Supreme Court No. _____

(Court of Appeals No. 31520-7-III)

91701-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

MATTHEW HIBBARD,
Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Matthew Hibbard, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Hibbard appealed from his Benton County Superior Court conviction for third degree assault with an aggravator for substantial bodily harm. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. The Sixth Amendment's guarantee of the right to present a defense and the Fourteenth Amendment guarantee of due process, along with similar guarantees of the Washington Constitution, are violated where a trial court bars a defendant from presenting relevant evidence. Washington courts have concluded that so long as evidence is minimally relevant, the refusal to admit violates a defendant's rights unless the State can establish the relevance is outweighed by potential prejudice to the fairness of the process. Where the trial court found evidence to be relevant but nonetheless not admissible, did the court violate Mr. Hibbard's Sixth and Fourteenth Amendment rights as well as his rights under Article I, section 22, and was the Court of Appeals decision thus in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1).

2. The right of the public and the accused to a public trial may only be restricted in the most unusual of circumstances, and if so, after a trial court considers the Bone-Club[1] factors and finds it necessary. Voir dire is a critical stage of trial that must be open to the public. During jury selection, the court called the parties to a private conference, during which the parties apparently made juror-specific challenges. The proceeding was not recorded. Because the trial court did not make any Bone-Club assessment or findings before conducting this important portion of jury selection in private, did the court violate Mr. Hibbard's and the public's constitutional right to a public trial, and is the Court of Appeals decision in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1).

3. An accused has a fundamental right to be present at all critical stages of a trial, including voir dire and the empanelling of the jury. Did Mr. Hibbard's absence from the conference during which his jury was selected violate his constitutional right to be present at all critical stages of the trial, and is the Court of Appeals decision in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1).

4. This Court should consider each of the issues raised in Mr. Hibbard's Statement of Additional Grounds, as specifically itemized and preserved in his Statement, as each requires review under RAP 13.4(b).

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

D. STATEMENT OF THE CASE

Matthew Hibbard, a lifelong resident of the Tri-Cities area, has worked in security positions for most of his adult life. 2RP 192-93. By the summer of 2011, Mr. Hibbard had worked his way up to the position of general manager at Jack Didley's, a popular bar in Kennewick. 2RP 187, 192-93. According to his boss, Mr. Hibbard had a reputation of peaceful conflict resolution with the establishment's patrons. Id.

Todd Jones, the owner of the bar, testified at trial that he and Mr. Hibbard often discussed how to handle situations with unruly customers. 2RP 189.

> You handle it in a peaceful manner. You spend as much time as you can with an individual to try to talk him down, and that is one of the skills Matt has always been incredible at. You can sit there and spend a long period of time. It's an investment. If you spend several minutes trying to talk somebody down or getting their friends to get the person to leave and that is again an incident where maybe that person is able to come back later and we don't lose a customer often. It's the last thing we want to do is go hands on with an individual.

2RP 189.

On the evening of July 4, 2012, Mr. Hibbard was working when a group of young men came in. These men had never been to the bar before, and after they were asked by Mr. Hibbard to leave the VIP area, they became angry. 2RP 40-43, 195-96. One of the men, Ben Ensign, started to behave more aggressively, stripping off his shirt and even

unbuckling his pants. 2RP 212-13; Ex. 39. Mr. Ensign also took a drink from a female customer's table and then knocked over two chairs, before returning to his own table. 2RP 195-96, 212-14; Ex. 39.

When Mr. Hibbard observed Mr. Ensign's behavior, he reviewed the security videotape in order to see exactly how the chairs had been tipped over. 2RP 195-96. When he determined that Mr. Ensign had clearly knocked the chairs over, Mr. Hibbard decided Mr. Ensign was too intoxicated to remain in the bar that evening. 2RP 196. Mr. Hibbard tapped Mr. Ensign on the shoulder and told him and his friends they had to leave the bar. Id.

Mr. Ensign initially agreed, but then immediately returned to the bar. Id. at 197-99. Mr. Hibbard reminded him that he had been kicked out of the bar, but Mr. Ensign swore at him and demanded proof of what he had done wrong. Id. Mr. Ensign's friends promised to escort him out again, but Mr. Ensign demanded that Mr. Hibbard physically remove him from the bar. Id. Mr. Ensign's friends apologized for his belligerent behavior, explaining that he was "f'd up." 2RP 199.

In fact, tests would show that Mr. Ensign's blood-alcohol level was between .22 and .24 at the time of the incident – three times the legal limit. CP 50 (stipulation). Mr. Ensign's friends finally pulled him down the street, as he struggled with them. 2RP 200. Moments later, however, Mr.

Ensign broke free of his friends and charged the door to Jack Didley's again. 2RP 200. Since Mr. Hibbard did not know Mr. Ensign's intentions, he and the other doorman barred Mr. Ensign's entrance to the club. 2RP 200. Mr. Hibbard grabbed Mr. Ensign in a head-lock, and the other doorman held Mr. Ensign by the ankles, because he was flailing. Id. at 170-72, 201. Mr. Hibbard repeatedly told Mr. Ensign to relax and asked, "Are you done? Are you done? Just relax. Calm down." 2RP 201. Mr. Ensign's arms were flailing and he was squirming. When Mr. Ensign started throwing punches, Mr. Hibbard released his hold, and Mr. Ensign dropped to the sidewalk. Id.[2]

Mr. Ensign's head hit the sidewalk, causing a subdural hematoma. 2RP 17-20. The injuries were extensive, requiring surgery, an induced coma, and extensive rehabilitation. Id. at 21-33.

Mr. Hibbard was charged with assault in the third degree. CP 1-2. Numerous defense witnesses offered to testify as to Mr. Hibbard's good character and reputation at trial. 2RP 107, 109-10, 124-25, 139, 238. The trial court severely limited the number and scope of these defense witnesses. Id.

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[2] Mr. Hibbard noted that the way he held Mr. Ensign was by design, with one hand pushed against his own chest, so as not to tighten up and compress too tightly, thus distinguishing between a head-lock and a choke-hold. 2RP 202-03.

The jury found Mr. Hibbard guilty as charged: the jury also returned a special verdict stating Mr. Ensign's injuries exceeded the statutory definition of bodily harm. CP 52, 53.

After presiding over the trial, which had included a strong showing of community support for Mr. Hibbard, the court expressed its understanding of the pathos involved:

> With regard to confinement, I don't think I've heard a case that has been more problematic and tragic and devastating to everyone involved than this one. Probably true justice would be that it never happened in the first place. My guess is that the families of both the defendant and the victim are probably under a life sentence.

3RP 28.

The trial court sentenced Mr. Hibbard to 12 months custody, 345 days of which could be served on work release.

On appeal, Mr. Hibbard argued the same issues he raises in this petition as well as an additional issue regarding a lesser included jury instruction. He also raised a number of additional issues in a detailed Statement of Additional Grounds.

On April 14, 2015, the Court of Appeals affirmed Mr. Hibbard's conviction. Appendix.

Mr. Hibbard seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).

The trial court violated Mr. Hibbard's Sixth Amendment rights when it limited his right to present a defense, when it refused to properly instruct the jury on a lesser degree offense, and when it deprived Mr. Hibbard of his constitutional right to a public trial. For these reasons, review should be granted. RAP 13.4(b)(1).

a. The trial court's exclusion of relevant evidence violated Mr. Hibbard's Sixth Amendment right to present a defense. A defendant has a constitutional right to present a defense, and must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). As long as the proffered evidence is minimally relevant, the burden is on the State to show that a defendant's evidence is so prejudicial that it would disrupt the fact-finding process at trial. Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

Here, the trial court's refusal to permit admission of relevant evidence denied Mr. Hibbard his right to present a defense. Mr. Hibbard sought to introduce evidence of his good character and reputation for peacefulness, which the court found inadmissible.[3] Although the trial court properly found the evidence as to Mr. Hibbard's reputation for peacefulness and diligence was relevant under ER 405(b), the court then improperly limited Mr. Hibbard's ability to introduce that relevant evidence. 2RP 107. The court held that Mr. Hibbard could only offer such evidence by way of reputation evidence. Id. at 109-10. The court rejected, without explanation or findings, the notion that ER 405(b) allowed Mr. Hibbard to offer evidence of specific instances of conduct. First, ER 405(a) does not require proof of character be made by evidence of reputation but rather the plain language of that rule merely allows that manner of proof. The rule provides:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

ER 405(a).

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[3] Evidence of good character is admissible where relevant, and where a proper foundation is laid. State v. Grisvold, 98 Wn. App. 817, 829, 991 P.2d 657 (2000), abrogated on other grounds, State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

Courts rely on the rules of statutory construction to interpret court rules. State v. Blilie, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). Generally, courts attempt to give effect to the plain terms of a statute. Tommy P. v. Board of Cy. Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982); see also, State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (every statutory term is intended to have some material effect). ER 405(a) uses the word "may" rather than "shall" in describing the manner of proof which may be employed. Use of the word "shall" creates a mandatory requirement whereas "may" confers discretion. See e.g., State v. Krall, 125 Wn.2d 146, 148-49, 881 P.3d 1040 (1994). Thus, the allowance in ER 405(a) for proof of character by reputation evidence is not a prohibition of proof by specific instances of conduct.

But in any event, ER 405(b) specifically permitted Mr. Hibbard to prove his character by specific instances of conduct. The rule allows:

> In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Here, the State argued, and the court seemed to agree, Mr. Hibbard's character trait was not an essential element of the "charge" and thus could not be proved by evidence of specific instances of conduct. 2RP 108-10. But the rule is not limited simply to cases where the character trait is an

essential element of a charge. Instead, the rule also applies in cases where the trait is an element of a "claim [or] defense." ER 405(b). Mr. Hibbard's non-violence and the many specific examples of peaceful conflict-resolution were an essential component of his defense -- his claim that he acted reasonably, and not negligently, under the circumstances. The evidence was relevant and plainly admissible pursuant to ER 405(b).

Applying the standard set forth in Jones, the court found the evidence relevant. Thus, the State was required to prove the evidence was "so prejudicial as to disrupt the fairness of the fact-finding process at trial" and that this prejudice outweighed Mr. Hibbard's need for the evidence. Jones, 168 Wn.2d at 720. The State did not meet that burden. The State made no showing of prejudice at all, much less a showing that admission of this relevant evidence would upset the fairness of the proceeding. The trial court's erroneous ruling deprived Mr. Hibbard of his Sixth Amendment right to present a defense.[4]

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[4] It is not sufficient that the State express concern that witnesses will be time-consuming; Jones and Darden clearly set out the State's burden to show prejudice. Mr. Hibbard, in fact, argued that the additional witness would not even have taken a particularly long amount of time:

> We've already been limited to just reputation. Clearly he has a good reputation ... [t]hese witnesses -- I think the last two took a total of four minutes. I think it's important for the jury to know just how many people know the good reputation of Mr. Hibbard. Anybody can find two or three or four but if you have ten people that can say that [--] that is important.

2RP 140.

A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Because the trial court's error was constitutional, and because the Court of Appeals decision is in conflict with decisions of this Court, review should be granted. RAP 13.4(b)(1).

b. The trial court violated Mr. Hibbard's right to a public trial by conducting the peremptory challenge portion of jury selection in a private unrecorded conference. The federal and state constitutions provide parties the right to a public trial and also guarantee the public access to court proceedings. Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995); State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005); State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012); U.S. Const. Amend. VI; Art. I, §§ 10, 22.

Exercising peremptory challenges is a vital part of voir dire. See State v. Wilson, 174 Wn. App. 328, 343, 298 P.3d 148, 156 (2013) (observing that unlike hardship strikes made by clerk, "voir dire" involves trial court and counsel questioning prospective jurors to determine their

ability to serve fairly and to enable counsel to exercise informed challenges for cause and peremptory challenges).

This Court's 2014 decisions addressing the public courtroom, though fragmented, reinforce Mr. Hibbard's argument that his right to a public trial was violated, and that the violation of the right to a public trial is structural error. See, e.g., State v. Shearer, 181 Wn.2d 564, 569, 334 P.3d 1078 (2014) (Owens, J., lead opinion), 575-77 (Gordon McCloud, J., concurring); State v. Frawley, 181 Wn.2d 452, 464, 334 P.3d 1022 (2014) (C. Johnson, J., lead opinion), 467-69 (Stephens, J., concurring), 469-77 (Gordon McCloud, J., concurring in part, dissenting in part). As the lead opinion in Shearer explained, finding a public trial error to be de minimus conflicts with this Court's jurisprudence that such violations are structural error. Shearer, 181 Wn.2d at 569. The unreported conference in Mr. Hibbard's case thus cannot be excused as a de minimus violation of his right to a public trial.

The Court of Appeals compared Mr. Hibbard's case to State v. Love, concluding that peremptory challenges "do not have to take place in public." Slip op. at 9. However, this Court recently granted review and heard argument on exactly this issue. State v. Love, 176 Wn. App. 911, 309 P.3d 1209, review granted, 181 Wn.2d 1029 (2015). Because this Court is

considering the same public trial issue raised in Mr. Hibbard's appeal, this Court should grant review pursuant to RAP 13.4(b).[5]

The Court of Appeals also notes that the "record" of the voir dire proceedings does not support Mr. Hibbard's public trial argument. Slip op. at 9. To support this portion of the opinion, the Court quotes the following portion of the report of proceedings:

> THE COURT: Anybody need a break at the time. Okay. We will take a short recess.
>
> (Recess taken)
> (Peremptory challenges taken and a jury was impaneled)

Slip op. at 9.

It is difficult to see how the "record" in this matter could show anything, since the trial court took a "short recess" and distinctly went off the record before taking peremptory challenges from both counsel and impaneling the jury. RP 80; slip op. at 9.

A related concern over "sparse" records was noted by several members of this Court in State v. Slert, 181 Wn.2d 598, 619, 334 P.3d 1088 (2014) (Stephens, dissenting). Justice Stephens and three other members of this Court write that the Slert majority "lament" that the Court could not reach the issue of the public trial right due to an "inadequate record." Id.

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[5] The Court of Appeals notes that Mr. Hibbard was aware of State v. Love at the time of his Opening Brief, but raised the public trial issue in light of other cases on review at that time before this Court. Mr. Hibbard notes the change in status of Love since that time, since review has since been granted. 181 Wn.2d at 1029.

However, the dissenting justices note that "the sparse record results from the very constitutional error at issue." Id.

The trial court violated Mr. Hibbard's constitutional right to a public trial when it conducted peremptory challenges at a conference that neither the public nor he could hear, without conducting a Bone-Club analysis. Review should be granted, as the Court of Appeals decision upholding the conviction was in conflict with decisions of this Court. RAP 13.4(b)(1).

c. The trial court violated Mr. Hibbard's constitutional right to be present by conducting peremptory challenges in his absence. A person accused of a crime has the fundamental constitutional right to be present for all critical stages of the proceedings. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); State v. Irby, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011). Under the Fourteenth Amendment, the defendant's right to be present applies to hearings where the defendant's presence would contribute to the fairness of the proceedings. Stincer, 482 U.S. at 745; United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). The right to "appear and defend in person" is also protected by the Washington Constitution under Article I, section 22, as well as by Court Rule 3.4(a).

Here, the trial court took peremptory challenges while the court was at recess, and there is no indication that Mr. Hibbard was present or permitted to participate in the peremptory challenge proceedings. See Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) ("[W]here the [defendant's] personal presence is necessary in point of law, the record must show the fact."); see also People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violates right to be present; court refuses to speculate that defendant could overhear conversations).

The denial of the right to be present is analyzed under the constitutional harmless error standard. Irby, 170 Wn.2d at 885-86. The State cannot demonstrate beyond a reasonable doubt the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Irby, 170 Wn.2d at 886. This Court should accept review. RAP 13.4(b)(1).

2. EACH ASSIGNMENT OF ERROR RAISED IN MR. HIBBARD'S STATEMENT OF ADDITIONAL GROUNDS REQUIRES REVIEW UNDER RAP 13.4(b).

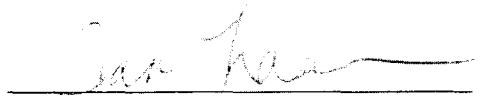
This Court should review each of the issues raised in Mr. Hibbard's Statement of Additional Grounds, as several require review under the criteria enumerated in RAP 13.4(b).

F. CONCLUSION

For the above reasons. the Court of Appeals decision requires review. as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

DATED this 13th day of May. 2015.

Respectfully submitted,



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APPENDIX

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. MATTHEW HIBBARD, Appellant.	)	No. 31520-7-III UNPUBLISHED OPINION

BROWN, A.C.J. – Matthew Hibbard appeals his conviction for third degree assault with an aggravator that the injury suffered by the victim substantially exceeded the level of bodily harm necessary to satisfy the elements of the charge. He contends the trial court erred by (1) limiting character evidence to reputation, (2) denying his request for a lesser included offense jury instruction, and (3) violating his public trial right when using a passing sheet to conduct peremptory challenges. In his statement of additional grounds for review (SAG), Mr. Hibbard expresses concerns about ineffective assistance of counsel, prosecutor and juror misconduct, and the trial court's limits on the number of his character witnesses. We disagree with Mr. Hibbard's contentions, find Mr. Hibbard's SAG lacks merit, and affirm.

FACTS

On the evening of July 4, 2012, Ben Ensign and three friends went to a Kennewick bar and, without permission, sat in the very important (VIP) section. Mr. Hibbard, the bar's general manager and experienced bouncer, told Mr. Ensign and his friends they could not sit there. Mr. Ensign was intoxicated and disruptive. Given Mr. Ensign's behavior, Mr. Hibbard told Mr. Ensign and his friends to leave the bar. Mr. Ensign's friends escorted him out of the bar, but he turned around and attempted to re-enter. Mr. Hibbard and doorman Ray Anderson barred Mr. Ensign's way. Mr. Hibbard grabbed Mr. Ensign by the head and Mr. Anderson held his feet, suspending Mr. Ensign in midair. Eyewitness accounts varied on what happened next. While Mr. Hibbard testified he thought Mr. Ensign was trying to hit him, Mr. Anderson did not believe Mr. Ensign was a threat. After telling Mr. Ensign to calm down, Mr. Hibbard either dropped or threw Mr. Ensign head down to the concrete sidewalk. A jury later viewed a security video of the events.

Mr. Ensign suffered a subdural hematoma and brain contusions. He was in intensive care for a month. Mr. Ensign had difficulty using his right arm and leg and currently suffers from expressive aphasia, which means it is hard for him to express his thoughts as he cannot match his thoughts to words.

The State charged Mr. Hibbard with third degree assault and alleged an excessive-injury sentencing aggravator. At Mr. Hibbard's trial, Mr. Hibbard sought to call numerous witnesses to testify as to Mr. Hibbard's good character via reputation and

specific instances of conduct. The trial court sustained the State's objection to proving character through specific instances. The court limited the number of Mr. Hibbard's character witnesses as cumulative.

Mr. Hibbard unsuccessfully requested a jury instruction on fourth degree assault, arguing it was a lesser included offense of third degree assault. Mr. Hibbard was found guilty as charged. The jury returned a special verdict, finding Mr. Ensign's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of third degree assault. Because of this aggravating factor, the court sentenced Mr. Hibbard to 12 months. Mr. Hibbard appealed.

ANALYSIS

A. Character Evidence

The issue is whether the trial court erred by not allowing Mr. Hibbard's witnesses to testify as to specific instances of conduct in which he acted in a diligent and peaceful manner while on the job. Mr. Hibbard contends his constitutional right to present a defense was thus violated because character was an essential element of his claim or defense and ER 405(a) implicitly allows specific instances that show his character without ER 405(b)'s essential elements restriction. We disagree.

We review a trial court's evidence rulings for abuse of discretion. *State v. Stacy*, 181 Wn. App. 553, 565, 326 P.3d 136, *review denied*, __ Wn.2d __, 335 P.3d 940 (2014). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Id.* at 565-66.

Criminal defendants have a constitutional right to present a defense. *Id.* at 566. However, this constitutional right is not unrestrained, as defendants have no "right to introduce irrelevant or inadmissible evidence." *Id.* Although "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion," ER 405(b) allows evidence of specific instances only if the "character or a trait of character" is "an essential element of a charge, claim, or defense." ER 404(a). Character is rarely an "essential element" in criminal cases. *State v. Kelly*, 102 Wn.2d 188, 196, 685 P.2d 564 (1984). "For character to be an essential element, character itself must determine the rights and liabilities of the parties." *Id.* at 197.

ER 405(a) states "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation." Washington courts have interpreted this to mean ER 405(a) limits character evidence solely to reputation unless character is an essential element. *State v. Mercer-Drummer*, 128 Wn. App. 625, 630-32, 116 P.3d 454 (2005) (rejecting the argument that reputation testimony is not the exclusive way to prove character under ER 405(a)). Reading ER 405(a) in the manner suggested by Mr. Hibbard directly conflicts with and undermines ER 405(b)'s limitations on proof by specific instances of conduct. *See State v. Morales*, 168 Wn. App. 489, 492, 278 P.3d 668 (2012) (stating that interpretations rendering any portion of a statute meaningless should not be adopted). Thus, Mr. Hibbard's second contention fails.

Washington courts have held "character does not determine a party's rights and liabilities incident to an assault." *Mercer-Drummer*, 128 Wn. App. at 632; *see also Stacy*, 181 Wn. App. at 566. Mr. Hibbard unpersuasively attempts to distinguish both *Mercer-Drummer* and *Stacy*. He points to the fact that *Mercer-Drummer* and *Stacy* dealt with (1) third degree assault under RCW 9A.36.031(g), assault of a law enforcement officer, which requires an entirely different mens rea than negligent assault; and (2) different defenses. He argues his defense–that he acted reasonably and not negligently under the circumstances–necessarily means specific examples of his peaceful conflict-resolution were essential elements of his defense. But nothing in *Mercer-Drummer* and *Stacy* limits their holdings to assaults under RCW 9A.36.031(g). Both courts fashioned their holdings broadly, stating "[c]haracter is not an essential element of *any* charge, claim, or defense for the crime of *assault*." *Stacy*, 181 Wn. App. at 566 (emphasis added). Thus, Mr. Hibbard's first contention fails.

In sum, the trial court did not err in limiting Mr. Hibbard's evidence. Having so concluded, we do not discuss harmless error.

B. Requested Fourth Degree Assault Instruction

The issue is whether the trial court erred in denying Mr. Hibbard's request for a jury instruction for assault in the fourth degree. Mr. Hibbard contends both the legal and

factual prongs of the *Workman*[1] test were met, thus entitling him to an instruction on the assault in the fourth degree.[2]

RCW 10.61.006 provides "a defendant can be convicted of an offense that is a lesser included offense of the crime charged." *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). To receive an instruction on a lesser included offense, the proponent of the instruction must satisfy a legal and factual requirement. *State v. McDonald*, 123 Wn. App. 85, 88, 96 P.3d 468 (2004). "To satisfy the legal requirement, the proponent must show . . . that the proposed instruction describes an offense each element of which is included within the charged offense." *Id.* at 88-89. "To satisfy the factual requirement, the proponent must show that when the evidence is viewed in the light most favorable to him, the jury could find that even though the defendant is not guilty of the charged offense, he is guilty of the . . . lesser offense." *Id.* at 89.

RCW 9A.36.031(1)(f) states a person is guilty of assault in the third degree if "[w]ith criminal negligence, [he] causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." Assault in the fourth degree is simple assault at common law. *State v. Davis*, 60 Wn. App. 813, 820,

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[1] *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

[2] Mr. Hibbard uses "inferior degree" and "lesser included offense" interchangeably throughout his brief. *See* Appellant's Br. at 15-17. An inferior degree instruction is provided for in RCW 10.61.003, while a lesser included offense instruction is provided for in RCW 10.61.006. While the two are closely related, they are not the same and have different tests. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). Because Mr. Hibbard solely argues and applies the lesser included offense instruction test, we do not elaborate on an instruction based on an inferior degree. For Mr. Hibbard, the result is the same because fourth degree assault does not require negligent conduct as does this charged third degree assault.

808 P.2d 167 (1991); RCW 9A.36.041(1). An assault is defined as "an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented." *State v. Sample*, 52 Wn. App. 52, 54, 757 P.2d 539 (1988) (internal quotation marks omitted) (citation marks omitted). Thus, fourth degree assault requires proof of intent. *Id.*

In *Sample*, the State charged the defendant with assault in the third degree under former RCW 9A.36.030(1)(b), stating a person committed third degree assault when he, "[w]ith criminal negligence," caused physical injury to another with a weapon. *Sample*, 52 Wn. App. at 54. The trial court convicted the defendant of simple assault as a lesser included offense of third degree assault. *Id.* The appellate court reversed the conviction, stating the statute "eliminate[d] the element of intent and [took] conduct–negligence–that would not be an assault under common law[ ] and [made] it an assault." *Id.* at 54-55 (holding fourth degree assault "is not a lesser-included offense of assault in the third degree by negligence"); *see also Seattle v. Wilkins*, 72 Wn. App. 753, 758, 865 P.2d 580 (1994) (stating "[i]t may be possible to commit . . . criminally negligent assault without committing simple assault because a person can be convicted of . . . criminally negligent assault without proof of intent, while one cannot be convicted of simple assault without proof of intent").

Mr. Hibbard was charged with criminally negligent third degree assault under RCW 9A.36.030(1)(f). In order to be entitled to a lesser included offense instruction for fourth degree assault, he had to meet the legal and factual requirements of the test. He

cannot show the legal requirement. The proposed instruction on fourth degree assault includes an element not included in the instruction on criminally negligent third degree assault: intent. As Mr. Hibbard cannot meet the legal requirement, we need not discuss whether he can meet the factual requirement. Accordingly, the trial court did not err in refusing to give the lesser included offense instruction.

C. Public Trial

The issue is whether Mr. Hibbard's right to a public trial was violated when the parties exercised their peremptory challenges using a passing sheet in open court. Mr. Hibbard contends this procedure resulted in a private, unrecorded conference violating his right to be present at all critical stages since the record does not show he was present or able to participate in the peremptory challenges.

"The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to a public trial." *State v. Dunn*, 180 Wn. App. 570, 574, 321 P.3d 1283 (2014). Section 22 partly provides "it is error . . . to 'close' the courtroom to any aspect of a criminal trial that is required to be 'open.'" *State v. Love*, 176 Wn. App. 911, 916, 309 P.3d 1209 (2013). Courts use the "experience and logic" test to determine whether a particular portion of a proceeding is required to be held in public. *Id.* Typically, "[j]ury selection in a criminal case is considered part of the public trial right and is [ ] open to the public." *Id.*

The "experience and logic" test requires courts to ask "whether the practice in question historically has been open to the public [the experience prong] . . . and whether

public access is significant to the functioning of the right [the logic prong]." *Id.* If a court answers both prongs affirmatively, then the five factor test enunciated in *State v. Bone-Club*, 128 Wn.2d 254, 261, 906 P.2d 325 (1995), must be applied to determine whether the court can properly close the courtroom. *Love*, 176 Wn. App. at 916.

In *Love*, this court applied the "experience and logic" test and concluded peremptory challenges do not have to take place in public. *Id.* at 920; *see also Dunn*, 180 Wn. App. at 575 (agreeing that "[t]he public trial right does not attach to the exercise of challenges during jury selection"). The court failed to find evidence suggesting that historical practices required parties to make peremptory challenges in public. *Id.* at 918; *see also State v. Thomas*, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976) (defendant's challenge to using secret, written peremptory challenges had "no merit"). The court stated the written record of peremptory challenges "satisfies the public's interest in the case and assures that all activities were conducted aboveboard, even if not within public earshot." *Love*, 176 Wn. App. at 919-20.

Given *Love*, Mr. Hibbard's argument lacks merit.[3] Moreover, the record does not support Mr. Hibbard's argument. At the conclusion of voir dire, the transcript reads:

> THE COURT: Anybody need a break at this time. Okay. We will take a short recess.
> (Recess taken)
> (Peremptory challenges taken and a jury was impaneled)

[3] Mr. Hibbard notes he is aware of this court's decision in *Love*. However, he states "due to the procedural posture of other public trial cases currently on review in the Washington Supreme Court, [he] preserves this issue for review." Appellant's Br. at 26, n.11.

Report of Proceedings (RP) Voir Dire at 80. These facts are similar to those seen in *Love*. *See Love*, 176 Wn. App. at 914. The peremptory challenges were done in writing and recorded. The judge then, in open court, replaced certain jurors and empanelled the jury. The courtroom was not closed for peremptory challenges.

Mr. Hibbard argues he was not present during the exercise of peremptory challenges. Criminal defendants have the right to be present at all critical stages, which includes voir dire and empanelling of the jury, of their criminal trials. *Love*, 176 Wn. App. at 920-21. As the record is unclear whether Mr. Hibbard was present during the exercise of peremptory challenges, his assertion partly relies on facts outside the record on appeal.[4] We do not address issues on direct appeal relying on facts outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

D. SAG Concerns

First, regarding assistance of counsel, the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove (1) defense counsel's representation was deficient, i.e., it was below an objective standard of reasonableness under the circumstances and (2) the deficient representation prejudiced him, i.e., a reasonable probability exists the outcome would have been different without the deficient representation. *McFarland*, 127 Wn.2d at 334-35. We strongly presume

representation was effective. *Id.* at 335. Defense counsel's legitimate strategic or tactical decisions do not support ineffective assistance claims. *Id.* at 335-36.

Mr. Hibbard's concerns generally relate to his counsel's trial strategy. He asserts defense counsel never attempted to discredit the State's witnesses, however; defense counsel did inquire into potential biases. He argues defense counsel failed to emphasize certain evidence, however defense counsel did discuss bias with relevant witnesses. It is not ineffective assistance of counsel merely because Mr. Hibbard would have emphasized evidence more or differently. Mr. Hibbard argues defense counsel did not call certain witnesses who would have been helpful to his case. But the testimony of Mr. Hibbard's proposed witnesses is not in the record, so we cannot conclude failure to call these witnesses prejudiced him. Mr. Hibbard's remaining allegations, including failure to bring up Mr. Ensign's history, not requesting a venue change, conversations disparaging defense counsel, trial court concerns, and counsel's throwing the case, are not based on facts in our record. If it is not in the record, we do not consider the matter on a direct appeal. *McFarland*, 127 Wn.2d at 335. The appropriate means of raising such matters is through the filing of a personal restraint petition. *Id.*

Second, regarding Mr. Hibbard's misconduct concerns, nothing in our record shows the State destroyed evidence or acted to delete any Facebook conversation. We do not consider matters outside the record on direct appeal. *McFarland*, 127 Wn.2d at

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[4] The State, who in this appeal is represented by the same attorney that prosecuted Mr. Hibbard, states Mr. Hibbard was present during peremptory challenges.

335. The appropriate means of raising such matters is through the filing of a personal restraint petition. *Id.*

Third, regarding limiting character-evidence witnesses, even if relevant evidence is admissible, it may still be excluded "if its probative value is substantially outweighed . . . by considerations of . . . needless presentation of cumulative evidence." ER 402; ER 403. In *State v. Baker*, 56 Wn.2d 846, 355 P.2d 806 (1960), the defendant was charged with negligent homicide. *Id.* at 849. At trial, one witness testified about the defendant's reputation as a good and careful driver; however, the trial court refused to allow defendant's four remaining witnesses testify as to the same. *Id.* at 857. Because the State never attacked the defendant's reputation as a good and careful driver, the Washington Supreme Court found this was not error. *Id.* The *Baker* court reasoned that allowing the remaining four witnesses to testify in the same manner "would be merely repetitious and cumulative." *Id.* at 857-58.

The State never attacked Mr. Hibbard's reputation or the testimony of Mr. Hibbard's character witnesses. As no reason existed to doubt the character witnesses' testimony, allowing additional testimony on the same subject would have been cumulative and unhelpful. The trial court did not err in limiting the number of witnesses. Mr. Hibbard's other arguments regarding character evidence were addressed by his counsel in his appeal. *See* RAP 10.10(a).

Fourth, regarding Mr. Hibbard's concern about an alleged Facebook comment about juror comments, nothing in our record supports this allegation. Again, we do not

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Resp't Br. at 13-14.

consider such matters on direct appeal. *McFarland*, 127 Wn.2d at 335. The appropriate means of raising such matters is through the filing of a personal restraint petition. *Id.*

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 206.040.

Brown, A.C.J.

WE CONCUR:

Korsmo, J.

Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 31520-7-III
	)	
MATTHEW HIBBARD,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF MAY, 2015, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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	[prosecuting@co.benton.wa.us]	( )	HAND DELIVERY
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	KENNEWICK WA 99336-2341		
[X]	MATTHEW HIBBARD	(X)	U.S. MAIL
	416 COTTONWOOD DR	( )	HAND DELIVERY
	RICHLAND, WA 99352	( )	_____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF MAY, 2015.

X_____

Washington Appellate Project
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WASHINGTON APPELLATE PROJECT

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- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: PETITION FOR REVIEW TO THE SC

Comments:

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