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SUPREME COURT
STATE OF WASHINGTON
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IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

STEVEN LEE SMITH, Petitioner

SUPREME COURT NO. 91253-0

COURT OF APPEALS, DIVISION III NO. 31698-0-III

Klickitat County Superior Court NO. 13-1-00028-0

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

David Quesnel, WSBA #38579
Prosecuting Attorney

Jessica L. Blye, WSBA #43759
Deputy Prosecuting Attorney

Klickitat County Prosecuting Attorney
205 S. Columbus Avenue, MS-CH-18
Goldendale, WA 98620
509-773-5838

 ORIGINAL

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RULES

RAP 13.4(b).....

I. STATEMENT OF THE CASE

Steven Lee Smith appealed his April 18, 2013 conviction for possession of a stolen firearm. He challenged the admission of ER 404(b) evidence and the sufficiency of the evidence to support his conviction.

The Court of Appeals held that the trial court's on-record ER 404(b) analysis regarding prior acts involving firearms was insufficient, but that this was not reversible error. *Slip Op.* at 14-15. The Court found the record showed that the trial court adopted the State's arguments as to the purpose of the evidence and the State's weighing of probative value against prejudice, and that this excused the court's failure to state its own explicit findings on the record. *Slip Op.* at 15.

The Court of Appeals found that the trial court failed to analyze the purpose and relevancy or weigh the prejudice of testimony regarding past drug sales of the defendant. *Slip Op.* at 16. However, the Court held that this erroneous admission of evidence was harmless as it did not, within reasonable probabilities, affect the outcome of the trial. *Slip Op.* at 19. The Court found that the improperly admitted evidence unlikely altered the jury's view of the defendant in light of other, properly admitted evidence of a drug transaction. The Court also found that "the State presented strong

admissible evidence that [the defendant] knew he possessed a stolen firearm.” *Id.*

The Court of Appeals held that the evidence presented was sufficient for a jury to find beyond a reasonable doubt that the firearm in the defendant’s possession was stolen. *Slip Op.* at 22. In finding the evidence sufficient, the Court referenced officer testimony regarding the distinctiveness of the firearm and that a firearm of the same make and model had been stolen within six weeks of purchase in the same city. *Id.* The Court referenced the defendant’s admission to purchasing the firearm for a low sum of \$50 and four grams of methamphetamine. *Slip Op.* at 23. The Court also referenced the testimony regarding prior acts that it held to be properly admitted despite the lack of ER 404(b) analysis explicitly conducted by the trial court on the record. *Id.*

II. ARGUMENT

Rule of Appellate Procedure (“RAP”) 13.4(b) governs the considerations for accepting a Washington State Supreme Court petition for review. These considerations include appellate court decisions that are in conflict with another decision of an appellate court or the Washington State Supreme Court. They also include appellate court decisions that involve a question of constitutional law or an issue of substantial public interest.

This Court should deny the petition for review because none of these considerations are present. The Court of Appeals decision in Smith's case does not conflict with another Court of Appeals or Supreme Court decision and the case does not involve a constitutional law question or issue of substantial public interest.

- A. The Court of Appeals decision in this case does not involve a conflict with another decision of the Court of Appeals or Supreme Court.

Smith has not specifically identified which prior Supreme Court or Court of Appeals decision(s) it believes this matter is in conflict with, but it does state that the Court of Appeals erred in holding that the lack of explicit ER 403(b) analysis by the trial court was not reversible error.

To admit evidence under the ER 403(b) exception, "the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect." *State v. Pirtle*, 127 Wash.2d 628, 648-49 (1995). While this full analysis should be conducted on the record, if the record shows that the trial court adopted one of the parties' express arguments, failure to do so is not reversible error. *State v. Asaeli*, 150

Wn.App. 543, 576-77 (2009) (*quoting Pirtle*, at 650-51; *State v. Foxhoven*, 161 Wash.2d 168, 175 (2007)).

Smith argues that the Court of Appeals erred in applying these rules to the actions of the trial court, stating that “neither the trial court nor the State addressed the preponderance of the evidence factor” and that failing to do so was not harmless. *Petition* at 6.

However, in the unpublished Court of Appeals opinion, the Court stated that “the trial court ruled and adopted the State’s position immediately after hearing argument on the motion in limine” and that this argument included the State reviewing “the authenticity of the evidence.” *Slip Op.* at 15. Additionally, the Court of Appeals quoted from the trial transcript where the trial court stated, when ruling the evidence admissible, “This is all through testimony of a witness, obviously, and the jury will make what they want of that. They’re going to test [the witness’s] credibility, and we’ll have to let them do that.” *Slip Op.* at 6 (*quoting* RP at 71-72). The trial court stating that the ultimate determination of the witness’s credibility would lie with the jury, and ruling in favor of the State after the State reviewed the authenticity of the evidence shows that the trial court did consider the prong of whether the acts occurred. That the trial court’s ruling was in favor of the State strongly suggests that it believed that

the acts more likely than not occurred. The Court of Appeals did not err or create a conflicting decision when it found that the trial court considered all necessary factors in analyzing the ER 404(b) testimony and that it was not reversible error to admit the evidence without first explicitly performing the analysis on the record by repeating the State's arguments.

With regards to the sufficiency of the evidence argument, the Smith does not argue that the Court of Appeals decision is in direct conflict with any other decision by the Court of Appeals or Supreme Court. Therefore, this Court should not accept review on that basis.

B. There is no significant constitutional law question or issue of substantial public interest.

Smith has put forth no argument that his case presents a constitutional law question or issue involving a substantial public interest. As this decision regards admission of evidence under ER 404(b), there is no constitutional questions of law at issue, and this Court should not accept review on that basis.

C. CONCLUSION

This Court accepts review of Court of Appeals decisions that conflict with another decision of the Court of Appeals or Supreme Court. It also accepts review of cases involving questions of constitutional law or issues involving a substantial interest to the public. Because none of these

considerations are present, this Court should deny the petition for discretionary review.

Dated this 6th Day of March, 2015.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'J. Blye', with a long horizontal flourish extending to the right.

Jessica L. Blye, WSBA #43759
Deputy Prosecuting Attorney
Klickitat County Prosecuting Attorney
205 S. Columbus Avenue, MS-CH-18
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,
vs.
STEVEN LEE SMITH,
Petitioner

SUPREME COURT NO: 91253-0
DECLARATION OF MAILING

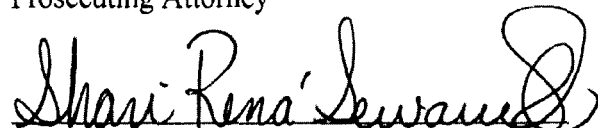
I, Shari Seward, declare that on March 6, 2015, I deposited in the United States mails by certified mail, proper postage affixed, a copy of the Respondent's Answer to Petition for Review to:

Steven Lee Smith
DOC #737289
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of March, 2015.

DAVID R. QUESNEL
Prosecuting Attorney


SHARI SEWARD
Legal Assistant III

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SUPREME COURT NO: 91253-0
DECLARATION OF MAILING

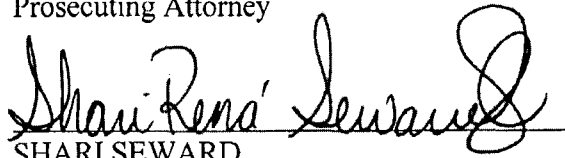
I, Shari Seward, declare that on March 6, 2015, I emailed, a copy of the Respondent's
Answer to Petition for Review to:

Attorney for Appellant:
Maria J. Trombley
WSBA# 41410
P.O. Box 829
Graham, WA 98338
Email: marietrombley@comcast.net

I certify under penalty of perjury under the laws of the state of Washington that the
foregoing is true and correct.

DATED this 6th day of March, 2015.

DAVID R. QUESNEL
Prosecuting Attorney


SHARI SEWARD
Legal Assistant III

OFFICE RECEPTIONIST, CLERK

To: Shari Seward
Cc: marietrombley@comcast.net; Jessica Blye; David Quesnel
Subject: RE: Respondent's Answer to Petition for Review: State v. Steven Lee Smith

Received 3-6-15

From: Shari Seward [mailto:sharis@klickitatcounty.org]
Sent: Friday, March 06, 2015 2:04 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: marietrombley@comcast.net; Jessica Blye; David Quesnel
Subject: Respondent's Answer to Petition for Review: State v. Steven Lee Smith

Good Afternoon:

Case Name: **State of Washington v. Steven Lee Smith**
Case Number: **91253-0**

Jessica L. Blye, WSBA No. 43759
Deputy Prosecuting Attorney

E-mail: jessicab@klickitatcounty.org
Phone No. **509-773-5838**

Attached you will find a copy of the Respondent's Answer to Petition for Review in the Case Name and Number above. Declaration of Service is attached to the petition. If you have any questions, please let me know.

Thank you for your assistance in this matter.

Regards,

--

Shari R. Seward

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