

**NO. 43816-0-II**

---

---

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DAMON CLARK McGRAW, APPELLANT

---

---

Appeal from the Superior Court of Pierce County  
The Honorable Beverly G. Grant

No. 11-1-05032-9

---

---

**RESPONDENT'S BRIEF**

---

---

MARK LINDQUIST  
Prosecuting Attorney

By  
Kawyne A. Lund  
Deputy Prosecuting Attorney  
WSB # 19614

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Did the trial court abuse its discretion in admitting statements volunteered by the appellant at the time of his arrest? ..... 1

    2. If the trial court erred, is the error harmless because appellant's statements were admitted without objection through a different witness? ..... 1

B. STATEMENT OF THE CASE..... 1

    1. Procedure..... 1

    2. Facts ..... 1

C. ARGUMENT..... 6

    1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ADMITTING STATEMENTS APPELLANT MADE AT THE TIME OF HIS ARREST ..... 6

    2. IF THE TRIAL COURT ERRED, THE ERROR IS HARMLESS BECAUSE APPELLANT'S STATEMENTS WERE ADMITTED WITHOUT OBJECTION THROUGH A DIFFERENT WITNESS..... 11

D. CONCLUSION..... 13

## Table of Authorities

### State Cases

<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	9
<i>Chase v. Beard</i> , 55 Wn.2d 58, 61, 346 P.2d 315 (1959), <i>overruled on other grounds</i> , 100 Wn.2d 729, 675 P.2d 1207 (1984).....	8
<i>State v. Guloy</i> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).....	6, 7
<i>State v. Hughes</i> , 106 Wn.2d 176, 201, 721 P.2d 902 (1986).....	9
<i>State v. Kirman</i> , 159 Wn.2d 918, 935, 155 P.3d 125 (2007).....	12
<i>State v. Koepke</i> , 47 Wn. App. 897, 911, 738 P.2d 295 (1987) .....	7
<i>State v. Korum</i> , 157 Wn.2d 614, 141 P.3d 12 (2006).....	7, 12
<i>State v. Kronich</i> , 160 Wn.2d 893, 899, 161 P.3d 982 (2007).....	12
<i>State v. Rehak</i> , 67 Wn. App. 157, 162, 834 P.2d 651, <i>review denied</i> , 120 Wn.2d 1022 (1992).....	6
<i>State v. Rice</i> , 48 Wn. App. 7, 737 P.2d 726 (1987) .....	7, 9
<i>State v. Swan</i> , 114 Wn.2d 613, 658, 700 P.2d 610 (1990) .....	6
<i>State v. Tharp</i> , 27 Wn. App. 198, 206, 616 P.2d 693 (1980), <i>affirmed</i> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	9
<i>State v. Thetford</i> , 109 Wn.2d 392, 397, 745 P.2d 496 (1987) .....	6

### Federal And Other Jurisdictions

<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	10
---	----

### Constitutional

Fifth Amendment.....	10
----------------------	----

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

1. Did the trial court abuse its discretion in admitting statements volunteered by the appellant at the time of his arrest?
2. If the trial court erred, is the error harmless because appellant's statements were admitted without objection through a different witness?

B. STATEMENT OF THE CASE.

1. Procedure.

Appellant was arrested on December 15, 2011, in a Pierce County courtroom for intimidation of a witness and harassment. He was arrested immediately following a court hearing on an unrelated matter.

There were no substantive motions and on June 13, 2012, the case was called for trial. The jury returned guilty verdicts to both counts. The defendant was sentenced on July 27th and timely filed his notice of appeal on August 10, 2012.

2. Facts.

On December 15, 2011, Deputy Huber appeared in the courtroom of the honorable Ronald Culpepper in response to a subpoena issued by deputy prosecutor, Mark Sanchez. 3RP 40.

Deputy Huber, dressed in his assigned uniform, arrived at the courtroom and greeted the prosecutor. 3RP 10-11. The appellant arrived after Deputy Huber. 3RP 11-12. Everyone waited for Mr. McGraw's counsel.

Deputy Huber testified that he was seated in the courtroom when appellant first entered the room. He testified appellant "mumbled something as he walked by." 3RP 12. The deputy did not hear what the appellant said nor did he look at him. *Id.* The deputy watched as the appellant took a seat at counsel table, turned the chair so that he faced the deputy in the gallery, and began staring at him. 3RP 12. Appellant ultimately got up from the chair and walked out of the courtroom walking by Deputy Huber again. 3RP 13. This time the deputy was able to hear what the appellant said. He heard appellant say "Fuck you." 3RP 14. The deputy testified that though appellant's voice was below that of a normal speaking voice, he was able to hear him. 3RP 14-15. Appellant kept walking and just prior to exiting the door, he turned around and made a gun shape with his hand and then "a shooting motion." *Id.*

The appellant did not leave the area after exiting the courtroom. The deputy testified that appellant stayed near the door and peered inside the courtroom through the diamond shaped windows of the door. 3RP 15. Deputy Huber explained how the defendant configured his hand, this time in the motion of a knife going across appellant's throat. *Id.* The appellant was staring directly at the deputy while making this motion. *Id.* The

appellant remained on the hallway side of the door, but began to make comments loud enough to be heard by the deputy in the courtroom. The deputy testified he heard appellant say, "*You are a fucking dead man.*" *Id.* The appellant continued and made several more threatening remarks directed towards the deputy's family, including his wife and children. Appellant said he was going to kill them as well. *Id.* Deputy Huber and Deputy Prosecutor Sanchez spoke about the appellant's behavior and determined court security should be called. 3RP 16.

In describing appellant's actions, the deputy characterized appellant's actions and demeanor as "unusual" and that they caused him concern. 3RP 17. When asked if he took appellant's threats seriously he responded, "absolutely." *Id.* He explained that he has contacted numerous people in the course of his time working in the patrol division, and had encountered people under the influence, many of whom make inappropriate comments. However, he distinguished these comments as different.

Deputy Prosecutor Sanchez testified next. He corroborated the deputy's testimony. He testified he was in the courtroom when the appellant first came in. He said the appellant sat at counsel table, then turned and stared at the deputy. 3RP 41-42. He also testified the appellant's behavior made him uncomfortable such he moved. 3RP 43. After the appellant exited the courtroom he heard him say to the deputy, "You're dead." 3RP 44.

The next witness was Deputy Carter. Deputy Carter was one of three deputies that responded to handle the matter of the appellant's threats to Deputy Huber. Prior to taking the stand, the court heard argument regarding Deputy Carter's testimony, which was going to include statements made by appellant at the time of his arrest in the courtroom. 3RP 65-68. Defense argued appellant's statements were made after his arrest, and were therefore not close in time to the threats, and were therefore prejudicial and didn't "show[] anything of relevance." 3RP 66. The State responded the statements in question were made "less than an hour after the threats...." *Id.* The State also argued the statements made by the defendant at the time of his arrest were admissible to show his state of mind and reflected on the threats in general. *Id.* Defense reiterated its position that the statements were not relevant and were more prejudicial than probative. 3RP 67. The trial court found the statements were relevant because of their close proximity in time. *Id.*

Deputy Carter testified that appellant kept using disparaging comments toward "myself and my partners who arrived...to take him into custody[.]" 3RP 70-71. He also said appellant called the deputies, "pigs,"

and "white devils." 3RP 71. On re-direct, Deputy Carter testified the appellant said, "we should all be killed." 3RP 75, 76. This answer was allowed over appellant's hearsay objection. *Id.* It is the State's understanding these statements are the basis of appellant's challenge.

Deputy Villahermosa testified next for the State. He also responded to the courtroom regarding the report of threats to Deputy Huber. He testified the appellant was belligerent during the course of his arrest. 3RP 79. When asked by the State if appellant made any "threats, general threats, toward law enforcement," the deputy recalled appellant's statement, "we should all be dead." 3RP 79-80. Appellant also made several racially based comments which the deputy construed to be general attacks on their professionalism. *Id.* Appellant did not object to, or in other way challenge this testimony. The State rested following this witness.

Appellant called both the judge and judicial assistant as witnesses who had been in the courtroom during at least part of the events on December 15, 2011. In essence, neither witness recalled hearing or seeing anything of consequence. 3RP 83-85, 87-91, 93-94.

The jury returned guilty verdicts to both charges of intimidation of a witness and harassment.

C. ARGUMENT.

1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ADMITTING STATEMENTS APPELLANT MADE AT THE TIME OF HIS ARREST.
  - a. Appellant's statements were relevant and not unfairly prejudicial.

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. 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).

We will not reverse the trial court's decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant

argues for reversal based on an evidentiary rule not raised at trial. *State v. Korum*, 157 Wn.2d 614, 648, 141 P.3d 13 (2006). A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Koepke*, 47 Wn. App. 897, 911, 738 P.2d 295 (1987), citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

In the present case appellant's objection to Deputy Carter's testimony was lack of relevance and unfairly prejudicial.

#### ER 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

#### ER 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although 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.

Facts that are of consequence include facts that offer direct evidence of an element of a claim or defense. Also included are facts that imply an element of a claim or defense, as well as facts bearing on the credibility or probative value of other evidence. *State v. Rice*, 48 Wn. App. 7, 737 P.2d 726 (1987). The relevancy of evidence will depend upon

the circumstances of each case and the relationship of the facts to the ultimate issue. *Chase v. Beard*, 55 Wn.2d 58, 61, 346 P.2d 315 (1959), *overruled on other grounds*, 100 Wn.2d 729, 675 P.2d 1207 (1984).

In the present case, there were essentially two issues: First, did appellant make the statements alleged? Second, if yes, did he do so with the intent to influence the deputy's testimony and did he knowingly threaten to cause bodily injury to the deputy?

There was direct evidence offered by both Deputy Huber and Deputy Prosecutor Sanchez as to certain statements, (3RP 15, 44), and Deputy Huber alone as to other statements and gestures. 3RP 12, 14, 15. Appellant's derogatory and inappropriate statements at the time of arrest tend to demonstrate his perception and beliefs as they relate to law enforcement officers. The statements clearly tend to "imply an element of a claim," i.e., the defendant made the statements alleged, and that he did so with the intent to try to influence testimony and threaten bodily injury.

Appellant's statements are more relevant in this case than in many others in part because the basis of both charges is defendant's communication. The communication in question was both verbal and nonverbal and within a short period of time, namely about one hour on December 15, 2011. The nature of the crimes charged, and their respective elements, make the appellant's statements at the time of his arrest particularly critical. Appellant's statements were clearly of

consequence to the elements of the crimes charged and as such were relevant and admissible.

The probative value of appellant's words substantially outweigh any possible prejudicial effect. Appellant should not be allowed to express himself in a manner that demonstrates the intent to intimidate or threaten another and then ask those words be suppressed because they tend to paint him in a bad light. The words themselves are relevant to the State proving the requisite elements of the two charges. To preclude the jury from hearing appellant's statements would be to unjustly sanitize the facts and undermine the State's ability to prove its case. Rule 403 is considered an extraordinary remedy, and the burden is on the party seeking to exclude the evidence to show that the probative value is substantially outweighed by the undesirable characteristics. *Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994). Appellant cannot meet his burden and his argument must fail.

Additionally, the trial judge has broad discretion in balancing the probative value of the evidence against its possible prejudicial impact. *State v. Rice*, 48 Wn. App. 11, *State v. Hughes*, 106 Wn.2d 176, 201, 721 P.2d 902 (1986). As noted above, the trial court's decision may only be reversed upon a manifest abuse of discretion. Abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Tharp*, 27 Wn. App. 198, 206, 616 P.2d 693 (1980), *affirmed*, 96 Wn.2d 591, 637 P.2d 961 (1981). Appellant

cannot show the trial court abused its discretion in admitting appellant's statements made at the time of his arrest.

The trial court properly allowed the admission of appellant's statements at arrest in compliance with both ER 401 and 403.

- b. Appellant's statements were spontaneous and volunteered and not the product of interrogation.

The admission of voluntary, noninterrogational statements are not prohibited by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In *Miranda*, the Court stated at 384 U.S. at 444:

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

"Interrogation refers not only to express questioning, but also to any words or actions on the part of the police...that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Miranda*, 384 U.S. at 650. However, volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by [*Miranda*.] *Miranda*, 384 U.S. at 478.

As noted earlier, Deputy Carter said the appellant made the statements in question when they arrived to take appellant into custody. 3RP 71. Deputy Villahermosa was clear in his testimony. The appellant became belligerent in response to being handcuffed. 3RP 79. The testimony of both he and Deputy Carter is unrefuted. The appellant became angry and began making disparaging and threatening comments at the time of arrest. Appellant's statements were not in response to any question posed by any officer, they were merely volunteered by a man displeased about being arrested.

While holding a CrR 3.5 hearing would have been preferable, there was no custodial interrogation, therefore the appellant's rights were not violated. His comments were spontaneous and volunteered and not the product of any interrogation and were therefore properly admitted. <sup>1</sup>

2. IF THE TRIAL COURT ERRED, THE ERROR IS HARMLESS BECAUSE APPELLANT'S STATEMENTS WERE ADMITTED WITHOUT OBJECTION THROUGH A DIFFERENT WITNESS.

- a. Appellant failed to preserve the alleged error.

Deputy Villahermosa testified very briefly after Deputy Carter. He was asked to describe appellant's demeanor. He responded, "At the time that we went to place him into handcuffs he immediately started

---

<sup>1</sup> Statements by appellant are not hearsay. ER 801(d)(2) clearly allows statements by a party-opponent. This objection is without merit. **App. A**

getting belligerent[.]" 3RP 79. He recalled the appellant commenting "all officers should be dead." 3RP 79-80. He also referenced comments that were "racist in nature." 3RP 80. He called us "landowners" and "slave owners." *Id.* There were no objections to the deputy's testimony.

A party may not raise an objection on appeal not properly preserved at trial absent manifest constitutional error. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). "We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid retrial." *State v. Kirman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

Appellate courts have even declined to entertain an issue on appeal where an objection was made at trial, but objected on a ground other than that which was argued on appeal. In *State v. Korum*, 157 Wn.2d 614, 141 P.3d 12 (2006), defense counsel objected to testimony based on lack of foundation. On appeal appellant argued ER 403. The Court held the appellant had not properly preserved the issue for appeal because the sole basis of the objection was foundation, not prejudice. *Id.* at 648. In the present case, appellant did not object to the same testimony he now wishes this Court to disallow. Appellant failed to preserve the issue for appeal and his argument must fail.

D. CONCLUSION.

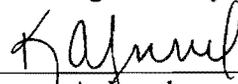
The trial court did not abuse its discretion in admitting appellant's statements he volunteered at the time of his arrest. Given the nature of the charges, his statements were relevant and not unduly prejudicial. Though appellant was in custody at the time the statements were made, it is unrefuted the statements were not made in response to any interrogation or questioning by the officers. The spontaneous statements were not admitted in violation of *Miranda*.

Any error regarding the admission of Deputy Carter's testimony regarding appellant's statements was harmless given the same testimony was admitted from a later witness without objection.

Appellant's claims fail, therefore his request for reversal of his conviction should be denied.

DATED: April 22, 2012

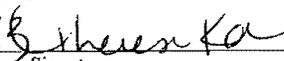
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



\_\_\_\_\_  
Karyne A. Lund  
Deputy Prosecuting Attorney  
WSB # 19614

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.

4-22-12   
Date Signature

## APPENDIX A

**C**

West's Revised Code of Washington Annotated Currentness

Part I Rules of General Application

↖ Washington Rules of Evidence (Er)

↖ Title VIII. Hearsay

→ **RULE 801. DEFINITIONS**

The following definitions apply under this article:

**(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

**(b) Declarant.** A "declarant" is a person who makes a statement.

**(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

**(d) Statements Which Are Not Hearsay.** A statement is not hearsay if--

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

CREDIT(S)

[Amended effective September 1, 1992.]

Current with amendments received through 12/1/12

© 2013 Thomson Reuters.

END OF DOCUMENT

# PIERCE COUNTY PROSECUTOR

## April 22, 2013 - 2:21 PM

### Transmittal Letter

Document Uploaded: 438160-Respondent's Brief.pdf

Case Name: ST. V. MCGRAW

Court of Appeals Case Number: 43816-0

**Is this a Personal Restraint Petition?** Yes  No

#### The document being Filed is:

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

#### Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: [tnichol@co.pierce.wa.us](mailto:tnichol@co.pierce.wa.us)

A copy of this document has been emailed to the following addresses:

[KARSdroit@aol.com](mailto:KARSdroit@aol.com)