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**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LARRY AYO PETERS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Phil Sorensen, Judge

No. 17-1-00167-0

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**Brief of Respondent**

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A. INTRODUCTION.

Larry Peters, the defendant, lured his ex-girlfriend to a Motel 6 in Fife, Washington, by anonymous text message. Once she arrived, defendant tased her in the neck and stomach, placed her in a chair, and threatened her with a machete, claiming the encounter would end in a “murder-suicide”. After a night of being held captive, the victim fled and called the police. Numerous officers responded to her location and to the Motel 6 to arrest defendant.

Defendant claimed to have heart problems and was transported to the hospital. Detective Sergeant Tom Thompson and Detective Jeff Nolta met him there to ask him about the assault. Defendant’s statements were introduced at trial through both officers.

The jury found defendant guilty of kidnapping, harassment, violation of a protection order, and assault, but acquitted him of rape. The jury found true that defendant was armed with a deadly weapon at the time of his crimes. He could have been armed with either the machete or the taser; the jury did not specify which weapon it relied upon, and it was unnecessary for it to do so.

After trial but before sentencing, the prosecutor notified defense counsel that Detective Nolta had been found to have violated police department policy on an unrelated case with an unrelated person. Defendant

moved for a dismissal, but the trial court denied his motion finding that the violation had no bearing on dishonest behavior; rather, the detective was truthful about his mistake. The defendant received a prison sentence of 144 months for kidnapping, harassing, and assaulting his ex-girlfriend.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. DID THE STATE'S LATE DISCLOSURE OF POTENTIAL IMPEACHMENT EVIDENCE IT LEARNED OF POST-TRIAL VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL WHERE THE EVIDENCE WAS INADMISSIBLE AND WOULD NOT HAVE AFFECTED THE JURY'S VERDICT?
2. DOES A JURY NEED TO ELECT WHICH WEAPON IT RELIES ON FOR A DEADLY WEAPON ENHANCEMENT WHEN THE REQUIREMENT OF JURY UNANIMITY APPLIES ONLY TO MULTIPLE ACT CASES, AND BOTH WEAPONS MET THE DEFINITION OF A DEADLY WEAPON?

C. STATEMENT OF THE CASE.

1. PROCEDURE

The Pierce County Prosecuting Attorney's Office charged Larry Peters ("defendant") with one count of kidnapping in the first degree, one count of rape in the first degree, one count of felony harassment, one count of assault in the second degree, and one count of violation of a domestic

violence court order. CP 45-49. All counts were charged as domestic violence incidents, and with deadly weapon enhancements. CP 45-49.

The parties proceeded to trial before the Honorable Judge Phil Sorensen. 1RP (03/05/18) 3. Several witnesses testified against the defendant, including, four City of Fife patrol officers; three detectives; a detective sergeant; a captain; a Sexual Assault Nurse Examiner; a forensic scientist; the treating emergency room doctor; and victim M.T. 4RP (03/08/18) 330, 387; 1RP (03/12/18) 17, 62, 99; 5RP (03/13/18) 427, 457, 475, 484, 490, 509; 6RP (03/14/18) 529, 576, 617. The defendant did not testify or present any evidence. 6RP (03/14/18) 634.

The jury found the defendant guilty of kidnapping, felony harassment, assault, and violation of a domestic violence order.<sup>1</sup> CP 192, 200, 203, 207. The jury acquitted defendant of rape. CP 196. For the four counts of which defendant was convicted, the jury found that defendant and M.T. were members of the same family or household, and that defendant was armed with a deadly weapon during his commission of the crimes. CP 193-95, 201-02, 205-06, 208-09. The court imposed the high end of the sentencing range, resulting in 144 months incarceration. CP 321.

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<sup>1</sup> The court vacated and dismissed this count due to inconsistencies in the charging language and the verdict form. CP 313.

After the verdicts but before sentencing, the State received an investigation report dated February 20, 2018. CP 245-46. The report stated Detective Nolta violated department policy, in an unrelated matter, by accessing jail phone calls of an unrelated person. CP 245-46. The deputy prosecutor had no previous knowledge of the investigation. *Id.* The State provided defendant copies of the information it had regarding this investigation and violation on May 11, 2018. *Id.* Defendant subsequently moved to dismiss pursuant to CrR 8.3. CP 225-26. After hearing argument, the trial court denied defendant's motion to dismiss. 7RP (08/24/18) 795. Although knowledge of the investigation is imputed to the State because the report existed prior to the time of trial and could have been obtained, the trial court determined, based on the nature and findings of the report, that this evidence was irrelevant. 7RP (08/24/18) 795-796. Accordingly, the court found that this information was neither exculpatory nor impeaching. 7RP (08/24/18) 795-796.

This timely appeal follows. CP 332.

## 2. FACTS

Victim M.T. dated defendant for about two months in the fall of 2016. 1RP (03/12/18) 102-03. After the relationship ended, M.T. sought and successfully obtained a no-contact order prohibiting defendant from

contacting her. 1RP (03/12/18) 103-04. The order was still in place in January 2017. 1RP (03/12/18) 104.

On January 11, 2017, M.T. spent the day with her friend, Mark, until she received a text message from a number she did not recognize, inviting her to a Motel 6. 1RP (03/12/18) 105. Initially, M.T. believed the message came from her friend, Jen. 1RP (03/12/18) 106-07.

After dropping off her friend, Mark, at the Emerald Queen Casino, M.T. arrived at the motel around 10 p.m. 1RP (03/12/18) 109. She went to the room indicated on the text message and found the door cracked open. 1RP (03/12/18) 112. Thinking the door was intended to be left open for her, she looked in the dark room and noticed only the television was on. 1RP (03/12/18) 112. When she tried to push the door open further, the door felt like a towel was stuffed under it. 1RP (03/12/18) 112-13. She walked into the room and peered around the door to see what it was stuck on; she saw a person behind the door, wearing a black mask and an all-black outfit. 1RP (03/12/18) 113.

M.T. screamed. 1RP (03/12/18) 113. The person in all-black, who she recognized later as the defendant, put a taser to her neck and activated it. 1RP (03/12/18) 113-14, 119. She fell to the ground. 1RP (03/12/18) 114. Defendant placed the taser against her stomach and held it there for a “long time.” 1RP (03/12/18) 115-16. Defendant asked M.T. if anyone knew she

was at the motel; she told him Mark knew. 1RP (03/12/18) 116-17. However, she had not told anyone she was going to the motel. 1RP (03/12/18) 117. Defendant made her call Mark and tell him she was okay. 1RP (03/12/18) 117. He then took apart M.T.'s phone. 1RP (03/12/18) 117.

Defendant made M.T. place rags in her mouth, and she saw a chair set up next to a trash can half full of water. 1RP (03/12/18) 117. It was at this point, from his distinctive smell, that M.T. recognized the person in all black was defendant. 1RP (03/12/18) 118. Once she recognized him, her "mind switched to what [she] can do to de-escalate this guy" and she began pleading with him, saying "baby, why are you doing this to me? I love you. What are you doing?" 1RP (03/12/18) 118-19. He took off his mask and told her that he wanted to "make love" to her one last time. 1RP (03/12/18) 119. Defendant was crying, saying, "Why did you – why are you making me do this to you?" 1RP (03/12/18) 119. Defendant then ordered M.T. to take off her clothes, telling her he would kill her, and that the encounter would end in a "murder-suicide." 1RP (03/12/18) 119-21. He was holding a machete, swinging it around in the air, within inches of her head. 1RP (03/12/18) 121-23.

While M.T. was in the room, she saw many other weapons: a knife with a blade larger than six inches; a taser shaped like brass knuckles; zip-tie handcuffs with tape; and bear spray. 1RP (03/12/18) 124-28. Police later

recovered each weapon, and an additional can of pepper spray and a taser shaped like a flashlight. 4RP (03/08/18) 403-05; Exh. 68, 72.

M.T. was standing, facing the defendant after she removed her clothes. 1RP (03/12/18) 131. M.T. explained to the jury that defendant made her perform oral sex on him, and then lay on the bed with him and engage in intercourse. 1RP (03/12/18) 132-34. M.T. said the encounter was off and on throughout the night until defendant fell asleep with his body wrapped around her, preventing her from leaving. 1RP (03/12/18) 134-36.

The next day, defendant wanted to go to McDonald's. 1RP (03/12/18) 143. When they returned to the motel, defendant wanted to change rooms. 1RP (03/12/18) 146. He was afraid someone had called the police. 1RP (03/12/18) 146. Defendant expressed concern over M.T. leaving, because he "can't let her go now with all the stuff I've done to you." 1RP (03/12/18) 153. When defendant was moving rooms, M.T. found a window of time to escape. 1RP (03/12/18) 149. Her friend Mark had pulled into the parking lot and convinced her to get in her car. 1RP (03/12/18) 149-50. She drove to the Emerald Queen Casino parking garage, where Mark convinced her to call the police. 1RP (03/12/18) 149-50.

City of Fife patrol officer Dan Goff was dispatched to the casino to meet M.T. 5RP (03/13/18) 459-60. Before contacting M.T., Goff noted M.T. was "quite hysterical," and "it looked like she had been crying for

some time.” 5RP (03/13/18) 460. Detective Sergeant Thomas Thompson also responded to the casino. 1RP (03/12/18) 65. He also noted M.T. seemed very upset. 1RP (03/12/18) 66. The police transported M.T. to Saint Francis Hospital for a sexual assault examination. 5RP (03/13/18) 430-31.

Other police officers responded to the Motel 6 to contact the defendant. 5RP (03/13/18) 478. Among them was Capitan Aaron Gardner, who placed a call to defendant’s room to ask him to exit. 5RP (03/13/18) 486-87. Eventually, he had to use the public announcement system in a patrol car to call out to defendant and order him to exit. 5RP (03/13/18) 487. Once defendant exited the room, he had a cell phone and stocking cap in his hands. 5RP (03/13/18) 493-94. After defendant was arrested, he began having heart problems, so he was transported to Tacoma General Hospital. 5RP (03/13/18) 495-96. Detective Jeff Nolta and detective sergeant Thomas Thompson met defendant at the hospital. 1RP (03/12/18) 22, 71. The other officers applied for a search warrant. 1RP (03/12/18) 70.

A nurse told Det. Nolta and Det. Sgt. Thompson that there were no limitations on speaking to defendant, and that he was awake and alert. 1RP (03/12/18) 22. Det. Nolta testified that he informed defendant the police were investigating an assault, and before mentioning the assault was sexual

in nature, defendant said he did not need to force himself on women. 1RP (03/12/18) 25-26. Det. Nolta also performed a forensic examination of the cell phones recovered from defendant. 1RP (03/12/18) 38-55. Ultimately, defendant used this information to impeach M.T., and argue against her credibility in closing argument. 5RP (03/13/18) 437-43; 7RP (03/19/18) 720-23.

Det. Sgt. Thompson told the jury more of defendant's statements, including that defendant said he had been at the motel with many people, and they had all been smoking methamphetamine. 1RP (03/12/18) 74-75. Defendant was unsure who had come and gone from the room. 1RP (03/12/18) 74-75. Det. Sgt. Thompson also testified that defendant denied having sex with M.T., but after being told she would have a sexual assault kit done, defendant said he might have had sex with her, but he could not remember. 1RP (03/12/18) 75. Defendant told the Det. Sgt. that M.T. must have tased herself in the neck to get him in trouble. 1RP (03/12/18) 78. He also claimed, without provocation, that she had an abscess on her stomach that he believed M.T. would tell the police was from being tased, also to get him in trouble. 5RP (03/13/18) 79-80. Defendant began crying and stated that he does bad things when he hangs out with the wrong people and does drugs. 1RP (03/12/18) 82.

Meanwhile, M.T. was receiving a sexual assault examination from nurse examiner Tasha Cushman. 5RP (03/13/18) 430-31; 6RP (03/14/18) 576-77. Prior to the sexual assault examination, Dr. Charles Buck examined M.T. and noted a number of blisters on her neck, as well as an ulcer/burn on her abdominal area. 6RP (03/14/18) 622-23; Exh. 77, 79. The marks were consistent with a burn. 6RP (03/14/18) 623. At the completion of the sexual assault exam, the kit was sealed to be handed to police. 6RP (03/14/18) 607

Forensic examiner Jennifer Hayden performed the DNA testing on the kit. 6RP (03/14/18) 530, 543. The testing revealed semen on the vaginal/endocervical and perinea vulvar swabs, as well as on the anal swabs. 6RP (03/14/18) 547. On the vaginal swabs, Ms. Hayden found two contributors that were consistent with M.T. and an unknown male. 6RP (03/14/18) 550, 553. On the perinea vulvar and anal swabs, she found five contributors, including M.T. 6RP (03/14/18) 550. Because there were more than three contributors, it was above protocol for her to test the sample for a consistency with defendant's DNA, so no further testing was done. 6RP (03/14/18) 541, 553-54. M.T. testified that she had not had sex with anyone else on January 11, 2017, and Ms. Hayden explained that not all contact will result in identifiable DNA. 1RP (03/12/18) 150; 6RP (03/14/18) 558-59.

D. ARGUMENT.

1. THE STATE'S LATE DISCLOSURE OF EVIDENCE IT LEARNED OF POST-TRIAL DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL WHERE THE EVIDENCE WAS INADMISSIBLE AND WOULD NOT HAVE AFFECTED THE JURY'S VERDICT.

The Due Process Clause of the United States Constitution requires the government provide any exculpatory information to the defense. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Under *Brady*, the State must disclose impeachment evidence probative of witness credibility if that evidence is favorable to the accused. *Giglio v. United States*, 405 U.S. 150, 153–54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *United States v. Bagley*, 473 U.S. 667, 676–78, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). A prosecutor's decision not to disclose material evidence “favorable to an accused” violates that defendant’s due process rights where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution. *Brady*, 373 U.S. at 87.

To establish a *Brady* violation, a defendant must establish three things: (1) the evidence at issue was favorable to the accused; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material in the sense that if it had been disclosed to the defense, there is a reasonable probability that the result of the proceeding would have been different (i.e. prejudice must have ensued).

*State v. Davila*, 184 Wn.2d 55, 69, 357 P.3d 636 (2015) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)).

To establish a *Brady* violation, a defendant must demonstrate the existence of all three elements. *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011). The State cannot avoid its *Brady* obligations by keeping itself ignorant of matters known to other State agents, but it has no duty to independently search for *Brady* evidence. *In re Pers. Restraint of Brennan*, 117 Wn. App. 797, 805, 72 P.3d 182 (2003). The court reviews alleged due process violations under *Brady* de novo. *Mullen*, 171 Wn.2d at 893.

CrR 8.3(b) empowers a court to dismiss an action when “due to arbitrary action or governmental misconduct” that prejudices the rights of the defendant, there has been a material effect on the “right to a fair trial.” The party seeking relief bears the burden of showing both misconduct and actual prejudice. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017); *State v. Brooks*, 149 Wn. App. 373, 384, 203 P.3d 397 (2009). The governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is enough. *Brooks*, 149 Wn. App. at 384 (citing *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980)).

However, dismissal is an extraordinary remedy. *State v. Rohrich*, 149 Wn.2d 647, 653, 71 P.3d 638 (2003). On appeal, the court reviews the trial court’s CrR 8.3(b) ruling for abuse of discretion. *State v. Michielli*, 132

Wn.2d 229, 240, 937 P.2d 587 (1997); *Brooks*, 149 Wn. App. at 384. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Michielli*, 132 Wn.2d at 240; *Brooks*, 149 Wn. App. at 384. “Where reasonable persons could take differing views regarding the propriety of the trial court’s actions, the trial court has not abused its discretion.” *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

Here, because the party seeking relief carries the burden of proof, defendant must articulate how the late disclosure of the evidence of the investigation of Det. Nolta materially prejudiced his defense. *See, e.g., Rohrich*, 149 Wn.2d at 649 (party must show “not merely speculative prejudice but actual prejudice”). He has not done so.

Defendant cannot establish the trial court abused its discretion in denying his motion to dismiss when the trial court held that the evidence at issue was not exculpatory and it was not impeaching because it was irrelevant based on the nature of the findings—that a mistaken understanding of policy and truthful admissions of that mistake does not equate to dishonest behavior, thus dismissal was unwarranted.

First, the evidence defendant claims prejudiced him would be inadmissible at trial under Evidence Rules 608, 403, and 401. As threshold requirements, evidence must meet relevance standards, and if relevant, must

then succeed in the balancing test of probative versus prejudicial effect. This evidence does neither.

Relevant evidence is evidence that tends 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. The information at issue is completely irrelevant to the case at hand; it involves police departmental policy violations, regarding an unrelated case and an unrelated person. The policy violation did not necessarily implicate dishonest behavior. *See* 7RP (08/24/18) 795-96. Thus, the evidence does not make any fact of consequence more or less likely to be true. Because the evidence cannot meet the threshold of relevance, the trial court properly denied defendant’s motion.

But even if the evidence was relevant, it was more prejudicial than it was probative under ER 403, where the evidence was completely unrelated to the case, had no bearing on a fact at issue, and it would have resulted in considerations of undue delay and confusion to the jury. The evidence would not have been admissible under ER 403, thus the trial court was right to deny defendant’s motion.

Again, even if the evidence was relevant *and* the probative value was not substantially outweighed by the danger of unfair prejudice, specific

instances of conduct cannot be proved by extrinsic evidence under ER 608.

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.

(Emphasis added). The evidence at issue is extrinsic and not probative of truthfulness or untruthfulness; it is thus inadmissible under ER 608.

Defendant argues that he could have cross-examined witnesses about the substance of the evidence at issue. Brief of Appellant, 14-15, 16. But, he fails to set forth in any way how he would have cross-examined witnesses about this issue, or to what end. "Failing to allow cross examination of a State's witness under ER 608 is an abuse of discretion only if the witness is crucial and the alleged misconduct constitutes the only available impeachment." *State v. Clark*, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001) (citing *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980)). As an initial matter, the trial court did not abuse its discretion in denying this motion because it ruled that the evidence at issue and the nature of the findings had no bearing on the detective's character for truthfulness or

untruthfulness. 7RP (08/24/18) 795-96 (“the admissions that were made after that mistaken interpretation all appear to be genuine and forthright. A mistake plus truthful admissions, to me, does not equate to dishonest behavior.”)

Moreover, the detective was not a “crucial” witness, and “the need for cross-examination on misconduct diminishes with the significance of the witness in the state’s case.” *State v. Robinson*, 44 Wn. App. 611, 622, 722 P.2d 1379 (1986). The detective’s testimony did discuss some of defendant’s inculpatory statements; however, that testimony was later corroborated and expanded upon by a senior officer—Det. Sgt. Thompson. The only non-corroborated evidence provided by Det. Nolta was testimony regarding a forensic analysis of defendant’s cellphones; evidence which defendant later used to *impeach the victim* and argue against her credibility in closing argument.

Finally, the information provided in the detective’s testimony—specifically the “inculpatory” statements that defendant need not force himself on women<sup>2</sup>—only pertained to the rape charge of which defendant was acquitted.<sup>3</sup> Accordingly, the detective was not a “crucial” witness in

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<sup>2</sup> 1RP (03/12/18) 25-26.

<sup>3</sup> To clarify, Det. Nolta introduced more of defendant’s statements at the CrR 3.5 hearing. 3RP (03/07/18) 227-251. But the majority of those statements were introduced at trial through Det. Sgt. Thompson. 1RP (03/12/18) 74-87.

this case, and any information provided was immaterial to defendant's actual *convictions*. And, because defendant was acquitted of the charge which the detective provided evidence for, the evidence at issue does not undermine the confidence in the verdicts rendered in this case. The evidence proving that defendant kidnapped, assaulted, and harassed M.T. was provided through the person who lived through it: M.T.

The evidence at issue was inadmissible under ER 401, 403, and 608. Because the information was inadmissible at trial, its late disclosure could not have prejudiced defendant. Moreover, the information only pertained to a witness who provided information on a charge that defendant was acquitted of. Therefore, the trial court did not abuse its discretion in denying defendant's CrR 8.3 motion. This Court should affirm.

Even under a *de novo* standard of review, this Court should find that the evidence does not constitute a *Brady* violation for the same reasons the trial court did. *See State v. Mullen*, 171 Wn.2d 881, 259 P.3d 158 (2011) (*Brady* claims are reviewed *de novo*). The evidence was not necessarily linked to dishonest behavior, it was inadmissible as a specific instance of conduct for impeachment purposes, and it was irrelevant. For the reasons set forth above, this Court should hold that the evidence was not material, and there was no *Brady* violation. This Court should affirm.

2. A JURY NEED NOT ELECT WHICH WEAPON IT RELIES ON FOR A DEADLY WEAPON ENHANCEMENT WHEN JURY UNANIMITY ONLY APPLIES TO MULTIPLE ACT CASES, AND BOTH WEAPONS MEET THE DEFINITION OF A DEADLY WEAPON.

Article I, section 21 of the Washington State Constitution gives criminal defendants the right to a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). See Wash. Cont. Art. I, § 22.

Thus, “[w]hen the prosecution presents evidence of multiple *acts* of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such *acts* is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal *act*.” *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) (emphasis added). See *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

Defendant challenges the deadly weapon enhancements for counts I, II, and IV, claiming that the enhancements violated his constitutional right to a unanimous jury verdict. However, a jury need not specify which deadly weapon it is relying on when making this finding. Defendant cites no authority to the contrary.

The statute that authorizes deadly weapon sentencing enhancements, RCW 9.94A.825, does not state that the *specific* weapon

used is an element the State must prove. There appears to be no binding case law in Washington that stands for this proposition.

Instead, in unpublished decisions, this Court has held that where a statute does not indicate that the use of a particular weapon is an element of a crime, a unanimity instruction is unnecessary. *State v. Oeung*, No. 46425-0-II, 2016 WL 7217270 at \*26 (Wash. Ct. App. September 27, 2016) (Challenging the State’s failure to elect which firearm supported firearm enhancements, this Court held *Petrich* instructions are unnecessary because that rule only applies to instances of multiple acts or alternative means of committing a crime); *State v. Blair*, No. 30961-4-III, 2013 WL 6244197 at \*2-3 (Wash. Ct. App. December 2, 2013) (“There are many potential deadly weapons, but only one method of committing this enhancement—being “armed” with a deadly weapon. There was no need for a unanimity instruction on this topic.”); *State v. Stephens*, No. 41904-1-II, 2013 WL 992285 at \*3 (Wash. Ct. App. March 12, 2013) (Because use of a particular deadly weapon is not an element of second degree assault with a deadly weapon, the jury is not required to unanimously agree on a particular weapon).<sup>4</sup>

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<sup>4</sup> Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

Accordingly, the jury need not elect which specific weapon it relied upon to find that defendant was armed with a deadly weapon when he kidnapped, assaulted, and harassed M.T.

Defendant seems to make a tacit sufficiency of the evidence argument regarding whether the taser defendant applied to M.T. met the definition of a deadly weapon. Brief of Appellant, 20. A machete is per se a deadly weapon, and the entire jury could have relied upon that weapon when it found the deadly weapon enhancement. However, the evidence was sufficient for the jury to conclude that the taser was an “instrument that 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.” CP 190. In a challenge of the sufficiency of the evidence, the evidence is viewed in the light most favorable to the State, and all reasonable inferences are drawn in favor of the State. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265-66, 401 P.3d 19 (2017). Further, the defendant admits the truth of all the State’s evidence. *Id.* at 265.

Here, the jury heard testimony that the taser was administered briefly to M.T.’s neck, and for a longer time to her stomach. The jury also heard testimony from the doctor that treated M.T. at the hospital, who stated

that the electricity from a taser, and the damage it does to tissue, depends on where the taser contact points were. 6RP (03/14/18) 624. And, that “electricity has a way of traveling through your body from one point to an exit point, so it can cause injury further inside as well.” 6RP (03/14/18) 624. Accordingly, in viewing the evidence in the light most favorable to the State, the jury could have reasonably concluded<sup>5</sup> that given the contact point of the taser—M.T.’s neck—and the nature of the instrument—a taser—that the taser could have inflicted death by proximity of the electricity to M.T.’s brain.

As such, the jury need not elect which weapon in defendant’s arsenal it relied upon to find he was “armed” with a deadly weapon at the time of his crimes. Regardless of whether it relied upon the machete or the taser, the evidence was sufficient to support the jury’s conclusion. Therefore, there was no error, and this Court should affirm.

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<sup>5</sup> Jurors are expected to utilize their common sense and the normal avenues of deductive reasoning in evaluating the evidence presented. *State v. Balisok*, 123 Wn.2d 114, 119, 866 P.2d 631 (1994).

E. CONCLUSION.

For the above stated reasons, the State requests this Court affirm defendant's convictions.

DATED: August 14, 2019.

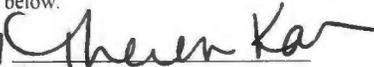
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8-14-19   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**August 14, 2019 - 10:10 AM**

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