NO. 44945-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY GREG O'HAVER,

Appellant.

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

The Honorable John Hickman, Judge

OPENING BRIEF OF APPELLANT

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STATUTES, RULES, AND OTHER AUTHORITY:

A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding Mr. O'Haver's testimony about the prior incidents of violence by his wife and neighbor which caused him to fear serious injury from them, and this exclusion denied him his state and federal constitutional rights to present a defense.

2. The trial court erred in denying Mr. O'Haver's motion for mistrial after the court made a statement from which the jurors could infer that Mr. O'Haver was in custody during trial.

3. Inaccurate testimony implying there had been a prior incident or incidents of domestic violence by Mr. O'Haver denied him a fair trial.

4. The prosecutor's telling the trial court that he needed to speak for a moment to the "victim advocate" violated the court's motion in limine and denied Mr. O'Haver a fair trial.

5. Officer Welsh's testimony implying his opinion that Mr. O'Haver was guilty of charged and uncharged crimes, including attempted murder, and repeatedly emphasizing the danger of the situation denied Mr. O'Haver a fair trial.

6. The trial court erred in admitting Officer Welsh's report of what Mrs. O'Haver allegedly said on the night of the incident as recorded recollection.

7. Officer Welsh testified falsely by embellishing what he had written as Mrs. O'Haver's alleged statements on the night of the incident.

8. Cumulative error denied Mr. O'Haver a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. O'Haver denied his state and federal constitutional rights to present a defense by the trial court's exclusion of his testimony describing specific instances of violence by his wife and neighbor, known to him, which would have allowed jurors to put themselves in his shoes in deciding his claim of self-defense? Assignment of Error 1.

2. Was Mr. O'Haver 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 Mr. O'Haver was in custody during trial? Assignment of Error 2.

3. Was Mr. O'Haver denied a fair trial where a state's witness improperly and untruthfully told the jurors that there had been prior incidents of domestic violence by him? Assignment of Error 3.

4. Did the prosecutor violate the court's in limine ruling and deny Mr. O'Haver a fair trial by asking for time to speak to the "victim advocate" in the case and thus implying his opinion as to guilt? Assignment of Error 5.

5. Did Officer Welsh's testimony implying his opinion that Mr. O'Haver was guilty of the charged crimes and uncharged crimes and repeatedly emphasizing the dangerousness of the situation deny Mr. O'Haver a fair trial? Assignments of Error 5 and 7.

6. Did the trial court err in admitting Officer Welsh's report as a recorded recollection where Mrs. O'Haver never said she could not remember the incident, and in fact testified fully about it; and never adopted the notes taken by Officer Welsh or the report he subsequently wrote as true; and where Officer Welsh embellished and falsely characterized what he had written in his report? Assignments of Error 6 and 7.

7. Did cumulative error deny Mr. O'Haver a fair trial? Assignment of Error 8.

C. STATEMENT OF THE CASE

1. Procedural history

The Pierce County Prosecutor's Office charged Appellant Timothy O'Haver, by amended information, with four counts of second degree assault: Counts I and III of Marcus Dettling; Count II of his wife Wendy O'Haver; and County IV of John Hoover. CP 19-21. Counts I, III, and IV were alleged to have been committed with a deadly weapon. CP 19-21. Count II was alleged to involve domestic violence, to be a part of an on-going pattern of abuse, and to have been committed within the sight or

sound of minor children; but the trial court, the Honorable John Hickman, dismissed all of the aggravating factor allegations for Count II at the close of the state's case for insufficient evidence to support them. RP 421.[1]

The jury acquitted Mr. O'Haver of Counts I and IV; found him guilty only of the lesser included offense of assault in the fourth degree on Count II, convicted him as charged of Count III and found that he committed Count III with a deadly weapon.[2] CP 167, 170, 173, 176.

Judge Hickman sentenced Mr. O'Haver to a term within the standard range. CP 190-194. Mr. O'Haver subsequently filed a timely notice of appeal. 195-211.

2. Trial testimony

Mr. O'Haver and his wife Wendy O'Haver lived with their two children, aged ten and twelve, in a house on a dead-end street in a wooded and hilly area of Tacoma, Washington. 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 main door to the O'Haver house faced the door of the Dettling house; sliding glass doors at the other end of

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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.

[2] The jury also acquitted of the lesser included offenses of unlawful display of a weapon on Counts I and IV. CP 165, 166, 169.

the O'Haver house led to a more private patio off the kitchen. RP 341, 435-436,

On August 21, 2012, Mr. O'Haver came home from work mid-to-late afternoon. RP 193, 437. He is a carpenter-construction worker who, at that time, left home at 4:00 or 5:00 a.m. and returned after working eight hours. RP 437. Mrs. O'Haver had been drinking before he arrived home that day; they both had several drinks after he got home. RP 197, 437-438-440, 443. Sometime around 7:00 p.m., Mr. O'Haver got 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 196, 198, 448-449.

Mr. Dettling had three musician friends over that evening to practice for an upcoming engagement. RP 243, 268-272, 341-344. They quit practicing when Mrs. Dettling came home from work about 7:30 p.m., 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.

The trial evidence consisted of the testimony of all of the witnesses who described what they said they saw of the incident, the police officers who responded to 911 calls, and the medical personnel who saw Mr.

Dettling after the incident and found no evidence of trauma or injury consistent with his testimony.

Mr. O'Haver testified that his wife had so much to drink on August 21 that she could not function well and became spiteful and sarcastic. RP 446,448. When she hit him on the head during the argument, he grabbed her by the forearms and held her at arm's length.[3] 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. Mrs. O'Haver closed her eyes when he sprayed her and staggered backwards against a wall, where she slumped to the ground. RP 453. Mr. O'Haver believed the incident was over at that point. RP 486.

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

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[3] As set out in more detail below, Mr. O'Haver was not allowed to describe an incident in 2007 in which Mrs. O'Haver hit him and her fingernail injured his eye. RP 455-461. This was offered to explain why he felt the need to defend himself from her. RP 456-457.

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

At that point, Mr. O'Haver returned home and placed his shotgun on the kitchen table loaded with a non-lethal round, to have it ready in cases he was followed home, and returned to the Dettling house with his .40 caliber pistol. RP 500-502. He placed the gun on the 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. Mr. Dettling raised and pointed his gun and Mr. O'Haver grabbed his gun. RP 505. The police arrived and Mr. O'Haver dropped his weapon as commanded by the officers. RP 505.

Wendy O'Haver testified that Mr. O'Haver 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; she did hear her husband beating on the door. RP 203-205. She described her injuries: bruising on her arms towards her elbows, a black eye, some marking on her throat, a cut on one shoulder and a

matching red area on the other. RP 206-209. The photograph taken after the incident showed her eye as puffy, swollen, and red underneath. RP 208. She testified that she was confused, scared and wanting to be left alone the night of the incident and could not recall giving a statement to the police. RP 210. She did not recall saying that she was embarrassed and concerned about finances. RP 212. She did not recall saying that her husband went crazy, was vulgar and mean, held her with his arms across her chest, or that she was screaming she couldn't breathe and begging for her life. RP 213-215. On cross-examination, Mrs. O'Haver confirmed that Mr. 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 Mr. 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.

Mr. Dettling's friend John Humen, who had been playing music with him, testified that as they were standing and talking outside the Dettling house, he heard some shouting and saw Mr. and Mrs. O'Haver come out to the patio and that he was choking her. RP 241-242, 245-247. Mr. Dettling went and physically separated them. RP 246-247. The three went inside the O'Haver house. RP 218. According to Mr. Humen, Mrs. O'Haver came hurrying out towards the Dettlings house. RP 248. Humen

left; but he said that, at the top of the driveway, he saw Mr. Dettling and Mr. O'Haver face-to-face and angry. RP 249. A short time later Mr. Humen called 911. RP 250. He talked to the police when they arrived and then left the scene. RP 250-251.

Mr. Dettling's friend John Hoover, who had also been at his house playing music, described seeing Mrs. O'Haver round the corner and trip over a wood pile. RP 272. According to Mr. Hoover, Mr. O'Haver grabbed her and tried to pull her up; she struggled and he hit her once with an open hand and then they went back down the side of the house. RP 272. Mr. Hoover then testified that Mr. Dettling said, "This is my neighbors and they have done this before."[4] RP 273. Mr. Hoover described seeing, as he walked to his scooter, Mr. O'Haver and Mr. Dettling having "a fairly civilized" conversation. RP 274. Then he said he saw, as he was putting on his gear, Mrs. O'Haver come out of the house crying and screaming, Mr. O'Haver come out with a gun in his hand and Mr. Dettling following him. RP 275. When, according to Mr. Hoover,

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[4] Outside the presence of the jury, the prosecutor told the court that he had asked defense counsel to explain to Mr. Hoover the motions in limine while interviewing him, but that the witness had nonetheless mentioned a prior incident. RP 293. Of course, Mr. Hoover was a state's witness and it was the prosecutor's responsibility to make sure he did not testify improperly. Defense counsel indicated that he would not ask for a limiting or cautionary instruction and thereby ask the jurors to ignore the ringing bell. RP 293. The trial court agreed that there was a dilemma about whether to ask for a cautionary instruction. RP 293.

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. Mr. Dettling caught up with Mr. O'Haver at this point and they struggled over the gun. RP 277-279. Mr. O'Haver was holding the gun up in the air and Mr. Dettling was holding Mr. O'Haver's arm. RP 279. Hoover pushed his bike around the corner and called 911. RP 278.

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 Mr. 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 Mr. O'Haver yelling at the door. RP 301. When asked, she brought Mr. Dettling their gun – the "old lady" -- and took Mrs. O'Haver into the bedroom. RP 304-305. 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. She saw nothing that happened at the O'Haver house and never left her own house during the incident. RP 312, 314.

Marcus Dettling described seeing Mrs. O'Haver come out of the house screaming, and Mr. O'Haver tackling her and hitting her in the face with his fists. RP 345-346. When Mrs. O'Haver stood up, Mr. O'Haver

"hauled" her back inside. RP 346. Mr. Dettling said he followed and saw Mr. O'Haver in the kitchen on top of his wife hitting her. RP 347-350. He started insulting Mr. O'Haver who, in response, tried to push him out of the house. RP 351-352. Mrs. O'Haver ran out. RP 352. When Mr. O'Haver went and got a gun, he ran as well. RP 354. He called for his wife to get their gun. RP 355-356. He testified that Mr. O'Haver kicked and broke the door knob and broke a baseball bat that had been inside the door hitting it against the door. RP 356-358. Mr. 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 him with it repeatedly. RP 359-359. Mr. Dettling testified that Mr. O'Haver accused him of kidnapping his wife. RP 360.

On cross-examination, Mr. Dettling testified 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 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 Mr. O'Haver choking his wife and that when he followed them inside, he again saw Mr. O'Haver choking his

wife. RP 397. This differed from his trial testimony. In his second statement, he said he saw Mr. O'Haver point a gun at Mr. 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 Mr. O'Haver pointed a gun at him. RP 408-409.

Mary Meyers, emergency room physician and defense witness, testified that she found no evidence of trauma to Mr. Dettling's head or body, no swelling, no bruising, no eye protrusion. RP 551-553. His CT scan was normal as were other objective tests. RP 554. Although he had a visual deficit in his eye, as he claimed, he had suffered a previous injury with previous visual impairment. RP 556. Brian Mace, the paramedic who went with Mr. Dettling in the ambulance and who was also a defense witness, testified that Mr. Dettling was oriented to time and place, and stated that he and his friend had been drinking and that he had sustained injuries in an argument caused by being repeatedly hit in the head with the barrel of a gun. RP 537. Mace, however, was unable to find any evidence of a head injury, nor did Mr. Dettling pass out in the ambulance, as he had claimed. RP 537-538. Mace did notice that Mr. Dettling smelled of alcohol. RP 537.

Officer Eric Barry confirmed that when he arrived, he found

Marcus Dettling inside the door of his house pointing a gun outward. RP 86-88. Officer Barry went around the corner and saw Officer Welsh detaining Mr. O'Haver, who also had a gun. RP 87, 90. According to Officer Barry, all of the people he encountered smelled of alcohol, including both Mr. and Mrs. O'Haver and Mr. and Mrs. Dettling. RP 91-94. The O'Haver children were asleep upstairs.[5] RP 96. Other officers described helping to make sure that no one was injured in either house, collecting evidence and photographing the scene. RP 99-103; 137-144, 177.

Officer Jimmy Welsh testified expansively, volunteering unrequested information liberally. In response to the prosecutor's question about whether he was allowed to go into a different sector:

> That's correct. 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.

RP 159. When asked if he recalled why he was called out that night, Officer Welsh continued:

> 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.

RP 160. He continued that he was trying to sneak up on them because:

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[5] The trial court found, at the close of the state's evidence, that there was no evidence that the minor children heard or saw the incident. RP 421.

> A lot of times if it's involving a weapon and this incident is very serious already, sometimes our presence can overexcite and make things worse.

RP 161. He explained that he was sighting his pistol on the "subject" [Mr. O'Haver] 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.
>
> So when I got there and having seen what I saw, it was a suspect attempting to gain entry to this house, possibly to take those lives.

RP 166-167.

Later, in describing Mrs. O'Haver's demeanor, Officer Welsh volunteered that her voice was "raspy," and that "Oftentimes when victims are strangled or choked. . ." RP 171. At that point, a defense objection was sustained.[6]

Over defense objection, the prosecutor was permitted to examine Officer Welsh about Mrs. O'Haver's statements to him and present them to the jury as substantive evidence under the recorded recollection exception to the hearsay rule.[7] RP 317-319.

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[6] By pre-trial in limine ruling, witnesses were limited to "alleged victim" rather than "victim," and to use names rather than "defendant" or "suspect." RP 20.

[7] The trial court found that Mrs. O'Haver had not denied she made the statements, she simply could not remember making them, and "if a

In his testimony, Officer Welsh editorialized about what Mrs. O'Haver was alleged to have told him. He testified that:

> She stated following the inflection [sic] of vulgarity and onset of anger, that he started making statements referencing how she was, as a wife, being terrible . . .

RP 329. Defense counsel objected that Welsh was embellishing, but the court ruled that counsel could bring it up on cross-examination. RP 328-329.

Officer Welsh continued that the altercation moved "into the kitchen where witness O'Haver stated that she was grabbed by Mr. O'Haver, thrown up against the cabinets in the kitchen near the sink." RP 330. When defense counsel objected again that what was written in the report was that "he pulled her into the kitchen and held her against the cabinets," the court agreed that the officer's testimony was not accurate. RP 331-332. As a result, Officer Welsh was directed to read two

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foundation is laid by the office that this written memorandum or record concerning her statement was done contemporaneously at the scene when she was fully capable of remembering or having just witnessed the incident itself, I think it would fall within the scope of that exception." RP 319. Outside the presence of the jury, Officer Welsh testified that that he interviewed Mrs. O'Haver in her living room after everything was secured, and that she was "afraid, scared, upset, crying and remorseful" and "admittedly stated she wasn't going to know – be able to explain every single detail that took place." RP 321-322. Further she was too emotional to give a handwritten statement. RP 322-323. Officer Welsh took notes, read them back to her and then some number of hours later put them into his report. RP 323-324. Unlike the other officers, Welsh said he could not tell she had been drinking. RP 324-325.

paragraphs from his report to the jury without paraphrasing them. RP 334-335. These paragraphs included reported statements that Mr. O'Haver pulled her into the kitchen, held her against the cabinet using his arms across her chest, grabbed the nozzle and sprayed water into her face so she couldn't breathe. RP 336. She fought and begged for her life; she struggled to break free. RP 336. During the struggle she was knocked to the ground; Mr. O'Haver held her down with his arms across her chest restricting her ability to breathe. RP 336-337. Mr. O'Haver told her she needed to die and that he hated her. RP 337. She broke free and ran out to the Dettlings' house. RP 337.

3. Excluded defense evidence

The trial court refused to let Mr. O'Haver testify, in support of his claim of self-defense,[8] that he was concerned and afraid he might be violently attacked by his wife and Mr. 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 breaking out the window of a passing car whose driver failed to acknowledge her flag. RP 466-467.

He was not allowed to testify that Mr. Dettling had discharged

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

weapons in the neighborhood, RP 468-470, had told him that he had once killed a man, RP 471, had spoken about his experiencing blood lust, RP 472-473, and had beaten a young Samoan boy. RP 482. He was not allowed to testify that he heard Mr. Dettling berating his wife when he was under the influence of his medications. RP 471; CP 113-118.

After briefing and argument, the trial court ruled that the 2007 incident did not establish character for violence, the dismissal from her job was not an act against Mr. O'Haver and was unduly prejudicial, the allegations against Mr. Dettling were hearsay and purely speculative. RP 480-485. On reconsideration, the trial court again denied the defense the right to present the evidence, ruling that propensity for violence is not an essential element of self-defense. RP 571-572. The court reiterated that the 2007 incident was too remote and ruled that the window breaking was not reputation evidence. RP 573. Similarly, the court ruled that Mr. Dettling's firing of weapons or fistfight was not reputation for violence and reiterated that the claim of blood lust was unreliable. RP 573-574.

4. Reference to in-custody status

At the end of the day, the trial court asked the clerk-bailiff in front of the jury, "is there any reason, either from counsel or from our reasons, that we can't start at 9:00 tomorrow morning?" RP 640. The court asked counsel if they had conflicts. RP 640. When they replied "no," the court

stated,"So officer, we'll see everybody back here at 9:00, okay?" RP 640.

Counsel noted that the court had just called attention to Mr. O'Haver's in-custody status. The court responded that the jury would not connect the officer with the defendant. RP 641. The following day, defense counsel moved for a mistrial, particularly in light of statements during voir dire that people being held pending trial were more likely guilty. RP 647.

The court denied the motion, noting it was inadvertent, and indicated a willingness to give a limiting instruction. RP 648-649. Defense counsel indicated he was not asking for an instruction which would reemphasize the point. RP 649.

D. ARGUMENT

1. THE TRIAL COURT'S ERROR IN EXCLUDING MR. O'HAVER'S TESTIMONY ABOUT THE INCIDENTS OF VIOLENCE BY HIS WIFE AND NEIGHBOR WHICH CAUSED HIM TO FEAR INJURY DENIED HIM HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE.

When Mr. O'Haver began to explain to the jury why he acted as he did to try to resolve the argument with his wife -- because she had injured him in the past, the state objected and the court sustained the objection. RP 455-456, 463-464. The court excluded evidence that Mrs. O'Haver had struck him in the past, injuring his eye, an injury that took several

months to heal. RP 455. The court excluded evidence that she had lost her job because she broke the window of a passing car because the driver had ignored her school crossing-guard flag. RP 466-467. The court further precluded Mr. O'Haver from testifying that he feared injury from Mr. Dettling because of instances in which he knew that Mr. Dettling had fired weapons in the neighborhood; because Mr. Dettling had fought with his wife while on his medications; because Mr. Dettling had claimed to him to have killed a man in the past and to have blood lust – a condition which made him be unable to stop an attack once blood had been drawn; and because he had witnessed Mr. Dettling beating up a Samoan boy. RP 468-473, 482. After briefing and reconsideration, the court again excluded this evidence, ruling that the evidence was excluded under ER 405, or was too prejudicial, remote or unreliable. RP 571-572. In so ruling, the trial court misapprehended the difference between character evidence and evidence to establish whether a defendant claiming self-defense had reason to fear bodily harm. In so ruling, the trial court denied Mr. O'Haver his right under the state and federal constitution to a jury trial and to present a defense at trial.

A person accused of a crime has the right under the Sixth Amendment and Article 1, sections 21 and 22 to present a defense. 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.

This purpose provides a distinctly different basis for admission than proof of prior acts of violence to establish that the victim was acting in conformity with his character for violence at the time of the crime. If the purpose is substantive evidence of the victim's character, the evidence is admissible only if ER 405 is satisfied. But where, as here, the evidence is presented to establish the defendant's state of mind, exclusion of the evidence denied the defendant the right to present a defense. State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). While evidence of a victim's character for violence is not an element of self-defense, and is not admissible to prove the character of the victim, State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061, cert. denied, 525 U.S. 1157 (1999), specific

instances of conduct are admissible to show the defendant's reasonable fear of the victim.[9]

The rationale for the admissibility of specific instances of violence known by the defendant 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

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[9] The case of State v. Martin, 169 Wn. App. 620, 628-29, 128 P.3 315 (2012), makes this point:

> Evidence of specific instances of conduct is admissible only if the character trait is "an essential element of a charge, claim, or defense." ER 405(b) A victim's character and prior misconduct in general are excluded from evidence. Our Supreme Court has held that the Sixth Amendment is violated where a defendant is effectively barred from presenting a defense due to the exclusion of evidence. Thus, where a defendant claims self-defense, courts have admitted evidence of a victim's prior acts of violence to establish a defendant's reason for apprehension and the basis for acting in self-defense. But in self-defense cases, "specific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense." (citations omitted).

The trial court, however, erroneously read Martin as precluding specific instances of violence in all cases. RP 57-572.

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 Wn. 369, 373, 70 P. 963 (1902).

Further, defendants "need not even have been in actual danger of great bodily harm, they are entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger . . . . they were justified in defending themselves." State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) (holding that it was error to exclude evidence that the defendant was *told* that the decedent carried a gun).

Because the trial court prohibited Mr. O'Haver from presenting his defense and being able to provide the jury with how things appeared to him, knowing what he knew at the time, his Sixth Amendment rights and rights under the state constitution were violated. For this reason, his convictions for fourth degree assault and second degree assault should be reversed and remanded for retrial. While the jurors apparently disbelieved much of the state's evidence, they also apparently did not find that he had acted in self-defense. Had the jurors been able to evaluate the situation from his point of view, they likely would not have convicted him of either

the fourth degree assault involving his wife or the second degree assault involving Mr. Dettling.

2. THE TRIAL COURT ERRED IN DENYING MR. O'HAVER'S MOTION FOR MISTRIAL AFTER ALERTING THE JURY TO HIS IN-CUSTODY STATUS.

The trial court alerted the jurors to Mr. O'Haver's in-custody status at the end of one day of trial. 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.

Initially, the court responded that the jury would not connect the officer with Mr. O'Haver. RP 641. After the defense moved for a mistrial, the court found that there was no prejudice to Mr. O'Haver because the court had not referred to him. RP 648. 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.

Under these circumstances, the trial court erred in denying the motion for mistrial.

The statement to the officer was not a question asking the officer if he personally was available, or even an order directing the officer to be available. The court did *not* say "So officer, we'll see *you* back here at 9:00, okay?" The court said "everyone" with the clear implication that the purpose of the statement was to make sure that the officer brought Mr. O'Haver, who was in custody, to the courtroom at 9:00 a.m. This violated Mr. O'Havers' constitutional rights to a fair trial before an impartial jury. Sixth and Fourteenth Amendments, U.S. Constitution; Washington Constitution, article I, sections 3, 21, 22.

The right to a fair trial includes the 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). This presumption is the bedrock foundation in every criminal trial. Morissette v. United States, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952). This "unqualified presumption of innocence" is guaranteed to an indigent person as well "as one who can post bail." State v. Gonzalez, 129 Wn. App. 895, 897, 120 P.3d 645 (2005). He is entitled

to "the physical indicia of innocence," which include the right to stand "before the court with the appearance, dignity, and self-respect of a free and innocent man." 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).

What the jury saw here was a man without the self-respect of a free and innocent man.

Violations of the right to the presumption of innocence and the denial of an impartial jury are reviewed de novo. State v. Johnson, 125 Wn. App. 443, 457, 105 P.3d 85 (2005).

While in some cases where the jury inadvertently becomes aware that the defendant is in custody, a curative instruction may be sufficient to cure the prejudice, State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002), this is not such a case. It is the court's constitutional duty to make sure that the jurors do not learn from routine security measures that an accused person is in custody. Hutchinson, 137 Wn.2d at 887-888. Instead, the court revealed this status by addressing the officer responsible for bringing Mr. O'Haver to court in such a way that jurors would surmise that he was in custody of the officer and the jail.

The trial court conveyed that Mr. O'Haver was in custody. By not

fulfilling its duty to preserve the presumption of innocence, as a matter of inattention or indifference, the court undermined any possibility of successfully convincing the jurors that the matter was unimportant and they should disregard the unfairly prejudicial information they had received. A mistrial should have been granted; and, because it was not, a new trial should be granted now.

3. THE UNTRUTHFUL TESTIMONY THAT MR. O'HAVER HAD COMMITTED DOMESTIC VIOLENCE IN THE PAST DENIED HIM A FAIR TRIAL.

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 Mr. 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 prosecutor stated on the record that he had asked defense counsel to explain the motions in limine to Mr. Hoover when counsel interviewed Hoover, and that he was sure that defense counsel had done so. RAP 293. It was, however, the prosecutor's duty to caution Mr. Hoover, a state's

witnesss.

Although defense counsel declined to ask for a curative instruction, which he described as telling the jury "to ignore a ringing bell," that error should require reversal of Mr. O'Haver's conviction on appeal.

The jury's hearing that a person accused a crime of violence had committed a similar prior act of violence is the kind of irregularity that has been deemed too prejudicial to be cured by an instruction by the court. State v. Escalona, 49 Wn. App. 251, 255, 74 P.2d 190 (1987) (surprise testimony that the defendant charged with an assault with a knife had stabbed someone on a prior occasion); 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).

> [W]hile it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.

Miles, 73 Wn.2d at 71. "A 'bell once rung cannot be unrung.'" State v. Easter, 130 Wn.2nd 228, 238-39, 922 P.2d 1285 (1996) (quoting State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976).

A curative instruction is insufficient when the improper evidence is inherently prejudicial and likely to impress itself on the minds of the jurors. Escalona, 49 Wn. App. at 255.

Thus, as in Escalona, the evidence here was too inherently prejudicial and likely to impress itself on the minds of the jurors to be cured by an instruction. This is particularly true where, as here, the evidence was not cumulative of other evidence. It conveyed to the jury that Mr. O'Haver was guilty because domestic violence was something he engaged in and that his doing so was known by his neighbors. Because this was improperly put before the jury, Mr. O'Haver should be granted a new trial.

4. THE PROSECUTOR'S STATEMENT THAT HE NEEDED TO TALK TO THE "VICTIM ADVOCATE," WHETHER OR NOT IT WAS INTENDED TO, INDICATED AN OPINION AS TO GUILT AND DENIED MR. O'HAVER A FAIR TRIAL.

When asked by the trial court if he had any further redirect examination of witness John Hoover, the prosecutor asked: "Your Honor, can I have just a moment to talk to my victim advocate real quick?" RP 283. When the court responded, "Talk to who [sic]?," the prosecutor repeated, "The victim advocate." RP 284. He then added, "In the case. It's a piece of paper I want to look at, Your Honor." RP 284.

In this exchange, the jury heard the prosecutor's expression of his opinion that Mr. Hoover was a victim and in need of an advocate to work for him at trial. A prosecutor's expression of his opinion implying that the defendant is guilty or that a witness is credible is constitutional error under the state and federal constitutions. See United States v. Young, 470 U.S. 1,

105 S. Ct. 1038, 54 L. Ed. 2d 1 (1985) (it is misconduct for a prosecutor to invade the province of the jury by expressing a personal opinion that the defendant is guilty).

A prosecutor may not constitutionally express a personal opinion as to the defendant's guilt or a witness's credibility. State v. Lindsley, 171 Wn. App. 171 Wn. App. 808, 288 P.3d 641, 653 (2013; State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). A "'[f]air trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused." State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1957).

Where there is, as here, a substantial likelihood that the error affected the jury, in the context of the record and circumstances of trial, a new trial should be granted. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

Such an error is waived unless "the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). That standard should be deemed to be met here. The prosecutor was aware of the judge's ruling that witnesses should be referred to as "alleged" victims and yet he still repeated "victim advocate" for a second time after the judge

was unclear what he said initially.[10] RP 4. This was not an inadvertent disclosure. Most importantly, nothing could have cured that prejudice because there was a victim advocate working on the case; it was just not something that was to be introduced as evidence by a witness or the prosecutor. Once that was disclosed, it is unlikely that the jurors would have disregarded that information.

Mr. O'Haver was unfairly prejudiced by the prosecutor's disclosure. The jury heard that there was a victim advocate and that the prosecutor was actively depending on this advocate at trial. This conveyed the prosecutor's opinion that Mr. O'Haver was guilty. This was error which denied Mr. O'Haver a fair trial, particularly in light of the other errors at trial. His convictions should be reversed and his case remanded for retrial.

5. OFFICER WELSH'S TESTIMONY IMPLYING THAT HIS OPINION THAT, BASED ON INFORMATION HE HAD, CRIMES HAD BEEN COMMITTED INCLUDING ATTEMPTED MURDER, AND THAT THE SITUATION WAS EXTREMELY DANGEROUS AND SERIOUS WAS IMPROPER AND DENIED MR. O'HAVER HIS RIGHT TO A FAIR TRIAL.

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

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[10] With the exception of his failure to curtail the testimony of Officer Welsh and this instance, the prosecutor in this case was otherwise professional and fair during the trial.

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.

Later he embellished his report to try to establish Mr. O'Haver's guilt -- by exaggerating what he had written there that Mrs. O'Haver said, and by saying that her voice sounded as if she had been strangled or choked, essential elements of the assault as it was charged. RP 171. 328-332.

Officer Welsh's opinion that Mr. O'Haver was guilty was constitutional error and it denied Mr. O'Haver a fair trial.

No witness may offer testimony in the form of an opinion regarding the credibility of the defendant because such testimony is "unfairly prejudicial to the defendant" and "invades the exclusive province

of the jury." 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). This testimony is particularly prejudicial because an officer's testimony may be deemed particularly reliable. Kirkman, 159 Wn.2d 927; Demery, 144 Wn.2d 765.

It is equally well-settled law that a witness may not express an opinion as to the guilt or innocence of the accused. ER 608(a); 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). Such testimony 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. This can constitute a manifest constitutional error which can be raised for the first time on appeal even if not, as in this case, objected to at trial. Thach, at 312.

By his repeated testimony as to guilt, Officer Welsh became a critical witness at trial. The state's witnesses who gave varying accounts of what happened were less than credible on important particulars, and the verdicts reflected the jurors' lack of faith in important particulars of that

testimony. The jury, however, convicted Mr. O'Haver of two counts and apparently did not find that he acted in self defense. In convicting on those counts, the jury may well have been swayed by Officer Welsh's testimony as to guilt. For this reason, this error alone and in combination with the other trial errors should require reversal of Mr. O'Haver's convictions and the granting of a new trial.

6. THE TRIAL COURT ERRED IN ADMITTING OFFICER WELSH'S POLICE REPORT AS A 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 are not met. First and foremost, the state failed to show that Mrs. O'Haver's memory was insufficient to provide truthful and accurate trial testimony. 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 recalled 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.

Mrs. O'Haver did not agree that the report was accurate at the time it was made. She had been drinking at the time – by her admission at least six drinks of vodka and juice. RP 197. Officer Barry and other officers confirmed that she had been drinking. RP 92. She described herself as scared, confused and wanting to be left alone at the time, crying and hysterical. RP 210, 212. Both Mrs. O'Haver and Officer Welsh testified that she was not able to give a written statement by herself at the time. RP 216, 322. Welsh further reported that she said that she was not going to

explain all of the details. RP 323. 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 safe guards 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 circumstance, there was nothing to show that the report accurately reflected anything Mrs. O'Haver may have said at the time.

She could recall and testify about the incident. She did not recall everything about it, but she also stated at the time of the interview that she could not recall everything. The report was impeachment not recorded recollection under ER 803(a)(5) and the trial court erred in admitting it as such.

Finally, it is worth noting that Officer Welsh did not testify truthfully in court; he was so eager to provide inculpatory and inflammatory testimony that he embellished his own report. His other testimony reflected a desire to persuade the jury of guilt more rather than a desire to report accurately. His word should not have been sufficient to justify admitting substantive evidence which was not needed or helpful. Mr. O'Haver's convictions should be reversed and remanded for retrial.

7. THE CUMULATIVE ERROR IN THIS CASE REQUIRES A NEW TRIAL.

In this case, the errors individually and cumulatively denied Mr.

O'Haver a fair trial and should require a new trial. As set out above, the combined errors unfairly prejudiced Mr. O'Haver in numerous ways: (a) the jury heard, untruthfully, that there had been prior domestic violence by Mr. O'Haver; (b) the jury heard that the prosecutor needed to consult with a "victim advocate" even though the court ruled in limine that the state and state's witnesses must confine themselves to referring to alleged victims; (c) the jury heard Officer Welsh repeatedly describe the seriousness of the situation, the danger to the neighbors and officers and his opinion, which he said was based on what he already knew, that serious crimes including attempted murder had taken place or were taking place; (d) the jury heard Officer Welsh falsely testify about Mrs. O'Haver's statements to him; and (e) the trial court revealed that Mr. O'Haver had been in custody during trial. At the same time, the jurors were not allowed to hear of the prior acts by Mrs. O'Haver and Mr. Dettling that made Mr. O'Haver fear that he would be injured if he did not defend himself. These errors combined, as well as individually, substantially undermined the fairness of the trial, particularly in light of the weakness of the state's case.

Such combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-

Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984).

Here, the errors pervasively conveyed to the jury that Mr. O'Haver was guilty and Mrs. O'Haver and the others at the scene were victims. His convictions should be reversed.

E. CONCLUSION

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

DATED this 9th day of September, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 9th of September , 2013, I caused a true and correct copy of Appellant's Opening Brief to be served on the following by e-mail

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