SUPREME COURT NO.
COA NO. 37153-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

100198-3

STATE OF WASHINGTON,
Respondent,

v.

JOSEPH HARPER,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

Spokane County Cause No. 17-1-04571-32

The Honorable John O. Cooney, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Joseph Harper, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Joseph Harper seeks review of the Court of Appeals unpublished opinion entered on August 12, 2021. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: A prosecutor commits misconduct by misstating the law to the jury during argument. Did the prosecutor at Mr. Harper's trial commit misconduct by incorrectly informing the jury that it did not need to conclude that Mr. Harper had intended to injure the alleged victim in order to find him guilty of first-degree assault?

ISSUE 2: A prosecutor commits misconduct by "testifying" to "facts" that have not been admitted into evidence during closing argument. Did the prosecutor commit misconduct at Mr. Harper's trial by telling the jury that his psychological diagnosis means that he is a "difficult person" when no evidence to that effect had been admitted at trial?

ISSUE 3: ER 404(b) bars the admission of evidence of uncharged misconduct when offered "to show action in conformity therewith." Did the trial court err by admitting evidence of extensive uncharged property damage by Mr. Harper when the state chose not to file any charges based on that alleged conduct and the only potential relevance of the evidence was to encourage an improper propensity inference?

ISSUE 4: The cumulative effect of errors during a trial can require reversal when, taken together, they deprive the accused of a fair trial. Does the doctrine of cumulative error require reversal of Mr. Harper's convictions?

IV. STATEMENT OF THE CASE

Joseph Harper was a heavy user of methamphetamine. RP 486, 840. At least three psychological experts concluded that he suffered from a methamphetamine-induced psychosis, causing him to genuinely believe that local women, including his estranged wife, were in danger of being subjected to sex trafficking and rape. RP 869, 873, 934, 953, 955; CP 14.

Specifically, Mr. Harper believed that his wife was being subjected to sex trafficking and assault during her work at Dairy Queen. RP 812-13, 869, 873. One day, after he believed that God had told him to go and save his wife, Mr. Harper ran

to the Dairy Queen, flagged down police, and asked them to go inside and help his wife. RP 388, 812-15.

After determining that Mr. Harper's wife was not truly at risk, the police left. RP 394-96. But Mr. Harper still believed she was in danger. RP 817. He thought that his wife had not told the police the truth because they had questioned her in front of her abusers. RP 816.

After unsuccessfully soliciting the help of the police, Mr. Harper believed that he needed to take matters into his own hands. RP 817-18. He banged on the Dairy Queen windows. RP 818. He got into his wife's car and drove erratically through the Dairy Queen parking lot, purposefully hitting some cars in the process. RP 818-21. Specifically, he thought that a white van with Idaho plates was there to traffic his wife to Idaho. RP 818-19. Believing that that would be impossible if he destroyed the van, he hit the van intentionally with his wife's car. RP 818-19.

Mr. Harper frantically drove back and forth across the street to a convenience store parking lot too. RP 819-21. He

believed that he needed to take any action necessary to get the attention of his wife, other citizens, and the authorities. RP 821-22.

Again, psychologists – included one who testified for the state – believed that Mr. Harper's delusional beliefs were genuine. RP 869, 873, 934, 953, 955; CP 14.

When Kelly Krebs pulled into the convenience store and asked Mr. Harper what he was doing, Mr. Harper felt threatened. RP 554, 821. Mr. Harper slowly backed into Mr. Krebs's car and then drove back across the street to the Dairy Queen parking lot. RP 555-56.

Mr. Krebs took out a stun gun and "sparked" it at Mr. Harper. RP 557. Then he got out of his car and followed Mr. Harper on foot, videotaping his actions and telling him that he was going to be put in jail. RP 557-58, 581. Mr. Harper tried to drive around Mr. Krebs to continue what he was doing, and Mr. Krebs eventually went back across the street. RP 821.

But Mr. Krebs thought that Mr. Harper was trying to him with his car. RP 559-62. Even so, he continued videotaping Mr. Harper and taunting him. RP 561. Mr. Krebs did not run away when Mr. Harper drove near him again later. RP 568.

Eventually, the police showed up again. RP 823. Mr. Harper attempted to direct them toward the Dairy Queen to get them to "save" his wife. RP 823. But, once the officers approached Mr. Harper, he delusionally believed them to be demons and sped off in the car. RP 823.

After being chased by the police, Mr. Harper crashed the car and was taken to the hospital. RP 709, 823-25.

At the hospital, Mr. Harper did not believe that the medical staff was trying to help him or that the hospital was real. RP 829-30. Mr. Harper told them that he did not think they were real and that he did not want their help. RP 830. When a medical worker tried to insert an IV, Mr. Harper grabbed him by the throat to prevent it from happening. RP 604.

The state charged Mr. Harper with taking of a motor vehicle, first-degree assault for allegedly driving toward Mr. Krebs, attempting to elude the police, and third-degree assault for grabbing the medical worker by the neck. CP 1-2.

At trial, Mr. Harper objected to the admission of evidence regarding his erratic driving and the property damage he caused in the Dairy Queen and convenience store parking lots. RP 468. He pointed out that the state had not charged him with any crime for those actions and that the evidence was not relevant to any of the charges against him. RP 468. But the court admitted the evidence over his objection. RP 470-71 477-78, 500, 506-07, 509, 533, 539.

Accordingly, numerous witnesses were permitted to testify regarding the property damage Mr. Harper caused to the cars in the parking lots and a trash can belonging to the Dairy Queen. RP 477-78, 500, 506-07, 509, 533, 539. The court also allowed witnesses to testify that the employees inside the Dairy Queen were afraid for their safety because of Mr. Harper's

uncharged misconduct. RP 522-23, 526, 529. The court also allowed the state to introduce photographs showing the extent of the uncharged damage that Mr. Harper had caused and videos showing the reaction of the people inside the Dairy Queen. RP 506-07, 529, 545, 570-71; Ex. 3, 4, 9-17.

Mr. Harper testified at trial. RP 811-62. He admitted to taking his wife's car and to driving away from the police but explained that he had thought that his actions were necessary to protect his wife and himself. RP 818-19, 823-24. He claimed that he had never tried to hit Mr. Krebs with the car but had been trying to go around him. RP 821. He said that he did not remember the medical worker whose neck he had allegedly grabbed but explained that he had felt like he needed to fight for his life while he was at the hospital and that he did not want any medical treatment while he was there. RP 831-32.

During closing argument, the prosecutor told the jury that it did not need to find that Mr. Harper had intended to hurt Mr. Krebs in order to find him guilty of first-degree assault:

> [I]t is not necessary to inflict bodily harm and the actor, *meaning Mr. Harper, doesn't need to actually intend to inflict bodily injury. What he intends to do is to create in another apprehension and imminent fear of bodily injury, which is what you witnessed there*. And so based upon their interaction, ladies and gentlemen, ….Mr. Harper did intend to assault Mr. Krebs that night, and the State has proven that beyond a reasonable doubt.
> RP 1052 (emphasis added).

During trial, the state elicited evidence that Mr. Harper had been diagnosed with Antisocial Personality Disorder. RP 932-33, 947-48. The court barred any testimony, however, regarding the details of the diagnosis or the reasons behind it. RP 947-48.

Even so, the state argued during closing that Mr. Harper was a psychologically "difficult person":

> But what you also have to understand is that across five separate evaluations, the other consistent has been the antisocial personality diagnosis.
> …
> Antisocial personality, a difficult person, difficult to deal with. And that's what we've got here, a difficult person who didn't want to have to deal with the break-up of his marriage …
> RP 1054.

The jury found Mr. Harper guilty of each charge. CP 160-63. He timely appealed. CP 309. The Court of Appeals affirmed his convictions in an unpublished opinion. *See* Appendix.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that prosecutorial misconduct deprived Mr. Harper of his constitutional right to a fair trial.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

1. The prosecutor committed misconduct at Mr. Harper's trial by misstating the law to the jury on the critical issue of the intent element of First-Degree Assault.

In order to convict Mr. Harper of First-Degree Assault against Mr. Krebs, the state was required to prove beyond a reasonable doubt that he had intended to inflict great bodily harm. RCW 9A.36.011.

This was the primary issue for the jury regarding that charge (the most serious charge in the case) because Mr. Harper adamantly denied that he had intended to hit Mr. Krebs or to cause him any harm. RP 821.

The requirement that the jury hold the state to its burden of proof regarding the intent element of the first-degree assault charge was particularly important given that Mr. Harper had admitted to intentionally hitting Mr. Krebs's car earlier during the interaction. RP 843. Without the application of the element requiring proof of intent to inflict substantial bodily harm, the jury could have incorrectly concluded that that admission provided proof of guilt on the first-degree assault charge.

Even so, the prosecutor told the jury during closing argument that conviction was required even if Mr. Harper did not intend to inflict injury. RP 1052.

The Court of Appeals found this argument to constitute a misstatement of the law: "it is clearly improper to [misstate the law] in addressing a clear point of law material to a contested element of a charge." Appendix, p. 14.

But the Court still affirmed Mr. Harper's assault conviction, finding that he was not prejudiced by the prosecutor's explicit misstatement of the law. Appendix, p. 15.

As noted above, however, the "prestige associated with the prosecutor's office" lent "special weight" to the prosecutor's argument and increased the risk that the jury would rely on the prosecutor's statement of the law. *Glasmann*, 175 Wn.2d at 706.

Making matters worse, interplay between the intent element of the general definition of assault and the specific intent element of assault in the first degree is already confusing.

The prosecutor's argument demonstrates that this legal concept is unclear even to attorneys who specialize in criminal law.

The Court of appeals relies on the fact that the to-convict instruction included an element of intent to inflict great bodily harm. Appendix, p. 15. But the jury was also instructed as follows:

> … An assault is an act done with the intent to create in another an apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.
> CP 115.

Accordingly, the court's instructions likely appeared to the jury to *confirm* the prosecutor's misstatement of the law, which was the last thing the jury heard on that complicated issue before deliberations. The Court of Appeals' conclusion that any prejudice was cured by the jury instructions is misplaced.

Mr. Harper's entire defense to the first-degree assault charge was that he had not intended to hurt Mr. Krebs. In order

to receive a fair trial, Mr. Harper needed to the jury to properly apply the intent element of that charge. There is a substantial likelihood that the prosecutor's improper misstatement of the law on that exact issue affected the outcome of Mr. Harper's trial. *Glasmann*, 175 Wn.2d at 704.

The prosecutor's misconduct requires reversal even though defense counsel did not object below. The elements of first-degree assault are "a well-established rule," which had been available to the prosecutor for decades. *State v. Sundberg*, 185 Wn.2d 147, 153, 370 P.3d 1 (2016). As is the caselaw regarding a prosecutor's duty to correctly characterize the law for the jury during closing. The improper arguments were flagrant and ill-intentioned because they directly violated case law available to the prosecutor. *Glasmann,* 175 Wn.2d at 707.

The prosecutor committed misconduct at Mr. Harper's trial by misstating the law to the jury. *Sundberg*, 185 Wn.2d at 153; *State v. Allen*, 182 Wn.2d 364, 373–74, 341 P.3d 268

(2015). Mr. Harper's first-degree assault conviction must be reversed. *Id.*

2. The prosecutor committed misconduct at Mr. Harper's trial by "testifying" to "facts" that had not been admitted into evidence.

Part of Mr. Harper's defense required expert psychological testimony regarding his drug-induced psychosis. *See* RP 865-917. In rebuttal, the state provided evidence from its own expert who testified, *inter alia*, that Mr. Harper had been diagnosed with Antisocial Personality Disorder (APD). RP 932-33, 947.

When the prosecutor attempted to delve deeper into the meaning of that diagnosis, however, the court barred that testimony. RP 947-48.

Even so, the prosecutor argued during closing that Mr. Harper's APD diagnosis meant that he was a "difficult person" who is "difficult to deal with." RP 1054. The prosecutor argued, specifically, that the diagnosis and Mr. Harper's allegedly "difficult" nature made him more likely guilty of the charges

against him. RP 1054. The prosecutor committed misconduct by arguing "facts" that had not been admitted into evidence. *See State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008).

The prosecutor also committed misconduct by encouraging the jury to make an improper propensity inference. *See State v. Fisher*, 165 Wn.2d 727, 748, 202 P.3d 937 (2009). The argument that Mr. Harper's APD diagnosis made him a "difficult person" explicitly invited the jury to conclude that he had a psychological predilection for criminal behavior and was, accordingly, more likely guilty of the charges against him. That was also improper. *Id.*

Even so, the Court of Appeals holds that the argument was proper because is constituted "an inference the prosecutor believed could be drawn from the [APD] diagnosis," rather than "the criteria for diagnosing [APD]." Appendix, p. 17. The Court draws a distinction without a difference. Indeed, the Court does not even attempt to explain how such a distinction would

change the analysis. The Court of Appeals' reasoning is misplaced.

There is a substantial likelihood that the prosecutor's improper argument affected the outcome of Mr. Harper's trial. *Glasmann*, 175 Wn.2d at 704.

First, as noted above, the "prestige associated with the prosecutor's office" likely lead the jury to lend special credence to the improper argument. *Glasmann*, 175 Wn.2d at 706. The fact that the argument was tied to the conclusions reached by multiple psychological experts also lent the improper argument an air of scientific weight. Mr. Harper was prejudiced by the misconduct. *Glasmann*, 175 Wn.2d at 704.

The prosecutor's improper argument was also flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707. The prosecutor had access to longstanding case law prohibiting the introduction of "facts" outside the evidence into closing argument. *See e.g. Jones*, 144 Wn. App. at 293. Indeed, the court reminded the prosecutor immediately before the improper

argument that Mr. Harper's APD diagnosis had been admitted, but that the details behind that diagnosis had been excluded from evidence. RP 1054.

The argument was also designed to have an "inflammatory effect on the jury," such that the prejudice could not be cured by an instruction. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158, *review denied,* 175 Wn.2d 1025 (2012). The prosecutor's improper argument requires reversal of Mr. Harper's conviction even absent an objection below. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed misconduct by arguing "facts" that had not been admitted into evidence during closing. *Jones*, 144 Wn. App. at 293. Mr. Harper's convictions must be reversed. *Id.*

The issues related to the prosecutorial misconduct at Mr. Harper's trial present significant questions of constitutional law, which are of substantial public importance. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

B. The Supreme Court should accept review and hold that Mr. Harper's claim under ER 404(b) was preserved by his attorney's objections below. The Court of Appeals' holding on this issue is in conflict with this Court's prior holding in *Mason* and with the precedent of this Court and the Court of Appeals regarding circumstances in which the basis for an objection is "apparent from the context."

Mr. Harper hit several cars in the Dairy Queen parking lot and ran into a trash can in an attempt to drive toward the building itself. RP 818-21. He also struck Mr. Krebs's car during an altercation preceding the alleged assault. RP 843. But the prosecution chose not to charge him with malicious mischief, or any other offense related to damage to that property. *See* CP 1-2.

Nonetheless, the court admitted lengthy testimony about Mr. Harper's uncharged conduct, over his objection. RP 477-78, 500, 506-07, 509, 533, 539. The court also admitted (over Mr. Harper's objection) that the people inside the Dairy Queen building were afraid because of his erratic behavior. RP 522-23, 526, 529. The court went so far as to allow the state to introduce photographs showing the extent of the uncharged

damage that Mr. Harper had caused and videos showing the reaction of the people inside the Dairy Queen. RP 506-07, 529, 545, 570-71; Ex. 3, 4, 9-17.

As outlined at length in Mr. Harper's Court of Appeals briefing, none of this evidence was admissible because it constituted evidence of uncharged misconduct, which was offered in order to show "action in conformity therewith." ER 404(b).

But the Court of Appeals never considered the admissibility of the evidence under ER 404(b). *See* Appendix. Instead, the Court holds that Mr. Harper's repeated objections to the evidence were insufficient to preserve the issue for appeal because his attorney did not mention ER 404(b), by name. Appendix, pp. 19-20.

But defense counsel did claim, during colloquy on the objection, that the evidence would "prejudice[] the jury" and was "very prejudicial to Mr. Harper." RP 523, 525. This Court has explicitly held that objection on the basis of "prejudice" is

sufficient to preserve an argument under ER 404(b) for appeal. *State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) ("An objection based on "prejudice," is adequate to preserve an appeal, based on ER 404(b), because it suggests the defendant was prejudiced by the admission of evidence of prior bad acts").

The Court of Appeals' holding that Mr. Harper failed to preserve his ER 404(b) objection is in direct conflict with this Court's ruling in *Mason*. This Court should grant review on that basis alone, pursuant to RAP 13.4(b)(1).

The Court of Appeals' ruling also conflicts with prior cases from this Court and the Court of Appeals regarding objections for which the grounds are "apparent from the context."

In order to preserve an evidentiary issue for appeal, defense counsel is only required to state the "specific ground of objection" when "the specific ground [is] not apparent from the context." ER 103(a)(1); *State v. Black*, 109 Wn.2d 336, 340,

745 P.2d 12 (1987); *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992), *amended* (Jan. 4, 1993) ("[a]lthough trial counsel did not cite a particular rule of evidence as the basis for his objection, such precision is not necessarily required"); *State v. Padilla*, 69 Wn. App. 295, 301, 846 P.2d 564 (1993), *as amended on denial of reconsideration* (Apr. 14, 1993).

The specific ground for an objection is "apparent from the context" when the discussion of the objection includes language understood by the parties to apply to a rule of evidence. *See e.g. Braham*, 67 Wn. App. at 935; *Padilla*, 69 Wn. App. at 300-01; *Blomstrom v. Tripp*, 189 Wn.2d 379, 394, 402 P.3d 831 (2017).

Additionally, Mr. Harper's defense counsel repeatedly pointed out to the trial court he had not been charged with any offense related to the property damage and that the evidence was not relevant to any of the crimes with which he was charged. *See* RP 468, 521-23.

Defense counsel's repeated arguments that Mr. Harper had not been charged with any property damage crime constituted a clear reference to the common parlance in the legal community that ER 404(b) bars evidence of "uncharged misconduct." *See e.g. State v. Gonzales*, 1 Wn. App. 2d 809, 819, 408 P.3d 376 (2017); *State v. Nelson*, 131 Wn. App. 108, 114, 125 P.3d 1008 (2006); *State v. Zatkovich*, 113 Wn. App. 70, 83, 52 P.3d 36 (2002); *State v. Fletcher*, 30 Wn. App. 58, 61, 631 P.2d 1026 (1981) (all referring to ER 404(b) as a rule barring admission of evidence of "uncharged misconduct"); *see also* Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575 (1990).

Finally, the colloquy on Mr. Harper's objection involved lengthy conversations regarding the exceptions to ER 404(b), including motive, intent, and the doctrine of *res gestae*. RP 469, 523-24; *See e.g. State v. Grier*, 168 Wn. App. 635, 643, 278

P.3d 225 (2012) (describing the exception to ER 404(b) for evidence of *res gestae*).

The parties' extensive discussion of the exceptions to ER 404(b) makes clear that they understood themselves to be addressing that rule, specifically. The basis of Mr. Harper's objection was "apparent from the context" to the parties at trial and remains apparent on the record. *Braham*, 67 Wn. App. at 935; *Padilla*, 69 Wn. App. at 300-01; *Blomstrom*, 189 Wn.2d at 394.

The Court of Appeals' decision in Mr. Harper's case is in direct conflict with this Court's decision in *Mason* and with prior rulings of this Court and the Court of Appeals regarding situations in which the basis of an objection is "apparent from the context." This Court should grant review pursuant to RAP 13.4(b)(1) and (2).

C. The Supreme Court should accept review and hold that the cumulative effect of the errors below

deprived Mr. Harper of his constitutional right to a fair trial.

Under the doctrine of cumulative error, an appellate court may reverse a conviction when "the combined effect of errors during trial effectively denied the defendant [his/]her right to a fair trial even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); U.S. Const. Amends. VI, XIV.

In Mr. Harper's case, the cumulative effect of the errors at trial requires reversal of his convictions. Taken together, the errors exposed the jury to extensive, highly prejudicial evidence and improper prosecutorial argument encouraging the jury to make an improper propensity inference. The prosecutor's improper argument misstating the intent element of first-degree assault worked in combination with these other errors to invite the jury to find Mr. Harper guilty of that most serious charge against him even if the state had not proved each element beyond a reasonable doubt. Taken together, these errors deprived Mr. Harper of a fair trial by seriously undercutting his

opportunity to hold the state to its burden of proof and to have the jury consider his guilt or innocence based only on the proper evidence of the charges

Even if this court determines that each error, standing alone, does not require reversal, the cumulative effect of the errors at Mr. Harper's trial deprived him of a fair trial and requires reversal. *Id.*

This significant question of constitutional law is of substantial public interest. This Court should grant review. RAP 13.4(b)(3), (4).

VI. CONCLUSION

The issues presented in Mr. Harpers case are significant under the constitutional and could impact a large number of criminal cases. This Court should accept review pursuant to RAP 13.4(b)(3) and (4). The Court of Appeals' holding regarding issue preservation is also in conflict with this Court's prior holding in *Mason* and with prior cases in this Court and the Court of Appeals addressing contexts in which the basis for

an objection is "apparent from the context." This Court should grant review of that issue pursuant to RAP 13.4(b)(1) and (2).

This document contains 4,213 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted September 10, 2021.

_____

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Joseph Harper/DOC#880763
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

and I sent an electronic copy to

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on September 10, 2021.

_____
Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

FILED
AUGUST 12, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JOSEPH TERRY HARPER, Appellant.	))))))))))	No. 37153-1-III UNPUBLISHED OPINION

SIDDOWAY, J. — Joseph Harper received a life without parole sentence under the Persistent Offender Accountability Act (POAA)[1] after being convicted below of first degree assault, among other crimes. We stayed the appeal pending the Washington Supreme Court's decision on whether legislation enacted in 2019 that removed second degree robbery from the list of "most serious offenses" meant that Mr. Harper's prior conviction of that crime could not be relied on to support his POAA sentence.

We lifted the stay after the Supreme Court ruled that the 2019 legislation cannot be relied on by offenders like Mr. Harper. (At about the same time, the legislature afforded him a statutory remedy.) We address his remaining assignments of error and, finding no error or abuse of discretion, affirm.

[1] RCW 9.94A.030(38)(a), .570.

FACTS AND PROCEDURAL BACKGROUND

Late one evening in early November 2017, Joseph Harper went on a destructive spree fueled by methamphetamine and, the State would later argue, by the breakup of his marriage. It was presaged four to five hours earlier, when he drove erratically, screaming and yelling, through the parking lot of an apartment complex where his estranged wife, Chelsea Harper, was living. She and her roommate told him to leave and he apparently complied.

Chelsea Harper later drove to the Dairy Queen, where she worked, and parked her 1993 Chevrolet Camaro in the back of its parking lot.

At around 10:00 p.m., Spokane Police Officer Jeremy McVay was on patrol when he saw Mr. Harper on the median of the road fronting the Dairy Queen, trying to flag him down. He stopped and spoke to Mr. Harper, who was sweating heavily and spoke fast and frantically. In a convoluted narrative, Mr. Harper expressed concern about the safety of his wife, who was working inside. Mr. Harper's behavior suggested to the officer that he was under the influence of a stimulant—either cocaine or methamphetamine.

After speaking with Mr. Harper for about 10 minutes, Officer McVay went into the Dairy Queen to check on Ms. Harper. Officer David Betts, who had been dispatched to assist Officer McVay, stayed with Mr. Harper. Officer Betts agreed that Mr. Harper appeared to be high on methamphetamine, and was told by Mr. Harper that he had ingested some. Officer McVay spoke with Chelsea Harper, who was finishing up her

work shift. He returned to Mr. Harper to assure him that Ms. Harper was not in any danger. Mr. Harper left.

Mr. Harper soon returned, entered the Dairy Queen, and told one of Ms. Harper's coworkers that he needed to speak to her. Ms. Harper saw that he was in the lobby and walked to the back of the building. Her night manager told Ms. Harper that he would take care of it and told Mr. Harper to leave.

The restaurant closed at 10:00 p.m., and as Ms. Harper was doing dishes and washing her grill, she heard coworkers questioning what some guy was doing in his car out front. It turned out to be Mr. Harper. He knew that Ms. Harper's Camaro's damaged ignition could be started without a key and that she was unable to lock the car, and he had located it in the parking lot. When Ms. Harper walked up front to see what was going on, she saw that it was her car, "do[ing] donuts in the parking lot and peel[ing] around very fast." Report of Proceedings (Feb. 1, 2019) (RP) at 463. When the car stopped, Mr. Harper got out, approached the building, and pounded on the windows, yelling at Ms. Harper to come out and talk to him.

When Ms. Harper remained inside, Mr. Harper got back in her car and left. Different witnesses observed later events from different vantage points, and their accounts are not entirely consistent. They are in agreement that Mr. Harper drove the Camaro back and forth, through the Dairy Queen parking lot and the parking lot of J&K Gas located across the street, driving it into several vehicles.

Kelly Krebs had the misfortune of driving up to J&K Gas at one point when Mr. Harper suddenly backed out of the Dairy Queen parking lot, and Mr. Krebs had to brake hard to avoid a collision. He honked, and as he drove around the Camaro, looked at Mr. Harper and raised his arms. He then pulled up to a gas pump at J&K and went inside to prepay for his gas. When he emerged, he saw Mr. Harper parked in the lot, yelling at a bicyclist for no apparent reason. When Mr. Harper saw Mr. Krebs, he put the Camaro in reverse and begin backing toward Mr. Krebs's car, alternately revving the engine and hitting the brakes. Mr. Krebs yelled, "[W]hat are you doing, don't hit my car!," but Mr. Harper moved the Camaro to within a couple of feet of the front of Mr. Krebs's car and then backed into it. RP at 555. At that point, Mr. Krebs pulled a stun gun from his car and sparked it at Mr. Harper. Mr. Harper drove off.

As Mr. Krebs fueled his car, he heard crashing sounds from the Dairy Queen across the street. He saw Mr. Harper strike two cars in Dairy Queen lot with the Camaro. Leaving his car behind, Mr. Krebs walked to the Dairy Queen lot, video recording what was happening with his cell phone. When Mr. Krebs reached the Dairy Queen lot, Mr. Harper accelerated directly toward him three times and each time Mr. Krebs got out of the way. Mr. Harper then drove back to the J&K lot and sideswiped Mr. Krebs's less agile car with the Camaro.

Either before or after sideswiping Mr. Krebs's car, Mr. Harper, while in the Dairy Queen parking lot, crashed the Camaro into the restaurant's entry. Ms. Harper was

standing in the lobby, about 10 feet from the front doors; she was afraid her husband was going to speed up and actually enter the building. The restaurant manager, Tiffany Glick was also watching; according to her, it was only because Mr. Harper struck a garbage can that he did not break through the double doors.

Police received multiple calls during the melee. According to Ms. Glick, they arrived after Mr. Harper had done a couple of "loops" on the street at high speed and had come to a stop on the median. RP at 509-10. Ms. Glick saw Mr. Harper put his hands out the driver's door window after police arrived. But when an officer grabbed his arm, Mr. Harper accelerated away.

The officer Ms. Glick saw approach the Camaro was Sergeant Kevin Vaughn, who arrived at the scene at around 10:30 p.m. Officer Jerry Anderson was riding with him. Both officers stepped out of their car and the sergeant approached the driver's door, told Mr. Harper to keep his hands visible, and grabbed his left hand. While holding Mr. Harper's hand, Sergeant Vaughn opened the car door, but Mr. Harper used his free hand to reach for the gear shift or steering wheel and sped away. Sergeant Vaughn and Officer Anderson rushed back to their car and followed Officer David Betts, who had also responded to the scene and was already in pursuit of the Camaro.

Officer Betts pursued Mr. Harper through residential neighborhoods. Mr. Harper was driving upwards of 75 miles per hour in areas with speed limits of 25 to 30 miles per hour and was ignoring stop signs and red lights. Officer Betts, who was required to slow

down at intersections, fell a few blocks behind, and following a short chase, found the Camaro crashed and abandoned in a residential front yard. A perimeter was established and a K-9 unit was called in.

Officers eventually saw Mr. Harper walking and gave chase. While chasing him, they noticed he was injured: his shirt was torn and his back was covered in blood. Mr. Harper ignored orders to stop and was captured when he slipped and fell in the snow. He was handcuffed, a cervical collar was placed on his neck, and he was taken to the hospital.

At the hospital, Mr. Harper was agitated, addressed an attending officer with homophobic slurs, and made vulgar sexual remarks to hospital staff. He said numerous times that he did not believe they were real medical staff and accused them of trying to hurt him.

When medical staff arrived to take Mr. Harper from a trauma room to get a CT[2] scan, the two officers present accompanied them to where the scan would be performed. An emergency room technician, James Pluid, helped transport Mr. Harper and was present to help move him to a table. Mr. Pluid was holding down Mr. Harper's uncuffed hand when Mr. Harper suddenly pulled his hand free and lunged, grabbing Mr. Pluid by the throat. Mr. Pluid and the officers pushed him down and officers detained him again in handcuffs. Mr. Harper had to be medicated before the CT scan could be performed.

[2] Computed tomography.

Mr. Harper was charged with first degree assault, for his assault of Kelly Krebs; theft of a motor vehicle; attempt to elude a police vehicle; and third degree assault, for his assault of James Pluid.

Defense counsel moved for a competency evaluation, which was ordered, and Mr. Harper was found incompetent to stand trial as a result of an "unspecified psychotic disorder, most likely methamphetamine induced." Clerk's Papers (CP) at 14. Competency restoration was ordered. After approximately six weeks, the court received a report from the state hospital that Mr. Harper was no longer exhibiting a methamphetamine-induced psychotic disorder and was competent to stand trial.

Six months later, defense counsel moved for a second competency evaluation, concerned that Mr. Harper was decompensating significantly. The motion was granted, but this time, an evaluation by Eastern State Hospital psychologist C. O'Donnell concluded that while Mr. Harper had a history of methamphetamine-induced psychosis, "he is not mentally ill" and had "exaggerate[d] both psychiatric symptoms and memory impairment." CP at 51. This time, Mr. Harper was found competent to stand trial.

In early 2019, after the State received a report by defense expert Michael Stanfill, PhD, on which Mr. Harper intended to rely for his defense, the trial court granted a State request that it order an evaluation of Mr. Harper's mental state at the time of his crimes. Mr. Harper was evaluated for this further purpose by Dr. O'Donnell.

The prosecution of Mr. Harper proceeded to trial in May 2019. The State called over a dozen witnesses, who testified consistent with the facts recounted above. In addition, Chelsea Harper testified that she was in the process of divorcing Mr. Harper. She testified that he did not like her working at the Dairy Queen, and she and Ms. Glick testified to prior conduct by Mr. Harper in an apparent attempt to get Ms. Harper fired. Officer McVay testified to a statement he had taken from Mr. Harper at the hospital, in which Mr. Harper explained his actions after commandeering his wife's Camaro as efforts to get Ms. Harper's attention. According to Officer McVay, Mr. Harper never said in the course of his statement that those actions were out of concern for his wife's safety or to protect her.

During presentation of the State's case, the defense objected to the State's presentation of evidence of property damage and witness apprehension on the night in question, since neither was the basis for his criminal charges. The trial court overruled the objection.

In the defense case, Mr. Harper testified on his own behalf and called Dr. Stanfill. Mr. Harper testified that all of his actions beginning with flagging down Officer McVay were taken only after God had told him in a very firm voice that his wife was in danger. He knew that people

> were going to hurt my wife and they were—they were going to kidnap her and hurt her because she's on meth and she's—they know that she's

> homeless, she doesn't have anywhere to go. She's just a helpless person. They were going to rape her or steal her organs or something.

RP at 819-20.[3]

He testified that God told him exactly what to do. He admitted taking his wife's car and driving away from police but explained that he thought his actions were necessary. He denied ever trying to hit Mr. Krebs with the car, saying that Mr. Krebs kept jumping in front of him. He admitted that he drove to the J&K lot and "smashed into [Mr. Krebs's] vehicle to get him to leave me alone." RP at 843. He testified that he had intended to give himself up when he was stopped on the median, but as the officer grabbed his wrist he saw the officer turn into the devil. He testified that Ms. Harper did not want to divorce him and they would never get divorced.

Dr. Stanfill testified during his direct examination that Mr. Harper acted intentionally on the night of his crimes, but "suffered from a substance-induced psychotic disorder that was caused by methamphetamine and potentially synthetic stimulants, bath salts." RP at 877. He testified that as a result of the psychotic disorder, Mr. Harper "believed Ms. [Harper] was in danger. He was attempting to protect her, and . . . was not exhibiting any more use of force than what was perceptually needed to keep her safe." *Id.* He testified that Mr. Harper believed the necessary force included ramming into cars that might be used to kidnap his wife. *Id.*

[3] Ms. Harper testified that she had formerly used drugs with her husband, but after separating from him, she was sober. RP at 486.

Toward the end of his direct examination, Dr. Stanfill testified to his diagnosis of Mr. Harper, which included antisocial personality disorder. He testified that his diagnosis was consistent with the findings of others who had evaluated Mr. Harper. He did not testify to anything more about the antisocial personality disorder diagnosis. Accordingly, when the State began cross-examining him about that diagnosis, the defense objected that it was outside of the scope of its direct examination. The objection was sustained.

The State called Dr. O'Donnell as a rebuttal witness; she testified that in her opinion, Mr. Harper was able to understand the nature and quality of his acts. She testified that during forensic examinations he exaggerated both his substance use and his report of auditory or visual hallucinations. She testified she did not believe he was faking on the night of his crimes, but his behavior was better explained by drug use than by a mental health issue. She testified it was consistent with being a possessive husband and angry about being taunted by Mr. Krebs.

Asked about how many times Mr. Harper had been evaluated, Dr. O'Donnell identified three competency-related evaluations in addition to Dr. Stanfill's and her own evaluations. She testified that there was no indication in Mr. Harper's history or from the several evaluations that he had any mental illness. It was her opinion that what might appear to be mental illness *symptoms* were attributable to Mr. Harper's drug use.

The jury found Mr. Harper guilty as charged. Based on his prior convictions for two most serious offenses—first degree manslaughter and second degree robbery—the court found him to be a persistent offender and sentenced him to life in prison for the first degree assault and low-end sentences on the remaining counts. Mr. Harper appeals.

ANALYSIS

While Mr. Harper's appeal was pending, the Washington Supreme Court decided *State v. Jenks*, 197 Wn.2d 708, 487 P.3d 482 (2021), in which Alan Jenks challenged his life without parole sentence imposed under the POAA. One of Mr. Jenks's strike offenses was second degree robbery, which the legislature had removed from the list of most serious offenses in 2019, and Mr. Jenks contended that the legislation should apply to his case. *Id.* at 711 (citing ENGROSSED SUBSTITUTE S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019)). The Supreme Court decided the issue adversely to Mr. Jenks, thereby resolving identical challenges that Mr. Harper raised to his sentence in this appeal.

The court's opinion observed that while it would not order that Mr. Jenks be resentenced, he would be entitled to resentencing under a "legislative fix." *Id.* at 713 n.2. Legislation enacted earlier this year mandates resentencing for those, like Mr. Jenks and Mr. Harper, whose "persistent offender" status depended on a current or past conviction for second degree robbery. *Id.* at 711-12; *and see* LAWS OF 2021, ch. 141 (effective July 25, 2021).

We turn to Mr. Harper's remaining assignments of error. He contends that the State committed prosecutorial misconduct and admitted evidence of other crimes or wrongs in violation of ER 404(b).[4]

I. PROSECUTORIAL MISCONDUCT

Mr. Harper contends the State committed prosecutorial misconduct during closing argument in two ways: by misstating the law to the jury on a critical legal issue and by testifying to facts not in the record.

Prosecutorial misconduct is not attorney misconduct in the sense of violating rules of professional conduct. *State v. Fisher*, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009). It is, instead, a term of art that refers to "prosecutorial mistakes or actions [that] are not harmless and deny a defendant [a] fair trial." *Id.* "To prevail on a claim of prosecutorial misconduct, the defendant must establish 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). A defendant demonstrates prejudice by proving there is a "'substantial likelihood the instances of misconduct affected the jury's verdict.'" *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). Courts

[4] Mr. Harper also contends that cumulative error deprived him of a fair trial. Since we find no error or abuse of discretion, the cumulative error doctrine does not apply.

recognize the possibility that juries will give special weight to the State's argument. *State v. Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012) (citing the commentary on *American Bar Association Standards for Criminal Justice* std. 3-5.8).

When a defendant fails to object in the trial court to a prosecutor's statements, he waives his right to raise a challenge on appeal unless the remark was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). The analysis focuses more on whether the resulting prejudice could be cured had the defendant raised a timely objection. *State v. Loughbom*, 196 Wn.2d 64, 75, 470 P.3d 499 (2020).

A. Misstating the law

During rebuttal closing argument, the prosecutor told the jury:

> [I]t is not necessary to inflict bodily harm *and the actor, meaning Mr. Harper, doesn't need to actually intend to inflict bodily injury. What he intends to do is to create in another apprehension and imminent fear of bodily injury, which is what you witnessed there.* And so based upon their interaction, ladies and gentlemen, Mr. Harper did intend to assault Mr. Harper—or I'm sorry, Mr. Harper did intend to assault Mr. Krebs that night, and the State has proven that beyond a reasonable doubt.

RP at 1052 (emphasis added).

The highlighted language misstated the law. In identifying the conduct that constitutes first through fourth degree criminal assault, the Washington criminal code does not define "assault" so the common law applies, and one definition of assault

recognized by Washington courts is putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm. *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263 (1988). But that sort of assault does not constitute *first degree* assault. In Washington, a person is guilty of assault in the first degree only if he commits one of four acts of assault "with intent to inflict great bodily harm." RCW 9A.36.011(1). Mr. Harper was charged with intending to inflict great bodily harm while "[a]ssault[ing] another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a).

The defense did not object to the prosecutor's misstatement of law. The State concedes an "arguabl[e]" misstatement of law, but contends it was fleeting and in context, the prosecutor simply misspoke. Br. of Resp't at 20. It emphasizes that the jury was properly instructed and any confusion could have been cured had the defense objected. Mr. Harper argues, however, that the prestige associated with the prosecutor's office lent special weight to the prosecutor's argument. Br. of Appellant at 11 (citing *Glasmann*, 175 Wn.2d at 706). It emphasizes that Mr. Harper's "entire defense to the first-degree assault charge was that he had not intended to hurt Mr. Krebs." *Id.* at 12.

It is misconduct for a prosecutor to misstate the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015), *aff'd*, 192 Wn.2d 526, 431 P.3d 117 (2018). It is clearly improper to do so in addressing a clear point of law material to a contested element of a charge.

Mr. Harper fails to establish prejudice, however. While Washington courts acknowledge the *possibility* that a jury will give special weight to a prosecutor's argument, more than that possibility must be shown to establish prejudice. Unlike *Allen*, on which Mr. Harper relies, the misstatement of the law in this case was not repeated, there was no ruling on an objection during closing argument that could have left the jury with the impression that the misstatement of law was correct, and the jury raised no question during deliberations that revealed confusion on the issue.

Mr. Harper argues that the issue of intent was likely the most complex legal issue in the jury's instructions, but we disagree. The general assault instruction allows for apprehension of bodily injury, but the to-convict instruction explicitly told the jury that one of the elements that must be proved beyond a reasonable doubt was "(3) That the defendant acted with intent to inflict great bodily harm." CP at 111.

Any prejudice was slight, and could have been neutralized with a curative instruction.

Reference to Mr. Harper's antisocial personality disorder diagnosis

As noted, during his direct testimony, Dr. Stanhill touched on the fact that he had diagnosed Mr. Harper with antisocial personality disorder. He did not elaborate on the diagnosis, and when the State sought to explore the diagnosis on cross-examination, the objection was sustained.

During Dr. O'Donnell's testimony in the State's rebuttal case, she testified that she had diagnosed Mr. Harper with substance use disorder, primarily methamphetamine, and testified that Mr. Harper had a history of substance-abused psychosis and "antisocial traits." RP at 932-33, 940. The defense did not object to that testimony. It also did not object when Dr. O'Donnell testified that one consistent conclusion across the evaluations that Mr. Harper had undergone was that he "was antisocial." RP at 947. When Dr. O'Donnell was asked to explain what "antisocial personality disorder" is, however, the defense objected and the court sustained the objection, stating the testimony did not have "any bearing as to the issues raised by the defendant's expert." RP at 947-48.

During closing, the prosecutor advanced the following argument, and was met with the following objection:

> [W]hat you also have to understand is that across five separate evaluations, the other consistent has been the antisocial personality diagnosis.
>
> [DEFENSE COUNSEL]: Objection, Your Honor. That fact wasn't permitted into evidence.
>
> THE COURT: Overruled. The diagnosis was permitted but not what factors are taken into consideration in making that diagnosis. So you're welcome to comment on the diagnosis but not beyond that.
>
> [PROSECUTOR]: Thank you.
>
> Antisocial personality, *a difficult person, difficult to deal with. And that's what we've got here, a difficult person* who didn't want to have to deal with the break-up of his marriage that he caused and, over the course of time, progressively escalated his attempts to get Chelsea Harper fired. I mean, think about it, ladies and gentlemen, why else on that night, 30 minutes before he flags down the officers, says she's going to be—she is

> being raped, she's been kidnapped, but yet he calls 9-1-1 that night and he tells them that she's suicidal; two conflicting stories. It's going to be whatever story is going to get him to achieve his goal.

RP at 1054-55 (emphasis added). The defense did not object to this continued argument.

Mr. Harper now argues that the continued argument was the prosecutor "delv[ing] deeper into the meaning of th[e] diagnosis," and thereby testifying to facts that were not in evidence. Br. of Appellant at 13. During closing argument, it is improper for a prosecutor to make statements or submit facts to the jury that are not supported by the evidence. *Glasmann*, 175 Wn.2d at 705-06.

We reject the premise that the prosecutor believed or intended to convey to the jury that the criteria for diagnosing antisocial personality disorder is "being a difficult person." As one would expect, the criteria are more complex (and more contemptible).[5] The prosecutor's argument is more reasonably explained as an inference the prosecutor believed could be drawn from the diagnosis, or from Dr. O'Donnell's unobjected-to testimony that the psychologists who evaluated Mr. Harper all characterized him as exhibiting "antisocial traits." Among the meanings of "antisocial" are

> **1** **:** averse to the society of others **:** UNSOCIABLE
>
> **2** **:** hostile or harmful to organized society
>
> ***especially*** **:** being or marked by behavior deviating sharply from the social norm

[5] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM- 5, at 659 (5th ed. 2013).

MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com /dictionary/antisocial (last visited Aug. 6, 2021). "[T]he prosecuting attorney has 'wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.'" *Fisher*, 165 Wn.2d at 747 (quoting *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014)).

Nevertheless, when a subject requires the specialized knowledge of experts, the lawyers' arguments should not stray far from the testimony, and a timely objection might have been sustained. Most importantly, however, a timely objection would have cured any prejudice. "Difficult" is not charged language that would leave a lasting impression on the jury. To say that Mr. Harper was "a difficult person" did not introduce a new, inculpatory aspect of character that was unlike other evidence about Mr. Harper presented during the trial.

Finally, Mr. Harper asserts that the prosecutor's statements "explicitly invited the jury to conclude that he had a psychological predilection for criminal behavior." Br. of Appellant at 14. The prosecutor's statements "explicitly" did no such thing, nor was the notion implied. The jury was properly instructed on the difference between evidence and argument. We are unpersuaded that any juror would find a "psychological predilection for crime" that no expert testified existed based on the prosecutor's brief argument that Mr. Harper was a difficult person.

II. RELEVANCE OBJECTIONS TO UNCHARGED CONDUCT

The jury was presented with considerable testimony and documentary evidence about the physical damage wrought by Mr. Harper on the night of his crimes, as well as evidence that his actions caused people inside the Dairy Queen restaurant to be fearful. Some of the evidence was admitted over defense objections. Mr. Harper argues that it was extensive evidence of uncharged conduct that was inadmissible under ER 404(b).

A threshold issue is whether, as the State argues, the challenge to the admissibility of the evidence under ER 404(b) is being raised for the first time on appeal. We conclude that it is.

During pretrial discussion of motions in limine, the trial court asked the prosecutor, "[D]oes the State have any 404(b) evidence?," and the prosecutor answered, "No, Your Honor." RP at 181. Evidently, the State did not perceive its planned presentation as implicating ER 404(b). Defense counsel was on notice of that perception.

Later, during Ms. Harper's testimony, when the State began asking her about Mr. Harper crashing into the Dairy Queen building, defense counsel objected on relevance grounds. The trial court excused the jury and gave defense counsel an opportunity to expand on her objection. While defense counsel pointed out that Mr. Harper's driving into the building and other cars in the parking lot were not charged offenses, she did not mention ER 404. She did not use any of the rule's recognizable terminology, such as "character evidence," "other crimes, wrongs, or acts," or proving "action in conformity."

She did not argue that the rule's permitted purposes (motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident) would not apply. She did not address the several step analysis required by ER 404(b). In short, her argument that driving into the building was not a charged offense appeared to be nothing more than an argument that the evidence was not relevant under ER 401. We do not see why the trial court would have understood her to be making an ER 404(b) objection.

Later, when a relevance objection was being made and the trial court thought ER 404(b) was implicated, the *trial court* brought up the rule. *See* RP at 495. It concluded that proposed evidence about staff concern for Ms. Harper's safety on past occasions when Mr. Harper showed up at the Dairy Queen was "starting to turn . . . into 404(b) evidence" and sustained an objection. *Id.*

Considering the trial record as a whole, the trial court addressed ER 404(b) when it perceived counsel to be relying on that rule. It reasonably perceived Mr. Harper's objections to evidence of uncharged criminal behavior on the night of his crimes as what counsel said they were: relevance objections.

Evidence is relevant if it has "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." ER 401. It represents a low bar, such that "[e]ven minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41

P.3d 1189 (2002). A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *Id.* at 619.

The State responded to Mr. Harper's relevance objection by pointing out that the evidence of Mr. Harper's behavior throughout his less-than-hour-long spree was relevant as res gestae, was evidence of intent, and was evidence of motive. The trial court observed that it was also evidence that he exerted unauthorized control over the Camaro he was charged with stealing. It observed that the evidence was not unduly prejudicial in light of the clearly admissible evidence of Mr. Harper's use of the vehicle in committing first degree assault.

The evidence was relevant for all of the reasons raised by the State and the trial court. Mr. Harper stole his wife's car and used it throughout his criminal spree. It was relevant as res gestae—evidence that completes the story of the crime on trial by proving its immediate context of happenings near in time and place. *State v. Grier*, 168 Wn. App. 635, 646, 278 P.3d 225 (2012) (citing *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995)). Mr. Harper's collisions with Mr. Krebs's and others' cars is what drew Mr. Krebs to the Dairy Queen lot, where he was assaulted. And Mr. Harper's explanation for causing the property damage was all of a piece with his explanation of the crimes with which he *was* charged: he claimed he was trying to attract the attention of police to help save his wife. He, as much as the State, needed to tell the "whole story" about the property damage and apprehension he caused.

The evidence was also relevant in showing a series of actions that the State could argue were related and goal-oriented, and therefore intentional. It was relevant to the State's theory that Mr. Harper had a motive for his actions: a frustration with the breakup of his marriage and a desire to force Ms. Harper to pay attention to him. No abuse of discretion in overruling the defense objections is shown.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Pennell, C.J.

Fearing, J.

LAW OFFICE OF SKYLAR BRETT

September 10, 2021 - 12:52 PM

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Appellate Court Case Title:	State of Washington v. Joseph Terry Harper
Superior Court Case Number:	17-1-04571-4

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