Supreme Court No. 100355-2
(COA No. 81106-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TAMEE PURDY,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Tamee Purdy, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Ms. Purdy seeks review of the decision by the Court of Appeals dated October 4, 2021. A copy is attached as Appendix A and B.

C. ISSUE PRESENTED FOR REVIEW

The right to present a defense and receive a fair trial by jury include the right to present relevant evidence that contradicts the prosecution's explanation of events and to exclude unfairly prejudicial evidence that encourages jurors to decide the case based on impermissible factors. At Ms. Purdy's trial for third degree assault, the court admitted evidence portraying Ms. Purdy as threatening and belligerent to other people, while simultaneously excluding evidence showing the

police officer who claimed he was assaulted appeared undisturbed and unharmed after the incident. Did the court misconstrue the governing rules of evidence and deny Ms. Purdy her rights to present a defense and receive a fair trial?

D. STATEMENT OF THE CASE

On New Year's Eve, some neighbors living on Fleming Street got together to shoot fireworks and have drinks. RP 289. Dana Lashbrook "had a lot to drink" with her neighbors. RP 313. As Ms. Lashbrook was heading home after midnight, she encountered a woman who was "really loud" walking down the street. RP 307. Ms. Lashbrook and this woman "yelled back and forth" at each other. RP 308. Ms. Lashbrook called 911 to report a woman "yelling in the street." RP 189, 309.

Police officer Ryan Greely responded. RP 187. Officer Greely saw two people in different houses yelling back and forth at Ms. Purdy, who was walking in a direction away from him. RP 192. The people arguing were "very animated." *Id*. He

heard “verbal threats from both sides,” saying they would “beat each other’s asses.” RP 193.

Officer Greely told Ms. Purdy “to stop” but she said “get the fuck away.” RP 193-94. Ms. Purdy kept walking away from Officer Greely. RP 194. Officer Greely decided to “physically stop her” from walking away, and lunged toward her to grab her arm. RP 195. Officer Greely said he was concerned there could be a fight and wanted to stop it before it happened. RP 196.

Officer Greely said he grabbed Ms. Purdy’s arm and she responded by hitting him one time in the arm, with an open hand. RP 196. Officer Greely immediately “took her to the ground” using a “straight arm bar technique.” RP 197. He handcuffed Ms. Purdy and called for a supervisor because he had used force against an arrestee. RP 197, 251-52. Ms. Purdy had cuts on her chin and hand from the impact of Officer Greely forcing her to the ground. Exs. 3-4, RP 248.

Ms. Purdy's friend and former work colleague, Jason Heil happened to be in a taxi that stopped due to the police activity. RP 316, 324, 333. He saw an officer lunge at Ms. Purdy and tackle her to the ground. RP 324-25. She never hit the officer. RP 326, 343. He offered to take Ms. Purdy home but the officer refused. RP 328.

For this incident, Ms. Purdy was charged with third degree assault.

At her trial, she objected to evidence describing threats and insults police said she made to them after the incident, but the court admitted them as relevant. CP 77-79; RP 14-20. Officer Stephen Klocker told the jury that while driving Ms. Purdy to jail, she made "threats," such as saying she "could rip our throats out." RP 229. Officer Klocker also described Ms. Purdy insulting Officer Greely while in the police car. RP 229. Acting sergeant Nathan Wallace similarly claimed Ms. Purdy was "belligerent and yelling" while in custody and insulted him. RP 247-48.

Sergeant Wallace agreed he did not see any injuries to Officer Greely. RP 254. A video taken by one of the police officers included some photos of Ms. Purdy's injuries but none of Officer Greely. Ex. 14.

The court refused to admit a 40-second video showing Ms. Purdy and Officer Greely after the arrest in which Officer Greely smiled and chuckled when another officer said he should have "let them beat her ass." RP 299-301; Ex. 14 (00:23-36).

The court also admitted, over objection, testimony from a bouncer about a separate incident that occurred at the bar where he worked. RP 14, 263-64, 270, 274-77. Bouncer Tony Stiffarm said a woman got "a little irate," said "vulgar words" to the bartender, and "was not cooperative." RP 280-81, 287. When Mr. Stiffarm asked her to leave, she "started being physical." RP 282.[1] He "confronted her" and told her to leave,

[1] The court sustained the defense objection to this testimony. RP 282-83.

which she did. RP 283. Mr. Stiffarm was not sure what time this incident occurred and did not identify Ms. Purdy as the person he interacted with, but the police claimed she matched the description given at the time. RP 188, 201, 280, 287.

Ms. Purdy was convicted of assault in the third degree. CP 56. The court imposed a first-time offender sentence. RP 465.

On appeal, she challenged the court's evidentiary rulings that allowed the jury to conclude she was the type of person who would insult, threaten, and assault others while also barring her from introducing a video supporting her argument that she did not assault the police officer. The Court of Appeals affirmed.

E. ARGUMENT

The Court of Appeals opinion dilutes the right to present a defense and encourages jurors' reliance on inflammatory allegations of uncharged wrongful acts.

1. The right to present a defense does not apply only when a person makes a threshold showing that evidence has "extremely high probative value," contrary to the Court of Appeals.

A person accused of a crime has the right "to present a complete defense and to confront adverse witnesses." *State v. Orn*, 197 Wn.2d 343, 347, 482 P.3d 913 (2021). The "minimum essentials of a fair trial" include the opportunity to meaningfully challenge the credibility of the prosecution's witnesses. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 296 (1973); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. An accused person has "the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

One issue before the Court of Appeals was whether Ms. Purdy's rights to present a complete defense and challenge the credibility of the accusations against her was violated when the court barred from offering video evidence showing the complaining witness, Officer Greely, appeared calm and uninjured shortly after the incident and smiled and chuckled to a fellow officer's comment that he should have let the neighbors "beat" Ms. Purdy's ass. Ex. 14.

The Court of Appeals ruled that no Sixth Amendment violation occurs unless the court excludes evidence that is "of extremely high probative value." Slip op. at 16, quoting *State v. Case*, 13 Wn. App. 2d 657, 669, 466 P.3d 799 (2020).

This explanation of the law dilutes the constitutional right to present a defense. It uses the harmless error test that follows a constitutional violation as a substitute for the error itself. Contrary to the Court of Appeals, the right to present a

defense applies in all cases, and is not triggered only by evidence of "extremely high probative value."

Because the constitutional right to present a defense supercedes evidentiary rules, and stems from a different source than the rules of evidence, the rules of evidence do not trump the constitutional right to present a complete defense. *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010); see *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177 (2004) (Sixth Amendment's protection is not subject to "vagaries of the rules of evidence"). A court "necessarily abuses its discretion" when its evidentiary rulings deny "a criminal defendant's constitutional rights." *Orn*, 197 Wn.2d at 351.

In *Jones*, the trial court had rejected evidence as inadmissible, but because this evidence was critical to his defense, the evidence rule could not trump his right to present a defense. 168 Wn.2d at 724-25. On the other hand, in *State v. Arndt*, 194 Wn.2d 784, 813, 453 P.3d 696 (2019), the

defendant was able to offer evidence supporting his theory of defense even though the court limited his expert's testimony after finding the expert's methods were not founded in established science.

More recently in *Orn*, this Court held the trial court impermissibly limited evidence regarding the potential bias of a key witness. The Court explained that a witness's bias is "always relevant as discrediting the witness and affecting the weight of his testimony." 197 Wn.2d at 353. Only minimal relevance is required and this witness's bias was certainly relevant. *Id*. at 353-54.

Because the evidence was relevant, the *Orn* Court assessed whether the State had a compelling interest in excluding it. *Id*. at 355-56. Concluding there was no such reason to exclude the evidence, this Court assessed whether the violation of the Sixth Amendment required reversal. *Id*. at 359.

The Court of Appeals disregarded this test in Ms. Purdy's case. Instead, it insisted there cannot be a Sixth

Amendment violation unless the defendant proves the "extremely high probative value" of the excluded evidence. Slip op. at 16. This analysis is contrary to *Orn* and the cases on which it relied.

Ms. Purdy had no other avenue to challenge the officer's credibility and the reliability of his claim of assault or to document the hostility of the officer's toward her. CP 72-74. The court refused to let her show the jury evidence that the officer's post-incident behavior cast doubt on whether he was actually assaulted as he claimed. The only rule of evidence at issue was the court's determination that the evidence was not relevant enough. RP 179, 225-26, 229-301. But relevance is a low bar, and the court unreasonably refused to credit the importance of this video to Ms. Purdy's right to challenge the allegations against her. *State v. Briejer*, 172 Wn. App. 209, 225, 289 P.3d 698 (2012) ("The threshold for relevance is very low.").

The Court of Appeals' erroneous use of an inflated threshold to assess a Sixth Amendment violation raises an issue of substantial public importance. Even if the court's refusal to admit this evidence alone may not require reversal, errors that occur in a case may be taken together to cumulatively show the denial of a fair trial. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). By insisting there can be no error at all unless the evidence at issue is of extremely high probative value, Ms. Purdy is left unable to contend the errors, taken together, denied her a fair trial.

By conflating the right to present a complete defense with the harmless error test for such a violation, and concluding Ms. Purdy had to prove the harmfulness of the error to establish the error, the court denied her the right to seek reversal based cumulative harm from various errors. This Court should grant review due to the Court of Appeals' misapplication of the right to present a defense.

2. The court impermissibly admitted a host of evidence alleging Ms. Purdy's uncharged acts to portray her propensity for misbehaving, based on an untenable expansion of res gestae.

The right to a fair trial also includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Implementing the presumption of innocence requires a court to "be alert to factors that may undermine the fairness of the fact-finding process." *Id*.

Here, the prosecution undermined Ms. Purdy's right to a fair trial by admitting unduly prejudicial evidence about uncharged misconduct.

ER 404(b) categorically bars the admission of other "acts" to prove that during the incident in question, a person acted "in conformity" with the behavior at another time. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468, 39 P.3d 294 (2002); *see State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The rule is designed to prevent the prosecution

from "suggesting" an accused person is guilty because she is the type of person who would commit the crime charged. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

Over Ms. Purdy's objection, the prosecution offered testimony about unrelated allegations that she misbehaved at a bar earlier in the evening. CP 78, RP 14, 16-17, 263-64. The trial court ruled it was part of the incident, even though none of the same people or behavior was at issue and it had nothing to do with whether she struck Officer Greely one time in the arm. Yet the Court of Appeals affirmed this analysis, illogically concluding that a person's hostile behavior toward a bar's bouncer demonstrates a person's "state of mind" when reacting a police officer's effort to grab her at a different location for an unrelated reason. Slip op. at 11-12. It adopted an extended res gestae approach to deem conduct that occurred at a different time and place constitutes the crime itself that unreasonably extends the law. Slip op. at 11-12.

Also over Ms. Purdy's objection, the court admitted allegations she threatened other police officers while in a police car being driven to jail following her arrest, and made vulgar insults toward these others police officers following her arrest.

The prosecution contended Ms. Purdy's threats to law enforcement and other insulting words show her "consciousness of guilt" and prove the police did not make up an allegation that she assaulted them. RP 19. The court ruled her statements were "relevant to her state of mind" after the incident and were not governed by ER 404(b). RP 20.

Ms. Purdy's emotional reaction to being arrested has no bearing on whether she committed the charged assault. But it is highly prejudicial evidence and the type of evidence likely to influence the jury, and thus inadmissible under ER 403.

The evidence about Ms. Purdy's post-arrest insults and threats to police officers was used by the prosecution to show she was an aggressive and irate person, who must have acted in

conformity with that behavior and purposefully assaulted Officer Greely. RP 410-11, 432-33. It should not have been admitted.

The Court of Appeals misapplied and misunderstood the rules of evidence as well as Ms. Purdy's right to present a defense. This Court should grant review.

F. CONCLUSION

Petitioner Tamee Purdy respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains approximately 2475 words and complies with RAP 18.7(b).

DATED this 3rd day of November 2021.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TAMEE MARIE PURDY, Appellant.	No. 81106-1-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — A jury found Tamee Marie Purdy guilty of assault in the third degree. Purdy appeals, contending the trial court erred by (1) admitting certain pre- and post-arrest evidence, (2) excluding certain post-arrest video evidence, and (3) inadvertently imposing discretionary legal financial obligations (LFOs). For the reasons discussed below, we remand for the trial court to strike the supervision fees and affirm in all other respects.

I. BACKGROUND

A. Facts

On New Year's Eve 2017, at the Madison Street Pub (Pub) in Everett, bouncer Tony Stiffarm confronted a female patron who bartenders refused to serve. Law enforcement later purported to identify the patron as Purdy. According to Stiffarm, he told the patron that "she cannot yell at my customers. You will not be served. You can stay and watch karaoke if you want, but you cannot have a drink." The patron became "irate" and uncooperative, but eventually left. "Then shortly later, she came back." Stiffarm testified, "I had to

confront her with my hands in my pockets, excuse me, Ma'am, you're not welcome here again. I need you to leave my building." She eventually left.

Meanwhile, someone called 911 to report a disturbance at the Pub. "[A] little bit before midnight," Everett Police Officers Ryan Greely and Stephen Klocker responded. According to Greely, Stiffarm said that the patron who caused the disturbance was a "[s]lender female, [with] long hair, [a] white jacket, [and] brown boots."[1] Stiffarm described what happened and said the patron had left. He said he saw her go north on Fleming Street. The officers ceased investigating and left the Pub.

"Three to four minutes" after Officer Klocker left the Pub, he drove on "the 6700 block of Fleming" Street and observed Purdy "[s]taggering out in the middle of the street." Klocker testified that Purdy "matched the description of the party who -- we received at the pub." Although at trial, he could not recall what that description was. Klocker testified that as he drove by, "she saw me, she got rather animated and started flipping me off and cursing at me." But he "ignored her and continued driving."

Dawn Lashbrook was walking home from a neighbor's party on a residential portion of Fleming Street that did not have sidewalks. Lashbrook testified to the following: Purdy "was really loud walking on Fleming." She said,

> [L]iving on Fleming is very interesting anyway, because you get a lot of interesting characters. So usually people just mind their own business. And you're used to that when you live there. But she was like overly -- and it made me, you know, kind of nervous. And I think

[1] At trial, Stiffarm testified only that the patron was "a taller, white female."

> that's why I called the police just because I was nervous. I live alone so . . .

"[W]e were yelling back and forth just because I was wanting her to just move along, and she wasn't going down the street."

Officer Greely learned about Lashbrook's call about "nine minutes after midnight" and responded to it. He testified to the following: He went to the 6400 block of Fleming Street, which was "a couple of blocks north of the" Pub. He found Purdy "walking in the middle" of the street and she was yelling at "neighbors out on their [respective] porch[es]." Purdy and the neighbors threatened "to beat each other's asses." Greely got out of his patrol vehicle, walked toward Purdy, identified himself, and asked Purdy to stop. Purdy responded, "[G]et the fuck away." She kept walking and yelling at the neighbors. Greely was concerned there would be a fight and felt "[t]here really wasn't a chance" to deescalate the situation with further verbal commands. To prevent a fight, Greely grabbed Purdy's arm. Purdy responded by punching Greely's shoulder and causing him "temporary pain, soreness." Greely then "took her down to the ground" and handcuffed her. While on the ground, Purdy called Greely "a bitch." Greely then called other officers and a supervisor for help.

Lashbrook testified that Purdy was not cooperating with the officers. She remembered Purdy "pushing him or something."

Lashbrook's neighbor Steve Danielson testified to the following: He was celebrating New Year's Eve at his neighbor's house. "[A]t midnight or shortly after," he saw a law enforcement vehicle's flashing lights, and went outside to "see what was going on." From across Fleming Street, he saw Purdy on the

ground. When an officer tried to get her off the ground, "she wasn't too cooperative." Purdy "was pretty belligerent" and "acting pretty out of control." Once she was standing, she "[g]rabbed him, was throwing punches, [and] cussing" at the officer. Then, the officer "took her to the ground."

Purdy's friend Jason Heil testified to the following: He had been at the Pub with Purdy earlier that evening. The Pub was "extremely rowdy" so he left for another bar nearby and Purdy stayed. Heil did not see Purdy interact with Stiffarm. Just after midnight, Heil left the other bar and was on Fleming Street in a taxi when he recognized Purdy because she was wearing the same white jacket that she had been wearing at the Pub. He saw Purdy and an officer yelling at each other and, within a "split second," the officer "got her with the arm, and then he tucked her in, and she went down." Heil did not see Purdy "hit the officer." Next, he saw the officer get Purdy up, and "put the handcuffs on." He said the officer "was celebrating" and his face expressed "joy, like I just got -- got her."

Officer Klocker testified that he responded to Greely's call "just a few minutes" after he saw Purdy in the street. He also testified that Greely and Purdy were in the "6400 block, which would be about two or three blocks north of where I'd initially seen her." Officer Nathan Wallace also responded to Greely's call. Wallace and Klocker testified that, when they arrived, Purdy was "[d]runk, belligerent, obnoxious," "threatening," and "yelling" at Greely. Purdy told Klocker that Greely was "a pussy and . . . needed to grow a dick."

Klocker then took photographs of Purdy's injuries—abrasions on her chin and hand—and of Greely. Each time Klocker took a photograph, he inadvertently took a short video. In the video, an officer says, "You should've just let those people beat her ass," and another officer responds by chuckling. Klocker then placed Purdy in the back of his patrol vehicle. Klocker testified that while in the patrol vehicle, Purdy "continu[ed] to berate, insult, and threaten us." According to Klocker, Purdy said "she could rip our throats out."

B. Procedural History

The State charged Purdy with third degree assault of Greely.

Before trial, the court considered the parties' motions in limine. The State moved to admit Stiffarm's testimony that the female patron was intoxicated, he asked her to leave the Pub, and "she immediately became combative, slapping, kicking, and spitting on him." The State asserted that Stiffarm's testimony was res gestae and probative evidence to rebut Purdy's defense that Greely assaulted her because it showed that "Purdy is assaultive moments before, the same night with another authority figure, a bouncer at a pub." Purdy did not dispute being at the Pub. She argued that Stiffarm's testimony would be more prejudicial than probative and the jury could mistake it as propensity evidence—"that because she assaulted the bouncer, she must have assaulted the police officer later that evening." The trial court determined Stiffarm's testimony concerned "what was going on with her shortly before this offense" and "the State's recitation of what they believe Mr. Stiffarm will testify to is that she also was combative and refused to follow his direction when given, which I think are --

are different in that I'm not sure that is 404(b), I mean, that is not an uncharged crime." The trial court said, "I do not see the prejudicial nature of any testimony as to what Ms. Purdy's demeanor was."

Purdy also objected, "[I]t's not clear to me that [Stiffarm] identifies Ms. Purdy at all during the evening." The trial court stated, "It seems like there's a question right now as to whether or not Mr. Stiffarm will identify Ms. Purdy or has identified Ms. Purdy as the person that was in the Madison Pub. Assuming that he can, we will hear his testimony as to what occurred."

The State asked the trial court to admit Purdy's post-arrest statements to the officers. The State at first argued the statements were admissible under ER 404(b). The State then changed course and asked the trial court to admit the evidence as relevant to Purdy's state of mind under ER 401 and 403. Purdy responded that the statements were inadmissible as more prejudicial than probative under ER 403. The court admitted the statements as "relevant as to her state of mind."

Before opening statements, the defense advanced the theory that Greely tackled Purdy "because she flipped him off and swore at him, and then [he] made up a false story that [she] assaulted him to justify his excessive use of force after he saw she was injured." To support this theory, Purdy moved to admit the video taken by Klocker. After watching the video, the trial court denied Purdy's request, explaining that it was unclear who was speaking in the video, but recognizing that "[i]t may be that based on testimony that comes out, this

becomes relevant." The trial court also stated, "I'm really struggling to see how – how the video is relevant."

During trial, Purdy again moved for the trial court to exclude testimony of her post-arrest statements to the officers arguing it was more prejudicial than probative. The trial court stated

> I think that her statements beyond simply flipping [the officers] off and saying, Fuck you and then being tackled, the statements that she could rip out their throats and that the assaulting officer was a pussy and needed to grow a dick go directly towards her frame of mind in terms of her interactions with the officer. So, again, without something new or more, I don't have any information that would cause the Court to reconsider its earlier decision to admit the statements that were admitted at the 3.5 hearing.

During Klocker's cross-examination, Purdy also again asked the court to admit the video. Klocker testified that Wallace said to Greely, "You should've just let those people beat her ass," and Greely responded by chuckling. Purdy argued the video was admissible as evidence of Greely's state of mind and bias toward her, and admissible to impeach Greely's testimony that she was belligerent. The State argued that because Purdy's, rather than Greely's, state of mind was at issue, the video was irrelevant. The trial court disagreed "that Officer Greely's state of mind is not at issue given [Purdy's] theory is that he lied in order to avoid making a use of force report after observing Ms. Purdy's injuries. However, I now can find no tangible connection between Sergeant Wallace's statement after the fact." The trial court determined,

> Whether or not he thought someone else's statement later was funny I think has limited value as to what he was thinking at the time that he had an altercation with Ms. Purdy, because this all happens after the fact.
>
> . . . .

> So I don't see how his chuckling at a comment after the fact can at all be interpreted to determine what he -- whether or not he tackled Ms. Purdy and then lied about it.

The trial court excluded the video.

Before Stiffarm testified, Purdy again asked the trial court to exclude his testimony: "My issue [is] with Mr. Stiffarm testifying about the fact that he encountered a female . . . [and] he doesn't recall what this woman looks like. He didn't go and do any sort of like identification process to identify that it was Ms. Purdy." She also asserted, "My concern is that he can't identify who this is and so that would be not relevant. It would be prejudicial if it were let in. I just -- I just don't see that the State can show by a preponderance that it's -- that it's Ms. Purdy at all." The State argued that while there was "no direct identification[,] . . . there is sufficient circumstantial evidence to establish identification by a preponderance of the evidence."

The trial court allowed Stiffarm to testify to a certain extent. It reasoned that

> the information that the police responded to the Madison Pub and the information they received was partly to identify the same description of the person and partly to explain what Officer Greely knew and understood the situation to be when -- when he came upon her.
>
> Also, I'll allow Mr. Stiffarm's testimony that is consistent with that. I would agree that other statements, given the -- I think this establishes the identity of Ms. Purdy by a preponderance of the evidence given what Officer Greely reported. However, I would agree that the exact statements as to cuss words that she used, that she hit, kicked or was physical with him would be unduly prejudicial given his inability to identify Ms. Purdy today as that person and that he was simply -- related on the night of the general description of a female and what she was wearing.

Stiffarm testified that the irate patron was a tall, white female. He said the patron was uncooperative. He said, "[S]he was not cooperative one bit . . . . [W]hen she came back the second time and I asked her to leave, she started being physical." Purdy objected and the trial court sustained the objection, stating, "The jury's instructed to disregard the last statement."

The jury convicted Purdy as charged. The trial court granted Purdy a first time offender waiver" and sentenced her to 240 hours of community restitution and 12 months of community custody under the supervision of the Department of Corrections (DOC). During the sentencing hearing, the trial court said, "I will find that Ms. Purdy is indigent for the purposes of legal financial obligations, impose only the $500 victim penalty assessment and the $100 DNA fee."

Purdy appeals.

II. ANALYSIS

A. Evidence of Purdy's Acts

Purdy says the trial court violated ER 404(b) by admitting Stiffarm's testimony. She also says the trial court erred by admitting her post-arrest statements to the officers. The State responds that the evidence was admissible as res gestae and relevant under ER 402.

We review a trial court's evidentiary rulings for abuse of discretion. State v. Dillon, 12 Wn. App. 2d 133, 146, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020). "A trial court abuses its discretion if its decision is based on untenable grounds, an erroneous view of the law, or is manifestly

unreasonable. If evidence was improperly admitted, the court analyzes whether the improper admission was harmless." Id. (citations omitted).

Generally, all relevant evidence is admissible. ER 402. 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. The trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403.

Under ER 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

But "ER 404(b) does not restrict evidence of acts that are closely associated with the crime charged." State v. Sullivan, 18 Wn. App. 225, 235, 491 P.3d 176 (2021). Res gestae or same-transaction evidence is "'admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.'" Dillon, 12 Wn. App. 2d at 148 (quoting State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004)). "[R]es gestae evidence 'more appropriately falls within ER 401's definition of 'relevant' evidence, which is generally admissible under ER 402' rather than an exception to propensity evidence under ER 404(b)." Id. (quoting State v. Grier, 168 Wn. App. 635, 646–47, 278 P.3d 225 (2012)).

The trial court instructed the jury that an element of assault "is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person." To prove Purdy assaulted Greely, the State had to prove she intentionally hit or punched Greely.

1. Stiffarm's Testimony

Purdy contends the trial court abused its discretion in admitting Stiffarm's testimony about the female patron who was belligerent, uncooperative, and physical[2] and not conducting an ER 404(b) analysis. She says ER 404(b) bars Stiffarm's testimony because the jury could view it "as showing her propensity to be assaultive and uncooperative and therefore she was the type of person who would assault a police officer." The State responds that Stiffarm's testimony was admissible as res gestae.[3] We agree with the State.

In Sullivan, the State charged the defendant with robbery in the first degree with a deadly weapon and unlawful possession of a firearm. 18 Wn. App at 232. To prove a material element of the crimes, the trial court admitted evidence that the defendant had been involved in a shooting 25 minutes before the robbery. Id. at 237. The trial court also admitted the evidence as res gestae because the events occurred close in time. Id. On appeal, we determined the

[2] Purdy contends that although the trial court sustained her objection to Stiffarm's testimony that she was "physical" with him, and despite the court's instruction, "jurors would be unlikely to erase this information from their minds given the tenor of the testimony and the prosecution's reliance on it in closing argument." Without evidence otherwise, we presume juries follow instructions. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). We thus do not address the stricken testimony.

[3] The State also contends Stiffarm's testimony is relevant to show what Greely knew when he responded to Lashbrook's call and to rebut Purdy's defense that Greely assaulted her. Because the evidence was admissible as res gestae and as relevant evidence of Purdy's state of mind before the assault, we do not reach this contention.

trial court acted within its discretion. Id. at 239. The evidence from the shooting was material to elements of both robbery in the first degree with a deadly weapon and unlawful possession of a firearm and necessary to provide context for the robbery. Id. We determined that the evidence was not evidence of other misconduct requiring the application of ER 404(b). Id. at 240.

While the trial court here did not use the term "res gestae" or "same transaction," in response to the State's res gestae argument, it essentially conducted a res gestae analysis. The trial court found Stiffarm's testimony relevant to "what was going on with her shortly before this offense," including her state of mind and demeanor. The trial court determined that Purdy's assault of Greely occurred shortly after and in the same area as her interaction with Stiffarm at the Pub. During trial, the court also viewed Stiffarm's testimony as relevant "to explain what Officer Greely knew and understood the situation to be when -- when he came upon her."

The trial court did not abuse its discretion[4] because Stiffarm and Purdy's interaction occurred a few minutes before and a few blocks away from the assault on Officer Greely, and was relevant to show her state of mind just before the assault and therefore to show the intent element of the crime. As in Sullivan,

[4] Even if the trial court erred in admitting Stiffarm's testimony about Purdy's conduct, the error would have been harmless because of the extensive other evidence that Purdy engaged in similar behavior that evening. See State v. Ashley, 186 Wn.2d 32, 47, 375 P.3d 673 (2016) ("Erroneous admission of evidence in violation of ER 404(b) is harmless unless there is a reasonable probability that the verdict would have been materially different but for the error.").

Stiffarm's testimony was part of the immediate context of the assault, so it was admissible as res gestae and ER 404(b) did not apply.[5]

2. Purdy's Post-Arrest Statements to the Officers

Purdy contends the trial court erred by admitting evidence of her post-arrest statements to the officers. The State contends the evidence was admissible as res gestae and as evidence of Purdy's state of mind. We conclude that Purdy's post-arrest statements were relevant to her state of mind.

The trial court admitted the testimony because it found "the statements that she could rip out their throats and that the assaulting officer was a pussy and needed to grow a dick go directly towards her frame of mind in terms of her interactions with the officer." In Dillon, we determined a defendant's post-arrest threats to the arresting officer were admissible to show the defendant's state of mind and hostility toward the officer at the time of the crimes and was not subject to ER 404(b). 12 Wn. App. 2d at 150. Likewise, here, Purdy's statements were relevant to show Purdy's intent and were not subject to ER 404(b). The trial court did not abuse its discretion in admitting this evidence.[6]

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[5] Purdy contends the trial court "deemed ER 404(b) inapplicable and admitted the evidence without limitation." The State responds that because Purdy did not request a limiting instruction, the court did not have to give one about her pre- and post-arrest behavior. We agree with the State. See State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604 (2011) ("[A]bsent a request for a limiting instruction, the trial court is not required to give one sua sponte."); State v. Gresham, 173 Wn.2d 405, 424, 269 P.3d 207 (2012) ("[I]n the context of ER 404(b) limiting instructions, once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction."). In any event, because we conclude that Stiffarm's evidence was res gestae, a limiting instruction about Purdy's behavior was unnecessary.

[6] Given this conclusion, we do not reach the res gestae issue about the post-arrest statements.

B. Post-Arrest Video

Purdy says the trial court violated her Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution right to present a defense by excluding the post-arrest video. She contends the video was admissible to undercut the State's claim that she was irate and hostile and to impeach Greely's testimony that she injured him, causing "temporary pain [and] soreness." (Alteration in original.) The State counters that the video tracks its claim that Purdy was belligerent and was irrelevant because Greely's chuckle was not probative of his state of mind or injury. The State also says, if the video has any probative value, its potential for prejudice outweighed that value. We conclude the trial court did not deprive Purdy of her right to present a defense.

The state and federal constitutions guarantee a defendant the right to present a defense. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; State v. Hudlow, 99 Wn.2d 1, 14–15, 659 P.2d 514 (1983). But that right is not absolute. State v. Bedada, 13 Wn. App. 2d 185, 193, 463 P.3d 125 (2020). For example, a defendant has "no constitutional right to present irrelevant evidence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (emphasis omitted).

For claims of a violation of the right to present a defense, we apply a two-step process: (1) we "review the trial court's individual evidentiary rulings for an abuse of discretion," and (2) we "consider de novo the constitutional question of whether these rulings deprived [Purdy] of her Sixth Amendment right to present a defense." State v. Arndt, 194 Wn.2d 784, 797–98, 453 P.3d 696 (2019).

First, we consider whether the trial court abused its discretion in excluding the video. As discussed above, only relevant evidence is admissible. ER 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." ER 401. "The proponent of the evidence bears the burden of establishing its relevance and materiality." Bedada, 13 Wn. App. 2d at 193.

Purdy says the video shows her calm demeanor, which contradicts the State's contention that she was irate and hostile after her arrest. She contends the video was thus relevant to whether she intentionally assaulted and injured Greely. The State responds that "the video shows her cursing, which is consistent with a belligerent attitude." The video is 38 seconds long, it is dark, and visibility is limited. It captures only brief glimpses of Purdy's demeanor after the assault. And it depicts her swearing. The brief glimpses of Purdy's demeanor are not necessarily inconsistent with her being irate and hostile during the period after her arrest. As a result, we cannot say that the trial court abused its discretion on this ground.

Purdy also contends the video of Greely allegedly chuckling after Wallace's statement, "You should've just let those people beat her ass," contradicts Greely's claim that her assault caused him temporary pain and soreness. While the trial court agreed the video might be probative of Greely's state of mind, it concluded that it is not probative as to Purdy's defense nor of whether Purdy caused Greely temporary injury. The chuckle in response to

Wallace's statement is not necessarily inconsistent with Greely's temporary pain. Again, we cannot say that the trial court abused its discretion.[7]

Second, we consider whether the trial court's ruling to exclude the video violated Purdy's right to present a defense and her right to a fair trial. We determine it did not.

"[A] defendant's Sixth Amendment rights are not absolute." State v. Case, 13 Wn. App. 2d 657, 669, 466 P.3d 799 (2020). "To show a Sixth Amendment violation, the excluded evidence must be of extremely high probative value." Id. at 670. "[I]t is not enough that the excluded evidence simply be relevant in that it makes a fact of consequence more or less probable." Id.

Purdy asserts that the video impeaches Greely's credibility as the State's central witness. Her defense theory is essentially that Greely "made up a false story that she assaulted him to justify the fact that she was injured." The trial court excluded the video in part because it found that Greely's chuckle had limited probative value as to Greely's state of mind when he took Purdy to the ground. It also found that the video did not support Purdy's theory that Greely lied about the incident "to avoid making a use of force report." The trial court determined the video had little probative value and did not make any fact more or less probable. The exclusion of the video did not prevent Purdy from arguing her trial theory. Based on the record before us, we cannot say that the video was of "extremely high probative value."

[7] Given our conclusion, we do not reach the State's contention that the video would have been prejudicial against it.

C. Right to a Fair Trial

Purdy contends the trial court's admission of Stiffarm's testimony, admission of her post-arrest statements to the officers, and exclusion of the video was unduly prejudicial and denied her the right to a fair trial. A trial court's erroneous admission of evidence is subject to the harmless error analysis. State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). An error is harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" State v. Gresham, 173 Wn.2d 405, 425, 269 P.3d 207 (2012) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Because we do not see any evidentiary errors, we cannot conclude that the trial court denied Purdy her right to a fair trial.

D. Supervision Fees

Purdy says the trial court intended to waive all discretionary LFOs but inadvertently imposed supervision fees. We agree and remand for the trial court to strike the fees.

Because trial courts can waive supervision fees, they are discretionary LFOs. Dillon, 12 Wn. App. 2d at 152; RCW 9.94A.703(2). "Where the record demonstrates that the trial court intended to impose only mandatory LFOs but inadvertently imposed supervision fees, it is appropriate for us to strike the condition of community custody requiring these fees." State v. Peña Salvador, 17 Wn. App. 2d 768, 791–92, 487 P.3d 923 (2021) (citing Dillon, 12 Wn. App. 2d at 152); see also State v. Markovich, No. 81423-1-I, slip op. at 18 (Wash. Ct.

App. Aug. 2, 2021), https://www.courts.wa.gov/opinions/pdf/801562.pdf (holding similarly).

During sentencing, the court said, "I will find that Ms. Purdy is indigent for the purposes of legal financial obligations, impose *only* the $500 victim penalty assessment and the $100 DNA fee." (Emphasis added.) The trial court then used a form judgment and sentence with an appendix providing, "While on community custody, the defendant shall . . . pay supervision fees as determined by DOC."

In Dillon, we struck supervision fees because the record established that "the trial court intended to impose only mandatory LFOs." 12 Wn. App. 2d at 152; RCW 9.94A.703(2); see also Peña Salvador, 17 Wn. App. 2d at 792. At sentencing, the trial court said it would "'simply order $500 victim penalty assessment, which is still truly mandatory, as well as restitution, if any.'" Dillon, 12 Wn. App. 2d at 152. We concluded that this, along with the location of the prewritten language imposing supervision fees—in a separate section on community custody conditions—supported a remand for the supervision fees to be stricken. Id. Similarly, here, as for "legal financial obligations," the trial court stated its intent to "impose *only* the $500 victim penalty assessment and the $100 DNA fee." (Emphasis added.) The judgment and sentence's LFO section does not include an option for imposing supervision fees. As in Dillon, it appears the trial court inadvertently imposed the supervision fees by using a form judgment and sentence with prewritten language in the community custody conditions appendix.

The State asks us to disregard Dillon and instead follow Division Two's decision in State v. Starr, 16 Wn. App. 2d 106, 108, 479 P.3d 1209 (2021) (Worswck, J., concurring in part and dissenting in part). In Starr, the sentencing court stated, "The defendant is otherwise indigent. So no other costs will be assessed." Id. But the sentencing court did not strike the part of the boilerplate judgment and sentence imposing supervision fees. Id. On appeal, a majority of the panel observed that supervision fees do not constitute costs, and thus the sentencing court's statements did not necessarily show that it did not intend to impose such fees. Id. at 109. The dissenting judge agreed that such fees are not statutory costs, but believed that the sentencing court stated an intent not to impose the fees. Id. at 111. Starr does not apply here because the trial court stated its intent to waive all nonmandatory LFOs.

The State seems to argue that the written judgment and sentence controls over the trial court's oral statement. We rejected this argument in State v. Spieker, No. 80224-9-I, slip op. at 6 (Wash. Ct. App. Mar. 22, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/802259.pdf, noting that the imposition of supervision fees through prewritten language is "more akin to a scrivener's error or clerical mistake than a contradictory statement."[8] The remedy for a "scrivener's error is remand to the trial court for correction of the

[8] See GR 14.1(c) ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.").

judgment and sentence."[9] Id. (citing In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701–02, 117 P.3d 353 (2005)).

We remand for the trial court to strike the supervision fees and otherwise affirm.

Chun, J.

WE CONCUR:

Mann, C.J.

Dwyer, J.

[9] In the alternative, the State contends that if the judgment and sentence does not express the intent of the sentencing court, Purdy should have moved for relief under CrR 7.8(a). But the State does not explain how this affects the appeal here.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81106-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

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