

FILED
Court of Appeals
Division II
State of Washington

NO. 52418-0-II
1/9/2020 4:49 PM

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

STATE OF WASHINGTON,

Respondent,

v.

PETER NORTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-00100-05

BRIEF OF RESPONDENT

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11
Port Angeles, WA 98362-301

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 12

A. THE COURT PROPERLY EXCLUDED JENKS’ TESTIMONY OF HORNER’S PAST BEHAVIOR BECAUSE IT WAS INADMISSIBLE TO PROVE CONFORMITY OF CONDUCT AND NOT RELEVANT TO ESTABLISH NORTON’S STATE OF MIND AND THEREFORE THE COURT DID NOT VIOLATE NORTON’S RIGHT TO PRESENT A DEFENSE. 12

1. Jenks’ testimony about Horner’s past behavior was not relevant to prove Norton’s intentions in the instant case and therefore the trial court properly excluded it..... 16

2. The trial court properly excluded Jenks’ testimony of Horner’s past behavior offered to establish Horner’s behavior the day of the collision because such evidence would be inadmissible character evidence. 18

3. The trial court upheld Norton’s right to present a defense by allowing Jenks to testify about Horner’s behavior on Sept. 22 and Norton was permitted to testify about his past experience with Horner in order to explain his stated intent to help Horner rather than hit him with the vehicle..... 20

//

4. The remainder of the trial court’s evidentiary rulings were proper because the answers were either inadmissible or non-responsive.	22
5. Assuming any exclusion of evidence was erroneous, the nonconstitutional harmless error test applies because the excluded evidence was not admissible and did not prevent Norton from arguing his theory of the case.	28
B. THE PROSECUTOR’S STATEMENTS WERE REASONABLE INFERENCES BASED ON THE EVIDENCE AND NOT IMPROPER OR PREJUDICIAL.	32
C. THE COURT SHOULD STRIKE THE COURT COSTS AND NONRESTITUTION INTEREST PROVISION.	40
IV. CONCLUSION	41
CERTIFICATE OF DELIVERY	43

TABLE OF AUTHORITIES

Washington Supreme Court Cases

<i>Lundberg v. Baumgartner</i> , 5 Wn.2d 619, 625, 106 P.2d 566 (1940)	23
<i>State v. Clark</i> , 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017).....	13
<i>State v. Clark</i> , 187 Wn.2d 641, 648–50, 389 P.3d 462 (2017).....	28
<i>State v. Darden</i> , 145 Wn.2d 612, 624, 41 P.3d 1189 (2002).....	13
<i>State v. Everybodytalksabout</i> , 145 Wn.2d 456, 466, 39 P.3d 294 (2002)	18
<i>State v. Hutchinson</i> , 135 Wn.2d 863, 886, 959 P.2d 1061 (1998).....	19
<i>State v. Ray</i> , 116 Wn.2d 531, 546, 806 P.2d 1220 (1991).....	29
<i>State v. Russell</i> , 125 Wn.2d 24, 85, 882 P.2d 747 (1994).....	33
<i>State v. Russell</i> , 125 Wn.2d 24, 86, 882 P.2d 747 (1994).....	34, 40
<i>State v. Russell</i> , 125 Wn.2d 24, 87, 882 P.2d 747 (1994).....	34

Washington Court of Appeals

<i>Kaech v. Lewis County Public Utility Dist. No. 1</i> , 106 Wn. App. 260, 23 P.3d 529 (2001).....	25
<i>State v. Anderson</i> , 153 Wn. App. 417, 427–28, 220 P.3d 1273 (2009)....	33
<i>State v. Blair</i> , 3 Wn. App.2d 343, 349, 415 P.3d 1232 (2018).....	12
<i>State v. Blair</i> , 3 Wn. App.2d 343, 351, 415 P.3d 1232 (2018).....	13
<i>State v. Braham</i> , 67 Wn. App. 930, 935, 841 P.2d 785 (1992)	23
<i>State v. Callahan</i> , 87 Wn. App. 925, 943 P.2d 676 (1997)	19
<i>State v. Cloud</i> , 7 Wn. App. 211, 218, 498 P.2d 907 (1972)	16
<i>State v. Donahue</i> , 105 Wn. App. 67, 79, 18 P.3d 608 (2001).....	17
<i>State v. Kassahun</i> , 78 Wn. App. 938, 946, 900 P.2d 1109 (1995)	36
<i>State v. Kilgore</i> , 107 Wn. App. 160, 185, 26 P.3d 308 (2001).....	17, 26
<i>State v. King</i> , 131 Wn. App. 789, 130 P.3d 376 (2006)	23

<i>State v. Lizarraga</i> , 191 Wn. App. 530, 553 364 P.3d 810 (2015)	28
<i>State v. Mee Hui Kim</i> , 134 Wn. App. 27, 42, 139 P.3d 354 (2006).....	17
<i>State v. Pavlik</i> , 165 Wn. App. 645, 656, 268 P.3d 986 (2011).....	29
<i>State v. Thach</i> , 126 Wn. App. 297, 106 P3d 782 (2005)	19

Federal Cases

<i>United States v. Toney</i> , 599 F.2d 787, 788 (6th Cir.1979)	36
--	----

Other State Cases

<i>State v. Bvocik</i> , 324 Wis.2d 352, 353, 781 N.W.2d 719 (2010).....	37, 38
--	--------

Rules

ER 402	13
ER 404(a)	18
ER 404(b).....	18

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly excluded Jenks' testimony of her knowledge of Horner's past troublesome behavior because it was not admissible to prove conformity of conduct and was not relevant to establish Norton's stated intent before the collision?
2. Whether the trial court's evidentiary rulings were proper and not an abuse of discretion because there was an independent valid basis for sustaining the State's objections?
3. Whether the court upheld Norton's right to present a defense by allowing Norton to testify about Horner's past behavior to explain his intent before the collision and allowing Jenks to testify about her observations of Horner's behavior before the collision?
4. Whether an alleged error in excluding testimony by Jenks of Horner's past troublesome behavior was harmless?
5. Whether Norton waived his claim of prosecutorial misconduct because Norton fails to establish the prosecutor's arguments were flagrant and ill-intentioned and incurable when the prosecutor's arguments were properly based upon the evidence presented?
6. The State concedes the discretionary LFOs should be stricken and the case remanded to determine whether the DNA fee is appropriate.

II. STATEMENT OF THE CASE

On Sept. 22, 2017, Edward Norton was walking home on W. 18th Street in Port Angeles when he heard a vehicle approaching. RP 213. Horner testified that he was walking westward when he saw the vehicle speeding on Edgewood Drive, slow down, and go through a stop sign. RP 213, 220. Then the driver, later identified as Peter Norton, the defendant, gunned his Jeep right towards Horner. RP 217, 220. Horner testified that he threw his beer can hitting the grill of Norton's Jeep and flipped off Norton who was looking right at Horner before the Jeep struck Horner. RP 215, 220–21. As a result, Horner sustained a concussion, suffered a broken arm and injured leg, and a cut on his nose requiring eight stitches. RP 215.

Just before the collision, Lisa Irwin, a teacher from Forks, was heading towards her second job driving west on 18th St. in Port Angeles. RP 183–84. All of sudden, Irwin found herself hitting her brakes quickly to avoid hitting a Jeep that had pulled out in front of her. RP 185. Irwin then watched as the Jeep rapidly accelerated driving in front of her going west. RP 185, 187. Irwin watched as the Jeep made a beeline for the side of the road where there is a little path that people walk upon that was on the opposite side of the road from Irwin. RP 187. Irwin noticed an older man walking on the opposite side of the road in the foot path heading east towards her as she was driving west. RP 187.

The Jeep was squared towards the man, identified as Horner, and headed directly at him. RP 187. The Jeep did not appear to be slowing down. RP 187–88. Irwin saw the man simply walking completely off the roadway before he was hit by the Jeep. RP 189–90. Irwin was not able to tell if the man jumped on the hood of the Jeep. RP 189.

Horrified, Irwin immediately called 911. RP 190. Irwin saw the driver get out of the Jeep and begin to pull Horner to his Jeep. RP 191. Irwin yelled at Norton to leave Horner there because he was hurt and help was on the way. RP 192. Norton said he was taking Horner in. RP 192. Norton got Horner into his Jeep and then Irwin described Norton flipping his Jeep around to head east almost hitting her car. RP 193.

Daniel Deleon was at Volunteer Park watching his daughter's soccer practice when his attention was caught by Norton's jeep speeding eastbound on 18th Street. RP 248–49. Deleon watched the vehicle turn onto L street and make a U-turn, spraying gravel everywhere. RP 250. The manner in which the vehicle was driving caught the attention of many of the people on the soccer field. RP 250. The vehicle, turned back onto 18th heading west at a high rate of speed driving erratically. RP 250. Deleon watched as the vehicle sped past him, veer into the lane, and hit a pedestrian that was walking on the side of the road. RP 250. Deleon

testified that the man was walking east towards town on 18th street before the vehicle heading west crossed the line and hit the man. RP 259.

Deleon observed Horner just walking and did not see him jumping or anything but he did not see if Horner tried to jump on the hood of the Jeep or out of the way before he was hit. RP 251. Deleon heard a loud bang, the sound of a person being hit with the front of a car. RP 251. Deleon told another father at the soccer practice to call 911 and then he ran to the scene only to see Norton exit and run around the Jeep and drag Horner to his Jeep. RP 252. Horner was not moving and his face and hands were bloody. RP 252. Deleon and others told Norton to stop but Norton continued to drag Horner and put him in his Jeep and then he sped off. RP 252–53. Norton drove of fast and erratically, the same as when he hit Horner. RP 254. Norton drove Horner to the hospital. RP 282.

Norton testified that he was heading east on 18th Street when he saw Horner flipping him off on the side of the street while walking westward towards his home. RP 401. Norton knew Horner and was very familiar with him because they lived in the same building. RP 400. Norton figured Horner was “on a roll again” because he “gets in quite a bit of trouble around the house.” RP 401. Norton stated he intended to pick up Horner and drop him off at home to keep him out of trouble. RP 401.

Norton testified that after he turned around to pick up Horner, Horner started running at him and threw a beer can at his windshield. RP 401–02. Norton hit the brakes but not in time to stop before colliding with Horner. RP 402. Norton didn't want to wait for an ambulance because he was scared for Horner. RP 403. So Norton helped Horner get into the jeep and then he took Horner to the hospital. RP 271, 402–03.

Norton was contacted by law enforcement at the hospital. RP 269. The State charged Norton with Vehicular Assault, reckless driving or disregard for the safety of others, and Second Degree Assault. CP 82–83.

Relevant Procedural History

Prior to trial, the State filed a Motion in Limine to exclude improper character evidence testimony from defense witnesses. CP 67 (Motion in Limine no. 5). On Aug. 22, 2018, the court granted the State's Motion in Limine no. 5 with the agreement of defense counsel. RP 67, 69, 87, 94; CP 64–65.

Aug. 27, 2018, on the first day of trial before jury selection, the State raised the issue of anticipated defense witness testimony again after discussions with defense counsel. RP 117. The State pointed out that defense witnesses Ginger Peterson's proposed testimony and Tiffany Jenks' joint pre-trial interview gave the State concerns that inadmissible character evidence would be injected into their testimony in violation of

the ruling on the State's Motion in Limine no. 5. RP 117–19. The prosecutor argued that Jenks' should not be allowed to testify about Horner's past erratic behavior as character evidence to prove that Horner's actions in the instant case conform with his past behavior. RP 118.

Accordingly, the prosecutor asked the court to uphold its prior ruling granting the State's Motion in Limine no. 5 to prevent the introduction of improper character evidence. RP 119.

Defense counsel argued that Jenks' and Peterson's testimony about Horner's past troublesome behavior goes to Norton's state of mind and intent to turn his Jeep around in order to help Horner and keep Horner out of trouble. RP 120-21. Defense counsel also argued that the testimony of the defense witnesses is essential to support or to refute recent fabrication about Mr. Horner's behaviors. RP 122.

Defense counsel also intended to offer testimony about Horner's past behaviors to explain "what he did next." RP 122. Defense counsel claimed that Peterson was familiar with Horner, knew that he acts in a troublesome manner and that his past troublesome behavior is consistent with what Norton observed and with what Jenks observed. RP 123. Finally, defense counsel said their testimony is relevant to Norton's state of mind. RP 123.

The trial court ruled as follows:

THE COURT: All right. Well, with regard to Ms. Peterson (sic) and Ms. Jenks, I think they can certainly testify as to what their observations were. If they saw Mr. Horner on the side of the road throwing beer cans, flailing his arms, dancing, whatever he happened to be doing that they could observe, they certainly can testify to that.

They're not going to be able to testify as to why he was doing those things, whether it was because he was off his meds, because he was having a psychotic episode. All they can testify to is this is what I saw Mr. Horner doing without getting into the rationale for that behavior.

RP 124.

The court ruled that Norton would be allowed to testify he knows Horner and based on his familiarity with Horner he believed he was in distress. RP 125. Norton would be allowed to set out his rationale for "why he may have gone over to Mr. Horner to attempt to help him." RP 125.

During Jenks' trial testimony, the prosecutor raised the issue again concerned that Jenks was injecting her knowledge of Horner's past behavior into the testimony. RP 369. The prosecutor conceded that Jenks could testify about her personal observations of Horner at the time of the offense but was concerned that Jenks' testimony would not be tailored to what is admissible. RP 369. The prosecutor expressed concern that Jenks' testimony was already heading down the road of Horner's past behavior and of Jenks' own state of mind regarding Horner's behavior. RP 369. The

prosecutor argued that Jenks should not be allowed to substantiate someone else's state of mind with her own. RP 369.

Defense counsel responded that she was trying to direct Jenks to testify about her observations on the day of the offense and she was not "attempting to have her say that she knows him, that he's crazy, or that she knows him, that he's dangerous." RP 370.

The court echoed the prosecutor's concern:

THE COURT: Yeah, I appreciate you're not asking those questions but the information's being provided by the witness in terms of I think your knowledge of Ed, the experiences that you've had with him. What you're going to be limited to in terms of testifying is what you saw on the 22nd of September of last year. That's it.

RP 370.

Trial Testimony

Tiffany Jenks testimony RP 364–398.

The defense called Tiffany Jenks to testify. RP 363. Jenks testified about her observations of Horner's behavior on Sept. 22, 2017. RP 366. At one point, after a number of sustained objections, the State objected when defense counsel asked Jenks about her observations of Horner and the court overruled:

Q.What did you observe about his behavior, how was he behaving, was he walking, was he running, what did you notice about him?

MS. KING: What's the relevance about -- objection, relevance.

THE COURT: I -- well, I think the jury's entitled to get a synopsis of what this witness observed on that day to put things in context, so I'll -- I'm going to allow her to answer the question. What did you observe, ma'am?

THE WITNESS: So I was walking -- what caught my attention was Ed was -- he was loud, he was being verbal. There was nobody else near him or anything like that. When you're walking by yourself you just kind of -- I was paying attention to those kinds of things.

RP 368.

Jenks elaborated further about Horner's behavior:

Q.So, um, can you describe for the jury what you saw this person doing -- well, what drew your attention to him, first of all?

A.So I was walking, there was a man in front of me walking towards me that was being very vocal. He was yelling. There was nobody else around so he was yelling very loudly with nobody else around him. Um, was flailing his arms about. Um --

Q.He was what?

A.Flailing his -- he was moving his arms about very wildly and he had something, you know, in his hand while he was, you know -- he was very agit -- he seemed very angry and very upset about something. Um, I -- my sense -- I was alert to what -- you know, he caught my attention, I was being very alert, you know, as I was walking towards him. He was, you know -- he wasn't walking in a straight line, he was, you know, moving his arms -- he was walking erratically I could say. So that's what had my attention at the time I was walking and this gentleman in front of me was acting wild.

RP 372.

//

Objections sustained during Jenks' testimony

The trial court sustained the following State's objections during Jenks' testimony:

Q.Okay. And did you notice -- did you happen to see Ed Horner at that time when you were walking back to the Serenity House?

A.Yes, I did. *Ed was acting a little bit wild, he was, um --*

MS. KING: Your Honor, I'm going to object.

THE COURT: Sustained.

RP 367.

Q.Why don't you come up here, and using this pen can you point to where it was that you first saw Ed?

A.So this is 18th here, correct?

Q.Yes.

A.Okay. So I was walking towards Serenity House over here. But I had walked past Lincoln Park and was just about to cross the intersection -- or actually I was walking to the intersection past Lincoln Park towards the ball fields. Ed was walking in the -- close to the road, on the shoulder right here, and I noticed him, *he was acting --*

MS. KING: Objection.

Q.What did you --

THE COURT: Sustained.

RP 367-68.

THE WITNESS: So I was walking -- what caught my attention was Ed was -- he was loud, he was being verbal. There was nobody else near him or anything like that. When you're walking

by yourself you just kind of -- I was paying attention to those kinds of things. *I knew Ed and so the behavior wasn't alarming to --*

MS. KING: I'm going --

THE COURT: Sustained.

RP 368.

Q.Okay. How would you describe -- if you didn't know who he was, would you have done something different than kept walking?

MS. KING: Objection.

MS. UNGER: I'm trying to put the behavior in context.

THE COURT: I think that's a little too speculative.

RP 372–73.

Q. Let me interrupt you, let me ask you a question. Did it appear that the vehicle that approached Ed -- how fast did it appear to you that this vehicle was going?

A.No very fast at all. I mean, it -- I thought they were -- you know, maybe they had known him, they were, you know, stopping to (inaudible) -- I honestly don't know what they were doing, but they were --

MS. KING: Objection –

A.-- stopping, you know --

THE COURT: Sustained.

RP 375.

Norton's Testimony – Objections Sustained

Defense counsel asked Norton if he could understand how some of the witnesses may have misconstrued what happened. RP 406. After

Norton answered in the positive, counsel asked Norton why he thinks they could have misconstrued what happened. RP 406. The prosecutor objected after Norton began to answer “Because they don't -- they didn't know me, they don't know him.” The prosecutor argued that the question is calling upon Norton to speculate as to the witnesses’ state of mind. RP 407. The court sustained the objection on the basis that it was too speculative. RP 407.

III. ARGUMENT

A. THE COURT PROPERLY EXCLUDED JENKS’ TESTIMONY OF HORNER’S PAST BEHAVIOR BECAUSE IT WAS INADMISSIBLE TO PROVE CONFORMITY OF CONDUCT AND NOT RELEVANT TO ESTABLISH NORTON’S STATE OF MIND AND THEREFORE THE COURT DID NOT VIOLATE NORTON’S RIGHT TO PRESENT A DEFENSE.

“[C]riminal defendants have a constitutional right to present a defense.” *State v. Blair*, 3 Wn. App.2d 343, 349, 415 P.3d 1232 (2018) (citing U.S. CONST. amends. V, VI, XIV; Wash. Const. art. I, § 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973)). “However, this right and the right to confrontation are not absolute.” *Blair*, 3 Wn. App.2d at 349 (citing *State v. Arredondo*, 188 Wn.2d 244, 266, 394 P.3d 348 (2017)).

“It does not extend to irrelevant or inadmissible evidence.” *Id.* (citing *State v. Wade*, 186 Wn. App. 749, 763-64, 346 P.3d 838 (2015));

see also State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002) (citing *State v. Hudlow*, 99 Wn.2d, 1, 15, 659 P.2d 514 (1983)); ER 402. ““The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.”” *Blair*, 3 Wn. App.2d at 349 (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed. 2d 798 (1988)). “The defendant’s right to present a defense is subject to ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *Id.* at 350 (quoting *Chambers*, 410 U.S. at 302, 93 S.Ct. 1038) (citing *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 296, 359 P.3d 919 (2015)).

“We first look to see if the trial court abused its discretion in excluding evidence or limiting cross-examination. If there is no abuse of discretion, the inquiry ends because there is no error. If the trial court does abuse its discretion, then we take the next step and review de novo the claim that a constitutional right has been violated. We do not, however, review the court’s evidentiary ruling de novo.” *Id.* at 351; *see also State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017) (citing *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001); *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (Court only reviews whether trial

court violated defendant's right to present a defense if it first finds the trial court's evidentiary rulings constitute an abuse of discretion).

The trial court's evidentiary rulings are reviewed for abuse of discretion and the reviewing court defers to the trial court's rulings unless "no reasonable person would take the view adopted by the trial court." *Clark*, 187 Wn.2d at 648–49 (quoting *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001)).

Here, defense counsel agreed to the State's Motion in Limine no. 5, to exclude improper character evidence testimony from defense witnesses. CP 64, 67; RP 87. However, before jury selection the State raised objection to Peterson's and Jenks' anticipated testimony of Horner's past behavior. Defense counsel argued that Horner's past behavior was relevant to explain his present behavior, Norton's state of mind, and to rebut a claim of recent fabrication. RP 120–23.

On appeal, Norton argues that *all* the excluded evidence was relevant "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" Br. of Appellant at 23. Norton argues further that evidence Horner had been observed engaging in similar behavior by

Norton and also by Jenks was relevant because it would have explained Horner's irrational conduct to a juror. *See Id.*

Boiled down, Norton's first argument is that Jenks testimony regarding Horner's past behavior was relevant to establish Norton's state of mind. Second, that Horner's past behavior was relevant to prove Horner's current behavior. The third contention, to explain Horner's irrational conduct to the jury is the same as the second, i.e., to prove Horner's current behavior.

Horner's past troublesome behavior offered to prove conformity of action therewith is inadmissible character evidence. Testimony by Jenks of Horner's past behavior also does not tend to establish Norton's state of mind regarding his stated intent to come to Horner's aid on the day in question and is therefore irrelevant. Norton's knowledge of Horner's past troublesome behavior is relevant to Norton's state of mind on the relevant occasion and Norton was permitted to testify accordingly. Jenks was permitted to testify about her observations of Horner's troublesome behavior on the relevant occasion, just before the collision.

Therefore, the trial court's evidentiary rulings were proper and did not prevent Norton from presenting a defense.

//

1. Jenks' testimony about Horner's past behavior was not relevant to prove Norton's intentions in the instant case and therefore the trial court properly excluded it.

The court excluded the following testimony:

[Ms. Peterson (sic) and Ms. Jenks are] not going to be able to testify as to why [Horner] was doing those things, whether it was because he was off his meds, because he was having a psychotic episode. All they can testify to is this is what [they] saw Mr. Horner doing without getting into the rationale for that behavior.

RP 124; *see also* RP 370.

Jenks' independent observations of Horner's past troublesome behavior was not relevant to prove Norton's state of mind, i.e., that he turned his Jeep around, accelerated while making a beeline over the other lane directly towards Horner off the roadway into the footpath because he intended to take Horner home to help Horner stay out of trouble.

First, as a threshold, for such evidence of Jenks' observations to be relevant in this regard, there must be evidence that Norton witnessed or had personal knowledge of the same specific past behavior observed by Jenks. Here, there was no evidence of a specific event and no evidence that Norton witnessed or had personal knowledge of what Jenks' observed in the past. *See State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (1972) ("If the defendant knew of such an act which was not too remote and would normally cause a person to be apprehensive, evidence of the act and the defendant's knowledge of it should be allowed. The trial court properly

refused the proffered evidence as hearsay and because it could not have caused fear in the defendant.”).

Secondly, even if witnessed by Norton, Jenks’ observations of Horner’s past troublesome behavior still have no connection or probative value in proving Norton’s intent before striking Horner with his Jeep. Connecting Horner’s past behavior with Norton’s current intent requires speculation.

“Courts should exclude evidence that is remote, vague, speculative, or argumentative because otherwise ‘all manner of argumentative and speculative evidence will be adduced,’ greatly confusing the issue and delaying the trial.” *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001) (quoting *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)), *aff’d on other grounds*, 147 Wn.2d 288, 53 P.3d 974 (2002); *See also State v. Mee Hui Kim*, 134 Wn. App. 27, 42, 139 P.3d 354 (2006) (evidence of defendant Kim’s ex-partner Lee’s past behavior to suggest Lee gave defendant a date rape drug to argue a superseding cause of a collision was speculative and inadmissible); *State v. Donahue*, 105 Wn. App. 67, 79, 18 P.3d 608 (2001) (finding evidence that a juvenile was seen walking on highway within a half mile of the accident to prove defendant swerved to avoid an pedestrian was speculative and inadmissible).

Here, any connection between Horner's past behavior and Norton's stated intent to turn around to help Horner as he was walking home is purely speculative. Therefore, the court properly excluded Jenks' testimony of her observations of Horner's past behavior as evidence of Norton's intent on the day of the offense.

2. The trial court properly excluded Jenks' testimony of Horner's past behavior offered to establish Horner's behavior the day of the collision because such evidence would be inadmissible character evidence.

Character evidence of a victim is generally inadmissible. *See* ER 404(a) and (b). "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." ER 404(b); *see also State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002) ("Petitioner correctly concludes that "acts" inadmissible under ER 404(b) include any acts used to show the character of a person to prove the person acted in conformity with it on a particular occasion.").

Here, Jenks' testimony of Horner's violent, irrational, or trouble making past behavior to establish that Horner flipped off Norton, threw a beer can at the Norton's Jeep, and then charged and ran into the Jeep is character evidence. It is character evidence because it was offered to show

Horner's propensity for troublesome irrational behavior on the instant occasion. Therefore, it was inadmissible.

Moreover, evidence of a witness's character trait, if admissible, must be in the form of reputation and not specific acts. *State v. Hutchinson*, 135 Wn.2d 863, 886, 959 P.2d 1061 (1998) (citing ER 404(a)(2); ER 405(a)). Reputation evidence must be limited to a neutral generalized community. *See State v. Callahan*, 87 Wn. App. 925, 943 P.2d 676 (1997) (citing *State v. Lord*, 117 Wn.2d 829, 874, 822 P.2d 177 (1991)) (assault victim's reputation among law enforcement officers inadmissible); *State v. Thach*, 126 Wn. App. 297, 106 P3d 782 (2005) (defendant's reputation among members of family inadmissible).

Defense counsel never asked Jenks about her knowledge of Horner's reputation in a relevant community.

Further, evidence of Horner's past troublesome behavior is not relevant to rebut the State's position that Norton acted recklessly and intentionally when he struck Horner with his Jeep. In fact, Horner's troublesome character and Horner and Norton's past encounters (Horner threatened Norton) could just as well suggest Norton had the required mens rea for the Vehicular Assault and Assault 2.

Finally, Jenks's testimony of Horner's past troublesome behavior would not be admissible to "refute recent fabrication about Mr. Horner's

behaviors.” RP 122. Refuting recent fabrication is not a basis for admitting propensity evidence under ER 404(b). *Prior statements* of a witness may be admissible “to rebut an express or implied charge against the declarant of recent fabrication,” but prior bad acts are not. ER 801(d)(1)(ii).

Finally, Jenks testimony of Horner’s past troublesome behavior would have only been duplicative in that Jenks’ and Norton both testified as to Horner’s irrational troublemaking behavior just before the offense and Norton testified about Horner’s troublemaking character to prove his state of mind.

Jenks’ testimony of Horner’s past troublesome behavior was inadmissible character evidence. Therefore, the trial court did not abuse its discretion by excluding it.

3. The trial court upheld Norton’s right to present a defense by allowing Jenks to testify about Horner’s behavior on Sept. 22 and Norton was permitted to testify about his past experience with Horner in order to explain his stated intent to help Horner rather than hit him with the vehicle.

Before the trial commenced, the trial court specifically ruled that Jenks would be allowed to testify about her observations of Horner’s behavior on the day of the offense. RP 124. Accordingly, Jenks testified in detail about her observations of Horner’s behavior leading up to the collision. RP 368, 372.

During the trial, after the prosecutor objected to the defense questioning Jenks about her observations of Horner's behavior, the court allowed Jenks to testify. The prosecutor explained that Jenks could obviously testify about Horner's behavior on the relevant occasion, but the concern was that Jenks was already going down the road of injecting inadmissible evidence just as she did during her interview. RP 369.

Defense counsel stated that she was trying to keep Jenks focused on her observations. The court agreed with the State's concerns and reiterated that Jenks testimony needed to be limited to what she observed of Horner on Sept. 22, the relevant occasion.

Jenks then testified that as Horner was walking on Sept. 22, Horner was screaming at nobody, flailing his arms wildly, he was agitated or angry and was walking erratically. RP 372. Thus the defense was able to illustrate that Horner did not seem to be acting rationally just before the collision with Norton's Jeep.

Additionally, Norton was permitted to testify about Horner's past behavior to explain his own state of mind to show he did not intend to hit Horner, but rather, he was trying to help Horner. RP 401. Norton testified that he knew Horner as they lived in the same apartment building. RP 400. Norton testified that he was familiar with Horner and sees him around a lot. RP 400. Norton was permitted to testify that Horner gets himself into a

lot of trouble at home. Norton testified that “He’s threatened me” at which point the State objected and the court sustained the objection but the testimony was not stricken.

Norton testified that on Sept. 22, he saw Horner walking towards his home. RP 401. Horner was flipping him off and seemed to be on a roll again suggesting to Norton that Horner needed to be taken home before he could get himself into trouble as he does quite a bit.

Norton’s own testimony regarding Horner’s past troublesome behavior was relevant to explain Norton’s stated intent to help Horner rather than hit him with the vehicle. The testimony was not admitted to prove that Horner’s alleged act of throwing the beer can and charging the Jeep conformed with his past behavior although there was a risk it could be interpreted that way by a jury.

This testimony of Norton’s state of mind and the basis for it was admitted. Therefore, Norton was not prevented from presenting a defense by exclusion of evidence of Norton’s state of mind.

4. The remainder of the trial court’s evidentiary rulings were proper because the answers were either inadmissible or non-responsive.

The trial court’s rulings (pointed out in Norton’s “Relevant Facts”) sustaining the State’s objections were proper because Jenks’ testimony became unresponsive to the questions being asked.

Unresponsive answers are objectionable and may be stricken. *See, e.g., State v. King*, 131 Wn. App. 789, 130 P.3d 376 (2006) (when witness unexpectedly referred to defendant as a registered sex offender, in violation of a pretrial order, defense counsel preserved error for appeal by promptly moving to strike the testimony and requesting an instruction to disregard); *Lundberg v. Baumgartner*, 5 Wn.2d 619, 625, 106 P.2d 566 (1940) (finding witness's unresponsive answer to be inadmissible where counsel objected "as soon as he could reasonably be expected to comprehend the purport of the unresponsive answer and formulate and state his objection thereto."); *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (A specific objection may be inferred from the context of trial).

Here, before and during the trial, the prosecutor expressed concern that Jenks would intertwine proper testimony with inadmissible irrelevant evidence of Horner's troublesome character. RP 117–18, 369 (Prosecutor: "And I just -- I don't know how clearly her testimony's going to be tailored to what is admissible."). The court also voiced this concern about Jenks going into her experience with Horner and limited Jenks' testimony to her observations of Horner on the day in question. RP 124, 370. As shown below, the prosecutor predicted that Jenks would not keep her answers tailored and responsive and she objected when Jenks' testimony became

unresponsive anticipating that Jenks could move on to Horner's character evidence:

Q.Okay. And did you notice -- did you happen to see Ed Horner at that time when you were walking back to the Serenity House?

A.Yes, I did. *Ed was acting a little bit wild, he was, um --*

MS. KING: Your Honor, I'm going to object.

THE COURT: Sustained.

RP 367.

Q.Okay -- let me ask you, *where did you first notice Ed?*

A.Um, I was walking --

MS. UNGER: Your Honor, may the witness approach the map?

THE COURT: Yes.

Q.Why don't you come up here, and using this pen can you point to where it was that you first saw Ed?

A.So this is 18th here, correct?

Q.Yes.

A.Okay. So I was walking towards Serenity House over here. But I had walked past Lincoln Park and was just about to cross the intersection -- or actually I was walking to the intersection past Lincoln Park towards the ball fields. Ed was walking in the -- close to the road, on the shoulder right here, and I noticed him, *he was acting --*

MS. KING: Objection.

Q.What did you --

THE COURT: Sustained.

RP 367-68.

The question was whether Jenks' noticed or saw Horner at a particular place and time. After answering this question, Jenks continued,

unprompted, to talk about Horner's behavior. The court was correct to sustain these objections because Jenks' answers became non-responsive to the question asked and could easily move toward the objectionable character evidence which was already excluded the trial court's ruling on the State's Motion in Limine, no. 5. This concern was expressed beforehand to the court. Therefore, the answer was objectionable and properly sustained. Otherwise, the State risked that Jenks' would answer with objectionable material before an opportunity to object. *See Kaech v. Lewis County Public Utility Dist. No. 1*, 106 Wn. App. 260, 23 P.3d 529 (2001) (objection to authenticity of test report came too late and objection was waived; earlier objection to relevance was not sufficiently specific to preserve objection to authenticity). Ultimately, Jenks was permitted to testify about her observations of Horner's behavior before the collision when asked.

The trial court also properly sustained objection to Jenks' reaction to Horner based upon her knowledge of Horner's past behavior.

THE WITNESS: So I was walking -- what caught my attention was Ed was -- he was loud, he was being verbal. There was nobody else near him or anything like that. When you're walking by yourself you just kind of -- I was paying attention to those kinds of things. *I knew Ed and so the behavior wasn't alarming to --*

MS. KING: I'm going --

THE COURT: Sustained.

RP 368.

In this instance above, Jenks answered the question and then began to offer her own state of mind and knowledge of Horner's past behavior which was not relevant to establish Norton's state of mind and it was suggestive of Horner's character which was not admissible. Therefore, the objection was properly sustained.

Q.Okay. How would you describe -- if you didn't know who he was, would you have done something different than kept walking?

MS. KING: Objection.

MS. UNGER: I'm trying to put the behavior in context.

THE COURT: I think that's a little too speculative.

RP 372-73.

The court properly sustained this objection above because the question called for speculation and it was irrelevant to Norton's state of mind. *See Kilgore*, 107 Wn. App. at 185. In the testimony below, Jenks's response began again to veer away from the question asked:

Q. Let me interrupt you, let me ask you a question. Did it appear that the vehicle that approached Ed -- how fast did it appear to you that this vehicle was going?

A.No very fast at all. I mean, it -- I thought they were -- you know, maybe they had known him, they were, you know, stopping to (inaudible) -- I honestly don't know what they were doing, but they were --

MS. KING: Objection --

A.-- stopping, you know --

THE COURT: Sustained.

RP 375.

The court properly sustained this objection as it was unresponsive and headed towards a speculative answer about why Norton was driving in a particular manner.

Norton: Testimony Excluded

Q.Okay. Can you understand how some of these witnesses might have misconstrued what happened?

A.Yes.

Q.Why do you think they could have misconstrued?

A.Because they don't -- they didn't know me, they don't know him --

MS. KING: Objection, Your Honor --

THE COURT: Sustained.

RP 406.

This objection was sustained because the court found the question was asking Norton to speculate on the state of mind of other witnesses.

The court properly exercised its discretion by sustaining the objections because there was a separate and valid reason for sustaining each objection. Therefore, Norton's claim that all the court's exclusions of

evidence was erroneous and therefore violated Norton's right to present a defense fails. This Court should affirm the conviction.

5. Assuming any exclusion of evidence was erroneous, the nonconstitutional harmless error test applies because the excluded evidence was not admissible and did not prevent Norton from arguing his theory of the case.

Norton argues that the constitutional harmless error applies because the court's exclusion of Jenks' knowledge of Horner's past troublesome behavior violated his right to present a defense.

This argument fails because the exclusion of Jenks' knowledge of Horner's past troublesome behavior was proper under the rules of evidence. *See State v. Clark*, 187 Wn.2d 641, 648–50, 389 P.3d 462 (2017) (harmless error test is not necessary where the court properly excluded expert testimony regarding defendant's mental state because defense did not plead diminished capacity). "Evidentiary "rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *State v. Lizarraga*, 191 Wn. App. 530, 553 364 P.3d 810 (2015) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987))). "Accordingly, a defendant's interest in presenting relevant evidence may 'bow to accommodate other legitimate

interests in the criminal trial process.” *Id.* (quoting *Scheffer*, 523 U.S. at 308, 118 S.Ct. 1261 (quoting *Rock*, 483 U.S. at 55, 107 S.Ct. 2704)).

Here, the exclusion of Jenks’ knowledge of Horner’s past behavior did not abridge Norton’s right to present his defense. Norton himself testified about Horner’s past troublesome behavior and both he and Jenks testified about his current troublesome behavior. Norton used this to argue that he intended to help Horner get home without getting into trouble.

Therefore, assuming error, the nonconstitutional harmless error test applies because the exclusion of Jenks’ additional knowledge of Horner’s past troublesome behavior did not prevent Norton from presenting his defense. *See State v. Pavlik*, 165 Wn. App. 645, 656, 268 P.3d 986 (2011) (citing *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986)) (applying nonconstitutional harmless error test when defendant’s excited utterance evidence was excluded erroneously but did not prevent defense from arguing its theory of the case); *see also State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991) (“The same nonconstitutional harmless error standard that applies to ER 404 rulings also applies to ER 609(a) rulings.”).

“Nonconstitutional error is harmless if, within reasonable probability, it did not affect the verdict.” *Pavlik*, 165 Wn. App. at 656 (citing *Zwicker*, 105 Wn.2d at 243).

Here, the exclusion of Jenks' knowledge of Horner's past troublesome behavior did not affect Norton's case. The testimony of multiple eye witnesses show that Norton turned his vehicle around abruptly, catching the attention of numerous people in a nearby soccer field. Witnesses then watched the vehicle speed up, cross the lane into a footpath off the road, and head directly at Horner until Horner was hit.

The jury heard Norton's explanation that he intended to help Horner. Norton suggested Horner was acting belligerently while walking towards his home and that Horner tends to get himself into trouble quite a bit. Horner's behavior was Norton's cue that Horner was on a roll again and could use help getting home to stay out of trouble. Norton did not expect Horner to throw the beer at his windshield blocking his view and that Horner would charge the Jeep causing the collision. In support of Norton's testimony, Jenks testified that Horner was acting irrationally yelling at nobody, flailing his arms, and walking erratically.

However, the rest of the evidence shows there was no emergency on Horner's part as nobody else was around on the footpath and Horner, according to Norton, was walking towards his home already. Norton's behavior was so disproportionate to the circumstances and contradicted by eye witnesses, that the absence of Jenks' additional knowledge that Horner has a troublesome character was not likely to affect the jury's verdict.

Furthermore, assuming for argument that the court's sustained objections to Jenks' trial testimony were erroneous, such alleged errors are harmless. Jenks' testimony was only objectionable where it was non-responsive. Jenks eventually testified in detail regarding her observation of Horner's behavior. Jenks' and Norton were permitted to testify about Horner's behavior on the relevant occasion and Norton testified about Horner's past behavior to explain his intent to help Horner.

Moreover, as to the charge of Vehicular Assault, Norton's intent to assault was not at issue. Only evidence of reckless driving or disregard for safety of others was at issue. Independent witnesses, Horner, and Norton himself described Norton's driving and driving right at Horner. The evidence clearly shows that Norton's driving was dangerous and created the circumstances leading to the collision regardless of Norton's stated intent. Thus, overwhelming evidence shows the jury would not have changed its verdict regardless of Horner's past troublesome behavior.

In regards to the charge for Assault in the Second Degree, had the court allowed Jenks to speculate regarding Norton's stated intent and had she been permitted to describe Horner's past irrational troublesome behavior to suggest Horner caused the collision, the evidence of Norton's driving after Horner flipped him off and his reckless U-turn then driving onto the footpath directly towards Horner was more than sufficient to

show that every reasonable jury would still have found Norton at least intended to scare Horner with the threat of hitting him with his Jeep. The intended apprehension of an imminent harmful contact constitutes and assault. CP 46 (Jury Instruction no. 9).

Any error in the exclusion of evidence discussed is harmless because it was not reasonably likely to affect the jury's verdict. Therefore, this Court should affirm.

Conclusion

The trial court's rulings had an independent and valid basis for either excluding testimony or sustaining the State's objections. Therefore, the court's evidentiary rulings were not an abuse of discretion. Because the court did not abuse its discretion in its evidentiary rulings, this Court should hold that the trial court did not violate Norton's right to present a defense and should affirm the conviction. *See State v. Blair*, 3 Wn. App.2d 343, 351, 415 P.3d 1232 (2018).

B. THE PROSECUTOR'S STATEMENTS WERE REASONABLE INFERENCES BASED ON THE EVIDENCE AND NOT IMPROPER OR PREJUDICIAL.

"Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *State v. Russell*, 125 Wn.2d

24, 85, 882 P.2d 747 (1994) (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986)).

“Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.” *Russell*, 125 Wn.2d at 85 (citing *Hoffman*, 116 Wn.2d at 93; *State v. York*, 50 Wn. App. 446, 458, 749 P.2d 683 (1987), *review denied*, 110 Wn.2d 1009 (1988)).

“Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *Russell*, at 85–86 (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990); *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986)).

The State is entitled to argue its theory of the case and argue the evidence against the defense theory. “The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Anderson*, 153 Wn. App. 417, 427–28, 220 P.3d 1273 (2009) (citing *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)). “The State is entitled to comment upon the quality and quantity of evidence the defense presents.” *Anderson*, 153 Wn. App. at 427–28.

“It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory.” *Russell*, 125 Wn.2d at 87 (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990); *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014, 797 P.2d 514 (1990)). “Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *Id.* (citing *United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir.1978)).

In the instant case, defense counsel did not object to any of the prosecutor’s comments which Norton alleges are misconduct. Therefore, Norton waived the alleged errors unless he establishes the prosecutor’s arguments were “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.* at 86 (citing *Hoffman*, 116 Wn.2d at 93; *State v. York*, 50 Wn. App. 446, 458–59, 749 P.2d 683 (1987)).

Here, the prosecutor’s comments were based upon reasonable inferences from the evidence. The prosecutor essentially argued that the defense theory that Norton intended to help Horner was not reasonable in light of the eye witness evidence showing Norton drove his Jeep recklessly and crossed a lane driving off the road straight at Horner causing the collision. There was no sign of such an emergency when

Horner was simply walking home and flipped off Norton in his Jeep as he passed. It should also be pointed out that *Norton* did not testify that he saw Horner flailing his arms and yelling to nobody. Norton only saw Horner flip him off before Norton decided to turn around. Only Jenks testified Horner was flailing his arms and seemed angry. Considering the eyewitnesses testimony of Norton's driving there is nothing improper about the prosecutor's arguments that Norton's story did not make sense under the circumstances.

Norton, without specifying any particular evidence, argues that the prosecutor committed misconduct by first moving to exclude "the evidence" and then arguing its lack. Br. of Appellant at 24. Norton argues that evidence showing he was acting to help Horner was suppressed and that the State argued there was no evidence supporting Norton's testimony that he was acting so. Jenks testimony of Horner's past behavior is not evidence of Norton's intent when he turned his Jeep at Horner.

Norton cites to *State v. Kassahun*, 78 Wn. App. 938, 900 P.2d 1109 (1995), *United States v. Toney*, 599 F.2d 787, 790-91 (6th Cir.1979); and *State v. Bvocik*, 781 N.W.2d 719, 720, 324 Wis.2d 352 (2010) to support his argument. With these citations, Norton suggests that the State successfully suppressed relevant defense evidence and then implied to the jury that Norton was not credible when he could not produce was

suppressed and that this was foul play because it prompted the jury to infer something that the State knew was not true. *Kassahun, Toney, and Bvocik* do no support a finding of misconduct in the instant case because the prosecutor did not argue that Norton's story was not supported by independent evidence of his intent and no such evidence was ever suppressed.

In *Kassahun*, the prosecutor successfully challenged Kassahun's *discovery motion* to obtain *objective evidence* of gangster activity preventing the discovery of evidence relevant to Kassahun's state of mind. *State v. Kassahun*, 78 Wn. App. 938, 946, 900 P.2d 1109 (1995). During closing argument at trial, the prosecutor argued "[Kassahun] 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?" *Kassahun*, 78 Wn. App. at 946. The *Kassahun* Court opined because the State successfully prevented Kassahun from even discovering objective evidence of gang activity it was misconduct for the prosecutor to imply "that Kassahun was being untruthful" because he failed to such offer such evidence. *Id.* at 952.

In *United States v. Toney*, incriminating "bait" money stolen during a bank robbery was found during a search of Toney's home. *United States v. Toney*, 599 F.2d 787, 788 (6th Cir.1979). Toney admitted the robbery was his idea but also that he backed out and was replaced by

Jimmie King. *Id.* Toney told detectives that he had won the bait money after the robbery gambling with King. *Id.* King independently admitted to agents that he played with Toney the day after the robbery and both King and Toney won substantial sums of money. *Id.* at 789. King's statement was *erroneously suppressed* although it was a statement against penal interest and evidence of a material fact. *Id.* at 789, 790.

The government, to blunt Toney's defense, put on evidence that Toney had never gambled with King, that Toney lost big gambling the next day after the robbery, and Toney suffered a net loss all of which suggested that Toney didn't win the bait money. *Id.* at 789. Meanwhile, the government possessed King's statement. The *Toney* Court found the prosecutor's argument that Toney's claim was unsupported by any evidence to be foul play because the government knew there was in fact evidence to support Toney's claim that he had won the "bait" money from King, one of the participants of the robbery. *Id.* at 790–91.

State v. Bvocik, was a Wisconsin State case based upon the holding in *State v. Weiss*, which "held that when a prosecutor's closing argument asks the jury to draw an inference that the prosecutor knows or should know is not true, it is improper argument which may require reversal." 324 Wis.2d 352, 353, 781 N.W.2d 719 (2010) (citing *State v. Weiss*, 312 Wis.2d 382, 752 N.W.2d 372 (2008)).

In *Bvocik*, the defendant was charged with attempting to have sex with a 14-year-old girl. *Bvocik*, 324 Wis.2d at 353–54. Bvocik was set up through the internet by a 28-year-old pretending to be 14. *Id.* at 353. However, at closing the prosecutor made a comment from which the jury could infer that the woman was actually 14 while knowing the woman was 28. *Id.* at 353–54.

Here, unlike *Kassahun*, the prosecutor made no effort to prevent Norton from discovering independent objective evidence relevant to Norton's state of mind when he drove his Jeep at Horner. Further, the evidence which was suppressed, Jenks' testimony of her observation of Horner's past behavior, was not relevant to establish Norton's intent when he drove his Jeep at Horner.

Rather, the prosecutor argued that the defendant's story was unreasonable based upon the evidence presented at trial because eye witness testimony painted a picture in stark contrast to Norton's story. This was not misconduct.

Further, unlike *Toney*, where the prosecutor was aware of actual independent evidence supporting Toney's defense that he obtained the bait money while gambling, here there was no other evidence of Norton's intent. The only evidence supporting Norton's claim that he was acting to help Horner was Norton's testimony of his own intent. No other witness

knew what Norton was thinking when he turned his vehicle around spraying gravel everywhere and then driving directly at Horner. Norton did not communicate his intent to anyone and one could only speculate what he intended.

Finally, Norton takes the statement by the prosecutor during rebuttal argument that there was no evidence Horner was flailing his arms or rushing at the Jeep out of context. *See* RP 502. The prosecutor followed this sentence with the statement that “no eyewitnesses saw that” and was referring particularly to Lesa Irwin’s testimony which was attacked during the defense closing argument as inaccurate because she believed the beer can was thrown by Norton, the driver of the Jeep, rather than Horner due to her vantage point. RP 207–08 (cross examination); RP 478 (defense closing argument). The prosecutor only referred to this on rebuttal to point out that Ms. Irwin naturally attributed the beer can to Norton when comparing his behavior to Horner’s. RP 502. After making this point in reference to Lesa Irwin’s testimony, the prosecutor stated that none of the eye witnesses saw Horner flailing his arms or rushing the Jeep, referring to the State’s witnesses, not Jenks’ testimony.

Put into context, even if Horner actually needed help getting back home and help staying out of trouble, the prosecutor’s argument that there was no reasonable explanation for Norton’s driving was still reasonable.

There was no evidence of an emergency. Horner was already walking home. Norton only saw Horner walking home and flip him off, nothing else. From Jenks' testimony, Horner was not interacting with anyone while waving and flailing his arms and talking to nobody. Thus it was not flagrant and ill-intentioned to argue that there was no reasonable explanation for Norton's reaction with his reckless driving.

Norton fails to establish that the prosecutor's arguments were flagrant and ill-intentioned such as to cause "an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Russell*, 125 Wn.2d at 86. This is so because the prosecutor's arguments were well within bounds of argument and inferences based upon the evidence presented.

Therefore, this Court should hold that there was no prosecutorial misconduct that prejudiced the defendant's right to a fair trial. This Court should affirm.

C. THE COURT SHOULD STRIKE THE COURT COSTS AND NONRESTITUTION INTEREST PROVISION.

The State concedes that the \$200 court filing fee and the provision requiring nonrestitution interest should be stricken from the Judgment and Sentence. Additionally, the case should be remanded to the trial court to

inquire whether the DNA fee has already been collected, and if so, it should be stricken.

IV. CONCLUSION

The trial court did not err by excluding Jenks' testimony regarding Horner's past troublesome behavior because it was inadmissible to establish conformity of conduct and was irrelevant to establish Norton's intent.

Moreover, the trial court allowed Norton to testify about his familiarity with Horner's past troublesome behavior in order to explain his intent to help Horner when it appeared to Norton that Horner was on a roll again. The trial court also allowed Jenks' to testify that she saw Horner acting irrationally before the collision when he was flailing his arms, shouting out angrily to nobody, and walking erratically to corroborate Norton's story that he was trying to help Horner. Therefore, the trial court did not violate Norton's right to present his defense.

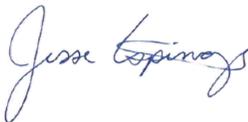
Norton fails to establish the prosecutor's conduct was so ill intentioned and flagrant that it was incurable by an instruction to the jury because the prosecutor's arguments were based upon reasonable inferences from the evidence and were not improper. Therefore, Norton waived his claim of prosecutorial misconduct.

For all the forgoing reasons, this Court should affirm the conviction.

The State concedes that the \$200 court costs and provision for nonrestitution interest should be stricken from the Judgment and Sentence. The State also concedes that the case should be remanded for the trial court to determine whether the DNA fee is appropriate.

Respectfully submitted this 9th day of January, 2020.

MARK B. NICHOLS
Prosecuting Attorney

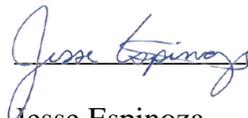
A handwritten signature in blue ink that reads "Jesse Espinoza". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Kathryn A. Russell Selk on January 9, 2020.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

January 09, 2020 - 4:49 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52418-0
Appellate Court Case Title: State of Washington, Respondent v. Peter A. Norton, Appellant
Superior Court Case Number: 18-1-00100-4

The following documents have been uploaded:

- 524180_Briefs_20200109164833D2293088_9540.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Norton - 52418-0-II - Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- KARSdroit@gmail.com
- Valerie.kathrynrussellselk@gmail.com

Comments:

Sender Name: Jesse Espinoza - Email: jespinoza@co.clallam.wa.us

Address:

223 E 4TH ST STE 11

PORT ANGELES, WA, 98362-3000

Phone: 360-417-2301

Note: The Filing Id is 20200109164833D2293088