NO. 31520-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW HIBBARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

REPLY BRIEF

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A. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MR. HIBBARD'S RIGHT TO PRESENT A DEFENSE WHEN IT LIMITED CHARACTER EVIDENCE.

a. The trial court's refusal to permit admission of relevant character evidence by specific acts was an abuse of discretion and a violation of the right to present a defense. Evidence of a defendant's good character may be relevant and admissible, if a proper foundation is laid. ER 405(b); 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).

Pursuant to ER 405(b), where character is "an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct." (emphasis added).

At trial, Mr. Hibbard made an offer of proof that several witnesses would testify as to specific instances of conduct in which he acted in a diligent and peaceful manner at work. 2RP 109-10. This evidence was essential to the defense that he remained calm, and did not resort to violence, even when provoked. Mr. Hibbard argued that to limit the witnesses' testimony to reputation alone was erroneous. Id.

The State cites State v. Mercer-Drummer, a 2005 case from Division Two, for the proposition that character is not an essential element of assault, and therefore specific acts of misconduct cannot be admitted under ER 405(b); 128 Wn. App. 625, 632, 116 P.3d 454 (2005). What the State fails to acknowledge, however, is that under ER 405(b), specific instances of conduct are admissible where they are relevant to prove an essential element of a defense. ER 405(b).

Here, given the nature of the allegation -- that Mr. Hibbard was negligent when he allegedly assaulted Mr. Ensign – guilt turned on the mens rea of the accused. This required proof that Mr. Hibbard committed a "gross deviation" from the standard of care that a "reasonable person" would exercise. CP 39 (Jury Instruction 5). The proffered evidence was directly relevant to rebutting this essential element of Mr. Hibbard's defense – that he was eminently reasonable and did not deviate from an extremely high standard of care. Mr. Hibbard's reputation for 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 State v. Jones, the court found the evidence relevant. 168 Wn.2d 713, 720, 230 P.3d 576 (2010). 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 was both an abuse of discretion, and it deprived Mr. Hibbard of his Sixth Amendment right to present a defense.

The State also cites State v. Stacy, __ Wn. App. __, 326 P.3d 136 (2014), for the proposition that character is not an essential element of assault.[1] However, Stacy, like Mercer-Drummer, were both third degree assault cases under RCW 9A.36.031(g) – assault of a law enforcement officer – that is, both requiring an entirely different mens reas from Mr. Hibbard's case, which was charged as a negligent assault under RCW 9A.36.031(f). In addition, the Stacy court held that the proffered character evidence was not relevant to that defendant's

[1] A petition for review was filed in State v. Stacy on June 9, 2014.

defense, involuntary intoxication, which is wholly unrelated to the instant case. 326 P.3d 136, n. 2.

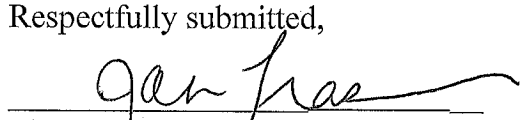
b. Because the trial court denied Mr. Hibbard's right to present a defense, this Court should reverse. A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 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). The State must prove beyond a reasonable doubt that none of the jurors could have had a doubt as to Mr. Hibbard's guilt after hearing evidence that he had a reputation for nonviolence and peaceful conflict resolution, which would have been shown by specific examples of conduct. The State cannot meet that standard here, and this Court should reverse Mr. Hibbard's conviction.

B. CONCLUSION

For the reasons stated above, as well as those cited in the opening brief, Mr. Hibbard respectfully asks this Court to reverse his conviction and remand for a new trial.

DATED this 28th day of August, 2014.

Respectfully submitted,



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	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF** 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:

[X]	ANDREW MILLER, DPA [prosecuting@co.benton.wa.us] BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE KENNEWICK WA 99336-2341	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF AUGUST, 2014.

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