NO. 315207-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

MATTHEW THOMAS HIBBARD, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 12-1-00896-9

BRIEF OF RESPONDENT

ANDY MILLER, Deputy
Prosecuting Attorney
BAR NO. 10817
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

WASHINGTON STATUTES

REGULATIONS AND COURT RULES

I. RESPONSE TO ASSIGNMENTS OF ERROR

1. **The trial court was in its discretion in limiting character evidence.**

2. **Assault in the Fourth Degree is not a lesser included of Assault in the Third Degree/Criminal Negligence prong.**

3. **Peremptory challenges were conducted neither at a private conference nor off the record.**

II. STATEMENT OF THE CASE

On July 4, 2012, Ben Ensign and three friends went to Jack Didley's, a bar in Kennewick, Washington. RP[1] at 38. When they arrived, there were four people other than themselves inside the bar. *Id.* They sat in the "VIP section" which had "nicer seats." RP at 38-39. They were informed they could not sit in the "VIP seats" so they moved over to different seats. RP at 39.

The defendant was also present at Jack Didley's as a bouncer and manager. RP at 193. The defendant eventually told Ensign he would have to leave. RP at 42.

Testimony differed about Ensign's behavior in the bar that caused him to being asked to leave. However, it was clear that he was

[1] Unless otherwise indicated, "RP" refers to the Verbatim Report of Proceedings titled "Jury Trial" dated January 28-31, 2013, contained in two volumes, reported by Court Reporter John McLaughlin.

intoxicated. His blood alcohol level was between .22 and .25 at the time and he did cause two chairs to be knocked over, did dance around a pole and did approach a woman at the bar. RP at 15, 36-58, 192-235. Also, the jury observed a video of the defendant in the bar before he was asked to leave. Exhibit 39.

Mr. Ensign complied, leaving the bar with his friends. RP at 43. However, for unknown reasons, Mr. Ensign turned around and attempted to reenter the bar. RP at 75, 170. The defendant and another bouncer, Ray Anderson, moved to prevent him from reentering the bar. *Id.* Despite descriptions of him being antagonistic, all parties agree that Mr. Ensign did not attempt to attack the defendant or Ray Anderson, or get into an altercation with them in any way upon returning. RP at 75, 86, 149, 218.

The defendant and Ray Anderson picked up Mr. Ensign, the defendant holding his head. RP at 78. The defendant had Mr. Ensign in a choke hold. RP at 76. Ray Anderson had Mr. Ensign's feet. RP at 170. This immobilized Mr. Ensign, with the sole exception of his arms. RP at 170. The period of time Mr. Ensign was suspended was about ten seconds. Exhibit 39. During that time, the defendant and Ray Anderson carried Mr. Ensign over the concrete sidewalk, away from the door. RP at 179. While Ray Anderson held Ensign's feet, the defendant either threw or dropped Ensign's head to the concrete sidewalk. RP at 79. Security

videos of Mr. Ensign being picked up, being immobilized, and the defendant throwing or dropping his head to the sidewalk were admitted as evidence and shown to the jury. Exhibit 39; RP at 128.

There were multiple eyewitnesses to Mr. Ensign being suspended in air, and both the prosecution and the defense called eyewitnesses. RP at 76, 87, 95, 101-02. No witness indicated that Mr. Ensign ever struck the defendant. While suspended in the air, Mr. Ensign did move his hands back and forth, and, at one point, closed them. Exhibit 39; RP at 79, 230. However, he immediately reopened them. Exhibit 39; RP at 231. Witnesses did not interpret his actions as physically threatening. One described it as him being a "smarty-pants." RP at 78. He was heard to be giggling and laughing. RP at 180-82. Ray Anderson, the other bouncer, did not believe that Mr. Ensign was a threat, believing the people around them to be more concerning, and focused his attention on them. RP at 182. The defendant either dropped or thrust Mr. Ensign to the ground, slamming him headfirst into the concrete, the impact of his head sounding like a cinderblock striking. RP at 79. The defendant's body position in the security video makes it difficult to ascertain to what extent the motion was deliberate, and eyewitness testimony was mixed. Exhibit 39. The defendant gave no warning whatsoever to Mr. Ensign that he was going to be dropped. RP at 182-83.

Mr. Ensign was taken to Kennewick General Hospital, where a neurosurgeon, Dr. Cheerag Upadhyaya, was contacted. RP at 16-17. At Dr. Upadhyaya's direction, Mr. Ensign was transferred to Kadlec Regional Medical Center. RP at 17. Dr. Upadhyaya ascertained that, as a direct result of being thrown or dropped onto concrete by the defendant, Mr. Ensign had suffered a subdural hematoma. RP at 19. This is a condition where blood begins to pool between the dura, a thick lining of ligaments surrounding the brain, and the neural tissue itself. *Id.* He also had suffered contusions on the brain. RP at 20. Mr. Ensign's results on tests of neural functioning were very poor, indicating that the subdural hematoma was placing pressure on the left side of his brain. RP at 21-22. Mr. Ensign was taken to surgery, where the subdural hematoma was removed, as well as some spinal fluid, in an attempt to release the pressure Mr. Ensign's brain was under. RP at 23-24. A portion of Mr. Ensign's skull was removed to ensure that the swelling could continue with no further damage to neural tissue. *Id.* Unfortunately, Mr. Ensign's brain continued to swell. RP at 28-29. They found it necessary to induce a medical coma in Mr. Ensign. RP at 29. Mr. Ensign required a month of intensive care. *Id.* A tracheostomy and a feeding tube were required in order to ensure Mr. Ensign continued to survive. RP at 32. Mr. Ensign eventually regained control of his right arm and leg, to Dr. Upadhyaya's

surprise. *Id.* However, he continued to have difficulty using both, as well as difficulties with speech. *Id.* As a direct result of the defendant dropping or thrusting him onto the ground, Mr. Ensign suffered from expressive aphasia. RP at 33. This condition means that while Mr. Ensign maintains the ability to engage in thought, he experiences intense difficulty matching his thoughts to words and expressing himself through them. *Id.*

The defendant was charged with Assault in the Third Degree. CP 1-2. The Voir Dire was conducted as normally. RP 01/28/2013 "Jury Voir Dire" at 2-80. Peremptory challenges were taken in open court, with the defendant present. CP 89-90; RP 01/28/2013 "Excerpt of Proceedings: Peremptory Challenges" at 2. The method was via the writing of names on a document, each in turn, while counsel remained at the counsel tables. CP 89; RP 01/28/2013 "Excerpt of Proceedings: Peremptory Challenges" at 2. When both sides had finished their selections, the court then went down the list, excusing jurors in order, and calling up their replacements to the jury box. CP 89-90; RP 01/28/2013 "Excerpt of Proceedings: Peremptory Challenges" at 2.

After the jury was seated, and opening statements finished, the State presented its case in chief. Because of Mr. Ensign's expressive aphasia, the State elected to not call Mr. Ensign as a witness, as his

testimony would be difficult for anyone unfamiliar with those afflicted with aphasia to understand. RP at 33. At the close of the State's case in chief, a brief hearing was conducted outside the presence of the jury. RP at 106-10. The defendant indicated he planned to call numerous character witnesses and to have them testify to specific events to demonstrate those elements of character. RP at 107. The State objected to testimony proving character through specific act, under ER 405(b). RP at 107-09. The court sustained this objection. RP at 109-10. After the defendant had presented four witnesses on purely the defendant's reputation as to peacefulness in the community, the State objected to any further on the grounds of cumulative, under ER 403. RP at 139-40. The court overruled the objection, but as counsel stated that there were six additional character witnesses, indicated that it would be best to "pick out the two or three best ones you have left," in order to avoid becoming overly cumulative. RP at 140.

At the close of the defendant's case, the defendant requested that instructions be given on Assault in the Fourth Degree, arguing that it was a lesser included of Assault in the Third Degree. RP at 237-38. The court denied this motion, determining that Assault in the Fourth Degree was not a lesser included of Assault in the Third Degree by Criminal Negligence. RP at 238.

The defendant was found guilty of Assault in the Third Degree, with an aggravator that the injury suffered by the victim substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. CP 52-53, 70-71. The defendant's standard sentencing range was one to three months. CP 71. However, the court sentenced the defendant to twelve months, based upon the aggravating factor found by the jury. CP 73. The defendant now appeals.

III. ARGUMENT

1. The trial court was in its discretion in limiting character evidence.

The defendant first argues that the trial court erred by following ER 405(a) and requiring that the defendant prove his character by reputation evidence instead of specific acts of conduct. He argues first that ER 405(a) does not require that manner of proof but only allows it. He also argues that ER 405(b) specifically permits the defendant to prove his character by specific acts of conduct. App. Brief at 10-11.

The defendant's argument was specifically rejected in *State v. Mercer-Drummer*, 128 Wn. App. 625, 116 P.3d 454 (2005). There, the defendant was charged with Assault in the Third Degree. *Id.* at 626. She sought to introduce evidence that she had never been convicted of a crime, in order to establish her good character and to support her defense that she

did not intend to strike Deputy Kimbriel. *Id.* at 629. The Court of Appeals affirmed the trial court's ruling that her proffered testimony was not in the form of reputation evidence and therefore not admissible under ER 405. *Id.* at 630.

That Court also found that character is not an essential element of assault, meaning that specific acts of misconduct cannot be admitted under ER 405(b). *Id.* at 632. The Court quoted the Supreme Court in *State v. Kelly,* 102 Wn.2d 188, 685 P.2d 564 (1984), which held that "[c]haracter is an 'essential element' in comparatively few cases. In criminal cases, character is rarely an essential element of the charge, claim, or defense. For character to be an essential element, character must itself determine the rights and liabilities of the parties." *Mercer-Drummer,* 128 Wn. App. at 632.

Similarly, in *State v. Stacy*, __ Wn. App. __, 326 P.3d 136 (2014), the Court of Appeals found that the trial court acted within its discretion by excluding specific instances of conduct showing his peaceful character under ER 405(b). There, the defendant was charged with three separate assaults and sought to introduce evidence he had not been in a fight since eighth grade. *Id.* at 143. In finding that there was abuse of discretion, the Court in *State v. Stacy* cited *State v. Mercer-Drummer* for its holding that

"[c]haracter is not an essential element of any charge, claim, or defense for the crime of assault." *Id.*

The defendant next argues that is was error for the court to limit the number of character witnesses who would testify about the defendant's reputation. App. Brief at 10, 12. In the present case, the defendant was allowed to call six witnesses to testify as to the defendant's reputation. RP at 111-13, 117-18, 137-144.

The trial court did not abuse its discretion in applying ER 403. In *State v. Baker*, 56 Wn.2d 846, 857-58, 355 P.2d 806 (1960), the defendant was charged with negligent homicide. There, the defendant called five character witnesses and the trial court permitted only one of the five to testify as to the defendant's reputation as a good and careful driver. *Id.* at 857.

The Supreme Court found that the trial court's decision was not error. It wrote:

> The state did not attack appellant's reputation as a good and careful driver. Therefore, to permit the other four witnesses to reiterate that which had already been testified to by the one witness would be merely repetitious and cumulative. The trial court, in its discretion, properly limited such testimony to a single witness.

Id. at 857-58.

Likewise, in the present case, the State did not attack the defendant's reputation or testimony of the character witnesses. The trial court did not abuse its discretion in limiting the number of character witnesses to six.

2. Assault in the Fourth Degree is not a lesser included of Assault in the Third Degree/Criminal Negligence prong.

The defendant argues that the trial court erred in not instructing the jury on the lesser included offense of Assault in the Fourth Degree. App. Brief at 13.

The defendant's argument is rejected by the logic of *State v. Tucker*, 46 Wn. App. 642, 731 P.2d 1154 (1987) and *City of Seattle v. Wilkins*, 72 Wn. App. 753, 865 P.2d 580 (1994).

In *Wilkins*, the defendant was charged with two alternative subsections of the Seattle Municipal Court's assault statute: intentional assault and reckless assault. *Wilkins*, 72 Wn. App. at 754. The trial court gave the jury a lesser included offense of simple assault. *Id.* The jury found the defendant guilty of simple assault. *Id.*

The Court of Appeals reversed, finding that simple assault was not a lesser included offense as reckless assault because of the difference in elements. *Id.* at 755. The Court found "[i]t may be possible to commit reckless or criminally negligent assault without proof of intent, while one

cannot be convicted of simple assault without proof of intent." *Id.* at 758.

In *State v. Tucker*, the defendant was charged with Assault in the Third Degree. *Tucker*, 46 Wn. App. at 643. The trial court refused to instruct pertaining to reckless endangerment as a lesser included offense of third degree assault. *Id.*

The Court of Appeals affirmed. *Id.* at 646. It found that the recklessness for reckless endangerment entails a greater degree of culpability than does criminal negligence. *Id.* at 645. The Court then found that because criminal negligence is the least culpable mental state, it cannot substitute for any of the other three mental states. *Id.* In other words, one could be criminally negligent in terms of third degree assault without being reckless in terms of reckless endangerment.

The same logic applies to the present case. The defendant was charged with causing the injury to Ben Ensign by criminal negligence. To prove Assault in the Fourth Degree, the State would have to prove that the defendant acted with intent.

The conclusion that Assault in the Fourth Degree is not a lesser included offense of Assault in the Third Degree with Criminal Negligence is supported by analysis.

It is unclear to the State whether the defendant is basing his argument on an inferior degree offense theory pursuant to RCW 10.61.006

and *State v. Berlin*, 133 Wn.2d 541, 545, 947 P.2d 700 (1997), or that doctrine's close relative, a lesser included offense based on *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Part of the problem is that the defendant cites authority from both doctrines. App. Brief at 14, 15, 17.

An excellent discussion of the distinction is found in *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). The Court in *Fernandez-Medina* found that the failure to note the distinction was not significant in that case because the only difference was in respect to the legal component of the test and, there, both parties conceded that the legal component of the test was satisfied. *Id.* at 454-55.

As discussed earlier, Assault in the Fourth Degree is not a lesser included offense because of Assault in the Fourth Degree's greater mental state.

It also does not meet the factual component discussed in *Fernandez-Medina*. Here, there is no evidence that affirmatively establishes the defendant's theory of the case, that he only committed Assault in the Fourth Degree. In the present case, there was never any debate or contention that Ben Ensign's injuries did not meet the required elements of Assault in the Third Degree, that the defendant caused bodily harm to Ben Ensign and that the bodily harm was accompanied by

substantial pain that extended for a period of time sufficient to cause considerable suffering. There also was no issue that Ensign's injuries were caused by the defendant dropping or throwing his head to the concrete sidewalk. The only issue was the defendant's mental state.

While the defendant could argue that the defendant's conduct did not constitute criminal negligence, he could not argue that the defendant's actions in causing the injuries were intentional as that would also satisfy the requirement of criminal negligence.

3. Peremptory challenges were conducted neither at a private conference nor off the record.

The defendant argues that the trial court conducted peremptory challenges in a private conference, off the record, without making specific findings or employing the *Bone-Club* test. *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

That argument is simply not true. There was no private conference, nor was there a conference off the record. The defendant cites no evidence that there was a private conference.

In fact, the peremptory sheets show that the peremptory challenges were done in writing, in open court. CP 89-90. Page 89 of the Clerk's Papers is the sheet filled out by the prosecution and defense counsel alternating the peremptory challenges. Page 90 of the Clerk's Papers is

the judge's notations of the written peremptory challenges by the trial judge. The State's counsel on appeal was also trial counsel and can attest to the common sense application of the record. After jurors were questioned, defense counsel asked for a recess to prepare for peremptory challenges. After the recess, in open court, with the defendant's presence, the bailiff would present the peremptory challenge sheet, Clerk's Paper 89, to one of the counsel. The bailiff would then take the sheet to the court, who would make a notation on the court's page, Clerk's Paper 90. Then, the counsel page, Clerk's Paper 89, would be returned to counsel for the next peremptory challenge. After this was finished, the judge, in open court, had certain jurors replaced by others. This is also shown by the Excerpt of Proceedings: Peremptory Challenges, dated January 28, 2013.

Since there was no off-the-record private conference, but instead a written exercise of peremptory challenges in open court, the defendant's argument must be rejected.

IV. CONCLUSION

Based upon the foregoing analysis, the State respectfully asks this Court to affirm the defendant's conviction.

RESPECTFULLY SUBMITTED this 29th day of July, 2014.

Andy Miller,
Prosecuting Attorney
Bar No. 10817
OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

David Donnan
Jan Trasen
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101-3635

☒ E-mail service by agreement was made to the following parties: wapofficemail@washapp.org

Matthew T. Hibbard
416 Cottonwood Dr.
Richland, WA 99352

☒ U.S. Regular Mail, Postage Prepaid

Signed at Kennewick, Washington on July 29, 2014.

Courtney Sheafer
Legal Assistant