

67446-3

67446-3

NO. 67446-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TYSON WHITFORD,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly refuse to give a self-defense instruction?

2. Did the trial court properly exercise its discretion to exclude evidence of the victim's reputation for being quarrelsome, aggressive, and untruthful?

3. Did the trial court properly exercise its discretion to exclude cross-examination about specific instances of alleged untruthfulness of the victim and his wife?

4. Is Whitford entitled to a new trial based upon the prosecutor's isolated comment during rebuttal argument referencing facts not in evidence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

In 2010, Tyson Whitford was charged in King County Superior Court with assault in the second degree with a deadly weapon enhancement, for his assault of Kerry Mason. CP 5. Following a jury trial, he was found guilty as charged. CP 99-100. Whitford was sentenced in July 2011 to a standard range sentence of 25 months of incarceration. CP 173-81. He appealed. CP 182.

2. SUBSTANTIVE FACTS

a. The Crime.

A dispute arose between Tyson Whitford and the victim, Kerry Mason, over a car dolly. CP 3-4, 6; 5RP¹ 86-105. Mason and his wife, Deborah Porter, owned the dolly. 4RP 133-34; 5RP 83. They stored it at the home of Perry McElroy. 4RP 134-36; 5RP 86-87; 6RP 146-47. Whitford lived with McElroy for a time. 5RP 134; 6RP 144.

Whitford told Mason that he wanted to buy the dolly. 5RP 87. Mason told Whitford he would sell the dolly to him for \$500. Id. Sometime later, Whitford again expressed interest in the dolly, and Mason told him that he could still have it for \$500, but he needed to pay within one week. 5RP 90.

After a week passed without hearing from Whitford, Mason left Whitford a phone message asking him to let Mason know if he was still interested in the dolly. 5RP 101. When Mason had not heard from Whitford, he went to McElroy's house to retrieve the dolly so that he could sell it on Craigslist. 5RP 101-02; 6RP 149.

When Mason and Porter arrived at McElroy's home, they observed that someone had put locks on the dolly. 4RP 141-42; 5RP

¹ The Verbatim Report of Proceedings consists of 10 volumes and will be referred to as follows: 5/26/11 (1RP), 5/31-6/2/11 (2RP), 6/6/11 (3RP), 6/7/11 (4RP), 6/8/11 (5RP), 6/9/11 (6RP), 6/13/11 (7RP), 7/1/11 (8RP), 7/8/11 (9RP), 7/15/11 (10RP).

102-03. McElroy was present, but Whitford was not. 5RP 102.

Mason sawed the locks off the dolly, and he and his wife took it back to their condo. 4RP 142; 5RP 103.

McElroy called Whitford while the Masons were at the house retrieving the dolly. 6RP 153-54. By the time Whitford arrived, Mason and his wife had already left with the dolly. 6RP 82-83, 155.

When Mason arrived at his condo, he enlisted the help of his neighbor, Mark Denton, to move the dolly into a parking spot. 4RP 30, 144; 5RP 104-05. Bruce Wade, who also lived in the condo complex, was walking by as the men unloaded the dolly, and stopped to talk to Denton. 3RP 53-57; 4RP 144; 5RP 104-05. Wade had met Denton before, but did not know Mason. 3RP 54-56.

While they were unloading the dolly, Whitford and his girlfriend, Nicole Broughton, arrived in a white van. 4RP 38; 5RP 105-06. Whitford got out of the van and began yelling at Mason. 3RP 63; 4RP 38, 145; 5RP 106. Mason yelled back at Whitford; both men were angry. 3RP 63; 4RP 42, 145; 5RP 106-07; 6RP 83-84. Mason repeatedly told Whitford to leave. 4RP 44, 145; 5RP 107-08. Broughton and Porter were also yelling at each other. 4RP 43, 146, 151-52; 5RP 121; 6RP 119, 121.

According to Wade, Denton, Porter and Mason, during the verbal altercation Whitford suddenly took out a baton or club and

struck Mason repeatedly in the head and arm with it. 3RP 65-69; 4RP 44, 51, 58-59, 148; 5RP 109, 111-12. No one, except for Broughton, testified that Mason ever struck or pushed Whitford.² 3RP 64, 79; 4RP 56-57, 147; 5RP 109-10, 118-19. According to Denton, the only "struggle" occurred after Whitford began beating Mason with the baton, and was due to Mason trying to deflect the blows from the baton. 4RP 50-51.

Immediately after beating Mason with the baton, Whitford and Broughton got back into the van and quickly left. 3RP 71-72; 4RP 44, 159; 5RP 121. Mason was bleeding from the head. 3RP 72; 4RP 63, 150; 5RP 13, 122-23. The police were called. 4RP 63, 159; 5RP 11-12, 123. Denton took Mason to the hospital, where his head wound was stapled. 4RP 66-67; 5RP 123.

The police could not locate Whitford or his van that day. 5RP 26-27. He was arrested some time later. 6RP 32.

b. The Defense.

Whitford did not testify. 6RP 187. Broughton testified that Mason had agreed to sell the dolly to Whitford for \$300, but he had to pay within a week. 6RP 77. Broughton testified that she and Whitford

² Broughton's testimony on this point was equivocal; when asked if she saw that occur, her testimony was, "I don't know. I mean, I don't know. I think [he] did, but I don't know." 6RP 124.

discovered their locks had been cut from the dolly. 6RP 81-82. They drove to Mason's condominium complex and saw Mason unloading the dolly. 6RP 83. Broughton and Whitford got out of the van, and "it was a yelling match from the minute [they] pulled up." Id. Broughton testified that Mason was very angry, that he was screaming and cursing, and that his arms were "flying around." 6RP 84. She confirmed that Mason was telling Whitford to leave. Id. She testified that Whitford was not angry, just "upset." 6RP 118.

According to Broughton, Whitford was standing by the driver's side of the van, and she was near the passenger side. 6RP 88. She testified that Mason came "running towards" Whitford. 6RP 88-89. She told the jury that she and Whitford "made eye contact," and that they both got back into the van and left. 6RP 89-90. She testified that Whitford did not have a weapon and denied that Whitford ever struck Mason, maintaining that all Whitford did was get into the van and leave. 6RP 126, 131. Broughton testified that a day or two after the altercation, Whitford noticed blood on the driver's side of the van and pointed it out to her. 6RP 127, 129-31. She testified that there were large mirrors on the van, and speculated that Mason may have struck his head on the mirror when running toward Whitford. 6RP 93-97, 131-32. Broughton did not actually see Mason strike his head on the van. 6RP 125.

c. The Nielsons.

During a pretrial interview of Mason and Porter,³ Whitford's lawyer learned of an unrelated dispute involving the car dolly. CP 7-8. The Masons had sued a man named Brian Nielson for possession of the dolly. CP 7. After learning of the lawsuit, Whitford's attorney located and interviewed Nielson. Id.

Whitford learned that Nielson and his wife had met the Masons through an online social group called "X Marks the Scot." CP 7. The two couples went on a vacation together in 2009. Id. The Nielsons owned an RV, and the Masons purchased the car dolly specifically for the vacation--so that the Nielsons could pull the Masons' car behind the RV. Id. According to Brian Nielson, the parties agreed to split the gasoline for the trip. Id.

However, Nielson complained that during the trip, the Masons "fought the whole time," that Kerry Mason "drank excessively -- sometimes passing out drunk on the lawn or picnic table," and that he would become "quick to anger, aggressive, abusive and explosive." CP 8. Moreover, according to Nielson, when it came time to put gasoline in the RV, the Masons "disappeared." Id. Nielson said that he confronted Kerry Mason about the gasoline, and Mason told him

³ For ease, the State will refer to Mason and his wife as "the Masons." The State means no disrespect to Ms. Porter.

that he and his wife had run out of money. Id. But Nielson "observed that [the Masons] were always able to buy food for themselves or alcohol as well as other items." Id.

Apparently, there was a blow-up between the Masons and the Nielsons sometime during the vacation. CP 8. The Masons left in their car, leaving the car dolly attached to the Nielsons' RV. Id. The Nielsons returned to Washington with the dolly. Id. Later, the Masons filed a small claims suit to get the dolly back from the Nielsons. Id. The Masons sought \$800 from the Nielsons for the dolly. Id. The Nielsons were incensed, as they believed the Masons to have shirked on their half of the expenses for the vacation as well as the cost to bring the dolly back and store it, and because they understood the Masons had only paid \$300 for the dolly. CP 8-9. Brian Nielson ultimately gave the dolly back to the Masons. CP 9.

According to Nielson, Kerry Mason had a reputation within the "X Marks the Scot" group for "drinking excessively, being aggressive and abusive and untruthful." CP 9.

d. Defense Motions *In Limine*.

On the day of trial, Whitford disclosed that he planned to introduce testimony from the Nielsons. 1RP 10, 14. Whitford made an offer of proof regarding his self-defense claim, specifically that Broughton would testify that Mason "became enraged and attacked

[him] making it necessary for [him] to retreat into his van." CP 10.

Whitford characterized his "defensive act" as closing "the door of the van thereby hitting Mr. Mason in the head with the industrial mirror attached to the door." CP 10-11.

Whitford moved *in limine* to allow testimony from the Nielsons. CP 9-13, 14-18; 2RP 66-67. Specifically, Whitford sought to introduce through Brian Neilson evidence that Mason had a reputation within the "X Marks the Scot" social group for being "quarrelsome and aggressive." 2RP 66. He argued the evidence was admissible under ER 404(a)(2), as a character trait pertinent to his self-defense claim. CP 10; 2RP 66.

Whitford also sought to introduce testimony from Nielson, pursuant to ER 608(a), that Mason had a reputation for being "untruthful" within the "X Marks the Scot Community." CP 11-12; 2RP 66.

Finally, Whitford sought to cross-examine both Mason and Porter under ER 608(b) about "a pattern of untruthfulness" during their trip with the Nielsons. CP 12-13; 2RP 66-67. Specifically, Whitford wanted to question them about "lying" about running out of gas money, as well as claiming \$800 for the dolly in the subsequent lawsuit, when they only paid \$300 for it. CP 13.

After much argument, the court excluded evidence of Mason's reputation for "quarrelsome and aggressive" behavior, as well as evidence of his reputation for untruthfulness. The court found that Whitford had failed to establish that the "X Marks the Scot" community was sufficiently general and neutral. 2RP 118-19, 129.

The court left some room for cross-examination pursuant to ER 608(b) about specific conduct that went to the issue of the Masons' credibility. 2RP 119-20. However, in order to "avoid objections at trial," the court wanted a clearer understanding of exactly what questions would be asked. 2RP 119.

Prior to testimony, Whitford moved the court to reconsider the admissibility of reputation evidence. CP 42-48; 3RP 21. Whitford presented additional information regarding "X Marks the Scot," as well as Nielson's and Mason's involvement in the organization. CP 42-43.

The court denied the motion to reconsider, finding that there was still an insufficient showing that the organization was general and neutral. 3RP 29-30. Moreover, the court pointed out that the Nielsons had "unhappy" experiences with Mason, and that they clearly had a bias. 3RP 28. The court stated that it did "not have a high degree of confidence that this is a reflection of the opinion" of the "X Marks the Scot" community. Id. The court noted that there had been no factual information provided as to Mason's specific involvement in the

organization or how its members would be well enough acquainted with him to know his disposition; there were merely assertions that Mason was quarrelsome, aggressive and untruthful. 3RP 28-29.

e. The Trial.

During cross-examination of Deborah Porter, Whitford inquired about specific instances of conduct involving the Nielsons. 4RP 163-67. Despite a pretrial acknowledgment from Whitford's counsel that pursuant to ER 608(b), he would not be allowed to admit extrinsic evidence in order to prove the conduct,⁴ he demonstrated an inability to properly confine his questioning to the parameters of the rule:

DEFENSE COUNSEL: So what are the names of those people that you went [on vacation] with?

PORTER: The Nielsens.

DEFENSE COUNSEL: And specifically the names?

PORTER: I've been trying to forget them. Penny and I can't remember his first name. Mr. Nielsen.

DEFENSE COUNSEL: Could it be Brian Nielsen?

PORTER: It could be.

DEFENSE COUNSEL: Would it help if I refresh your recollection from the civil lawsuit filed.

PROSECUTOR: Objection Your Honor.

THE COURT: The objection is sustained.

⁴ Whitford acknowledged that, "unfortunately, per the rule, I'm stuck with the answers. I can't bring in intrinsic [sic] evidence." 2RP 104.

DEFENSE COUNSEL: And you said something there, why did you want to forget about the Nielsens?

PORTER: Because they are not nice people.

DEFENSE COUNSEL: I see. Well, you may be surprised to know that they don't have too many nice things to say about you.

PROSECUTOR: Objection Your Honor.

THE COURT: The objection is sustained.

...

DEFENSE COUNSEL: And during that time, were you supposed to contribute for gas?

PORTER: He did say something about we were going to take turns. So, they would take turns. They would fill it up one time and we would fill it up another time.

DEFENSE COUNSEL: Your testimony here is that you actually did fill it up?

PORTER: Yes we did.

DEFENSE COUNSEL: Would you be surprised to know that ...

PROSECUTOR: Objection Your Honor.

THE COURT: Objection sustained.

4RP 163-65. Shortly after it became apparent that Porter was not going to agree with the Nielsens' version of events, Whitford inquired:

DEFENSE COUNSEL: So that was the only argument you say occurred?

PORTER: The only one I can remember.

DEFENSE COUNSEL: Did your husband ever get drunk and pass out?

PROSECUTOR: Objection Your Honor.

THE COURT: The objection is sustained.

4RP 166-67. The State asked for a sidebar, at which time the jury was excused. 4RP 167.

The court indicated that the cross-examination was "far afield" of the type of questioning it had anticipated, specifically noting the impropriety of questions about Mason passing out drunk. 4RP 174-75. The court asked for clarification as to exactly what it was that Whitford was planning to ask Mason and Porter that would tend to show they were untruthful. 4RP 169-71. The court also noted that it was re-examining its prior decision to allow cross examination under ER 608(b), stating that it was "becoming concerned" that "whatever probative value that this line of inquiry may have is substantially outweighed, not so much by any unfair prejudice, but certainly misleading the jury and prolonging the trial." 4RP 175.

The court ultimately excluded further cross-examination about the Nielson trip, and instructed the jury to disregard the previous testimony as "not relevant." 4RP 177-78.

Prior to cross-examining Mason, Whitford presented the court with the specific areas of inquiry he intended to pursue under

ER 608(b). CP 49-50; 5RP 48-50. After argument, the court determined that the probative value of the questioning was substantially outweighed by the likelihood of confusing and misleading the jury, "mixing the issues up," and unduly delaying the trial. 5RP 68.

Noting that ER 608(b) required the specific conduct to be probative of untruthfulness, the court stated, "Really, all we ultimately have here is a dispute." 5RP 68. The court prohibited Whitford from cross-examining Mason about the Nielson trip, finding that whether the Masons were able to pay for gas to get home after claiming to have run out of money when it was their turn to fill the RV was irrelevant to the issues at trial. 5RP 70-71.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REJECTED WHITFORD'S PROPOSED SELF-DEFENSE INSTRUCTION.

Whitford argues that the trial court erred when it declined to give his proposed instruction on self-defense. This claim should be rejected, as Whitford did not produce sufficient evidence that he acted to defend himself.

Jury instructions are sufficient if they are supported by substantial evidence, permit each party to argue its theory of the case, and properly inform the jury of the applicable law. State v. Clausing, 147 Wn.2d 620, 625, 56 P.3d 550 (2002). An instruction not

supported by the evidence is improper. State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986) (citing State v. Gibson, 32 Wn. App. 217, 223, 646 P.2d 786 (1982)).

When determining whether the evidence was sufficient to support giving an instruction, the appellate court views the evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). However, "[t]o raise self-defense before a jury, a defendant bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense[.]" State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

If a defendant denies the act underlying the charged crime, a self-defense instruction is unwarranted. State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). In the absence of any evidence that the defendant intentionally used force, a self-defense instruction is inappropriate. State v. Hendrickson, 81 Wn. App. 397, 400, 914 P.2d 1194 (1996); see also Gogolin, 45 Wn. App. at 643-44 (self-defense instruction unwarranted where defendant claimed that he did not know if he touched the victim and that she accidentally fell down the stairs while chasing him).

While claims of self-defense and accident are not necessarily mutually exclusive, there must be sufficient evidence of both to justify a self-defense instruction. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (citing State v. Callahan, 87 Wn. App. 925, 931-33, 943 P.2d 676 (1997)). The defendants in both Werner and Callahan testified that they intentionally displayed firearms because they feared for their safety, but claimed that the weapons fired accidentally. Werner, 170 Wn.2d at 336; Callahan, 87 Wn. App. at 933. On appeal, the courts in each case determined that there was sufficient evidence of both accident and self-defense to warrant a self-defense instruction. Werner, 170 Wn.2d at 338; Callahan, 87 Wn. App. at 933-34.

Similarly, in State v. Dyson, 90 Wn. App. 433, 434, 952 P.2d 1097 (1997), the defendant testified that, after the victim put him in a chokehold and he began to lose consciousness, he used "passive resistance" and "raised [his body] up" in a manner designed to release the victim's grip. 90 Wn. App. at 435-36. This Court found that a self-defense instruction was appropriate because Dyson had produced sufficient evidence that the victim's injuries occurred during the course of a struggle wherein Dyson intentionally used force ("rose up" to defend himself), and in so doing accidentally caused the victim to lose his balance and fall through a glass door. Id. at 440.

Both Dyson and Callahan distinguished Gogolin, where a self-defense instruction was appropriately rejected because the defendant denied the use of *any* intentional force. The Callahan court noted:

Gogolin testified that before the alleged assault, he and the victim argued, she "came at [him] swinging," he raised his hands and attempted to push her away, and she fell down the stairs. He could not recall ever actually touching her. Without evidence that Gogolin intentionally used force in response to his subjective fear of the victim, his self-defense theory was doomed, regardless of whether he testified that the victim's injury was accidental.

Callahan, 87 Wn. App. at 932 (citing Gogolin, 45 Wn. App. at 643-44).

Therefore, Callahan, Werner and Dyson are best understood as presenting self-defense claims through the commission of an intentional act, coupled with the accidental and unintended infliction of injury. See Callahan, 87 Wn. App. at 932-33 ("[A]ssuming sufficient evidence to support a self-defense claim, the law permitted Callahan to assert defenses of self-defense and accidental infliction of injury.").

Here, Whitford did not produce any evidence of an intentional act done in self-defense. Through his girlfriend, he denied the acts alleged by the State (using a baton to beat the victim) and he failed to produce any evidence of an intentional act done in self-defense. As such, the court properly denied a self-defense instruction.

The State's witnesses all testified that, during the course of a heated verbal argument, Whitford hit Mason repeatedly on the head

with a police baton, or some sort of weapon, causing a bloody laceration to Mason's head. 3RP 65-69; 4RP 44, 51, 58-59, 148; 5RP 109, 111-12. None of the witnesses saw Mason hit or push Whitford. 3RP 64; 79; 4RP 56-57, 147; 5RP 109-10, 118-19.

Whitford did not testify. 6RP 187. His girlfriend, Nicole Broughton, told the jury that during a verbal yelling match, Mason was confrontational and angry, and that he "came running" toward Whitford with his arms flailing. 6RP 83, 86, 87-90, 124. She testified that when Mason ran toward Whitford, both she and Whitford got into their van and drove away. 6RP 88-90.

Broughton told the jury that she never saw Whitford with a police baton, pipe, or weapon of any kind. 6RP 98-99, 140-41. She testified that "all [Whitford] did was get in the van to get away from [Mason]." 6RP 131. In fact, Broughton specifically testified that she did not believe it was possible that Whitford pulled out a weapon and hit Mason, saying "No, not in my--I can't imagine that happening." 6RP 140. She testified, "I saw [Whitford] when he got out of the car and when he got in the car and there was [sic] no weapons. I think I would have noticed for sure if there was something there." 6RP 141.

Rather, Broughton speculated that Mason *might* have hit his head on the mirror of Whitford's van. 6RP 131-32. Furthermore, she did not clarify whether her speculation was that Mason hit his head on

the mirror as he ran toward Whitford, or if Whitford accidentally struck Mason on the head with the mirror as he pulled the door shut. No one, including Broughton, testified that they actually observed Mason hit his head on the van mirror, much less that they observed Whitford accidentally strike Mason with the mirror as he shut the van door. During argument about the jury instructions, the trial court accurately described Whitford's defense:

The defense is arguing that he intentionally slammed the door as retreating from a charging Mr. Mason, and that that was the intent, and then harm resulted.

7RP 26.

Despite Whitford's attempt (during oral argument to the court and closing argument to the jury) to characterize Broughton's testimony as supporting some sort of altercation,⁵ she never testified that any struggle occurred between Whitford and Mason. She was adamant that Whitford did not assault Mason as Mason ran toward him; rather, she testified that Whitford merely retreated into the van and they left.⁶ 6RP 88-90, 140-41.

Therefore, unlike Werner and Callahan, Whitford produced no evidence that he intentionally acted to defend himself, accidentally

⁵ 7RP 8, 11-12, 67.

⁶ Whitford's position that he did not intentionally strike Mason was clear. See 2RP 96 ("Ms. Broughton is very clear that Mr. Whitford did not raise a hand. He was attacked. He was hit and retreated.").

injuring Mason in the process. Had Broughton testified that she actually observed Whitford shut the van door to get away, striking Mason with the mirror as he did so, the instruction may have been appropriate under Dyson. However, mere speculation by Broughton that the scenario *may* have occurred was insufficient for Whitford to meet his burden to produce "some evidence" of self-defense.

The scenario described by Broughton is much more akin to that in Gogolin, where the defendant was not entitled to a self-defense instruction because he did not produce sufficient evidence of an intentional act. Gogolin, 45 Wn. App. at 643-44.

Whitford, through his girlfriend, could not deny the act that formed the basis of the charge and then claim that he was entitled to a self-defense instruction premised on sheer speculation. There was no evidence that would justify a self-defense instruction in this case. Accordingly, the trial court's refusal to provide one was appropriate.

2. THE COURT PROPERLY EXCLUDED EVIDENCE OF THE VICTIM'S REPUTATION.

- a. The Victim's Reputation For "Quarrelsome And Aggressive" Behavior Was Irrelevant Because Whitford Did Not Establish Any Evidence Of Self-Defense.

Whitford claims that the court erred when it excluded evidence that victim Mason had a reputation for "aggression" under ER 404(a)(2) and ER 405(a). Whitford argues that the evidence was

relevant to his self-defense claim, as it established that Mason was the first aggressor. Brf. of Appellant at 17-21. Whitford's claim must be rejected because Mason's reputation for being "quarrelsome and aggressive" was not relevant when Whitford denied that he intentionally acted to defend himself against Mason.

The admissibility of character evidence to prove specific conduct is governed by ER 404. ER 404(a)(2) allows a defendant to offer "evidence of a pertinent trait of character of the victim of the crime." However, ER 405(a) requires that proof of character must be by evidence of reputation in the community. State v. O'Neill, 58 Wn. App. 367, 370, 793 P.2d 977 (1990).

When a defendant alleges self-defense, the victim's reputation for quarrelsome or violent behavior may be admissible to support an inference that the victim was the aggressor. Callahan, 87 Wn. App. at 934; State v. Adamo, 120 Wash. 268, 270, 207 P. 7 (1922). The party seeking to admit evidence must establish a foundation for it. State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

The testimony can only be provided from a witness who is knowledgeable about the defendant's reputation in the community. Callahan, 87 Wn. App. at 934. Additionally, the defendant must establish that the witness's testimony is based on the community's perception of that person with regard to the character trait at issue. Id.

at 935. The testimony cannot be based upon the personal opinion of the impeaching witness. State v. Lord, 117 Wn.2d 829, 873, 822 P.2d 177 (1991); State v. Mercer-Drummer, 128 Wn. App. 625, 632, 116 P.3d 454 (2005).

Moreover, the community from which the opinion is sought must be neutral and general. Land, 121 Wn.2d at 500. Factors relevant to this determination include: "the frequency of contact between members of the community, the length of time a person is known in the community, the role a person plays in the community, and the number of people in the community." Id.

A decision as to whether the foundation for a valid community has been established is reviewed for abuse of discretion. Land, 121 Wn.2d at 500. The court's decision "will be reversed only if no reasonable person would have decided the matter as the trial court did." State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). See also Land, 121 Wn.2d at 500 ("A trial court abuses its discretion when it acts in a manner that is manifestly unreasonable or based on untenable grounds or reasons.").

Whitford characterized his defense as self-defense. CP 10-11. He anticipated that the evidence would show that Mason attacked him, causing Whitford to retreat into his van, and while shutting the door he accidentally struck Mason in the head with the van's mirror. CP 10-11;

2RP 89. Pursuant to this claim, Whitford sought to introduce evidence from Brian Nielson that Mason had a reputation within the online social group "X Marks the Scot" for being "quarrelsome and aggressive." CP 10-11, 16; 2RP 65-66.

The trial court accepted Whitford's offer of proof with respect to how he would establish his self-defense claim, but excluded Mason's reputation for being "quarrelsome and aggressive," finding that the community for that reputation was not sufficiently general and neutral. 2RP 118, 129; 3RP 26-30. Moreover, the court was not convinced that Nielson's proposed testimony was anything more than his own personal opinion of Mason. 2RP 119; 3RP 28.

For the reasons outlined above in Sec. C.1, Whitford failed to establish that he acted in self-defense. As such, Mason's reputation was irrelevant and inadmissible. See In re Pers. Restraint of Benn, 134 Wn.2d 868, 895, 952 P.2d 116 (1998) (evidence of a victim's reputation for violence is not admissible to establish a claim of self-defense, but only to support such a claim once some proof of the defense has been introduced).

Because Mason's reputation for being "quarrelsome and aggressive" was irrelevant in the absence of a valid self-defense claim, the evidence was properly excluded.

b. The Court Properly Exercised Its Discretion When It Excluded The Victim's Reputation For Untruthfulness.

Whitford also argues that the court improperly excluded evidence of Mason's reputation for untruthfulness pursuant to ER 608(a). Brf. of Appellant at 23-25. This Court should reject Whitford's argument, because he failed to establish that the proposed "community" was sufficiently general and neutral, and he failed to establish that the testimony was more than the impeaching witness's own personal opinion.

ER 608(a) permits a party to introduce evidence of a witness's reputation for untruthfulness, for the purpose of impeaching credibility. However, the evidence must meet five criteria:

The first element is the foundation for the testimony--the knowledge of the reputation of the witness attacked. Second, the impeaching testimony must be limited to the witness's reputation for truth and veracity and may not relate to the witness's general, overall reputation. Third, the questions must be confined to the reputation of the witness in his community. Fourth, the reputation at issue must not be remote in time from the time of the trial. **Finally, the belief of the witness must be based on the reputation to which he has testified and not upon his individual opinion.**

Lord, 117 Wn.2d at 873 (quoting 5A Karl B. Tegland, Wash. Prac., Evidence, sec. 231 at 202-04 (3d ed. 1989)) [emphasis added].

To be admissible, the witness's reputation for untruthfulness must be shown to exist within a neutral and generalized community.

State v. Gregory, 158 Wn.2d 759, 804-05, 147 P.3d 1201 (2006) (quoting Land, 121 Wn.2d at 500). As noted above, the relevant factors include "the frequency of contact between members of the community, the length of time a person is known in the community, the role a person plays in the community, and the number of people in the community." Land, 121 Wn.2d at 500. The trial court is afforded wide discretion in determining whether a party has established a proper foundation for such reputation testimony. Gregory, 158 Wn.2d at 804-05.

Here, the trial court did not abuse its discretion when it excluded reputation evidence under ER 608(a). Whitford failed to establish that "X Marks the Scot" was a general and neutral community. Moreover, despite Whitford's attempt to cast Brian Nielson's proposed testimony as evidence of Mason's "reputation," it was not at all clear that the testimony was anything more than Nielson's own personal opinion of Mason. There was significant bad blood between the Nielsons and the Masons, stemming from a vacation that went awry and culminating in a lawsuit. CP 7-9; 4RP 164-67.

During motions *in limine*, the court questioned Whitford's attorney as to how it could be sure that the testimony was "the opinion of this community and not just the opinion of the Nielsens [sic], who

are unhappy about all of their experiences with Mr. Mason and given the opportunity would certainly vent that here in the courtroom."

2RP 90. Whitford's proffer fell far short of answering that question.

Based on the requirements of ER 608(a) and the Land factors, the trial court acted well within its discretion in excluding the proposed testimony. Although Whitford contended that Nielson had met approximately 100 members of "X Marks the Scot," it was unclear exactly how many total individuals comprised the organization. CP 43; 2RP 95. Moreover, although Nielson himself had apparently met 100 members, he had only spoken to 15-25 of them about Mason. CP 43. Thus, it was not at all clear that Mason had any particular reputation in the community itself, rather than within a small sub-group. Additionally, Whitford provided no information about the substance of Nielson's conversations, or how the topic of Mason came up, such that the court could be sure the testimony would accurately reflect Mason's reputation in the community as a whole, and not merely Nielson's own opinion.

There was no evidence that Mason played any particular role in the organization. CP 17, 43; 2RP 93-94. The only hint at the frequency of contact between Mason and the group appeared to be that Mason had shown up for a dozen social events over the course of two to three years. CP 43; 2RP 94. There was no indication that

Mason spent any time with any members of the organization other than during the isolated events he had attended. CP 43; 2RP 95. There was no basis for the court to conclude that the members of the group would have any basis to know Mason's character based merely on his attendance at a small number of social functions.

In distinguishing the case before it from Land, the trial court noted that the defendant in Land was a salesman who operated in a close-knit community, had had numerous personal contacts in the community for several years, and had a reputation that was well-known within the community. 2RP 93. When denying Whitford's motion to reconsider, the trial court stated:

Factually, we understand that Mr. Nielson and his wife have had very unhappy experiences with Mr. Mason and so they clearly have a bias. And I understand it's reputation evidence, but the Court does not have a high degree of confidence that this is a reflection of the opinion, a neutral and generalized opinion of a particular organization . . . I think [X Marks the Scot] is readily distinguished from Land, which was a close-knit, sort of like the workplace type situation . . . where the defendant had been a salesman, and the court describes it as numerous personal contacts with various members of the industry . . . the Court does not believe that it has been shown that Mr. Mason is so involved in it that members would be well-acquainted with his quarrelsome and aggressive disposition and untruthfulness, if that indeed is something that they experienced. It did not appear he had any leadership role, other than that he was there, he was present, he was seen, and involved in a number of social events.

3RP 30.

This Court cannot say that the trial court's decision was manifestly unreasonable or based on untenable grounds. Because Whitford failed to establish that the evidence was properly admitted under ER 608(a) and Land, supra, the trial court did not abuse its discretion when it excluded evidence of Mason's alleged reputation.

3. THE COURT PROPERLY EXCLUDED CROSS-EXAMINATION REGARDING SPECIFIC INSTANCES OF MISCONDUCT PURSUANT TO ER 608(b).

Whitford argues that the court erred when it prohibited him from impeaching the Masons' credibility with specific instances of untruthfulness pursuant to ER 608(b). He is wrong; the court properly exercised its discretion to exclude speculative cross-examination on collateral matters that would have served only to mislead the jury, confuse the issues and unduly delay the trial.

A defendant has the right to confront and cross-examine the witnesses against him. Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2003); U.S. Const. amend. VI; Wash. Const. art. I, § 22. That right, however, is subject to the limitation that the evidence must be relevant. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

Under ER 401 and 402, evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is generally admissible. Nonetheless, 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." ER 403.

Pursuant to Evidence Rule 608(b), a witness's credibility may be attacked by specific instances of conduct. Specifically, ER 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness.

Thus, according to the plain language of the rule, specific instances of conduct may only be inquired into if they demonstrate a person's general disposition for truthfulness or untruthfulness. ER 608(b). If a specific instance of conduct is not probative of a person's veracity, it is

not relevant and is not admissible. ER 608(b); State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991).

Furthermore, even if a specific instance of conduct is probative of the witness's character for untruthfulness, and therefore relevant, the court must balance the defendant's right to introduce the evidence against the State's interest in precluding prejudicial evidence that disrupts the fairness of the proceeding. State v. McDaniel, 83 Wn. App. 179, 920 P.2d 1218 (1996), rev. denied, 131 Wn.2d 1011 (1997). "The court should apply the overriding protection of ER 403 (excluding evidence if its probative value is outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury) and of ER 611 (prohibiting harassment and undue embarrassment)." Wilson, 60 Wn. App. at 893.

This Court reviews the trial court's exclusion of such evidence for an abuse of discretion. State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001); see also ER 611(a) (the trial court shall exercise reasonable control over examining witnesses and presenting evidence so as to effectively ascertain the truth, avoid needless consumption of time and protect the witnesses from harassment).

A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. McDaniel, 83 Wn. App. at 185; State v. Posey, 161 Wn.2d

638, 648, 167 P.3d 560 (2007). The trial court's balancing of the evidence is a matter within the court's discretion, which this Court will overturn "only if no reasonable person could take the view adopted by the trial court." Posey, 161 Wn.2d at 648 (citing Hudlow, 99 Wn.2d at 17).

Additionally, the Court reviews a trial court's relevancy determinations for manifest abuse of discretion. Gregory, 158 Wn.2d at 835. A trial court, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and, therefore, the prejudicial effect and relevancy of evidence. Posey, 161 Wn.2d at 648.

In McDaniel, supra, a prosecution for assault, the defendant should have been permitted to impeach the victim's credibility by showing that she had committed perjury in a related civil proceeding when she lied about her drug use. 83 Wn. App. at 186. The evidence was germane because her drug use may have impeded her ability to perceive who it was that kicked her, and a fact of consequence was the assailant's identity. Id. at 186. Additionally, the victim was motivated to minimize her drug use because she was on probation, a condition of which was that she refrain from drug use. Id.

In reversing McDaniel's conviction, this Court stated that "[t]he fact of the lie and the motivation for the lie are highly relevant." Id. Because the victim had lied under oath for her own purposes in the

related civil proceeding, it was a question for the jury whether she would lie under oath for her own purposes in the criminal proceeding.

Id.

Washington cases have allowed cross-examination under ER 608(b) where the specific instance of conduct is germane to the trial issues. In Wilson, supra, the trial court permitted the State to cross-examine the defendant's witness (his wife) regarding a prior false statement that she had made under oath, on a Department of Social and Health Services financial assistance form. 60 Wn. App. at 891. The court found that the prior false statement was not only relevant to the witness's veracity but also germane to the issues at trial. Id. at 893.

In contrast, if the evidence at issue is merely collateral to the questions presented, the trial court acts well within its discretion by excluding the evidence. See State v. Griswold, 98 Wn. App. 817, 830-31, 991 P.2d 657 (2000), abrogated on other grounds by State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003) (the witness's prior false statement was "clearly collateral" and "not germane to the guilt issues here.").

a. The Court Properly Excluded Cross-Examination Of The Masons Regarding Their Vacation With The Nielsons.

Pursuant to ER 608(b), Whitford sought to cross-examine Mason and Porter about the trip that they took with the Nielsons. CP 12-13, 18-19, 50; 2RP 104. Specifically, Whitford wanted to question them about their agreement to pay for gasoline during the trip, and about their alleged failure to do so. CP 50. According to Nielson, Mason told him that he had run out of money, and yet he later produced enough money to pay for his own gasoline to get home. Id.

Whitford also wanted to question the Masons about the fact that they had paid \$300 for a car dolly, so that the Nielsons could tow the Masons' car behind their RV on the trip. Id. Later, when the vacation went sour and the two couples parted ways, the Nielsons had to bring the empty car dolly back to Washington, and Whitford wanted to cross-examine the Masons about their failure to pay for the expenses of the towing. Id.

Finally, Whitford intended to question the Masons about the small-claims lawsuit they had filed against the Nielsons to get the dolly back. Id. Whitford believed that their claim for \$800 was dishonest, as the Nielsons believed that the Masons had only paid \$300 for the dolly. Id.

The court's decision to exclude this evidence was well within its discretion. Noting that ER 608(b) requires the specific conduct to be probative of untruthfulness, the court stated, "Really, all we ultimately have here is a dispute." 5RP 68. The court was correct; the proposed cross-examination was nothing more than an attempt to rehash an irrelevant dispute between the victim and a third party.

The court made the determination that "whatever probative value that this line of inquiry may have is substantially outweighed, not so much by any unfair prejudice, but certainly misleading the jury and prolonging the trial." 4RP 175. Later, after counsel submitted his proposed areas of cross-examination in written form, the court remarked that the probative value of the questioning was substantially outweighed by the likelihood of confusing and misleading the jury, "mixing the issues up," and unduly delaying the trial. 5RP 68.

The court's reasoning was sound. The proposed cross-examination did not regard a specific instance of conduct that was particularly probative of the Masons' veracity. First, it was not at all clear that the Masons had engaged in any dishonest behavior, as what actually occurred on the vacation was speculative. Porter's version of events during the trip was very different from Brian Nielson's version. CP 7-8; 4RP 165-66. Moreover, even if Nielson's version was accurate, it was only marginally probative of the Masons' veracity.

Telling Nielson that they had run out of money when they had not may have been untruthful, but it does not suggest a general disposition for untruthfulness, and does not particularly bear on the Masons' ability to tell the truth under oath in a court proceeding.

Additionally, claiming \$800 in the small claims lawsuit when they had originally paid \$300 for the dolly does not bear on the Masons' veracity in the slightest. There is no indication of what the dolly was worth. In fact, Mason testified that he had agreed to sell it to Whitford for \$500.⁷ 5RP 87. It is certainly conceivable that when the Masons bought the dolly, they got it at a bargain rate, well below its actual value. Asking \$800 for it does not suggest a problem with the Masons' veracity.

A court may, within its discretion, exclude cross-examination that is vague, speculative, argumentative, or irrelevant. Darden, 145 Wn.2d at 621. The cross-examination that Whitford proposed was just that: vague, speculative and irrelevant. And, as demonstrated during cross-examination of Deborah Porter, it was extremely argumentative:

DEFENSE COUNSEL: And you said something there, why did you want to forget about the Nielsens?

PORTER: Because they are not nice people.

⁷ Deborah Porter recalled that the agreement with Whitford was to sell the dolly for \$600. 4RP 183.

DEFENSE COUNSEL: I see. Well, you may be surprised to know that they don't have too many nice things to say about you.

PROSECUTOR: Objection Your Honor.

THE COURT: The objection is sustained.

4RP 164.

The trial court was in the best position to evaluate the dynamics of the trial, to determine the relevancy of the evidence, and to prevent the introduction of evidence that would disrupt the fairness of the proceeding. Posey, 161 Wn.2d at 648; McDaniel, 83 Wn. App. at 185. Moreover, under ER 611(a)(3), the court had the obligation to protect witnesses from harassment or undue embarrassment. Whitford's proposed cross-examination was an attempt to inject an irrelevant dispute into the trial to make the Masons look bad:

DEFENSE COUNSEL: So that was the only argument you say occurred?

PORTER: The only one I can remember.

DEFENSE COUNSEL: Did your husband ever get drunk and pass out?

PROSECUTOR: Objection Your Honor.

THE COURT: The objection is sustained.

4RP 166-67. The court's decision to prohibit cross-examination on collateral matters was not an abuse of discretion.

b. The Nielson Trip Was Not The Only Evidence Available To Impeach The Masons.

Failing to allow cross-examination of a State's witness as to prior instances of misconduct that bear on untruthfulness is an abuse of discretion when the witness is crucial and the alleged misconduct constitutes the only available impeachment. Clark, 143 Wn.2d at 766. Nevertheless, the proffered misconduct must still be "germane to the issues at trial." State v. O'Connor, 155 Wn.2d 335, 351, 119 P.3d 806 (2005). Once a witness has been impeached, there is less of a need for further impeachment of that witness. Clark, 143 Wn.2d at 766; State v. Martinez, 38 Wn. App. 421, 424, 685 P.2d 650 (1984).

Whitford argues that the Masons were crucial witnesses, and that his proposed cross-examination of them regarding the Nielson trip was the only available impeachment. Brf. of Appellant at 27. He is wrong.

First, Porter was not a crucial witness. Her testimony about the assault was essentially the same as that of two other witnesses (Bruce Wade and Mark Denton). Additionally, although Kerry Mason's status as the victim made him an important witness, it was possible for the State to convict Whitford without his testimony, as both Bruce Wade and Mark Denton observed the assault, and Denton testified as to Mason's injuries.

Finally, both Mason and Porter were impeached by other evidence. Whitford cross-examined Mason about inconsistencies between his testimony and his prior statements to the police.⁸ Whitford's witness, Perry McElroy, directly contradicted Mason's testimony on points relevant to the case.⁹ Additionally, Nicole Broughton testified in a manner that directly contradicted both Mason's and Porter's testimony. She testified that the agreement was for Whitford to buy the dolly for \$300, not the \$500 or \$600 that the Masons testified to. 4RP 183; 5RP 87; 6RP 76. She also testified that Mason charged at Whitford with his arms flailing, which was contrary to what Mason and Porter reported. 6RP 86-88.

Thus, cross-examining the Masons about their claim to not have any gas money during a vacation, and the damages they claimed in a lawsuit unrelated to the assault, was not the only available impeachment. In fact, Whitford presented impeachment evidence relating to matters that were actually central to the issues in the case. There was no abuse of discretion, particularly when the proffered misconduct was not germane to the issues at trial.

⁸ Defense pointed out that Mason had previously told the police that he had been hit with a "solid pipe type object," despite his testimony that he had been struck with an "extendable baton." 5RP 133.

⁹ Mason testified that he borrowed tools from McElroy to cut the locks of the dolly. 5RP 135. McElroy later testified that he had not loaned Mason any tools to cut the locks. 6RP 155.

c. Even If The Court Improperly Excluded The Cross-Examination, Any Error Was Harmless.

The violation of a defendant's right to cross-examine a witness is a constitutional error. McDaniel, 83 Wn. App. at 185. A constitutional error is harmless when it appears, beyond a reasonable doubt, that the error complained of did not contribute to the verdict. State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003).

Even if the court should have allowed Whitford to cross-examine the Masons about their vacation with the Nielsons, it is clear beyond a reasonable doubt that the error did not contribute to the verdict. Mason's and Porter's testimony about the assault was corroborated by Wade and Denton. Wade was an impartial third party, who did not know the Masons or Whitford. Furthermore, as outlined above, the jury was presented with inconsistencies in Mason's own statements about the assault, and was presented with evidence that contradicted both Mason and Porter on issues directly related to the assault. Such impeachment was far more relevant to the Masons' credibility than a prior dispute over gasoline money and a claim for damages in an unrelated lawsuit.

Precluding the cross-examination of evidence only marginally probative of the Masons' credibility did not contribute to the verdict. Any error was harmless.

4. WHITFORD HAS NOT SHOWN THAT HE IS ENTITLED TO A NEW TRIAL DUE TO THE PROSECUTOR'S REBUTTAL ARGUMENT.

Whitford argues that he is entitled to a new trial because of the prosecutor's brief reference during rebuttal argument to matters outside the evidence, specifically, her statement regarding "the doctor, who wasn't able to be here, based on schedules - - ." While the prosecutor's brief remark about the reason the doctor did not testify was inappropriate, the trial court sustained Whitford's objection, and over the course of the trial repeatedly instructed the jury that the arguments of counsel were not evidence.

Moreover, both parties' arguments regarding the victim's injuries were based on the victim's testimony, which included Whitford's extensive cross-examination about a medical report. There is no substantial likelihood that the prosecutor's brief reference to the doctor's absence affected the verdict. Given these facts, Whitford cannot show that he suffered prejudice justifying a new trial.

The law governing Whitford's claim is well-settled. When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

To establish prejudice, Whitford must show a substantial likelihood that the misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Where the defendant objects or moves for a mistrial on the basis of prosecutorial misconduct, the trial court's ruling is entitled to deference on appeal, as it "is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995) (quoting Lord, 117 Wn.2d at 887).

The State acknowledges that the prosecutor's brief statement during her rebuttal argument referring to scheduling conflicts for the doctor improperly referenced facts not in evidence. See State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429 (2005) (comments meant to encourage the jury to render a verdict based on facts not in evidence are improper).

Although the prosecutor's statement was inappropriate, this Court should reverse only if Whitford can show prejudice. Prejudice exists where there is a substantial likelihood that the prosecutorial misconduct affected the verdict. McKenzie, 157 Wn.2d at 52. Juries are presumed to follow the court's instructions to disregard improper evidence. State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994).

Mason testified on direct examination that, after the assault, he went to the hospital where he received seven staples in his head. 5RP 123. During cross-examination, Whitford's counsel repeatedly referred to the medical report, which was not admitted in evidence:

DEFENSE COUNSEL: So when you got to the hospital, did the doctors find that you had a concussion?

MASON: No.

DEFENSE COUNSEL: Did they find that you had an indent on the skull anywhere?

MASON: Yes.

DEFENSE COUNSEL: Really? I have the medical documents, there is nothing - -

PROSECUTOR: Objection, your Honor.

THE COURT: Objection sustained.

DEFENSE COUNSEL: Would you like to look at them?

PROSECUTOR: Objection, your honor [sic].

MASON: You can show them to me, if you want.

DEFENSE COUNSEL: What's that?

MASON: You can show them to me, if you want.

THE COURT: Let's ask a question.

. . .

DEFENSE COUNSEL: Would it surprise you here, it shows no indication of fracture?

PROSECUTOR: Objection, your Honor.

DEFENSE COUNSEL: This is - -

THE COURT: The Court will overrule, allow the question. It may be the most efficient way to proceed.

DEFENSE COUNSEL: Shows no indication of a fracture on radiography, left upper extremity. In other words, nothing except a six-centimeter scalp laceration repaired, that's it.

PROSECUTOR: Objection.

MASON: You said that's an indentation?

DEFENSE COUNSEL: In your skull.

MASON: Wouldn't you say that's an indentation?

DEFENSE COUNSEL: Scalp laceration?

MASON: Uh-huh.

DEFENSE COUNSEL: I think that's a laceration of the skin.

5RP 138-40.

During cross examination of witness Mark Denton, Whitford asked the following questions in regards to the police baton admitted by the State as an illustrative exhibit:

DEFENSE COUNSEL: Are you saying that my client hit Kerry Mason with this in the head and arms? How many times was this?

DENTON: Two in the head and two in the arm that I know for sure, that I saw specifically. He was swinging as he came around the front of the van and as he approached Kerry.

DEFENSE COUNSEL: Yet the medical report only shows one injury to the head.

DENTON: Mm-hmm.

DEFENSE COUNSEL: Just one. There's no lacerations anywhere else. No bumps.

DENTON: I haven't seen the medical report.

PROSECUTOR: Objection your Honor. Defense counsel is testifying.

THE COURT: Objection is sustained.

PROSECUTOR: Thank you.

DEFENSE COUNSEL: He's hitting like this right here (inaudible - loud noise), is that correct? This is a pretty light hit right? It makes a loud noise?

DENTON: Well, what you're doing seems light, yes.

DEFENSE COUNSEL: Yes. Yet, loud noise - - I'm actually hitting it (inaudible). This kind of weapon can at least cause a concussion of some sort, yet in the . . .

PROSECUTOR: Your Honor, objection. Counsel is testifying at length and I would ask that he ask questions of the witness.

THE COURT: The objection is sustained.

4RP 122-23.

At the close of the evidence, Whitford's counsel made the following argument to the jury:

DEFENSE COUNSEL: Why embellishment? If the scene as Mark Denton describes it were to occur, this thing hit Kerry Mason's head - - you can hear that on my head - - if this was any harder than this, it would leave some sort of fracture on the skull. This weapon would leave a fracture if it hit like this, it would leave a mark on the arm, it would leave marks on the body. They describe somewhere between four and eight blows, one to which he went down on one knee. All you've heard as far as evidence is that there was a lesion, skin scraped, some staples, no fracture to the bone, no indentation to the bone. No medical evidence whatsoever. If the action occurred as he describes, the damage would be devastating.

7RP 70.

During rebuttal argument, while referencing the victim's testimony about his injuries, the prosecutor made the following statement:

PROSECUTOR: The fact that defense counsel argues they do not have a burden of proof, I will grant you, defense counsel doesn't have a burden at all in this case, but they are arguing to you, well, it couldn't have been with this baton or asp or club because, well, the injuries don't match. He indicated that, constantly indicated that, you know, it would have been an indentation of the skull or something of that nature.

Well, as you'll recall, Mr. Mason indicated to you that the doctor, who wasn't able to be here, based on schedules

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DEFENSE COUNSEL: Objection, your Honor.

THE COURT: Objection sustained. Let's just reach a conclusion. Thank you.

PROSECUTOR: The argument -- Mr. Mason indicated to you that in fact there was an indentation on his skull. And in addition to that indentation, there were seven staples that were on his head. His head was lacerated. That's not just a bump on the head, that's not a scraping of his head, as defense counsel put it. It's a laceration that required staples . . .

7RP 77-78.

The court sustained Whitford's objection to the prosecutor's improper remark, and the prosecutor then confined her argument to the injuries testified to by the witnesses. 7RP 78-79. Moreover, throughout the trial and in its written instructions, the court repeatedly instructed the jury that the remarks of counsel were not evidence. CP 82; 4RP 67, 110; 7RP 62, 69. A jury is presumed to follow the court's instructions that the arguments of counsel are not evidence. State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

During closing argument, both parties extensively argued their respective theories that the injuries suffered by the victim could have been, or could not have been, made by the type of weapon alleged. 7RP 52-53, 69-70, 74, 77-79. The prosecutor's remark about the

doctor was isolated, brief, and interrupted with an objection that was sustained. 7RP 78. Moreover, the prosecutor herself specifically told the jury, "And the court has instructed you that if there are arguments that either myself or Mr. Pelka make that are not supported by the actual evidence in the case, then not only are you allowed to disregard it, but you must disregard it." 7RP 76.

Whitford points to the jury's request to see the medical report as evidence that the prosecutor's comment resulted in prejudice: "Given that there was no medical testimony and no evidence regarding a medical report, the only source for [the jury's] inquiry must be the prosecutor's reference." Brf. of Appellant at 32. Whitford's argument misstates both the evidence and the jury's request.

First, during trial, Whitford repeatedly drew the witnesses' attention to the medical report, quoting from it extensively during cross-examination despite the fact that it was not admitted in evidence. 4RP 122-23; 5RP 138-40. The witnesses never disagreed with Whitford's recitation of what was in the medical report, the court did not sustain all of the prosecutor's objections to counsel's quoting from the report, and the court did not strike any of the testimony. 4RP 122-23; 5RP 138-40. Therefore, contrary to his claim on appeal, there was evidence regarding the medical report, and the prosecutor's offhand comment was not the only source for the jury's request.

Moreover, Whitford neglects to mention that the jury's request to see the medical report was not an isolated inquiry; rather, the jury also asked to see the police reports and all of the other witness statements at the same time. CP 101. Based on the entire record, there is no reason to believe that the jury was improperly focused on the medical report as a result of the prosecutor's brief remark during rebuttal argument.

Here, the strength of the State's case, in conjunction with Whitford's sustained objection to the prosecutor's isolated remark, makes it highly unlikely that the misconduct affected the verdict. The trial judge, who was in the best position to determine whether or not the comment prejudiced Whitford, denied his motion for a mistrial after closing arguments. 7RP 90. That ruling is entitled to deference, as it is the trial court that was in the best position to judge any prejudice to Whitford. See Lord, 117 Wn.2d at 887.

Moreover, after the jury asked to see the medical report, Whitford renewed his motion for a mistrial based on the prosecutor's remark. 7RP 98-99. The court denied the motion without prejudice to bring any written motion "under the applicable rules." 7RP 99. Presumably, the court meant a motion for a new trial pursuant to CrR 7.5. Regardless, Whitford never made any further motions regarding the prosecutor's rebuttal argument. Thus, this Court can assume that

Whitford must not have felt that there was substantial prejudice, as he did not pursue the matter further in the trial court.

Viewed in the context of the evidence, the issues in the case, the total argument and the instructions given to the jury, there is not a substantial likelihood that the prosecutor's brief remark affected the verdict. As such, Whitford has not established the requisite prejudice to warrant a new trial.

5. WHITFORD DID NOT RECEIVE A FUNDAMENTALLY UNFAIR TRIAL.

Whitford argues that the cumulative error doctrine warrants reversal. Whitford characterizes the errors as: (1) failing to give a self-defense instruction, (2) excluding Mason's reputation for aggression and untruthfulness, (3) excluding specific acts of aggression by the victim known to Whitford,¹⁰ (4) excluding cross-examination regarding specific instances of untruthfulness, and (5) prosecutorial misconduct during rebuttal argument. Brf. of Appellant at 34. Whitford's claim must be rejected because he was not denied a fair trial.

First, the State concedes that if this Court finds that Whitford was entitled to a self-defense instruction, he is entitled to a new trial. See State v. McCullum, 98 Wn.2d 484, 499, 656 P.2d 1064 (1983). If Whitford was *not* entitled to a self-defense instruction, then there was

¹⁰ Whitford did not raise this claim in his assignments of error, nor did he brief it.

no basis upon which to admit evidence that the victim had a reputation for being "quarrelsome and aggressive" or for admitting specific acts of aggression by the victim that Whitford was aware of. Thus, the only errors that *could* have accumulated to deny Whitford a fair trial were exclusion of Mason's reputation for untruthfulness, prohibiting cross-examination of the Masons under ER 608(b), and the prosecutor's remark in rebuttal argument.

The cumulative error doctrine applies where several trial errors occurred which, standing alone, may not be sufficient to justify reversal, but when combined, may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004) (citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)).

To seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors, and show that accumulated prejudice affected the verdict. Where errors have little or no effect on the outcome of trial, the doctrine is inapplicable. Greiff, 141 Wn.2d at 929.

The isolated remark by the prosecutor in rebuttal argument referencing matters outside the evidence was improper, but did not prejudice Whitford. Moreover, even if the trial court erred by excluding Mason's reputation for untruthfulness, and by excluding cross-

examination regarding the Nielsons, these errors had no effect on the outcome of the trial. The assault was corroborated by two other witnesses, independent of the Masons' testimony. Broughton's version of events was incredible in light of the eyewitness testimony from Wade and Denton.

Any error in excluding evidence that Mason was "untruthful" or in excluding evidence of an unrelated dispute did not affect the verdict and did not deny Whitford a fair trial.

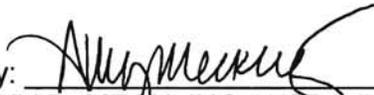
D. CONCLUSION

For all of the above reasons, this Court should affirm Whitford's conviction.

DATED this 20 day of April, 2012.

Respectfully submitted,

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