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SUPREME COURT NO. 90566-5
COURT OF APPEALS NO. ~~44945-5-II~~
71669-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY GREG O'HAVER,

Petitioner.

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

The Honorable John Hickman, Judge

PETITION FOR REVIEW

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STATUTES, RULES, AND OTHER AUTHORITY:

A. IDENTITY OF PETITIONING PARTY

Timothy O'Haver, appellant below, asks this Court to accept review of the decision designated in Part B of this petition.

B. DECISION

Petitioner O'Haver seeks review of the decision of the Court of Appeals filed in his case on July 7, 2014.

The decision is in the Appendix to this Petition at A-1 through A-19.

C. ISSUES PRESENTED FOR REVIEW

1. Is evidence of prior bad acts of violence committed by the alleged victim of an assault, which were known to the accused at the time of the incident, admissible if even minimally relevant; and do claims that such evidence is speculative, committed against another person, or not supported by expert testimony go to weight rather than admissibility? Does exclusion of the evidence deny the accused his state and federal constitutional rights to present a defense?

2. Is a recorded recollection inadmissible where the witness remembers the incident she is testifying about even though she does not remember making the statement and where there was no showing that it was adopted as accurate when it was made?

3. Is an accused person denied the presumption of innocence and due process where the trial court made a statement to the security officer which conveyed to the jury that the accused was in jail during trial?

4. Is an accused person denied a fair trial where a state's witness improperly and untruthfully told the jury that there had been prior incidents of domestic violence by him?

5. Is an accused person denied a fair trial where a police officer witness implies his opinion that the accused is guilty?

D. STATEMENT OF THE CASE

A Pierce County jury convicted Timothy O'Haver of only one of the four counts of second degree assault with which he was charged, one of two counts involving his neighbor Marcus Dettling, and one count of the lesser included offense of fourth degree assault for the count involving his wife Wendy O'Haver. CP 19-21, 167, 170, 173, 176. These verdicts reflect the jury's finding that much of the testimony of the state's witnesses was not credible.

Mr. and Mrs. O'Haver lived in Tacoma, Washington.[1] RP 83, 85, 99, 163, 192-194, 434. Marcus and Patricia Dettling lived in a small house which had been converted from a garage about 20 to 30 feet behind the O'Haver house. RP 85, 177, 295-297, 340-341. The charges stemmed from an argument between the O'Havers which eventually involved their neighbor Marcus Dettling and one of his friends, John Hoover.

On August 21, 2012, Mrs. O'Haver started drinking before Mr. O'Haver arrived home from work; they both had several drinks after he got home. RP 197, 437-438-440, 443. Around 7:00 p.m., Mr. O'Haver was hungry and wanted dinner; Mrs. O'Haver told him to eat a snack. RP 195-196, 445-445. An argument, that became very heated, ensued. RP

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[1] The verbatim report of proceedings prepared by Emily Dirton is in ten consecutively-numbered volumes designated "RP." Short additional transcripts prepared by Syndie Hargardt are designated by date.

196, 198, 448-449.

Dettling had three musician friends over that evening. RP 243, 268-272, 341-344. They quit practicing when Mrs. Dettling came home from work and one of the musicians left shortly after that. RP 244-245, 270-271, 298, 344. The others were standing between the two houses talking when the argument between the O'Havers erupted inside the house. RP 246, 272, 299, 345.

Mr. O'Haver described his wife as having had so much to drink that she could not function well and became spiteful and sarcastic. RP 446,448. When she hit him on the head, he grabbed her by the forearms and held her at arm's length. RP 449-450. Then he described what he called "having an epiphany"; he took the spray hose from the kitchen sink and sprayed her in the face for a few seconds with cold water. RP 450, 453, 487. She closed her eyes, staggered backwards against a wall and slumped to the ground. RP 453. Mr. O'Haver believed the incident was over at that point. RP 486.

He explained that he turned to find Dettling in the house. RP 488. Dettling put his hands on Mrs. O'Haver's shoulders and pushed her towards the door. RP 490. O'Haver followed his wife and Dettling through the door and along the sidewalk beside the house and watched them enter and close the door to the Dettling house. RP 492-494. When

O'Haver knocked on the door and demanded that his wife be let go, he heard Dettling ask his wife to bring him the "old lady," which he knew to be their code name for their gun. RP 495-496. Dettling threatened that if O'Haver kept knocking, he would shoot him. RP 496. 500.

At that point, O'Haver returned home and placed his shotgun on the kitchen table loaded with a non-lethal round, to have it ready in case he was followed home, and returned to the Dettling house with his .40 caliber pistol. RP 500-502. He placed the gun on a table outside the door to the house, picked up a baseball bat leaning near the door and kicked and hit the door until he broke the handle and lock on the door. RP 502-504. Dettling raised and pointed his gun and O'Haver grabbed his own gun. RP 505. The police arrived and O'Haver dropped his weapon as commanded by the officers. RP 505.

Wendy O'Haver testified that her husband held onto her when he sprayed her with the kitchen sink hose, and that she felt she couldn't breathe. RP 198, 200-201. When he stopped, she ran across to the Dettlings' house. RP 202. She stayed with Mrs. Dettling and never saw any weapons, although she did hear her husband beating on the door. RP 203-205. She testified that she could not recall giving a statement to the police. RP 210. She did not recall saying to the officer that she was embarrassed and concerned about finances, that her husband went crazy,

was vulgar and mean and held her with his arms across her chest or that she was screaming she couldn't breathe and begging for her life. RP 212-215. On cross-examination, however, Mrs. O'Haver confirmed that O'Haver never put the hose in her mouth or nose and that she could move her head throughout the spraying. RP 227, 229. She confirmed that she slipped and fell and that O'Haver never held her down on the ground. RP 229. Most importantly, she confirmed that the shotgun was not on the table when she left the house. RP 225.

Two of Mr. Dettling's musician friends, John Humen and John Hoover, said they saw the O'Havers came out of their house and one said Mr. O'Haver was choking Mrs. O'Haver (241-242, 245-247) and the other that he hit her once with an open hand when she struggled. RP 272. Dettling said that O'Haver tackled Mrs. O'Haver and hit her in the face with his fists. RP 345-346. Both of the musician friends described seeing Mrs. O'Haver leave her house again; Humen also described seeing Dettling and O'Haver outside face-to-face and angry (RP 249), while Hoover described O'Haver as coming out of his house with a gun in his hand and Mr. Dettling following him and their struggling over the gun. RP 275, 277-279. According to Hoover, when Mr. O'Haver saw him take his cell phone out of his pocket, he pointed the gun at him and told him not to think about it. RP 275-277. The jury did not convict O'Haver of

the assault charge against him based on his alleged pointing of a gun at Hoover, or of the lesser charge of unlawful display of a weapon. RP 659-660; CP 123-162, 166, 176.

Dettling said he followed the O'Havers into their kitchen where he saw O'Haver on top of his wife hitting her. RP 347-350. He said he started insulting O'Haver who responded by trying to push him out of the house. RP 351-352. Mrs. O'Haver ran out. RP 352. Dettling said O'Haver then went and got a gun, and Dettling ran to his own house. RP 354. The jury, however, acquitted O'Haver of the count alleging that he assaulted Dettling with a gun in the O'Havers' kitchen. RP 657; CP 165.

When he got home, Dettling called for his wife to get their gun. RP 355-356. He testified that O'Haver kicked and broke the door knob and broke a baseball bat that had been inside the house by hitting it against the door. RP 356-358. O'Haver gave up for a while and went around the house before returning, shoving the muzzle of his gun through the door and hitting Dettling with it repeatedly. RP 359-359. Dettling testified that O'Haver accused him of kidnapping his wife. RP 360.

On cross-examination, Dettling agreed that he may have consumed alcohol on the date of the incident and took some of his painkillers -- morphine, oxycodone or valium -- that day; at the least he took four morphine pills. RP 367, 401. He had told the ambulance attendant that

he had been drinking. RP 395-396. He admitted that he wrote a handwritten statement on the night of the incident and wrote another typewritten statement later. RP 396. He had told the officers in his first handwritten statement that he saw O'Haver choking his wife and that when he followed them inside, he again saw O'Haver choking his wife. RP 397. This differed from his trial testimony. In his second statement, he said he saw O'Haver point a gun at Hoover, but admitted that he couldn't have seen this. RP 399-400, 408. He agreed as well, on redirect examination, that he had spoken with Humen and Hoover the next day and learned that Hoover said O'Haver pointed a gun at him. RP 408-409.

The emergency room physician found no evidence of trauma to Mr. Dettling's head or body. RP 551-553. His CT scan was normal as were other objective tests. RP 554. The paramedic who went with Dettling in the ambulance testified that Dettling said he and his friend had been drinking and that he had sustained injuries caused by being repeatedly hit in the head with the barrel of a gun. RP 537. The paramedic was unable to find any evidence of a head injury. RP 537-538.

Patricia Dettling testified that she heard her husband intently urging Mrs. O'Haver to come over to their house and that she saw her rush in sobbing and wet. RP 299-300. She testified that Mrs. O'Haver said that O'Haver held her down and put the hose in her mouth. RP 301. After

Mrs. O'Haver came in, Mrs. Dettling heard her husband and O'Haver yelling at the door. RP 301. She heard tapping at windows all around the house, but no windows were broken. RP 305-306, 314. After what she believed was about one-half hour, she heard the police shouting "drop your weapon." RP 307.

E. REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4(B) (1), (2), (3) AND (4) BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH OTHER DECISIONS AND THE ISSUES ARE CONSTITUTIONAL AND OF SUBSTANTIAL PUBLIC IMPORTANCE.

1. PRIOR ACTS OF VIOLENCE BY ALLEGED VICTIM, KNOWN TO THE ACCUSED.

The trial court refused to let Mr. O'Haver explain, in support of his claim of self-defense,[2] his state of mind and why he was concerned that he might be suffer great bodily injury from his wife and Dettling. He was not allowed to testify that in 2007, Mrs. O'Haver struck him and injured his eye with her fingernail, RP 455-456. 463-464, or that she had been terminated from her job as a playground supervisor and crossing guard several months earlier after smashing the window of a passing car whose driver failed to acknowledge her flag. RP 466-467.

He was not allowed to testify that Dettling had discharged weapons in the neighborhood, RP 468-470, had told him that he had once killed a

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[2] The trial court gave self-defense instructions. CP 129-162,

man, RP 471, had spoken about his experiencing blood lust, RP 472-473, and having beaten a young Samoan boy. RP 482. He was not allowed to testify that he heard Dettling berating his wife when he was under the influence of his medications. RP 471; CP 113-118.

The Court of Appeals, while acknowledging that specific acts of violence are admissible if the defendant is aware of them to support a claim of self-defense, Slip op. at 5, nevertheless held that Mr. O'Haver was not allowed to testify about these acts known to him because (a) they were committed against someone else, (b) were too remote or speculative or (c) were not supported by expert testimony. Slip op. at 5-7. This holding is in conflict with virtually all of the authority on this issue. This holding denied Mr. O'Haver his state and federal constitutional rights to appear and defend at trial and present evidence in his own defense. This exclusion of evidence also presents an issue of substantial public importance that should be decided by this Court.

A person accused of a crime has the right under the Sixth Amendment and Article 1, sections 21 and 22 to present a defense. For that reason, it is well-established that evidence of a victim's prior acts of violence known to the defendant is relevant to the jury's resolution of a claim of self-defense "because such testimony tends to show the state of mind of the defendant. . . and to indicate whether he, at that time, had

reason to fear bodily harm." State v. Cloud, 7 Wn. App. 211, 218, 498 P.2d 907 (1972) (quoting State v. Adamo, 120 Wash. 268, 269, 207 P. 7 (1922)). The evidence of such prior acts of violence, known to the defendant, is admissible to show the defendant's reason for being apprehensive and basis for acting in self-defense. State v. Woodward, 26 Wn. App. 735, 737, 617 P.3 1039 (1980); State v. Walker, 13 Wn. App. 545, 549-50, 536 P.2d 657 (1975), Cloud, 17 Wn. App. at 217. The prior acts of violence need not be against the defendant. Walker, 13 Wn. App. at 548-560, Cloud, 17 Wn. App. at 218; Adamo, 120 Wash. at 271.

The rationale for the admissibility of specific instances of violence is that the defendant's actions must be judged by his or her subjective impressions and not what actions the jurors might find objectively reasonable. State v. Wanrow 88 Wn.2d 221, 224, 559 P.2d 548 (1977). The jury must be allowed to consider "all the facts and circumstances known to the defendant, including those known substantially before the incident." Wanrow, 88 Wn.2d at 234. State v. Kelly, 102 Wn.2d 188, 196-97, 685 P.2d 544 (1984); State v. Allery, 101 Wn.2d 591, 594, 682 P.2 312 (1984). The jury must stand "as nearly as practical in the shoes of [the] defendant, and from this point of view determine the character of the act." Wanrow, at 235 (quoting State v. Ellis, 30 Wash. 369, 373, 70 P. 963 (1902)).

Although the Court of Appeals dismisses Wanrow because it "involved instructional error where the jury was misadvised as to the particular circumstances it could consider in reaching a decision," Slip op. at 7, Wanrow clearly sets out the law regarding the relevance of prior acts of violence and the subjective nature of the inquiry in a self-defense case. The instructional error in Wanrow was in precluding the jury from considering the relevant evidence; here, the error was in precluding the jury from considering the relevant evidence by withholding it.

From this well-established law, it is clear that claims that prior violence is speculative, against another person or unsupported by expert opinion generally goes to the weight of the evidence not its admissibility. See, e.g. State v. Lui, 179 Wn.2d 457, 315 P.3d 493 (2014) (error in chain of custody goes to weight not admissibility); State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013) (defects in eyewitness identification goes to weight not admissibility); State v. Banden, 150 Wn.App. 690, 208 P.3dd 1242 (2009) (whether generally accepted technique was performed accurately in the specific case goes to weight not admissibility). Evidence is admissible under ER 402 if it is minimally relevant; it is a low threshold. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). It is for the jury to determine how much credence the evidence deserved. Jones, 175 Wn. App. at 108.

Mr. O'Haver was subject to cross-examination and the state was free to impeach his testimony, including by a state's expert if appropriate. It was his testimony about his own state of mind and it was for the jury not the court to determine how much credence to give it.

Review should be accepted on this issue. While the jurors apparently disbelieved much of the state's evidence, they also apparently did not find that O'Haver had acted in self-defense. He had a right to testify and explain to the jurors his state of mind at the time of the incidence. The jury then could have evaluated his testimony in light of any argument or impeachment by the state. The issue of whether the proponent of the evidence has to establish more than minimal relevance is an issue of substantial public importance which should be decided by this Court. Review should be accepted on the issue.

2. RECORDED RECOLLECTION

ER 803(a)(5) provides an exception to the hearsay rule for recorded recollections:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. . . .

Admission is proper only if: (1) the record pertains to a matter about

which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory; and (4) the record reflects the witness's prior knowledge accurately. State v. Mathes, 47 Wn.App. 893, 867-68, 737 P.2d 700 (1987). The admission of statements under ER 803(a)(5) is reviewed for an abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997),

Here the factors were not met. First, the state failed to show that Mrs. O'Haver's memory was insufficient to provide truthful and accurate trial testimony about the incident. She was asked early in her testimony if she recalled the incident and she responded "yes." RP 192. She testified about the day's activities before her husband came home (RP 192), about what she was preparing for dinner (RP 195), about how the argument began (RP 196), about being sprayed with water and not being able to breathe (RP 198, 201), and about running to the Dettlings' house and her husband coming there and beating on the door. RP 202, 204. What she did not recall were the statements she made to Officer Welsh. RP210-215. Nevertheless, the Court of Appeals held that not remembering the statements she allegedly made to Welsh was sufficient to introduce her statements about the incident. Slip op. at 18. This is contrary to the rule

and illogical. The recorded statement is about the incident itself.

Further, Mrs. O'Haver did not agree that the report was accurate at the time it was made. She had been drinking at the time. RP 197. Both she and Officer Welsh testified that she was not able to give a written statement by herself at the time. RP 216, 322. Most importantly, Mrs. O'Haver did not adopt the report. Welsh said he took notes of the conversation and later put those into a report; he said he read only his notes to Mrs. O'Haver, not his report written sometime later. RP 323.

To meet the requirement that the recollection adequately reflects the witness's knowledge at the time without the witness's saying they were accurate, the trial court must examine the totality of the circumstances "including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement." State v. Alvarado, 80 Wn. App. 543, 551-2, 949 P.2d 831 (1998),

Unlike in this case, in Alvarado the witness asserted at the time they were made that the statements were accurate, and made two separate statements to the police. Id. at 552-53. This case is unlike State v. Derouin, 116 Wn. App. 38, 46, 64 P.3d 35 (2003), where the witness provided a written statement to the police signed under penalty of perjury,

the accuracy of which she never disavowed. Again in State v. White, 152 Wn.App. 173, 185, 215 P.3d 251 (2009), the witness signed the officers' report under penalty of perjury and noted with her initials where her account began and ended.

No safeguards were present in this case. Mrs. O'Haver did not adopt the officer's report by her signature or initials at the time it was given, nor did she ever see the report – at most she heard notes Officer Welsh had taken some time before he wrote the report. Under the totality of the circumstances, there was nothing to show that the report accurately reflected anything Mrs. O'Haver may have said at the time.

Moreover, Officer Welsh did not testify truthfully in court; he was so eager to provide inculpatory and inflammatory testimony that he embellished his own report. Review should be accepted to clarify that a recorded recollection is admissible only when the witness cannot remember the underlying incident and is shown to be accurate. Review should be accepted to clarify that the requirements of the rule must be met.

3. ALERTING THE JURY TO CUSTODIAL STATUS

The trial court alerted the jurors to Mr. O'Haver's in-custody status. The court first asked the attorneys and his staff, but not Mr. O'Haver, if there was any reason why the trial could not continue at 9:00 the following morning. RP 640. When counsel replied "no," the court

responded, "So officer, we'll see everybody back here at 9:00, okay?" RP 640. Because this clearly implied that the officer was responsible for seeing that Mr. O'Haver was brought to court at 9:00 a.m., from jail, defense counsel noted his objection and moved for a mistrial the next day. RP 641, 649. The court denied the motion, and defense counsel declined an instruction which would only reemphasize the point that Mr. O'Haver was in custody. RP 649. In moving for a mistrial, defense counsel noted that during voir dire a number of people had expressed their belief that people held in custody during trial were more likely to be guilty. RP 647.

The Court of Appeals held that the judge was simply asking the officer whether he would be there at 9:00 and that "[a]ny prejudice that may have resulted from the jury's knowledge of O'Haver's custodial status is unlikely to have impacted the outcome of trial." Slip op. at 9.

In fact, the judge was not simply asking the officer if he would be back. The judge did not inquire about the officer's availability at all; the judge stated, "So officer, we'll see everybody back here at 9:00, okay?" RP 640. This clearly implied that the officer was in charge of bringing Mr. O'Haver to the courtroom and was being directed to have him in the courtroom at that time.

Given the uncontroverted statement that prospective jurors believed that being in custody made it more likely the defendant was

guilty and given the closeness of the case, it was likely that the judge's statement impacted the verdict. As constitutional error, it certainly was not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 765 (1967).

The issue is constitutional as it implicates the right to trial before a fair and impartial jury under the Sixth and Fourteenth Amendments, U.S. Constitution; Washington Constitution, article I, sections 3, 21, 22. It also denies the constitutional right to the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999); State v. Hutchinson, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998) (appearance of prison garb, shackles, or other restraints may "reverse the presumption of innocence" and thereby deny due process).

Review should be granted because the issue is constitutional and because it is of substantial public importance to continue to make clear that the presumption of innocence and an impartial jury must be afforded to those accused of crimes.

4. UNTRUTHFUL TESTIMONY THAT MR. O'HAVER HAD COMMITTED PRIOR VIOLENCE AGAINST HIS WIFE

The trial court granted a motion in limine to exclude prior

convictions of Mr. O'Haver; and, in fact, he had no prior convictions. RP 21. The state neither identified nor sought to admit any ER 404(b) evidence against Mr. O'Haver either prior to trial or during trial. When witness John Hoover testified that Dettling said, "This is my neighbors and they've done this before" after reporting seeing Mr. O'Haver trying to "drag" Mrs. O'Haver and hitting her, the prosecutor acknowledged that this was improper testimony. RP 272-273, 292-293.

The Court of Appeals also acknowledged that the testimony was improper, but held the error was harmless because "the improper remark was ambiguous enough that it did not necessarily suggest a propensity to commit the crime charged." Slip op. at 11-12.

In fact, what the testimony "they've done this before," precisely does suggest is that the O'Havers have a propensity for domestic fights in which Mr. O'Haver physically assaults Mrs. O'Haver, the crime he was charged with committing. And, although the Court of Appeals cites the evidence it believes is strong, Slip op. at 10, the jury obviously did not find a great deal of the evidence credible; it acquitted Mr. O'Haver of the second degree assault of his wife, and very likely convicted of the lesser crime of fourth degree assault precisely because they believed it was something that he had done before.

In denying relief, the decision of the Court of Appeals is in conflict

with the decisions State v. Escalona, 49 Wn. App. 251, 255, 74 P.2d 190 (1987); State v. Hopson, 113 Wn.2d 273, 284, 778 P.3d 1014 (1989); State v. Mack, 80 Wn.2d 19, 490 P.2d 1303 (1971); State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968); State v. Easter, 130 Wn.2nd 228, 238-39, 922 P.2d 1285 (1996); State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976).

Review should be granted on this issue.

5. OFFICER'S TESTIMONY AS TO GUILT

Officer Welsh did everything he could to communicate to the jury his opinion that Mr. O'Haver was dangerous; that he created a situation in which people, including police officers, were likely to get hurt or killed; and that he had actually attempted to or was attempting to kill someone, e.g, "It was supposed to be a domestic violence incident involving a weapon with someone actively pursuing another party attempting to possibly harm them," "this incident is very serious already," "we have a person attempting to – possibly attempting to take another life, witnesses already indicating that that's what the scenario was before we arrived," and "it was a suspect attempting to gain entry to this house, possibly to take those lives." RP 159-161, 166-167. Further, he implied that his opinion was based on information from others that the jurors might not hear – "witnesses already indicating . . ." RP 166-167.

The Court of Appeals nevertheless held that this was not improper opinion testimony as to guilt. This is in conflict with the decisions in State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Sutherby, 144 Wn.2d 755, 759, 30 P.3d 1278 (2001); State v. Jones, 117 Wn.2d 89, 91, 68 P.3d 1153 (2003), State v. O'Neal, 126 Wn. App. 395, 409, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 505 (2007).

The error is constitutional under the state and federal constitutions because it invades the province of the jury and denies the accused his or her right to a jury trial. State v. Thach, 126 Wn. App. 297, 312, 106 P.3d 752 (2005); Sutherby. 144 Wn.2d at 617. Review should be granted on this issue

E. CONCLUSION

Appellant respectfully submits that review should be accepted and his convictions reversed and remanded for retrial.

DATED this 30th day of July, 2013.

Respectfully submitted,

_____/s/_____
RITA J. GRIFFITH; WSBA #14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 30th day of July , 2014, I caused a true and correct copy of Appellant's Petition for Review to be served on the following:

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_____/s/_____7-30-2014_____
Rita Griffith DATE at Seattle, WA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TIMOTHY GREG O'HAVER, Appellant.	)	No. 71669-7-I DIVISION ONE UNPUBLISHED OPINION FILED: July 7, 2014

TRICKEY, J. — The exclusion of irrelevant evidence does not bar an accused from the constitutional right to present a defense. Here, the trial court instructed the jury on self-defense and permitted the defendant to present evidence of the circumstances surrounding the incident to support his theory of self-defense. The trial court did not err in its evidentiary rulings or in its refusal to grant a new trial. Accordingly, we affirm.

FACTS

Timothy O'Haver came home from work. He and his wife consumed several drinks of vodka and juice. After a couple of hours, they began arguing.[1] During the argument, O'Haver grabbed his wife and sprayed her with the hose from the kitchen sink. She slipped on the water and fell to the floor.[2] The wife ran out of the house.

The neighbor next door, and his friends John Hoover and John Humen, witnessed O'Haver chasing his wife outside. The wife either fell or O'Haver pushed her down.[3] O'Haver then struck his wife, although the accounts varied whether he

[1] 4 Report of Proceedings (RP) at 197, 224.
[2] 4 RP at 231.
[3] 4 RP at 247, 272; 5 RP at 345.

did so with an open hand or a fist.[4] O'Haver grabbed his wife and went back into their home, closing the door.[5]

The three continued to hear screaming coming from the O'Haver house. The neighbor entered the house through a back door.[6] The neighbor testified that he distracted O'Haver by insulting him in an attempt to get O'Haver to focus on him so that the wife could escape.[7] The wife left and O'Haver pushed the neighbor. When O'Haver grabbed a gun, the neighbor fled to his house with O'Haver running behind him.[8]

The neighbor called for his wife to get the "old lady," a term used by the neighbors for their gun in the event of an emergency.[9] The neighbor's wife retrieved the gun and gave it to her husband.[10] O'Haver testified that he was aware of the neighbors' code for their gun and that he feared for his wife's safety. The wife told O'Haver that she was in the house on her own free will and told him to go home and sleep it off.[11]

O'Haver banged on the neighbor's front door with a baseball bat trying to get inside. In the process, he broke the door. O'Haver also attempted to enter through windows around the house while shouting for his wife.[12] O'Haver testified that he ran back to his house to retrieve his guns[13] when the neighbor threatened

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[4] 4 RP at 272; 5 RP 349.
[5] 5 RP at 347.
[6] 5 RP at 349.
[7] 5 RP at 352.
[8] 5 RP at 355-56.
[9] 5 RP at 302, 355.
[10] 5 RP at 356.
[11] 5 RP at 304.
[12] 5 RP at 307.
[13] O'Haver owned two handguns and a shotgun. 4 RP at 197.

to shoot him through the door. O'Haver reached through the broken front door hitting the neighbor with his gun.[14]

The police arrived at the scene. Both parties dropped their weapons. The police arrested O'Haver. The State introduced evidence of the neighbor's broken door and the broken baseball bat.

The State charged O'Haver with four counts of assault, but a jury found him guilty of only two: second degree assault of the neighbor and a lesser included count of fourth degree assault of the wife. O'Haver appeals alleging multiple evidentiary errors.

ANALYSIS

Exclusion of Evidence

O'Haver contends that the trial court violated his constitutional right to present a defense when it excluded evidence that both his neighbor and his wife had committed prior acts of violence. He argues that this evidence corroborated his account that he feared both of them and was therefore acting in self-defense.

Both the Sixth Amendment of the federal constitution and article I, section 22 of the Washington Constitution guarantee an accused the right to present a defense. State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). However, this right is not absolute; a defendant does not have the right to introduce evidence that is irrelevant or otherwise inadmissible. State v. Stacy, __ Wn. App. __, 326 P.3d 136, 143 (2014) (citing State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)). "Evidence is relevant if it has any tendency to make any fact that is of

[14] 5 RP at 359.

consequence to the case more or less likely than without the evidence." State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.2d 354 (2006) (citing State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); ER 401).

In general, evidence of a person's character is inadmissible to prove "conformity therewith on a particular occasion." ER 404(a). However, an exception to this rule provides that "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused" is admissible. ER 404(a)(2). Thus, where a defendant asserts self-defense, evidence of the victim's violent disposition is a pertinent character trait because it is relevant to the question of whether the victim acted in conformity with his or her character by provoking the incident as the first aggressor. State v. Alexander, 52 Wn. App. 897, 900, 765 P.2d 321 (1988); United States v. Keiser, 57 F.3d 847, 853-54 (9th Cir. 1995). Evidence offered for this purpose is subject to the restrictions set forth in ER 404 and 405. Only the victim's reputation for violence is admissible; specific acts of violence are not. ER 405(a), (b); Alexander, 52 Wn. App at 901. O'Haver did not seek a first aggressor instruction and none was given.

Evidence regarding the victim's violent character may also be relevant to show the defendant's state of mind; in other words, the reasonableness of his or her belief that the use of force was necessary in self-defense. State v. Dyson, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997) ("To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable."). Under those circumstances, because the character evidence is used to show state of

mind rather than to show the victim acted in "conformity therewith," the restrictions of ER 404 and 405 do not apply. Keiser, 57 F.3d at 853. Evidence of specific acts is admissible provided the defendant was aware of the acts at the time. State v. Walker, 13 Wn. App. 545, 549-50, 536 P.2d 657 (1975).

At trial, the State objected to O'Haver's testimony that his wife had struck him during a prior incident in 2007.[15] O'Haver submitted an offer of proof that the incident with his wife occurred during a stressful time while the parties were in the midst of a foreclosure. Alcohol also played a part in that incident. O'Haver woke up the next morning with a red eye.[16] Because the 2007 incident was supported only by O'Haver's testimony, with no independent witnesses, no history of restraining orders or domestic violence orders entered against either party and occurred over five years ago, with no charges filed, the court found the evidence remote, unreliable, and insufficient to establish a claim of self-defense for this particular incident.[17]

O'Haver then argues that the trial court erred in preventing him from testifying about his wife being fired from her crossing-guard job because she allegedly smashed a window of a car whose driver failed to follow her directions.[18] He argues that the evidence was admissible under ER 404(b) to show her quarrelsomeness[19] and thus her propensity for violence.[20] Because O'Haver was

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[15] 6 RP at 455.
[16] 6 RP at 464.
[17] 6 RP at 460-61, 480.
[18] 6 RP at 465-66.
[19] 6 RP at 464-65.
[20] 6 RP at 466.

not the object of that incident, the court found the evidence irrelevant and prejudicial.[21] The court did not err in finding the evidence inadmissible.

O'Haver also related, in his offer of proof, testimonial evidence of various scenarios demonstrating the neighbor's propensity to become violent. O'Haver related two instances in which the neighbor illegally discharged a gun in the neighborhood.[22] O'Haver did not witness either incident.[23] The neighbor also told O'Haver that he had killed a man but did not supply any specific details; however, O'Haver admitted that he did not fully believe it to be true.[24] O'Haver next asserted that his neighbor described himself as having an inability to control himself when aroused by the sight of blood.[25] This "blood lust" allegedly caused the neighbor to viciously beat another person.

The court found the statements unreliable and not supportive of a claim of self-defense. O'Haver also related an incident in which the neighbor had a reaction with the medication he was taking that caused him to become violent with his spouse one night.[26] No expert testimony was presented or offered to substantiate the claim that the neighbor's medication caused him to be violent. Finding that O'Haver had not established a foundation, the court ruled the evidence inadmissible. The court specifically stated that its ruling did not limit O'Haver from

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[21] 6 RP at 480.
[22] 6 RP at 467.
[23] 6 RP at 469, 476.
[24] 6 RP at 472.
[25] 6 RP at 472-73.
[26] 6 RP at 476.

testifying regarding any apprehension or fear that he experienced at the time of the incident to support his self-defense argument.[27]

Defense counsel filed a motion for reconsideration regarding the court's denial. After hearing oral argument, the court reiterated its ruling with regard to the acts of the wife, that the 2007 incident was remote, and that the allegation that she broke a car windshield did not establish a reputation for violence in the community.[28]

With regard to the allegations of the neighbor's violent persona, the court found no indicia of reliability that could create a subjective intent on the part of O'Haver to create apprehension and fear. This was particularly true, here, where O'Haver testified that he returned to his home to retrieve his pistol and shotgun. Additionally, O'Haver's alleged fear for his wife is contradicted by the testimony that the wife said she was there on her own free will and that she clung to the neighbor's spouse. Under these facts, the trial court properly found no corroborating circumstances existed to show that these past instances would support O'Haver's theory that his wife was abducted.

O'Haver's reliance on State v. Wanrow, 88 Wn.2d 221, 224, 559 P.2d 548 (1977) for support that the evidence should have been admitted here is misplaced. The court in Wanrow involved instructional error where the jury was misadvised as to the particular circumstances it could consider in reaching a decision. As stated in State v. Martin, 169 Wn. App. 620, 628-29, 281 P.3d 315 (2012), review denied, 176 Wn.2d 1005, 297 P.3d 68 (2013):

> Thus, where a defendant claims self-defense, courts have admitted evidence of a victim's prior acts of violence to establish a defendant's

[27] 6 RP at 484.
[28] 7 RP at 572.

> reason for apprehension and the basis for acting in self-defense. [State v. Cloud, 7 Wn. App. 211, 218, 498 P.2d 907 (1972).] But in self-defense cases, "[s]pecific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense." [State v. Hutchinson, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998).][29]

Here, the court permitted general references to the volatile spousal relationship. O'Haver testified that he sprayed his wife with water to calm her down after she had attacked him. O'Haver additionally testified that his neighbor entered his home uninvited and taunted him to support his objective belief that he needed to defend himself. The court was correct in ruling that any evidence of misconduct the night of the incident was admissible. The court instructed the jury on self-defense and no duty to retreat.[30]

O'Haver had an opportunity to fully present his theory of the case that he acted out of fear for himself and fear for his wife. The excluded evidence did not violate O'Haver's right to present a defense. The State argues that O'Haver was not entitled to a self-defense instruction, but fails to cross-appeal the court's giving that instruction. Accordingly, we will not address the State's argument.

Mistrial

O'Haver moved for a mistrial contending that the trial court alerted the jury to O'Haver's custodial status. This court reviews a trial court's denial of a motion for a mistrial under an abuse of discretion standard and will only grant a new trial when a "defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Lewis, 130 Wn.2d 700, 707,

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[29] (Alteration in original.)
[30] Clerk's Papers (CP) at 152.

927 P.2d 235 (1996). This court reviews alleged violation of the right to an impartial jury and the presumption of innocence de novo. State v. Johnson, 125 Wn. App. 443, 457, 105 P.3d 85 (2005). Curative instructions can sufficiently overcome any prejudice that might have otherwise arisen from inadvertent observations of a defendant in shackles. State v. Rodríguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). When an error can be cured by a curative instruction, a defendant waives the error by failing to request such an instruction. Rodriquez, 146 Wn.2d at 271. Here, the court simply asked the officer, who had been attending court every day, whether he would be there at 9:00 a.m. This is not sufficient to conjure up the image of custody. The court denied the motion for mistrial; but in an abundance of caution, offered to give a curative instruction which O'Haver rejected.[31]

O'Haver's reliance on State v. Gonzalez, 129 Wn. App. 895, 120 P.3d 645 (2005) is misplaced. There, the trial court informed the jury that the defendant was in jail because he could not post bail, was being transported in restraints, and would be under guard in the courtroom. Gonzalez, 129 Wn. App. at 899. The facts here are simply not that egregious. Any prejudice that may have resulted from the jury's knowledge of O'Haver's custodial status is unlikely to have impacted the outcome of his trial. The trial court did not abuse its discretion.

ER 404(b)

Prior to trial, O'Haver moved to exclude evidence of other crimes that had been prosecuted. The State responded that it was not seeking to admit any prior bad acts under ER 404(b). At trial, John Hoover, one of the witnesses who testified

[31] 8 RP at 649.

that he saw O'Haver strike his wife, stated that the neighbor said, "I can take care of this. This is my neighbors, and they've done this before."[32] The next day the prosecutor brought Hoover's testimony to the attention of the court because it violated the motions in limine.[33] Because a curative instruction would call the jury's attention to it, defense counsel told the court it would not request one.[34]

The erroneous admission of ER 404(b) evidence is harmless absent a reasonable probability that the error materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Unlike the cases cited by O'Haver, where the admission of prior bad acts may have led jurors to convict based on propensity given the lack of other credible evidence, here, it is unlikely that this single vague reference to O'Haver's previous combative conduct would affect the verdict, particularly given the additional ample evidence of guilt, i.e., the wife's bruising, the broken bat, the broken door, and the use of the guns. See State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987).

O'Haver fails to establish that the testimony amounts to a serious trial irregularity requiring a mistrial. "An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial." State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). To determine whether a

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[32] 4 RP at 273.
[33] 5 RP at 292-93.
[34] 5 RP at 293.

trial irregularity deprived a defendant of a fair trial, a reviewing court considers the following factors: "(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow." Escalona, 49 Wn. App. at 254 (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)). A reviewing court views claims of prejudice "against the backdrop of all the evidence." Escalona, 49 Wn. App. at 254.

While a violation of an order in limine is considered a serious trial irregularity, not all violations of orders in limine have been held to be so serious as to deprive the defendant of a fair trial. See State v. Thompson, 90 Wn. App. 41, 46-47, 950 P.2d 977 (1998) (remark "was sufficiently serious because it violated a motion in limine," but "not so egregious as to deny . . . a fair trial"); Condon, 72 Wn. App. at 649-50. In Condon, the State's witness twice testified that the defendant had been in jail despite an order in limine excluding such evidence, but the court held that while the remarks had the potential for prejudice, they were not so serious to warrant a mistrial. Condon, 72 Wn. App. at 648-50. The court noted that the reference to being in jail was ambiguous and did not necessarily indicate a propensity to commit the crime charged, nor did it necessarily mean that the defendant had been convicted of a crime. Condon, 72 Wn. App. at 649. The court also noted that the curative instruction alleviated any resulting prejudice, and that unlike in Escalona, it was not a "close case," as the evidence against Condon was strong. Condon, 72 Wn. App. at 650 n.2.

Viewed in context and against the backdrop of all the evidence, Hoover's remark was likewise not so serious as to deprive O'Haver of a fair trial. While no curative instruction was given and, in fact, as noted above, was specifically not requested, the remark was sufficiently vague about what incident was being described and even if O'Haver was committing a crime. At most, the jury could infer he was involved in marital discord, but that was obvious from other testimony. Thus, as in Condon, the improper remark was ambiguous enough that it did not necessarily suggest a propensity to commit the crime charged. The remark did not warrant a new trial.

Prosecutorial Misconduct

O'Haver argues that he was unfairly prejudiced by the prosecutor's statement that he had to check with his "victim advocate" before determining whether he had any redirect questions for Hoover.[35] In response to the court's question "who," the prosecutor indicated that the advocate in this instance was his notes, a piece of paper.[36] The prosecutor then asserted that he had no further questions. O'Haver did not object to the statement.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). Prejudice is established if there is a substantial likelihood the misconduct affected the jury's verdict. Where no objection is made to the remarks, the reviewability of

[35] 4 RP at 283.
[36] 4 RP at 283-84.

the alleged misconduct depends on whether the prosecutor's conduct was "'so flagrant and ill-intentioned'" as to create prejudice that could not be negated by a curative instruction. State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

O'Haver contends that this comment was in fact a statement about the victim Hoover's testimony and its credibility. O'Haver's arguments are unpersuasive. The defendant must make a plausible showing that the error "had practical and identifiable consequences [at] trial." State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). The prosecutor's nonsensical comment was not a comment on Hoover's truthfulness. This is particularly true here because the jury returned a not guilty finding to the assault charge with Hoover as the victim.

Officer Welsh's Testimony

Officer Welsh testified that he was working another sector that evening.[37] In response to a query of whether police were permitted to go into different sectors, Officer Welsh replied affirmatively, "Given the nature of the call, often very violent crimes, we cross boundaries just to help out because oftentimes it takes more than two or three officers to take care of a serious incident."[38] When asked if he recalled why he was called out, Officer Welsh responded:

> I do. It was supposed to be a domestic violence incident involving a weapon with someone actively pursuing another party attempting to possibly harm them.[39]

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[37] 4 RP at 159.
[38] 4 RP at 159.
[39] 4 RP at 159-60.

Upon arriving at the scene, neighbors told him that "they heard loud verbal arguing, yelling coming from the north."[40] Officer Welsh continued in that direction and heard someone saying "'come out' and something to the fact of 'I was going to kill you' or 'I'm going to kill you.'"[41] Officer Welsh saw a suspect, later identified as O'Haver, with his right leg raised as though he had just kicked the door.[42] Officer Welsh also observed a black semiautomatic handgun in O'Haver's right hand.[43] When asked whether he identified himself, Officer Welsh responded:

> I did. At this point it was -- like I said, this was a very serious incident. Witnesses have already stated that someone is attempting to take a life. My views from on scene, very aggressive, holding a firearm, pointing it in the direction of possible victims. It was a very serious incident.[44]
>
> At that point, we're not required to identify ourselves before we take action. At that point I had already drawn down on the suspect.

Officer Welsh further testified, without objection, that he had drawn his gun because

> it's a very serious incident. We have a person attempting to -- possibly attempting to take another life, witness statements already indicating that that's what the scenario was before we arrived, and that those parties were able to be separated.[45]

On appeal, O'Haver argues for the first time that Officer Welsh's testimony was an opinion of O'Haver's guilt. O'Haver's reliance on State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) is misplaced. There, the defendants claimed

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[40] 4 RP at 160.
[41] 4 RP at 164.
[42] 4 RP at 164.
[43] 4 RP at 165.
[44] 4 RP at 165-66.
[45] 4 RP at 166.

for the first time on appeal that testimony by detectives and a physician constituted improper opinion evidence regarding victim credibility. The Kirkman court held that testimony of an investigating officer does not necessarily give rise to a manifest constitutional error where there has been no objection at trial. 159 Wn.2d at 938. As noted by Kirkman, 159 Wn.2d at 936:

> Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. "Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim.

In Kirkman, as here, the jurors received instructions that they were not bound by witness opinions, but were to form their own opinion as to credibility.[46] Kirkman, 159 Wn.2d at 937. O'Haver likewise fails to establish prejudice.

In determining whether statements are impermissible opinion testimony, courts consider the circumstances of the case, the type of witness, the nature of the testimony, the nature of the charges, the type of defense, and other evidence before the trier of fact. State v. King, 167 Wn.2d 234, 331-33, 119 P.3d 642 (2009). While it is true that an officer's testimony carries a special aura of reliability, here, the testimony did not constitute an opinion on O'Haver's guilt. The officer was merely recounting inferences of fact-based observations. See State v. Blake, 172 Wn. App. 515, 525-26, 298 P.3d 769 (2012) (testimony that includes inferences of fact-based observations admissible), review denied, 177 Wn.2d 1010, 302 P.3d 180 (2013).

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[46] CP at 125.

In sum, Officer Welsh's testimony did not comment on the guilt or innocence of O'Haver and thus did not invade the province of the jury.

Recorded Recollection

The wife testified that she was confused and scared and just wanted to be left alone the night of the incident. She did not remember having a conversation with Officer Welsh and did not remember giving the police statements about the events.[47]

Because the wife testified she could not recall what she had said to the officer, the court admitted Officer Welsh's police report as a recorded recollection of what the wife had told him.[48] ER 803(a)(5) provides an exception to the hearsay rule for recorded recollections where such recorded recollection is

> [a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness'[s] memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The court's determination that the statement was admissible was correct. However, Officer Welsh's testimony varied from the report and O'Haver objected.[49] The particular statement that O'Haver objected to was the description that O'Haver threw his wife down, rather than held his wife down.[50] When the jury returned, the court sustained O'Haver's objection regarding Officer Welsh's description of the

[47] 4 RP at 210.
[48] 5 RP at 318-19.
[49] 5 RP at 330.
[50] 5 RP at 331-32.

alleged victim being thrown against the cabinets.[51] The court struck the testimony and directed the jury to disregard the comment as it was not an accurate rendition of what was said.[52] Officer Welsh testified thereafter by reading directly from his written report.

Decisions regarding evidentiary issues lie within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Thus, under ER 803(a)(5), an audio recording has been held admissible where the proponent demonstrates:

> (1) the record pertains to a matter about which the witness once had knowledge, (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony, (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory, and (4) the record reflects the witness's prior knowledge accurately.

State v. White, 152 Wn. App. 173, 183, 215 P.3d 251 (2009). The fourth requirement can be satisfied with the "witness'[s] direct averment of accuracy at trial." State v. Alvarado, 89 Wn. App. 543, 551, 949 P.2d 831 (1998). A witness need not swear or sign under penalty of perjury the accuracy of the statement. See State v. Nava, 177 Wn. App. 272, 274, 311 P.3d 83 (upholding the admission of a witness's unsworn tape-recorded statement as a recorded recollection, even in the face of the witness's disavowal), review denied, 179 Wn.2d 1019, 318 P.3d 279 (2013).

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[51] 5 RP at 335.
[52] 5 RP at 335-36.

The trial court did not err in admitting the recollection. On the stand, the wife repeatedly denied making statements to the officer, responding "[n]o" to the following questions:

> Q. Do you remember giving them statements about what happened?
> A. No.
> Q. Do you ever remember asking them not to arrest your husband?
> A. No.
> . . . .
> Q. Do you remember talking to [O]fficer Jimmy Welsh that night about what happened?
> A. No.[53]

The trial court did not abuse its discretion in finding that the foundation for admitting the evidence was satisfied.

O'Haver's argument that Officer Welsh's embellishment of the report in his initial testimony is not persuasive because the court struck Officer Welsh's inaccurate response to the question and the court properly instructed the jury to disregard that testimony. A jury is presumed to follow the directions of the court, so no harm was present. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010).

Cumulative Error

O'Haver argues that cumulative error denied him a fair trial. We disagree. While some errors "standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors" may require a new trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Because no prejudicial error occurred, the cumulative error doctrine is not applicable to this case. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

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[53] 4 RP at 210.

Statement of Additional Grounds

O'Haver filed a statement of additional grounds asserting that there were multiple abuses of discretion by the trial court regarding prosecutorial misconduct. These allegations are encompassed in his direct appeal and will not be addressed again here.

O'Haver also contends that the trial court violated his right to a speedy trial for a variety of reasons. O'Haver's claims are insufficient to "inform the court of the nature and occurrence of [the] alleged errors." RAP 10.10(c); State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). Moreover, these allegations involve matters outside of the record and therefore cannot be considered on appeal. See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

Trickey, J.

WE CONCUR:

Appelwick, J.

Becker, J.

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Rec'd 7-31-14

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Please accept for filing the attached Petition for Review to be filed in the case of State v. Timothy O'Haver, NOA No. 71669-7-1. The petition is being served on the Pierce County Prosecutor's Office through this e-mail.
Thank you.

Rita Griffith
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