IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL RAY MAPLES, Appellant.	No. 38096-0-II UNPUBLISHED OPINION

Penoyar, J. — Daniel Maples appeals his second degree murder conviction. Maples argues that the trial court erred by failing (1) to hold a *Frye*[1] hearing prior to admitting expert testimony that hairs found at the crime scene appeared "stretched" and were "forcibly removed" and (2) to instruct the jury on the lesser included offenses of first and second degree manslaughter. In a statement of additional grounds (SAG),[2] Maples contends that the trial court erred by denying (1) his motions to dismiss for (a) preaccusatorial delay, (b) insufficient evidence, and (c) prosecutorial misconduct during closing argument, and (2) his motion to exclude the medical examiner's testimony that the victim died as a result of "homicidal violence." Finally, the State concedes that Maples's 1977 robbery conviction washed out and should not have been included in his offender score. We affirm Maples's conviction but decline to accept the State's concession that Maples's 1977 robbery conviction washed out. We remand for a hearing to determine whether Maples spent ten consecutive years in the community after his 1977 robbery conviction without being convicted of any felonies.

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[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[2] Rule of Appellate Procedure (RAP) 10.10.

FACTS

I. Christine Blais's Disappearance

On Saturday, October 8, 1988, Christine Blais agreed to give Maples a ride home after the two finished working a late-night shift at AK-WA shipyards in Tacoma. Around 4:00 a.m., Kristian Wales, an AK-WA coworker, observed Blais and Maples together in the AK-WA parking lot where Blais had parked her car. Wales had a brief conversation with Maples in the parking lot. A short while later, Wales noticed Blais's car leaving the area. Wales unloaded supplies from his vehicle and drove home.

About 20 to 30 minutes after Wales arrived home, Maples called him and asked for a ride home. Wales met Maples at a phone booth near AK-WA shipyards. Maples told Wales that Blais had experienced car trouble and that someone had already picked her up. Wales observed Maples's hands shaking. Maples directed Wales to drive to a nearby wooded area where Wales saw Blais's car parked on the shoulder near a "small building." 46 Report of Proceedings (RP) at 3335. Maples gave Blais's keys to Wales, who started Blais's car without any trouble. Wales noticed "some beer containers" on the floor in front of the passenger seat. 46 RP at 3337. The men proceeded to Maples's home, with Wales driving Blais's car and Maples driving Wales's car. Maples put Blais's car in his garage.[3]

According to Maples's ex-wife, Linda,[4] Maples arrived home at about 6:00 a.m., which was unusually late. Linda noticed knuckle abrasions on Maples's right hand, a "purple, black,

[3] Wales did not tell police about Maples's phone call and the ensuing events until October 2007 despite several prior interviews with police.

[4] We occasionally use witnesses' first names for clarity. We intend no disrespect.

reddish" bruise on his neck, and blood stains covering the thigh areas of his work jeans. 50 RP at 3870. Several days later, Linda noticed that Maples no longer wore his wristwatch, as was his daily custom, and no longer carried a "[f]olding buck knife" that he normally carried in his pocket "[a]ll the time."[5] 50 RP at 3873.

On October 9, Blais's 8-year old daughter called Blais's brother, Samuel Blais, and told him that Blais was missing. Samuel noticed that Blais's car was not parked at her apartment complex and that Blais's work clothes and steel-toed boots were not in her apartment. Sam filed a missing persons report with the police.

An AK-WA employee told Samuel to visit Maples. A few days after Blais's disappearance, Samuel went to Maples's home. Maples told Samuel that Blais dropped him off by the Puyallup River Bridge and then drove north toward Fife. Samuel noticed a large yellowish bruise on Maples's neck. Several AK-WA coworkers also asked Maples about the events of October 8, and Maples gave descriptions of the precise location where Blais dropped him off that night.

II. Police Investigation

On October 14, Maples told police that Blais offered him a ride home after he helped her load empty wire spools into her car. Before they left, Maples opened a bottle of beer from Blais's car and had "a couple swallows" before Blais told him to throw away the open container. 52 RP at 4153. Maples told police that Blais experienced no car trouble. Maples told police that he got out of Blais's car at the intersection of Portland Avenue and Puyallup Avenue and that Blais

[5] Linda did not provide most of this information to police until around the time that she and Maples separated in 1993. She informed police, however, that Maples's watch was missing during a January 1989 interview.

continued north toward Fife. Maples walked the remaining four miles home. After arriving home, Maples worked on his motorcycles in the garage. Maples told police that he received the bruise on his neck after he collided with a beam at work.

On October 27, a water service mechanic for the Tacoma Water Department discovered Blais's car in a hotel parking lot in Tacoma. Bloodhounds followed a scent from Blais's car to a nearby dumpster, which was empty. The water service mechanic later recalled seeing Blais's car parked near a water pump station on McMurray Road in northeast Tacoma the day before.

On January 7, 1989, the owner of a house at 302 McMurray Road Northeast in Tacoma discovered Blais's skull in a heavily wooded area near his house, which was not far from the water pump station. Maples and Linda had rented the house at 302 McMurray Road Northeast in 1986 and 1987. Police searched the area extensively and recovered several of Blais's bones scattered throughout the woods.

About 10 feet from the skull, police also discovered a wristwatch with a torn leather band. At trial, Linda testified that the watch looked "exactly like the Timex watch that [Maples] had." 50 RP at 3868. Linda also observed that the leather watchband looked like one that she had purchased specifically for Maples. Seven human head hairs were "intertwined" around Maples's watch and "stuck" in the leather wristband. 51 RP at 4045. Forensic analysts did not recover a usable DNA profile from the watch.[6]

Police discovered a large clump of human hair in the same vicinity as the skull and the

[6] A Federal Bureau of Investigation (FBI) photographic technologist compared the wristwatch to a watch that Maples wore in photographs that the police seized from Maples's home on January 10, 1989, and concluded, to a reasonable degree of scientific certainty, that "[t]here is no way that one can possibly eliminate the watch . . . as not being the watch seen in these film negatives and photographs." 48 RP at 3635.

watch. About 200 yards away, police found a 48-inch rope with a small clump of hair. Police also discovered a 28-inch length of rope, several fingernails, aggregates of human and animal hair, and other trace evidence. Mitochondrial DNA testing tied one of the recovered hairs to Blais.[7] Police never found any of Blais's clothing or her work boots.

Dr. John Howard, the county medical examiner, testified that Blais's body likely decomposed in the wooded area where her remains were found. Dr. Howard identified Blais's cause of death as "homicidal violence of an undetermined [etiology]." 45 RP at 3199. Dr. Howard noted that Blais's social and medical history revealed a healthy individual with a young daughter and a steady work history who suffered from no life-threatening illnesses. Blais's body was discovered away from her home and her car. Dr. Howard also noted that in cases of homicidal violence, victims are often discovered without clothing.

On January 13, 1989, police arrested Maples for Blais's murder. Maples told the arresting officers that he would tell them what happened as long as they did not arrest him. The State eventually released Maples.

Over sixteen years later, on April 1, 2005, the State charged Maples with one count of first degree murder. At the close of the State's case, in Maples's first trial, the trial court granted Maples's motion to dismiss the first degree murder charge because the State presented insufficient evidence of premeditation. The jury deadlocked on the second degree murder charge.

The State retried Maples on a second degree murder charge.

[7] Specifically, a forensic analyst testified that the mitochondrial DNA profile of Blais's daughter matched the mitochondrial DNA obtained from the hair sample. The analyst concluded that Blais's daughter "could not be eliminated as a potential maternal relative of the contributor of the hair sample." 48 RP at 3668.

III. Hair Comparison Analysis

At the second trial, two Washington State Patrol Crime Lab (WSPCL) forensic scientists, George Johnston and Charles Vaughan, testified about the hair comparison analyses that they performed on the hair police had recovered from the McMurray Road crime scene. On the morning of Johnston's scheduled testimony, Maples raised *Frye* and Evidence Rule (ER) 702 objections to Johnston's testimony. In response, the trial court stated:

> Well, certainly he can't come in and testify that they can match the hair. Nobody is arguing that . . . . And that seem[s] to be the testimony with the hair as I recall, we can't say it matches anybody, but we can say it is excluded . . . . And so I think for those reasons that it does have some value, and that goes to the weight.

51 RP at 3969-70.

Maples then observed that Vaughan, in the first trial, "testified about . . . stretched hair and trying to make that link to sexual assaults." 51 RP at 3970. Maples therefore asked the trial court to prohibit both experts from testifying "about stretched hair and what they have seen in rape cases." 51 RP at 3970. The State responded by noting that although the trial court ruled in the first trial that Vaughan could testify about his findings regarding stretched hair, he could not draw comparisons to rape cases. The trial court agreed with its previous ruling on this point. The trial court then told Maples, "Just by way of explanation, I sort of denied your motion as far as Johnston is concerned . . . [f]or the reasons that I said, so I'm going to leave it at that." 51 RP at 3970-71.

Johnston testified that he performed hair comparison analysis in early 1989 on several hairs taken from the crime scene.[8] Specifically, Johnston compared (1) the two clumps of human

[8] Police also removed a number of hairs from Blais's vehicle, but Johnston did not analyze these.

hair found 200 yards apart; (2) the seven head hairs wrapped around Maples's watch and stuck in the broken leather band; and (3) the two aggregates of human and animal hair.

Johnston used a comparison microscope, which allows scientists to examine a slide of several hairs from one source alongside a slide of several hairs from another source through a single eyepiece. A comparison microscope magnifies the hairs to 250-500 times their normal size. Scientists use comparison microscopes to determine whether the hairs from different sources share similar characteristics.[9] Hair comparison analysis does not permit scientists to state with certainty that an unidentified hair comes from a particular individual. As Johnston explained at trial,

> The strongest conclusion that you can make when you make a hair comparison is that the hairs demonstrate similar, you know, consistent microscopic characteristics and could be from [the same] person . . . . So you cannot say definitely that this hair came from this person, only that it exhibits microscopic characteristics similar to the known sample.

51 RP at 4037-38. WSPCL no longer performs hair comparison analysis because it is far less discriminating than DNA analysis in its ability to identify individuals.

Johnston concluded that the two clumps of human head hair, the seven head hairs from the watch and the human head hair contained in the aggregates were microscopically similar and could have come from the same person. Some hairs from the two clumps were cut or broken. The hairs from Maples's watch were not decomposing, and at least one of these hairs had an intact root. This suggested to Johnston that the hairs on Maples's watch were "closer to being forcibly removed or something." 51 RP at 4046.

[9] For human hair, scientists attempt to determine the part of the body where the hair originated, the length and color of the hair, the race of the individual, whether the individual has straight or curly hair, whether the hair has been chemically treated, and the appearance of the root.

In 2005, Vaughan performed a hair comparison analysis on some of the crime scene hairs. Vaughan testified that the hairs on Maples's watch were microscopically similar to each other and to a large clump of hair at the crime scene. Vaughan testified that two to three of the seven hairs from Maples's watch "appeared to be stretched." 53 RP at 4439. Under the microscope, those hairs had stretched beyond their "spring-back stage" and had therefore acquired "kind of a rumpled look." 53 RP at 4440. On cross-examination, Vaughan agreed with defense counsel's statement that WSPCL no longer performed hair comparison analysis because "scientifically it [is] too tenuous." 53 RP at 4441.

IV. Instruction Conference

The trial court denied Maples's request for jury instructions on first and second degree manslaughter. The State submitted a to-convict instruction that contained accomplice language. The State asserted that Maples could have been an accomplice to second degree murder, noting that Wales (1) was present when Maples and Blais left the AK-WA shipyard, (2) carried a knife, and (3) helped Maples to move Blais's car after the murder. Maples objected, and the trial court ruled that insufficient evidence supported an accomplice theory of liability.

V. Closing Arguments

The State referred to Johnston and Vaughan's hair comparison analysis testimony in its closing and rebuttal arguments in order to argue that Maples intended to kill Blais:

> [Blais's] hair is tangled up in the watch . . . . There was evidence of the hairs themselves being stretched, the use of force against those hairs, testimony by the experts in this case.
>
> . . . .
>
> The defendant's watch left behind at 302 McMurray Road. Her hair tangled up in it. Her hair pulled and stretched and pulled out by force.
>
> . . . .
>
> Further evidence that a struggle occurred was the stretched and pulled hairs that

> you saw that were entangled in the watch . . . . What you heard Charles Vaughan and George Johnston testify to is that some of those hairs had been pulled by the roots, some of them had been stretched. Again, evidence of a violent struggle. That is very important.

58 RP at 4780, 4815-16, 4871. The State also argued that circumstantial evidence of a struggle between Blais and Maples, Blais's lack of clothing, and Maples's intentional acts before the murder—such as getting into Blais's car and directing her to McMurray Road—supported a finding of intent.

Additionally, the State argued that the to-convict instruction did not require it to prove that Maples acted alone in causing Blais's death:

> [STATE]: There are some things that are not part of our burden of proof that are equally important.
>
> . . . .
>
> What about whether the defendant did it alone or with somebody else? You see in Instruction No. 11[10] that the defendant must have done it, but you don't see any limitations as to whether it --
>
> [DEFENSE]: Objection, Your Honor; this misstates their burden of proof in this case.
>
> [STATE]: I am talking about what is in the Court's instructions.
>
> [DEFENSE]: Your Honor, he's arguing that it doesn't limit it to the defendant, that he could have done this with another person, and that is a misstatement of the law.
>
> . . . .
>
> THE COURT: Well, Members of the Jury, you have heard the evidence. I have instructed you on the law. You're to apply the facts as you determine them to be to the law as I give it to you and you understand it to be. I remind you now, and I will probably remind you again, that included in my instructions, their arguments and statements, it is up to you to decide whether they are consistent with the facts and the law as I give it to you.

[10] The first two elements of Instruction 11 read: "(1) That on or about 8th day of October, 1988, the defendant caused the death of Christine Blais; (2) That the defendant acted with intent to cause the death of Christine Blais." Clerk's Papers (CP) at 293.

58 RP at 4761, 4763-64. The State continued to emphasize, over Maples's repeated objection, that the to-convict instruction did not require the State to prove that "the defendant and the defendant alone caused the death." 58 RP at 4764. Maples moved for a mistrial and moved to dismiss for prosecutorial misconduct based on the State's "attempt[] to argue the accomplice liability theory that this Court precluded." 58 RP at 4818. The trial court denied the motions.

The jury found Maples guilty of second degree murder. At sentencing, Maples contested the inclusion of a 1977 robbery conviction in his offender score. The trial court included this conviction in Maples's offender score and sentenced him to 342 months in prison, the high end of the standard range. Maples now appeals his conviction and sentence.

ANALYSIS

I. *Frye* Hearing

Maples argues that the trial court should have held a *Frye* hearing before permitting (1) Johnston's testimony that the hairs on Maples's watch had been "forcibly removed or something," and (2) Vaughan's testimony that two to three hairs on Maples's watch "appeared to be stretched." 51 RP at 4046, 53 RP at 4439. Maples asks us to remand for a *Frye* hearing or, alternatively, to reverse his conviction. We conclude that Maples did not preserve the *Frye* issue with regard to Vaughan's testimony and that admission of Johnston's testimony was, at most, harmless error.

A. Standard of Review

We review a trial court's ruling after holding a *Frye* hearing de novo. *State v. Gregory*, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006). In *Gregory*, our Supreme Court noted that "[i]t is

not clear what standard of review should be applied to a trial court's decision not to conduct a *Frye* hearing at all." 158 Wn.2d at 830. Here, because Maples challenges the scientific basis of the experts' testimony, de novo review is appropriate. *See Gregory,* 158 Wn.2d at 830 (applying de novo standard of review where the trial court declined to hold a *Frye* hearing after the trial court specifically found that the challenged scientific evidence was generally accepted.)

B. Analysis

Washington has adopted the *Frye* test for evaluating the admissibility of new scientific evidence. *Gregory*, 158 Wn.2d at 829. Both the scientific theory underlying the evidence and the technique or methodology used to implement the theory must be generally accepted in the scientific community for evidence to be admissible under *Frye.* *Gregory*, 158 Wn.2d at 829. The identification and comparison of hairs using comparison microscopes is generally accepted by the scientific community and "admitted regularly in courts all over the country." *State v. Lord*, 117 Wn.2d 829, 850, 822 P.2d 177 (1991). The trial court need not engage in a *Frye* analysis if the proffered evidence does not involve new methods of proof or new scientific principles from which conclusions are drawn. *State v. Russell,* 125 Wn.2d 24, 69, 882 P.2d 747 (1994).

Improper admission of new scientific evidence is a non-constitutional error subject to harmless error analysis. *See State v. Leuluaialii*, 118 Wn. App. 780, 796, 77 P.3d 1192 (2003) (applying harmless error standard to improper admission of canine DNA evidence). The appellant must demonstrate "within reasonable probabilities" that but for the alleged error the trial's outcome would have differed. *State v. Sipin*, 130 Wn. App. 403, 421, 123 P.3d 862 (2005) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

1. Vaughan's Testimony

Maples did not request a *Frye* hearing prior to Vaughan's testimony that two to three hairs on Maples's watch had a "rumpled look" and "appeared to be stretched." 53 RP at 4439-40. Rather, Maples asked the trial court to prohibit both experts from testifying "about stretched hair and what they have seen in rape cases." 51 RP at 3970. The trial court granted Maples's motion, and Vaughan made no improper comparisons with rape cases during his testimony. Therefore, we decline to address Maples's untimely *Frye* challenge to Vaughan's testimony for the first time on appeal. *See* RAP 2.5(a).

2. Johnston's Testimony

Johnston observed that human head hairs intertwined around Maples's watch and stuck in the band were not decomposing and that at least one of these hairs had an intact root. The trial court properly admitted this testimony because, under *Lord*, the empirical observations of a qualified expert who performs hair analysis using a comparison microscope are admissible under *Frye*. *See Lord*, 117 Wn.2d at 850. As Johnston explained, hair comparison analysts must carefully compare the unique characteristics of individual hairs—including color, length, and root appearance—to determine whether hairs are microscopically similar.

Johnston's tentative conclusion about the hairs' forced removal, however, is not an empirical observation.[11] Although the trial court arguably should have held a *Frye* hearing to

[11] Maples cites a Delaware case for the proposition that "some dispute [exists] among scientists as to the validity" of expert conclusions that hairs have been stretched or forcibly removed. Appellant's Br. at 11 (citing *Fensterer v. State*, 493 A.2d 959 (Del. 1985), *rev'd on other grounds*, 474 U.S. 15, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)). In that case, an FBI agent testified about three separate theories that generally supported a determination that hair had been forcibly removed: (1) presence of a follicular tag, (2) presence of an elongated and misshaped root, and (3) presence of a sheath of skin surrounding the root area. *Fensterer*, 493 A.2d at 963. The FBI agent, however, could not recall which of the three theories he had employed to determine that a hair found on the murder weapon (a cat leash) had been forcibly removed.

more carefully evaluate Johnston's hypothesis about the relationship between intact roots, decomposition, and the forced removal of hairs, admitting Johnston's comment at worst was harmless error that did not prejudice Maples at trial.

Johnston's testimony established that the hairs were not merely lying close to, or on top of, the watch but, rather, were "intertwined" and "adhering to the watch" in addition to being "stuck" in the watchband. 51 RP at 4045. This observation strongly suggests that the watch pulled the hairs from the victim's head. Further corroborating evidence was of little import, especially considering Vaughan's testimony that some of the hairs were stretched.

Additionally, the testimony about the hairs' forced removal was not the only evidence supporting an inference that Maples intentionally killed Blais. A short time after Wales saw Blais drive away from the shipyard with Maples, Maples called Wales to help him pick up Blais's car at the murder scene. According to his wife, Maples arrived home that night with blood on his jeans and a large bruise on his neck. He was missing his knife and wristwatch. Police recovered what appeared to be Maples's wristwatch at the murder scene. Analysts determined that hairs at the crime scene—including those entwined in the watch and attached to a rope—could have come from Blais. Maples gave differing accounts of what happened that night, but he did not reveal to anyone except Wales that he picked up Blais's car from the murder scene. In light of this additional evidence, Maples cannot demonstrate within reasonable probability that the trial outcome would have differed had the trial court not admitted Johnston's testimony that the hairs were forcibly removed. Thus, any error in admitting this testimony was harmless.

Fensterer, 493 A.2d at 962-63. Because the court resolved the matter in the defendant's favor on Confrontation Clause grounds, it did not determine whether the agent's testimony was admissible under *Frye*. *Fensterer*, 493 A.2d at 962 n. 3.

II. Manslaughter Instructions

Maples contends that he was entitled to first and second degree manslaughter instructions because the evidence at trial raised an inference of recklessness or criminal negligence,[12] rather than intent. To support his argument, Maples cites evidence of intoxication,[13] his inconsistent statements about the events of October 8, and evidence of his alleged struggle with Blais. These arguments fail.

A. Standard of Review

Alleged errors of law in a trial court's instructions are legal questions that we review de novo. *State v. Porter*, 150 Wn.2d 732, 735, 82 P.3d 234 (2004). A defendant is entitled to an instruction on a lesser included offense if two conditions are met. *State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 382 (1978); RCW 10.61.006.[14] First, under the legal prong, each of the elements of the lesser offense must be a necessary element of the charged offense. *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006). Second, under the factual prong, the evidence in the case must support an inference that only the lesser crime was committed. *State v. Fernandez-Medina,* 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). We must consider all of the evidence presented at trial in the light most favorable to the party that requested the instruction. *Fernandez-Medina,* 141 Wn.2d at 455-56.

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[12] A person is guilty of first degree manslaughter when he or she "recklessly causes the death of another person." RCW 9A.32.060(1)(a). A person is guilty of second degree manslaughter when he or she, "with criminal negligence . . . causes the death of another person." RCW 9A.32.070(1).

[13] Maples did not assert an intoxication or diminished capacity defense at trial.

[14] The legislature's recent amendment to RCW 10.61.006 does not impact the present analysis. *See* Laws of 2010, ch. 8, § 1055.

B. Analysis

The parties dispute only whether Maples met the factual prong of the *Workman* test. To satisfy *Workman*'s factual prong, the evidence must raise an inference that "*only* the lesser included . . . offense was committed to the exclusion of the charged offense." *Porter*, 150 Wn.2d at 737 (quoting *Fernandez-Medina,* 141 Wn.2d at 455). Accordingly, the evidence must affirmatively establish the defendant's theory of the case; it is not enough that the jury might disbelieve the evidence pointing to guilt. *Fernandez-Medina* 141 Wn.2d at 456. If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, the trial court should give a lesser included offense instruction. *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

Maples cites the following evidence to raise an inference that he was intoxicated at the time of the crime: (1) Maples had a "couple swallows" of beer in the AK-WA parking lot before leaving with Blais; (2) Linda and Maples regularly used marijuana; and (3) some AK-WA employees used drugs during their breaks. Appellant's Br. at 17 (citing 46 RP at 3291; 50 RP at 3861; 52 RP at 4153). Wales also noticed "some beer containers" in Blais's car. 46 RP at 3337. This evidence is simply insufficient to support Maples intoxication claim, even when viewed in the light most favorable to Maples.

Evidence of a struggle and Maples's inconsistent statements to co-workers and police also do not support an inference that he acted recklessly or negligently rather than intentionally. Although such evidence could theoretically support a *mens rea* of recklessness or negligence, it just as plausibly supports a *mens rea* of intent. There is no way to infer from these facts, even when viewed in Maples's favor, that he committed only manslaughter, not murder. Consequently,

Maples was not entitled to manslaughter instructions.

Additionally, *Fernandez-Medina* and *Warden* do not support Maples's position, as he contends. In *Fernandez-Medina*, the defendant pointed a gun at the head of his victim, who closed her eyes and heard a clicking sound 141 Wn.2d at 451. The defendant presented expert testimony that clicking sounds can emanate from guns even when the trigger is not pulled. *Fernandez-Medina*, 141 Wn.2d at 451. As a result, our Supreme Court concluded that the jury could have rationally concluded from the expert testimony that the State did not prove that the clicking sound was caused by pulling the trigger, a conclusion that would support a conviction of second degree assault rather than first degree assault. *Fernandez-Medina*, 141 Wn.2d at 457. Thus, the trial court erred by failing to instruct the jury on the elements of second degree assault. *Fernandez-Medina*, 141 Wn.2d at 462. Similarly, in *Warden*, the defendant was entitled to a manslaughter instruction because she presented a psychiatrist's testimony that she suffered from post-traumatic shock disorder and therefore lacked the mental capacity to form the intent to kill. 133 Wn.2d at 564. Here, unlike the defendants in *Fernandez-Medina* and *Warden*, Maples has not presented any affirmative evidence to negate evidence that he intentionally caused Blais's death.

III. Offender Score

In 1977, Maples was convicted of a robbery that he committed before the effective date of the Washington Criminal Code, which divided robbery into degrees. *See* RCW 9A.04.010(1); *see also* Laws of 1975, 1st Ex. Sess., ch. 260. The trial court included the 1977 robbery conviction in determining Maples's offender score for his second degree murder conviction. Maples objected.

A pre-criminal code robbery is generally comparable to the current crime of second degree

robbery, a class B felony.[15] *See State v. Failey*, 165 Wn.2d 673, 677-78, 201 P.3d 328 (2009); RCW 9A.56.210. Under the law in effect at the time of Blais's murder, a class B felony washed out if the offender had spent "ten consecutive years in the community without being convicted of any felonies" after the offender's last date of release from confinement, if any, or entry of judgment and sentence. Former RCW 9.94A.360(2) (Laws of 1988, ch. 157, § 3).

Maples points out that he had no felony convictions from 1980 to 1994. But this fact alone does not end the inquiry. The statute requires Maples to have spent "ten consecutive years in the community" without a felony conviction. Former RCW 9.94A.360(2). The record before us is insufficient to determine whether Maples was confined at any point after his robbery conviction and before his felony conviction in 1994. Because we cannot determine if Maples was confined during this period, we also cannot evaluate whether that confinement interrupted his time "in the community" in a manner that prevented his 1977 robbery conviction from washing out under former RCW 9.94A.360(2). Therefore, we remand to the sentencing court for a hearing to determine whether Maples spent ten consecutive years in the community after his 1977 robbery conviction and before 1994 without being convicted of any felonies.

[15] Apparently, the State does not allege that Maples used a deadly weapon, inflicted bodily injury, or robbed a financial institution in the course of the robbery, which would have made his pre-code robbery comparable to the current crime of first degree robbery. *See* RCW 9A.56.200; *see also* former RCW 9.75.010, *repealed by* Laws of 1975, 1st Ex. Sess., ch. 260 (robbery statute in effect at time of Maples's robbery).

IV. Statement of Additional Grounds

A. Motions to Dismiss

Maples challenges the trial court's "refusal to accept Motion to Dismiss filed by Assigned Counsel." SAG at 1. Maples brought three separate motions to dismiss, and we conclude that the trial court properly denied each of these motions.

1. Motion to Dismiss for Preaccusatorial Delay

Before his first trial, Maples moved to dismiss the charges against him because "the prosecution deliberately delayed the filing of the present charge for more than 16 years." Clerk's Papers (CP) at 18. The trial court properly denied Maples's motion.

Preaccusatorial delay in bringing charges may violate due process. *State v. Calderon*, 102 Wn.2d 348, 352, 684 P.2d 1293 (1984) (citing *United States v. Lovasco,* 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)). Our Supreme Court established a 3-prong test for determining when preaccusatorial delay violates due process: (1) the defendant must show that he was prejudiced by the delay; (2) the court must consider the reasons for the delay; and (3) if the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused. *State v. Alvin*, 109 Wn.2d 602, 604, 746 P.2d 807 (1987).

We agree with the trial court's determination that Maples did not demonstrate sufficient prejudice to prevail on his motion to dismiss. Maples argued that (1) the unavailability of Blais's car and apartment prevented him from discovering exculpatory forensic evidence therein; (2) the unavailability of AK-WA records prevented Maples from determining whether those records helped to substantiate his theory that Wales murdered Blais;[16] (3) Maples never had an

[16] Before the first trial, Maples moved for permission to argue at trial that Wales murdered Blais.

opportunity to examine the watch before police disassembled it for DNA analysis; and (4) witnesses' memories had faded. At trial, however, Maples extensively cross-examined State's witnesses about Blais's car and apartment and about the condition of Maples's watch. The trial court correctly noted that Maples failed to demonstrate any prejudice apart from that of a normal cold case. Also, as the trial court noted, there is no evidence that the State intentionally cause the delay.

2. Motion to Dismiss for Insufficient Evidence

After the State's case, Maples moved to dismiss the charges against him for insufficient evidence. Like all sufficiency challenges, we review a defendant's motion to dismiss for insufficient evidence at the end of the State's case in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). Circumstantial evidence is no less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The State presented sufficient evidence that Maples intentionally caused Blais's death. Any rational trier of fact could have found that Maples acted intentionally based on the State's evidence of a struggle between Blais and Maples, Blais's lack of clothing, Maples's injuries, and evidence that Maples directed Blais to drive to McMurray Road. The State's witnesses positively identified Blais's remains and determined that Blais died from "homicidal violence." 45 RP at 3199. Accordingly, the question of Maples's guilt or innocence was properly before the jury.

The trial court denied the motion, and this court affirmed the trial court's denial. *See State v. Maples*, No. 36717-3-II, Ruling Denying Review and Denying Motion for Stay (Oct. 18, 2007).

3. Motion to Dismiss for Prosecutorial Misconduct

Maples also argues that the trial court erred by denying his motion to dismiss for prosecutorial misconduct in closing argument. Specifically, Maples asserts that the "[p]rosecutor ignored judge's ruling omitting [a] jury instruction on accomplice liability, which misle[d] the jury." SAG at 1. This argument fails because the prosecutor's repeated statements that the to-convict instruction did not require the jury to find that Maples acted alone are correct statements of the law. As the trial court correctly noted in distinguishing *State v. Davenport,* 100 Wn.2d 757, 675 P.2d 1213 (1984), here the State did not argue that Maples was guilty as an accomplice to the murder. Rather, the State emphasized that Maples committed the murder and that it did not have the burden to prove that Maples acted without an accomplice.

B. Motion to Exclude Blais's Cause of Death

Maples challenges the trial court's denial of his motion to exclude the medical examiner's testimony that Blais's death occurred from "homicidal violence of an undetermined [etiology]." 45 RP at 3199. At trial, Maples objected to this testimony based on an insufficient foundation for the medical examiner's opinion.

The medical examiner, Dr. Howard, provided a sufficient foundation for his opinion. Howard is a board-certified forensic pathologist and physician who conducted an autopsy of Blais's remains. Although Howard did not discover specific injuries to Blais's skeletal remains, he noted that, in cases of homicidal violence, victims are often discovered without clothing. Blais's body was discovered away from her home and her car. Howard spoke with law enforcement about Blais's social history and with Blais's physician about her medical history. Howard determined that Blais was a healthy young mother with a steady work history and no life-

threatening illnesses. Howard's testimony, therefore, was based on a sufficient foundation.

We affirm Maples's second degree murder conviction, but we remand to the trial court for a hearing to determine whether resentencing is necessary.

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

Penoyar, C.J.

We concur:

Hunt, J.

Van Deren, J.