Supreme Court No. 94676-1
COA No. 74334-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HANS HANSEN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Hans Hansen was the appellant in Court of Appeals No. 74334-1-I (decided May 22, 2017). Appendix A.

B. COURT OF APPEALS DECISION

Mr. Hansen seeks review of the Court of Appeals (Div. 1) decision affirming his convictions, and his sentence.

C. ISSUES PRESENTED ON REVIEW

1. Hans Hansen was a long-time gun aficionado who often fired assault rifles with his wife at a shooting range where those firearms were permitted. He admitted to police after his arrest that he precisely understood the power of such guns. The State offered three videos created by the Crime Laboratory which showed an AK47 assault rifle being aimed and fired into a police ballistic vest, an AK47 bullet being fired through a metal car door, and the AK 47 being aimed, and fired rapidly, ejecting spent shells into the air.

Did the trial court abuse its discretion in allowing each of the scenes to be played for the jury, where the general requirements of relevance and substantial similarity to the actual events were not met, where any minimal probity was cumulative, and where the relevance, if any, of the dramatic videos was completely outbalanced by their dramatic,

frightening, and unfairly prejudicial effect, requiring exclusion under State v. Finch, 137 Wn.2d 792, 975 P.2d 967, 984 (1999)?

Did the Court of Appeals erroneously fail to recognize that the defendant's admitted, extensive knowledge of the firearms and bullets he used, including his understanding that that they could penetrate both car doors and bulletproof vests, rendered the video evidence of limited probative value, cumulative, and overly prejudicial, requiring exclusion under Finch? Decision, at pp. 6, 9.

Did the Court fail to recognize the lack of similarity between the alleged incidents and the video evidence, and the extreme prejudice where one of the videos depicted bullets passing through a bulletproof vest causing the jug of water it was mounted on to drip, where no officer was struck through their vest or suffered bleeding, requiring exclusion under Finch? Decision, at pp. 8-9.

2. Where the trial court failed to consider that under the SRA a defendant's capacity to appreciate the wrongfulness of his conduct may, in certain circumstances, be a basis for a downward departure, is remand for re-sentencing required?

D. STATEMENT OF THE CASE

1. Facts. On October 15, 2014, Hans Hansen was despondent and suicidal because of the recent failure of his work prospects, and a severe

illness that had destroyed his ability to work as a custom cabinet maker. The business he began had foundered since the 2008 economic crash. 11/4/15RP at 809-21. On the night of October 15, Hans drove in his truck from the home he shared with his wife Angela Hansen to the nearby Granite Falls Police Department, where he fired one of multiple guns he had with him, putting bullet holes into the building and a patrol car. 11/15/15RP at 16. This conduct unfortunately escalated into further shooting at other locations and police departments, and at pursuing police vehicles, until Mr. Hansen was shot in the head so police could stop him, whereupon he was arrested. 11/15/15RP at 99.

However, Hans' conduct was driven by his diagnosed strong impetus to commit suicide in some fashion. At trial, the defense expert, Dr. Mark Koenen, testified that he diagnosed Mr. Hansen with several Axis 1 disorders including clinical depression. Dr. Koenen determined that Hans had clear suicidal ideation and intention. This was based in part on his additional, medical disorders of factor V Leiden thrombophilia, and related ischemia, which had resulted in a pending likelihood of amputation of one leg and possibly other limbs. 11/9/15RP at 866-70, 873. For Hans, this would be the nail in the coffin that would prevent him from working as a craftsman, his life's vocation. 11/9/15RP at 808, 817.

Hans defended at trial by arguing that he simply fired bullets in the direction of vehicles with the hope of provoking being shot himself by the police chasing him, and bleeding to death -- thanks to the exponentially high blood concentration of the Coumadin medication he had taken. 11/9/15RP at 940-51.

Mr. Hansen was charged with two counts of attempted first degree murder and additional charges of first degree assault and drive-by shooting, many of the charges with firearm enhancements. CP 382-84. The defense argued that Hans did not harbor the intent he was accused of. 11/9/15RP at 969-70.

The jury found Mr. Hansen guilty of first degree assault as to two officer (Counts 3 and 4), and as to Officers Smith and Shove (Counts 6 and 7). The jury found Mr. Hansen guilty of the lesser included crime of second degree assault as to Officer Kieland (Count 5). The jury also found Mr. Hansen guilty on counts of discharge of a firearm and drive-by shooting. CP 228-33.

2. <u>Sentencing</u>. The court denied the defense motion for an exceptional sentence below the standard range. 11/24/15RP at 1023. With consecutive enhancements, and with the consecutive running of the serious violent offenses, the court sentenced Mr. Hansen to 861 months

incarceration. CP 228. Mr. Hansen appealed. CP 227. The Court of Appeals affirmed. **Appendix A.**

3. Review is warranted under RAP 13.4(b)(1). Review of the Court of Appeals decision as to the video evidence is warranted under RAP 13.4(b)(1), because the decision is contrary to the rule that demonstrative evidence must be substantially similar to the facts, and must be more probative and enlightening to the jury than prejudicial. State v. Finch, 137 Wn.2d at 816. Review of the affirmance of the sentence is warranted, because this Court's case law provides that RCW 9.94A.585's prohibition on appeal of standard range terms is inapplicable if the court erroneously concluded that the factors offered in support of the downward departure are not legally viable. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). RAP 13.4(b)(1).

E. ARGUMENT

(1). The trial court wrongly admitted the State's dramatized videotape scenes which merely served to cause unfair prejudice.

By the time the three AK47 videos were shown to the jury, the jury already knew from multiple witnesses that there were bullets actually fired, that went through police cars and police car doors, and the jury knew that Mr. Hansen was well familiar with high-powered rifles and their assaultive danger, and the risk that firing them could cause substantial risk

to others when done in "drive-by" style. Mr. Hansen remarked in the hospital that these were guns that would go through bullet proof vest or cars. CP 385-89 (affidavit); see Exhibit 28 (defendant's recorded statement); Exhibit 29 (transcript of recorded statement); see also State's pre-trial exhibit 1, State's trial exhibit 456.

None of the law enforcement officers in question was struck by any bullet that penetrated any bullet proof vest. Yet the court also admitted this third video, the most inflammatory of all. Bullets kill people, or at least cause great bodily harm. This is commonly known. The prosecution is not entitled to introduce a newly-produced video that has the effect of portraying the defendant as purposefully aiming at a simulated police officer in a bulletproof vest in order to prove the disputed issue whether Mr. Hansen did aim to harm, under the guise of demonstration evidence offered for a 'technical' purpose of showing that bullets can hurt. It was beyond cavil that the defendant, a firearms and expert shooting aficionado, certainly knew that. This was not an issue.

a. Ruling on demonstration videos. Prior to trial, the court over defense objection (which was renewed during trial), ruled it would allow the prosecution to show the jury the three demonstration videos. 10/26/15RP at 66-68. The videos, State's pre-trial exhibit 1 and trial exhibit 456, depicted three scenes:

- a person aiming and firing an AK 47 firearm;
- a bullet from an AK47 penetrating and piercing through a metal car door; and
- a bullet being fired from an AK47 at a gallon of water representing an officer, piercing a ballistic vest and causing water to drip.

10/26/15RP at 56-58, 60. These scenes were offered through Mr. Smelser of the Washington State Patrol Crime Laboratory. 11/5/15RP at 375-76; State's trial exhibit 456.

In seeking admission, the prosecution contended the videos were relevant to "intent," in particular to the attempted murder and the assault charges, because they would counter jury speculation that Mr. Hansen would not understand the bullet power of an AK47 assault rifle. 10/26/15RP at 59, 65-66. The trial court agreed, and reasoned that the video scenes would be useful to the jury to understand the power of the gun and what it can do. 10/26/15RP at 64-66; see 11/5/15RP at 375-76 (renewed defense objection).

b. Demonstration evidence must be relevant, substantially similar to the facts, not cumulative, and not overly prejudicial. In the specific context of demonstration evidence, a trial court may only admit a specially created dramatic "demonstration" if it is relevant and helpful to a rational decision by the jury, if the demonstrative or experimental conditions are substantially similar to the facts of the case, and if probative

value outweighs prejudicial effect. State v. Hultenschmidt, 125 Wn. App. 259, 268, 102 P.3d 192 (2004); ER 401; ER 402; ER 403.

The Court of Appeals in Hultenschmidt applied this analysis, relying in part on the Supreme Court's decision in State v. Finch:

> A trial court may admit demonstrative evidence when the experimental conditions are substantially similar to the facts of the case. State v. Finch, 137 Wn.2d 792, 816, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999). If substantially similar, then demonstrative evidence such as photographs and videotapes may be admitted when it is shown that their probative value outweighs their prejudicial effect.

(Emphasis added.) Hultenschmidt, 125 Wn. App. at 268; compare, ER 403 (general prejudice standard, stating that evidence may be excluded where "probative value is substantially outweighed by the danger of unfair prejudice") (Emphasis added.).

Only if the general relevance test, and the substantial similarity and degree of outweighing probative value requirements are met, may the evidence be admitted, in which case insubstantial residual differences between the facts of the case and the demonstrative evidence will go to weight. See Jones v. Halvorson–Berg, 69 Wn. App. 117, 126–27, 847 P.2d 945 (1993); see also Finch, 137 Wn.2d at 816; State v. Bechtel, 186 Wn. App. 1003, review denied, 183 Wn.2d 1015, 353 P.3d 641 (2015).

c. <u>The three video scenes failed the criteria for demonstration evidence</u>. In this case, the disputed questions at trial were whether Mr. Hansen, following an irrational plan induced by his mental and physical disorders, was simply trying to cause his own "suicide by cop" by provoking law enforcement officers to the extreme circumstance of killing him. Or, whether Mr. Hansen was specifically aiming at officers intending to kill them, or to cause great bodily harm for purposes of first degree assault. 10/27/15RP at 362, 379-81, 383-90 (opening statements); 11/9/15RP at 920, 940-44 (closing arguments).

(i). The evidence was cumulative, did not carry substantial similarity, and caused great prejudice. Throughout the 8-day trial, the jury learned volumes about the gravely dangerous power of an AK47 assault rifle from the police witnesses, who knew the matter professionally, and who observed it that night. The three frightening video scenes shed the scantest of light on an issue already explored.[1]

On the question of the danger of assault rifles, the prosecutor offered the testimony of, among others, Officer Maples, who was involved in significant portions of the police pursuit of Mr. Hansen. Officer Maples

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[1] In the Court of Appeals, the State argued that Mr. Hansen was inebriated when he made these statements at the hospital, and contended, therefore, that it was entitled to introduce this evidence. SRB, at p. 23. But persons do not accidentally give detailed admissions about technical knowledge when affected by medication or alcohol.

stated that upon encountering Mr. Hansen in his truck, he exited his patrol car and crouched behind it to protect himself from shots being fired; he believed Mr. Hansen was trying to shoot him. However, "the [bullet] rounds were coming through the car and metal," no matter where Maples tried to hide behind his vehicle, and Maples was wounded in the ankle by one of the bullets. 11/5/15RP at 469-73.

As counsel argued, the video of a bullet being shot through the side of a door was cumulative, and added nothing to the detailed, authoritative testimony of the officers, except for fear-inducing unfair prejudice.

The jury was also presented with evidence of actual bullets that did penetrate through police cars, and about the holes they made, that were measured by forensics officers. 10/26/15RP at 56. A plethora of testimonial, physical, photographic, and video footage was admitted, documenting the SMART team's forensic evidence collection procedures at the shooting scenes. 11/4/15RP at 292-96, 308-11; 11/4/15RP at 222-23; see also, e.g., Exhibits 163, 164, 165, 166, 167, 167, 450, 452 (photographs of police cars with bullet damage). Consequently, the State's argument that the demonstration video was necessary because a bullet piercing a car door could not adequately be communicated to the jury by showing them photographs of the actual squad car door pierced,

and the entrance and exit bullet holes, was completely without merit. 10/26/15RP at 59-60.

In addition, Brian Smelser of the Washington State Patrol Crime Laboratory, before the movies were played for the jury, had already testified that Exhibit 76, the AK47 rifle, was easily capable of firing through a door. 11/5/15RP at 377. He also testified the bullets from such a rifle will pierce a ballistic vest "like a police officer would use." 11/5/15RP at 378. Smelser also testified that the AK47 is among the class of semiautomatic rifles that can be fired repeatedly and fast simply by pulling the trigger. 11/5/15RP at 333-35.

Importantly, the jury was also fully educated as to Mr. Hansen's knowledge of the grave danger of an AK 47 assault rifle, giving lie to the prosecution's implausible claim that the jury might think Mr. Hansen was unaware of the danger of guns. Mr. Hansen was a long-time gun collector, including of the AK47 and the AR15; as Mrs. Hansen recounted, he had built firearms as part of their survivalist philosophy, and they used firearms together at shooting clubs and gun ranges. This included a range where powerful assault rifles were permitted. 11/9/15RP at 827-28.

After the incident, Mr. Hansen admitted in his police statement, when thoroughly interrogated at the hospital, that he knew the power of the gun and bullets he used, and knew that they could pierce police car

doors, and bullet proof vests. 10/26/15RP at 57 (argument on admission); see Exhibit 29 (Defendant's police statement).

As counsel argued, there was no need to show the video scenes to the jury on ground that the jurors might think Mr. Hansen did not know he was acting dangerously by firing an AK47. The paucity of colorable reasoning on this point reveals the probity argument to have been a mere crowbar, employed solely to interject the State's own specially produced videos into the process, for their frightening value to the jury alone.

(ii). There was no substantial similarity, and yet great unfair prejudice. Beyond the broad general truth that scenes of an assault rifle being aimed and fired, and bullets being fired at, into and through things, do illustrate the particular harm of firearms, the video demonstrations were not substantially similar to the facts, and were inadmissible for that reason alone. Finch, 137 Wn.2d at 816; Hultenschmidt, 125 Wn. App. at 268 (no abuse in excluding reenactment videotape purporting to demonstrate effects of vehicle speed where demonstration not substantially similar to incident).

No bullet had penetrated or pierced any vest. This was not a fact in the case, and yet this particular mini-movie was particularly inflammatory because the water container leaking liquid obviously appeared to represent a police officer being shot in, and all the way

through, their body, and then bleeding. 10/26/15RP at 56-57. The court simply did not address the fact that the scene's depiction of a bullet passing through the front, and then the back of the vest, after passing entirely through the water bottle body, was completely different and significantly greater than anything that occurred. 10/26/15RP at 60-61.

With regard to the video of a person firing an AK47, what that video did show, very unfairly, was a person specifically sighting with, and carefully aiming, an assault rifle. 10/26/15RP at 57-58. But the defense in the case was that Mr. Hansen did not purposefully aim at officers; rather, he stupidly and recklessly shot in the general direction of police vehicles. The State has no right to produce a movie showing a person aiming and shooting an assault rifle simply under the claim that this is what they want to convince the jury of what happened. Nothing technical or helpful is added to a case where the parties simply produce Hollywood versions of what each side says happened, and the fact that the videos were produced under the official authority of the Crime Laboratory adds no imprimatur that renders them admissible if they fail the substantial similarity test.

All of this makes this case akin to State v. Hunter, 152 Wn. App. 30, 41-42, 216 P.3d 421 (2009). In Hunter, though more stark and less complex. In, a trial court abused its discretion in allowing the jury to be shown a newly-manufactured device that purported to show the

dimensions of a gun and the related pressure necessary to pull the trigger on the firearm. The Court of Appeals stated that there were substantial differences between the trigger pull device and the firearm used, including a physical dimension difference between the trigger and the simulator of one inch and a lever mechanism on the actual trigger that was different from the straight-pulled trigger on the demonstrator. Hunter, 152 Wn. App. at 39-43. Furthermore, the evidence was not harmless because the issue was whether Hunter accidentally shot the victim. Hunter, at 42-44.

Here, notably, the prosecutor admitted that in the making of the videos, there was no measure of how far away from the targeted car door, or the targeted ballistic vest, the bullets were fired from; rather, the distances were an "approximation" in comparison to what the distances might have been during the incident. 10/26/15RP at 63. Demonstration evidence must be substantially similar to the facts of the case. Even if the jury needed a video to show that bullets can pierce metal car doors, which it did not, these videos were not substantially similar.

Courtroom demonstrations like this, by their nature, must be relevant and helpful enough to overcome their inherent dramatic effect, and they must be very much like what occurred. Demonstration evidence is not an opportunity for the State to dramatize its theory of the accused's conduct; rather, its purpose is to "enlighten the jury and to enable them

more intelligently to consider the issues presented," a test this evidence failed Sewell v. MacRae, 52 Wn.2d 103, 107, 323 P.2d 236 (1958).

d. Reversal is required. As defense counsel argued in closing, Mr. Hansen's intent was to shoot off his firearms so that he would be killed by law enforcement. His system was triple-loaded with the blood thinner Coumadin, which had been prescribed for his health condition; this was a drug that he knew, or at least hoped, would cause him to bleed to death quickly. Hans' effort at this desperate plan of "suicide by cop" of course failed when he himself was shot in the head. His statement to officers at the hospital only confirmed his foolish plan to provoke being shot. But he never aimed or fired his guns at persons with any purpose killing Officer Maples or Officer Tolbert or others, or any intent to inflict great bodily harm. RP 940, 943, 946-958, 968.

Within reasonable probabilities, the video evidence affected the outcome, given the closely contested issue of intent. The video of a person calmly and purposefully aiming and firing an AK47, and a video showing a simulated police officer being shot straight through a bulletproof vest, promoted decision by fear in a very close case. Trials must proceed by dry testimony, and proper demonstration evidence should be admitted only when truly accurate and needed. Instead, below, the prosecutor argued that despite Mr. Smelser and other witnesses being

expected to testimonially answer each of the State's questions about the power of assault firearms, dry testimony was "not going to do justice to what you can see on that video." 10/26/15RP at 62-63. This is correct and is precisely why a created video must be held to the existing, exacting standards before it can be placed before a lay jury. The produced demonstration video focused the jurors on their understandable fear of the inherent and dramatic dangerousness of the weapons involved, rather than on the more difficult question of what Mr. Hansen's intent was. The counts of first degree assault and drive-by shooting must be reversed.

(2). The trial court erred in determining there was no legally cognizable basis for a downward departure sentence.

a. <u>Mr. Hansen may appeal his sentence</u>. Mr. Hansen sought an exceptional sentence below the standard range. CP 247-56 (Defense sentencing memorandum). The request recognized that Mr. Hansen was facing a standard range of 717 to 861 months, based one consecutive serious violent offenses and enhancements. Mr. Hansen requested that the court consider mitigating factors and a sentence of 60 months on each of the first degree assault convictions, and zero days on the other assault, drive-by shooting, and discharge of a firearm convictions. CP 247-48. This would result in a sentence of 516 months. CP 248.

In seeking this sentence, the defense acknowledged that given Mr. Hansen's illness, the sentence, despite being a downward departure, would still impose a sentence likely to result in lifetime imprisonment. CP 248. However, the reduced sentence would balance the need for a defendant to be punished severely for his offenses, and yet also recognize that

> Mr. Hansen's actions on October 15, 2014, were motivated by a desire to end his own life, a desire born of acute depression spawned from a grave illness and in inability to cope productively with the impact it had on his life.

CP 248; see 11/24/15RP at 1007, 1014-19. The court denied the request, noting that it did "accept that Mr. Hansen on that evening was a man with serious and debilitating physical and mental health issues which clearly evolved into a mental health crisis," the court "did not accept that that stands as a reason to somehow hold Mr. Hansen less accountable when I look at his actions." 11/24/15RP at 1023. The Court of Appeals wrongly stated that the court accepted the legal availability of a mitigated term, and that this bars appeal. Decision, at pp. 10-11.

Mr. Hansen may appeal despite having been given a standard range sentence. As a general rule, under the rule of RCW 9.94A.585, when the sentence imposed on a convicted defendant is within the standard range, there is no right to appeal it. State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719, 718 P.2d 796 (1986). If a court has concluded

correctly that there is no legally applicable basis for an exceptional term, or that there is no factual basis adequate to satisfy the legal requirements of that mitigating factor, the court has exercised its discretion, and the defendant may not appeal. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). However, RCW 9.94A.585's prohibition on appeal of standard range terms does not apply where the court has relied on an incorrect legal basis that the factors offered in support of the downward departure are not legally viable. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); Ammons, 105 Wn.2d at 183. That is the case here.

b. A downward departure sentence was supported by a legally recognized mitigating factor. The trial court stated that the mental illness suffered by Mr. Hansen could not be accepted as a basis for a downward departure, and later remarked that although the mental health system is far from perfect in being able to offer help to those who need it, "Mr. Hansen did not seek that help[.]" 11/24/15RP at 1024.

The court appeared to simply reject the proposition that mental illness could be considered, as set forth in section 535(1)(e). But the Sentencing Reform Act allowed the trial court to take these matters into consideration. RCW 9.94A.535(1). RCW 9.94A.535(1)(e) provides for an exceptional sentence below the standard range based on the mitigating factor that

> (e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

Notably, the sentence requested by Mr. Hansen would be both reasonable and supported by the standards of mitigation set forth by the SRA, and certainly would be affirmed because it would not be clearly erroneous. State v. Allert, 117 Wn.2d 156, 163, 815 P.2d 752 (1991) (legal error allows reversal of sentence); see also State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991).

The Court of Appeals decision incorrectly states the trial court understood the legal availability of this factor, but found the evidence insufficient to support it. Decision, at pp. 12-13. But the evidence showed that Hansen, rather than a person who was set on the destruction of others, was someone who had suffered a severe psychological breakdown, and sought to end *his* life. Where he did not have, during that acute period of illness, the acuity or the foresight to fully appreciate the impact his actions would have on others, this is a viable mitigating factor. CP 248. The court erred in determining there was no legally cognizable basis to impose an exceptional sentence below the standard range.

c. This Court should remand for re-sentencing. In these circumstances, the trial court's refusal to impose a sentence below the

standard range requires reversal because the court relied on an untenable basis, believing it did not have authority. Herzog, 112 Wn.2d at 423; Ammons, 105 Wn.2d at 183; see also State v. Khanteechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000); RCW 9.94A.585. The sentencing court also could be said to have rejected an applicable legal standard, as a result not exercising discretion it possessed. See State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). This Court should reverse Mr. Hansen's sentence and remand the case for factual appraisal of the sentencing arguments offered in mitigation.

F. CONCLUSION

Based on the foregoing, Mr. Hansen requests that this Supreme Court accept review and reverse his convictions, and his sentence, as argued herein.

DATED this 15TH day of June, 2017.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HANS ERIC HANSEN, Appellant.	No. 74334-1-I DIVISION ONE UNPUBLISHED OPINION FILED: May 22, 2017

BECKER, J. — This is Hans Hansen's appeal from convictions for assault and drive-by shooting. We find no abuse of discretion by the trial court in allowing the State to present a demonstrative video of ammunition piercing a bulletproof vest and a car door. The demonstration was relevant to show Hansen's intent to harm the police officers he shot at and to rebut his defense that he was only trying to get himself killed. We also conclude the court properly forfeited the arsenal of firearms Hansen had in his truck during the incident.

FACTS

Hansen, a 43-year-old man with no criminal history to speak of, went on a shooting spree with an AK-47 in Snohomish County one evening in October 2014. At the time, Hansen was troubled by setbacks in his personal life. He told arresting officers that he was losing his company, his leg was going to be

amputated, his house was about to go into foreclosure, he was an alcoholic, and his son was suicidal. Hansen told the officers he was "done with life."

Hansen drove to an industrial park in Granite Falls. From his truck, he repeatedly shot his AK-47 at the building where he had previously run a cabinet-making business. He proceeded to the Granite Falls Police Department and the Lake Stevens Police Department. He repeatedly shot at police cars parked at both stations.

He then drove into Marysville. According to the officers' testimony, Hansen shot at numerous officers and police cars as they pursued him. Some of them testified that they perceived from the path of his bullets that he was tracking their movements. Officers dodged his shots and took refuge behind their vehicles. One officer was struck several times in the leg and sustained serious injuries.

Eventually, the officers set spike strips in the road and one officer shot at Hansen's truck as it approached. The truck came to a stop, and Hansen got out. He was arrested and taken to the hospital, where it was discovered that despite an abundance of blood, he had sustained only a superficial head wound. The police interviewed Hansen at the hospital.

The State charged Hansen with two counts of attempted first degree murder, five counts of first degree assault, and four counts of drive-by shooting. The State alleged firearm enhancements on the attempted murder and assault charges.

Trial lasted for approximately 11 days in October and November 2015. Hansen did not testify. His defense presented an expert witness on mental illness to support a diminished capacity defense.

A disputed issue at trial was Hansen's intent as it related to the attempted murder and assault charges. Both parties drew inferences from the interview of Hansen conducted by the police at the hospital. The State theorized that Hansen picked the police as targets for his anger because his house was in foreclosure and he believed the police were going to kick him out of his house. Therefore, the State argued, "he was going to hunt for the people that he was mad at." Hansen claimed he did not have the intent required for the attempted murder and assault charges. He defended on the theory that he was suicidal: he wanted to provoke the officers to shoot him and kill him and "his intent that night was not to harm anyone but himself."

The jury deadlocked on the attempted murder charges; the court declared a mistrial as to those charges and later dismissed them. The jury convicted Hansen of four counts of first degree assault, one lesser-included count of second degree assault, two counts of drive by shooting, and two lesser-included counts of unlawful discharge of a firearm. The jury found firearm enhancements on all of the assault convictions.

The court rejected Hansen's request for an exceptional sentence downward. Hansen was sentenced to 861 months, the top of the standard range. The court ordered forfeiture to the sheriff's office of the firearms and ammunition found in Hansen's truck at the time of his arrest.

Hansen appeals the convictions for first degree assault and drive-by shooting, the sentence, and the forfeiture order.

DEMONSTRATIVE VIDEO

At trial, the State showed the jury a demonstrative video created by the crime laboratory of the Washington State Patrol. The video is less than three minutes long. It shows the State's firearms expert, Brian Smelser, shooting Hansen's AK-47 using steel-jacketed ammunition that was found in Hansen's truck. First, Smelser shoots two rounds at a car door mounted on a wooden block about 25 feet away; both rounds pierce the door. Next, from the same distance, he takes one shot at a bulletproof police vest mounted over a plastic jug of water; the shot penetrates through the vest and water pours out of the plastic jug. The last segment of the video is a close-up showing Smelser shooting the AK-47, slower at first and then faster.

Hansen argues that the demonstrative video did not meet the test for admissibility of demonstrative evidence, and as a result, his convictions for first degree assault and drive-by shooting should be reversed.

This court reviews a trial court's decision to admit evidence under an abuse of discretion standard. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. Finch, 137 Wn.2d at 810.

The use of demonstrative evidence is encouraged when it accurately illustrates facts sought to be proved. Finch, 137 Wn.2d at 816. In Finch, the

defendant fired shots from a bedroom window when police arrived to conduct an investigation of a report of a murder. What could be seen from the bedroom window was relevant to questions of intent and premeditation. Finch, 137 Wn.2d at 818. The court affirmed the admission of a video demonstrating the foliage and lighting conditions at the scene as they affected the visibility of police movements as seen from the window.

"'The ultimate test for the admissibility of an experiment as evidence is whether it tends to enlighten the jury and to enable them more intelligently to consider the issues presented.'" Finch, 137 Wn.2d at 816 (internal quotation marks omitted), quoting Jenkins v. Snohomish County Pub. Util. Dist. No. 1., 105 Wn.2d 99, 107, 713 P.2d 79 (1986). The factors that determine whether demonstrative evidence is admissible are set forth in Finch, 137 Wn.2d at 816.

Relevance

The evidence sought to be admitted must be relevant. Finch, 137 Wn.2d at 816. The point of the demonstrative video was to ensure the jury understood that a police officer is not necessarily shielded from harm by wearing a ballistics vest or crouching behind the door of a police car. The State argued to the trial court, and maintains on appeal, that the demonstrative video was relevant to prove Hansen intended to harm the officers he was shooting at. For attempted first degree murder, the State had to prove that Hansen had a "premeditated intent to cause the death of another person." RCW 9A.32.030(1)(a). For first degree assault, the State had to prove that Hansen had the "intent to inflict great bodily harm." RCW 9A.36.011(1).

The evidence suggested that Hansen was very familiar with the power of an AK-47. He and his wife had often visited shooting ranges. He told the detectives at the hospital that the steel-tipped bullets he fired from his AK-47 could penetrate cars and bulletproof vests. Thus, he argues that his understanding of the penetrating power of the AK-47 was undisputed and the State did not need the video to prove it.

The State was not required to rely on Hansen's admission to prove he knew an AK-47 could penetrate a car door or a ballistics vest. The State was entitled to rebut Hansen's defense that he did not intend to harm the officers. During the interview, Hansen said he went on a "joyride with an AK-47" because he was "done with life." He said he planned to "just piss off as many fucking people as I could 'til I got shot." He said he tried to shoot police cars, not officers, and he was "not happy" to hear that he hit an officer because "I never honestly had any intention of hurting anybody." The jury could infer from the demonstrative video that Hansen, given his familiarity with the AK-47, knew full well that shooting such a powerful weapon at police cars could kill human beings who were taking cover inside or behind them. The video was relevant to prove that despite his disavowal of lethal intent, Hansen did intend to inflict great bodily harm or death when he shot at the police officers and their cars.

Substantially similar conditions

Demonstrative evidence is admissible if the experiment was conducted under substantially similar conditions as the event at issue. Finch, 137 Wn.2d at 816. Determining whether the similarity is sufficient is within the trial court's

discretion, and the decision will not be disturbed on appeal absent an abuse of discretion. Finch, 137 Wn.2d at 816. If the similarity is sufficient to justify admission, any lack of similarity goes to the weight of the evidence. Finch, 137 Wn.2d at 816.

Hansen contends the demonstration of a bullet piercing a ballistics vest should have been excluded because there is no allegation that any of his bullets hit the officers' ballistics vests. But the demonstration in the video was not intended to recreate the crime scene. It was offered to prove Hansen's intent, not what actually occurred. Any lack of similarity between the ballistics vest in the video and vests worn by the officers Hansen shot at went to the weight of the evidence, not admissibility. See Finch, 137 Wn.2d at 816.

Hanson also argues that the demonstration was not substantially similar because it shows Smelser sighting with and carefully aiming the AK-47, whereas according to Hansen, the evidence shows that he did not aim at the officers but rather shot recklessly in the general direction of their vehicles. His description of the demonstration is inaccurate, in that the video does not show Smelser aiming at any target, the trajectory of any bullet, or any bullet hitting a target. It is a close-up of Smelser shooting the gun. The video does not disprove either Hansen's statement that he did not aim at individual officers or the officers' testimony that his shots appeared to track their movements.

Hansen contends the 25-foot distances to the targets in the video were not similar to the actual distances between him and his targets. As the State explained to the trial court, the distance was approximate because Hansen fired

various shots at different distances. Hansen does not claim that 25 feet is inaccurate or an unreasonable estimation. The estimate was sufficiently similar to justify admission, and any lack of similarity went to the weight of the evidence.

Hansen argues that his case is like State v. Hunter, 152 Wn. App. 30, 216 P.3d 421 (2009), review denied, 168 Wn.2d 1008 (2010). In Hunter, the key issue was whether the defendant, on trial for murder, intended to shoot the victim or whether the gun in his hands went off by accident. A demonstrative "trigger pull device" was admitted to show jurors what it was like to experience trigger pull and thus to prove that considerable pressure was needed to fire the gun in question. Hunter, 152 Wn. App. at 42. The conviction was reversed on appeal because the demonstration did not meet the requirement for substantially similar conditions. Hunter, 152 Wn. App. at 42. The defense was able to show through cross-examination of the State's expert witness that the perceived trigger pull created by the device was substantially different from the trigger pull required for the gun used by the defendant. Hunter, 152 Wn. App. at 42. In this case, the demonstration in the video was similar to Hansen's conduct. Smelser used the same gun and the same bullets as Hansen.

Prejudice

If the evidence is more prejudicial than probative, the court should refuse its admission. Finch, 137 Wn.2d at 816. Hansen argues that the video was prejudicial because it was "frightening," provoked "raw emotion," and "focused the jurors on their understandable fear of the inherent dangerousness to persons and police of the weapons involved." This is not an accurate assessment of the

emotional effect of the video. The video is not a re-creation of the crime. The car door is not attached to a car. The ballistics vest has a plastic jug of water inside, not a human effigy. The targets are removed from context and seen as disembodied objects. While the observer gets the message that the water pouring out of the pierced plastic jug is supposed to represent blood, the visual representation is rather sterile, much like a technical description in an instructional manual.

The court may consider whether demonstrative evidence is "merely cumulative and illustrative of issues already introduced and therefore not prejudicial or whether it is unique evidence of a factual assertion and potentially prejudicial." Jenkins, 105 Wn.2d at 107. Here, the video was not unique evidence; the potential prejudice of the video was diminished by the fact that it illustrated issues already introduced.

By the same standard, Hansen argues that the video should have been excluded because it was cumulative of other evidence, including testimony and photographs showing that Hansen's bullets did penetrate through the police cars he fired at, and therefore it did not add to the jury's ability to answer the disputed issue of intent.

In admitting the video, the trial court found that the visual dimension of the video made it useful to the jury in a way that the other evidence did not project: "I don't think a general juror really understands the power of this particular gun that was used in terms of the power of an AK-47 and I do think the video does show that in a way that is different than just describing things in testimony."

We conclude the trial court properly determined the demonstrative video was relevant and that it met the requirement for substantially similar conditions. Any potential prejudice was not so great as to require its exclusion. Though somewhat cumulative of other evidence, the video satisfied the ultimate test of admissibility: it tended to enlighten the jury and to enable them to more intelligently consider the issues presented. We find no abuse of discretion in admitting the video.

REQUEST FOR MITIGATED SENTENCE

The standard range sentence generated by the number of convictions for this incident was high.[1] The court imposed a sentence of 861 months, the top of the standard range. Hansen proposed a sentence of 516 months, an exceptional sentence below the standard range. He appeals the trial court's decision denying that request.

A sentencing court may depart from the sentencing guidelines and impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. RCW 9.94A.535(1). One mitigating factor recognized by the statute as appropriate for consideration by the court is whether "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her

[1] Hansen's offender scores, which were 0, 6, and 12 for the various convictions, included only his current offenses. The convictions for first degree assault were serious violent convictions that must run consecutively. The court imposed the top of the standard range for each of these first degree assault convictions, 585 months total, plus the required firearm enhancements of 276 months, for a total sentence of 861 months. The sentences for the other convictions ran concurrently.

conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded." RCW 9.94A.535(1)(e). Hansen's request was based on this statutory provision and the testimony of expert witness Mark Koenen, a psychiatrist, who diagnosed Hansen with alcohol dependence, depression, and anxiety. Dr. Koenen explained that alcohol use, health problems, financial problems, and marital problems are all exacerbating factors for depression.

The court declined to depart from the standard range:

> I accept that Mr. Hansen on that evening was a man with serious and debilitating physical and mental health issues which clearly devolved into a mental health crisis which was supplemented clearly by alcohol abuse as well. It was a potent and lethal combination, but I do not accept that that stands as a reason to somehow hold Mr. Hansen less accountable when I look at his actions. This was not, these were not events that happened in the blink of an eye or an instant. They were clearly planned over a significant period of time. They took place over a significant period of time.
>
> . . . .
>
> I cannot and do not accept that Mr. Hansen's difficulties in any way excused his actions on that night. The actions were simply too egregious.
>
> . . . .
>
> There are, unfortunately, a lot of people in our community who suffer from physical and mental health issues. Our mental health system is clearly far from perfect, but it does exist and it exists to help those who are willing to seek help.
>
> Mr. Hansen did not seek that help and instead his actions were about as far removed from seeking help as a person can get. They were actions that forced trauma on a great many people and, again, in my opinion, they are actions that deserve maximum accountability.
>
> So I will not accept the defense recommendation. I don't believe there are any factors that would justify an exceptional sentence down.

A standard range sentence is generally not appealable. RCW 9.94A.585(1). When a defendant's request for an exceptional sentence below the standard range has been denied, our "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998).

Hansen contends the court relied on an impermissible basis to refuse his request for an exceptional sentence. In his view, the court refused to consider whether he had a mental illness that diminished his capacity to appreciate that his conduct was wrongful or to conform his conduct to the requirements of the law.

A trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling. Garcia-Martinez, 88 Wn. App. at 330. That is the case here. The ruling reflects the court's awareness that Hansen suffered from mental illness. The fact of mental illness, particularly when coupled by alcohol abuse, is not enough by itself to compel a downward departure from the guidelines. Indeed, "impaired judgment and irrational thinking is inherent in most crimes." State v. Rogers, 112 Wn.2d 180, 185, 770 P.2d 180 (1989). What the court's ruling reflects is not a refusal to consider the proposed mitigating factor. Rather, it reflects that the court did not see the evidence as sufficient to

establish the mitigating factor. The court exercised its discretion, and Hansen may not appeal the length of the sentence.

FIREARMS FORFEITURE

The court ordered forfeiture of the firearms and ammunition found in and around Hansen's truck at the time he was arrested. Hansen assigns error to the order of forfeiture.

A court may order forfeiture of a firearm that is proven to be "in the possession or under the control of a person at the time the person committed or was arrested for committing a felony or committing a nonfelony crime in which a firearm was used or displayed." RCW 9.41.098(1)(d).

Hansen first argues that the court must return the firearms to his wife because she is an owner of the firearms who had no knowledge of nor consented to his crimes. "The court shall order the firearm returned to the owner upon a showing that there is no probable cause to believe a violation of subsection (1) of this section existed or the firearm was stolen from the owner or the owner neither had knowledge of nor consented to the act or omission involving the firearm which resulted in its forfeiture." RCW 9.41.098(3).

Hansen cannot assert a claim to the firearms on behalf of his wife in this appeal. His wife was not a party before the trial court and is not a party on appeal. She is not represented by Hansen's attorney, and her interests are not at issue here.

Hansen next argues that the trial court erred in ordering the forfeiture of two upper receivers and six magazines with ammunition because they are not "firearms" within the meaning of the statute.

Whether an object is a "firearm" within the meaning of the statute is a question of statutory interpretation that we review de novo. State v. Raleigh, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029 (2011).

"Firearm" means "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(9). A disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of the statute. State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113, review denied, 139 Wn.2d 1003 (1999); State v. Releford, 148 Wn. App. 478, 490-91, 200 P.3d 729, review denied, 166 Wn.2d 1028 (2009).

In the interview at the hospital, Hansen told the police that the two upper receivers could be swapped out onto his AR-15 firearm. He confirmed he had three different upper receivers for the AR-15 firearm and stated that "my AR platform comes with three different types of guns." Smelser, the State's firearms expert, testified that he expected the two upper receivers at issue would clip onto the lower receiver of Hansen's AR-style firearm. Given this evidence, the two upper receivers are appropriately viewed as part of a disassembled AR-15 firearm that could be rendered operational with reasonable effort and within a reasonable time period. They are "firearms" within the meaning of the statute.

At the forfeiture hearing, the State represented to the trial court that it was seeking forfeiture only of the magazines and ammunition that were found inside the firearms in Hansen's possession. Hansen does not dispute the State's assertion that the magazines and ammunition in question were found inside the firearms. They were therefore a part of the firearms and were properly forfeited.

STATEMENT OF ADDITIONAL GROUNDS

Hansen has filed a statement of additional grounds for review. A statement of additional grounds will not support review if it does not adequately inform the court of the nature and occurrence of the alleged errors. RAP 10.10(c); State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

Hansen claims the trial court erred in giving jury instruction 7, "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to act with premeditation, intentionally, recklessly, or willfully." This is a pattern instruction for the diminished capacity defense. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.20, at 302 (4th ed. 2016) (WPIC). Hansen argues that this instruction relieved the State of its burden of proof. But the jury was properly instructed that the State had the burden of proving each element of each crime beyond a reasonable doubt. This claim does not support further review.

Hansen challenges the jury instructions defining recklessness and knowingly. These instructions were also pattern instructions, WPIC 10.02, at 222, and WPIC 10.03, at 225, and on this record, we see no basis for review.

Hansen claims trial counsel was ineffective in proposing or failing to object to the above pattern instructions. He also claims trial counsel was unreasonable in not presenting evidence that his mental illness prevented him from forming the requisite intent and that counsel did not adequately investigate this issue. But counsel did present the psychiatrist's testimony that Hansen was depressed and suicidal. Hansen's bare claim of ineffective assistance does not support a claim that more should have been done.

The State asks for an award of appellate costs as the substantially prevailing party on review. We exercise our discretion to decline the State's request for an award of costs. On the present record, there is no realistic basis to expect that Hansen will have the ability to pay. When a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. Hansen has been sentenced to serve more than 70 years. He was found indigent by the trial court. If the State has evidence indicating that Hansen's financial circumstances have significantly improved since the trial court's finding, the State may file a motion for costs with the commissioner.

The judgment and sentence is affirmed. The order of forfeiture is also affirmed.

Becker, J.

WE CONCUR:

Trickey, ACJ

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74334-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Andrew Alsdorf, DPA
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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: June 15, 2017

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