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Division II  
State of Washington  
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NO. 53398-7-II

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

RYAN SCOTT ADAMS,

Appellant.

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BRIEF OF RESPONDENT

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**I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court did not err by denying defendant's motion to exclude nine autopsy photographs which were provided to the defense two weeks before trial and which depicted the same injuries as autopsy photographs which were timely provided to the defense. Defendant has not shown any actual prejudice by the court's decision.

2. The trial court did not err by overruling defendant's two objections on the basis of speculation when the witness was testifying as to her personal observations.

3. Defendant's out-of-state conviction for the crime of unlawful use of a dangerous weapon is factually comparable to the Washington crime of second degree assault.

**II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Was it error to admit nine additional autopsy photographs which were provided to the defense two weeks before trial which depicted the same injuries as autopsy photographs which were timely provided to the defense? Has defendant shown any actual prejudice by the court's decision?

2. Did the court err in overruling defendant's two objections on the basis of speculation?

3. Was defendant's actual conduct underlying an out-of-state conviction factually comparable to the Washington crime of second degree assault?

### **III. STATEMENT OF THE CASE**

Shannon Miosek met defendant Ryan Adams in Florida in February 2018. They then hitchhiked throughout the country, eventually arriving in Longview towards the end of April. While in Longview they set up a tent and camped in a large vacant lot. Around the beginning of May Miosek and defendant met four men at a nearby Walmart who were also "travelers." The four men had a van. Miosek and defendant quickly became friends with the group. RP 723-726, 861, 1022.

Robert Diaz, the victim in the case, was one of the four men in the van. When Miosek first met Diaz she only knew him by the nickname "reckless." She learned his real name afterwards and referred to him as "Rob" while testifying at trial. RP 780-81. After first meeting the four men Miosek and defendant went back to their campsite. Miosek then spoke to defendant about her traveling on with the group in the van. RP 728-29.

Miosek and defendant returned to visit with the group the following morning. RP 727-28. She spoke with the driver of the van and it was agreed that she could leave with them. RP 729. However, she needed to return to the campsite to get her belongings. Miosek, defendant, and Mr. Diaz walked

back from Walmart to their campsite. RP 730–31. During the walk back to the campsite there was no argument or confrontation between defendant and Mr. Diaz, or between Miosek and defendant. RP 732.

As soon as they arrived back at the campsite defendant picked up a hatchet. RP 737. Defendant and Mr. Diaz were both standing in front of a fire pit, while Miosek started gathering her belongings. RP 734. Within seconds defendant told Mr. Diaz not to stand on the side of him. Mr. Diaz did not yell or argue with defendant. He did not punch, kick, or try to use any weapon against the defendant. RP 738-39. When Mr. Diaz turned to move to the other side of the fire pit, defendant struck him in the head with the hatchet. RP 735-36. Mr. Diaz collapsed to the ground after the first swing. His skull was open and he looked dead. Defendant continued to hit him with the hatchet, “quite a few” more times. When defendant stopped bludgeoning Mr. Diaz with the hatchet, he said something to Miosek like “what did you make me do.” RP 740-42.

At this point Miosek wanted to get to the closest store to call 911, while defendant was focused on not getting into trouble. RP 745. To that end, defendant came up with the idea to make it look like they found Mr. Diaz in the condition he was in. Defendant cleaned blood off of himself, and the two began walking out of the camp area towards a store. On the way defendant randomly got rid of some his bloody clothing. RP 746-47.

When they got to the minimart Nicole Hildebrandt, an employee, dialed 911 and handed the phone to defendant. RP 749, 798, 804. Miosek was very upset and told Hildebrandt that “he did it, I watched him do it,” referring to defendant. RP 809. The 911 call was played to the jury. On the call defendant recounted his fabricated story that they had just found their friend injured at their campsite. RP 811-813.

When Longview police officers James Bessman and Daniel Butler arrived at the minimart a frantic Miosek told them that defendant was the one who did this, and tried to tell the officers where the victim was and how to get to him. RP 750, 814-819. She then led officers back to the campsite where Mr. Diaz was located. RP 751. Officer Eric Hendrickson observed Mr. Diaz laying on the ground with a very obvious head wound. Part of his skull was missing and Hendrickson could see his brain through what was left of his skull. He was unconscious but still breathing. RP 864. He was then transported to a hospital via life flight where he later died. RP 865. A chain with a small padlock and can opener device was located on Mr. Diaz. RP 925. Hendrickson located a hatchet nearby. RP 868.

The first officer defendant spoke with was Bessman. Defendant told him “okay, I’ll tell you everything, no bullshit,” and then told Bessman he confronted a man who came to his area. RP 821-823. This man had a chain with a lock on the end of it called a “smiley,” but the man was not swinging

or threatening defendant with it. RP 824. Defendant said he struck the man first, in the head one time with a hatchet. RP 826. Defendant said he received no injuries and Bessman observed none. RP 827.

After speaking with Bessman, defendant was interviewed by Detective Brandon McNew. RP 1007. The interview was tape-recorded and played for the jury. RP 1017. During the interview, defendant described a heated and contentious discussion with Miosek about one of the guys in the van taking his girl, and the ensuing confrontation with Mr. Diaz back at the campsite. RP 1027, 1030-31. He described himself as “breaking down” during the walk back to the campsite because Miosek was going to leave with “some fucking asshole.” RP 1032. Defendant described standing near Mr. Diaz while Diaz is fiddling with a smiley– which he described as anything that has a lock at the end of it used to hit people. Defendant told him to move over. RP 1039. But Mr. Diaz was just shrugging off defendant’s demands to go to the spot he was pointing to like it was a joke. Defendant, in a rage, then started swinging the hatchet at Mr. Diaz’s head, not being able to stop. Defendant did not know how many times he struck Mr. Diaz. RP 1046-1048. During this interview defendant admitted lying on the 911 call by saying somebody else attacked one of their friends. RP 1055. At trial he argued self-defense. He did not testify, and relied upon his statements to the police to support his self-defense theory.

Dr. Wickham, a forensic pathologist, and the Clark County medical examiner, performed the autopsy on Mr. Diaz. Diaz had multiple contusions, abrasions, lacerations and skull fractures, and died from blunt head trauma. RP 951, 957, 990. Most of the injuries were to his head. RP 958. The largest of these head injuries was a “complex laceration.” This complex laceration was consistent with being hit in that particular area several times. About three quarters of a pound of brain tissue had herniated out through this laceration. RP 968-970. Three separate blunt force traumas could have caused that particular injury. RP 980.

In June of 2018 defense counsel first interviewed Dr. Wickham. After this interview Dr. Wickham submitted his final autopsy report. Among other things this report included diagrams, drawings, and a description of the injuries. RP 205-06. Defense counsel did a subsequent interview of Dr. Wickham on January 30, 2019, where the parties first learned that Dr. Wickham had himself taken 60 photographs at the autopsy. These photographs were obtained from the Medical Examiner’s Office and provided to the defense that same day. RP 204-05. At a hearing on January 31, the defense asked the court to dismiss the case or to exclude the photos, and stated in the alternative they might need a continuance. RP 202, 207. The court directed the State to provide the defense with each photo from those that were not previously disclosed that it intended to admit, and

directed the defense to contact their expert as soon as possible to provide them with the newly discovered photographs. The court then scheduled a subsequent review hearing on the matter. RP 207-08.

At the review hearing on February 4, the State advised the court that of these 60 photographs it sought to admit just nine. The defense indicated they consulted with their forensic pathologist who was able to review everything. Defense counsel stated they were prepared to move forward without the aid of that forensic pathologist. RP 231. The only remedy the defense sought was to exclude the recently discovered photographs. RP 220, 221. The trial remained on schedule to begin on February 13.

The court ruled that the delayed production of photographs taken by the doctor performing the autopsy was mismanagement, not an intentional violation, and that “all views of the decedent depicted in the new photos are also contained within those that were timely supplied. Some of them are clearer from a different angle, but the wounds, injuries shown are contained in both sets of photos. So I would find that there is no prejudice to the defense in that circumstance and permit those photos to be used in the trial, again subject to the trial court’s ruling regarding those 403 issues.” RP 222.

#### IV. ARGUMENTS

1. **WHERE THE COURT FOUND THAT THE LATE DISCLOSED AUTOPSY PHOTOGRAPHS DEPICTED THE SAME INJURIES AS IN THE TIMELY DISCLOSED PHOTOGRAPHS, AND THUS DID NOT PREJUDICE THE DEFENDANT, THE COURT DID NOT ERR IN ADMITTING THESE PHOTOGRAPHS.**

##### Standard of review

A trial court's ruling on a CrRLJ 8.3(b) motion is reviewed under the deferential abuse of discretion standard. *State v. Salgado-Mendoza*, 189 Wash. 2d 420, 427, 403 P.3d 45, 49 (2017), citing *State v. Michielli*, 132 Wash.2d 229, 240, 937 P.2d 587 (1997). A court abuses its discretion when an “ ‘order is manifestly unreasonable or based on untenable grounds.’ ” *In re Pers. Restraint of Rhome*, 172 Wash.2d 654, 668, 260 P.3d 874 (2011) (internal quotation marks omitted) (quoting *State v. Rafay*, 167 Wash.2d 644, 655, 222 P.3d 86 (2009)). A discretionary decision is “ ‘manifestly unreasonable’ ” or “ ‘based on untenable grounds’ ” if it results from applying the wrong legal standard or is unsupported by the record. *Id.* (internal quotation marks omitted) (quoting *Rafay*, 167 Wash.2d at 655, 222 P.3d 86). A reviewing court may not find abuse of discretion simply because it would have decided the case differently—it must be convinced that “ ‘no reasonable person would take the view adopted by the trial court.’ ” *State*

*v. Perez-Cervantes*, 141 Wash.2d 468, 475, 6 P.3d 1160 (2000) (quoting *State v. Huelett*, 92 Wash.2d 967, 969, 603 P.2d 1258 (1979)).

The party seeking dismissal of a criminal charge due to governmental misconduct bears the burden of showing both misconduct and actual prejudice. CrRLJ 8.3(b). *State v. Salgado-Mendoza*, 189 Wash. 2d 420, 403 P.3d 45 (2017). Case law makes clear that a party cannot meet this burden by generally alleging prejudice to his fair trial rights—a showing of actual prejudice is required. See *State v. Rohrich*, 149 Wash. 2d 647, 71 P.3d 638 (2003) (noting “dismissal under CrR 8.3(b) ... requires a showing of not merely speculative prejudice but actual prejudice to the defendant's right to a fair trial” (emphasis added)); see also *City of Seattle v. Orwick*, 113 Wash.2d 823, 829, 784 P.2d 161 (1989) (“ [A]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate.” (quoting *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981))). Washington courts have maintained that dismissal is an “extraordinary remedy to which the court should resort only in ‘truly egregious cases of mismanagement or misconduct.’” *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003) (quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, *affd*, 121 Wn.2d 524, 852, P.2d 294 (1993)).

Here, additional photographs were discovered and provided to the defense approximately two weeks before the trial began. The court directed the State to determine which of the 60 newly discovered autopsy photographs it intended to offer, and directed the defense to provide these to their consulting expert. When the court reconvened on February 4, the court examined both the nine new photographs and those the defense already had. Defense counsel did not ask for dismissal, and then asked only for the photographs to be excluded. Further, defense counsel told the court their consulting expert reviewed the new photographs and indicated they would not call their consultant as a witness, and they were prepared to move forward as scheduled.

The court found that admitting the nine recently discovered autopsy photographs did not prejudice defendant because they depicted the same injuries shown in the autopsy photographs the defense already had. Defendant now asserts “there was no question the lack of photos undercut his ability to prepare and for his expert to offer an opinion.” Appellant’s brief, page 16. But to the contrary, defendant’s attorney explained that they had an opportunity to show the newly discovered photographs to their consultant, that they would not be calling this person for any reason, and they did not need a continuance. Defendant is not arguing that his counsel was ineffective for making these decisions. Defendant asserts the new

evidence “impeded his case preparation” but does not explain how. His defense was self-defense – he did not dispute causing the injuries that were depicted in photographs taken at the scene as well as the autopsy. The fact that his counsel conferred with their consultant about these additional photographs, chose not to call the consultant to testify, and did not need a continuance belies his assertion that his counsel’s preparation was impeded. Defendant simply has not carried his burden of demonstrating actual prejudice. He fails to articulate how he was prejudiced, and at most simply speculates that he was. Defendant fails to show the trial court abused its discretion.

**2. THE COURT DID NOT ERR IN OVERRULING  
DEFENDANT’S TWO OBJECTIONS DURING MS.  
MIOSEK’S TESTIMONY.**

Defendant assigns error to two evidentiary rulings. First, he contends that the trial court erred in allowing Miosek to offer “speculative, impermissible opinion testimony over defense objection.” Appellant’s brief page 19. Regarding this claim, he asserts 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 defendant to even defend himself at all. Second, he contends the court erred in overruling an objection on the basis that an answer was nonresponsive to the question and speculation. Defendant is incorrect.

Miosek was neither asked to provide an opinion nor offered one. Rather, she simply testified about her personal observations. She testified in detail about the events immediately before defendant repeatedly bludgeoned Mr. Diaz with a hatchet. She was asked if Rob “swung a chain or any weapon” and she testified “no, not at all, no.” She was then asked if Mr. Diaz “tried to throw a punch or a kick or anything like that” and she testified “no, there was no fight, and there was no chains for him to even defend himself at all.” After her answer, defendant objected on the basis of *speculation, not impermissible opinion*. The court properly overruled the objection. RP 738. Miosek clearly was not speculating. She testified to her personal observations surrounding the events. Continuing along this line of questioning, Miosek was asked if Diaz was “in the act of using any weapon against the defendant” to which she replied “not at all, no.” RP 739. She did not, as defendant contends, offer an *opinion* that defendant was not entitled to defend himself. She simply testified about what Mr. Diaz was doing immediately before defendant attacked him.

A party may not raise an objection not properly preserved at trial absent manifest constitutional error. “We adopt a strict approach because trial counsel’s failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial.” A manifest error has “practical and identifiable consequences in the trial of the case.” The appellant may only

assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Henson*, 451 P.3d 1127, 1130 (Wash. Ct. App. 2019), citing *State v. Powell*, 166 Wash.2d 73, 82, 206 P.3d 321 (2009). At trial, defendant objected to portions of Miosek's testimony on the basis of speculation, not opinion. On appeal he raises an objection not properly preserved at trial, and makes no argument regarding manifest constitutional error.

The court also did not err in overruling an objection on the basis that an answer was nonresponsive and speculative. Miosek was testifying about what happened after defendant was done hitting Mr. Diaz with a hatchet. She was asked about statements defendant made. She replied that he didn't want to get in trouble and didn't want it known that he was someone that did this, and that was his main focus at that point. When asked if defendant and Miosek ended up walking somewhere and what the plan was, she replied, "so we were in the middle of a field and we didn't have phones that work. 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." Defendant objected on the basis that the answer was nonresponsive to the question and speculation. RP 745.

The court properly overruled the objection. Now defendant contends that Miosek's testimony amounted to speculation "about Mr. Adams

internal mental state after Mr. Adams hit Mr. Diaz with the hatchet.” Miosek testified about the things defendant did and the statements that he made surrounding his actions after the killing. She was not speculating about defendant’s internal mental state.

The court reviews the admission of evidence by a trial court for abuse of discretion. *State v. Redmond*, 150 Wash.2d 489, 495, 78 P.3d 1001 (2003). A lay witness can testify to matters about which they have personal knowledge. ER 602. Miosek had personal knowledge of what defendant said and did regarding the plan he came up with to tell the police someone else assaulted Mr. Diaz. He carried out that plan by initially lying on the 911 call, and then admitted the lie when interviewed by the police. The court did not err in overruling defendant’s objection as to speculation.

**3. THE COURT CORRECTLY RULED THAT DEFENDANT’S OREGON CONVICTION OF UNLAWFUL USE OF A WEAPON WAS COMPARABLE TO THE WASHINGTON OFFENSE OF SECOND DEGREE ASSAULT.**

At the sentencing hearing the State argued that defendant’s Oregon conviction of unlawful use of a weapon was factually comparable to the Washington crimes of third degree assault and second degree assault.<sup>1</sup> The

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<sup>1</sup> Defendant pled guilty to unlawful use of a weapon in Marion County Oregon, on August 19, 2015.

court found that this Oregon conviction was factually comparable to the Washington crime of second degree assault.

At the sentencing hearing the State submitted the following certified Oregon records:

1. Information, filed on July 13, 2015 listing the charges as follows: count 1 assault in the second degree (B felony), and Count 2 unlawful use of a weapon (see felony). Count 1 alleges “the defendant, on or about July 2, 2015, in Marion County, Oregon, did unlawfully and knowingly cause physical injury to Michael Grant Spencer by means of a dangerous weapon, to wit: a screwdriver, by stabbing Michael Grant Spencer with the screwdriver.” Count 2 alleges “the defendant, on or about July 2, 2015, in Marion County, Oregon, did unlawfully carry with intent to use unlawfully against Michael Grant Spencer, a screwdriver, a dangerous weapon.”

2. Indictment filed on July 20, 2015. This document indicates Ryan Scott Adams as being accused by the grand jury of the Marion County Oregon with the following offenses: count 1 – assault in the second degree; Count 2 – unlawful use of a weapon; count 3 – strangulation; and Count 4 – strangulation. The elements were set forth as follows: Count 1 alleges “the defendant, on or about July 2, 2015, in Marion County, Oregon, did unlawfully and knowingly cause physical injury to Michael Grant Spencer by means of a dangerous weapon, to wit: a screwdriver, by stabbing Michael Grant Spencer with the screwdriver.” Count 2 alleges “the defendant, on or about July 2, 2015, in Marion County, Oregon, did unlawfully attempt to use unlawfully against Michael Grant Spencer, a screwdriver, a dangerous weapon.”

3. Petition to enter plea. This document includes the following written statement as a factual basis for guilt: “on 7/2/15 in Marion County, Oregon I attempted to use against Michael Spencer a dangerous weapon,” at paragraph 8.

4. Judgment and amended judgment.

5. Transcript of proceedings in Marion County Oregon, on August 19, 2015. This is the transcript of the plea and sentencing colloquy. The following are excerpts:

THE COURT: and then in case number 15CR 28753, Count 2 is a charge of unauthorized use of a – or sorry – unlawful use of a weapon. How do you wish to plead to that charge?

THE DEFENDANT: guilty.

THE COURT: okay. And according to your plea petition, the reason for that is that in Marion County, Oregon, on July 2, 2015, you attempted to use against Michael Spencer a dangerous weapon. Is that true?

THE DEFENDANT: yes, your Honor.

THE COURT: okay. And so the language of the indictment doesn't require any specificity as to the weapon.

MR. ORRIO: no, it does not, Your Honor. Transcript, pages 5, 6.

The prosecutor then provided a further factual basis as follows:

MR. ORRIO: But the reason that I required a plea to the unlawful use of a weapon is he physically overpowered the victim and did not, in my opinion have a self-defense claim to use the screwdriver. It was a screwdriver. The victim suffered a number of puncture wounds to the neck and face. Transcript, page 7.<sup>2</sup>

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<sup>2</sup> These documents were attached as exhibits to the State's sentencing memorandum CP 54.

General scoring principles

In determining criminal history based on out-of-state convictions, the sentencing court must determine that the out-of-state crime is comparable to a Washington crime. RCW 9.94A.525 (3). The purpose of the offender score statute is to ensure that defendants with equivalent prior convictions are treated the same way, regardless of whether their prior convictions were incurred in Washington or elsewhere. The key inquiry is under what Washington statute could the defendant have been convicted if he had committed the same acts in Washington. While it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial. *State v. Morley*, 134 Wash. 2d 588, 952 P.2d 167 (1998).

Out-of-state convictions can be included in a defendant's offender score only if they are either legally or factually comparable to a Washington offense. *State v. Arndt*, 179 Wn. App. at 378–79. Offenses are legally comparable if the elements of the out-of-state offense are the same or narrower than the Washington statute. *State v. Olsen*, 180 Wn.2d 468, 472–73, 325 P.3d 187 (2014). Offenses are factually comparable when

defendant's actual conduct underlying the out-of-state offense would have violated the Washington statute. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). *State v. Greer*, 199 Wash. App. 1066 (2017), review denied, 189 Wash. 2d 1035, 407 P.3d 1135 (2018). Given the legislature's broad purpose and the SRA's loose point assignment, courts have interpreted the SRA as requiring rough comparability—not precision—among offenses. *State v. Jordan*, 180 Wash. 2d 456, 465, 325 P.3d 181, 185 (2014). Where, as here, the elements of the out-of-state crime are different or broader, the sentencing court examines the defendant's conduct as evidenced by the undisputed facts in the record to determine whether the conduct violates the comparable Washington statute. *Morley*, at 606.

The sentencing court can engage in limited fact-finding. In *State v. Thomas*, 135 Wash. App. 474, 481–82, 144 P.3d 1178, 1181–82 (2006), as amended (Oct. 13, 2006), the court concluded a sentencing court can engage in a limited fact finding to determine whether an out-of-state prior conviction is factually comparable. The Thomas court wrote,

“In *Shepard* the defendant had four prior Massachusetts convictions for burglary. Under Massachusetts law, burglary included thefts committed in buildings as well as in a vehicle or boat. The government argued that a sentencing court could consider police reports and complaint applications to determine whether Shepard's guilty plea convictions were for generic burglaries. The Supreme Court rejected the government's argument and held a later court in examining a prior conviction may consider only the statutory definition, charging documents, written plea agreements, *transcripts*

of the plea colloquy, and explicit factual findings stipulated to by the defendant.” (Emphasis added) *Shepard*, 544 U.S. at 16, 125 S.Ct. 1254.

Oregon crime of unlawful use of a weapon

Following are the definitions, in relevant part, for the Oregon crime of unlawful use of a weapon and other relevant statutes:

(1) A person commits the crime of unlawful use of a weapon if the person:

(a) Attempts 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; Or. Rev. Stat. Ann. § 166.220.

Dangerous weapon means 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. Or. Rev. Stat. Ann. § 161.015.

Serious physical injury means physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. Or. Rev. Stat. Ann. § 161.015.

There is no statutory definition of the term “use,” but Oregon case law does define the term in the context of the above statutes. In *State v. Ziska*, 355 Or. 799, 334 P.3d 964 (2014), the court held “As used in unlawful use of weapon statute, term “use” refers both to employment of a weapon to inflict harm or injury and employment of a weapon to threaten immediate harm or injury.” In Oregon, “[a] guilty plea implicitly admits

all facts necessary to support the material elements of a charge.” *State v. Kappelman*, 162 Or. App. 170, 175, 986 P.2d 603, 605 (1999).

Washington statutes

In Washington one means of committing the crime of assault in the second degree is by assaulting another with a deadly weapon. RCW 9A.36.021(1)(c) provides, A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree assaults another with a deadly weapon. Assault is defined as an intentional striking or cutting, with unlawful force, that is harmful or offensive. WPIC 35.50. The definition of deadly weapon includes any other weapon, device, instrument, article, or substance, 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. “Substantial bodily harm” means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part. RCW 9A.04.110.

In Washington the crime of assault in the third degree is committed if he or she, under circumstances not amounting to assault in the first or second degree causes bodily harm to another person by means of a weapon

or other instrument or thing likely to produce bodily harm, with criminal negligence. RCW 9A.36.031(d).

*Factual comparability analysis*

The record before the trial court consisted of the information, indictment, petition to enter plea, judgments, and the transcript of the plea and sentencing hearing. All of these documents were admitted at the sentencing hearing without objection. Defendant's actual conduct underlying the out-of-state offense was provided during the plea and sentencing hearing in Oregon. The transcript of this proceeding shows that the factual basis provided to the court was undisputed.

The Oregon indictment specified that the dangerous weapon used was a screwdriver. The term "use" under Oregon law for purposes of the crime of unlawful use of weapon is accomplished by inflicting harm or injury with a dangerous weapon. Under Oregon law a guilty plea implicitly admits all facts necessary to support the material elements of a charge. Defendant's written statement in his petition to enter plea was that he attempted to use against Michael Spencer a dangerous weapon. The judge asked defendant if he attempted to use against Michael Spencer a dangerous weapon, and he replied yes. The undisputed facts provided to the court during the Oregon sentencing colloquy showed that the weapon, a

screwdriver, was used to *inflict* harm or injury. The injury inflicted was a number of puncture wounds to the neck and face of Michael Spencer.

Thus, defendant's actual conduct underlying the Oregon conviction was stabbing a person with a screwdriver causing puncture wounds to his neck and face. This clearly is a *striking with unlawful force that is harmful or offensive* thereby meeting the Washington definition of assault. Further, a screwdriver used to strike someone meets the Washington definition of deadly weapon. A screwdriver used to stab a person in the neck and face is readily capable of causing death or substantial bodily harm. Keeping in mind the principle that the SRA requires rough comparability—not precision—among offenses, the defendant's conduct for the underlying Oregon conviction of unlawful use of a weapon is comparable to assault in the second degree in Washington.

Even though defendant submitted a sparse statement describing his conduct (I attempted to use against Michael Spencer a dangerous weapon), under Oregon law he implicitly admitted all facts necessary to support the material elements of the charge. Thus, by pleading guilty to this charge where the dangerous weapon was specifically alleged to be a screwdriver, he admitted inflicting harm or injury, conduct synonymous with assault, with a screwdriver. The clearly charged facts combined with his plea show that his actual conduct was assaulting a person with a screwdriver, even

without the benefit of the information provided by the prosecutor. Defendant's Oregon conviction of unlawful use of a weapon is factually comparable to the Washington crime of second degree assault.

**V. CONCLUSION**

For the above stated reasons defendant's conviction should be affirmed.

Respectfully submitted this 28 day of May, 2020

By



\_\_\_\_\_  
Tom Ladouceur, WSBA #19963  
Chief Criminal Deputy Prosecuting Attorney  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I, Julie Dalton, do hereby certify that the opposing counsel listed below was served RESPONDENT'S BRIEF electronically via the Division II portal:

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

Signed at Kelso, Washington on May 28, 2020.

  
Julie Dalton

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

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