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Division III  
State of Washington  
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No. 37015-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

SHERI WOOLEY,

Appellant.

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BRIEF OF RESPONDENT

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**I. TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii-iii.

STATEMENT OF THE CASE.....1-9.

STATEMENT OF THE ISSUES.....9.

STANDARDS OF REVIEW.....9-10.

ARGUMENT.....10-34.

    Appellant’s Issue I.....10-17.

    Appellant’s Issue II.....17-31.

    Appellant’s Issue III.....31-34.

CONCLUSION.....34.

## II. TABLE OF AUTHORITIES

### Washington State Supreme Court Cases:

|   |           |
|---|-----------|
| <u>State v. Gower</u> , 179 Wash.2d 851, 321 P.3d 1178 (2014).....  | 30.       |
| <u>State v. Gresham</u> , 173 Wash.2d 405, 269 P.3d 207 (2012)..... | 20.       |
| <u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....   | 18.       |
| <u>State v. Smith</u> , 20 Wash.2d 53, 145 P.2d 557 (1944).....     | 18.       |
| <u>State v. Vreen</u> , 143 Wash.2d 923, 26 P.3d 236 (2001).....    | 9-10, 11. |

### Washington State Court of Appeals Cases:

|  |            |
|--|------------|
| <u>State v. Barry</u> , 184 Wash.App. 790, 339 P.3d 200<br>(Div. III, 2014).....   | 28, 29-30. |
| <u>State v. Burnam</u> , 4 Wash.App.2d 368, 421 P.3d 977 (Div. III, 2018),<br><u>review denied</u> , 192 Wash.2d 1003, 430 P.3d 257 (2018).....                      | 12.        |
| <u>State v. Duarte Vela</u> , 200 Wn.App. 306, 402 P.3d 281<br>(Div. III, 2017).....   | 11-12.     |
| <u>State v. Emery</u> , 161 Wash.App. 172, 253 P.3d 413 (Div. II, 2011),<br><u>aff'd</u> , 174 Wash.2d 741, 278 P.3d 653 (2012).....                                 | 31, 32.    |
| <u>State v. Fuller</u> , 169 Was.App. 797, 282 P.3d 126 (Div. II, 2016).....   | 10.        |
| <u>State v. Hartzell</u> , 153 Wash.App. 137, 221 P.3d 928 (Div. I, 2009),<br><u>review granted, cause remanded</u> , 168 Wash.2d 1027,<br>230 P.3d 1054 (2010)..... | 20-21.     |
| <u>State v. McCreven</u> , 170 Wash.App. 444, 284 P.3d 793<br>(Div. II, 2012).....   | 28.        |
| <u>State v. Venegas</u> , 155 Wn.App. 507, 228 P.3d 813<br>(Div. II, 2011).....  | 31-32.     |

State v. Wilson, 144 Wash.App. 166, 181 P.3d 887 (Div. III, 2008),  
as amended (May 20, 2008).....24-27.

**Federal Cases:**

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 11015 (1974).....10-11.

Rivera v. Illinois, 556 U.S. 148, 129 S. Ct. 1446 (2009).....10, 11.

**Court Rules:**

WA RAP 2.5.....18.

**Secondary Sources:**

11 WAPRAC WPIC 10.02.....24.

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(5th ed., 2007).....20.

### III. STATEMENT OF THE CASE

This case is about one ex-wife attacking another ex-wife. Appellant Sheri Ann Wooley (hereinafter “Ms. Wooley”) was married to Gerald “Curley” Wooley (hereinafter “Mr. Wooley”), with whom she had two children. RP 240, lines 17-19. Ms. Wooley and Mr. Wooley separated and divorced in December of 2006. RP 240, line 20. Mr. Wooley then married Cheryl Peterson (hereinafter the “victim”) in 2009. RP 242, 10-14. The victim and Mr. Wooley divorced in 2011, but remained friends. RP 242, lines 13-14; 254, lines 20-25. Mr. Wooley passed away in early 2018. RP 77, lines 2-7; 241, lines 15-16. The victim filed a petition for appointment as personal representative of Mr. Wooley’s estate in June of 2018. RP 325-26.

On May 11, 2018, Ms. Wooley showed up unannounced at the victim’s home. RP 267, lines 18-23. Ms. Wooley was shouting and angry. RP 267, lines 1-6. The victim was shocked that Ms. Wooley was there because Ms. Wooley was not supposed to know where the victim lived. RP 267, lines 22-23. When asked, “[a]nd was that I guess why did you feel like you didn’t want her to know where you lived,” the victim responded, “[b]ecause she has caused me harm and intended to harm me before that day.” RP 268, 16-19. Ms. Wooley’s attorney objected to the victim’s answer and the Superior Court overruled the objection. RP 268, lines 21-

23. The victim elaborated on why she was afraid of Ms. Wooley and why she believed Ms. Wooley would do her harm:

Question: ...And it wasn't a conversation you said, so now back to where we picked up a little bit there. It wasn't a conversation you – that you guys were having?

Answer: No, I was trying to ask her questions and find out why she was upset and what she was so angry about, but like it never really could come out of her what it was.

Answer: ...  
She was mad at me. It was focused on me. She wanted to punch me in the face. She said that multiple times.

RP 269, lines 6-15. Before she left on May 11, Ms. Wooley threatened the victim. RP 269-70. The victim called 9-1-1, but did not want to press charges against Ms. Wooley. RP 270-71. Instead, the victim chose to get a protection order. RP 271, lines 12-17.

The victim obtained a temporary protection order and appeared at a hearing on May 25, 2018. RP 271-72. Ms. Wooley failed to appear at the protection order hearing and the court continued the matter. RP 273, lines 2-4, 10-11. When the victim returned home that day, she sat down to do some schoolwork; it was then that she heard a knock on the door. RP 273, lines 15-18.

The victim heard the knock and asked who it was. RP 274, lines 1. At first, the person on the outside did not respond. RP 274, line 3. The

victim asked again and this time the person said it was “Shandy”, who was a very good friend of the victim. RP 274, lines 5-7. The victim thought it was odd that Shandy would be at her door, given that Shandy was supposed to be out of the area. RP 274, line 10-11. When the victim asked again who it was at the door; the response she got was, “Sherry, it’s Shandy open the f’ing door.” RP 274, line 16. Figuring that was something her friend would say, the victim started to open the door. RP 274-75. Who the victim discovered on the other side of the door was not Shandy; it was Ms. Wooley. RP 275, lines 2-3. As soon as the victim unlocked the door and started to open it, Ms. Wooley pushed her way into the victim’s home and began hitting the victim. RP 275, lines 2-16, 24-25. Ms. Wooley was right on top of the victim. RP 276, line 6. Ms. Wooley hit, grabbed, and twisted the victim. RP 276, lines 6-8. Ms. Wooley twisted the victim around so that her back was against the door, so that the door shut behind the victim and she could not get out. RP 276, lines 9-11. In her hands, Ms. Wooley had something crumpled up—the deed to Mr. Wooley’s house. RP 276, line 14. As she was hitting the victim, Ms. Wooley yelled, “...if you want a restraining order, I’ll give you a reason to get a restraining order...[your] face won’t be pretty anymore.” RP 276, lines 15-18.

Eventually, Ms. Wooley stopped hitting the victim and slamming her up against the door and started to ransack the victim’s house, breaking

things in the victim's kitchen. RP 277, lines 7-19. At that point, the victim was able to get out the door. RP 277-79. Ms. Wooley eventually noticed that the victim had escaped and followed the victim outside. RP 279, lines 5-7. As the victim was yelling to one of her neighbors for help, Ms. Wooley caught her and started hitting her again. RP 279, lines 9-21. The victim was finally able to call 9-1-1 when Ms. Wooley fled the scene. RP 280, lines 10-20. At trial, the jury was shown photos of the victim's house and of the victim's injuries, including cuts and bruising. RP 281-87, 287-297.

The victim immediately telephoned law enforcement to report that her home had been burglarized and that she had been assaulted by Ms. Wooley. RP 442. Officer Chartrey of the Colville Police Department responded to the victim's home. RP 442, lines 3-15. When the victim answered the door, she was visibly upset, crying, shaking, and her lip was cut and bleeding. RP 443, lines 1-3. Officer Chartrey noticed that the victim's kitchen was in disarray; there was a broken ceramic and a bunch of utensils "...all over the floor." RP 443, lines 2-4. Officer Chartrey noticed that there was blood on the victim's hand and asked her if the blood was from her lip. RP 443, lines 6-7. The victim responded that the blood was probably from her head. RP 443, lines 7-8. The victim lifted her hair out of the way to reveal a large bump that was split and bleeding above her left eye. RP 443, lines 8-10.

Officer Chartrey searched for Ms. Wooley but was unable to locate her for three days. RP 443-44. Officer Chartrey later learned that Ms. Wooley would be coming back to the town of Colville from the Kettle Falls area, to the West. RP 444, lines 8-9. On the north end of town, Officer Chartrey located Ms. Wooley in her vehicle and made a traffic stop. RP 444, lines 15-17. Officer Chartrey arrested Ms. Wooley and asked her some questions about what happened between her and the victim on May 25, 2018. RP 444-45. Ms. Wooley responded that she had already talked to Officer Chartrey about the incident. Officer Chartrey acknowledged that he and Ms. Wooley had talked about a previous altercation (the May 11, 2018 incident), but this time he wanted to talk about the May 25 incident. RP 445, lines 5-11. Ms. Wooley told Officer Chartrey that she had not been to the victim's house on May 25, which conflicted with the report Officer Chartrey had been given. RP 445, lines 12-20. Ms. Wooley responded by claiming that the victim was crazy and that she had made it all up and that the victim must have injured herself. RP 445, lines 22-23.

Ms. Wooley then changed her story while talking to Officer Chartrey. RP 445-46. Ms. Wooley admitted that she had been to the victim's home after the May 11, 2018 incident, but claimed that she just drove through the parking lot, honking her horn because she was mad. RP 445-46.

After he arrested Ms. Wooley, Officer Chartrey returned to the victim's home to conduct follow-up. RP 446. Officer Chartrey took photos of the victim's injuries and found some new injuries. RP 446, lines 17-18.

Ms. Wooley was charged in Stevens County Superior Court (hereinafter "Superior Court") by way of a five-count Information on May 31, 2018. CP 1-3. The State later dismissed Count 5, the charge of Driving While License Suspended or Revoked in the Third Degree. CP 3, RP 160, lines 8-20. The remaining four charges were Burglary in the First Degree, Criminal Impersonation in the First Degree, Assault in the Fourth Degree, and Malicious Mischief in the Third Degree. CP 1-2.

On September 20, 2018, the State filed a Notice of Intent to Use 404(b) Evidence. CP 4-5. On May 21, 2019, Ms. Wooley's trial counsel filed Motions in Limine. CP 7-14. The State responded by filing its own Motions in Limine on July 12, 2019. CP 15-18.

The Superior Court held a hearing on the Motions in Limine. RP 129. At the hearing, the Superior Court ruled that Ms. Wooley could cross-examine the victim on potential bias and motivation to lie, and the connection with the victim's position as personal representative of Mr. Wooley's estate. RP 156-57. In fact, Ms. Wooley was explicitly granted the ability to inquire as to the timing of her filing of a petition in Mr. Wooley's estate, including the fact that her petition was filed approximately

10 days after Ms. Wooley was arrested for burglary and assault. RP 157, lines 16-25; 326-27.

A jury trial was held on July 16 and 17 of 2019. RP 3. The victim testified about the issue of who owned the home in which Mr. Wooley lived. RP 252-53. The victim testified that she and Mr. Wooley had reached an agreement that Mr. Wooley would pay the victim back for the money she had contributed to Mr. Wooley's house. RP 256-57. The victim testified about Mr. Wooley's desire to have his house given to his son. RP 260, lines 4-10. The victim testified about her work on Mr. Wooley's estate and the dispute over his former home. RP 260-262. When the victim testified about Mr. Wooley's intentions and that the victim's name was still on the deed to Mr. Wooley's house, counsel for Ms. Wooley objected. RP 262, lines 24-25. The Superior Court overruled the objection and informed Ms. Wooley's attorney that she could inquire on cross-examination. RP 263, lines 1-2.

At trial, Ms. Wooley's trial counsel moved for admission and the Superior Court admitted the victim's Petition for appointment as personal representative of Mr. Wooley's estate, as Exhibit No. 101. RP 325-26. Ms. Wooley's trial counsel cross-examined the victim about the victim's comment that she did not want Ms. Wooley to know where she lived. RP 330, lines 3-4.

The victim's upstairs neighbor, Aris Schulz, testified that he heard the altercation in the victim's apartment. RP 385-86. Mr. Schulz eventually went to the window of his apartment and saw the victim and Ms. Wooley struggling. RP 390, lines 12-21. Ms. Wooley looked up and saw Mr. Schulz and fled the scene. RP 390, lines 16-21. Mr. Schulz overheard the victim yell that she was going to get another restraining order on Ms. Wooley. RP 391, lines 15-16. Ms. Wooley replied, "you don't need to get another restraining order on me you f'ing bitch." RP 391, lines 19-20. Ms. Wooley then fled the scene. RP 391, lines 23-24. Mr. Schulz saw the victim crying and heard her call 9-1-1 and report the burglary and assault. RP 392, lines 15-20.

The next witness the State presented was Tabitha Chandler, in whom Ms. Wooley confided the details of her crimes. Ms. Chandler testified that Ms. Wooley told her that Ms. Wooley, "...went up and knocked on the lady's door and posed as one of that other lady's friends and as soon as the lady opened the door, she just obliterated her face." RP 407-08. "[Ms. Wooley] [j]ust started wailing on her...." RP 408, line 5.

The jury convicted Ms. Wooley of Burglary in the First Degree, Assault in the Fourth Degree, and Malicious Mischief in the Third Degree. RP 128, lines 2-9. The jury found Ms. Wooley not guilty of Criminal

Impersonation. RP 128, lines 7-8. Sentencing took place on August 6, 2019, and this appeal followed. RP 128; CP 51-58, 62.

On the same day she filed her Notice of Appeal to this Court, Ms. Wooley filed what her attorney styled, “Motion in Limine Supplemental Documents.” Index of Clerk’s Papers on Appeal, page 1; CP 75-85. These so-called supplemental documents were filed over twenty days after the conclusion of the jury trial and nearly a month after the hearing on Ms. Wooley’s pre-trial Motions in Limine. CP 75, RP 3. The supplemental documents appear to have been marked in the lower left-hand corners of each document as trial exhibits but were not offered at trial. CP 76-85; RP 128, 504.

#### **IV. STATEMENT OF THE ISSUES**

- I. Was Ms. Wooley permitted to present her theory of the case?
- II. Did the Superior Court properly admit 404(b) testimony?
- III. Assuming the Superior Court committed the errors alleged by Ms. Wooley, was there a cumulative effect on Ms. Wooley’s right to a fair trial such that reversal is required?

#### **V. STANDARDS OF REVIEW**

Issue I, Ms. Wooley’s challenge to whether her proposed evidence was relevant to her defense, is reviewed for abuse of discretion. State v.

Vreen, 143 Wash. 2d 923, 932, 26 P.3d 236 (2001) (abrogated on other grounds by Rivera v. Illinois, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009)).

Issue II, Ms. Wooley's challenge to admission of WA ER 404(b) material, is reviewed for abuse of discretion. State v. Fuller, 169 Was.App. 797, 828, 282 P.3d 126 (Div. II, 2016).

Issue III, the cumulative effect of the alleged errors does not appear to have a standard of review.

## VI. ARGUMENT

### 1. **MS. WOOLEY WAS PERMITTED TO PRESENT HER DEFENSE AND TO CROSS-EXAMINE THE STATE'S WITNESSES.**

Ms. Wooley was not denied the opportunity to present a defense. The theory of Ms. Wooley's defense was that the victim exaggerated the burglary and assault because she would gain financially. For Ms. Wooley to argue on appeal that she was prevented from presenting a defense is simply not true.

Ms. Wooley was not denied the opportunity to cross-examine her accuser. Ms. Wooley cites Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 11015 (1974), in which a trial court refused to allow a defendant to cross-examine a key prosecution witness. What happened in Davis is not what happened

here. In fact, the Superior Court stated that Ms. Wooley could cross-examine the victim specifically on motive and the relationship between Ms. Wooley's theory of the case and the financial incentive generated by the victim's administration of the estate of Mr. Wooley. RP 156-57.

A defendant has the right to present a defense, but the theory of her defense must be bound by the limits of relevance. "We review a trial court's evaluation of relevance under ER 401 and its balancing of probative value against its prejudicial effect or potential to mislead under ER 403 with a great deal of deference, using a 'manifest abuse of discretion' standard of review." State v. Vreen, 143 Wash.2d 923, 932, 26 P.3d 236, 240 (2001) (abrogated on other grounds by Rivera v. Illinois, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009)).

The Superior Court exercised its discretion and permitted Ms. Wooley to attempt to discredit the victim but the Superior Court put some logical restraints on how far Ms. Wooley was allowed to go.

Ms. Wooley cites State v. Duarte Vela, 200 Wn.App. 306, 321, 402 P.3d 281 (Div. III, 2017), in which this Court held, "[t]he trial court should admit probative evidence [offered by the defense, even if it is suspect. In this manner, the jury will retain its role as the trier of fact, and it will determine whether the evidence is weak or false." Opening Brief of Appellant at 15. But Ms. Wooley misuses Duarte Vela because in order to

apply the holding in Duarte Vela, the evidence offered by the defendant must first be relevant. See State v. Burnam, 4 Wash.App.2d 368, 421 P.3d 977 (Div. III, 2018), review denied, 192 Wash.2d 1003, 430 P.3d 257 (2018) (distinguishing Duarte Vela) (“But if the court excluded relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense.”) (internal quotation marks omitted).

Ms. Wooley was allowed to offer testimony and evidence that the victim stood to gain financially from her appointment as personal representative of Mr. Wooley’s estate. But to claim that the Superior Court interfered and thereby prejudiced Ms. Wooley’s presentation is simply incorrect. The distribution of Mr. Wooley’s estate occurred well after the victim reported the burglary and assault to police. This is precisely the point made by the Superior Court when it said:

Well again, to the extent that you believe, I mean I don’t want to go too far down a rabbit hole, but on the other hand and I don’t know about Ms. Wooley testifying to probate matters in which she didn’t take part, but if you’re suggesting that somehow that’s fair game for impeachment of Ms., I mean it can’t be. It can’t be impeachment because it’s after.

RP 155, lines 19-25. Ms. Wooley’s attorney argued that the victim had a financial incentive “...to not be entirely truthful or blow this incident out of proportion.” RP 156, lines 6-7. The Superior Court agreed that Ms. Wooley

could explore that topic in cross-examination. RP 156, lines 8-9. Apparently unsatisfied with the limitation of inquiring on cross-examination of the victim, Ms. Wooley's attorney again pressed the request for presentation of more evidence of potential bias:

MS. HAGARA: Well, wouldn't the motive be the money in the estate?

THE COURT: No, cause there's -- you're talking about court orders, you're talking about an area of law that isn't at all involved with this and in fact, I would challenge anybody to really talk about well, how does an intestate estate get divided. I could tell ya, it's 11.04.015 and it has to do with what's community property and what's separate property. That goes down a rabbit hole. If you're suggesting that your client made contact with the [victim] because she was upset about what she thought might happen in probate, so be it, but what actually happens in probate, I think, is irrelevant. So, if you want to somehow suggest that well isn't it true that what, I mean how does -- how does the [victim] keep Ms. Wooley in jail so she can't participate in proceedings? So, she can make up what happened, is that --

MS. HAGARA: She can exaggerate it.

THE COURT: Okay, well I think you can pursue that on cross examination as intent, as and how she goes about that, I said you know I suppose it's as artful as you

can be on cross examination to pursue that line of questioning as impeachment to say well, wouldn't it be to your benefit if Ms. Wooley wasn't there to help her kids or whatever it is. But, what happens in the ultimate distribution of the estate I see as totally irrelevant. Your claim, your client's claim, is that it was to Ms. Petersen's benefit, the [victim]'s benefit to exaggerate what occurred so that Ms. Wooley could not participate in probate proceedings.

MS. HAGARA: That's it, Your Honor.

THE COURT: Well then you can certainly claim that and you can ask questions about that, but we're not gonna talk about what the probate court did. That is a rabbit hole, as far as I'm concerned, that is irrelevant.

RP 156-57. Ms. Wooley's attorney seemed satisfied with that ruling by the Superior Court. However, on appeal, Ms. Wooley assigns error to what appears to have been an agreeable ruling by the Superior Court.

“Without the additional evidence of the considerable **amount** of money she secured after doing so, however, the evidence of being personal representative was inadequate to demonstrate to the jury that Ms. Petersen had a financial motivation to lie.” Opening Brief of Appellant at 8. Ms. Wooley's argument is not persuasive, for two reasons. First, there is no indication that she presented Clerk's Papers 75 through 85 to the Superior

Court, so that it could rule on the admissibility of the documents. Therefore, the Superior Court was deprived of the opportunity to rule on the admissibility of each document.

Second, Ms. Wooley's argument to the Superior Court was that the victim was motivated to lie to "...keep Ms. Wooley in jail", so that the victim could keep Ms. Wooley "out of the way." RP 156, lines 1-3; Opening Brief of Appellant at 12. Ms. Wooley never made the argument that the **amount** of money Ms. Peterson obtained through the probate was of such a great amount as to entice her to lie. The Superior Court cannot bar an argument that Ms. Wooley did not make.

Even if Ms. Wooley had fully apprised the Superior Court of the evidence she proposed to present and even if her argument had been the same as it is now, the Superior Court's ruling on Ms. Wooley's Motions in Limine was not an abuse of discretion.

Ms. Wooley cannot point to a single exhibit offered by her at the trial that the Superior Court rejected. There is no indication in the record that Ms. Wooley offered any of the documents she designated as Clerk's Papers 75 through 85. In fact, those Clerk's Papers do not appear in the record until well after the jury trial and after Ms. Wooley was sentenced. Ms. Wooley's filing of documents after the jury trial was, at best, irregular

and deprived the Superior Court of the opportunity to rule on the admissibility of each document.

Unlike what Ms. Wooley claims, the Superior Court did not prohibit her from eliciting evidence regarding the victim's potential bias and incentive to be dishonest. Opening Brief of Appellant at 13.

Ms. Wooley was allowed to cross-examine the victim about ownership of the house in which Mr. Wooley lived prior to his death. RP 311, 321, 322. Ms. Wooley was allowed to cross-examine the victim about her appointment as personal representative of Mr. Wooley's estate and that she filed the petition for appointment approximately 10-14 days after the burglary and assault on May 25, 2018. RP 325; 326, lines 13-24. Ms. Wooley was even permitted to cross-examine the victim regarding the fact that Mr. Wooley's children signed waivers, allowing the victim to be appointed as personal representative of Mr. Wooley's estate. RP 377-78. Even the State was permitted to address the appointment of the victim. State's Exhibit 24 was the series of waivers signed by Mr. Wooley's children, allowing the victim to serve as personal representative of Mr. Wooley's estate. The victim's petition for appointment as personal representative of Mr. Wooley's estate was offered by Ms. Wooley's trial counsel and admitted by the Superior Court. RP 128, 325-26.

The evidence and testimony Ms. Wooley sought to introduce was not exculpatory evidence relating to the allegation of burglary and assault. The testimony and evidence related only to the credibility of the victim. Ms. Wooley was permitted to attack the credibility of the victim. On appeal, Ms. Wooley can only point to the **depth** that the Superior Court permitted her trial attorney to go in an attempt to discredit the victim, not that the Superior Court entirely prevented her from attempting to discredit the victim. The Superior Court did not abuse its discretion when it informed Ms. Wooley that she would not be permitted to go too far down the “rabbit hole.” RP 155, lines 20-21; 156, line 18; 157, line 19.

Ms. Wooley was not denied the opportunity to present her theory of the case; the Superior Court did not commit error in this respect.

**2. THE SUPERIOR COURT DID NOT ERR WHEN IT ADMITTED THE VICTIM’S COMMENT THAT MS. WOOLEY HARMED HER AND INTENDED TO HARM HER IN THE PAST.**

On appeal, Ms. Wooley claims that the following testimony from the victim is 404(b) material and should not have been admitted:

Because she has caused me harm and intended to harm me before that day.

RP 268, lines 18-19; Opening Brief of Appellant at 15. As argued *infra*, Ms. Wooley’s attorney did not properly preserve the issue for appeal, the

comment by the victim was not ER 404(b) material, and even if the comment is 404(b) material, the Superior Court did not err by admitting it.

**A. Ms. Wooley’s trial counsel did not properly preserve the issue for appeal.**

Generally, a reviewing court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). “It is a well-established rule in this state that, unless an objection made to testimony of a witness is sufficiently definite to call the attention of the trial court to the particular ground upon which it is based, error cannot be predicated thereon.” State v. Smith, 20 Wash.2d 53, 56, 145 P.2d 557 (1944). “The reason for this rule is that the court should be apprised of the nature of the objection made to proffered testimony and the basis therefor so as to enable the court to pass intelligently upon the question raised. Id.”

Based on the record, it is impossible to determine the basis of Ms. Wooley’s objection. The entirety of Ms. Wooley’s objection was, “[y]our Honor, I’m gonna object and move to strike.” RP 268, lines 21-22. The objection could have been any number of grounds, such as speculation, ER 403, or lack of personal knowledge. The only reason this Court would have any idea as to the basis is that Ms. Wooley now claims the basis was

improper 404(b) material. Without stating any basis for the objection, Ms. Wooley's trial counsel deprived the Superior Court of the opportunity to understand, evaluate, and properly rule on the objection.

**B. The victim's comment was not 404(b) material because the comment cannot be understood as describing a specific act.**

The victim's comment about Ms. Wooley's prior behavior and intent was too vague to be understood as falling within the prohibitions of ER 404(b). In order to qualify as a matter governed by ER 404(b), the behavior described must be a crime, wrong, or act. Simply saying that someone had harmed her and/or intended to harm her at some unspecified point in the past is not evidence of a **specific** crime, wrong, or act.

Furthermore, it does not appear that the State or Ms. Wooley, at the time of trial, understood the comment as being a reference to a specific instance of conduct. The State neither relied on the victim's comment nor was the comment in response to a question that was intended to elicit testimony about specific defined acts of Ms. Wooley. Indication that the State's purpose for the question was not to elicit testimony of prior bad acts is shown by the subsequent question: "Okay. So, you were surprised that she even showed up at your house because you didn't know she knew where you lived?" RP 268-69. The victim's answer was, "I was shocked." RP 269, line 2.

The victim's statement was the equivalent of saying that she was afraid of Ms. Wooley and why she did not want Ms. Wooley to know where she lived; it was not a description or evidence of a specific prior act.

**C. Even if the victim's comment was 404(b) material, it was not error for the Superior Court to admit the comment because it related to Ms. Wooley's criminal intent.**

The Superior Court did not err by admitting the victim's comment. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." WA ER 404. "Properly understood, then, ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wash.2d 405, 420, 269 P.3d 207 (2012). "Critically, there are no 'exceptions' to this rule. Id. at 421 (citing 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.9, at 497 (5th ed., 2007)). "Instead, there is one improper purpose and an undefined number of proper purposes. Though the other purposes are sometimes referred to as exceptions, this is simply legal shorthand for other purposes." Id. Appellate courts review "...decisions to admit evidence under ER 404(b) for abuse of discretion." State v. Hartzell, 153 Wash.App. 137, 150,

221 P.3d 928 (Div. I, 2009), review granted, cause remanded, 168 Wash. 2d 1027, 230 P.3d 1054 (2010). “A court abuses its discretion if it is exercised on untenable grounds or for untenable reasons.” Id.

“To admit evidence of a person's prior misconduct, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” Id. (internal quotation marks omitted). “The third and fourth elements ensure that the evidence does not run afoul of ER 402 or ER 403, respectively. The party seeking to introduce evidence has the burden of establishing the first, second, and third elements.” Id. “It is because of this burden that evidence of prior misconduct is presumptively inadmissible.” Id.

The State sought to admit three types of ER 404(b) material: 1. The May 11, 2018 incident between Ms. Wooley and the victim, 2. Conviction history of Ms. Wooley, and 3. The history of restraining orders protecting the victim from Ms. Wooley. CP 15-18; RP 130, lines 7-23; 140-41; 139-40; 141-44.

The Superior Court carefully addressed each of the three types of ER 404(b) material. RP 140-47. The Superior Court admitted testimony

about the May 11, 2018, incident under the theory of *res gestae*. RP 130-31. Even Ms. Wooley’s attorney seemed to agree with the State’s request that the Superior Court allow discussion of the events of May 11, 2018 because, “[t]hat’s when the first incident occurred in May and then as the prosecutor has laid out, the second incident was kind of a continuation of the first discussion between the two women.” RP 133, lines 2-5.

However, the Superior Court would not permit the State to offer any testimony or evidence about the restraining orders and prior convictions, because it viewed the evidence to be improper under ER 404(b).<sup>1</sup> “So, in this circumstance at least and for purposes of the case -- the State’s case in chief, no to restraining orders or prior convictions.” RP 145, lines 22-24. The State’s attorney asked for clarification on the prohibition of discussing the prior protection orders: “She -- when they talk about the history between them, make sure I talk to the victim about not talking about the fact that they even had a restraining order.” RP 146, lines 5-8. The Superior Court’s definitive response was, “[c]orrect.” RP 146, line 9. Though neither the State nor Ms. Wooley could talk about the prior restraining orders, the Superior Court, without objection from either the State or Ms. Wooley’s counsel, advised the Parties that the victim could testify to threats or

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<sup>1</sup> In contravention of the Superior Court’s pre-trial ruling, Ms. Wooley testified about the restraining orders in at least two separate instances at trial. RP 464-65 & 478-79.

statements that Ms. Wooley made and the general animosity between the two of them. RP 144-45.

The testimony Ms. Wooley claims to be 404(b) material appears in one sentence of the Report of Proceedings. At trial, the victim testified why she did not want Ms. Wooley to know where she lived: “Because she has caused me harm and intended to harm me before that day.” RP 268, lines 18-19. The victim’s comment does not appear to fit within any one of the three categories of ER 404(b) addressed by the Superior Court. The comment does, however, relate directly to one of the purposes for which 404(b) material can be used: intent.

Intent was relevant to all four crimes with which Ms. Wooley was charged. First, Ms. Wooley was charged with Burglary in the First Degree. CP 1. The Information alleged that, “... on or about May 25, 2018, with **intent** to commit a crime against a person or property therein, did enter or remain unlawfully in a building...and in entering such building, while in such building, or in immediate flight therefrom [Ms. Wooley] did assault [the victim], a person therein, by physical assault....” CP 1-2 (emphasis added).

Second, Ms. Wooley was charged with Criminal Impersonation in the First Degree. CP 2. The Information alleged that “...on or about May 25, 2018, with **intent** to defraud another or for any other unlawful purpose

assumed a false identity, to wit: Shandy Wahl, and did an act in his/her assumed character, to wit: to gain entry into a residence....” CP 2 (emphasis added).

Third, Ms. Wooley was charged with Assault in the Fourth Degree. CP 2. The Information alleged that, “...on or about May 25, 2018, [Ms. Wooley] did commit the crime of Assault in the Fourth Degree: under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, did **intentionally** assault [the victim]....” CP 2 (emphasis added).

Finally, Ms. Wooley was charged with Malicious Mischief in the Third Degree. CP 3. The Information alleged that, “...on or about May 25, 2018, [Ms. Wooley] did commit the crime of Malicious Mischief in the Third Degree; did **knowingly** and maliciously cause physical damage in an amount not exceeding \$750.00 to the property of another...belonging to [the victim].” CP 3 (emphasis added). “When acting knowingly is required to establish an element of a crime, the element is also established if a person acts intentionally.” 11 WAPRAC WPIC 10.02; CP 37.

At hearing on the Motions in Limine, the Superior Court drew attention to State v. Wilson, 144 Wash.App. 166, 181 P.3d 887 (Div. III, 2008), as amended (May 20, 2008). RP 142, 18-19. Based on Wilson, the Superior Court voiced concern about permitting evidence of Ms. Wooley’s

other bad acts, including the prior protection orders the victim had obtained against Ms. Wooley and claims that Ms. Wooley may have violated those protection orders. RP 142-43. The Superior Court concluded that evidence about the prior protection orders and potential violations could not be used to prove intent. RP 143-44. The Superior Court found that prior protection orders and violations would be probative of intent in a case where the defendant was charged with protection order violations, but not in this particular case. RP 144, lines 1-5.

While the Superior Court may have reached the correct decision in prohibiting evidence of prior protection orders, the way in which it arrived there was incorrect because Wilson is distinguishable. Wilson does not stand for the proposition that prior bad acts that fall within the meaning of ER 404(b) cannot be used to prove intent in some cases where intent is a necessary element of the crime charged. The key to Wilson was that the underlying charge, felony murder, does not contain the element of intent.

In Wilson, State charged Ms. Wilson with felony murder in the first degree with burglary as the underlying predicate. Id. at 175. The State's theory was that Ms. Wilson committed burglary by entering and remaining at the place where the murder occurred and contacting the victim in violation of restraining orders. Id. at 176. At trial, the State argued that evidence of intent to kill was admissible because a showing of a higher *mens*

*rea* would prove a lower level of *mens rea* and because the State had the ability at trial to amend the information to include intentional murder. Id. The court allowed evidence of intent to kill in the event the State decided to amend the charges during trial, but the the State did not amend the information to include intentional murder. Id.

This Court concluded that the trial court abused its discretion by allowing the evidence of bad acts and intent to kill. Id. at 177. Ms. Wilson conceded that she was in the house where the murder occurred, in violation of a restraining order. Id. The evidence of her prior bad acts or her intent to kill was highly prejudicial because intent is not an element of felony murder.” Id. With the concession that she was in the house in violation of the restraining order, Ms. Wilson satisfied the element of intent in the burglary charge and the element that she was there unlawfully.

“A person is guilty of burglary in the first degree if, with **intent to commit a crime against a person or property therein**, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime...assaults any person.” RCW 9A.52.020(1) (emphasis added). “The Legislature has adopted a permissive inference to establish the requisite intent whenever the evidence shows a person enters or remains unlawfully in a building.” Id. at 175–76 (internal quotation marks omitted).

Unlike in Wilson, there was no concession that Ms. Wooley was in the victim's home unlawfully, or that Ms. Wooley was in the victim's home, given that she told Officer Chartrey that she wasn't there on May 25, 2018. In Wilson, the second charge, felony murder, did not have an intent element. But each one of the charges in Ms. Wooley's case either had an intent element or had a *mens rea* element that could be satisfied with proof of intent. Therefore Ms. Wooley's intent was highly probative.

The victim's comment did not include a reference to the prior protection orders and therefore cannot be taken as violating the Superior Court's pre-trial ruling. But even if the victim's comment could be construed as 404(b) material, it should be construed as speaking to the general animosity between the victim and Ms. Wooley and, more particularly, that Ms. Wooley would intend to commit crimes against the victim. 404(b) material is permitted to prove intent and, in this case, is directly related to elements within each of the crimes charged.

**D. Applying the ER 403 balancing test, the probative value of the victim's comment was not substantially outweighed by the danger of unfair prejudice.**

The admission of the victim's comment did not violate the ER 403 balancing test. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” WA ER 403. “The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response.” State v. McCreven, 170 Wash.App. 444, 457, 284 P.3d 793 (Div. II, 2012).

“Trial courts have considerable discretion to consider the relevancy of evidence and to balance the probative value of the evidence against its possible prejudicial impact.” State v. Barry, 184 Wash.App. 790, 801, 339 P.3d 200 (Div. III, 2014). Appellate courts “...review a trial court's decision on relevance and prejudicial effect for manifest abuse of discretion. Id. at 801-02. “Abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Id. at 802. Any error in a trial court's decision requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” Id. (internal quotation marks omitted).

Ms. Wooley makes two arguments in an attempt to show how the jury would have misused the victim’s comment. First, Ms. Wooley argues that the victim’s comment could have confused the jury because the jury could have been confused over Ms. Wooley’s past intent to harm the victim and the intent element of Burglary in the First Degree. Opening Brief of

Appellant at 21.

The opposite, of what Ms. Wooley argues, is true. The victim's statement is actually helpful for the jury to discern the element of intent in the Burglary First Degree charge. The charge of Burglary in the First Degree requires a finding by the jury that Ms. Wooley entered or remained unlawfully in the home of the victim, with the **intent** to commit a crime therein. In other words, the jury had to find that Ms. Wooley intended to harm the victim during or after entering or remaining unlawfully in the victim's home.

Second, Ms. Wooley argues that the jury would be unfairly prejudiced against her because the jury could conclude that Ms. Wooley was dangerous and therefore would conclude a propensity to act in a dangerous manner. Opening Brief of Appellant at 21. However, this second argument of Ms. Wooley's is merely a restatement of the general concern over 404(b) material and does not delve into the separate considerations embodied in ER 403. The unfair prejudice ER 403 seeks to guard against is not the same unfair prejudice that could result from an ER 404(b) violation, *id est* action in conformity. The unfair prejudice ER 403 seeks to guard against is visceral bias based upon a lack of reason, such as emotion. ER 403 is meant to guard against the inflammation of a jury's emotions to the point that it would use emotion, rather than reason, as a basis for

conviction. See State v. Barry, 184 Wash.App. 790, 802, 339 P.3d 200 (Div. III, 2014). Ms. Wooley does not explain how the jury could have misused the comment to develop an emotional response and irrational bias against her.

**E. Even if the comment was ER 404(b) material and the comment should not have been admitted, its admission was harmless error.**

Even if the victim’s comment was 404(b) material and was improperly admitted, the error was harmless beyond a reasonable doubt. “Erroneous admission of evidence in violation of ER 404(b) is analyzed under the nonconstitutional harmless error standard—that is, we ask whether there is a reasonable probability that, without the error, the outcome of the trial would have been materially affected.” State v. Gower, 179 Wash.2d 851, 854, 321 P.3d 1178 (2014) (internal quotation marks omitted).

The comment of the victim amounted to one sentence within two days of trial. At worst, the sentence was a vague reference to prior harmful behavior of Ms. Wooley. The statement did not reference whether the “harm”, as the victim put it, was physical, emotional, financial, or any other type of harm. It is inconceivable that the jury would have believed that Ms. Wooley acted in conformity with a vague, brief, and ultimately insignificant statement of the victim’s belief. One vague sentence regarding prior

harmful behavior was not so powerful as to taint all of the remaining incriminating evidence against Ms. Wooley.

If the Superior Court erred in admitting the victim's comment, the error was harmless beyond a reasonable doubt.

**3. THE CUMULATIVE EFFECT OF THE SUPERIOR COURT'S RULINGS DID NOT DEPRIVE MS. WOOLEY OF A FAIR TRIAL.**

Assuming, *arguendo*, that the Superior Court committed both alleged errors, the cumulative effect is not enough to have influenced the outcome of the trial.

The only case Ms. Wooley cites to support her cumulative error argument is State v. Venegas, 155 Wn.App. 507, 228 P.3d 813 (Div. II, 2011). Opening Brief of Appellant at 19. In Venegas, the trial court improperly excluded causation testimony of a physician who treated the victim for his injuries, the trial court improperly admitted evidence of prior bad acts, and the prosecutor committed egregious misconduct during the closing argument. Id. at 510.

The prosecutorial misconduct in Venegas "...was so flagrant and ill intentioned that a jury instruction could not have cured it." State v. Emery, 161 Wash.App. 172, 194, 253 P.3d 413 (Div. II, 2011), aff'd, 174 Wash.2d 741, 278 P.3d 653 (2012). The witness credibility issue in Venegas was

whether the victim's injury was caused by the defendant or was potentially caused by the victim tripping and falling, thereby calling into question the victim's claim of physical abuse. See Venegas, 155 Wash.App. at 526. The Court of Appeals in Venegas, "...further held that the cumulative effect of the prosecutor's improper conduct, excessive discovery sanctions preventing the defense from challenging the credibility of the victim's testimony, and improperly admitted evidence warranted reversal of Venegas's convictions under the cumulative error doctrine." Emery, 161 Wash. App. at 194–95 (citing Venegas, 155 Wash.App. at 526–27).

Venegas is a far cry from Ms. Wooley's case. Unlike Venegas, where the excluded credibility testimony went to causation of the victim's injury, the credibility issue in Ms. Wooley's case had to do with whether or not the victim had a motive to exaggerate the injuries Ms. Wooley caused. And unlike the defendant in Venegas, Ms. Wooley was permitted to attack her victim's credibility. In addition, the State presented photographs of the victim's injuries, a witness who testified that Ms. Wooley admitted the crimes to her, photographs of the damage that Ms. Wooley did to the victim's property, and the corroborating testimony of the victim's neighbor.

By making a cumulative error argument, Ms. Wooley claims that the jury would not and could not have convicted her but for her inability to

discredit the victim to the degree she wished and but for the victim's statement about Ms. Wooley's prior bad behavior.

Following Ms. Wooley's logic, if she had been able to present all of the evidence she wished to present, then the jury would have believed her over the victim. If the jury believed Ms. Wooley over the victim then it would not have convicted Ms. Wooley because there would have been insufficient credible evidence to convict Ms. Wooley. Ms. Wooley's position, taken to its logical extent, is that the jury would not have convicted her in spite of the testimony of the victim's neighbor, the admissions that Ms. Wooley made to witness Tabitha Chandler, the numerous photos of the victim's injuries, and the photos of the physical damage Ms. Wooley caused to the victim's personal property inside her house.

Likewise, if the Superior Court had kept out the one sentence, amounting to two lines in over 500 pages of trial transcript, about some vague prior harmful behavior of Ms. Wooley, the jury would not have believed that Ms. Wooley acted in conformity and would not have been prejudiced against her and would not have convicted her. Ms. Wooley is therefore arguing to this Court that the one sentence regarding prior bad acts, when combined with the other alleged evidentiary error, was so powerful as to taint all of the remaining incriminating evidence against Ms. Wooley.

Ms. Wooley's argument on cumulative error not believable. The Superior Court did not err, but even if it had, the errors were not so egregious in their cumulative effect as to deny Ms. Wooley a fair trial when the sheer mountain of evidence weighed in favor of conviction.

## VII. CONCLUSION

For the reasons stated above, the State respectfully requests that the convictions and sentencing of Ms. Wooley be affirmed.

DATED this 24 day of April, 2020.



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