

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

AMENDED APPELLANT'S OPENING BRIEF

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A. SUMMARY OF THE ARGUMENT

Policarpo Cruz-Nava appeals his convictions for one count of Second Degree Assault, two counts of Felony Harassment, one count of First Degree Assault, and his domestic violence and deadly weapon enhancements. First, the evidence is not sufficient to support the jury's verdict for First Degree Assault, namely that Mr. Cruz-Nava was armed with a deadly weapon or used force or means to likely to produce great bodily harm. The knife, under three inches, was not used in the manner necessary to make it a deadly weapon.

Second, the trial court abused its discretion in admitting evidence of a prior act of Mr. Cruz-Nava, as regulated by ER 404(b). The prior domestic abuse incident was not supported by a preponderance of the evidence, was not relevant for the purpose asserted by the State, and was prejudicial to Mr. Cruz-Nava. The error was not harmless.

Finally, the trial court erred by imposing legal financial obligations (LFOs) on Mr. Cruz-Nava without doing an individual inquiry as to whether he had the ability to pay.

The conviction for first degree assault should be reversed and dismissed and the remaining convictions and LFOs reversed and remanded to the trial court for further proceedings.

B. ASSIGNMENTS OF ERROR

1. The appellant's conviction for Assault in the First Degree with a deadly weapon enhancement is not supported by the evidence.
2. The trial court abused its discretion in admitting evidence of an alleged prior bad act of the appellant, contrary to ER 404(b).
3. The trial court erroneously imposed legal financial obligations on the appellant without inquiring whether he had the ability to pay.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Whether the any rational trier of fact could have found beyond a reasonable doubt that the appellant committed the crime of First Degree Assault by deadly weapon or by force or means likely to produce great bodily harm when the knife used was not 3 inches long and the circumstances in which it was used did not establish that it was capable of substantial or great bodily injury.
2. Whether the trial court erred by admitting evidence contrary to ER 404(b) when the alleged prior bad act was not supported by a preponderance of the evidence, was not relevant for the purpose offered by the State, and was clearly prejudicial due to the weak and inconsistent testimony used to find the appellant guilty.

3. Whether the trial court's failure to conduct an individual inquiry regarding the appellant's ability to pay legal financial obligations requires remand, in light of *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680 (2015).

C. STATEMENT OF THE CASE

On January 20, 2017, a Chelan County jury found Mr. Policarpo Cruz-Nava guilty of Assault in the Second Degree with a domestic violence enhancement (Count 2), two counts of Felony Harassment with one domestic violence enhancement (Counts 3 & 5), and Assault in the First Degree with a deadly weapon enhancement (Count 6). Mr. Cruz-Nava appeals.

In March 2016, Mr. Cruz-Nava and Maribel Analco-Gutierrez lived together in Wenatchee, Washington. (RP 54-55) The couple became romantically involved about ten years earlier while they both were in California. (RP 24, 88-89) At some point during the relationship, Mr. Cruz-Nava became aware he was HIV-positive. (RP 161) The couple remained intimate, but took protective measures during intercourse. (RP 54-55)

For three weekends straddling March and April 2016, Mr. Cruz-Nava invited his friend, Hugo Mateos-Rosas to his house for dinner and drinking. (RP 56-57) Mr. Cruz-Nava and Mr. Mateos-Rosas knew each

other from work. (RP 55-56) On the first weekend, the men ate dinner prepared by Ms. Analco-Gutierrez and drank alcohol, about 20 cans of beer each. (RP 233, 303) Mr. Mateos-Rosas was unable to drive home and slept on the couch at Mr. Cruz-Nava's home that night. (RP 233-34) Mr. Cruz-Nava suggested that Ms. Analco-Gutierrez should have sex with Mr. Mateos-Rosas because he was a good person, but Ms. Analco-Gutierrez testified at trial that this did not occur.¹ (RP 93-99)

On the second weekend, Mr. Cruz-Nava texted Mr. Mateos-Rosas and asked him to come over again for dinner and drinking. (RP 235, 305) Mr. Mateos-Rosas had already agreed to go and didn't respond. (RP 305) Ms. Analco-Gutierrez and Mr. Cruz-Nava went to see Mr. Mateos-Gutierrez at a restaurant to ask him in person to come to the home.² (RP 306, 309) Mr. Mateos-Rosas ultimately agreed. That night he and Mr. Cruz-Nava drank about 20 beers each. (RP 237) At some point, Ms. Analco-Gutierrez went to bed. About 3:00 am, Mr. Mateos-Rosas laid down to sleep on the couch again. (RP 238) Mr. Cruz-Nava invited Mr. Mateos-Rosas to lay in bed with him and Ms. Analco-Gutierrez, and he agreed. (RP 239, 311) Mr. Mateos-Rosas was very intoxicated. (RP 61)

¹ This contradicts statements she gave to police during an interview, which was recognized by defense counsel at trial. (RP 93-99)

² This contradicts Ms. Analco-Gutierrez's testimony that she only met Mr. Mateos-Gutierrez when he came to her home. (RP 56)

After some encouragement and help from Mr. Cruz-Nava, Mr. Mateos-Rosas and Ms. Analco-Gutierrez had sex. (RP 65, 243-44, 311-13, 329) Mr. Mateos-Rosas left and regretted the event. (RP 247)

The alleged offenses occurred on third weekend, around April 2nd and 3rd, 2016. (RP 68) Earlier in the week, Mr. Cruz-Nava again invited Mr. Mateos-Rosas over for dinner and drinking. Mr. Mateos-Rosas refused, but changed his mind when Mr. Cruz-Nava said that nothing was going to happen. (RP 248-49) Ms. Analco-Gutierrez also texted Mr. Mateos-Rosas to come over. (RP 315)

On Saturday night, Mr. Mateos-Rosas went to the house around 5:30 or 6:00 pm. (RP 314) The two men ate and had a lot to drink, about 20 cans of beer each and a bottle of tequila. (RP 68, 71, 248) Ms. Analco-Gutierrez went to bed around 1:30 am. (RP 70)

According to Ms. Analco-Gutierrez, at about 3:00 am on Sunday, Mr. Cruz-Nava and Mr. Mateos-Rosas went into Ms. Analco-Gutierrez's room. (RP 71) Both men were drunk. (RP 72) Mr. Cruz-Nava encouraged Ms. Analco-Gutierrez and Mr. Mateos-Rosas to have sex, but Ms. Analco-Gutierrez did not want to participate. (RP 72) Mr. Cruz-Nava was angry and grabbed Ms. Analco-Gutierrez by the neck and said he was going to kill her. (RP 72) Ms. Analco-Gutierrez was scared. (RP 72) Mr. Mateos-Rosas tried to pull Mr. Cruz-Nava away. (RP 73)

Mr. Cruz-Nava left the bedroom and went into the kitchen and got a knife. (RP 73) Mr. Mateos-Rosas followed him. (RP 74) Ms. Analco-Gutierrez stayed in the bedroom and could not see into the kitchen, but could hear. (RP 75) Mr. Cruz-Nava said that he was going to kill Ms. Analco-Gutierrez and to call the cops. (RP 75) She said that Mr. Cruz-Nava came into the room with the knife and closed the bedroom door, while Mr. Mateos-Rosas stayed in the living room. (RP 76) Mr. Mateos-Rosas left around 5:00 pm. (RP 79, 83) After Mr. Cruz-Nava fell asleep, Ms. Analco-Gutierrez left the home and reported the incident to the police. (RP 79, 86)

Mr. Mateos-Rosas gave his version of events. He testified that on the third weekend, at about 3:00 am, he went to lay down on the couch. (RP 253) Mr. Cruz-Nava invited him into the bedroom and he eventually agreed. (RP 253, 316) Mr. Cruz-Nava asked both Mr. Mateos-Rosas and Ms. Analco-Gutierrez to take off their clothes. (RP 254) When the two repeatedly refused, Mr. Cruz-Nava became upset. (RP 255) He grabbed Ms. Analco-Gutierrez by the neck. (RP 256) Mr. Mateos-Rosas removed Mr. Cruz-Nava's hands from Ms. Analco-Gutierrez. (RP 259) Mr. Cruz-Nava threw punches toward Ms. Analco-Rosas, with one hitting her and one hitting Mr. Mateos-Rosas. (RP 259-60) Mr. Cruz-Nava looked like his eyes were popping out. (RP 260) Mr. Mateos-Rosas tried to calm Mr.

Cruz-Nava and followed him out of the bedroom. (RP 260) Mr. Mateos-Rosas testified that it was Ms. Analco-Gutierrez and Mr. Cruz-Nava who were doing the fighting. (RP 319)

Mr. Cruz-Nava went to the kitchen and grabbed a knife out of the drawer. (RP 260-61) Mr. Mateos-Rosas grabbed a folding chair to keep Mr. Cruz-Nava from getting too close. (RP 261-62) Mr. Mateos-Rosas was nervous and still trying to calm Mr. Cruz-Nava, which worked somewhat. (RP 262) Mr. Cruz-Nava said that he was going to kill both Mr. Mateos-Rosas and Ms. Analco-Gutierrez. (RP 262) Mr. Cruz-Nava reached the knife up and pressed the knife harder in his hand.³ (RP 263) Mr. Mateos-Rosas kept Mr. Cruz-Nava at a distance because he thought Mr. Cruz-Nava could stab him with the knife. (RP 263) Mr. Mateos-Rosas was scared. (RP 266) The house was very small and Mr. Mateos-Rosas kept backing up into the living room. (RP 265, 271) Mr. Mateos-Rosas told Mr. Cruz-Nava not to do anything regrettable. (RP 263) Mr. Mateos-Rosas grabbed Mr. Cruz-Nava's hand and loosened the knife. (RP 263) Mr. Cruz-Nava calmed down. (RP 263)

Mr. Cruz-Nava threw the knife into the kitchen. (RP 265) It was only at this point that Mr. Mateos-Rosas could tell what the knife looked

³ 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)

like. (RP 321) Mr. Mateos-Rosas sat on the couch to put on his shoes, keeping his eye on Mr. Cruz-Nava. (RP 266) He was afraid Mr. Cruz-Nava was going to hit him, so he made an excuse to leave the house and left before tying his shoes. (RP 280) Mr. Cruz-Nava apologized to Mr. Mateos-Rosas. (RP 278)

Mr. Cruz-Nava followed Mr. Mateos-Rosas outside and Mr. Mateos-Rosas got into his car. (RP 280-81) Mr. Cruz-Nava looked angry again and insisted that Mr. Mateos-Rosas go back inside. (RP 281-82) Mr. Mateos-Rosas rolled down his window and Mr. Cruz-Nava caressed the back of Mr. Mateos-Rosas head. (RP 323) Mr. Mateos-Rosas eventually left.

Mr. Mateos-Rosas did not call the police, but three weeks later went to the police station when he heard that the police were looking for him. (RP 282-83, 323) In exchange for his testimony, Mr. Mateos-Rosas was given immunity from any criminal liability related to events that occurred over the three weekends, including rape. (RP 299-300)

The Wenatchee Police Department investigated. (RP 176, 179) Detective Seth Buhler went to Mr. Cruz-Nava's home. Ms. Analco-Gutierrez located the green-handled knife used during the altercation. (RP 184) Detective Buhler took a picture of the knife and left it at the scene. (RP 185)

At trial, the State sought to introduce Ms. Analco-Gutierrez's testimony regarding an alleged domestic violence incident in California where Mr. Cruz-Nava pulled a knife, threatened to kill her, and was arrested for the incident. (RP 8) The State asserted that the act was being offered to show Ms. Analco-Gutierrez's state of fear and belief that Mr. Cruz-Nava's threats would be carried out due to his prior acts with the knife, as well as Mr. Cruz-Nava's modus operandi. (RP 9, 14) The State claimed that a knife was used in the incident, but it produced no record of the incident. Instead, the State informed the court that the NCIC showed an arrest and citation in May 2009 for Corporal Injury to a Spouse or Cohabitant. (RP 8, 18-19) Defense counsel objected to its admission under ER 404(b) and because there was no proof of the prior incident or that it involved a knife. (RP 10-12, 16-19)

The court limited Ms. Analco-Gutierrez's testimony to the one incident that resulted in the arrest. (RP 19) The court found that a preponderance of evidence supported the occurrence of the domestic violence incident with the knife and arrest. (RP 16) The trial court also found that the evidence was relevant to the harassment charge and Ms. Analco-Gutierrez's state of mind. (RP 15) Last, the court found that the evidence of the act was not unfairly prejudicial. (RP 20)

When it came time for the testimony regarding the act, Ms. Analco-Gutierrez said that in May 2009, she was hit with a stove grill by Mr. Cruz-Nava. (RP 26-28) She never stated that Mr. Cruz-Nava was arrested or that a knife was used in the incident. (RP 26-28)

Detective Buhler provided testimony regarding the knife allegedly used by Mr. Cruz-Nava on the third weekend. When shown the picture, he guessed the knife was about 2-3 inches, maybe longer. (RP 185) Defense counsel questioned Detective Buhler as to why the knife was not seized if it was involved in a serious violent offense. (RP 189) Detective Buhler said the decision was made to take a picture and leave the knife, but admitted that having a photograph was not the same thing as physically having it. (RP 189)

On the second to last day of trial, Ms. Analco-Gutierrez brought in the knife allegedly used during the altercation on the third weekend. (RP 381) Ms. Analco-Gutierrez kept the knife in her kitchen after the detectives photographed it. (RP 381) The State presented the knife at trial. (RP 383, 387) Detective Buhler measured the knife for the first time while on the witness stand. (RP 389) The knife measured 2 15/16th inches. (RP 389-90)

The jury found Mr. Cruz-Nava guilty of four of the six counts charged, including Second Degree Assault by strangulation or suffocation

of Ms. Analco-Gutierrez, with a domestic violence enhancement; Felony Harassment for the threat to kill Ms. Analco-Gutierrez, with a domestic violence enhancement; Felony Harassment for the threat to kill Mr. Mateos-Rosas; and First Degree Assault of Mr. Mateos-Rosas with a deadly weapon or by force or means likely to produce great bodily harm, with a deadly weapon enhancement. (CP 71-74, 113-123) The jury found Mr. Cruz-Nava not guilty of First Degree Assault of Ms. Analco-Gutierrez by HIV exposure; and Second Degree Rape of Ms. Analco-Gutierrez. (CP 71-74, 113, 117)

At sentencing, the State informed the court that it contacted the California court clerk of court in regard to the issue at trial, meaning the “possibility, of an offense – a domestic violence offense” that occurred in 2009. (RP 460) The State attempted to get conviction data on that case, but there was “no conviction data to be found, in California.” (RP 460) Mr. Cruz-Nava had no prior criminal history. (RP 462) The court sentenced Mr. Cruz-Nava to 156 months confinement. (CP 135)

The trial court also checked the box on the judgment and sentence that Mr. Cruz-Nava had the ability or likely future ability to pay the legal financial obligations (LFOs) imposed by the court. (CP 134) At sentencing, the court noted Mr. Cruz-Nava’s prior ability to work and ordered his LFOs payable at \$35.00 a month after his sentence was

completed. (RP 467) The court imposed \$1250.00 in LFOs, plus any restitution and additional legal financial obligations to be assessed at a later date. (CP 136-37, RP 467) A total of \$879.74 of the LFOs were discretionary costs (\$200.00 criminal filing fee, \$114.84 in witness fees, \$115.00 domestic violence assessment fee, and \$450.00 in attorney fees.) (CP 136, 148-49)

Mr. Cruz-Nava appeals. First, the State did not prove beyond a reasonable doubt that Mr. Cruz-Nava committed first degree assault or the deadly weapon enhancement. Specifically, the evidence is not sufficient to establish that the knife was a deadly weapon or that Mr. Cruz-Nava acted by force or means likely to produce great bodily harm or death. Second, the trial court abused its discretion in admitting evidence of an alleged prior bad act of Mr. Cruz-Nava. The evidence materially affected the outcome of trial, within reasonable probabilities, considering the weak and inconsistent testimony of the alleged victims. Last, the court erred by imposing legal financial obligations without considering Mr. Cruz-Nava's ability to pay.

D. ARGUMENT

1. There was insufficient evidence to support Mr. Cruz-Nava's conviction for assault in the first degree and deadly weapon

enhancement because the knife was not used by Mr. Cruz-Nava in a manner that would make it a deadly weapon

In a criminal prosecution, due process requires the State to prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Cr. 1068, 25 L.Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 821, 874-75, 83 P.3d 970 (2004). A claim of insufficiency of the evidence admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Id.* Thus, the pertinent question on appeal is whether any rational trier of fact could have found the essential elements of the crime after viewing the evidence in the light most favorable to the State. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d 114 (2006). When there is substantial evidence, and when the evidence is of such a character that reasonable minds may differ, it is the function and the province of the jury to weigh the evidence, determine the credibility of the witnesses, and decide the questions of fact. *Id.* If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143.

A person is guilty of assault in the first degree if he or she, with intent to inflict bodily harm, assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death. RCW 9A.36.011(1)(a). The three alternative means to commit first degree assault under this subsection are (1) Firearm, (2) deadly weapon, and (3) by force or means likely to produce great bodily harm or death. *State v. Gallo*, 20 Wn. App. 717, 730, 582 P.2d 558 (1978). Mr. Cruz-Nava's jury instruction contains the second two alternative means. (CP 101)

Deadly weapon element: Mr. Cruz-Nava contends that the State failed to produce sufficient evidence that the knife was deadly weapon. A "deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any 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. RCW 9A.04.110(6). "This definitional statute creates two categories of deadly weapons: deadly weapons per se, namely 'any explosive or loaded or unloaded firearm' and deadly weapons 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)).

If an item is not a weapon per se, the inherent capacity and “the circumstances in which it is used” determines whether the item is deadly. *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995).

“Circumstances include “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. *Id.* “Ready capability is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm.” *Id.*

Substantial bodily harm is bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part. RCW 9A.04.110(4)(b).

A knife, especially one under three inches, is not a deadly weapon per se. *In re Martinez*, 171 Wn.2d at 365. Whether a knife shorter than 3 inches is a deadly weapon is a question of fact to be determined by the jury. *State v. Taylor*, 97 Wn. App. 123, 126, 982, P.2d 687 (1999).

In *State v. Cobb*, 22 Wn. App. 221, 589 P.2d 297 (1978), the court held that the State presented sufficient evidence of a deadly weapon where a knife with less than a three-inch blade produced a cut over the sternum

bone, a cut to the forehead, and a cut in the muscle of the left arm. *Cobb*, 22 Wn. App. at 223. Although these injuries were not life threatening, we reasoned that a reasonable jury could have found that the knife was a deadly weapon in part because it could “inflict a penetrating wound to the chest cavity and endanger major structures.” *Id.* at 223-24.

Likewise, in *State v. Thompson*, 88 Wn.2d 546, 564 P.2d 323 (1977), the defendant used a pocketknife with a blade two to three inches in length to assault the victim during a robbery. The defendant held the knife against the victim's neck, and the victim sustained bruises on her right arm and a cut on her neck. *Id.* at 550. Given these circumstances of the knife's use, our Supreme Court held that the jury could have properly found that the knife was a deadly weapon. *Id.*

In comparison, in *State v. Skenandore*, 99 Wn. App. 494, 994 P.2d 291 (2000), the defendant attacked a corrections officer with a homemade spear. *Id.* at 496. The spear was “two-and-one-half feet to three feet long, fashioned from writing paper rolled into a rigid shaft bound with dental floss, affixed to a golf pencil.” *Id.* The court noted that, under some circumstances, the pencil spear might be shown to be a deadly weapon. *Id.* at 500. For example, the spear could have inflicted serious bodily harm had it pierced the officer's eyes. *Id.* But, from where Skenandore was standing, he was unable to reach the officer's head with the spear. *Id.*

Thus, “the surrounding circumstances inhibited the spear's otherwise potential, but unproven, ready capability to inflict substantial bodily harm.” *Id.*

Here, the knife was not a deadly weapon. The knife was not a dangerous weapon per se because it was under three inches long. Additionally, the evidence does not support a finding that the knife was a deadly weapon under the circumstances in which it was used. While Mr. Cruz-Nava may have verbally expressed an intent to do harm and Mr. Mateos-Rosas was scared, Mr. Cruz-Nava did not try to inflict any injury, much less one that meets the definition of a substantial bodily injury. Mr. Cruz-Nava did not use the degree of force or apply or attempt to apply the knife to any part of Mr. Mateos-Rosas’s body.

Unlike in *Cobb* and *Thompson*, Mr. Cruz-Nava never injured Mr. Mateos-Rosas with the knife. Nor did he even attempt to cut him with the knife. Mr. Mateos-Rosas never claimed that Mr. Cruz-Nava thrust the knife toward him, even though Mr. Mateos-Rosas was in a small room with Mr. Cruz-Nava and was close enough to him to knock the knife out of Mr. Cruz-Nava’s hand. The most that can be gleaned from the testimony is that Mr. Cruz-Nava grasped the knife firmly, reached the knife up, and pressed the knife harder in his own hand.

It is questionable whether Mr. Cruz-Nava even had the ability to use the knife as a deadly weapon, given his intoxicated nature after drinking 20 cans of beer and sharing a bottle of tequila. While Mr. Cruz-Nava may have been angry and made threats toward Mr. Mateos-Rosas, he did not use the knife in a manner that would cause death or substantial bodily harm.

This case is more akin to *Skenandore*. . Mr. Skenandore and Mr. Cruz-Nava both expressed intent to cause injury, but this was not enough. Also, the knife, like the spear, could have been a deadly weapon if Mr. Cruz-Nava had used it as such, but he did not. The surrounding circumstances, including Mr. Cruz-Nava's actions and inebriated state, hindered the knife's possibility of inflicting substantial bodily harm.

Given these circumstances of the knife's use, the evidence is not sufficient to support a conclusion that the knife was a deadly weapon that was used in a manner readily capable of causing substantial bodily harm.

Force or means likely to produce great bodily harm or death element: For the same reasons above, the evidence is insufficient to prove the alternative element of first degree assault, that Mr. Cruz-Nava used force or means likely to produce great bodily harm or death.

“Great bodily harm” means bodily injury that creates a probability of death, or that causes significant permanent disfigurement, or that caused

significant loss or impairment of the function of any bodily part or organ. RCW 9A.01.110(4)(c). In absence of a firearm or weapon, first degree assault can be supported by other means, such as a kick or blow with a fist. *State v. Pierre*, 108 Wn. App. 378, 384, 31 P.3d 1207 (2001).

There was no indication from the trial testimony that Mr. Cruz-Nava moved in a manner that put Mr. Mateos-Rosas in danger of permanent disfigurement, or impairment of a bodily function or organ. Mr. Cruz-Nava did not use force or any other means on Mr. Mateos-Rosas. Mr. Cruz-Nava did not inflict or attempt to inflict injury when holding the knife. There was no likelihood that Mr. Cruz-Nava's acts would produce great bodily injury. There is no testimony that Mr. Mateos-Rosas was ever in danger of death, permanent disfigurement, or significant loss to any part of the body.

Deadly weapon enhancement: For purposes of the special verdict, 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. RCW 9.94A.825. Just as above, Mr. Cruz-Nava did not act in a manner that was likely to produce Mr. Mateos-Rosas's death. Mr. Cruz-Nava did not strike or attempt to strike Mr. Mateos-Rosas with the knife.

Without some action on Mr. Cruz-Nava's part aside from holding up the knife, the evidence does not support the conclusion that the knife was used in a manner to support the deadly weapon element for First Degree Assault or the deadly weapon enhancement. Mr. Cruz-Nava did not have a deadly weapon per se or under the circumstances, nor did he use force or means necessary to inflict great bodily harm on Mr. Mateos-Rosas. The convictions for first degree assault and related sentence enhancement should be dismissed.

2. ER 404(b) prohibited the admission of the alleged prior bad act because the event occurrence was not supported by a preponderance of evidence and the ultimate testimony of the witness did not comport with the reason the State offered for using the evidence

The trial court erred by allowing evidence of prior bad acts by Mr. Cruz-Nava because the acts alleged by the State did not occur in the manner that the State offered them. Additionally, the evidence was overly prejudicial.

On appeal, the admission of evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The trial court abuses its discretion when its

decision is manifestly unreasonable or rests on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

The admission of ER 404(b), or prior bad acts, evidence requires a four-step analysis. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). First, the court must first find by a preponderance of the evidence that the event happened. *Id.* Second, the court must then identify a purpose for admitting the evidence, other than propensity; the evidence must be relevant. *Id.* Third, the court must conclude that the proffered evidence actually shows something other than propensity. *Id.* Finally, the court must weigh the probative value of the evidence against its potential prejudice to the defendant. *Id.*

“ER 403 requires the exclusion of evidence, even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice.” *State v. Wilson*, 144 Wn. App. 166, 176, 181 P.3d 887 (2008).

Here, the court erroneously found that a preponderance of the evidence supported the occurrence of the 2009 knife incident, as described

by the State. The NCIC report showed an arrest for an incident in 2009, but there was no evidence of who was involved in the incident or if it involved a knife. This was not a preponderance of evidence to conclude the event occurred. Indeed, when it came time for sentencing, the State could not find a conviction or citation for the incident. Moreover, when testifying about the 2009 incident, Ms. Analco-Gutierrez did not mention a knife or that Mr. Cruz-Nava was arrested, making the State's reason and the trial court's basis for admitting the supposedly similar act irrelevant. The incident was not supported by preponderance of evidence and should not have been admitted.

Also, evidence was not relevant and was unfairly prejudicial to Mr. Cruz-Nava. Mr. Cruz-Nava never threatened to kill her in the earlier incident, or used a knife. Also, the 2009 incident was old—it happened 5 years before the 2016 incident—and did not show a pattern of domestic violence. Instead, the incident prejudiced Mr. Cruz-Nava because it simply showed a prior bad act by Mr. Cruz-Nava.

The trial court's error in admitting the evidence was not harmless. An erroneous ruling is not reversible error unless the court determines that, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). Improper

admission of evidence constitutes harmless error if the evidence is of minor significance when compared with the evidence as a whole. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

The admission of the prior bad act that was not supported by a preponderance of the evidence was not of minor significance. There is a reasonable probability that testimony of the alleged prior bad act influenced the jury and materially affect the outcome. The testimony of the witnesses was the only evidence that Mr. Cruz-Nava committed the charged offenses. Thus, statements made by Ms. Analco-Gutierrez were crucial to the ultimate determination by the jury. The prior bad act, introduced at the beginning of trial by Ms. Analco-Gutierrez, improperly tarnished Mr. Cruz-Nava's character and set the stage for the jury to assume guilt on the crimes charged.

Furthermore, it is difficult to conclusively determine that the jury relied on other evidence to support Mr. Cruz-Nava's convictions. The inconsistent testimony⁴ of the witnesses makes it hard to conclude what evidence the jury trusted in making its decision. The jury did not accept all testimony, considering that they found Mr. Cruz-Nava not guilty of two of the six counts. Within reasonable probabilities, the outcome of the trial

⁴ The inconsistency issue was recognized by both the State and defense counsel. (RP 66, 93-99, 119-120, 243-45, 253, 273-74, 306-07, 312-313, 321, 330-34)

would have been materially affected had the testimony not been presented, considering the limited evidence of the crimes and the contradictory testimony in the record.

The trial court abused its discretion by admitting unsupported evidence that was not relevant for the purpose of showing Mr. Cruz-Nava's pattern of domestic violence. The evidence was prejudicial as it set the stage for Mr. Cruz-Nava's character. The error was not harmless, within reasonable probabilities, considering the ability it had to influence the jury. Remand and retrial is necessary for the remaining counts.

3. The trial court did not conduct an individual inquiry into whether Mr. Cruz-Nava had the current or future ability to pay before imposing the legal financial obligation

Mr. Cruz-Nava challenges the trial court's imposition of LFOs and requests review under RAP 2.5 and *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680 (2015).

Under RCW 10.01.160(3), courts may not order a defendant to pay discretionary "costs unless the defendant is or will be able to pay them," taking into account "the financial resources of the defendant and the nature of the burden that payment of costs will impose." The failure of trial courts to adhere to this statutory limitation and make the required

finding results in great injustice, and appellate courts may use their discretion to review such errors, even when those errors are unpreserved.

Blazina, 182 Wn.2d at 834-37.

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors ... such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id. at 838.

Here, the trial court did nothing more than to note that Mr. Cruz-Nava worked before being incarcerated. The court did not look at Mr. Cruz-Nava's other debts, including restitution, or the effect incarceration would have on his financial status and ability to find a job when released. Nor did the trial court ask Mr. Cruz-Nava about his ability to repay his LFOs. However, the court still found Mr. Cruz-Nava could pay LFOs and ordered repayment. The trial court's inquiry was insufficient. Remand is appropriate for the trial court to conduct a proper review to support a finding under RCW 10.01.160(3).

E. CONCLUSION

The evidence is insufficient to support Mr. Cruz-Nava's conviction for Assault in the First Degree. 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 15th day of August, 2017.

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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 Amended Appellant's Opening Brief with postage paid to the indicated parties:

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