Supreme Court No. 99982-1
Court of Appeals No. 36967-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Alvaro Guajardo,
Petitioner

Spokane County Superior Court

Cause No. 17-1-02220-0

The Honorable Judge Raymond F. Clary

Amended PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF ARGUMENT

Alvaro Guajardo's felony murder conviction must be reversed for three reasons. First, the State failed to prove the *corpus delicti* of felony murder by independent evidence. It did not produce a body, a murder weapon, or an eyewitness, instead relying on an informant who claimed that Mr. Guajardo had "confessed." Second, when crucial lab testing was delayed by the crime lab, the State provided the report to the defense when trial was set to start, the trial court should have granted Mr. Guajardo's motion to dismiss the case or to suppress the late DNA evidence. Third, the accomplice statute and associated pattern instruction are unconstitutionally overbroad, because the court's instructions allowed conviction based on pure speech that was not directed at and likely to incite imminent lawless action.

DECISION BELOW AND ISSUES PRESENTED

Petitioner Alvaro Guajardo asks the Court to review the Unpublished Opinion (attached, cited as OP). This case presents three issues:

(1) Did the State fail to prove the *corpus delicti* of felony murder?
(2) Should the trial court have suppressed late DNA test results or dismissed the prosecution based on the crime lab's mismanagement?
(3) Is the accomplice liability statute overbroad because it permits conviction for speech that is not directed to inciting or producing imminent lawless action and likely to incite or produce such action?

STATEMENT OF THE CASE

Brett Snow's family reported him missing in December of 2015. RP (6/17/19) 378, 384, 391. Snow was homeless and using and distri-

buting drugs. RP (6/17/19) 376-379, 382-383, 386, 403; RP (6/18/19) 571. Over the next months, investigation revealed no body, no murder weapon, and no eyewitness to any killing. RP (6/17/19) 470; RP (6/19/19) 736.

Snow's mother did not know where he'd been living, though she spoke to him every few weeks. RP (6/17/19) 377. His sister said he lived "random places." RP (6/17/19) 383. Snow spent some time at a property owned by Russell Joyce where Joyce lived, along with Cheryl Sutton, Ken Stone, and Alvaro Guajardo. RP (6/17/19) 395-398. Stone and Sutton lived in the main house, where they established a drug distribution business. RP (6/17/19) 399-401; RP (6/18/19) 569, 571. Joyce stayed in a room above the shop, and Mr. Guajardo sometimes stayed in a shop room right below. RP (6/17/19) 397. At some point, Snow "wasn't around [that property] because he had stolen [a] van" belonging to Sutton and Stone. RP (6/17/19) 403. By January of 2016, all had been evicted from the property and a new owner set about remodeling. RP (6/17/19) 452-453.

More than a year after Snow was reported missing, drug dealer Christopher Schoonover contacted police from an Idaho prison. RP (6/18/19) 593. Schoonover alleged that Mr. Guajardo had told him what happened to Snow. RP (6/18/19) 574. Schoonover claimed that Mr. Guajardo told him that Sutton hit Snow over the head, then Snow was "finished off" and cut up. RP (6/18/19) 567-568, 574-577. Schoonover further asserted that Mr. Guajardo admitted to participation in the murder. RP (6/18/19) 576. Schoonover was given consideration for his statement that included dismissal of two drug charges and a significantly reduced jail

term on unrelated offenses. RP (6/18/19) 579-581, 606. Schoonover's description of murder, as he attributed to Mr. Guajardo, included use of a lawnmower blade, a firearm, one or more knives, a tarp and a bucket. None of these items were ever recovered. RP (6/18/19) 574, 576-577.

In June of 2016, still without any arrests, a search dog identified scents in the remodeled shop that later were found to be blood. RP (6/18/19) 486-487, 491-492, 506-509. Police had also rounded up several cell phones and traced calls and messages. None of these phones had any tie to Mr. Guajardo. RP (6/18/19) 519, 526-528; RP (6/19/19) 690-713.

The state charged Mr. Guajardo with murder on June 22, 2017.[1] CP 1. After numerous continuances, trial was set to begin on November 26, 2018. CP 96. Two weeks before trial, police found a mattress "where Brett Snow was laying [sic] when he was stabbed to death." CP 97-99. Police immediately submitted the mattress to the crime lab for testing. CP 13.

Over Mr. Guajardo's objection, the court continued the case to allow for DNA testing of the mattress. RP (11/16/18) 2-14. The trial was ultimately reset to begin on February 4, 2019, but defense counsel had still not been provided the results of DNA testing. RP (2/4/19) 123; CP 101-106. Those results were provided later that day. RP (2/4/19) 135.

The State only accounted for a week of the delay, saying "there was another case that had priority that bumped [the] analysis of the mattress back." RP (1/25/19) 102. Once the lab began its work, it provided results within approximately 10 days, while the case had been delayed two

[1] The state also charged Cheryl Sutton and Ken Stone with murder. RP (6/18/19) 526.

months. RP (1/25/19) 102; RP (2/4/19) 123, 135; CP 102-107.

Mr. Guajardo moved to dismiss the charges or suppress the new DNA evidence. CP102-106; RP (2/4/19) 104-138. The court denied the motions, granting a lengthy continuance to allow the defense to prepare to meet the new DNA evidence. CP 107. Trial was reset for June 17, 2019. CP 107. At trial, the State's expert testified that the mattress contained DNA from both Mr. Guajardo and Snow.[2] RP (6/19/19) 669-673. No other piece of evidence contained DNA from both men. RP (6/19/19) 649-683. The expert could not determine if Snow's DNA came from blood or saliva. RP (6/19/19) 672.

Russell Joyce told the jury that everyone who lived on his property used and sold drugs, including Snow. RP (6/17/19) 398, 401, 403. He said Snow hoped to set up a methamphetamine lab, which would need to be a secret as Snow meant to exclude Sutton. RP (6/17/19) 405-406, 429; RP (6/18/19) 571. Snow had stolen Sutton's van. RP (6/17/109) 403-404, 429. According to Joyce, while the two were in his room talking about cooking methamphetamine, Sutton burst angrily into the room. RP (6/17/19) 405-406, 429. Joyce said that Sutton had a steel bar, and Stone tied Snow up with a phone cord. RP (6/17/19) 405-406. Joyce said that Mr. Guajardo came up and the group went downstairs. RP (6/17/19) 406. Joyce admitted he never contacted police with his story. RP (6/17/19) 408, 415. Joyce also acknowledged that he did not hear any sounds of fighting or yelling, and

[2] There was also blood containing DNA from Nicole Price, who had the mattress at the time it was seized by police. RP (6/18/19) 531-532; RP (6/19/19) 671-672.

that he didn't ever see a body or even any blood. RP (6/17/19) 434.

The court instructed the jury on a theory of accomplice liability. CP 34, 35, 44, 48. The court did not instruct jurors that accomplice liability could not rest on Mr. Guajardo's speech unless it was directed to inciting or producing imminent lawless action and likely to incite or produce such action. CP 22-48. The jury convicted Mr. Guajardo of first-degree felony murder.[3] CP 61. Mr. Guajardo timely appealed. CP 78. The Court of Appeals affirmed the conviction in an unpublished Opinion. [4]

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE *CORPUS DELICTI* OF MURDER.

At Mr. Guajardo's murder trial, the State did not produce a body, a murder weapon, or an eyewitness. Instead, the case rested primarily on an informant's claim that Mr. Guajardo had confessed to killing Snow. Because the State failed to produce independent proof of the *corpus delicti*, the evidence was insufficient to convict Mr. Guajardo of felony murder. The charge must be dismissed.

A. The State was required to produce independent evidence establishing the *corpus delicti*.

[3] The jury also found Mr. Guajardo guilty of first-degree kidnapping. The Court of Appeals has directed the trial court to vacate that conviction. OP 35.

[4] The Court of Appeals vacated Mr. Guajardo's sentence and struck three prior convictions from his offender score. The court also directed the trial court to vacate Mr. Guajardo's kidnapping conviction, and address the imposition of DOC supervision fees. Opinion, pp. 30-32, 34-37.

Due process requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction based on insufficient evidence must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The prosecution may not use an accused person's uncorroborated statement to obtain a conviction. *State v. Cardenas-Flores*, 189 Wn.2d 243, 252-263, 401 P.3d 19 (2017). Instead, the State must produce independent evidence that *prima facie* establishes the *corpus delicti* of the charged crime. *Id.*, at 258.

Here, the murder conviction rested primarily on Mr. Guajardo's alleged "confession" to Schoonover. The State failed to introduce sufficient independent evidence to prove the *corpus delicti* of felony murder.

The *corpus delicti* rule "protects against convictions based on false confessions." *Id.*, at 247. A *corpus delicti* argument challenges the sufficiency of the evidence, and thus may be raised for the first time on review. *Id.*, at 263. Failure to independently establish the *corpus delicti* requires dismissal. *Id.*, at 260, 262-263. To prove a *prima facie* case, the State's independent evidence of the *corpus delicti* must be consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007). If the independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Id., at* 329-330.

In homicide cases, the *corpus delicti* rule requires independent

proof of "(1) the fact of death and (2) a causal connection between the death and a criminal act." *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). Where the charge is felony murder, the State need not establish the underlying felony as an element of the *corpus delicti*. *State v. Burnette*, 78 Wn.App. 952, 957, 904 P.2d 776 (1995).

Here, the independent evidence was insufficient to prove the *corpus delicti* of murder. The State did not prove the "fact of death" or a causal connection to some criminal act. *Aten,* 130 Wn.2d at 655.

B. The independent evidence introduced at trial was insufficient to prove the *corpus delicti* of felony murder.

Here, the State failed to prove the *corpus delicti* of murder. The prosecution did not independently show that Snow was deceased, or any causal connection between some criminal act and Snow's alleged death. Instead, the State relied on Schoonover's unsupported claims regarding Mr. Guajardo's "confession."

The "fact of death." The independent evidence did not prove "the fact of death." *Aten,* 130 Wn.2d at 655. Although Snow went missing, the independent evidence supports reasonable and logical inferences of both guilt and innocence. *Brockob,* 159 Wn.2d at 329.

Snow was a drug user who lived in "random places." RP (6/17/19) 383. He had disappeared before – there was a time when "he wasn't around" one of his regular haunts[5] "because he had stolen [a] van." RP

[5] The North Starr Road address.

(6/17/19) 403. Snow's driver's license and EBT card were found in Montana, and he'd also distributed other personal property to people "in the community." RP (6/17/19) 462. The evidence is consistent "with a hypothesis of innocence": that Snow fled Washington to evade further retribution from Sutton and/or to escape the difficult life he'd made for himself in order to begin anew in Montana or elsewhere. His departure from Spokane County can be explained without assuming he'd been killed.

Without a body, the State *can* rely on circumstantial evidence to prove the fact of death. *State v. Thompson*, 73 Wn.App. 654, 659, 870 P.2d 1022 (1994). But in such cases, the supporting evidence is considerably stronger than that produced here. *See, e.g., State v. Lung*, 70 Wn.2d 365, 423 P.2d 72 (1967); *State v. Sellers*, 39 Wn.App. 799, 695 P.2d 1014 (1985); *State v. Quillin*, 49 Wn.App. 155, 160, 741 P.2d 589 (1987).

In *Sellers*, two people witnessed a shooting and "saw the gunman put the inert victim in a car and drive away." *Sellers*, 39 Wn.App. at 803. This was found to be independent proof establishing the fact of death. *Id.* Here, no witnesses claim to have seen Snow killed.

In *Lung*, police found a coat belonging to a woman who'd gone missing. The coat had blood stains surrounding a bullet hole. *Lung*, 70 Wn.2d at 372-373. This was held sufficient to prove the fact of death. *Id.* Here, police did not find any bloody clothing that had belonged to Snow.

The defendant in *Quillin* was seen driving a car that belonged to the mother of a missing person, a car that had been stolen the day the victim disappeared. *Quillin*, 49 Wn.App. at 160. It was later found burned

and abandoned, and witnesses testified that the defendant had burned it. *Id.* The defendant (and his half-brother, who pled guilty to the murder) had some of the victim's clothing, including a leather jacket stained with red-dish-brown mud. *Id.,* at 162 n. 1. The defendant and his half-brother had mud on their own clothing. *Id.,* at 162 n. 1. Bloodstains were found on the pants worn by the defendant's half-brother and on a pair of shoes. *Id.,* at 162 n. 1. The likely murder weapon was a box knife that had been seen in the defendant's possession. *Id.,* at 162 n. 1. Here, by contrast, nothing suggests that Mr. Guajardo or his companions tried to destroy property that had belonged to Snow. They had no bloody clothing that had been worn by Snow, nor did they themselves have bloody clothing. Further, the State here did not produce a description of a murder weapon or show that Mr. Guajardo was in possession of such a weapon.

In *Thompson,* the missing victim "never missed appointments without informing the affected parties, she never had been gone for more than a 24–hour period, she was a good housekeeper, she let people know where she was, she did not have any dangerous habits, she had prepared for the upcoming fall quarter and had made plans to remodel her mother's house, she took excellent care of her pets, and her physical and psychological health was good." *Id.,* at 663. The consistency of her habits, and the fact that they had all been broken at once, provided strong evidence that she had died suddenly: "there was evidence that [the victim], after making several appointments and having numerous obligations to fulfill, disappeared without telling anyone, that a moldy coffeepot and dirty dishes

were found in her house, and that her cat was left for days without food and water." *Id.* In addition, the defendant was found using the victim's ATM card and her car, which had bloodstains in it. *Id.*

Snow, by contrast, was not known for his consistency. Unlike the missing person in *Thompson,* Snow had previously "been gone for more than a 24-hour period," he did not regularly "let people know where [he] was," he had "dangerous habits," he had not described any plans for upcoming activities, and his "physical and psychological" health were questionable in light of his long-standing drug habit. *Id.* Furthermore, unlike the defendant in *Thompson,* Mr. Guajardo did not possess or use Snow's ATM card, vehicle, or other property.

Even the trace amounts of Snow's blood discovered in the shop do not establish that he'd been killed.[6] As Joyce testified, it was not uncommon in the drug world for people to be beaten for their transgressions. RP (6/17/19) 404, 406, 408. The small amounts of blood found in the shop may have resulted from a beating, or drug injection, rather than a killing. After Snow left Joyce's apartment, Joyce did not hear any yelling, fighting, or sounds of torture from the shop where Snow was allegedly killed and dismembered. RP (6/17/19) 434. Joyce never saw a body or blood, even though he had cameras set up to monitor the property. RP (6/17/19) 434.

The Court of Appeals found the independent evidence sufficient to

[6] A small amount of Snow's DNA was also recovered from the mattress where he was allegedly killed; however, it was not clear that the DNA came from blood rather than saliva. RP (6/19/19) 672.

establish the fact of death. The court pointed to "plastic used to prevent blood spatter," and evidence that "the scene had been cleaned with chemicals." OP 17. Without citing to any basis for its conclusion, the Court of Appeals opined that "[p]lastic to prevent blood spatter and use of chemicals to clean blood are more consistent with a killing than a mere beating." OP 17.

Contrary to the court's position, even this evidence is consistent with a hypothesis of innocence. A new owner had taken possession by January 2016 and was remodeling the residence. OP 5. The shop "had new plywood on the walls and the carpeting and flooring had been torn up." OP 5. Police did not find any evidence in January and February of 2016. OP 6. When they revisited months later, they found evidence of chemical cleaning agents and "torn pieces of plastic and staples, indicating there had been a barrier that had been removed." OP 6. The scraps of plastic did not include any blood spatter.

It is unsurprising that a new owner engaged in renovating a property would use bleach or other cleaning chemicals. Similarly, the new owner may well have put up plastic to protect an area while painting. Nothing suggested that the plastic was used to prevent blood spatter, or that the chemicals were used to clean blood from the shop.

The independent evidence was insufficient to prove the "fact of death." The evidence was consistent with a hypothesis of innocence. One reasonable and logical inference from the independent evidence is that Snow left the area for his own reasons. *Brockob,* 159 Wn.2d 329-330.

A "causal connection." The independent evidence here also failed to establish "a causal connection between the [alleged] death and a criminal act." *Aten*, 130 Wn.2d at 655. First, in the absence of a body, no cause of death could be determined. Second, no one claimed to have witnessed a murder or other criminal act that could have caused Snow's death. Third, police did not find a murder weapon, despite Schoonover's claim that the perpetrators used a lawnmower blade, a firearm, a knife, and tools for dismembering Snow.[7] RP (6/18/19) 574, 576-577.

Although Joyce testified that Mr. Guajardo was involved in unlawfully restraining and assaulting Snow in Joyce's apartment, the independent evidence did not prove any causal connection between those acts and Snow's alleged death.

The Court of Appeals points to "strange sounds" that came from the shop days after the assault as evidence of a causal connection. OP 19. But nothing tied these noises to Snow. Accordingly, the sounds were consistent with a hypothesis of innocence. *Brockob*, 159 Wn.2d 329-330.

Further, even considering Joyce's testimony that Mr. Guajardo allegedly pointed a gun at Joyce and asked if he was going to be a problem, what the concern may have been remained unspecified. OP 19. The question could have related to the kidnapping and beating Joyce witnessed, or to the other criminal activity those associated with the house were involved in. Again, the evidence was consistent with a hypothesis of

[7] Nor did police find the tarp or buckets Schoonover described when relaying Mr. Guajardo's purported "confession." RP (6/18/19) 574, 576.

innocence. *Brockob*, 159 Wn.2d 329-330. In the absence of proof showing a causal connection between the "fact of death" and some criminal agency, the independent evidence was insufficient to prove the *corpus delicti*.

C. The Supreme Court should grant review because this case presents an issue of substantial public interest.

Review is proper when "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). This case presents such an issue. It does not appear that the Supreme Court has examined the *corpus delicti* rule in a homicide case since it decided *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999). Furthermore, the last time the court examined *corpus delicti* issues in a case where the prosecution failed to produce a body was 1967. *See Lung*, 70 Wn.2d at 372-373. The Supreme Court should take this opportunity to address the issue here. This case warrants review under RAP 13.4(b)(4).

II. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE CRIME LAB'S MISMANAGEMENT OF THE EVIDENCE PREJUDICED MR. GUAJARDO.

The prosecution did not provide defense counsel DNA test results until the day of trial. The crime lab had waited 2 ½ months to perform testing which it was ultimately able to complete in approximately 10 days. The court should have either suppressed the new DNA evidence or dismissed the prosecution.

A. The Court of Appeals decision conflicts with *Michielli* and *Price*.

A trial court may suppress evidence for "arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b); *City of Seattle v. Holifield*, 170 Wn.2d 230, 239, 240 P.3d 1162 (2010). Under CrR 8.3, misconduct "'need not be of an evil or dishonest nature; *simple mismanagement is sufficient.*'" *State v. Michielli,* 132 Wn.2d 229, 239, 937 P.2d 587 (1997) (quoting *State v. Blackwell,* 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)) (emphasis in *Michielli*). The mismanagement may stem from the conduct of any governmental entity, including the state crime lab. *See State v. Woods*, 143 Wn.2d 561, 583, 23 P.3d 1046 (2001).[8]

Here, police submitted the mattress to the crime lab one day after they'd recovered it. CP 13. The crime lab did not report the results of DNA testing until 2 ½ months later, on the day trial was scheduled to begin. RP (2/4/19) 123, 136. The State provided no information explaining the delay, other than to say that "there was another case that had priority that bumped [the] analysis of the mattress back." RP (1/25/19) 102.

But this higher priority case apparently accounted for only one week of the 2 ½ month delay. RP (1/25/19) 102. Furthermore, once the lab finally started its work, the record suggests that the analysis, preparation of the report, and peer review took approximately 10 days. RP (1/25/19) 102; RP (2/4/19) 135.

[8]S*ee also State v. Wake*, 56 Wn.App. 472, 475, 783 P.2d 1131 (1989) (addressing impact of crime lab mismanagement on speedy trial).

The Court of Appeals erroneously claims that Mr. Guajardo "does not provide citations to… the record supporting [the] assertion" that a higher priority case delayed analysis by only one week, and that the testing and peer review itself took only 10 days. OP 21. This is incorrect: the prosecutor relayed to the court that a higher priority case "forced [the lab] to put this on the back burner for a week." RP (1/25/19) 102. Ten days later, the results had been reviewed and were provided to the parties. RP (2/4/19) 123-124, 136.

The crime lab mismanaged the evidence in this case by delaying analysis for 2 ½ months without explanation. This mismanagement prejudiced Mr. Guajardo. The prejudice contemplated by CrR 8.3 "includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.'" *Michielli,* 132 Wn.2d at 240 (quoting *State v. Price,* 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

In *Michielli,* the State added charges shortly before trial was scheduled to begin. As a result, the defendant "was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance." *Id.,* at 244. Similarly, Mr. Guajardo was forced by the lab's delay to seek a continuance when the court refused to dismiss the case or suppress the evidence. The *Michielli* court noted that "[d]efendant's being forced to waive his speedy trial right is not a trivial event," and that forcing a waiver of speedy trial due to unwarranted delay "can reasonably be considered mismanagement and prejudice sufficient to satisfy CrR 8.3(b)." *Id.* at 245. Mr.

Guajardo was forced to choose between his right to a speedy trial and his right to adequately prepared counsel. *Michielli*, 132 Wn.2d at 240.

The late DNA evidence was significant. The new results, provided on the very day trial was scheduled to start, showed that the mattress contained DNA from both Mr. Guajardo and Snow. RP (6/19/19) 669-673. The evidence was critical to the prosecution's case, given the State's failure to produce a body, a murder weapon, or an eyewitness. The DNA evidence's importance was magnified by the weakness of the State's case. In the absence of other evidence, jurors may well have placed great weight on the presence of Snow's DNA on Mr. Guajardo's mattress, even though the forensic expert could not determine if Snow's DNA came from blood or saliva. RP (6/19/19) 672.

Defense counsel could not meet the evidence that he received it on the day of trial. RP (2/4/19) 120, 127, 137-138. Instead, Mr. Guajardo was forced to waive speedy trial and request a continuance to allow his attorney to consult with an expert. RP (2/4/19) 120, 127, 137-138.

The Court of Appeals noted that "Guajardo (properly) sought and the court granted a continuance to allow counsel to prepare" to meet the new DNA evidence. OP 24. Despite this, the court distinguished *Michielli,* primarily on the grounds that "the State added no new charges," and "counsel was not forced to prepare for 'surprise charges'" brought just before trial.[9] OP 24 (quoting *Michielli,* 132 Wn.2d at 244).

[9] The Court of Appeals also noted that Mr. Guajardo "knew for two months that the results could potentially link him to Snow." OP 24. This observation may be relevant to Mr.

But the rule in *Michielli* is not limited to cases where the State adds new charges. *See, e.g., State v. Brooks*, 149 Wn.App. 373, 386, 203 P.3d 397 (2009) (dismissal based on late discovery). Given the appellate court's acknowledgement that Mr. Gujardo "(properly) sought" a continuance, it is clear that the defense was forced into the same choice as the accused person in *Michielli.*

B. The Supreme Court should revisit *Woods*, because the "new facts" standard outlined in that case is overly strict and unrealistic.

As a result of mismanagement at the state crime lab, DNA test results were not produced until the first day of trial. The defense was forced to seek a continuance to address the new DNA results. The results should be considered "new facts," weighing in favor of dismissal under CrR 8.3(b). Defense counsel could not reasonably be expected to meet this new DNA evidence produced on the day of trial. RP (2/4/19) 138; RP (2/8/19) 140. Instead, Mr. Guajardo was forced to choose between his right to a speedy trial and his "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense." *Price*, 94 Wn.2d at 814.

As the Court of Appeals acknowledged, "Guajardo (properly) sought and the court granted a continuance to allow counsel to prepare" to meet the new DNA evidence. OP 24. Despite this, the Court of Appeals found that "the test results did not insert 'new facts' into the proceedings."

Guajardo's request for dismissal; it does not apply to a request for suppression. *See State v. Salgado-Mendoza*, 189 Wn.2d 420, 436 n. 10, 403 P.3d 45 (2017).

OP 21 (citing *Woods*).

In *Woods*, the Supreme Court upheld a conviction, finding that a "delay in producing… DNA test results did not cause the interjection of new information into the case." *Woods*, 143 Wn.2d at 584. According to the *Woods* court, no new facts arose because the defendant had been "placed on notice from the time of the charging that the State intended to use the results from forensic testing to prove that [the defendant] was the perpetrator of the crimes." *Id.*, at 584–585 (citing *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996)).

This position is puzzling: notice that evidence is being tested for DNA does not allow a defendant to prepare to meet that evidence. Even if an expert was already on board, that expert cannot evaluate the methodology or attempt to reproduce the result until the State's testing is concluded and the report provided to the parties. Taken at face value, the *Woods* court's reasoning suggests that the untimely production of evidence will never permit dismissal if the defense was on notice of the type of evidence the State intends to test. Late disclosure of a fact witness would not interject new facts into the case if the defendant was "placed on notice… that the State intended to use" fact witnesses to prove guilt. *Id.*

The "new facts" test as outlined in *Woods* is overly strict. It is both "incorrect and harmful." *State v. Pierce*, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (internal quotation marks and citations omitted) (outlining the standard for overruling precedent.)

The Supreme Court should revisit *Woods* and articulate a more

realistic test for determining if late disclosure injects "new facts" into a case.[10] When provided such information on the morning of trial, any reasonable attorney must seek a continuance to consult an expert and prepare to defend against the evidence. The expert would then need to review the State's methodology and results and might need to perform independent testing. The Court of Appeals acknowledged as much when it observed that "Guajardo (properly) sought" a continuance so his attorney could consult with an expert. OP 24.

C. The Supreme Court should accept review under RAP 13.4(b)(1) and (4).

The Court of Appeals decision conflicts with *Michielli* and *Price.* Review is appropriate under RAP 13.4(b)(1). In addition, this case presents issues of substantial public interest. This court should revisit *Woods*, and fashion a new test for determining when late disclosure injects "new facts" into a case. Additionally, this court should explain how the test outlined in *Michielli* and *Price* applies to cases in which mismanagement produces late DNA test results. Review is appropriate under RAP 13.4(b)(4).

III. THE ACCOMPLICE LIABILITY STATUTE AND ASSOCIATED JURY INSTRUCTION ARE OVERBROAD BECAUSE THEY CRIMINALIZE CONSTITUTIONALLY PROTECTED SPEECH.

[10]For example, the court could hold that "new facts" arise whenever a reasonable attorney would need additional time to prepare to meet the State's late disclosure. Applying this test to Mr. Guajardo's case, dismissal was appropriate. The state crime lab committed mismanagement by taking 2 ½ months to perform tasks that it could complete in approximately 10 days. RP (1/25/19) 102; RP (2/4/19) 136. The lab's mismanagement resulted in late disclosure of results showing DNA from both Snow and Mr. Guajardo on the mattress. RP (6/19/19) 669-673.

Speech advocating criminal activity may only be punished if it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Washington's accomplice liability statute and the associated pattern instruction allow conviction for protected speech that is not directed to or likely to produce imminent lawless action. The statute and instruction are facially overbroad. The Supreme Court should accept review under RAP 13.4(b)(1) and (2).

A. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds.

The First Amendment protects free speech.[11] U.S. Const. Amend. I. A statute is overbroad under the First Amendment if it sweeps within its prohibitions a substantial amount of constitutionally protected speech. *State v. Immelt*, 173 Wn.2d 1, 6-7, 267 P.3d 305 (2011); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). Anyone accused of violating such a statute may bring an overbreadth challenge; the accused person need not have engaged in constitutionally protected activity or speech. *Immelt*, 173 Wn.2d at 33. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused.[12] *Id.* Mr. Guajardo's jury was instructed on

[11] This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases). Washington's constitution gives similar protection: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Wash. Const. art. I, §5.

[12] In other words, "[f]acts are not essential for consideration of a facial challenge…on First Amendment grounds." *City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991). The

accomplice liability. CP 34, 35, 44, 48. Accordingly, he is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks*, 539 U.S. at 118-119; *Webster*, 115 Wn.2d at 640.

B. The Court of Appeals decision conflicts with *Brandenburg*, because Washington's accomplice liability scheme punishes protected speech.

The First Amendment protects speech advocating criminal activity: "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft*, 535 U.S. at 253. Because of this, such speech may only be punished if it "is *directed to inciting* or producing imminent lawless action *and is likely to incite* or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969) (emphasis added). This requires courts to instruct juries in a manner which ensures that mere advocacy is not criminalized. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).[13]

Accomplice liability in Washington does not meet the *Brandenburg* standard. The accomplice statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes a substantial amount of

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First Amendment overbreadth doctrine is an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003). "The Supreme Court has 'provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.'" *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005) (quoting *Hicks*, 539 U.S. at 119).

[13] In *Freeman*, the defendant was charged with counseling others to violate the tax laws. The court reversed some of the convictions[13] because the trial court failed to instruct on the *Brandenburg* standard: "[T]he jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur." *Freeman*, 761 F.2d at 552.

constitutionally protected expression. *Hicks*, 539 U.S. at 118. In Washington state, a person may be convicted as an accomplice for "encourage[ment]" provided "[w]ith *knowledge* that it will promote or facilitate the commission of the crime."[14] RCW 9A.08.020(3)(a) (emphasis added); *see also* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (4th Ed). This does not require proof of criminal intent: under the statute, knowledge is sufficient for conviction. Thus, a person may be convicted even if the speech is not "directed to inciting or producing imminent lawless action," and even if it is not likely to produce imminent lawless action. *Brandenburg,* 395 U.S. at 447*;* RCW 9A.08.020(3)(a).

Because the law governing accomplice liability "is susceptible of regular application to constitutionally protected speech," it is unconstitutional. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 467, 107 S. Ct. 2502, 2512, 96 L. Ed. 2d 398 (1987). Indeed, Washington's accomplice liability statute and WPIC 10.51 would criminalize speech protected by the U.S. Supreme Court. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (reversing a conviction stemming from a protester's statement "We'll take the f*cking street later"); *Brandenburg*, 395 U.S. at 445 (reversing a Klan leader's conviction for "'advocat(ing) * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform'") (quoting Ohio Rev. Code Ann. §2923.13). These examples

[14] Accomplice liability may also be premised on "aid," which has been interpreted to include "all assistance whether given by words [or] encouragement." WPIC 10.51; RCW 9A.08.020(3)(a)(ii).

involve encouragement made with knowledge that the encouragement would promote or facilitate a violation of law. Each would lead to conviction in Washington, despite being protected by the First Amendment.

Washington's accomplice statute can be construed so that it does not reach constitutionally protected speech. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction in *Brandenburg*. But Washington's law and pattern instruction fail to include those limitations. Washington's law of accomplice liability, as expressed in the statute, WPIC 10.51, and the court's instructions in this case, is overbroad. *Id.*

C. The Court of Appeals decision conflicts with numerous cases interpreting the phrase "manifest error."

A manifest constitutional error may be reviewed for the first time on appeal. RAP 2.5(a)(3). An error is manifest if "the facts necessary to adjudicate the claimed error are in the record on appeal." *State v. Jones*, 163 Wn. App. 354, 360, 266 P.3d 886 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995)).[15]

Here, the Court of Appeals declined to review Mr. Guajardo's First Amendment issue. The court found that the error was not "manifest" because of prior appellate decisions rejecting similar arguments. *See* OP 27 (citing, *inter alia*, *State v. Coleman*, 155 Wn.App. 951, 231 P.3d 212

[15] The record "must be sufficient to determine the merits of the claim." *State v. Fenwick*, 164 Wn. App. 392, 400, 264 P.3d 284 (2011); *see also State v. Schierman*, 192 Wn.2d 577, 604, 438 P.3d 1063 (2018) (constitutional error found manifest because "the record is sufficient to allow us to determine the merits of [appellant's] claim.")

(2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011)).[16] This approach conflicts with numerous cases interpreting RAP 2.5(a)(3). The "manifest" inquiry focuses on the facts in the record, not on the legal merits of the claim. *Jones*, 163 Wn.App. at 360. The court should reaffirm that a "manifest error" is one where the facts in the record are sufficient to adjudicate the merits of the claim.

D. The *Coleman* court applied the wrong legal standard in upholding RCW 9A.08.020 against an overbreadth challenge.

The Court of Appeals erroneously relied on *Coleman* when denying Mr. Guajardo's First Amendment challenge. OP 27. In upholding the statute, the *Coleman* court ignored the provision that permits conviction when a person "encourages" criminal activity without aiding or agreeing to aid the other person. RCW 9A.08.020(3)(a)(i). Encouragement, even when coupled with knowledge, does not meet the *Brandenburg* standard: the First Amendment protects speech made with knowledge but without intent to incite imminent lawless action. *Freeman*, 761 F.2d at 552. Washington accomplice law directly contravenes this requirement.

In addition, First Amendment protections extend beyond speech "that only consequentially further[s] the crime." *Coleman*, 155 Wn.App. at 960-961. The State cannot criminalize mere advocacy of criminal activity. *Hess*, 414 U.S. at 108. Even if accomplice liability required proof of intent

[16] The other cases cited by the court all flowed from the Coleman decision. OP 27, citing *State v. Ferguson*, 164 Wn.App. 370, 264 P.3d 575 (2011); *State v. Holcomb*, 180 Wn.App. 583, 321 P.3d 1288 *review denied*, 180 Wn.2d 1029, 331 P.3d 1172 (2014); *State v. McCreven*, 170 Wn. App. 444, 284 P.3d 793, 813 (2012).

(as *Coleman* implies), it would remain unconstitutional unless it required proof that the speech was likely to produce imminent lawless action.[17] *Brandenburg*, 395 U.S. at 447; *cf. Coleman,* 155 Wn.App. at 960-961.

Washington's accomplice liability statute and associated pattern jury instruction are unconstitutionally overbroad. *Id.* The Court of Appeals erred by denying Mr. Guajardo's overbreadth challenge. Its decision, based on *Coleman* (among other cases), conflicts with *Brandenburg.*

CONCLUSION

The Supreme Court should accept review. The Court of Appeals decision conflicts with decisions of the U.S. Supreme Court, the Washington Supreme Court, and the Washington Court of Appeals. RAP 13.4(b)(1) and (2). It also presents issues of substantial public interest that should be reviewed by the Supreme Court. RAP 13.4(b)(4).

Respectfully submitted July 23, 2021.

BACKLUND AND MISTRY

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[17]The *Holcomb* court attempted to remedy *Coleman's* error by noting that the accomplice liability statute has been construed to require knowledge of the specific crime charged, rather than any other crime. *Holcomb*, 180 Wn.App. at 590. But proving specific knowledge does not establish that "both the intent of the speaker and the tendency of [their] words was to produce or incite an imminent lawless act, one likely to occur." *Freeman*, 761 F.2d at 552. Requiring proof of knowledge—even specific knowledge of the crime to be committed – is insufficient to meet the *Brandenburg* standard. *Id.; Brandenburg*, 395 U.S. at 447.

CERTIFICATE OF SERVICE

I certify that on today's date, I mailed a copy of this document to:

Alvaro Guajardo DOC# 382871
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on July 23, 2021.

_____
Jodi R. Backlund, No. 22917
Attorney for the Appellant

APPENDIX

Court of Appeals Unpublished Decision

Renee S. Townsley
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CASE # 369676
State of Washington v. Alvaro Guajardo
SPOKANE COUNTY SUPERIOR COURT No. 171022200

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
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FILED
JUNE 17, 2021
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. ALVARO GUAJARDO, Appellant.	)))))))))	No. 36967-6-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Alvaro Guajardo appeals his conviction and sentence for first degree felony murder. We affirm his conviction but remand for resentencing and for the trial court to vacate the jury's guilty verdict for first degree kidnapping. The trial court is directed to resentence Guajardo by excluding a California conviction it previously included and by excluding two prior Washington convictions for possession of a controlled substance, the latter in accordance with *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

FACTS

Bret Snow has been missing since late 2015. Snow's mother last spoke with him on Thanksgiving Day in 2015. Snow and his mother talked every few weeks. Snow's sister last saw him in mid-November 2015. She saw or talked to Snow several times per week. Snow did not have a job, he used drugs, and lived in random places. In the months

before his disappearance, Snow spent a lot of time at a property on North Starr Road in Newman Lake, Washington.

North Starr Road drug conglomerate

Russell Joyce owned a house and a shop on North Starr Road. Joyce lived in an apartment above the shop and rented out the remaining living spaces. Cheryl Sutton and Ken Stone lived in the house. Guajardo stayed in a makeshift bedroom on the ground floor of the shop. Guajardo, Sutton, and Stone all had keys to the shop.

Sutton, Stone, and Guajardo sold methamphetamine and heroin. Sutton oversaw the drug business, while Stone and Guajardo were the "enforcers." Report of Proceedings (RP)[1] at 400, 570. Enforcement in the drug community involves intimidation and beatings. Snow sold drugs for Sutton, as did Colby Vodder.

Snow and Joyce were friends. Snow sold drugs to Joyce, which Joyce believed came from Sutton. Sometime in 2015, Snow allegedly stole Sutton's van. He stayed away from North Starr Road until Joyce convinced him to come back and face Sutton and Stone.

[1] "RP" references are to the four volume set of verbatim report of proceedings numbered 1-875 unless otherwise indicated.

Snow's disappearance

On December 2, 2015, Snow's friend Karen Nelson gave him a ride to the North Starr Road property. Snow went to Joyce's apartment. According to Joyce, Sutton and Stone came running up the stairs and angrily burst in. Sutton held a steel bar in her hand and told Snow to get on the ground. Stone tied Snow up with a telephone cord. They called Guajardo up to the apartment. He punched Snow a couple times before the trio took him downstairs into the shop. Joyce called and texted Snow later but never heard from him again.

Snow sent a text message to Nelson at 4:25 a.m. on December 3. To send that message, Snow's phone accessed cell towers closest to the North Starr Road property. Nelson called and texted Snow back the next morning, but Snow's phone was off. No calls or text messages were received on Snow's phone after that morning.

Days later, Joyce heard noises downstairs in the shop. He said, "[I]t sounded like somebody was drilling through my wall from the shop side," and an hour or two later, he heard "what sounded like a chain being pulled through something metal." RP at 410-11. Joyce knocked on the door to the shop, and Guajardo answered, "just wait, just wait." RP at 411. Through the closed door, Vodder said he had poached a deer. Neither Guajardo nor Vodder allowed Joyce into the shop.

Sometime afterward, Joyce and Guajardo took a ride in Vodder's truck. Eventually, Guajardo stopped on the side of the road near open fields. Guajardo pulled his gun, pointed it at Joyce's face, and asked, "'Do we have to worry about you?'" RP at 414. Joyce said, "'Nope.'" RP at 414. Guajardo then fired his gun out the window before driving with Joyce back to the North Starr Road property.

On December 11, 2015, Guajardo was arrested and brought to Spokane County Jail.[2] He placed a phone call from jail to Sutton and Stone. Guajardo instructed Sutton to "Get rid of that shit." Ex. 68.

Sometime afterward, Sutton asked her friend, Derek Lyle, to bring her to a hotel in Airway Heights. Sutton told Lyle to "run in and grab a bucket behind the counter and bring it back out." RP at 635. Lyle heard liquid sloshing in the bucket. When they got back to North Starr Road, Sutton "did whatever she did with the bucket." RP at 636.

On December 15, 2015, Stone, Sutton, and Joyce were evicted from the North Starr Road property due to foreclosure. They gave the mattress that had been in Guajardo's bedroom to their friend, Nicole Price. Price moved the mattress to a storage facility in Post Falls, Idaho.

[2] It is unclear why Guajardo was arrested, but he was incarcerated until mid-January 2016. He was not arrested in this matter until May 2017.

Bret Snow's mother and sister filed a missing person report with the Spokane County Sheriff's Department. Detective Lyle Johnston obtained Snow's fingerprints, photograph, DNA,[3] dental records, and phone records. He sent multiple flyers to the media and forwarded Snow's information to national databases. Detective Johnston was never contacted after posting Snow's missing person information.

Law enforcement's investigation

Detective Johnston first searched the North Starr Road property on January 15, 2016. The property had been vacated by Joyce, Stone, and Sutton and a new owner was remodeling the residence for sale. The shop had new plywood on the walls and the carpeting and flooring had been torn up. Detective Johnston did not find anything of evidentiary value.

Detective Johnston obtained phone records for Snow, Sutton, Stone, and Vodder. In the two months leading up to Snow's disappearance, there were 96 calls and 416 text messages between Sutton and Snow. Sutton never contacted Snow after December 3. Detective Johnston was unable to locate phone records for Guajardo during this period because he had multiple potential phones but none appeared to be "actually his." RP at

[3] Deoxyribonucleic acid. To develop a DNA profile, Detective Johnston gathered two hats from Snow's mother, as well as buccal swabs from his mother and siblings.

458. Detective Johnston also searched Snow's social media and learned that "Mr. Snow had some personal items out in the community." RP at 462. He contacted the recipients of the items and recovered them. Snow had left his electronic benefits transfer card and driver's license with a friend prior to Thanksgiving, and Detective Johnston recovered them in Montana.

Detective Johnston returned to North Starr Road on February 6, 2016, with a forensic specialist. They took numerous photos but still did not find anything of evidentiary value.

On June 3, 2016, Detective Johnston, several forensic specialists, and a cadaver dog searched the North Starr Road property. The cadaver dog indicated there were human remains behind a metal shelf in the shop. The detective moved the shelving, which had been installed by the new owner, and saw water stains on the wall. There was no water source around and no other wall had stains, which indicated the stains were likely from cleanup of a crime scene.

The forensics team performed several tests to determine whether blood had been present where the dog alerted. One test indicated there may have been blood, while another came out negative. Two dots of blood were identified: one near the base of a utility sink and another on top of the water heater. Along another wall, the tests indicated

a streak of blood along with a visible patch of hair embedded into a crevice of the cement. In that area, there was heavily coagulated blood and a brown tint that appeared to be human tissue.

The detectives then tested for chemical cleaning agents. They found torn pieces of plastic and staples, indicating there had been a barrier that had been removed. There was no evidence of blood underneath.

Detective Johnston arrested Vodder in December 2016 for Snow's murder. He later arrested Sutton, Guajardo, and Stone. He was unable to recover any weapons from the scene. He did, however, find the SIM[4] card from Snow's cell phone in Sutton's belongings after her arrest. Snow's sister later found Snow's dog at Sutton's mother's house.

Christopher Schoonover

Christopher Schoonover met Snow at North Starr Road. They both sold drugs for Sutton. On January 12, 2017, Detective Johnston interviewed Schoonover, who said he knew nothing about Snow's disappearance.

On May 25, 2018, Schoonover contacted Detective Johnston from jail in Idaho. He was in custody on possession charges and made a deal with the State to reduce his

[4] Subscriber identification module.

sentence in exchange for testifying against Sutton, Stone, Vodder, and Guajardo at their separate trials. He provided Detective Johnston with the following information: Sutton's and Stone's "demeanor" changed drastically at the end of 2015. RP at 572. In December 2015, Schoonover ignored a phone call from Sutton. Sutton then called with Vodder's phone and asked Schoonover to "do something," which he refused to do. RP at 573. After that call, Schoonover was concerned for Snow's safety.

Schoonover also said he talked to Guajardo in December 2015. Guajardo allegedly told Schoonover:

> [Snow] had been struck in the head by Ms. Sutton with a lawn mower blade and that he had been taken in the back to the bedroom and finished and then taken back into the front area of the garage and cut into pieces and put into buckets and was taken to a pig farm.

RP at 574. Guajardo said that Snow had tried to rob Sutton and Stone earlier, and Stone wanted to "finish him off." RP at 575. Guajardo admitted that he and Vodder assisted. Guajardo told Schoonover that Snow was put on his bedroom mattress, covered with a tarp, shot, stabbed, and then cut into several pieces.

Trial court proceedings

On June 22, 2017, the State charged Guajardo with first degree felony murder (predicated on first or second degree kidnapping), second degree felony murder (predicated on first or second degree kidnapping), and conspiracy to commit first degree

kidnapping. After discovery and various pretrial motions, the court set trial to commence November 26, 2018.

Motion to dismiss or suppress evidence

On November 8, 2018, police learned that Price had Guajardo's mattress, which might have been used during Snow's killing. On November 13, Detective Johnston located the mattress in a storage facility. The mattress was stained despite being cleaned by Price. Initial testing indicated the presence of blood. The next day, the State submitted sections of the mattress to the Washington State Crime Laboratory.

On November 15, 2018, the State moved for a trial continuance to allow for blood evidence testing, which it estimated would be complete by December 7. It noted that other testing was occurring at this time and could take longer depending on the initial results and number of contributors. The State set its motion for continuance to be heard November 16.

At the hearing, Guajardo objected to a continuance and argued that "he shouldn't have to delay his speedy trial because of newly discovered evidence." RP (Nov. 16, 2018) at 4. The State explained that Detective Johnston had talked to Price several times before and had only just learned of the mattress. The initial testing indicated blood, so the State wanted to process the rest of the mattress. The court granted the continuance for

good cause and reset the trial to commence December 10. On November 29, the trial court reset the trial date to February 4, 2019.

On February 1, the crime lab informed the State its testing was complete and would be peer reviewed by February 4. On February 4, the day trial was set to begin, Guajardo filed a motion to dismiss the case or to suppress the DNA evidence from the mattress. The court heard argument and explained its decision for denying Guajardo's motion to dismiss:

> We have a missing person. DNA is critical. We didn't learn of this mattress, which is the subject of this motion, until November 8th, 2018. And at that point, it wasn't even known to the State that it still existed. . . .
>
> And then Detective Johnston immediately sought to find the mattress. He found the mattress within five days, by November 13, 2018. Within one day, November 14, 2018, the mattress was submitted to the crime lab. The crime . . . lab promised and did expedite the examination and testing. At the same time, however, it had other cases that were at least equally, if not more, pressing in terms of time constraints . . . . [T]he trial has only been continued about two months total since our first trial date. . . . I think that at this . . . point the court[ ] [has] done and the parties have done all that they can to keep this case on track to get tried. . . .
>
> . . . .
>
> We're informed this morning, through law enforcement and from the State's attorney, that we're going to know sometime today what the outcome of that testing is. We don't even know now whether it's going to be exculpatory. . . . [I]t could be [as] exculpatory as it is inculpatory.
>
> On learning that, and at each juncture from the first discovery of the mattress, the State has immediately been in contact with Mr. Guajardo's lawyer, Mr. Jones, to inform him of the status of the progress with the mattress. . . .
>
> . . . .

> . . . [T]he court has to find that it's probable that the State failed to act with due diligence, which is another way of articulating that first element of [CrR] 8.3. I find that the first element is not satisfied; that I cannot conclude that the State did not act with due diligence given the circumstances under which the mattress was discovered and the factors that I've already outlined. Therefore, I deny the motion to dismiss.

RP at 122-25.

The court explained, "I can't suppress whatever comes of the mattress, whether it be exculpatory or inculpatory, because, again, the State didn't fail to act with due diligence. So I don't find arbitrary action or governmental misconduct." RP at 125.

The crime lab determined the mattress contained a mixture of three individuals' DNA, which included Snow. The statistics indicated "it is 720,000 times more likely that the observed profile occurred as a result of a mixture of Bret Snow and two unknown contributors than if originated from three unrelated individuals . . . ." RP at 670. An additional blood sample from the mattress matched Guajardo.

The trial court continued Guajardo's trial to June 17, 2019. Snow's mother and sister, Joyce, Nelson, Price, Schoonover, Lyle, Detective Johnston, and other law enforcement and forensic specialists testified.

Jury instructions and verdict

The trial court instructed the jury of its duty to reach a unanimous verdict. It also instructed:

> A person commits the crime of murder in the first degree when he or she or an accomplice commits or attempts to commit first or second degree kidnapping and in the course of or in furtherance of such crimes he or she or another participant causes the death of a person other than one of the participants.

Clerk's Papers (CP) at 34. The relevant portion of instruction 19 provided: "A 'participant' in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice." CP at 43. Instruction 20 stated:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP at 44. Guajardo did not object to the instructions.

The jury found Guajardo guilty of first degree felony murder and first degree kidnapping. It found Guajardo was armed with a deadly weapon for the offenses.

Sentencing

The trial court discussed the comparability of Guajardo's out-of-state convictions and incorporated them in its oral ruling. The court found five California convictions comparable to Washington convictions. First, possession of a controlled substance in July 1996 was comparable to possession of methamphetamine in Washington, adding 1 point. Second, assault with a deadly weapon in July 1996 was comparable to second degree assault in Washington, adding 2 points. Third, evading a police officer in March 2000 was comparable to attempting to elude a pursuing police vehicle in Washington, adding 1 point. Fourth, taking a motor vehicle without consent in December 2004 was comparable to taking a motor vehicle without permission in the second degree in Washington, adding 1 point. Fifth, felon in possession of a shotgun in June 2011 was comparable to unlawful possession of a firearm in the second degree in Washington, adding 1 point. That conviction was accompanied by threat to another human being with a shotgun. The court found all out-of-state convictions had been proved by a preponderance of the evidence.

Guajardo's Washington convictions added 4 points to his score: 1 point for possession of a controlled substance in February 2017, 1 point for conspiracy to possess a

controlled substance in May 2015, 1 point for the current conviction, and 1 point for committing the current offense while on community custody.

The trial court calculated Guajardo's offender score as 9. Guajardo did not stipulate to his offender score but did not make specific arguments against it.

The State asked the court to find merger between the jury's verdicts for first degree kidnapping and first degree murder, which was predicated on kidnapping. It argued that for purposes of sentencing, merger was appropriate, but that because the intent for kidnapping and intent for murder were not necessarily the same, the State could argue that in the future. It concluded, "[T]here can be no punishment based solely on that first-degree kidnapping charge." RP at 858.

On July 19, 2019, the court sentenced Guajardo for first degree felony murder and ordered him to serve 572 months' imprisonment, including 24 months for the deadly weapon enhancement.

Guajardo appealed, and a panel of this court heard oral argument.

ANALYSIS

SUFFICIENCY OF EVIDENCE

Guajardo contends the State failed to present sufficient evidence to establish the corpus delicti for felony murder. We disagree.

"The doctrine of corpus delicti protects against convictions based on false confessions, requiring evidence of the 'body of the crime.'" *State v. Cardenas-Flores*, 189 Wn.2d 243, 247, 401 P.3d 19 (2017) (internal quotation marks omitted) (quoting *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996)).[5] The rule requires the State to produce independent evidence supporting a logical and reasonable interference that the crime the defendant confessed to actually occurred—a defendant's incriminating statement alone is insufficient. *Id.* at 253; *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006); *State v. Sellers*, 39 Wn. App. 799, 803, 695 P.2d 1014 (1985); *see also State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010) ("a conviction cannot be supported solely by a confession"). The independent evidence need not establish the corpus delicti beyond a reasonable doubt or even a preponderance. Rather, it is sufficient if it prima facie establishes the corpus delicti. *Cardenas-Flores*, 189 Wn.2d at 258.

Corpus delicti is considered a rule of sufficiency and may be considered for the first time on appeal. *Id.* at 260-62. As with other sufficiency challenges, we assume the truth of the State's evidence and all reasonable inferences drawn therefrom. *Id.* at 264. The independent evidence is sufficient if it supports a logical and reasonable inference of

[5] During oral argument, the State conceded that Guajardo's statements to Schoonover were "confessions" for purposes of the corpus delicti rule because Schoonover received a reduced sentence for testifying.

the facts the State seeks to prove. *Brockob*, 159 Wn.2d at 328. The independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *Id.* at 328-29. We engage in the same inquiry as the trial court, reviewing de novo whether the State met its burden of production to satisfy the corpus delicti rule. *State v. Pineda*, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000).

Corpus delicti in homicide cases requires the State to prove "(1) the fact of death and (2) a causal connection between the death and a criminal act." *Aten*, 130 Wn.2d at 655. We address each element in turn.

Fact of death

Guajardo contends the State failed to produce sufficient independent evidence that Snow is dead. He argues the independent evidence produced equally supports innocence as it does guilt. We disagree.

The State can rely on circumstantial evidence to prove the fact of death. *State v. Thompson*, 73 Wn. App. 654, 659, 870 P.2d 1022 (1994). "[D]irect proof of the killing or the production of the body" is not required for homicide convictions; that would be "manifestly unreasonable and would lead to absurdity and injustice." *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967). "'All that is required to prove death is circumstantial evidence sufficient to convince the minds of reasonable men of the

existence of that fact.'" *State v. Hummel*, 165 Wn. App. 749, 768, 266 P.3d 269 (2012) (quoting *Lung*, 70 Wn.2d at 371).

Here, the circumstantial evidence supports a reasonable inference that Snow is dead. Snow was last seen with Guajardo and his associates, and forensics identified Snow's blood in the shop and on Guajardo's mattress.

Guajardo argues this evidence does not rule out a hypothesis of innocence—that Snow was beaten and voluntarily fled. He argues the trace amounts of blood indicate a beating not a murder. We disagree. Forensics found plastic used to prevent blood spatter and opined the scene had been cleaned with chemicals. Plastic to prevent blood spatter and use of chemicals to clean blood are more consistent with a killing than a mere beating. Moreover, the fact that those involved in Snow's abduction routinely called him before December 3, 2015, and did not call him after that date supports a reasonable inference that they knew he was dead.

Guajardo next argues that Snow did not have a consistent home and it is not unusual for transients to be alive but missing. We agree that Snow did not have a stable residence and he sold and used drugs. But he spoke with his family regularly until early December 2015, when he abruptly stopped returning calls or text messages.

The record does not support the hypothesis that Snow voluntarily fled. Snow does not own a car. He did not take his dog. Several state and national agencies had the missing person report, but nothing came of it. He was last seen being beaten by Guajardo, one of Sutton's enforcers. Snow's SIM card was found with Sutton. Snow's dog was found with Sutton's mother. These facts more strongly support the hypothesis that Snow is dead, rather than the hypothesis that he was beaten and he fled.

Causal connection

Guajardo next argues the State failed to prove a causal connection between Snow's alleged death and a criminal act. We disagree.

The corpus delicti rule "does not require proof of a causal relation between the death and the accused." *Lung*, 70 Wn.2d at 371. Rather, the evidence must show that the death was "caused by someone's criminal act." *Cardenas-Flores*, 189 Wn.2d at 263. Again, we assume the truth of the State's evidence and all reasonable inferences drawn therefrom. *Id.* at 264.

Guajardo emphasizes that no cause of death was determined, there were no witnesses to an alleged murder, and the police failed to locate a murder weapon. But the circumstances of Snow's disappearance sufficiently establish a causal link between Snow's death and someone's criminal act. Guajardo hit Snow before he was forced

downstairs to the shop. Days later, Joyce heard strange sounds in his apartment coming from the shop downstairs. The sound was like someone using a chain to hoist something. When Joyce knocked on the shop door, Guajardo did not open the door and Vodder claimed to have poached a deer. Soon after, Guajardo took Joyce on a long ride culminating in him pointing a gun at Joyce's face and asking if he was going to be a problem. After Joyce said "'Nope,'"[6] Guajardo punctuated the seriousness of his threat by firing a shot in the air.

The State presented sufficient prima facie evidence that someone—Guajardo, Vodder, or Sutton—committed a criminal act that caused Snow's death. The State did not need to locate Snow's body and perform an autopsy, it did not need to produce an eyewitness, and it did not need to locate the murder weapon. The State merely needed to provide prima facie evidence that Snow was dead and that his death was caused by someone's criminal act. The State's evidence certainly meets this standard.

SUPPRESSION OF EVIDENCE

Guajardo contends the trial court erred by denying his CrR 8.3(b) motion to dismiss the charges or suppress the DNA evidence from his mattress. He argues the crime lab's delay in testing and releasing the results forced him to choose between his

[6] RP at 414.

right to a speedy trial and his right to adequately prepared counsel. For the reasons set forth below, we disagree.

We review CrR 8.3(b) rulings for abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). We address Guajardo's dismissal and suppression arguments in turn.

Dismissal

Guajardo contends the trial court erred in denying his motion to dismiss the murder charge because the DNA evidence injected "new facts" into the proceedings. Based on the case law, we disagree.

Dismissal of charges pursuant to CrR 8.3(b) requires a defendant to establish by a preponderance of the evidence: (1) an arbitrary action or governmental misconduct, and (2) prejudice affecting the defendant's right to a fair trial. *Michielli*, 132 Wn.2d at 239-40. Governmental misconduct "'need not be of an evil or dishonest nature'"; simple misconduct supports the first prong. *Id.* at 239 (quoting *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). To meet the second prong, a defendant must show actual—not merely speculative or general—prejudice. *Salgado-Mendoza*, 189 Wn.2d at

431-32; *State v. Rohrich*, 149 Wn.2d 647, 657-58, 71 P.3d 638 (2003). Actual prejudice may result from late disclosure of material facts shortly before litigation. *Salgado-Mendoza*, 189 Wn.2d at 432.

Dismissal under CrR 8.3(b) is an extraordinary remedy reserved for egregious cases; it is improper absent material prejudice to the rights of the accused. *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). A delay in production of evidence, even if attributable to the State's lack of due diligence, does not warrant reversal unless it interjects "'new facts' into the case which then causes the defendant to choose between two constitutional rights." *State v. Woods*, 143 Wn.2d 561, 584, 23 P.3d 1046 (2001).

Guajardo has not met his burden to warrant CrR 8.3(b) dismissal. He argues the crime lab's two and one-half month delay, when the actual testing only took 10 days, shows mismanagement satisfying the first prong. He does not provide citations to authority or the record supporting this assertion. In fact, the record shows the crime lab expedited the testing but had other high priority deadlines to meet. And even if the delay demonstrated a "lack of due diligence," the test results did not insert "new facts" into the proceedings.

The *Woods* court addressed a similar argument. There, the State said the DNA testing would be complete by October, but it was not completed until February of the next

year. *Id.* at 583. The four-month delay was partly due to the State having inadvertently frozen Woods's blood and a forensic scientist taking a vacation. *Id.* The court held this dilatory conduct did not warrant dismissal because Woods was not forced into "choosing between salvaging one constitutional right at the expense of another." *Id.* at 584. Citing *State v. Cannon*, 130 Wn.2d 313, 922 P.2d 1293 (1996), the court reasoned:

> Woods was placed on notice from the time of the charging that the State intended to use the results from forensic testing to prove that Woods was the perpetrator of the crimes. Although the State did not produce test results as promptly as it initially indicated that it would, the test results which were produced did not constitute new evidence that forced Woods to choose between two constitutional rights.

Woods, 143 Wn.2d at 584-85. The court affirmed Woods's convictions.

Similarly, the State promptly informed Guajardo when it found his mattress, it told him that a stain on the mattress tested positive for blood, and that the blood was sent to the crime lab for further testing. Because the State promptly notified Guajardo of these developments, the crime lab's test results did not inject "new facts" into the case.

Guajardo argues the "new facts" test in *Woods* is overly strict and urges this court to fashion a more realistic test. Abandoning precedent "is the prerogative of the state Supreme Court, not the Court of Appeals." *State v. Jussila*, 197 Wn. App. 908, 931, 392 P.3d 1108 (2017). We are bound by the Supreme Court and disregarding direct controlling authority would be error. *Id.*

Suppression

Guajardo alternatively contends the trial court erred in denying his motion to suppress the DNA evidence due to the crime lab's misconduct. While this argument is more persuasive, we ultimately find the trial court did not abuse its discretion here either.

In reviewing claims under CrR 8.3(b), a trial court may entertain a less severe remedy than dismissal. *City of Seattle v. Holifield*, 170 Wn.2d 230, 239, 240 P.3d 1162 (2010). Indeed, "'Dismissal is not justified when suppression of evidence will eliminate whatever prejudice is caused by the action or misconduct.'" *Salgado-Mendoza*, 189 Wn.2d at 431 (quoting *State v. McReynolds*, 104 Wn. App. 560, 579, 17 P.3d 608 (2000)).

Even assuming the crime lab's two and one-half month delay was misconduct, Guajardo still must establish prejudice. The prejudice contemplated by CrR 8.3(b) "includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense . . . .'" *Michielli*, 132 Wn.2d at 240 (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

Guajardo relies on *Michielli* to support his position. There, the State added four charges days before trial was set to begin on a single theft charge. *Id.* at 243. The State

admitted the additional charges were based entirely on information already known and described in the initial information. *Id.* The Supreme Court held, "The State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice sufficient to satisfy CrR 8.3(b)." *Id.* at 245.

Michielli is inapposite. There, the State knew all of the information necessary to charge all five counts in its initial information, but for reasons unknown, waited until days before trial to add four new charges. Defense counsel was wholly unprepared to proceed to trial on the new charges and Michielli had to choose between a speedy trial and a prepared defense. Conversely, here, the State added no new charges. And as soon as it found the mattress, it informed Guajardo and sought expedited testing. Guajardo's counsel was not forced to prepare for "surprise charges brought three business days before [his] scheduled trial." *Id.* at 244. Rather, he knew for two months that the results could potentially link him to Snow. When that turned out to be true, Guajardo (properly) sought and the court granted a continuance to allow counsel to prepare.

We conclude that the trial court did not err in denying Guajardo's motion to dismiss or suppress the DNA evidence pursuant to CrR 8.3(b).

JURY UNANIMITY

Guajardo contends his state constitutional right to a unanimous verdict was violated when the jury was not given a unanimity instruction for it to decide whether he was a principal or an accomplice to the felony murder. The State argues Guajardo failed to preserve this error on appeal and has not demonstrated that it is one of manifest constitutional magnitude. We agree with the State.

It is well settled that parties may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in RAP 2.5, which aims to "'afford[ ] the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.'" *Id.* (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). A party may, however, raise for the first time on appeal an issue involving a "manifest error affecting a constitutional right." RAP 2.5(a)(3). As our Supreme Court has explained,

> RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be "manifest"—*i.e.*, it must be "truly of constitutional magnitude". The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes this error "manifest," allowing appellate review.

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citation omitted).

A court must first determine whether the claimed error is a manifest constitutional error before addressing the substantive argument and conducting a harmless error analysis. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). This is because:

> The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal. In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.

Id. at 99-100. "This distinction also comports with the common legal definition of 'manifest error': '[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.'" *Id.* at 100 n.1 (quoting BLACK'S LAW DICTIONARY 622 (9th ed. 2009)).

Here, appellate review is not warranted under RAP 2.5(a) because the error, if any, was not manifest. We have previously held, "'There was no need for a unanimity instruction where accomplice liability allows a jury to convict as long as it finds that the elements of the crime were met, regardless of which participant fulfilled them.'" *State v. Holcomb*, 180 Wn. App. 583, 588, 321 P.3d 1288 (2014) (quoting *State v. Walker*, 178 Wn. App. 478, 488, 315 P.3d 562 (2013), *aff'd in part, rev'd in part*, 182 Wn.2d 463, 341

P.3d 976 (2015)). Because Guajardo's argument is contrary to precedent binding on the trial court, the claimed error is not manifest and we decline to review it.

CONSTITUTIONALITY OF RCW 9A.08.020

Guajardo contends the accomplice liability statute is unconstitutionally overbroad because it criminalizes constitutionally protected speech. The State responds that Guajardo failed to preserve this issue with a proper objection to the trial court's accomplice liability instruction or by arguing the issue below. Again we agree.

As noted above, unpreserved error may be raised for the first time on appeal if it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3). To be "manifest," the error must be "so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d at 100.

The trial court's accomplice liability jury instruction was premised on RCW 9A.08.020(3), which provides in relevant part:

> A person is an accomplice of another person in the commission of a crime if: (a) With knowledge that it will promote or facilitate the commission of the crime, he or she: (i) Solicits, commands, encourages, or requests such other person to commit it; or (ii) Aids or agrees to aid such other person in planning or committing it . . . .

We have rejected similar overbreadth challenges to this statute. *See, e.g.*, *Holcomb*, 180 Wn. App. at 589-90, *review denied*, 180 Wn.2d 1029, 331 P.3d 1172

(2014); *State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011), *review denied*, 173 Wn.2d 1035, 277 P.3d 669 (2012); *State v. Coleman*, 155 Wn. App. 951, 960-61, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011); *see also State v. McCreven*, 170 Wn. App. 444, 484-85, 284 P.3d 793 (2012) (rejecting overbreadth argument as it relates to accomplice liability jury instruction), *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013).

Guajardo, recognizing that his argument is contrary to precedent, argues that *Holcomb* and its antecedents should be overturned. In making this argument, he tacitly concedes that the accomplice liability instruction given by the trial court was not obvious error. For this reason, the error is not manifest and we decline to review it for the first time on appeal.

COMPARABILITY OF CALIFORNIA CONVICTIONS

Guajardo contends the trial court erred in including two prior California convictions in his offender score. The State concedes that one conviction is not comparable but maintains the other was properly included. We discuss the relevant standards of review before addressing each conviction in turn.

We review the sentencing court's calculation of Guajardo's offender score de novo. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014). Prior out-of-state

convictions may be counted in an offender score if they are comparable to a Washington crime. RCW 9.94A.525(3). The State must prove the existence and comparability of all foreign convictions. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

"'Comparability is both a legal and a factual question.'" *State v. Wilson*, 170 Wn.2d 682, 690, 244 P.3d 950 (2010) (quoting *State v. Collins*, 144 Wn. App. 547, 553, 182 P.3d 1016 (2008)). To determine whether an out-of-state crime is comparable, we apply a two-part test: first, we compare the elements of the out-of-state offense to the Washington statute in effect at the time. *Olsen*, 180 Wn.2d at 472-73; *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). "If the foreign conviction is identical to, or narrower than, the Washington statute, the foreign conviction counts toward the offender score as if it were the Washington offense." *Olsen*, 180 Wn.2d at 478. Second, if the foreign statute is broader than its Washington counterpart, we determine whether the defendant's conduct would have violated the comparable Washington statute. *Id.* In this step, we consider only facts that were previously admitted, stipulated to, or proved beyond a reasonable doubt. *State v. Davis*, 3 Wn. App. 2d 763, 772, 418 P.3d 199 (2018).

Assault with a deadly weapon

Guajardo was convicted under California's assault with a deadly weapon statute. The statute punished "any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury . . . . " Former CAL. PENAL CODE § 245(a)(1) (1993). Assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." CAL. PENAL CODE § 240. In California, assault is a general intent crime. *People v. Williams*, 26 Cal. 4th 779, 788, 29 P.3d 197, 111 Cal. Rptr. 2d 114 (2001).

In Washington, assault is a specific intent crime. *State v. Stevens*, 158 Wn.2d 304, 314, 143 P.3d 817 (2006). That is, the State must prove a person had the specific intent either "'to cause bodily injury'" or "'to create reasonable fear and apprehension of bodily injury.'" *Id.* (quoting *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996)).

Guajardo could be convicted of the California assault without having been guilty of second degree assault in Washington. The Washington crime is narrower and is therefore not legally comparable. *See Lavery*, 154 Wn.2d at 255-56 (concluding second

degree robbery in Washington is not legally comparable to federal bank robbery because the former is specific intent while the latter is general intent).

We next consider whether the facts admitted, stipulated to, or proved beyond a reasonable doubt are comparable to Washington's second degree assault. We may look to the record of the foreign conviction to aid in our analysis, but "the elements of the charged crime must remain the cornerstone of the comparison." *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). "Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial." *Id.* A guilty plea is not an admission of the facts in the charging document. *State v. Bunting*, 115 Wn. App. 135, 141-42, 61 P.3d 375 (2003); *see also State v. Thomas*, 135 Wn. App. 474, 486, 144 P.3d 1178 (2006) ("Where facts alleged in the charging documents are not directly related to the elements, a court may not assume those facts have been proved or admitted.").

This prong is often difficult due to the requirement that we rely only on facts admitted, stipulated to, or proved beyond a reasonable doubt. As our Supreme Court has noted:

> Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are

> broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258. This problematic tendency is illustrated here. Guajardo agreed that the California sentencing court could consider police reports and other documents as a factual basis for his guilty plea. The State did not provide these materials to the trial court. Accordingly, the State did not prove factual comparability and this California conviction should not have been counted in Guajardo's offender score. We accept the State's concession and remand for resentencing.

Evading a police officer

Guajardo pleaded guilty to evading a police officer in California, which provides:

> If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment . . . .

CAL. VEH. CODE § 2800.2(a). Section 2800.1 requires four conditions: "(1) a red light, (2) a siren, (3) a distinctively marked vehicle, and (4) a peace officer in a distinctive uniform." *People v. Hudson*, 38 Cal. 4th 1002, 1008, 136 P.3d 168, 44 Cal. Rptr. 3d 632 (2006). A "distinctive uniform" is "the clothing prescribed for or adopted by a law enforcement agency which serves to identify or distinguish members of its force." *People v. Mathews*, 64 Cal. App. 4th 485, 490, 75 Cal. Rptr. 2d 289 (1998).

The Washington statute in effect provided:

> Any driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

Former RCW 46.61.024 (1983). The signal "may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle." *Id.*

The statutes are legally comparable. They each require an attempt to flee or elude with willful or wanton disregard for the lives or property of others, a disregard for a peace officer's signal to stop via siren or lights, and an officer in uniform. If anything, the Washington statute is broader in that it permits the officer's signal to be by hand or voice, in addition to a light or siren.

Guajardo argues the charging document did not allege the uniform element and therefore the crimes are not legally comparable. He is correct that the charging document states only that "the peace officer's motor vehicle was operated by a peace officer," and does not contain the remaining statutory language regarding the uniform. CP at 184. But the complaint cites the proper section of the vehicle code, and the California and Washington statutes are legally comparable.

DOUBLE JEOPARDY

Guajardo contends the trial court erred by failing to dismiss the first degree kidnapping charge. He implies that the charge is a conviction, and the trial court was obligated to dismiss or vacate it.

The State notes that the trial court, in its judgment and sentence, did not refer to the jury's kidnapping verdict. The State nevertheless concedes that "this Court should remand with instructions to enter an order vacating the first-degree kidnapping." Br. of Resp't at 61.

Our federal and state constitutions protect an accused person "from being twice put in jeopardy for the same offense." *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); *see* U.S. CONST. amend. V; U.S. CONST. amend. XIV, section 1; WASH. CONST. art. I, § 9. This prohibits courts from "imposing multiple punishments for the same criminal conduct." *Turner*, 169 Wn.2d at 454. The term "punishment" includes a conviction, even if no separate punishment is imposed. *Id.* at 454-55. The remedy for a double jeopardy violation is vacation of one of the underlying convictions. *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007).

A charge is not a conviction. But RCW 9.94A.030(9) defines a "conviction" as including a verdict of guilty. Guajardo fails to cite any authority to support his argument that a charge is a sufficient "punishment" to warrant vacation or dismissal.

Nevertheless, because the State concedes that the jury's guilty verdict should be vacated, we instruct the trial court to enter an order vacating the guilty verdict with respect to the charge of kidnapping in the first degree.

RESENTENCING PURSUANT TO *BLAKE*[7]

Guajardo contends he is entitled to resentencing pursuant to *Blake*, 197 Wn.2d 170, which held that Washington's possession of a controlled substance statute is unconstitutional. The State concedes this issue.

A prior conviction that is constitutionally invalid on its face may not be considered in a defendant's offender score. *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986). "A conviction is facially invalid if constitutional invalidities are evident without further elaboration." *State v. Webb*, 183 Wn. App. 242, 250, 333 P.3d 470 (2014). The *Blake* court held a conviction for possession of a controlled substance is constitutionally invalid on its face. 197 Wn.2d at 186.

[7] This issue appears in the parties' supplemental briefing.

Guajardo's criminal history includes two possession-related offenses: a 2015 conviction for conspiracy to possess methamphetamine and a 2017 conviction for possession of methamphetamine. The 2017 conviction occurred when Guajardo was on community custody, which added 1 extra point to his offender score. Because the possession convictions are unconstitutional under *Blake*, we remand for the sentencing court to strike those convictions and the extra point added for the community custody violation from Guajardo's offender score.

DEPARTMENT OF CORRECTIONS (DOC) SUPERVISION COSTS[8]

Guajardo contends the trial court erred in imposing supervision fees because he is indigent. He challenges case law that narrowly interprets the prohibition on imposing costs on indigent defendants. The State argues supervision fees are not costs under the statute and therefore may be imposed on Guajardo at the trial court's discretion. We agree with the State.

RCW 10.01.160(3) prohibits sentencing courts from imposing costs on indigent defendants. "Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program . . . or pretrial supervision." RCW 10.01.160(2).

[8] This issue appears in the parties' supplemental briefing.

Division Two of this court has twice held that a sentencing court is not prohibited from imposing community supervision fees on an indigent defendant. *State v. Starr*, 16 Wn. App. 2d 106, 479 P.3d 1209 (2021); *State v. Spaulding*, 15 Wn. App. 2d 526, 536-37, 476 P.3d 205 (2020). We find those opinions persuasive: community supervision fees do not meet the statutory definition of "costs" and are therefore discretionary legal financial obligations. *Spaulding*, 15 Wn. App. 2d at 536.

The supervision fees challenged here were not specifically addressed on the record. They are standard fees in the felony judgment and sentence form, found in the middle of a lengthy paragraph describing the conditions of community custody. The trial court imposed a $500 victim's compensation assessment fee and waived the DNA collection fee due to Guajardo's criminal history. The court left the restitution fee—which was joint and several with Vodder, Sutton, and Stone—open for 180 days as requested. The court signed Guajardo's order of indigency.[9] The trial court may impose the DOC supervision fees at its discretion but the record is unclear as to whether it intended to. We remand to ensure it so intended.

[9] The court initially imposed the $200 filing fee based on Guajardo's ability to work while incarcerated, but later ensured it was not included due to Guajardo's order of indigency.

Affirmed but remanded for resentencing.

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.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, A.C.J.

Fearing, J.

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