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NO. 50617-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE BENAVIDES,

Appellant.

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

The Honorable Grant Blinn, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by prohibiting the defendant, Jose Benavides, from testifying that he believed the alleged victim, LaTaria Brewer, was intoxicated, and from testifying to further details regarding the context of his argument with Brewer.

2. The trial court erred in permitting Brewer to testify regarding “bad days” as a euphemism to indicate prior incidents of assault against Brewer by Benavides.

3. In addition to requiring reversal independently, the cumulative effect of the errors discussed above deprived Benavides of his constitutional right to a fair trial.

Issues pertaining to assignments of error.

1. Where trial counsel described Benavides’ expected testimony in detail, did the trial court err by finding Benavides had not made an adequate offer of proof?

2. Where Benavides’ testimony was relevant to explain Brewer’s motive to lie, and relevant to rebut the State’s argument that Benavides had fabricated his version of events after the fact, did the trial court’s ruling to suppress his testimony violate Benavides’ right to present a defense?

3. The trial court correctly excluded evidence regarding alleged prior incidents of domestic violence under ER 404(b). In the context of the trial, did the trial court err in concluding that as a factual matter, Brewer's testimony regarding "bad days" was not a clear euphemism referencing alleged prior domestic violence incidents?

4. Did the trial court err in failing to apply the required ER 404(b) analysis before admitting evidence of Benavides' alleged prior misconduct?

5. Given the above, was the trial court's ruling to admit testimony regarding "bad days" an abuse of discretion?

6. Did cumulative error deprive Benavides of his constitutional right to a fair trial?

B. STATEMENT OF FACTS

1. Initial Charges & First Trial

The Pierce County Prosecutor's Office charged Jose Benavides with second degree assault-DV and unlawful imprisonment-DV. See CP 2-3 (assault I later amended to assault II); also CP 114, 116. The State alleged that over the course of several hours, Benavides repeatedly struck his former girlfriend, LaTaria Brewer, strangled her with his hands, and pulled her back into his house when she tried to escape. CP 2-3. Benavides denied these events ever occurred. 1RP 1; 2RP 441.

Brewer, Benavides, and others testified during the first trial. E.g. 1RP 70, 180, 112, 160. The jury was unable to reach a verdict and the court declared a mistrial. 1RP 275.

2. Second Trial Evidence

During the second trial, the State presented testimony from Brewer, her friend, police officers, and an emergency room physician, as well as photographs of Brewer's injuries and items of her clothing. Benavides testified and offered into evidence a large metal ring that he wore every day. 2RP 439, 464-65.

Brewer testified to the following. On the night of August 15, 2015, she and her friend, Rashawn Young-Wheeler, went to a private motorcycle club known as the Diplomatz Clubhouse around 10:00 or 10:30 P.M. 2RP 223. Brewer testified she had three alcoholic drinks that evening, and had no more alcohol during that night or the next morning. 2RP 223, 229. She received text messages and phone calls from Benavides, her ex-boyfriend, inviting her to spend the night at his home. 2RP 223-24, 228. She and Young-Wheeler left the club around 1:00 A.M. 2RP 269. She drove to Benavides' house and arrived sometime before 2:00 A.M. 2RP 269.

Brewer testified that Benavides grew angry with her when she declined to respond positively to his invitation to move back into his home, and he began bringing up arguments from the past. 2RP 230. During the

course of several hours, Benavides shouted at her, struck her, and strangled her with his hands to the point that she passed out and urinated on herself. 2RP 223-28, 243-246, 247-55. She testified that she did not fight back, but repeatedly attempted to leave. 2RP 236, 244, 247. Benavides prevented her from leaving by dragging her back into the house twice, and during her second attempt, he pulled her off of a chain-link fence causing injuries to her hand. 2RP 244, 247, 251. Around 9:00 A.M., she distracted Benavides by saying she heard a car approaching, grabbed her purse, ran out the back door and got away. 2RP 255.

Although her car was parked in the driveway, she testified that she ran on foot to Young-Wheeler's house a few blocks away. 2RP 257. On her way, she called her place of employment to tell them she was unable to come. 2RP 257. They told her to hang up and call police. 2RP 257. When she arrived at Young-Wheeler's house, she called police, and later spoke to officers who responded to the call. 2RP 258-59. She was taken to the hospital and treated for injuries to her left eye and hand. 2RP 260.

Young-Wheeler and Officer Douglas Maier, who responded to the 911 call from Young-Wheeler's house, both testified that Brewer told them Benavides had assaulted her. 2RP 160-63, 326. These witnesses, in addition to Officer Jason Mills, confirmed Brewer was taken to the hospital. 2RP 164 (Maier), 190 (Mills), 333 (Young-Wheeler). Mills also testified

that he looked for Benavides at his house the next day, but did not make contact with him, and that he collected Brewer's pants, shirt and underwear at the hospital in order to document the alleged blood and urine on her clothing. 2RP 188, 190, 196-99.

Dr. Davesh Sharma testified that he treated Brewer in the emergency room, and that Brewer told him her injuries had been caused by an assault, including choking and several punches to the face. 2RP 416-17, 420.

Dr. Sharma also testified in detail regarding Brewer's injuries, and offered his expert opinion on potential causes. Her left eye was swollen shut but scans showed no bone fractures. 2RP 427. These were blunt trauma injuries, and could be caused by a punch or strike by a broad object (not something hard and flat, like a knife), or could be caused by falling on the ground. 2RP 430. Brewer's left eye also showed hemorrhaging, but there was no hemorrhaging in her right eye, and no petechia in either eye. 2RP 432-34. Dr. Sharma opined the hemorrhage was caused by internal pressure, which could include strangulation or heavy coughing. 2RP 422, 433-34. Dr. Sharma did not testify regarding any significant injuries to Brewer's neck, and noted her airways were intact. See 2RP 423. He did note a "small puncture wound on her left hand." 2RP 424.

Dr. Sharma also confirmed that a blood test taken at the hospital after 10:11 A.M. that morning showed Brewer had a blood alcohol content of .077, just 3/1000ths less than the legal limit of .08. 2RP 426, 434.

Dr. Sharma's account of Brewer's injuries was generally consistent with photographs taken the next day, as well as with the testimony from Young-Wheeler and responding officers, who also noted scratches on Brewer's neck. See 2RP 322-23, 323, 15; see also 2RP 261 (Brewer); 2RP 92, 286-87.

During Brewer's testimony, a critical issue arose when the trial court allowed the prosecutor to ask questions regarding "bad days" over defense counsel objection. 2RP 237-38, 241.

During motions *in limine*, the State moved to admit evidence of prior incidents of domestic violence by Benavides against Brewer, for the purpose of explaining why Brewer did not fight back during the alleged incident of assault. 2RP 43. The trial court reserved ruling, stating it was inclined to exclude the evidence. 2RP 44-46. When the issue was raised again later, the trial court clarified it still had not ruled on the admissibility of evidence of prior bad acts, and so the State should not elicit such testimony in the presence of the jury without first making an offer of proof to the court and obtaining an advance ruling. 2RP 114. Explaining it did

not want to “push[] the envelope,” the State agreed not to raise evidence of prior instances of domestic violence unless Brewer recanted. 2RP 115.

During the State’s direct examination, Brewer testified that her relationship with Benavides began in 2009. 2RP 211. From that time up until their break-up in 2012, she stated “[w]e had our good times and then our bad times.” 2RP 214. Initially, the State did not elicit further testimony on what Brewer meant by “bad times.” 2RP 214.

However, when Brewer began discussing the events of the charged incident, the State raised the issue again, this time with a comparison. The State’s questioning proceeded as follows:

Q. ... What was going on?

A. You know, still yelling, and you know, he was yelling. Mad. And then I get hit again a couple times.

Q. So I’m going to pause you for just a sec. When you say that he was yelling and being mad, where was he standing when he was yelling and being mad at you?

A. So by this time, he’s in front of me. Standing right in front of me.

Q. When you say in front of you, in your face?

A. In my face.

Q. What are some of the things he’s yelling?

A. This time, I can’t tell you.

Q. To back up, when your relationship started with the defendant in September of 2009 to August of 2015, you said you’ve had good times and bad times with the defendant.

A. Yeah.

Q. How would you describe what was happening to you on August 15th of 2015?

A. One more time?

Q. You mentioned from September of 2009 to August of 2015 during your relationship with the defendant, you've had good times and bad times with the defendant.

A. Mm-hm.

Q. How would you describe August 15th, 2015?

2RP 237-38 (emphasis added).

Before Brewer answered, defense counsel objected. 2RP 238. Brewer and the jury were excused. 2RP 239. Counsel explained the basis for the objection was concern that the State was attempting to elicit inadmissible character evidence of prior bad acts. 2RP 240 (citing 404(b)). The State was attempting to get in through the back door evidence of prior domestic violence by Benavides against Brewer, by comparing the alleged incident with prior “bad times” and suggesting those days were the same, i.e. also involved domestic violence. See 2RP 240.

The prosecutor insisted he was “not getting into prior acts of domestic violence” and that he was respecting the court’s prior ruling. 2RP 240. The prosecutor went on to state that “if [Brewer] thinks this is a good day in their relationship, she’s able to answer that way, if this was a bad day, she’s afforded that opportunity as well.” 2RP 240. He then protested,

“I’m not getting into prior acts of domestic violence. There’s nothing headed even remotely in that direction.” 2RP 240-41.

The trial court then ruled:

I’m going to allow her to state whether this was a good day or a bad day with the understanding that it’s not going to, at this point, be in any way compared expressly or impliedly to any other good days or bad days. It’s just, is it a good day or a bad day, and she can answer it in either of those two manners, but not go beyond that.

2RP 241.

The trial court also clarified that its previous ruling on 404(b) evidence was that such evidence is presumed inadmissible absent prior showing and an advance ruling from the court. 2RP 241. However, the court concluded, “[h]aving said that, it hasn’t been offered” 2RP 241.

Brewer and the jury were brought back into the courtroom, and the State’s questioning continued:

Q. During the time of September of 2009 when your relationship with the defendant first started to August 15th, 2015, you mentioned you had good days and bad days in your relationship. How would you describe August 15th, 2015?

A. A bad day.

Q. At this point in your bad day, did it end?

Let me rephrase.

At this point of the defendant pulling you back inside of his residence, being in your face and yelling at you, you standing in the same spot where he hit you earlier, did your bad day end?

A. No.

Q. What happened next?

A. It continued.

Q. How did it continue?

A. With him hitting me and me trying to leave again.

...

2RP 243 (emphasis added).

After the State rested, Benavides testified on his own behalf, stating Brewer was not at his house on August 15, 2015, and the incident she alleged had never occurred. 2RP 441.

He also testified to the following. He and Brewer had dated and lived together, but had broken up. 2RP 441, 468. More recently, they had become “friends with benefits,” meaning they occasionally met at places where they both socialized, and on those occasions sometimes spent the night together, but did not have an ongoing monogamous relationship. 2RP 443. He had similar relationships with other women and had no desire to return to a monogamous, live-in relationship with Brewer as they had had before. 2RP 443, 483.

During the time they lived together, Brewer’s son, LaTron, and Benavides’ son had become friends, and up until 2015 the boys had continued to stay in touch through social media. 2RP 470-71. Shortly before the alleged incident, Benavides planned to travel out of town to a motorcycle rally, and invited Brewer to bring her son to stay at his home and watch his 11-year-old son during his absence. 2RP 444. He had asked

her because of her and her son's previous and ongoing relationship with his son. 2RP 444. She accepted. 2RP 445.

While he was away and days prior to the end of his trip, he was unable to reach Brewer for four to five hours. 2RP 447-48. Eventually, he was able to contact her, they got into a heated argument, and Benavides became concerned for his son's welfare. 2RP 459. Benavides attempted to provide additional context regarding this argument with Brewer. Specifically, he sought to testify that days prior to the alleged incident, he had revoked permission for Brewer to stay at his house because this phone call led him to believe Brewer was intoxicated while watching his 11-year-old son. 2RP 441, 445, 448. However, as discussed in detail later in this brief, the trial court excluded this testimony. 2RP 448-59.

Benavides was permitted to testify that after he argued with Brewer, he arranged to cut his trip short and drove straight home. 2RP 459-60. When he arrived home, Brewer was no longer at his house, and his son was down the street with a friend. 2RP 460. Brewer was not at his house on August 15, 2015, and he only learned about her allegations when he received a summons to court to answer for assault charges. 2RP 440.

Benavides also testified that the Diplomat Clubhouse was only two to three blocks from his house, was a private establishment that opened after 2:00 A.M., and continued serving alcohol until the last person left. 2RP

460-62. Brewer had, on several occasions, parked her car near his house without his permission, and he had observed that on at least one such occasion, she had gone out with friends. 2RP 463-64. Benavides also testified that he wears a heavy metal ring on his right index finger every day, and often wore other metal rings as well. 2RP 464-65.

3. Closing Arguments

In closing, the State relied heavily on the credibility of Brewer's testimony and her out of court statements of accusation, and argued the evidence established the charged crimes. 2RP 519, 523-24. The State also emphasized Dr. Sharma's opinion that injuries to Brewer's left eye were caused by internal pressure to argue Benavides had struck and strangled Brewer. 2RP 519.

Defense counsel presented the following alternative. It was Brewer who wanted to rekindle the relationship, but she had lost that opportunity when her care of Benavides' son ended badly. 2RP 536-37. Similar to previous times, she parked her car at Benavides' house without his permission and returned to the Diplomat Clubhouse around 2:00 A.M. that evening. 2RP 541. She became heavily intoxicated, fell, urinated on herself, and injured herself. 2RP 547. Defense counsel emphasized Dr. Sharma's testimony that Brewer's blunt force injuries could have been due to falling on the ground, and the internal pressure injury could have been

caused by heavy coughing or similar processes. 2RP 539. When Brewer awoke the next morning, she realized she was late to work and made up a lie in an attempt to keep her job. 2RP 538, 548.

Brewer's willingness to testify that she had only three drinks earlier in the evening the night before, when the blood test showed she was almost legally drunk at 10:00 A.M. the next morning, showed that she was willing to lie on the stand and in fact, had done so. 2RP 532-34.

In rebuttal, the State argued Brewer was generally credible, despite minimizing the amount of alcohol she drank on the evening in question. 2RP 550-51. The State also asserted Benavides' version of events was an implausible fabrication. 2RP 551, 556.

4. Verdict, Sentence & Appeal

The second jury found Benavides guilty of assault in the second degree and unlawful imprisonment. CP 114, 116. The jury also found Benavides and Brewer were household or family members with respect to both counts. CP 117, 119.

The court sentenced Benavides to the high end of the standard range on both counts: 43 months on second degree assault concurrent with 29 months on unlawful imprisonment. CP 122, 125.

Benavides timely appeals. CP 144.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED BENAVIDES' RIGHT TO PRESENT A DEFENSE.

Benavides sought to testify that days prior to the alleged incident, he had revoked permission for Brewer to stay at his house because he believed her to be intoxicated while watching his 11-year-old son. 2RP 441, 445, 448. This evidence was offered primarily to prove Brewer's motive to fabricate the accusations against him. 2RP 451, 454. By excluding this, and other related testimony, the trial court deprived Benavides of his constitutional right to present a defense. If admitted, the evidence would have created a reasonable doubt where there was none before, and so requires reversal.

The right to present testimony in one's own defense is guaranteed by the Sixth Amendment and article I, section 22. U.S. CONST., Amend. VI; WASH. CONST., art. I, §22; State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). This right is an integral part of the right to present a defense. State v. Duarte Vela, 200 Wn. App. 306, 317, 402 P.3d 281 (2017) (quoting State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010)).

The right to present a defense does not provide a defendant with an "absolute" right to testify on any topic. State v. Darden, 145 Wn.2d 612,

620, 41 P.3d 1189 (2002). Evidence “must be of at least minimal relevance.” Id. at 622. “[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Id. Generally, the State’s interest in excluding prejudicial evidence must also “be balanced against the defendant’s need for the information sought,” and relevant information can be withheld only “if the State’s interest outweighs the defendant’s need.” Id. However, where evidence has “*high* probative value ‘it appears no state interest can be compelling enough to preclude its introduction.’” Jones, 168 Wn.2d at 720 (emphasis in original) (quoting Hudlow, 99 Wn.2d at 16).

Generally, a trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. Diaz v. State, 175 Wn.2d 457, 462, 285 P.3d 873 (2012).¹ However, a violation of the constitutional right to present a defense is reviewed *de novo*. Jones, 168 Wn.2d at 719.

Here, the trial court violated Benavides’ right to present a defense when it excluded his highly probative testimony regarding Brewer’s motive to fabricate the allegations. Benavides testified that when he went out of town for a motorcycle rally, he left his 11-year-old son in Brewer’s care.

¹ Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Untenable reasons include errors of law. Noble v. Safe Harbor Family Preservation Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

2RP 444. He initially testified that in the middle of his trip, he was unable to reach Brewer by phone for several hours, and when he did reach her, she sounded intoxicated, which led to an argument. 2RP 447-48. However, this response, including the nature of their argument and Benavides' belief of Brewer's intoxication was ultimately stricken from the record with a curative instruction. 2RP 459.

The State made several objections to this testimony, including lack of relevance and the court's prior ruling to exclude discussion of alcohol use prior to the alleged incident of assault. 2RP 452-53. Benavides argued his testimony was not offered to prove the truth of whether Brewer was intoxicated. 2RP 451. Rather it was offered to prove Brewer's motive to fabricate the accusations. 2RP 454.

The trial court initially ruled that Benavides could testify regarding the nature of his dispute with Brewer, including her alcohol use, but cautioned it may open the door for the State to additional questioning regarding prior disputes. 2RP 456. However, the trial court then revised its decision and ruled that while Benavides could testify that he was concerned for the safety of his son and so returned home early, he was prohibited from

testifying that Brewer sounded intoxicated over the phone absent a showing of relevance and a showing of proof. 2RP 458.²

- i. Benavides made an adequate offer of proof and showing of relevance.*

The trial court's ruling shows it did not believe Benavides had made an adequate offer of proof or adequately established the relevance of his testimony. See 2RP 458. In fact, Benavides had made an adequate offer of proof, and the trial court already understood, and in fact had paraphrased, the relevance of Benavides' testimony.

As part of his offer of proof, trial counsel explained Benavides would testify that the last time he spoke to Brewer, which was during this conversation over the phone, he believed she sounded intoxicated, he became concerned, and they argued. 2RP 451. He then took action, and when he arrived home, she was not there. 2RP 451. By providing this level of detail to the trial court, Benavides' offer of proof was more than adequate.

Trial counsel also explained the relevance of this testimony was to establish Brewer's motive to fabricate. 2RP 454. The trial court clarified

² During motions *in limine*, the trial court also made two initial rulings that had some bearing on its later analysis. First, the trial court ruled that any out-of-court statements by Benavides were generally inadmissible as hearsay if offered to prove the truth of the matters. 2RP 29-30. Second, the trial court ruled that Brewer's general alcohol use was inadmissible as improper character evidence under ER 404(b), but her alcohol use on the evening of the alleged incident was admissible. 2RP 37, 39. In making both rulings, the trial court left open the possibility that it would revise its rulings if additional facts or issues came to light, and noted that it would give particular consideration to the purpose for which any testimony was offered. 2RP 29-31, 39.

that defense's point was that Brewer and Benavides got into an argument a few days prior to the alleged incident, and this gave Brewer a motive to fabricate a story that he had assaulted her; defense confirmed. 2RP 455. This shows that the trial court was presented with adequate information regarding the relevance of the testimony to his defense, and the court was aware the relevance was Brewer's motive to lie.

This Court should find Benavides made an adequate offer of proof and established the relevance of the testimony.

ii. Just as in State v. Jones, the trial court here engaged in improper balancing and denied Benavides a meaningful defense.

The trial court's failure to recognize Benavides's rights, and overemphasis on potential prejudice to the State, is similar to the erroneous analysis rejected in Jones. 168 Wn.2d at 721. In Jones, the right to present testimony regarding an alleged victim's actions and motivations just prior to the alleged incident were pitted against the State's concern that the testimony was an attack on the alleged victim's character. See id. at 717-18, 721.

Jones was accused of raping K.D. Id. at 717. The trial court prohibited Jones both from offering his own testimony and from cross-examining witnesses about K.D.'s participation in a consensual all-night sex party beginning earlier that evening. Id. at 719-20. Specifically, Jones

sought to testify “that during a nine-hour alcohol- and cocaine-fueled sex party [K.D. and another woman] danced for money and engaged in consensual sexual intercourse” with Jones and two other men they met at a truck stop. Id. at 717. The trial court found that discussion of the sex party was offered for the purpose of attacking the alleged victim’s credibility and was barred by the rape shield statute. Id. at 717-18. The trial court asserted that Jones was not, however, precluded from testifying generally that K.D. had consented to sex with him. Id. at 721.

The Washington State Supreme Court was unconvinced by this reasoning, and reversed, noting, “The trial court’s formulation would have allowed testimony of consent, but devoid of any context about how the consent happened or the actual events,” and thus, “effectively barred Jones from presenting his defense.” Id. at 721 (emphasis added). Remand for retrial was the appropriate remedy. Id. at 721.

Here, the trial court made the same two errors as those made by the trial court in Jones, by failing to recognize that balancing is inapplicable and context is essential.

First, both trial courts failed to recognize that where the right to present a defense is implicated, a defendant’s relevant and highly probative testimony may not be excluded, regardless of prejudice to the State. Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16). In Jones, the trial

court was concerned that the proffered evidence would pose an attack on the alleged victim's character. Jones, 168 Wn.2d at 718-18, 721. It balanced these concerns against the defendant's right to present a defense to conclude that Jones could not testify regarding the sex party but could testify generally regarding K.D.'s consent. Id. at 717-18, 721. Where the testimony was relevant and highly probative of a key issue—consent—the Washington Supreme Court ruled balancing was wholly inappropriate. Id. at 720-21.

Here, the trial court in Benavides' case appeared to be similarly concerned that the defendant's testimony would serve to attack the alleged victim's character, by painting her as an irresponsible alcoholic. In response to the State's objection that allegations of alcoholism is improper character evidence, the trial court ruled that questions regarding Brewer's general alcohol use was inadmissible, and only evidence of her alcohol use on the date of the alleged incident was admissible, absent some additional showing that the State had opened the door. 2RP 40, 42. Just as in Jones, the trial court here balanced concerns of prejudice to the State against Benavides' interest in presenting a critical aspect of his defense, namely Brewer's motive to fabricate the charges. Compare Jones, 168 Wn.2d at 718-18, 721; with 2RP 42, 454. The trial court's ruling here was similar to the compromise in Jones; Benavides could testify that there was an argument,

but could not testify regarding the content of the argument or the facts precipitating it. Id. at 2RP 458. Just as in Jones, this balancing was wholly inappropriate. Benavides should have been able to testify without restriction regarding his argument with Brewer as it was highly probative of her motive and his theory of the case.

Second, the trial court in both Jones and the case at bar failed to recognize that the right to present a defense is not merely the right of a defendant to say ‘I didn’t do it,’ or ‘she’s lying.’ Rather, it involves the right to present a “meaningful” defense, including the right to explain the context, motive, and surrounding circumstances of the defendant’s version of events. Jones, 168 Wn.2d at 721. By denying him the right to explain the facts surrounding his claim of K.D.’s consent, the trial court denied Jones a “meaningful” defense. Id. Similarly, by ruling Benavides could testify that he argued with Brewer, but denying him the ability to testify to the surrounding circumstances, it denied him the ability to present a “meaningful” defense. Id.

iii. Remand for retrial is the proper remedy.

The erroneous exclusion of the testimony discussed above requires reversal as a violation of Benavides’ right to present a defense if “the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist.” Duarte Vela, 200 Wn. App.

at 326 (citing United States v. Blackwell, 459 F.3d 739, 753 (6th Cir.2006)), 328.

Here, the remaining record did not overwhelmingly establish Benavides' guilt. There were no other witnesses to the alleged assault. See e.g. 2RP 135, 229, 257, 276-77. As a result, the State relied heavily on Brewer's own testimony and the out-of-court statements of accusation she made to others. See 2RP 519-20 (State's closing argument reference to Brewer's testimony), 521 (reference to Brewer's statements to Young-Wheeler), 524 (reference to Brewer's statements to Officer Maier).

In addition, Brewer's credibility was a key issue at trial. During the second trial, Brewer initially testified that she had a "couple" of drinks at a club prior to arriving at Benavides' house around or shortly before 2:00 A.M. 2RP 224, 227. She then revised her answer to state that she had three drinks (consistent with her testimony in the first trial). 2RP 224; see also 1RP 96. However, a blood test taken shortly after 10:00 A.M., more than eight hours later, showed her blood alcohol content at .077. 2RP 426, 434. Testimony from the State's own expert, Dr. Sharma, established this meant that at the time of the blood draw, Brewer was just 3/1000ths away from the legal limit of .08. 2RP 426. Defense counsel argued in closing, and plausibly so, this suggested Brewer was so intoxicated during the time of the alleged incident that she passed out from alcohol consumption. 2RP

547. The blood draw results cast serious doubt on Brewer's sobriety during, and potentially her recollection of, events that evening, and strongly suggested she was willing to lie on the stand. 2RP 532-34, 540-49. Notably, during closing, the State did not attempt to rebut that Brewer had lied about her level of intoxication, but rather chose to minimize the relevance of her dishonesty on this point. 2RP 550-51.

Evidence at trial conclusively established Brewer had sustained injuries. E.g. 2RP 151-53 (Officer Maier), 286-87 (Brewer), 421-28 (Dr. Sharma); see also 486-87 (Benavides viewing pictures of Brewer's injuries). However, the primary issue at trial was the cause of her injuries. While the State asserted Benavides as the cause, other plausible explanations were available, including that Brewer had been so intoxicated she had blacked out, fallen, and injured herself. 2RP 519, 547-49.

For example, Dr. Sharma's testimony indicated injuries to the blood vessels in her left eye were most likely due to internal pressure, and could not have been caused by slipping and falling. 2RP 423. The State argued this was evidence Benavides had choked Brewer. 2RP 519. However, Dr. Sharma testified that the external injuries to her eye could have been caused by a fall. 2RP 430. Regarding the internal injuries to her eye, Dr. Sharma also agreed that petechia was usually present in instances of strangulation, but that no petechia was present in either of Brewer's eyes. 2RP 433-34.

Dr. Sharma further agreed that a hemorrhage due to the internal pressure of strangulation was the result of blood building up in the head. 2RP 433. Dr. Sharma's description suggested that such buildup would occur in the head as a whole, not merely on one side, and so hemorrhages in both eyes should be expected. However, Dr. Sharma agreed that in Brewer's case, he did not see any hemorrhage in her right eye, only her left. 2RP 433. In addition, Dr. Sharma testified that such internal pressure could be the result of a number of causes, including heavy coughing. 2RP 422, 434. This also made heavy vomiting from intoxication a plausible explanation for her injuries.

In summary, neither Brewer's own testimony, nor the doctor's testimony, nor evidence of Brewer's injuries made an overwhelming case for assault and unlawful imprisonment by Benavides.

Moreover, the trial court's failure to allow Benavides to testify—to either the context of his version of events or to Brewer's motive to fabricate—were driving factors in the jury's guilty verdicts. The result of the first trial, a hung jury, provides strong support that Benavides' version of events was perceived as credible by at least some members of the jury when they were provided with context establishing Brewer was a jilted and humiliated lover who had been kicked out of Benavides' house for

irresponsible drunkenness when entrusted with the care of his child. See 1RP 195, 200 (Benavides' testimony), 275 (hung jury).

By contrast, without this context, Benavides' story appears implausible. Why would Benavides rush home to his son after a simple argument with Brewer? Why would Brewer fabricate serious charges merely because she and Benavides had argued? These questions were left unanswered for the second jury, and left the State free to emphasize the implausibility of Benavides' story during closing.

In addition, without additional context and supporting details, Benavides' actions seem reactive, extreme, and paint him in a more negative light than if he had never testified about the argument at all. This second jury was far less likely to, and in fact did not, believe that Benavides behaved reasonably and that Brewer had lied, when this jury was presented with no coherent motive for her dishonesty. Given the existing evidence of Brewer's lack of credibility, it was particularly important to allow Benavides the opportunity to provide a coherent, opposing narrative.

This Court should find that Benavides' testimony, if properly admitted "creates a reasonable doubt that did not otherwise exist," and so requires reversal for retrial. Duarte Vela, 200 Wn. App. at 326, 328.

iv. Self-serving hearsay rules are inapplicable.

The State also objected to Benavides' testimony on hearsay grounds. 2RP 458. However, as discussed above, Benavides' purpose in offering this testimony was to prove Brewer's motive to fabricate, not to assert the truth of whether Brewer was or was not intoxicated. 2RP 455. Trial counsel pointed out that because Benavides did not arrive back into town until days later, he could not and was not making any claim regarding whether Brewer was in fact intoxicated. 2RP 451. His testimony was offered to show that his accusation and related actions (i.e. of withdrawing consent for Brewer to remain in his home or watch his son, and his instructions to a friend to carry out these wishes) precipitated a heated argument with Brewer and gave her a motive to lie. 2RP 455.

Where Benavides' testimony was not offered to prove the truth of the matter, it was not hearsay. ER 801(c). The trial court properly overruled the State's objection on hearsay grounds. 2RP 448. Thus, this Court should find that hearsay does not provide an alternative ground to support the trial court's ruling to exclude Benavides' testimony.

In summary, the trial court violated Benavides' right to present a defense when it prevented him from testifying regarding the context of his version of events. Given its purpose, the excluded testimony was not hearsay. Had the testimony been included, it would have created a reason

to doubt where there was none before. Reversal and remand for a retrial is the appropriate remedy.

2. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF “BAD DAYS.”

The trial court also erred by allowing the prosecutor to elicit evidence of Benavides’ prior misconduct, in violation of ER 404(b), by premising its decision on facts unsupported by the record, and by failing to engage in the required analysis. The error was not harmless and requires reversal and remand for a new trial.

Under ER 404(b), evidence of a defendant’s prior misconduct is generally inadmissible to show propensity to commit the charged crime. State v. Fisher, 165 Wn.2d 727, 744, 202 P.3d 937 (2009) (citing ER 404(b)). However, it may be admissible for other purposes, such as motive, intent, or the victim’s state of mind. Id. at 744-45 (internal citations omitted). In determining whether prior misconduct is admissible for a non-propensity purpose, the trial court must read ER 404(b) in conjunction with ER 403, and exercise discretion to exclude even relevant evidence where it is unfairly prejudicial. Fisher, 165 Wn.2d at 745.

In so doing, courts must apply the following test:

Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the

evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. Fisher, 165 Wn.2d at 745 (emphasis added) (citing State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

The trial court's interpretation of ER 404(b) is a matter of law, reviewed *de novo*. Fisher, 165 Wn.2d at 745 (citing Foxhoven, 161 Wn.2d at 174). If the trial court interprets ER 404(b) correctly, its decision to admit or exclude evidence of prior misconduct is reviewed for abuse of discretion. Id. "A trial court abuses its discretion where it fails to abide by the rule's requirements." Id. More generally, a trial court abuses its discretion where its decision is made on untenable grounds or for untenable reasons. State ex rel. Carroll, 79 Wn.2d at 26.

- i. *The trial court based its ruling on untenable grounds and failed to conduct the proper legal analysis.*

Here, the trial court abused its discretion in two ways. First, it based its reasoning on untenable grounds: facts not supported by the record. Second, by completely failing to apply the four-part test before admitting evidence of Benavides' alleged prior misconduct, the trial court failed to abide by the rule's requirements.

The trial court's ruling was based on two factual assertions, that ER 404(b) character evidence of prior bad acts had not yet been elicited, and

that the comparison between the present incident and prior “bad days” had not already been made. 2RP 241. Where a trial court’s factual finding is not supported by “substantial evidence,” it must be stricken. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” Id. Here, the record establishes that the comparison had already been made, and evidence of prior bad acts had already been elicited in violation of the court’s prior ruling. 2RP 237-38.

In the midst of Brewer’s discussion of Benavides’ alleged August 15, 2015 assault on her, the prosecutor asked Brewer the following:

Q. You mentioned from September of 2009 to August of 2015 during your relationship with the defendant, you’ve had good times and bad times with the defendant.

A. Mm-hm.

Q. How would you describe August 15th, 2015?

2RP 237-38 (emphasis added). Benavides’ counsel immediately objected. 2RP 238.

The quotation shows that the prosecutor set up the question by creating a comparison. He did not ask the question—whether Brewer was having a good day or a bad day—in a vacuum. In fact, had he done so, the question would have had no relevance at all. The sole purpose of the question was to imply that “bad times” was a euphemism for assault. By

doing so, it allowed the prosecutor to suggest this was not the first time Benavides had assaulted her, to lend credibility and sympathy to Brewer's allegations in the instant case, and to insert into the trial the improper misconduct evidence that the State had sought to introduce during motions *in limine*. This comparison would have been more than obvious to the jury, given the context of the questioning.

However, the trial court persisted in ruling that as a factual matter, no evidence of misconduct had yet been presented, no comparison between "bad times" and prior misconduct had been made, and such comparison would not be permitted, "expressly or impliedly." 2RP 241. As shown above, the record establishes that such a comparison had already been made, and that character evidence under ER 404(6) had already been admitted. The trial court's finding to the contrary lacks substantial support in the record and must be stricken as erroneous. See Hill, 123 Wn.2d 641, 647. With the faulty assumptions stricken, the trial court's reasoning is unsound. This Court should find the trial court abused its discretion by basing its ruling on untenable factual grounds.

The trial court also abused its discretion by failing to engage in the analysis required in Fisher. See Fisher, 165 Wn.2d at 745. The trial court expressly stated it had not ruled on whether evidence of misconduct should be admitted, yet allowed Brewer to testify about prior "bad times" with

Benavides, and allowed the prosecutor to draw explicit parallels between these prior “bad times” and alleged acts of violence. 2RP 241-42. As discussed above, such evidence had already been admitted, and the trial court failed to sustain the objection. 2RP 237-38.

After its initial ruling, the trial court then allowed the State to repeatedly draw this comparison, and elicit further ER 404(b) evidence by drawing parallels between the alleged current assault and alleged prior misconduct by Benavides. For example, the prosecutor reminded Brewer that she had previously stated she had “bad days” with Benavides in the past before prompting Brewer to state whether the day of the alleged crime was a “bad day.” 2RP 243. To ensure the jury did not miss the point, the prosecutor even paraphrased Brewer’s testimony regarding specific allegations of violence on that day, before calling that day a “bad day” and asking if the “bad day” ended then. 2RP 243. Brewer obligingly answered the question by stating her bad day continued, and describing further violence. 2RP 243. This shows that Brewer understood, and the jury did as well, that the prosecutor was using “bad day” as a euphemism for violence and was asking if Benavides continued to assault her.

All of this testimony occurred without an ER 404(b) analysis. This Court should find the trial court abused its discretion by failing to conduct the proper analysis before admitting evidence of misconduct.

Had the trial court engaged in the proper analysis, it would have concluded the evidence was inadmissible. The testimony was not relevant to any proper purpose. The true purpose of the testimony was highly improper and prejudicial as it implied Benavides assaulted Brewer on the date in question because he had similarly assaulted her on previous occasions. In other words, it suggested to the jury that this was just another “bad day” in a string of “bad days” during which Benavides assaulted Brewer. Under ER 404(b) and the relevant four-part test, this is impermissible propensity evidence and should have been excluded.

ii. *Reversal and remand for a retrial is the proper remedy.*

Where a trial court admits evidence of prior misconduct in violation of ER 404(b), the error is subject to harmless error analysis. State v. Ashley, 186 Wn.2d 32, 47, 375 P.3d 673 (2016) (citing State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)). An error is not harmless where “there is a reasonable probability that the verdict would have been materially different but for the error.” Id. Here, there is a reasonable probability that but for the improper admission of alleged prior misconduct, the jury would not have convicted.

As discussed above, the State’s case against Benavides was not overwhelming, and relied heavily on Brewer’s own testimony and out-of-

court statements. The improperly admitted evidence—of prior misconduct by Benavides against Brewer—made Brewer’s testimony more credible and sympathetic while making Benavides’ testimony less so. In the first trial, some evidence of prior misconduct was admitted. 1RP 72-73. However, it was balanced by Benavides’ more comprehensive testimony, in which he discussed Brewer’s prior instances of alcohol abuse, her prior alcohol-induced assault on him, her intoxication while his son was in her care, and his response of sending his neighbor to kick Brewer out of his house, retrieve his house key, and take his son out of Brewer’s care and to a neighbor’s house. 1RP 185-88, 195-95, 200. Where the jury was presented with this context and balance of evidence, it did not convict. 1RP 275.

By contrast, where Brewer’s testimony was bolstered by her allegations of Benavides’ prior misconduct, without any balancing testimony by Benavides to explain or give context to Brewer’s motive to lie, the jury convicted. CP 114, 116. This provides strong evidence, of a kind usually not available, that but for the erroneous admission of Brewer’s allegations of prior misconduct by Benavides there is a reasonable probability the jury would not have convicted.

This Court should find that but for the ER 404(b) error, there is a reasonable probability the jury would have reached a different verdict, and reversal for retrial is the appropriate remedy.

3. CUMULATIVE ERROR REQUIRES REVERSAL.

Cumulative error may deprive a defendant of his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). If this Court concludes that each of the errors discussed above do not by themselves warrant reversal, the combined effect of these errors warrants reversal for a new trial.

Here, as discussed above, the State's case against Benavides was not overwhelming, relied heavily on the jury finding Brewer's testimony credible, and finding Benavides' testimony not credible. By excluding Benavides' critical testimony and including Brewer's improper testimony, both errors enhanced Brewer's credibility and likeability at the expense of Benavides. Combined, these errors denied Benavides his constitutional right to a fair trial and require reversal.

D. CONCLUSION

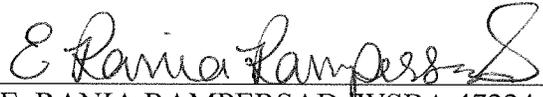
The trial court violated Benavides' right to present a meaningful defense, and erred in admitting Brewer's testimony of "bad days" as a euphemism for Benavides' prior misconduct. Each error requires reversal alone, and combined constitutes reversible cumulative error.

Benavides respectfully requests that this Court reverse his convictions and remand for a retrial.

DATED this 10th day of January, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "E. Rania Rampersad". The signature is written in black ink and is positioned above a horizontal line.

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