

71026-5

71026-5

NO. 71026-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ROBERTO GONZALEZ-MENDOZA,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE NICOLE K. MACINNES

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**BRIEF OF RESPONDENT**

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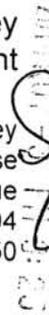


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**A. ISSUES PRESENTED**

1. Evidence is relevant only if it tends to make the existence of a material fact more or less probable than it would be without the evidence. The defendant sought to introduce evidence that a trace amount of a third party's biological material was found on the rape victim's body, despite testimony from the DNA scientist that the amount of material was so small that no meaningful conclusions could be drawn about who it was from, that person's gender, what kind of cells it came from, or how long it had been on the victim's body. Did the trial court properly exercise its discretion in excluding the evidence, where the victim had already testified to having multiple prior sexual partners on the night she encountered the defendant?

2. A trial court's refusal to allow cross-examination of a crucial witness about prior misconduct under ER 608(b) is an abuse of discretion only if the misconduct is not remote in time and is the only available impeachment evidence. The defendant sought to cross-examine the prostitute victim about an unrelated prior incident in which she had given a false name when contacted by police. Did the trial court properly exercise its discretion in excluding evidence of that incident, where the defendant had

numerous other avenues of impeachment and there was no indication that the incident was not remote in time?

3. A defendant who testifies to his own good character “opens the door” to cross-examination about prior acts of misconduct inconsistent with that character, even if such misconduct would otherwise be inadmissible. The State sought to cross-examine the defendant about his prior conviction for assault after the defendant made an unprompted assertion on the stand that he was “not aggressive.” Did the trial court properly exercise its discretion in ruling that the defendant had opened the door to cross-examination about the prior conviction?

4. A trial court has broad discretion in crafting the specific wording of jury instructions, so long as the instructions accurately state the law and do not mislead the jury. The trial court gave the standard separate WPIC jury instructions defining “deadly weapon” for purposes of the elements of the charge and for purposes of the deadly weapon special allegation, and the instructions accurately stated the applicable statutory definitions. Did the trial court properly exercise its discretion in not modifying the WPICs to explicitly instruct the jury not to substitute the broader

“deadly weapon” definition relevant to the elements for the narrower definition contained in the special verdict form?

5. The occurrence of multiple errors that are individually harmless may still require reversal if the cumulative prejudice denies the defendant a fair trial. In this case, no errors occurred that prejudiced the defendant either individually or collectively. Should this Court reject the defendant’s claim that the cumulative error doctrine requires reversal of his conviction?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

The State charged the defendant, Roberto Gonzalez-Mendoza, with one count of rape in the first degree with a deadly weapon enhancement. CP 5-6. In 2007, a jury found Gonzalez-Mendoza guilty as charged and found that the enhancement had been proven. CP 41-42. After failing to appear for the verdict and being on warrant status for 6 years, Gonzalez-Mendoza was finally sentenced in 2013. CP 45-50, 122-23. He received a standard range indeterminate sentence of 116 months to life in prison, plus an additional 24 months for the enhancement, for a total sentence

of 140 months to life in prison. CP 46, 49. He timely appealed.  
CP 57.

## 2. SUBSTANTIVE FACTS.

In January of 2007, 22-year-old Chan Keo was working as a prostitute on Denny Way in Seattle to support herself and her two-month-old son. 3RP<sup>1</sup> 34-35. One night, Keo had run out of condoms and was about to drive home when she saw Gonzalez-Mendoza trying to get her attention from his truck. 3RP 41-43. He at first appeared to be a nice, normal client, with a clean appearance and no evidence of alcohol or drug use. 3RP 42, 44. After Gonzalez-Mendoza indicated that he had a condom, Keo got in his truck and directed him to a secluded spot nearby. 3RP 45 47, 101-02.

Gonzalez-Mendoza initially agreed to a price of \$80, but then counted the money in his wallet and indicated that he had less than \$60. 3RP 46-48. When Keo indicated that that was not enough, Gonzalez-Mendoza put his wallet back in the door pocket of his vehicle, and instead pulled out a large kitchen knife with a blade

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<sup>1</sup> The eight volumes of the report of proceedings are referred to as 1RP (August 6, 2007), 2RP (August 7, 2007), 3RP (August 8, 2007), 4RP (August 9, 2007), 5RP (August 13, 2007), 6RP (August 14, 2007), 7RP (August 16\*, 2007), and 8RP (October 3, 2013).

\*Although the cover page for this volume mistakenly states the date as August 6, 2007, page two correctly states the date as August 16, 2007.

approximately eight inches long. 3RP 46, 49-50. He told Keo, "I'm sorry I have to do this to you." 3RP 51.

After drawing the knife, Gonzalez-Mendoza's demeanor changed significantly, and he became angry and aggressive. 3RP 50-51. He put the knife up to Keo's throat and yelled at her to take her pants off, before beginning to aggressively pull them down himself. 3RP 51. Frightened, Keo did not resist even after Gonzalez-Mendoza put the knife down. 3RP 53. He initially put on a condom that he had brought with him, but then took it off after deciding that he wanted oral sex. 3RP 53. As Keo sat with her back pressed up against the passenger door, afraid he might use the knife at any point, Gonzalez-Mendoza got on his knees, put his penis in her face, and forced her to perform oral sex on him. 3RP 55, 57.

Gonzalez-Mendoza then kissed Keo, something that she did not normally do with clients, and forced her to perform oral sex again. 3RP 58. He then put the condom partially back on, telling her, "You're lucky that I want to use a rubber with you." 3RP 54. Gonzalez-Mendoza pulled on Keo's legs to make her lie down on the truck's bench seat. 3RP 59. Despite the fact that the condom was barely on, Gonzalez-Mendoza then forced penile-vaginal

intercourse on Keo. 3RP 61. When she reached for the door handle during the rape, he angrily told her, "Don't make me fucking do it," which Keo took to be a threat not to make him pull out the knife. 3RP 59, 62.

When Gonzalez-Mendoza finished, he drove her back to the parking lot where he had first picked her up and told her to "get the fuck out" of his truck. 3RP 65, 69. Wanting to prevent him from running her over or getting away with rape, Keo grabbed the keys out of the ignition and tried to run to a well-populated street nearby. 3RP 70-71. Unfortunately, Gonzalez-Mendoza caught her before she could get there, and tackled her to the ground. 3RP 71. When Keo continued to hold on to his keys, Gonzalez-Mendoza punched her in the face, took both his keys and hers, and ran back to his truck and drove off. 3RP 71-73.

Keo took note of Gonzalez-Mendoza's license plate number as he drove off, and called 911 from her cell phone. 3RP 72. Officers were able to trace the vehicle to Gonzalez-Mendoza's residence, where he was later arrested. 2RP 14-17, 68-69. Keo identified Gonzalez-Mendoza in a photo montage, and his DNA was found on swabs taken from Keo's vagina and anal area during a sexual assault examination immediately after the rape.

2RP 63-67; 4RP 46. Photographs taken at the hospital documented injuries to Keo's lip, knee, and hand, which were sustained in the struggle over the keys, and the Sexual Assault Nurse Examiner also documented a bruise on Keo's inner labia and bleeding in her cervix area. 4RP 77. Gonzalez-Mendoza admitted having oral and vaginal sex with Keo, but claimed that it was consensual. 5RP 13-17.

**C. ARGUMENT**

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING IRRELEVANT EVIDENCE THAT A THIRD PERSON'S BIOLOGICAL MATERIAL WAS FOUND ON THE VICTIM.

Gonzalez-Mendoza contends that the trial court abused its discretion when it excluded evidence that a third person's biological material was found on an anal swab collected during Keo's sexual assault examination, because such evidence would have impeached Keo's testimony that she used condoms when having sex with clients. This claim should be rejected. The trial court properly exercised its discretion in excluding the evidence, because it was irrelevant, cumulative, and likely to confuse the jury.

a. Relevant Facts.

When DNA analysis was performed on the vaginal and anal swabs taken during Keo's sexual assault examination, the forensic scientist, Amy Jagmin, detected a trace amount of biological material on one of the anal swabs that did not belong to either Keo or Gonzalez-Mendoza. 4RP 22-24. The biological material contained so little genetic information that Jagmin was unable to tell what kind of biological material it was, who the DNA belonged to, or whether it came from a male or female. 4RP 23. There was also no way to tell how long the biological material had been present before the swab was taken. 4RP 16.

Before trial, the State moved to exclude any testimony about the trace material as irrelevant and likely to lead to improper speculation by the jury, but the trial court deferred the issue. CP 106; 1RP 92-95. The issue was readdressed prior to Jagmin's testimony, at which point Jagmin took the stand outside the presence of the jury and testified to the facts set out above. 4RP 15-27.

Gonzalez-Mendoza argued that the evidence was relevant because it tended to show that Keo had at least one partner other than him on or shortly before the night in question. 4RP 15, 28-29.

He also argued that it was relevant to impeach Keo's testimony that she used condoms with her clients, despite acknowledging that the material could be from Keo's boyfriend, with whom she had sex two days before the rape. 4RP 29.

The trial court excluded the evidence, ruling that it was not relevant given the lack of any information about the time frame in which the material came into contact with Keo. 4RP 16. Gonzalez-Mendoza had confirmed that he intended to ask the jury to conclude from the trace evidence that Keo had sexual relations with another person on the night in question or a few days before, and the court concluded that such speculation would be improper and would only confuse the jury in light of the fact that Jagmin's testimony could not support such a conclusion. 4RP 30-31. The trial court also noted that Keo had already testified that she had two prior clients on the night she met Gonzalez-Mendoza. 3RP 41; 4RP 28.

- b. The Trial Court Properly Exercised Its Discretion In Excluding The Evidence Because It Was Irrelevant, Cumulative, And Likely To Confuse Or Mislead The Jury.

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. Evidence that is relevant may nonetheless be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

Evidence offered to impeach a person is relevant if it tends to cast doubt on the person’s credibility and his or her credibility is a fact of consequence to the action. State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). However, a witness may not be impeached on a collateral matter, meaning impeachment is not allowed on facts not directly relevant to the trial issue. State v. Aguirre, 168 Wn.2d 350, 362, 229 P.3d 669 (2010).

A trial court’s evidentiary rulings are reviewed for abuse of discretion. State v. Garcia, 179 Wn.2d 828, 846, 318 P.3d 266 (2014). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

Evidence that unknown biological material not attributable to Keo or Gonzalez-Mendoza was found on Keo's body was not

relevant to this case, because it did not make any fact of consequence to the verdict any more or less probable than it would be without that evidence. Jagmin indicated that it was not possible to make any meaningful conclusions about what the trace material was or how long it had been on Keo's body, although she noted that the small quantity of material suggested that it was less recent than the biological material left by Gonzalez-Mendoza. 4RP 16, 22-23. Thus, there was no basis to conclude that the evidence was the result of recent sexual intercourse, and Gonzalez-Mendoza's plan to ask the jury to reach such a conclusion invited improper speculation. 4RP 31.

Even if the trace material had been evidence of recent sexual contact with another person, such evidence would not make it more or less likely that Gonzalez-Mendoza raped Keo, given that he raised a defense of consent and not identity. Because Keo had already testified that she had two prior clients on the night she met Gonzalez-Mendoza, such evidence would merely be cumulative. 3RP 41.

Additionally, the evidence was not admissible to impeach Keo's testimony that she used condoms with clients for several reasons. First, Keo never testified that she had never had sexual

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING EVIDENCE OF THE VICTIM'S PRIOR POLICE CONTACTS.

Gonzalez-Mendoza contends that the trial court abused its discretion when it precluded him from cross-examining Keo about an unrelated prior incident in which she was contacted by police officers and gave a false name. This claim should be rejected. Because Keo's name was not relevant to the issues at trial, there was substantial other impeachment evidence available to Gonzalez-Mendoza, and there was no indication that the prior incident was sufficiently close in time to the current case to make it probative of Keo's credibility in the current case, the trial court properly exercised its discretion in excluding all evidence of the prior police contact.

a. Relevant Facts.

During pretrial motions, the State moved to preclude Gonzalez-Mendoza from cross-examining Keo about an unrelated prior incident in which Keo was stopped by police while in a vehicle that contained a gun.<sup>2</sup> 1RP 106; CP 110. During the stop, Keo

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<sup>2</sup> The record contains no further details about the circumstances of this stop, whether the vehicle belonged to Keo, or whether the stop was related to Keo's prostitution activities.

gave officers a false name; however, no charges were ever filed against Keo as a result of the stop or the false name. CP 110.

The parties disagreed as to how many times Keo had given a false name during contacts with police; Gonzalez-Mendoza indicated that he believed Keo had given a false name “in several instances where she’s been arrested on various types of crimes,” while the State asserted that it was “a one time instance.” 1RP 106, 109. Gonzalez-Mendoza never made a formal proffer of what Keo’s testimony would be if she were asked about it, and did not ask that Keo take the stand outside the presence of the jury in order to find out. 1RP 106-10. There is no indication in the record of when the incident(s) occurred. 1RP 106-10.

The trial court excluded the evidence of Keo’s prior police contact(s), finding that the giving of a false name in a prior unrelated incident was “not really related to the charge in this case,” and was insufficiently probative of her credibility in the current case in light of other impeachment the jury would hear about in the course of the trial. 1RP 108-10.

Gonzalez-Mendoza was nonetheless able to attack Keo’s credibility by eliciting evidence that she had been convicted of a crime of dishonesty, by challenging the plausibility that a rape

victim would provoke a rapist who was armed with a twelve-inch knife by taking his keys or would continue to work as a prostitute after being raped, by impeaching Keo's trial testimony with prior inconsistent statements regarding the amount of money she and Gonzalez-Mendoza had agreed on and her intent in taking the keys, and by impeaching Keo's denial that Gonzalez-Mendoza's truck had struck a wall during the scuffle over the keys with physical evidence that the truck incurred damage in the parking lot where the scuffle occurred. 3RP 100, 104; 6RP 7, 12, 14, 16.

- b. The Trial Court Properly Exercised Its Discretion In Excluding Keo's Use Of A False Name During A Prior Unrelated Police Contact.

If a specific instance of a witness's conduct (other than a criminal conviction) is probative of untruthfulness, a trial court has the discretion to allow inquiry into it on cross-examination for the purpose of attacking the witness's credibility. ER 608(b). Accordingly, a trial court's refusal to allow cross-examination of a witness under ER 608(b) is reviewed only for abuse of discretion. State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001); State v. Kunze, 97 Wn. App. 832, 858-60, 988 P.2d 977 (1999) (admission of specific instances of lying under ER 608(b) is "highly discretionary").

Such a refusal is an abuse of discretion only if the witness is crucial and the alleged misconduct constitutes the only available impeachment and is not remote in time. Clark, 143 Wn.2d at 766; State v. McSorley, 128 Wn. App. 598, 610-14, 116 P.3d 431 (2005) (on retrial, prior misconduct probative of untruthfulness should be admitted if it is not too remote in time, because it is the only available impeachment of crucial prosecution witness); State v. Wilson, 60 Wn. App. 887, 891-94, 808 P.2d 754 (1991) (prior misconduct under ER 608(b) must be probative of truthfulness and not remote in time, and is subject to ER 403 and ER 611). A trial court exclusion of ER 608(b) evidence is not an abuse of discretion when there is other available impeachment evidence because once a witness is impeached, "there is less need for further impeachment on cross." Clark, 143 Wn.2d at 766.

In exercising its discretion, the trial court should consider whether the witness's misconduct is relevant to the witness's veracity on the stand and whether it is relevant to the issues presented at trial. State v. Gregory, 158 Wn.2d 759, 798-800, 147 P.3d 1201 (2006) (victim's very recent lie during a defense interview in the current case was relevant to her veracity on the stand and relevant to the current case); State v. York, 28 Wn. App.

33, 35-37, 621 P.2d 784 (1980) (witness's prior misconduct while working as an undercover informant was relevant to credibility in case where witness was undercover buyer and sole witness to the crime).

In this case, although Keo was a critical witness for the State, evidence that she had once given officers a false name in an unrelated incident was not the only available impeachment. Gonzalez-Mendoza attacked Keo's credibility through several means, including her prior conviction for a crime of dishonesty; her behavior after the rape, including taking the defendant's keys when he allegedly had a twelve-inch knife and continuing to work as a prostitute after the rape; inconsistencies between her trial testimony and her prior statements; and physical evidence corroborating Gonzalez-Mendoza's testimony that his truck struck a wall as they struggled over the keys, which Keo had denied. 3RP 100, 104; 6RP 7, 12, 14, 16.

Additionally, 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. Furthermore, there is no evidence in the record that the incident involving the false name was sufficiently close in time to the rape or the trial to be probative of Keo's credibility in this

when contacted by police, any error was harmless. An erroneous ER 608 ruling is not of constitutional magnitude, and thus is harmless if there is no reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. State v. Ferguson, 100 Wn.2d 131, 137, 667 P.2d 68 (1983).

The jury knew that Keo supported herself through illegal prostitution activities, and that she had previously been convicted of a crime of dishonesty. 3RP 35, 100. It would likely have come as no surprise that a prostitute would have had prior contacts with police and might have attempted to avoid prosecution by giving a false name. Furthermore, as discussed above, Gonzalez-Mendoza competently attacked Keo's credibility using everything from physical evidence contradicting certain details of her account, to inconsistencies between her trial testimony and prior statements, to arguments about the implausibility of her behavior after the rape. 3RP 100, 104; 6RP 7, 12, 14, 16. Despite all that, after observing Keo's testimony from the witness stand the jury found her account credible beyond a reasonable doubt.

If anything, evidence that Keo previously gave police a false name to avoid prosecution for prostitution might have caused the

jury to find her trial testimony even more credible. By highlighting the lengths Keo had gone to in the past to prevent the police from linking her to prostitution, the evidence would have strengthened the inference that Keo would not have contacted the police and disclosed her work as a prostitute in this case simply to get revenge against a client she felt had underpaid her, as Gonzalez-Mendoza claimed.

Given the many reasons the jury had to question Keo's credibility and its unanimous decision that Keo's testimony was nevertheless credible beyond a reasonable doubt, there is no reasonable possibility that evidence that Keo had once given a false name when contacted by police would have materially affected the jury's verdict.<sup>3</sup>

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<sup>3</sup> Even if this Court were to review this as a constitutional issue, as Gonzalez-Mendoza urges, the many bases utilized by Gonzalez-Mendoza to attack Keo's credibility and the double-edged nature of the excluded evidence should convince this Court beyond a reasonable doubt that the result would have been the same had the evidence not been excluded. See State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result had the error not occurred).

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING THAT GONZALEZ-MENDOZA OPENED THE DOOR TO CROSS-EXAMINATION ABOUT HIS PRIOR ASSAULT CONVICTION.

Gonzalez-Mendoza contends that the trial court abused its discretion when it ruled that he had opened the door to evidence of his prior conviction for misdemeanor assault. This claim should be rejected. Because the defendant voluntarily put his aggressiveness at issue by directly and non-responsively asserting his non-aggressive character on cross-examination, the trial court properly exercised its discretion in allowing the State to rebut his testimony by eliciting evidence of his prior assault conviction.

a. Relevant Facts.

During pretrial motions, the State gave notice that it would seek to cross-examine Gonzalez-Mendoza about his May 2006 domestic violence assault conviction if he opened the door by claiming that he was a peaceful or non-violent person. 1RP 110; CP 111. The victim in that case was Gonzalez-Mendoza's wife. CP 111. The trial court noted that such cross-examination would be allowed "only if [Gonzalez-Mendoza] himself brought that on in some way," which defense counsel acknowledged. 1RP 111.

During direct examination, Gonzalez-Mendoza testified that he decided to pick up a prostitute because he was having problems with his wife and wasn't satisfied in his marriage. 5RP 10. On cross-examination, the prosecutor elicited testimony that Gonzalez-Mendoza was frustrated about his marital problems when he took note that there were prostitutes working on Denny Way a week before the rape. 5RP 38. Shortly thereafter, the following exchange occurred:

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 an aggressive person.

5RP 38.

Outside the presence of the jury, the prosecutor asked the trial court for a ruling that Gonzalez-Mendoza had opened the door to evidence of the assault conviction. 5RP 55-56. Although Gonzalez-Mendoza was testifying through an interpreter, defense counsel claimed that his client's response was simply the result of a language barrier, and argued that the prosecutor had intentionally baited him into giving an answer that would open the door.

5RP 56-57.

The trial court found that the prosecutor's initial question was not intended to prompt a response that would open the door. 5RP 57. The court re-read the pertinent portions of the court reporter's transcription, noting that it was defense counsel who first brought up the issue of Gonzalez-Mendoza's marital problems on direct examination, and found that the prosecutor's questions merely followed up on that line of questioning and properly focused on how he was feeling on the night in question. 5RP 61.

The court observed that Gonzalez-Mendoza's answer was "just the sort of answer that would open the door to character evidence" to contradict a claim of a non-aggressive character. 5RP 58. Gonzalez-Mendoza conceded that this was true, but argued that the door would only be opened if the question asked had called for an answer about character. 5RP 58. The court noted that door-opening answers are frequently nonresponsive, because defendants often want the jury to hear positive things about themselves that aren't called for by the question, and observed that "this appears to be one of those times." 5RP 63-64.

The court ruled that the door had been opened, and that the State could permissibly cross-examine Gonzalez-Mendoza about his prior conviction. 5RP 63-64. Although the State sought to ask

Gonzalez-Mendoza whether he had a 2006 conviction for assault in the fourth degree domestic violence for an act against his wife, the trial court restricted the permissible inquiry to simply whether he had a misdemeanor assault conviction from May of 2006. 5RP 63-64. The court explained that those details were sufficient to address the claim that he was not an aggressive person. 5RP 63.

b. The Trial Court Properly Exercised Its Discretion In Ruling That Gonzalez-Mendoza Had Opened The Door To Evidence Of His Assault Conviction.

Evidence of a defendant's character is generally inadmissible for the purpose of proving action in conformity therewith. ER 404(a). However, a defendant who testifies to his own good character or good past behavior "opens the door" on the issue, and the State may then cross-examine him as to specific acts of misconduct unrelated to the crime charged, even though such evidence would otherwise be inadmissible. State v. Renneberg, 83 Wn.2d 735, 738, 522 P.2d 835 (1974); State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998); ER 404(a)(1). The determination that a party has opened the door is reviewed for abuse of discretion. State v. Warren, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006), aff'd, 165 Wn.2d 17, 195 P.3d 940 (2008).

A passing reference to a prohibited topic during direct examination does not automatically open the door for cross-examination about prior misconduct. Stockton, 91 Wn. App. at 40-41 (testimony that defendant thought men were trying to sell him drugs did not open door to questioning about whether defendant had bought drugs in the past); State v. Avendano-Lopez, 79 Wn. App. 706, 715, 904 P.2d 324 (1995) (reference to being released from jail did not open door to questioning about prior drug sales unrelated to jail sentence).

However, where a defendant directly or indirectly asserts his good character, the door is opened and the State may offer contradictory evidence. Renneberg, 83 Wn.2d at 738-39 (defendant's extensive testimony about wholesome activities painted picture of a person unlikely to commit grand larceny, putting character before the jury and allowing State to "complete the tapestry" with evidence of drug addiction); Warren, 134 Wn. App. at 64-65 (defendant's testimony in child molestation case that he always avoided touching certain areas on stepdaughter's body constituted affirmative assertion of a character trait, opening door to

prior conviction for child molestation); State v. McFadden, 63 Wn. App. 441, 450-51, 820 P.2d 53 (1991) (defendant's testimony that he was not "the kind of guy" who deals cocaine opened door to evidence of prior unrelated cocaine sale).

Gonzalez-Mendoza's testimony that he is "not aggressive" was a direct assertion of good character and had the effect of communicating to the jury that he is not the kind of person who would commit rape. See Warren, 134 Wn. App. at 65 (only reasonable interpretation of testimony that defendant always avoided touching certain areas of stepdaughter's body was that defendant was not the type of person who would touch a young girl sexually, constituting an affirmative assertion of a character trait). The trial court explicitly found that the testimony was not intentionally provoked by the prosecutor's proper questioning about Gonzalez-Mendoza's mood on the night he took note of the prostitutes on Denny Way. 5RP 61.

Evidence that he had been convicted of assault eight months before the charged crime was directly relevant to rebut the defendant's claimed lack of aggressiveness. Indeed, as the trial

court noted and defense counsel conceded, Gonzalez-Mendoza's testimony was exactly the kind of assertion of good character that opens the door to rebuttal with contradictory evidence of prior misconduct. Id.; 5RP 58.

The trial court personally observed the defendant's testimony, carefully reviewed the transcript of what Gonzalez-Mendoza had been asked and how he had responded, and allowed extensive argument before making his ruling. 5RP 55-64. The court also carefully limited cross-examination to only those details necessary to rebut the defendant's claim that he is "not aggressive," and excluded the more inflammatory details that the conviction involved domestic violence against his wife. 5RP 63. The trial court therefore properly exercised its discretion in ruling that Gonzalez-Mendoza's unresponsive assertion that he is "not aggressive" had opened the door to limited cross-examination about the existence of a prior misdemeanor assault conviction. See State v. Brush, 32 Wn. App. 445, 452-53, 648 P.2d 897 (1982).

4. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE DEFINITION OF DEADLY WEAPON FOR PURPOSES OF THE DEADLY WEAPON SPECIAL ALLEGATION.

Gonzalez-Mendoza contends that the trial court's instruction to the jury on the statutory definition of deadly weapon for purposes of the deadly weapon special allegation was improper because the jury was also instructed on the broader statutory definition of deadly weapon for purposes of the underlying charge. This claim should be rejected. Because the only weapon mentioned at trial was a knife with a blade approximately eight inches long, the trial court properly used the standard WPIC to instruct the jury that the definition of deadly weapon for purposes of the special allegation was satisfied if the weapon was a knife with a blade longer than three inches. The fact that the statutory definition of deadly weapon in the context of the elements of the crime is broader does not render the court's special verdict instruction inaccurate or improper.

a. Relevant Facts.

At trial, Keo testified that Gonzalez-Mendoza threatened her with a large kitchen knife during the rape. 3RP 49. She testified that the total length of the knife was about thirteen inches, and that approximately five inches of that was the handle. 3RP 50. There was no mention during trial of any other weapon being involved in the incident in any way. 3RP 34-109 (Keo's testimony); 5RP 7-85 (defendant's testimony).

The jury was instructed that one of the elements of the charge 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." CP 30. The trial court used standard WPIC 2.06.01 ("Deadly Weapon—Definition as Element—Weapons Other Than Firearms and Explosives") to instruct the jury on the definition of deadly weapon as an element of the crime:

Deadly weapon . . . means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP 33 (Instruction 8); WPIC 2.06.01. This instruction tracks the statutory definition of deadly weapon set out in the criminal code at RCW 9A.04.110.

The trial court also instructed the jury to fill out a special verdict form if it found the defendant guilty of rape in the first degree. CP 39. The special verdict form asked whether Gonzalez-Mendoza was armed with a deadly weapon at the time he committed the crime. CP 42. The court used a slightly modified version of WPIC 2.07.01 (“Deadly Weapon—Definition for Sentence Enhancement—Special Verdict—Knife”) proposed by the State to instruct the jury on the burden of proof and the definitions of “armed” and “deadly weapon” for purposes of the special verdict form:

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.

CP 40 (Instruction 14), 89; WPIC 2.07.01.<sup>4</sup>

At the time of trial, the statutory definition of a deadly weapon for purposes of a special verdict was contained in former RCW 9.94A.602, which stated in relevant part:

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce

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<sup>4</sup> The full text of WPIC 2.07.01 states:

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 *[in Court]*.

[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 *[or an accomplice]*. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the *[location of the weapon at the time of the crime]**[the type of weapon]* *[(fill in other relevant circumstances)]*.]

*[If one participant in a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.]*

*[A knife having a blade longer than three inches is a deadly weapon.][A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.]*

The last sentence of the second paragraph was omitted from the State's proposed instruction because it was "superfluous and potentially confusing." CP 89.

death. The following instruments are included in the term deadly weapon: . . . any knife having a blade longer than three inches . . . .

Former RCW 9.94A.602 (2001) (recodified as current RCW 9.94A.825 by Laws of 2009, ch. 28, § 41).

Gonzalez-Mendoza did not submit proposed jury instructions relating to the definition of a deadly weapon in the context of either the elements of the charge or the special verdict form. CP 12-21. Because the court reporter did not report the parties' primary discussion about the jury instructions, the record does not reflect whether Gonzalez-Mendoza adopted the State's instructions. 4RP 126.

- b. The Trial Court Properly Instructed The Jury On The Definition Of Deadly Weapon For Purposes Of The Special Verdict Form.

Jury instructions are reviewed de novo to ensure that they accurately state the applicable law, do not mislead the jury, and allow the parties to argue their theories of the case. Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Once those criteria are met, a trial court's decision regarding the specific wording of instructions is reviewed only for

abuse of discretion. Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 44, 244 P.3d 32 (2010), aff'd, 174 Wn.2d 851, 281 P.3d 289 (2012).

In order to accurately state the applicable law, the trial court needed to instruct the jury on both the meaning of “deadly weapon” that applied to the elements of the offense and the meaning that applied to the special verdict, which it did. However, because the only weapon the jury heard about during the trial was a large knife with an eight-inch blade, and as a matter of law a knife with a blade longer than three inches is a deadly weapon for purposes of the special verdict, there was no reason to instruct the jury on the generic special verdict definition that “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.” Former RCW 9.94A.602; State v. Rahier, 37 Wn. App. 571, 576, 681 P.2d 1299 (1984) (where defendant is alleged to have used an instrument that is by definition a deadly weapon, generic definition of deadly weapon in special

verdict WPIC should be omitted and jury should be instructed the implement is a deadly weapon as a matter of law).<sup>5</sup>

It was therefore proper to simply instruct the jury that, “For purposes of a special verdict . . . . [a] knife having a blade longer than three inches is a deadly weapon.” Rahier, 37 Wn. App. at 576; former RCW 9.94A.602; CP 40. Because that correct and very specific statement of the law was contained in Instruction 14, which specifically pertained to the special verdict, there was no risk that the jury would disregard that statement in favor of the less specific definition of deadly weapon given in Instruction 8 in the context of definitions pertaining to the elements of the charge. See State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007) (jury is presumed to follow the court’s instructions).

The instructions given therefore did not relieve the State of its burden to prove the special allegation beyond a reasonable doubt. As a result, the trial court properly exercised its discretion in not adding additional language to the standard WPICs to explicitly

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<sup>5</sup> Although State v. Rahier analyzed the pre-SRA deadly weapon enhancement statute, RCW 9.95.040, it remains applicable because the Sentencing Reform Act’s definition of deadly weapon for purposes of a special verdict remains the same. Comment to WPIC 2.07 (citing State v. Sullivan, 47 Wn. App. 81, 733 P.2d 598 (1987)); State v. Samaniego, 76 Wn. App. 76, 79-80, 882 P.2d 195 (1994).

tell the jury not to substitute the deadly weapon definition in Instruction 8 for the definition in Instruction 14.

c. Any Error Was Harmless.

Even if this Court were to conclude that the trial court erred in failing to modify the standard WPIC instructions, any error was harmless beyond a reasonable doubt. There was no suggestion at trial that any weapons were involved in the incident other than the large kitchen knife, which was described by Keo as having a blade approximately eight inches long. 3RP 49-50. In finding Gonzalez-Mendoza guilty of rape as charged, the jury necessarily found beyond a reasonable doubt that he had threatened Keo with the knife as she described in her testimony.

Even if the jury had been misled by the instructions to use the wrong definition when considering whether the knife described by Keo qualified as a deadly weapon for purposes of the special verdict, it is clear beyond a reasonable doubt that their answer would have been the same had they considered the correct definition, because the knife described by Keo was a deadly weapon for purposes of the special verdict as a matter of law. See State v. Samaniego, 76 Wn. App. 76, 79-80, 882 P.2d 195 (1994).

5. GONZALEZ-MENDOZA'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.

Gonzalez-Mendoza contends that the cumulative effect of the trial errors alleged requires reversal, even if the errors are found to be harmless individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). In order to seek reversal pursuant to the cumulative error doctrine, however, the defendant must establish the presence of multiple trial errors *and* that the cumulative prejudice affected the verdict. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). The doctrine does not apply "where the errors are few and have little or no effect on the outcome of the trial." Id.

Instead, reversals due to cumulative error are justified only in rather extraordinary circumstances. See, e.g., State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426 (1997) (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a new trial); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859

(1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

Here, as explained in the sections above, no error occurred that affected the outcome of the trial, either individually or cumulatively.

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Gonzalez-Mendoza's conviction and sentence.

DATED this 3<sup>rd</sup> day of November, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis, the attorney for the appellant, at Oliver@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Roberto Gonzalez-Mendoza, Cause No. 71026-5, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 3<sup>rd</sup> day of November, 2014.

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Name:

Done in Seattle, Washington