

72702-8

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Court of Appeals  
Division I  
State of Washington

No. 72702-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JASON BLAIR JACOBS,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in excluding evidence that Jason Jacobs had no prior criminal history.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. General information about an accused's "background" is admissible in a criminal trial. Courts have held such information may include the accused's lack of prior criminal history. Did the trial court abuse its discretion in excluding background information about Mr. Jacobs' lack of criminal history?

2. Evidence of an accused's trait of character is admissible if relevant to the charge. An accused's character trait of being law-abiding is always relevant and admissible. Also, evidence of a particular character trait is admissible if relevant to support the defense that the accused lacked the requisite mental state. Here, Mr. Jacobs offered evidence of his character for honesty to support his defense that he did not have an intent to steal on this occasion. Did the trial court abuse its discretion in excluding the evidence?

3. Evidence that is otherwise inadmissible may be admitted to explain the basis for an expert's opinion, if the expert reasonably relied upon the information. Here, Mr. Jacobs offered evidence of his lack of

criminal history to explain the basis of his expert's opinion, where the expert reasonably relied upon that information in forming his opinion that Mr. Jacobs was suffering from a dissociative state that interfered with his ability to form an intent to commit the current crime. Did the trial court abuse its discretion in excluding the evidence?

C. STATEMENT OF THE CASE

Marissa Gallo lived in an apartment building called the "Belroy" in Capitol Hill, Seattle. RP 281. Ms. Gallo's unit was on the ground floor, just off the courtyard. RP 281. The building is enclosed by a fence with two big heavy metal gates. RP 273.

On October 20, 2013, at around 2:30 a.m., Ms. Gallo was sleeping alone in her bedroom. RP 282, 303. She awoke to the sound of a man talking to himself in her living room. RP 304. The man was speaking in a normal speaking voice but she could not tell what he was saying. RP 304. She walked into the living room and saw Jason Jacobs, whom she did not know, holding her television monitor.<sup>1</sup> RP 304. He was fiddling with the cables coming out of the back of the monitor. RP 306. She thought he might be trying to steal the monitor but she did not actually know why he was there. RP 307, 333, 378.

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<sup>1</sup> Apparently Mr. Jacobs entered the apartment through an unlocked door. 9/09/14RP 314-14.

Ms. Gallo said, “What are you doing?” RP 306. Mr. Jacobs seemed surprised to see her. RP 307. He calmly responded, “I’m just doing this,” while pointing to the television monitor. RP 307. She asked again what he was doing and he spent some minutes trying to explain that someone had called him to her apartment to fix something. RP 307. She thanked him for coming and said he could now leave. RP 308. When he would not leave, she walked to the door, opened it, and said, “You need to leave right now.” RP 309. He did. RP 309. Ms. Gallo called the police. RP 310.

Ms. Gallo thought maybe Mr. Jacobs lived in the building, was drunk, and had wandered into her apartment by mistake. RP 358. She thought “[h]e seemed really out of it.” RP 358. She could not smell the odor of alcohol on his breath, and he was not slurring his words. RP 360. But although she could understand the words he said, “the conversation didn’t make sense.” RP 373. It was “not a normal conversation.” RP 373. Mr. Jacobs was “babbling,” saying he was there to fix the television, but it was obvious he was not there for that purpose. RP 373. For some reason, he told her to “stay calm” two or three times. RP 374. She did not know what that meant. RP 348, 374.

Mike Larsen, another resident of the building, also observed Mr. Jacobs acting strangely that night outside the building. RP 425-26, 438. Mr. Larsen saw Mr. Jacobs pulling repeatedly on the front gate. RP 429, 434. That was odd because the gate could be opened easily by reaching through and flipping the handle. RP 434. Mr. Jacobs did not seem to comprehend that the gate was locked. RP 434. He said something to Mr. Larsen like, “sorry, man, . . . I’m drunk.” RP 429. Mr. Jacobs then began to climb over the gate. When Mr. Larsen walked away, he heard a thump as if Mr. Jacobs had fallen to the ground on the other side of the fence. RP 429-30. When Mr. Larsen returned a short time later, he saw Mr. Jacobs inside the courtyard sitting on a concrete fixture. RP 430-31. Mr. Larsen watched him for a few minutes from inside his apartment before concluding he had no malicious intent. RP 432. Overall, Mr. Larsen thought Mr. Jacobs’ behavior was “kind of weird or odd to me.” RP 438. He thought Mr. Jacobs might be drunk or suffering from a “brain problem.” RP 438.

Mr. Jacobs had had another episode of strange behavior in the vicinity of the Belroy a few weeks earlier. RP 396. Police officers had been called when Mr. Jacobs blew a rape-type whistle repeatedly at two a.m. RP 396. He was emotional and had been drinking. RP 397, 402.

He had been assaulted nearby a few weeks earlier and bought the whistle for protection. RP 415. He told the responding officers he blew the whistle because he wanted to see if anyone would come to his aid. RP 397-98. He was upset that no one responded right away. RP 399. The officers had trouble communicating with him and spent a long time trying to explain why it was inappropriate for him to blow the whistle. RP 397-99.

When Mr. Jacobs left Ms. Gallo's apartment, he did not flee but instead sat peacefully on the steps outside. RP 311. The police soon responded and arrested him. RP 310-11. One of the officers noted that he seemed intoxicated. RP 391-93.

After Mr. Jacobs left, Ms. Gallo looked around her apartment. RP 312. Nothing was missing, but she noted that her purse, which was on the couch, was open. RP 313. The purse had been closed when she went to bed. RP 313. Her wallet was on the couch next to the purse and was unzipped. RP 313, 359. Nothing was missing from the wallet. RP 313. Although Ms. Gallo had not put any cash in the wallet, she did have a couple of credit cards inside, which were not taken. RP 313.

Mr. Jacobs was charged with one count of residential burglary.<sup>2</sup> CP 1; RCW 9A.52.025. The State alleged he unlawfully entered the residence “with intent to commit the crime of theft therein.” CP 68.

Before trial, the defense announced it would present a defense of diminished capacity and voluntary intoxication. A psychologist would testify that he evaluated Mr. Jacobs and concluded he was suffering from a dissociative state at the time of the incident. CP 11-16. Due to his dissociative state, Mr. Jacobs did not have the ability to form an intent to commit theft, or any crime, inside the residence. Id.

In support of the defense, counsel requested to present evidence that Mr. Jacobs had no prior criminal convictions.<sup>3</sup> RP 48-50. Counsel argued the lack of prior burglary convictions in particular supported the inference that Mr. Jacobs did not have an intent to steal on this occasion. RP 49-50, 99-102, 109. Counsel also argued the evidence was admissible to support the expert’s opinion because the expert relied

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<sup>2</sup> The State also charged the statutory aggravator that the victim of the burglary was present in the residence during the crime. CP 1; RCW 9.94A.535(3)(u). Although the jury found the aggravating factor, the State did not request an exceptional sentence and the court did not impose one. CP 82; RP 722. Instead, the State recommended Mr. Jacobs receive a first-time offender waiver and the court agreed. RP 722-24, 741-42.

<sup>3</sup> The court specifically found at sentencing that Mr. Jacobs had no prior felony criminal history and his offender score was zero. CP 82.

upon Mr. Jacobs' lack of criminal history in forming his opinion that Mr. Jacobs was suffering from a dissociative episode. RP 48-49, 111.

The court ruled that evidence of Mr. Jacobs' lack of criminal history was not admissible. RP 112. The court reasoned that the evidence demonstrated only that Mr. Jacobs was a law-abiding citizen and was not specific enough to rebut the allegation that he had an intent to steal. RP 107. The court also reasoned the evidence was character evidence that must be presented in the form of reputation testimony. RP 112. The court did not address the defense argument that the evidence was admissible to explain the bases for the expert's opinion.

At trial, psychologist Tyson Bailey testified he evaluated Mr. Jacobs. RP 452-53. He reviewed multiple sources of information, including Mr. Jacobs' medical history and self-report. RP 458. He concluded Mr. Jacobs was suffering from a dissociative state. RP 464.

Dissociation is the separation of consciousness from the present moment and can cause an individual to behave in ways that do not seem to make sense. RP 454, 464. A person in a dissociative state often looks as if he or she is daydreaming or "spacing out," and it can take longer to get a point across. RP 464, 479-80. Dissociation can interfere with a person's ability to form memories of an event. RP 455-

56, 464, 522. It also interferes with executive functioning, including the ability to plan, organize, make decisions, and regulate emotion. RP 456-57. Dissociation “make[s] it difficult to form intent.” RP 522.

In forming his opinion, Dr. Bailey relied upon the content of telephone calls Mr. Jacobs made from jail, in which he consistently expressed confusion and a lack of memory about what had happened. RP 465-66. Mr. Jacobs said the allegations in the police report “[did not] make sense,” and “[did not] sound like me.” RP 467, 657. He said this was not the type of behavior he would normally engage in. RP 467. He said he could not remember what happened and it was “a dream.” RP 658. Mr. Jacobs’ difficulty understanding what had happened and his lack of memory about it supported the conclusion he was in a dissociative state. RP 471. Mr. Jacobs’ behavior was consistent with a dissociative episode. RP 522.

Dr. Bailey found significant that Mr. Jacobs had suffered multiple significant traumas in his life. RP 457. In 2007, he had been the victim of a carjacking, during which he had been left in a hole and covered with blankets. RP 461. He suffered a wrist fracture. RP 461. In September 2012, he had been assaulted because he was wearing a T-shirt that advocated for the passage of Referendum 74. RP 462. That

time, he suffered pain in his chest and a contusion on his head. RP 461. And in August 2013, he had been attacked by multiple assailants in the vicinity of the Belroy in Capitol Hill. RP 462. He was found in a parking lot and was taken to the hospital by ambulance. RP 462. He suffered broken ribs and significant injuries to his face. RP 462.

Dr. Bailey could not conclude definitively what had caused Mr. Jacobs' dissociative state. RP 471. It could have been a psychological process, caused in part by the earlier traumas Mr. Jacobs had experienced. RP 471, 512. Mr. Jacobs' alcohol consumption could have contributed to the episode, as alcohol can make a person more susceptible to experiencing fear associated with past trauma. RP 476. The cause could also have been organic, such as a head injury, or it could have been substance-induced. RP 471, 512.

The jury was instructed on Mr. Jacobs' defense of diminished capacity<sup>4</sup> and voluntary intoxication.<sup>5</sup> CP 66-67. The jury found him guilty of residential burglary as charged. CP 79.

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<sup>4</sup> The jury was instructed, "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent to commit a crime or acted with knowledge." CP 66.

<sup>5</sup> The jury was instructed, "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent." CP 67.

#### D. ARGUMENT

##### **The trial court abused its discretion in excluding probative evidence of Mr. Jacobs' lack of criminal history.**

Generally, the Court reviews a trial court's decision to include or exclude evidence for abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). The court necessarily abuses its discretion if its decision is based on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). A trial court's interpretation of the rules of evidence is a question of law reviewed *de novo*. State v. Sanchez-Guillen, 135 Wn. App. 636, 642, 145 P.3d 406 (2006).

1. *Mr. Jacobs' lack of criminal history was admissible as "background" information about the accused.*

In a criminal trial, it is generally acceptable for the accused to introduce evidence concerning his background, such as about his education and employment. Government of Virgin Islands v. Grant, 775 F.2d 508, 513 (3d Cir. 1985). Such background information is routinely admitted without objection. Id. “[E]vidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to

understanding.” United States v. Blackwell, 853 F.2d 86, 88 (2d Cir. 1988).

Testimony about an accused’s lack of criminal history is commonly admitted as part of this background information. Grant, 775 F.2d at 513. In Blackwell, for instance, the Second Circuit held that, just as testimony about Blackwell’s service in the military and his completion of two years of college was admissible as background information, so too was the testimony that he had never been arrested or convicted of a crime. Blackwell, 853 F.2d at 88. Such information was relevant and admissible because it “told the jury something about the defendant as a person, and his experience in life,” and was helpful to the jury in assessing the credibility of his story. Id.

The jurisprudence of “background evidence” is essentially undeveloped. Grant, 775 F.2d at 513. The routine admission of evidence that an accused has never been arrested or convicted of a crime is a function of the common sense notion that it is helpful for the trier of fact to know something about a defendant’s background when evaluating his culpability. Id.

Washington courts permit the accused in a criminal trial to present information about his or her background, even when that

information could be characterized as “character evidence.” E.g., State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974); State v. Brush, 32 Wn. App. 445, 648 P.2d 897 (1982). In Renneberg, the defendant was permitted to testify about her past good behavior, including her work experience, that she had attended college, and that she had participated in a glee club, drill team, and pep club, and was the treasurer of a science club. Renneberg, 83 Wn.2d at 738. “Implicit in such testimony is the painting of a picture of a person most unlikely to commit grand larceny.” Id.

Similarly, in Brush, the defendant was permitted to relate a personal history supportive of good character, including his duties and responsibilities as the county fire marshal and building inspector, his extensive property dealings, his involvement in the construction industry, and his financial dealings including salary, debts, prior bankruptcy and credit history. Brush, 32 Wn. App. at 451-52.

There is no reasoned basis to distinguish this kind of background history supportive of good character from information regarding the accused’s lack of prior criminal history. As with information that the accused attended college and participated in a glee club, or information that the accused was a fire marshal and had a

strong work history, information regarding the accused's lack of criminal history is helpful to the jury in trying to understand what kind of person he is and in judging his culpability.

In State v. O'Neill, 58 Wn. App. 367, 371-73, 793 P.2d 977 (1990), Judge Forrest explained in dissent that an accused should be permitted to testify that he has never been arrested or convicted of a crime. Relying on the Third Circuit's decision in Grant, Judge Forrest explained such information should be admitted because it is helpful "background" information. Id. at 371 (Forrest, J., dissenting). As demonstrated in the Renneberg and Brush cases discussed above,

A defendant's education, work experience, marital status, church affiliation, none of which are technically relevant to guilt or innocence, are routinely admitted. The reason is that the jury is trying a flesh and blood defendant, not a hypothetical abstraction such as we ask them to consider in assessing negligence on the reasonable man standard.

O'Neill, 58 Wn. App. at 371 (Forrest, J., dissenting). An accused's lack of criminal history "falls easily into this category" of admissible background information. Id.

This Court should follow these authorities and hold that Mr. Jacobs should have been permitted to present evidence of his lack of criminal history as "background" information. Such information would

have been helpful to the jury in understanding what kind of person he is, and in judging his culpability and the credibility of his story.

2. *Evidence of Mr. Jacobs' character traits for honesty and law-abidingness was admissible to support his diminished capacity defense.*

The general rule is that evidence of a person's character is not admissible to show he acted in conformity with that character on a particular occasion. ER 404(a).<sup>6</sup> But an exception exists for evidence of the character of the accused in a criminal trial. ER 404(a)(1) provides for the admission of "[e]vidence of a pertinent trait of character offered by an accused."

Under Rule 404(a)(1), the accused in a criminal case may introduce evidence of his good character. Accord State v Arine, 182 Wash. 697, 48 P.2d 249 (1935). The evidence must be directed toward a trait of character which is pertinent to rebut the nature of the charge against the defendant. State v. Schuman, 89 Wash. 9, 153 P. 1084 (1915).

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<sup>6</sup> ER 404(a) provides:

**(a) Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

One reason for allowing the accused to present evidence of a pertinent trait of good character is that such evidence may be the only means available to him to raise a reasonable doubt as to his guilt. See Michelson v. United States, 335 U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 2d 168 (1948). Moreover, such evidence causes little, if any, prejudice to the State. State v. Eakins, 127 Wn.2d 490, 503, 902 P.2d 1236 (1995). To the extent the jury is influenced by such evidence, it only serves to reinforce the presumption of innocence to which the accused is entitled. Robert H. Aronson, The Law of Evidence in Washington, § 404.05(1)(b), at 404-10 (2011).

Through the use of character evidence, the defendant is permitted to try to persuade the jury that a person of such character would not have committed the crime charged. City of Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). Although the concept of character is amorphous, it generally includes such traits as honesty, temperance and peacefulness. Id. at 6.

The accused's trait of character must be "pertinent" to the charge. ER 404(a)(1). "Pertinent" in the context of the rule means "relevant." State v. Eakins, 127 Wn.2d 490, 495-96, 902 P.2d 1236 (1995). Thus, a pertinent character trait is one that tends to make the

existence of any material fact more or less probable than it would be without evidence of that trait. Id.; ER 401. The threshold for relevance under the rule is “extremely low.” Day, 142 Wn.2d at 8.

Evidence of an accused’s trait of character is relevant and admissible if it supports any defense against the charged crime. Eakins, 127 Wn.2d at 499. If the evidence helps to prove or disprove an affirmative defense, it clearly meets the *de minimis* standard for relevance. Day, 142 Wn.2d at 10.

In particular, evidence of an accused’s trait of character is pertinent and admissible if it supports the inference that the defendant did not have the necessary mental state to make him guilty of the crime. Eakins, 127 Wn.2d at 499. For instance, in Day, the supreme court held that evidence of Day’s character trait of sobriety was relevant and admissible to rebut the State’s allegation that he used or intended to use paraphernalia to ingest marijuana. Day, 142 Wn.2d at 10.

Likewise, evidence of an accused’s trait of character is relevant and admissible if it supports a defense of diminished capacity. Eakins, 127 Wn.2d at 498-500. Diminished capacity is an affirmative defense against a crime requiring proof of specific intent. Id. at 496. In raising the defense, the accused aims to show that he had a mental condition

that impaired his ability to form the required specific intent. Id. In Eakins, the defendant was charged with second degree assault and presented evidence that he suffered from a mental condition caused by drugs and alcohol which impaired his ability to form the required specific intent to cause bodily harm or create apprehension of bodily harm. Id. The supreme court held that evidence of Eakins' character trait for peacefulness was relevant and admissible on the question whether he had the requisite specific intent on this occasion. Id. The court reasoned, "[b]y showing his behavior on the night in question was out of character when he was not influenced by drugs and alcohol, the proffered evidence is relevant to show Eakins, but for his induced mental condition, would not or could not form the intent to assault." Id. at 498.

Under similar reasoning, evidence of an accused's character trait for truth, integrity and honesty is relevant and admissible in a prosecution for theft, which requires the State to prove a specific intent to steal.<sup>7</sup> State v. Kramp, 200 Mont. 383, 389, 651 P.2d 614 (1982); State v. Hortman, 207 Neb. 393, 398, 299 N.W.2d 187 (1980).

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<sup>7</sup> RCW 9A.56.020 provides that the crime of theft requires proof of specific intent to deprive another of his or her property.

Finally, evidence of an accused's character trait for being law-abiding is generally relevant and admissible in any criminal trial. United States v. Angelini, 678 F.2d 380, 381 (1st Cir. 1982) (“Evidence that Angelini was a law-abiding person would tend to make it less likely that he would knowingly break the law. Such evidence has long been recognized as relevant.”); United States v. Hewitt, 634 F.2d 277, 279 (5th Cir. 1981) (evidence of accused's character for being a “law abiding citizen” is “always relevant” and “may be introduced whether or not the defendant takes the stand”); United States v. Darland, 626 F.2d 1235, 1237 (5th Cir. 1980) (same).

Under these authorities, evidence of Mr. Jacobs' character trait of honesty and law-abidingness was relevant and admissible. Mr. Jacobs was charged with residential burglary and the State alleged he “unlawfully entered ore remained unlawfully in a dwelling” with an “intent to commit the crime of theft therein.” CP 1-2, 68. Thus, the State was required to prove Mr. Jacobs acted with a specific intent to steal from Ms. Gallo. RCW 9A.56.020; CP 61-62.

In defense of the charge, Mr. Jacobs presented the defense of diminished capacity or voluntary intoxication. CP 66-67. He presented expert testimony to show that he was suffering from a mental

condition—dissociation—that impaired his ability to form the required specific intent. See Eakins, 127 Wn.2d at 498-500.

Mr. Jacobs was entitled to present evidence that he was a truthful, honest and honorable person in order to rebut the State’s allegation that he had a specific intent to steal. Kramp, 200 Mont. at 389; Hortman, 207 Neb. at 398. Such evidence was relevant and admissible to show that his behavior on the night of the incident was out of character and that he would not have committed the acts if he had not been in a dissociative mental state. Eakins, 127 Wn.2d at 498.

Moreover, evidence that Mr. Jacobs was a law-abiding person was relevant and admissible, as in any criminal trial. Angelini, 678 F.2d at 381; Hewitt, 634 F.2d at 279; Darland, 626 F.2d at 1237.

Because evidence that Mr. Jacobs had no prior criminal history would have tended to establish these pertinent character traits, the trial court abused its discretion in excluding the evidence. ER 404(a)(1); Eakins, 127 Wn.2d at 499.

3. *Evidence of Mr. Jacobs’ lack of criminal history was admissible because the expert reasonably relied upon that information in forming his opinion.*

Even if evidence of Mr. Jacobs’ lack of criminal history was not admissible under the evidence rules discussed above, the evidence was

admissible to help explain the basis for the expert's opinion. In Washington, ER 703 expressly allows experts to base their opinion testimony on facts or data that are not admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." ER 705 provides that an "expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise." Together, these rules permit a trial court to allow an expert to relate otherwise inadmissible evidence to the jury in order to explain the bases for his or her opinion. 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice, §705.5, at 293-94 (5th ed. 2007).

As discussed above, a defendant who wishes to present a defense of diminished capacity must present expert testimony. "To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 921, 16 P.3d 626 (2001). Admissibility of the testimony is subject to the usual Rules of Evidence, including those on relevance, expert

witnesses, and unfair prejudice. State v. Acosta, 123 Wn. App. 424, 431, 98 P.3d 503 (2004). When a psychiatrist expert testifies in support of a diminished capacity defense, he may recount otherwise inadmissible evidence if he reasonably relied upon that information in forming an opinion about the defendant's mental condition at the time of the crime. State v. Eaton, 30 Wn. App. 288, 293-94, 633 P.2d 921 (1981).

Although otherwise inadmissible evidence is admissible to show the basis of an expert's opinion, "[t]he admission of these facts . . . is not proof of them." Group Health Co-op. of Puget Sound, Inc. v. Dept. of Revenue, 106 Wn.2d 391, 399, 722 P.2d 787 (1986).

[I]f an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question. It is an illustration of the kind of evidence which can serve multiple purposes and is admitted for a single, limited purpose only.

Id. (quotation marks and citations omitted)); see also In re Det. of Marshall, 156 Wn.2d 150, 162-63, 125 P.3d 111 (2005) (expert could relate otherwise inadmissible material for purpose of explaining basis for her expert opinion).

Where otherwise inadmissible evidence is admitted for the limited purpose of explaining the basis of an expert's opinion, a party is entitled to an appropriate instruction informing the jury of that purpose. State v. Lui, 153 Wn. App. 304, 321-22, 221 P.3d 928 (2009), aff'd, 179 Wn.2d 457, 315 P.3d 493 (2014).

Here, Mr. Jacobs raised a defense of diminished capacity and presented the testimony of an expert, Dr. Bailey, to opine about his mental state at the time of the crime. RP 452-512. Dr. Bailey concluded that Mr. Jacobs was suffering from a dissociative episode. RP 464. In forming his opinion, he relied upon multiple sources of information about Mr. Jacobs and his background, including Mr. Jacobs' lack of prior criminal history. RP 48-49, 111.

Because the expert reasonably relied upon that information in forming his opinion, the trial court should have admitted it at trial. ER 703; ER 705; Eaton, 30 Wn. App. at 293-94. The information would have been admitted not as substantive evidence but only to help the jury understand the basis for the expert's opinion. Group Health Coop. of Puget Sound, Inc., 106 Wn.2d at 399. The State would have been entitled to a limiting instruction to that effect. Lui, 153 Wn. App. at 321-22.

Because the trial court violated these well-established rules, it abused its discretion.

4. *The conviction must be reversed.*

As stated, evidence of an accused's positive trait of character may be the only evidence the accused can present that raises a reasonable doubt. Michelson, 335 U.S. at 476. Courts commonly hold that the wrongful exclusion of such evidence is unfair and prejudicial, requiring reversal. Day, 142 Wn.2d at 15 (“We believe a reasonable probability exists that the outcome of the trial could have been materially affected had this evidence been admitted”) (quotation marks and citation omitted); Eakins, 127 Wn.2d at 503 (refusal to admit evidence of defendant's character for peacefulness not harmless in case where defendant presented defense of diminished capacity because jury reasonably could have concluded defendant would not have acted with specific intent to harm if not for his impaired mental state); Angelini, 678 F.2d at 382 (exclusion of evidence of defendant's trait for law-abidingness not harmless); Darland, 626 F.2d at 1237-38 (exclusion of evidence not harmless).

As in those cases, the exclusion of evidence that Mr. Jacobs had no prior criminal history was not harmless. There is a reasonable

probability that, had the jury heard evidence suggesting that Mr. Jacobs had never committed such acts before, and was generally a law-abiding person, they would have believed his defense that he had a mental disorder that influenced his behavior on this occasion. They would have been much more likely to believe that, if not for his impaired mental state, he would not or could not have formed the intent to steal. Thus, the error was not harmless and the conviction must be reversed.

E. CONCLUSION

The trial court abused its discretion in excluding probative evidence that Mr. Jacobs had no prior criminal history. The conviction must be reversed.

Respectfully submitted this 17th day of December, 2015.

/s/ Maureen M. Cyr

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 72702-8-I
	)	
JASON JACOBS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF DECEMBER, 2015.

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