

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II
NO. 43727-9-II
APPEAL FROM CLALLAM COUNTY NO. 12-1-00144-7

STATE OF WASHINGTON,

Respondent,

vs.

EDWARD STEINER,

Appellant.

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE ISSUES

ISSUE ONE

When Mr. Steiner objected to the introduction of 404 (b) evidence only because he believed it was not relevant, has Mr. Steiner's objection preserved the issue of the evidence's alleged prejudice for appeal?

ISSUE TWO

If this matter has been preserved for appeal, has Mr. Steiner showed the trial court erred when it admitted the threats to the officer to show his state of mind?

STATEMENT OF THE CASE

On May 9, 2012, Edward J. Steiner was charged with felony harassment because of threats to kill (CP 68; RP 19). On July 9, 2012, the first day of trial (RP 19), the trial court conducted a 3.5 hearing. Prior to receiving testimony, the parties agreed that Mr. Steiner had not been mirandized (RP 51), but that none of the statements he made had been in response to questioning (RP 21). Officer Leroux, Port Angeles Police Department (RP 38), testified he and other officers were dispatched at 5:09 p.m. on May 8, 2012 (RP 38). He arrived approximately five minutes later (RP 39) and made contact with Mr. Steiner approximately ten minutes after arriving (RP 40). Mr. Steiner would not answer the door and was yelling and swearing at the officers (RP 40). Mr. Steiner told them to talk to him "through the comp system"¹ (RP 40). Two other responding officers remained at Mr. Steiner's door while Officer Leroux left to obtain a search warrant (RP 40). When

¹ This is probably a reference to an intercom system.

Officer Leroux returned, Mr. Steiner had exited the apartment (RP 41). When Mr. Steiner was informed about why he was being arrested, he admitted that his behavior had been “kind of rude” (RP 41-2). Mr. Steiner was placed in Officer Leroux’s patrol vehicle to transport to jail (RP 42). Officer Leroux testified that Mr. Steiner was belligerent and called the officer a “dumb ass.” (RP 42). Mr. Steiner then said something to the effect of “you’re lucky I don’t kill you” and then made another threat that was not correctly transcribed (RP 43).

For 3.5 purposes, the trial court ruled that all of Mr. Steiner’s statements were admissible (RP 53). The State requested that the trial court permit officers to testify to Mr. Steiner’s demeanor during the incident, calling his behavior “an ongoing course of provocative conduct. We argue it is relevant and should be admissible” (RP 54). Mr. Steiner disagreed, stating:

“Well, your Honor, I obviously disagree. As far as the statements that were made to the officer after Mr. Steiner was placed under arrest. Um, we have some estimates

but they could be as much as 30 minutes later. I think that they are far removed from the time. If there is any emotional impact from the actual alleged incident, I think it would have expired by then.” (RP 54).

Mr. Steiner then referred to his motion in limine as a basis to exclude other evidence obtained while he was still at his residence (RP 54-5).

The trial court then conducted a 404 (b) and *res gestae* analysis (RP 55). The court defined *res gestae* as “conduct [that] was part of the same transaction” (RP 55). The evidence “has to be connected with time, place, circumstances, and woven to show – to support the crime that’s been charged” (RP 55). The court then ruled the statements and demeanor with the officers were relevant “because it tends to support the State’s theory that the Defendant acted in an aggressive manner and threatening manner towards the alleged victim in this case(RP 56). It also “adds some relevancy to show his state of mind which the state of mind is certainly relevant under the definition of threat, what is a true threat from the perspective of

the individual that's speaking ...(RP 56). The court found it was connected to the incident, citing to the short period of time involved (RP 56). The court also found the behavior in each incident "virtually identical" (RP 56). The behavior is "also circumstantial evidence that the behavior that he displayed towards the officer was the same that he exhibited towards the alleged victims minutes earlier" (RP 57). The court held that the later demeanor and threats were an "inseparable part of the crime" and permitted their introduction into the trial (RP 57).

At trial, Officer Leroux testified as follows:

[F]irst he called me dumb ass, then he said something to the effect of you're lucky I don't kill you, and then something to the effect of you know what I'm going to do to you, I'm going to kill you. (RP 112).

When he was asked whether he thought Mr. Steiner was going to carry out those threats, he replied "not at that time" because he was handcuffed and had no access to a weapon (RP 112). There was no objection.

The jury convicted Mr. Steiner of harassment and found

him not guilty of felony harassment, threats to kill (CP 18, 19).

This appeal of the lesser conviction followed.

ARGUMENT

ISSUE ONE

When Mr. Steiner objected to the introduction of 404 (b) evidence only because he believed it was not relevant, has Mr. Steiner's objection preserved the issue of the evidence's alleged prejudice for appeal?

RESPONSE

Mr. Steiner's objection to introduction of the threats made to Officer Leroux did not preserve the issue of prejudice for appeal because the objection was only that the evidence was not relevant.

STANDARD OF REVIEW

A party may not raise an objection on appeal not properly preserved at trial absent a manifest constitutional error. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009).

Errors raised for the first time are not generally reviewable. RAP 2.5 (a); *State v. Robinson*, 164 Wn.App. 392, 264 P.3d 284 (2011). However, RAP 2.5 (a)(3) permits a defendant to raise an issue for the first time on appeal if the

alleged error is a manifest error affecting a constitutional right.

ANALYSIS

Mr. Steiner alleges the trial court erred when it admitted statements he made to Officer Leroux. At trial, counsel only responded that it disagreed with the State's argument that the evidence is relevant. Mr. Steiner stated the evidence is not relevant because of the time that had expired between the incident and the threats to the officer. He referred to his motion in limine (CP 62) only when speaking about the conduct of Mr. Steiner at the apartment.

State v. Powell, id., at 82-3, 206 P.3d 321, is controlling. It held that a party waives an argument not addressed to the trial court because it denies the court an opportunity to correct any error and avoid a retrial. Mr. Steiner did not preserve the issue about whether the admission of the threats to the officer was prejudicial. His argument to the trial court was that the evidence was not relevant. Now, on appeal, he has attempted to argue the admitted testimony was prejudicial. An objection

based on relevance is not sufficient to preserve an argument about whether 404 (b) evidence was improperly admitted. *State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007).

An issue not raised below cannot be raised on appeal simply because appellate counsel can identify a constitutional issue not litigated below. *State v. Kirkpatrick*, 160 Wn.2d 873, 879, 161 P.3d 990 (2007). An error of constitutional magnitude can be raised for the first time on appeal, but (1) the error itself must be of constitutional magnitude, and (2) the error must be manifest, meaning it must cause actual prejudice, as seen from a review of the record. *State v. Fenwick*, 164 Wn.2d 392, 399-400, 264 P.3d 284 (2011). Failure to preserve an alleged evidentiary error under 404 (b) is not of constitutional magnitude and cannot be raised for the first time on appeal. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). This Court should dismiss the appeal because Mr. Steiner did not preserve the alleged error and is raising the issue of prejudice for the first time on appeal.

ISSUE TWO

If this matter has been preserved for appeal, has Mr. Steiner showed the trial court erred when it admitted the threats to the officer to show his state of mind?

RESPONSE

The trial court properly addressed why the evidence was admissible as relevant state of mind evidence. Even if there had been an appropriate objection, the trial court did not abuse its discretion. In addition, Mr. Steiner cannot show the evidence materially affected the trial's outcome.

STANDARD OF REVIEW

An appellate court reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Briejer*, ___ Wn.App. ___, 289 P.3d 698 (2012). An evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404 (b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997).

ANALYSIS

The trial court did not commit error. *State v. Briejer*,

supra, points out the risk of error when a trial court utilizes *res gestae* as a basis to admit evidence without also looking at whether the evidence is admissible for a purpose set out in ER 404 (b). In this case, the trial court analyzed the testimony of the police officer under both tests. First, the trial court decided the evidence was admissible as *res gestae* evidence because it was part of the same transaction (RP 55). Then, the trial court decided the evidence was admissible to show Mr. Steiner's state of mind, which it termed an element of harassment (RP 56).

In *State v. Powell, supra*, a case heavily relied on by Mr. Steiner, the issue was whether the trial court erred when it admitted evidence of the defendant's state of mind "at the time of the alleged offense." *Powell*, 166 Wn.2d at 81, 206 P.3d 321. *Powell* held a trial court may admit ER 404 (b) evidence to prove the defendant's state of mind where the misconduct focuses on the defendant's mental state at the time of the alleged offense. Mr. Powell had ingested methamphetamine

shortly before he attempted to enter the victim's residence. The drug use showed Mr. Powell's state of mind.

Here, the State was required to prove that Mr. Steiner knowingly threatened to cause bodily injury or maliciously do any act intended to substantially harm another person. WPIC 36.06. Mr. Steiner's intent, his state of mind, was relevant to the State's burden of proof. Like *Powell*, the question was whether Mr. Steiner "intended to just go over and talk...or whether he intended to commit some other crime." *Powell*, 166 Wn.2d at 82, 206 P.3d 321.

Admission of "state of mind" evidence was also held permissible in *State v. J.C. Johnson*, ___ Wn.App. ___, 289 P.3d 662 (2012). Mr. J.C. Johnson had been charged with felony harassment, among other things. The trial court permitted the state to present evidence of prior mistreatment of the victim by this defendant. The reviewing court held that the trial court had not abused its discretion because "Washington courts allow evidence of prior misconduct to show that the

victim's fear was reasonable." *J.C. Johnson*, slip op. No. 66624-0-1 at 8 (Wn.App. 2012). In this case, the evidence of other threats during the same incident was admissible to show that the victim's fear was reasonable. The trial court in Mr. Steiner's case correctly addressed the admissibility of the 404 (b) evidence.

Moreover, Mr. Steiner cannot show any prejudice arising from the admission of the threats to the police officer. If 404 (b) evidence is erroneously admitted, the issue is whether, within reasonable probabilities, the outcome of the trial would have been different. *Jackson*, 102 Wn.2d at 695, 689 P.2d 76. The jury was obviously not swayed by the evidence of threats made to the officer because it did not find Mr. Steiner guilty of felony harassment. The jury found Mr. Steiner guilty only of the lesser crime of harassment as a gross misdemeanor.

Mr. Steiner argues that the testimony of Officer Leroux made it likely the jury found him guilty because it viewed him as having a highly combative and volatile demeanor.

Appellant's Brief, page 10. However, "likely" is not the test; Mr. Steiner must show, within reasonable probabilities, the outcome of the trial would have been different. That the jury found him not guilty of felony harassment precludes any such proof.

Additionally, other evidence firmly established that Mr. Steiner threatened the victims in a manner that provided substantial evidence of his guilt. The victim's testimony was clear, their explanation about what occurred was witnessed by an independent witness (who did not hear the threats to kill) and was supported by the physical evidence at the scene (Mr. Steiner had torn his window screen off to get to the victims). There was no error.

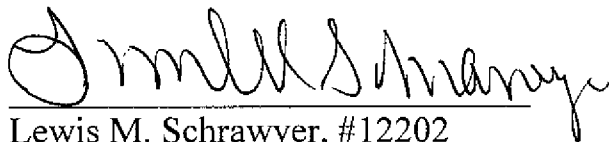
CONCLUSION

There is no question Mr. Steiner's counsel at trial did not object to the admissibility of the threat evidence on the basis that he believed the evidence's prejudice outweighed any probative value. There is also no question that Mr. Steiner's

counsel on appeal is attempting to bootstrap an evidentiary question to a constitutional issue. There is only an evidentiary issue that cannot be raised to a constitutional issue merely because trial counsel did not raise it. There is nothing that supports a decision that the trial court abused its discretion. This court should affirm Mr. Steiner's conviction.

Respectfully submitted this 15th day of February, 2013.

DEBORAH KELLY, Prosecutor

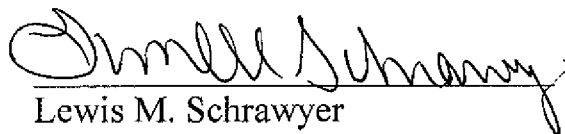


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CERTIFICATE OF DELIVERY

Lewis M. Schrawyer, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to ptiller@tillerlaw.com on 2/15/2013.

DEBORAH KELLY, Prosecutor



Lewis M. Schrawyer

CLALLAM COUNTY PROSECUTOR

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