

71141-5

71141-5

NO. 71141-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TYLISHA BROWN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE J. WESLEY SAINT CLAIR

BRIEF OF RESPONDENT

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A. ISSUES

1. To prove fourth degree assault, the State must show that the defendant intentionally assaulted a person as a principal or as an accomplice. An accomplice to a crime is one who solicits, commands, encourages, or requests another to commit a crime or aids in the committing of the crime. More than presence at the scene of the crime and knowledge is required. The State presented evidence that Brown pushed Marie and Shaylea. The State also presented evidence that Brown was angry at Marie and Shaylea, discussed fighting them though felt they were too young, stopped the two from leaving the area, went to the area of the fight, and then recorded and presided over the fight at which Marie and Shaylea were each physically assaulted. Did the State present sufficient evidence from which any rational trier of fact could find Brown guilty as a principal and accomplice of two counts of fourth degree assault?

2. Relevant evidence is evidence that has any tendency to make the existence of a fact of consequence more or less probable. ER 404(b) prohibits admission of evidence of prior acts of a person to prove action in conformity therewith, though it allows admission for other purposes if the trial court conducts the proper

analysis. The trial court allowed Roxanne Amaral, an administrator at Brown's former school, to testify that Amaral's position primarily dealt with discipline and that she had spoken to Brown daily from a quick greeting to an hour long conversation. Amaral did not testify to the content or reason for any of these conversations. Did the trial court properly allow Amaral to testify to these facts as a basis for Amaral's ability to recognize Brown's voice on a recording? If this was error, was any error harmless given the minor significance of this testimony in light of the other evidence of Brown's guilt?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged Tylisha Brown by information with one count of fourth degree assault for intentionally assaulting Shaylea Pilarski and Marie Davis. CP 1. The State amended the information prior to trial to two counts of fourth degree assault; count one for assaulting Shaylea¹ and count two for assaulting Marie. CP 7-8. The Honorable J. Wesley Saint Clair presided over

¹ The State adopts the Appellant's practice of referring to the juvenile witnesses by first name only. Br. of App. at 1. No disrespect is intended.

the bench trial in King County Juvenile Court. RP 9;² CP 27-29. The court found Brown guilty of both counts. RP 88-90; CP 27-29. The court imposed a standard range disposition of 6 months of supervision and 16 hours of community service. RP 91-93; CP 21-26.

2. SUBSTANTIVE FACTS

On the afternoon of October 1, 2012, thirteen-year-old Marie Davis was at the South Park Community Center. RP 20-21, 26. Marie was with her friends, Shaylea Pilarski³ and Jahleaha Bell⁴. RP 21. Marie attended Denny International Middle School. RP 20.

Tylisha Brown was also at the community center that afternoon. RP 25; CP 31. Marie and Brown did not attend the same school at the time, but Marie knew Brown because both lived

² The verbatim report of proceedings consists of a single volume dated October 15, 2013; October 21, 2013; and November 21, 2013. This brief refers to the corrected page 26 of the verbatim report of proceedings filed on August 4, 2014.

³ The State also adopts the Appellant's spelling of the witnesses' names. Br. of App. at 3. Shaylea Pilarski is referred to as "Sheiliya Poloski" in the verbatim report of proceedings (RP 21); "Shayla Pilarski" in the findings of fact and conclusions of law (CP 31); and "Shaylea Pilarski" in the information and certification of probable cause (CP 1-3). She will be referred to as "Shaylea" in this brief.

⁴ Jahleaha Bell is referred to as "Julia Bell" in the verbatim report of proceedings. RP 21. She is referred to as "Jahleaha Bell" in the certification of probable cause and findings of fact. CP 2-3, 31-33. The State will refer to her as "Jahleaha" in this brief.

in the same area. RP 23. She had known Brown for several years and also knew Brown's sister, Tyquwanjia Duren.⁵

Brown approached Marie at the community center and told her that she was angry with her. RP 25-26; CP 31. She explained she was angry because Marie and Shaylea had shown some people where Brown lived. RP 26; CP 31. She also discussed fighting, but said she would not fight them because they were too young. RP 26; CP 32.

After this conversation, Marie and Shaylea walked inside the community center. RP 27; CP 32. They then decided to leave. Brown was also leaving with her sister and friends, including Aushinae Washington.⁶ RP 28-29; CP 32. Marie saw Brown and her group up ahead of them. RP 28; CP 32. Marie and Shaylea ignored Brown and her group. RP 28. They tried to keep walking and talking among themselves. Id. Brown stopped Marie and her friends. RP 28; CP 32. Aushinae then told Marie and Shaylea that she and her friends wanted to fight them. RP 28-29.

⁵ Tyquwanjia Duren is referred to as "Tykwajenay" in the verbatim report of proceedings (RP 23) and as "Tyquwanjia Duren" in the certification for probable cause and findings of fact and conclusions of law (CP 2-3, 32). She will be referred to as "Tyquwanjia" in this brief.

⁶ Aushinae is referred to as "Ashanya" in the verbatim report of proceedings (RP 29); "Aushinae Washington" in the certification for probable cause (CP 2-3); and "Aushunage Washington" in the findings of fact and conclusions of law (CP 32). She will be referred to as "Aushinae" in this brief.

Marie and Shaylea went over to the grassy area by the community center. RP 30. Aushinae and Tyquwanjia also went to the grassy area and lined up facing Marie and Shaylea. RP 30. Brown was also there, but on the side by the window of the building. RP 31. Brown came over and pushed Marie and Shaylea so that they would fight. RP 35; CP 32. Brown then began recording with her cellular phone. RP 31; CP 32.

Aushinae and Tyquwanjia then "came at" Marie and Shaylea. RP 32; CP 32 Aushinae grabbed Marie by her hair and began punching her. RP 32. Marie was not sure exactly what happened after she was punched. Id. Marie did not want to fight with Aushinae and Tyquwanjia on that day. RP 36; CP 32. She had never had a problem with these girls. RP 36.

A video recording of the fight shows Marie, Shaylea, Aushinae, and Tyquwanjia. RP 37-38, 67; Ex. 1. On the recording, Shaylea is the girl wearing white, Aushinae is the girl wearing pink, and Tyquwanjia is the girl wearing black. RP 67. Marie is on the other side of the screen across from Aushinae and Tyquwanjia. RP 67; Ex. 1. The video shows Marie and Shaylea simply standing facing Aushinae. RP 45; Ex. 1. Aushinae is observed charging Marie and physically assaulting her. RP 32, 45; Ex. 1. At the same

time, Tyquwanjia is observed charging Shaylea and assaulting her.

Ex. 1.

Brown can be heard on the video, though she cannot be seen. RP 68; CP 32. Brown's voice is heard most clearly toward the beginning of the video. RP 68-69; Ex. 1. The video starts out showing the girls and Brown is speaking, then the picture disappears. RP 90; Ex. 1. Brown narrates the beginning of the video and commands the girls by stating, "Fight!" RP 90; CP 32 (Finding of Fact 6); Ex. 1 at 37 seconds. Brown then states, "hold on, hold on." RP 90; Ex. 1. She calls to someone else to come over and record it. RP 90; Ex. 1. The camera then focuses on the girls again, and Brown is heard speaking again. RP 90; Ex. 1. Aushinae and Tyquwanjia then are seen assaulting Marie and Shaylea. RP 32; Ex. 1.

Roxanne Amaral identified Brown's voice and the girls in the video. RP 65-71; CP 32. Amaral worked at Denny International Middle School as the house administrator. RP 62; CP 32. As house administrator, Amaral had many roles and was primarily in charge of discipline for the eighth grade students. RP 62. Brown was a past student of Amaral's during Brown's eighth grade year at Denny Middle School. Id. During that year, Amaral had seen and

spoken with Brown on a daily basis. RP 63; CP 32. She estimated that she had had approximately 30 conversations with Brown.

RP 65; CP 32. Their conversations had ranged from a quick hello to conversations of an hour or longer. RP 65; CP 32.

Amaral found the video recording on Facebook after learning that several Denny Middle School students had been involved in the fight. RP 66; CP 32. She recorded it onto her cellular phone. RP 66. She watched the video about five times prior to testifying at trial. RP 66. Amaral was able to identify the four girls involved in the fight and Brown's voice on the recording. RP 67-68.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS BROWN'S CONVICTIONS FOR FOURTH DEGREE ASSAULT.

Brown asserts that the State did not present sufficient evidence to convict her of two counts of fourth degree assault. She alleges that findings of fact 3, 4, and 5 are not supported by substantial evidence, and that, without those findings, there is not sufficient evidence to support the convictions. This argument should be rejected. The State presented sufficient direct and

circumstantial evidence from which any rational trier of fact could find Brown guilty.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court draws all reasonable inferences in favor of the State and interprets them “most strongly against the defendant.” Id.

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). A claim of insufficiency admits the truth of the State’s evidence and of all inferences that may reasonably be drawn from that evidence. Salinas, 119 Wn.2d at 202. Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

When reviewing a juvenile court adjudication, the appellate court reviews the findings of fact for substantial evidence and then whether the findings support the conclusions of law. State v. B.J.S., 140 Wn. App. 91, 97, 169 P.3d 34 (2007). Substantial evidence means that there is “a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings of fact are verities on appeal. Id. A trial court’s conclusions of law are reviewed de novo. B.J.S., 140 Wn. App. at 97.

a. Sufficient Evidence Supports Brown’s Convictions For Fourth Degree Assault As A Principal.

To convict Brown of fourth degree assault, the State had to prove that Brown assaulted another. RCW 9.36.041(1). Because assault is not defined by statute, Washington uses the common law definition of assault. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). There are three definitions of assault:

- (1) an unlawful touching (actual battery);
- (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and
- (3) putting another in apprehension of harm.

Id. Only the unlawful touching or actual battery definition of assault is at issue here.

The Washington Pattern Jury Instructions (“WPIC”) further define an assault as:

an intentional touching of another person with unlawful force that is harmful or offensive, regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (3d Ed). The instructions adapted the definition of “offensive” from the Restatement (Second) of Torts, Section 19. WPIC 35.50 (3d Ed).

The Restatement (Second) of Torts, Section 19 states, “a bodily contact is offensive if it offends a reasonable sense of personal dignity.” (1965). The comment to section 19 further explains:

In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.

Restatement (Second) of Torts § 19 (1965). As noted in City of Seattle v. Taylor, “the concept of offensive touching is well-rooted, and persons of ordinary understanding from the early days of the

common law to the present have understood its meaning.”

50 Wn. App. 384, 748 P.2d 693 (1988).

Here, the State presented sufficient evidence to convict Brown, as a principal, of fourth degree assault for assaulting Marie and Shaylea. Marie testified that Brown pushed her and Shaylea. RP 35; CP 32. She testified to this fact after she recounted that the girls had gone to the grass area. RP 30.

Marie then testified that Aushinae and Tyquwanjia had lined up facing Marie and Shaylea on the grass area. RP 30; CP 32. Marie and Shaylea simply stood there. RP 30; CP 32. She testified Brown stood to the side of the girls by the window and was recording with her cellular phone. RP 31; CP 32. Marie then recounted that Aushinae grabbed her hair and punched her. RP 32; CP 32. At this point, Marie testified that she was unsure if Brown had ever touched her. RP 32. She then reviewed the transcript of her statement, which she had made to the detective shortly after the incident. RP 34. Marie then testified that Brown had in fact touched her and had done so by pushing her and Shaylea. RP 35; CP 32.

From the surrounding testimony, it is clear that Brown pushed Marie and Shaylea shortly before Brown began recording

and before Aushinae and Tyquwanjia physically assaulted Marie and Shaylea. Marie clarified this point during cross-examination by defense when she explained that Brown was not seen pushing her on the video because Brown pushed her before the video recording began. RP 46.

The circumstances of Brown's push of Marie and Shaylea also provide sufficient evidence that this was a harmful and offensive touching. Shortly before the push, Brown had told Marie that she was angry at her for showing others where she lived and discussed fighting Marie and Shaylea. RP 25-26; CP 31-32. Brown had then stopped Marie and Shaylea while they were leaving the community center. RP 28; CP 32. Aushinae, who was with Brown, then declared that they wanted to fight Marie and Shaylea. RP 29. In this context, Brown's push of Marie and Shaylea would have clearly been offensive to any reasonable person.

Marie's use of the word "push" rather than "touch" or "brush" showed that this was an offensive contact. RP 35. It was not necessary for her to testify that she or Shaylea found Brown's push to be offensive. Similar to the conclusion in Taylor that any person of ordinary understanding would understand the meaning of an

offensive touching, any person of ordinary understanding would conclude that a “push” was harmful or offensive.

The trial court also had the opportunity to observe Marie’s testimony and found her credible. CP 32. The trial court found Marie credible on this point despite the fact that she could not remember exactly where she was when Brown pushed her and despite Marie’s failure to further explain the push of Shaylea. Marie used the word “like” when she testified that Brown “like tried to push us so like we could fight.” RP 35. However, her use of the word “like” appears to have been simply Marie’s manner of speaking because she clarified that Brown *actually* touched or pushed her.⁷

Id.

It was reasonable for the trial court to conclude from Marie’s testimony that Brown had physically pushed both her and Shaylea. CP 32 (Finding of Fact 5). This Court must defer to the trier of fact on the credibility of witnesses and the persuasiveness of the evidence. Fiser, 99 Wn. App. at 719. Considering all of the evidence and the reasonable inferences therefrom, sufficient

⁷ For example, Marie also testified, “[Aushinae], she grabbed my hair and was like punching me.” RP 32. Marie’s later testimony and the video recording clarify that Aushinae physically assaulted her, despite Marie using the word “like” when describing the assault. RP 32, 45; Ex. 1. The use of the word “like” appears to be nothing more than this fourteen-year-old girl’s manner of speaking.

evidence supports the trial court's conviction of Brown as a principal of fourth degree assault of Marie and Shaylea.

b. Sufficient Evidence Supports Brown's Convictions For Fourth Degree Assault As An Accomplice.

To convict Brown of fourth degree assault of Marie and Shaylea as an accomplice, the State had to present sufficient evidence of fourth degree assault and of Brown's actions as an accomplice. A person is an accomplice to another's crime if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it;
 - or
 - (ii) Aids or agrees to aid such other person in planning or committing it . . .

RCW 9A.08.020(3)(a)(i)-(ii).

The Washington Pattern Jury Instructions further explain in WPIC 10.51:

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person is guilty of aiding in a crime if he or she aids or encourages the crime by words, acts, encouragement, or support. B.J.S., 140 Wn. App. at 98. As stated in the jury instruction, accomplice liability requires more than mere presence at the scene of the crime. WPIC 10.51; State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). The accomplice must have knowledge of the crime and be ready to assist in its commission. Id.

Here, sufficient evidence supports Brown's conviction as an accomplice for the two counts of fourth degree assault. The testimony established that Brown informed Marie that she was angry with Marie and Shaylea for showing others the location of her house. RP 25-26; CP 31 (Finding of Fact 3). Brown discussed fighting Marie and Shaylea, but then said she would not fight them because they were too young. RP 26; CP 32 (Finding of Fact 4). Brown stopped Marie and Shaylea as they walked away from the community center, despite the fact that Marie tried to ignore Brown. RP 28; CP 32 (Finding of Fact 5). Aushinae, who was with Brown, then told Marie and Shaylea that they wanted to fight Marie and Shaylea. RP 28.

Marie, Shaylea, Aushinae, and Tyquwanjia then all went to the grass area. RP 30. Brown was nearby, standing by the

window. RP 31. Brown pushed Marie and Shaylea in order to get the girls to fight. RP 35; CP 32 (Finding of Fact 5). Brown began recording with her cellular phone. RP 31, 46; CP 32 (Finding of Fact 6).

The video recording shows Marie, Shaylea, Aushinae, and Tyquwanjia all standing together on the grass area. RP 89-90; CP 32 (Finding of Fact 9); Ex. 1. Brown introduces the recording and is heard telling the girls, "Fight!" CP 32 (Finding of Fact 6); Ex 1 at 36 seconds. Then the recording shows the ground and Brown says, "hold on, hold on." RP 90; Ex. 1 at 47 seconds. Brown is again heard on the recording. RP 90; Ex. 1. Aushinae then charges at Marie. RP 32; CP 32 (Finding of Fact 6); Ex. 1. Tyquwanjia physically fights with Shaylea. CP 32 (Finding of Fact 6); Ex. 1.

Based on Brown's voice on the recording, her actions, and the timing of the assaults; the evidence shows that Brown was commanding and orchestrating the fight. RP 90; CP 32 (Findings of Fact 4, 5, 6, and 9). Roxanne Amaral identified Brown's voice on the recording, which established Brown's active participation by her words on the recording. RP 68-71; CP 32 (Finding of Fact 8).

The evidence also supports that Brown encouraged Aushinae and Tyquwanjia to assault Marie and Shaylea. Brown spoke to Marie about being angry with her and discussed fighting Marie and Shaylea, although she said she felt that Marie and Shaylea were too young for her to fight. RP 25-26; CP 31. Brown then left the community center with Aushinae and Tyquwanjia. RP 28-29; CP 32.

Brown stopped Marie and Shaylea, and then Aushinae told Marie that they wanted to fight Marie and Shaylea. RP 28; CP 32. Aushinae and Tyquwanjia lined up facing Marie and Shaylea on the grass while Brown recorded and verbally encouraged the fight. RP 30-31; CP 32. The timing and facts of these events are sufficient evidence that Brown encouraged Aushinae and Tyquwanjia to assault Marie and Shaylea.

Marie's testimony that Brown pushed her and Shaylea to prompt them to fight the other girls, also shows that Brown acted as an accomplice in encouraging the assaults. RP 35, 46; CP 32 (Finding of Fact 5). The trial court found it key that Brown ordered the girls to "hold on," then came back and the recording re-focused on the girls. RP 90; Ex. 1. Brown is heard again on the recording and only then do the four girls fight. RP 90; CP 32 (Finding of

Fact 6); Ex. 1. The trial court explained, "She's commanding now the behavior at that point in time." RP 90.⁸

Roxanne Amaral testified to recognizing Brown's voice on exhibit 1 toward the beginning of the recording. The trial court then reviewed exhibit 1 in his chambers and made these specific findings of fact during his oral ruling.

Taken together, these facts established by the testimony and by exhibit 1 are sufficient to persuade a rational trier of fact that Brown was an accomplice to fourth degree assault of both Marie and Shaylea. Brown's actions, viewed in the light most favorable to the State, show that she was angry at Marie and Shaylea, she discussed fighting with them, she stopped them from leaving the community center, she pushed them both to get them to fight the other girls, and, finally, she commanded the girls by stating, "Fight!" CP 32 (Finding of Fact 6); Ex. 1 at 37 seconds. This Court should affirm Brown's convictions for fourth degree assault as an accomplice for assaulting Shaylea and Marie.

⁸ The trial court noted that Brown is heard on the recording telling the other girls to fight, after the picture focused on the ground and Brown is heard telling someone else to record the fight. However, it appears that Brown is heard on the recording telling the girls to fight slightly earlier at approximately 36 seconds. RP 90; Ex. 1.

c. Substantial Evidence Supports The Necessary Findings Of Fact To Support The Trial Court's Conclusions Of Law.

Finally, Brown assigns error to the trial court's findings of fact numbered 3, 4, and 5. Br. of App. at 1. Brown is correct that portions of the findings of fact for 3, 4, and 5 are not supported by the record. However, these portions of findings 3, 4, and 5 are not necessary to support the trial court's conclusions of law. The remaining portions of these findings and the other findings do support the trial court's conclusions of law and Brown's convictions.

Finding of fact 3 states:

[Brown] was upset with [Marie] and [Shaylea] because three weeks prior they told some girls [where] [Brown] lived. [Brown] stated it was disrespectful to show people where she lives.

CP 31. Substantial evidence supports the first portion of this finding, that Brown was upset with Marie and Shaylea because they had told some girls where Brown lived. RP 25-26. However, the record does not support that Marie and Shaylea had told the girls this three weeks prior or that Brown had stated it was disrespectful to show people where she lived. These latter portions are minor facts that are not necessary to support the trial court's conclusions of law.

Finding of fact 4 states:

[Brown] was angry and told [Marie] and [Shaylea] that she wanted to fight them but she was too old. [Brown] ordered [Marie] and [Shaylea] to fight [,] [Aushinae] Washington and Tyquwanjia Duren. [Tyquwanjia] is [Brown's] sister.

CP 32. The majority of finding of fact 4 is supported by Marie's testimony. Marie first testified that Brown told her she was angry because Marie and Shaylea had showed some others where Brown lived. RP 25-26. Marie then testified that Brown had said she was not going to fight them because they were too young. RP 26.

However, that Brown made this statement to both Marie and Shaylea is not supported by the record. Marie's testimony was not clear on this point.⁹ RP 25-26. The record also does not support that Brown ordered Marie and Shaylea to fight Aushinae and Tyquwanjia at the time Brown spoke to Marie about being angry with Marie and Shaylea. Neither of these two portions of finding of fact 4 are necessary to support the trial court's conclusions of law.

⁹ Marie testified that she had a conversation with Brown on the day of the assaults. RP 25. Marie then testified that "[Brown] was angry that we showed some people her house and she told me and [Shaylea] that (pause) – um – (pause)." RP 26. When asked who was present for the conversation, Marie testified, "Of course, me, [Brown] (pause) – um, and I'm not sure who else was there." Id. She then stated that there was one more person present for the conversation. Id. On cross examination, she agreed with defense that she was the only person present for this conversation with Brown. RP 51.

Finding of fact 5 states:

[Marie] had not had any problems in the past with [Brown] or Ms. Brown [sic] and did not want to fight. [Marie], [Shaylea], and [Jahlea] left the community center and walked outside. [Brown] and other[s] were at the edge of the community center property. They were approached by [Brown]. [Brown] told [Marie] and [Shaylea] to fight [Aushinae] and [Tyquwanjia]. [Marie] and [Shaylea] refused to fight [Aushinae] and [Tyquwanjia]. [Brown] pushed [Marie] and [Shaylea] toward [Aushinae] and [Tyquwanjia]. [Marie] and [Shaylea] still refused to fight.

CP 32. The testimony and exhibits support the majority of finding of fact 5. Marie testified that she had not had any problems with Brown and that she did not want to fight. RP 36. She also testified that she, Shaylea, and Jahlea left the community center (RP 27); Brown was already outside the community center with Aushinae and Tyquwanjia (RP 27-28); and Brown approached Marie (RP 29). This testimony supports the first four sentences of finding of fact 5.

The recording supports the portion of finding of fact 5 that states, “[Marie] and [Shaylea] refused to fight [Aushinae] and [Tyquwanjia]...” CP 32. The recording shows Marie and Shaylea standing facing the other girls. Ex. 1. Neither made any movement toward the girls across from them, Aushinae and Tyquwanjia. Ex. 1. Marie testified that she did not want to fight and that she did not have any disagreement with the other girls. RP 36.

The testimony and facts outlined above which show Brown assaulted Marie and Shaylea as a principal,¹⁰ are substantial evidence to support the portion of finding of fact 5 that states, “[Brown] pushed [Marie] and [Shaylea] toward [Aushinae] and [Tyquwanjia].” CP 32. The context in which Marie testified that Brown pushed her and Shaylea show that the push was immediately before Brown began recording. Marie testified, “She like tried to push us [inaudible].” RP 35. After the deputy prosecutor asked her to speak more loudly, Marie said, “Um, she tried to like push us so like we could fight.” Id.

The context of this testimony along with the recording showing Marie and Shaylea and then Aushinae and Tyquwanjia support that Brown pushed Marie and Shaylea so that they would fight Aushinae and Tyquwanjia. That Marie and Shaylea still did not fight, but instead simply stood facing the other girls, supports the last portion of finding of fact 5 that they continued to refuse to fight. Ex. 1; CP 32.

These facts testified to at trial and seen on the recording are sufficient to persuade a rational person of the truth of the majority of the findings in finding of fact 5. Hill, 123 Wn.2d at 644. Further,

¹⁰ See Section C. 1. b. of this brief at 11-14.

these facts support Brown's liability as an accomplice, for these facts establish that Brown orchestrated and encouraged the fight.

The only portion of finding of fact 5 not supported by the record is the portion that states, "[Brown] told [Marie] and [Shaylea] to fight [Aushinae] and [Tyquwanjia]." CP 32. This portion is not significant due to the trial court's other findings supported by substantial evidence, which in turn support the conclusions of law.

Brown does not assign error to finding of fact 6. Finding of fact 6 states, "[Brown] was recording the incident on a cellphone video camera. [Brown] can be heard on the video telling the girls to fight and then [Aushinae] and [Tyquwanjia] go toward [Marie] and [Shaylea]. [Aushinae] pulled [Marie's] hair and hit [Marie]. [Tyquwanjia] hit [Shaylea]." CP 32. Finding of fact 6 provides substantial evidence of Brown's active encouragement of the assaults. It proves that Brown's actions were criminal, for she was not simply present with knowledge of the assaults; she instigated and actively participated in the assaults with her words and actions. Finding of fact 6 must be considered a verity on review, because Brown did not assign error to it. Hill, 123 Wn.2d at 644.

Brown also did not assign error to finding of fact 10 nor did she discuss it in the issues pertaining to her assignments of error.

Br. of App. at 1-2. In her brief, Brown then asserts that finding of fact 10 is a conclusion of law mischaracterized as a finding of fact. Br. of App. at 14. RAP 10.3(4) requires an appellant to separately assign error to every error the party contends was made by the trial court. See e.g. State v. Roggenkamp, 115 Wn. App. 927, 943, 64 P.3d 92 (2003). Because Brown did not properly assign error to finding of fact 10, this Court should not consider Brown's argument as to it.

Even so, finding of fact 10 is properly termed a finding of fact and is supported by substantial evidence. Finding of fact 10 states, "[Brown] encouraged [Tyquwanjia] and [Aushinae] to fight [Marie] identified [Shaylea]."¹¹ CP 32. The testimony of Marie and the recording support finding of fact 10.

The testimony of Marie established that Brown left the community center with Aushinae and Tyquwanjia immediately after Brown discussed with Marie that she was angry with Marie, and that Brown felt Marie and Shaylea were too young for Brown to fight. RP 27. Brown then stopped Marie and Shaylea outside the community center, even though Marie tried to ignore Brown.

¹¹ The last portion of finding of fact 10 appears to be a typographical error. From the context and testimony, it appears that the author intended the word "and" in place of the word "identified."

RP 28. Brown was with Tyquwanjia and Aushinae. RP 27-29.

Aushinae then told Marie that Aushinae and Tyquwanjia wanted to fight Marie and Shaylea. RP 29.

All of the girls then proceeded to the grass area. RP 31, 54.

Brown then pushed Marie and Shaylea to try to get them to fight.

RP 35, 46. Brown then recorded the incident and verbally

encouraged the fight. RP 31, 90; Ex. 1. Marie also clarified that

she had never had any problems with Aushinae prior to this fight.

RP 57.

From this testimony, the rational inference is that Brown encouraged Aushinae and Tyquwanjia to fight Marie and Shaylea, as stated in finding of fact 10. Brown was the sole person who was angry with Marie and Shaylea and she had expressed that only a short time before Aushinae stated that she wanted to fight Marie and Shaylea. Brown's actions in stopping Marie and Shaylea, recording the incident, and commanding them to fight all support that Brown encouraged Aushinae and Tyquwanjia to fight Marie and Shaylea. Therefore, drawing all reasonable inferences in favor of the State, substantial evidence supports finding of fact 10.

Ultimately, even if some of the trial court's findings of fact are flawed, these flaws are minor and do not undermine the trial court's

ultimate conclusion. The remaining findings of fact, particularly finding of fact 6, support the trial court's conclusions of law finding Brown guilty as charged.

2. THE TRIAL COURT PROPERLY ALLOWED AMARAL TO TESTIFY REGARDING HER FORMER POSITION AND HER BASIS FOR RECOGNIZING BROWN'S VOICE.

Brown contends that the trial court abused its discretion in allowing Roxanne Amaral to testify to her disciplinary duties in her former position at Denny Middle School and her interactions with Brown. Brown asserts that this evidence was not relevant under ER 401 and was improperly admitted under ER 404(b). Brown's arguments should be rejected. The trial court properly allowed Amaral's testimony. Even if it was error to allow Amaral's testimony regarding her disciplinary duties in her former position, any error was harmless in the context of the other admissible evidence.

ER 401 defines relevant evidence. Relevant evidence is evidence that has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401; State v. Everybodytalksabout, 145 Wn.2d 456, 468, 39 P.3d 294 (2002).

ER 403 states that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 404(b) prohibits the admission of evidence of “other crimes, wrongs, or acts. . .to prove the character of a person in order to show action in conformity therewith.” State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (quoting ER 404(b)). However, ER 404(b) allows the admissibility of such evidence for other purposes, such as motive, opportunity, intent, or knowledge. ER 404(b); Gresham, 173 Wn.2d at 420. Prior to admitting such evidence, the trial court must engage in a four-step analysis and weigh the probative value of the evidence against its prejudicial effect.¹² Gresham, 173 Wn.2d at 421. Not all evidence involving a defendant’s prior acts necessarily qualifies as ER 404(b) evidence. State v. Brown, 132 Wn.2d 529, 578-79, 940 P.2d 546 (1997).

¹² The trial court must conduct the following analysis: (1) find by a preponderance of the evidence that the prior act occurred; (2) identify the purpose for which the evidence is offered; (3) determine whether the evidence is relevant to prove an element of the charged crime; and, (4) weigh the probative value of the evidence against its prejudicial effect. Gresham, 173 Wn.2d 421.

The appellate court reviews a trial court's decision to admit evidence under an abuse of discretion standard. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court will not be reversed unless its decision "is manifestly unreasonable or based upon untenable grounds or reasons. . ." Id.

Here, the trial court did not abuse its discretion in allowing Amaral to testify to her former position and to her basis for recognizing Brown's voice. Amaral's testimony was relevant because it explained how she recognized Brown's voice on the video recording. It was also not truly ER 404(b) evidence because it did not involve any prior acts of Brown.

Amaral testified that she knew Brown because she had been the house administrator at Denny International Middle School during Brown's eighth grade year. RP 62. Amaral then explained that as house administrator she had many roles, but primarily she was responsible for student discipline. Id. Amaral then testified that she had interacted daily with Brown and also had interacted with her parents. RP 63.

Amaral's testimony continued with further testimony about the number of prior conversations she had had with Brown and the length of those conversations. RP 65. Amaral then identified Brown's voice on the recording. RP 67-72; Ex. 1. Amaral never testified to the nature or content of any of the prior conversations she had had with Brown. She instead testified to these facts as her basis for recognizing Brown's voice on the recording. Her testimony was relevant and did not encompass any prior bad acts, misconduct, or even any prior act of Brown. The trial court did not abuse its discretion in allowing her testimony.

The erroneous admission of ER 404(b) evidence is subject to the non-constitutional harmless error standard of review. Everybodytalksabout, 145 Wn.2d at 468-69. Reversal is required only "if the error, within reasonable probability, materially affected the outcome." Id. "The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole." Id.

Any error in admitting this testimony was harmless considering its very limited nature and the evidence of Brown's guilt. The other evidence established that Brown was angry at

Marie and Shaylea, stopped the girls and went with them to the grass area, pushed Marie and Shaylea so that they would fight, and recorded and presided over the fight. Brown's involvement was verified by her voice on the video recording and Marie's testimony.

Lastly, this case was not tried to a jury, but instead to the court. RP 3. The trial court is presumed to know the law. Douglas Northwest v. O'Brien & Sons, 64 Wn. App. 661, 681, 828 P.2d 565 (1991). When the trial court acts as the finder of fact, the trial court is "presumed to be able to disregard any inadmissible evidence, thus avoiding any prejudice to the defendant." State v. Melton, 63 Wn. App. 63, 68, 817 P.2d 413 (1991).

Here, the trial court clearly understood the limited role and proper purpose of Amaral's testimony from its ruling on defense's objection. RP 64. There is no prejudice to Brown as this Court should presume that the trial court did not use the evidence for any improper purpose. Considering all of the properly admitted evidence and that this case was tried to a judge, any error in admitting these portions of Amaral's testimony was harmless.

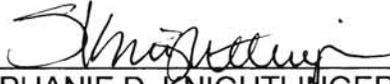
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Brown's convictions and sentence.

DATED this 6th day of August, 2014.

Respectfully submitted,

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