

FILED  
Court of Appeals  
Division III  
State of Washington  
1/8/2018 3:03 PM

Court of Appeal No. 35114-9-III

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

---

STATE OF WASHINGTON,

Respondent,

v.

POLICARPO CRUZ-NAVA

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CHELAN COUNTY  
Cause No. 16-1-00232-4

The Honorable Judge T.W. Small

---

APPELLANT'S REPLY BRIEF

---

CATHY M. HELMAN, WSBA #43731  
Attorney for Appellant  
Burke Law Group, PLLC  
221 N. Wall Street, Suite 624  
Spokane, WA 99201  
(509)466-7770  
cathy@burkelg.com

TABLE OF CONTENTS

Table of Authorities ..... ii

A. Argument ..... 1

    1. There was insufficient evidence to support the conviction of Assault in the First Degree with a Deadly Weapon enhancement.. 1

    2. The court relied on unsupported facts when admitting Mr. Cruz-Nava’s alleged prior bad act(s) and the error was not harmless. .... 7

    3. The Court did not conduct an inquiry into Mr. Cruz-Nava’s present and future ability to pay legal financial obligations. .... 9

B. Conclusion ..... 10

Certificate of Service ..... 11

TABLE OF AUTHORITIES

WASHINGTON CASES

*In re Martinez*, 171 Wn.2d 354, 256 P.3d 277 (2011)..... 3

*State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 9

*State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002)..... 7

*State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1992)..... 1

*State v. Shilling*, 77 Wn. App. 166, 889 P.2d 948 (1995)..... 6

*State v. Skenandore*, 99 Wn. App. 494, 994 P.2d 291 (2000) ..... 1, 2, 5

*State v. Sorenson*, 6 Wash. App. 269, 492 P.2d 233 (1972)..... 3, 5

*State v. Taylor*, 97 Wn. App. 123, 982 P.2d 687 (1999)..... 3

RULES

ER 404(b)..... 7

OTHER CASES

*People v. Fisher*, 234 Cal.App.2d 189, 44 Cal.Rptr. 302 (1965) ..... 3

## A. ARGUMENT

### 1. There was insufficient evidence to support the conviction of Assault in the First Degree with a Deadly Weapon enhancement.

In reviewing a claim of insufficient evidence, the court determines “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Skenandore*, 99 Wn. App. 494, 498, 994 P.2d 291 (2000) (quoting *State v. Ortiz*, 119 Wn.2d 294, 311–12, 831 P.2d 1060 (1992) (quotations omitted)).

- i. *This case is distinguishable from State v. Barragan in that Mr. Cruz-Nava did **not** injure anyone with the knife.*

The State overlooked a crucial fact when they asserted that the “analysis [of the facts] is entirely similar to the facts of *Barragan*, where the defendant had attacked the victim with a pencil in a manner likely to seriously injure or kill and accompanied the attack with the promise, ‘You're gonna die.’” (Brief of Respondent at 6) (See *State v. Barragan*, 102 Wn. App. 754, 761-62, 9 P.3d 942 (2000)). The distinguishable factor is that no one was injured by Mr. Cruz-Nava’s wielding of the knife.

In *Barragan*, the court reviewed the evidence, which included the fact that the victim was injured in the attack, and concluded that:

**Due to the force of the attack** and the fact that Mr. Barragan accompanied it with the promise, “You're gonna die,” a

reasonable person could infer that Mr. Barragan intended to commit great bodily harm or death with the pencil. Expert testimony is unnecessary to prove the obvious fact that a pencil can put out an eye. And the testimony of the officer who **pulled out the embedded pencil**—describing it as like pulling out a nail with pliers—indicates that **while the actual injury was minor, it could have been serious** if not deflected from the eye. On the whole, the evidence is substantial that the pencil constituted a deadly weapon **under the circumstances of its use.**

*Id.* at 761-62 (emphasis added)

Unlike in *Barragan*, no wounds were inflicted on either Mr. Mateos-Rosas or Ms. Analco-Gutierrez while Mr. Cruz-Nava yielded the knife, making the only similarity between these cases the verbal threat.

This case has more similarities to *Skenandore*, where the weapon was yielded at a distance too far away from the intended victim to cause substantial bodily harm. *State v. Skenandore*, 99 Wn. App. 494, 994 P.2d 291 (2000).

Because of the significant disparity between this case and *Barragan*, we cannot use the determinations of the court in *Barragan* to establish that the in this case knife is a deadly weapon in fact.

ii. *The State did not establish that, under the circumstances in which it was used, the knife was a deadly weapon in fact.*

In order to be considered a deadly weapon, the knife must be shown to be a deadly weapon in fact, “namely ‘any other weapon, device,

instrument, article, or substance ... 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.” *In re Martinez*, 171 Wn.2d 354, 365, 256 P.3d 277 (2011) (quoting *State v. Taylor*, 97 Wn. App. 123, 126, 982 P.2d 687 (1999)).

“[U]se [of an implement] as a deadly weapon [is determined] by the surrounding circumstances, such as the intent and present ability of the user, the degree of force, the part of the body to which it was applied, and the physical injuries inflicted.” *State v. Sorenson*, 6 Wn. App. 269, 273, 492 P.2d 233 (1972) (quoting *People v. Fisher*, 234 Cal.App.2d 189, 193, 44 Cal.Rptr. 302 (1965)).

These criteria, when applied to this case, do not support the jury’s finding of a deadly weapon enhancement:

- 1) *Intent*- There is no evidence that Mr. Cruz-Nava intended to use the knife as a deadly weapon. He threw the knife down on the ground and never attempted to use it on Mr. Mateos-Rosas and/or Ms. Analco-Gutierrez. (RP 265-266)
- 2) *Present ability of the user*- Mr. Cruz-Nava did not have the ability to use the knife in a deadly manner. Mr. Mateos-Rosas kept Mr. Cruz-Nava at a distance with a chair, and Mr. Cruz-Nava was severely inebriated at the time of the incident.

- 3) *Degree of force* – There is no apparent degree of force used because the knife never made contact with a person. And, despite what the State asserts in their Response, Mr. Mateos-Rosas never stated that Mr. Cruz-Nava “lunged” the knife at him<sup>1</sup>. (Brief of Respondent at 6)
- 4) *Part of the body to which the implement was applied* – The knife was not applied to any part of the body.
- 5) *Physical injuries inflicted* – There were no injuries inflicted using the knife.

To justify a deadly weapon instruction, the State had to show that the pencil had both the inherent capacity to cause substantial bodily injury or death and that it was readily capable of causing such injury or death under the circumstances of its use. *Barragan*, 102 Wn. App. at 761.

Here, the State established only that the knife had the *inherent capacity* to cause substantial bodily injury or death, but this does not relieve the State of the burden of proving that the knife, as it was used in

---

<sup>1</sup> Mr. Mateos-Rosas testified that during the scuffle, Mr. Cruz-Nava “went like that” with the knife, but there is no indication what “that” meant. (RP 263) Mr. Mateos-Rosas was asked to demonstrate how Mr. Cruz-Nava held the knife and how he was coming at Mr. Mateos-Rosas with the knife, but there is no indication of what Mr. Mateos-Rosas demonstrated to the court. (RP 262-263) The use of the word “lunged” appears to be the State’s own interpretation of Mr. Mateos-Rosas’s testimony. (Brief of Respondent at 6)

this particular case, is a deadly weapon. The State is mistaken in asserting that “it is unnecessary to prove the obvious fact that knife [sic] can cause serious bodily harm of [sic] death.” (Brief of Respondent at 6). Despite what is implied by the State, “[b]y statutory definition, a ‘knife having a blade longer than three inches’ is a deadly weapon as a matter of law. But whether a knife with a blade of less than 3 inches is a deadly weapon is a question of fact.” *State v. Sorenson*, 6 Wn. App. 269, 273, 492 P.2d 233 (1972). The State was required to prove under the facts of the case that, under the circumstances in which it is used, attempted to be used, or threatened to be used, the knife was readily capable of causing death or substantial bodily harm.

The State’s argument is similar to its closing argument made in *Skenandore*, where the conviction of second degree assault with a deadly weapon was reversed on appeal. *Skenandore*, 99 Wn. App. at 494. The prosecutor in *Skenandore* argued that “[a] sharpened pencil in the eye could cause substantial bodily injury and that is the definition of deadly weapon.” *Id.* at 498. The *Skenandore* court noted that in some circumstances, the pencil spear might be shown to be a deadly weapon, but not as it was used in the case. *Id.* at 500-01. However, the spear never came near the victim’s eye. *Id.* at 500. Similarly here, the knife never

came close to Mr. Cruz-Nava's alleged victims. It was not shown to be a deadly weapon.

This case is not like *State v. Shilling*, 77 Wn. App. 166, 889 P.2d 948 (1995), where the evidence was "sufficient to support the determination that the bar glass had the ready capability under the circumstances to cause substantial bodily harm, and was a deadly weapon." *Id.* at 172. In *Shilling*, the victim was actually hit in the head with the glass, suffered injuries, and "expert testimony established that a blow to the head using the glass could fracture the nose and/or cause lacerations requiring stitches and producing permanent scarring." *Id.* Here, the victims were never injured with the knife, nor was there expert testimony to establish harm from the knife. The knife was not even directed at a part of the body.

Just because the weapon was a knife and knives can cause bodily injury does not establish the element that the knife was a deadly weapon. The State was required to prove beyond a reasonable doubt that, under the circumstances in which it is used, attempted to be used, or threatened to be used, the knife was readily capable of causing death or substantial bodily harm. It did not meet this burden.

iii. *It is irrelevant whether the jury acquitted Mr. Cruz-Nava of other charges.*

The jury acquitting Mr. Cruz-Nava on the counts of Rape in the Second Degree and Assault in the First Degree by HIV is not “evidence of the jury's careful consideration of all the evidence presented at trial.” (Brief of Respondent at 7) This is speculation, as the State is not privy to the mindset or thinking of the jury.

2. The court relied on unsupported facts when admitting Mr. Cruz-Nava's alleged prior bad act(s) and the error was not harmless.

For the Court to admit evidence under an exception to ER 404(b), it requires a four-step analysis: 1) the court must first find by a preponderance of the evidence that the event happened; 2) the court must then identify a purpose for admitting the evidence, other than propensity—the evidence must be relevant; 3) the court must conclude that the proffered evidence actually shows something other than propensity; 4) the court must weigh the probative value of the evidence against its potential prejudice to the defendant. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

In this case, the Court acknowledged that admitting the prior bad act would be prejudicial if the jury believed the witness, but claimed it would not be unfairly so because, as the Court was led to presume, it tied together with the couple's relationship. (RP 20) The State asserts that it sought to admit into evidence the alleged evidence of prior bad acts for

fear purposes. (Brief of Respondent at 1-2, 9) But this is not the purpose it gave in its pretrial motion regarding admitting the prior bad act. The State argued: “[W]e have actual acts that have occurred to this particular person, who can testify as to previous domestic violence incidents, both involving threats to kill, and also involving a knife, that are similar in this particular instance, and gives a greater level and greater credence to that fear that she experienced, that this has happened previously.” (RP 12-13)

Yet, when asked later in the trial for proof, there was no evidence offered that showed the alleged prior bad act involved either a threat to kill *or* a knife, as the State contended. Thus, the State misled the court and did not have a basis for admitting this prior bad act. It should have been excluded.

The fact that the jury acquitted Mr. Cruz-Nava on the charge of Rape in the Second Degree is not evidence that it was improperly influenced by such testimony, as the State argues. (Brief of Respondent at 10) Based on the testimony given, there was no sexual element in the alleged prior bad act. This alleged prior bad act would have had more of a potential impact on the jury’s view with regards to the domestic violence and assault charges, and not the rape charge.

When calculating Mr. Cruz-Nava’s offender score and recommended sentence length at the sentencing hearing a month and a

half after the trial, the State admitted that “there was no conviction data to be found, in California” for the alleged offence. (RP 460) The prior bad act should not have been admitted and doing so prejudiced the outcome of Mr. Cruz-Nava’s trial.

3. The Court did not conduct an inquiry into Mr. Cruz-Nava’s present and future ability to pay legal financial obligations.

The court did not look into Mr. Cruz-Nava’s future ability to pay legal financial obligations. While the trial court was “privity to the testimony provided regarding Mr. Cruz-Nava's ability to work in the past,” this does not establish that future circumstances would give Mr. Cruz-Nava the ability to pay. (Brief of Respondent at 11) Past work is in the past and does not establish his future ability. The Supreme Court ruled that the trial court has a statutory obligation to make an individualized inquiry into a defendant’s **current** and **future** ability to pay and to “consider important factors ... such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The trial court did not conduct an individualized inquiry that takes these factors into consideration.

B. CONCLUSION

The evidence fails to establish that the knife used by Mr. Cruz-Nava constituted a deadly weapon, and is thus insufficient to support Mr. Cruz-Nava's conviction for Assault in the First Degree with a Deadly Weapon. The State failed to establish that the knife was a deadly weapon or that Mr. Cruz-Nava acted with force or means likely to produce great bodily harm or death. The conviction and enhancement should be reversed.

Additionally, the trial court erred by allowing the State to present evidence of an alleged prior bad act of Mr. Cruz-Nava. This was not a harmless error. Remand for a new trial is appropriate for the remaining counts.

Last, the trial court failed to conduct an individual inquiry as to whether Mr. Cruz-Nava has the ability to pay his LFOs. Remand is appropriate for the trial court to conduct the proper inquiry.

Respectfully submitted this 8<sup>th</sup> day of January, 2018.

/s/ Cathy M. Helman  
Cathy M. Helman, WSBA # 43731  
Attorney for Appellant  
Burke Law Group, PLLC  
221 N. Wall St. Ste. 624  
Spokane, WA 99201  
Telephone: (509) 466-7770  
Fax: (509) 464-0463  
Email: Cathy@BurkeLG.com

CERTIFICATE OF SERVICE

The undersigned states the following under penalty of perjury under the laws of the State of Washington. On the date below, I personally e-filed and emailed and/or placed in the United States Mail the foregoing Appellant's Reply Brief with postage paid to the indicated parties:

1. Douglas J. Shae  
Attorney at Law  
PO Box 2596  
Wenatchee, WA 98807-2596  
douglas.shae@co.chelan.wa.us  
cindy.dietz@co.chelan.wa.us
  
2. Mr. Policarpo Cruz-Nava DOC # 397630  
c/o Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99326

Signed at Spokane WA, Washington on January 8, 2018.

/s/Cathy M. Helman  
Cathy M. Helman  
Counsel for Appellant  
Burke Law Group, PLLC  
221 N. Wall St. Ste. 624  
Spokane, WA 99201  
Telephone: (509) 466-7770  
Fax: (509) 464-0463  
Email: [Cathy@BurkeLG.com](mailto:Cathy@BurkeLG.com)

**BURKE LAW GROUP, PLLC**

**January 08, 2018 - 3:03 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35114-9  
**Appellate Court Case Title:** State of Washington v. Policarpo Cruz Nava  
**Superior Court Case Number:** 16-1-00232-4

**The following documents have been uploaded:**

- 351149\_Briefs\_Plus\_20180108150121D3319411\_8077.pdf  
This File Contains:  
Affidavit/Declaration - Service  
Briefs - Appellants Reply  
*The Original File Name was 06 Reply Brief - Cruz-Nava.pdf*

**A copy of the uploaded files will be sent to:**

- cindy.dietz@co.chelan.wa.us
- douglas.shae@co.chelan.wa.us
- nicole.hankins@co.chelan.wa.us
- prosecuting.attorney@co.chelan.wa.us

**Comments:**

---

Sender Name: Stephanie Burke - Email: stephanie@burkelg.com

**Filing on Behalf of:** Cathy Madere Helman - Email: cathy@burkelg.com (Alternate Email: stephanie@burkelg.com)

Address:  
221 N Wall St  
Suite 624  
Spokane, WA, 99201  
Phone: (509) 466-7770 EXT 107

**Note: The Filing Id is 20180108150121D3319411**