Supreme Court No. 99814-1
(COA No. 53398-7-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Ryan Scott Adams,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Ryan Adams, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review on April 27, 2021, pursuant to RAP 13.3 and RAP 13.4.

B. ISSUES PRESENTED FOR REVIEW

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 trial 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 refused to hold the State to its discovery obligations, denying Mr. Adams's motion to exclude the evidence or dismiss the charge. Ignoring the difficulty of having to prepare for trial in the face of this blatant mismanagement and Mr. Adams's concern about the integrity of the discovery process, the Court of Appeals erroneously determined the State's mismanagement of its evidence did not prejudice him. This Court should accept review. RAP 13.4(b)(1).

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. Mr. Adams objected to the State's central, lay witness opining that Mr. Adams did not need to act in self-defense and about his mental state. The Court of Appeals found that an objection to "speculative" testimony was insufficient to preserve the objection as violating ER 602 and ER 701 on appeal, and did not consider Mr. Adams's alternative citation to caselaw interpreting such inadmissible opinion testimony as subject to review under RAP 2.5(a)(3). This decision is contrary to case law from other Court of Appeals Divisions and this Court, meriting review under RAP 13.4(b)(1) & (2).

C. 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 to leave together. RP 1044-45. Mr. Diaz became confrontational about Ms. Miosek leaving when they were back at the campsite. 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 knew from living on the streets that people use 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 Mr. Diaz with his hatchet. RP 1047-50. Mr. Adams picked up a rock and continued to hit him until he realized what he was doing, panicked, and flung the rock and hatchet. 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.

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 back to their campsite. RP 751, 863-64. Mr. Diaz was airlifted to a nearby hospital where he eventually died. The autopsy revealed 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. 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. 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 prosecutor gave Mr. Adams 60 new photos. CP 68. The court determined the prosecutor mismanaged the case, but refused to sanction the prosecutor by excluding the photos or dismissing the charges as Mr. Adams requested. 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.

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.

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 for the deadly weapon enhancement for a total of 264 months in prison. CP 251.

On appeal, Mr. Adams argued that the trial court erred in failing to remediate the prosecution's mismanagement of its discovery and the court erred in allowing Ms. Miosek to offer speculative testimony in violation of ER 602 and ER 701. Op. at 8. The Court of Appeals determined that Mr. Adams's objection that the evidence was "speculative" was insufficient to preserve the issue for appellate review and found that Mr. Adams did not establish prejudice warranting a sanction for the prosecutor's mismanagement. Op. at 5-6.[1]

D. ARGUMENT

1. The trial court found the government mismanaged its case, but erred in denying Mr. Adams's requested remedy for this mismanagement, meriting review under RAP 13.4(b)(1).

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

[1] Mr. Adams also argued on appeal that the Court erred in including an out-of-state conviction in Mr. Adams's offender score because it was not comparable. The Court of Appeals agreed and remanded for resentencing on the correct offender score. Op. at 9-13.

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 dismissing the charge.

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). 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." *Id.* at 882-83.

Mr. Adams was awaiting trial since May of 2018. RP 617. Discovery was deemed complete by September of 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.

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 additional 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 provided 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. *Id*. at 883. 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. Still, the Court of Appeals found no prejudice, ignoring *Hutchinson's* consideration that sanctions ensure the integrity of the discovery process, which the State continued to disregard in Mr. Adams's case. Op. at 7.

This Court should accept review where the factors outlined by this Court in *Hutchinson* establish Mr. Adams was entitled to a remedy that ensured the integrity of the discovery process. RAP 13.4(b)(1).

2. The Court of Appeals erred in declining to review the trial court's erroneous evidentiary rulings that deprived Mr. Adams of a fair trial. RAP 13.4(b)(1)&(2).

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 "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, 22. 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).

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

[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."

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). 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).

Here, Ms. Miosek offered several opinions about critical issues at trial that she was not qualified to give, in violation of ER 602 and ER 701. Mr. Adams's defense of justifiable use of force was based on him 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.

[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.

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. <u>And Ryan was mainly focused on just not getting into trouble.</u>
> 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.

The Court of Appeals held that Mr. Adams's objection that this evidence was speculative was insufficient to preserve the objection on appeal. Op. at 8. This is contrary to caselaw interpreting that an objection is sufficient if 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 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, under *Farr-Lenzini*, witness's statement about the intent of the accused violates the accused's

fair trial right, which would make it subject to review under RAP 2.5(a)(3). 93 Wn. App. at 460. For all of the reasons provided in Mr. Adams's opening and reply briefs, this was a manifest error affecting Mr. Adams's constitutional right.

This Court should accept review and hold this objection was adequate for review or alternatively subject to review under RAP 2.5(a) and this testimony was improperly permitted, prejudicing Mr. Adams. RAP 13.4(b)(1)&(2).

E. CONCLUSION

Based on the foregoing, petitioner Ryan Adams respectfully requests this that review be granted pursuant to RAP 13.4(b).

DATED this 25th day of May, 2021.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RYAN SCOTT ADAMS, Appellant.	No. 53398-7-II UNPUBLISHED OPINION

VELJACIC, J. — A jury convicted Ryan Adams of murder in the second degree after he struck and killed Robert Lorenzo Diaz with a hatchet. Adams appeals his conviction based on three grounds. First, he argues that the trial court erred in refusing to either dismiss his case or exclude autopsy photographs that the State disclosed late due to prosecutorial mismanagement. Second, he argues that a witness gave improper and speculative opinion evidence, violating ER 602 and ER 701. Finally, he argues that when the trial court erroneously ruled that a foreign conviction was comparable to second degree assault, resulting in an incorrect offender score. We affirm Adams's conviction, but remand for resentencing.

FACTS

Adams and his companion, Shannon Miosek, met in Florida before traveling to Washington. Once in Washington, Adams and Miosek stayed together and set up a campsite. During a trip to a nearby store, Adams and Miosek met a group of men in the parking lot who had been traveling in a van. Miosek decided to join the group as they traveled out of Washington.

One of the men, Diaz, accompanied Adams and Miosek to their campsite to help Miosek gather her belongings. At the campsite, the mood became tense. Adams picked up a hatchet. Adams and Diaz stood within a few feet of each other until Adams told Diaz not to stand on the side of him. Diaz attempted to move away, and Adams attacked him from behind with the hatchet. Adams struck Diaz repeatedly.

After Adams attacked Diaz, Adams and Miosek went to a nearby convenience store to call 911. Adams told Miosek that he wanted to tell police that they had found Diaz laying on the ground in their campsite. He requested Miosek cooperate with his attempt to deceive police.

While Adams and Miosek traveled to the store, Adams removed his bloodied clothing and a bloodied bandana, and hid it in a junk pile. At the store, Adams called 911 and spoke with police. When the police arrived, Miosek told them that Adams had attacked Diaz. The police found Diaz and had him transported to a hospital where he later died. The State charged Adams with murder in the first degree.

Two weeks before trial, the State disclosed 60 additional autopsy photographs that had not been previously provided to the defense. Of those 60, the State sought to admit 9 for trial. The trial court determined the delay in production constituted mismanagement. During a later hearing on whether to dismiss Adams's case under CrR 8.3(b) or exclude the evidence under CrR 4.7(h)(7)(i), the court determined that the delay had not prejudiced Adams because the photos depicted autopsy evidence that had previously been timely provided to the defense. Additionally, the court determined that the State's delay was unintentional.

During trial, Miosek testified about Diaz's murder. Adams objected when Miosek answered the State's question about whether Diaz had provoked Adams. Miosek answered that

there had been no fight between Diaz and Adams, and that Diaz had nothing to defend himself with. Adams objected on the basis that Miosek's answer was speculative.

Later in her testimony, Miosek described what occurred after the attack. She said that Adams was focused on "not getting into trouble." 4 Report of Proceedings (RP) at 745. Adams objected to the testimony, arguing it was speculative. Immediately afterward, Miosek clarified that Adams said he wanted to tell police that they had found Diaz at the campsite, and that he wanted Miosek to play along. Additionally, she testified that Adams made efforts to discard bloodied clothing and a bandana. The jury convicted Adams of the lesser crime of murder in the second degree.

At sentencing, the State sought to increase Adams's offender score based on a prior Oregon conviction. In 2015, Adams pleaded guilty in Oregon to one count of unlawful use of a weapon. His "petition to enter a guilty plea" identified that he was pleading guilty to "Count 2" in the indictment, which read, "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." Clerk's Papers (CP) at 213, 210. At the hearing to enter his plea, the judge asked Adams whether he "attempted to use against Michael Spencer a dangerous weapon." CP at 235. Adams answered "Yes." CP at 235.

The trial court here conducted a comparability analysis of Adams's Oregon conviction. The State conceded that Oregon's unlawful use of a weapon statute was not legally comparable to Washington's assault statutes and, therefore, the court should conduct only the factual prong of the analysis. In conducting the factual comparability analysis, the trial court looked at the verbatim report of proceedings from Adams's 2015 Oregon sentencing hearing and the charging documents. The trial court considered statements made by the prosecution that explained why Adams pleaded

guilty. The court also examined information on the injuries to the victim's face and head. In the Oregon proceeding, neither the prosecution's statements nor the injuries were proven beyond a reasonable doubt, and Adams did not admit to them.

The trial court then analyzed whether Adams's use of the screwdriver satisfied Washington's definition of a deadly weapon. The court examined "use" under Oregon's statute, and determined that, while not synonymous with use under Washington's assault in the second degree statute, they were close. In analyzing whether the screwdriver was a deadly weapon under RCW 9A.04.110(6), the trial court considered the circumstances of Adams's actual use. Adams did not admit or stipulate to facts about the circumstances of his use of the screwdriver. The court concluded that because the screwdriver was readily capable of causing death or substantial bodily harm, and Adams had used it on someone's face or head, the weapon satisfied the Washington statute. The court ultimately determined that Adams's conduct was factually comparable to Washington's assault in the second degree statute.

The State argued that Adams's offender score should be two because his Oregon conduct was comparable to Washington's assault in the second degree. The trial court sentenced Adams to 264 months of confinement followed by 36 months of community custody. Adams appeals his conviction and sentence.

ANALYSIS

I. DISMISSAL UNDER CrR 8.3(b) AND EXCLUDING EVIDENCE UNDER CrR 4.7(h)(7)(i)

Adams argues that the trial court erred by not dismissing his case under CrR 8.3(b) or excluding evidence disclosed just before trial under CrR 4.7(h)(7)(i). Adams also argues that the State's mismanagement improperly forced Adams to choose between prepared counsel and his speedy trial right. We disagree.

A. Standard of Review

We review a trial court's CrR 8.3(b) and CrR 4.7(h)(7)(i) rulings for abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997); *State v. Brooks*, 149 Wn. App. 373, 384, 203 P.3d 397 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Michielli*, 132 Wn.2d at 240; *Brooks*, 149 Wn. App. at 384.

B. Legal Principles

Under CrR 8.3(b), a trial court may dismiss a case due to government misconduct. CrR 8.3(b) states, "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order."

Before a trial court may dismiss charges under CrR 8.3(b), the defendant must show by "a preponderance of the evidence (1) 'arbitrary action or governmental misconduct' and (2) 'prejudice affecting the defendant's right to a fair trial.'" *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *Michielli*, 132 Wn.2d at 239-40). Governmental misconduct need not be evil or dishonest; simple mismanagement is sufficient. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). However, a defendant must show actual versus speculative prejudice to succeed under CrR 8.3(b). *Rohrich*, 149 Wn.2d at 657-58. Dismissal under CrR 8.3(b) is an extraordinary remedy. *Id*. at 658.

A trial court may also exclude evidence under CrR 4.7(h)(7)(i) that was provided to a party in violation of Washington's discovery rules. *Hutchinson*, 135 Wn.2d at 881. CrR 4.7(h) states:

(7) *Sanctions*.

> (i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

CrR 4.7(h)(7)(i) empowers a superior court to exclude evidence. *Hutchinson*, 135 Wn.2d at 881.

Discovery sanction decisions made under CrR 4.7 are within the trial court's sound discretion. *State v. Vance*, 184 Wn. App. 902, 911, 339 P.3d 245 (2014). Minor violations of discovery rules are appropriately remedied by producing the evidence and ensuring the nonviolating party has sufficient time to review. *Hutchinson*, 135 Wn.2d at 881. Like dismissal, exclusion is an extraordinary remedy. *Vance*, 184 Wn. App. at 911.

A trial court must weigh four factors to determine if exclusion of evidence is warranted: "'(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.'" *State v. Ruelas*, 7 Wn. App. 2d 887, 896, 436 P.3d 362 (2019) (quoting *Hutchinson*, 135 Wn.2d at 883).

C. Dismissal or Exclusion

Here, Adams argues that the State's mismanagement seriously prejudiced his defense, and therefore, dismissal or exclusion of the evidence was required. According to Adams, the trial court's refusal to provide one of his requested remedies required him to choose between his right to a prepared defense or his right to a speedy trial. We disagree.

Here, the trial court found that the State had mismanaged Adams's case. However, at a later hearing, the trial court found that the additional photos included information that had been timely provided to Adams. The court also found that the State had not intentionally delayed

production. Based on those findings, the court concluded that Adams was not prejudiced and, therefore, neither dismissal nor exclusion were necessary.

Adams fails to show how his defense was prejudiced by the delayed production. Under CrR 8.3(b), Adams bears the burden of showing by a preponderance of the evidence that his defense was prejudiced. *See Rohrich*, 149 Wn.2d at 654. Adams must show actual, not speculative, prejudice to succeed under CrR 8.3(b). *See Id.* at 658. Adams uses strong language in arguing that the production delay required him to seek a continuance so that he could prepare his defense. However, he fails to say how his defense was affected or why new photos that included information he had timely received required additional preparation time.

Adams also fails to show why exclusion of the evidence was necessary under CrR 4.7(h)(7)(i). Although the trial court did not go through the four factors from *Hutchinson*, the court did determine that the production delay did not prejudice Adams and that exclusion was therefore unnecessary.

Because Adams makes no showing of prejudice, we hold that the trial court did not abuse its discretion when it decided that neither dismissal nor exclusion were necessary.

II. LAY WITNESS OPINION TESTIMONY

Adams argues that, over his objection, the trial court improperly admitted Miosek's speculative opinion testimony under ER 602 and 701. We disagree.

A. Standard of Review

We review a trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). An abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

B. Legal Principles

Under ER 602 and ER 701, a lay witness may testify about matters they have personal knowledge of and the lay witness's testimony is limited to those opinions or inferences that are rationally based on the perception of the witness. *State v. Henson*, 11 Wn. App. 2d 97, 102, 451 P.3d 1127 (2019). ER 602 states,

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

ER 701 states,

> If the witness is not testifying as an expert, the witness' 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' 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.

Absent manifest constitutional error, a party may only appeal issues preserved in the superior court. *Henson*, 11 Wn. App. 2d at 102. "The appellant may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *Id*.

C. Miosek's Testimony Properly Admitted

Adams objected to Miosek's testimony on the grounds that it was speculative. Adams now argues that Miosek's testimony that Diaz did not provoke Adams, along with her testimony about what occurred after the attack, was speculative and improper opinion testimony because it required her to speculate about Adams's mental state. However, when Adams objected to the testimony, he only argued it was speculative. Because he did not properly preserve his argument that Miosek's testimony was improper opinion evidence, he may not raise that issue on appeal. *See*

Henson, 11 Wn. App. 2d at 102. For this reason, we only analyze whether Miosek's testimony was speculative.

Miosek's testimony was not speculative. Miosek's testimony about whether Diaz provoked Adams and what occurred after the attack was based on her personal observation. Such testimony is expressly allowed under ER 602. Based on this record, the trial court's decision to allow Miosek's testimony was not manifestly unreasonable or based upon untenable grounds or reasons. We hold that the trial court did not abuse its discretion.

III. ADAMS'S FOREIGN CONVICTION COMPARABILITY

Adams argues that the trial court improperly relied on information in the Oregon charging documents and plea colloquy when it considered the factual prong of its comparability analysis. We agree.

A. Standard of Review

We review a trial court's sentencing calculations de novo. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014).

B. Legal Principles

Washington's Sentencing Reform Act of 1987 creates standard sentencing ranges calculated based on the crime's seriousness and the defendant's offender score. *Olsen*, 180 Wn.2d at 472; RCW 9.94A.530. A defendant's offender score may be increased based on an out of state, or foreign, conviction per RCW 9.94A.525(3). *Olsen*, 180 Wn.2d at 472. Under RCW 9.94A.525(3), a foreign conviction increases a defendant's offender score if the crime the defendant was convicted of is comparable to a Washington crime. *Id.*

To determine whether the foreign conviction is comparable, we conduct a two-part analysis. *Id*. at 472-73. Under the first prong, we analyze the legal elements of a foreign conviction and compare them to the comparable Washington crime. *Id*. If the foreign conviction is identical to or narrower than the Washington crime, and thus contains all the serious elements of the Washington statute, the foreign conviction is legally comparable and may be used to calculate the defendant's offender score. *Id*.

If, however, the elements are not comparable, we must conduct a factual prong analysis. Under the factual prong analysis, we determine whether the defendant's foreign conduct would have violated a comparable Washington statute. *Id*. at 473.

In conducting the factual prong analysis, we are limited to analyzing those facts admitted or stipulated to by the defendant or proved to a factfinder beyond a reasonable doubt. *Id*. at 473-74; 476. "'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.'" *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (quoting *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). Only those facts that are essential elements of the crime are considered admitted by the defendant. *Lavery*, 154 Wn.2d at 255.

C. Proved or Admitted Oregon Conduct

The Oregon crime of unlawful use of a weapon states:

> (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.

OREGON REVISED STATUTE (ORS) § 166.220.

In Oregon, the term "use" in the unlawful use of weapon statute refers both to "employment of a weapon to inflict harm or injury and employment of a weapon to threaten immediate harm or injury." *State v. Ziska*, 355 Or. 799, 334 P.3d 964, 970 (2014).

Further, Oregon defines dangerous weapon and deadly weapon as follows:

> (1) "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.
>
> (2) "Deadly weapon" means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.

ORS § 161.015.

Here, Adams pleaded guilty to count 2, which read, "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." CP at 213, 210. Adams also answered "yes" when the Oregon trial court asked whether he "attempted to use against Michael Spencer a dangerous weapon." CP at 235. Thus, Adams only admitted to using a dangerous weapon against his victim.

D. Factual Comparability to Washington's Assault in the Second Degree Statute

The Washington crime of second degree assault states:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
>
> . . . .
>
> (c) Assaults another with a deadly weapon.

RCW 9A.36.021.

Washington defines a deadly weapon as:

> (6) "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include 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.

When conducting the factual comparability analysis, a court may only consider those facts admitted to by the defendant that are essential elements of the crime. *See Lavery*, 154 Wn.2d at 255. Here, Adams admitted to little more than the essential elements of the Oregon crime. We cannot consider, and the trial court should not have considered, the injuries allegedly caused by Adams's use of the screwdriver or the statements the prosecutor made to the Oregon court; such facts were neither admitted, nor proved beyond a reasonable doubt. The trial court improperly considered them in its analysis.

To be factually comparable, Adams's admitted or proved Oregon conduct would have to fulfill the relevant elements of Washington's crime of second degree assault. Here, the State would have to show that Adams had either "(a) Intentionally assault[ed] another and thereby recklessly inflict[ed] substantial bodily harm;" or that he had "(c) Assault[ed] another with a deadly weapon." RCW 9A.36.021(1). The record does not contain evidence of injury, so Adams's conduct does not satisfy RCW 9A.36.021(1)(a). To satisfy subsection (c), we must determine whether the screwdriver qualifies as a deadly weapon under RCW 9A.04.110(6) based on the circumstances of its use.

Centered on the appeal record, and considering only those facts admitted by Adams, we hold that Adams's Oregon conduct is not factually comparable to Washington's second degree assault statute. The record lacks the circumstances of Adams's use of the screwdriver, and

therefore, we cannot classify it as a deadly weapon under RCW 9A.04.110(6). Because the screwdriver cannot be classified as a deadly weapon, Adams's conduct does not satisfy RCW 9A.36.021(1)(c).

Moreover, Adams's admission to "use" of a weapon in his 2015 Oregon plea does not establish comparability. The definition of "use" in Oregon's deadly weapon statute fails to establish sufficient circumstances of use that would qualify the conduct as a second degree assault in Washington. In Oregon, "use" refers both to "employment of a weapon to inflict harm or injury and employment of a weapon to threaten immediate harm or injury." *See Ziska*, 334 P.3d at 970. Neither satisfies the circumstances of use requirement of Washington's statute. Washington's deadly weapon statute states: "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(6) (emphasis added). Even Adams's admission to "use" of the weapon in Oregon, *i.e.* to inflict harm or injury or threaten immediate harm or injury, fails to satisfy the Washington requirement that the weapon be "readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). Adams's Oregon conduct is not factually comparable to Washington's second degree assault statute.

CONCLUSION

The trial court did not abuse its discretion in making its evidentiary rulings. However, because the trial court erred when it ruled Adams's Oregon conduct was comparable to Washington's assault in the second degree statute, thereby erroneously increasing his offender score, we remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Worswick, J.

Lee, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 53398-7-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 25, 2021
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