Supreme Court No. _____
Division III, No. 39560-0-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PAULINO FLORES,

Petitioner

PETITION FOR REVIEW FOLLOWING APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Jeffrey B. Swan

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Paulino Flores asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction for attempted kidnapping in the second degree.

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, unpublished opinion, filed on October 29, 2024. A copy of this opinion is attached as "Appendix A."

C. ISSUE PRESENTED FOR REVIEW

Issue 1: Insufficient evidence was presented to uphold the deadly weapon enhancement as to attempted kidnapping in the second degree. Review should be accepted under RAP 13.4(b)(1), (2), (3) and (4).

D. STATEMENT OF THE CASE

On the evening of April 29, 2022, Liliana Cazares arrived at her parents' business in Yakima to pick up her daughter. (RP 228-229). Wanting to bring her daughter inside from the cold, Ms. Cazares took her daughter into a back office to log into

YouTube to keep her entertained. (RP 229-230). Suddenly a man entered the office. (RP 230). The man was holding a sharp object as he approached Ms. Cazares and told her to come with him. (RP 230-232).

Ms. Cazares started to leave the room with the man, but as she was leaving, saw her aunt through a window and waved to get her attention. (RP 234-235). The commotion came to the attention of Ms. Cazares's family, including her brother, Ugo Robledo. (RP 237, 347-350). Mr. Robledo confronted the man, who swung at Mr. Robledo with the sharp object. (RP 347-350). Mr. Robledo called the police. (RP 350).

Ms. Cazares later identified Paulino Flores to the police as the man with the sharp object. (RP 250-253).

The State charged Mr. Flores with assault in the second degree with a deadly weapon enhancement in Count 1 involving the alleged victim Ugo Robledo, and attempted kidnapping in the second degree with a deadly weapon

enhancement in Count 2 involving the alleged victim Liliana Cazares.[1] (CP 9-10).

A jury trial followed, and witnesses testified consistent with the facts above. (RP 228-365).

Ms. Cazares testified first. (RP 228-248). She told the jury when Mr. Flores approached her that night, he was holding a really sharp object about 18 inches long. (RP 230-231). Ms. Cazares stated:

> It's almost like it was a crowbar, but it wasn't a crowbar. And it just looked like it had a sharp edge on the front of it.

(RP 231). Ms. Cazares was scared. (RP 231). She said Mr. Flores had the object in his hand and told Ms. Cazares "you're coming with me." (RP 231). Ms. Cazares then grabbed her daughter and put her behind her back to protect her. (RP 231-232). She testified Mr. Flores again told Ms. Cazares to "start

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[1] Mr. Flores was also charged with a second count of attempted second degree kidnapping in Count 3 involving the alleged victim E.C., but this charge was later dismissed by the trial court for insufficient evidence. (CP 10; RP 365-370).

moving" and that she was leaving with him in an affirmative tone. (RP 232). He was not far away from Ms. Cazares. (RP 233). She said he was holding the sharp object steady on his side the whole time, with the sharp edge out in front of him. (RP 233-234). Mr. Flores was not waving the object at her. (RP 233).

Ms. Cazares testified she started walking out of the room with Mr. Flores. (RP 234). He turned around and she took that opportunity to wave to a family member for help. (RP 234). When Mr. Flores turned back toward Ms. Cazares, she stopped waving and continued walking with him out the door. (RP 236, 243-245). She stated Mr. Flores told her to hurry up, that he was not going to tell her again. (RP 236). Ms. Cazares' brother approached Mr. Flores at that point. (RP 236, 245). Ms. Cazares then left with her daughter and went back inside. (RP 236-237, 245). The police were summoned. (RP 237). Ms. Cazares identified Mr. Flores to police as the man she encountered. (RP 237-238). Ms. Cazares never described the

object Mr. Flores was holding as a knife nor identified it as a specific object. (RP 228-248).

An officer testified they made contact with Mr. Flores shortly after the incident. (RP 301-310). The officer approached Mr. Flores, stating there had been an attempted abduction, to which he replied "that was my wife" and he was "trying to get her to go." (RP 305). The officer said Mr. Flores was carrying a bag and did not have any weapons on him. (RP 304, 307).

A second police officer testified. (RP 317-342). He stated when Mr. Flores was discovered, the bag with him contained about a dozen brown, hollow, lightweight metal pipes. (RP 325, 330-331, 333, 337; State's Ex. 1). The pipes weighed approximately 2.5 to 5 pounds. (RP 338). None of the pipes appeared to be deliberately sharpened, although there appeared to be sharp edges where a bend in the pipe was. (RP 337).

Ugo Robledo, brother to Ms. Cazares, testified. (RP 345-364). He was assisting with his parents' business on the evening of the incident and heard a commotion. (RP 345-348). Mr. Robledo testified Mr. Flores told him that Ms. Cazares was his wife, and he was going to take her with him. (RP 348-349). Mr. Flores then charged at Mr. Robledo with a round and pointy object that was sharp. (RP 349, 364). Mr. Robledo testified that Mr. Flores then swung at his abdomen with the object. (RP 349-352). Mr. Robledo said the object would have hurt him, though he was not injured or struck in any way. (RP 352, 364).

The jury was instructed on the deadly weapon enhancement as follows:

> For the purpose of a special verdict, deadly weapon means 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.

(CP 118; RP 445). The jury was also given a special verdict form, which read as follows:

> We, the jury, return a special verdict by answering as follows:
> QUESTION: Was the defendant Paulino Flores armed with a deadly weapon at the time of the commission of the crime in Count 2?

(CP 122; RP 446). The trial court concluded that the weapon described by the witnesses during trial was not per se a deadly weapon and did not include the per se deadly weapon definition in the jury instructions. (CP 118; RP 423).

The jury found Mr. Flores guilty of assault in the second degree in Count 1 with a deadly weapon enhancement as to Mr. Robledo and attempted second degree kidnapping in Count 2 with a deadly weapon enhancement as to Ms. Cazares. (CP 119-122; RP 491-492).

Mr. Flores timely filed a notice of appeal. (CP 171-180). The Court of Appeals denied Mr. Flores' request to reverse the conviction for attempted kidnapping in the second degree for insufficient evidence. *See* Appendix A.

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Issue 1: Insufficient evidence was presented to uphold the deadly weapon enhancement as to attempted kidnapping in the second degree. Review should be accepted under RAP 13.4(b)(1), (2), (3) and (4).

Review by this Court is merited because the Court of Appeals' decision conflicts with a decision from the Supreme Court and a published opinion in the Court of Appeals. RAP

13.4(b)(1) and (2); *State v. Barnes*, 153 Wn.2d 378, 103 P.3d 1219 (2005); *State v. Peterson*, 138 Wn. App. 477, 157 P.3d 446 (2007). Review is also merited because the issue involves a significant question of law under the federal constitution: whether Mr. Flores' due process rights were violated because the State did not prove beyond a reasonable doubt every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; RAP 13.4(b)(3). Finally, requiring courts to hold the State to its burden of proof is also of substantial public interest. RAP 13.4(b)(4).

The State failed to prove the deadly weapon enhancement as to Count 2. The evidence presented did not establish the object used was employed in a *manner* that was likely to produce or may easily and readily produce death. In its opinion, the Court of Appeals used the wrong standard—the Court found the item Mr. Flores was holding "had the capacity to inflict death and was easily and readily available to produce

death while committing the crime of attempted kidnapping." Appendix A, pg. 6. However, the Court's opinion did not address whether the item was used in a *manner* that was likely to produce or may easily and readily produce death. The Court conflates "capacity" of an item with the "manner" in which it is used. The two are not the same. Appendix A.

For this reason, the deadly weapon enhancement must be vacated.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *Winship*, 397 U.S. at 364; U.S. Const. amend. XIV. Where 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 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the

evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

"In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *see also State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). "In rendering a guilty verdict, a trier of fact properly may rely on circumstantial evidence alone, even if it is also consistent with the hypothesis of innocence, so long as the evidence meets the *Green* standard." *State v. Kovac*, 50 Wn. App. 117, 119, 747 P.2d 484 (1987); *see also Green*, 94 Wn.2d at 220-22 (setting forth the standard for reviewing sufficiency of the evidence: "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.").

Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

To find Mr. Flores guilty of the deadly weapon enhancement in Count 2, the jury had to find he was "armed with a deadly weapon at the time of the commission of the crime in Count 2". (CP 122); *see also* RCW 9.94A.533(4) (enhanced sentence); RCW 9.94A.825 (deadly weapon special verdict).

Whether a person is armed with a deadly weapon is a mixed question of law and fact and is reviewed de novo. *State v. Schelin*, 147 Wn.2d 562, 565-566, 55 P.3d 632 (2002).

What constitutes a deadly weapon may be established in either one of two ways: (1) as a deadly weapon *per se*; or (2) as "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." *State v. Peterson*, 138 Wn. App. 477, 482, 157 P.3d 446 (2007) (emphasis added). A *per se* deadly weapon are those specific items listed by statute. RCW 9.94A.825 (including items such as blackjacks, daggers, and firearms); *Peterson*, 138 Wn. App.

at 482. Here, the trial court determined the per se deadly weapon definition did not apply, thus the jury was only instructed 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." (CP 118; RP 423); RCW 9.94A.825; 11 Wash. Prac. Jury Instr. Crim. WPIC 2.07 (5th ed. 2018).

In its opinion, the Court of Appeals solely focused on whether the object in this case had the capacity to inflict death, and not whether it was used in a manner that is likely to produce or may easily and readily produce death. RCW 9.94A.825; Appendix A. The Court of Appeals mistakenly relied upon the first part of the deadly weapon inquiry—whether the instrument has the capacity to inflict death—but does not address the second part of the inquiry about the manner in which it was used. RCW 9.94A.825; Appendix A. This is problematic because several seemingly innocuous items have the capacity to inflict death—including pencils—but it is

the manner in which those items are used that turns innocuous items into a deadly weapon.

The Court of Appeals relied upon *State v. Barnes* as authority for finding the object Mr. Flores possessed could have easily killed Ms. Cazares. Appendix A, pg. 7 (citing *State v. Barnes*, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005). However, in *Barnes* the defendant possessed a firearm—which is a per se deadly weapon. *Id*. at 380-387. Moreover, the *Barnes* opinion addressed whether knowledge of a firearm's presence at a crime scene must be proven to establish the defendant was armed with a firearm. *Id*. at 380-387. This opinion does not address an object which does not fall under the per se deadly weapon category. Nor does it address whether such an object was employed in a specific manner. The *Barnes* opinion is not helpful to Mr. Flores' case. It does not apply. *Id*. at 380-387.

A more appropriate opinion to follow is *State v. Barragan*. *State v. Barragan*, 102 Wn. App. 754, 760-762, 9 P.3d 941 (2000). There, the court recognized a pencil was used

as a deadly weapon. *Id.* The defendant swung the pointy pencil at the victim's eye and told him he was going to die. *Id.* at 761-762. While a pencil is not a deadly weapon per se, the court recognized the manner in which the pencil was used turned it into a deadly weapon. *Id.* at 761. Thus, it is not enough that Mr. Flores "could have" used the item he was holding in a deadly manner, contrary to what the Court of Appeals decided. Otherwise, by the Court of Appeals' logic, some object as innocuous as a pencil could always be a deadly weapon because it would always be "easily accessible and readily available for offensive or defensive purposes" and have the "capacity to easily and readily produce death." Appendix A, pg. 7.

Another appropriate opinion that applies in this case is *Peterson*, wherein the non-per se deadly weapon analysis is used. 138 Wn. App. at 484-485. The *Peterson* case addresses the correct standard—that the manner of use of an object determines whether it is a deadly weapon. In *Peterson*, the

defendant used a knife to cut stereo wires to steal a car stereo. 138 Wn. App. at 479-485. The defendant was convicted of malicious mischief with a deadly weapon sentencing enhancement. 138 Wn. App. at 484-485. The court recognized the knife was not a *per se* deadly weapon because it did not fall within the statutory list of deadly weapons as the knife was only three inches long. 138 Wn. App. at 482-483. Next, the court examined whether the knife had the capacity to inflict death and whether the manner of use could easily and readily have produced death. 138 Wn. App. at 483. In the end, the court determined the knife was not used as a deadly weapon. 138 Wn. App. at 484-485. First of all, at the time the defendant was using the knife to cut stereo wires, no person was nearby to use the knife on in a deadly manner. 138 Wn. App. at 484-485. Second, using the knife to cut stereo wires was not likely or easily and readily able to produce death. 138 Wn. App. at 485. The court vacated the deadly weapon sentencing enhancement. *Id*. at 485.

Here, the State failed to produce sufficient evidence that the item used by Mr. Flores during the attempted kidnapping in the second degree was a deadly weapon. The object was not "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 (emphasis added); (CP 118). Ms. Cazares testified that during the attempted kidnapping, Mr. Flores was merely holding a sharp object. (RP 230-231). Ms. Cazares stated that Mr. Flores was holding the object steady at his side the entire time and was not waving it. (RP 233-234). Ms. Cazares said the item was approximately 18 inches long and was "almost like" a crowbar but was not a crowbar. (RP 230-231). While Ms. Cazares was scared, there was no indication or testimony that Mr. Flores was using the item in a manner that was likely to produce or may easily and readily produce death. (RP 231). It is possible the item was one of the small lightweight metal hollow pipes found with Mr. Flores. (State's Ex. 1). Even so

and regardless of what object was used, he did not swing at her, strike her, nor did he threaten to kill her with the object. (RP 228-248). The circumstances do not establish the object was used in a manner likely to produce or could easily and readily produce death at the time of the offense. *Peterson,* 138 Wn. App. at 483.

The jury was specifically instructed that 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." (CP 118; RP 423); RCW 9.94A.825; 11 Wash. Prac. Jury Instr. Crim. WPIC 2.07 (5th ed. 2018). Considering all the evidence in the light most favorable to the State, a rational trier of fact could not have found Mr. Flores guilty of the deadly weapon enhancement as to Count 2. *Salinas*, 119 Wn.2d at 201. Reasonable inferences from the evidence do not point to the usage of the item in Mr. Flores's hands as a deadly weapon. *Id*.; RCW 9.94A.825. There must be more than a scintilla of

evidence that the item was to be used in such a manner in order to establish sufficiency. *Fateley*, 18 Wn. App. at 102. There must be a quantum of evidence to establish circumstances from which the jury could reasonably infer the item was used in a manner likely to produce or may easily and readily produce death, and the evidence presented did not meet that standard. *Id*. The deadly weapon enhancement as to Count 2 should be vacated for insufficient evidence. *Smith*, 155 Wn.2d at 505; *Peterson*, 138 Wn. App. at 485.

Because the evidence could not establish the object Mr. Flores was holding was used in a manner that was likely to produce or may easily and readily produce death, and the Court of Appeals did not use the proper standard in deciding its opinion, review should be granted. Appendix A; RAP 13.4(1), (2), (3) and (4).

F. CONCLUSION

For the reasons stated herein, Mr. Flores requests this Court grant review pursuant to RAP 13.4(b)(1), (2), (3) and (4).

I certify this document contains 3,492 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 2nd day of December, 2024.

Laura M. Chuang, WSBA #36707

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Petitioner vs. PAULINO FLORES Appellant/Respondent	) Supreme Court No.) _____)) COA No. 39560-0-III)) PROOF OF SERVICE)

I, Laura M. Chuang, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 2, 2024, having obtained prior permission, I served a copy of the Petition for Review on the Respondent at Appeals@co.yakima.wa.us using the Washington State Appellate Courts' Portal.

Dated this 2nd day of December, 2024.

/s/ Laura M. Chuang____
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Appendix A

FILED
OCTOBER 29, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. PAULINO FLORES, Appellant.	)	No. 39560-0-III UNPUBLISHED OPINION

C●●NEY, J. — Paulino Flores was convicted of second degree assault and attempted second degree kidnapping. The jury returned special verdicts, finding Mr. Flores was armed with a deadly weapon during the commission of both crimes.

On appeal, Mr. Flores argues one of the deadly weapon enhancements is not supported by sufficient evidence, and the victim penalty assessment (VPA) was improperly imposed against him. We conclude sufficient evidence supported the enhancement but remand for the limited purpose of striking the VPA.

BACKGROUND

Mr. Flores was charged with one count of second degree assault and two counts of attempted second degree kidnapping. The State alleged a weapon enhancement on each count. The charges arose after Mr. Flores entered a restaurant in Sunnyside, Washington, owned by Lilian Cazares' parents. After entering the restaurant, Mr. Flores continued to a small office inside the building that was occupied by Ms. Cazares and her five-year-old daughter, Gracie.[1] Meanwhile, Ms. Cazares' parents were outdoors selling food for the upcoming Cinco de Mayo weekend. Ms. Cazares' brothers (Ugo Robledo and Elidro Robledo[2]), her sister-in-law, her aunt (Veronica Lara), and a dozen or so patrons were also present outdoors.

Ms. Cazares had entered the office to provide Gracie with video entertainment on the business computer. While accessing the computer, Ms. Cazares saw a stranger, Mr. Flores, walk into the office steadily holding a "really sharp object" on his right side. Rep. of Proc. (RP) at 230. The object was about 18 inches in length, appeared similar to

[1] To protect the privacy interests of Ms. Cazares' child, we use a pseudonym throughout this opinion. Gen. Order of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses*, (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

[2] Ugo and Elidro Robledo are referred to by their first names for clarity. No disrespect is intended.

a crowbar, and "had a sharp edge on the front of it." RP at 231. The sight of Mr. Flores with the object scared Ms. Cazares.

Mr. Flores told Ms. Cazares "you're coming with me." RP at 231. Ms. Cazares placed Gracie behind her for Gracie's protection. As Mr. Flores advanced on Ms. Cazares and Gracie, he stated in an affirmative tone, "[y]ou're leaving with me" and demanded she "start moving." RP at 232. Feeling scared and vulnerable, Ms. Cazares took a step forward when Mr. Flores told her to "hurry up." RP at 234. While exiting the office, Ms. Cazares saw Ms. Lara through a window and waved her hands as a signal for help. Ms. Cazares did not yell in an attempt to keep Mr. Flores from turning around. As they departed the building, Mr. Flores turned and told Ms. Cazares to "hurry up" and "start walking." RP at 236. Ms. Cazares noticed Ms. Lara running to tell her brothers and father that something was wrong. Ugo then approached Mr. Flores, which allowed Ms. Cazares to reenter the building to be with Gracie.

Ugo asked Mr. Flores, "what are you doing?" RP at 348. In response, Mr. Flores claimed Ms. Cazares was his wife. Ugo then directed Mr. Flores to leave. Mr. Flores charged once at Ugo with the steel or aluminum "sharp, pointy object" that was "[b]igger than a ruler . . . [m]ore than 12 inches" swinging toward Ugo's abdomen. RP at 349, 352. In response, Ugo jumped backward, fearing for his life. Mr. Flores swung at Ugo with the object a second time, causing Ugo to call the police. The third attempt by Mr. Flores

was an aggressive advance without swinging the sharp object. Restaurant patrons attempted to intervene, some by drawing their firearms.

Mr. Flores fled the area at the sound of approaching sirens. He was later arrested. When told by law enforcement personnel there had been an attempted abduction, Mr. Flores responded, "that was my wife … I was trying to get her to go." RP at 305.

Mr. Flores' charges were tried to a jury. After the State rested its case, the court dismissed the charge of attempted second degree kidnapping related to Gracie on Mr. Flores' motion. Following deliberations, the jury found Mr. Flores guilty of second degree assault and attempted second degree kidnapping. The jury also returned special verdicts, finding Mr. Flores was armed with a deadly weapon during the commission of both crimes.

Mr. Flores was sentenced to 53 months of incarceration on the assault charge and a concurrent 46.5 months on the attempted kidnapping charge. The court ordered a consecutive 6-month deadly weapon enhancement to the assault charge and a consecutive 12-month deadly weapon enhancement to the attempted kidnapping charge. Mr. Flores' sentence totaled 71 months of incarceration. The court further ordered the then-mandatory VPA.

Mr. Flores timely appeals.

ANALYSIS

SUFFICIENCY OF EVIDENCE

Mr. Flores argues the deadly weapon enhancement associated with his conviction for attempted second degree kidnapping is not supported by sufficient evidence. Specifically, Mr. Flores asserts the evidence failed to establish that the metal object was employed in a manner that was likely to produce or may easily and readily produce death. We disagree.

The sufficiency of the evidence is a question of law this court reviews de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). In a sufficiency of the evidence challenge, "we review the evidence in the light most favorable to the State" to determine whether any rational trier of fact could have found the aggravating factor beyond a reasonable doubt. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it." *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

To enhance a defendant's sentence under RCW 9.94A.533(4), the State must prove the defendant was armed with a deadly weapon. "A person is 'armed'… if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." *State v. Barnes*, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005). However, "[t]he

mere presence of a deadly weapon at the crime scene is insufficient to show that the defendant is 'armed.'" *Id.* Consequently, the State must show a nexus between the defendant, the crime, and the deadly weapon. *Id.*

A "deadly weapon" is an instrument listed as a deadly weapon in RCW 9.94A.825 or "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. Here, the court found the instrument was not a deadly weapon per se. Accordingly, the court instructed the jury that a "deadly weapon means 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." Clerk's Papers (CP) at 118.

We conclude there was sufficient evidence to support the jury's finding that Mr. Flores was armed with an instrument that had the capacity to inflict death and was easily and readily available to produce death while committing the crime of attempted kidnapping.

Ms. Cazares testified that Mr. Flores, standing in close proximity to her while demanding she leave with him, was armed with a "really sharp object" about "18 inches long" that he held with the "[t]he sharp edge [ ] out." RP at 230-31, 233. Mr. Flores' presence with the object caused Ms. Cazares to feel scared and vulnerable. Ugo's perception of the situation mirrored Ms. Cazares'. Ugo testified the object in Mr. Flores'

possession caused him to fear it was a life or death situation. Moreover, a couple of patrons drew their firearms after witnessing Mr. Flores swing the object twice.

The 18-inch, sharp, metal object Mr. Flores was holding could have easily killed Ms. Cazares. Further, Mr. Flores was holding it with the sharp edge facing out, toward Ms. Cazares, and could therefore have easily used the object for "offensive or defensive purposes," or to hurt or kill Ms. Cazares, at any time. *Barnes*, 153 Wn.2d at 383.

In reviewing the evidence in the light most favorable to the State, and accepting the truth of the State's evidence and all inferences that can reasonably be drawn from it, the object Mr. Flores possessed while committing the attempted kidnapping was easily accessible and readily available for offensive or defensive purposes and had the capacity to easily and readily produce death. Sufficient evidence supports the jury's finding that Mr. Flores was armed with a deadly weapon within the meaning of RCW 9.94A.825 during the commission of the attempted second degree kidnapping.

VICTIM PENALTY ASSESSMENT

Mr. Flores requests we remand his case to have the VPA struck from his judgment and sentence. The State concedes.

Former RCW 7.68.035(1)(a) (2018) required a VPA be imposed on any individual found guilty of a crime in superior court. In April 2023, the legislature passed Engrossed Substitute House Bill 1169 (H.B. 1169), 68th Leg., Reg. Sess. (Wash. 2023), that amended RCW 7.68.035 to prohibit the imposition of the VPA on indigent defendants.

RCW 7.68.035 (as amended); LAWS OF 2023, ch. 449, § 1. H.B. 1169 took effect on July 1, 2023. Amendments to statutes that impose costs upon convictions apply prospectively to cases pending on appeal. *See State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018).

Mr. Flores was found to be indigent, and because Mr. Flores' case is pending on direct appeal, the amendment applies.

CONCLUSION

Sufficient evidence supports the jury's deadly weapon finding on Mr. Flores' conviction for attempted second degree kidnapping. We remand for the limited purpose of striking the VPA from Mr. Flores' judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Pennell, J.

Staab, A.C.J.

NORTHWEST APPELLATE LAW

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Appellate Court Case Title:	State of Washington v. Paulino Flores
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