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.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Nichole Macinnes

REPLY BRIEF

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A. REPLY ARGUMENT

1. Impeachment by asking the forensic scientist about biological material found on the complainant – the State's arguments go 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. The Respondent initially appears to contend that the proposed inquiry was required to be relevant and material under ER 401 to an element of the crime, but quickly concedes that the inquiry was sought by the defense as impeachment evidence. BOR, at pp. 1, 9-10; 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). 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. 452, 459, 989 P.2d 1222 (1999).

In that regard, the State offers arguments appropriate for

trial that address the *weight* of the impeachment evidence, but did not warrant precluding Mr. Gonzalez-Mendoza from making the inquiry of the forensic witness, Jagmin. 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.

It simply does not matter that the trial prosecutor might be able to question Jagmin on re-direct examination and elicit that the trace material was not attributed to a *known* person and therefore *could* be from the complainant's boyfriend, that it also *could* have come from a female as well as a male, or that it also *could* have resulted from contact with someone at a different time, rather than on the same night or the several days preceding it. BOR, at p. 9-11. 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 State contends that this was impeachment on a collateral matter. BOR, at p. 10. The State offers no argument as

to why this impeachment was collateral, and cites a case, State v. Allen S., supra, at 459-60, that stands for the proposition that "if a person's credibility is not a fact of consequence to the action, the jury does not need to assess it, and impeaching evidence could not be helpful." That rule does not apply here. The cited case of State v. Aguirre, 168 Wn.2d 350, 362, 229 P.3d 669 (2010), also 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.

The evidence, which was able to be explained completely clearly by the forensic scientist, would in no way have been confusing for the jury that was obviously apable of hearing from Jagmin and understanding her detailed, sophisticated discussion of the science of DNA testing including the polymerase chain reaction (PCR) method and similar topics. See 8/9/07RP at 32- The State's argument that the jury would be baffled by the very same scientist testifying about other trace DNA or biological material

being detected on the complainant by her laboratory tests is not a credible assertion. BOR, at p. 9.

The State is correct that the complainant had already testified that she was with two other prostitution customers that night. However, contrary to the State's contentions, 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).

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.'

Respondent erroneously cites ER 608(b) as applicable to the present circumstances, and argues Mr. Gonzalez-Mendoza's proposed inquiry was barred because of the extrinsic evidence proscription. However ER 608(b) involves a party inquiring of a

witness about the witness's "[s]pecific instances of the conduct of a witness," to attack credibility, which is allowed if the proponent has a good-faith basis to believe it occurred, ER 608(b), and comes with the caveat the conduct may not be proved by extrinsic evidence if it is denied. State v. Barnes, 54 Wn. App. 536, 540, 774 P.2d 547 (1989); 5A Tegland, Washington Practice, Evidence Law and Practice, § 608.11 (5th ed. 2007). But the type of impeachment sought by the defendant was impeachment under ER 607 by eliciting contradicting evidence, a wholly different kind of impeachment. See Karl B. Tegland, Washington Practice, Evidence, § 607.17, at 407 (5th ed.2007). 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.

2. The defense was precluded from inquiring into misconduct by the complainant in giving a false name to police, that bore on her credibility. This next issue *does* involve

ER 608(b). 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.

That ruling was an abuse of discretion. The Respondent contends that the trial court could use its discretion to preclude this inquiry because there was other impeachment evidence available to the defense. But the trial court excluded the evidence on a clearly untenable basis, and the Respondent on appeal erroneously states that "Keo's prior untruthfulness was solely on the issue of her name, a topic that was not relevant to the issues in the current case." BOR, at p. 18. This is not a tenable argument. 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).

3. 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 concedes 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). BOR, at pp. 29-

32. The State argues, however, 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. BOR, at pp. 35.

But the cited case of State v. Rahier, in which the Court stated that the jury need not be given the full language of the deadly weapon enhancement definition in its instructions, involves a case where the proof of a firearm, which was found, was overwhelming and uncontroverted. State v. Rahier, 37 Wn. App. 571, 572-73, 681 P.2d 1299 (1984).

Here, the opposite is true – 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, 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.

In this case, there was no knife found at all. 8/8/07RP at 140. Importantly, although the Rahier Court concluded that the issue had not been preserved for appeal, the Court endorsed Mr. Rahier's argument that he should be able to argue to a jury that the pistol, because it was not loaded, was not a deadly weapon for purposes of the enhancement considering "the manner in which it is used" and the requirement that it be used in a way that may "easily and readily produce death." State v. Rahier, 37 Wn. App. at 574-75.

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 330, 339, 58 P.3d 889 (2002).

B. CONCLUSION

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

Respectfully submitted this 8 day of December, 2014.

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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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **REPLY 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:

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[X] ROBERTO GONZALEZ-MENDOZA 370083 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF DECEMBER, 2014.

X_____

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