

FILED
Court of Appeals
Division II
State of Washington
7/27/2020 4:11 PM

No. 53398-7-II

IN 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 WASHINGTON
FOR THE COUNTY OF COWLITZ

REPLY BRIEF OF APPELLANT

KATE BENWARD
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
katebenward@washapp.org

TABLE OF CONTENTS

A. INTRODUCTION..... 1

B. ARGUMENT IN REPLY 1

 1. Governmental mismanagement required either exclusion of the evidence or dismissal. 1

 2. The court’s erroneous evidentiary rulings were properly preserved and harmful as they were impermissible opinions about Mr. Adams’s mental state—the central issue at trial. 3

 3. The State ignores *Olsen*’s limitation on what a sentencing court can consider to establish factual comparability, wrongly asserting the sentencing court was permitted to rely on unproven allegations to establish factual comparability of a foreign offense. 6

C. CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON STATE SUPREME COURT DECISIONS

In re. Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)..... 10

In re. Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005) 6

State v. Jordan, 180 Wn.2d 456, 325 P.3d 181 (2014)..... 8

State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2010) 4, 5

State v. Olsen, 180 Wn.2d 468, 325 P.3d 187 (2014)..... 6, 8, 10

Wilcox v. Basehore, 187 Wn.2d 772, 389 P.3d 531 (2017)..... 4

WASHINGTON COURT OF APPEALS DECISIONS

City of Seattle v. Levesque, 12 Wn. App. 2d 687, 460 P.3d 205 (2020)..... 4

State v. Brooks, 149 Wn. App. 373, 203 P.3d 397 (2009)..... 2

State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999)..... 4, 5

State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006)) 9

UNITED STATES SUPREME COURT DECISIONS

Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)..... 9

RULES

ER 602 4, 5

ER 701 4, 5

RAP 2.5(a)(3)..... 4

AUTHORITY FROM OTHER STATES

State v. Kappelman, 162 Or. App. 170, 986 P.2d 603 (1999) 10

A. INTRODUCTION

Governmental mismanagement and erroneous evidentiary rulings deprived Mr. Adams of a fair trial. Additionally, the court erred in finding Mr. Adams's prior Oregon conviction for unlawful use of a weapon was comparable to an assault in the second degree offense under Washington law, because the court's comparability finding was based on allegations about the offense that Mr. Adams did not admit to in his guilty plea. Reversal for a new trial, or alternatively, a new sentencing hearing is required.

B. ARGUMENT IN REPLY

1. Governmental mismanagement required either exclusion of the evidence or dismissal.

The trial court concluded there was governmental mismanagement in this case. RP 207. When the violation occurred, Mr. Adams requested dismissal or exclusion of the photos at trial. CP 70; RP 202. The remedy of a continuance granted by the court was the less-desired alternative. RP 202; 207. The State cites to defense counsel's later statement that they were able to have their expert review the photos without a continuance (without citation to the record where this occurred), as if this means the prior objection and request for a remedy had not been made. Br. of resp. at 10. This ignores the fact that Mr. Adams requested the remedy of dismissal or

exclusion of the evidence, which the trial court denied, instead offering a continuance to accommodate the State's mismanagement of the evidence. RP 202; 207-08.

Though the court granted time for the defense to bring their expert back to review the additional photos, the prejudice is not just the admission of the photos; defense counsel made clear that Mr. Adams was prejudiced by the lack of integrity in the State's discovery process, which undermined defense counsel's ability to prepare for trial. RP 617. Counsel put this prejudice on the record when again, days before trial, the State again handed the defense more discovery on a thumb drive that had not been provided through pre-trial litigation, well after the cut off for discovery. RP 617. The trial court erred in refusing to either dismiss or exclude the photos, where this sanction would have ensured defense counsel could meaningfully rely on the State's representations that discovery was complete when preparing for trial. *See State v. Brooks*, 149 Wn. App. 373, 389, 203 P.3d 397 (2009) (it is the prejudice to the defendant's right to a fair trial that is material, rather than the evidence itself). Moreover, it cannot be said that the accumulation of these additional, very graphic photos did not impact the jury's decision-making about the disputed level of Mr. Adams's culpability and whether he acted in self-defense.

Dismissal or exclusion of the photos was the proper remedy where the photos were so belatedly supplied to the defense as a result of governmental mismanagement, that Mr. Adams was entitled to a remedy that would ensure his ability to prepare for trial was not undermined by the State's mismanagement of its evidence.

2. The court's erroneous evidentiary rulings were properly preserved and harmful as they were impermissible opinions about Mr. Adams's mental state—the central issue at trial.

Mr. Adams's objections to Ms. Miosek's testimony were adequately preserved for review by this Court, and the court erred in overruling defense objections to her speculative, non-responsive testimony about Mr. Adams's mental state.

Mr. Adams asserted that he acted in self-defense against the chain or "smiley" Mr. Diaz wielded. Ms. Miosek speculated that there was no reason for Mr. Adams to defend himself. RP 738. Additionally, she offered a non-responsive answer to the question asked and instead offered impermissible speculation in the form of an opinion about Mr. Adams's mental state, stating he was "mainly focused on just not getting into trouble." RP 745.

The State claims that defense counsel's objections on the basis of "speculation" and "non-responsive" do not properly preserve the challenge to this testimony on appeal. Br. of Resp. at 12-13. The purpose of

the objection requirements is to ensure that the trial court is able to rule on the issue and provide a curative instruction. *City of Seattle v. Levesque*, 12 Wn. App. 2d 687, 695, 460 P.3d 205 (2020). Here, the objection to “speculative” testimony encompasses the rules ER 602 and ER 701, because it is an objection to facts that were not observed and were an opinion about the defendant’s mental state, which is pure speculation. Br. of App. at 19-20. These objections were sufficient to give the trial judge “an opportunity to address the issue before it becomes an error on appeal.” *Levesque*, 12 Wn. App. 2d at 695 (citing *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2017)).

Even if this court construed these objections as inadequate to preserve the objected to testimony on appeal, *State v. Farr-Lenzini*, cited in Mr. Adams’s opening brief to argue that Ms. Miosek’s personal belief about the intent of the accused violate the accused’s fair trial right, analyzes this as a constitutional error, which would make it subject to review under RAP 2.5(a)(3). *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). For an error to be “manifest” there must be a showing of actual prejudice, which is defined as a “plausible showing...that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2010). “Actual prejudice” exists when it is “so obvious on

the record that the error warrants appellate review.” *Id.* at 99–100. In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *Id.* “[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *Id.* at 100.

Here, the error is obvious from the record, because it was a plain objection to Ms. Miosek’s testimony on basis that it exceeded her personal knowledge (ER 602) and was opinion testimony that exceeded her own perception of events (ER 701)—in other words, “speculative,” as was the objection that her testimony was non-responsive because she was not asked to speculate on Mr. Adams’s mental state. Based on what the trial court knew at the time, it could have corrected the error, making this a manifest error affecting Mr. Adams’s constitutional right should this Court determine the objection raised below were inadequate.

Where the critical issue at trial was Mr. Adams’s mental state and whether he acted in self-defense, this impermissible opinion testimony speculating about his mental state during the offense and after are not harmless beyond a reasonable doubt. *Farr-Lenzini*, 93 Wn. App. at 465 (applying constitutional harmless error analysis).

3. The State ignores *Olsen*'s limitation on what a sentencing court can consider to establish factual comparability, wrongly asserting the sentencing court was permitted to rely on unproven allegations to establish factual comparability of a foreign offense.

The State misunderstands what a sentencing court may consider in determining factual comparability of a foreign offense. Br. of Resp. at 17-19. *State v. Olsen* unambiguously provides the sentencing court may consider only facts that “were admitted, stipulated to, or proved beyond a reasonable doubt” to establish factual comparability for a foreign offense. 180 Wn.2d 468, 473-74, 325 P.3d 187 (2014) (citing *In re. Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005)).

The State does not dispute that Mr. Adams only admitted that he “attempted to use against Michael Spencer a dangerous weapon” in his Oregon guilty plea. CP 214; Br. of Resp. at 22. The Oregon sentencing court specifically noted that “the language of the indictment doesn’t require any specificity as to the weapon.” CP 235. Accordingly, Mr. Adams did not admit to the use of a particular weapon, only to an unnamed, “dangerous weapon.” CP 176; 213; 234-35. Nor did he admit to any particular act in the attempted “use” of the “weapon.” CP 234-35.

Contrary to the State’s assertion, Mr. Adams’s admission establishes neither an assault nor the use of a deadly weapon that would make this offense comparable to an assault under Washington law. Br. of

Resp. at 22. The Oregon prosecutor dismissed the more serious assault allegation, and justified its dismissal of the charge to the Oregon sentencing court during the plea colloquy. CP 235-37. The State asserts that the Washington sentencing court was permitted to consider all of the Oregon prosecutor's unproven allegations in relation to the dismissed charge to ascertain Mr. Adams's "actual conduct underlying the out-of-state offense," including the prosecutor's statements about the reasons for the plea offer and dismissal of the assault charge that were neither proved nor admitted by Mr. Adams. Br. of Resp. at 21.

The Oregon prosecutor explained its decision to dismiss the assault charge, in part because, Mr. Adams had a "colorable self-defense claim." CP 235-36. The prosecutor outlined for the court the "mitigators" in the case that led to dismissal, but also that he "required a plea to unlawful use of a weapon" based on the unproven allegation that Mr. Adams "physically overpowered the victim" and used a "screwdriver." Br. of resp. at 16; 236.

Despite the fact that Mr. Adams did not plead guilty to using a "screwdriver" or that he "overpowered" anybody, the State claims the Oregon prosecutor's extraneous allegations explaining the dismissed charge establish Mr. Adams's "[a]ctual conduct underlying the Oregon conviction was stabbing a person with a screwdriver causing puncture

wounds to his neck and face.” Br. of Resp. at 22. The State believes this unproven conduct—not admitted to in Mr. Adams’s plea to unlawful use of a weapon— establishes “this clearly is a striking with unlawful force that is harmful or offensive thereby meeting the Washington definition of assault.” Br. of Resp. at 22.

The State cites to *State v. Jordan* to justify its blatant disregard for *Olsen*’s unambiguous limitation on what a court can consider to establish factual comparability, arguing the court need only establish “rough comparability” of an out-of-state conviction. Br. of Resp. at 18 (citing *State v. Jordan*, 180 Wn.2d 456, 465, 325 P.3d 181 (2014)). *Jordan* does not stand for a relaxed interpretation of *Olsen* as the State suggests—the notion of “rough comparability” is a reference to the SRA’s assignment of points to offenses—e.g., “crimes as diverse as premeditated murder and attempted kidnapping count the same number of points.” *Jordan*, 180 Wn.2d at 464. The question in *Jordan* was whether parity was required, “not only between elements but also available defenses.” *Id.* at 461. *Jordan* determined that the SRA does not require judges to “conduct the tedious task of comparing out-of-state criminal procedures to in-state procedures” as part of its comparability analysis. *Id.* at 465. That sentencing courts are not required to consider the nuances of out-of-state

self-defense laws under the SRA's comparability analysis does mean that that trial courts may exceed the bounds established by *Olsen*.

The State also misunderstands *State v. Thomas* to mean that the court can consider the transcript of the plea colloquy untethered from *Olsen's* limitation of the facts admitted in the guilty plea or proven beyond a reasonable doubt. Br. of Resp. at 18 (citing *State v. Thomas*, 135 Wn. App. 474, 481-82, 144 P.3d 1178 (2006)). The prosecutor derives the wrong principle from *Thomas's* citation to *Shepard*, which states that "a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). The State highlights the mention of "plea colloquy," Br. of resp. at 19, but *Shepard* plainly states that any such consideration must be tied to the findings to which the accused has "assented." *Id.*

The State also cites to the Oregon Appellate Court decision, *State v. Kappelman*, to support its position, but *Kappelman* means no more than what it says, which is that under Oregon law "a guilty plea implicitly admits" the "facts necessary to support the material elements of the charge." Br. of Resp. at 19-20 (citing *State v. Kappelman*, 162 Or. App.

170, 175, 986 P.2d 603 (1999)). In no way does this support the State's proposition that facts beyond the elements of the offense may be inferred, including a prosecutor's allegations in clear excess of the facts necessary to establish the elements of the offense. Br. of Resp. at 21-22.

This Court must reject the State's effort to broaden *Olsen's* clearly defined limits of what the court can consider to establish factual comparability. Relying on a prosecutor's statements during a plea colloquy related to a dismissed charge, none of which were admitted to or proven beyond a reasonable doubt clearly exceeds these limits. The trial court exceeded these limits by relying on bare allegations not admitted to by Mr. Adams in his guilty plea to find his Oregon conviction for unlawful use of a weapon was comparable to a Washington assault. RP 1355-56. This was error, requiring reversal and remand for Mr. Adams to be sentenced on the correct offender score. CP 248; *In re. Goodwin*, 146 Wn.2d 861, 876, 50 P.3d 618 (2002).

C. CONCLUSION

The trial errors warrant reversal for a new trial. The State also misconstrues binding case law on what a sentencing court may consider in determining factual comparability for an offense. This resulted in Mr. Adams being sentenced on the wrong offender score, requiring reversal and remand to be sentenced on the correct offender score.

DATED this 27th day of July, 2020.

Respectfully submitted,

s/ Kate Benward
Washington State Bar Number 43651
Washington Appellate Project
1511 Third Ave, Suite 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
E-mail: katebenward@washapp.org

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 53398-7-II
v.)	
)	
RYAN ADAMS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JULY, 2020, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] THOMAS LADOUCEUR	()	U.S. MAIL
[Tom.ladouceur@co.cowlitz.wa.us]	()	HAND DELIVERY
[appeals@co.cowlitz.wa.us]	(X)	E-SERVICE VIA
COWLITZ COUNTY PROSECUTING ATTORNEY		PORTAL
312 SW 1ST AVE		
KELSO, WA 98626-1739		

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF JULY, 2020.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

July 27, 2020 - 4:11 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53398-7
Appellate Court Case Title: State of Washington, Respondent v. Ryan Adams, Appellant
Superior Court Case Number: 18-1-00643-8

The following documents have been uploaded:

- 533987_Briefs_20200727161048D2456599_7721.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.072720-01.pdf

A copy of the uploaded files will be sent to:

- Tom.ladouceur@co.cowlitz.wa.us
- appeals@co.cowlitz.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Kate Benward - Email: katebenward@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200727161048D2456599