostitute because he was having marital problems and was not satisfied in his marriage. On cross-examination, in response to the State's question regarding his frustration (the reason he proffered for seeking a prostitute), Gonzalez-Mendoza stated: "I'm not a person who gets irritated or I'm not an aggressive [person]."[5]

The trial court ruled that the State could cross-examine Gonzalez-Mendoza about his misdemeanor assault conviction from May 2006, but limited it to the conviction and not the fact that it was for domestic violence of his wife.

[5] RP (August 13, 2007) at 38.

When a party introduces evidence that would be inadmissible if offered by the opposing party, that party opens the door to the explanation or contradiction of that evidence. State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). "[A] trial court has discretion to admit evidence that might otherwise be inadmissible if the defendant opens the door to [that] evidence." State v. Warren, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006). This court reviews a trial court's determination that a party has opened the door for abuse of discretion. Ortega, 134 Wn. App. at 626.

Here, Gonzalez-Mendoza put his character at issue by his own testimony, opening the door to the admission of evidence of his prior conviction. There was no abuse of discretion.

II. Deadly Weapon Enhancement

Gonzalez-Mendoza argues that his due process right was violated because the jury was not properly instructed on the definition of "deadly weapon" for purposes of the special verdict.

"Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law." Fergen v. Sestero, 182 Wn.2d. 794, 803, 346 P.3d 708 (2015). We review de novo alleged errors of law in jury instructions. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

Here, the trial court instructed the jury with two different definitions of "deadly weapon." Instruction 8 defined "deadly weapon" for purposes of the underlying offense. Instruction 14 defined "deadly weapon" for purposes of the special verdict.

Instruction 8 was one of several instructions related to the underlying offense of rape in the first degree. The jury was instructed that one element of rape in the first degree was that "the defendant used or threatened to use a deadly weapon or what appeared to be a deadly weapon."[6] Consistent with the statutory definition set forth in RCW 9A.04.110(6), and the standard Washington Pattern Jury Instructions: Criminal (WPIC) 2.06.01 ("Deadly Weapon—Definition as Element—Weapons Other Than Firearms and Explosives"), Instruction 8 defined "deadly weapon" as follows:

> Deadly weapon also 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 harm.[7]

This instruction properly set forth the applicable definition of "deadly weapon" for purposes of the substantive criminal charge. As Gonzalez-Mendoza correctly points out, however, the definition of "deadly weapon" for purposes of the substantive criminal charge differs from the definition of "deadly weapon" for purposes of the special verdict. Compare RCW 9A.04.110(6) with former RCW 9.94A.602 (1983) (recodified as RCW 9.94A.825 by LAWS OF 2009, ch. 28, § 41).

For purposes of the special verdict, the relevant statutory definition is found in former RCW 9.94A.602, the statute in effect when Gonzalez-Mendoza committed the offense. This statute defines "deadly weapon" as follows:

> [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: . . . any knife having a blade longer than three inches, any razor with an

[6] Clerk's Papers (CP) at 30.
[7] CP at 33.

> 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.

Under this statute, certain instruments, including a knife with a blade over three inches in length are deadly weapons as a matter of law. These instruments "require nothing more than their existence for proof of their nature." State v. Samaniego, 76 Wn. App. 76, 81, 882 P.2d 195 (1994). In such cases, the trier of fact need not inquire into whether the instrument is a deadly weapon because of the manner of its use. State v. Sullivan, 47 Wn. App. 81, 83-84, 733 P.2d 598 (1987). Rather, the jury should be instructed that the implement is a deadly weapon as a matter of law. State v. Rahier, 37 Wn. App. 571, 576, 681 P.2d 1299 (1984).

Instruction 14 defined "deadly weapon" for purposes of the special verdict. The trial court issued a slightly modified version of WPIC 2.07.01 ("Deadly Weapon—Definition for Sentence Enhancement—Special Verdict—Knife"). Instruction 14 provided:

> 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 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.

> A knife having a blade longer than three inches is a deadly weapon.[8]

This instruction properly informed the jury of the definition of "deadly weapon" for purposes of the special verdict in this case. The weapon alleged by the complainant was a knife with a five inch handle and a total length of about 13 inches. Consistent with the authorities just discussed, a knife with a blade over three inches in length is a deadly weapon as a matter of law.

Gonzalez-Mendoza claims that the jury instructions, as a whole, were confusing. We reject this argument. Instruction 14 expressly applied "[f]or purposes of a special verdict."[9] We presume that the jury followed all instructions given. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). In light of this language, there was no risk that the jury was confused by the deadly weapon definition contained in Instruction 8.

Gonzalez-Mendoza argues that Instruction 14 should have included language relating to the manner of the knife's use because there was a dispute at trial as to the nature of the device wielded. Assuming he can raise this argument for the first time on appeal, it has no merit. It was proper to omit language relating to the manner of use from the instruction. This language is properly included when the knife in question has a blade less than three inches in length. Here, there was no evidence that the knife had a blade of less than three inches. Rather, the testimony showed either that the knife had a blade of about eight inches or that there was no knife at all.[10]

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[8] CP at 40.
[9] CP at 40.
[10] RP (Aug. 8, 2007) at 49-50; RP (Aug. 13, 2007) at 17, 31.

We affirm the judgment and sentence.

Trickey, J

WE CONCUR:

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71026-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Stephanie Guthrie, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[stephanie.guthrie@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 10, 2015