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No. 35114-9-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 16-1-00232-4

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

POLICARPO CRUZ NAVA,
Defendant/Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

1. The conviction for Assault in the First Degree with a Deadly Weapon is supported by the evidence.
2. The trial court did not abuse its discretion by allowing evidence under 404(b) and even if the court did abuse its discretion, the error is harmless.
3. The trial court did not error when it considered the appellant's work history in determining his ability to pay financial obligations.
4. The appellant's statement of additional grounds lacks merit and support from the record.

B. STATEMENT OF THE CASE

The State accepts the recitation of the case provided by the appellant with minimal exceptions. The State, by pretrial motion outside the presence of the jury, sought to introduce evidence of prior bad acts under ER 404(b) as to a prior incident between Ms. Analco-Gutierrez and Mr. Cruz-Nava in California. RP 9. The State argued that the previous event of domestic violence was evidence of her reasonable fear that the threats of death or bodily harm would be

carried out in the charges of harassment but also to the allegations of forcible compulsion alleged in the charge of rape. RP 9. The trial court ruled the prior domestic violence incident in California to be material to the case at hand, proved by a preponderance of the evidence, and that the probative value outweighed any prejudice under ER 403. RP 17-20.

During the trial Mr. Mateos-Rosas testified that during the third weekend altercation with Mr. Cruz Nava he grabbed a chair to keep Mr. Cruz-Nava from coming at him and stated, "I'm going to kill you both." RP 261-263. He went on to testify, "I wouldn't let him get close to me. I had—I kept him at a distance, with the chair, so that he wouldn't get close to me. Because I thought, at that moment, that, yes, he could stab us with the knife." RP 263. He testified that Mr. Cruz-Nava was only a few feet away from him. RP 264. When repeatedly asked to confirm details about whether or not Mr. Cruz-Nava was coming at him with the knife, he consistently answered "Yes" in response. RP 261-266.

Mr. Mateos-Rosas testified that he worked with Mr. Cruz-Nava at Blue Star Packing at the time of the offense. RP 229-232.

Mr. Cruz-Nava was ultimately convicted after jury trial of Assault Second Degree Domestic Violence, Felony Harassment, Felony Harassment Domestic Violence, and Assault in the First Degree with a Deadly Weapon. He was acquitted of Assault in the First Degree by HIV and Rape in the Second Degree. RP 446-449. At Mr. Cruz-Nava's sentencing, the court individually addressed Mr. Cruz-Nava's previous ability to work when considering his ability to pay legal financial obligations. RP 467. The court also assessed his financial obligation at \$35.00 per month to commence sixty days after the completion of sentence. RP 467.

C. ARGUMENT

1. There was sufficient evidence to support the appellant's conviction for Assault in the First Degree with a Deadly Weapon.

A review of the sufficiency of the evidence asks 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. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013) (quoting State v. Benzivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999)); State v. Green, 94 Wn.2d 216, 220-

22, 616 P.2d 628 (1980). By challenging the sufficiency of the evidence, Mr. Cruz-Nava, “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Equal weight is given to both direct and circumstantial evidence during a review of the sufficiency of the State’s evidence and either type of evidence may sustain a conviction. Kintz, 169 Wn.2d at 551. The State bears the burden of proving all elements of a crime beyond a reasonable doubt. State v. Teal, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). The question is whether, assuming the truth of the State's evidence, the knife qualified as a deadly weapon within the statutory meaning, a legal question that we review de novo. State v. McCormack, 117 Wn.2d 141, 143, 812 P.2d 483 (1991).

An instrument that is not defined as deadly weapon per se may still meet the statutory definition of “deadly weapon” if it is used in a manner “capable of causing substantial bodily [harm].” State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995)

(quoting RCW 9A.04.110(6)) (finding that a bar glass was used as a deadly weapon). In measuring the manner of use, we look at the assailant's intent, his ability to cause substantial injuries, the degree of force, and the potential or actual injuries inflicted. State v. Barragan, 102 Wn. App. 754, 761, 9 P.3d 942 (2000) (holding that even though the defendant missed, a pencil used to attack the victim was intended to be deadly weapon). A knife under three inches not a deadly weapon per se. To justify a deadly weapon instruction, the State had to show that the knife used 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. State v. Skenandore, 99 Wn. App. 494, 499, 994 P.2d 291 (2000); *see also* State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998) (an instruction must state the applicable law correctly and must be supported by the evidence), *cert. denied*, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999); State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993). The circumstances of a weapon's use include the intent and ability of the user, the degree of force, the part of the body to which it was applied, and the actual injuries that

were inflicted. Shilling, 77 Wn. App. at 171-72. Here, a reasonable trier of fact could have found that the knife, as wielded by Mr. Cruz-Nava, constituted a deadly weapon. While there was no evidence of actual injury to the victim, according to Mr. Mateos-Rosas's testimony, Mr. Cruz-Nava lunged the knife at him causing him to use a chair to protect himself. Due to the force of the attack and the fact that Mr. Cruz-Nava accompanied it with the promise, "I'm going to kill you," a reasonable person could infer that Mr. Cruz-Nava intended to commit great bodily harm or death with the knife. Although the trial court denied law enforcement testimony about the knife's ability to produce harm, it is unnecessary to prove the obvious fact that knife can cause serious bodily harm or death. This analysis 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." On the whole, the evidence is substantial that this particular knife, although under three inches, constituted a deadly weapon under the circumstances of its use.

Only if the court finds no rational trier of fact could have found guilt beyond a reasonable doubt will the conviction be overturned for insufficiency of the evidence. State v. Ward, 148 Wn.2d 803, 815, 64 P.3d 640 (2003); State v. Finch, 137 Wn.2d 792, 835, 975 P.2d 967 (1999); State v. Green, supra. In this case, 12 rational triers of fact did find Defendant Cruz-Nava guilty of Assault in the First Degree with a Deadly Weapon. Additionally, the jury acquitted Mr. Cruz-Nava on the counts of Rape in the Second Degree and Assault in the First Degree by HIV. This is further evidence of the jury's careful consideration of all the evidence presented at trial.

2. The trial court did not abuse its discretion in allowing evidence of prior bad acts of the appellant under ER 404(b) and even in the event of abuse of discretion, the error is harmless.

ER 404(b) provides as follows:

“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.”

The courts have held that when the State seeks admission of evidence under ER 404(b), before a court may admit evidence under an exception to ER 404(b), it must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice. State v. Trickier, 106 Wn. App. 727, 732, 25 P.3d 445 (2001) (citing State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)); State v. Pirtle, 127 Wn. 2d 628, 649, 904 P.2d 245 (1995). This analysis must be conducted on the record. State v. Slocum, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). We review a trial court's decision to admit evidence for abuse of discretion. State v. Finch, 137 Wn.2d at 810.

“A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” State

v. Hudson, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). The appellant bears the burden of proving an abuse of discretion. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

Even if the evidence of prior bad acts was erroneous, it is harmless unless there is a reasonable probability that the verdict would have been materially different but for the error. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); State v. Barragan, 102 Wn. App. at 761. Ms. Analco-Gutierrez's experience of Mr. Cruz-Nava's prior acts of domestic violence was relevant to the reasonable fear element of harassment. State v. Ragin, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999) (similar facts, same conclusion). The trial court properly identified on the record this purpose for admitting the evidence and did not abuse its discretion in admitting the evidence on this basis. State v. Brown, 132 Wn.2d at 571.

Here, there is no reasonable probability that the admission of Mr. Cruz-Nava's prior incident of domestic violence against Ms. Analco- Gutierrez for fear purposes caused the verdict to be materially different. Ms. Analco-Gutierrez's testimony was limited

to be admissible for purposes of establishing that he had previously made threats the harm her and such threats were carried out in California in 2009 when he was arrested for a domestic violence offense. This was relevant to show her fear that his current threat for threat to kill would be carried out as well as her fear that lead up to compulsion to engage in the alleged sexual assault. The fact that the jury acquitted on the charge of Rape in the Second Degree is evidence that the jury was not improperly influenced by such testimony and carefully considered the evidence separately in its application to both counts.

3. The court appropriate considered the appellant's ability to pay legal financial obligations.

In State v. Blazina, the court ordered Nicholas Blazina and Mauricio Paige-Colter to pay discretionary legal financial obligations (LFOs) under RCW 10.01.160(3). State v. Blazina, 174 Wn. App. 906, 311 P.3d 27 (2015). The records in that case did not show that the trial judges considered either defendant's ability to pay before imposing legal financial obligations. The decision of the Supreme Court ruled that the courts shall not order a defendant to pay costs unless the defendant is able or will be able to pay them.

Here, the court was privy to the testimony provided regarding Mr. Cruz-Nava's ability to work in the past. At sentencing, the court specifically mentioned this ability in assessing Mr. Cruz-Nava's future ability to pay. In ordering the legal financials, the court did not assess the payments on the legal financial obligations to begin until after Mr. Cruz-Nava had served his sentence. Therefore, the court did individually consider his present and future ability to pay and the court's ruling should stand. Additionally, no restitution has been ordered in this case.

4. The appellant's statement of additional grounds lacks legal merit, factual support from the record, and/or are issues not raised at trial.

Mr. Cruz-Nava's statements of additional grounds for review allege new facts and issues that were not raised at trial. All of the issues presented are factual issues that would have had little to no impact on the verdict of the jury. They should carry no weight on appeal. These issues lack support from the record and should be summarily dismissed.

D. CONCLUSION

The evidence is sufficient to support the conviction of Assault in the First Degree with a Deadly Weapon. The State, through the testimony of witnesses and proper inferences from the jury, proved the knife was a weapon capable of producing great bodily harm or death and used in such a manner in this case. The conviction should stand. The allowance of the prior bad acts against Mr. Cruz-Nava were proper and any potential error should be considered harmless. The trial court was aware of Mr. Cruz-Nava's working capabilities as testified to by other witnesses and presented at the time Mr. Cruz-Nava was appointed an attorney. The court took this into account when it imposed a low monthly payment of \$35.00 per month not to be imposed until 60 days from his release from confinement. No restitution has been ordered in his case. Mr. Cruz-Nava's statement of additional grounds lack factual support from the record and also lack legal merit.

DATED this 7th day of December, 2017.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'Nicole Hankins', written over a horizontal line.

By: Nicole Hankins WSBA #42895
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,)	No. 35114-9-III
Plaintiff/Respondent,)	Chelan Co. Superior Court No. 16-1-00232-4
vs.)	DECLARATION OF SERVICE
POLICARPO CRUZ NAVA,)	
Defendant/Appellant.)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 7th day of December, 2017, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 7th day of December, 2017.


Cindy Dietz
Legal Administrative Supervisor
Chelan County Prosecuting Attorney's Office

CHELAN COUNTY PROSECUTING ATTORNEY

December 07, 2017 - 2:56 PM

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