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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSE BENAVIDES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Grant Blinn

No. 16-1-00460-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the prosecution did not offer and trial court did not admit evidence of prior specific crimes, wrongs, or acts evidence, did the trial court abuse its discretion concerning admission of testimony about the general character of the relationship between the victim and defendant?
2. Where the trial court admitted evidence of the victim's medical blood alcohol content over the prosecution's objection, did the trial court abuse its discretion where the testimony was related to the victim's mental status at the time of the crime?

B. STATEMENT OF THE CASE.

1. Procedural History.

On February 1, 2016, Appellant Jose Benavides (the "defendant") was charged with second degree assault and unlawful imprisonment for an August 15, 2015, incident that occurred at the defendant's residence. CP 1-3. The case proceeded to trial in January 2017 but the trial ended with a deadlocked jury and a mistrial was declared. 01/11/2017 RP 270, et. seq.¹

¹ The verbatim reports from both trials include volume numbers that overlap. For the sake of clarity, references to the first trial will include the date of the proceeding whereas references to the second trial will include the volume and page number.

The case then proceeded to trial a second time during March and April 2017 before a different trial department. 1 RP 3, et. seq. The second trial resulted in the defendant being found guilty of both charges on April 6, 2017. 6 RP 566-67.

The parties filed pretrial motions and motions *in limine* before both trials. CP 4-10,11-17, 64-70 and 163-66. Before the second trial the state sought to exclude evidence of the victim's alcohol consumption while the defendant sought to exclude evidence of prior assaultive, domestic violence. *Id.* After colloquy and argument on the first day of trial the trial court in the second trial issued provisional rulings partially granting both motions. 1 RP 41-42, 46-47. As to the prior assaultive conduct, the state subsequently elected not to present the evidence. 2 RP 114. As to the alcohol consumption issue, the provisional ruling included the requirement that the issue be re-addressed outside the presence of the jury before the evidence would be offered. 1 RP 42

Opening statements and testimony for the second trial took place on March 30, 2017. 2 RP 113, et. seq. The state called six witnesses, including the victim, her best friend, an emergency room physician and several police officers. CP 167. The state also introduced a number of

photographs showing the victim's facial and neck injuries and her vehicle at the defendant's residence. CP 168-69. The defendant called the defendant.

Testimony was completed on April 4, 2017. 4 RP 487. The parties presented their closing arguments the next day and the jury returned guilty verdicts for both charges on April 6, 2017.

2. Statement of Facts.

The incident took place in the early morning hours of August 15, 2015. Officer Douglas Maier responded to the home of Rashawn Young, victim Lataria Brewer's best friend. 2 RP 122-26. Ms. Young was in a state of great excitement and indicated that her friend Ms. Brewer had been injured and was inside the house. 2 RP 150. Officer Maier then made contact with Ms. Brewer and observed her injuries, which he described as "obvious injuries, extreme injuries." 2 RP 151.

The prosecution introduced photographs depicting the injuries, which included photos of injuries to Ms. Brewer's face, neck and extremities. CP 168-69. Officer Maier also testified about excited utterances from Ms. Brewer, including that she had gone to the defendant's residence. She reported that he wanted to resume a relationship with her, that he "snapped", and that he assaulted and

restrained her for several hours before she was able to escape and make her way on foot to Ms. Young's home. 2 RP 160-63.

Ms. Brewer left her vehicle behind at the defendant's residence where it was found by the police. 2 RP 189. The police went to the residence looking for the defendant after Ms. Brewer had been transported to the hospital. The police found the Ms. Brewer's vehicle parked at the defendant's residence but there was no answer at the defendant's door. 2 RP 189-90.

Ms. Brewer testified both about her relationship with the defendant and the incident. She and the defendant started dating in 2009 and soon began living together. 3 RP 212. Each of them had a child from a previous relationship and at first they all got along. 3 RP 213. She summarized her relationship without objection as follows:

Q: 2013, okay. So from about September of 2009 to around 2013 when the defendant's son moved in, describe your relationship with the defendant?

A: We had our good times and then our bad times.

3 RP 214. *See also* 3 RP 238.

Ms. Brewer testified that she split up with the defendant two to three years before the incident. 3 RP 215. They resumed their relationship soon after and by 2015 they were seeing each other almost daily. 3 RP 220. On the night of the incident Ms. Brewer received text

messages from the defendant that she did not consider out of the ordinary. 3 RP 223. She had gone to an afterhours, private motorcycle club and had three drinks consisting of vodka and cranberry juice served in five inch tall cups. 3 RP 224-25, 266-67. Although Ms. Brewer planned to go to her friend Rashawn Young's home after the club, she was persuaded by the defendant to go to his place instead. 3 RP 225-27.

At first things were normal. 3 RP 228. The defendant wanted Ms. Brewer to move back in. *Id.* The mood changed when the defendant "wasn't liking the answers I was giving, and he just grew angry." 3 RP 230. The defendant began yelling at Ms. Brewer "and then he hits me in my face." 3 RP 234. The violence then escalated to include (1) restraining Ms. Brewer from leaving via the back door [3 RP 235.]; (2) covering her mouth and forcefully dragging her back in the back door [3 RP 237.]; (3) continually hitting her, including with a closed fist in the eye [3 RP 243.]; and (4) choking her with both hands to the point that she thought "I may die", and so that she lost consciousness and involuntarily urinated on herself [3 RP 244-45.].

Ms. Brewer tried to escape twice. The second time she made it to a fence and tried to climb over before the defendant hauled her back inside. 3 RP 250. Ultimately she was able to escape and make her way on foot to Rashawn Young's home leaving her car behind at the defendant's.

3 RP 255-58. She had feigned hearing a car outside and slipped out the back door when the defendant went to look. *Id.* Ms. Young called the police and an ambulance. 3 RP 259-60. She described Ms. Brewer's injuries by saying, "She looked like the elephant man." 3 RP 322. Ms. Brewer was treated at the hospital for head and face injuries and for injuries related to strangulation by Dr. Davesh Sharma. 4 RP 415, et. seq.

In addition to testimony about Ms. Brewer's head and neck injuries, Dr. Sharma also testified about the victim's degree of intoxication. 4 RP 425. He stated that the actual measurement of Ms. Brewer's blood alcohol level "means nothing . . . because she didn't show any signs of altered mental status, it didn't matter." *Id.*

The defendant also took the stand. In the face of the injuries described in detail by all of the prosecution witnesses, he insisted that he was not the one who did it and that she was not even at his house when it happened. 4 RP 441. He did not say where he was and he claimed to have first heard about the assault when he got a summons. 4 RP 440. He also claimed that Ms. Brewer habitually parked her car at his house. 4 RP 463.

The jury deliberated for less than a day before finding the defendant guilty. 6 RP 565. The defendant was sentenced on May 12, 2017. CP 120-135. He was found to have twenty prior convictions and an

offender score of six. *Id.* at ¶¶ 2.2 and 2.3. He was sentenced to the high end of the standard range. *Id.* at ¶ 4.5. This appeal was timely filed on May 23, 2017. CP 144-60.

C. ARGUMENT.

In this case the trial court was asked to rule on cross motions for exclusion of other crimes, wrongs, or acts evidence. The defense sought to exclude past incidents of domestic violence by the defendant while the state sought to exclude alleged past alcohol abuse by the victim. CP 4-10, 64-70, 163-66. 1 RP 36, et. seq. 1 RP 43, et. seq. The trial court did not grant either motion as submitted but instead crafted rulings calculated to avoid the danger of unfair prejudice while still allowing evidence that had probative value to be admitted. 1 RP 39-41. 4 RP 449-458. The trial court applied the correct legal standard with sensitivity to the overall fairness of the proceedings. Under these circumstances it cannot be said that the trial court abused its discretion. Most experienced trial judges would have done much the same as the trial court in this case.

1. THE VICTIM'S TESTIMONY ABOUT HER RELATIONSHIP WITH THE DEFENDANT DID NOT CONSTITUTE OTHER SPECIFIC CRIMES, WRONGS, OR ACTS EVIDENCE, WAS EXPRESSLY PERMITTED BY THE TRIAL COURT'S PRE-TRIAL RULING, AND WAS NOT ADMITTED AS AN ABUSE OF DISCRETION.

Evidence of prior misconduct of a defendant or a witness may be properly admitted or excluded depending on the purpose for which it is offered and the probative value of the evidence versus the danger of unfair prejudice. ER 404(b). *State v. Magers*, 164 Wn.2d 174, 183, 189 P.3d 126 (2008). The evidence rule itself specifies that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

Review of a trial court's rulings concerning the admission or exclusion of other crimes, wrongs, or acts evidence, is for abuse of discretion. *State v. Gunderson*, 181 Wn.2d 916, 921–22, 337 P.3d 1090, 1093 (2014). The question is whether " '[T]he trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons' such as the misconstruction of a rule", and whether it can be said that no other "reasonable judge would [have ruled] as the trial judge did." *Id.*, quoting

State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), and citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) and *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

In domestic violence cases it is not uncommon for evidence of other crimes, wrongs, or acts to be offered against both sides of the relationship. “Washington courts have recently been persuaded ‘to admit [evidence of prior acts of domestic violence] on less traditional theories, tied to the characteristics of domestic violence itself.’” *State v. Ashley*, 186 Wn.2d 32, 44, 375 P.3d 673 (2016), quoting Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, § 404:25, at 188 (2015). Prior domestic violence has been properly admitted where it is probative of the victim’s state of mind, or her credibility. *Id.* In such cases care must be taken that, “evidence of the assaults was offered to show something other than that [the defendant] had a violent character or to show that he acted in conformity with that character.” *State v. Wilson*, 60 Wn. App. 887, 891, 808 P.2d 754 (1991) (Prior assault evidence was admissible to explain delayed reporting and to rebut the claim that sexual assault did not occur.).

In the case before the court, the defendant would have the phrase “good times and bad times” [3 RP 238], held to be the equivalent of the admission of specific, past incidents of domestic violence. While under

cases like *Ashley* and *Wilson*, past domestic assault evidence could be properly admitted for a permissible purpose, that is not what happened here. To be sure the prosecution filed a pre-trial motion before the first trial seeking to admit just such evidence. CP 4-10. However during colloquy on the second day of the second trial, the prosecutor withdrew the motion:

MR. HAM: If the Court has just a few minutes before we break, I wouldn't mind, I guess, quickly visiting it and the record is essentially this, Your Honor: I don't anticipate offering it.

THE COURT: All right.

MR. HAM: Until Ms. Brewer perhaps minimizes or recants. I had an opportunity to review *Gunderson*, and although I'm leaning more towards the dissenting opinion, I understand the majority opinion there, and in light of that, I plan on abiding by that, and I have -- have and will ensure witnesses don't get into that unless there's -- and outside the presence of the jury unless the Court makes another ruling.

2 RP 115.

After making the foregoing concession the prosecutor conducted the remainder of the trial in conformity with what he told the court he would do. The record in this case does not support the defendant's contention that evidence of other crimes, wrongs, or acts was in fact admitted during the second trial.

The defendant's argument would have the court equate a common phrase used to describe most domestic relationships with prior, assaultive, propensity evidence. This is not a valid argument. The victim's testimony about her relationship with the defendant was not evidence of other crimes, wrongs, or acts evidence. It was a description of the ebb and flow of a relationship using terms that could be understood by anyone and that were devoid of any explicit or implicit reference to past violence. 3 RP 238-42. The court carefully restricted the use of the phrase in the prosecutor's follow up question to the single phrase and did not permit any linkage to be made with domestic violence incidents from the past. 3 RP 241. It is inaccurate to characterize what was testified to and what was permitted by the court as the equivalent of testimony about past domestic assaults.

A description of a couple's relationship as including good times and bad times is an apt description of the relationship of most committed or married couples. The use of that phrase did not constitute the admission of specific acts of violence that painted the defendant as a person with a propensity for violence. Nor was there any evidence admitted that signified that the defendant acted in conformity with specific past acts of violence. The trial court's ruling is instructive in this regard:

THE COURT: All right. A couple of things. I -- 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.

The second thing, to be very clear about, what I have ruled is that 404(b) evidence doesn't come in absent prior order of the Court, and it's just presumed to be inadmissible if it's offered under 404(b). Having said that, it hasn't been offered. . . .

3 RP 241

The innocuous character of the complained about phrase is all the more evident when the full record is consulted. The phrase was brought to the court's attention during the pretrial motions when the prosecution sought the court's permission to use it in light of the court's ruling on one of the defense motions *in limine*. Without objection the state advised the court:

MR. HAM: However, to the extent that Ms. Brewer is able to describe her relationship with the defendant as having good times, bad times, they argued, they cared about each other and so on, I believe is -- it's a general, I guess, opinion that she has of the defendant, but I mean in terms of -- I don't anticipate getting into any other opinion testimony.

1 RP 57

During the colloquy for the pretrial motions the defendant did not complain about the victim's characterization of her relationship with the

defendant. He sought to exclude specific instances of criminal assaultive behavior. While in this case the prosecution sought a pre-trial order *in limine* permitting such testimony, the prosecutor also cautiously declined to pursue actual admission of the evidence. Had the prosecutor continued on his original course, the evidence would have included a prior reported domestic violence assault as well as testimony from the victim concerning multiple prior assaults that were not reported. The testimony was originally proffered to explain why “[the] victim didn’t fight back or try to defend herself from the defendant because she knew it would have made it worse. . . .” CP 4-10. While it is possible to debate the admissibility of other crimes, wrongs, or acts evidence such as was originally proffered in this case, the debate is not necessary. No such evidence was actually admitted. On this assignment of error the defendant’s conviction should be affirmed.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING VICTIM’S MEDICAL BLOOD ALCOHOL RESULT OVER THE PROSECUTION’S OBJECTION AND THUS DID NOT DEPRIVE THE DEFENDANT OF THE RIGHT TO PRESENT A DEFENSE.

Criminal defendants have a constitutional right under both the United States Constitution and the Washington Constitution to present a defense. United States Constitution, Amendment VI. Washington

Constitution, Article I, §22. That right does not include the right to introduce inadmissible evidence. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). *State v. Mee Hui Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006), quoting *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The right to defend means simply that “ ‘[a] defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.’ ” *State v. Rafay*, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012), quoting *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

Criminal defendants also have a constitutional right to confront witnesses. Sixth Amendment. Washington Constitution, Art. I, § 22. “The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002), citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) and *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

The right of confrontation, like the right to present a defense, does not do away with the rules of evidence. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). “In keeping with the right to establish a defense

and its attendant limits, ‘a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.’ ” *Id.*, quoting *State v. Hudlow*, 99 Wn.2d at 15. Examples of valid limitations on the right of confrontation include a defendant’s proffer of insufficiently supported other suspect evidence and polygraph results. *State v. Thomas*, 150 Wn.2d at 856-57.

The complained of evidence in this case concerns the victim’s use of alcohol. Just as admission of prior assaults by the defendant has been limited under ER 404(b), so too has past use of alcohol by the complaining witness. “If a witness’ past use of intoxicants has not been shown to produce ongoing mental deficiencies, such use is relevant only if the cross-examining party can demonstrate that the witness was under the influence either at the time the witness observed the events at issue or when the witness is called on to testify.” *State v. Arredondo*, 188 Wn.2d 244, 269, 394 P.3d 348, 361 (2017), citing *State v. Thomas*, 150 Wn.2d 821, 863, 83 P.3d 970 (2004), *State v. Russell*, 125 Wn.2d 24, 83-84, 882 P.2d 747 (1994), and *State v. Benn*, 120 Wn.2d 631, 651, 845 P.2d 289 (1993). Where a witness is not shown to have been under the influence at the time of the incident, evidence of alcohol use or impairment is not admissible. *Id.* Moreover such evidence may be properly excluded or limited where it is not probative of any material issue. *State v. Barker*, 75

Wn. App. 236, 243, 881 P.2d 1051, 1055 (1994) (“We find that the court did not abuse its discretion in excluding evidence of the complaining witness's deferred prosecution, because the evidence was neither relevant to show [the complaining witness's] motive nor did it make the existence of [the defendant's] robbery more or less probative.”).

In this case the victim's medical alcohol result was actually admitted at the defendant's request and over the prosecution's objection. The issue first came up in the pretrial motions. The prosecutor filed a motion *in limine* to exclude two aspects of the victim's alcohol usage: her use of alcohol in the past, and her use of alcohol on the night of the assault. CP 4-10. The trial court took a pragmatic view of the evidence and ruled on the motion largely without objection from either party. 1 RP 41. Specifically, the court ruled:

THE COURT: All right. So I don't think there's any disagreement that Defense is free to explore her consumption in the hours leading up to this incident and, you know, during the time period that she was reporting the incident.

Id.

After this ruling the defendant indicated that if he were to seek admission of other evidence concerning alcohol, he would do so outside the presence of the jury. 1 RP 41-42. As things stood following the pretrial motions, evidence of the victim's alcohol consumption on the

night of the assault was in, and other alcohol evidence issues would be ruled upon in due course during the trial. It is likely that even the defendant would concede that as things stood after the pretrial motions there was no error in the trial court's handling of the issue.

Alcohol came up during the victim's testimony. Both the prosecutor and the defendant asked questions about her consumption of alcohol during the course of her night out at Diplomat's. On direct she candidly testified that she had three drinks consisting of vodka and cranberry juice. 3 RP 224. This came in without objection. Then on cross the defense asked for further details:

Q: I have my fingers spaced here. Do you mind showing me again how you described it? We're talking about a cup that's maybe four or five inches high; is that correct?

A: Correct.

Q: And the record should reflect that the witness was gesturing about the size of the cup. Now, Ms. Brewer, how much of that cup was filled with your drink? Was it going to slosh out or was it down below?

A: It was down below the rim.

Q: Okay. A third of the way down. How far down from the rim?

A: No. Just so it doesn't spill over.

Q: Okay. All right. Do you recall if it was a strong drink?

A: No.

Q: How would you describe the strength of the drink?

A: It was, what, half -- not even half liquor. It wasn't a whole lot, no.

Q: Okay. All right. So you had three of those drinks?

A: Yes.

3 RP 267.

After the victim's testimony, the jury would have had an accurate layperson's view of her alcohol consumption. She had an unknown number of ounces of vodka served in a cup or cups five inches tall and mixed with cranberry juice. This evidence was not controversial and because this was not a DUI case, it was also not hotly contested.

Alcohol next surfaced during the testimony of the emergency room physician. The prosecution sought to exclude the .77 blood alcohol result both on foundational grounds and on the ground that since this was not a DUI case the precise measurement of the victim's alcohol level was not relevant and was unfairly prejudicial. 4 RP 379 et. seq. After a rather extensive colloquy and an offer of proof, the trial court reasonably permitted the number to come in but with some restriction:

THE COURT: Okay. I'm going to allow him to testify as to the numerical value, that is 77, and if he wants to express it in terms not of the legal standard, but in terms of a BAC standard, as .077, he'll be allowed to do that, and your concerns go to the weight of the evidence not its admissibility, and you're free to cross examine him all you

want about, Do you know exactly when the blood was drawn? Do you -- you know, do you -- what is the standard deviation? What's our uncertainty factor? And, you know, you observed her, having treated her personally, didn't you? Yes. Did you observe any manifestations of alcohol being in her system at this level? "Yes" or "no." And you're free to do that all day long.

4 RP 409.

The court also ruled concerning whether the jury would be given an instruction concerning the DUI alcohol standard. 4 RP 413-14. Without objection from the defense the court declined to give such an instruction because this was not a DUI trial. *Id.* The emergency room physician then testified consistent with the trial court's ruling. The prosecution elicited the .77 value but with context that made it meaningful to the issues the jury was to decide. The doctor testified concerning alcohol that:

Q: What significance, if any, does a 77 value have for you in your medical diagnosis of Ms. Brewer?

A: The number itself means nothing, but in – with Ms. Brewer, because she didn't show any signs of altered mental status, it didn't matter.

Q: She didn't have any altered mental status? Do you mean she was coherent?

A: Exactly.

4 RP 425-26.

The defendant likewise explored alcohol consumption on cross but only in the most cursory fashion. The defendant merely clarified the timing of the blood test before moving on to the more pertinent testimony of the victim's injuries. 4 RP 434.

The final issue concerning alcohol arose during the defendant's testimony. The record shows that before the defendant took the stand the defense did not clear with the trial court the defendant's intent to go into the victim's use of alcohol on a prior occasion. 4 RP 438-40. This violated the court's *in limine* ruling. 1 RP 41. Nevertheless in spite of the *in limine* violation the trial court reasonably resolved the issue during the defendant's testimony after the defense launched into the restricted subject matter without warning. 4 RP 448.

The defendant testified that he had asked the victim to watch his son while he traveled to a motorcycle rally in South Dakota. 4 RP 444, et. seq. He claimed that he tried to call and check in with her which he did regularly but he called at approximately four in the morning on August 5th during his birthday celebration. 4 RP 447-48. He then sought to give an opinion about the victim's level of sobriety at that time from his conversation with her on the phone. *Id.* This prompted an objection.

The court's resolution of the objection took into account its ruling up until that point that prior incidents of domestic violence by the defendant would not be admitted. 4 RP 455-56. The court noted:

I'm not completely foreclosing the possibility that the substance of their argument might be relevant. What I'm saying is before you go there, I need to know what the argument is about because if it's -- if it turns -- if he starts testifying, We were arguing about she was drinking and, you know, she -- I entrusted my child to her, and I come home and she's drunk again and, yes, we argued about that. I don't know that why they're arguing really has anything to do with it. It's just the fact that they're arguing and the fact that they're both very angry at each other is certainly relevant, but specifically what they're arguing about generally, I mean, if you can make a showing and an offer of proof, I'll hear it. . . .

4 RP 457.

Following this provisional ruling and invitation to present an offer of proof, the defense attorney took the defendant aside for consultation. 4 RP 457. The prosecution also withdrew its objection. *Id.* Thereupon the defendant elected not to pursue the line of questioning concerning whether the defendant had an opinion (based on a phone conversation) that the victim was drunk at four in the morning. 4 RP 458.

The defendant then went on to complete his testimony. He was concerned for the safety of his son while the victim was watching him. 4 RP 459. But this did not lead to any disputes or arguments relevant to the assault incident because he did not see her the night of the incident. *Id.* 4

RP 441. The defendant claimed that the victim was not even at his house the night of the incident, and implausibly claimed that although her car was shown to have been there in police photos, that was because she habitually parked her car at his residence not because she was there with him that night. 4 RP 440-42, 462-63.

The right to present a defense does not include disregard of the rules of evidence. “A defendant may open the door to evidence that would otherwise be inadmissible, even if constitutionally protected, if the rebuttal evidence is relevant.” *State v. Hartzell*, 153 Wn. App. 137, 154, 221 P.3d 928 (2009). The defendant in *Hartzell* opened the door to the prosecution introducing evidence of threats to kill, much like the defendant in this case risked opening the door to past domestic violence incidents by claiming that the assault in this case was the fault of the victim who became intoxicated while watching the defendant’s son. The rebuttal might well have included that the assault was motivated by the same domestic violence issues that had motivated the defendant’s past assaults. The defendant elected not to introduce his claim that alcohol consumption was the issue because he knew that he might very well open the door to a more complete discussion of the history of the relationship. This was not a deprivation of the right to present a defense, it was the presentation of a defense within the restrictions of the rules of evidence.

More than the sustaining of an objection to inadmissible evidence is required before there can be a constitutional deprivation of the right to defend. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). From the very beginning, the trial court in this case kept the focus where it should have been, namely on the events that occurred during the night of the assault. This held true during the defendant's testimony. The court observed:

If we're under that line of reasoning, wouldn't Mr. Ham then be allowed to ask her her perceptions why she didn't fight back, why she tried to placate him during this alleged incident? If we're going to get into the details of prior bad acts of the alleged victim for the defendant to explain their actions, I mean, shouldn't it work both ways? I mean, he wants to -- you want to get into the fact that she's drunk on this occasion, perhaps on a number of other occasions to explain why he's concerned and why he's acting in such a manner, and I'll -- I'll grant you, it's relevant for that purpose.

It comes down to a 403 issue, and that is the danger of unfair prejudice. Wouldn't the same analysis apply if we're going to examine her state of mind and her decision-making process? I mean, isn't it the flip side of the same coin?

4 RP 450-51.

The weighing of prejudice versus probative value for other crimes, wrongs, or acts evidence directed at either the victim or the defendant is the bread and butter of a trial court's task in a criminal case. It cannot be said that no other "reasonable judge would [have ruled] as the trial judge

did” in this case. *State v. Gunderson*, 181 Wn.2d 916, 921–22, 337 P.3d 1090, 1093 (2014). Thus it follows that this was not an unconstitutional deprivation of the right to defend. The defendant’s conviction as to this assignment of error should be affirmed.

D. CONCLUSION.

For the foregoing reasons the defendant’s conviction and sentence should be affirmed. As to the claim that cumulative error applies, the foregoing discussion forestalls that argument even if two alleged errors could be deemed “multiple” separate harmless errors. Under the cumulative error doctrine, a defendant may be entitled to relief if a trial court were to commit multiple, separate harmless errors. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). In such cases, each individual error might be deemed harmless, whereas the combined effect could be said to infringe on the right to a fair trial. *Id.* citing *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), and *State v. Hodges*, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). “The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial.” *Id.* The alleged errors here were not actually errors, they

were few and they had no impact on the outcome or fairness of the trial.

The defendant's convictions and sentence should be affirmed.

DATED: Thursday, April 26, 2018

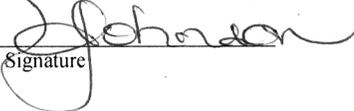
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WSB # 17298

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ ^{File} or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/27/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

April 27, 2018 - 9:09 AM

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