

NO. 41234-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER AHLSTEDT,

Appellant.

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

The Honorable Kenneth Williams, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to effective assistance of counsel when his attorney prepared to present expert testimony that would have corroborated his account of events and then failed to do so.

2. The prosecutor committed misconduct when he used a detective to re-enact the offense during rebuttal closing argument.

3. Appellant's sentence is unconstitutional because it is based on facts, other than the fact of a prior conviction, found by the court instead of a jury.

4. The trial court failed to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.

Issues Pertaining to Assignments of Error

1. Appellant testified Chad Beauchesne lunged at him, he pushed Beauchesne away, and Beauchesne must have fallen on his own knife. Beauchesne was under the influence of numerous illicit drugs. Defense expert Mike Flynn would have testified persons on such drug cocktails are emotionally volatile and often overreact to delusions of disrespect by initiating irrational conflicts. The court ruled it would admit this testimony so long as a foundation was laid that Beauchesne's conduct was consistent with Flynn's description. Was counsel ineffective in

failing to present Flynn's expert testimony that would have corroborated appellant's version of events?

2. Prosecutors may not argue facts not in evidence. Although no demonstrative evidence was presented during the trial, during rebuttal closing argument, the prosecutor attempted to demonstrate Ahlstedt's version of events was unreasonable using himself and the detective to re-enact the crime. Did this blatant disregard of the rules governing admissibility of demonstrative evidence constitute flagrant misconduct causing irreparable prejudice?

3. To determine whether appellant's prior convictions should be included in his offender score, the court engaged in detailed fact-finding regarding the dates and nature of his confinement in California. Does appellant's sentence based on the resulting offender score violate the Sixth and Fourteenth Amendments?

4. CrR 3.5(c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant's statement. Should this case be remanded for entry of the required findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Clallam County prosecutor charged appellant Christopher Ahlstedt with first-degree assault and intimidating a witness. CP 110. The jury found him guilty and the court imposed a standard range sentence of 318 months. CP 71, 74, 52. Notice of appeal was timely filed. CP 46.

2. Substantive Facts

Ahlstedt loaned his truck and trailer to his friend Chad Beauchesne for his move on Saturday, February 14, 2009. 4RP¹ 102; 6RP 136-37. Beauchesne was to return the truck and trailer Saturday evening because Ahlstedt needed them for work on Monday. 4RP 104; 6RP 137. Late Saturday night, Beauchesne called to say he was on his way but it was late and he was very tired. 4RP 104; 6RP 137. Ahlstedt agreed Beauchesne could rest for the night and return the items on Sunday. 4RP 104; 6RP 137. Sunday, Beauchesne did not return the trailer and did not call. 6RP 137. Ahlstedt was forced to make alternate arrangements for his work. 6RP 137. Beauchesne finally called again Monday afternoon. 6RP 137.

Monday evening, sometime between 8 and 10 p.m., Beauchesne returned the truck and trailer. 4RP 105. He assumed no one was home, so

¹ There are ten volumes of Verbatim Report of Proceedings referenced as follows: 1RP – June 8, 2010; 2RP – June 15, 2010; 3RP – July 1, 2010; 4RP – July 6, 2010; 5RP – July 7, 2010; 6RP – July 8, 2010; 7RP – July 12, 2010; 8RP – Aug. 12, 2010; 9RP – Sept. 23, 2010; 10RP – Sept. 24, 2010.

simply left them and did not speak to Ahlstedt. 4RP 106. He left with his then-girlfriend Sarah Hughes in her truck. 4RP 107.

At some point, Ahlstedt, who was home, looked outside and saw the truck and trailer parked with the lights on and the doors open. 6RP 138. He walked outside and found the keys in the ignition and the gas tank empty. 6RP 138. He also found the jack on the trailer was bent and damaged so Ahlstedt could not detach the trailer to put gas in the truck. 6RP 139.

Ahlstedt called Beauchesne about the damage, and Beauchesne assured Ahlstedt he would either repair the damage or pay for it. 5RP 18-19. After a stop at Wendy's for food, Beauchesne and Hughes returned to Ahlstedt's property. 5RP 19. Beauchesne repaired the trailer and then called Ahlstedt around 11 p.m. to tell him it was fixed. 5RP 19-21. Ahlstedt came outside. 5RP 21. Witnesses gave different accounts of what happened next.

a. Trial Testimony

Ahlstedt testified when he came outside, Beauchesne was claiming to have fixed the wrong jack. 6RP 142. He explained, no, the damage was to the one in the front of the trailer, and walked around the trailer to show Beauchesne the damage. 6RP 143. Halfway around the trailer, Ahlstedt testified, Beauchesne suddenly lunged at him. 6RP 146. Ahlstedt responded by grabbing Beauchesne and throwing him to the ground. 6RP 146. Beauchesne landed in a pile of debris by the shed. 6RP 146.

Only after this altercation did Ahlstedt see the knife on the ground. 6RP 146. He picked it up and told Beauchesne this was neither the time nor the place. 6RP 147. He saw Beauchesne get up, dust himself off, get in his truck, and drive away. 6RP 147. According to Ahlstedt, Beauchesne did not appear to be hurt, and the other person in Beauchesne's truck never got out. 6RP 147-48.

Beauchesne claimed Ahlstedt came out of the house, said, "I should kill you, punk," and immediately, with no provocation, stabbed him in the stomach. 5RP 22. Beauchesne testified that Ahlstedt's girlfriend (now his wife) Sarah, came out of the house, and both simply looked at him without offering help before going back inside the house. 5RP 23-24. Beauchesne claimed he then put his hands over his wound and got back in the truck, telling Hughes to drive him to the hospital. 5RP 24-25.

Hughes testified she thought she saw Ahlstedt punch Beauchesne. 5RP 58. Then Beauchesne was on the ground, and when Ahlstedt turned around, she saw a knife in his hand. 5RP 58. She claimed she helped Beauchesne, who was too injured to drive, get into the truck before driving him to the hospital. 5RP 61. She also claimed Ahlstedt and his wife simply looked at them and did not offer help. 5RP 61-62.

Ahlstedt's wife testified she watched from the window and first saw Beauchesne pacing, talking to himself, and swearing. 6RP 109. She

described Ahlstedt walking up to Beauchesne and waiting to be noticed. 6RP 109. As Ahlstedt directed Beauchesne to the damage at the front of the trailer, Beauchesne suddenly turned, pulled a knife, and lunged at Ahlstedt. 6RP 111. She saw Ahlstedt fall to the ground and pick something up when he got up. 6RP 113. She testified Beauchesne walked right by them to get in his truck and did not appear hurt. 6RP 113-14.

Sheila Perkins, a tenant of Ahlstedt's mother, also testified she was home and watching from the window. She described seeing a truck pull up around 11:20 p.m. 6RP 55-56. A man got out and started screaming and going haywire. 6RP 57. He appeared to be a lunatic on hard-core drugs and was flapping his arms screaming there was nothing wrong with the flatbed. 6RP 58. When Ahlstedt walked up to the man, she testified, the man lunged at Ahlstedt. 6RP 60. She saw Ahlstedt push the man away, but it was too dark to see what happened to the man after that. 6RP 61. However, she could see Ahlstedt the entire time. 6RP 62. Then she saw the man walk out of the shadows, dust himself off and get in his truck on the driver's side. 6RP 62. She did not see anyone else in the truck and did not see anyone help the man get into the truck. 6RP 62-63.

Tina Sloan, a friend of Ahlstedt and his wife, testified she was only in town and staying with them for the night. 6RP 68. However, about 20 minutes after this incident, she decided to leave because there was too much

drama. 6RP 77. After this, she lost contact with the Ahlstedts' for about a year and a half. 6RP 77. She testified she was awakened by a man outside the window walking back and forth cussing, ranting, and raving to himself. 6RP 70. She saw a pickup truck there with a woman in the passenger seat. 6RP 70. She testified Ahlstedt walked over to the man, and they were looking at the truck. 6RP 71. Suddenly, she said, the man turned around and lunged at Ahlstedt. 6RP 72. Then the man came towards the shed where she could not see, but it appeared someone was on the ground. 6RP 72. She saw both men jump up from the darkness by the shed. 6RP 72. Ahlstedt's wife came outside to see if he was all right, and the other man brushed himself off, walked to his truck, got in, and drove away. 6RP 74.

At the hospital Beauchesne was too intoxicated to provide a medical history. 5RP 6. He tested positive for amphetamines, opiates, benzodiazepines, and THC. 5RP 33-34. Beauchesne had surgery for a potentially life-threatening three-to-four-inch laceration in his stomach. 5RP 6-9.

Deputies searched Ahlstedt's home and found a knife with blood on it in plain sight on a table next to Ahlstedt's side of the bed. 5RP 98, 111. DNA testing of the blood on the blade of the knife matched Beauchesne. 6RP 27. DNA from the handle was matched to Ahlstedt with traces that could have come from someone else. 6RP 32, 37, 39. Analysis of

Beauchesne's DNA with the trace on the handle was inconclusive; he could not be excluded as the source of the trace. 6RP 39-40, 45, 100.

b. Ahlstedt's Statements, Letters, and Phone Calls

A sheriff's deputy interviewed Ahlstedt at 3:45 a.m., shortly after his arrest. Ex. 36² at 1. Ahlstedt, who had taken sleeping pills before going to bed just a few hours before, repeatedly denied stabbing Beauchesne. Ex. 36 at 2, 4, 5, 6, 7, 11; 6RP 150. He repeatedly explained he pushed Beauchesne, who then fell on a bunch of rakes by the shed. Ex. 36 at 2, 4, 11. Towards the end of the interview, the deputy asked Ahlstedt "[W]as it just once or was it multiple times?" and Ahlstedt replied, "Just once." Ex. 36 at 12. The deputy said, "Pardon me?" and Ahlstedt continued, "Just once, I guess, I don't know. It was just once, I guess. I don't even remember, sir." Ex. 36 at 12.

Ahlstedt freely admitted carrying a small pocketknife, but did not know if it was with him at the time of the altercation with Beauchesne. Ex. 36 at 13. The deputy asked him, "Is that what you stabbed him with?" Ex. 36 at 13. Ahlstedt replied, "I don't remember it. I guess so. If that's what you're saying. I mean, that's crazy." Ex. 36 at 13-14. The deputy then said, "You just got done telling me a little while ago it was only one time. You

² The recording of Ahlstedt's interview was admitted as exhibit 12. 5RP 117. Exhibit 36 is the transcript, admitted for illustrative purposes only. 5RP 120-21. For ease of reference, this brief cites to the transcript.

only stabbed him one time.” Ex. 36 at 14. Ahlstedt replied, “I don’t remember stabbing him, but you’re saying I did so I guess I’m just telling you what you want to hear.” Ex. 36 at 14. When the deputy told Ahlstedt what he wanted to hear was the truth, Ahlstedt stated, “I did not intentionally stab him. I didn’t go out of the house to hurt him, I didn’t do any of that. All right?” Ex. 36 at 14.

Ahlstedt called his mother and told her, “I didn’t murder anybody.” Ex. 33 at 2. His mother responds, “Well if he dies you would have.” Ex. 33 at 2. Ahlstedt replies, “Well, he’s not going to.” Ex. 33 at 2.

The jury also heard recordings of two of Ahlstedt’s phone calls from jail to his wife. 5RP 145, 152-53. In the first call, on December 14, 2009, Ahlstedt is heard to mention an offer made to him by someone called Squirrel about “somebody maybe not being able to come to court.” Ex. 31³ at 2. He said Squirrel said he “might be able to arrange something. . . where somebody took a trip and they didn’t come back.” Ex. 31 at 3. He then instructs his wife to “put it in play” and explains that his former attorney said “if that happens we’re [unintelligible] home free.” Ex. 31 at 3. In the next call, on December 22, 2009, his wife tells him she was with the “nut

³ Exhibit 40 is the recording of Ahlstedt’s phone calls. Exhibits 31, 32, and 33 are the transcripts admitted for illustrative purposes only. 5RP 147-50. For ease of reference, this brief cites to the transcripts.

gatherer” and he needs a map of “where what’s-his-name moved to.” Ex. 32 at 1.

In a letter to his wife, Ahlstedt tells her, “you must tell squearll [sic] to do that had said of that I will give him what ever OK start selling everything, everything I must raise 5,000 for him ASAP OK. . . offer the white Ford truck 2001 worth 10K. Ex. 37. And in a letter given to his wife but addressed to “H.P.,” Ahlstedt writes, “I do have a 2001 Ford F 350 truck worth 7-10K I would be willing to let go so this problem of mine would go away.” Ex. 37. Ahlstedt writes, “my lawyer think if he dosen’t [sic] show for court I will walk what do you think this is a funny world we live you just never know what might or might not happen. It’s a nice day to go for a walk. They have me in a box for now I just don’t want to stay in it. Can you do a little some thing for a good white boy down on his luck.” Ex. 37.

C. ARGUMENT

1. AHLSTEDT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO PRESENT EXPERT TESTIMONY.

The constitutional right to counsel includes the right to effective assistance of counsel. Const. art. I, § 22; U.S. Const. amend VI; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). It is violated when counsel’s performance is unreasonably deficient and the client suffers prejudice as a result. State v. Thomas, 109 Wn.2d 222, 225,

743 P.2d 816 (1987). Ineffective assistance of counsel is a mixed question of law and fact that appellate courts review de novo. State v. Meckelson, 133 Wn. App. 431, 435, 135 P.3d 991 (2006) (citing Strickland, 466 U.S. at 698).

Although Defense expert Mike Flynn was qualified via experience and the foundational requirements were met, defense counsel never attempted to present Flynn's testimony to the jury. This failure to present the expert testimony that would have supported the defense theory of the case was unreasonably deficient performance that prejudiced Ahlstedt's defense.

a. Facts Pertaining to Expert Testimony

Flynn has 15 years experience as a chemical dependency counselor. CP 51. He is typically referred to intervene with the most serious substance abusers. Id. During his career he has averaged over 150 crisis interventions per year with intoxicated persons. Id. In his declaration, Flynn explains the effects of methamphetamine can be difficult to distinguish from a severe manic episode of someone with bipolar disorder. CP 54. He explained that persons experiencing a "heavy tweak" from methamphetamine display high energy and emotional volatility, often accompanied by hallucinations and paranoid delusions. Id. He further explained that common delusions involve feeling disrespected and persons suffering from this sort of intoxication may initiate conflict due to this delusion. Id.

This proposed testimony would have provided a reason for the manner in which Ahlstedt testified Beauchesne behaved that evening. The State moved to exclude it, arguing Flynn was not qualified. 4RP 9-10. Defense counsel acknowledged he also had concerns based on the case the State cited. 4RP 10. The court initially granted the State's motion, but told defense counsel it could be admitted if a foundation was laid that Beauchesne acted consistently with Flynn's description. 4RP 11-12. Counsel immediately informed the court there would be such testimony. 4RP 12. Ahlstedt and his wife, as well as Tina Sloan and Sheila Perkins, subsequently testified to Beauchesne's emotional volatility and initiation of the conflict. 6RP 111, 141, 146.

b. Flynn Was Qualified by Reason of Experience, His Testimony Would Have Helped the Jury Comprehend Beauchesne's Conduct, and the Required Foundation Was Laid.

A witness may qualify as an expert "by knowledge, skill, experience, training, or education." ER 702. It is well established that "practical experience" is sufficient to qualify a witness as an expert. See, e.g., State v. Yates, 161 Wn.2d 714, 765, 168 P.3d 359 (2007) (quoting State v. Ortiz, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992)); State v. McPherson, 111 Wn. App. 747, 762, 46 P.3d 284 (2002) (expert witness does not have to be a "rocket scientist" in the appropriate context). In McPherson, a police officer was

held to be sufficiently qualified as an expert on the chemical processes involved in manufacturing methamphetamine, despite a lack of academic credentials in chemistry or related fields. 111 Wn. App. at 762.

Flynn's declaration explains his 15 years of experience in dealing with persons who are under the influence of severe addiction and multiple drug cocktails. CP 51-55. He was, therefore, qualified by virtue of his practical experience, to express an opinion as to the effect of such drugs on a person's behavior and conduct.

In moving to exclude Flynn's testimony, the State relied on State v. Swagerty, 60 Wn. App. 830, 810 P.2d 1 (1991), but that case does not mandate exclusion in this case. The Swagerty case did not hold that substance abuse counselors are not qualified to opine regarding the effects of alcohol or other substances on a person. Nor did it hold that a witness must possess academic degrees in certain fields in order to opine regarding the effects of drugs on a person. It merely held that on the facts of that case, the court was within its discretion to conclude that a particular alcohol counselor, who had only a correspondence degree in sociology, was not qualified.⁴ 60 Wn. App. at 836. In this case, the court simply granted the State's motion to exclude unless counsel provided the requested foundation.

⁴ Swagerty is also inapposite because the expert testimony in that case was immaterial. Swagerty was charged with statutory rape, a strict liability crime that does not require any particular mental state. 60 Wn. App. at 836. Therefore, this Court held any expert testimony regarding Swagerty's voluntary intoxication was irrelevant. Id.

The court made no express finding that Flynn was not qualified, and indeed indicated a willingness to admit the testimony, provided the requisite foundation was laid. 4RP 11-12.

c. There Was No Reason to Fail to Present Expert Testimony That Would Have Made Ahlstedt's Version of Events More Credible.

Counsel fails to provide effective assistance when he fails to call or subpoena a necessary witness even though the decision to call a particular witness usually lies within the professional judgment of trial counsel. Thomas, 109 Wn.2d at 230; State v. Byrd, 30 Wn. App. 794, 799-800, 638 P.2d 601 (1981). In Byrd, counsel was deficient in failing to interview a witness whose affidavit contradicted the prosecuting witness. 30 Wn. App. at 799-800. In Thomas, the court excluded the defense's expert testimony because the proposed defense expert was only a trainee with practically no experience. 109 Wn.2d at 229-30. The court held the failure to inquire as to the expert's qualifications was deficient performance that could not be characterized as trial strategy. Id. at 230.

Here, counsel, without explanation, simply failed to present the expert testimony after first fighting for that testimony in motions in limine and then laying the foundation the court required during direct examination of Ahlstedt and his wife. 4RP 11-12; 6RP 111, 141, 146. In closing argument, counsel continued to advance the theory that Beauchesne was on

numerous drugs at the time, as testified to by Dr. Bundy, and was in a rage according to both Ahlstedt and his wife. 7RP 39, 40, 41. He even referenced Sarah Hughes' testimony that Beauchesne often behaves strangely when under the influence of drugs. 7RP 41. There was no valid tactical reason not to support that theory with expert testimony that people on similar drug cocktails often initiate conflicts because of delusions of disrespect. This expert testimony from a person with fifteen years experience dealing with addicts would have been far more persuasive and would have lent credibility to Ahlstedt's testimony that Beauchesne lunged at him. The failure to present the testimony was deficient performance

d. Counsel's Failure to Present Expert Testimony that Would Have Corroborated Ahlstedt's Defense Undermines Confidence in the Result.

When counsel's performance was deficient, reversal is required when there is a "reasonable probability" that deficient performance prejudiced the outcome of the case. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine the confidence in the outcome. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

Prejudice occurs when the defendant is deprived of the benefit of expert testimony that would corroborate or show the reasonableness of his version of events. Thomas, 109 Wn.2d at 231-32. In Thomas, defense counsel was deficient in failing to investigate the qualifications of a defense expert who would have explained the effects of alcohol on the brain and the potential for a blackout, thereby corroborating the defendant's own testimony that she had blacked out. Id. The expert was excluded as unqualified and was not replaced. Id. The court found Thomas was prejudiced because expert testimony explaining how an alcoholic blackout could have affected her mental state "may have proved crucial to her defense." Id. at 232.

Flynn's testimony was also likely to be crucial in this case. As in Thomas, this case hinged on credibility. Only Thomas could testify regarding her state of mind; here Ahlstedt and his wife testified Beauchesne lunged at him, while Beauchesne and his former girlfriend testified Ahlstedt stabbed Beauchesne. The jury had to decide whom to believe.

Flynn's declaration shows Ahlstedt's description of Beauchesne's behavior was reasonable and could have counteracted the general assumption that defendants' testimony is self-serving. The court ruled Flynn's testimony could be presented with a proper foundation, and that

foundation was laid. There is at least a reasonable probability Flynn's testimony would have tipped the scales in favor of Ahlstedt's credibility.

2. THE PROSECUTOR COMMITTED MISCONDUCT IN USING A DETECTIVE TO REENACT THE CRIME DURING REBUTTAL ARGUMENT.

The evidence of what occurred outside Ahlstedt's house that evening was limited to verbal descriptions of the incident photographs taken after the fact. No re-enactment evidence was admitted. Nevertheless, during closing argument, the prosecutor invited the detective to stand up and help him demonstrate why Beauchesne could not have fallen on his knife. 7RP 61. This was improper argument based on facts not in evidence and was so flagrant and ill-intentioned as to be incurable by instruction. Ahlstedt's conviction should be reversed for prosecutorial misconduct.

"A person being tried on a criminal charge can be convicted only by evidence, not by innuendo." State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950). Therefore, all advocates have a duty not to intentionally introduce prejudicial inadmissible evidence. State v. Montgomery, 163 Wn.2d 577, 593, 183 P.3d 267 (2008). A prosecutor is a quasi-judicial officer, with a special duty to act impartially in the interests of justice and to seek verdicts free of prejudice and based on reason. State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds such as passion, prejudice, or

sympathy. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

Nor may they refer to matters outside the evidence. Id.

Prosecutorial misconduct is established when the prosecutor's comments were improper and were substantially likely to affect the outcome of the proceedings. Reed, 102 Wn.2d at 145. Even if not objected to at trial, prosecutorial misconduct requires reversal when the prosecutor's comments were so flagrant and ill intentioned they could not have been cured by instruction. Belgarde, 110 Wn.2d at 508.

- a. The Prosecutor Committed Flagrant and Ill-Intentioned Misconduct by Sidestepping the Rules Governing Admission of Demonstrative Evidence.

Rather than relying on the evidence presented during the trial and arguing credibility on that basis, the prosecutor essentially created new evidence during closing argument. Had this re-enactment been proposed as illustrative evidence during trial, it would almost certainly have been excluded as unfairly prejudicial to have the prosecutor and the police officer acting out their version of what must have occurred. But even so, this is not a case in which a trial court permitted an illustrative reenactment in the exercise of its discretion. The court was given no such opportunity. 7RP 61.

Washington has procedures in place for admission of demonstrative evidence. See, e.g., State v. Finch, 137 Wn.2d 792, 816, 975 P.2d 967 (1999). A re-enactment or experiment may be admissible at the trial court's

discretion if it is performed under conditions sufficiently similar to the event at issue. Id. Additionally, demonstrative evidence such as a re-enactment must be relevant. Id. “[T]he ultimate test for the admissibility of an experiment as evidence is whether it tends to enlighten the jury and to enable them more intelligently to consider the issues presented.” Id. (quoting Jenkins v. Snohomish County Pub. Util. Dist. No. 1, 105 Wn.2d 99, 107, 713 P.2d 79 (1986)). Finally, the court should refuse to admit demonstrative evidence when it is more prejudicial than probative. 137 Wn.2d at 816. By presenting his re-enactment during closing argument, the prosecutor sidestepped these foundational requirements.

By presenting this demonstration during rebuttal closing argument, the prosecutor also sidestepped the most important check on such evidence: the testing ground of vigorous cross-examination. If demonstrative evidence is sufficiently similar to be relevant, differences in the conditions are presumed to go to the weight of the evidence, rather than its admissibility. Finch, 137 Wn.2d at 816. And that weight may be explored via cross-examination and attacked during closing argument by the opposing party. For example, in Jenkins, a video that was not an exact representation of events was admitted. 105 Wn.2d at 108. On appeal, the court held there was no abuse of discretion in admitting the video, in part because the differences were explained to the jury. Id. Similarly, in Jones v. Halvorson-Berg, 69

Wn. App. 117, 847 P.2d 945 (1993), the trial court did not abuse its discretion in admitting a video made ten years after the fact because “the differences in circumstances were brought out in testimony and cross examination.” *Id.* at 126. By contrast, in this case the re-enactment was presented to the jury during the prosecutor’s rebuttal closing argument, after the end of all testimony and after the defense’s closing argument. There was no opportunity to explain or question.

b. A Visual Re-Enactment of the Crime by Two Officers of the State Caused Prejudice that Could Not be Cured by Mere Instruction.

“[R]ecreating human events with the use of actors is a course of conduct that is fraught with danger. . . . The danger of jurors branded with television images of actors, not testimony, is too great to ascertain. State v. Stockmyer, 83 Wn. App. 77, 84-85, 920 P.2d 1201 (1996) (quoting Lopez v. State, 651 S.W.2d 413, 414-15 (Tex. App. 1983)). The Stockmyer court upheld the trial court’s ruling excluding a defendant’s proposed videotaped re-enactment of a crime. 83 Wn. App. at 83-85. Whether the trial court here would have found this re-enactment by the prosecutor and a detective similarly dangerous cannot now be determined because the court was never given the opportunity to rule on it.

The danger of prejudice is only increased in this case when the “actors” supposedly demonstrating what happened were not actors, but the

prosecutor and detective. The “aura of reliability” that attaches to law enforcement officers’ testimony is well recognized in Washington. See, e.g., Montgomery, 163 Wn.2d at 595 (citing State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). In this case, that aura of reliability attached to the re-enactment by the prosecutor and detective.

Additionally, when an investigating officer and prosecutor are involved in presenting a re-enactment that was not offered into evidence, there is an implication that these state actors are privy to additional evidence that was not presented to the jury. Courts have found misconduct when the prosecutor implies the defendant is guilty based on facts to which only the State is privy. See, e.g., State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956) (fair trial is one in which the State’s attorney does not throw “information from its records” onto the scale against the accused); State v. Susan, 152 Wash. 365, 380, 278 P. 149 (1929) (improper vouching when prosecutor implies knowledge of defendant’s guilt based on evidence not before the jury).

“This is one of those cases of prosecutorial misconduct in which ‘[t]he bell once rung cannot be unring.’” State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (quoting State v. Trickel, 16 Wn. App. 18, 30, 533 P.2d 139 (1976)). What is seen cannot be unseen. In this case, with the defense limited to verbal explanations of conduct, only the State managed to

present a vivid live demonstration of the alleged crime. That image was likely impress itself on the jury's minds as the representation of what occurred. This misconduct was incurable by mere instruction.

3. JUDICIAL FACTFINDING AT SENTENCING THAT INCREASED AHLSTEDT'S STANDARD RANGE UNDER THE SRA VIOLATED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Due process and the right to trial by jury entitle an accused to have a jury determine every element of the crime beyond a reasonable doubt. U. S. Const. amends. 6, 14; Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (citations omitted). Applying this principle, the Apprendi Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”

In Blakely v. Washington, the Court clarified that the statutory maximum means “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Thus, any increase in the permissible sentence, based on facts found by the sentencing judge, violates the Sixth and Fourteenth Amendments and is invalid. Id.

In this case, Ahlstedt's standard sentencing range was increased because the court found his prior convictions should be counted in his offender score under the SRA. Ahlstedt's sentence is unconstitutional because the sentencing court went far beyond the "fact of a prior conviction" in determining whether his prior convictions were subject to Washington's "wash out" provisions.

- a. At the Sentencing Hearing, the Court Heard Testimony and Considered Documentary Evidence to Determine the Dates and Nature of Ahlstedt's Past Confinement and Parole in California.

At the sentencing hearing, the State offered into evidence certified copies of Ahlstedt's prior felonies, the most recent in 1992. 9RP 11-19; Sentencing Exs. 2-8. His next offense was a Clallam County misdemeanor in 2008. 9RP 13-14; Sentencing Exs. 9, 10, 11, 12. The court acknowledged Ahlstedt was sentenced to six years in 1992 and in Washington would have been released no later than 1998, which may meet the ten year period for wash-out. 9RP 83. See RCW 9.94A.530(2)(b) (Class B felonies not included in offender score, "if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction," offender spent ten consecutive crime-free years in the community).

Ahlstedt testified he was in and out of the California Medical Facility (CMF) from 1992 until 1999 or 2000, but that this facility was at the time not a prison, but was under the Department of Health. 9RP 58-59. He testified he was placed there because he was to be committed at the California Rehabilitation Center (CRC) for substance abuse treatment, but he also needed to be on medication for his bipolar disorder, which was not permitted at the CRC. 9RP 59-60. He testified his commitment to CMF (in lieu of CRC) was civil rather than criminal. 9RP 60.

Part of Exhibit 2 includes a handwritten chronological history from the California Department of Corrections known as a 969b prison packet. Ex. 2. To interpret this document, the State called Allan Tyson, a former Los Angeles County prosecutor. 9RP 20. He testified that, as a California prosecutor, he reviewed hundreds of these documents. 9RP 22.

He testified Ahlstedt was initially on a dual commitment to the Department of Health for mental health treatment. 9RP 67-68. However, he testified it appeared from the records that Ahlstedt's 1992 robbery conviction rendered him ineligible, so his commitment was revoked and his six-year prison sentence reinstated. 9RP 68-69. After that, he interpreted the 969b prison packet as indicating Ahlstedt was paroled on June 2, 1999, but returned to custody on November 17, 1999. 9RP 35. He was paroled again August 6, 2000, but returned to custody due to a parole violation on

November 7 of that year. 9RP 36. He was not released again until January 30, 2002. 9RP 38.

Tyson agreed the CRC is run by the Department of Health. 9RP 43. But Tyson disputed Ahlstedt's characterization of CMF, although he has never visited the facility. 9RP 43-44, 49. He testified CMF is essentially the prison hospital, a secure facility operated by the California Department of Corrections. 9RP 43-44, 49. He testified it is completely fenced and has no outpatient facility. 9RP 44. He explained he knew about the fencing because he saw photographs of the facility on the Internet three weeks before. 9RP 45. He had no personal knowledge of what the facility was like in 1992. 9RP 45.

The court concluded Ahlstedt was not released from confinement, which includes residential treatment under RCW 9.94A.530, until 2002. 9RP 82; CP 66. It concluded Ahlstedt remained crime free in the community from 2002 until 2008, not long enough for his prior felonies to wash out. 9RP 83; CP 65-67.

b. To Determine Whether Ahlstedt's Prior Felonies Washed Out, the Court Made Findings of Fact Beyond the Fact of a Prior Conviction.

To determine the precise dates and nature of Ahlstedt's confinement and treatment after his California convictions, the court considered documentary evidence, expert testimony, and testimony from Ahlstedt himself. 9RP 11-12, 30-38, 43, 47-49, 59, 67; Exs. 2-8. This fact-finding went far beyond the Apprendi exception for the "fact of a prior conviction." In deciding these facts without a jury, the court violated Ahlstedt's right to a jury trial under the federal and state constitutions as well as the United States Supreme Court's jurisprudence in Apprendi and Blakely.

To determine whether a finding falls under the exception for the fact of a prior conviction, the United States Supreme Court concluded the issue is whether that finding can be made conclusively from the record of conviction, the jury instructions, bench trial findings, or defendant's admissions. Shepard v. United States, 544 U.S. 13, 25, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). Here, the judge's finding could not be made conclusively on the basis of such records. On the contrary, the court heard detailed testimony from a former California prosecutor and from Ahlstedt himself describing the circumstances of his incarceration, parole, and treatment. 9RP 30-54, 58-66, 67-69. In addition, the State's expert, in turn, relied in part on websites describing the various facilities. 9RP 44, 45.

These elaborate factual determinations also do not fall under exceptions established in Washington case law for facts directly related to and following from the fact of a prior conviction. For example, the timing of prior misdemeanors used in calculating whether felonies wash out is not a determination related to the core concern in Apprendi and Blakely. State v. Cross, 156 Wn. App. 568, 589-90, 234 P.3d 288 (2010). By contrast, interpreting the meaning of records pertaining to Ahlstedt's various parole and treatment dates and the nature of the facilities where he spent time goes far beyond the mere date of a prior conviction.

A fact is directly related to the fact of a prior conviction when the fact-finding requires "nothing more than a review of the nature of the defendant's criminal history and the defendant's offender characteristics." State v. Jones, 159 Wn.2d 231, 234, 149 P.3d 636 (2006). In Jones, the court held that a sentencing court did not violate the right to a jury trial when it determined whether the defendant was on community placement at the time of a conviction. Id. By contrast, the determinations made by the sentencing court here involved evidence of the status and nature of various residential treatment facilities and a historical inquiry into their status 20 years ago when Ahlstedt was there. The determinations made here also included scrutiny of handwritten records of parole violations, revocations, additional confinement terms, and release dates. Ex. 2. This goes far

beyond merely the “nature of the defendant’s criminal history and the defendant’s offender characteristics.” Jones, 159 Wn.2d at 234.

Part of the rationale behind the “fact of a prior conviction” exception is the consolation that the prior conviction was itself determined via proceedings that carefully protected constitutional jury trial guarantees. Appendi, 530 U.S. at 488. Washington’s Supreme Court also noted these procedural safeguards in holding that the fact of being on community placement at the time of the offense is part of the “fact of a conviction” exception. Jones, 159 Wn.2d at 240. The court cannot be similarly reassured in this case, where the determination of the timing of Ahlstedt’s release from confinement was made based on expert testimony interpreting handwritten notes and websites of state institutions that may or may not have described what those institutions were like when Ahlstedt was there.

Like the exceptional sentence struck down in Blakely, Ahlstedt’s high standard range was based on facts not found by a jury. Under Washington law, unless the State proved these convictions did not wash out, Ahlstedt would be entitled to be sentenced under his current offenses only, with an offender score of 3. This would give him a standard range of 120-160 months for first-degree assault. RCW 9.94A.510; RCW 9.94A.515. Based on the facts the trial court found, Ahlstedt’s California convictions were included in his offender score of 13, giving him a standard range of

240-318 months. Increasing Ahlstedt's offender score and standard range based on facts not proved to the jury beyond a reasonable doubt violated his state and federal constitutional rights to a jury trial. His sentence is invalid because it is in violation of these constitutional rights.

4. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 3.5

After a CrR 3.5 hearing, the court ruled the statements Ahlstedt made to police were admissible. 4RP 50-51. The court, however, failed to enter written findings or conclusions.

CrR 3.5 provides in part:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

Written findings of fact and conclusions of law are required following a CrR 3.5 hearing. "When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy." State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992); accord State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205.

Although the court below rendered an oral decision following the hearing, no written findings of fact and conclusions of law have been entered in this case as of this date. A trial court's oral decision is "no more than a verbal expression of [its] informal opinion at the time . . . necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Consequently, the court's decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State v. Hescok, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

Where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is an appropriate remedy. Id.

D. CONCLUSION

For the foregoing reasons, Ahlstedt requests this Court reverse his convictions.

DATED this 27th day of April, 2011.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 41234-9-II
)	
CHRISTOPHER AHLSTEDT,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF APRIL, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] BRIAN WENDT
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APR 28 2011
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Kse

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF APRIL, 2011.

x Patrick Mayovsky