SUPREME COURT NO. 91613-6
C.O.A. No. 44847-5-II CONSOL W/44877-7-II
(CONSOLIDATED UNDER 44877-7-II)
Cowlitz Co. Cause NO. 11-1-01353-4

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHARI ANNE BRENTIN,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Ryan P. Jurvakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly decided this matter, holding that the trial court did not err by refusing to permit the admission of evidence that was inadmissible under ER 403 and ER 405(b) and permitting relevant testimony that did not comment, directly or indirectly, on the Brentins' guilt or veracity. The respondent respectfully requests this Court deny review of the March 31, 2015, Court of Appeals Opinion in *State v. Shari Brentin*, No. 44847-5-II, affirming Shari Brentin's conviction.

III. STATEMENT OF THE CASE

In 2009, Shari Brentin and her husband, Anthony Brentin, opened and managed a Primerica office in Woodland, Washington. A.B. RP 447-78. Primerica is a financial-services company, the business of which includes investments, mortgage refinances, and life, auto, and home insurance. A.B. RP 447. By 2011, the Brentins financial status was dire. A.B. RP 739-40, 742-43, 787-88. Their home had been foreclosed upon, they had been evicted from an apartment while owing $4,680.24 for unpaid rent and a security deposit check that bounced, and for a while they were

living in a trailer on a couples' property with whom they were friends but were only able to make partial utility payments despite promising to pay rent. A.B. RP 416-44, 450-55, 740, 742-43, 772-73, 777, 780-81. In July of 2011, the Brentins moved into a home with that same couple and where the rent was $1,700 a month. A.B. RP 785. In 2011, the rent for the Primerica office space was $1,000 a month with about an additional $200 a month in utilities. A.B. RP 764-65. All told, the Brentins had about $4,000 in expenses each month and were still not making ends meet. A.B. RP 785-88. Things had to change. And they did. The Brentins became very close to Suzanne Faveluke an elderly woman in her 70s who was well known locally for being generous and a woman they knew to have lots of money. A.B. RP 748, 805-06[1]. They ended up separating her from about $20,000 of her money, which she thought was going to save Ms. Brentin's cat Mr. Socks's life and to support Mr. Brentin's campaign for city council. A.B. RP 171-260, 591-593.

Instead, Ms. Brentin bought a jewelry armoire for herself, remarking that she had wanted one for a long time, paid $1,700 in December for rent for herself and Mr. Brentin as well as her housemates, $1,200 in back rent on the house, $500 towards a car payment, $2,000 to towards the lease on

[1] Testimony indicated that Ms. Faveluke had multiple bank accounts at US Bank each in the "mid six figures." A.B. RP 313.

the Brentins' business office as they owed $1,500 in back payments and $500 for the month of December, $350 in owed deposit fees on the house for November and December, $300 on Christmas gifts, $150 in gas for her vehicle, $45 for gas in a different vehicle, $620 in back-due utility bills on the Brentins' home and business, and $350 on her cellphone bill. A.B. RP 464, 468-72, 615-17, 782. Meanwhile, Mr. Brentin spent $4,680.24 paying off the judgment entered for the unpaid rent and security deposit on the apartment. A.B. RP 440-43, 750-51. It was undisputed at trial that Ms. Faveluke was the source of this money, what was disputed was whether the Brentins deceived her by leading her to believe all the money she gave to them was to save the life of Ms. Brentin's cat and to fund Mr. Brentin's campaign for city council.

At trial multiple witnesses testified about Ms. Faveluke. She was well known in Woodland as she would regularly visit local businesses and in particular her local bank and a local restaurant by the name of Eager Beaver. A.B. RP 266-67, 320-21, 350-51, 385-86, 481-84. Ms. Faveluke was well-liked by the bank employees and she had developed a reputation in the community for being kind, generous with her money, and full of stories. A.B. RP 268, 320, 386, 494-96, 682, 748, 805-06. Ms. Faveluke admitted to being generous and testified that she gave $20,000 to the owners of Eager Beaver to keep it open, donated to the Woodland police and fire

departments, and that every Christmas that she would give the garbage man, the street sweeper, and different people that worked for the city a $100 bill. A.B. RP 206, 225-28, 247-48, 252, 258, 591.

Bank employees testified about Ms. Faveluke's normal banking practices and demeanor over the years, noting that she would always come to the bank very happy, get a cup of coffee, chat with the tellers, and check the balances of her accounts. A.B. RP 268, 321, 386. Ms. Faveluke always presented as very clean and well dressed, in a word—classy. A.B. RP 322. She also always appeared with a dog named Mindy Peep perched on her shoulder. A.B. RP 268-69, 322-23, 387. When it came to her money, she never withdrew large sums of cash. A.B. RP 275-6, 282, 321-22, 327. Instead, she would make deposits, maybe withdraw ten to twenty dollars, or get change for a bigger bill because she did not like to have large bills. A.B. RP 275-76, 321-22.

Ms. Faveluke's personality changed in the fall of 2011 as Mindy Peep died and the loss was very upsetting to her. A.B. RP 270-71, 322-23, 387. She became very forgetful, she appeared in the bank in the same dirty clothes with very messy hair, and she was no longer happy-go-lucky, rather she showed up and conducted business without visiting or having coffee; she was not herself. A.B. RP 270-282, 323-24, 387, 392. Soon after Mindy Peep died, Ms. Faveluke fell down her stairs and injured herself, which

resulted in a stay at a care facility for a few weeks. A.B. RP 184, 221-23, 274-78. During those weeks, Ms. Faveluke did not go to the bank. A.B. RP 274-78, 332.

When she reappeared she was still not herself and Ms. Brentin was with her. A.B. RP 274-82, 291, 392. Ms. Brentin had not previously accompanied Ms. Faveluke to the bank, but now she was regularly with her. A.B. RP 274-82, 287-297, 331, 354 390-94. Once Ms. Brentin was no longer showing up with Ms. Faveluke at the bank, however, Ms. Faveluke returned to her normal self. A.B. RP 303-04, 399-401. On the occasions in which Ms. Brentin accompanied Ms. Faveluke to US Bank, November 16, 2011, a couple days after November 16, November 29, 2011, and December 7, 2011, respectively, Ms. Faveluke withdrew $1,000 in cash, cashed a $5,000 check, withdrew $3,400 in cash, and asked for $5,000 in cash but the bank would only give her a cashier's check for that amount. A.B. RP 278-285, 288-296, 325-331, 350-52, 357, 391-97. According the US Bank employees, Ms. Faveluke indicated that she needed all that money to save Ms. Brentin's cat. A.B. RP 278-285, 288-296, 325-331, 350-52, 357, 391-97.

During the December 7, 2011 transaction, Ms. Faveluke was originally in the bank without Ms. Brentin, but when Ms. Faveluke left the bank with only a cashier's check in hand, she reappeared moments later

with Ms. Brentin by her side each requesting that the check be cashed. A.B. RP 296-97, 397. Ms. Loucks declined to cash the check explaining that the bank did not have that much cash on hand even though it in fact did, so Ms. Faveluke and Ms. Brentin departed the bank without cash. A.B. 299-301. Following this transaction Ms. Loucks called the police. The pair did not give up, however, as they headed to a US Bank in Vancouver to attempt to have the cashier's check cashed. A.B. RP 727-28. The bank did cash the check. A.B. RP 713. In addition, there, a bank employee saw Ms. Faveluke and Ms. Brentin together and overheard Ms. Brentin say to Ms. Faveluke, "Are you almost ready, Mom?" A.B. RP 730-31.

Additional financial information was provided by the manager of the Woodland Banking Center for the Bank of America, which was the Brentins' bank, and an investigator for US Bank. A.B. RP 499, 517, 524, 542-43. The manager identified a check payable to Shari Brentin written by Ms. Faveluke for $4,000, dated November 23, 2011, and negotiated on November 25, 2011; the memo line read Mr. So--. A.B. RP 536-37. She also explained that the Brentins had two separate accounts at the bank, but that both were joint accounts with both their names on them. A.B. RP 541-42. The investigator identified a check payable to Anthony Brentin written by Ms. Faveluke for $5,000, dated October 12, 2011 and negotiated on October 13, 2011; the memo line read $100 cash. A.B. RP 505-06. The

investigator also provided stills from the Woodland US Bank's surveillance system for the dates of November 16, 2011, November 29, 2011, and December 7, 2011 and from the Vancouver US Bank's surveillance system on December 7, 2011 that showed, in all but one, Ms. Brentin standing right next to Ms. Faveluke during the bank transactions. A.B. RP 510-11, 610-12; Ex. 25-31.

Deanna Waggoner, one-time co-owner of the Eager Beaver provided testimony similar to that of the bank employees regarding Ms. Faveluke's personality. A.B. RP 481-83. She also detailed how Ms. Faveluke came to give her and her mother (the other co-owner) $20,000 so that they could pay off what was owned on the loan for the Eager Beaver. A.B. RP 483-84, 494-96. In order to make the gift official, Ms. Faveluke's husband, a former judge, met with Ms. Waggoner, her mother, and Ms. Faveluke and the group filled out paperwork to include a slip of donation and Ms. Faveluke wrote out a check. A.B. RP 484-86.

At some point, Ms. Faveluke brought Mr. Brentin to the Eager Beaver and introduced him to Ms. Waggoner. A.B. RP 486. Ms. Waggoner testified that Ms. Faveluke began coming to the restaurant with Mr. Brentin two to three times a week and that at the beginning she was herself but that she became very distant. A.B. RP 487. More specifically, that she wasn't colorful with her stories, very quiet, and sometimes didn't recognize Ms.

Waggoner or her mother. A.B. RP 487. Ms. Brentin also showed up a couple times. A.B. RP 488. One of these times, Ms. Brentin informed Ms. Waggoner that she and Mr. Brentin were going to take over Ms. Faveluke's finances and that they were very concerned about her well-being. A.B. RP 489. Ms. Brentin stated to Ms. Waggoner that they were trying to get power of attorney in order to get control of Ms. Faveluke's finances. A.B. RP 490. Ms. Waggoner also noticed that once the police became involved and the Brentins were no longer in Ms. Faveluke's life she was back to the normal Suzanne. A.B. RP 491.

Mr. Socks, Ms. Brentin's cat, was actually quite sick. A.B. RP 342-46. He was taken to the Woodland Veterinary Hospital and examined by a veterinarian on November 17, 2011 and referred to Columbia River Veterinary. A.B. RP 340. The total cost of the visit was $127.00, which was paid in cash by Ms. Brentin. A.B. RP 341. Woodland Veterinary accepts checks, cash, Visa, MasterCard, Discover, and CareCredit as forms of payment. A.B. RP 337.

Columbia River Veterinary, which accepts all the same types of payment as Woodland Veterinary save personal checks, provides emergency and specialty services for cats and dogs. A.B. RP 364-65. Ms. Brentin took Mr. Socks to Columbia River on November 18, 2011. A.B. RP 371. Ms. Brentin's total bill for Mr. Socks's care at Columbia

River,which spanned from November 18, 2011 to December 8, 2011, was $1,772.29 including tax. A.B. RP 370-73[2].

The Woodland Police became involved following Ms. Loucks's call on December 7, 2011. A.B. RP 549. Officers contacted US Bank employees and the relevant veterinary offices to collect records. A.B. RP 549-559. On December 14, 2011, Detective David Plaza proceeded to Ms. Faveluke's residence and when he knocked on the door Mr. Brentin answered. A.B. RP 559-561. Detective Plaza testified that when Ms. Faveluke came to the door she was not looking her usual self, rather she was extremely disheveled, her clothes were messy and her hair was not done. A.B. RP 563. Mr. Brentin asked Det. Plaza if he needed to step out and Det. Plaza told him it would be a good idea. A.B. RP 563. Det. Plaza spoke with Ms. Faveluke about what was going on for about an hour and a half maybe two hours and when he left he noticed that Mr. Brentin was still outside and that he went back into Ms. Faveluke's house. A.B. RP 564-65.

After some further investigation, Det. Plaza returned to Ms. Faveluke's home on December 22, 2011. A.B. RP 567. Ms. Faveluke made a formal statement to Det. Plaza by dictating it to him and then signed it

[2] Ms. Brentin did also pick up medications a couple times after December 8, 2011 and Mr. Socks was euthanized by Columbia River in what appears to be May of 2012. A.B. RP 379, 382. The estimated cost for the medications and euthanization was around $200. A.B. RP 382.

under penalty of perjury. A.B. RP 568-570. That statement was read into evidence and is as follows:

"I have known Tony and Shari Brentin for about five years. I met Tony when he was the fire chief for the Woodland Fire Department and I donated money to the department after I was hurt. After falling down my stairs, Tony and Shari stated coming over about three months ago. Shari and Tony would help around the house and help me shower, make sure I ate, et cetera. The Brentins did not help me pay bills, nor did they do any financial transactions on my behalf.

On October 12, 2011, Tony was at my house and made a comment about how nice my Jamie Herrera election signs were. He was running for Woodland City Council at the time. We talked about how nice signs would help his campaign. Tony said that campaign sings cost money. Shari then said if we had money, they would buy nice signs, too. After we talked for a while, I decided to help Tony by donating to his campaign. I wrote Tony a check, Check Number 1389 for $5,000 but kept $100.00 for myself, so I gave Tony $4,900.00. This money was to be used solely for his campaign and nothing else. He was supposed to buy signs, flyers, posters, et cetera. I later found out he did not use my money for any of that.

On November 16, 2011, Shari stopped by my house and she was crying. She told me her cat had cancer and it was dying. She said the vet

could save the cat, but it would cost $1,000. She told me the vet would only take cash. Since my dog recently died of cancer, and knowing the pain I went through, I gave Shari the money. I was told the entire amount was for the vet bill.

On November 29, 2011, Shari came by my house again. She said her cat needed more surgery or her cat would die. She told me again that her vet only took cash. She drove me to the bank and I withdrew $4,352.00 in cash. I gave her the money, believing that the entire amount was to be used to pay the vet.

On December 7, 2011, Shari came to my house again. She said the cat needed more work done. At one point, she was on the telephone with who she said was the vet office. After she hung up, she told me the vet said either she paid them $5,000.00 in cash or they would put her cat to sleep. Not wanting her cat to be killed, I agreed to give her the money. She took me to the bank and I tried to withdraw the cash but was told the bank did not have it. I got a cashier's check instead. The bank lady asked me to wait one day before I cashed it, and I said okay. When we got to my car, Shari said we should look for a bank to cash the check at. We went to a bunch of banks before we found one that would cash it. After I gave her the money she told me not to tell Tony about it. She said Tony would not agree with her spending $5,000.00 on a cat. I promised not to tell. I gave her the

money thinking it would all be used on an operation for Shari's cat. The day the police came by, Tony and Shari stopped coming over." A.B. RP 591-93.

While Ms. Faveluke's trial testimony was generally consistent with her statement to Det. Plaza some details were different and she appeared confused at times. A.B. RP 171-260. That said, she was clear that she gave a substantial amount of money to the Brentins for only two purposes: (1) to save the life of Ms. Brentin's cat and (2) Mr. Brentin's campaign. A.B. RP 182, 187-88, 198-200, 202-03, 207-08, 236-37, 249-50. Ms. Faveluke also provided information about an additional $500 in cash she gave to Mr. Brentin for his campaign and more specifically for signs. A.B. RP 187, 197, 199-200, 249-50, 259. Though part of this testimony could be fairly characterized as jumbled, Ms. Faveluke was able to distinguish between the $5,000 check she wrote to Mr. Brentin in which she kept $100 and the $500 cash, in five one-hundred dollar bills, that she gave to him while in the nursing home. A.B. RP 187, 197, 199-200, 249-50, 259. She also acknowledged that it was possible that she read a newspaper article about Mr. Brentin's campaign and that if she had read an article that portrayed him badly she probably would have talked to him about it. A.B RP 251, 253-54. Ms. Faveluke likewise agreed that it was possible that she talked to her neighbor Scott Perry about Mr. Brentin's campaign and that she

probably told him she wanted to help out Mr. Brentin by giving him money. A.B. RP 256-57.

The day after getting Ms. Faveluke's formal statement, Det. Plaza spoke with Ms. Brentin. A.B. RP 594. Mr. Brentin explained to Det. Plaza that after Ms. Faveluke got hurt and returned from the nursing home she (Ms. Brentin) would be at Ms. Faveluke's house every day to help out. A.B. RP 598. When asked about going to the bank with Ms. Faveluke, Ms. Brentin initially stated that she would wait at the door or stand by the side of it while Ms. Faveluke conducted her business because Ms. Faveluke's banking business was not her business. A.B. RP 601. Det. Plaza asked Ms. Brentin whether she had received any money from Ms. Faveluke and she replied that she had as Ms. Faveluke had offered to pay for three of her vet bills which she estimated to be $3,000.00. A.B. RP 601-03.

Ms. Brentin ended up writing a statement for Det. Plaza and in it she now estimated that she received $4,000 from Ms. Faveluke to pay her vet bills. A.B. RP 609. Det. Plaza then confronted Ms. Brentin with things he found confusing about her statement including the fact that she had told him that they (the Brentins) were doing just fine financially. A.B. RP 609-10. Next, Det. Plaza and a fellow officer revealed that they were aware of how much the vets' bills really were and how much money was really involved overall. A.B. RP 614-15. Det. Plaza then asked Ms. Brentin if she always

intended to take Ms. Faveluke's money, or if it had gotten away from her. A.B. RP 615. Ms. Brentin responded that "it just had gotten way from her." A.B. RP 615.

Ms. Brentin then admitted that when she found out the vet bill was substantially less than she had told Ms. Faveluke it would be that she decided to keep the money for herself and to pay off personal bills. A.B. RP 616. She also claimed at some time during interview, however, that when she tried to give Ms. Faveluke the extra money back that Ms. Faveluke told her that she did not want the money back and for Ms. Brentin to use it. A.B. RP 633. Nonetheless, after admitting to using Ms. Faveluke's money to pay for things other than vet bills, Ms. Brentin gave a detailed list of the things for which used Ms. Faveluke's money[3], admitted her family's financial distress, said that "Suzanne probably believed the money was going towards the vet bills," and said that what she did was wrong. A.B. RP 617-18.

The defendant(s) called two witnesses, Scott Perry and Anthony Brentin. Mr. Perry's testimony was equivocal. He testified that Ms.

[3] $1,200 in back rent on the house, $500 towards a car payment, $2,000 to towards the lease on the Brentins' business office as they owed $1,500 in back payments and $500 for the month of December, $350 in owed deposit fees on the house for November and December, $300 on Christmas gifts, $150 in gas for her vehicle, $45 for gas in a different vehicle, $620 in back-due utility bills on the Brentins' home and business, and $350 on her cellphone bill. A.B. RP 464, 468-72, 615-17, 782.

Faveluke was upset about a newspaper article written about Mr. Brentin that referenced a debt he owed and that she dropped by his office to tell him she had given Mr. Brentin $5,000 for his campaign. A.B. RP 679-680. He also testified that in their conversation about the article Ms. Faveluke seemed to be saying that she didn't want that (the article) to be a negative to his campaign, but couldn't say that she said the money was specifically for the debt. A.B. 686, 698. Mr. Perry noted that since situation with the Brentins, Ms. Faveluke had become somewhat paranoid calling him at least once a day for several weeks. A.B. RP 692-94.

Mr. Brentin testified that in June 2011 he filed to run for Woodland City, but did not intend to campaign. RP 743-45, 750, 793. After he filed to run, his former landlord wrote a letter to the Columbian that mentioned Mr. Brentin's debt of $4,680.24. RP 251, 745. Mr. Brentin testified that as a result of this article Ms. Faveluke offered to pay his debt and that despite his declining her offer, her persistence paid off and he accepted the money. A.B. RP 747-78, 751, 796-97. During this time period and contemporaneous to it, Mr. Brentin and his wife visited Ms. Faveluke daily at her nursing home following her fall. RP 753. After Ms. Faveluke was back home, Mr. Brentin continued his almost daily visits and helped her around the house to include repairs and running errands. A.B. RP 755-58. He denied conning or scamming Ms. Faveluke. A.B. RP 759.

Both Mr. and Ms. Brentin were convicted at trial. These convictions were affirmed on appeal. Ms. Brentin now seeks review of the Court of Appeals' decision, affirming the trial court's rulings that limited testimony under ER 403 and ER 405(b) and permitted testimony that did not comment, directly or indirectly, on the Brentins' guilt or veracity.

IV. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Ms. Brentin's petition fails to demonstrate that any of the grounds listed under RAP 13.4(b) apply, her petition should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

In her petition, Ms. Brentin makes no claim that the Court of Appeals' decision conflicts with a decision of the Supreme Court, thus RAP

13.4(1) does not apply. Ms. Brentin claims that the Court of Appeals' affirmation of the trial court's decision limiting cross examination of Ms. Faveluke regarding acts of generosity raises a significant question of constitutional law and a substantial issue of public interest. However, in support of her assertion regarding a substantial issue of public interest, Ms. Brentin provides no explanation as to why this is so. Ms. Brentin also maintains that the Court of Appeals' affirmation of the trial court's ruling that testimony was not inadmissible as opinion testimony conflicts with another decision of the Court of Appeals. However, she fails to comprehend the distinction between the prior case which involved prejudicial evidence of opinion evidence introduced with the sole purpose of showing the guilt of the accused, and her case, involving non-opinion evidence, which did not contain any comment as to guilt or veracity of her or her husband. Because Ms. Brentin's petition fails to provide grounds for review under RAP 13.4(b), it should be denied.

A. Ms. Brentin fails to demonstrate how the Court of Appeals' holding that the trial court did not err in limiting evidence that was inadmissible under ER 403 and 405(b) involves a significant question of constitutional law or a substantial issue of public interest.

The trial court did not abuse its discretion by applying the rules of evidence to testimony in the courtroom, therefore the Court of Appeals'

decision affirming the trial court does not raise a significant question of constitutional law or a substantial issue of public interest. "Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion." *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) ("The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view.") (citations omitted). When a trial court's ruling on such matters of evidence is in error, reversal will only be required "if there is a reasonable possibility that the testimony would have changed the outcome of trial." *Aguirre*, 168 Wn.2d at 361 (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006)).

Pursuant ER 404(a), character evidence is generally inadmissible. *Martin*, 169 Wn.App at 628 ("A victim's character . . . in general [is] excluded from evidence."). ER 404(a)(2). However, is an exception to the general rule and allows "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused." While ER 404 "controls the admissibility of character evidence," ER 405 "controls the method of proving character when evidence of character is admissible." *State v. Donald*, 178 Wn.App 250, 256, 316 P.3d 1081 (2013).

Consequently, under ER 405, when evidence of the character of the victim is admissible, and not an essential element of a "charge, claim, or defense," it may only be proven "by testimony as to reputation." On the other hand, when the "character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct. ER 405(b). In criminal cases, "character is rarely an essential element of the charge, claim, or defense." *State v. Kelly*, 102 Wn.2d 188, 196-87, 685 P.2d 564 (1984). This is not surprising because for "character to be an essential element, character must itself determine the rights and liabilities of the parties." *Id.* In other words, if "[p]roof, or failure of proof of the character trait, standing alone, would not satisfy any element of the charge, claim, or defense" the character trait is not an essential element and evidence of the character trait must be limited to reputation. *State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998); *See e.g. State v. Alexander*, 52 Wn.App 897, 901, 765 P.2d 321 (1988) (holding that specific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense).

Under the Constitution, States' have "broad latitude . . . to establish rules excluding evidence from criminal trials." *Donald*, 178 Wn.App at 263. That said, a criminal defendant's "constitutional right to a meaningful opportunity to present a complete defense limits this latitude." *Id.* (citation

and internal quotations omitted). "An evidence rule abridges this right when it infringes upon a weighty interest of the defendant and is arbitrary or disproportionate to the purpose it was designed to serve." *Id.* Similarly, a defendant's right to present a defense is limited. *Id.* For instance, a defendant's right to present a defense is "subject to reasonable restrictions and must yield to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id* at 263-64 (quoting *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999)). A violation of a defendant's right to present a complete defense is subject to harmless error analysis. *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *Id.*

Here, Ms. Brentin appears to take the position that specific instances of conduct are an acceptable method of proof even when character is not an essential element of the charge or defense. Noting that the second sentence of ER 405(a) states that "[o]n cross examination, inquiry is allowable into relevant specific instances of conduct," she contends subsection (a) allows proof by specific instances of conduct. Appellate courts have rejected this reading of the rule, however, and held that reputation testimony is the exclusive way to prove character under ER 405(a) when the character of the

victim is not an essential element of a "charge, claim, or defense." *State v. Mercer-Drummer*, 128 Wn.App. 625, 630-32, 116 P.3d 454 (2005); *State v. O'Neill*, 58 Wn.App. 367, 370, 793 P.2d 977 (1990). Rather, the second sentence of ER 405(a) pertains to allowing the impeachment of an opposing party's character witness by asking said witness whether they have personal knowledge of specific incidents of (mis)conduct regarding the person for whom they appeared as a character witness. *State v. Lord*, 117 Wn.2d 829, 891, 822 P.2d 177 (1991).

Ms. Faveluke's generosity was not an essential element of the Ms. Brentin's defense and Ms. Brentin does not argue otherwise. Consequently, the only allowable method of proof of Ms. Faveluke's generosity was through reputation testimony. Ms. Brentin was allowed to and did present a complete defense. Not only did Ms. Brentin introduce substantial evidence of Ms. Faveluke's reputation for being generous, but the trial court allowed testimony through multiple witnesses about a specific instance of Ms. Faveluke's generosity, i.e., her $20,000 gift to the owners of the Eager Beaver restaurant for the purposes of paying off their debt. Further, there were additional specific instances of Ms. Faveluke's generosity that ended up being testified to by Ms. Faveluke herself, to include donations to the Woodland Fire Department and Woodland Police Department and $100 bills she gave out around Christmas time. A.B. RP 206. Thus, contrary to

Ms. Brentin's argument that she should have been able to admit into evidence even more instances of Ms. Faveluke's generosity, here, the trial court allowed testimony about a specific instance of generosity that ER 404(a) and ER 405 do not allow. As a result, the trial court did not err to Ms. Brentin's detriment in its application of the evidence rules concerning Ms. Faveluke's character. Instead, Ms. Brentin had many more specific instances of Ms. Faveluke's generosity admitted into evidence than which they were entitled under the evidence rules.

Additionally, the Brentins failed to make sufficient offers of proof regarding the other alleged specific instances of Ms. Faveluke's generosity. A.B. RP 126, 132-33, 138-139, 157-158. The offers of proof that were made were vague as to the time, place, and/or purpose of the gifts. A.B. RP 126, 132-33, 138-139, 157-158. Notably, not a single offer of proof included a cash gift to a person with no strings attached. Instead, each purported gift was made either to an organization or to a specific person for a specific purpose. A.B. RP 126, 132-33, 138-139, 157-158. Thus, even if there were admissible evidence existed that was central to ability of the Ms. Brentin to present a complete defense, such an offer of proof was not made to the trial court.

Finally, assuming *arguendo* that the trial court erred in preventing Ms. Brentin from cross-examining Ms. Faveluke concerning specific

instances of her generosity this error would have been harmless. Any reasonable jury would have reached the same result as additional evidence of her generosity would not have realistically changed the core facts of the case or the reasonable inferences from the evidence presented.

The Court of Appeals correctly analyzed the issue and held that the "minimal probative value of the evidence was substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence and was therefore inadmissible under ER 403." COA Opinion at 21. The Court of Appeals also noted that evidence of specific instances of conduct may only be admitted if the person's "character is an essential element of a charge, claim, or defense." COA Opinion at 22 (citing *Kelly*, 102 Wn.2d at 197). The Court of Appeals explained that there was no dispute that Ms. Faveluke voluntarily and generously gave the Brentins her money, but rather the issue was the Brentins' intent to deceive Ms. Faveluke. COA Opinion at 22. The Court of Appeals then stated: "Because Faveluke's character for generosity does not itself determine the Brentins' rights and liabilities under the first degree theft statute, it is not an essential element of any charge, claim, or defense to the crime[.]" COA Opinion at 22. Thus, because the evidence would not have shown an essential element of the charge, claim, or defense, its exclusion was proper under ER 405(b) and this did not violate any constitutional right to present a defense.

The Court of Appeals' reasoning was consistent with the case law and the rules of evidence. Further, it also recognizes the superior position of the trial court to make determinations regarding the application of evidentiary rules to the facts and circumstances presented at trial. Here, because the offer of proof did not show that the evidence sought to be admitted was an essential element of the charge, claim, or defense, there is no showing that the trial court abused its discretion. Rather, it applied ER 405(b) and ER 403 properly to the evidence at issue. Further review of this matter neither raises a significant question of constitutional law nor a substantial issue of public interest. For these reasons the petition for review should be denied.

B. The Court of Appeals' decision affirming that the trial court did not abuse its discretion in permitting non-opinion testimony does not conflict with another decision of the Court of Appeals.

Ms. Loucks' testimony was not a comment on the Brentins' guilt or veracity, therefore there is no conflict between the admission of her testimony and another Court of Appeals' decision. The general rule is that no witness may "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Our Supreme Court has, however, "expressly declined to take an expansive view of claims that testimony constitutes an opinion of

guilt." *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (quoting *City of Seattle v. Heatley*, 70 Wn.App. 573, 579, 854 P.2d 658 (1993). "Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *State v. Notaro*, 161 Wn.App 654, 662, 255 P.3d 774 (2011) (quoting *Heatley*, 70 Wn.App at 578). In other words, lay witnesses may offer opinion testimony. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) ("Lay witnesses also may [] give opinions or inferences based upon rational perceptions. . . ."). To help determine whether statements are impermissible opinion testimony, a court will consider (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Id.* at 590.

Here, Ms. Loucks did not testify as to her opinion of Ms. Brentin's guilt. Ms. Loucks had been working in the banking industry for 38 years and was acting manager at the Woodland US Bank during the incidents in question and testified at length. A.B. RP 261-314. She explained that as part of her duties she tries to keep an eye out for problematic and fraudulent transactions by getting to know her customers' banking habits, that she paid special attention to her elderly customers and how they were doing, and that

at the time of the incidents she had known Ms. Faveluke for at least six years. A.B. RP 264-66. Near the end of her testimony she was asked if she had been trying to get in touch with the police and she responded "Yes." A.B. RP 301-02. She was also asked if she tried to get in touch with Adult Protective Services and she responded "Yes. And our fraud department." A.B. RP 302. Ms. Loucks was asked if she ended up speaking with the police and whether she provided them information and other materials, she responded "Yes, I did" and "Yes" respectively. A.B. RP 303. Ms. Loucks offered no additional testimony concerning her contact with the police, Adult Protective Services, or her fraud department. A.B. RP 264-314.

Ms. Loucks' testimony contained no direct opinion on Ms. Brentin's guilt or on her credibility. Rather, she testified to objective facts and by acknowledging that she contacted to police, her testimony only informed the jury as to how the police came to be involved in the matter. Importantly, to the extent that Ms. Loucks' testimony included her opinion, that opinion was based solely on her experience in the banking industry and her observations of the change in Ms. Faveluke's banking habits, personality, and physical appearance, all of which coincided with when Ms. Brentin began appearing in the bank with her.

Thus, this evidentiary foundation directly and logically supported Ms. Loucks' concern, if it can be said that acknowledging she called a

couple agencies in response to what was happening informed the jury of her opinion. At most, Ms. Loucks' simple acknowledgment that she called the police and Adult Protective Services allowed the jury to infer she was concerned about what was going on. But her concern or suspicion about what was going on, which would have been evident by all the other objective facts to which she testified, does not rise to the level of an opinion that Ms. Brentin was guilty of the crime charged. Testimony by Ms. Loucks' as to her actions after encountering suspicious circumstances is similar to police or eye witness testimony as to what actions were taken upon encountering suspicious circumstances—a routine part of any jury trial.

Moreover, the jury was in a position to independently assess Ms. Loucks' testimony in light of the foundation evidence. Ms. Loucks was available for cross examination and the jury was instructed that it was the sole judge of credibility and the weight to be accorded the testimony of each witness. In sum, Ms. Loucks did not improperly offer her opinion as to Ms. Brentin's guilt, if part of her testimony included her opinion it was proper. Further, it would be entirely unreasonable to conclude that the jury would have reached a different result if Ms. Loucks had not testified that she contacted other parties. Thus, when evaluating the evidence the trial court

did not abuse its discretion in admitting this evidence and the Court of Appeals agreed when it affirmed this decision.

Ms. Brentin argues that the Court of Appeals' decision conflicts with the decision in *State v. Johnson*, 152 Wn.App. 924, 219 P.3d 958 (2009). However, in *Johnson*, the testimony at issue was highly prejudicial evidence of the defendant's wife attempting suicide after the victim of child molestation disclosed to the defendant's wife details of the victim's sexual relationship with the defendant. *Id.* at 929. This improper opinion testimony's only purpose was to "convey to the jury that the defendant's wife believed [the victim] was telling the truth that the defendant was guilty." *Id.* at 929-30. The testimony in Ms. Brentin's case did not carry any such prejudicial effect. As a bank manager, Ms. Loucks had a duty to be careful when dispensing funds. Her action of contacting the authorities, expressed no opinion as to Ms. Brentin's guilt, it simply explained how the authorities came to be contacted to investigate the possibility of any wrongdoing. Because Ms. Loucks' testimony did not comment directly or indirectly on Ms. Brentin's guilt or veracity, it was not improper opinion testimony and there is no conflict with another decision of the Court of Appeals. Thus, RAP 13(4)(2) does not apply.

V. CONCLUSION

Because Ms. Brentin's petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 29th day of May, 2015.

Ryan P. Jurvakainen
Prosecuting Attorney
Cowlitz County, Washington

By _____
Eric H. Bentson, WSBA #38471
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

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and,

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 29th 2015.

Michelle Sasser

Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle; Cathy Glinski (cathyglinski@wavecable.com)
Subject: RE: PAs Office Scanned Item Shari Ann Brentin, 91613-6, Response to Petition For Review

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Attached, please find Response to Petition For Review regarding the above-named Petitioner.

If you have any questions, please contact this office.

From: pacopier_donotreply@co.cowlitz.wa.us [mailto:pacopier_donotreply@co.cowlitz.wa.us]
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