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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSE BENAVIDES, Appellant.	No. 50617-3-II UNPUBLISHED

COX, J.P.T.[*] — Jose Benavides appeals his conviction of second degree assault and unlawful imprisonment. The trial court did not violate his constitutional right to present a defense when it excluded certain evidence of the victim's alcohol use. The trial court did not abuse its discretion in admitting evidence of the victim's testimony on "bad days" with Benavides. There was no cumulative error by the trial court. We affirm.

The State charged Benavides with second degree assault – domestic violence and unlawful imprisonment – domestic violence. These charges arose from incidents that occurred on August 15, 2015. A jury failed to convict him in his first trial.

During a second trial, the victim, LaTaria Brewer, testified that on August 15, 2015, after a night out with a friend, she went to Benavides's house. They talked for less than an hour before arguing. He then hit her and choked her over the next several hours. Brewer also testified that she

[*]Judge Ronald E. Cox is serving as a judge pro tempore of the Court of Appeals pursuant to CAR 21(c).

attempted to escape twice but Benavides forcibly dragged her back into the house each time. On her third escape attempt, she was able to run a few blocks to her friend's house, where she telephoned the police. She was transported to a hospital for treatment once police responded.

Benavides testified that Brewer was never at his residence on August 15. He denied striking or strangling her. And he claimed that he never restrained her in his residence.

A jury convicted him, as charged. He appeals.

RIGHT TO PRESENT A DEFENSE

Benavides contends that the trial court violated his constitutional right to present a defense by excluding certain evidence regarding the victim's alleged abuse of alcohol. We disagree.

A claimed violation of a defendant's right to present a defense under the Sixth Amendment of the United States Constitution is reviewed de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

The United States Constitution guarantees a right to present testimony in one's own defense. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). This right is not absolute. *Jones*, 168 Wn.2d at 720. Defendants have a right to present only relevant evidence with no constitutional right to present irrelevant evidence. *Jones*, 168 Wn.2d at 720 (citing *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014)). "Evidence that a defendant seeks to introduce 'must be of at least minimal relevance.'" *Jones*, 168 Wn.2d at 720 (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). "'[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" *Jones*, 168 Wn.2d at 720 (alteration in original) (quoting *Darden*, 145 Wn.2d at 622). The State's interest in

excluding prejudicial evidence must also "'be balanced against the defendant's need for the information sought'" and relevant information can be withheld only "'if the State's interest outweighs the defendant's need.'" *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622). For evidence that is of high probative value, no state interest can be compelling enough to preclude its introduction if doing so would deprive the defendants of the ability to testify to their versions of the incident. *Jones*, 168 Wn.2d at 720-21.

We apply the de novo standard of review here, as the *Jones* court and other courts have done where a constitutional claim is made. 168 Wn.2d at 719.

During motions in limine, the State moved to exclude any reference to Brewer's alleged prior alcohol use, unless previously approved by the trial court by an offer of proof. The court held that any consumption of alcohol during the hours leading up to the alleged incident on August 15 and the time immediately thereafter could be admitted. But the court determined that neither attorney should ask any witness about their use of controlled substances or alcohol, in general, unless some showing of relevance was first made outside the presence of the jury.

During trial, Brewer's use of alcohol came up in relation to two events. The first instance was on August 15 in the evening hours leading up to and during the alleged assault and imprisonment. The second instance was in regards to an argument that Benavides testified happened in the weeks before the alleged incident, on August 5. It is this second instance on which he rests his claim of a constitutional violation.

Benavides testified that on July 31, he departed on a 10-day trip to Sturgis, South Dakota and left his son in Brewer's care. He further testified that for the first several days he was able to reach Brewer by phone to check up on his son. But he testified that on August 5, he was unable

to reach her. He became worried, and when he finally got in contact with her, he believed she was drunk and they argued. The State objected to this testimony as self-serving hearsay. The trial court overruled this objection.

The State then objected to this testimony as irrelevant. The court sustained this objection. The court then excused the jury to hear arguments of the parties.

Outside the presence of the jury, the trial court ruled that Brewer's alcohol use on prior occasions could not be admitted without a proper ER 404(b) analysis. The court also noted that evidence of prior alcohol use created a danger of unfair prejudice under ER 403.

The trial court made clear that Benavides could testify that they were arguing during the phone call, that he was concerned for the safety of his child, and that he came home from his trip early. But the court ruled that he could not include that their argument was based on Brewer's alleged intoxication absent some further showing of relevance by an offer of proof.

The jury was brought back in and the testimony continued without reference to the alleged intoxication of Brewer. Benevides testified that he was concerned for the safety of his child in the care of Brewer and that he cut his trip short and came home to find his son at a friend's house down the street. He claimed that he did not see Brewer once he was back.

Here, the first question is whether evidence of Brewer's alleged intoxication during the telephone call between Benavides and her days before the August 15 crimes is of any relevance to the crimes committed on that date. The trial court considered this question and decided that there was no showing by the offer of proof of any relevance of the victim's alleged intoxication at that time to the charged crimes. In doing this, the court carefully considered the scope of what evidence about the telephone call could come in as relevant. The court properly concluded that the central

point was to show that Benavides was concerned about Brewer's care of his child, causing him to return early from his trip away. That was a proper conclusion for the court to reach under the circumstances.

As the court properly noted during the consideration of the question of the proper scope of evidence to admit, evidence of Brewer's alleged intoxication was prejudicial under ER 403. Benavides cannot and does not challenge this conclusion.

The question then becomes whether the State bore its burden to show if its interest in avoiding prejudicial admission of evidence of intoxication of its witness outweighed Benavides's need for the information sought. Even if we were to assume that evidence of intoxication at that time bore some minimal relevance to the crimes committed days later, we conclude that the trial court properly excluded the proffer under the circumstances.

As *Hudlow* and other cases make clear, there is no right to admission of evidence that is not relevant. The trial court properly decided that admission of the evidence proffered was improper.

For the foregoing reasons, we hold that the trial court did not violate Benavides's constitutional right to present a defense by excluding testimony regarding Brewer's alleged intoxication prior to the time of the crimes.

Benavides argues that the evidence excluded from the testimony was of high probative value. The record does not support that argument and we reject it.

His argument relies on his contention that the facts of this case are analogous to *Jones*. His reliance is misplaced.

In *Jones*, the defendant was on trial for rape and his defense to the charge was consent. 168 Wn.2d at 717. The defendant attempted to testify that he and the victim were engaged in "a nine-hour alcohol and cocaine-fueled sex party" with two other men and another woman, but the trial court ruled that it was barred by the rape shield statute. *Jones*, 168 Wn.2d at 717. Our Supreme Court held that for evidence of high probative value, no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment. *Jones*, 168 Wn.2d at 720. It said that the defendant's testimony was evidence of extremely probative value because it was his "entire defense." *Jones*, 168 Wn.2d at 721. For these reasons, the Supreme Court reversed and remanded for a new trial. *Jones*, 168 Wn.2d at 725.

The facts in *Jones* were different. First, this testimony is of past alcohol use on August 5, 10 days prior to the night of the assault, August 15. In *Jones*, the evidence did not refer to past sexual conduct but to conduct on the same night of the alleged rape. 168 Wn.2d at 723. The *Jones* court made a distinction between evidence of past general promiscuity and evidence that, if excluded, would deprive the defendant of his ability to testify to his version of the events. 168 Wn.2d at 720-21. The court reasoned that barring such evidence would effectively read the word "past" out of the rape shield statute. *Jones*, 168 Wn.2d at 723. Unlike the *Jones* court, this case does not require us to read the word "past" out of ER 404(b).

Second, Benavides's argument with Brewer about her intoxication on August 5 did not constitute Benavides's entire defense. Benavides contends that he "should have been able to testify without restriction regarding his argument with Brewer as it was highly probative of her motive and his theory of the case." Br. of Appellant at 21. However, it is not her alleged intoxication during the argument that is probative of Brewer's motivation to fabricate the allegations to lie, but

the fact that they had an argument at all. Benavides was still permitted to testify that he telephoned Brewer, that they argued, and that he cut his trip short and returned home because he was concerned for the safety of his son.

It is true that *Jones* makes a distinction between evidence that is marginally relevant that a court should balance against the State's interest in excluding the evidence and evidence that is of extremely high probative value, which no State interest can possibly be compelling enough to preclude its introduction. 168 Wn.2d at 721. However, the evidence at issue here does not rise to this level of extremely high probative value.

"BAD TIMES" EVIDENCE

Benavides next argues that the trial court abused its discretion in admitting evidence concerning the victim's "bad times" with him. We again disagree.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). Discretion is abused when a decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). A court's decision is based on untenable grounds if the factual findings are unsupported by the record and it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Littlefield*, 133 Wn.2d at 47.

During Brewer's testimony, when asked to describe her relationship with Benavides between 2009 and 2013, she testified, "[W]e had our good times and then our bad times." 3 Verbatim Report of Proceedings (VRP) (Apr. 3, 2017) at 214. Later on in her testimony, the following exchange with the prosecutor took place:

> Q You mentioned from September of 2009 to August of 2015 during your relationship with the defendant, you've had good times and bad times with the defendant.
> A Mm-hm.
> Q How would you describe August 15th, 2015?

3 VRP (Apr. 3, 2017) at 238. Benavides objected to the question.

The trial court excused the jury and took up the matter with counsel. Benavides argued that this questioning made a comparison between the events of August 15 and other "bad times" in their relationship. He claimed this was evidence of prior domestic violence that the court had ruled inadmissible under ER 404(b).

The State took the position that there was no violation of ER 404(b), only an explanation by Brewer of what she meant by her earlier testimony about "bad days."

The court ruled,

> I'm going to allow her to state whether this was a good day or a bad day with the understanding that it's not going to, at this point, be in any way compared expressly or impliedly to any other good days or bad days. It's just, is it a good day or a bad day, and she can answer it in either of those two manners, but not go beyond that.
>
> The second thing, to be very clear about, what I have ruled is that 404(b) evidence doesn't come in absent prior order of the Court, and it's just presumed to be inadmissible if it's offered under 404(b). Having said that, it hasn't been offered.

3 VRP (Apr. 3, 2017) at 241. The jury returned to the courtroom. The State continued its questioning as follows:

> Q During the time of September of 2009 when your relationship with the defendant first started to August 15th, 2015, you mentioned you had good days

and bad days in your relationship. How would you describe August 15th, 2015?
A A bad day.
Q At this point in your bad day, did it end?
Let me rephrase.
At this point of the defendant pulling you back inside of his residence, being in your face and yelling at you, you standing in the same spot where he hit you earlier, did your bad day end?
A No.
Q What happened next?
A It continued.
Q How did it continue?
A With him hitting me and me trying to leave again.

3 VRP (Apr. 3, 2017) at 243.

A close reading of the trial court's oral ruling and the questions and answers that follow show there was no abuse of discretion in admitting the evidence. Once the jury returned to the courtroom, the questions asked and answered were limited to the events of the day in question, not prior days. To read the relevant passages otherwise misreads the record.

Benavides argues that the trial court abused its discretion when it allowed Brewer to testify that August 15 was a "bad day" because it based its reasoning on untenable grounds—namely that it relied on two faulty assumptions. First, that ER 404(b) character evidence of prior bad acts had not yet been elicited, and second, that the comparison between the present incident and prior "bad days" had not already been made. Benavides contends that the sole purpose of the question was to imply that "bad times" was a euphemism for assault which allowed the prosecutor to suggest that this was not the first time Benavides had assaulted Brewer. He asserts that the comparison would have been more than obvious to the jury. This argument is creative, but unpersuasive.

As we stated, a close reading of the questions and answers after the jury came back in show no violation of the court's ruling, a ruling that was within the range of acceptable choices. There simply was no abuse of discretion in admitting this evidence.

CUMULATIVE ERROR

Cumulative error may deprive a defendant of his constitutional right to a fair trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Because there was no error in either respect for the issues we already discussed, cumulative error does not apply.

THE STATE CONCEDES ALCOHOL EVIDENCE WAS ADMISSIBLE

In its reply, the State expressly concedes that the trial court's ruling admitting evidence of the victim's alcohol use on the night of August 15, the time of the crimes of conviction, was not an abuse of discretion. We accept this concession.

We affirm the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Cox, JPT

COX, J.P.T.

We concur:

J. E, A.C.J.

J. E, A.C.J.

Sutton, J.

SUTTON, J.