Supreme Court No. _____
COA No. 86179-4-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

JOSEPH LEONARD,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, Joseph Leonard asks this Court to review decision of the Court of Appeals *State v. Leonard*, entered August 5. attached as Appendix 1-23.

B. ISSUES PRESENTED FOR REVIEW

1. The prosecutor tampered with witnesses to ensure they identified Mr. Leonard as the perprator. This tampering betrays the government's obligation to protect all people's rights, including the accused. This Court should grant review to address the impact of this misconduct on Mr Leonard's fair trial rights and because substantial public interest merits review. This Court should grant review under RAP 13.4(b)(4).

2. CrR 8.3(b) provides for dismissal of charges where government mismanagement prejudices a defendant. The State withheld material evidence from

Mr. Leonard but disclosed the same evidence to a material witness to influence their testimony. The prosecutor also delayed its discovery as it amended charges several times, forcing Mr. Leonard to choose between his constitutional rights to prepared counsel ora speedy trial. Did the Court of Appeal incorrectly hold that review courts cannot review the issue under CrR 8.3(b) if a defendant does not assert a violation of the time for trial rule under CrR 3.3? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

1. A masked man tries to rob a cherry stand.

A masked man approached two attendants of a cherry stand and said: "[g]ive me all your money." 3/28/22 RP 31. His hand was on his gun by his hip. *Id.* at 33. Suzi Goodwin put her hands up and stepped out of his way. 3/24/22 RP 158. Laura Meade said: "Hell

no." *Id.* at 33. But then the man reached and tugged at Ms. Meade's fanny pack. *Id.* at 34. The man and Ms. Mead both fell over. *Id.* The fanny pack remained firmly in Ms. Mead's grip. *Id.* Ms. Goodwin screamed. *Id.* at 35. The masked man panicked, got up, and ran. 3/24/22 RP 159; 3/28/22 RP 35. The whole incident lasted 30 to 40 seconds. 3/28/22 RP 117.

2. All eyewitnesses say the robber is a white man in a white sweatshirt.

From Ms. Meade's contemporaneous account she was certain the man who tried to rob her was a white man from his eyes through the black mask; and was sure he could not have been Black or Hispanic. 3/28/22 RP 32, 40, 41.

Aaron and Jill Horner were in their garage when they heard the screams from the cherry stand. 3/28/22 RP 114-15. Mr. Horner, Ms. Horner and their son started towards the stand. From 50 feet away, the

masked man pointed his gun at Mr. Horner and he instinctively shielded his wife and son. 3/28/22 RP 114-15. Ms. Horner called police and described the suspect as a white man wearing a white hoodie with a black mask. *Id*. She also described the get-away car. 3/28/22 RP 58.

3. Mr. Leonard, a Native-American is arrested unmasked, wearing a grey sweatshirt.

Police caught up with a car they believed matched the description of the get-away car. 3/28/22 RP 58, 61-62. As the police gave chase the car collided with another and fell upside down in thick brush. 3/28/22 RP 68. Police pulled a man in a gray sweatshirt from the vehicle, he was not wearing a mask. 3/28/22 RP 69. The man was later identified as Mr. Leonard. He is not white, he is Native American. A bandana found some distance from the car was seized as

evidence. 3/28/22 RP 79-81, 105. Officers found a gun four to six feet from the car. 3/28/22 RP 104.

The State charged Mr. Leonard with one count of unlawful possession of a firearm, two counts of attempted first degree robbery, and two counts of second degree assault. CP 9-12.

4. The prosecutor influences two witnesses to change their testimony to match her evidence.

Ms. Horner's contemporaneous account describes the masked man as white and wearing a white sweatshirt, dark blue jeans, and a black bandana as a face mask. CP 63. Mr. Horner's handwritten statement describes the masked man as wearing a white hoodie sweatshirt, dark jeans, and a black bandana with white flowers. CP 65-66; 11/1/21 RP 4.

Six months later, the prosecutor, Sunni Ko, emailed Ms. Horner and attached photographs of the

bandana found on the ground some distance from Mr. Leonard's car crash and the sweatshirt Mr. Leonard was wearing at the time of the car chase, copies of Ms. Horner's 911 calls, and her handwritten statements. CP 70, 701; 1/1/21 RP 5. Ms. Ko asked: "And do these items (sweatshirt and bandana) look familiar? Can you please ask your husband?" CP 70; 1/1/21 RP 4-5.

Ms. Ko told Ms Horner no other eye witness got a good look at the masked man. CP 68. Ms. Horner waivered, saying she did not get a good look either: "everything happened so fast and truthfully all I could focus on was the gun lol." CP 68; 1/1/21 RP 5. Ms. Ko then suggested Ms. Horner could not be sure the hoodie was white in light of what Ms. Ko's other witnesses said: "In the light, it could very well have appeared white. And others described a grey hoodie." CP 68; 1/1/21 RP 4-5. As a result, Ms. Horner changed

her statement: "I thought the hoodie was white, but it could've been grey" and "[t]he bandana is for sure it though." CP 69.

Ms. Ko responded by confirming Ms. Horner's testimony would now match her theory of the case: "Thank you Jill. This was the sweatshirt that the medics cut off of him and nothing else was found inside the car." CP 69. Ms. Horner still hedged: "The bandana looks correct. That doesn't look like the sweatshirt the guy who actually robbed the place was wearing though, unless he was wearing it underneath." CP 69.

After Ms. Ko's influence, Mr. Horner in his interview with the defense described the bandana as having a "native pattern" "the Aztec temple style," "like blue" or "turquoise color," "some orange," "Seahawks emblem," having a "Native American style," or "the tribal" graphics. CP 111-12. Although he had

previously described a white sweatshirt, Mr. Horner now recalled the sweatshirt was a grey hoodie with a Seahawks symbol of "the Native American style." CP 112.

Ms. Ko had not bothered to give these two photos to defense counsel in discovery. CP 78-81; 11/1/21 RP 9. When defense counsel learned Ms. Ko had discussed these photographs with the Horners they asked her to provide that same evidence to the defense. *Id.* Ms. Ko refused. Mr. Leonard moved to dismiss under CrR 8.3(b). 10/20/21 RP 9.

After filing his motion, Mr. Leonard asked to interview the prosecutor to substantiate Ms. Ko's tampering with the eyewitness identification. 10/20/21 RP 11. Ms. Ko's testimony was critical and material impeachment evidence. *Id.* at 9.

The court was convinced Ms. Ko had improperly

revealed evidence and information to a witness. 10/20/21 RP 14. Ms. Ko vehemently denied contacting Mr. Horner but readily admitted she spoke several times over the phone with Ms. Horner. *Id.* at 15. Minimizing her actions, Ms. Ko claimed she only spoke with Ms. Horner to discuss her availability for an interview "and the substance of the descriptions of the bandanna and the sweatshirt." *Id.* at 15.

The prosecutor insisted the court could "remedy" the issue by simply precluding the parties from eliciting evidence of descriptions of the bandana or the sweatshirt. *Id.* at 17. Ms. Ko argued she could be disqualified only if the court could find no other impeachment method or alternative method of cross-examining. *Id.* at 18. She suggested the defense could introduce the email communication to impeach both witnesses. *Id.* Ms. Ko insisted that evidence about how

she "altered" and "supplanted" these witnesses' memories was obtainable through the emails themselves; Ms. Ko's actual testimony could only authenticate the emails and had no additional evidentiary value. *Id.* at 19.

The court noted that after communicating with Ms. Ko, Ms. Horner's description of the robber had evolved from a person wearing a white hoodie to one wearing a gray hoodie: a description matching the photographs Ms. Ko had given her. *Id.* at 17.

The court denied Mr. Leonard's motion to disqualify Ms. Ko. CP 51-52. The court "remedied" the evidentiary issue by saying: "Evidence that the Horners were provided with photographs, however, is obtainable through the witnesses and, if necessary to impeach or refresh recollection, is available through the email correspondence between the deputy

prosecuting attorney and the witnesses." CP 51. The court also held that Ms. Ko's emails to Horner was "prejudicial" to the State. CP 51-52. The court allowed the defense to introduce the email chain to discredit the witness' descriptions. *Id.* at 21; CP 51.

Mr. Leonard also asked the court to dismiss all counts except the unlawful possession of a firearm under CrR 8.3(b) due to Ms. Ko's tampering with the eye witnesses identifications. CP 57, 61. Mr. Leonard argued Ms. Ko had influenced the Horner's to change their testimony to match Ms. Ko's theory of the case. CP 57.

After Ms. Ko spoke to her, Ms. Horner changed her statements. She testified at trial, describing the bandana as black with some white flowers. CP 137. Although she had twice described it as white, she said "now you start like rethinking everything" because the

masked man was "probably like Native American or Mexican." CP 138. She recounted that the mask she saw was 100% the picture of the mask Ms. Ko showed her before trial. CP 140.

Defense counsel knew that the prosecution had shared evidence with Ms. Horner. But the prosecutor had never provided that evidence to the defense. CP 140.

Ms. Ko she said she communicated with Ms. Horner through a chain of emails and showed her photographs and discussed the prosecutor's evidence in follow-up phone conversations. CP 78-81; 11/1/21 RP 9. Indeed, the prosecutor in her email had asked Ms. Horner to make sure her testimony and that of her husband matched the photographs in the prosecutor's evidence. CP 78-81; 11/1/21 RP 9. The prosecutor readily conceded it was improper to communicate to

Ms. Horner by email and several phone conversations to discuss the sweatshirt cut of from Mr. Leonard. 11/1/21 RP 9.

. She insisted showing Ms. Horner the photographs was not improper. CP 82.

The court denied Mr. Leonard's motion to dismiss for prosecutorial misconduct without explanation.CP 231-32.

5. The prosecutor also hampers defense preparation by withholding evidence, and providing discovery late and piecemeal, forcing the court to vacate trial dates.

Mr. Leonard also requested the court to dismiss the case under CrR 8.3(b) and CrR 4.7 because the prosecutor mismanaged the case by withholding discovery and continually providing late discovery in piecemeal fashion. CP 162-172.

Because Mr. Leonard was in jail, his speedy trial

deadline was 60 days after this date, or August 30, 2020. CrR 3.3(b)(1)(i), (c)(1). Mr. Leonard was arraigned for possession of a firearm charge on June 29, 2020. The day after he was arraigned, Mr. Leonard requested discovery from the prosecutor. CP 162. A month passed and the prosecution turned over about 92 pages as evidence to the defense. CP 162.

After interviewing Ms. Horner, the defense realized that the prosecutor was withholding several pages of material and potentially exculpatory photographs. *Id.* at 26. Some photographs showed that when the car overturned all items inside were thrown all around the crash scene; but others photos showed these same items back inside the car. *Id.* at 26. The last receipts of these photos required follow-up interviews with the tow driver and the officers to determine where the gun and other evidence were

initially collected viz a viz the occupants of the car. *Id.* at 26. The prosecutor's actions in withholding evidence, delayed Leonard's trial preparation time by ten months. *Id.* at 26-27.

After the State filed an amended information to include two counts of attempted robbery, they provided the defense with additional discovery. CP 163. However, the discovery the prosecutor turned over was from a completely different prosecution of a different person. CP 163.

The prosecutor promised the court it would provide Mr. Leonard with a list of witnesses by March 2021, nine months after his arraignment. CP 163. However, the prosecutor did not turn over this list for nearly double that length of time – 16 months. CP 163; 11/1/21 RP 44.

The day before trial, the defense moved to

suppress certain belately disclosed evidence withheld in violation of the court's discovery order. 3/24/22 RP 11. Ms. Ko, an experienced prosecutor, claimed her failure to comply with the court rules and deadlines was "inadvertent." 3/24/22 RP 14-15.

Similarly, Ms. Ko promised to provide video and photographs of the crash scene to the defense as required by CrR 4.7. 11/1/21 RP 29. However, the prosecutor provided only seven additional photographs. CP 163. When it became clear, there was some missing evidence, Ms. Ko blamed this failure on her legal assistant. 11/1/21 RP 29-30.

Ms. Ko waited seven months to share with defense counsel the photos she had shown Ms. Horner. CP 81.

At an omnibus hearing, Ms. Ko assured the court she had provided all discovery to the defense. CP 163.

When that turned out to be false, Ms. Ko said she mistakenly believed all discovery had been turned over to the defense but her legal assistant was to blame if some evidence had not been turned over. *Id.* at 30. Ms. Ko responded by faulting the defense for having mistakenly believed the prosecutor complied with her obligation to provide all the discovery and not advising the prosecution it needed additional materials earlier. *Id.* at 30.

The next month, Ms. Ko turned over new discovery on two additional dates. CP 163. And based on the newly disclosed evidence Mr. Leonard interviewed Mr. and Ms. Horner. CP 103-117; 124-151. The Court continued the trial date. CP 163.

Again the next month, the prosecutor turned over even more discovery. CP 164.

Then two months later, the prosecutor amended

the charges to include two counts of assault. CP 164. And then finally prosecutor provided the defense with the chain of emails in which she urged Ms. Horner and her husband to ensure their recollection matched the State's evidence. CP 164.

Five months later, Mr. Leonard realized Ms. Ko was withholding additional photographs from the scene of the crash. CP 177-78. This time Ms. Ko blamed the Buckley Police Department for not releasing those photographs to the defense. 11/1/21 RP 44.

On the day set for trial, the prosecutor claimed she became aware she had not turned over all the evidence. 11/1/21 RP 31. Only then did she share two folders of documents. *Id.* at 30-31. But then the prosecutor again realized there were two additional folders of files which she had not provided. *Id.* at 30-31. Ms. Ko claimed she had no way of knowing what

discovery had been turned over. She promised to turn over these two additional folders. *Id.* at 31-32.

The court refused to find Ms. Ko "misbehaved" and instead chalked it up as a "breakdown in communication" between the prosecutor and her legal assistant. CP 232. The court orally chastised Ms. Ko for blaming the defense for her failure to turn over evidence as it was the prosecutor's obligation to turn over all the evidence. 11/1/21 RP 44. However, offering no reasoning, the court denied Mr. Leonard's motion to dismiss for governmental mismanagement. CP 232. The court on its own continued trial to allow the defense to review the newly disclosed evidence. *Id.* at 45-46.

6. Ms. Horner refuses to testify despite subpeona. Mr. Leonard cannot impeach her to establish Ms. Ko's efforts to change evidence.

After the trial was reset, the prosecutor informed

the court that although Ms. Horner was subpoenaed, she refused to testify and was refusing to receive calls from the prosecutor. 3/28/22 RP 7. The prosecutor told the Court Ms. Horner was refusing to testify because she feared "retaliation" from Mr. Leonard. 3/28/22 RP 8.

Ms. Ko said she would not seek a material witness warrant to compel Ms. Horner to testify. 3/28/22 RP 7. Mr. Leonard argued it was problematic because the prosecution referenced Ms. Horner's 911 call but she was refusing to testify. *Id.* at 9. Her testimony and her 911 call was crucial to the defense because she reported the masked man was a white male in a white hoodie. *Id.* at 10. Her handwritten statement refered to a "white hoodie" but the hoodie in evidence was not white. *Id.* at 10. Mr. Leonard asked the court to require Ms. Horner to testify even by a

material witness warrant. *Id.* at 10. Mr. Leonard requested a mistrial if Ms. Horner could not testify, because it changed the defense strategy including the motions in limine, opening statements, and how to defend the case. *Id.* at 11.

The prosecutor opposed the material witness warrant and countered that the defense would gain nothing from Ms. Horner's testimony and cross-examination because her entire testimony was in the 911 calls. *Id.* at 13. If Mr. Leonard wanted her to testify for the defense he could call her as a witness by requesting the material witness warrant. *Id.* at 13, 19.

The prosecution introduced Ms. Horner's 911 call into evidence after Mr. Horner authenticated her voice. *Id.* The prosecutor played the 911 call and asked the jury to read along. *Id.* at 129.

Mr. Horner testified for the State. 3/28/22 RP

109-35. Mr. Horner testified he was inside his garage when they heard screams from the cherry stand. *Id.* at 110. He and his wife ran towards the cherry stand. *Id.* at 110. A masked man run down the sidewalk in front of their house. *Id.* at 111. The masked man briefly pointed his gun at Mr. Horner from 50 feet away, and his wife and son were some distance behind him. 3/28/22 RP 114, 115. The masked man drove off in a vehicle. *Id.* at 116.

Mr. Horner was allowed to testify generally that he gave police the description of the masked man and what he was wearing and his physical appearance providing no details he gave:

> Q: Did you describe the type of clothing he was wearing?
> A. I did, yes.
> Q. Did you give a description of the face covering he may have had?
> A. Yes.

3/28/22 RP 128.

7. Mr. Leonard's only in-court identification is unreliable.

Despite having previously identified the robber as a white man, at trial Ms. Mead identified Mr. Leonard, the dark complected Native American, as the person she saw. 3/28/22 RP 38. Ms. Mead tried to explain her conflicting statements, "Like I said, all I could see was his eyes." 3/28/22 RP 38.

8. The prosecutor makes improper arguments.

During closing argument, Ms. Ko argued Mr. Leonard's flight showed he knew he was guilty. 3/29/22 RP 76. Mr. Leonard objected that the prosecutor's argument was improper as it imputed thoughts to him based on facts not in evidence. 3/29/22 RP 77; CP 208-09. The State had presented no facts in evidence about what Mr. Leonard knew or thought. *Id.*

The prosecutor countered that the State could

draw inferences of Mr. Leonard's "guilty knowledge" because he was fleeing from the area. *Id.* at 78. The court warned that the prosecutor had been "walking a little bit of a [fine] line," but still overruled Mr. Leonard's objection and held that consciousness of guilt was a reasonable inference for the prosecutor to draw for the jury. *Id.*

Following trial, a jury found Mr. Leonard guilty of all five counts. 3/30/22 RP 7-8.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court should grant review because the State concedes the prosecutor tampered with eyewitnesses to urge them to change their description of the perpetrator in a case that rests on this identification testimony.

This case turned on proving the identity of a masked robber. At the scene, eye witnesses saw a white man in a white sweatshirt. Mr. Leonard is dark-

complected Native-American and he was wearing a grey sweatshirt. "[M]istaken eyewitness identification is a leading cause of wrongful conviction." *State v. Derri*, 199 Wn. 2d 658, 662, 511 P.3d 1267(2022) *citing State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009)(internal citation ommitted.).

At least eight Washingtonians have been exonerated after being convicted, in part, based on mistaken eyewitness evidence, but the number of people wrongly convicted on this basis is likely much higher. *Derri*, 199 Wn. 2d at 662. In particular, we now know that cross-racial identifications can be particularly unreliable—studies show that rates of error in making identifications are much higher when a person is asked to identify someone of another race. *Derri*, 199 Wn.2d at 675.

The *Derri* court explained how a witness memory can be shaped by improper tactics that "severely compromise" the accuracy of the eye witness identification by artificially inflating a witness' certainty in their identification. *Derri*, 199 Wn.2d at 688.Mr. Leonard pointed out that Ms. Ko, the representative of Pierce County, tampered with witnesses to secure a conviction against Mr. Leonard. The State readily conceded that Ms. Ko's communication with these witnesses was improper and amounted to misconduct. It conceded Ms. Ko "communicated" with witnesses to change their memory of the sweatshirt but minimized the impropriety as not egregious. Br. of Resp. at 26. The State claimed the trial court cured any prejudice by excluded compromised evidence on the sweatshirt. *Id.*

at 28. This was a tacit concession that Ms. Ko's conduct prejudiced Mr. Leonard's right to a fair trial.

Ms. Ko's cynical manipulation of eyewitness testimony went to the heart of the case against Mr. Leonard. The prosecutor severely compromised the eye-witness identification to secure a conviction.. Ms. Ko's improper tactics are of the same species decried in *Derri* as leading causes of false identification.

Ms. Ko's tampering curtailed his right to confront and cross-examine two adverse witnesses. U.S. Const. amend. VI; Const. art. I, § 22; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). It precluded Mr. Leonard from presenting substantive evidence and impeachment evidence from two key witnesses. Br. of Appellant at 34. Ms. Ko told the jury what her testimony would be in closing argument. But Ms. Horner did not testify and Mr. Leonard could neither

show that her initial description did not match Mr. Leonard, that she continued to say Mr. Leonard was not wearing the sweatshirt the perpetrator wore, and that Ms Ko urged her to change her testimony.

Such underhanded tactics raise serious concerns about the fairness of the entire proceeding against Mr. Leonard.

The court of appeals minimized Ms. Ko's conduct as "improperly" discussing the content of those witnesses' testimony prior to trial. App. 1.

It has been thoughtfully observed that if prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by similar unfair means. *State v. Torres*, 16 Wn.App. 254, 263, 554 P.2d 1069 (1976).

The Court should grant review under RAP 13.4(b) and hold that a prosecutor tampering with witnesses to alter eyewitness identification testimony and secure a conviction in antithetical to a fair trial.

2. The Court of Appeals glosses over egregious mismanagement and read CrR 8.3(b) out of existence by stating dismissal is not required by CrR 8.3(b) unless there is a speedy trial violation under CrR 3.3.

It has been thoughtfully observed that if prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by similar unfair means. *State v. Torres*, 16 Wn.App. 254, 263, 554 P.2d 1069 (1976).

Turning over evidence to witnesses and withholding it from defendants is unfair. So is delaying discovery for 16 months. Review is appropriate because viewed in the broader context of other government's

mismanagement in this case, the tampering was just but one of many unfair means the prosecutor used to secure a conviction against Mr. Leonard.

Dismissal is appropriate under CrR 8.3(b) "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 government's conduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." *State v. Michielli,* 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

For dismissal under this rule, the defendant must show (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *State v. Brooks,* 149 Wn. App. 373, 384, 203 P.3d 397 (2009).

Under CrR 8.3(b)'s "lenient" standard, "belatedly disclosed material information" is enough to show mismanagement. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 434, 403 P.3d 45 (2017).

Dismissal is appropriate from prejudicial mismanagement, including unnecessary trial delay caused by late discovery*State v. Michielli*, 132 Wn.2d at 239-240,. "Such prejudice includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.'" *Id.* (*quoting State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

Mr. Leonard requested the court to dismiss the entire case under CrR 8.3(b) and CrR 4.7 because the prosecutor mismanaged the case by withholding discovery and continually providing late discovery in piecemeal fashion. CP 162-172. Even setting aside the

tampering with witnesses, the prosecutor frequently amended charges, provided piecemeal discovery, engaged in dilatory turning over evidence, and turned over evidence to witnesses but not to Mr. Leonard, and this forced Mr. Leonard to forsake his speedy trial right so his counsel could be prepared. 11/1/21 RP 33-35.

The Court of Appeals declared that Mr. Leonard was not entitled to dismissal under CrR 8.3(b) because he was not entitled to dismissal under the speedy trial rule, CrR 3.3. App. 15. The State did not make this argument on appeal. The Court of Appeals decision improperly reads CrR 8.3(b) out of existence. Like statutes, court rules must not be read to be superfluous. *State v. George*, 160 Wn.2d 727, 735, 738-39, 158 P.3d 1169 (2007).

The Court of Appeals reasoned that this case could not be dismissed under CrR 8.3(b), because Mr. Leonard made repeated references to his right to a "speedy trial so his counsel could be prepared" and a generic "right to a fair trial," without anywhere explicating how CrR 3.3 the speedy trial rule was violated. App. 15. The opinion faults Mr. Leonard for not asserting a outright violation of his right to speedy trial. *Id.*

But Mr. Leonard does not seek dismissal "for time-to-trial reasons." He seeks dismissal under CrR 8.3(b), not CrR 3.3(h), because several unfair tactics by the prosecutor that Mr. Leonard identifies—tampering with witnesses, frequently amending charges, providing piecemeal discovery, delays in turning over evidence, turning over evidence to witnesses but not to Mr. Leonard, forced Mr. Leonard to forsake his speedy

trial right so his counsel could be prepared. 11/1/21 RP 33-35. At several junctures Mr. Leonard could not go to trial because Ms. Ko intentionally withheld evidence or that Ms. Ko turned over evidence so late and in piecemeal fashion, that it hampered Mr. Leonard's trial preparations.

Mr. Leonard was forced to forsake his speedy trial right to enable his counsel to prepare for trial. 11/1/21 RP 33-35. Being forced to waive your speedy trial right is not a "trivial event." *Michielli*, 132 Wn.2d at 245.

Here, the Court of Appeals refused to weigh the 16 months of delay in turning over evidence. The Court of Appeals overlooked how Ms. Ko's abuse and mismanagement of the discovery process forced Mr. Leonard to forsake his speedy trial right so his counsel could be prepared. 11/1/21 RP 33-35. That is sufficient

prejudice to support dismissal under CrR 8.3(b). *Michielli*, 132 Wn.2d at 239–40. Dismissal is the only sufficient remedy for the egregious violation that occurred here.

The underlying purpose of CrR 8.3(b) is fairness to the defendant. *State v Stephans*, 47 Wn. App. 600, 603, 736 P.2d 302 (1987). The court should revitalize CrR 8.3(b) and instruct prosecutors and our courts that at a minimum accused persons must be treated fairly and this Court will not condone such underhanded tactics by prosecutors.

E. CONCLUSION

Mr. Leonard respectfully requests this Court to accept review and reverse for prosecutorial misconduct and government mismanagement of his case. RAP 13.4(b)(1) (3), (4).

This brief complies with RAP 18.7 and contains 4,742 words.

DATED this 30th day of August 2024.

Respectfully submitted,

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APPENDICES

FILED
8/5/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSEPH ISAIAH LEONARD, Appellant.	No. 86179-4-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Joseph Isaiah Leonard appeals his conviction for attempting to rob a cherry stand with a firearm and assaulting witnesses to the crime. He argues the State violated his constitutional right to confront two key witnesses, when it admittedly "improperly" discussed the content of those witnesses' testimony prior to trial. Leonard additionally argues that the trial court erred by failing to dismiss the charges against him after the State mishandled discovery, and by allowing the State to make an improper statement in its closing argument. We disagree, affirm the conviction, but remand to strike his Victim Penalty Assessment (VPA).

I. BACKGROUND

The parties do not dispute that the following facts occurred, as Leonard claims that this matter is a case of mistaken identity. On June 27, 2020, a man with a face covering and dark bandana approached a cherry stand in Buckley, and

ordered the attendants to give him their money. Both of the attendants, Suzi Goodwin and Laura Meade, saw the assailant with his hands on a firearm. Goodwin put her hands up and stepped away. Meade said, "[h]ell no." The man tugged Meade's fanny pack, which they then tussled over. Goodwin screamed. The man ran away.

Aaron and Jillian Horner were a married couple who lived near the fruit stand. When they heard screaming, Mr. and Ms. Horner and their young son ran towards the noise. Mr. Horner saw a man run near their house and toward a parked car. The man pointed a gun at the Horners from approximately 50 feet away, with Mr. Horner standing in front of Ms. Horner and their son. Mr. Horner saw the gunman get into the passenger side of a "light-teal-green Dodge Stratus." The Horners' other contemporaneous observations will be described in more detail below.

The Stratus traveled at speeds exceeding 100 miles per hour as a police vehicle pursued it for approximately four to five miles. The Stratus collided with another car and then rolled off the road. Law enforcement arrested a man who exited the passenger side, with dark hair, wearing a grey sweatshirt, and identified him as Leonard. At the scene, law enforcement found a firearm. Law enforcement also found a bandana nearby that was "a black and white piece of cloth with white filigree and teal, orange, red, black, and white markings in the middle."

The State charged Leonard with two counts of attempted robbery in the first degree, two counts of assault in the second degree, and one count of unlawful possession of a firearm. As we will discuss in more detail later, before his trial

began, Leonard brought multiple motions related to the State's alleged prosecutorial misconduct, both for its contact with the Horners and for providing incomplete or dilatory discovery. The trial court denied Leonard's various motions and ordered alternate remedies which will be discussed below.

At trial, the jury found Leonard guilty on all counts. Leonard appeals.

II. ANALYSIS

A. Leonard's Sixth Amendment Right to Cross-Examine the State's Witnesses

1. Additional Factual and Procedural Background

On the same date of the robbery, the Horners each gave handwritten statements describing their assailant. Ms. Horner described "a hispanic [sic] male wearing a *white* sweatshirt, dark blue jeans and a black bandana as a face mask." (Emphasis added). Meanwhile, Mr. Horner described a man with a "dark complexion, wearing a black bandana with white flowers on it. He had dark jeans and a *white* hoodie." (Emphasis added).

Approximately six months later, between December 14 and 15, 2020, State's counsel had the following email exchange with Ms. Horner:

> State: I hope you remember me; we spoke few weeks ago about that robbery you and your husband witnessed. I found the handwritten statements you and your husband drafted, and am hoping you can refresh your memory. Also I've attached the 911 call you made. Can you review for accuracy? And do these items (sweatshirt and bandana) look familiar?[1] *Can you please ask your husband?* Thank you!
>
> Ms. Horner: The bandana definitely looks correct. That doesn't *look like* the sweatshirt the guy who actually robbed the place was wearing though, unless he was wearing it underneath. That *possibly*

[1] The email attached an audio file of the 911 call and photos of the items in question.

> could've been the drivers [sic], he never left the vehicle so we never got a good look at him.
>
> State: Thank you, [Ms. Horner]. *This was the sweatshirt that the medics cut off of him* and nothing else was found inside the car. The driver was wearing a blue/black shirt.
>
> Ms. Horner: *I thought the hoodie was white, but it could've been grey*. Or they ditched it when they were running before police were actually chasing them. The bandana is for sure it though.
>
> State: In the light, *it could very well have appeared white*. And *others described a grey hoodie*. So *we're good*. Thank you!

(Emphasis added).

Ms. Horner then responded: "true, everything happened so fast and truthfully all I could focus on was the gun lol." The two continued to correspond about where the assailant parked his car, etc.

In March 2021, law enforcement interviewed the Horners, separately. Mr. Horner described a "black mask" with a "white pattern on it . . . looked like the bandanas . . . it had a native pattern on it." He described a "grey hoodie" with a "Seahawk symbol on the front of it, the Native American style." Ms. Horner stated "he had a black bandana with like white . . . flowers from a distance . . . jeans and a long hoodie and a mask, like you know, a bandana . . ." She did not describe the color of his sweatshirt.

In November 2021, Leonard moved to dismiss the charges against him (except for the charge of unlawful possession of a firearm) under CrR 8.3(b) based on the State's conversation with Ms. Horner.[2] Specifically, Leonard asserted that

[2] Prior to that motion, Leonard had moved to disqualify the prosecutor for emailing Ms. Horner because "the intent was to sway the testimony . . . of the suspect wearing a white hoodie . . . to a gray hoodie." And, in so doing, Leonard claims

the State "tamper[ed]" with the Horners' testimony, arguing "we have a witness who originally described a white sweatshirt, effectively being coached to change testimony to that of a gray sweatshirt – here, one with a Seahawks logo." At no time did Leonard argue his constitutional rights were violated.

At the hearing, the State conceded its communications with Ms. Horner were "improper." The State further conceded that Mr. Horner was likely privy to the email correspondence between it and Ms. Horner, thus potentially tainting his testimony too. However, the State argued the court should consider available intermediate remedies short of dismissing the charges. The State offered not to elicit in-court identification of the sweatshirt or bandana from the Horners. Instead, it would introduce only the original (inaccurate) statements the Horners made to law enforcement on the day of the incident, and not offer the (accurate) statement in Mr. Horner's subsequently recorded interview.

The court denied Leonard's motion to dismiss. The court noted that "the difficulty with this motion is the encouragement to draw a different conclusion than what was concluded at the scene. It's not improper to refresh. It is improper to encourage." The court concluded "there needs to be some sort of remedy fashioned . . . the remedy that's been proposed is one that I'm going to order,

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she "made herself a material witness and is thus no longer qualified to act as an advocate" per RPC 3.7(a). The trial court, though expressing concern about the State's conduct, denied Leonard's motion to disqualify because "I don't think it rises to the level under the analysis that the Court has to have . . . to require that [the State] be removed from the case. I do believe that the *remedy* is that *the text messages themselves*, in whatever format is determined at trial *would be admissible*, and it would be on the four corners of those text messages." (Emphasis added).

which is, essentially, *the State is stuck with the description that the Horners provided at the scene to the officers*." (Emphasis added). The court further ordered that, if Leonard wanted to impeach either of the Horners, he could introduce the email correspondence between them and the State.

2. Law

"The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (quoting U.S. CONST. amend 6; CONST. art. I, § 22). "The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses." Id. "The purpose is to test the perception, memory, and credibility of witnesses." Id. "Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question . . . [a]s such, the right to confront must be zealously guarded." Id. "However, the right to cross-examine adverse witnesses is not absolute." Id.

Namely, although in a different context,[3] our Supreme Court has held that "[t]he Sixth Amendment to the United States Constitution guarantees a defendant a fair trial but not a trial free from error." State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). "The burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial." Id. at 747; see also Br. of Appellant at 31 (citing State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). "Once proved, prosecutorial misconduct is grounds for reversal where there is a

[3] Leonard's opening brief provides a cursory and undeveloped presentation of his somewhat novel confrontation-clause-via-misconduct argument, but he offers the same foregoing and following legal principles.

substantial likelihood the improper conduct affected the jury." Fisher, 165 Wn.2d at 747; see also Br. of Appellant at 31-32 (citing State v. Lucas-Vicente, 22 Wn. App. 2d 212, 223–24, 510 P.3d 1006 (2022)). We review an alleged denial of such constitutional rights de novo. State v. Lizarraga, 191 Wn. App. 530, 551, 364 P.3d 810 (2015).

3. Discussion

On appeal, Leonard asserts that the State's conceded interference with the Horner's testimony violated his Sixth Amendment right to confront those witnesses.[4] We discuss each witness in turn.

a. Ms. Horner

As to Ms. Horner, Leonard argues that the State's interference prevented her from testifying at all, thus implicating his Sixth Amendment right. Leonard avers "Ms. Horner felt anxious because [the State] had compromised her testimony on the record and she would open herself to potential perjury charges on the stand." Indeed, Ms. Horner did not testify, but this claim fails for several reasons.

First, Leonard does not cite to anything in the record to support the claim that Ms. Horner "felt anxious" because of the State's interference. The court is not

[4] In his reply brief, Leonard argues both that the trial court's denial of his CrR 8.3(b) motion was error and, "[a]dditionally, separate from CrR 8.3," that the State's misconduct "prejudiced his [constitutional] right to a fair trial." He did not, however, in his opening brief assign error to the court's denial of his CrR 8.3(b) motion or substantively argue that the basis of his constitutional claim was a generalized right to a fair trial, arguing only that the misconduct meant "he could not meaningfully cross-examine or impeach either witness." To the extent they are stand-alone claims of error, we decline to consider them because he raises both issues for the first time on reply. State v. Pervez, 15 Wn. App. 2d 265, 272, n. 11, 478 P.3d 103 (2020).

required to search the record to locate the portions relevant to a litigant's arguments. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). The record, on the contrary, indicates that neither party was able to locate Ms. Horner before trial. And the State reported that Mr. Horner advised that Ms. Horner feared retaliation from Leonard. When Mr. Horner testified, he also explained that Ms. Horner was not present because she suffers from "crippling anxiety and depression" without any suggestion that the State's interference caused or exacerbated those conditions. In other words, the record does not bear out the factual causal predicate underlying the claim.

Establishing this factual predicate is important because, second, Ms. Horner's absence alone does not mean there was a constitutional violation of Leonard's right to cross-examine her because "[m]ore than the mere absence of testimony is necessary to establish a violation of the right [to cross-examine a State's witness]." Lizarraga, 191 Wn. App. at 552 (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)).

Third, although Leonard had the right, though not absolute, to compel Ms. Horner to testify, he did not exercise it. Id. Neither party at trial requested a material witness warrant. Instead, Leonard argued he *would* request a mistrial if trial continued without Ms. Horner's appearance, because the existing motions in limine and opening statement were predicated on being able to cross-examine her. However, at trial, Leonard did not move for a mistrial nor did he raise a Sixth Amendment challenge of any kind to Ms. Horner's absence at any time (which we will address further below). Therefore, he cannot raise the issue now because,

e.g., "[t]he availability of the Sixth Amendment compulsory process clause 'is dependent entirely on the defendant's initiative.'" Lizarraga, 191 Wn. App. at 552 (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)).

Fourth, Leonard must show that the State's misconduct would have prevented him from "meaningfully cross-examining" Ms. Horner about her description of their assailant, had she testified. Darden, 145 Wn.2d at 620. A close reading of the email correspondence, however, shows that Ms. Horner remained consistent about her description of a white sweatshirt instead of a grey one, besides acknowledging once that "maybe" it could be a different color. The record does not indicate that the State's, concededly, improper suggestion Leonard wore a grey sweatshirt would have changed her testimony at trial, if she had been present. Moreover, nothing the record suggests that any effect on her testimony would have prevented Leonard from meaningfully cross-examining her, let alone establishes that the misconduct would have affected the final verdict against Leonard. Fisher, 165 Wn.2d at 747.

In short, we conclude Leonard has not met his burden to show the State's misconduct caused Ms. Horner's absence, prevented Leonard from meaningfully cross-examining this witness, had he taken the initiative to compel her to testify, or otherwise affected the verdict by such mere absence.

b. Mr. Horner

Again, the State conceded below and concedes again on appeal that Mr. Horner—while not a participant of the email exchange—became privy to the

correspondence between the State and Ms. Horner, thus potentially interfering with his testimony as well. We accept the State's concession and assume the couple discussed the State's improper suggestion about the color of the sweatshirt, and discussed the State's improper suggestion that two of its witness, at best, compared or, at worst, coordinated their testimony. From there, Leonard argues that this "tampering" violated his right to meaningfully cross-examine Mr. Horner's testimony. This claim fails for three overarching reasons, which require additional factual background.

At trial, when the State examined Mr. Horner, it asked him: "Do you recall what description you gave as far as his physical size and the like?" Mr. Horner gave the following answer, which Leonard's counsel interrupted: "He was wearing a light –". The court held a colloquy outside the presence of the jury, during which the State (a) represented she was "not going to go anywhere near the hoodie," (b) asserted that the "jury has already heard the description he gave to the police,"[5] and (c) would only ask Mr. Horner if he gave a description to the police in a "yes-or-no fashion."

Upon the jury's return, the court instructed the jury to disregard the partial answer. And the State further questioned Mr. Horner, as follows:

> Q. (By the State) Mr. Horner, did a police officer make contact with you to interview you about what happened?
> A. He did, yes.
>
> Q. And do you recall giving a description, at that time, to the police

[5] The officer (Fetterman) who took Mr. Horner's statement testified that Mr. Horner described the clothing the gunman was wearing to Officer Fetterman as including "[a] light -- or light-gray sweatshirt." This testimony was not consistent with the handwritten statement, which described the sweatshirt as white.

about the person that pointed the gun at you and your wife?
A. Yes, I did.

Q. Did you give a description of the type of clothing he was wearing?
A. I did, yes.

Based on these facts, Leonard now avers that "Mr. Horner could not be cross-examined about [1] his prior inconsistent statements and [2] his insinuation that his 'identification' matched Mr. Leonard."

This argument fails, first, because both claims are simply factually inaccurate. As to the former claim, the State's examination was limited to the questions reviewed above, but the court expressly permitted Leonard to impeach either of the Horners with the email correspondence between Ms. Horner and the State to remedy Leonard's CrR 8.3 motion. In other words, Leonard could have elicited from Horner that his written statement described the sweatshirt as white. Leonard simply chose not to.

As to the latter claim, Horner himself did not insinuate at trial that he described the hoodie (correctly) as grey on the date of the crime, thus "matching" that found on Leonard. In pertinent part, he testified that he provided "*a* description" to the police without going into any detail.

To the extent the "insinuation" comes from Officer Fetterman's inaccurate testimony (that Mr. Horner described "a light – or light-gray sweatshirt"), Leonard could have cross examined Officer Fetter with Mr. Horner's written statement that described the sweatshirt as "white." Leonard did not impeach Officer Fetterman in

that way, despite having the opportunity to do so.[6]

On the contrary—and as the second reason this argument fails—Leonard's counsel on cross-examination asked Mr. Horner:

- if his memory was "fresh" when he gave the handwritten sworn statement to law enforcement, to which Mr. Horner agreed;
- if he knew that details in the statement "matter[ed]" because law enforcement would rely on his statements therein, to which Mr. Horner agreed; and sought to confirm that
- "any detail that [he] might have remembered would have made it into that statement," to which Mr. Horner agreed.

And, in closing argument, Leonard's counsel argued that the evidence showed it was a "a white male in a white hoodie", referencing inter alia Officer Fetterman's testimony "that Mr. Horner had told him that the suspect was wearing a white or gray hoodie" and Ms. Horner's 911 call where she indicated the assailant was wearing "a white hoodie".

In other words, despite the inconsistency of Officer Fetterman's testimony, Leonard's cross-examination was focused only on driving home the reliability of Mr. Horner's statement. Regardless of why Leonard chose not to cross-examine Mr. Horner about the inconsistency between his written statement and his alleged verbal statements to the police or the prosecutor, Leonard had the opportunity to meaningfully cross-examine Mr. Horner on all relevant details of his testimony in such as way as to test his "perception, memory, and credibility." Darden, 145 Wn.2d at 620 (quoting State v. Parris, 98 Wn.2d 140, 144, 654 P.2d 77 (1982)

[6] Leonard also did not assign error to Officer Fetterman testifying about the out-of-court statements Mr. Horner made as inadmissible hearsay. Therefore, we decline to consider it.

(quoting U.S. CONST. amend 6; CONST. art. I, § 22)). Leonard chose a different route.

Third—and this reason applies equally to any challenge to the absence of Ms. Horner's testimony—"a defendant [must] raise an objection at trial or waive the right of confrontation. Requiring an objection brings this claim to align with what we employ in other cases where we have held that some constitutional rights may be waived by a failure to object." State v. Burns, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019). Here, neither in the colloquy with the court reviewed above nor at any other time did Leonard object *on Sixth Amendment grounds* to the court's remedial measure that Mr. Horner may only testify to the fact that he gave the police a description at the scene. Leonard also did not object to the court's remedial measure that permitted Leonard to impeach his testimony with those emails. Instead, per the record reviewed above, Leonard chose to take advantage of the evidentiary limitation placed upon the State in cross-examination. Far from objecting, Leonard's counsel hammered home the discrepancy during his closing argument, in response to which the State was silent.

For these reasons, we conclude that, even if the jury was left with some misimpression from the officer's testimony, Leonard chose not to correct the misimpression either by impeaching the officer through the Mr. Horner's written statement or simply through Mr. Horner. Therefore, Leonard has not met his burden to prove that he raised this challenge below or otherwise that his right to meaningfully cross-examine Mr. Horner was hindered.

B. Whether the Trial Court Should Have Dismissed the Charges Because the State Mishandled Discovery

Leonard contends that government mismanagement resulted in delays proceeding to trial. He asserts that, pursuant to CrR 8.3(b), his convictions must be reversed and the charges against him dismissed due to this mismanagement. We disagree.

1. Additional Factual Background

Approximately two months before trial, the State provided Leonard's counsel its witness list. Then a few days before trial, Leonard's counsel noticed that the State did not provide some photos from the car crash scene as part of discovery, and the photos may have been taken of relevant items such as the bandana, and other "clothing items." Leonard did not receive these photos for the approximately eight months when counsel was preparing for trial. The State explained it thought Leonard received these photos, but it then promptly provided the photos Leonard requested. Leonard moved to dismiss under CrR 8.3(b) because the delay was "a pure discovery violation." CrR 3.3 went unmentioned.

The court continued the trial to allow Leonard the time to review this newly produced evidence. The court further ordered that the late-discovered photographs be suppressed, unless Leonard and only Leonard wanted to introduce them. In other words, the court prohibited the State from introducing evidence in its possession that Leonard was unable to prepare to argue on the eve of trial.

2. Discussion

Leonard argues that the State's delays in providing the witness list and the photographic evidence forced him to choose between his right to a speedy trial

and his right to prepared counsel. We disagree because he fails to articulate a cognizable claim for the relief he requests, i.e., dismissal.

Criminal Rule 3.3 governs time-to-trial requirements in Washington. The rule provides that when a charge is not brought to trial within the time limits set forth therein, that charge "shall be dismissed with prejudice." CrR 3.3(h). However, and significantly, CrR 3.3(h) provides that "[n]o case shall be dismissed for time-to-trial reasons *except as expressly required by this rule, a statute, or the state or federal constitution*." (Emphasis added.)[7] Below and on appeal, Leonard did not and does not identify, or explain, the violation of CrR 3.3, any statute or the state or federal constitution underlying his request for dismissal.[8]

Instead, Leonard simply makes repeated references to his right to a "speedy trial so his counsel could be prepared" and a generic "right to a fair trial," without anywhere explicating how CrR 3.3, any statute, or a constitutional provision was violated. Leonard does not assert a speedy trial claim pursuant to either the Sixth Amendment to the United States Constitution, or article I, section 22 of our state constitution. State v. Shemesh, 187 Wn. App. 136, 144, 347 P.3d 1096 (2015).[9]

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[7] Our Supreme Court amended the time-for-trial rule in 2003 based on the recommendations of the Time-for-Trial Task Force. See State v. Kone, 165 Wn. App. 420, 435, 266 P.3d 916 (2011).

[8] "[T]his procedural right is not self-executing and requires that a motion be filed to exercise it in accordance with the procedure outlined in the rule." State v. Walker, 199 Wn.2d 796, 804, 513 P.3d 111 (2022). Namely, under CrR 3.3(d)(3), "[a] party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits." That did not happen here and, as it was not raised by the parties, we decline to address this additional failure.

[9] Had he articulated a violation of his *Sixth Amendment* right to a speedy trial, we would have undertaken a two-part inquiry. State v. Iniguez, 167 Wn.2d 273, 283-

Moreover, he nowhere asserts that he was either completely deprived of counsel, see United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), or that his counsel was ineffective. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Leonard's claim of error is premised on CrR 8.3(b). This rule provides that "[t]he 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." CrR 8.3(b). But, CrR 3.3(b), we have held, "provides the exclusive means to challenge a violation of the time-to-trial rule." State v. Kone, 165 Wn. App. 420, 437, 266 P.3d 916 (2011).

It is additionally problematic that Leonard attempts to obtain reversal of his convictions and dismissal of the charges against him by characterizing a claim of error regarding trial delay as one of "government mismanagement." Even if he had asserted a CrR 3.3 violation, and undertaken the right analyses, we have previously rejected the assertion that dismissal of charges was warranted for purported government mismanagement prejudicing a defendant's so-called "right to a speedy trial" pursuant to CrR 3.3. Kone, 165 Wn. App. at 435-37.

84, 217 P.3d 768 (2009). First, we would have determined whether "the length of the delay crossed a line from ordinary to presumptively prejudicial." Id. If such a line was crossed, then we would have applied the non-exclusive, four-factor Barker balancing test to determine if a constitutional violation occurred. Id. Namely we would have considered (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of their right, and (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). No such analysis occurred below or in Leonard's briefing on appeal.

Finally, and tellingly, in support, Leonard cites inter alia to State v. Whitney, 96 Wn.2d 578, 580, 637 P.2d 956 (1981), State v. Michielli, 132 Wn.2d 229, 239-240, 937 P.2d 587 (1997), and State v. Sherman, 59 Wn. App. 763, 769, 801 P.2d 274 (1990). This judicial authority is unavailing as it preceded our Supreme Court's 2003 amendments to CrR 3.3. This court has rejected arguments relying on decisional authority preceding the 2003 amendments to the rule. See, e.g., State v. Thomas, 146 Wn. App. 568, 576, 191 P.3d 913 (2008).[10]

Thus, we reject Leonard's contention that the court erred in denying his motion to dismiss under CrR 8.3(b) because the plain language of CrR 3.3(h) "specifically prohibits dismissal for time-to-trial reasons unless expressly required" on grounds Leonard nowhere articulates. Thomas, 146 Wn. App. at 575.

C. Whether the State Committed Misconduct in Closing Argument

1. Law

"In the context of closing arguments, the prosecuting attorney has 'wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.'" Fisher, 165 Wn.2d at 747 (quoting State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., Jr., 181 Wn.2d 757, 760, 336 P.3d 1134 (2014)). "We review allegedly improper comments in the context of the entire argument." Id. "References to evidence outside of the record and bald appeals to passion and prejudice constitute misconduct." Id.

[10] Leonard also cites to State v. Brooks, 149 Wn. App. 373, 386, 203 P.3d 397 (2009). We decline to follow Brooks because it relies likewise on judicial authority pre-dating the 2003 amendments to CrR 3.3.

"The burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial." Id. at 747. "If the defendant objected to the offending statement at trial, he must establish that the 'misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict.'" State v. Slater, 197 Wn.2d 660, 681, 486 P.3d 873 (2021) (quoting State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012)).

In Slater, our Supreme Court reviewed how federal courts and our state courts treat flight evidence to justify an inference of a defendant's consciousness of guilt. Id. at 667. Our Supreme Court approvingly explained the following three principles and guidance.

First, "while flight evidence may be considered by the jury, the court must not *instruct* the jury that flight evidence is conclusive proof of guilt." Id. at 668 (citing Hickory v. United States, 160 U.S. 408, 420, 16 S. Ct. 327, 40 L. Ed. 474 (1896)) (emphasis added).

Second, "[i]t is an accepted rule that evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence." Id. at 668 (quoting State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965)). Further, our Supreme Court elaborated that that "accepted rule" requires that:

> the circumstance or inference of *flight* must be *substantial and real*. It may not be speculative, conjectural, or fanciful. In other words, the evidence or circumstances introduced and giving rise to the contention of flight must be substantial and sufficient to create a *reasonable and substantive inference* that the defendant's departure from the scene of difficulty was an instinctive or impulsive reaction to

> a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.

Id. at 668 (emphasis added) (some alterations in original) (quoting Bruton, 66 Wn.2d 112-113).[11]

Third, our Supreme Court approvingly surveyed cases that "opined that flight evidence is admissible as evidence of consciousness of guilt in other cases. Examples include cases in which the defendant flees the scene of the crime, escapes police contact, travels to a different state, or evades arrest for a significant period of time, among others." Id. at 669-70. Further, it cited a case holding that a flight instruction was proper when "'shortly after the robbery and prior to the arrest [police and the victim] spotted the defendant running along the shoulder of the freeway.'" Id. at 670 (alteration in original) (quoting State v. Nichols, 5 Wn. App. 657, 659, 491 P.2d 677 (1971)).

Ultimately, "[a] trial court when faced with proposed flight evidence must decide whether or not the alleged evidence amounts to flight that supports a consciousness of guilt *inference*. If it does amount to flight evidence that supports a consciousness of guilt inference, the judge may allow the evidence to be considered by the jury." Id. (emphasis added).

2. Discussion

[11] This court in Freeburg examined a Fifth Circuit decision that laid out a four-step test to examine the probative value of flight evidence: "the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." State v. Freeburg, 105 Wn. App. 492, 498, 20 P.3d 984 (2001) (quoting United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977)).

Leonard argues that the State committed misconduct by making an unsupported inference of guilt from the evidence he fled the scene. We disagree.

In closing, the State argued:

> the defendant knew that he had to go. That vehicle had to flee because he knew he had just tried to rob two ladies trying to make a living selling cherries, that he held a gun to a family, a husband and a wife and a child; and *he knew that he needed to get out of that area, get out of dodge* –

(Emphasis added).

Leonard's trial counsel objected. After the court excused the jury, the court held a colloquy.

Leonard's counsel argued:

> I'm very concerned that [the State], repeatedly, is putting thoughts in Mr. Leonard's head, arguing facts not in evidence: "He knew he had to get out of there." I think the case law, the defendant was thinking to himself, and then, of course, the prosecutor makes up something sinister, there's a line of cases, *Walker*, *Glassman*, *Pierce*, *Jones*, *Bohning*, *Russell* in regards to the facts not in evidence, but there's no facts in evidence of *what he knew or thought*. I think it crosses some lines. I'd ask that the State be told to refrain from such information and that the jury being disregard -- or be asked to disregard it.

(Emphasis added).

The court overruled Leonard's objection, with a caveat:

> But when we start talking too much about what the defendant knew or didn't know, you're allowed to make reasonable inferences; so I'm going to overrule the objection at this time. But I will caution you to just be cognisant [sic] of your comments.

When the jury returned, the State concluded its closing argument:

> the defendant who was extricated as the passenger in that vehicle, in fact, was fleeing from law enforcement because the defendant was involved in two armed robberies, although he did not get away with

> any money, and because he assaulted a family with a firearm. *The very fact of the fleeing is circumstantial evidence of his guilt.*

(Emphasis added).

We hold that these statements were not improper for the following reasons.

First, consistent with the principle elucidated by our Supreme Court in Slater, the court did not allow the State to say (let alone instruct the jury) that Leonard's flight was *conclusive* of guilt. 197 Wn.2d at 668. The State simply indicated evidence was "circumstantial evidence" of guilt.

Second, we hold that the evidence of flight was "substantial and real" and created a "reasonable and substantive inference" that Leonard departed both due to an "instinctive or impulsive reaction to a consciousness of guilt" and as part of "a deliberate effort to evade arrest and prosecution." Id. (quoting Bruton, 66 Wn.2d 112-113). Here, the cherry stand attendants and then law enforcement testified to seeing Leonard run from the cherry stand immediately after the robbery and then lead the police in a dangerous high-speed chase for several miles.

In response, as his counsel asserted below, Leonard argues that the record includes no evidence of his actual state of mind at the time of the robbery and ensuing car chase. But, direct evidence of a defendant's state of mind is not the test. An inference of consciousness of guilt is sufficient. Slater, 197 Wn.2d at 670. Here, the State did not make a "bald" and unsupported assertion. Fisher, 165 Wn.2d at 747. On the contrary, on the facts presented above, the inference here is reasonable, substantive and sufficient.

Finally, this case is unlike in Bruton, where the defendants merely exited a store after being accused of shoplifting, and then "walked up the street." Bruton,

66 Wn.2d at 113. There, the State provided no testimony about the circumstances of their exit from the store. Id. The full context of the facts presented at trial support the necessary inference above and, thus, defeat Leonard's misconduct claim.

D. VPA

Leonard argues in his reply brief that we should strike his $500 Victim Penalty Assessment.

Formerly, RCW 7.68.035(1)(a) mandated a $500 VPA for all adults found guilty in superior court of a crime. State v. Mathers, 193 Wn. App. 913, 918, 376 P.3d 1163 (2016). In 2023, our legislature amended section .035 to state that "[t]he court shall not impose the penalty assessment under this section if the court finds that the defendant, at the time of sentencing, is indigent as defined in RCW 10.01.160(3)." LAWS OF 2023, ch. 449, § 1; RCW 7.68.035(4). This change took effect on July 1, 2023, but applies to Leonard because his appeal was pending at the time. State v. Ellis, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023) (the legislature's VPA amendment applied to the defendant because the case was still on direct appeal).

Here, there is no dispute that the trial court found Leonard indigent on June 29, 2020 or that the VPA was imposed prior to the 2023 amendments, and the State did not oppose Leonard's request to strike the VPA at oral argument or otherwise. Accordingly, we remand this matter to the trial court to strike the VPA.

III. CONCLUSION

We affirm the trial court but remand solely to strike Leonard's VPA.

Díaz, J.

WE CONCUR:

Feldman, J.

Coburn, 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. 86179-4-I**, 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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☐ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: August 30, 2024

WASHINGTON APPELLATE PROJECT

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