SUPREME COURT NO. _____
NO. 85008-3-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MELVIN TAYLOR, JR.,

Petitioner.

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

The Honorable Matthew Williams, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Melvin Taylor, Jr., asks this Court to grant review of the court of appeals' unpublished decision in State v. Taylor, No. 85008-3-I, filed February 18, 2025 (appended).

B. ISSUES PRESENTED FOR REVIEW

1. Is review warranted, where the prosecution violated its discovery obligations under CrR 4.7, as well as a ruling in limine, by failing to disclose its DNA expert Jennifer Reid's opinion until her direct-examination at trial?

2. Is review warranted, where the trial court additionally erred in admitting Reid's expert opinion because it was speculative and lacked an adequate factual basis under ER 702?

3. Is review warranted, where Reid's previously undisclosed testimony also amounted to an improper opinion on Taylor's guilt?

4. Is review warranted, to the extent defense counsel was ineffective in failing to renew the objection to Reid's testimony or object on the correct basis?

C. STATEMENT OF THE CASE

1. **Substantive Evidence**

In February of 2002, 43-year-old L.K.'s body was found in a corner alcove behind a grocery store in Federal Way. 1RP 733-40, 979. L.K. was partially disrobed, with her pants and underwear off her right leg and partially down her left leg. 1RP 980. Two used condoms were found underneath her feet. 1RP 859-63. There was mud on the ground and L.K.'s clothes were wet. 1RP 895-96. There appeared to be blood about two and a half feet up the wall in the corner near L.K.'s head. 1RP 926-32. Several beer cans were found nearby. 1RP 853-56.

The medical examiner, Dr. Richard Harruff, noted multiple blunt force injuries to L.K.'s head and face, but determined her cause of death to be manual strangulation. 1RP 981-83, 993. L.K. had curvilinear marks on her neck, consistent

with the shape of fingernails—possibly from her assailant's fingernails or from L.K.'s own fingernails in an attempt to pry her assailant's hands off her neck. 2RP 32.

Dr. Harruff collected clear fluid from inside L.K.'s vagina, which did not contain any sperm. 2RP 13, 59. L.K. had a small laceration at the opening of her anus, which Dr. Harruff explained could have come from consensual intercourse. 2RP 16-17, 44-46. Dr. Harruff took swabs from L.K.'s vagina, anus, neck, and fingernails, and also collected fingernail clippings. 1RP 976; 2RP 27-28.

The original forensic scientist, Michael Dornan, tested the vaginal and anal swabs, along with the two condoms found underneath L.K. 2RP 185-90. L.K.'s DNA was on the outside of one condom. 2RP 185-86, 204. Testing of the condoms showed an absence of sperm or acid phosphatase, an enzyme found at high levels in seminal fluid, indicating a very low level of semen, if present at all. 2RP 185-89.

The vaginal and anal swabs both tested positive for acid phosphatase. 2RP 191. Under a microscope, Dornan could see three to four sperm heads per view on the vaginal swabs, and zero to two per view on the anal swabs, the latter indicating a low level of semen. 2RP 192, 218. Dornan explained, in general, the upper limit of observable sperm would be too many to count—"fifty hundreds" per view. 2RP 217.

Dornan developed a male DNA profile from the vaginal swabs, which matched a partial male profile from the anal swabs and from inside one of the condoms. 2RP 202-04. Dornan named this single source, unknown male contributor "Individual A." 2RP 203-04. When no one could be identified as Individual A, the case went cold. 2RP 142.

In 2020, a routine search of cold cases revealed Melvin Taylor's DNA matched Individual A.[1] CP 284; 2RP 246-47. A new detective, Adam Howell, was assigned to investigate the

[1] Taylor's DNA was entered into CODIS in May 2019—information that was excluded at his jury trial. 1RP 43-45.

case. 2RP 252-53. Detective Howell asked the crime lab to test L.K.'s fingernail clippings. 2RP 335-36. Detective Howell believed "it would help 'paint the picture' if the suspect's DNA happened to be there." 2RP 336.

Detective Howell and another detective interviewed Taylor in November of 2020. 2RP 279. The detectives showed Taylor an in-life photo of L.K. Ex. 85, at 3. She did not look familiar to Taylor. Ex. 85, at 3. But Taylor acknowledged he used to sleep with sex workers back in those days.[2] Ex. 85, at 3. Taylor further acknowledged he must have had sex with L.K. because his DNA was found on her, but was adamant that he never forced himself on any sex workers or harmed them in any way. Ex. 85, at 9-12.

Later in the interview, the detectives showed Taylor a photo of the alcove where L.K.'s body was found. Ex. 85, at 23-24. This jogged Taylor's memory. Ex. 85, at 24. Taylor recalled

[2] L.K. sometimes engaged in sex work. 1RP 748-50.

that, years ago, he hired a sex worker who took him to that location. Ex. 85, at 24. He remembered the woman agreed to have anal intercourse, but they stopped when it was hurting. Ex. 85, at 26. Taylor recalled that they finished vaginally. Ex. 85, at 26. Taylor remembered this encounter because it was the first time he had anal intercourse. Ex. 85, at 33. Taylor maintained he left the woman unharmed. Ex. 85, at 33.

On December 21, 2020, the prosecution charged Taylor with first degree felony murder predicated on first or second degree rape. CP 1.

Following the interview with Taylor, Detective Howell renewed his request for the crime lab to test L.K.'s fingernail clippings, which the lab had still not done. 2RP 341-42. The crime lab finally provided those results in March of 2021. 2RP 343. Underneath L.K.'s left fingernails was her own DNA, as well as a single source male profile. 2RP 451-52. Taylor was excluded as a possible contributor. 2RP 452-53.

2. **Opinion of DNA Expert, Jennifer Reid**

Forensic Scientist Jennifer Reid was tasked with examining multiple items not previously tested. 2RP 360-63. At Taylor's trial, Reid gave limited testimony about her training and experience, explaining she received a master's degree in forensic science and had worked at the crime lab for 20 years. 2RP 237. She testified she spent a year training with the crime lab "learning how to identify the different biological fluids we'd be dealing with, getting that DNA out of those different biological fluids, and what that process was." 2RP 237-38.

Among other things, Reid examined eight swabs of the red substance on the walls near L.K.'s body. 1RP 874-78; 2RP 387-90. Only three tested presumptively positive for blood, despite obvious staining on all eight. 2RP 389-90; Ex. 96. Reid noted severe degradation of the blood but was able to develop partial profiles for L.K. 2RP 437-38, 515. Reid acknowledged rain, ultraviolet light, and dirt can all cause DNA to start to degrade within just a couple of days. 2RP 513-14.

Reid also examined the four beer cans found at the scene. 2RP 462. DNA on those cans likewise showed signs of serious degradation, and Reid only had enough DNA on one beer can to move forward with testing. 2RP 463, 517. A partial DNA profile on that can matched L.K. 2RP 464.

Detective Howell also asked Reid to examine L.K.'s underwear for the presence of semen or sperm—the theory being that if L.K. ever got dressed again, it would have drained onto her underwear. 2RP 273-74. The underwear had been kept by the police department in unknown storage conditions for the prior 18 years. 2RP 273, 516-17. Reid explained best practice would have been to maintain it "in a room temperature type room or even a freezer to minimize any of those things that can break DNA down." 2RP 440. Dirt flaked off the underwear when Reid removed it from its packaging. 2RP 516. Reid reiterated dirt contains bacteria that breaks down organic material. 2RP 531. Reid further noted acid phosphatase "is especially subject to time and breakdown and degradation." 2RP 521.

Reid did not detect any acid phosphatase or P30, another enzyme found in semen, on the underwear. 2RP 188, 367-70. She swabbed the interior crotch and did not see any sperm under a microscope. 2RP 368-70. In consultation with the prosecutor's office, Reid did not test the underwear for DNA. 2RP 523-24. But Reid acknowledged DNA could still be present even after acid phosphatase has broken down, "depend[ing] on what the original condition of the item was and then how it was stored over the years." 2RP 521.

In its notice of appearance and request for discovery, the defense asked the prosecution to identify all its expert witnesses, "together with a summary of their testimony" and "the nature of their opinion." CP 303. In its trial brief, the defense likewise moved to preclude the prosecution from eliciting "any additional or changed opinions by State's experts which have not previously been disclosed to defense." CP 32. The prosecution agreed and the motion was granted. 1RP 54.

Aware of the prosecution's theory that Taylor's semen would have transferred to L.K.'s underwear if she ever got dressed again, the defense interviewed Reid about it before trial. CP 88. Reid ultimately could not offer an opinion:

> [Defense counsel]: But are you able to say this is, like, a full ejaculation, or this could be stray sperm from, you know, post-ejaculation or penetration or the condom's used improperly, or what have you; or are you able to say it's a full ejaculation?
>
> Reid: *I can't remember what the quantities were for some of that*. I mean, I think that he had a good quantity of DNA. But whether I could say for certain that it's a full ejaculation versus a partial, I don't think I could say that.
>
> [Defense counsel]: You couldn't say that, or one couldn't -- or anyone couldn't say; it's not knowable?
>
> Reid: I think with that, I don't think you could -- *I don't know that you could know that exactly. I just know that there's spermatozoa present in the vaginal area and it's in a level that we could get a DNA profile from*.
>
> [Defense counsel]: Okay. So you can't say anything more than that. Okay.

CP 245 (emphasis added). Reid explained later in the interview that "each sperm has 3 picograms of DNA in it so, you know, if you had just, like, 100 sperm you have enough to get something out of that." CP 247.

Notwithstanding Reid's lack of opinion expressed before trial, the prosecution asked her on direct-examination at trial whether she had an opinion regarding semen transfer:

> Q. Were you aware of whether or not spermatozoa was visible on the vaginal swab that Mike Dornan examined?
>
> A. Yes, I was aware and there was.
>
> Q. And in what amount? And I don't mean precise numbers, but a small amount, a medium amount, a lot amount. What was the volume that was seen in her vaginal swab?
>
> A. Well, there was a good amount; there was a moderate amount.
>
> Q. And could that be consistent with ejaculation?
>
> A. Yes.
>
> Q. And based on that amount being on the vaginal swab, did you expect to see --

2RP 371-72. Defense counsel objected, "I don't think there's a basis for this opinion." 2RP 372. The prosecution responded, "I mean, she's examined many items like this and she's discussing --." 2RP 372. The court told the prosecution to restate the question:

> Q. Based on -- you indicated that you didn't go forward with any DNA testing -- based on what you saw in Mike Dornan's report of the amount of sperm in the vaginal swab, would you expect to see DNA from sperm on her underwear if she had put them back on?

2RP 372. Defense counsel reiterated the objection. 2RP 372. The trial court overruled, and Reid was allowed to respond:

> A. Yes. So my expectation when looking for seminal fluid on the underpants is that if [L.K.] had put them back on that I would hoped to have found some, you know, a little bit of something on those underpants that would've been detectable with the type of testing that we had.

2RP 372-73.

On cross-examination, Reid acknowledged she did not conduct any DNA testing of L.K.'s underwear. 2RP 532. She reiterated her direct-examination testimony about transfer:

> [B]ased on the level of seminal fluid that was on the vaginal and anal swabs, saying that within those levels of what was detected on those swabs that my expectation was that I could confidently determine if there was seminal fluid on those underpants with our detection level. So, given the levels that were on the vaginal and anal swabs, I know that I'm confident that my testing would detect that seminal fluid, if it was on those underpants, it would be transferred, there would be enough there to transfer.

2RP 533.

The prosecution elicited Reid's opinion again on redirect—that it was her expectation based "on the amount of seminal fluid that was found in [L.K.'s] body" that it would have transferred to L.K.'s underwear if she had put them back on again. 2RP 547. Reid explained, "So that's why I didn't recommend DNA." 2RP 547. Reid was the last witness to testify before both parties rested. 2RP 556, 569.

After deliberating for two full days, the jury found Taylor guilty as charged. CP 85, 215-16.

3. Defense Motion for a New Trial

The defense moved for a new trial under CrR 7.5, arguing Reid's testimony about semen transfer violated CrR 4.7(a)(2)(ii), which requires that the prosecution disclose expert opinions to the defense.[3] CP 90-91. Defense counsel argued the prosecution never disclosed that it would introduce Reid's "opinion regarding the likelihood of finding DNA given the amount of ejaculation, the human anatomy, and physics." CP 90. Had counsel known of Reid's opinion, they would have sought their own expert "to see if Ms. Reid's opinion was valid and adjust trial strategy, accordingly." CP 91; 2RP 745-49. Counsel further argued Reid's testimony amounted to an improper opinion on Taylor's guilt. CP 91-94. Counsel contended Reid's surprise

[3] There was not enough time to obtain a transcript of Reid's testimony, so defense counsel had to rely on memory and mistakenly thought he objected to Reid's opinion on redirect, rather than direct-examination. CP 87.

opinion "cut to the core issue at trial regarding whether there was forensic evidence for the conclusion that Ms. [L.K.] never stood up after her encounter with Mr. Taylor." CP 87.

At a hearing on the motion, the trial court played the audio of Reid's redirect and recross in open court. 2RP 720-40. Defense counsel acknowledged there was no objection to Reid's testimony on redirect regarding transfer to L.K.'s underwear. 2RP 742-43. Counsel indicated, "my memory may be mixed up," but "obviously the record will be the best way to see that, having the whole transcript." 2RP 744-45. Regardless, counsel stressed, he "absolutely should have objected" and there was no strategic reason for him not to object. 2RP 740, 744.

The trial court denied the motion for a new trial. 2RP 756. The court reasoned Reid's opinion on redirect "was clearly put in the context of rebuttal to an attack on the witness's credibility." 2RP 754. The court further ruled Reid did not offer an opinion that L.K. never put her underwear back on, but simply explained "why she didn't do something." 2RP 755. "That's not

the same thing. And it's well within the context of both of the interviews," the court reasoned. 2RP 755. The court therefore concluded Reid's testimony was neither a surprise nor an improper opinion. 2RP 756.

The court of appeals held the trial court did not abuse its discretion in denying Taylor's motion for a new trial, and affirmed Taylor's first degree murder conviction. Opinion, 8, 14.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **The prosecution's violation of its discovery obligation to disclose Reid's expert opinion warrants review under RAP 13.4(b)(3) and (4).**

Taylor argued on appeal that the prosecution violated its discovery obligations under CrR 4.7(a)(2)(ii), as well as a ruling in limine, by eliciting Reid's previously undisclosed opinion about semen transfer on direct-examination. Br. of Appellant, 32-37. The court of appeals disagreed, holding, "[i]n compliance with CrR 4.7(a)(2)(ii), the State disclosed Reid, the subject of her testimony, and made her available for pretrial interviews." Opinion, 9. The court reasoned "Reid's interview statements

indicate there was a level of spermatozoa sufficient for a DNA profile in the vaginal area, she was concerned about drainage and concerned to test the underwear for seminal fluid, finding none, and this eliminated need for further DNA testing." Opinion, 9.

CrR 4.7(a)(2)(ii) requires the prosecution to disclose "any expert witnesses whom the prosecuting attorney will call at the hearing or trial, *the subject of their testimony*, and any reports they have submitted to the prosecuting attorney." (Emphasis added.) By agreement, the trial court in Taylor's case also ordered the prosecution to give the defense "notice of any additional or changed opinions by State's experts which have not previously been disclosed to defense." CP 32; 1RP 54. The prosecution violates its discovery obligations by failing to disclose material changes in a witness's testimony. State v. Greiff, 141 Wn.2d 910, 919-20, 10 P.3d 390 (2000).

The purpose of CrR 4.7, Washington's reciprocal discovery rule, "is to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government." State v.

Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). "'The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.'" State v. Coe, 101 Wn.2d 772, 783, 684 P.2d 668 (1984) (quoting Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970)).

Contrary to the court of appeals' conclusion, the record demonstrates the prosecution violated its discovery obligations under CrR 4.7(a)(2)(ii), as well as the court's ruling in limine, by failing to disclose Reid's opinion that there was enough semen present in L.K.'s vagina to transfer if she put her underwear back on. While the defense knew that was the prosecution's theory, the defense did not know that theory would be supported by Reid's expert testimony. 2RP 745. Reid's DNA testing reports did not include any opinion about transfer. CP 88. Nor did she express any such opinion during pretrial interviews. CP 245. Rather, she indicated she could not speculate as to how much seminal fluid was present—"I don't think you could know that exactly." CP

245. All Reid could say was that there was enough sperm on the vaginal swab that a DNA profile could be developed. CP 245.

Yet, on direct-examination, Reid testified for the first time that there was enough *sperm* present to transfer: "based on what [she] saw in Mike Dornan's report of the amount of sperm in the vaginal swab," Reid's "expectation" was that she would have "found some" on L.K.'s underwear. 2RP 372-73. On cross-examination, her opinion morphed into a conclusion about "the level of *seminal fluid* that was on the vaginal and anal swabs." 2RP 532-33 (emphasis added). Reid was "confident" that "there would be enough there to transfer." 2RP 533. She reiterated that opinion on redirect, based "on the amount of seminal fluid that was found in her body." 2RP 547. Again, all Reid said pretrial was that there was enough sperm present to get a DNA profile—which takes only "like, 100 sperm." CP 245, 247. She never previously said whether there was enough sperm or seminal fluid present in L.K.'s body to transfer to her underwear. Just the opposite, Reid could not say how much ejaculate was present. CP 245.

Reid's opinion was never disclosed to the defense before trial or even during trial but before Reid's testimony. There is a material difference between a prosecution's theory and an expert's opinion on the matter. As the defense explained in their new trial motion, they would have consulted another expert had they known of Reid's opinion. CP 91; 2RP 745-49. As it was, however, the prosecution introduced an essentially unrebuttable expert opinion that carried an aura of scientific certainty. The prosecution's introduction of Reid's opinion violated both the letter and the spirit of CrR 4.7, as well as the trial court's ruling in limine.

The prosecution's discovery obligation under CrR 4.7 is an issue of substantial public interest, warranting review under RAP 13.4(b)(4). The constitutional implications of defense counsel's preparedness further warrants review under RAP 13.4(b)(3).

2. **Reid's speculative opinion, which lacked an adequate factual basis likewise warrants review under RAP 13.4(b)(4).**

Taylor argued Reid's new opinion was additionally problematic because it was speculative and lacked an adequate

factual basis, making it inadmissible under ER 702. Br. of Appellant, 37-44; see also 2RP 372 (defense counsel objecting on direct, "I don't think there's a basis for this opinion."). The court of appeals acknowledged "Reid did not testify about her direct knowledge on the transfer of bodily fluids." Opinion, 6. The court nevertheless concluded Reid's limited testimony about her training and experience, "coupled with the facts available to her, provided some foundation for the trial court to admit her testimony[.]" Opinion, 6. Because the trial court's ruling was "at least fairly debatable," the court of appeals reasoned, there was no abuse of discretion in admitting Reid's testimony. Opinion, 6-7.

To assist the trier of fact, an expert's opinion "must be based on fact and cannot simply be a conclusion or based on an assumption." Coogan v. Borg-Warner Morse Tec Inc., 197 Wn.2d 790, 801, 490 P.3d 200 (2021) (quoting Volk v. DeMeerleer, 187 Wn.2d 241, 277, 386 P.3d 254 (2016)). Conclusory or speculative expert opinions lacking an adequate foundation are therefore inadmissible. Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177,

817 P.2d 861 (1991). "[W]hen ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert." Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (quoting Davidson v. Mun. of Metro. Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986)).

The medical examiner, Dr. Harruff, observed a clear fluid inside L.K.'s vagina. 2RP 13. However, Dr. Harruff found no indication of sperm in that fluid and so he could not conclude that it was semen. 2RP 58-59, 66. He testified it could have been vaginal discharge or urine. 2RP 66-67.

Michael Dornan tested the vaginal swabs back in 2002 and got a positive result for acid phosphatase, an enzyme found at high levels in semen but also in other bodily fluids. 2RP 185, 190-91. Consequently, "it's not a confirmatory test for semen." 2RP 185. Dornan microscopically examined the vaginal and anal swabs, finding three to four sperm heads per view for the vaginal swabs, and zero to two per view for the anal swabs. 2RP 192, 218.

Dornan explained, in general, the upper limit of observable sperm would be "[t]oo many to count," i.e., hundreds. 2RP 217.

The only testimony Dornan gave about the *amount* of seminal fluid present was that the zero to two sperm heads visible on the anal swabs indicated a "low level" of semen. 2RP 192. He said nothing about the amount of seminal fluid present on the vaginal swabs or in L.K.'s vagina. Both Dr. Harruff and Dornan acknowledged men produce ejaculate and sperm at different levels based on their biology and anatomy. 2RP 58, 230-31, 233-34.

Reid did not retest the vaginal or anal swabs; she simply used updated DNA technology to confirm Dornan's conclusion that Taylor's DNA matched the male DNA profile on the swabs. 2RP 380-81; CP 246. Consistent with her lack of personal knowledge, Reid indicated in her pretrial defense interview that she could not say how much semen was present based on the amount of sperm Dornan observed. CP 245. Instead, all Reid could say was that there was enough *sperm* present to develop a

DNA profile, which says nothing about the amount of *ejaculate* present or whether transfer would have occurred. CP 245.

Yet, at trial, Reid unexpectedly opined that, based on the amount of seminal fluid present, she would expect to find some on L.K.'s underwear. 2RP 372-73. She went as far as to say, "based on the level of seminal fluid that was on the vaginal and anal swabs," she was "confident" that "it would be transferred, there would be enough there to transfer." 2RP 533; see also 2RP 547 (same). But, as discussed, there was no information as to the amount of seminal fluid present in L.K.'s vagina or on the vaginal swabs and only a "low level" present on the anal swabs. 2RP 192. And Reid herself previously indicated she could not say how much ejaculate was present. CP 245.

Reid's testimony at trial was therefore speculative and lacked an adequate factual basis. The court of appeals' holding to the contrary warrants review under RAP 13.4(b)(4), because interpretation and application of the evidence rules are questions of public significance.

3. Reid's testimony amounted to an improper opinion on Taylor's guilt, warranting review under RAP 13.4(b)(3).

Taylor also argued Reid's opinion was improper because it amounted to a comment on Taylor's guilt, thereby invading the "inviolate" role of the jury under our state constitution. Br. of Appellant, 44-47; CONST. art. I, § 21. The court of appeals acknowledged "the absence of transfer was circumstantial evidence that L.K. never got up again, a fact that inferentially suggested Taylor's guilt." Opinion, 12. The court of appeals nevertheless concluded Reid's testimony did not amount to an improper opinion on guilt because it did "not go directly to Taylor's guilt, but only to Reid's expectation for seminal fluid transfer, and the statements were couched in terms of the limits of Reid's testing." Opinion, 12.

No witness, lay or expert, "may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987). Speculative expert testimony that lacks an adequate factual basis

can invade the province of the jury. In State v. Quaale, 182 Wn.2d 191, 198, 340 P.3d 213 (2014), for instance, a state trooper testified there was "no doubt" the accused was driving impaired based solely on the horizontal gaze nystagmus (HGN) test. This testimony, couched in terms of scientific certainty, amounted to improper opinion testimony, where the HGN test "simply shows physical signs consistent with alcohol consumption" and cannot by itself "reveal specific levels of intoxication." Id. at 198-99.

As in Quaale, Reid lacked a factual basis to express her opinion that, based on the amount of semen supposedly on the vaginal swabs (for which there was no evidence), she was "confident" and "could confidently determine" there was enough seminal fluid present to transfer. 2RP 533. This is akin to the impermissible testimony in Quaale, where the trooper had "no doubt" the defendant was impaired based on the HGN test alone. Reid's testimony, in turn, amounted to an opinion that Taylor was guilty of murder, because if L.K. never stood up from intercourse again and Taylor admitted having intercourse with her, then he

must have been the one who killed her. This was the ultimate issue for the jury to decide. Reid's testimony was therefore improper for this additional reason. The court of appeals' decision to the contrary warrants review under RAP 13.4(b)(3).

4. **Defense counsel was ineffective to the extent he failed to object to Reid's undisclosed, improper opinion, likewise warranting review under RAP 13.4(b)(3).**

Lastly, Taylor argued, to the extent his counsel needed to renew the objection after Reid's direct-examination, or did not object at the right time or on the right basis, then defense counsel was constitutionally ineffective. Br. of Appellant, 50-53. Defense counsel repeatedly indicated at the hearing on the new trial motion that he "absolutely should have objected" and there was no strategic reason for his failure to do so. 2RP 740-44; State v. Vazquez, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (recognizing defendant must show absence of legitimate strategic choice for counsel's challenged conduct).

The court of appeals rejected Taylor's ineffective assistance of counsel claim because "Reid's testimony was not a new opinion that violated CrR 4.7, nor did it lack a foundational basis." Opinion, 13. Therefore, the court concluded, "Taylor cannot show that an objection to Reid's cross-examination or redirect testimony would have succeeded." Opinion, 13. Taylor maintains his above arguments regarding the discovery violation and lack of factual basis for Reid's opinion. See supra sections D.1. & D.2.

There is a reasonable probability that Reid's improper, surprise opinion materially affected the outcome of Taylor's trial. In closing argument, the prosecution noted Reid's "almost twenty years" of experience, emphasizing, "She can see it in a way that you and I cannot. This is her job." 2RP 602. The prosecution argued, "And her expectation, based on what was seen in the vaginal swab and the anal swab, was that that would come out onto the underwear." 2RP 602.

Meanwhile, Taylor maintained that he did not harm L.K. Ex. 85, at 33. This aligned with the unknown male DNA found

under L.K.'s left fingernails. 2RP 451-53. L.K. had curvilinear marks on her neck consistent with fingernails, suggesting she might have tried to pry her assailant's hands from her neck. 2RP 32. Multiple prosecutorial witnesses agreed L.K.'s fingernails could have trace DNA evidence from her attacker. 1RP 892, 957-58; 2RP 32, 37-40. Detective Howell even acknowledged DNA under L.K.'s fingernails could "paint the picture" of what happened. Ex. 93; 2RP 336.

Because ineffective assistance of counsel is an issue of constitutional significance, review is additionally warranted under RAP 13.4(b)(3).

E. CONCLUSION

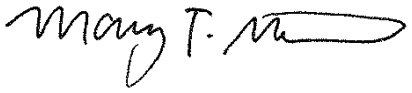
For the reasons discussed, this Court should grant review and reverse the court of appeals.

DATED this 13th day of March, 2025.

I certify this document contains 4,971 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MELVIN LEWIS TAYLOR, JR, Appellant.	No. 85008-3-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Melvin Taylor, Jr. was convicted of murder in the first degree under RCW 9A.32.030(1)(c). On appeal, he argues that the State improperly presented new expert opinion at trial, and on this basis he asserts (1) the trial court erred in overruling his objection to the State's DNA expert's testimony on direct examination, (2) the trial court erroneously denied his CrR 7.5 motion for a new trial based on the State's alleged discovery violation, (3) the DNA expert's testimony amounted to an improper opinion on Taylor's guilt, (4) defense counsel was ineffective in failing to renew his objection to the DNA expert's opinion, and (5) as stated in Taylor's statement of additional grounds, the State failed to disclose exculpatory evidence. Finding no error, we affirm Taylor's conviction.

I

We limit our discussion of the trial evidence to that necessary to Taylor's contention that the State presented a new expert opinion at trial. L.K.'s body was found behind a grocery store off Pacific Highway in Federal Way. Her pants were

unfastened and unzipped, and completely off her right leg. Two used condoms were collected at the scene. A medical examiner collected vaginal and anal swabs and testified that L.K.'s cause of death was asphyxia due to strangulation, classifying the manner of death as homicide.

Michael Dornan, a DNA analyst at the Washington State Patrol Crime Laboratory, examined the two condoms and the vaginal and anal swabs. Dornan labeled the condoms condom "A" and condom "B" and swabbed the condoms to test for semen. Condom A was positive for the presence of P30—an enzyme found in semen—and the anal and vaginal swabs produced positive results for semen. Dornan testified the male profile developed from the condom and the two swabs was a "single source male profile," which Dornan identified as individual "A."

Taylor's DNA profile matched the male profile identified as individual A developed in L.K.'s case. A detective submitted additional items for testing at the crime lab, including L.K.'s underwear. Jennifer Reid, a forensic scientist with the Washington State Patrol Crime Laboratory, reviewed Dornan's work and performed further analysis of the evidence. Reid conducted multiple presumptive tests on L.K.'s underwear to look for seminal fluid, and did not detect any.

The State charged Taylor with first degree murder under RCW 9A.32.030(1)(c) predicated on rape in the first or second degree. The State's theory was that the absence of any seminal fluid from L.K.'s underwear was circumstantial evidence that L.K. never stood up again after Taylor's ejaculate entered her body. At trial, the State asked Reid about her expectation about transfer of seminal fluid to the underwear if L.K. had put them back on, and Reid

testified she would have expected in that case to find seminal fluid in her testing. Taylor contends this was a new opinion. The jury convicted Taylor of murder in the first degree. Taylor appeals.

II

During direct examination, Reid testified she did not look for DNA on the underwear because "the request was to see if potentially [L.K.] had put the underpants back on and if any transfer of seminal fluid had happened. And so I was looking for seminal fluid." The following testimony occurred:

> Q. Were you aware of whether or not spermatozoa was visible on the vaginal swab that [Dornan] examined?
>
> A. Yes, I was aware and there was.
>
> Q. And in what amount? And I don't mean precise numbers, but a small amount, a medium amount, a lot amount. What was the volume that was seen in her vaginal swab?
>
> A. Well, there was a good amount; there was a moderate amount.
>
> Q. And could that be consistent with ejaculation?
>
> A. Yes.
>
> Q. And based on that amount being on the vaginal swab, did you expect to see—
>
> [DEFENSE COUNSEL]: I'm going to object to this. I don't think there's a basis for this opinion.
>
> . . . .
>
> THE COURT: Restate the question for me, please.
>
> . . . .
>
> Q. Based on—you indicated that you didn't go forward with any DNA testing—based on what you saw in [Dornan's] report of the amount

> of sperm in the vaginal swab, would you expect to see DNA from sperm on her underwear if she had put them back on?
>
> [DEFENSE COUNSEL]: And I'm objecting.
>
> THE COURT: Overruled.
>
> . . . .
>
> A. Yes. So my expectation when looking for seminal fluid on the underpants is that if [L.K.] had put them back on that I would have hoped to have found some, you know, a little bit of something on those underpants that would've been detectable with that type of testing that we had.

On redirect, Reid testified she was confident she had performed every test to determine there was no seminal fluid in L.K.'s underwear. When asked, "Given what you saw or what you observed in [L.K.'s] vaginal swab and her anal swab, what was your expectation with respect to transfer to that underwear if she had put it back on?" Reid replied,

> Yes. Well, that was my expectation. That was my recommendation. Based on the amount of seminal fluid that was found on her body, the expectation would be that all of my tests, I would have gotten some sort of answer from all those tests. So that's why I didn't recommend DNA.

Taylor did not object.

Following trial, Taylor moved for a new trial pursuant to CrR 7.5 "because the state elicited an improper opinion, which had not been previously disclosed to defense *on redirect*." (Emphasis added.) Taylor contended he was aware that the State would argue its theory that if L.K. had put her underwear back on, seminal fluid would have been found in her underwear, however, he was not prepared to challenge that expert opinion because "it never appeared in any document before." The State argued the testimony was not a complete surprise because prior

defense interviews "talked about sort of this drainage issue and discharge issue," and Reid's testimony "just provided context." The trial court held Reid's testimony was not an improper opinion and could not conclude "that the testimony would have been prejudicial in the context of being testimony that then could be, that the testimony itself essentially misled the jury in any way, nor can I say that this issue was in any way a surprise."

A

Taylor argues Reid's opinion was inadmissible under ER 702 because it was speculative and lacked an adequate factual basis. We disagree.

To be admissible under ER 702, expert testimony must be, among other requirements, "helpful to the trier of fact." State v. Lewis, 141 Wn. App. 367, 389, 166 P.3d 786 (2007). Expert testimony is helpful if "it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury." State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004). The expert's testimony must be relevant, meaning it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401, 402. Speculative testimony, even if from an expert, is irrelevant. Lewis, 141 Wn. App. at 389. Determining the admissibility of expert evidence is largely within a trial court's discretion, and its decision will not be disturbed except for an abuse of such discretion. In re Marriage of Katare, 175 Wn.2d 23, 38, 283 P.3d 546 (2012). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." State v. Griffin, 30 Wn. App.

2d 164, 170, 544 P.3d 524, review denied, 3 Wn.3d 1015, 554 P.3d 22 (2024). If the basis for admission of the evidence is " 'fairly debatable,' " we will not disturb the trial court's ruling. Grp. Health Coop. of Puget Sound, Inc. v. Dep't of Revenue, 106 Wn.2d 391, 398, 722 P.2d 787 (1986) (internal quotation marks omitted) (quoting Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)).

Taylor objected to Reid's direct examination testimony, arguing Reid lacked "a basis for this opinion." Reid testified she had 20 years of experience working in the crime lab as a DNA analyst. In her first year, Reid was "learning how to identify the different biological fluids we'd be dealing with, getting that DNA out of those different biological fluids, and what that process was." Reid testified she was familiar with Dornan's testing of the vaginal swab, and there was a "moderate amount" of spermatozoa on the swab, which could be consistent with ejaculation. Reid's experience, coupled with the facts available to her, provided some foundation for the trial court to admit her testimony that if L.K. had put the underwear back on seminal fluid would have been "detectible with that type of testing that we had." Though Reid did not testify about her direct knowledge on the transfer of bodily fluids, Taylor "ably raised these foundational challenges for the jury's consideration during . . . cross-examination." Johnston-Forbes v. Matsunaga, 177 Wn. App. 402, 412, 311 P.3d 1260 (2013), aff'd 181 Wn.2d 346, 333 P.3d 388 (2014). Taylor's challenge " 'goes to the testimony's weight, not its admissibility.' " Johnston-Forbes, 181 Wn.2d at 357 (quoting Katare, 175 Wn.2d at 39). Because the trial court's decision to overrule Taylor's objection was at least

fairly debatable, we cannot say the trial court abused its discretion in determining this testimony had a sufficient foundational basis.

B

Taylor argues the trial court erred in denying his motion for a new trial because the State violated its discovery obligations under CrR 4.7 by eliciting Reid's "previously undisclosed opinion" about semen transfer. We disagree.

A trial court has wide discretion in ruling on discovery violations and motions for a new trial. State v. Linden, 89 Wn. App. 184, 189-90, 947 P.2d 1284 (1997). These decisions will not be disturbed on appeal unless the court abused its discretion. Id. at 190. CrR 4.7(a)(2)(ii) requires a prosecutor to disclose to the defendant "any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney." The purpose of this rule is to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government. State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996).

In State v. Greiff, 141 Wn.2d 910, 916, 10 P.3d 390 (2000), a law enforcement officer testified at the defendant's first trial that when he asked the victim if they had been sexually assaulted, they told him they had not. The court declared a mistrial after the jury could not reach a unanimous verdict. Id. In the second trial, defense counsel, relying on the officer's earlier testimony, stated in their opening that the police officer would testify he asked the victim if they had been assaulted, and they told him they had not. Id. However, when the officer took the stand in the second trial, he testified that he never asked the victim if they

had been sexually assaulted. Id. at 917. The court concluded the State violated its discovery obligation under CrR 4.7(a)(1)(i) because "the record shows that the deputy prosecuting attorney assigned to this case knew as early as the day before the second trial" that the officer's testimony would differ, and the information was discoverable. Id. at 919-20.

In response to the motion for a new trial, the State submitted excerpts of Reid's two pretrial interviews. Analogizing to Greiff, Taylor focuses on defense counsel's question at one of the interviews about the amount of ejaculate: "[A]re you able to say this is, like, a full ejaculation, or this could be a stray sperm from, you know, post-ejaculation or penetration or the condom's used improperly, or what have you; or are you able to say it's a full ejaculation?" Reid answered, "I can't remember what the quantities were for some of that. I mean, I think he had a good quantity of DNA. But whether I could say for certain that it's a full ejaculation versus a partial, I don't think I could say that." She added, "I don't know that you could know that exactly." Taylor characterizes this as a pretrial statement that Reid could say nothing about the amount of ejaculate, and argues that, like the officer in Greiff, she reversed her testimony when she opined she would have expected transfer. But Reid's interview statement denied only the ability to say whether there had been "full" or "partial" ejaculation, a question appearing to relate to absolute quantity, and Reid reiterated her opinion that there was qualitatively "a good quantity of DNA." Reid did not reverse a statement she had previously made as the officer did in Greiff.

During the pretrial interviews, Reid stated she was looking for seminal fluid on the underwear and did not conduct DNA testing on the underwear as she would not have been able to put any relevance to the DNA profile "because we don't know what type of the DNA is even originating from it." Reid stated there was a possibility of vaginal discharge if a person was horizontal but "it would be at a much lesser amount," and if a person was "getting up, moving around, then you're already draining seminal fluid out of yourself" because "gravity is working on you." Reid's interview statements indicate there was a level of spermatozoa sufficient for a DNA profile in the vaginal area, she was concerned about drainage and concerned to test the underwear for seminal fluid, finding none, and this eliminated need for further DNA testing. In compliance with CrR 4.7(a)(2)(ii), the State disclosed Reid, the subject of her testimony, and made her available for pretrial interviews. The trial court did not abuse its discretion in determining the State did not violate its discovery obligation and denying Taylor's motion for a new trial.

C

Taylor argues Reid's testimony was constitutionally improper because it amounted to a comment on Taylor's guilt. We disagree.

In a criminal trial, "[o]pinions on guilt are improper whether made directly or by inference." State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." Id. The trial court has wide discretion to determine the admissibility of evidence, and

the trial court's decision whether to admit or exclude evidence will not be reversed on appeal unless the appellant can establish that the trial court abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

An opinion is not improper merely because it involves an ultimate factual issue. City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). ER 704 states, "Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." But the opinion must be "otherwise admissible." Heatley, 70 Wn. App. at 579. Therefore, where opinion testimony on an ultimate issue lacks proper foundation, is not helpful to the trier of fact, is confusing or misleading, or its probative value is substantially outweighed by the danger of unfair prejudice, the testimony may constitute an impermissible opinion on guilt. Id.

Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an ultimate issue will depend on the "specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." Id. In Quaale, an answer by a state trooper in a DUI case that " 'Absolutely. There was no doubt [the defendant] was impaired' " was an improper opinion on guilt because it "went to the core issue and the only disputed element." 182 Wn.2d at 200. Similarly, in State v. Montgomery, a police officer testified, " 'I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different

checkout lanes." 163 Wn.2d 577, 587-88, 183 P.3d 267 (2008). This, among other statements, was an improper opinion on guilt because it "went to the core issue and the only disputed element." Id. at 594.

"Improper opinions on guilt usually involve an assertion pertaining directly to the defendant." Heatley, 70 Wn. App. at 577. In contrast, "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." Id. at 578. We have "expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt." Id. at 579. In Demery, the court concluded statements by police officers in a recorded interrogation of the defendant suggesting the defendant was lying did not amount to opinion testimony concerning truthfulness. 144 Wn.2d at 764-65. In Heatley, testimony by a police officer that a driving while under the influence of intoxicating liquor defendant was " 'obviously intoxicated' " and " 'could not drive a motor vehicle in a safe manner' " were not improper opinions on guilt because they were not "direct" statements on the defendant's guilt and were based on the officer's experience and observations of the defendant's appearance and performance on field sobriety tests. 70 Wn. App. at 577, 579. The officer's statements based on observation were "similar to but not identical to" the controlling legal standards in the jury instructions, and amounted to an opinion on "the degree of intoxication" the defendant exhibited. Id. at 581-82. This was distinguished from an opinion on guilt. Id. at 582.

The statement Taylor describes as an improper opinion on guilt came in the context of the State asking why Reid did not conduct DNA testing on L.K.'s underwear. Reid testified, "So my expectation when looking for seminal fluid on the underpants is that if [L.K.] had put them back on that I would hoped to have found . . . a little bit of something on those underpants that would've been detectable with the type of testing that we had." Reid's statements do not go directly to Taylor's guilt, but only to Reid's expectation for seminal fluid transfer, and the statements were couched in terms of the limits of Reid's testing. The State's closing acknowledged that the absence of transfer was circumstantial evidence that L.K. never got up again, a fact that inferentially suggested Taylor's guilt. Reid's statements did not amount to an improper opinion on guilt.[1]

D

Taylor argues defense counsel was ineffective in failing to renew his objection to Reid's "undisclosed, improper opinion." We disagree.

To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate that (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different but for the challenged conduct. Strickland v. Washington, 466 U.S. 668, 687, 104

[1] Taylor argues the trial court erred in ruling that defense counsel "made Reid's opinion relevant and admissible," contending the trial court's ruling was "essentially one of curative admissibility." Because we hold the trial court did not abuse its discretion in overruling Taylor's objection, or denying Taylor's motion for a new trial, we need not reach this issue.

S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either prong has not been met, we need not address the other. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

"When a defendant bases his ineffective assistance of counsel claim on trial counsel's failure to object, the defendant must show that the objection would likely have succeeded." State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019). Reid's testimony was not a new opinion that violated CrR 4.7, nor did it lack a foundational basis. Taylor cannot show that an objection to Reid's cross-examination or redirect testimony would have succeeded. Therefore, Taylor cannot show deficient performance and his claim for ineffective assistance of counsel fails.

III

In his statement of additional grounds, Taylor argues the State knowingly used perjured testimony where "Reid [gave] testimony to a DNA test, which on cross-examination Reid acknowledged she did not conduct any DNA testing of L.K.'s underwear," and argues defense counsel was ineffective by failing to have an ongoing objection during Reid's testimony. Because these issues are addressed above, we do not separately consider Taylor's similar pro se argument. State v. Johnson, 100 Wn. App. 126, 132, 996 P.2d 629 (2000).

Taylor further provides multiple case citations regarding the State's duty to disclose exculpatory material and what a defendant must demonstrate to establish a violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). However, Taylor provides no argument or factual basis that the State failed

to disclose exculpatory evidence in this case. This claim fails to inform the court of the "nature and occurrence of [the] alleged errors." RAP 10.10(c). Therefore, we decline to address this claim.

Affirmed.

Birk, J.

WE CONCUR:

Díaz, J.

Smith, C.J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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