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NO. 90356-5
Cowlitz Co. Cause NO. 12-1-00205-1

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

SHANE AUSTIN STACY,

Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

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 ORIGINAL

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I. STATE'S RESPONSE TO ISSUES PRESENTED FOR REVIEW

1. The Defendant fails to show how the decision by Division One, Court of Appeals, is in conflict with a decision by the Washington Supreme Court pursuant to RAP 13.4(b)(1).
2. The Defendant fails to show, or even argue, how the matter presents a significant question of law under the Constitution of the State of Washington pursuant to RAP 13.4(b)(3).
3. The Defendant fails to argue or show, how this case presents a questions of substantial public interest under RAP 13.4(b)(4).

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

1. Whether a party, without direct argument or citation to a case may prove the grounds for acceptance of review under RAP 13.4(b)(1), (3) and (4)?

III. STATEMENT OF THE CASE

Factual History

On February 24 2012, the Defendant and his wife Mary Beth attended a longshoreman party at the Monticello hotel. RP 794.¹ The party started at 7:00 pm and went until approximately 11:15. RP 247.

¹ The Report of Proceedings consists of seven volumes of continuously numbered verbatim reports referred herein as "RP (page #)."

There were about 200-250 people at the party with a full bar provided. RP 247-48, 261. Kyle Wharton, the bartender that night, testified a person could put their drink order with the cocktail server or come to the bar. RP 248. Additionally, anyone could order drinks for anyone else and there were bar tabs running. RP 248. Mr. Wharton remembered the Defendant had a tab between he and his wife consisting of beer and maybe shots. RP 249. Mary Beth was drinking rum and diet soda and Shane purchased beer. RP 249-50. Wharton recalled Mary Beth purchasing drinks for a lot of people. RP 251. He did not recall anyone acting suspicious around the bar or adding anything to anyone else's drink, but admitted there is always a high-flow of drinks at the longshore parties and it is difficult to keep track of how many a person has had. RP 251-52. One of the reason for the difficulty is patrons will bring alcohol into the ballroom from other areas of the hotel, namely the rented motel rooms. RP 253, 261. When the bartender saw Stacy just before the assault, he estimated he was a 5 or 6 on the buzz scale. RP 254.²

Andrea Holde, a member of the Women's Auxiliary for the longshoreman, came at the end of the party to assist in cleaning up. RP 157-60, 215. When she arrived she heard from her friend Karen Mitchell that Mary Beth was found kissing Heather's husband, Mike Robinson. RP

² The buzz scale is a scale where one is a sober and ten denotes unconsciousness. RP 254.

160, 216. This upset Andrea as Heather was Andrea's friend. RP 160, 164, 195, 216.

Andrea confronted Mary Beth, asking Mary Beth if she liked being "a home-wrecking whore." RP 160-61, 195-96. Mary Beth denied multiple times kissing Mike. RP 161, 217. Andrea then went to Shane Stacy. RP 161. She told him about Mary Beth kissing Mike and asked him if it usual for he and Mary Beth to go outside their marriage and are they swingers. RP 162-63, 217. Karen was with Andrea when she asked Stacy the question. RP 217. It dawned on Karen that Stacy was with Heather about 20 minutes earlier comforting Heather, telling her it was ok. RP 214-15, 514. When Karen realized this, she said to Stacy, "wait a minute you were just out talking to Heather not very long ago. Your wife was the one that was kissing her husband." RP 217-18. Stacy appeared to be upset and surprised, said they were lying, and went directly to talk to Mary Beth. RP 163, 197, 218. He walked approximately 20 paces to Mary Beth, spoke to her, and returned a short time later. RP 166, 197, 219.

Stacy walked straight towards Holde, repeatedly asked why she was lying, and grabbed Andrea Holde's neck. RP 166, 168, 188, 199, 219, 235. Holde at first thought he was joking because she didn't expect it, but then he slammed her to the wall. RP 166-67. Stacy held her against the

wall and strangled her, cutting off her airflow for a couple of seconds. RP 167-68, 177, 200. Other people came to her aid, attempting to pull Stacy off Holde. RP 169, 201-02. They ended up in a pile on the ground and Holde was at the bottom of the pile. RP 169. Both Scott Mitchell and Jimmy Meadows, other party goers, attempted to pry Stacy off Holde. RP 20, 2073. Meadows placed Stacy in a sleep hold, telling Stacy to let go and tightening it until rendering Stacy unconscious. RP 204, 207, 236-37, 256, 522. Mitchell pulled Holde out of the pile limp and handed her off to another person. RP 203.

The police were called and most of the party goers were mad at the level of police force. RP 257, 280, 313. Many of them were cursing and other fights began to break out. RP 257-58, 359. The police attempted to control the situation involving Stacy. When Stacy regained consciousness, he first had a blank stare, then becomes angry, wondering what was going on and screaming. RP 259, 522, 545. Officer Deisher was first on the scene. RP 272. When he arrived, Stacy was conscious with a couple of guys holding him down. RP 272. Officer Deisher noted Stacy had bloodshot and watery eyes and was yelling and cursing with slurred speech. RP 272-73. Officer Deisher also noted an abrasion on Stacy's head. RP 273. Officer Deisher did not detect any signs of drug usage in Stacy based upon his training and experience. RP 281.

Officer Deisher identified himself as police and tried to get Stacy to calm down, but the Defendant looked at Deisher, appeared to get more agitated, and said "Fuck you." RP 274-75, 295. He was also struggling against those people holding him. RP 259, 274, 276. Deisher bent to grab Stacy's legs and Stacy reared back and intentionally kicked Deisher in the face. RP 277-78. Officer Huycke arrived and assisted in getting Stacy handcuffed. RP 279. Stacy calmed a little bit, but was still yelling and agitated. RP 279-80. Officer Huycke believed Stacy was under the influence of alcohol and noted he was very agitated, excited, smelled strongly of alcohol, and had slurred speech. RP 315. Officer Headly who was also assisting with the detention of Stacy noticed the odor of alcohol and slurred speech. RP 342.

The police escorted Stacy from the hotel to be seen by the ambulance for the alcohol and unconsciousness. RP 205, 280-81. Scott Mitchell saw Stacy outside and described Stacy as looking out of it. RP 205. During the escort and when he was outside with the police, Stacy was uncooperative, not wanting to walk in the direction of the escort, aggressive, yelling, and saying everybody was going to hell. RP 222, 317, 406. The ambulance medics checked out the Defendant and did not feel it necessary to transport via ambulance, but that Defendant needed treatment for his bleeding head. RP 290, 318-19, 342, 407. The Defendant was thus

transported to the hospital by Officer Rocky Epperson to be medically clear in a police vehicle. RP 297-99, 318-20, 408.

Upon arriving at the hospital, the Defendant was uncooperative in getting out of the police vehicle. RP 412-13, 451, 495. He also stomped his feet down trying to prevent being wheeled into the hospital. RP 413-14, 452, 495. When he was inside the hospital, Stacy did not want to identify himself. RP 497. One of the security guards, Mike Derry, who as helping with Mr. Stacy, was actually an acquaintance of Stacy outside of the hospital context. RP 415, 493, 503-04. He was trying to calm Stacy and explain to him to allow medical staff to do their job. RP 415. Derry asked Stacy where Mary Beth was. RP 497. Stacy answered that his wife was fine, recognized who Mike was and called him by name, saying Mike knew him. RP 497-98. Stacy became highly agitated when the hospital wanted to remove his cross necklace to take his blood pressure. RP 414, 454, 498-99. However, Stacy would try to jerk away (even though in handcuffs) when the staff tried to take his blood pressure. RP 415, 454, 499. Hospital security was trying to get him to be compliant, when Stacy laid back, looked at the other security guard, Mr. Roush, and deliberately kicked Mr. Roush in the face with one leg. RP 415-16, 454-56, 499. Officer Epperson had to restrain Stacy's legs when he tried to kick out again. RP 417. Afterwards, even though restrained by multiple people

and placed in four-point restraints, Stacy kept yelling, asking people if they were Christians and saying they were going to hell. RP 343-44, 414, 456. Epperson then punched and kneed Stacy to try to get compliance. RP 418. Afterwards, Stacy calmed down and allowed the staff to remove the necklace. RP 419. Officer Epperson spent about 45-50 minutes with Stacy and noted he was staggering, eyes were bloodshot, movements were slow and there was obvious odor of alcohol. RP 421. He opined Stacy was very intoxicated. RP 420. Officer Headly noted Stacy went through mood swings at the hospital and would go from yelling to calm to yelling again. RP 345. Mr. Roush also noted the strong odor of alcohol, his defiant and obstinate natures and felt Stacy was quite intoxicated. RP 457. Neither Officer Headley nor Epperson noticed anything in the defendant's behavior to suspect drug ingestion. RP 348, 421. Moreover, Mike Rogan, the registered nurse who treated Stacy at the hospital did not see anything in his behavior or vital signs indicating drug influence. RP 477.

After released from the hospital, Officer Huycke transported Stacy to the jail. RP 321-22. Huycke noted Stacy was now cooperative and calm and appeared to sway on his feet and stagger like he was under the influence of too much alcohol. RP 322. He still had red, watery eyes and slurred speech. RP 323. Based upon Officer Huycke's training and experience he did not see any indication Stacy was under the influence of

a substance other than alcohol. RP 323. Over the half an hour Huycke was with Stacy, Stacy had mood swings. RP 323. At times he was cooperative and others not. For instance, during the booking process, in response to an action of correctional staff, Stacy threatened to kill a correctional officer. RP 330-31.

Later, Officer Brian Price and Officer Chris Blanchard were at the jail on an unrelated matter. RP 362. As they were leaving, the Defendant came up to the window and asked why he was in jail. RP 362. The State objected to the Defendant's statement as hearsay during the testimony of Officer Blanchard. RP 362. The court sustained the objection. RP 362. However, after the witness' testimony concluded, the court sua sponte reversed its earlier ruling, finding the question was not offered for the truth of the matter, but for the fact of the question. RP 366. The court clarified it would not allow the Defendant's response that he didn't know anything about the assault. RP 366. The court invited defense counsel to call the witness back to the stand after the break. RP 366. Defense counsel did recall Officer Blanchard. RP 446. Blanchard then testified Stacy asked him "what he was doing there." RP 447.

The State next called Officer Brian Price. RP 392. In the midst of the State's questioning him of his part of the investigation that night, defense counsel asked to voir dire Officer Price. RP 396. Counsel brings

up Officer Price saw defendant in the jail later that night, but did not see him at the hotel. RP 396-97. Defense counsel then moves to strike all of Price's testimony that does not have to do with the Defendant. RP 397. The court denies the motion and Officer Price testified to his interactions with other state's witnesses. RP 398. Upon cross-examination, defense counsel inquired as to Price's contact with the Defendant later at the jail. RP 399. Officer Price said he and Blanchard were there for an unrelated case. Stacy was in a holding cell, looking out the cell window and asked them "what he was doing there, because he had no idea." RP 399-400. The State objected to the last part of the answer as hearsay. RP 399. The court sustained the objection as to the last comment about him not knowing why and instructed the jury to disregard. RP 399. In effort to clarify what the jury could consider, Defense counsel was allowed to ask Price what Stacy asked him. RP 400. Price testified "[Stacy] asked us why he was in jail." RP 400. Officer Price was not able to give an opinion as to Stacy's level of intoxication due to his limited interaction. RP 400. After several more questions, counsel ended cross-examination and informed the court Officer Price was excused from defense counsel's subpoena. RP 402.

The Defendant called a number of the defendant's co-workers and friends who were present at the party. These people testified the

Defendant was not intoxicated. RP 591-92, 602. They said he did not have slurred speech nor watery or bloodshot eyes, nor any trouble walking. RP 592, 594, 602, 611, 776-77. Michelle Brister-Williams testified she did not recognize the defendant when he was on the floor after regaining consciousness and afterwards he acted crazy. RP 612-13. Ms. Porter testified she was with the Defendant short before the assault. RP 778. She was outside talking to him and he called her Michelle, although her name is Shelly and believed she was talking about his wife, when she was talking about another woman. RP 780. She felt he was not making sense and was very focused on his wife. RP 781, 786.

The Defendant also presented testimony from Dr. Raymond Grimsbo and Nicholas Rosello in an attempt to bolster his involuntary intoxication defense. Dr. Grimsbo is a forensic scientist and the director of Intermountain Forensic Laboratories in Portland, Oregon. RP 657. Dr. Grimsbo was hired to look for any drug that could explain Stacy's behavior. RP 664, 690. He admitted that without more information, specifically a toxicology report, he could not say with a reasonable degree of medical certainty that the Defendant was on any sort of substance that night. RP 669. He had to admit that his opinion was based upon speculation and he could only say the behavior "could be" from drug ingestion. RP 669, 691. He then opined the Defendant's behavior was

like caused by a stimulant, but could not say if it was a natural stimulant such as adrenaline or artificial such as methamphetamine or bath salts. RP 672-73. He could also not say how a specific drug would affect the defendant. RP 679-80, 693-94. Dr. Grimsbo did testify that even though alcohol is a central nervous system depressant, it can cause a drop in inhibitions, mood swings, and aggression. RP 680-81. Additionally that alcohol intoxication can cause stumbling, slurring of words, and odor of alcohol on the breath. RP 698. Dr. Grimsbo opined the defendant would be at a .03-.05 from five beers in four hours. RP 683-84. However this calculation would change depending on the number of drinks, how fast they were consumed, and if a person ate. RP 699. Grimsbo could not say at what level Mr. Stacy would have to be to black out from alcohol. RP 687.

Dr. Grimsbo did say that methamphetamine and PCP and other related drugs are not associated with blackouts. RP 687. Additionally, Dr. Grimsbo admitted pupil dilation would be sign of drug ingestion, but the defendant did not exhibit this effect. RP 700. Grimsbo also indicated a hair shaft test was not done on the Defendant, even though that test could determine if a particular drug was ingested around the time of the offense. RP 703-04. However, more than 90 days after the event the sample wouldn't like tell much for a one time event. RP 704. Lastly, he admitted

there was no hard, physical evidence other than ingestion of alcohol in this case. RP 706.

Mr. Rosello was a hired pharmacist called to give his opinion the defendant's behavior was caused by methamphetamine ingestion. RP 725, 743. He testified opposite of Dr. Grismbo that methamphetamine can cause amnesia. PR 735. Upon cross-examination, Mr. Rosello testified he researched the "symptoms" of the defendant to see what drugs corresponded. RP 747. He also admitted that a person does not have to be a chronic alcoholic to have blackouts and someone who merely drinking too much on one occasion can black out. RP 756.

The Defendant testified he only consumed 5 beers that night at the party while eating. RP 795. However, on cross he admitted he only had a memory of drinking three beers and relied upon the bar tab to say he had five. RP 806. But he was adamant he did not consume more than five beers. RP 807. He said he had no memory of the assaults and only remembered waking up strapped to a chair in a room with a window. RP 797. It was the defendant's opinion that someone slipped something into his drink. RP 813. However, he could not say that anyone had a motive to do so that night. RP 813.

In closing argument, counsel argued under the prong of involuntary intoxication by fraud, that someone slipped the defendant a

drug and he did not voluntarily take it. RP 885, 893, 903. He did not opine any other method of ingestion of the substance by the defendant and no other suggestion was made during the trial. He also argued the defendant's reputation for peacefulness and honesty made it unlikely he would assault without another cause. RP 908-09.

Procedural History

At the close of the evidence, the court instructed the jury in Instruction number 18 as to involuntary intoxication. The instruction read:

Involuntary Intoxication is a defense to a charge of Assault if:

- (a) The defendant was given alcohol or drugs by force or fraud; and
- (b) The alcohol or drugs prevented the defendant from forming the intent to assault.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to a specific charge. Because a separate crime is charged in each count, you must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 177.

The defendant objected to instruction number 18 and proposed

Involuntary intoxication is a defense to the crimes charged. "Involuntary intoxication" means intoxication

brought about by force, or fraud, or some other means not within the control of the defendant. Involuntary intoxication absolves the defendant of any criminal responsibility.”

CP 72. The Defendant argued the terms fraud and force were terms of art not commonly understood by the jury. RP 835-836.

IV. ARGUMENT

1. THIS COURT SHOULD NOT ACCEPT REVIEW OF THE CASE AS THE DEFENDANT FAILS PROVE ANY GROUNDS OF ACCEPTANCE UNDER RAP 13.4.(b).

The Defendant argues in his brief the decision of the court of appeals is in conflict with a decision of the Washington Supreme Court, presents a significant question of law under the Washington State Constitution, and is a matter of substantial public interested under RAP 13.4(b). Def. Brf at 14-15.

The Defendant never points to what part of the decision by the Court of Appeals is in conflict. Nor does he point to which decision it conflicts with. He does cite to *State v. Mriglot*, 88 Wn.2d 573, 564 P.2d 784 (1977), to illuminate the test for involuntary intoxication. Def. Brf at 18. However, the decision by the Court of Appeals also cites to *Mriglot* for the same test. *State v. Stacy*, 326 P.3d 136, 145 (Div 1, 2014). The Court of Appeals ruled while the trial court incorrectly instructed the jury

as to involuntary intoxication, the defendant's proposed instruction erroneously stated the law. *Id.* 146-47. Moreover, the trial court did not abuse its discretion in refusing to define the term fraud. Stacy does not argue the decision by Division One using an abuse of discretion standard is in conflict with a Supreme Court decision.

The Court of Appeals ruled the instruction given by the court actually lessened the defendant's burden to the jury and was harmless beyond a reasonable doubt. *Id.* The Defendant does not argue this decision is in conflict with a decision by the Washington Supreme Court.

The Defendant does argue the right to a fair trial under Article I, § 3 of the Washington Constitution, and the 14th Amendment Due Process clause of the United State's Constitution apply to his argument, but does not argue how the decision of the Court of Appeals ruling is in violation of these principles. Def. Brf at 15.

Generally, "parties raising constitutional issues must present considered arguments to this court, [and] 'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.' *State v. Johnson*, 119 Wn.2d 167, 170-71, 829 P.2d 1082, 1083-84 (1992); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992); *Regan v. McLachlan*, 163 Wn.App 171, 178, 257 P.3d 1122 (Div 2, 2011).

Lastly, the Defendant makes no argument how this is an issue of substantial public interest. In fact, his citation to the Washington Supreme Court case of *Mriglot* and Division One's opinion seem to indicate the defense of involuntary intoxication should be seldom used and is not one differentiated from the *M'Naghten* insanity test. *Stacy*, at 146.

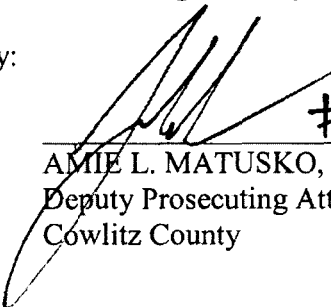
V. CONCLUSION

For the foregoing reasons and arguments, this court should not accept review. However, should the court accept review, the State would request the opportunity to brief the issues presented to the court.

Respectfully submitted this 7th day of August, 2014.

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By:


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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that the Response to Petition for Review was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 7th, 2014.


Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle
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Attached, please find the Response to Petition for Review regarding the above-named Petitioner.

If you have any questions, please contact this office.

Thank you.

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