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No. 53398-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

Ryan Scott Adams,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

Ryan Adams and Shannon Miosek traveled together from Florida to Longview, where they lived together in a homeless camp. Ms. Miosek decided to leave Mr. Adams with some men she had just met. While she was packing up her belongings, one of these men, known by the nickname “Reckless,” stood close to Mr. Adams, handling a chain with a padlock that Mr. Adams knew to be a weapon. Mr. Adams told the man to step back. When he refused, Mr. Adams struck him with his hatchet, unfortunately killing him. Mr. Adams was charged with first degree murder, but the jury convicted him of the lesser offense of second degree murder with a deadly weapon.

The court determined the State’s late disclosure of autopsy photos was mismanagement; however, the court failed to grant Mr. Adams’s requested remedy of exclusion of the photos or dismissal. During trial, the court also allowed Ms. Miosek to offer impermissible testimony. These errors require reversal of Mr. Adams’s conviction.

In addition, the court found Mr. Adams’s prior Oregon conviction of unlawful use of a weapon was factually comparable to assault in the second degree in Washington based on the prior Oregon prosecutor’s extraneous statements about a dismissed charge, requiring reversal and remand for resentencing based on the correct offender score.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the defense motion to dismiss or exclude evidence based on the prosecution's mismanagement.

2. The trial court erroneously overruled defense objection to speculative witness opinion testimony in violation of ER 602 and ER 701.

3. The trial court erred in finding the Oregon offense of unlawful use of a weapon to be factually comparable to the Washington offense of assault in the second degree.

4. The trial court sentenced Mr. Adams on the incorrect offender score.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The untimely revelation of evidence constitutes governmental misconduct under CrR 8.3. Misconduct is grounds for dismissal or exclusion of evidence when the defendant is prejudiced, depriving him of a fair trial. Here, the court found the prosecutor mismanaged Mr. Adams's case by providing numerous additional autopsy photographs on the eve of trial in violation of the discovery rules. The trial court found this was misconduct, but erred in failing to grant Mr. Adams's motion to exclude the evidence or dismissal of the charge where this belated disclosure prejudiced Mr. Adams.

2. A lay witness may not testify to matters of which she lacks personal knowledge. ER 602. Under ER 701, lay witnesses may only testify to opinions or inferences that are rationally based on their perception, helpful to a clear understanding of their testimony or the determination of a fact in issue, and not based on other specialized knowledge. Did the trial court err in overruling Mr. Adams's objection to the lay witness, Ms. Miosek, offering her speculative opinions that Mr. Adams did not need to act in self-defense and opining on his mental state?

3. An out-of-state conviction does not count in a defendant's offender score unless the State proves it is comparable to a Washington felony. When a foreign conviction is not legally comparable to a Washington offense, the prosecutor may establish factual comparability based only on facts about the foreign conviction that were admitted, stipulated to, or proved beyond a reasonable doubt. Here, the court found Mr. Adams's prior Oregon conviction for unlawful use of a weapon was factually comparable to the Washington offense of assault in the second degree based on unproved statements the Oregon prosecutor made during Mr. Adams's plea colloquy. Did the court err by adding two points to what should have been Mr. Adams's offender score of zero, based on a non-comparable out-of-state conviction?

D. STATEMENT OF THE CASE

1. Ryan Adams and Shannon Miosek live together in a shelter Mr. Adams built for them until she decides to leave with "Reckless."

Ryan Adams lived and worked in Florida when he met Shannon Miosek, who traveled there to attend a Rainbow Festival. RP 724, 775-77, 1022-23. They decided to travel together afterwards, hitchhiking from Florida to Longview, Washington, where Mr. Adams built them a shelter in a homeless encampment. RP 649, 723, 777, 1022-23.

Mr. Adams was a skilled builder and carried a hatchet for cutting wood around their campsite. RP 777. After Ms. Miosek and Mr. Adams had lived in Longview for several months, Mr. Adams was offered a job and given a \$100 advance to get work boots. RP 729, 778, 1025-26. He and Ms. Miosek went to the nearby Walmart to purchase them. RP 729, 1026. While there, they met some men in a van in the parking lot. RP 725, 1029. Mr. Adams bought beer, pot, and socks for everyone in the van with the remaining cash advance for his job. RP 729, 778. Ms. Miosek only knew the men by their nicknames, Coyote, Cash, and Reckless. RP 727.

Even though Mr. Adams had only known Ms. Miosek for a few months, he really cared about her. RP 1045. But Ms. Miosek decided to leave Mr. Adams to go to California with the men in the van. RP 728. Ms. Miosek described that after sharing the beer Mr. Adams bought, her new

“friend Rob [Reckless]” went with her and Mr. Adams to the campsite to collect her belongings so she could leave. RP 729, 731. Reckless was later identified as Robert Diaz. CP 75.

2. Mr. Adams reacts to Mr. Diaz’s aggression, striking and unintentionally killing him.

Mr. Adams had survived a remarkably high degree of trauma in his life. RP 1317-18. His childhood was shaped by abuse, neglect, special education needs, and suicide attempts. RP 1317. He was in the child welfare system, diagnosed with bipolar disorder, ADHD, and was psychiatrically hospitalized for several suicide attempts. RP 1318. Mr. Adams has PTSD and his “flight or fight response” is triggered much more quickly than a person who has not experienced the same degree of trauma. RP 1322. This means that Mr. Adams may perceive danger where another person would not. RP 1322. Because of the trauma he has experienced, “Mr. Adams is hypervigilant, very sensitive to the issues of shame and humiliation as well as for his own physical safety.” RP 1319.

Mr. Adams was unaware that Ms. Miosek and Mr. Diaz were planning for her to leave. RP 1044-45. Mr. Diaz became confrontational about Ms. Miosek leaving when they were back at the campsite. RP 1044. Mr. Adams perceived that Ms. Miosek was intoxicated and that Mr. Diaz would abandon her, which happened previously to his ex-girlfriend. RP

1044. Mr. Diaz was fiddling with a chain with a padlock on it, called a “smiley,” talking to Mr. Adams about how he puts people in the hospital and is always going to jail for assaults. RP 824, 849-50; 1039. Mr. Adams had been living on the streets for a while by this time, and was familiar with how people used a lock and chain as a weapon. RP 1042. Mr. Adams told Mr. Diaz to get away from him. RP 825, 1039. When he refused to move, Mr. Adams, filled with rage, “snapp[ed],” and hit him with his hatchet. RP 1047-50. Mr. Adams picked up a rock and continued to hit him with that until he saw himself holding the rock, panicked, and threw the rock and hatchet that was nearby. RP 1050-51; 744.

Neither Mr. Adams nor Ms. Miosek had phones, and they had to walk to the nearest store to get help. RP 744-45. Mr. Adams discarded his overalls on their way to get help. RP 747, 1053. When they got to a phone at a nearby store, they frantically requested the clerk call 911, and she handed the phone to Mr. Adams. RP 749. Though at first Mr. Adams, in his panic, did not tell the 911 operator the truth about how Reckless got hurt, he urged police to come immediately. RP 813-14; 1055. While Mr. Adams was on the phone, Ms. Miosek, visibly shaken, mouthed to the store clerk, Nicole Hildebrandt, “he’s dead, he’s dead,” and that Mr. Adams “did it.” RP 807. Ms. Hildebrandt described Mr. Adams as visibly upset and it was clear he wanted to get help for the person who was hurt.

RP 810. Mr. Adams and Ms. Miosek waited at the store for police to come. RP 1055.

When police arrived, the two were separated, and Mr. Adams shouted at Ms. Miosek to “tell the truth.” RP 846-47. Mr. Adams told the responding officer, James Bessman, that he would tell them what happened, “no bullshit.” RP 821. Mr. Adams told Officer Bessman about the “smiley” and threats that caused him to hit Mr. Diaz. RP 821-27.

Ms. Miosek led police to their campsite where Mr. Diaz was laying on the ground. RP 751, 863-64. Mr. Diaz was airlifted to a nearby hospital where he eventually died. The medical examiner who performed the autopsy found three injuries to the back of the skull. RP 969, 995. Blunt head trauma was the cause of death. RP 990.

After calling police and talking to an officer, Mr. Adams was taken to the police station where he provided a more detailed, taped statement to Detective Brandon McNew. RP 1017-47. Crying, Mr. Adams begged to know if Mr. Diaz was going to be okay. RP 1019. Mr. Adams told the detective about Mr. Diaz’s threats and his reaction to them, including that he told himself to stop swinging, but could not stop. RP 1047. Mr. Adams did not want it to go that far, but he just needed Mr. Diaz to leave him alone. RP 1048.

Police retrieved the chain with the lock, or the “smiley” that Mr. Adams described that Mr. Diaz had on him.¹ RP 924.

Contrary to Mr. Adams’s description of Ms. Miosek’s intended departure, by her account, the decision was mutual, and Mr. Adams knew she was leaving. RP 729, 731. Unlike the threatening, emotional encounter Mr. Adams described, Ms. Miosek testified to hearing Mr. Adams tell Mr. Diaz not to stand on that side of him in a nonaggressive tone at the campsite. RP 736-37. Over defense objection, Ms. Miosek opined that Mr. Diaz did not possess any “chains” that would have necessitated Mr. Adams acting defensively. RP 738. She also speculated that after striking Mr. Diaz, Mr. Adams was trying to not get into trouble, over defense objection. RP 745.

3. The prosecutor provides nearly 60 additional photographs days before trial; the court finds this is mismanagement, but denies Mr. Adams’s request to sanction the State for its discovery violation.

The parties completed discovery in September, and trial was set for February. Noting how few autopsy photos the State had provided in discovery, Mr. Adams asked the prosecutor, shortly before trial, if this was the total number of photos that would be provided. RP 201-02; CP 67-68. The State confirmed it was. CP 68. However, right before trial began, the

¹ Though it had a stain on it that appeared to be blood, police never sent it for testing. RP 1075.

prosecutor gave Mr. Adams 60 new photos. CP 68. The court determined the prosecutor mismanaged the case, but refused to sanction the prosecutor as Mr. Adams requested, by excluding the photos or dismissing the charges. RP 222. After trial began, the prosecutor provided 32 additional photos to Mr. Adams. RP 617-18. Mr. Adams informed the court that he did not have confidence he had received all available discovery in the case where there was no system in place to ensure the prosecutor's compliance with the discovery rules. RP 617-18.

4. The jury convicts Mr. Adams of a lesser offense, prompting the prosecutor to argue for the first time that Mr. Adams's foreign conviction for unlawful use of a weapon is factually comparable to a Washington assault, where the parties previously agreed it was not.

The State charged Mr. Adams with premediated murder with a deadly weapon. CP 21. Mr. Adams asserted the defense of justifiable homicide. CP 131. The jury acquitted Mr. Adams of first degree murder, convicting him instead of the lesser offense of murder in the second degree with a deadly weapon. CP 147-48.

Throughout plea negotiations, Mr. Adams and the State agreed that Mr. Adams had an offender score of zero. RP 1295; 1297. However, at sentencing, the State sought to prove that Mr. Adams's prior Oregon conviction for unlawful use of a weapon was comparable to a Washington assault in the second degree conviction. RP 1298. In an effort to establish

factual comparability between these legally distinct offenses, the prosecutor asserted that the Oregon prosecutor's extraneous statements about alleged conduct related to a dismissed assault charge during Mr. Adams's plea colloquy could be used to establish factual comparability. CP 154 -58. The court found the offenses were comparable and sentenced Mr. Adams based on an offender score of two rather than zero. CP 248; RP 1356-57.

At sentencing, the forensic psychologist and neuropsychologist who evaluated Mr. Adams, Robert Gerald Stanulis, opined that Mr. Adams's childhood history of abuse, shame, humiliation and abandonment was relevant to Mr. Adams's conduct in this case, even if these issues did not amount to a legal defense to the charged conduct. RP 1317-23. Mr. Adams requested the court impose the low end of the standard range. RP 1362. The court rejected his request and sentenced Mr. Adams to serve 240 months, the top of the standard range, in addition to the 24 months imposed for the deadly weapon enhancement for a total of 264 months in prison. CP 251.

E. ARGUMENT

1. The trial court erred in failing to grant a meaningful remedy for the prosecution's mismanagement under CrR 8.3(b), depriving Mr. Adams of a fair trial.

The trial court ruled that the prosecutor's belated disclosure of autopsy photos was mismanagement; but the court erred in failing to grant Mr. Adams's request for a meaningful to remedy of either exclusion of the autopsy photos or dismissal under CrR 8.3(b).

a. Dismissal or exclusion of evidence for the State's failure to comply with discovery rules is appropriate where the accused's right to a fair trial has been prejudiced.

The criminal rule governing a prosecutor's discovery obligations is designed to ensure the accused is not prejudiced at trial by the State's mismanagement of its discovery obligations. Here, the court found the State's late disclosure of autopsy photos was mismanagement, but erred by not granting Mr. Adams his requested relief to either exclude the belated autopsy photos or dismissal.

CrR 4.7 governs the State's discovery obligations in a criminal proceeding. This includes required disclosure of any reports and physical examinations and photographs, which here, included autopsy photos. CrR 4.7(a)(1)(iv), (v). The purpose of CrR 4.7 is "to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government." *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293

(1996). This duty is ongoing, requiring the State to disclose “additional material or information” discovered after initial compliance with the discovery rules. CrR 4.7(h)(2); *State v. Krenik*, 156 Wn. App. 314, 320, 231 P.3d 252 (2010).

Criminal Rule 8.3(b) provides for dismissal of a criminal prosecution “due to arbitrary action of 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). No evil or dishonesty is required; simple mismanagement is enough for dismissal under CrR 8.3(b). *State v. Brooks*, 149 Wn. App. 373, 384, 203 P.3d 397 (2009). A motion to dismiss under CrR 8.3(b) is supported when the accused shows “arbitrary action or governmental misconduct” and “prejudice” affecting his right to a fair trial. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

The accused’s right to fair trial is prejudiced when the discovery violation affects his speedy trial right and his “right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.” *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). “The State cannot by its own unexcused conduct force a defendant to choose between his speedy trial rights and his right to effective counsel who has had the opportunity to adequately prepare a

material part of his defense.” *Brooks*, 149 Wn. App. at 387 (citing *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). The accused is prejudiced when he can show by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either the right to effective of assistance of counsel or his speedy trial rights. *Brooks*, 149 Wn. App. at 387.

A trial court has discretion to determine the appropriate sanction for a discovery violation; dismissal or exclusion of evidence may be the proper remedy where the defendant shows actual prejudice. CrR 4.7(h)(7)(i); *State v. Hutchinson*, 135 Wn.2d 863, 881-82, 959 P.2d 1061 (1998). Factors to be considered in deciding whether to exclude evidence as a sanction are: “(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.” *Hutchinson*, 135 Wn.2d at 882-83.

Normally this Court reviews the trial court’s decision on a CrR 8.3(b) motion for manifest abuse of discretion. *See Michielli*, 132 Wn.2d at 240. However, where, as here, the trial court does not issue a written order setting out the court’s reasoning as required by CrR 8.3(b), this

Court reviews the matter *de novo*. *State v. Warner*, 125 Wn.2d 876, 882-83, 889 P.2d 479 (1995).

b. The prosecutor's late disclosure of autopsy photos was a serious abuse of discovery and mismanagement that prejudiced Mr. Adams, but the court erroneously denied his requested remedy, requiring reversal and remand for a new trial or dismissal.

The trial court erred in refusing to impose the remedy of exclusion of the late-disclosed evidence or dismissal to alleviate the prejudice to Mr. Adams in the preparation of his defense.

Mr. Adams was awaiting trial since May of 2018. RP 617. Omnibus applications were filed by both parties on August 21, 2018. CP 68. Discovery was considered complete by September 11, 2018 after a discovery review in open court, with the exception of pending information from the Washington Crime Lab that was later received. CP 68. The State provided only about seven autopsy photos. RP 202-03.

Mr. Adams's counsel proceeded on the belief that this limited number of autopsy photos provided in discovery were all the State intended to present at trial. CP 69. Mr. Adams hired a forensic pathologist to review the autopsy reports. CP 69.

On January 10, 2019, Mr. Adams's counsel sent an email to the prosecuting attorney to ensure discovery was complete. CP 68. The prosecutor responded, confirming the State had provided all the autopsy

photos in this case. CP 68. However, on January 30, 2019, nine days before trial, the prosecutor disclosed there were 60 new photos in the case. CP 68. Mr. Adams needed an opportunity for his expert to review these additional photographs. CP 69. Mr. Adams had to choose between a continuance in violation of his speedy trial rights, and moving forward with unprepared counsel. CP 69. Additionally, defense counsel had been unable to incorporate this critical evidence into his trial preparation over the last four months:

We did seek out and consult with a forensic pathologist. The main concern that that pathologist had in really giving us a thorough report was the fact that there were no or very, very minimal photos. The seven photos that we received prior to yesterday evening were -- I mean, frankly just photos of Mr. Diaz laying on a table. Nothing had been done to the body at that point in time. It didn't appear as though anything other than the organ procurement took place prior to those photos being taken.

RP 202-03; *see also* CP 67-70.

The prosecutor admitted these new photographs contained evidence of additional injuries that were not part of the medical examiner's report, but argued the autopsy report was "meticulously described" and the injuries were "documented" in "scientific terms." RP 205. However, Mr. Adams rejected this notion that the "line drawings" they had been given were in any equivalent to the actual photographs when consulted with the medical examiner and the defense expert. RP

206-07. There was no question the lack of photos undercut Mr. Adams's ability to prepare and for his expert to offer an opinion, where "all he had to go on were these line drawings and the four-and-a-half to five-page report." RP 207.

Based on this discovery violation that so seriously prejudiced the preparation of his defense, Mr. Adams requested the court dismiss his case. CP 70; RP 202. In the alternative, if the court refused to dismiss his case, Mr. Adams asked the court to exclude the photos at trial. CP 70; RP 207. If the court did not exclude the evidence or dismiss his case, he would be forced to request a continuance. RP 207.

The court rightfully determined this was mismanagement "I don't see any way I can call this anything other than mismanagement." RP 207. Especially where there had been a prosecutor present when the autopsy photos were taken. RP 207. However, the court found that "trying to craft a sanction is very difficult." RP 207. The trial court ordered defense counsel to immediately contact the defense expert. RP 208. The trial court also ordered the State to identify the photos it intended to use for trial and summarize their utility by the following day. RP 208.

When the issue was addressed about one week later, the State culled the 60 photos down to nine additional photos it sought to introduce at trial. RP 220; Ex. 35-38; 62-76. Mr. Adams maintained his objection to

the introduction of these additional autopsy photos. RP 220. The court overruled Mr. Adams's motion to exclude the photos, finding that "some of them are clearer from a different angle, but the wounds, injuries shown are contained in both sets of photos." RP 222. Focusing on the narrow issue of the arguably duplicative nature of the photos' content, the court ruled this late disclosure did not prejudice Mr. Adams, and refused to sanction the State for this untimely disclosure. RP 222.

When government misconduct forces a defendant to choose between two constitutional rights, it constitutes actual prejudice to a defendant's right to a fair trial. *Michielli*, 132 Wn.2d at 240. Here, the fact that this new evidence impeded his case preparation over the last four months forced Mr. Adams to choose between either (1) proceeding to trial with counsel who had prepared his case without this critical evidence; or (2) accepting further delays in trial, including addition time in pre-trial detention and expiration of his speedy trial rights. CP 69.

The court's failure to provide the requested defense remedy failed to prevent further mismanagement. *See Hutchinson*, 135 Wn.2d at 882 (discovery violator has no incentive to comply with an order unless exclusion is a remedy). After trial began, Mr. Adams brought to the court's attention that the day before the jury was brought in, the State brought to the defense a thumb drive containing an additional 32

photographs taken by one of the officers in the case. RP 617. Noting that a previous trial court had already found prosecutorial mismanagement, the defense put on the record their concern that this late-developing discovery undermined confidence in the integrity of the State's discovery process. RP 617.

There can be no doubt that additional evidence about this gruesome injury would influence the jury, eclipsing the question of mens rea and lack of intent that was the central issue at trial. *See e.g.* Ex. 35-38; 62-76; CP 122-39; *Hutchinson*, 135 Wn.2d at 882-83.

Exclusion was also merited where this belated discovery was a complete surprise to defense counsel. *Hutchinson*, 135 Wn.2d at 883. Here, Mr. Adams's expert's opinion and four months of trial preparation were based on the State's assurance that there were a very limited number of autopsy photos. Defense counsel even went so far as to confirm this understanding with the State prior to trial. This late disclosed evidence impeded Mr. Adams's ability to prepare for a trial. CP 69.

The prosecutor's mismanagement deprived Mr. Adams of his right to be represented by prepared defense counsel without sacrificing his right to a speedy trial. The court's failure to address this mismanagement with a meaningful remedy warrants reversal for a new trial without this evidence, or dismissal.

2. The trial court's erroneous evidentiary rulings deprived Mr. Adams of a fair trial.

A "fair trial in a fair tribunal" is a basic element of due process.

Withrow v. Larkin, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); U.S. Const. amend. XIV; Const. art. I, §§ 3, 21, 22. The presumption of innocence flows from this right. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Evidence rules reflect these requirements by "narrowly confin[ing] the trial contest to evidence that is strictly relevant to the particular offense charged."

Williams v. People of State of N.Y., 337 U.S. 241, 247, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

This court reviews evidentiary rulings for an abuse of discretion; this Court's review of evidentiary rulings should also consider the accused's constitutional rights. *State v. Horn*, 3 Wn. App. 2d 302, 310, 415 P.3d 1225 (2018); *State v. Blair*, 3 Wn. App.2d 343, 357, 415 P.3d 1232 (2018) (Worswick, J., concurring).

a. The trial court erroneously allowed Ms. Miosek to offer speculative, impermissible opinion testimony over defense objection.

The State's witness, Ms. Miosek, was permitted to offer speculative testimony and impermissible opinion testimony, over objection, in violation of ER 602 and ER 701.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that they have personal knowledge of the matter. ER 602. Evidence is inadmissible under this rule if the witness could not have actually perceived or observed that to which they testify. *M. B. A. F. B. Fed. Credit Union v. Cumis Ins. Soc., Inc.*, 681 F.2d 930, 932 (4th Cir. 1982) (applying Fed. R. Evid. 602,² which is nearly identical to ER 602). A court properly excludes the testimony of a witness where their personal knowledge is tenuous, being based on sheer speculation, and without factual foundation. *United States v. Sorrentino*, 726 F.2d 876, 887 (1st Cir. 1984). Personal knowledge of a fact requires an opportunity to observe and actually observe the fact. *United States v. Owens*, 789 F.2d 750, 754 (9th Cir. 1986), *rev'd on other grounds*, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988).

Although some lay opinions are allowed under ER 701,³ “there are some areas that are clearly inappropriate for opinion testimony in criminal trials.” *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

² Fed. R. Evid. 602 reads: “A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.”

³ Under ER 701, If the witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

For example, expressions of personal belief as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses is not allowed. *Id.*; *State v. Farr-Lenzini*, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999). Inadmissible lay witness opinion testimony about the defendant's guilt invades the accused's right to a fair trial and an impartial jury. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009).

In *Farr-Lenzini*, the trial judge improperly allowed a trooper to opine that a driver who was speeding away from him "was attempting to get away from me." 93 Wn. App. at 458. The State did not lay a foundation demonstrating the officer was an expert in determining a driver's state of mind. *Id.* at 461. Consequently, there was an insufficient foundation for the officer to give opinion testimony about the defendant's state of mind. *Id.*

Here, Ms. Miosek offered several opinions about critical issues at trial that she was not qualified to give. Mr. Adams's defense of justifiable use of force was based on his seeing that Mr. Diaz possessed this chain with a padlock, which was a weapon, and which was recovered from Mr. Diaz's person. RP 924, 1039, 1255-60 (defense closing argument). Ms. Miosek was permitted to opine that Mr. Adams was not justified in using force, over defense objection, when she testified there was no fight, and "no chains for him [Mr. Adams] to even defend himself at all." RP 738.

Ms. Miosek's opinion that Mr. Adams was not entitled to defend himself went beyond observation permitted under ER 602, and was an impermissible opinion on guilt. ER 701; *Johnson*, 152 Wn. App. at 930-32.

Ms. Miosek was similarly permitted to speculate about Mr. Adams's internal mental state after Mr. Adams hit Mr. Diaz with the hatchet, over defense objection:

Q. Okay. What was the plan?

A. So we were in the middle of a field and we didn't have phones that worked. What I wanted to do was make it to the closest store so we could call 911 and find out if Rob could be saved or not. And Ryan was mainly focused on just not getting into trouble.

MR. GOODAY: Objection, your Honor.

THE COURT: Basis.

MR. GOODAY: It's nonresponsive to the question and speculation.

THE COURT: Overruled. The question was, what was your plan.

RP 745 (emphasis added). The prosecutor then asked a follow up question, restating Ms. Miosek's speculation about Mr. Adams's mental state, "so did the defendant say anything about this plan to avoid getting in trouble?" RP 746.

This testimony was inadmissible under ER 602 and ER 701, because it went beyond Ms. Miosek's perception of events into an inference about Mr. Adams's culpability and internal motivations, which she was not qualified to give. *Farr-Lenzini*, 93 Wn. App. at 459-60. The

trial court erred in refusing to sustain Mr. Adams's objection to both of these impermissible, speculative opinions that bore directly on Mr. Adams's guilt. RP 745-46.

b. The remedy is reversal of Mr. Adams's conviction and remand for a new trial.

Because the court erred in overruling Mr. Adams's objections, this Court should reverse his conviction and remand for a new trial.

Reversal for evidentiary error is required when within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). Where there is no way to know what value the jury placed on the improperly admitted evidence, and there is a risk of prejudice, a new trial is necessary. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010). When the error deprives the accused of a constitutional right, such as improperly admitted opinion testimony, the State must prove that an error of constitutional magnitude was harmless beyond a reasonable doubt. *Farr-Lenzini*, 93 Wn. App. at 465; *State v. Olmedo*, 112 Wn. App. 525, 533, 49 P.3d 960 (2002).

Under either standard, this Court should hold the improper admission of Ms. Miosek's statements were prejudicial. Central to Mr. Adams's defense of justifiable use of force was that the decedent

threatened Mr. Adams with his “smiley,” a chain with a lock on the end used as a weapon. CP 138; RP 637; 1255-60 (defense closing). This chain with a padlock was collected from Mr. Diaz’s person by police when he was taken to the hospital. RP 924. Yet Ms. Miosek was permitted to opine that there was no such chain, and that Mr. Adams was not justified in using force. RP 738. This impermissible, speculative testimony undercut the heart of Mr. Adams’s defense and cannot be deemed harmless. The same is true about her opinion about his guilty mental state afterwards, where the question at trial was Mr. Adams’s mental state in acting as he did, not whether or not he committed the act. *See e.g.* RP 1255-60; CP 122-38 (lesser included instructions and justifiable homicide).

The State cannot establish the court’s erroneous admission of this testimony was harmless error. This Court should reverse Mr. Adams’s conviction and remand for a new trial.

3. The court erroneously found the Oregon offense of unlawful use of a weapon to be comparable to the Washington offense of second degree assault.

The trial court erroneously determined that Mr. Adams’s prior Oregon conviction for unlawful use of a weapon was factually comparable to the Washington offense of assault in the second degree.

a. When, as here, a foreign offense is not legally comparable to a Washington offense, courts may conduct a limited factual inquiry to determine comparability.

At sentencing, prior out-of-state convictions are classified according to their Washington equivalents, if any. RCW 9.94A.525(3). The State bears the burden of proving the comparability of out-of-state convictions. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). An out-of-state conviction may not be used to increase an offender score unless the State proves it is comparable to a Washington felony. *Id.*

Washington has a two-part test for comparing foreign convictions. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014). Under the first, legal prong, a court compares the elements of the out-of-state conviction to the relevant Washington crime. *Id.* at 472. If the foreign conviction is narrower because it contains all the most serious elements of the Washington statute, the out-of-state conviction counts toward the offender score as if it were a Washington offense. *Id.* at 472-73. However, if the foreign statute is broader than the Washington statute, the court moves on to the “factual prong—determining whether the defendant’s conduct would have violated the comparable Washington statute.” *Id.* at 473. A court reviews a trial court’s calculation of the defendant’s offender score de novo. *Id.* at 472.

In 2015, Mr. Adams was charged in Oregon with several offenses, including assault, unlawful use of a weapon, and misdemeanor charges.

CP 208-10. The assault and misdemeanor charges were dismissed in exchange for Mr. Adams's guilty plea to the offense of unlawful use of a weapon. CP 214; 235. As the State acknowledged, the Oregon offense of unlawful use of a weapon and Washington's assault statutes were not legally comparable, because they are entirely different offenses. RP 1348-49. Under ORS 166.220,⁴ "unlawful use of weapon" requires the person "[a]ttempts to use unlawfully against another, or carries or possesses with intent to use unlawfully against another, any dangerous or deadly weapon as defined in ORS 161.015." In Oregon, "dangerous weapon" is defined as: "any weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury." ORS 161.015.⁵

In Washington, assault with a deadly weapon is committed when, "under circumstances not amounting to assault in the first degree," a person assaults another with a deadly weapon. RCW 9A.36.021(1)(c). A "deadly weapon" is any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance,

⁴ This statute was the same in 2015, the date of Mr. Adams's conviction. https://www.oregonlegislature.gov/bills_laws/archive/2015ors166.pdf

⁵ This statute was the same in 2015, the date of Mr. Adams's conviction. https://www.oregonlegislature.gov/bills_laws/archive/2015ors161.pdf

including a “vehicle” as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm. RCW 9A.04.110(6). A “criminal attempt” in Washington is defined as “with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1).

Despite the Oregon unlawful use of a weapon offense requiring no intent to commit any specific crime, the State alleged the Oregon conviction was factually equivalent to the anticipatory offense of assault in Washington, which would be included in an offender score, the same as if the person committed an assault. RCW 9.94A.525(4). RP 1339. If comparable to attempted assault in the second degree, the State alleged that this would count as two points in Mr. Adams’s offender score, and one point if comparable to assault in the third degree. CP 152.

b. The court relied on impermissible factual assertions to find the Oregon offense of unlawful use of a weapon was comparable to the Washington offense of assault in the second degree.

The trial court erred in relying on statements that were not admitted or proven beyond a reasonable doubt to find Mr. Adams’s 2015 Oregon conviction for unlawful use of a weapon was factually comparable to the Washington offense of assault in the second degree.

The court may consider only facts that were “admitted, stipulated to, or proved beyond a reasonable doubt” to find a foreign conviction is comparable to a Washington offense. *Olsen*, 180 Wn.2d at 473-74 (citing *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005)). This includes only facts that were “clearly charged and then clearly proved beyond a reasonable doubt to a jury or admitted by the defendant.” *Olsen*, 180 Wn.2d at 476.

Facts alleged in a charging document are not equivalent to facts found by a jury or admitted by the defendant necessary to establish factual comparability. *Olsen*, 180 Wn.2d at 473-74. Washington courts recognize that when the defendant pleads guilty to a foreign conviction that criminalizes a broader range of conduct than the allegedly comparable Washington offense, the defendant at that time has no incentive to prove they are guilty of more narrow conduct. *State v. Thomas*, 135 Wn. App. 474, 485, 144 P.3d 1178 (2006) (citing *Lavery*, 154 Wn.2d at 258).

In *Thomas*, the element required for conviction under Washington’s burglary statute, but missing from the California statute at issue—unlawful entry—was alleged in the charging documents for the foreign conviction; however, the record did not establish the defendant “adopted that allegation in pleading guilty as charged.” *Thomas*, 135 Wn. App. at 487. *Thomas* found, in the absence of a plea colloquy, jury

instructions or other court records showing unlawful entry was proved beyond a reasonable doubt, his burglary conviction was not factually comparable. *Id.* Because he entered a guilty plea, he had no incentive to admit or mount a defense to an allegation that did not affect the determination of guilt. *Id.* (citing *Lavery*, 154 Wn.2d at 258).

In *Lavery*, where the record of the federal conviction did not establish the defendant admitted or stipulated to having the specific intent to steal, as required under Washington's statute, nor was it proved that he possessed such an intent, the foreign robbery conviction was neither legally nor factually comparable. *Lavery*, 154 Wn.2d at 262.

Here, to support its claim that the legally dissimilar Oregon and Washington offenses were factually comparable, the State presented the Information, Indictment, guilty plea, judgment, and plea colloquy, which established that Mr. Adams pleaded guilty to one count of unlawful use of a weapon. CP 208-43; RP 1339. Mr. Adams's guilty plea to count II, "UUW," provided the following factual basis for the plea: "On 7/25/15 in Marion County, OR I attempted to use against Michael Spencer a dangerous weapon." CP 213-14. In exchange for his plea, the State dismissed count 1, assault in the second degree, and count 3-4, strangulation. CP 214. The judgment found him guilty of only count two, unlawful use of a weapon. CP 217.

The plea colloquy also established that Mr. Adams pleaded guilty only to the offense of unlawful use of a weapon. CP 235. The court reviewed with Mr. Adams that he was admitting that on the alleged date, he “attempted to use against [a person] a dangerous weapon.” CP 235. The court specifically noted that “the language of the indictment doesn’t require any specificity as to the weapon.” CP 235. The court entered judgment solely on Mr. Adams’s plea to the unlawful use of a weapon. CP 176; 235-41. Thus, all that was admitted and proven beyond a reasonable doubt based on Mr. Adams’s guilty plea to unlawful use of a weapon, was that he attempted to use an unspecified dangerous weapon against a person. There was no evidence he attempted to commit an assault against another.

Misunderstanding the limitations of what a court can consider in determining factual comparability to include any statements within the transcripts of a plea colloquy, the State here asserted the Oregon prosecutor’s statements during the 2015 plea colloquy in regard to the dismissed charges of assault could be used in determining factually comparability. RP 1339; 203-04; 230-42. The Oregon plea colloquy proffered by the State here included the Oregon prosecutor’s statements about the allegations surrounding the more serious assault charge that was dismissed. CP 204; 235-37. The State alleged that the prosecutor’s

statements about these unproven, ultimately dismissed allegations could establish factual comparability for the offense of assault in the second degree. RP 1339; CP 203-04.

Despite Mr. Adams pleading guilty only to unlawful use of weapon, which requires mere “intent” to use a weapon, not to commit an assault, the court agreed with the State that the Oregon offense of unlawful use of a weapon was factually comparable to the Washington offense of assault in the second degree:

[I]n the colloquy there was the prosecutor was going on about why the reasons and the factors that led to the reduction of the charge or a change in the charge, and there was a reference to, it was a screwdriver, the victim suffered a number of puncture wounds to the neck and face. It said that he was very uncooperative. And so then the court chimed in and then Mr. Perez was the defense attorney had opportunity to chime in to correct anything that was erroneous as far as the prosecutor’s statements related to the puncture wounds to the neck and the face.

So where there is the injury, substantial bodily harm caused by a deadly weapon, I think that’s analogous or comparable to the Oregon law and the Washington law where a screwdriver is used in Washington and that’s considered a deadly weapon in Washington. It’s readily capable of causing death or substantial bodily harm, and the method used was to the face or to the head which are sensitive areas where the brain is located. So I think there that the assault two is comparable to the unlawful use of a weapon. The attempt, I mentioned that before, is equal to a completed crime, so it’s basically use of a weapon, use of a deadly or dangerous weapon against another.

So and then the intentional is there, then obviously the criminal negligence is there also, so the lesser mens rea is included within that. So either the assault two or the assault

three are comparable to the unlawful use of a weapon in Oregon. So I'll make that finding that it is factually comparable.

RP 1355-56. The court's consideration that the defense attorney could have "chimed in" to correct the prosecutor's statements is directly contrary to the Supreme Court's recognition that the defendant has no incentive to admit or mount a defense to an allegation that did not affect the determination of guilt. *Lavery*, 154 Wn.2d at 258. The court's finding of the alleged tool used, the conduct, and the injury was based on a prosecutor's allegations about unproven conduct was not "clearly proved beyond a reasonable doubt to a jury or admitted by the defendant" as is required of facts a court relies on to establish factual comparability. *Olsen*, 180 Wn.2d at 476.

The trial court plainly erred in relying on the Oregon prosecutor's statements regarding his justification for *dismissing* a charge against Mr. Adams to establish factual comparability. *Olsen*, 180 Wn.2d at 476.

c. The court sentenced Mr. Adams based on an offender score of two rather than zero which was error requiring reversal for resentencing.

The court calculated Mr. Adams's offender score as two rather than zero based on erroneous factual analysis, requiring reversal and remand for the court to resentence Mr. Adams based on the correct offender score.

A sentence based upon an incorrect offender score is “fundamentally defective.” *In re Goodwin*, 146 Wn.2d 861, 876, 50 P.3d 618 (2002). The State bears the burden of establishing by a preponderance of the evidence that a prior conviction adds a point to an offender score. *Ford*, 137 Wn.2d at 480-81.

The trial court sentenced Mr. Adams on an offender score of two points for the noncomparable Washington offense of assault in the second degree. CP 248. Without this offense, Mr. Adams had an offender score of zero. RP 1342. This means Mr. Adams was sentenced on a higher offender score than what is permitted by the Sentencing Reform Act—a fundamental defect requiring reversal and remand for resentencing based on the correct offender score. *Goodwin*, 146 Wn.2d at 878-79.

F. CONCLUSION

The trial court erred in failing to grant a remedy to cure the prejudice of the prosecutor’s mismanagement, requiring reversal for a new trial without the additional autopsy photos, or in the alternative, dismissal of Mr. Adams’s conviction. The trial court’s evidentiary rulings regarding the State’s central witness’s testimony deprived Mr. Adams of a fair trial, and provides a separate grounds for reversal and remand for a new trial. Finally, the court’s mistaken finding of factual comparability led to Mr.

Adams being sentenced on an incorrect offender score, requiring reversal and remand for resentencing.

DATED this 14th day of January 2020.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 53398-7-II
v.)	
)	
RYAN ADAMS,)	
)	
APPELLANT.)	

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