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No. 35374-5-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT,

v.

JOSE PEDRO LINARES,

APPELLANT.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENT OF ERROR.

1. The evidence presented was not sufficient to support the deadly weapon element of the second degree assault conviction and the deadly weapon enhancement.
 - a. The State did not prove the “deadly weapon” element because the evidence does not show that the cutting implement was readily capable of causing death or substantial bodily harm under the circumstances in which it was used.
 - b. The State did not prove the deadly weapon enhancement because the evidence does not show the implement had the capacity to inflict death and was likely to produce or may easily and readily produce death from the manner in which it was used.
2. The term for the deadly weapon enhancement exceeds the one-year statutory maximum.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The State proved beyond a reasonable doubt that the weapon used to assault Mr. Ruiz met the definition of deadly weapon. The State proved the “deadly weapon” element, the evidence showed that the implement used to stab Mr. Ruiz was readily capable of causing death or substantial bodily harm under the circumstances in which it was used.

Further, the deadly weapon enhancement was also proven because the evidence showed the implement had the capacity to inflict death and was likely to produce or may easily and readily produce death from the manner in which it was used.
2. The two-year enhancement imposed was incorrect, it should have been one year. The State concedes this error and requests the court of appeals order the judgment and sentence be amended without requiring the defendant be returned to Yakima county.

II. STATEMENT OF THE CASE

The victim Mr. Ruiz was at a local laundromat, the Agitation Station, with his two daughters, who were two and four years old at the time of the assault. RP 377. The three of them were doing their laundry, Mr. Ruiz had been to the Agitation Station on several other occasions. RP 377-78. The three of them had driven to the laundromat in Mr. Ruiz's Ford Taurus which is red in color. RP 378. Mr. Ruiz testified that he parked his car to the left of the building near a taco truck and nearly in front of the door to the business. RP 380, 381.

Mr. Ruiz entered the business with his two daughters and began to do his laundry. RP 381. Mr. Ruiz identified the interior of the business from photographic exhibits admitted at trial. RP 383-4. Mr. Ruiz and his daughters sat down in some of the chairs which are located inside the business. Once inside Mr. Ruiz noticed a man, whom he had never seen before, pacing back and forth inside the business. Mr. Ruiz testified that eventually there were two people pacing around. He testified that these two men were walking around one side and back around the other way. RP 384

Mr. Ruiz testified regarding the appearance of the two men who were pacing about, he was able to tell them apart. RP 384. One of the men was not inside the building when Mr. Ruiz and his daughters first arrived. That man was wearing what he described as a gray zip-up sweater and dark blue jeans. Mr. Ruiz testified that this man arrived about 10-15 minutes after he arrived. Both of these men were doing what he described as a "routine" that was walking back and

forth from one side of the laundromat to the other. Mr. Ruiz did not hear these two men talking and did not see them doing laundry. RP 384-5.

Mr. Ruiz testified that he sat and waited for his laundry to finish washing, he had determined that he was going to take his clothes to another laundromat to dry them. He testified that he "...felt uneasy being there." RP 385. He went on stating "Just I've never been there like that with people just walking back and forth not doing their laundry...It just gave me a bad vibe, like I shouldn't be here. Something is kind of sketchy." When asked if they were looking at him he testified, "Not that I could tell because they just kind of walked with their heads kind of down." RP 385-6.

Mr. Ruiz testified the two men "looked pretty much similar" and he believed the two were related. He believed them to be about 25 or 26 years old, they were Hispanic and had similar complexions. RP 386-7.

Mr. Ruiz testified there were only two other people in the building besides the defendant and his brother. One of those was an employee of the laundromat and about five to ten minutes before his laundry was done this employee approached Mr. Ruiz and asked him to call the cops. She made this request of Mr. Ruiz because she was afraid to call the cops herself. RP 388-9.

Mr. Ruiz did not dry his laundry at this business. It took about forty minutes for the wash to be done and when it was done he threw the laundry into his baskets, put them in a cart and walked them out to his car. RP 389-90.

The defendant and his brother walked outside during the period of time

that Mr. Ruiz was loading up his laundry. Mr. Ruiz exited the business through the same door he had entered. He had his two young daughters perhaps a foot or two in front of him as he was leaving. The family car was only about five feet from the front door. RP 390

Mr. Ruiz was taking his keys out as he was walking to his car, "I was asked if I gang banged. I proceeded and told him no. I went to open my door, and I got stuck in the back." It was only a matter of fifteen to twenty seconds from the time that Mr. Ruiz was asked if he gang banged and he responded that he did not, until he was stabbed in the back. Mr. Ruiz was actually opening the front passenger door when he was stabbed, his two daughters were right in front of him when he was stuck, he put them into his car and left.

Mr. Ruiz identified the person who asked him if he gang banged as the defendant who was sitting in the courtroom. RP 391. He further identified the defendant as the person who had stabbed him. Mr. Ruiz was 100% certain that the defendant was the person who had stabbed him. RP 418, 421.

Mr. Ruiz stated that he knew that he had been stabbed when he could feel blood dripping down his back. He stated that it was hard to describe what being stabbed felt like. He testified;

A. It's kind of hard to describe. Maybe like (indicating.),
like a real quick, like a medium-soft punch to the back.

Q. And how did you know you were stabbed?

A. I felt the blood dripping down my back.

Q. What was your reaction to that?

A. I just turned around to see like if he was still there, and then he wasn't there. So, I put my girls in the car and then put my laundry in the car and took off.

Q. Did you tell anyone at the Agitation Station?

A. Yeah. I told the lady that was working there that I'd gotten stabbed in the back.

Q. Okay. Did you tell her by who?

A. No. I just said the guys that were in here.

Q. The same people that she was concerned about?

A. Yes.

RP 391-2.

Mr. Ruiz testified he left the Agitation Station because he was afraid that the defendant would come back and potentially harm his daughters. And that he could see the second person from inside the business was standing around the corner of the building when he was stabbed. Mr. Ruiz testified that the two men ran off behind the building together after he was stabbed. RP 392-3.

Mr. Ruiz testified that his two daughters were crying and the older one was freaking out, that they knew something had happened. He then drove the two little girls to his girlfriend's place of business. RP 393-4. He testified that it took several minutes for him to drive to Jackson Hewitt, his girlfriend's place of work. He told his girlfriend what had occurred and another employee of the business called the police. He testified that they were "freaking out." He stated that he was infuriated by what occurred and that his plan regarding his daughters was "just to get them out of harm's way and to try to do something with my wound." RP 394.

Mr. Ruiz testified that he was still in shock and that the people at Jackson-Hewitt were applying pressure to the wound "to try to stop the bleeding." RP 395. Mr. Ruiz identified photographs which were taken of his car that showed that the bleeding from this stab wound was on the car seat. Mr. Ruiz's shirt had a

hole in it and blood from the stab wound, stating “[t]hat’s the hole where the knife or whatever was used to stab me that (sic) left in the back of my shirt.” RP 399.

Mr. Ruiz was shown several exhibits, specifically 6A- 6D which were of him while he was in the hospital.

The testimony regarding those exhibits was that they depicted Mr. Ruiz after the assault, the stab wound, and blood on the hospital bed from the wound. He testified that the pictures were taken while he was waiting to be taken in for a CT scan to determine if there was any internal bleeding. He also had a urine test to see if there was blood in his urine. When asked if there was a determination regarding the depth of the wound the following exchange occurred;

Q. Okay. And 6D, do you recognize that?

A. Yes.

Q. What is that?

A. That's a picture of the wound.

Q. Did they determine how deep the wound went?

A. No.

Q. Is that why they were doing the tests?

A. Yeah. They did the test to make sure I wasn't bleeding internally.

Q. Make sure it didn't hit any vital organs?

A. Yeah.

Q. What were the results of the test?

A. They were negative. RP 403-4.

Mr. Ruiz testified that he was in the hospital for two and a half or three hours. On the day of the stabbing Mr. Ruiz did not go to the police station because he was sore from the assault. He testified that he felt sore, like he had lifted weights two days in a row but the pain was not excruciating. He testified that his level of pain persisted for about three maybe four days. RP 415

On cross-examination Mr. Ruiz stated that he did not see a knife and that he had not seen the two brothers threaten anyone “until [he] was outside and they stabbed me.” RP 426. He stated that the people from the ambulance advised him to go to the hospital. And that it was about one-half hour after the stabbing that he was told that he should go to the hospital.

Det. Berry went to the hospital to make contact with Mr. Ruiz, he testified that when he was at the hospital that “[h]e was lying on a hospital bed hooked up to various machines.” RP 445. This detective testified that stab wounds can be fatal, that he had observed a person or persons who had died from stab wounds to the torso. That this type of wound resulted in internal bleeding having severed an artery. That death could result from a single stab wound if it hit a vital organ. RP 445-6. Det. Berry collected the victim’s clothing and identified them in trial. His testimony addressed the blood on the back of the victim’s shirt and the hole in the shirt. The blood was found on the shirt from the center of the back of the shirt and extended almost to the tail of the shirt and this blood stain was approximately six inches wide. RP 449.

On cross-examination Linares’ counsel was questioning Det. Berry regarding the condition of Mr. Ruiz when he met with him. The officer testified that he did not think that Mr. Ruiz was going to die from the stab wound. Counsel went on to query this officer about the location of the stab wound asking if a vital organ had been damaged. Det. Berry’s responded, “Based on my observations and training and experience, the location of the wound caused

concern.” RP 471.

This was followed up by the State’s attorney:

Q. You indicated to Mr. Therrien-Power the location of the wound caused you concern. Can you explain?

A. It was in the area of the vital organs.

Q. You indicated it's on his flank. What's behind there or inside?

A. You could have kidneys and possibly a lung.

Q. What are your lungs used for?

A. Breathing.

RP 474

Officer Jeff Cunningham, an officer with twenty-seven year’s experience, was one of the first responders to Jackson-Hewitt where he contacted the victim, Mr. Ruiz. This officer testified that when he arrived on the scene Mr. Ruiz’s girlfriend was doing compression on the wound. RP 650-1 The officer stated the Mr. Ruiz was injured and concerned because of the wound and the officer called the fire department and had them come examine Mr. Ruiz. Officer Cunningham testified that he had seen numerous stab wounds in his career. That some of them such as ones delivered by a pocket knife or a stiletto are usually used for “jabbing, like thrusting...[t]hey are usually long, skinny, with a point.” When asked about the type of wound they could make he testified that such a blade could leave a small but deep wound. RP 652-3. His final answer was regarding whether he had seen a small wound that were deadly, his response was “Yes, I have during autopsies.” RP 654.

The defendant was identified by several witnesses to be an associate of or affiliated with the Sureno street gang. That gang “claims” the color blue and is

the stated enemy of the Norteno gang that claims the color red. The defendant had several tattoos, a BGL – Bell Garden Locos, on his neck, a BGL emblem on a forearm and three dots on one wrist and one on the other, which stands for the number 13 which is claimed by the Sureno sect. RP 465, 607-9

Mr. Ruiz identified photographs of his red car, the red beads hanging from his mirror, some little gloves with the “49ers” on it. Portions of the 49ers emblem is red and gold. His shirt contained the colors Black white and red RP 397-8. Mr. Ruiz testified that his attire was a short-sleeve shirt and that his tattoos were visible. Those tattoos include his last name, his daughter’s name and an angel with his mother’s name. He described them as being done in “Old English” lettering and that they took up most of the area on his forearms. He also has three stars behind his right ear. He testified that none of his tattoos had any connection with any gang. RP 405-6. Mr. Ruiz testified that he had some knowledge regarding gangs and colors and that the Norteno gang wore red and Surenos who blue. He also testified that these two gangs did not get along. RP 407-8

Mr. Ruiz thought the reason he was attacked was because of the star tattoos, the red color of some of his clothes and the red color of his car. RP 409. He confirmed that he had never met and did not know the defendant, that he was not a member of a gang, and the only thing that was said to him by the Defendant before he was stabbed was “do you gang bang.” He could think of no other motivation for the attack that resulted in him being stabbed. RP 410.

Det. Berry testified regarding the clothing that he collected from Mr. Ruiz. Those included the shirt and shorts that Mr. Ruiz was wearing that included red piping and lettering. The red coloring was significant to this detective because the defendant is a BGL/Sureno. RP 449-50.

Det. Berry testified regarding the phrase used by Appellant when he confronted Mr. Ruiz;

- Q. Last series of questions. You heard Mr. Ruiz state that Mr. Linares, Pedro Linares, walked up and said basically, and I'm paraphrasing, do you gang bang or what do you bang. In your training and experience, what does that mean?
- A. It's a callout to find out whether they're a friend or foe.
- Q. In your training and experience, does that callout often precipitate violence?
- A. Yes.
- RP 467

Officer Jose Ortiz testified about some specific issues pertaining to gangs and the actions and phrases often used in confrontations such as those in this case. He stated that the callout "what do you bang" was something that in his experience always means that something bad is going to happen, an altercation is going to happen. RP 630. He testified that this is used whenever a gang member is disrespected or when they are confronting a person they believe is in a rival gang. The following was a portion of Officer Ortiz's testimony that addressed why an act like this might occur:

- Q. You mentioned the term respect. What is that? Can you define that for us or what it means in a gang like BGL.
- A. I'm just going to say in gangs in general respect is everything to them. They will what they call throw down. They will fight for that. If they feel

disrespected in any shape, way or form they're going to go for it whether it's a police officer, a teacher.

A. So it is kind of -- it is kind of scary in situations especially if they come up and they do that, they ask that particular question, but they won't back down.

Q. (By Mr. Clements) Are colors considered disrespect, rival colors? If somebody is flying colors in your presence, would that be a disrespect?

A. Yes, especially if they believe that you are of the rival gang and if you're in their territory. RP 630-1

A. Like I said, when they throw something down like what do you bang, that's one of those things, if you answer or you don't answer, it's a tossup. You're probably going to get hit regardless. If you don't answer, the individual will think you're disrespecting them. If you answer or you're making a smart remark, you're going to get it. RP 632

...

Q. I'm saying somebody that has no gang affiliation whatsoever. Have you had assaults where the gang has mistakenly believed they're gang related or they're gang members when, in fact, they are not?

A. There has been, yes.

Q. And what types of assaults have occurred in Sunnyside?

A. For the most part it's been simple assaults, you know, a fistfight, you know, for the most part. Sometimes it could be more serious.

Q. When you say that, what do you mean?

A. A knife or a gun. RP 638

Officer Ortiz finished his direct testimony by stating, without objection, his expert opinion that "...this is a gang motivated assault..." that Linares would gain "...street credibility, notoriety for the gang. Again, it's asserting that they're a group to be contended with. They'll confront wherever, whenever...Reputation of not only him but the gang. That's what --that's a form of respect for them."

III. ARGUMENT

1. The direct and circumstantial evidence presented to the jury was sufficient to meet the State's burden of proof that the weapon used was readily capable of causing death or substantial bodily harm under the circumstance in which it was used.

a. The State proved the deadly weapon element of the crime of second degree assault as charged in the information.

Linares does not dispute that he stabbed Mr. Ruiz, "...Linares showed an intent to inflict injury on Ruiz and had the ability to do so." He disputes that the State proved that the weapon which was never recovered was "readily capable of causing death or substantial bodily harm." (Apps brief at 9, emphasis added) This is incorrect.

Evidence is sufficient to support a verdict if the trier of fact has a factual basis for finding each element of the offense proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. Green, 94 Wn.2d at 221. This court shall draw all reasonable inferences from the evidence in the State's favor when testing for sufficient evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence carry equal weight. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The State bears the burden of proving all elements of a crime. State v. Teal, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

For decades this State has adopted the rule that almost any instrument can be a deadly weapon, if the circumstance of its use meet the burden of proof.

State v. Sorenson , 6 Wn.App. 269, 273-4, 492 P.2d 233 (1972): “By 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. The character of an implement as a deadly weapon is determined by its capacity to inflict death or injury, and its use as a deadly weapon 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. People v. Fisher, 234 Cal.App.2d 189, 193, 44 Cal.Rptr. 302, 305 (1965). Under proper instruction, the jury could have found that Sorenson's penknife with a 1 1/2 inch blade was a deadly weapon.”

(Emphasis added.)

State v. Goforth , 33 Wn.App. 405, 411-2, 655 P.2d 714 (1982) ““The evidence may be circumstantial; no weapon need be produced or introduced. [State v.] Slaughter, [70 Wash.2d 935, 938-39, 425 P.2d 876 (1967)]; State v. Williams, 3 Wn.App. 336, 339, 475 P.2d 131 (1970).” Tongate, at 754, 613 P.2d 121.””

State v. Slaughter, 70 Wn.2d 935, 938, 425 P.2d 876 (1967) a case with factual similarities to this case court stated:

As to the first major point, we are unable to agree with defendant that the evidence was insufficient to support a conviction. In addition to the circumstantial evidence, we have the testimony of

Mr. McFerran that defendant struck him, knocked him down, and, although he did not see the weapon which produced them, the blows inflicted the wounds which required suturing and medical care. The sight of a blade in defendant's hand would have added little to the direct evidence that he struck his victim, knocked him down, and in so doing inflicted two cutting wounds. Viewed in the light of the argument between Mrs. Ruiz and defendant, followed immediately with her leaving the two men alone in the hallway, and the complete absence of any other evidence explaining or implying that the wounds could have been inflicted by another person, or by accident, we have proof of circumstances rivaling in persuasiveness direct evidence that the victim saw a weapon in defendant's hand when the blow was struck.

State v. Carlson, 65 Wn.App. 153, 158-60, 828 P.2d 30 (1992) addressed the issue now before this court. In Carlson the defendant testified that the bb gun used in the assault was not operable. This court ultimately ruled that the **facts** of the case were such that it was not reasonable to believe that the State had proven its case stating:

We must now look to RCW 9A.04.110(6) for a definition of deadly weapon. There we find two categories of weapons which are defined as deadly. Category one includes weapons which are deadly per se...and category two includes "any other weapon ... instrument ... which, under the circumstances in which it is used, ... or threatened to be used, is readily capable of causing death or substantial bodily harm", i.e., deadly-in-fact under the circumstances in which the instrument is used or threatened to be used. (Italics ours). In assault, the crime itself encompasses the used or threatened to be used language of RCW 9A.04.110(6), but the issue must still be resolved whether the weapon "as used" was "readily capable of causing ... substantial bodily harm." If a weapon or thing is not deadly per se as defined in RCW

9A.04.110(6), whether it is nevertheless deadly in the circumstances in which it was used, i.e., whether it is "readily capable of causing substantial bodily harm" becomes a question of fact. See State v. Sorenson, 6 Wn.App. 269, 273, 492 P.2d 233 (1972) (stating that whether a knife with a blade shorter than 3 inches is deadly is a question of fact to be determined by the knife's capacity to inflict death and the circumstances in which it is used).

The facts of this case, as set forth above, are that Linares, a gang member, confronted a father with his two children at a laundromat. The gang member challenged the father with a code phrase used by gang members to ferret out whether another person is a gang member and if so, what their gang affiliation is. Linares then, with literally no provocation, stabbed Mr. Ruiz in the back. Which resulted in a hole being stabbed into Mr. Ruiz that bled enough that it soaked half the shirt he was wearing and that needed to have direct pressure applied to it in an attempt to stop the bleeding. The bleeding soaked the lower portion of Mr. Ruiz's shirt, was found on the seat of his car and even later was photographed on the hospital bed where the offices met him during treatment.

This injury was severe enough to cause emergency medical personnel to tell Mr. Ruiz that he needed to go to the hospital, severe enough to require Mr. Ruiz to be hooked up to machines at the hospital, to require the use of a CT scan and urine test to determine if there was internal bleeding, required Mr. Ruiz to be in the ER at the hospital for several hours. The injury was described by Mr. Ruiz as feeling like a punch to the back and that it felt like he had lifted weights two days in a row and very importantly Mr. Ruiz stated that he felt sore for two or

three days.

This was not some superficial wound, some knife cut to the arm or for that matter to the back, that could be readily evaluated by those treatment personnel and dismissed. Therefore, the weapon, which to this day is still unknown, was “readily capable of causing death or substantial bodily harm.”

The Defendant’s theory, if it were taken to the logical extreme, would mean that if Linares had had a knife in his hand and he threatened to use the knife, and “merely” stated he would stab Mr. Ruiz in the back, but Linares just threatened the use, that could be assault in the second degree. But where, as here, the victim was actually stabbed but no one saw the weapon or knows the depth of the wound there would be no chance for proof that this was a second degree assault. This also begs the question of how depth had any real relevance, the depth of the wound is as much dependent on the force of the blow, the location of the blow and numerous other factors as it is the actual size of the blade. The legislature would not have included in the definition of deadly weapon the section “or threatened to be used, is readily capable of causing death or substantial bodily harm,” RCW 9A.04.110(6), if they only intended for proof of a charge to be done with a measurement of the injury inflicted.

“Threatened to” and “capable of” clearly indicates the legislature knew and understood that this crime could be committed and proven without the victim having to actually be stabbed or necessitating the doctor sticking a ruler into the stab wound so that they could testify about the depth of that stab wound.

The defendant, in his trial and in this appeal, stresses that Mr. Ruiz testified that he did not believe his death was near and that he could and did drive his car. That is a red herring. The law for proof of the criminal act does not really care what the victim felt or thought.

The issue is, when this court takes into account all of the evidence and draws all reasonable inferences from the evidence in the State's favor, does that evidence, the actions of Linares, the stab wound, the testimony that attempts to prove the “why” Mr. Ruiz was attacked, meet the State’s burden of proof? Clearly the answer is yes.

Linares points to the testimony of Mr. Ruiz regarding how he felt about the wound, clearly attempting to portray the wound as minimal and not having the possibility of being deadly. The State would posit that many people do not believe that the wound or wounds they have are going to kill them and then they are dead. The effects of anger and adrenaline and the human body are well known to all. The jury does not come into a case required to set aside the knowledge that they have acquired throughout their lives, they listen to the facts and apply the law to those facts with their lives history as a guide.

The fact is Mr. Ruiz was stabbed, very forcefully in the back with an object that left a hole into his body. The wound bled to the point that those who were rendering aid need to *try* to stop the bleeding, was such that medical personnel advised Mr. Ruiz to go to the hospital, such that the victim’s mother would not and did not let him drive himself to the hospital, such that when at the

hospital Mr. Ruiz was hooked up to various machines and had tubes coming out of him – information that was before this jury of Linares peers.

The wound was clearly not some superficial wound, Mr. Ruiz was in the ER, the doctors did not just send him on his way, they sent him to have a CT scan so that they could determine if this stab wound to his back had caused any internal bleeding. The hospital and the doctors would not have been doing this specific test if they did not believe that the nature, place and size of the wound was such that it could cause this type of bleeding, a bleeding which by its very name is something which is not observable and is caused by entry of an object into the interior of the human body.

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). There is little doubt that being stabbed in the back by an object that was obviously sharp enough to penetrate Mr. Ruiz's back, being used in a manner that felt like a mild punch to the back that resulted in several days of being sore is sufficient proof that whatever the weapon was, Linares used it in a manner that was "readily capable of causing death or substantial bodily injury."

The circumstances of a weapon's use may include the intent and present ability of the use, the degree of force, the part of the body to which it is applied, and the physical injuries inflicted. State v. Winings, 126 Wn.App. 75, 87, 107

P.3d 141 (2005). Such 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." State v. Schilling, 77 Wn.App. 166, 171, 889 P.2d 948 (1995) (quoting State v. Sorenson, supra). This analysis in each case allows for the possibility that, any device, instrument, substance, or article can become a "deadly weapon" depending on how it is used. A given sets of circumstances can turn otherwise non-threatening objects into deadly weapons.

See, State v. Hoeldt, 139 Wn. App 225, 230, 160 P.3d 55 (2007) where this court ruled that a dog can constitute a "deadly weapon" for second degree assault purposes if trained and used as an instrument of violence and death or State v. Barragan, 102 Wn App. 754, 761-62, 9 P.3d 942 (2000) where a pencil was found to be capable of being considered a "deadly weapon" when used in attempt to stab fellow prison inmate in the eye; or Schilling, 77 Wn.App. at 171-72 where a glass was a "deadly weapon" when smashed against the backside of a the victim's head. The State would direct this court, pursuant to GR 14.19(a) to consider as nonbinding authority and accord such persuasive value as this court deems appropriate State v. Harding, 48408-1-II (WACA) (June 6, 2017) three-foot-long two by two board with nails, no separate medical testimony, officer testified as to lethality.

Here, the jury had the opportunity to evaluate the uncontradicted testimony, the credibility of each witness, and the persuasiveness of the evidence. The jury could have reasonably found that Linares had, with no provocation,

stabbed of Mr. Ruiz from behind while at a laundromat with his two small daughters with an instrument and with enough force to cause a penetrating wound that made Mr. Ruiz sore for several days.

While recognizing that the question is one of fact, defendant argues that the jury's verdict was not supported by substantial evidence because the wounds were superficial and not in fact life threatening. Such an argument begs the question. The test is not the extent of the wounds actually inflicted. Rather, the test is whether the knife was capable of inflicting life-threatening injuries under the circumstances of its use. State v. Thompson, supra.

The wounds inflicted were stabbing, not slashing, wounds to the head and chest. While perhaps a stab directly to the forehead may be unlikely to penetrate the skull, a blow with equal force directed to the throat area can easily reach major blood vessels. Likewise, a stab to the chest, but for the fortuitous striking of the sternum or a rib, can inflict a penetrating wound to the chest cavity and endanger major structures. Similarly, a blow to the area of the underarm musculature can, with a slight change of direction, sever a major blood vessel. For these reasons, we conclude that there is substantial evidence from which the jury could have properly concluded that this knife was, under the circumstances of its use, a deadly weapon in fact. United States v. Enos, 453 F.2d 342 (9th Cir. 1972).

State v. Cobb, 22 Wn.App. 221, 223, 589 P.2d 297 (1978), review denied, 92 Wn.2d 1011 (1979).

The jury could have reasonably inferred from the testimony and exhibits presented that the evidence presented supported a finding of guilt.

b. The State proved the deadly weapon enhancement as charged in the information.

The State shall not set forth a detailed and entirely separate argument to address this allegation. The State has set forth the facts and law in section “a”

which supports the States position that there was sufficient evidence for the jury to find that the defendant committed second degree assault when he stabbed Mr. Ruiz in the back and that the State proved that the weapon used was “deadly.”

Clearly if the State did not present sufficient evidence at trial to support that proof beyond a reasonable doubt above, then there is no possible means for the State to support the enhancement nor need to support the enhancement.

Therefore, the State shall set forth abbreviated argument and will adopt and incorporate the argument set forth above to rebut this portion of Linares’ brief.

Suffice it to say, once again, this was a gang related surprise attack and stabbing of a non-gang citizen in a laundromat that resulted in a half-inch wound to Mr. Ruiz’s back.

Det. Berry testified that when he was at the hospital Mr. Ruiz was hooked to various machines, that stab wounds of this nature can cause internal bleeding and that stab wounds to the torso can be fatal. That he found there was a hole in Mr. Ruiz’s shirt that was surrounded by blood, all consistent with a stab wound. He testified that the location of this stab wound caused him concern and this was an area where vital organs are found.

Officer Cunningham testified that Mr. Ruiz’s girlfriend was putting pressure on the wound, that Mr. Ruiz at the time of the stabbing was concerned because of the wound. Officer Cunningham testified that he had seen numerous stab wounds in his career stating that some left small deep wounds and that he had

seen wounds like that which has resulted in the death of the victim, “during autopsies.”

A jury could reasonably find that the weapon had the capacity to inflict death when used in this manner. State v. Cook, 69 Wn.App. 412, 418, 848 P.2d 1325 (1993).

For purposes of the deadly weapon sentence enhancement, RCW 9.94A.825 requires a special verdict as to whether the defendant was armed with a deadly weapon during the commission of the crime, and further requires that for such purposes “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.” See, State v. Cook, 69 Wn.App. 412, 418, 848 P.2d 1325 (1993) (“[w]hen seeking an enhanced sentence, the State must prove that the weapon had the capacity to cause death and death alone”).

All of these facts support the jury’s conclusion that the weapon used by Linares “had the capacity to cause death and death alone.” State v. Cook, 69 Wn.App. 412, 417-18, 848 P.2d 1325 (1993)

The court in State v. Thompson, 88 Wn.2d 546, 564 P.2d 323 (1977) while addressing whether a knife having a blade 3 inches can be found to be a deadly weapon stated the following:

It is not denied that a knife having a blade 3 inches or less in length can be capable of producing death and is in fact likely to produce death if strategically used. If the interpretation contended

for by the petitioner and adopted by Division Two were correct, a person who actually committed murder with a knife under 3 inches in length would be exempt from the provisions of RCW 9.95.040. The same would be true of a person who strangled his victim by exerting pressure with a metal pipe or bar, rather than using it as a club. Such an anomalous result cannot have been intended and is not invited by the language used.

...

It is the general rule that a pocketknife may be a deadly weapon, depending on the circumstances of its use. See United States v. Enos, 453 F.2d 342 (9th Cir. 1972); De Witt v. State, 58 Okl.Cr. 261, 52 P.2d 88 (1935); Williams v. State, 477 S.W.2d 24 (Tex.Cr.App.1972); 11 *Words and Phrases, Deadly Weapon*, 206, 216--19 (1971), 1976 Supp., 11, 12.

Here, the evidence showed that the defendant held an open pocketknife, with a blade between 2 and 3 inches in length against the neck of the victim, a motel clerk, while he demanded she turn over the money in her possession. During the robbery, she sustained a cut on her neck and bruises on her right arm. The jury could properly find that the knife was a deadly weapon under the circumstances of its use.

2. The State concedes that the court improperly imposed 24 months for the deadly weapon enhancement. This must be corrected.

The State concedes this error. The State would request that in lieu of ordering a “resentencing” which involves the trial court ordering the defendant returned from prison, the appointment of new counsel and what will invariably be numerous hearings, this court simply order the trial court to enter an ex parte order that amends the judgment and sentence correcting this portion of that document.

IV. CONCLUSION

The State proved all elements of the crime as charged. This was not some de minimis cut caused by Linares striking out at Mr. Ruiz. This was a calculated attack by a gang member against a literally innocent member of the public who was merely trying to do the week's laundry with his two and four-year-old daughters.

The defendant stabbed Mr. Ruiz in the back which resulted in a half inch wide wound that bleed profusely and was such that Mr. Ruiz spent hours in the emergency room and had to have various tests, including a CT scan to determine if in fact there was internal bleeding.

The jury could and did determine that the method and manner this instrument was used met the definitions and law set forth in the jury instructions.

Respectfully submitted this 30th day of April, 2018,

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DECLARATION OF SERVICE

I, David B. Trefry, state that on April 30, 2018, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Casey Grannis and Eric Nielsen at Sloanej@nwattorney.net

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

DATED this 30 day of April, 2018 at Spokane, Washington.

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