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Clallam County No. 18-1-00100-05

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

STATE OF WASHINGTON,

Respondent,

v.

PETER NORTON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
CLALLAM COUNTY

The Honorable Christopher Melly, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Peter Norton was deprived of his state and federal due process rights to present a defense when the trial court excluded evidence which was relevant, material, and necessary to the defense.
2. The prosecutor committed misconduct which supports reversal.
3. The 2018 amendments to the statutes providing for imposition of legal financial obligations and conditions at sentencing apply to this case under State v. Ramirez, 191 Wn.2d 732, 425 P.3d 714 (2018), and the Court should thus strike the \$200 filing fee and interest provision and remand for reconsideration of the \$100 DNA fee.

B. QUESTIONS PRESENTED

1. The state claimed Mr. Norton had been angered when the alleged victim “flipped him off” when Norton was driving by so Norton turned his car around and deliberately hit the alleged victim with it. Mr. Norton’s defense was that he knew the alleged victim well and was aware the man would get into trouble when agitated so Norton turned his car around and headed towards the other man, intending to take him to their shared home when the other man threw a beer can with liquid in it at the vehicle and then charged it, causing the impact.

Did the trial court violate Norton’s due process rights to present a defense by excluding testimony that Norton believed the alleged victim was in trouble based on his past experiences with him and that another witness, who had seen the alleged victim just prior to the incident and noticed his erratic behavior, had similar experiences when that evidence was relevant, material and necessary to support the defense?

Further, did the prosecutor commit flagrant, ill-intentioned and prejudicial misconduct by first moving to exclude the evidence and then denigrating the defense and arguing that jurors should rely its absence?

2. Should the legal financial obligations and conditions be stricken or reversal granted for reconsideration under the controlling precedent of Ramirez?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Peter A. Norton was charged in Clallam County superior court with vehicular assault and second-degree assault with a deadly weapon, “to wit: a motor vehicle[.]” CP 82-83; RCW 9A.36.021; RCW 46.61.522. Pretrial proceedings were held before the Honorable Judge Erik Rohrer on April 6, the Honorable Judge Brian Coughenhour on April 13, May 24, June 14 and 21, July 26 and 31, 2018, and Judge Rohrer on August 21, 2018, after which the Honorable Judge Christopher Melly heard a suppression hearing and motions in limine on August 22 and a jury trial on August 27-30, 2018. RP 3, 12, 18, 24, 30, 38, 50, 57, 67, 114-513. The jury convicted Norton as charged. CP 31-33.

After a continuance on September 6, on September 11, Judge Melly imposed a standard-range sentence. CP 8-1; RP 558-65. Mr. Norton appealed and this pleading follows. CP 7-8.

2. Overview of relevant facts

Lesla Irwin was driving home from work on the night of September 22nd when she had to brake quickly because a Jeep pulled in front of her suddenly. RP 181-86. Ms. Irwin would later testify the vehicle then accelerated and made a “beeline” for the side of the road. RP 181-87. An older man was walking on a path on that side and Irwin then saw that man get hit by the Jeep. RP 187-88.

Daniel Deleon was at a nearby park watching his daughter’s soccer practice and saw the Jeep first speed, then make a u-turn, which seemed to spray gravel and drew attention. RP 250. To Deleon, the Jeep’s driving

seemed “erratic” as the vehicle went over to the other side of the road and hit the pedestrian. RP 250-51.

Marc Orth was also at the soccer game and heard tires screech, saw the Jeep do the “u-turn,” and saw the impact. RP 343-46. He would later testify that the Jeep was driving in a way he would describe as “not normal” and “reckless.” RP 345-46.

Mr. Orth, however, had a limited view. RP 347. And while he opined that the Jeep “basically ran into a pedestrian basically clipping his legs,” Orth conceded it was hard to tell from his vantage point what had happened. RP 347. In fact, he admitted, while he assumed the pedestrian was just walking prior to impact, the man had only come into view seconds before. RP 347-48.

Indeed, Orth would testify, it was not “a hundred percent clear” to Orth where the pedestrian had been when hit or if he was even on or off the road or path. RP 348.

Likewise, Ms. Irwin had not really been able to see the whole event. RP 189-90. She did not know what the pedestrian had been doing before he was hit. RP 189. And she could not see whether he had charged at the approaching car. RP 189.

Mr. Deleon also did not know what happened just before the pedestrian was hit. RP 258. As far as Deleon knew, the man was just walking. RP 251. But Deleon could not see from the soccer field because trees obstructed that view. RP 258-59. Mr. Deleon thus conceded that he could not see if the pedestrian had tried to jump on the hood or anything similar. RP 251.

From her perspective, Irwin did not think the Jeep had slowed down. RP 187-88. Mr. Orth, however, said it was slowing at the time of impact, but was still travelling in his estimation at least 15 miles per hour. RP 347, 362-63. And he repeated his opinion that the person who was driving the Jeep was being “reckless.” RP 347.

There were skid marks on the grass and gravel indicating the Jeep had hit the brakes. RP 262-63, 322-23.

Mr. Orth thought the impact knocked the pedestrian onto the hood, the Jeep then went another 10-15 feet, and the pedestrian then slid off the hood as the Jeep came to a stop. RP 347. He told another parent to call 9-1-1 and started running towards the stopped Jeep. RP 252. Ms. Irwin had also already called police. RP 190.

According to Irwin, the driver of the Jeep got out but it kept rolling, so he got back in, put the car into park, then took a can from inside and threw it. RP 190. In fact, Irwin said that liquid flew. RP 191. Mr. Deleon did not see anyone throw a beer can but saw one on the ground and said it was still foaming and had what looked like beer pouring out. RP 261.

At the later trial, the pedestrian, Eric Horner, would admit the beer can was his. RP 220. He had thrown it at Norton’s Jeep. RP 220. The beer, his second or third, was about half full, and it was a 24-ounce can. RP 220-21.

Meanwhile, the driver was at the front of the Jeep trying to rouse Horner, who was on the ground. RP 191. Mr. Horner’s eyes were closed and he had blood on his head. RP 191. The driver was trying to get

Horner up. RP 252. Mr. Deleon asked the driver to stop, as did Ms. Irwin. RP 192. Ms. Irwin also told the driver that she had called police and “help is on the way.” RP 192. The driver responded he was taking Horner “in,” or something to that effect. RP 192.

Mr. Orth said that Horner looked stunned but was conscious and moving when the driver grabbed his upper body. RP 349-58. Mr. Orth started yelling at the driver to leave him on the ground and wait for an ambulance to arrive. RP 353. The driver responded something like he was going to take Horner to the hospital and continued, putting Horner into the passenger seat of the Jeep. RP 354, 358. It did not appear to Orth that Horner could have gotten in the vehicle by himself but Horner was not fighting or resisting getting in. RP 355.

Mr. Deleon first testified that he did not hear the driver say that Horner was his friend and he was taking Horner to the hospital. RP 266. Later, Mr. Deleon recalled that the driver had, in fact, said something like, “this is my friend[.]” RP 317.

According to Orth, when the driver “took off,” Orth thought he was going to hit another car. RP 355. Mr. Orth expressed his worry about “the accumulation of all the erratic behavior” he had seen. RP 356. The prosecutor again asked for more, inquiring, “[s]o when you say nearly hit another car as he was leaving, can you describe that in more detail?” RP 356. The witness said the U-turn was done “very quickly and so it was very wide as he did it much faster than most people would drive,” that “he might have lost control of the car,” as “he was driving in an erratic fashion when he did it.” RP 356.

But Orth admitted that the Jeep did not hit another car. RP 356. It was also headed in the right direction to go to the hospital. RP 358.

Ms. Irwin was very upset by the incident and said that was why she had told police the pedestrian was walking in a different direction than she testified at trial. RP 203. She also thought the driver was intoxicated and told as much to police. RP 210. The officer who later interacted with the driver saw no indication he was intoxicated at all. RP 275.

That officer, Port Angeles Police Department (PAPD) Officer Zachary Moore, testified at first that he heard a dispatch about the incident and just followed a hunch that the driver might have gone to the hospital. RP 267-68. He flatly denied that anyone had told him that the driver had said he was taking Horner there. RP 274. Instead the officer maintained that he “just guessed” or had a hunch which led him to the emergency room after the incident. RP 274.

But PAPD Officer Mike Johnson, who went to the scene and interviewed Irwin, Orth and Deleon, testified that those witnesses had indicated that the driver had told them he was taking Horner to the hospital. RP 318-20, 339. Officer Johnson also testified about sharing that information with other officers, including Officer Moore. RP 339.

At the hospital, a Jeep was in the no-parking zone near the emergency room. RP 268. Officer Moore went inside and found Horner sitting in a wheelchair at the admitting desk with another man. RP 269-76. That man was the driver, Peter Norton. RP 211-16. Officer Moore asked Norton to go outside to talk and, when Norton complied, placed him in handcuffs, read him his rights and questioned him. RP 268, 277.

Mr. Norton did not deny having hit the other man with the Jeep. RP 279. He told the officer that he and Horner lived in the same home and had been getting into arguments lately. RP 272. He had driven by Horner, who had flipped him off and, after Norton turned around, Horner threw a beer can at the Jeep. RP 270-71. According to the officer, Norton then said he went across the other lane and onto the dirt shoulder to stike the other man with the Jeep, going about five miles an hour. RP 271, 281. Mr. Norton said he grabbed Horner and drove him to the hospital. RP 271.

The officer did not recall Norton saying anything about being concerned about Horner or that Norton thought Horner looked like he might need help. RP 279-80. The officer did not record the statement, however. RP 279-80. On cross-examination, the officer recalled that Norton had said he had tried to slow down before impact. RP 279-80.

At trial, Mr. Horner admitted he had thrown a beer at Norton's Jeep and flipped him off RP 220. It was his second beer - or maybe his third. RP 223-24. When interviewed by Officer Moore at the hospital, Horner would say he did not remember the events. RP 225-26. At the later trial, however, Horner declared that he thought that Norton had tried to run him over. RP 247. He was also convinced Norton was still trying to run him over up to the date of trial. RP 247.

The emergency room physician who treated Horner said he suffered a laceration over his left eye which had been sewed up, soft tissue swelling in the right "periorbital region," and an abrasion on his nose. RP 146-51. She thought he could also have had a concussion, although he had

told another doctor he had not lost consciousness or noticed his vision changing. RP 150-66. He was also complaining of left wrist pain. RP 150. Scans were done of his head, spine and face and an x-ray taken of his left wrist which showed fractures, which a doctor thought were probably recent because otherwise a radiologist usually would indicate a fracture was old and there was no such indication in Horner's chart. RP 130-71.

One doctor who saw Horner at the emergency room said he had periods of anger and agitation when she tried to work with him. RP 172. Mr. Horner was "only intermittently cooperative," but oriented to himself and location. RP 167. The doctor had security present at many times during the procedures with Horner. RP 176. The medical record indicated Horner was "not reliably examinable due to lack of cooperation, likely intoxication, abnormal baseline." RP 168.

An officer who later gave him a ride home from the hospital said Horner had a swollen face and did not seem to recall what had occurred. RP 326, 339-40.

Peter Norton testified that he had been headed out of town that day when he had seen Horner on the side of the road and become concerned after Horner had flipped him off. RP 401. This indicated to Norton, "he's on a roll again," which was a reference to how Horner would get into trouble. RP 401. Mr. Norton turned the Jeep around, intending to pick up Horner and take him home so that Horner to ensure he was okay. RP 401, 413-14. Mr. Norton did not expect Horner to start "coming at" him when Norton was pulling off the road. RP 401.

According to Norton, Horner started running at the Jeep and threw

a beer can which hit the windshield. RP 401, 410. Mr. Norton stepped on the brakes, realizing Horner was coming right at him, but Norton could not stop in time. RP 402, 418-19. Mr. Norton thought the Jeep was going between 10-15 mph when they collided, although he might have previously said he thought it was lower. RP 401, 419. It was hard to estimate because Horner was charging him at the time. RP 402.

Mr. Horner held onto the hood until the Jeep stopped completely, when he fell. RP 402. Mr. Norton jumped out, went to Horner and tried to pick him up but could not. RP 402. Mr. Norton then said, "Ed, if you want to go to the hospital you're going to have to help me." RP 402. Mr. Horner then got to standing on his own and together they got him into the passenger side seat. RP 402. Mr. Norton put the other man's legs in and closed the door. RP 402.

Mr. Norton was not listening to the people hollering at him and said he was focused on Horner at the time. RP 416. Once Horner was in the Jeep and Norton was about to go to the hospital, then Norton heard people telling him he should not go anywhere. RP 416. He responded, telling them he was taking Horner to the hospital because no ambulance had yet arrived and he thought he could get Horner there fast. RP 416.

Once at the hospital, Norton ran inside, grabbed a wheelchair, ran outside and helped Horner into the chair, wheeled him inside and got him to emergency room "admitting." RP 403. Mr. Norton was talking to the nurse when Officer Moore showed up. RP 403.

Mr. Norton thought he had explained the situation to the officer. RP 403. He was clear he had not intended to hurt or assault Mr. Horner.

RP 404. When counsel asked if Norton had driven his car “in a manner that was reckless” that day, Norton said, “it may have looked that way, but I didn’t think it was.” RP 404.

Tiffany Jenks had known Horner for about four years at the time of the incident. RP 364-65. She saw him that day and noticed how he was acting. RP 366-37. At trial, the prosecutor repeatedly objected to any effort by the defense to elicit testimony about what Jenks saw Horner doing. RP 366-37. Ms. Jenks was allowed to testify that Horner was being loud and verbal, although no one was with him. RP 368. While Horner was yelling he was flailing his arms wildly and seemed to have something in his hand. RP 372.

Ms. Jenks said Horner seemed very angry and upset and was not walking in a straight line. RP 372. Instead, he was walking erratically and sort of on the shoulder of the road. RP 380. Ms. Jenks noticed a vehicle make a u-turn in front of her and head back in the direction of Horner. RP 374. The vehicle then started slowing down. RP 374.

The Jeep was not moving very fast when Jenks saw Horner throw a can at it. RP 374. After that, Horner went running towards the vehicle. RP 374-75. Although the Jeep seemed to slam on the brakes it seemed unable to stop and Jenks then saw Horner collide with the front of the car. RP 374-75.

Ms. Jenks said the driver immediately stopped and jumped out of the car, running up to Horner and then helping him up. RP 374, 378. She saw that Horner was getting help and another person had stopped, too, so she felt comfortable letting them handle the situation. RP 374. She did

not want to leave her friend but also was concerned, because she had an outstanding warrant. RP 374-75.

Ms. Jenks did not recall telling an officer that Horner had “jumped up” after he came off the hood. RP 379-82. She felt that Horner had put himself in danger by running towards a moving vehicle that day. RP 379, 382.

Ms. Jenks wrote a letter to Horner about the incident. RP 384. In it she asked him why he had jumped on the hood of a moving vehicle. RP 384. She explained it was her perception that he had sort of run into the Jeep rather than the Jeep running into Horner. RP 385. She wrote in the letter that his claim he was “hit on purpose” was not true, that she had seen the whole thing and had stayed away from authorities because of warrants and her fear of the police. RP 392. She then wrote to Horner, “Ed, I seen you yelling and screaming at Peter [Norton] and you were walking in the road, it was obvious you were drunk.” RP 392. Ms. Jenks also wrote that she was worried about Horner hurting himself or getting hurt.” RP 392-93. She went on:

Pete has known you a long time and everyone knows when you are being disorderly that you are not taking your medication or that you are inebriated, intoxicated. Pete [Norton] turned his vehicle quickly to assure you were not injured. Ed, you jumped on the hood of the moving vehicle . . . Pete did not want to harm you, he took you to the hospital, he made sure you were okay.

RP 393. She wrote the letter a week before trial, which was about when she surfaced as a witness. RP 394.

Ms. Jenks agreed that she had spoken to Norton about the incident but made it clear she had written in the letter what she had seen Horner do

that day. RP 395. She had only surfaced late because of the warrant out for her arrest. RP 395.

The prosecutor confronted Jenks about the statement that Norton had not wanted to harm Horner, asking if that was not just based on what Norton had later told her, and Jenks demurred. RP 396. She pointed out, “somebody that’s going to harm somebody is going to speed up and accelerate and would have not slammed on the brakes[.]” RP 395-96.

Mr. Horner and Ms. Jenks had since talked about the incident. RP 376-77. He told her that he did not remember what happened but thought he was going to get “a paycheck” out of it. RP 377-78.

The state recalled Officer Moore in rebuttal and he could not recall Norton saying anything about Horner running at the vehicle or jumping on the car. RP 422. The officer did recall, however, that Norton had said Horner had flipped him off and thrown a beer. RP 422. Another officer testified about an informal interview with Jenks the week before trial. RP 425. The officer noted that Jenks declined to write a statement under penalty of perjury. RP 425, 432.

But the officer admitted that Jenks had already given him an interview which had lasted a long time, about an hour and a half, when the officer then asked her to write everything out. RP 440-41. That interview was recorded, because Ms. Jenks had so agreed. RP 435-36, 441. He did not recall if she declined because she was hungry. RP 441.

D. ARGUMENT

1. MR. NORTON’S STATE AND FEDERAL DUE PROCESS RIGHTS TO PRESENT A DEFENSE WERE VIOLATED BY THE EXCLUSION OF EVIDENCE WHICH WAS RELEVANT, MATERIAL AND NECESSARY TO HIS DEFENSE AND THE PROSECUTOR COMMITTED SERIOUS, PREJUDICIAL MISCONDUCT

Both the state and federal constitutions guarantee the due process right to present a defense. See State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 502 (2006); Sixth Amend., 14th Amend., Art. 1, §3. In addition, both constitutions enshrine the right of the accused to meaningful confrontation of the state’s case. See State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983); see also, Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L. Ed. 2d 674 (1986). This includes the right to present testimony in your own defense. Hudlow, 99 Wn.2d at 14-15; Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Together these rights ensure that the accused have the “right to a fair opportunity to defend against the State’s accusations.” See Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973). All of those rights were violated here when the trial court repeatedly excluded evidence and testimony which was extremely probative, relevant and material to the defense. The state cannot meet its heavy burden of proving this constitutional error “harmless.” Further, the prosecutor committed misconduct in first moving to exclude the evidence then arguing the jury should rely on its lack.

a. Relevant facts

Before trial, the prosecution moved to exclude evidence from witnesses that they had seen Horner behave violently when he was drinking and had seen him “freaking out” in ways which supported Norton’s belief that Horner needed help and Norton’s subsequent actions - and his defense. RP 117-18. Counsel first argued that the state had to prove “specific intent” and the evidence was relevant to Norton’s state of mind. RP 120. Counsel also argued it was relevant evidence because Norton said he had turned his car around to go get Horner because of his belief that Horner was in trouble, to give him a ride back to their mutual home. RP 121-22. Counsel argued it was also relevant to rebut claims that Norton was fabricating Horner’s behaviors. RP 120-22. Counsel also stated that Jenks, who knew Horner, would testify to having seen him screaming, flailing, and yelling all alone that day, just before the incident. RP 122-23.

Judge Melly ruled that witnesses could testify about what they had seen Horner doing that day but could not testify about their belief that Horner had not been taking his medicine that day. RP 124. The prosecutor declared that it was important counsel not include anything in opening about Horner being being unstable or “off his meds” and that Norton was going to go help “and that’s what all this was about[.]” RP 127.

Later, during Jenks’ testimony, the prosecutor objected repeatedly to her efforts to testify about Horner. RP 366-77. When Jenks tried to testify that “Ed was acting a little bit wild” when she saw him that day, the

prosecutor objected and that objection was sustained. RP 367. She started to say when she noticed him, how he was acting and the state's objection was sustained. RP 367-68. She was asked, "[w]hat did you observe about his behavior, how was he behaving, was he walking, was he running, what did you notice about him?" RP 367. The prosecutor objected, "[w]hat's the relevance" and the court allowed "a synopsis of what this witness observed on that day to put things in context[.]" RP 368. She was then allowed to say he was loud and being verbal with no one else around, but when she said she knew him and so the behavior did not alarm her, the state's objection was sustained and the jury removed. RP 368. The prosecutor objected this was going into inadmissible history and the defense said he was trying to direct the witness to the prior ruling and the court said the testimony would be limited to what she saw that day. RP 370.

Ms. Jenks was not allowed to testify whether she would have done anything different if she had not known it was Horner. RP 372-73. An objection was sustained when she said she thought the Jeep was approaching Horner because maybe they had known him and seen him. RP 375.

Mr. Norton testified in his defense that he saw Horner on the side of the road and Horner had "flipped off" Norton, which made Norton think, "well, he's on a roll again." RP 401. Mr. Norton said Horner "gets in quite a bit of trouble around the house," and Norton had intended to turn around, pick up Holder and take him home, "so he wasn't getting in anymore trouble[.]" RP 401. He said he had not expected Horner to

charge at the car. RP 401-402.

When Norton was asked about what he had told the officer at the hospital about arguments with Horner, Norton responded that Horner “gets in a lot of trouble at home” and then started, “[h]e’s threatened me - - “ at which point the state’s objections were sustained. RP 404-405. Counsel then asked whether Norton had told the officer they had been having arguments and Norton said, “[y]es,” after which it was clarified that the arguments were not the reason why Norton had hit Horner with the Jeep. RP 406.

Mr. Norton also understood how some witnesses might have misconstrued what was going on because they did not know Norton or Horner, but the state’s objection was sustained and the jury removed. RP 406. At that point the prosecutor objected this was “character evidence” and counsel corrected, “[t]his is what he knows about this guy from his interactions with him,” not as “character evidence.” RP 407. The judge said it was not character evidence but the questioning was “speculating about what the other witnesses” might have thought. RP 408.

In closing argument, the prosecutor dismissed the defense by saying, “this is not about a good [S]amaritan trying to help a neighbor” but rather about Norton losing his temper with his neighbor and taking it out on that neighbor with his car. RP 466-67. The prosecutor also said it was “bizarre that Mr. Norton is arguing that this was an accident, that Mr. Horner contributed to this by rushing at the vehicle[.]” RP 467-68. The prosecutor claimed the defense was, “Horner brought this on himself, you know, let’s blame the victim basically.” RP 468.

The prosecutor continued to denigrate the defense claim that Norton had not meant for this to happen and the claim that Horner ran at the car and jumped on the hood, citing Horner's physical appearance in the courtroom ("we all saw Mr. Horner. It looks like he'd have trouble going up a flight of stairs, much less jumping on the hood of a Jeep"). RP 468-69.

The prosecutor also declared that the defense was basically, "if I run someone over as long as I give him a ride to the hospital, which he didn't ask for, then well, you know, I didn't do anything wrong." RP 470. The prosecutor mocked the defense as wanting to argue "well, I had no other option in trying to help this man." RP 471.

Regarding reasonable doubt, the prosecutor argued that none of the explanations the defense had put forward for the incident were "reasonable." RP 472. The prosecutor mocked the idea that Horner would run at the car and jump on the hood when he seemed frail in court. RP 469. The prosecutor also said "talk is cheap, you know," and people can apologize but "[a]ctions speak louder than words" and this was "no accident" based on the skid marks. RP 474. The prosecutor said "[t]o say that he had no other options but to take the course he did is ridiculous," counsel's objection this was "improper argument" was overruled. RP 473. The prosecutor declared, "[i]t's ridiculous" that the defense was arguing that what Norton had done was reasonable and he was trying to help his friend, when in fact he was a man who lost his temper "and used the weapon he had at hand, the car he was driving[.]" RP 475.

Then, in rebuttal closing argument, the prosecutor described the

acts of Norton as an “unwanted, pseudo rescue attempt,” that was “all cover, that’s like a puff of smoke, that’s an explanation after the fact.” RP 502. The prosecutor declared that there was “no evidence” that Horner “was flailing or rushing at the car or jumping on the hood,” and that “[n]one of the eye witnesses saw that.” RP 502.

A little later, the prosecutor declared:

A good [S]amaritan, that - - if his story is true, and if Ed ran out in front of him and jumped on the hood and all that, and caused - - I mean, it’s like that old joke. If I say oh, I had a car accident, a tree jumped in front of my car, or a house jumped in front of my car, it’s like that. **They’re blaming the victim saying the victim came to the car and created his own vehicular assault and it’s ridiculous. Talk about common sense, apply it to that and the end result is that’s a ridiculous argument.**

RP 506-507 (emphasis added). The prosecutor told jurors it was “undisputed” that Norton did a u-turn after the neighbor he had been arguing with flipped him off, “[a]nd there’s no reasonable - - I mean, **common sense, innocent explanation for this.**” RP 507 (emphasis added).

- b. The exclusion of the evidence violated Norton’s due process rights to present a defense

The trial court’s rulings excluding the evidence violated Norton’s state and federal due process rights to present a defense and meaningfully confront the state’s case. As a threshold matter, because of the constitutional rights involved, this Court does not use the usual “abuse of discretion” standard of review. See State v. Clark, 187 Wn.2d 641, 389 P.3d 462 (2017).

Instead, de novo review applies. State v. Jones, 168 Wn.2d 713,

719, 230 P.3d 576 (2010); see also, State v. Ward, 8 Wn. App.2d 365, 438 P.3d 588, review denied, 193 Wn.2d 1031, 447 P.3d 161 (2019). Where, as here, counsel’s objections below do not explicitly mention a violation of the constitutional right to present a defense, the constitutional error is still reviewable on appeal, if that error is “manifest,” i.e., is an error for which there was a practical, identifiable effect. See State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Applying de novo review, this Court should reverse. The due process right to present a defense guarantee the accused the right to introduce evidence which is relevant and material to the defense. See State v. Cayetano-Jaimes, 190 Wn. App. 286, 359 P.3d 919 (2015). While there is no right to present irrelevant evidence, where evidence is relevant, the state must bear the burden to show “the evidence is so prejudicial as to disrupt the fairness of the fact-finding process” if it is admitted - in order to justify its exclusion from trial. Hudlow, 99 Wn.2d at 16; Darden, 145 Wn.2d at 621.

Further, the threshold for “relevance” in this context is very low. Darden, 145 Wn.2d at 621. Evidence is relevant if it makes more or less probable the existence of any fact that is of consequence to the outcome. ER 401. As a result, even “minimally relevant evidence is admissible” if it is relevant and material to the defense, unless the state can show “a compelling interest” for its exclusion. Darden, 145 Wn.2d at 612.

Indeed, the Supreme Court has held that, where the evidence is relevant and material to the defense, it may be excluded only if the State’s interest in excluding it “outweighs the defendant’s need” in its

introduction. Id. The Court must also consider the important concerns of “the integrity of the truthfinding process” and the defendant’s right to a fair trial. Hudlow, 99 Wn.2d at 14. The balance tips based upon the importance of the evidence to the defense, so that when the evidence is of high probative value, “it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment” and Article 1, §22, rights to present a defense. Hudlow, 99 Wn.2d at 16; see Jones, 166 Wn.2d at 723-24.

Thus, in Cayetano-Jaimes, where the defendant was accused of first-degree rape and the crime was alleged to have occurred when he and his wife babysat the victim and her sister, the trial court violated the right to present a defense by excluding telephonic testimony from the victim’s mom. 190 Wn. App. at 289-90. The trial court had excluded the evidence because jurors could not evaluate the declarant’s credibility with testimony given by phone. 190 Wn. App. at 290. In reversing, the appellate court noted that, where constitutional rights are involved, “[c]ourt rules may not prevent a defendant from presenting highly probative evidence vital to his defense.” 190 Wn. App. at 297-98. The testimony which was excluded was testimony disputing that the victim and her sister had ever actually been left with the defendant and his wife, from the victim’s mom. 190 Wn. App. at 290. Because the evidence was of “extremely high probative value” to the defense, the Cayetano-Jaimes Court held, exclusion of the evidence violated the defendant’s right to present a defense. 190 Wn. App. at 300.

Similarly, the right to present a defense was violated in Jones,

supra, even though the trial court had excluded evidence ostensibly based upon an important evidentiary rule. In Jones, the defendant wanted to testify (and cross-examine) about his claim that the sex was consensual and had happened at an all-night sex party in which he and the alleged victim were voluntarily involved. Jones, 168 Wn.2d at 717. The trial court excluded the evidence under the “rape shield” statute. Id.

On review, the Jones Court next held that, even if the statute applied, it could not bar the testimony without violating the state and federal rights to present a defense. 168 Wn.2d at 724. The testimony was of extremely high probative value, about the incident in question, so its exclusion even under the statute would violate the constitutional right to present a defense. 168 Wn.2d at 724.

Put another way, the right to present a defense is offended by a trial court’s exclusion of evidence if that exclusion “significantly undermines” the defense, excludes part of a witness’ testimony on a fact relevant to the alleged crimes, or otherwise prevents presentation of all the facts relevant to the defense. See State v. Donald, 178 Wn. App. 250, 268, 316 P.3d 1081 (2013), review denied, 180 Wn.2d 1010 (2014).

Here, the exclusion of the evidence had just such effects. There was never any question that Mr. Norton’s Jeep impacted Mr. Horner. He did not deny it. The only question was whether the impact was the result of an out-of-control angry Norton using the vehicle as a “weapon” in response to Horner simply “flipping him off,” as the state claimed, or the result of an out-of-control Horner rushing the Jeep, throwing a beer and obstructing Norton’s view so the impact occurred. The constitutional

rights to present a defense ensure that jurors hear not only the state's claims but also give the accused the opportunity to "present the defendant's version of the facts." State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), abrogated on other grounds by, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Further, state and federal due process principles require that criminal prosecutions must comport with prevailing notions of fundamental fairness, requiring that the defendant have a meaningful chance to present his defense. See State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Mr. Norton was deprived of that "fair opportunity."

Reversal is required. Where the defendant's rights to present a defense and to impeach are violated, those are constitutional errors. See Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L.Ed.2d 636 (1986). As a result, the errors are presumed prejudicial and reversal is required unless the state meets the heavy burden of satisfying the "constitutional harmless error" standard. See State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). To do so, the state must show beyond a reasonable doubt that *every* reasonable jury would still have convicted even if the missing evidence had been admitted. See State v. Whelchel, 115 Wn.2d 708, 728, 801 P.3d 948 (1990).

Put another way, the state must prove, beyond a reasonable doubt, that the untainted evidence of guilt is so overwhelming that no reasonable juror would have failed to convict even absent the error. State v. Guloy, 104 Wn.2d 412, 422, 805 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

The state cannot meet that burden here. The evidence was relevant, material, and necessary to the defense. Mr. Norton did not dispute that the Jeep he was driving collided with Mr. Horner and Horner was hurt as a result. The only question at trial was whether the jury would believe that it occurred because Mr. Norton was so out-of-proportion angry with Horner for Horner “flipping him off” that he turned his car around and drove at Horner with intent to hurt him or whether as Mr. Norton said, Norton thought Horner was having an episode and thus likely to get into trouble, so Norton went back to pick Horner up and take him home, not expecting Horner to throw a beer, obstructing vision, and charge towards the Jeep. The excluded evidence was thus highly relevant to the defense, because 1) it would have supported Norton’s stated reason for going back for Horner because he would need help, and 2) it would have supported Norton’s claim that Horner had thrown a beer at the car and charged it, because the average juror could well find such behavior unfathomable unless they understood that the person alleged to have engaged in that behavior had been observed engaging in similar behavior by the accused and Ms. Jenks.

The state cannot meet the heavy burden of proving that, even if the evidence had been admitted, every reasonable juror would necessarily have convicted Mr. Norton of vehicular assault and assault with a deadly weapon for this incident. Thus, it cannot rebut the presumption that this constitutional error is prejudicial. Because the state cannot satisfy the requirements of proving the constitutional error harmless, reversal and remand for a new, fair trial is required. This Court should so hold.

In addition, the prosecutor committed serious misconduct in relation to this issue below. Unlike other attorneys, prosecutors enjoy a special role as “quasi-judicial” officers. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). As a result, they owe a duty to the public, including the accused. In re Glassman, 175 Wn.2d 696, 712-13, 286 P.3d 673 (2012). This duty requires prosecutors to seek justice rather than acting like a “heated partisan,” even if that means “losing” a conviction. See State v. Reeder, 46 Wn.2d 888, 892-93, 285 P.2d 884 (1955).

Here, the prosecutor failed in these duties by first moving to exclude the evidence, then faulting Norton for its absence. It is misconduct to first move to exclude evidence and then rely on its absence in arguing guilt. State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995). As a quasi-judicial officer, it is improper for a public prosecutor to urge a jury to draw inferences the prosecutor knows or should know are actually untrue. See State v. Weiss, Jr., 752 N.W.2d 372, 393, 312 Wis.2d 382 (2008).

Further, it is “foul play” for a prosecutor to rely on the lack of certain evidence to argue that the defense is not credible when the prosecutor knows such evidence exists but was excluded. See United States v. Toney, 599 F.2d 787, 790-91 (6th Cir.1979). A prosecutor who “well knew that evidence did exist” which would support the defense

commits misconduct in telling jurors to convict or find the defense less credible based on the absence of that evidence. 599 F.2d at 791; see also, State v. Bvocik, 781 N.W.2d 719, 720, 324 Wis.2d 352 (2010) (misconduct “when a prosecutor’s closing argument asks the jury to draw an inference the prosecutor knows or should know is not true”).

Thus, in Kassahun, the defendant gas station store owner was accused of second-degree murder and second-degree assault and claimed he had acted in self-defense. 78 Wn. App. at 946. When he tried to secure evidence of gang association and activity by the alleged victim and other witnesses to support that defense, the prosecutor opposed these efforts and successfully moved to exclude all mention of gangs and gang activity. Id. But Kassahun was allowed to testify about his subjective fears that the store had been “plagued by gangs” who shoplifted and used drugs so that Kassahun would have to clean the flower beds of needles every morning. 78 Wn. App. at 946-47. He also testified about having his life threatened by a gang member a few weeks earlier and having police dismiss it as not a “real emergency.” Id. During closing argument, the prosecutor told jurors that Kassahun had “tried to paint a picture of lawless gangs taking over and running the show in the parking lot, everywhere, but where was the evidence of that?” Id. The defense objection was overruled. 78 Wn. App. at 947.

On review, the Court found that it was prosecutorial misconduct to argue to jurors they should find the defense less credible based on the absence of gang evidence. 78 Wn. App. at 952. The Court declared, “[h]aving prevailed by motion in limine in its effort to preclude Kassahun

from discovering objective evidence” of gang membership and activities, it was misconduct for the prosecutor to imply in argument to the jury that Kassahun was being untruthful because he failed to offer that objective evidence. Id. Because it was already reversing based on the other error, the Court did not decide whether that misconduct alone prejudiced the right to a fair trial, but made a point to “direct that the misconduct not be repeated” at the new, third trial. Id.

Here, after first convincing the trial court to exclude the evidence, the prosecutor then exploited that evidence’s absence against Norton. He repeatedly dismissed the defense as a false claim of being a “good Samaritan” by Norton. RP 466-67. He called Norton’s testimony that Horner “had contributed to this by rushing at the vehicle” “bizarre.” RP 467-68. The prosecutor faulted the defense as that, “Horner brought this on himself, you know, let’s blame the victim basically.” RP 468. He mocked Mr. Norton’s defense as basically amounting to, “if I run someone over as long as I give him a ride to the hospital, which he didn’t ask for, then well, you know, I didn’t do anything wrong” (RP 470) and, “well, I had no other option in trying to help this man.” (RP 471). It mocked the idea that Horner would run at the car and jump at the hood when he seemed frail in court. RP 469. The prosecutor told jurors the defense of “no other options” and that Norton was trying to reasonably help his friend was “ridiculous.” RP 475. And then in rebuttal, he mocked Norton’s defense as an “unwanted, pseudo rescue attempt,” said it was “all cover,” “like a puff of smoke (RP 502), that there was “no evidence” Horner was flailing or rushing at the car (despite the testimony of Jenks and Norton

supporting those facts) (RP 502), denigrated the defense as “I had a car accident, a tree jumped in front of my car (RP 506), again accused the defense of “blaming the victim” by saying Horner had gone “to the car and created his own vehicular assault” (RP 506), again declared this “ridiculous” (RP 506), then told the jurors that “common sense” should tell them it was “a ridiculous argument” to even suggest Horner had acted in the way Norton had said. RP 506-507.

Regarding reasonable doubt, the prosecutor argued that none of the explanations the defense had put forward for the incident were “reasonable.” RP 472. And this theme was returned to in rebuttal, with the prosecutor saying there was “no reasonable” or “common sense, innocent explanation” for Norton to have made a u-turn and driven in the direction of Horner at all. RP 507.

With these arguments, the prosecutor committed misconduct. The prosecutor denigrated the defense repeatedly as just “blaming the victim” by saying, as Norton said, that Horner had done the relatively strange, inexplicable act of charging towards the car. And the prosecutor denigrated Norton’s defense that Horner had run at the Jeep which had caused the collision as ridiculous. But the prosecutor knew there was evidence which would have supported both Norton’s belief that Horner was in trouble and in need of help and the reasonableness of the possibility that Horner had charged at the vehicle, which was otherwise, as the prosecutor made clear to declaim, “ridiculous.” And that evidence had been excluded based on the prosecutor’s own motion. Just as in Kassahun, here the prosecutor urged jurors to convict based on the lack of

evidence to support the defense when the prosecutor knew that such evidence existed, but had been excluded.

When coupled with the violation of Mr. Norton's due process rights to present a defense, this misconduct supports the need for reversal even more. This Court should so hold and should reverse.

2. THE FINANCIAL OBLIGATIONS AND CONDITIONS SHOULD BE STRICKEN

Before trial, Mr. Norton was found to be indigent. RP 5-6. At the original appearance, when asked about his income, Norton told the court he did not work and was instead "collecting . . . social security disability." RP 6. Then, at sentencing, the state asked for the court to impose legal financial obligations including a \$200 filing fee, \$100 court costs and \$500 for appointed counsel. RP 572-73. Judge Melly inquired of Norton briefly, establishing that he was disabled and his only source of income was "SSI." RP 579. Mr. Norton explained he got about \$600 a month from his disability check because there was about \$200 taken out of his \$800 monthly amount, for child support. RP 579. The remaining amount covered his rent. RP 579.

Judge Melly stated he did not think Norton had the ability to pay any discretionary costs, so he ordered only those he thought were mandatory. RP 582, 589. On the judgment and sentence, the following were imposed: \$200 court costs for the "[c]riminal filing fee," \$100 for a DNA collection fee, and that "[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments." CP 14-15.

This Court should strike the interest provision and \$200 criminal filing fee and remand regarding the DNA fee under Ramirez, supra. In Ramirez, the Supreme Court addressed such legal financial obligations, holding that amendments to the “LFO” system applied to all cases still pending on direct review, regardless when sentencing occurred. Ramirez, 191 Wn.2d at 735. The determination of when a case meets that standard was defined by the high court based on RAP 12.7. Id. In that rule, the appellate court “loses the power to change or modify its decision” on direct appeal after issuance of a mandate. See RAP 12.7(a) and (b). A “mandate” is defined as “the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review.” RAP 12.5(a). In general, a mandate only issues after a decision has been made on the merits. See RAP 12.5(b).

Thus, under Ramirez, the 2018 changes to the legal financial obligations statutes apply to this case, as no mandate has issued. Further, under the amendments, Mr. Norton is entitled to relief.

The 2018 amendments were contained in Engrossed Second Substitute House Bill (“Bill”) 1783, and include a total prohibition against “the imposition of certain LFOs on indigent defendants.” See Laws of 2018, ch. 269. The Bill eliminates the authority to impose a criminal filing fee of \$200 on an indigent defendant, eliminates “interest accrual” on all nonrestitution LFOs, establishes that the DNA database fee is no longer mandatory if the defendant has previously paid it, and provided new limits to remedies for failure to pay. Laws of 2018, ch. 269. In Ramirez, the defendant was ordered to pay a number of LFOs which were then

considered “mandatory.” 191 Wn.2d at 733. Indeed, the entire intermediate appellate court case had been decided and it was pending on Petition for Review in the Supreme Court when the Bill was passed. 191 Wn.2d at 733-37.

The Ramirez Court concluded that the triggering event for the Bill’s amendments was “the court’s ability to impose costs on a criminal defendant following conviction,” which did not occur until the conclusion of the case. Id. Because Mr. Ramirez’s case was still pending on first direct appeal as a matter of right, his case was deemed “not yet final under RAP 12.7” when the Bill was enacted, and, as a result, the Bill’s amendments applied. Id. Thus, even though the costs imposed had been deemed “mandatory” at the time of Mr. Ramirez’ sentencing and that sentencing occurred well before the 2018 legislative changes, the Supreme Court held that the statutory changes to the LFO scheme applied to Mr. Ramirez and all other cases still pending on direct review. Id.

Mr. Norton is entitled to relief under Ramirez. His case is still on direct review and thus not yet final under RAP 12.7. See RAP 12.7. This is his opening brief on appeal. His only income is disability, from “SSI,” and it amounts to Like Mr. Ramirez, Mr. Norton was ordered to pay a \$200 filing fee and interest, both of which are no longer authorized under the Bill, and a DNA database fee, which may not have been authorized, because Norton has a prior Washington offense. The \$100 DNA fee was added for all felony convictions starting with a statutory amendment in 2002. See Laws of 2002, ch. 289, §4. Possession of stolen property in the first degree was a Class B felony in 2005. RCW 9A.56.150(2); see Laws

of 1995, ch. 129 § 14 (Initiative Measure No.159). Mr. Norton was convicted in Clallam, Washington, in 2005, of first-degree possession of stolen property. CP 9. It thus appears he has previously been ordered to pay this fee. However, if there is a question, the Court should remand for reconsideration of the fee and presentation of whatever relevant evidence on the issue might be warranted.

This Court should strike the \$200 fee and the interest provision and order remand for further proceedings regarding whether the DNA database fee was authorized under the newly amended statutes. In addition, the Court should strike the payment terms. No such terms may be ordered under RCW 9.94A.760(a) (2018) if the defendant is indigent at the time of sentencing as defined under RCW 10.101.010(3). RCW 9.94A.760(1) (2018). RCW 10.101.010(3) defines one as “indigent” if, at any stage of a court proceeding, they are receiving one several types of public assistance, including “disabled assistance benefits.” RCW 10.101.010(3)(a). Mr. Norton’s sole source of income is SSI for disability. He is entitled to have these conditions and costs stricken under Ramirez, and for reconsideration to determine whether the DNA database fee was improperly imposed. This Court should so hold.

E. CONCLUSION

Mr. Norton's due process rights to present a defense were violated when the trial court excluded evidence which was relevant, material, and necessary to the defense. In addition, the legal financial obligations and conditions should be stricken under Ramirez.

DATED this 18th day of November, 2019.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that I served the attached document as follows: by this Court's portal upload to the Clallam County Prosecutor's Office and by depositing a true and correct copy in the U.S.P.S. first-class postage prepaid, addressed to appellant Peter Norton, at his last known address., 2311 W. 18th St. Apt 214, Port Angeles, WA. 98363-1543.

DATED this 18th day of November, 2019.



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