CITATION:	*The King v Silver (No 2)* [2025] NTSC 67
PARTIES:	THE KING
	v
	SILVER, Leslie
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory Jurisdiction
FILE NOs:	22334717 & 22332715
DELIVERED:	2 September 2025
HEARING DATE:	2 September 2025
JUDGMENT OF:	Grant CJ

CATCHWORDS:

EVIDENCE – Tendency evidence – Conduct – Criminal proceedings – Significant probative value

Tendency notice filed by accused – Tendency of complainant – Tendency to engage in physical violence when intoxicated – Tendency to use improvised weapons – Tendency to engage in controlling behaviour – Tendency to self-harm – Tendencies said to characterise relationship with accused as one of mutual violence – Whether evidence has significant probative value to establish reasonable possibility of a state of facts consistent with innocence of accused – Tendencies submitted not of sufficient particularity – Previous charged acts of violence by complainant only establish tendency to violence generally – No previous violence towards accused – Evidence insufficient to establish tendency to self-harm – Threshold of significant probative value not satisfied – Tendency evidence inadmissible

Evidence (National Uniform Legislation) Act 2011 (NT), s 97

AE v The Queen [2008] NSWCCA 52; *CEG v The Queen* [2012] VSCA 55;

DPP v Campbell & Ors (Ruling No 1) [2013] VSC 665; *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349; *Elias v R* [2006] NSWCCA 365; *Hughes v The Queen* (2017) 263 CLR 338; *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569; *R v AH* (1997) 42 NSWLR 702; *R v F* (2002) 129 A Crim R 126; *R v Fletcher* (2005) 156 A Crim R 308; *R v Ford* (2009) 201 A Crim R 451; *R v Harker* [2004] NSWCCA 427; *R v Holmes (No 5)* [2021] NSWSC 115; *R v Li* [2003] NSWCCA 407; *R v Lock* (1997) 91 A Crim R 356; R v Lockyer (1996) 89 A Crim R 457; *R v Milton* [2004] NSWCCA 195; *R v PWD* [2010] NSWCCA 209; *R v Smiler (No 2)* [2017] NTSC 31; *R v WRC* (2002) 130 A Crim R 89; *R v Zhang* (2005) 227 ALR 311; S*aoud v R* (2014) 87 NSWLR 481; *Semaan v The Queen* (2013) 230 A Crim R 568; *The Queen v Majak* [2022] NTSC 57; *The Queen v Nudjulu* [2020] NTSC 54; *Velkoski v R* (2014) 45 VR 680, referred to.

REPRESENTATION:

Counsel:

Crown:	R Everitt
Accused:	N MacCarron

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Bryson Kelly Lawyers

Judgment category classification:	C
Judgment ID Number:	Gra2508
Number of pages:	18

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v Silver (No 2) [2025] NTSC 67
Nos. 22334717 & 22332715

BETWEEN:

THE KING

AND:

LESLIE SILVER

CORAM: GRANT CJ

EDITED REASONS FOR DECISION
(Delivered *ex tempore* on 2 September 2025)

[1] The accused is charged with aggravated assault alleged to have been committed against the complainant on 10 October 2023, and sexual intercourse without consent, aggravated assault and choking in a domestic relationship alleged to have been committed against the same complainant on 28 October 2023.

The Crown case

[2] The Crown case may be summarised briefly as follows. The accused and the complainant were in an intimate partner relationship at the material time. There was a domestic violence order in force which named the complainant as the protected person and restrained the accused from assaulting her.

[3] On 10 October 2023, the accused became intoxicated, verbally abused the complainant and accused the complainant of sleeping with other men. He then ripped off the complainant's underwear and punched her three times in the groin. The accused then threatened to stab the complainant with a stick and struck her to the head with a rock. The complainant suffered injuries as a result of that assault and experienced pain when walking for a number of days after that assault. That conduct constituted the aggravated assault offence charged in count 1.

[4] On 28 October 2023, the accused again became intoxicated, verbally abused the complainant and accused the complainant of sleeping with other men. During that abuse the accused began punching and kicking the complainant. The accused then forcibly removed the complainant's clothing, pulled her to the ground and beat her with a stick. While on top of the complainant the accused forcibly inserted a finger or fingers into her vagina two or more times. That penetration constituted the rape offence charged in count 3.

[5] The accused then stabbed the complainant with a stick to the back, buttocks and chin, attempted to force the stick into the complainant's mouth and bit her on the forearm. That conduct, together with the physical violence which preceded the alleged rape, constituted the aggravated assault offence charged in count 2.

[6] The accused then placed his hands around the complainant's throat and strangled her with sufficient pressure to interfere with her breathing. That conduct constituted the choking offence charged in count 4.

[7] The complainant was taken to hospital and treated for extensive bruising and lacerations that she sustained as a result of that assault.

Tendency evidence

[8] Section 97 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('the *ENULA*') provides for the admissibility of tendency evidence subject to the requirements of notice and significant probative value. By notice dated 27 August 2025, the defence has indicated its intention to adduce tendency evidence to prove that the complainant has a tendency to act in a particular way, namely: (a) to engage in physical violence particularly when intoxicated; (b) to improvise offensive weapons to engage in physical violence; (c) to engage in controlling behaviour; and (d) to engage in self-harm. The notice also asserts concomitant tendencies in relation to the complainant's state of mind.

[9] Those tendencies are said to be relevant in determining whether on the two occasions the subject of these charges there is a reasonable possibility: (a) that the injuries the complainant suffered on 10 and 27 October 2023 were self-inflicted; (b) that the injuries suffered by the complainant on 10 October 2023 were inflicted by the accused in self-

defence; (c) that the complainant is a violent and controlling person who by that disposition prevents the accused from reporting injuries she has inflicted upon him; and (d) that when police found the accused on top of the complainant on 27 October 2023 he was doing so to stop her harming herself rather than in the prosecution of an assault on her.

[10] The evidence sought to be relied upon to establish that the complainant has a violent disposition is:

(a) on 14 December 2006, the complainant assaulted another female while intoxicated by punching her in the face and stabbing her in the face with a broken wine bottle;

(b) on 25 June 2008, the complainant assaulted another female while intoxicated by hitting her five times and stabbing her in the left cheek with a stick;

(c) on 1 August 2009, the complainant assaulted a male while intoxicated by punching him in the face and stabbing him in the shoulder and wrist with a broken bottle;

(d) on 4 November 2010, the complainant assaulted a male while intoxicated by striking him on the head and right arm with a pole and punching him five or six times;

(e) on 10 June 2011, the complainant assaulted a male while intoxicated by throwing a rock at him which struck him in the chest, then assaulted a female by slapping her to the face and chest

and then assaulted a second female by pulling her necklace and punching her;

(f) on 22 June 2012, the complainant assaulted another female while intoxicated by kicking her in the head;

(g) on 16 November 2013, the complainant assaulted another female while intoxicated by hitting her to the head, neck and hand with a stick;

(h) on 10 March 2017, the complainant assaulted another female while intoxicated by hitting her to the head three times with a leather boot;

(i) on 21 July 2017, the complainant assaulted another female by punching and kicking her to the head;

(j) on 2 May 2018, the complainant assaulted another female in prison by striking her on the head and spilling hot water onto her leg;

(k) on 17 November 2021, the complainant assaulted another female while intoxicated by striking her three times to the back with a broken bottle; and

(l) on 16 September 2024, the complainant assaulted a male while intoxicated by striking him on the head with a bottle, kicking his legs, punching him to the head and striking him on the head with a portable speaker.

[11] There is also a statement made by the accused in October 2023 to the effect that the complainant had broken his collarbone at some point in time. Although that is not evidence referred to in the defence tendency notice, it does have some relevance to the issue and it is also discussed further below.

[12] The evidence sought to be relied upon to establish that the complainant has a tendency to inflict injuries upon herself is:

(a) on 11 October 2023, a photograph was taken showing scars on the complainant's left forearm;

(b) on 11 October 2023, the accused alleged to police that injuries visible on the complainant were self-inflicted; and

(c) on 11 October 2024, the complainant was hospitalised for self-inflicted wounds to her left and right thigh and left forearm.

The assessment of significant probative value

[13] The Dictionary in the *ENULA* defines the 'probative value' of evidence to mean 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'. As already described, the relevant facts in issue in this case are whether the accused committed the offences charged. The defence says the tendencies could rationally affect the assessment of those facts because they inform the possibility whether the injuries the complainant sustained on those occasions were either self-inflicted or inflicted by

the accused in self-defence; and the possibility that the accused's conduct on 27 October 2023 was protective rather than aggressive.

[14] The test of 'significant probative value' requires something more than mere relevance.[1] The evidence will have 'significant probative value' if it could rationally affect the assessment of the probability of the existence of one or more of the facts in issue in some important fashion.[2] This resolves to a judicial evaluation of whether the hypothetical jury would rationally think it likely that the evidence is important in relation to the determination of the facts in issue.[3]

[15] However, as adverted to above by the reference to 'reasonable possibility', there is a distinction to be drawn in that process of evaluation where the evidence of tendency is sought to be deployed by the defence rather than by the prosecution. That distinction was described in *DPP v Campbell & Ors (Ruling No 1)* in the following terms:

> The approach to the question of admissibility of tendency evidence, sought to be adduced on behalf of the accused, must, of necessity, be different to the approach taken by the court to tendency evidence which is sought to be adduced on behalf of the prosecution. In a criminal trial, the accused does not bear any legal onus of proof. Rather, on particular issues, the accused may

---

1 *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [72]–[73]; S Odgers, *Uniform Evidence Law*, Thompson Law Book Co, Looseleaf Service, [EA.97.120]; *R v Lockyer* (1996) 89 A Crim R 457; *R v Lock* (1997) 91 A Crim R 356 at 361; *R v AH* (1997) 42 NSWLR 702.

2 *R v Zhang* (2005) 227 ALR 311 at [46]; *R v Ford* (2009) 201 A Crim R 451 at [52]; *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349 at [67], [71], [72]; *R v Lock* (1997) 91 A Crim R 356 at 361.

3 Odgers, op cit, [EA.97.120]; *R v Zhang* (2005) 158 A Crim R 504 at [46]; *R v Ford* (2009) 201 A Crim R 451 at [52]; *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349 at [67], [71], [72].

> bear an evidentiary onus of adducing evidence, from which an inference arises that a reasonable possibility, consistent with innocence, exists. Thus, in determining whether tendency evidence, sought to be adduced by an accused, is admissible under s 97(1), it must be borne in mind that that evidence must have significant probative value to the establishment of a particular reasonable possibility of a state of facts consistent with the innocence of the accused person.[4]

[16] A similar observation was made by the New South Wales Supreme Court in *R v Holmes (No 5)*, in which it was stated that the consideration of 'significant probative value' when dealing with tendency evidence to be introduced by an accused is directed not to the establishment beyond reasonable doubt of the facts in issue in relation to the legal elements of the offence, but to whether an accused's exculpatory version of events might be true as a reasonable possibility.[5]

[17] The issue has also been subject to consideration by this Court in *R v Smiler (No 2)*. In that matter, the defence sought to adduce evidence that the complainant had a tendency to resort to acts of serious violence in order to resolve disputes. Justice Kelly stated:

> It needs to be borne in mind that the Crown bears the legal onus of proof on all issues including negating self-defence. The accused need only point to a reasonable possibility that he was acting in self-defence and submit that the Crown has not eliminated that possibility. Very little may be required for evidence to be

---

4 *DPP v Campbell & Ors (Ruling No 1)* [2013] VSC 665 at [41].

5 *R v Holmes (No 5)* [2021] NSWSC 115 at [34]-[35]. See also *The Queen v Majak* [2022] NTSC 57 at [43].

"significant" or "of consequence" in pointing only to a reasonable possibility that the accused may have been acting in self-defence.[6]

[18] However, in assessing whether tendency evidence is 'significant' or 'of consequence' in the establishment of a reasonable hypothesis consistent with innocence, it remains necessary for the defence to establish that the tendency evidence could rationally affect the assessment of that matter in some important fashion. That assessment involves a two-step process. In the first step, the relevant question is whether the evidence concerning the conduct would be probative in establishing the tendencies to act in the manner alleged by the defence. If it is accepted that an inference of tendency could be sustained, the second question is whether that tendency could sustain the reasonable possibility that, on these particular occasions, the complainant has either attacked the accused such that the injuries he inflicted on her were the result of self-defence, or that the complainant has inflicted the injuries on herself and concocted the allegations against the accused.[7]

[19] The question whether the evidence significantly bears on the facts in issue is 'a matter of fact and degree, and will be influenced by the nature of the fact in issue sought to be proved (or disproved)'.[8] The proposed tendency evidence need not demonstrate an 'underlying

---

6 *R v Smiler (No 2)* [2017] NTSC 31 at [16], citing R v Lockyer (1996) 89 A Crim R 457 at 459-460. That passage was cited with apparent approval in *The Queen v Nudjulu* [2020] NTSC 54 at [15].

7 *Hughes v The Queen* (2017) 263 CLR 338 at [40]-[41], as necessarily adapted to accommodate an assertion of tendency on the part of a complainant rather than an accused.

8 *Semaan v The Queen* (2013) 230 A Crim R 568 at [38].

unity', 'a modus operandi' or a 'pattern of conduct' to have the capacity to inform the questions whether the injuries sustained by the complainant were the result of self-defence on the part of the accused after the complainant had attacked him and/or whether the injuries sustained by the complainant were self-inflicted and/or whether the accused was laying on top of the complainant while she was naked to stop her from self-harming.[9] Depending upon the issue to which it is directed, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it.[10] However, a sufficient degree of particularity is still required and the evidence does need to demonstrate a tendency 'to act in a particular way'.[11] For that reason, similarity will ordinarily remain a guide in determining whether tendency evidence has sufficient probative value to pass the test for admissibility.[12]

[20] The evidence in this case is said to demonstrate two separate and general tendencies on the part of the complainant. The first is said to be a tendency on the part of the complainant to a violent disposition, and the second is said to be a different and distinct tendency to inflict

---

9 *Hughes v The Queen* (2017) 263 CLR 338 at [34]. approving the approach in *R v Ford* [2009] NSWCCA 306, *R v PWD* [2010] NSWCCA 209, *Saoud v R* (2014) 87 NSWLR 481 and disapproving *Velkoski v R* (2014) 45 VR 680 at 682.

10 *Hughes v The Queen* (2017) 263 CLR 338 at [37].

11 See, for example, *R v Li* [2003] NSWCCA 407 at [11].

12 *R v Fletcher* (2005) 156 A Crim R 308, [60]. See also *AE v The Queen* [2008] NSWCCA 52; *R v Milton* [2004] NSWCCA 195; *R v Harker* [2004] NSWCCA 427; *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89.

injuries upon herself. The question is whether the features of commonality or peculiarity in the various incidents which are relied upon by the defence are significant enough logically to imply that because the complainant engaged in a type of conduct disclosed by the tendency evidence, there is a real possibility consistent with the innocence of the accused in the particular circumstances of this case.[13] For that reason, in relation to the asserted tendency of violent disposition it is not enough to establish a tendency on the part of the complainant to assault other people generally. There are several difficulties with the defence position in that respect.

[21] First, none of the prior incidents said to establish a tendency to a violent disposition on the part of the complainant rationally sustain a tendency for violence in her relationship with the accused. Most of the incidents relied on for that purpose involve females. It is not enough to say that because some of those women were aunties or sisters the assaults had the general flavour of 'domestic violence', and thereby potentially informed her conduct towards the accused. Most significantly, none of the incidents involve the accused. As the Crown has submitted, the tendency to have a violent disposition is expressed at such a high degree of generality that it offers no probative force. That difficulty is not ameliorated by the addition of a purported tendency to improvise offensive weapons to engage in physical

13 *CEG v The Queen* [2012] VSCA 55 at [14], as necessarily adapted to accommodate an assertion of tendency on the part of a complainant rather than an accused.

violence. Although it may be accepted that the evidence identified in the notice could sustain an inference of a tendency to violent disposition, it is not of sufficient particularity to sustain the reasonable possibility that, on these occasions, the complainant has attacked the accused such that the injuries he inflicted on her were the result of self-defence.

[22] To the extent that the defence says that this tendency evidence is necessary for the proper characterisation of the relationship between the accused and the complainant, it does no such thing. That is because none of the evidence said to establish violent disposition arises out of incidents in the relationship between the complainant and the accused. The submission that the admission of the defence tendency evidence naturally follows the decision to allow the Crown tendency evidence must be rejected for that reason. It may also be noted in this respect that the domestic violence order which was in place at the material time named the complainant as the protected person and there was no reciprocal order restraining the complainant from violent conduct towards the accused.

[23] As already stated, there is reference in the defence submissions, but not in the tendency notice, to the accused telling police at some stage in late October 2023 that he had suffered a broken collarbone at some earlier point in time which had been inflicted by the complainant. If it is intended to adduce that evidence from police, it is hearsay in nature

and *prima facie* inadmissible. If the accused does not give evidence at trial, then he is 'not available' for the purpose of the exception to the hearsay rule in s 65 of the *ENULA*. The statement would not be admissible under that exception given that the circumstances do not make it unlikely that the representation is a fabrication, and the circumstances do not make it highly probable that the representation is reliable. If the accused does give evidence at trial, then he is 'available' for the purpose of the exception to the hearsay rule in s 66 of the *ENULA*. The statement would be admissible in those circumstances if the asserted fact was fresh in the accused's memory at the time, but that consideration would largely be subsumed by the accused's direct evidence as to the matter and his availability for cross-examination. As is evident from the exclusion of the statement from the tendency notice, that evidence would not be for tendency purposes. It would be evidence from the accused directly asserting self-defence in the incident which took place on 10 October 2023. That would also be its purpose even if no objection is taken on hearsay grounds, and it is put into evidence by the Crown as part of the police body worn video footage.

[24] Second, the only incident demonstrating an assault in the context of an intimate partner relationship is the incident which took place on 16 September 2024, almost 12 months after the incident in question here. That may be contrasted with the tendency evidence relied on by

the Crown, all of which concerns assaults by the accused on either the complainant or his immediate previous intimate partner in similar circumstances and involving similar features. What took place in a later and unrelated incident involving the complainant cannot rationally affect the probability that the accused believed on an earlier occasion that inflicting injury on the complainant was necessary in order to defend himself.[14] It is also not enough that the evidence might establish that on some later occasion the complainant was capable of inflicting violence on a subsequent domestic partner, and to make the accused's account (whatever that might be) more credible. That use would rise no higher than evidence of subsequent bad character and is inadmissible for that purpose.

[25] Third, the reasonable possibility said to arise must have some evidentiary or other basis. The accused's account in the aftermath of the incident which took place on 10 October 2023 is that the injuries visible on the complainant were self-inflicted. The accused gave no account of self-inflicted injuries in the aftermath of the incident which took place on 28 October 2023. There is nothing in the material which would establish a contention on the part of the accused that the complainant directed extreme violence towards him, or that he was attacked by the complainant on either occasion, or that he was acting in self-defence. In the absence of such material, the suggestion that the

14 *Elias v R* [2006] NSWCCA 365 at [26].

complainant has demonstrated a violent disposition towards others in no way establishes a reasonable possibility consistent with the innocence of the accused and has absolutely nothing to say about the nature of the accused's response or its proportionality even if it could assist in establishing that the complainant attacked the accused.

[26] There are also several difficulties with the evidence said to sustain a tendency to self-harm on the part of the complainant. That evidence either bears no relationship to the matters to be determined at trial or is inadmissible for tendency purposes in the form sought to be relied on by the defence.

[27] As to the first piece of evidence involving the photograph, the fact that an Aboriginal woman living a traditional or semi-traditional lifestyle has scars to the left forearm has nothing to say about a tendency to self-harm in these circumstances. In particular, it has nothing to say about the nature of the attack and the nature of the consequential injuries said to have been sustained on these two occasions. The assertion made in this case is that the complainant was hitting herself in the head with a rock. That assertion is far removed from anything which could have caused scarification to the complainant's forearm, even if it is assumed to be self-inflicted rather than cultural.

[28] The second piece of evidence is constituted by an account given by the accused to police in the immediate aftermath of the incident which took

place on 10 October 2023. As already noted, in that account the accused asserts that the complainant had been hitting herself in the head with a rock, and that it was not him who had done so. By itself, that is not tendency evidence. It is an exculpatory statement made by the accused at the scene. It is certainly not an admission by the complainant that the mechanism of her injuries was that she had been hitting herself in the head with a rock, and it is not admissible as such. The question whether the accused's statement to that effect should be accepted will be a matter for the jury having regard to the fact that it is unsworn unless he gives evidence to the same effect at trial and having regard to the reliability of the statement in the circumstances in which it was made. The second piece of evidence is unrelated to the incident which took place on 28 October 2023. Even leaving that lack of nexus aside, there is nothing in the contemporaneous statements made by the accused in the aftermath of that incident that when he was found lying on the naked complainant, he was attempting to stop her from harming herself.

[29] The third piece of evidence arises from a single line in a statement of alleged facts that on 11 October 2024 the complainant was arrested and conveyed to hospital for medical treatment 'following self-inflicted wounds to her left and right thigh and left forearm'. There is no further evidence about the nature of those injuries or the circumstances in which they were sustained. In particular, there is no evidence to the

effect that the injuries took place during an altercation with the intimate partner. In addition, the incident took place almost 12 months after the circumstances the subject of these charges. Again, what took place in a later and unrelated incident involving the complainant has only very faint probative value in assessing the probability that the complainant hit herself in the head with a rock on 10 October 2023 or that the accused was attempting to stop the complainant from harming herself on 28 October 2023.

[30] It should also be noted that none of the evidence sought to be relied upon by the defence establishes a tendency on the part of the complainant to act as the aggressor and then concoct and pursue false allegations against her domestic partners, or anybody else, up to and including prosecution action. On proper analysis, that is the gravamen of the hypotheses consistent with innocence which the defence seeks to establish by this tendency evidence. To the contrary, it would appear that the complainant has pleaded guilty on each of the occasions sought to be relied upon as establishing a relevant tendency.

[31] For these reasons, the evidence on which the defence seeks to rely does not sustain an inference of a tendency to self-harm. Although the evidence on which the defence seeks to rely does sustain an inference of violent disposition, the threshold of significant probative value has not been satisfied because the evidence does not properly sustain the reasonable possibility that, on these occasions, the complainant has

attacked the accused such that the injuries he inflicted on her were the result of self-defence.

Ruling

[32] The ruling on the matter for preliminary determination is that the evidence set out in the notice dated 27 August 2025 is inadmissible in the trial for tendency purposes.

———————————————————