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COURT OF APPEALS

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NIKKI M. WILSON AND PAMELA PETERSON,

Plaintiffs-Appellants,

- v. -

**LAWRENCE FRYE, GUY CASEY AND GIL CORPORATION D/B/A
FRIENDLY DUCK RESTAURANT**

Defendants-Respondents.

BRIEF OF RESPONDENT FRIENDLY DUCK RESTAURANT

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I. INTRODUCTION

Appellants Nikki Wilson and Paula Peterson became intoxicated in a bar and started a fight. That they started the fight is indisputable because it was caught on videotape. Wilson got hurt in the fight. She and Peterson then sued the person they attacked and the bar in which the attack occurred. Not surprisingly, the jury found in favor of all defendants.

Wilson and Peterson appeal, claiming essentially two errors. They claim, first, that the court erred in failing to exclude the video of the fight. It makes little sense that they claim this error, since their counsel not only failed to move to exclude the video, but introduced it into evidence himself and used it in his opening argument. Second, they claim the court erred in permitting defense counsel to question them on several incidents preceding and following the altercation. This contention also does not merit reversal because (1) there was no error; and (2) even if there were error, it was harmless because the overwhelming evidence supports the jury's verdict and the alleged error could not have effected the outcome.

II. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court did not commit reversible error in allowing Blackburn (counsel for defendant/respondent Friendly Duck Family Restaurant) to cross-examine Peterson as to any other altercations she was involved in since the night of the altercation at the Friendly Duck, overruling Peterson's objection. Peterson did not testify as to any

altercation in response to counsel's questioning. Error, if any, was waived by Peterson. Further, error, if any, even if not waived, was harmless.

2. The trial court did not commit reversible error when it allowed Blackburn to cross-examine Peterson about details of an incident that occurred at a bowling alley subsequent to the altercation at the Friendly Duck. This assignment of error refers to the same line of questioning as assignment 1. As with assignment 1, error, if any, was waived by Peterson. Further, error, if any, even if not waived, was harmless.

3. The trial court did not commit reversible error when it allowed Wilson to be cross-examined about fights with other men prior to the altercation at the Friendly Duck. Peterson did not testify as to any altercation in response to counsel's questioning. Error, if any, was waived by Wilson. Further, error, if any, even if not waived, was harmless.

4. The trial court did not commit reversible when it allowed Blackburn to impeach Wilson's character by introducing evidence of an incident which occurred two years after the altercation at the Friendly Duck. Error, if any, was waived by Wilson. Further, error, if any, even if not waived, was harmless.

5. The trial court did not commit reversible error when it allowed Wilson to be impeached, through the introduction of extrinsic evidence of an arrest for assault. Error, if any, was waived by Wilson. Further, error, if any, even if not waived, was harmless.

6. The trial court did not err in denying Wilson's pretrial motion to compel production of security footage "intentionally deleted" from the hard drives of the Friendly Duck's computers. No security footage was "intentionally deleted" by anyone. Further, it is not clear from the record that the trial court did in fact deny the motion referenced by appellants. Assuming the trial court deny the motion, it did not abuse its broad discretion in controlling the manner and scope of discovery by doing so.

7. Wilson and Peterson contend the trial court erred in admitting evidence that violated alleged Washington public policy against tampering with physical evidence when it failed to exclude "edited" security footage of the altercation which occurred on the premises of the Friendly Duck. There was no reversible error. The trial court did not violate any public policy that might reasonably be ascertained from the statute relied upon by appellants. Further, even if admission of the DVD would have violated the public policy alleged by appellants, appellants waived any error (a) by failing to object to admission of the DVD when it was listed in Friendly Duck's ER 904 statement; (b) by listing the DVD in their own Statement of Evidence; (c) by failing to object to the DVD's admission into evidence or move to exclude it; and (d) by offering the DVD into evidence themselves.

8. Wilson and Peterson contend the trial court erred in admitting evidence that violated alleged Washington public policy which requires a person who witnesses the commission of a violent offense to

report it to law enforcement as soon as possible, when it failed to exclude the “edited” security footage. There was no reversible error. The trial court did not violate any public policy that might reasonably be ascertained from the statute relied upon by appellants. Further, even if admission of the DVD would have violated the public policy alleged by appellants, appellants waived any error (a) by failing to object to admission of the DVD when it was listed in Friendly Duck’s ER 904 statement; (b) by listing the DVD in their own Statement of Evidence; (c) by failing to object to the DVD’s admission into evidence or move to exclude it; and (d) by offering the DVD into evidence themselves.

III. STATEMENT OF THE CASE

One circumstance stands out above all others in this case and is clearly evident in the video of the incident: Wilson and Peterson, admittedly under the influence of alcohol, bum-rushed defendant/respondent Frye, and in the process of beating him, caused their own injuries. The jury reasonably concluded Wilson and Peterson were intoxicated and were more than fifty percent at fault for their injuries, precluding any liability against the Friendly Duck Family Restaurant (“Friendly Duck”). There is no basis to disturb this finding.

A. FACTS UNDERLYING LAWSUIT

1. The Fight.

On the morning of February 5, 2004, plaintiff/appellant Nikki Wilson received a telephone call from her family that her youngest brother

had been injured in an automobile accident in Arizona. (RP 340) Wilson decided fly to Arizona to see him. *Id.* Wilson went to work at Coca-Cola at 1:30 p.m. and asked her roommate, co-plaintiff/appellant Pamela Peterson (who also worked at Coca-Cola), to see if Wilson could get off work early. (RP 195) Wilson was permitted to leave work early. *Id.* After Wilson left work, she decided to go to defendant/respondent Friendly Duck to drink. (RP 279-80)

Richard Stotts, Wilson's ex-husband, was unemployed at the time and so went to defendant/respondent Friendly Duck at around 4:00 p.m. to have a drink. (RP 279, 309) After about 30 minutes, he left. *Id.* However, at around 5:00 p.m., he received a call from Wilson, who was at the Friendly Duck drinking and wanted him to meet her there. *Id.* He returned to the Friendly Duck and began drinking mixed drinks with Wilson in the lounge. *Id.*¹ Stotts and Wilson had known one another for about 14 years. (RP 279)

Co-plaintiff/appellant Peterson got off work at around 6:30 p.m. (RP 196) As she drove by the Friendly Duck, she saw Wilson's truck. *Id.* She called Wilson on her cell phone and asked if it was alright if she came in. *Id.* Wilson invited her to join them. *Id.* At around 6:45 p.m., Peterson joined Stotts and Wilson in the Friendly Duck lounge and began drinking with them. (RP 196-97)

¹ The Friendly Duck consists of a restaurant and a lounge, connected by a narrow hallway. (RP 424-27) *Id.*

At around 6:00 p.m., witness Michael Gibbons arrived at the workplace of defendant/respondent Lawrence Frye to drop off some motorcycle parts. (SRP2 10)² Frye works at his parents' motorcycle store building and servicing custom motorcycles. (SRP2 26) Frye is well known in the community for his parents' motorcycle shop and his work in putting on a yearly charity ride for the local battered women's shelter, and had been featured in the local newspapers several times. (SRP2 45) Frye was hard at work preparing for a show that was to take place in Portland. (SRP2 26) He and Gibbons discussed parts while Frye continued working. (SRP2 10)

Around this time, Frye received a telephone call from his friend, co-defendant/respondent Guy Casey. (SRP2 27) The three agreed to meet for dinner at the Friendly Duck. *Id.* Frye and Gibbons left separately. (SRP2 28) They arrived at the Friendly Duck around 7:00 p.m. (SRP2 10)

In the meantime, Stotts and Wilson were drinking mixed drinks in the Friendly Duck lounge. (RP 280) Wilson had 4-5 mixed drinks. (RP 354) She was sufficiently intoxicated that she did not believe she could drive her car. *Id.* She was feeling "tipsy." (RP 355) Peterson had

² Appellants did not order the entire proceedings transcribed in their statement of arrangements. In two separate motions, Respondents requested that the remaining portions of the proceedings be transcribed, resulting in two supplemental verbatim reports. The first supplemental RP covered the proceedings of February 21, 2007. The second supplemental RP covered the afternoon session of February 20, 2007. The court reporter began each supplemental verbatim report at page 1. Therefore, this brief designates citations from the first supplemental RP (February 21 proceedings) as "SRP1" and citations from the second supplemental RP (February 20 afternoon proceedings) as "SRP2".

consumed 3-4 12 ounce beers. (RP 226) None of them had anything to eat. (RP 422)

Frye and Gibbons joined Casey at a table in the Friendly Duck lounge. They ordered drinks and dinner. (SRP2 13) They were sitting at a table that was about 3-4 feet from the table occupied by Stotts, Wilson and Peterson, separated by a railing. (RP 423) Stotts, Wilson and Peterson were already at the lounge when Casey arrived. (RP 422) Although their food and drinks arrived, the events at issue occurred before Frye, Casey or Gibbons could finish eating or drink their first drink. (RP 310, 431-32; SRP2 38)

A short time after Frye and Gibbons arrived at the Friendly Duck, friendly banter began between the two tables about Volkswagens. (RP 284, 296-97, 432-33; SRP2 42)³ Frye is a huge fan of Volkswagens and has been featured in Hot VW magazine. (SRP 42)⁴ Unfortunately, the conversation soon took a turn for the worse. According to Stotts, Frye made a sexually suggestive comment to the bartender, Holly Hunter, and

³ Wilson and Peterson both told the police that Frye was loud, obnoxious and intoxicated from the moment he entered the bar. (Ex 27) However, their own friend, Stotts, belied this by testifying at trial that the conversation between the two tables was initially friendly. (RP 284, 296-97) The trial court dismissed on directed verdict plaintiffs' claim that the Friendly Duck served Frye when he was obviously intoxicated, because there was no evidence that he was intoxicated or that he consumed more than the partial beer he was served after he entered the lounge. (SRP1 384; CP 260-61) Appellants have not assigned error to that ruling.

⁴ Peterson testified that she, Wilson and Stotts were talking about Volkswagens and that Frye butted in saying "Volkswagens suck." (RP 202) Again, this is belied by Stotts' testimony and the fact that Frye is passionate about Volkswagens. (SRP2 42-43)

Stotts responded by standing up and saying to Frye, “Man, you got a big mouth.” (RP 285) Wilson and Peterson began making fun of Frye’s hair (which, at the time, was quite long and was worn in a ponytail). (RP 433) According to Casey, Gibbons and Frye, Wilson and Peterson began throwing ice and coasters at their table. (RP 435; SRP2 14-15, 38) Wilson and Peterson were swearing at Frye (RP 297), telling him to “shut the fuck up.” (RP 247) Wilson and Peterson threatened to “kick [Frye’s] . . . long haired faggot ass.” (SRP2 40) Eventually, Wilson, Peterson and Stotts approached Frye’s table. (Ex 22)

Holly Hunter was the bartender that night at the Friendly Duck lounge. She is a friend of Wilson and Peterson. (Ex 27, at p. DEF 27; RP 464; SRP2 44)⁵ At this point during the verbal exchange, she approached Frye’s table, pulled his beer, and told him to leave. (RP 287; SRP 40) She told Frye she had called the police and they were on their way. (RP 287)

According to Stotts, Hunter was trying to get Frye to exit out the “front” door and get Stotts, Wilson and Peterson to exit out the “back” door. (RP 287) The “front” door is the door to the restaurant—to reach it from the lounge, one has to exit the lounge into a narrow hallway and leave through the restaurant. (RP 424-27) The “back” door exit was closer to Wilson and Peterson and led into an alley and parking lot. *Id.* The back

⁵ Peterson denied under oath at trial that she was friends with Hunter. (RP 236) However, she told the police she, Stotts and Wilson were friends with Hunter. (Ex 27, at p. DEF 27) Frye did not know Hunter. (SRP2 43-44)

door was directly behind Wilson and Peterson, and their access to it was unimpeded by Frye or anyone else. (RP 305, 306, 308; Ex 22)⁶

At this point, Stotts was waiting for Frye to leave and had taken ahold of Wilson's jacket to hold her back as she argued with Frye. (RP 287, 305-08) He was trying to pull Wilson out the back and was saying "come on, let's just go." *Id.* He wanted to take Wilson and Peterson out the back door, but Wilson just kept going forward. (RP 308) Stotts testified that since Hunter had pulled Frye's beer and told him to leave, "you know, I figure he will eventually leave." (RP 288) However, rather than leave peacefully out the back—as they clearly had an opportunity to do, and as Hunter and Stotts were trying to get them to do—Wilson and Peterson chose instead to suddenly, and without warning, rush forward and attack Frye. (Ex 22; RP 209, 299, 363)

As is clearly shown in the security video, Wilson lunged forward and tackled Frye, grabbing his hair and pulling his head back as they tumbled over a table. *Id.*; (RP 440; SRP2 30) Frye hit his head on the table and on the ground as he went down on his back with Wilson on top of him. (SRP2 31-32) "At that point," testified Frye, "it was a haze of stars, feet, arms flailing." (SRP2 31) They tumbled into the narrow hallway

⁶ Peterson testified Frye was blocking their exit and preventing them from leaving. (RP 208) Again, this is clearly contradicted by Stotts' testimony and the security video, which shows they had a clear path to exit through the back door. (RP 305-08; Ex 22) Peterson also testified she was "very afraid" of Frye. (RP 230) This is difficult to reconcile with the facts that Wilson and Peterson came to Frye's table to confront him, that they instigated the fight by attacking him, and that, despite the fact they both had cell phones, chose not to call the police themselves.

leading to the restaurant, with Wilson on top of Frye. (RP 223, 441-42)
Stotts attempted to keep Peterson from joining the fray, but she pushed Stotts away and jumped on top of Wilson and Frye. (RP 210, 290, 441-42)
As Stotts went forward to attempt to pull Wilson off Frye again, Casey, fearing a third person attacking his friend, grabbed Stotts and pulled him back, eventually throwing him to the ground and holding him there until the fight was over. (RP 442-43) While Stotts had, in his direct testimony, insinuated Frye ended up on top of Wilson, it became clear in his cross that this wasn't the case (RP 300-01):

Q. . . . You were getting ready to grab Nikki [Wilson]; is that correct?

A. Yes.

Q. Because you were pulling her off of Mr. Frye, weren't you?

A. I was trying to, yes.

Q. Because she had essentially jumped on top of Mr. Frye at that point?

A. After he pushed Pam [Peterson].

...

Q. So you are pulling Nikki Wilson away essentially pulling her off Mr. Frye, correct?

A. Yes.

Q. And as you start to do that, Mr. Casey grabs you, does he not?

A. He grabs me by my jacket, yes.

Q. Right, and then he let you go, didn't he?

A. He let me go and I went back to try to grab Nikki.

Q. In other words, when he grabs you, he prevents you from joining into the fray; isn't that correct?

A. He prevented me from getting her off of him.

Frye was at the bottom of the pile, beneath Wilson and Peterson, when Gibbons came over and pulled him out from beneath the two

women. (RP 444; SRP2 18-19, 32) Frye, hindered by “two people twice my size on top of me”, was unable to defend himself, hit, or kick anyone. (SRP2 31-32) Frye testified, “I was scared for my life. It’s embarrassing to get beat up by two girls but let alone have three people attacking you.” (SRP2 32) After Gibbons dragged him out from under the women, Frye ran out the door. *Id.*

Wilson and Peterson claimed Frye kicked both of them during the fight, breaking Wilson’s jaw. However, an examination of the evidence demonstrates there was no proof of this allegation. When the police investigated the incident initially, no one said anything about Frye kicking Wilson. (RP 178-80) Neither Peterson nor Stotts ever saw Frye kick Wilson. (RP 222, 302-03) Wilson herself has no recollection of how she was injured. (RP 342) The last thing she remembers is lunging at Frye. (RP 342-43)⁷ Peterson testified Frye kicked her in the face (while wearing biker boots), but strangely, reported no injuries whatsoever from the alleged blow to the police (RP 178-79, 225, 231-32) and sought no medical treatment. (RP 178-79, 234) Casey, Gibbons, and Frye all testified Frye was underneath the two women the whole time and never had a chance to strike any blows. (RP 444; SRP2 17, 29, 33) Casey testified (RP 444):

⁷ This would be consistent with her having struck her face on the table or the ground or stairs as she tackled Frye over the table and tumbled with him down the stairs. Dr. Cantu, plaintiff’s dental expert, admitted on cross examination that the blow that fractured Wilson’s jaw could have been from any number of sources, as long as it came from the side. (RP 111)

When I let Mr. Stotts up, the fight was—they weren't fighting. They never were really fighting. When they went down there, the girls were pawing at him and hitting at him but there was no fight. Larry was underneath them and I don't believe Larry never got his balance to do anything. He never could do anything. He was falling backwards the whole time. I every [sic] saw Larry hit or kick anybody.

The entire fight took less than a minute. (Ex 22; RP 16, 39)

2. The Security Video.

Dong Kim, the owner of the Friendly Duck, maintained six security cameras in the restaurant at the time of the incident: two inside the lounge (one of which covered the till), two inside the restaurant, and two outside in the parking lots. (RP 249-50) The system digitally records events onto a computer. The system preserves the digital recordings for 4-5 days, then automatically records over what had been preserved. (RP 254, 275-76) To save any portion of the video, one has to go in and manually save it—otherwise, it is automatically erased. (RP 275-76)

When Kim was informed of the fight the day after it occurred, he went in and saved the video of the altercation to preserve it for police. (RP 256, 262) He made his best effort to preserve what had happened in the fight, keeping what he felt would be needed. (RP 262-63) Since Mr. Kim has owned the Friendly Duck, he has never had a fight or other crime in his bar other than this one. (RP 261-62) He had no experience with this type of thing. (RP 268) He kept what he felt was needed. *Id.* Detective Daniels, who interviewed Kim, did not have the impression Kim intentionally failed to preserve any relevant portion of the video. (RP 187-

88) Detective Daniels testified he “didn’t feel like in any way there was anything on [Kim’s] part to keep something out” (RP 188)

B. PROCEDURAL FACTS

1. Appellants’ Voluntary Use of the Security Video.

On February 15, 2006, Friendly Duck filed a notice pursuant to ER 904. (CP 66-68) The first item listed was a DVD of the preserved portion of the security video of the fight (“the DVD”). (CP 66) On March 3, 2006, Wilson and Peterson filed notice of objections to Friendly Duck’s ER 904 notice. (CP 81-85) They did not object to admission of the DVD. *Id.* On February 22, 2006, Wilson and Peterson filed motions in limine. (CP 69-72) They did not seek to exclude the DVD. *Id.* On July 25, 2006, Friendly Duck and Wilson/Peterson filed respective Statements of Evidence. (CP 89-100) Both statements indicated the parties would be offering the DVD into evidence (CP 90, 96), Friendly Duck specifically noting it would be offered “without objection.” (CP 90) On February 14, 2007, Wilson and Peterson’s counsel, Le Roy Dickens, gave his opening statement. (RP 12-34) Dickens played the DVD for the jury during his opening statement. (RP 25-28) Dickens again played the DVD during his direct examination of Peterson. (RP 207) The minutes of the trial state the DVD was offered into evidence without objection. (CP 252)

Wilson and Peterson offered as part of their proposed jury instructions an instruction on spoliation of evidence. (CP 234) However,

Dickens voluntarily withdrew the instruction prior to submitting the case to the jury. (SRP1 37)

2. Motion for Directed Verdict.

At the close of Wilson's and Peterson's case, Friendly Duck made a motion for directed verdict on all claims against it. (RP 380-416) The court granted the motion as to claims (1) that the Friendly Duck overserved Frye or Casey; (2) that the Friendly Duck served alcohol to Frye or Casey when Frye or Casey were obviously intoxicated; (3) that the Friendly Duck committed the tort of outrage; and (4) that that Friendly Duck committed the tort of intentional infliction of emotional distress. (CP 260-63; RP 384, 401-02) Neither Wilson or Peterson has assigned error to these rulings.

3. Judgment.

On February 22, 2007, the jury completed and submitted special verdict forms on all claims. (CP 239-44) For both Wilson and Peterson, the jury found:

Do you find defendant Lawrence Frye's intentional acts proximately caused injury to plaintiff [Wilson/Peterson]?
Answer: No.

Do you find defendant Guy Casey's intentional acts proximately caused injury to plaintiff [Wilson/Peterson]?
Answer: No.

Was plaintiff [Wilson/Peterson] under the influence of alcohol at the time of the occurrence in the Friendly Duck Restaurant? Answer: Yes.

Was plaintiff [Wilson/Peterson]'s condition of being under the influence of alcohol a proximate cause of her injury?
Answer: Yes.

Was plaintiff [Wilson/Peterson] more than 50 percent at fault for her injuries? Answer: Yes.

No other questions were answered. Appellants have not assigned error to any of these factual findings.

C. QUESTIONING AND TESTIMONY RELATING TO ALLEGED ERRORS.

1. Peterson.

During cross examination of Peterson, counsel for the Friendly Duck asked, “[S]ince the night of the altercation and [sic] in the Friendly Duck have you been in any other type of altercations since then?” (RP 239) Peterson answered, “Yes.” *Id.* Peterson’s counsel Dickens then interposed an objection and the jury was excused. Defense counsel argued any subsequent altercations would be relevant to Peterson’s claim of ongoing injury to her jaw. (RP 241-42) The court concluded that since Peterson had already answered the question, the door was open and the questioning could continue. (RP 242) When questioning continued, Peterson stated she wouldn’t call the incident an altercation “because I didn’t touch anybody but nobody touched me but there was something that happened in a bowling alley in 2004.” (RP 243) Dickens then objected again on the basis that Peterson testified she had not been touched and therefore could not have suffered further injury. *Id.* Friendly Duck’s counsel argued she could ask the question to show propensity to get into fights. *Id.* Dickens responded, “*If she can establish a propensity, please.*”

Id. The court then permitted the questioning to continue. Peterson described a verbal argument between herself and some young people in a parking lot that did not result in any physical altercation—there were only some swear words exchanged. (RP 244-45)

2. Wilson

During cross examination of Wilson, counsel asked if she had “been in fights with men before the night of the incident” at the Friendly Duck. (RP 363) The court permitted the question to be answered over objection. Wilson answered, “I wouldn’t call it a physical fight by any means. I mean, it was you tussle with your brothers, you know, every once in a while someone gets hurt. I don’t think it was intentional.” (RP 364) Counsel let the matter drop without further questioning. *Id.*

Later during cross examination, counsel asked whether Wilson “had any altercations since the night of the Friendly Duck with any men”. (RP 366) The jury was again excused. Asked where she was going with this, counsel responded they’d heard extensive testimony of how Wilson had been careful not to reinjure her jaw, and her getting into subsequent fights would be inconsistent with that claim. *Id.* Counsel argued the altercation was significant enough to reinjure Wilson’s jaw. (RP 367) The following exchange then took place (RP 368-69) (emphasis added):

THE COURT: Let’s do it this way. I think the more germane question would be have you been in any altercations since this incident where your jaw was injured.
MR. DICKENS: *I don’t have any problems with that question.*

...

MR. DICKENS: *Our only objection* is she hasn't given any indication that the jaw was injured.

THE COURT: You can bring that up on the cross. Remember how I indicated the question should be framed, Ms. Blackburn.

The following questioning then occurred (RP 370-71) (bracketed material added):

Q. Have you been in any altercations since the night at the Friendly Duck that could have caused further injury to your jaw?

A. No.

Q. Is it true that you were in a fight with a paramedic wherein he was assisting you out of your car and you fell to the ground and started fighting with him? [*No objection*]

A. I was not fighting with him. I didn't know who he was.

Q. And at the time you didn't go to the ground and have a fight with him?

A. I don't remember going to the ground. I don't remember fighting with him.

Q. If I show you a pleading where it has been pled that that did occur, would you deny that?

MR. DICKENS: Objection, Your Honor.

THE COURT: The objection.

MR. DICKENS: The objection is she is attempting to introduce intrinsic [sic] evidence to show something that the witness has already said, no, she did not have a fight.

THE COURT: Now, it's into impeachment. Go ahead.

Counsel then asked several questions regarding the incident, asking if the pleading refreshed Wilson's recollection as to what occurred. (RP 371) Co-defense counsel asked several follow-up questions, without objection. (RP 372-73) Wilson's counsel then asked a number of questions about the incident on redirect. (RP 374-78) Wilson denied throughout the questioning ever having fought with the paramedics. (RP 371-78)

D. APPELLANT'S QUESTIONING OF FRYE REGARDING CRIMINAL PROCEEDINGS RELATED TO THE ALTERCATION.

During his cross examination of Frye, Dickens asked Frye: "Just one last question, you pled guilty in a court of law, didn't you—". (SRP2 45) His question was cut off by an objection by Frye's counsel. *Id.* The jury was excused and a colloquy ensued. (SRP2 45-61) Dickens explained he was asking about Frye's Alford plea to misdemeanor assault of Wilson and Peterson. (SRP2 476) Dickens argued "I think we are entitled to go into his propensity to commit violent acts against women also." (SRP2 47) Defense counsel pointed out she did not ask Wilson during Wilson's cross about the fact that Wilson was to be tried on her assault charges against the paramedic in two weeks. (SRP2 48) Frye's counsel asked for a mistrial. (SRP2 49) The court requested additional briefing and excused the jury with an instruction to disregard the last question. (SRP2 59, 62)

The following morning, the court denied the motion for mistrial, explaining (SRP1 9-10):

I recognize what is at stake here but I also do not believe that when I look in the full content of this trial that it warrants a mistrial. And I say that because in balancing Nikki Wilson's charge of being charged with assault and although it's my understanding she was not convicted of assault or was she? It's pending? When you look at 609 even that if it were to be used should have been written notice should have been proffered to the opposing counsel and I think when you balance all this out, the jury will be left with these—both these individuals have some propensities aside from any assault or convictions that you can see. I think they are going to rely solely upon what the video shows them and the testimony presented. So I do not think it rises to the level to warrant a mistrial.

E. RESPONSE TO APPELLANT’S STATEMENT OF FACTS

Appellants make a number of assertions in their Statement of Facts which are not supported by their citations to the record. For example, on page 6, appellants write “At one point Hunter took a drink out of Frye’s hand and asked him to leave the premises, which he refused to do”, citing RP 287-88. Nowhere in the cited testimony does it state that Frye “refused to [leave]”. On the following page (7), appellants assert that Dong Kim “failed to notify the police he was in possession of the security video”, that he “deleted the parts of one video which showed the events leading up to the commencement of the fight in the lounge” and that “he erased the footage of Frye entering the restaurant, and him fleeing the restaurant.” There is no evidence to support any of these allegations (they are in fact contradicted by the record) and the citation appellants provided does not support them.

IV. ARGUMENT

A. ASSIGNMENTS OF ERROR RELATING TO THE SECURITY DVD.

Appellants raise two assignments of error relating to the admission of the security DVD, claiming: (1) the trial court violated Washington public policy against tampering with physical evidence by admitting the security footage (assignment no. 7); and (2) the court violated Washington public policy requiring a person witnessing commission of a violent offense to report it to law enforcement by admitting the security footage (assignment no. 8). Appellants also argue the trial court erred in denying their motion to compel the Friendly Duck to pay for a computer forensics

expert to attempt to recover deleted footage from their computer (assignment no. 6). None of these contentions has merit.

1. Motion to Compel.

On December 21, 2005, appellants filed a motion asking the court to issue an order appointing a computer forensics expert to attempt to retrieve portions of the automatically-deleted digital security footage taken by the Friendly Duck's security cameras on the night of the fight. (CP 40)⁸ Appellants asked that the Friendly Duck be ordered to pay for this retrieval. *Id.* Appellants did not request that the preserved portion of the video be excluded as a sanction for Friendly Duck's failure to preserve additional portions. (CP 39-49) Although appellants assert the trial court denied their motion, there is nothing in the record indicating what the court in fact ordered.⁹

Appellants alleged in their motion that Dong Kim "made the highly unusual and suspicious decision to review and erase all the images stored on the hard drive, except for a two minute segment of footage" (CP 42) This is simply untrue: in fact, Mr. Kim took the affirmative step of *preserving* footage of the fight. (RP 256, 261-63. 268) The system

⁸ Appellants cite no evidence that such retrieval would even be possible.

⁹ There is no order in the court file on the motion, and the minutes designated by appellants do not indicate what the court's decision was. (CP 51)

automatically recorded over the remaining portion of the footage after four days. *Id.*¹⁰

Appellants based their request that the Friendly Duck pay for a forensics expert to attempt to retrieve the lost data on the doctrine of spoliation. (CP 45-47) “Spoliation is the ‘intentional destruction of evidence.’” *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999) (quoting *Black’s Law Dictionary* 1401 (6th ed. 1990)). Spoliation is “a term of art, referring to the legal conclusion that a party’s destruction of evidence was both willful *and* improper.” *Homeworks Constr., Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006) (quoting Tegland, 5 *Washington Practice: Evidence*, § 402.6, at 37 (Supp. 2005)) (emphasis in original). In determining whether to sanction a party for spoliation of evidence, two factors control: (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the party accused of spoliating the evidence. *Marshall*, 94 Wn. App. at 382 (citing *Henderson v. Tyrell*, 80 Wn. App. 592, 607, 910 P.2d 522 (1996)). Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. *Id.*

A trial court’s decision regarding sanctions for spoliation is discretionary and will not be disturbed on appeal absent a showing of

¹⁰ Appellants repeated this false accusation in their appellate brief, stating Kim “willfully tampered with the evidence in order to gain an investigative advantage in any subsequent civil litigation” Brief of Appellants at p. 19. Appellants have failed to produce one shred of evidence supporting this assertion, although they have made it repeatedly throughout this litigation.

abuse of discretion. *Henderson*, 80 Wn. App. at 604. Additionally, a trial court has broad discretion to manage the discovery process, and, if necessary, to limit the scope of discovery; again, its decisions in this regard are reviewed under the abuse of discretion standard. *The Eagle Group, Inc. v. Mike Pullen*, 114 Wn. App. 409, 416, 58 P.3d 292 (2002).

Assuming the trial court did in fact deny appellants' motion, appellants cannot demonstrate it abused its discretion in doing so. Appellants have not shown that either of the two factors relating to spoliation mitigate in their favor. First, they failed to demonstrate the unpreserved video's relevance. No matter what the footage showed occurring between the parties leading up to the altercation, the preserved portion of the video clearly shows appellants initiating the fight by bum-rushing Frye. (Ex 22)

More importantly, appellants have demonstrated no culpability whatsoever on the part of Kim. The *only* evidence presented on this issue demonstrates that when Kim was informed of the fight, he went and preserved that portion of the video he felt was relevant (the actual footage of the fight). Kim is not a lawyer; he had never had a fight or other crime occur in his bar before; he had no experience with being sued. The detective who interviewed Kim and to whom Kim turned over the security video testified there was no indication Kim was attempting to hide anything. Kim destroyed nothing; he simply made a judgment call, as a layman, as to what portion of the video to preserve. No one asked him to preserve anything. In sum, appellants' attempt to manufacture some grand

conspiracy by Kim to willfully destroy evidence is supported by nothing other than their repeated assertion that it is so.

Whether a party is culpable is also based upon whether he or she had a duty to preserve the evidence. *Homeworks Constr.*, 133 Wn. App. at 901; *Henderson*, 80 Wn. App. at 610. The fact that one may be a potential litigant does not, in and of itself, create a duty to preserve evidence. *Id.* Neither do either of the statutes appellants cite in appellants' brief (pp. 22-23). RCW 9A.72.150 holds a person who has reason to believe an official proceeding is "pending or about to be instituted" culpable if he "destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its appearance, character, or availability in such . . . proceeding." Again, there is no evidence Kim destroyed, concealed, or altered anything. RCW 9.69.100 requires one who witnesses the commission of a particular set of violent offenses to report the offense to the authorities. Kim clearly did not violate this statute, because he did not witness the fight and his agent, bartender Hunter, reported the incident to police immediately. There was no demonstrable abuse of discretion by the trial court in denying appellants' motion to compel.

2. Appellants Both Waived and Invited Any Error Relating to Admission of the Security Video.

Even if appellants could demonstrate the trial court committed error in allowing the video to be shown at trial, such error could not form a basis for reversal because appellants repeatedly waived any objection to its admissibility. Appellants never, either in their motion to compel or in

motions in limine, moved to exclude the security video.¹¹ Further, they failed to raise any objections to admissibility of the video when it was listed in Friendly Duck's ER 904 statement. By failing to object to Friendly Duck's ER 904 disclosure, appellants waived any objections to the video's admissibility. *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 260, 944 P.2d 1005 (1997).

Appellants also invited any alleged error relating to the video. Appellants listed the video in their own Statement of Evidence, and the minutes of the trial show it was admitted without objection. Evidence admitted without objection may be properly considered and cannot form the basis for asserting error on appeal. *State v. Myers*, 133 Wn.2d 26, 34-35, 941 P.2d 1102 (1997). Furthermore, it was appellants' counsel who first showed the video to the jury, both in his opening statement and in his direct examination of Peterson. Under the invited error doctrine, admission of evidence offered by the party asserting error cannot serve as a basis to reverse. *In re Personal Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003); *Shanlian v. Faulk*, 68 Wn. App. 320, 329, 843 P.2d 535 (1992).

¹¹ Appellate Courts will generally not consider issues raised for the first time on appeal. *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006). RAP 2.5 provides limited exceptions to this rule, none of which apply here. Although appellants assert issues may be raised for the first time on appeal "when fundamental justice so requires" (citing *State v. Card*, 48 Wn. App. 781, 741 P.2d 65 (1987)), they have not identified any fundamental issues of justice to support such exceptional consideration here.

There is no valid basis for appellants to assert error relating to the use of the security video.

B. ASSIGNMENTS OF ERROR RELATING TO QUESTIONING REGARDING PRIOR AND SUBSEQUENT INCIDENTS.

Appellants make the following assignments of error relating to questioning of Peterson and Wilson: (1) the court erred in permitting counsel to question Peterson about a verbal argument at a bowling alley after the fight at the Friendly Duck (assignments 1 and 2); (2) the court erred in permitting counsel to question Wilson regarding arguments with her family prior to the fight at the Friendly Duck (assignment 3); (3) the court erred in permitting counsel to question Wilson regarding her altercation with paramedics or firefighters after the fight at the Friendly Duck (assignments 4 and 5). None of these allegations amount to reversible error, because there was no error; error, if any was waived; and error, if any, was harmless.

A trial court's decision on the admissibility of evidence is reviewed for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999), *cert. denied*, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. Absent an abuse of discretion, the Court of Appeal will not disturb a trial court's rulings on the admissibility of evidence. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 666, 880 P.2d 988 (1994).

1. Lack of Error and Waiver.

a. Questioning of Peterson.

During cross examination, defense counsel asked Peterson whether she had been in any altercations since the night of at the Friendly Duck. Peterson's counsel did not interpose any objection. Peterson answered "yes." Her counsel then objected to the question. He did not move to strike the answer already given.

Testimony admitted without objection is not reviewable on appeal. *State v. Jones*, 70 Wn.2d 591, 597, 424 P.2d 665 (1967). An objection after a question has been answered comes too late. *Id.* A party may not remain silent, speculate upon an answer being favorable, and when disappointed, make a motion to strike out the answer. *Id.* Furthermore, the objecting party's failure to move to strike the answer already given precludes appellate review. *Id.*; *State v. Gallo*, 20 Wn. App. 717, 728, 582 P.2d 558 (1978). By permitting Peterson to answer the question without objection, Peterson opened the door to the subsequent questioning. *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997).

When the questioning continued, Peterson responded that there had in fact been no altercation at all because no one touched anyone. Dickens objected on the basis that she could not therefore have injured her jaw. When defense counsel argued she was permitted to use the incident to show a propensity to get into fights, Dickens responded: "If she can establish a propensity, please." In other words, Dickens was now objecting that the questioning could continue only if counsel was able to show a

propensity. By modifying his objection, Dickens waived his initial objection, even if the initial objection had been correct. *Pearce v. Greek Boys' Mining Co.*, 48 Wn. 38, 40-41, 92 P. 773 (1907). *See also, State v. Severns*, 19 Wn.2d 18, 20, 141 P.2d 142 (1943) (“It is well settled that an objection must apprise the court of the ground upon which it is made, otherwise no error can be predicated upon it.”).

b. Questioning of Wilson.

During cross examination of Wilson, defense counsel asked whether Wilson had been in any fights since the incident at the Friendly Duck. In response to defense counsel’s explanation (outside the jury’s presence) that she was offering the testimony in response to Wilson’s contention that she had been careful to take care of her jaw since the Friendly Duck fight, the court stated the proper question would be “have you been in any altercations since this incident where your jaw was injured.” Dickens responded he “would have no problem” with that question and that his “*only objection* is she hasn’t given any indication that the jaw was injured.” Having modified and/or withdrawn his objection, he cannot reassert it here. *Pearce*, 48 Wn. at 40-41; *State v. Rowe*, 77 Wn.2d 955, 959-60, 468 P.2d 1000 (1970); *Severns*, 19 Wn.2d at 20.

Counsel then asked the question the court had permitted her to ask: “Have you been in any altercations since the night at the Friendly Duck that could have caused further injury to your jaw?” Even though Wilson

replied “no”, her counsel failed to object to counsel’s next several questions about the incident. By failing to object, Wilson waived any objection on appeal. *Myers*, 133 Wn.2d at 34. Wilson also waived objections by failing to object to co-defense counsel’s line of questioning on the incident, and by her own counsel’s questioning of her on the same incident on redirect. *Id.*

Appellants claim the trial court improperly balanced the weight of the testimony against its prejudice, citing ER 403. ER 403 has a presumption in favor of the admissibility of relevant evidence and the burden of establishing unfair prejudice is on the party seeking exclusion. *Janson v. North Valley Hosp.*, 93 Wn. App. 892, 903, 971 P.2d 67 (1999). A trial court is given broad discretion to weigh the probative value versus prejudice, and its decisions are reviewed under a manifest abuse of discretion standard. *Id.* at 902. Appellants have not demonstrated the trial court manifestly abused its discretion here.

2. Error, If Any, was Harmless.

Even if there was error in allowing the questioning at issue and the error was not waived, it was clearly harmless in light of the fact that the testimony at issue was inconsequential and unrelated to the conclusions reached by the jury. Given the overwhelming and largely undisputed evidence in support of the jury’s conclusions, there is no reasonable probability the disputed testimony affected the outcome.

a. Standards Relating to Harmless Error.

An error in admitting evidence that does not result in prejudice to the defendant is “harmless error” and thus, not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Where alleged error results from violation of an evidentiary rule, as opposed to error of constitutional magnitude, the applicable rule is that error is harmless “unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Id.* (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). *See also*, *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984) (evidentiary errors under ER 404 are not of constitutional magnitude). Improper admission of evidence constitutes harmless error if the evidence is of relatively minor significance in comparison to the overwhelming evidence as a whole. *Bourgeois*, 133 Wn.2d at 403.

With respect to the test of whether “within reasonable probabilities, had the error not occurred, the outcome . . . would have been materially affected”, the Supreme Court has elaborated as follows:

The record must be evaluated in terms of *reasonable probabilities* and whether the outcome was *materially affected*. Thus, the proper resolution depends upon the probability that the error materially affected the result, *i.e.*, a 2-component analysis. It is not a question of some possibility and not a question of a remote probability. Rather it must involve a reasonable probability. . . . Again, it is not the fact that every event or omission in a trial might conceivably have some effect upon the verdict. Rather, the inquiry is whether it has a material effect.

The reviewing court cannot isolate evidence, but must “scrutinize the entire record” and determine whether the claimed error affected the result.

State v. Thomas, 110 Wn.2d 859, 863, 757 P.2d 512 (1988) (emphasis added). In the instant case, looking at the record as a whole, the unchallenged findings of fact and the overwhelming evidence clearly dictate that the alleged error was harmless.

b. Undisputed Findings All Militate that Error, if Any, Would Not Have Altered Outcome.

Appellants have not assigned error to the following factual findings by the jury: (1) that neither Frye nor Casey’s intentional acts caused injury to Wilson or Peterson; (2) that Wilson and Peterson were under the influence of alcohol; (3) that Wilson and Peterson’s intoxication was a proximate cause of their injuries; and (4) that Wilson and Peterson were more than 50 percent at fault for their own injuries. Unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 9, 93 P.3d 147 (2004). Even challenged findings of fact are verities on appeal if the findings are supported by substantial evidence. *Id.* Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding. *Id.*

All of the preceding facts were supported by substantial evidence. With respect to (1), none of the witnesses who testified at trial saw Frye strike Wilson or Peterson, with the sole exception that Peterson claims she was kicked by Frye. Peterson admitted, however, that she was not

injured by the alleged kick and sought no medical treatment.¹² No one saw Frye kick or strike Wilson. Wilson did not recall how she was injured. Dr. Cantu, Wilson's medical expert, admitted on cross that the injury to Wilson's jaw could have come from any source, as long as it came from the side. The security video clearly shows the women attacking Frye and tackling him over a table, landing on top of him. Frye, Gibbons, and Casey all testified Frye was underneath the women the whole time and was never in a position to strike any blows. Thus, the jury was entitled to conclude Wilson's injury occurred not through any assault by Frye, but rather, as a result of her striking her face on the table or the stairs as she and Peterson took him down.¹³

With respect to (2), Wilson and Peterson both admitted to consuming substantial amounts of alcohol in a short period of time, without eating any food. Wilson admitted she was "tipsy" and was too intoxicated to drive. Peterson admits she drank 3-4 beers in about an hour and 15 minutes. Substantial testimony and admissions by Wilson and Peterson indicated they were acting in an unruly manner, swearing, throwing things at Frye's table, and ultimately, that they physically

¹² This strongly suggests Peterson fabricated the allegation, given that Frye was wearing biker boots when he allegedly kicked her in the face.

¹³ The only "evidence" introduced at trial that Frye kicked Peterson was the hearsay statement by bartender Hunter in the police report. Hunter was not called as a witness at trial, and thus was not subject to cross examination. The jury was entitled to discount this hearsay, as Hunter was a friend of Wilson, Peterson and Stotts—a fact that Peterson admitted to police but denied on the stand.

attacked Frye. The jury was instructed that “a person is under the influence of alcohol if, as a result of using alcohol, the person’s ability to act as a reasonably careful person under the same or similar circumstances is lessened to any appreciable degree.” (CP 134) (Instruction No. 21). As appellants did not take exception to this instruction and have not assigned error to it, it is the law of the case. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001).¹⁴

With respect to (3) and (4), both the security video and Wilson and Peterson’s own admissions establish that they started the fight by attacking Frye. The video plainly shows Frye standing with his arms out to his side when Wilson suddenly lunged at him and tackled him over a table. Furthermore, Stotts’ testimony and the security video establish that Wilson and Peterson had every opportunity to avoid the fight by simply exiting out the back door.

It is manifestly reasonable for the jury to conclude Wilson and Peterson were more than 50 percent at fault for injuries suffered in a fight they indisputably started, especially where there was a reasonable inference Wilson’s injury occurred in the process of tackling Frye. In *Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d 1061 (1993), the

¹⁴ The instruction is clearly correct. RCW 5.40.60 states “The standard for determining whether a person was under the influence of intoxicating liquor . . . shall be the same standard established for criminal convictions under RCW 46.61.502” A person is considered to be under the influence of alcohol under RCW 46.61.502 if “the ability to handle an automobile was lessened in an appreciable degree by the consumption of intoxicants” *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995).

Supreme Court upheld a jury's factual conclusion that an intoxicated passenger who was injured by an intoxicated driver was 70% at fault for his own injuries, despite the fact the passenger was asleep when the accident occurred and did nothing to cause the accident. *Id.* at 839-40. The Court reasoned "when a person has voluntarily engaged in behavior which increases the risk of injury, he or she may be held to be predominantly liable for the injuries occurring as a result thereof." *Id.* at 839. Given the overwhelming and undisputed evidence Wilson and Peterson were intoxicated and started the fight, there is no reasonable probability the disputed testimony affected the jury's conclusions.

c. Disputed Testimony Was Insignificant and Unrelated to Decisive Issues, Which Were Supported by Overwhelming Evidence.

An examination of the disputed testimony demonstrates it was relatively insignificant and unrelated to any disputed issue in the case. The Peterson testimony established only that she had been in a verbal argument with some teenagers at a bowling alley. There was no physical fight. Likewise, when Wilson testified regarding arguments with her family, she denied any physical fights: she said "I wouldn't call it a physical fight by any means. I mean, it was you tussle with your brothers, you know, every once in a while someone gets hurt. I don't think it was intentional." (RP 364) The only incident where a physical fight was referenced was the subsequent incident with the firefighter or paramedic. With regards to that incident, Wilson repeatedly denied having hit or

physically attacked the firefighter or paramedic. The incidents were not considered significant enough to even be mentioned by either defense counsel in closing arguments. *See, State v. Jones*, 26 Wn. App. 1, 9, 612 P.2d 404 (1980) (court concluded potentially improper admission of hearsay statement was harmless, reasoning: “Indicative of the statement's lack of prejudicial effect is the fact that the prosecution did not mention it in closing argument.”).

That the disputed testimony had nothing to do with the issues that the jury based their verdict upon distinguishes this case from a case relied upon by appellants: *Dickerson v. Chadwell*, 62 Wn. App. 426, 814 P.2d 687 (1991). In that case, the plaintiff Dickerson was severely injured and rendered incompetent after being beaten by a group of other patrons at a tavern. His representatives sued the tavern, alleging it over-served the offending patrons and failed to exercise reasonable caution to protect Dickerson from foreseeable injury at their hands. A central factual issue at trial was whether Dickerson had slapped his girlfriend Moore in the bar—something Moore denied, but which the attackers claimed precipitated the fight. The trial court permitted the defense over objection to question Moore regarding prior incidents in which Dickerson had slapped her. After a jury verdict in favor of the tavern, the trial court granted Dickerson’s motion for a new trial, reasoning it had committed an error of law by permitting the questioning.

The Court of Appeal began by recognizing the trial court’s decision that the error was prejudicial is reviewed under a “more generous

standard” than de novo review, stating that “[w]hen a trial court evaluates occurrences during trial and their impact on the jury, great deference is afforded the trial court’s decision.” *Id.* at 432-33. Affirming the decision to grant a new trial, the Court reasoned (*Id.* at 433):

A central issue at trial concerned how the altercation that resulted in Dickerson's injuries commenced. According to Dickerson's witnesses, primarily Moore, it was the Six-Eleven's negligence in overserving Reyes and in failing to take steps to prevent Reyes from continuing to harass Dickerson that led to the fight on the sidewalk outside the tavern. Moore also asserted that Dickerson had not slapped her on the night in question. According to Chadwell's witnesses, however, the commotion caused by Dickerson slapping Moore led to Dickerson's banishment from the tavern. Only after Dickerson was outside, Chadwell's witnesses testified, did he become involved in a dispute with people other than Moore.

Moore's admission that Dickerson had previously slapped her lent considerable credence to Chadwell's version of events, while it detracted from the credibility of her own story.

The instant case, in contrast, does not involve an appeal from the grant of a new trial. In fact, the opposite deference is warranted here, in favor of the trial court’s discretionary decision to admit the evidence.

Moreover, the disputed evidence has no relation to the issues found dispositive by the jury. Whether Peterson and Wilson had been involved in other disputes has nothing to do with whether they were under the influence of alcohol on the night of the fight, or whether they were more than 50 percent at fault for their injuries by starting the fight—issues with regard to which there was overwhelming and undisputed evidence.

State v. Cramer, 35 Wn. App. 462, 667 P.2d 143 (1983) is instructive. In that case, the defendant Cramer was tried for indecent liberties with three different children, including his natural son and his stepson. The stepson had recorded one of the abuse incidents without Cramer's knowledge. The trial court granted Cramer's motion to suppress the recording pursuant to RCW 9.73.030, but permitted witnesses to testify as to the making of the tape and its presentation to the boy's parents to persuade them to take his allegations seriously. The Court of Appeal held it was error to permit this testimony. It concluded, however, the error was harmless, because (1) the jury acquitted Cramer of the allegations relating to the stepson, finding him guilty only of molesting his natural son; and (2) there was independent evidence that he had molested the natural son. *Id.* at 465. Because, as here, the improper evidence did not relate directly to the issues found dispositive by the jury, the error was harmless.

In *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 815 P.2d 798 (1991), Kramer appealed a defense verdict in his product liability action against Case. Kramer had moved in limine to exclude evidence of his prior drug and alcohol use. The trial court ruled Case could introduce this evidence because it was relevant to Kramer's life expectancy, despite the fact that Case had made no offer of proof on the subject. Consequently, on cross examination Case was able to elicit testimony that Kramer was an alcoholic; that he currently used marijuana; that he had used marijuana extensively in the past; that he had been arrested for D.W.I.; and that he

participated in Alcoholics Anonymous. Case was never able to tie this evidence into Cramer's life expectancy, because the trial court ultimately precluded Case's expert from testifying on how Cramer's expectancy might be affected by his substance use.

The Court of Appeal held the trial court abused its discretion by admitting this evidence, but held the error was harmless. It reasoned (*Id.* at 559-60) (footnote omitted):

Admittedly, we are quite concerned about the prejudicial impact of this testimony. We are aware that it is certainly possible that the jury rejected Kramer's liability claims because it thought poorly of him. However, given the inadequate record, we are unable to determine whether there is a strong likelihood that this occurred and, if so, whether the jury thought poorly of Kramer because of his drug and alcohol use or because of his evasiveness and lack of credibility on other, unrelated issues. Moreover, Kramer was not alleged to have been intoxicated at the time of the accident. Consequently, the improper evidence concerning his drug and alcohol use was only relevant to the issue of damages. The jury never reached the damage issue and instead entered a defense verdict on the basis of a lack of improper conduct by Case. Accordingly, despite admission of the prejudicial evidence, we are unable to conclude that it is a basis for reversal.

Numerous cases have held that evidence improperly admitted pursuant to ER 404 amounted to harmless error in light of the magnitude of untainted evidence in favor of the verdict, despite the fact that the disputed evidence bore more directly on the decisive issues than is the case here. For example, in *State v. Medcalf*, 58 Wn. App. 817, 795 P.2d 158 (1990), Medcalf was convicted of statutory rape for having forcible

sex with an 11-year-old girl. The Court of Appeal held it was error pursuant to ER 404(b) for the trial court to have permitted an investigating officer to testify about his discovery of a number of videotapes in Medcalf's apartment on which children's film titles were followed by x-rated movie titles. The Court held the error was harmless, reasoning that the evidence against Medcalf was strong and that "[t]he only rebuttal . . . was Medcalf's own implausible version of events." *Id.* at 823-24.

In *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982), *overruled on other grounds as recognized in State v. Radcliffe*, 139 Wn. App. 214, 224, 159 P.3d 486 (2007), Robtoy was convicted of the first degree murder of King. At the trial, the State was permitted over objection to introduce evidence that Robtoy had murdered Pitts ten months earlier, an uncharged crime. Both murders were by strangulation. The Supreme Court held that "whatever relevance the Pitts murder had on the issues of motive and premeditation, if any, was far outweighed by the potentially prejudicial effect of the evidence." *Id.* at 44. It nevertheless held the error was harmless because the untainted evidence of guilt was overwhelming. *Id.* at 44-45.

The entire record on balance militates in favor of recognizing the alleged error as harmless as well. Wilson and Peterson were able to get before the jury that Frye had pleaded guilty to a crime. As the trial court noted, "when you balance all this out, the jury will be left with . . . both these individuals have some propensities aside from any assault or convictions that you can see. I think they are going to rely solely upon

what the video shows them and the testimony presented.” (SRP1 9-10)
The trial court should be afforded great deference in evaluating the impact of testimony on the jury. *Dickerson*, 62 Wn. App. at 432-33.

Another important factor to consider is the paucity of evidence of negligence by the Friendly Duck as weighed against the evidence of Wilson and Peterson’s fault for their own injuries. Instruction No. 18 (unexcepted to and therefore the law of the case) defined the Friendly Duck’s duty (CP 131) (emphasis added):

An establishment that serves intoxicating liquor, while not an insurer of the safety of its patrons, owes a duty to its patrons to exercise reasonable care and vigilance to protect them from reasonably foreseeable injury *at the hands of other patrons*. In order to find the Friendly Duck Restaurant breached this duty, you must find, first, that the assault upon plaintiffs by another patron was reasonably foreseeable; and second, that the Friendly Duck Restaurant failed under the circumstances to exercise reasonable care and vigilance to protect the plaintiffs from the assault of another patron.

Here and at trial, appellants are in the untenable position of arguing the Friendly Duck should have reasonably foreseen and prevented *them* from attacking *Frye*. Appellants’ own friendly witness, Stotts, along with the video evidence and appellants’ own admissions, established (1) Wilson and Peterson engaged in a mutual argument with Frye prior to the fight, using foul language; (2) it was Wilson and Peterson who approached Frye’s table; (3) at that point, Hunter had pulled Frye’s beer, told him she had called the police and they were on their way, and told him to leave out the front entrance while permitting Wilson and Peterson to leave out the

back; (4) Stotts himself was pulling on Wilson, urging her to leave out the back with him; (5) Wilson and Peterson's access to leave out the back was unimpeded; and (6) instead of leaving as instructed and urged, Wilson and Peterson instead chose to attack Frye. Since it was Wilson and Peterson who instigated the fight, the only opportunity the Friendly Duck might have had to prevent them from being injured by Frye (assuming for the sake of argument Frye did injure them) would have been to somehow break up the fight after *they* had started it and before they suffered injury. Since the entire fight took less than a minute (and Wilson's injury likely occurred in the first few seconds), it is difficult to ascertain what more the Friendly Duck could have done to protect Wilson and Peterson from their own alcohol-fueled aggressiveness.

V. CONCLUSION

Considering the untainted evidence presented to the jury, their verdict in favor of the Friendly Duck was inevitable and appropriate. The jury properly concluded the Friendly Duck should not be held accountable for protecting Wilson and Peterson from their own foolhardiness. The evidence of which appellants complain was insignificant, tangential, and under the circumstances presented to the jury, could not with reasonable probability have effected the outcome of the trial. In any event, appellants waived any error. Further, by introducing the surveillance video into evidence themselves, appellants waived any opportunity to assert error in

its admission. Friendly Duck respectfully requests that the verdict be affirmed in all respects.

DATED this 28th day of December, 2007

JACKSON & WALLACE

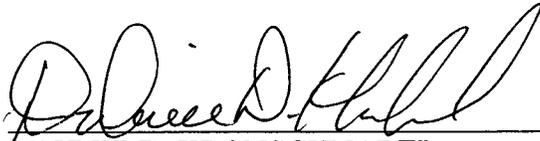
By 

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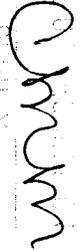
CERTIFICATE OF SERVICE

The undersigned certifies that on December 28th, 2007, she dispatched to a third-party commercial carrier for delivery to the clerk and counsel for appellant, the required number of copies of the Brief of Respondents.

DATED December 28th, 2007, at Seattle, Washington.



DAHNIE D. KRONSCHNABEL

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