No. 98751-3

COA # 81365-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PETER ALEXANDER NORTON,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION ONE
(transferred from Division Two)

and

THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
CLALLAM COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

FEDERAL CASELAW

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PETITIONER

Peter A. Norton asks for review of the decision indicated in section B below. Mr. Norton was the accused in the trial court and the appellant in the Court of Appeals.

B. COURT OF APPEALS DECISION

In the decision Mr. Norton seeks to have reviewed, Division One of the Court of Appeals affirmed Mr. Norton's convictions for second-degree and vehicular assault but reversed and remanded for further proceedings on legal financial obligations. State v. Norton, __ Wn. App. ___ (2020 WL 3047309) (No. 81365-0-I) (Appendix A).

C. ISSUES PRESENTED FOR REVIEW

1. Should the Court grant review because the Court of Appeals improperly extended this Court's rulings on the proper standard of review for determining whether the right to present a defense has been violated?

2. Should review also be granted because the decision of the Court of Appeals in this case conflicts with the decision of another Court of Appeals, in State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995)?

D. STATEMENT OF THE CASE

Petitioner Peter Norton was charged and convicted after jury trial in Clallam County superior court with vehicular assault and second-degree assault with a deadly weapon, "to wit: a motor vehicle[.]" CP 31-33, 82-83; RCW 9A.36.021; RCW 46.61.522.

The relevant incident occurred on September 22, 2017, when Norton's vehicle hit his neighbor, Edward Horner, where Horner was walking off the side of the road. Mr. Norton did not dispute that his

car had hit Horner but claimed that Horner had thrown a beer at the windshield, obstructing Norton's view, that Horner had then "charged" the Jeep and that Norton, who had been coming to help Horner, tried but failed to completely stop. RP 190-92, 401-18.

Mr. Norton got out of his Jeep and helped Horner up from the ground, put him in the Jeep, and drove to the hospital, where Norton got Horner a wheelchair and was sitting with him at admitting when police arrived. RP 191-92, 269-76, 354-58.

Witnesses for the state saw Norton driving up to Horner after making an unexpected u-turn and saw Horner get hit by the Jeep but did not actually see what had happened just before or had a very limited view and could not see if Horner had, in fact, charged at and jumped on the car. RP 187-89, 250-52, 340-58. There were skid marks on the grass and gravel indicating the Jeep had hit the brakes. RP 262-63, 322-23.

Mr. Norton testified that he had seen Horner act erratically and then end up into bad situations in the past. RP 270-81. More specifically, Norton said Horner "gets in quite a bit of trouble around the house." RP 401-402. Mr. Norton saw Horner on the side of the road and Horner had then "flipped off" Norton, which made Norton think of Horner, "well, he's on a roll again." RP 401. Mr. Norton testified that he had intended to turn around, pick up Horner and take him home, "so he wasn't getting in anymore trouble." RP 401. He had not expected Horner to throw the beer at the Jeep's

windshield and charge the car. RP 401-10.

A doctor who saw Horner at the emergency room said Horner showed periods of anger and agitation - so much so that the doctor had to have security present several times. RP 172-76. The medical record indicated Horner was "not reliably examinable due to lack of cooperation, likely intoxication, abnormal baseline." RP 168.

Tiffany Jenks had known Horner for about four years and saw the incident. RP 364-67. Ms. Jenks said Horner was being loud and verbal although no one was there, yelling and flailing his arms wildly as he was walking. RP 368. Mr. Horner seemed to Jenks to be very angry and upset and was not walking in a straight line. RP 372-80. Ms. Jenks saw something in Horner's hand, saw Horner run towards the Jeep and said it seemed the vehicle slammed on the brakes. RP 374-75.

Ms. Jenks only surfaced as a witness about a week before trial. RP 370-94. She explained she had warrants so had not stuck around after the incident. She had come forward when she learned a trial was going on. RP 370-94. An officer who interviewed her testified Jenks was unwilling to sign a statement under oath but admitted that she had already given a lengthy interview which had been recorded prior to being asked to write it all out for police. RP 435-41.

According to Ms. Jenks, Horner said he did not remember what happened but thought he was going to get "a paycheck" out of it. RP 377-78.

Before trial, the prosecution moved to exclude evidence from witnesses that they had seen Horner behave violently when he was drinking and had seen him "freaking out" in ways which supported Norton's claim that day that Norton had thought Horner needed help that day. RP 117-18. Counsel argued it was relevant 1) to prove Norton's state of mind, 2) to prove Norton's defense that he had said he turned his car around to help Horner and had a reasonable belief Horner was in trouble, and 3) to rebut the prosecution's claim that Norton was fabricating how Horner had acted that day, RP 120-22.

The judge limited the testimony to what witnesses saw Horner doing that day and excluded any testimony about prior instances and any beliefs about whether Horner had been "off his meds" that day. RP 124.

At trial, the prosecutor repeatedly objected and had excluded testimony from Norton and Jenks about Horner. RP 406. The state successfully stopped Norton from explaining that state's witnesses might have misconstrued what was going on because they did not know Norton or Horner or Horner's situation. RP 406. Ms. Jenks tried to testify that "Ed was acting a little bit wild" when she saw him that day, but the prosecutor's objection was sustained. RP 366-67. The prosecutor objected to "relevance" when Jenks tried to say what she observed that day. RP 367. When she started to explain that he was being loud and verbal but that it did not alarm her because she knew him, the state's objection was sustained. RP 368-70.

In closing argument, the prosecutor started with the state's theme that, "this is not about a good [S]amaritan trying to help a neighbor" and instead Norton had been angry and hit Horner on purpose. RP 466-67. The prosecutor called Norton's argument that Horner was rushing at the vehicle as "bizarre[.]" RP 467-68. The prosecutor claimed the defense was, "Horner brought this on himself, you know, let's blame the victim basically." RP 468.

The prosecutor continued to denigrate the defense claim that Norton had not meant for this to happen and the claim that Horner ran at the car and jumped on the hood, citing Horner's physical appearance in the courtroom ("we all saw Mr. Horner. It looks like he'd have trouble going up a flight of stairs, much less jumping on the hood of a Jeep"). RP 468-69.

Regarding reasonable doubt, the prosecutor argued that none of the explanations the defense had put forward for the incident were "reasonable." RP 472. The prosecutor said "[t]o say that he had no other options but to take the course he did is ridiculous," and counsel's objection this was "improper argument" was overruled. RP 473. The prosecutor also declared, "[i]t's ridiculous" that the defense was arguing that what Norton had done was reasonable and he was trying to help his friend. RP 475.

Then, in rebuttal closing argument, the prosecutor described the acts of Norton as an "unwanted, pseudo rescue attempt," and that Norton's defense was "all cover, that's like a puff of smoke, that's

an explanation after the fact." RP 502. Despite the testimony from Jenks, the prosecutor declared that there was "no evidence" that Horner "was flailing or rushing at the car or jumping on the hood," and that "[n]one of the eye witnesses saw that." RP 502.

A little later, the prosecutor declared:

> A good [S]amaritan, that - - if his story is true, and if Ed ran out in front of him and jumped on the hood and all that, and caused - - I mean, it's like that old joke. If I say oh, I had a car accident, a tree jumped in front of my car, or a house jumped in front of my car, it's like that. **They're blaming the victim saying the victim came to the car and created his own vehicular assault and it's ridiculous. Talk about common sense, apply it to that and the end result is that's a ridiculous argument.**

RP 506-507 (emphasis added). The prosecutor told jurors it was "undisputed" that Norton did a u-turn after the neighbor he had been arguing with flipped him off, "**[a]nd there's no reasonable - - I mean, common sense, innocent explanation for this.**" RP 507 (emphasis added).

Mr. Norton appealed and, ultimately, Division One of the Court of Appeals issued a decision upholding the convictions. App. A. More discussion of the details of that holding is contained in the argument section, *infra*.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

REVIEW SHOULD BE GRANTED BECAUSE THE QUESTION OF WHETHER MR. NORTON'S STATE AND FEDERAL DUE PROCESS RIGHTS TO PRESENT A DEFENSE WERE VIOLATED BY THE EXCLUSION OF EVIDENCE WHICH WAS RELEVANT, MATERIAL AND NECESSARY TO HIS DEFENSE IS OF SERIOUS, SIGNIFICANT CONSTITUTIONAL IMPORTANCE AND THE COURT OF APPEALS RULING IS IN APPARENT CONFLICT WITH THE COURT OF APPEALS DECISION IN KASSAHUN

Both the state and federal constitutions guarantee the due process right to present a defense. See State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 502 (2006); Sixth Amend., 14th Amend., Art. 1, § 3. In addition, both constitutions enshrine the right of the accused to meaningful confrontation of the state's case. See State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983); see also, Delaware v.Van Arsdall, 475 U.S.673, 678, 106 S.Ct. 1431, 89 L. Ed. 2d 674 (1986). This includes the right to present testimony in your own defense. Hudlow, 99 Wn.2d at 14-15; Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Together these rights ensure that the accused have the "right to a fair opportunity to defend against the State's accusations." See Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973); see State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

In this case, this Court should grant review, because the question whether Norton's state and federal due process rights to present a defense were violated is a serious, significant constitutional

issue.

This Court has repeatedly granted review on issues relating to the state and federal constitutional rights to present a defense. See State v. Arndt, 194 Wn.2d 784, 453 P.3d 696 (2019); State v. Clark, 187 Wn.2d 641, 389 P.3d 462 (2017); Jones, 168 Wn.2d at 720; Darden, 145 Wn.2d at 622. In Jones, this Court applied a de novo standard of review to the issue. 168 Wn.2d at 720. Instead of asking if the trial court had "abused its discretion" in refusing to admit the evidence allegedly excluded in violation of the right to present a defense, the Court noted a different standard, which requires only a finding that the evidence the defendant sought to introduce was of "at least minimal relevance." Jones, 168 Wn.2d at 719-20, quoting, Darden, 145 Wn.2d at 622. If the evidence met that standard, this Court had held, the burden then shifted to the State to show "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 143 Wn.2d at 622.

Indeed, the Court had detailed a sort of sliding scale regarding the balance of the State's interests and those of the defendant, so that the evidence can be withheld only if "the State's interest outweighs the defendant's need." Id. The interests of the accused are strong and include not only the right to a fair trial and the need for the evidence but also "the integrity of the truthfinding process[.]" Hudlow, 99 Wn.2d at 14. The Court has thus concluded that, where evidence of high probative value to the defense is excluded, "it

appears no state interest can be compelling enough to preclude its introduction" consistent with the Sixth Amendment and Article 1, § 22, rights of the accused. Id. In fact, the Court has held that an evidentiary statute cannot apply to exclude evidence of "extreme probative value[.]" Jones, 168 Wn.2d at 723.

In Clark, however, the Court appeared to depart from that standard, instead adopting a new two-step analysis. Clark, 187 Wn.2d at 648. The Clark Court first cited the usual standard of review for evidentiary rulings - "abuse of discretion," then said that, "[i]t the court excluded relevant evidence," the Court would determine as a matter of law whether the exclusion violated the constitutional right to present a defense, citing Jones. Shortly after Clark, in Arndt, the Court recognized that, "[w]hether a Sixth Amendment right has been abridged presents a legal question that is reviewed de novo," but applied the new "two-step review process to review the trial court's individual evidentiary rulings for abuse of discretion and to consider de novo the constitutional question of whether these rulings deprived" the accused of her rights to present a defense. Arndt, 194 Wn.2d at 797.

Here, in affirming, the Court of Appeals rejected the state's claim that the excluded evidence was "not relevant to Norton's state of mind," also rejecting the idea it would have been mere speculation, noting, "[i]f Jenks witnessed Horner engage in prior troublesome behavior, it make's Norton's contention that he

previously observed Horner engage in troublesome behavior more probable, and thus makes his theory that he was worried that Horner was going to get into more trouble and that he intended to assist Horner more credible." App. A at 7 n. 4.

Instead of applying the standards regarding relevance set forth by this Court in Jones, Darden, and similar cases as far back as Hudlow, Division One then applied its interpretation of the "two-step process" in Arndt, declaring that Arndt held that there was no violation of the right to present a defense whenever evidence was excluded but the defendant was not "completely" barred from offering relevant evidence "that would enable the defendant to present the defense theory of the case to the jury." App. A at 6-7.

This Court should grant review under RAP 13.4(b)(3). The right to present a defense is crucial to the integrity of our criminal justice system, and "[f]ew rights are more fundamental than that of an accused to present witnesses in his defense." Chambers, 410 U.S. at 302. Further, in Clark, this Court declared, "[w]e do not question the principle that a criminal defendant has the constitutional right to present evidence in his or her own defense, and relevant observation testimony tending to rebut any element of the State's case, including mens rea, is generally admissible." 187 Wn.2d at 653. Division One's application of the standard of review essentially eliminates the right to present a defense in every case unless there is complete exclusion of all relevant evidence. It also expands the "two-step" process

referred to in Arndt to effectively overrule the balancing test used by this Court in Hudlow and its progeny, thus watering down the protections of the rights this Court has previously found. Under Hudlow and its progency like Darden, the threshold for "relevance" in this context is very low. Darden, 145 Wn.2d at 621. Evidence is relevant if it makes more or less probable the existence of any fact that is of consequence to the outcome. ER 401. As a result, even "minimally relevant evidence is admissible" if it is relevant and material to the defense, unless the state can show "a compelling interest" for its exclusion. Darden, 145 Wn.2d at 612.

But under Division One's decision in this case, even if evidence meets the standard of minimal relevance and the state has made *no* showing of a compelling interest for its exclusion, a trial court could exclude the evidence with impunity despite the state and federal constitutional rights to present a defense. The constitutional rights to present a defense ensure that jurors hear not only the state's claims but also give the accused the opportunity to "present the defendant's version of the facts." State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), abrogated on other grounds by, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Further, state and federal due process principles require that criminal prosecutions must comport with prevailing notions of fundamental fairness, requiring that the defendant have a meaningful chance to present his defense. See State v. Wittenbarger,

124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Mr. Norton was deprived of that "fair opportunity."

Division One was also in error in declaring that the issue was unpreserved because there was no indication what evidence was excluded. App. A at 8-9. Prior to trial, the state explicitly moved to exclude testimony from Jenks or any other witness based on what had been said by them pretrial. RP 118. The prosecutor told the Court specifically what the state wanted to exclude was "witnesses putting forward information or claims that Ed Horner is crazy, that he gets violent when he's drinking, that he was off his meds by the roadside and that he probably was freaking out and therefore it would have justified Mr. Norton's U-turn to go help him. RP 118-19. The state argued such testimony was "based on prior extrinsic conduct of specific incidents they may have witnesses in the past involving Mr. Horner," among other sources. RP 118.

One proposed defense witness, Ginger Peterson-Hansen, knew Horner and worked around him and would testify that "he can act in a way that can get himself in trouble," which was consistent with what both Norton and Jenks would say. RP 123. The prosecutor told the court that the testimony of witnesses that Horner had a mental illness or condition was just "not relevant to the case," but that "Ms. Jenks and Ms. Peterson propose to come before the jury and introduce that." RP 118-19. Counsel said he did not intend to have someone say Horner was mentally ill or not on his medication,

but to explain why Horner acted the way he had and why Jenks, too, thought Horner was in trouble again. RP 122.

Review should also be granted to address whether Division One erred in declaring that there was no misconduct committed by the prosecutor in first moving to exclude the evidence, then faulting Norton for failing to present it. See App. A at 4-5. Unlike other attorneys, prosecutors enjoy a special role as "quasi-judicial" officers. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). As a result, they owe a duty to the public, including the accused. In re Glassman, 175 Wn.2d 696, 712-13, 286 P.3d 673 (2012). This duty requires prosecutors to seek justice rather than acting like a "heated partisan," even if that means "losing" a conviction. See State v. Reeder, 46 Wn.2d 888, 892-93, 285 P.2d 884 (1955).

In Kassahun, the Court of Appeals held it was prosecutorial misconduct for a public prosecutor to first move to exclude evidence and then rely on its absence in arguing guilt. Kassahun, 78 Wn. App. at 941. The Court of Appeals was is not alone in finding it "foul play" for a prosecutor to argue that the defense is not credible because of a lack of evidence when the prosecutor knows such evidence exists but was excluded. See United States v. Toney, 599 F.2d 787, 790-91 (6th

Cir. 1979); see also, State v. Bvocik, 781 N.W.2d 719, 720, 324 Wis.2d 352 (2010) (misconduct "when a prosecutor's closing argument asks the jury to draw an inference the prosecutor knows or should know is not true").

In Kassahun, the defendant gas station store owner was accused of second-degree murder and second-degree assault and claimed self-defense. 78 Wn. App. at 946. When he tried to secure evidence of gang association and activity by the alleged victim to support that defense, the prosecutor objected - with success. Id. The prosecutor also moved to exclude all mention of gangs and gang activity, although the defendant was allowed to testify about his subjective fears that the store had been "plagued by gangs" who shoplifted and used drugs around the store. 78 Wn. App. at 946-47. He also testified about having his life threatened by a gang member a few weeks earlier and having police dismiss it as not a "real emergency." Id. During closing argument, the prosecutor told jurors that Kassahun had "tried to paint a picture of lawless gangs taking over and running the show in the parking lot, everywhere, but where was the evidence of that?" Id. The defense objection was overruled. 78 Wn. App. at 947.

On review, the Court of Appeals found that it was prosecutorial misconduct to argue to jurors they should find the defense less credible based on the absence of gang evidence. 78 Wn. App. at 952. The Court declared, "[h]aving prevailed by motion in

limine in its effort to preclude Kassahun from discovering objective evidence" of gang membership and activities, it was misconduct for the prosecutor to imply in argument to the jury that Kassahun was being untruthful because he failed to offer that objective evidence. Id. Because it was already reversing based on the other error, the Court did not decide whether that misconduct alone prejudiced the right to a fair trial, but made a point to "direct that the misconduct not be repeated" at the new, third trial. Id.

Here, after first convincing the trial court to exclude the evidence, the prosecutor then exploited that evidence's absence against Norton. Repeatedly, the prosecutor dismissed the defense as a false claim of being a "good Samaritan" by Norton. RP 466-67. The prosecutor called Norton's testimony that Horner "had contributed to this by rushing at the vehicle" "bizarre" - and, to the average juror not knowing Horner's situation and history, it would of course seem to be so. RP 467-68. The prosecutor faulted the defense as, "let's blame the victim basically." RP 468.

Indeed, the prosecutor mocked the very idea that Horner would run at the car and jump at the hood. RP 469. The prosecutor pointed out how unlikely this was, noting that Horner had seemed frail in court. RP 469. The prosecutor told jurors the defense that Norton was trying to reasonably help his friend was "ridiculous." RP 475. And then in rebuttal, he mocked Norton's defense as an "unwanted, pseudo rescue attempt," said it was "all cover," "like a

puff of smoke (RP 502), that there was "no evidence" Horner was flailing or rushing at the car (despite the testimony of Jenks) (RP 502), denigrated the defense as "I had a car accident, a tree jumped in front of my car" (RP 506), and again declared the defense "ridiculous." RP 506.

Then, the prosecutor told jurors that "common sense" should tell them it was "a ridiculous argument" to even suggest Horner had acted in the way Norton had said. RP 506-507.

Regarding reasonable doubt, the prosecutor argued that none of the explanations the defense had put forward for the incident were "reasonable." RP 472. And this theme was returned to in rebuttal, with the prosecutor saying there was "no reasonable" or "common sense, innocent explanation" for Norton to have made a u-turn and driven in the direction of Horner at all. RP 507.

Thus, the prosecutor denigrated Norton's defense that Horner had run at the Jeep which had caused the collision as ridiculous. But the prosecutor knew there was evidence which would have supported both Norton's belief that Horner was in trouble and in need of help and the reasonableness of the possibility that Horner had charged at the vehicle, which was otherwise, as the prosecutor made clear to declaim, "ridiculous." And that evidence had been excluded based on the prosecutor's own motion. Just as in Kassahun, here the prosecutor urged jurors to convict based on the lack of evidence to support the defense when the prosecutor knew that such

evidence existed, but had been excluded.

Division One did not discuss Kassahun. App. A. Instead, it simply declared that the prosecutorial misconduct was not argued to be sufficiently independently prejudicial to support reversal. App. A at 4-5 n. 3. But Norton did not raise the misconduct as a separate grounds to reverse; he argued that the prosecutor's misconduct exacerbated the constitutional error of excluding the evidence in violation of Norton's rights to present a defense. See Brief of Appellant, at 1-2, 24-28. This Court should grant review to address whether it is misconduct for the prosecutor to prevent jurors from hearing evidence relevant to the defense and then fault the defense for its lack in closing, as the Kassahun Court held. And it should find that the violations of Norton's state and federal constitutional rights to present a defense were further exacerbated by the prosecutor's misconduct, so that reversal and remand for a new trial is required.

F. CONCLUSION

There was never any question that Norton's Jeep hit Horner. The only question was whether the impact was the result of an out-of-control angry Norton using the vehicle as a "weapon" in response to Horner simply "flipping him off," as the state claimed, or the result of an out-of-control Horner rushing the Jeep, throwing a beer and obstructing Norton's view so the impact occurred. The excluded evidence was relevant, material and necessary to support the defense. After first moving to preclude jurors from hearing it, the prosecutor

then mocked Norton's defense for its lack. This Court should grant review under RAP 13.4(b)(3), to address the significant constitutional question about whether the relevance standard set forth in Hudlow, Darden, and other cases of this Court was overruled by the mention of a "two-step" process in Clark and Arndt. It should further grant review to address the misconduct of first moving to exclude evidence, then faulting the defendant for its absence, and how that misconduct contributed to the corrosive effect of the error in exclusion of the evidence relevant, material and necessary for Norton's defense.

DATED this 30th day of July, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel via this Court's upload service, and Mr. Norton, at his last known address, ADDRESS

DATED this 30th day of July, 2020.

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FILED
6/8/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PETER ALEXANDER NORTON, Appellant.	DIVISION ONE No. 81365-0-I UNPUBLISHED OPINION

DWYER, J. — Peter Norton appeals from his convictions for assault in the second degree and vehicular assault. He contends that the trial court violated his right to present a defense by excluding evidence that supported his defense theory. Norton also asserts that, should we affirm his convictions, we must nevertheless remand to superior court to strike an improperly imposed criminal filing fee and to determine whether the imposition of a DNA collection fee is proper. We affirm the convictions, but remand to the superior court to strike the criminal filing fee and to determine whether Norton must pay a DNA collection fee.

I

On September 22, 2017, Norton struck pedestrian Edward Horner with his motor vehicle. The collision was witnessed by several people, including Tiffany Jenks. Norton, Horner, and Jenks all knew each other prior to the collision.

The State subsequently charged Norton with one count of assault in the second degree and one count of vehicular assault. At trial, Norton did not dispute that he had struck Horner with his motor vehicle. Rather, he disputed whether he had possessed the required mental states to be convicted of the charged offenses.[1]

Norton testified that he had been driving on the opposite side of the road from Horner when he saw Horner "flipping [him] off". Norton further testified that this caused him to be concerned that Horner was going to get himself into trouble, because he was Horner's neighbor and had previously seen Horner get himself into trouble when engaging in similar behavior. Norton then testified that he decided to "spin around, pick [Horner] up and take him home so he wasn't getting in anymore trouble." According to Norton, when he turned his motor vehicle around and started to pull off the road near Horner, Horner threw a beer can at his windshield and charged the vehicle.

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[1] For the crime of assault in the second degree, the jury was instructed that, to convict, it must find that Norton had committed "an act done with intent to inflict bodily injury upon another, intending but failing to accomplish it, and accompanied with the apparent present ability to inflict the bodily injury if not prevented." The jury was also instructed that "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime."

For the crime of vehicular assault, the jury was instructed that, to convict, it must find that Norton must have driven his vehicle in such a manner as to have caused substantial bodily harm to Horner and either "A, drove the vehicle in a reckless manner, or B, drove the vehicle with a disregard for the safety of others."

The jury was also provided with an instruction defining various mental states:

> To operate a motor vehicle in a reckless manner means to drive in a rash or headless manner, indifferent to the consequences. Disregard for the safety of others means an aggravated kind of negligence or carelessness falling short of recklessness but constituting a more serious dereliction than ordinary negligence.
>
> Ordinary negligence is the failure to exercise ordinary care. Ordinary negligence is the doing of some act which a reasonably careful person would not do under the same or similar circumstances, or the failure to do something which a reasonably careful person would have done under the same or similar circumstances.

In contrast to Norton, Horner testified that while he did indeed throw a beer can at the windshield of Norton's vehicle and had flipped him off, he did so only after Norton ran a stop sign, turned the motor vehicle to face him, and "gunned it."

Several other witnesses testified to the events leading up to and following the collision, but only one, Jenks, corroborated Norton's testimony that Horner ran toward the motor vehicle. Jenks testified that she observed, prior to the collision, Horner "yelling very loudly with nobody else around him," "flailing his arms about," and "walking erratically." She further testified that Norton's motor vehicle made a U-turn right in front of her and slowly began driving toward Horner and pulling off of the road. As the motor vehicle pulled in towards Horner, Jenks testified that she observed the vehicle slow down but still collide with Horner because Horner threw a beer can at the windshield and ran toward the vehicle.

Following the presentation of evidence, Norton's counsel gave closing argument to the jury during which she asserted that the State had failed to establish that Norton possessed the mental states required to convict him of assault in the second degree and vehicular assault. She further argued that Norton had intended to help Horner when he turned his vehicle around and drove toward him, and that the collision occurred because Horner ran toward the vehicle.

After hearing closing arguments, the jury found Norton guilty of assault in the second degree and vehicular assault.

At Norton's subsequent sentencing hearing, the sentencing judge found that Norton was unable to pay discretionary costs, then imposed a standard range sentence and required Norton to pay a $200 criminal filing fee, a $100 DNA collection fee, and any interest that accrued on all fees owed as part of the sentence until paid. Norton appealed to Division Two, which transferred the matter to us for resolution.

II

Norton appears to primarily contend that the trial court erred by barring him and Jenks from testifying to facts that supported his defense theory that he lacked the required mental states to be found guilty of the crimes with which he was charged and that this violated his constitutional "right to present a defense."[2] Based on the argument provided therein, Norton's briefing appears to assert that (1) evidentiary rulings during Jenks' testimony excluded evidence of her observations of Horner's past troublesome behavior, (2) evidentiary rulings during Norton's testimony prevented him from testifying to his mental state and his prior experiences with Horner, and (3) collectively, these exclusions violated his "right to present a defense" by preventing him from arguing his theory to the jury that he lacked the mental states required to be convicted of the crimes of assault in the second degree and vehicular assault.[3] We reject these assertions.

[2] It is somewhat unclear exactly which evidentiary rulings Norton is asserting violated his rights. His briefing contains no assignments of error to specific evidentiary rulings but, rather, asserts that his rights were violated by the exclusion of "testimony that Norton believed the alleged victim was in trouble based on his past experiences with him and that another witness, who had seen the alleged victim just prior to the incident and noticed his erratic behavior, had similar experiences." Br. of Appellant at 1.

[3] Norton also asserts that the prosecutor committed misconduct during closing argument and that such misconduct requires reversal. "To prevail on a claim of prosecutorial misconduct, the defendant must establish 'that the prosecutor's conduct was both improper and prejudicial in

The record establishes that the trial court never denied a request by defense counsel to present testimony from Jenks regarding her observations of Horner's behavior in the past, that Norton testified to the facts necessary to present his defense, and that Norton did, in fact, argue his defense theory to the jury.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee a defendant's rights to compulsory process and to confront the witnesses against him or her. U.S. CONST. Amend. VI; CONST. art. I, § 22. "Courts and litigants often refer to these rights, collectively, as the 'right to present a defense,' although this phrase does not appear in our state or federal constitutions." State v. Bedada, No. 79036-6-I, slip op. at 6 n.2 (Wash. Ct. App. May 11, 2020), https://www.courts.wa.gov/opinions/pdf/790366.pdf (citing State v. Arndt, 194 Wn.2d 784, 789, 453 P.3d 696 (2019)).

Our Supreme Court has explained that contentions that evidentiary rulings violated a defendant's constitutional "right to present a defense" are reviewed pursuant to a two-step process. Arndt, 194 Wn.2d at 797-98. First, we review the challenged evidentiary rulings under an abuse of discretion standard. Then, if necessary, we review de novo whether such rulings violate a defendant's constitutional "right to present a defense." See Arndt, 194 Wn.2d at 797-812

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the context of the entire record and the circumstances at trial." State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). In his briefing on this issue, Norton does not assert that any of the alleged misconduct was prejudicial, nor does he set forth any argument analyzing how any of the alleged misconduct prejudiced him. Because there is no possibility of reversal absent a showing of prejudice to Norton, we need not further address this insufficiently briefed contention. See State v. Mason, 170 Wn. App. 375, 380, 285 P.3d 154 (2012) (declining to consider insufficiently briefed contention).

(first determining that evidentiary rulings did not constitute abuse of discretion and then, only after finding no abuse of discretion, considering de novo whether the rulings violated the right to present a defense).

Here, Norton does not contend that any of the trial court's rulings violated applicable rules of evidence. Hence, we proceed directly to considering whether they violated his "right to present a defense." We consider whether a trial court's otherwise valid evidentiary rulings deprived a defendant of the "right to present a defense" de novo. Arndt, 194 Wn.2d at 797.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing Chambers, 410 U.S. at 294). However, "[d]efendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence." Jones, 168 Wn.2d at 720.

When determining whether the "right to present a defense" has been violated, "the State's interest in excluding evidence must be balanced against the defendant's need for the information sought to be admitted." Arndt, 194 Wn.2d at 812. It would violate a defendant's right to present a defense to bar the admission of evidence that, "if excluded, would deprive defendants of the ability to testify to their versions of the incident." Jones, 168 Wn.2d at 721. However, a

trial court may bar the admission of evidence that, if excluded, would not completely bar a defendant from offering relevant evidence that would enable the defendant to present the defense theory of the case to the jury. See Arndt, 194 Wn.2d at 814 (concluding that Arndt's right to present a defense was not violated in a murder and arson case when only some of her proffered evidence was excluded and she was able to argue her defense theory).

A

We first address Norton's contention that the trial court excluded Jenks' proposed testimony regarding her observations of Horner's past behavior.[4] Norton appears to assert that the trial court made rulings barring the admission of Jenks' prior observations of Horner during a discussion on the record regarding the State's motions in limine and during Jenks' testimony at trial. To the contrary, the record establishes that Norton's trial counsel never sought to admit such testimony and, thus, did not properly preserve this claim of error for appeal.

[4] The State incorrectly contends that such testimony is not relevant to Norton's state of mind. Evidence is relevant when it has a "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. Jenks' testimony regarding Horner's past troublesome behavior would have supported Norton's argument that he had driven towards Horner with the intent to help him avoid engaging in further troublesome behavior.

The State further contends that this would support Norton's defense theory only if it was proved that Jenks and Norton witnessed the exact same prior troublesome behavior. We do not agree. If Jenks witnessed Horner engage in prior troublesome behavior, it makes Norton's contention that he previously observed Horner engage in troublesome behavior more probable, and thus makes his theory that he was worried that Horner was going to get into more trouble and that he intended to assist Horner more credible.

The State also avers, without citation to supporting authority, that even if the evidence is relevant to establishing Norton's state of mind, it would be impermissibly speculative for the jury to connect evidence of Horner's prior acts to Norton's state of mind on the day of the collision. We reject this unsupported contention. See State v. Logan, 102 Wn. App. 907, 911, 10 P.3d 504 (2000) (declining to consider the State's argument for an extension of the speedy trial deadline where unsupported by citation to authority). Plainly, such circumstantial evidence, supporting an inference as to Norton's mental state, is not impermissibly speculative.

We generally review "only issues which the record shows have been argued and decided at the trial court level." State v. Aguirre, 73 Wn. App. 682, 687, 871 P.2d 616 (1994) (citing State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952); Metcalf v. Metcalf, 57 Wn.2d 612, 358 P.2d 983 (1961); Buchsieb/Danard, Inc. v. Skagit County, 99 Wn.2d 577, 663 P.2d 487 (1983)). We will consider contentions that the trial court erroneously excluded evidence only when the party seeking review made an adequate offer of proof before the trial court, unless the substance of the excluded evidence is apparent from the record. State v. Ray, 116 Wn.2d 531, 538-39, 806 P.2d 1220 (1991). An adequate offer of proof (1) informs the trial court of the legal theory under which the offered evidence is admissible, (2) informs the trial court of the specific nature of the evidence offered to enable the court to judge its admissibility, and (3) creates an adequate record for appellate review. Ray, 116 Wn.2d at 538 (citing Mad River Orchard Co. v. Krack Corp., 89 Wn.2d 535, 537, 573 P.2d 796 (1978); State v. Negrin, 37 Wn. App. 516, 525, 681 P.2d 1287 (1984)).

Herein, the record establishes that Norton never requested to admit any testimony from Jenks regarding her prior observations of Horner's behavior. Thus, he has not preserved the issue of whether such testimony was admissible. During an on the record discussion before trial regarding the State's motions in limine, defense counsel explained that she expected to elicit the following testimony from Jenks:

> Ms. Jenks was walking down the street and saw this, she saw Mr. Horner, who she also knows from living at Maloney Heights or being in the homeless community, saw him screaming,

> yelling, flailing his arms, saw him throw the beer can at the car and knew that he was trouble, that Mr. Horner was in trouble.
>
> And then she saw him run at the car and jump on -- what appeared to be jump on the car . . . . [t]hat's the testimony.

Norton's counsel then further explained that Jenks' testimony "goes to my client's state of mind. . . . [I]t's offered to prove why my client did what he did, why he turned the car around."

After hearing this explanation, the court ruled that Jenks could testify as to her observations, such as if she saw "Mr. Horner on the side of the road throwing beer cans, flailing his arms, dancing, whatever he happened to be doing that [she] could observe." The court further explained that Jenks was not permitted "to testify as to why he was doing those things, whether it was because he was off his meds, [or] because he was having a psychotic episode." Thus, although the court ruled that testimony explaining the *reasons* for Norton's behavior was impermissible, it did not make any ruling regarding the admissibility of Jenks' prior *observations* of Horner's behavior.

Then, during Jenks' testimony at trial, defense counsel attempted to elicit testimony from Jenks regarding her observations of Horner on the day of the collision. The prosecutor objected, arguing that the information was not relevant and, in the alternative, that Jenks should not be permitted to testify because she was incapable of testifying to her observations of Horner without also explaining why he behaved in the way that she observed. Norton's counsel then offered the following explanation for her question:

> I'm trying to direct the witness to answer the question what did you see, okay. And I think I expect her to say that she saw Ed flailing his arms, talking to himself. Uh, that he wasn't just walking quietly

> on the road. That's the testimony I'm attempting to elicit from this witness. I'm not attempting to have her say that she knows him, that he's crazy, or that she knows him, that he's dangerous.

Immediately following this exchange, the court restricted Jenks' testimony to what she "saw on the 22nd of September," noting that she could not put her observations in context by testifying to her previous experiences with Horner. Norton's counsel did not protest that this ruling was improper. Furthermore, she never attempted to elicit any testimony from Jenks regarding any observations of Horner's behavior prior to the day of the collision. Nor was any offer of proof ever made to establish that which Jenks would testify to were she permitted to testify to her past observations of Horner's behavior. Norton's trial counsel never argued that such testimony was admissible.

Because Norton never sought to elicit any testimony from Jenks regarding her prior observations of Horner's behavior and never presented any argument or offer of proof pertaining to the admissibility of any such testimony, Norton has failed to preserve the claim of error that such testimony was improperly excluded.

B

Next we consider Norton's contention that the court's rulings barred him from personally testifying to his mental state and to his prior observations of Horner's behavior. Again, the record does not support Norton's contention.

At trial, Norton testified that he drove towards Horner intending to help him avoid "getting in anymore trouble," that he did so because of his past experiences observing Horner's behavior, and that the collision occurred

because Horner ran directly into his vehicle. Thus, plainly, Norton was permitted to testify to his version of events.

C

While it is apparent that the trial court cannot have violated Norton's "right to present a defense" by excluding evidence Norton never sought to admit—Jenks' prior observations of Horner's behavior—or by allowing Norton to testify—specifically to his mental state and to his prior observations of Horner's behavior—we nevertheless next analyze whether the trial court violated Norton's right to present a defense.

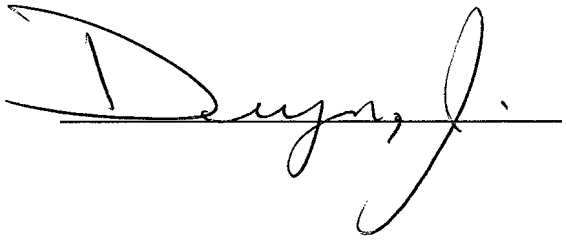
The record establishes that Norton was permitted to argue, and did in fact argue, his theory to the jury that he intended to help Horner when Horner ran at his vehicle. Because Norton presented sufficient evidence to argue his defense theory to the jury, and did in fact argue his theory to the jury, his "right to present a defense" was not violated. See Arndt, 194 Wn.2d at 813-14 (concluding that there was no violation of Arndt's right to present a defense because Arndt was able to advance her defense theory through the presentation of some, though not all, of her proffered supporting evidence).

III

Finally, Norton contends that we should remand this matter to the superior court with directions to strike from his sentence the imposition of a $200 criminal filing and the interest provision because he is indigent. He further urges that the superior court be directed to determine whether a $100 DNA collection fee should have been imposed given that he was previously convicted of a felony

and may have had his DNA previously collected by the State. The State concedes that such a remand is required. We agree. We, therefore, affirm Norton's convictions, but remand this matter to the superior court with directions to determine whether the State has previously collected a DNA sample from Norton, to strike from Norton's sentence the DNA collection fee unless the State demonstrates that Norton's DNA was not previously collected,[5] and to strike from Norton's sentence the criminal filing fee and interest provision.

Affirmed in part, reversed in part, and remanded.



WE CONCUR:

[5] See State v. Houck, 9 Wn. App. 2d 636, 651 n.4, 446 P.3d 646 (2019), review denied, 194 Wn.2d 1024 (2020) ("[T]he State must show that the defendant's DNA has not previously been collected.").

RUSSELL SELK LAW OFFICE

July 30, 2020 - 4:18 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	81365-0
Appellate Court Case Title:	State of Washington, Respondent v. Peter A. Norton, Appellant
Superior Court Case Number:	18-1-00100-4

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