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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court acted within its discretion in allowing evidence of a prior similar incident to refute defendant's defense of "accident."
2. Whether the trial court properly allowed the State to present impeachment evidence after defendant asserted that she was always cooperative with law enforcement.
3. Whether the defendant waived all objections to the jury instructions other than the one which he preserved at trial.
4. Whether defendant has failed to show that a jury instruction constituted a comment on the evidence when the wording was taken verbatim from a statute, was neutral, and correctly stated the law.
5. Whether the State adduced sufficient evidence for a reasonable trier of fact to find beyond a reasonable doubt that defendant was guilty of the crimes charged.

B. STATEMENT OF THE CASE.

1. Procedure

On June 29, 2009, the Pierce County Prosecutor charged Kelley Stephens, hereinafter "defendant" with assault in the third degree occurring on June 28, 2009, in cause number 09-1-03105-5. CP 1. The prosecutor filed an amended information which added a charge of obstructing a law enforcement officer. CP 7-8. Trial commenced before the Honorable Eric Schmidt, pro tem, on December 15, 2009.

During pretrial motions, defendant stated her intent to testify to her belief that she had a constitutional right to deny law enforcement officials entrance to her house to serve an arrest warrant on Timothy Clinton. 1 RP 5-6. The prosecutor sought to exclude this testimony as irrelevant. 1 RP 7. The trial court declined to limit defendant's testimony, but suggested that the prosecutor could propose a jury instruction regarding the relevant law. 1 RP 7. Defendant also intended to testify to her belief that an officer had to show her a copy of an arrest warrant before he could enter her house to arrest someone therein. 1 RP 8. The prosecutor objected that this testimony was irrelevant as it did not present a defense and might confuse the jury. 1 RP 7. Again, the court refused to exclude such testimony, but indicated that the parties could talk about the status of the law in terms of jury instructions. 1 RP 8-9.

The prosecutor brought a pretrial motion to allow evidence of a prior incident that occurred on March 15, 2008, when Deputy Jank attempted to serve an arrest warrant on Timothy Clinton at defendant's address. 1 RP 12. According to Deputy Jank's report of that incident, defendant attempted to lock the doors and windows to prevent his entry. 1 RP 12. The prosecutor argued that this evidence was relevant to both obstructing a law enforcement officer and assault in the third degree. The court found that this prior encounter was a prior bad act which fell under

the “knowledge” and “absence of mistake” exceptions to ER 404(b), and allowed the State to adduce evidence from the deputy about the March 15th incident. 1 RP 13.

During trial, defendant testified that she was always cooperative with the police. 3 RP 141-145. The prosecutor sought permission to impeach this testimony by cross-examining defendant about an incident that occurred on December 4, 2009, when Deputy Jank attempted to contact Clinton at defendant’s address. 3 RP 147. As an offer of proof, the prosecutor summarized Deputy Jank’s police report which indicated that on that date, defendant attempted to mislead him as to whether Clinton was present in her home, and she did not cooperate with the deputies’ attempt to locate him. 3 RP 147-148. The trial court ruled that defendant’s testimony had opened the door to whether she was always cooperative with the police, and allowed the prosecutor to cross examine her about the December 4th incident. 3 RP 149.

At the trial’s conclusion, the prosecutor proffered two jury instructions (given as instructions 11 and 12) designed to inform the jury of law enforcement’s powers to serve an arrest warrant. Appendix A and E. The court asked defendant whether there was any objection to the two instructions. Defense responded that he “guessed” that he had an objection to the first instruction (number 11), but that the second instruction was appropriate (number 12). 3 RP 160-161. The trial court

gave both instructions. 3 RP 161-162, CP 28-48, instructions 11 and 12, Appendix A and E.

The jury returned a verdict of “guilty” on both counts on December 18, 2009. On January 15, 2010, Judge Schmidt sentenced defendant to 15 days in custody on the assault. January 15, 2010, RP 10. The court sentenced defendant to serve one day in custody on the misdemeanor offense of obstruction, and imposed costs and conditions. January 15, 2010, RP 8.

Defendant timely filed this notice of appeal.

2. Facts

Pierce County Sheriff’s Deputy Jank testified that he was on duty on June 28, 2009. 3 RP 78. As he drove past defendant’s residence, he saw Timothy Clinton, for whom an arrest warrant had been issued, in the yard. 3 RP 79. Deputy Jank confirmed the warrant, called for backup, and returned to the residence. 3 RP 79-81. Deputy Miller arrived 3 to 4 minutes later to act as back-up. 3 RP 82. Deputy Jank saw Clinton run into the residence, and called a couple of times for him to stop. 3 RP 82. Clinton did not stop.

Deputy Jank testified that defendant came out of her residence and stood defiantly between him and the residence, making it clear that she was not going to let him in. 3 RP 97. He explained to her that he had a warrant for Clinton, and that he was going into the residence to arrest him.

3 RP 84. The deputy testified that defendant disputed that Clinton was in her residence and objected to the Deputy's entry. Deputy Jank explained to her three or more times that she would need to step out of the way or she would be arrested. 3 RP 85. He testified that defendant stated the deputies were not going to go into the residence, then she walked toward the house. 3 RP 85. The entry to defendant's house contained both a screen and glass sliding doors. Based on his prior experience attempting to arrest Clinton at defendant's house, Deputy Jank believed that defendant was going to lock the doors to the residence so that the deputies could not have access. 3 RP 85-86.

Deputy Jank stated that he followed defendant up the porch stairs to the house. When defendant entered the residence and tried to slam the screened slider door closed, Deputy Jank caught and held it. 3 RP 86. Defendant then looked directly at Deputy Jank as she slammed closed the glass slider door, which struck Deputy Jank's arm and pinned it between the door and the jamb. 3 RP 86-88. Deputy Jank testified that this did not appear to him to be an accident. 3 RP 88.

Deputy Jank testified regarding a previous incident on March 15, 2008, when he had tried to serve an arrest warrant on Clinton at defendant's residence. 3 RP 91. On that occasion, Clinton was in the yard but fled from him into the house. 3 RP 92. From outside the residence, Deputy Jank explained to defendant that he was there to arrest Clinton, who was inside. Defendant denied that Clinton was inside. 3 RP 93.

When Deputy Jank re-stated that he knew Clinton was inside the residence, defendant attempted to close the bedroom window through which they were speaking. 3 RP 93. During the March 15th incident, Deputy Jank eventually entered the house and arrested Clinton. 3 RP 91-93.

Deputy Miller testified that he responded to defendant's residence in Washington on June 28, 2009, when he was notified by Deputy Jank that Clinton was there. 2 RP 18. Deputy Miller initially took a position on the far side of the house, but was soon called by Deputy Jank to the opposite yard where he and the defendant were talking. 2 RP 23. Deputy Miller heard the defendant tell Deputy Jank that he was not coming in her house. 2 RP 25. Deputy Miller saw defendant begin to retreat back to the sliding glass door and try to close the door on Deputy Jank. Deputy Miller saw that Deputy Jank, who was face to face with defendant, had his arm through the open sliding door. Deputy Miller saw defendant aggressively slam that door on Deputy Jank's arm. 2 RP 26.

After defendant slammed the door on his arm, Deputy Jank was able to pull the door open, and take her into custody. 2 RP 27. Defendant was pulling and jerking away from him, and she did not settle down until Deputy Miller removed his taser from its holder and told her to stop the struggle or he would tase her. 2 RP 28.

During trial, defendant testified that she is in a girlfriend/boyfriend relationship with Clinton, and that he lives with her most of the time. 3 RP 122. Defendant saw Deputy Jank in her yard on June 28th, and went out to see why he was there. 3 RP 125. Defendant testified that Deputy Jank told her that he had seen Clinton run into the house, and that he was going in to serve an arrest warrant on him. 3 RP 125. Defendant denied that she had seen Clinton enter her house and said that she did not know where he was. She also told the Deputy that she needed to see the arrest warrant for Clinton before she let him enter her house. 3 RP 125. Deputy Jank did not have a paper copy of the warrant to show her.¹ 3 RP 127.

Defendant testified that she turned and walked up her porch and into her residence. When she turned, she saw Deputy Jank with one hand on the screen door so she closed the glass slider door. 3 RP 127. She testified that when the door was in mid-motion, the deputy stuck out his arm and the door hit him. 3 RP 127. She later testified that she had not realized that Deputy Jank's hand was in the way of the door until the door tapped him. 3 RP 130. She denied that she intentionally shut the door on the deputy's arm. 3 RP 131. She also denied it was her intent to hinder or delay the deputies. 3 RP 135. She testified that she told Deputy Jank

¹ It is not necessary that an officer have a copy of a warrant when making an arrest under the authority of that warrant. RCW 10.31.030.

she did not know Clinton's whereabouts, even though she knew that he was outside in the yard when the deputy came onto the property. 3 RP 136-1367.

The prosecutor cross examined defendant about March 15, 2008, when Deputy Jank tried to arrest Clinton at her residence. Defendant testified that on March 15th, she had initially told the deputies that Clinton was not in her residence. 3 RP 141-142. In fact, he was inside her residence on that date. 3 RP 93.

During cross-examination, defendant told the prosecutor that she is cooperative with police, if given the opportunity. 3 RP 143-145. For the purpose of impeachment, the prosecutor cross examined defendant about the December 4, 2009, incident, and whether she was cooperative with law enforcement on that occasion. 3 RP 149-152. Defendant testified that Deputy Jank came to her house and told her that he had seen Clinton drive a truck into the driveway, jump out of the truck and run into her residence. 3 RP 150. Defendant told the deputy that she had not seen Clinton drive a truck to her residence, and that she had been driving the truck, not Clinton. She also told him that she had not seen Clinton come into the residence, nor did she know if he was in it. 3 RP 147-152.

After the defense rested, Deputy Jank was recalled to testify about the December 4, 2009, incident. Defense did not object to his testimony. 3 RP 153-154.

C. ARGUMENT.

1. THE COURT PROPERLY RULED THAT EVIDENCE OF A PRIOR POLICE CONTACT WITH THE DEFENDANT UNDER NEARLY IDENTICAL CIRCUMSTANCES WAS ADMISSIBLE UNDER THE “KNOWLEDGE” AND “ABSENCE OF MISTAKE EXCEPTIONS OF ER 404(b).

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court’s decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

The prosecutor brought a pretrial motion to introduce evidence that during a prior contact on March 15, 2008, defendant had tried to prevent Deputy Jank from entering her home to arrest Clinton. CP 14-18, 1 RP 12-13. When the court asked for defendant’s response, counsel said:

I think the State is obviously trying to bring it in under 404(b), prior bad acts. I guess I would object. I don't think it's relevant whether or not she's...relevant in this case as to whether she intentionally closed the door on the officer's hand.

3 RP 12. The trial court allowed the prosecutor to introduce evidence of Deputy Jank's prior contact with defendant. 1 RP 13.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Defendant's objection to testimony about the March 15th incident was timely. However, her objection was specific to the "relevance" of this incident to the assault charge. 1 RP 13. Because defendant only objected to "relevance" to the assault charge, she is precluded from raising an objection on any other basis in this appeal.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. The prosecutor sought to adduce evidence of defendant's March 15th contact with Deputy Jank to show that her intent on June 28th was to obstruct his attempt to arrest Clinton.

Evidence Rule (ER) 404(b) allows the admissibility of other crimes, wrongs, or acts for:

[p]urposes such as proof of motive, opportunity, intent, preparation, *plan*, knowledge, identity, or *absence of mistake or accident*.

Emphasis added. After defendant testified then evidence of the March 15th incident also went to the “absence of accident” since it tended to rebut her claim of accident.

To prove count two, obstructing a law enforcement officer, the State needed to show the following elements:

- (1) That on or about the 28th day of June, 2009, the defendant *willfully* hindered, delayed or obstructed a law enforcement officer in the discharge of the law enforcement officer’s official powers or duties;
- (2) That the defendant knew that the law enforcement officer was discharging official powers or duties; and
- (3) That any of these acts occurred in the State of Washington.

CP 28-48, instruction 14, Appendix D, emphasis added.

“Willfully” was also defined:

Willfully means to *purposefully act with knowledge* that this action will hinder, delay, or obstruct a law enforcement officer in the discharge of the officer’s official duties.

CP 28-48, instruction 15, emphases added.

To establish the *mens rea* of obstructing, the State needed to prove that defendant acted against Deputy Jank to achieve her purpose of hindering or obstructing him from arresting Clinton. The facts of the March 15th incident between defendant and the deputy are relevant and necessary to show her plan on June 28th. From this evidence, a jury could reasonably infer that defendant willfully misled Deputy Jank about whether Clinton was in her residence. On both dates she tried to shut a door or window to her residence to prevent the deputy's entry. These facts also show that defendant knew that Deputy Jank was acting in his official duty on June 28th when he attempted to arrest Clinton on an outstanding warrant.

The State also charged defendant with assault in the third degree. CP 7-8. When defendant testified that she "accidentally" slammed her glass door closed on Deputy Jank's arm, the March 15th incident was also relevant to rebut her claim that she lacked the requisite "intent" to commit assault. The elements of assault are:

- (1) On or about the 28th day of June, 2009, the defendant assaulted E. Jank;
- (2) That at the time of the assault E. Jank was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and

(3) That the acts occurred in the State of Washington.

CP 28-48, instruction 7, Appendix C. The court gave an instruction defining “assault:”

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

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, which in fact creates in another reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 28-48, instruction 8, emphasis added. “Intent” was also defined:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 28-48, instruction number 9.

When defendant testified that she accidentally closed her glass slider door on Deputy Jank, the March 15th incident became relevant to refute the claim of accident. To establish the *mens rea* of assault in the third degree, the State needed to prove either that defendant intended to strike Deputy Jank as she closed the door to her residence, or that she acted with intent to frighten him. ER 404(b) allows the admission of prior

incidents to rebut a claim of accident. *State v. Womac*, 130 Wn. App. 450, 123 P.3d 528 (2005), *State v. Norlin*, 134 Wn. 2d 570, 581, 951 P.2d 1131 (1998).

Defendant testified that she knew that Deputy Jank was directly behind her when she went from the yard into her residence. 3 RP 127, 143. She stated that he had one hand on her screen door and the other on the door frame when she decided to close the glass slider door. 3 RP 127. Ultimately, defendant claimed it was an accident that she closed the door on Deputy Jank's arm because he stuck his arm into the door as she was closing it. 3 RP 130.

Whether defendant "intentionally" or "accidentally" closed the glass door on Deputy Jank's arm goes to an element of the crime of assault. The trial court properly allowed the prosecutor to introduce evidence of a prior similar incident to rebut defendant's claim of accident.

ER 403 allows the admission of prior bad acts unless the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence. In this case, the March 15th evidence was not unfairly prejudicial since they were not as egregious as they were on June 28th. In the March 15th incident, defendant did eventually cooperate with Deputy Jank, and allow Clinton to be arrested.

The evidence did not create a danger that the jury would become confused about the issues or be misled. Finally, the evidence of the March 15th incident was not cumulative.

The trial court properly allowed evidence of the March 15th incident to be admitted under ER 404(b). The trial court did not abuse its discretion in allowing this evidence, and its ruling should not be disturbed on appeal.

2. THE COURT PROPERLY ALLOWED THE STATE TO IMPEACH DEFENDANT'S TESTIMONY THAT SHE WAS COOPERATIVE WITH LAW ENFORCEMENT BY ALLOWING CROSS EXAMINATION REGARDING AN INCIDENT IN DECEMBER 2009 WHERE SHE MISLED AND OBSTRUCTED LAW ENFORCEMENT.²

Subject to the discretion of the trial court, specific instances of the conduct of a witness, if probative of truthfulness or untruthfulness, may be inquired into on cross examination for the purpose of attacking or supporting his credibility. ER 608(b). Washington case law allows cross-examination under ER 608(b) to specific instances that are relevant to veracity. See *State v. Cummings*, 44 Wn. App. 146, 152, 721 P.2d 545, review denied, 106 Wn.2d 1017 (1986). "Any fact which goes to the

² On appeal, defendant claims that the December 4, 2009, incident was admitted pursuant to ER 404(b). It was not argued pretrial with the ER 404(b) admissibility of the March 15, 2008, incident. 1 RP 12-13. Furthermore, ER 404(b) evidence is substantive while ER 608(b) evidence is for impeachment purposes only. *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991).

trustworthiness of the witness may be elicited if it is germane to the issue.” *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). When admitted for the purpose of impeachment, this evidence is not substantive. *State v. Wilson*, 60 Wn. App 887, 891-892, 808 P.2d 754 (1991). The trial courts decision to admit evidence for impeachment purposes will not be overruled absent a manifest abuse of discretion. *Id.* at 890.

A defendant may “open the door” to rebuttal evidence that would otherwise be inadmissible, even if constitutionally protected, if the rebuttal evidence is relevant. *State v. Hartzell*, 156 Wn. App. 918, 935, 237 P.3d 928 (2010).

Defendant testified that she was cooperative with law enforcement on June 28th, and that she would have looked through her house to see if Clinton was inside, and then turned him over to the officers if she found him. 3 RP 140-142. She implied that on June 28th she would have eventually cooperated by securing Clinton, just as she did on March 15th. 3 RP 142-149. The impression she attempted to convey to the jury was that her actions were cooperative on June 28th, and that she would not attempt to interfere in an attempt to locate Clinton if he were in her residence. By testifying in this way, defendant opened the door to impeachment by prior specific instances of conduct. ER 608(b).

After the defendant testified, the prosecutor made a motion outside the presence of the jury that he be allowed to cross examine her about an incident on December 4, 2009, during which Deputy Jank came to her residence and attempted to contact Clinton there.³ 3 RP 149. Defense objected that the December 4th incident was not relevant to the events of June 28th. 3 RP 148. The court ruled that defendant had opened the door as to her level of cooperation with the police. 3 RP 148. The court granted the motion and the prosecutor questioned defendant about her actions on December 4th.

When asked about the December 4th incident, defendant testified that she did not see Clinton jump out of the truck and run into her residence. 3 RP 150-151. She told the deputy that she had been driving the truck about 20 minutes before he came to her door, implying that Clinton had not driven it. 3 RP 150-151. When asked on the witness stand whether Clinton jumped out of her truck and ran into her residence, defendant answered “Not that I saw, no” 3 RP 151. When asked whether she was being cooperative with the Deputies on that occasion, defendant responded that she answered their questions to the best of her ability. 3 RP 152.

³ During defendant’s December 4th contact with Deputy Jank, she successfully prevented him from contacting Clinton. 3 RP 148.

Another case which allowed impeachment testimony is *State v. Wilson*, 60 Wn. App 887, 892, 808 P.2d 754 (1991). This case involved testimony by Wilson's wife on his behalf. The prosecutor was allowed to impeach the wife by questioning her about her statement that her husband was not a member of the household at the time in question. This statement was made under oath on a DSHS financial assistance form. *Id.* The Court of Appeals ruled that evidence of the wife's prior false statement under oath was relevant to her veracity. The prior false statement fit within the parameter of ER 608(b), and its admission was well within the discretion of the trial court. *Id.* In *Wilson*, the Washington Court of Appeals, Division Two, stated that there are limits to ER 608. The Court stated that the instances must be probative of truthfulness and not remote in time. *Id.* at 893. The *Wilson* Court also indicated that the trial court should apply the protections of ER 403, and exclude the impeachment evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. *Id.*

Like the statement made by Wilson's wife, defendant's conduct on December 4th was probative of her truthfulness when she testified that she was cooperative with law enforcement. The December 4th incident was not extremely prejudicial, as would be a prior conviction or an admission

that one had lied under oath on a public assistance form. Finally, it was not remote in time from the incident or from the time of trial.

The trial court properly allowed the prosecutor to adduce ER 608(b) evidence in this case to impeach defendant's claim that she is open and honest with police officers and that she cooperates with them. 3 RP 144-145.

After the defense rested, the prosecutor recalled Deputy Jank to adduce rebuttal evidence about the December 4th incident. Defendant did not object to Deputy Jank's return, or to the subject of his testimony. He simply asked that the deputy's testimony be limited to new evidence. 3 RP 154. Deputy Jank testified about the events of December 4, 2009, when he tried to contact Clinton at defendant's residence. 3 RP 156-159.

Defendant must make a timely and specific objection to the admission of evidence in the trial court. Failure to object precludes raising the issue on appeal. *Guloy, supra*. At trial, defendant did not object to Deputy Jank's rebuttal testimony. She is precluded from doing so now.

3. THE DEFENDANT FAILED TO PRESERVE HER CLAIM OF INSTRUCTIONAL ERROR BELOW, AND THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE LAW REGARDING THE SERVICE OF ARREST WARRANTS.

A trial court is to instruct the jury so that the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A party is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). The Court of Appeals will reverse a trial court's decision to give a specific jury instruction only if the court abuses its discretion. *Jaeger v. Cleaver Const. Inc.*, 148 Wn. App. 698, 716, 201 P.3d 1028 (2009).

- a Defendant Failed To Preserve Her Claims Of Instructional Error In The Trial Court Since She Did Not Object On The Basis She Now Raises On Appeal.

CrR 6.15 requires a party objecting to the giving of an instruction to state the reason for the objection. It is the duty of trial counsel to alert

the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing, *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

The Washington State Supreme Court has outlined the specificity a party must articulate when making an objection to the giving of a jury instruction:

The objector shall state distinctly the matter to which he objects and the grounds of his objection. The purpose of this rule is to clarify, at the time when the trial court has before it all the evidence and legal arguments, the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction.

State v. Bailey, 114 Wn. 2d 340, 345, 787 P. 2d 1378 (1990).

The State proposed two jury instructions, which were ultimately given as instructions 11 and 12, to inform the jury of the law regarding service of search warrants. 3 RP 160-164, Appendix A and E, CP 28-48 instructions 11 and 12. These instructions were requested because the defendant testified to her belief that she could deny entry to law enforcement officers trying to serve a warrant. 3 RP 84-85, 97, 125-126, 129.

Defendant now objects to jury instructions 11 and 12, whereas below, she lodged no objection.

Mr. Gant: I have some questions. I guess an objection as to the first one. *[Instruction number 11.]* To make an arrest in a criminal action an officer may break open any outer or inner door. The second instruction I think is appropriate, dealing with some of the issues that came up. *[Instruction number 12.]* Just to clarify the officer's authority, whether Ms. Stephens believed it at the time or not. I think that's an appropriate instruction, given the case and the facts we've heard. But the other one, *[instruction 11,]* I just don't see the purpose in it.

3 RP 160-161, emphasis added. Defendant neither clearly nor specifically objected to either instruction in the trial court. Thus, she failed to preserve any objection below.

Similarly, in *State v. Scherer*, defense counsel failed to be specific in his request that a court give a jury instruction. *State v. Scherer*, 77 Wn. 2d 345, 462 P.2d 549 (1970). In *Scherer*, the counsel's stated reason for requesting the instruction was "I feel that it is a proper statement of the law". *Id.* at 352. The Washington Supreme Court stated:

Such argument is not adequate to apprise the trial judge of the points of law involved. Where an attorney objecting to the refusal of a proposed instruction fails to advise the court of any particular point of law involved, those points will not be considered on appeal.

Id. at 352. As in *Scherer*, defendant's objection to instruction 11 is vague and does not put before the court his exact points of law or reasons for which he objected to the instruction. His statement "I just don't see the

purpose in it” does not inform the court whether he believes that instruction is irrelevant, whether he believes it would lead the jury astray, or anything about his thought process. Because he was not specific below in the reason for his objection, defendant has failed to properly preserve this issue for appellate review.

b. As Instruction 11 Properly Stated The Law,
The Trial Court Did Not Abuse Its Discretion
By Giving It To The Jury.

Jury instruction 11 reads as follows:

To make an arrest in criminal actions, the officer may break open any outer or inner door or windows of a dwelling house or other building, or any other inclosure, if after notice of his office and purpose, he be refused admittance.

CP 28-48. This language follows verbatim the language of the 2009 version of RCW 10.31.040 governing the authority of law enforcement to serve arrest warrants. *See* Appendices A and B. This instruction is not misleading, it is a correct statement of the law, and it allows each party to argue its theory of the case.

The Washington State Supreme Court has given examples of jury instructions which exemplify manifest constitutional error: directing a verdict, shifting the burden of proof, failing to require a unanimous verdict, and omitting an element of the crime charged. *State v. O’Hara*, 167 Wn. 2d 91, 103, 217 P.2d 756 (2009). *O’Hara* continues with

examples which are not constitutional error: failure to instruct on a lesser included offense and failure to define individual terms. *Id.*

Jury instruction 11 falls into the second category of instructions. It does not pertain to an element of the crimes charged, the burden of proof, the unanimity of the jury, or any other significant issue. In fact, at trial defendant objected to this jury instruction on the ground that it was “unnecessary.” The instruction addresses a peripheral issue raised by the defendant not one of “constitutional magnitude.” Because the instruction is peripheral, an objection to instruction 11 may not be raised for the first time on appeal.

To support her claim that jury instruction 11 incorrectly states the law, and therefore involves a constitutional error, defendant cites *State v. Wanrow*, 88 Wn. 2d 221, 559 P.2d 548 (1997). The *Wanrow* instruction included a misstatement of the law of self defense in a murder case. Instruction 11 relates to a peripheral issue and is a verbatim quote of the law. Defendant’s analogy fails since the jury instruction on the methods by which law enforcement may enter a house and serve an arrest warrant is not an issue pivotal to proving the charges of obstruction or assault. Instruction 11 is a correct statement of the law and the court did not abuse its discretion in giving it to the jury.

c. Jury Instruction 11 Does Not Make A
Comment On The Evidence.

An appellate court reviews jury instructions *de novo* as questions of law. *State v. Sheen*, 155, Wn. App, 243, 247, 228 P.3d 1285 (2010). Article 16 of the Washington Constitution provides that “judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” *State v. Johnson*, 152 Wn. App. 924, 935, 219 P.3d 958 (2009). A statement by the court constitutes a comment on the evidence if the court’s attitude toward the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement. *Id.* Article 16 also bars a judge from giving an instruction which implies that “matters of fact” have been established as a “matter of law.” *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Any remark that has the possible effect of suggesting that the jury need not consider an element of an offense may be a judicial comment. *Id.* at 721. Jury instruction 11 does not refer to any elements of obstruction or assault.

An instruction does not constitute an impermissible comment on the evidence if there is sufficient evidence in the record to support it, and if the instruction is an accurate statement of the law. *Johnson*, *supra* at 924. Instruction 11 was proposed by the State in response to defendant’s testimony about her understanding of the law to show that it was

erroneous and did not provide her a defense. 3 RP 129. Defendant testified that she believed that she could refuse entry to an officer who wanted to serve an arrest warrant. Instruction 11 makes clear that her belief is contrary to the law.

Defendant now argues that jury instruction 11 constitutes an improper judicial comment because it instructed the jury that a matter of fact had been decided as a matter of law. Again, this objection was not preserved at trial. Specifically, defendant objects that the instructions conveyed the judge's conclusion that Clinton resided with defendant. This fact is neither stated nor implied in instruction number 11. Regardless of the Court's belief as to Clinton's residence, defendant testified that he lived with her on occasion. 3 RP 136. She also testified that he had spent the previous night with her and that he had been in the yard when the deputies arrived. 3 RP 136.

Instruction 11 is a neutral and accurate statement of the law. The trial court did not abuse its discretion in giving this instruction. The jury was properly instructed in this case.

4. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS GUILTY OF ASSAULT IN THE THIRD DEGREE AND OBSTRUCTING A POLICE OFFICER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State*

v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is that, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654, 659 (1993); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Anderson*, 72 Wn. App. 453, 458, 864 P.2d 1001, *review denied*, 124 Wn.2d 1013 (1994).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992), *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992). Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld. 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. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1001, 833 P.2d 386 (1992).

Defendant asserts that the State must show that it could have met its burden of proving each element of each crime beyond a reasonable doubt even in the absence of the 404(b) and 608(b) evidence which was adduced in this case. Defendant cites no authority which requires an abbreviated review of the evidence, other than her assertion that some evidence in this case was improperly admitted. However, when the sufficiency of the evidence is challenged, the standard of review is for the Court of Appeals to review all of the evidence adduced in a case, in the light most favorable to the state.

Defendant was charged with assault in the third degree and obstructing a law enforcement officer. In this case, the jury was instructed as to the elements of assault in the third degree. CP 28-48, instruction number 7, Appendix C. The jury was also instructed as to the elements of obstructing a law enforcement officer. CP 28-48, instruction 14, Appendix D. As discussed above, the *mens reas* the State must show are “intent” and willfulness.”

Deputy Miller was a witness to some of the events that took place on June 28, 2009, and he testified that this arrest took place in Washington State. Deputy Miller also testified when he responded to defendant’s

residence to back-up Deputy Jank with Clinton's arrest, he was called to the side of the residence where defendant and the deputy were. 2 RP 42. Deputy Miller saw defendant retreating from the porch into her residence.

Deputy Miller saw defendant go inside and try to close the door to keep Deputy Jank from coming in. 2 RP 42. He saw Deputy Jank face to face with defendant on the porch as she was inside her house. Deputy Miller saw defendant aggressively slam the glass door closed on Deputy Jank's bicep. 2 RP 26.

Deputy Jank testified that on June 28, 2009, he was on duty and spoke with defendant at her residence, where he asked her to have Clinton come outside. 3 RP 78. Defendant replied that she didn't see him go into the house. Deputy Jank testified that he told defendant he had seen Clinton run into the house, and she again claimed she didn't see him. 3 RP 84. Defendant stood defiantly in his path and made it clear that she was not going to let the deputy in to her residence. 3 RP 97.

When Deputy Jank asked defendant to step aside, she replied that it was her constitutional right to see his warrant, and she demanded that he produce a copy to show her. 3 RP 84-85. When he did not provide her with a copy, she turned her back, said that they were not going into the residence, and walked onto the porch and inside. 3 RP 85.

Deputy Jank testified that he followed her up onto the porch to prevent her from locking the doors so that they could maintain free access to the residence. 3 RP 86. When defendant was inside, she turned and

tried to slam the screen slider door closed. 3 RP 86. In an effort to prevent defendant from locking them out, Deputy Jank caught that door and pushed it open. 3 RP 86. While she faced him from a foot or two away, defendant grabbed the glass slider and forcefully slammed it shut. 3 RP 86-87. She caught Deputy Jank's hand or forearm in the door which caused his elbow to be pinned between the door and the jamb. 3 RP 86. He felt a little pain but did not see a mark on his arm. 3 RP 87.

Deputy Jank believed that if defendant had shut the door gently, he would have been able to stop it from closing. The door would have to be forcefully pushed to slam his arm in the track. 3 RP 87. Deputy Jank testified that it was not an accident that defendant closed the door on his arm because she was looking directly at him when she acted. 3 RP 88. When he reached in and pulled defendant onto the porch to arrest her, she yelled profanities and started to thrash her body. 3 RP 89. She did not calm down until she saw that Deputy Miller had a taser. 3 RP 89. Deputy Jank testified that, because defendant was combative, he needed to secure her in a patrol car before they could begin to deal with the arrest of Clinton. 3 RP 112.

Defendant testified that she met Deputy Jank in her yard where he told her that he was there to arrest Clinton, who he had just seen run into the house. 3 RP 125. Defendant told him that she did not see Clinton come into the house, and that she "had" to see his arrest warrant before she let them "come into [my] house." 3 RP 125. Deputy Jank indicated

several times that he did not need to show her the warrant and that the deputies were going into the house to arrest Clinton. 3 RP 143.

Defendant testified that she was upset or nervous because the deputy declined to show her the warrant. 3 RP 126. Defendant turned to go into her house, and as she walked she knew that Deputy Jank followed directly behind her. 3 RP 127, 143.

Defendant testified that she stepped into her house.

By the time I turned around, Officer Jank is standing there with one hand where the sliding glass—where the screen door opens up. He has his hand on the screen, his other hand is on the door frame, so it's like, okay, I can't close my screen door. So I went to close my sliding glass door and as it is like in mid-motion, he sticks his arm out and it hits him.

3 RP 127. On cross examination the prosecutor confronted defendant with Deputy Jank's testimony that she was looking him in the face when she closed the glass door. She then testified:

When I went to close it, I'm looking kind of over my shoulder trying to figure where Joe's at. And then when I turned back around, I realize he's got his arm sticking out, the door touches him and I'm like, huh."

3 RP 145. Defendant stated that Jank was not moving when she began to close the door, and that she turned and looked and was looking directly at him as the door touched his arm. 3 RP 146. She did not apologize to him for the strike. 3 RP 159.

Defendant stated she knew that Clinton was outside her house working in the yard on June 28th, that he had stayed at her house the night before, and that he lives at her house on occasion. 3 RP 137. Defendant testified that she did not tell the officers that Clinton was at her house “because they knew he had been at [my] house. That’s why they were there.” 3 RP 136. The prosecutor asked defendant if she was engaging in a play on words when she told the officer that she had not seen Clinton come into her house. 3 RP 136. She testified that was “correct.” 3 RP 136. Defendant also admitted that she stood between Deputy Jank and her house, knowing that he wanted to go into the house. 3 RP 143.

Defendant’s testimony was contradicted by other evidence. She admitted that she was mistaken in whether her constitutional rights dictated that the officers show her a warrant before they entered her house. 3 RP 129. She testified that her back door was closed when she went back onto the porch to go inside. 3 RP 131. Deputy Jank testified that it was open when she reentered her house. Defense counsel asked defendant if she recalled whether she had told the officer that she had pets and another person in the house. Defendant could not recall if she told the deputy that, “or if it was just one of the screaming thoughts in [her] head.” 3 RP 128. She testified that the sliding glass door just tapped Deputy Jank’s arm. 3 RP 130. Both Deputies testified that she slammed the door when she was

face to face with Deputy Jank. Defendant's testimony is disputed by both deputies who were present at the scene, and she admitted that she was having a little play on words at the time of the incident.

Evidence from the March 15th incident is relevant to the obstructing charge since it showed defendant's "plan" to keep the deputies from entering her residence to arrest Clinton. It also showed her knowledge that the deputies could and would arrest him from her residence. The evidence also refutes defendant's claim that she accidentally slammed her door on Deputy Jank's arm, since she had earlier attempted to slam a window to prevent his entry to her residence.

The jury could also have inferred that defendant slammed the glass door sharply in Deputy Jank's face on June 28th in an attempt to intimidate him from coming into her house to serve the arrest warrant. When the Deputies went into the residence to serve the arrest warrant, they found Clinton inside. 3 RP 90. Based on this evidence, a reasonable jury could infer that the State proved every element of assault in the third degree beyond a reasonable doubt.

According to her own testimony, as well as that from both Deputies, defendant's demeanor during her whole contact with Deputy Jank was combative and protective of Clinton, rather than cooperative. Defendant's credibility is suspect since she testified that she was nervous and upset, and that she could not recall this event in its entirety because she had screaming thoughts in her head. Even more telling was

defendant's statement that after the glass door struck the Deputy's arm, she apologized to Joe, who she was caring for at the time of this incident. The jury could reasonably infer that defendant knew at that point that she had gone too far in her attempt to protect Clinton, and knew that she was in jeopardy of being arrested. Had the strike been an accident, it is more likely that defendant would have apologized to Deputy Jank. From this testimony the jury could infer that throughout this encounter, defendant was antagonistic and defiant toward Deputy Jank. Her testimony was still defiant at trial. Based on her demeanor and lack of remorse, the jury could reasonably believe that her act of closing the door on Deputy Jank's arm was purposeful, not an accident.

The State also adduced evidence sufficient to prove beyond a reasonable doubt that defendant had committed every element of obstructing a police officer on that same date in Pierce County. Deputy Jank was on official duty when he came to her residence to serve an arrest warrant. She met Deputy Jank outside the house, blocked his path to the house when she knew that is where he wanted to go, and she stated that she would not allow him entry into her house unless he fulfilled her prior condition, which was to show her a warrant. Defendant told Deputy Jank over and over that she would not allow him to enter her house unless she saw a copy of the warrant. This is a clear statement that she was not going to cooperate with him, and that her intent was that he not serve the warrant. Finally, defendant admitted that she had played word games with

Deputy Jank as she attempted to convince him that Clinton was not in her house. When defendant was arrested, she continued to be combative so that Deputy Jank had to struggle with her to restrain her. It was not until she saw the taser that defendant finally became cooperative with the deputies.

Upon reviewing the evidence in the light most favorable to the State, the prosecutor adduced substantial evidence from which a reasonable jury could infer that defendant intentionally closed her glass door on Deputy Jank's arm. There is also substantial evidence for a jury to find that defendant willfully attempted to hinder, delay or obstruct Deputy Jank as he attempted to serve an arrest warrant. The jury verdict in this case was proper and should not be disturbed.

D. CONCLUSION.

For the foregoing reasons, the State requests that this Court affirm the judgment entered below.

DATED: October 27, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KAREN PLATT
Deputy Prosecuting Attorney
WSB # 17290

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/28/19 Sheer Ka
Date Signature

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STATE OF WASHINGTON
BY DEPUTY

APPENDIX “A”

Jury Instruction 11

INSTRUCTION NO. 11

To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if after notice of his office and purpose, he be refused admittance.

APPENDIX “B”

RCW 10.31.040

Westlaw

West's RCWA 10.31.040

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C

West's Revised Code of Washington Annotated Currentness

Title 10. Criminal Procedure (Refs & Annos)

Chapter 10.31. Warrants and Arrests (Refs & Annos)

→ **10.31.040. Officer may break and enter**

To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his or her office and purpose, he or she be refused admittance.

CREDIT(S)

[2010 c 8 § 1030, eff. June 10, 2010; Code 1881 § 1170; 1854 p 129 § 179; RRS § 2082.]

Current with all 2010 Legislation

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APPENDIX “C”

Jury Instruction 7

INSTRUCTION NO. 7

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 28th day of June, 2009, the defendant assaulted E. Janks;
- (2) That at the time of the assault E. Janks was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “D”

Jury Instruction 14

INSTRUCTION NO. 14

To convict the defendant of the crime of obstructing a law enforcement officer, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 28th day of June, 2009, the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official powers or duties;

(2) That the defendant knew that the law enforcement officer was discharging official duties at the time; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “E”

Jury Instruction 12

INSTRUCTION NO. 12

A valid misdemeanor arrest warrant gives police authority to enter a suspect's residence to make the arrest. The officer need not possess a physical copy of the warrant to make the arrest.