

CITATION: *The King v Silver* [2025] NTSC 56

PARTIES: THE KING

v

SILVER, Leslie

TITLE OF COURT: SUPREME COURT OF NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory Jurisdiction

FILE NOs: 22334717 & 22332715

DELIVERED: 8 August 2025

HEARING DATE: 8 August 2025

JUDGMENT OF: Grant CJ

CATCHWORDS:

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

Two tendency notices – First notice dealing only with charged acts – Evidence mutually admissible – Second notice dealing with both charged acts and prior offending – Tendency on part of accused to engage in physical violence against female intimate partners – Tendency on part of accused to improvise weapons to use against female intimate partners during assaults – Tendency on part of accused to have controlling and violent disposition towards female intimate partners – Evidence capable of supporting tendencies asserted – Tendencies make more likely the facts said to constitute the charged offences – Tendency to engage in violence to exercise control clearly relevant to establishing whether accused exercised physical dominion as alleged – Clearly relevant to whether sexual penetration consensual – Probative value outweighs prejudicial effect – Evidence admissible

Harlen (A Pseudonym) v R [2023] VSCA 269, referred to.

REPRESENTATION:

Counsel

Applicant:	R Everitt
Respondent:	G O'Brien-Hartcher

Solicitors

Applicant:	Office of the Director of Public Prosecutions
Respondent:	Bryson Kelly Legal

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

The King v Silver [2025] NTSC 56
Nos. 22334717 & 22332715

BETWEEN:

THE KING

Applicant

AND:

LESLIE SILVER

Respondent

CORAM: GRANT CJ

EDITED REASONS FOR DECISION

(Delivered *ex tempore* 8 August 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.
- [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. 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 all 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. 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. 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.

- [5] The Crown has served two notices advising of its intention to adduce tendency evidence.
- [6] The first notice is dated 1 August 2025 and relates only to the charged conduct. The Crown contention is that the evidence in relation to each charged incident is mutually admissible to prove a tendency on the part of the accused to engage in physical violence towards the complainant; to engage in sexual or sexualised violence towards the complainant; and/or to have a jealous, controlling and violent disposition towards the complainant. Those tendencies are said to relate to the issue of whether the accused committed the acts charged.
- [7] The defence does not object to the mutual admissibility of the evidence for that purpose, subject to one important qualification. That is, the defence accepts that the offences with a sexual component, being counts 1 and 3, are mutually admissible for tendency purposes, and that the offences of frank violence, being counts 2 and 4, are mutually admissible for tendency purposes, but not otherwise. I will return to that asserted demarcation between sexual and violent offending shortly.
- [8] The second tendency notice is dated 7 August 2025 and relates to both the conduct charged in counts 1, 2 and 4, being the aggravated assault and choking offences, and six assaults which the accused committed on

his former intimate partner between 24 July 2017 and 19 January 2021.

The Crown contention is that the evidence of each incident is admissible to prove a tendency on the part of the accused to engage in physical violence against female intimate partners; to improvise weapons to use against female intimate partners during assaults; and/or to have a controlling and violent disposition towards female intimate partners. Again, those tendencies are said to relate to the issue of whether the accused committed the acts charged.

[9] The defence takes objection to the admissibility of the evidence of the six assaults which the accused committed on his former intimate partner. The evidence sought to be adduced for that purpose is particularised in the second tendency notice. Subject to questions of proof, those previous incidents may be summarised as follows in ascending chronological order:

- (a) on 24 July 2017, the accused became intoxicated and struck the victim on the back of the head twice with a toy truck causing swelling and bruising, in circumstances where a domestic violence order was in place naming the victim as the protected person;
- (b) on 28 September 2018, the accused became intoxicated and struck the victim in the head with a saucepan, placed his hands around the victim's neck and choked her, ripped the victim's clothing in the course of attempting to prevent her from escaping, struck the

victim on the back with a broomstick and punched the victim in the head;

- (c) on 10 July 2019, the accused became intoxicated, threatened to hurt the victim and then punched the victim to the chest, in circumstances where a domestic violence order was in place naming the victim as the protected person;
- (d) on 5 December 2019, the accused became intoxicated, started arguing with the victim about jealousy issues, struck her in the head and neck with a bicycle, punched the victim twice to the neck and then dragged the victim along the ground, in circumstances where a domestic violence order was in place naming the victim as the protected person;
- (e) on 18 November 2020, the accused verbally abused the victim and threatened to stab her with a pair of scissors he was holding; and
- (f) on 19 January 2021, the accused became intoxicated and struck the victim with a table causing her to fall to the ground, got on top of the victim and choked her, and stabbed the victim in the shoulder and lower leg with a pair of scissors.

[10] There is no doubt or dispute concerning the principles which govern the admissibility of tendency evidence. They are now well-settled. The first question is the extent to which the evidence is capable of supporting the tendency asserted. The second question is the extent to

which the tendency, if capable of support, would make more likely the facts said to constitute the charged offences. In answering those questions, the court must take into account the cogency of the evidence relating to the relevant conduct, the strength of the inference that can be drawn from the evidence concerning tendency, and the extent to which that tendency increases the likelihood that the fact in issue occurred.

[11] If the evidence satisfies those criteria, there is a further requirement that it cannot be used against an accused unless its probative value outweighs any prejudicial effect. For these purposes, the ‘probative value’ of evidence is defined to mean ‘the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue’.

[12] Turning then to the assessment of the strength of the tendency inference, the number and frequency of the incidents sought to be relied upon by the Crown is sufficient to establish that the accused has behaved in a violent manner towards his previous intimate partner and the complainant. Having regard to the number and nature of the previous incidents, when taken together with the conduct charged, any temporal gaps between them are not sufficient to sustain the conclusion that these were isolated aberrations or otherwise not reflective of a relevant tendency on the part of the accused. That is particularly so given that both the period of the accused’s relationship with the former

partner, and the interregnum between the end of that relationship and the date of this alleged offending, were punctuated by regular and sometimes lengthy periods of incarceration. The incidents are also not so remote in time from the circumstances of the offences charged as to significantly undermine their probative value in permitting an inference of tendency to be drawn.

[13] The conduct in question is general in the sense that it is said to demonstrate a tendency on the part of the accused to engage in physically violent behaviour towards his intimate partners and to have a violent disposition towards his intimate partners. On the other hand, certain aspects of the conduct are relatively specific in the sense that they variously involve either intoxication, a sexual component in the form of jealousy and/or and the use of everyday objects as weapons. Proof of those incidents is no doubt sufficient to demonstrate a tendency on the part of the accused to act in a particular way or to have a particular state of mind. Those tendencies are to engage in frank violence including the use of improvised weapons and to harbour a violent disposition towards his intimate partners.

[14] I turn then to consider whether those tendencies, if found to be established by the jury, would make more likely the facts said to constitute the charged offences. At the risk of doing a disservice to the carefully crafted submissions of both the Crown and the defence, the competing contentions can be broadly summarised as follows.

[15] The Crown says that it is unnecessary to establish that the violence deployed on each occasion was identical, or even of the same type. It is only necessary to demonstrate that the accused uses violence against his intimate partners in similar circumstances. It would be artificial to construct any rigid delineation between violent offending and sexual offending in these circumstances. That is because assault, domestic strangulation and rape are all offences of violence at base, and a tendency to engage in verbal and physical violence so as to exercise control is clearly relevant to establishing whether the accused exercised physical dominion in these circumstances as alleged, and whether the sexual penetration alleged was consensual: see *Harlen (A Pseudonym) v R* [2023] VSCA 269 at [74].

[16] Conversely, the defence says that general tendencies in relation to violence and violent disposition cannot assist the jury in determining whether the accused engaged in sexualised violence or sexual intercourse without consent. The evaluation of probative value is directed to the capacity of the tendency evidence to bear on the probability that the accused engaged in the conduct charged. In that calculus, a tendency to engage in non-sexual violence does not and cannot assist the jury in determining whether the accused has committed sexual offences. The defence also submits that it is not possible to quarantine the evidence of the prior convictions to proof only of the violent offences charged. Any direction to the jury designed

to limit the use of the evidence for tendency purposes to the violent offences charged would be ineffective to preclude rank propensity reasoning and/or would be so confusing as to give rise to unfair prejudice.

[17] In my assessment, while on one level the rape charge falls into a different category of offending to the other three charges, and while the tendencies asserted by the Crown in the second notice do not have a sexual component, that is not such as to fatally diminish the probative value of the tendency evidence sought to be adduced in the circumstances of this case. It is well accepted that as a general proposition there does not need to be a specific conformity between the incidents relied on for the tendency inference, either between themselves or with the conduct constituting the offence charged. With the exception of tendency evidence which is adduced to establish identity, evidence is not deprived of its character as tendency evidence only because the inference sought to be drawn from the prior behaviour does not conform precisely with the conduct charged.

[18] In the circumstances of this case, it is not meaningfully possible to disentangle the two charges alleging violent conduct on 28 October 2023 from the rape charge. All were committed as part of the same episode or transaction and occurred either simultaneously or in quick succession. All were highly violent in nature. The digital penetration as it is described in the Crown case and the complainant's evidence was

an act of violence and the exercise of physical dominion rather than a sexual act. The accused's conduct in that respect was not directed to his own sexual gratification. It was sexual conduct only in the sense that it involved a violent interference with the complainant's genitalia. Its defining characteristics were violence and degradation. The same may be said of the conduct charged in count 1.

[19] If one adds to the other evidence in the Crown case the fact that the accused has displayed a tendency in similar circumstances to respond with drunken violence towards his previous intimate partner, including by the use of improvised weapons, any suggestion that the complainant has fabricated her account of violence with a sexual component motivated by jealousy, or is somehow mistaken in that respect, might be assessed by a jury as unreasonably improbable.

[20] As well as satisfying the second threshold requirement for admissibility, that affords the evidence a relatively high degree of probative value. Ranged against that, the evidence is not of such a character as to provoke some irrational, emotional or illogical response in the jury or cause the jury to give it more weight than it deserves. Any concern in that respect can be adequately addressed by the orthodox directions in relation to the use of evidence for a tendency purpose.

Rulings

[21] The rulings on the preliminary issues are:

1. The evidence identified in the Crown's tendency notice dated 1 August 2025 is mutually admissible for tendency purposes.
 2. The evidence identified in the Crown's tendency notice dated 7 August 2025 is admissible for tendency purposes.
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