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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

AHMIN SMITH, Petitioner

V.

STATE OF WASHINGTON, Respondent

COA No. 31390-5-III

OKANOGAN COUNTY SUPERIOR COURT

No. 121002311

PETITION FOR DISCRETIONARY REVIEW

AHMIN SMITH, Acting pro se as Petitioner

TABLE OF AUTHORITIES

In order as the appear

STATE CASES

- *St. v. Salterelli*
- *St. v. Smith*
- *St. v. Jackson,* 102 Wn. 2d 689, 694, 689 P. 2d 76 (1984)
- *St. v. Hutton,* 7Wn. App. 726, 728, 502 P.2d 1037 (1972).
- *Babich* 68 Wn. App. @446.
- *St. v. Womble,* 93 Wash. App. 599, 604, 969 P. 2d. 1097 (1999).
- *St. Kilburn, 151 Wash. 2d 36, 44, 84 P. 3d 1215 (2004).*
- *St. v. Graffius, 74 Wn. App.* 23, 871 P.2d 1115 (1994).
- *St. v. Olson, (1994) 74 Wash. App. 126, 872 P. 2d 64 RG 125 Wash. 2d. 1001, 886 P. 2d 1133.*
- *St. v. Vandover,* 63 Wn. App. 754, 822 P.2d.
- *St. v. Gonzales, 46, Wn. App. 388, 731 P. 2d 1101 (1986).*
- *State v. Tanle 103 Wn. App. 354 12. P3d. 653 (2000).*
- *St. v. Bar, 123 Wn. App. 373 (2004).*
- *St. v. Valentine, 75 Wash. App.611, 625,879 P.2d.313 (1994),*
- *St. v. Lively, 130 Wash. 2d.1, 921 p.2d. 1035, 1044-49, 65 U.S. L. W.2180 (1996).*
- *Strickland v. Wash, post, at 693-696, 80 L. Ed. 2d 674, 104 S. Ct. 2052.*
- *St. v. Kirkman, 126 Wn. App.97 (2005)*
- *St. v. Crediford, 130 Wn. 2d 747,749, 927. P. 2d 1129 (1996).*
- *St. v. Kramer,* 167 Wn. 2d 668, 701, 940 P.2d 1239 (1997).
- *St. v. Hickan, 135 Wn. 2d 97. 103, 954 P. 2d 900 (1998);*
- *St. v. Stanton, 68 Wn. App. 855, 867, 845. P. 2d 1365 (1993).*
- *St. v. Robich, 149 Wn. 2d 647, 654, 71 P. 3d 638 (2003).*
- *St.v. Gentry, 125* Wash. 2d 570,888 p.2d 1105, 1165 (1995).

- *City of Redmond v. Burkart,* 99Wash. App. 21. 991 P. 2d 417 (2000)
- *St. v. Stephanie Rena Lily Blad, aka Stephanie Rena Davis, Appellant No.* 333-22-8-II Aug. 8, 2006.

FEDERAL CASES

- *United States v. Oaxaca, 233 F3d 1154, 1158 (9th Cir. 2000).*
- *United States v. Park, No. 05-375-SI, 2007 WL 152173, @*8-9 (N.D. Cal. 2007).*
- *United States v. Ramos-Oseguera, 120 F.3d 1028. 1035-36 (9th Cir.1997);*
- *United States v. Johnson, 936 F.2d 1082, 1084 (9th Cir. (1991);*
- *United States v. Wanless, 882 F.2d 1459, 1463-64 (9th Cir. 1987).*
- *U. S. v. Endicott, 803 F. 2d 506.*
- *Chapman v. California, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed 705 (1967);*
- *Jackson v. Virginia, 443 U.S. 307, 316, 99s. Ct. 2781, 61 L.Ed. 2d. 560 (1979).* (RAP) 16.4 (c) (2).
- *United States v. Gonzales, Inc., 412 F. 3d 1102 (9th Cir. 2005)*
- *United States v. Eide, 875 F. 2d 1429, 1434-8 (9th Cir. 1989)*
- *U.S. v. Lyons,* 352 F. Supp. 2d 1231, 1251-52 (M.D. Fla. 2004).
- *Kyles, 514 U.S. @ 437.*
- *U.S. v. Burton* 228 F. 3d 524, 527 (4th Cir. 2000).
- *Frunz v. City of Tacoma,* 468 F.3d 1141, 1145 (9th Cir. 2006).
- *U.S. v. Reid, 226 F. 3d 1020 (9th Cir.)*
- *Hervey v. Estes, 65 F. 3d 784, 789-91 (9th Cir. 1995)*

- *Alaska, 415 U.S.308, 39 L. Ed. 2d 347, 94 S.Ct. 1105 (1974),*
- *Smith v. Illinois, 390 U. S. 129, 131, 19L. Ed. 2d 956, 88 S. Cl. 748 (1968).*
- *Brookhart v. Janis, 384 U.S. 1, 3, 16 L. Ed 314, 86 S. Ct. 1246 (1966).*
- *Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000)*
- *Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).*
- *Blakely v. Wash, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed 2d 403 (2004).*
- *Winship, 397 U.S. 358, 364, 90 S. Ct. 1068. 25 L. Ed. 2d 368 (1970);*
- *Jackson v. Virginia, 443 U. S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d. 560 (1979).*
- *U.S. v. Salerno, 481 U. S. 739, 746 (1987).*
- *Mattews v. Eldridge, 424 U.S. 319 (1976).*

A. Identity of petitioner:

Ahmin Smith, Asks this Court to accept review of all the decision designated in part B of this motion.

B. Decision:

The Court of Appeals Division III took final action in this matter December 18, 2014, affirming Mr. Smith's convictions of four counts of felony harassment.

C. Issues Presented For Review:

Issue 1: Whether the search of Idris Smith's cell phone was constitutional. Washington Constitution article I section 7, and the 4th Amendment.

The order to retrieve Ahmin Smith's mobile phone is dated 11-26-12. Ahmin Smith's apprehension was 8-13-12. Approximately a (107) days difference, furthermore the State did not retrieve Ahmin Smith's mobile phone and instead was given Idris Smith's mobile phone by accuser Miller-Smith. There is no physical or temporal proximity link to the illegal search of Idris's Smiths cell phone and incident to arrest of Ahmin Smith. Not even constructive possession. Idris Smith's cell phone was directly retrieved from Ahmin's Smith's separated wife Miller-Smith. RP (259). "Third party consent that stems from prior government illegality is not valid." *United States v. Oaxaca, 233 F3d 1154, 1158 (9th Cir. 2000).*

"It appears from the direct or cross-examination of the States witnesses that the evidence was obtained by unlawful search and seizure, it is the duty of trial court upon motion to exclude it." *State v. Michaels, 60 Wn. 2d 638, 374 P. 2d.* Newport stated, "He placed phone in evidence." RP (259). "Later that day I pulled it back out and we went through the text." RP (259) and RP (277). "Holding that search of defendants cell phone was not a "search of the person" and so the hour and a half delay caused the search to be invalid as incident to arrest." *United States v. Park, No. 05-375-SI, 2007 WL 152173, @*8-9 (N.D. Cal. 2007).* In *U.S. v. Park*, the Court held that "because the government did not prove that a policy allowing searches of cell phones was in place, nor give any reason why such a search would be necessary, the search of defendant's cell phone was not valid as an inventory search." Mr. Smith put several hand written motions to have the evidence of cell phone, as well as the cell phone suppressed. RP (155-187). The search of Idris Smith's phone was unreasonable. "Evidence obtained through a constitutionally invalid search is inadmissible." *State*

v. Johnson 16 Wn. App. 899,559 P. 2d 1380 RD 89, Wn. 2d 1002 (1977). "State may not use, for its own profit evidence that has been obtained in violation of the law." *St. v. Gunkel, 188 Wash. 528, 534, 63p. 2d 376 (1936).* "The failure of police to correctly follow state law on inventory searches requires suppression of evidence uncovered during the search. *United States v. Ramos-Oseguera, 120 F.3d 1028. 1035-36 (9th Cir.1997); United States v. Johnson, 936 F.2d 1082, 1084 (9th Cir. (1991); United States v. Wanless, 882 F.2d 1459, 1463-64 (9th Cir. 1987).* Idris Smith did not give consent to search mobile phone nor was he served a warrant. Neither Ahmin Smith nor Miller-Smith had authority to give consent. In addition, Ahmin Smith was not in possession of Idris Smith's mobile phone pursuant to arrest, which was being utilized during arrest and post arrest. Mr. Smith raised the fact that there was no physical or temporal proximity link to him and mobile phone in S.A.G. Did the State violate Mr. Smith's constitutional rights to due process and rights to privacy by accessing, examining, photographing and photocopying the contents of Idris Smith's phone without consent or a warrant and using information of Idris Smith's phone to assert blame on Ahmin Smith? Ahmin Smith is the defendant, but is not the owner of the phone utilized to commit offense.

Issue 2: Whether the State violated Mr. Smith's Right to Confrontation Clause

Brady material is evidence both favorable to the accused and material to issue of guilt or punishment; defendant is denied due process if government suppresses Brady material. *U.S.C. A. Const. Amend. 14 U. S. v. Endicott, 803 F. 2d 506.*

Mr. Smith is accused of sending threatening text messages to Miller-Smith via cell phone. Neither Miller-Smith's cell phone, nor cell phone records were provided as discovery, despite Mr. Smith's several verbal and hand written request for full and complete discovery. CP (182-188). Mr. Smith was not given any hard evidence to contest allegation. "A victim's allegations or allegations in general cannot be harmless without "hard evidence" introduced or submitted." *St. v. Kirkman, 126*

Wn. App. 97 (2005). Without Miller-Smith's cell phone and cell phone records it is impossible to determine and confirm Miller-Smith even legitimately owns a cell phone to be able to receive text messages in the State of Washington. The State provided no evidence that confirmed the phone Miller-Smith presented to officer Newport was registered to her. Thus, the state is arguing evidence not in the record which is prohibited. "A violation of the Confrontation Clause requires reversal unless the State can prove the violation is harmless beyond reasonable doubt." *Chapman v. California, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed 705 (1967); St. v. Shafer, 156 Wn. 2d 381, 395, 128 P. 3d 87 (2006).* The State presented no evidence that validated allegation. Therefore, the jury's decision rest on assumption. "The admission or exclusion of evidence lies within the sound discretion of the trial court and the court of appeals will reverse a ruling for Manifest Abuse of discretion." *St.v. Clark, 78 Wn. App. 471, 477, 898 P.2d. 854 (1995).* "Trial court abuses its discretion when it bases its decisions on untenable or unreasonable grounds." *St. v. Partee, 141 Wn. App. 355, 361,170 p. 3d 60 (2007).* Did the State violate Confrontation Clause and due process by not providing Miller-Smith's phone and cell phone records in discovery?

Issue 3: Whether the State violated Due Process Clause of Fourteenth Amendment by failing to prove all necessary Facts of the crime charged.

Element (4). Requires that a threat was made or received in the State of Washington. Neither Miller-Smith's or Ahmin Smith's cell phone or cell phone records were provided in discovery or presented as evidence. Without the material evidence it cannot be determined and confirmed Miller-Smith received a threating text message made by Ahmin Smith in the State of Washington. The creator and the origin of where the text messages were created were not confirmed by affirmative evidence. AT&T (rep.) William Sutor's testimony confirmed mobile phone in question is registered to Idris Smith RP (285). The State provided no GPS record of Idris Smith's mobile phone

for the jury. The State provided no evidence that confirmed and validated a threat was made and received in the State of Washington. RP (285, 287, 294). Without GPS record of Idris Smith's phone when it was in use, it cannot be determined if the State even has jurisdiction to pursue this case.

Mobile phone in question is registered to Idris Smith who resides in New Mexico. RP (285). "A conviction based on insufficient evidence contravenes the Due Process Clause of the 14th Amendment and thus results in unlawful restraint." *Jackson v. Virginia, 443 U.S. 307, 316, 99s. Ct. 2781, 61 L.Ed. 2d. 560 (1979).* (RAP) 16.4 (c) (2). Element (4) cannot be confirmed without this hard evidence. Thus, the jury's decision rest on assumption. "The existence of a fact cannot rest upon guess speculation, or conjecture." *St. v. Hutton, 7Wn. App.726, 728, 502 P.2d 1037 (1972).* "Includes comparisons of booking photographs and finger prints, eyewitness identification, or distinctive personal information." *St. v. Santos, 163Wn. App. @ 784; St. v. Huber, 129 Wn. App. @ 502-03.* "When the prosecution fails to present sufficient evidence on any element, reversal and dismissal of the conviction is required. " *St. v. Hickan, 135 Wn. 2d 97. 103, 954 P. 2d 97. 103, 954 P. 2d 900 (1998); St. v. Stanton, 68 Wn. App. 855, 867, 845. P. 2d 1365 (1993).* Did the State violate Due Process Clause by failing to provide sufficient affirmative evidence to prove requirements of Elements (1-4)? Miller-Smith alleges she stopped receiving messages "within the hour of Ahmin Smith's arrest." RP (370). Ahmin Smith was arrested on 8-13-2012 at 1:30 a.m. without mobile phone. The jury could not confirm Miller-Smith received messages in the State of Washington.

A defendant cannot be said, to have had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an element need not be proved. Failure to instruct on an element of an offense is an error of constitutional magnitude. There is not a scintilla of substantial evidence or evidence in any form proving Ahmin Smith made a text message or voiced a true threat in the State of Washington. Even the allegation/accusation does not meet

the requirement of Element (4) "he 'sent me' threatening text messages." The messenger cannot be presumed to be the maker. In this case it has not been proven by fact that Ahmin Smith was the messenger or the maker by affirmative evidence. Ahmin Smith did not possess mobile phone. "Yeah. No proof."

Issue 4: Whether Officer Newport violated (18 U.S.C. §§ 2510-25-22). RP (247-248).

Officer Newport lacked authority to intercept electronic communications. ABA Rules of evidence: Permission to record electronic communication must be approved by written consent. Permission to record electronic communication cannot be obtained thru acquiescence. (RCW 9.73). "Employee accessing another employee's voicemail, forwarding a stored message to the intercepting employee's mailbox and recording the message constitutes interception" under the Wiretap Act, 18 U.S.C. §§ 2510-25-22 rather than the lesser offense of "access." See: *United States v. Gonzales, Inc., 412 F. 3d 1102 (9th Cir. 2005)* (suppressing wiretap evidence under Title III because agents failed to provide a full and complete statement that traditional investigative technique had failed or that they were unlikely to succeed or dangerous). *United States v. Eide, 875 F. 2d 1429, 1434-8 (9th Cir. 1989)* (Veterans Administration drug records should have been suppressed because of applicable confidentiality statue). Id.Washington's privacy act, chapter 9.73 RCW, which prohibits anyone not operating under a court order from intercepting or recording certain private communications without the consent of all parties, is one of the most restrictive surveillance laws ever promulgated. *State v. Roden*, No. 87669-0, slip op. at 3 (Wash. Feb. 27, 2014) (citing *State v. Faford*, 128 Wn.2d 476, 481, 910 P.2d 447 (1996)). "In balancing the legitimate needs of law enforcement to obtain information in criminal investigations against the privacy interests of individuals, the Washington [privacy act], unlike similar statutes in· ... other states, tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without

a warrant." *State v.Christensen*, 153 Wn.2d 186, 199, 102 P.3d 789 (2004). In fact, "[i]intercepting or recording telephone calls violates the privacy act except under narrow circumstances, and we will generally presume that conversations between two parties are intended to be private." *State v. Modica,* 164 Wn.2d 83, 186 P.3d 1062 (2008). Our legislature used sweeping language to protect personal conversations from intrusion. See RCW 9.73.030(1) (a) (protecting "[p]rivate communication transmitted by telephone, telegraph, radio, or other device" (emphasis added)). Did Officer Newport violate (18 U.S.C. §§ 2510-25-22) and RCW 9.73.030(1)? Had officer Newport adhered to requirements of 9.73 he would have realized Ahmin Smith was not in possession of a mobile phone.

Issue 5: Whether the State violated Mr. Smith's right to Due Process by failing to give instruction on the use of inference. CP (46 Instruction #3).

See: U.S. Constitution Amendment XIV; Constitution article I§3 challenge is of constitutional magnitude that can be reviewed on appeal IV RP 437-46, 449. *St. v. Deal, 128 Wn. 2d 693, 698, 911 P.2d 996 (1996); St. v. Sandoval, 123 Wn. App. 1, 3-4, 94 P. 3d 323 (2004).* See: RAP 2.5 (a) (3) Court reviews a due process challenge to jury instruction De Novo. Sandoval, 123 Wn. App. @ 4. Inferences are generally not favored in criminal law. *E.g., St. v. Cantu, 156 Wn. 2d 819, 826, 132 P. 3d 725 (2006).* Text messages at best proved equivocally and did not render Ahmin Smith made them or had intent to commit a crime. Did the court error by not giving instruction on the use of inference?

Issue 6: Whether Mr. Smith's right to have compulsory process to compel the attendance of witnesses in his own behalf has been denied. Art. 1 Section 22 Rights of Accused Persons.

Mr. Smith requested that his former attorney Emma Paulsen be subpoenaed. RP (126, 491, 493, 499). Mrs. Paulsen's testimony would have changed the outcome of trial. RP (6, 9, 11). Mrs.

Paulsen's testimony would be considered Brady material she would have testified there were other people of interest and that she sought out surveillance footage of Mr. Smith in a casino without mobile phone while the phone was in use. "Whether you are a public official or private citizen or Guantanamo detainee," "the government has an obligation to produce exculpatory evidence so that justice can be done." *U.S. v. Lyons*, 352 F. Supp. 2d 1231, 1251-52 (M.D. Fla. 2004). Was Mr. Smith denied his right to compel the attendance of witnesses in his own behalf and the right to exculpatory evidence?

Issue 7: Whether Trial Court erred by admitting "propensity –evidence" without authentication or conducting balancing test on record before admitting ER (404) (b) evidence.

Text messages, forwards/duplicates were never authenticated. Computer records are treated the same as other business records, but the proponent must show that "the sources of information, method and time of preparation were such as to justify admission." *St. v. Ben-Neth*, 34Wn. App. 600, 603, 663 P.2d 156 (1983). Here, the certification contained boiler plate language, but did not describe the mode of preparation of the attached documents as required by RCW 10.96.030 (2) (d). Reference or inference drawn from the text messages cannot be considered reasonable. Due to the fact there is no testimony, documentation, record to support a valid confirmation as to where, or by what means the text messages were manufactured. The texts were sent to officer Newport as forwards. RP (275). "What I know is that she was sending what she had received to me on my wireless card." Miller-Smith could have simply created messages and forwarded the messages to officer Newport and alleged they were from Ahmin Smith. Miller-Smith also stated she erased some of the text messages. RP (384). Trial court did not conduct balancing test to confirm and validate whether voice communication between Miller-Smith and Ahmin Smith in fact did occur. RP (370). Court did not conduct balancing test. *St. v. Salterelli, St. v. Smith*, "trial court commits error if it does

not undergo this analysis on the record before admitting ER (404) (b) evidence." *St. v. Jackson,* 102 Wn. 2d 689, 694, 689 P. 2d 76 (1984) Admitting ER (404) (b) evidence. Court required trial judges' three part analysis before (404). The State must be able to provide evidence to identify the persons whose voices are heard in telephone calls, and that the recordings are accurate. Propensity evidence jeopardizes the constitutional mandate presumption of innocence until proven guilty. *Federal Rule* 901(b)(5) long been established that if a communication made to or from a disembodied voice is relevant only if it is connected to a particular person, this connection must be proved prior to the admission of any evidence proving the content of the communication. Did trial court error by permitting Miller-Smith to testify about voice communication she alleges took place between herself and Ahmin Smith without providing means to confirm content of communication or Miller-Smith's claim that voice communication actually occurred i.e. audio or corroborating evidence nor balancing test? Providing phone dialing information does not prove or confirm voice communication occurred nor does it validate possession or prove Ahmin Smith made a threating text message in the State of Washington. Miller-Smith stated she did not know whether Ahmin Smith possessed any weapons. Given the distance between Miller-Smith and Ahmin Smith it cannot be reasonable to believe Miller-Smith could confirm Ahmin Smith was in possession of mobile phone, weapons or any object, or that Miller-Smith possessed ability to confirm any activity Ahmin Smith may have or may not have been engaged in, due to the fact the two individuals were nowhere near each other in proximity. Did trial court error by not requiring the state to provide evidence to confirm and validate the means the text messages were created and by whom and that forwards, text messages were authentic? Thus, violating due process requirements.

Issue 8: Whether the State violated Mr. Smith's right to due process by failing to provide complete discovery.

Officer Newport confirmed "39 other messages which are not exhibits, correct?" A) "I guess, yes." RP (275). Miller-Smith could not "recall entire alleged conversation." RP (370). Miller-Smith's testimony presents the fact that she lacked personal knowledge to bring forth a reliable proven fact. Hence, it is a false issue. No, facts are proven by information that a witness does not recall/remember. Miller-Smith did not testify that Mr. Smith allegedly made a true threat only that he allegedly voiced "things similar" to text messages. Miller-Smith did not specify what or who Mr. Smith was to beat up. Not even that Mr. Smith specifically threated her or any one in family. State presented no reliable evidence that substantiated conversation in fact occurred. Miller-Smith was not even sure she called Ahmin Smith's phone. "It was around eight o' clock, I think." RP (371). I think is not verification, but a guess maybe it is or isn't. "The existence of a fact cannot rest upon guess speculation, or conjecture." *St. v. Hutton*, 7Wn. App. 726, 728, 502 P.2d 1037 (1972). RULE ER 602 "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." "Failure to prove the statements in rebuttal that was error." *Babich* 68 Wn. App. @446. "The fact finder may infer but not presume knowledge." *St. v. Womble*, 93 Wash. App. 599, 604, 969 P. 2d. 1097 (1999). Article 1 Section 3 Personal Rights. No, person shall be deprived of life, liberty, or property, without due process of law. See: *Kyles, 514 U.S. @ 437.* See: ABA Model Rule of Professional Conduct 3.8 (d) (2008) "(The prosecutor in a criminal case shall" "make timely discloser to the defense of all evidence or information. Known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information. Known to the prosecutor except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."). "Whether a statement is a true threat or a joke is determined in light of the entire context." *St. Kilburn, 151 Wash. 2d 36, 44, 84 P.*

3d 1215 (2004). Did the prosecution violate due process by failing to provide text messages in complete context or Idris Smith's complete phone records for August 12th and 13th and GPS record? Miller-Smith's cell phone and cell phone records are without question material to this case. Is the prosecutions failure to provide complete discovery a violation of CrR 4.7, ER 401 and Washington State Constitution rights to due process? Should Miller-Smith's testimony have been excluded under rule 602 due to her in ability to recall entire alleged conversation therefore not presenting information in complete context? If individual cannot remember or recall information or "has no idea," then no reasonable reliable facts are presented. RP (371). No, clear proof is rendered. To convict someone on facts that a witness does not know nor has personal knowledge of is nonsensical. The only fact that can be derived from Miller-Smith's testimony is the fact she could not recall the entire alleged conversation she alleges took place between her and Ahmin Smith or that she actually called Ahmin Smith. The jury was forced to make a decision based on an alleged incomplete statement and without any affirmative evidence that the conversation actually occurred.

Issue 9: Whether Mr. Smith was denied his right to refuse consent.

Officer Newport did not identify himself and approached Mr. Smith in the dark. RP (181). Newport stated he approached Mr. Smith and stated, "He needed to speak to him." Mr. Smith stated, "He did not want to talk" entered his home and shut the door. RP (253). Mr. Smith was not read Miranda rights prior to questioning. "Can I ask you some questions? The citizen encountered in this manner has the right to ignore his interrogator and walk away." *U.S. v. Burton* 228 F. 3d 524, 527 (4th Cir. 2000). RP (252) and RP (253). "Where probable cause is lacking for a search warrant, police may conduct a "knock and talk," where they go to an address and attempt to contact the occupant; if he answers, they tell him they are investigating and ask if they can enter and talk to him; if he answers, they tell him they are investigating and ask if they can enter and talk to him; if

the occupant refuses, they leave." *St. v. Graffius, 74 Wn. App.* 23, 871 P.2d 1115 (1994). Mr. Smith informed unidentified officer that he "did not want to talk, went inside and shut the door." RP (181 and 253). Washington State Constitution Section nine right of Accused Person shall not be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense. Was Mr. Smith denied his constitutional right to refuse consent?

Issue 10: Whether Mr. Smith was unlawfully arrested. Washington Constitution article I, section 7, and the 4th Amendment.

Officer Newport stated several times Mr. Smith, "appeared to have a cell phone." Three officers searched Mr. Smith. Ahmin Smith did not have a cell phone or any object in his possession. RP (268 and 251). "Police investigation, which verifies innocuous details, commonly known facts, or predictable events, is insufficient corroboration of tip to establish probable cause." U.S.C. A constitution Amend. 4 west's RCWA Const. Article. 1§7, 98.9 % of Americans have some type of electronic device at/in their home including the homeless.

Prosecution confirmed Ahmin Smith did not have a cell phone. "In fact, in this case, no evidence was seized during the detention and arrest of the defendant." Prosecution brief. (p.15). Officer Newport, stated, "Yeah. There's no proof of that, no."RP (269). When asked if Mr. Smith possessed device sending threatening text messages. Both Mr. Smith's defense counsel stated, "No, evidence or information was gathered as a result of that arrest." "Establishing probable cause must consist of more than mere personal belief." *St. v. Olson, (1994) 74 Wash. App. 126, 872 P. 2d 64 RG 125 Wash. 2d. 1001, 886 P. 2d 1133. RP (251).* Furthermore, there was no new evidence presented after Mr. Smith's arrest to substantiate that he indeed was the actual person responsible for sending the text messages in question. It was a mobile phone any one, from anywhere could have used the phone to commit the offense. Officer Newport observed the text messages sent to Miller-Smith and had

Miller-Smith forward text messages to his laptop computer in his vehicle, (interception), which allowed him to view the result of a crime. This does not permit Officer Newport to conscientiously positively identify Ahmin Smith as the person committing the offense, nor does it place Ahmin Smith at the scene of a crime. "It cannot be presumed that the informant is an eyewitness or is providing first-hand information." *St. v. Vandover*, 63 Wn. App. 754, 822 P.2d. There are no reliable specific facts or circumstances that warranted immediate action against Ahmin Smith. Just (m) ere speculation that force or violence may occur, Mr. Smith demonstrating "peaceable demeanor," no conduct that could be required criminal activity to initiate an investigation.

Did Officer Newport violate Mr. Smith's constitutional right to privacy by entering and forcefully removing Mr. Smith from the sanctity of his home without consent, a warrant or probable cause? RP (181). "Totality of circumstances justified detention at scene for a reasonable time to determine if a crime had been committed, additional invasion of defendant's privacy by handcuffing and transporting him to the police station before probable cause to arrest existed, constituted an illegal arrest." *St. v. Gonzales, 46, Wn. App. 388, 731 P. 2d 1101 (1986).* "In the absence of consent or exigent circumstances the police were constitutionally prohibited from making a warrantless arrest even if probable cause existed to arrest him and an officer's post arrest I.D. of the defendant should have been suppressed under exclusionary rule as the fruit of an illegal arrest." *State v. Tanle 103 Wn. App. 354 12. P3d. 653 (2000).* Officer Newport stated he did not perceive an emergency. RP (183). Did Officer Newport have probable cause to arrest Ahmin Smith? RP (181). It took officers over five hours to contact Ahmin Smith after receiving complaint from accusers who were approximately 100 miles away from Ahmin Smith. "When police suspected a burglary, the fact that the intruders were known to have a personal relationship with the homeowner lessened the need for immediate action."*Frunz v. City of Tacoma*, 468 F.3d 1141, 1145 (9th Cir. 2006). Other circumstances in Frunz also pointed to complete lack of exigency, including the "Fact it took the

police forty minutes to respond." The fact the State argues "No, evidence or information" was gathered from illegal arrest and both Mr. Smith's trial counsel concur. Brings forth the question, why was Ahmin Smith arrested?

Issue 11: Whether trial court erred by permitting prosecution to utilize evidence obtained by illegal conduct.

"Illegally obtained evidence is inadmissible in a government direct case, or otherwise as substantive evidence of guilt." *U.S. v. Reid, 226 F. 3d 1020 (9th Cir.)* (Evidence that is recovered following an illegal entry into a home is inadmissible and must be suppressed). "A police officers testimony regarding verbal and non-verbal impressions of deceptiveness by the defendant during questioning constituted an impermissible opinion as to the defendant's guilt, that constituted a manifest constitutional error that was "not harmless." *St. v. Bar, 123 Wn. App. 373 (2004).* "The deliberately false or reckless inclusion of perception of sight, smell, and sound-given the court's reliance on officer's experience is "unforgiveable." *Hervey v. Estes, 65 F. 3d 784, 789-91 (9th Cir. 1995)* (applying Franks to false statements regarding officers experience and smell of meth lab). Judge Schultheis of the Court Of Appeals (Div.III) characterized such behavior as outrageous police misconduct and in possible violation of the Due Process Clause of the 14th Amendment so as to shock the judicial conscience. *St. v. Valentine, 75 Wash. App.611, 625,879 P.2d.313 (1994), review granted, 128 Wash. 2d. 1001, 907 P.2d. 298 (1995); (See also) St. v. Lively, 130 Wash. 2d.1, 921 p.2d. 1035, 1044-49, 65 U.S. L. W.2180 (1996).* Officers Newport testimony is erroneous and extremely prejudicial and for the Appellate Court or anyone to twist Newport's testimony to state officer Newport actually saw Ahmin Smith with a mobile phone is malpractice and should be reviewed for manufacturing facts and possible perjury. See: Appellate Court decision (p.20). Newport distinctly states there was "no proof"

Ahmin Smith possessed device used to send threatening text messages. A) "Yeah. There's no proof of that, no." RP (269). Ahmin Smith's cell phone and cell phone records were never entered into evidence. The jury saw 92 messages from Idris Smith's phone not Ahmin Smith's phone. See: Appellate court's decision. (p.20).

The search of Idris Smith's phone was illegal also. Did trial court error by permitting Officer Newport to testify giving detail account of his misperception (applying Franks) of Mr. Smith appearing to be texting and use of force to remove Ahmin Smith from his home? RP (251,268). Did the court error by permitting prosecution to use illegally obtained information of Idris Smith's phone to place assertion on Ahmin Smith? Should have Ahmin Smith's person and officers Newport's testimony pertaining to arrest been excluded as Fruit of the poisonous tree also the information of Idris Smith's mobile phone?

Issue 12: Whether Ahmin Smith was denied his sixth Amendment Constitutional right to effective assistance of counsel.

Mr. Smith's trial counsel did not cross-examine Debra McDonald. RP (364). "If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of sixth amendment rights that makes the adversary process itself presumptively unreliable, no specific showing of prejudice was required in *Alaska, 415 U.S.308, 39 L. Ed. 2d 347, 94 S.Ct. 1105 (1974),* because the petitioner had been "denied the right of effective cross-examination" "which would be constitutional error of the 1st magnitude and no amount of showing of want of prejudice would cure it." *T.d. @ 318, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (Smith v. Illinois, 390 U. S. 129, 131, 19L. Ed. 2d 956, 88 S. Cl. 748 (1968). Brookhart v. Janis, 384 U.S. 1, 3, 16 L. Ed 314, 86 S. Ct. 1246 (1966).* "Specific errors and omissions may be the focus of a claim of ineffective assistance as well." See: *Strickland v. Wash, post, at 693-696, 80 L. Ed. 2d 674, 104 S. Ct. 2052.* Was Mr. Smith denied right

to effective assistance of counsel, where counsel failed to make an effort to suppress illegally obtained tainted evidence listed here in motion and did not seek and interview witnesses or cross-examine Debra McDonald RP (364) and failed to object to officer Newport's erroneously prejudicial testimony pertaining to Ahmin Smith appearing to be texting when in fact Ahmin Smith did not have a mobile phone and not demanding the State to provide information validating who (509) 846-3240 number is registered in discovery and complete phone records for Aug. 12th and 13th of Idris Smith's phone? Counsel also failed to argue right to refuse consent and failed to object to the use of Idris Smith's mobile phone to assert guilt on Ahmin Smith. Was counsel ineffective?

Issue 13: Whether Ahmin Smith was denied equal protection of the law.

The equal protection clause of the 14th Amend. To the U.S. Const. provides that "No, State shall...deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause applies to the State and local governments through the 14th Amend. And to the Federal government through the 5th Amend. Reference to this issue can be examined by review of issues listed above and here in motion and by review of the record. Was Ahmin Smith denied equal protection of the laws?

Issue 14: Whether guilty verdict is a result of cumulative error resulting in an unfair trial.

"Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial." U.S. Const. Amend. XIV Const. art. I§3; e.g. *Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000)* (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding). *Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).* Reference to this issue can be

examined by review of the record and issues raised here in motion. Was the conviction of Ahmin Smith a result of cumulative error thus, denying him a fair trial?

Issue 15: Whether guilty verdict is a manifest injustice.

The entire record consists of hearsay pertaining to information of Idris Smith's mobile phone. The State presented no affirmative independent evidence that substantiated a fact, necessary to prove elements of the crime. This case is overwhelmingly lacking in sound evidence. The State presented absolutely no conclusive evidence. None of the States witnesses testified they eye-witnessed Ahmin Smith utilize a mobile phone for any purpose in the State of Washington. The phone in question does not even belong to Ahmin Smith nor was it in Ahmin Smith's possession.

"A victim's allegation or allegations in general alone cannot be harmless without hard evidence introduced or submitted." *St. v. Kirkman, 126 Wn. App.97 (2005).* State presented no hard evidence that validated and confirmed Miller-Smith allegations that she received a threatening text message. It was never confirmed who made threatening text messages or where the text messages originated. "A criminal defendant may only be convicted if the State proves every element of the crime beyond a reasonable doubt." *U.S. Const. Amend. XIV; Const. art. I, §§3, 22; Blakely v. Wash, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed 2d 403 (2004).* Due process requires the State to prove beyond a reasonable doubt all the necessary Facts of the crime charged. U.S. Const. Amend. 14; Const. art.1 § 3: *In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068. 25 L. Ed. 2d 368 (1970); St. v. Crediford, 130 Wn. 2d 747,749, 927. P. 2d 1129 (1996).*

"A conviction based on insufficient evidence contravenes the Due Process Clause of the 14th Amendment and thus results in unlawful restraint." *Jackson v. Virginia, 443 U. S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d. 560 (1979).* (RAP) 16.4 © (2). "The existence of a fact cannot rest upon guess speculation, or conjecture." *St. v. Hutton, 7Wn. App. 726, 728, 502 P. 2d 1037 (1972).* "A court

abuses its discretion when the decision is manifestly unreasonable or is based on untenable ground or reasons." *St. v. Kramer*, 167 Wn. 2d 668, 701, 940 P.2d 1239 (1997). "When the prosecution fails to present sufficient evidence on any element, reversal and dismissal of the conviction is required." *St. v. Hickan, 135 Wn. 2d 97. 103, 954 P. 2d 900 (1998); St. v. Stanton, 68 Wn. App. 855, 867, 845. P. 2d 1365 (1993).* Sutor, William AT&T (rep.) testimony. Does not confirm identity of who made the text messages or where the text messages were made. RP (283-296). "Discretion is abused if decision is manifestly unreasonable or rest on facts unsupported in the record or was reached by applying the wrong legal standard." *St. v. Robich, 149 Wn. 2d 647, 654, 71 P. 3d 638 (2003).* Is guilty verdict a manifest injustice?

D. Statement of the Case:

The due process of the 5th Amend. To the U.S. Const. provides that "No, person shall...be deprived of life, or property, without due process of law." See: *U.S. v. Salerno, 481 U. S. 739, 746 (1987). See: Mattews v. Eldridge, 424 U.S. 319 (1976).* The equal protection clause of the 14th Amend. To the U.S. Const. provides that "No, state shall...deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause applies to the State and local government through the 5th Amend. The State failed to operate within the constraints and requirements of Washington State and United States Constitutions. The convictions of Ahmin Smith were obtained by 'Flagrant disregard of the rules of law by those charged with its enforcement, violations of equal protection Clause. People's homes cannot be invaded nor should they be arrested on false pretenses that they appear to be texting. Reference to this statement can be examined here in motion, in issues stated above and in the record.

If all that is required to obtain a conviction related to reception of threatening text messages is a suspicion or assumption about who may have sent a message. Then

technology has some serious shortcomings where justice and the legal system are concerned. It also seems possible that in ugly break-ups, an embittered ex-partner need simply take possession of someone else's mobile phone, text themselves threats, make false claims about the origins, and a wrongful conviction would ensue. Remember, Ahmin Smith was not in possession of the mobile phone in question. The text messages allegedly did not stop until after Miller-Smith was notified Ahmin Smith was in custody. Seven officers confirmed Ahmin Smith did not have mobile phone the three officers that searched him, prosecution, and two defense counsel. Judge Culp approximately three and half months after illegal arrest during motion hearing 11/27/12 confirmed, "Right now there isn't any evidence against you." RP (70).

It appears the investigation to this case was scant and not taken serious. No, real investigation was conducted. Hacking electronics is a criminal practice using electronics to commit multifarious crimes to include identity theft and impersonation. Cell phones abilities are myriad. Cell phones can alter voice as well as send text messages using a dummy identification number to attach to a text message, so the message created appears to come from a cell phone of, which it in fact did not originate, which, is why an absolute confirmation of where, when and by whom the text messages were made and originated from is imperative to proving element (4).

Failure to provide this information had a direct impact on the case. The jury was forced to assume the text messages were made in Washington State without any evidence to confirm their decision. Therefore, the jury's decision is not supported by evidence supported by facts. This is a manifest error of constitutional magnitude because the jury's decision was brought forth by means of speculation and assumption. The only way the jury could confirm the texts were made in Washington State was

through guess-work. In addition the accusers where found to be in possession of cell phone in question. State did not present accusers cell phones to even validate that they received threatening text messages. Miller-Smith's claims (509) 846-3240 number is hers. State provided no evidence to confirm this claim. Ahmin Smith's cell phone and cell phone records were not introduced as evidence. The State utilized Idris Smith's mobile phone information to place assertion on Ahmin Smith. These are two separate individuals. The jury was clearly misled by prosecutions use of faulty evidence.

There are way too many possibilities to assert blame solely on Ahmin Smith who did not have constructive possession of a mobile phone. "The dissenters contended that the majority have ignored the safeguards of Rules 401 and 403 by permitting the victim's friends and families to seek vengeance and retaliation through state action:" "Disregarded the rules of by allowing the admission of irrelevant, untrustworthy, unreliable and unreasonably prejudicial evidence." *St.v. Gentry, 125* Wash. 2d 570,888 p.2d 1105, 1165 (1995). Ahmin Smith did not have possession of Idris Smith's phone Aug. 12th and 13th. Accusers simply applied sinister meaning to information found in Idris Smith's phone and asserted the information on Ahmin Smith. The state has brought forth no reliable evidence in any form that could confirm and validate the allegations made against Ahmin Smith. The conviction of Ahmin Smith was obtained by simply asserting allegations upon Ahmin Smith. Anyone could be found guilty if all that is necessary is an allegation be brought before a jury and presented as fact without reliable evidence proving it fact. It is easy for someone with ill intent towards another to make false allegations, especially if the allegation comes from a jilted lover bearing a grudge. Miller-Smith claims she called Ahmin Smith between messages. Once again Ahmin Smith's cell phone and cell phone records were not entered into evidence. *City of*

Redmond v. Burkart, 99Wash. App. 21. 991 P. 2d 417 (2000) (1) Statue ambiguous, we apply the rule of lenity, and we interpret the statue in favor of the defendant under statue (1) initiated the telephone call with the intent to harass, intimidate, torment, or embarrass." *St. v. Stephanie Rena Lily Blad, aka Stephanie Rena Davis, Appellant No.* 333-22-8-II Aug. 8, 2006. Ahmin Smith made no attempt to contact accusers.

E. Argument why Review should be accepted:

This case involves "Modern Technology" and should be reviewed with scrutiny. Review should be accepted to prevent rogue government agents or civil servants from conducting "Lawless Witch-Hunts." The repeated instances of deliberate and flagrant misconduct justify dismissal of the indictment. "It simply is wrong for government personnel to act as they have done here. This type of conduct cannot and must not be condoned; in fact it must be strongly condemned." Repeated instances of deliberate and flagrant misconduct." That has gravely jeopardized the "integrity of the judicial system." Review should be accepted to prevent Anarchy and protect the American People. What good is the constitution if it does not protect the people!!

F. Conclusion:

This court should accept review for the reasons indicated in Part E and reverse and dismiss Mr. Smith's convictions. In the alternative, he asks for a new trial.

Date: 12th day of January, 2015

Respectfully submitted,

AHMIN Raschaad Smith

217 E. Poe St.

Roswell, New Mexico 88203

IN THE APPELLATE COURT OF WASHINGTON STATE

DIV. III IN AND FOR OKANOGON COUNTY

THE STATE OF WASHINGTON	)	No. 313905 DIV. III
Plaintiff	)	Okanogan County Superior Court
	)	No. 12-1-00231-1
V.	)	DECLARATION OF SERVICE BY MAIL
AHMIN RASCHAAD SMITH	)	
Defendant		

I, AHMIN SMITH, the defendant in the above entitled cause, do hereby declare that I have served the following documents:

Petition For Review

PARTIES SERVED:

HON. RENEE S. TOWNSLEY
Clerk/Administrator
500 N. Cedar St. Spokane, WA 99201-1905

Karl F. Sloan
Okanogan County Prosecuting Attorney
P.O. Box 1130
Okanogan, WA 98840-1130

I deposited the aforementioned documents in the U.S. Postal Service by way of process as Legal Mail through Roswell Post Office. Roswell Post Office 415 N. Pennsylvania Ave. Roswell, NM 88201.

Dated this 12th day of January, 2015.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Ahmin R. Smith

FILED
OCTOBER 16, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. AHMIN R. SMITH, Appellant.	)	No. 31390-5-III UNPUBLISHED OPINION

FEARING, J. — New technology creates new ways to terrorize. Text messaging is one such technology.

A jury convicted Ahmin Smith of four counts of felony harassment with domestic violence enhancements for threatening to kill his wife, Crystal Miller-Smith, and the wife's father, mother, and stepmother. Smith asks this court to reverse his convictions and dismiss the charges, contending the evidence supporting his convictions is insufficient. In the alternative, he asks for a new trial arguing that impermissible testimony and inadmissible evidence improperly swayed the jury. Finally, Smith assigns error to the trial court expressing concern for his competency but failing to hold a competency hearing. We affirm Ahmin Smith's convictions.

FACTS

Ahmin Smith's convictions stem from a slew of text messages he sent his estranged wife, Crystal Miller-Smith, during the evening of August 12, 2012.

In late July 2012, Crystal Miller-Smith moved out of the home she shared with her husband, Ahmin Smith, because she feared for her and her child's safety. Over the next weeks, Smith attempted to reconcile with Miller-Smith, vacillating between seeking forgiveness and threatening to "beat her ass." Report of Proceedings (RP) at 381. As the weeks passed, Smith increasingly sent text messages to Miller-Smith's iPhone, so frequent that his messages filled her inbox. His textative behavior required her to delete messages to free space for new ones and led her to mute her phone's ringer when she retired to bed.

In the evening of August 12, Crystal Miller-Smith prepared, at her aunt's house, for a Native American naming ceremony. She quieted the ringer to her phone. When she checked her phone around 7:00 p.m., she discovered more than 20 new messages from Ahmin Smith. The messages shocked and upset her. A sample of the unedited text messages she received include:

- "If i dont c u I will kill your dad quick test it he dead fuck." Ex. 1.
- "Tst it I am going 2 kill your dad & mom n one night probably kill your grandma 2 hlp her dont fuck with me" Ex. 3.
- "U have 24hrs then bodies will drop dad first I will kill him thn grandma well let deb live so she can tell." Ex. 7.

- "Fuck it on my way." Ex. 8.
- "Hours getting short aunty dwn street bout 2 murk your whole fam 4 one I will kill i need exaple I will." Ex. 10.
- "I kill literally." Ex. 17.
- "Bout 2 murk hin & wife Im going 2 kill dog & spread entern" Ex. 19.
- "Bye 10 am your whole family will b dead im leaving." Ex. 20.
- "I promise leaving now will enjoy cutting throat." Ex. 21.
- "Bout 2 hear momy & daddies last words they will suffer & beg me 2 end it lol." Ex. 22.
- "I am? Litrally going 2 tie him down & peel his face back & make deb watch." Ex. 24.
- "I will skin your mom n front of u will eat that bitch 2." Ex. 35.
- "Iam going 2 kill your dad & mom your lkife's gone." Ex. 37.
- "Im leaviing please stop your husnand bout 2 wreck evey thibg." Ex. 38.
- "Going 2 'murk u for hurting me u brUoght.this" Ex. 44.
- "I love u butt will kill 2 get 2 u literally." Ex. 50.

  "Guaranteed =)" Ex. 53.

(Spelling and grammar errors in original.) Ahmin Smith used the word "murk" three times in his messages. According to the Urban Dictionary, "murk" means "to physically beat someone so severely, they end up dying from their injuries. To beat the living shit outta [sic] someone. To seriously whoop somebodys [sic] ass." Finesse, *Murk*, URBAN DICTIONARY (May 6, 2004), http://www.urbandictionary.com/define.php?term=murk.

Crystal Miller-Smith, being disturbed by the messages, called Ahmin Smith to discern his mental state. During the call, he yelled and threatened to beat her. Although

Miller-Smith testified that she recognized his voice, Smith contends he did not speak to her.

After the phone call, Crystal Miller-Smith showed the text messages to her father, Mark Miller. The messages shocked her father and caused him to fear for his safety. Crystal Miller-Smith also showed the messages to her mother, Deborah McDonald, and stepmother, Deb Miller. Both mothers were shocked, scared, and upset by the threats because they believed "it was very possible" Ahmin Smith could carry out the threats. RP at 363. Out of fear for his family's safety, Mark Miller turned on the exterior lights to his home and set out game cameras. Game cameras are remote cameras activated by heat sensing motion detectors. Crystal Miller-Smith called law enforcement. Okanogan County Sheriff Deputy Kevin Newport met Miller-Smith at her father's residence in Pateros, where he viewed some of the text messages from Ahmin Smith. Deputy Newport asked Miller-Smith to forward any additional messages she received. Miller-Smith sent Newport a total of 92 messages.

Deputy Kevin Newport decided to arrest Ahmin Smith for felony harassment. Deputy Newport drove to the Coulee Dam police station to retrieve an officer to assist him. When the officers arrived at Smith's home around 1:30 a.m., they parked a few houses down and walked to Smith's home. As they approached, Deputy Newport observed Smith outside the home, texting on a phone. Newport quietly walked up the driveway, when Smith stood. Newport yelled that he needed to speak to Smith. Smith

turned and quickly moved toward the home's front door. Newport told him he was under arrest for felony harassment. Smith said, "I don't want to talk to you," went inside his residence, and closed the door. RP at 253. Deputy Newport opened the door, grabbed Smith's wrist, pulled him outside, and handcuffed him. Newport again advised Smith he was under arrest for felony harassment and uttered the *Miranda* warnings.

Shortly after arresting Ahmin Smith, Deputy Kevin Newport notified Crystal Miller-Smith of the arrest. Miller-Smith received no further text messages after Newport arrested Smith.

Deputy Kevin Newport placed Ahmin Smith in the former's patrol car. After having been read his rights, Smith yelled at Deputy Newport, claimed Newport violated his rights, stated he did not wish to speak with Newport, and directed Newport to take him to jail. Deputy Newport never asked Smith any questions. During the journey, Smith complained about Newport's driving, told Newport he slipped his handcuffs, threatened to assault Newport if he were outside the car, and repeatedly spoke of suing Newport and the Okanogan Sheriff's Department for false arrest.

PROCEDURE

On August 16, 2012, the State of Washington charged Ahmin Smith with three counts of harassment with threats to kill, with domestic violence enhancements, in violation of RCW 9A.46.020. The State alleged that Smith knowingly threatened to kill Mark Miller, Deborah McDonald, and Crystal Miller-Smith, that each victim was a

family member, and that each victim was reasonably fearful because of the threat. On January 3, 2013, the State amended its information to add another count of harassment with threats to kill, domestic violence, for his threats to Debra Miller. During the course of the prosecution, Ahmin Smith repeatedly and vociferously accused law enforcement, the prosecutor, the judge, and his attorneys with misconduct.

Ahmin Smith, on his own, brought motions to suppress evidence, to dismiss the charges, to remove his counsel, for full discovery, for the trial court to take notice of ineffective counsel, for a list of all equipment an Okanogan County sheriff deputy must carry, to compel transcription of hearings, and to direct the court to follow the constitution. The trial court denied the motions.

Ahmin Smith repeatedly reserved his right to a suppression hearing. Ahmin Smith's first defense counsel, Emma Paulsen, declined to seek a suppression hearing because, regardless of the means by which the sheriff deputies apprehended Smith, the deputies gathered no evidence as a result of the arrest. On October 24, 2012, the trial court removed Emma Paulsen as Smith's counsel, at Smith's request when communications between the two deteriorated.

Ahmin Smith's second defense attorney, Michael Lynch, also concluded Smith lacked grounds for a suppression hearing. Lynch declared a hearing was unnecessary because Smith did not answer any questions from law enforcement officers. Lynch stated:

> MR. LYNCH: Your Honor, there were statements that were made to the effect of, "I'm going to sue the police." There were statements made attributed to Mr. Smith at the time of his detention saying that he closed the door, meaning the door to the police vehicle, he wanted his attorney. There's an allegation that on the trip over from Coulee Dam to—Okanogan, that Mr. Smith advised—"he had been able to slip his hands out of his handcuffs and was making comments that if I stopped the car to check he would assault me."
>
> These are not statements attributed to Mr. Smith that were in response to any questions. And I don't know if they would be germane, relevant, to the trial or not. But—a 3.5 hearing requires the court to analyze whether the defendant was in custody, and if he was in custody was he advised of his rights. The police report indicates that he was advised of his rights upon his arrest. The statements are attributed to him on the trip over.
>
> And finally the court has to determine if the statements attributed to the defendant were made in response to police questioning. My review of the discovery material indicates that there are no 3.5 issues under that analysis.

RP at 66-67.

On January 2, 2013, the day before trial, Ahmin Smith presented the court with a letter he asserted came from the Washington State Bar Association (WSBA). Smith asserted the letter vindicated his belief that police officers recorded their encounter with him and engaged in misconduct. Throughout the proceedings, Smith frequently insisted that law enforcement recorded his encounter and that the State hid the recordings from him. Contrary to Smith's belief, the letter came from Emma Paulsen, the counsel he dismissed. In the letter, counsel responds to the grievance Smith filed against her with the WSBA, a copy of which the WSBA sent Smith. Upon learning the true nature of the letter the court engaged in a colloquy with Smith:

COURT: I am on the verge of considering sending Mr. Smith to Eastern State Hospital for a competency evaluation.

DEFENDANT: For wanting—for wanting my rights?

THE COURT: No.

DEFENDANT: My constitutional rights?

THE COURT: I am concerned that you have an inability to hear and understand and perceive the nature of these proceedings,—

DEFENDANT: (Inaudible)—

THE COURT: —and that you fully appreciate what's going on.

DEFENDANT: Oh, I do appreciate—.

THE COURT: All you do is—

DEFENDANT: (Inaudible).

THE COURT: All you do is interrupt, you do not listen. And I'm unclear, unsure, I'm concerned about whether or not you have the ability to listen and comprehend. Because your practice, Mr. Smith, is simply to interrupt, continually, and not to accept or listen to anything that the court is trying to tell you.

This is not—and I repeat—this is not indication from the Washington State Bar Association about evidence existing or not existing. It just isn't. Period.

DEFENDANT: Well, how (inaudible) read it?

THE COURT: You're right; I haven't read it, because—

DEFENDANT: (Inaudible)—

THE COURT: —it's not correspondence from them.

DEFENDANT: (Inaudible) this is talking about my case.

THE COURT: Once again you're expressing indication that you don't understand, you're not willing to comprehend.

DEFENDANT: (Inaudible) understand. I understand (inaudible) this evidence existed I've been asking for for the past (inaudible)—

THE COURT: Does the state have any position? I mean, the court has authority to consider a 10.77 motion on its own.

MR. BOZARTH: Your Honor, I am not in a position to evaluate whether he's competent or just obstinate, to tell you the truth. I'll leave it to the court to—to make that decision. Or Mr. Lynch—

THE COURT: Okay.

MR. BOZARTH: He's probably in a better position than I am.

THE COURT: All right.

Well, the other way to approach it, I suppose, is simply to—Mr. Smith's made his record about this evidence. I know of nothing to indicate

that in fact it does exist. Mr. Lynch, I guess I'll leave it to you to deal with during trial.

MR. LYNCH: I understand, your Honor. And I should tell the court that— If it's a question of Mr. Smith's being unable to understand where he is, what the nature of the proceedings are,—there's a very low threshold that Eastern State applies towards issues of competency. Mr. Smith hasn't demonstrated any lack of ability regarding appreciate of where he is and what's going on. He has strong opinions about things, perhaps to the detriment of his ability to understand another's point of view. But I'm not certain that that rises to the level of incompetence. I wouldn't object if the state—if the court brought it on its own motion, but—I don't feel compelled at this point to make such a motion.

RP at 137-40.

Shortly thereafter, on January 2, the trial court renewed its concern:

THE COURT: Okay.

I'm going to renew my concern about Mr. Smith's inability to comprehend, or inability and unwillingness to accept what's going on. And between now and tomorrow morning I'm going to take under advisement my own—my own concern. And counsel, you should be fully prepared; this case may not go to trial tomorrow. And if it doesn't it will be because Mr. Smith's on his way to Eastern.

I'm just not going to continue this. This is—We're not making any progress. We're not accomplishing anything. We're talking about things which we shouldn't even be talking about. Or that we've already talked about multiple times. And the reason that it's being discussed again is because of, once again, either an unwillingness or an inability to comprehend and understand what's going on.

At a readiness calendar there are basically two questions: Is the state ready, is the defense ready. Yes, or no, and that's it. We've spent a half hour talking about things which we should ordinarily have talked about tomorrow, and we've accomplished nothing.

So, I'm leaving the case set for trial.

RP at 145.

Despite defense counsels' conclusion that no hearing was needed, the trial court held a CrR 3.5 confession hearing the first day of the trial. Deputy Kevin Newport testified during the hearing. The trial court found that the statements made by Ahmin Smith to Sheriff Deputy Newport were spontaneous, unsolicited, and voluntary. Accordingly, the trial court ruled that any statements made by Smith would be admissible.

On the first day of trial, the trial court also considered a motion by Ahmin Smith to serve as co-counsel. In denying the motion, the court said:

> You are competent to stand trial. You—. I'm convinced that you understand what's going on, but, frankly, I think that—whether or not you're just trying to make this more difficult, or if you're not wanting to listen, I don't know what your intentions are. But it simply flat not appropriate to allow you to act as counsel because I fear that you would be inviting either a mistrial or, worst case scenario, a conviction that is not based on the evidence but rather your misconduct.

RP at 209.

At trial, Deputy Kevin Newport testified that, after Ahmin Smith's arrest, he explained to Smith that the arrest was for felony harassment. Newport told the jury of Smith's decision not to talk to police. Deputy Newport, in the presence of the jury, also opened a brown bag that contained Smith's cell phone. The exterior of the bag was labelled, "Felony Harassment . . . suspect* Smith, Ahmin." Ex. 105.

On January 4, 2013, a jury found Ahmin Smith guilty of four counts of felony harassment with special enhancements for threatening family members. At sentencing,

the trial court mentioned that one juror, after the verdict, commented that "this was not a slam-dunk; this wasn't an easy decision." RP at 515.

The trial court sentenced Smith to the top of the standard range 42 months' confinement for each count, to be served concurrently. The court commented:

> The truth is, one of these texts to these four individuals would have been enough upon which to convict you. But the evidence is that you sent dozens of text messages to these four people which were threatening in nature and contained threats in so many words and so many different ways to kill those four individuals.
>
> To me, the sheer number, the sheer volume of the text messages is particularly disturbing. And I think because of that the evidence is overwhelming that a reasonable person could conclude that you intended to carry out the threats.
>
> This is a case of domestic violence. There's no question in my mind but that you were trying to use these threats and intimidating these people, trying to get your wife to do something, and that's classic domestic violence.
>
> . . . .
>
> With a standard range of 33 to 43 months, we know the presumptive range, the presumptive midpoint sentence of 38 months is where the court is to start in its assessment in terms of a sentence . . . .
>
> I'm satisfied that the sheer volume here of email, the threats, the nature of the threats, and—Mr. Smith's unwillingness to accept any sort of a responsibility for his actions, whether they're criminal or not, to me warrants a sentence at the higher end of the standard range.
>
> As it turns out the court's sentence this—this afternoon is three and a half years, which, if you do the math, is 41 months—42 months; correction —and so it is virtually the high end of the standard range.

RP at 516-18.

LAW AND ANALYSIS

Ahmin Smith asks this court to reverse his convictions and remand his case for a new trial because inadmissible opinion testimony and unacceptable evidence improperly swayed the jury. He contends these errors alone or cumulatively are sufficient to overturn his convictions. But even considering that evidence, Smith contends the evidence supporting his convictions is insufficient. Alternatively, Smith argues the trial court erred when it expressed concern for his competency, but did not hold a competency hearing.

Admissibility of Evidence

Ahmin Smith contends much of Deputy Kevin Newport's testimony was inadmissible. At trial, his counsel failed to object to most of this testimony. Under RAP 2.5, Smith is procedurally barred from raising the contentions for the first time on appeal. But RAP 2.5 provides an exception for errors of constitutional magnitude. To benefit from this exception, Smith must show the errors are "truly of constitutional dimension" and that the errors are manifest. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); *State v. Grimes*, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011). To determine whether an error is truly of constitutional dimension, appellate courts first look to the asserted claim and assess whether, if the claim is correct, it implicates a constitutional interest as compared to another form of trial error. *O'Hara*, 167 Wn.2d at 98. There must be a plausible showing that the asserted error had practical and identifiable

consequences in the trial of the case. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011); *Grimes*, 165 Wn. App. at 180. If Smith shows manifest constitutional error, the burden shifts to the State to prove the errors harmless beyond a reasonable doubt. *Grimes*, 165 Wn. App. at 186. To hurdle these procedural bars, Smith alleges three errors of constitutional magnitude affected the outcome of his trial.

Improper Opinion Testimony

Ahmin Smith first contends the court violated his right to a jury trial and his counsel provided ineffective assistance in violation of the Sixth Amendment to the United States Constitution when the jury heard Deputy Kevin Newport testify that he arrested Smith for felony harassment and saw a brown bag containing Smith's cell phone labelled "Felony harassment . . . suspect Smith, Ahmin." Ex. 105. He argues this evidence improperly invades the fact-finding province of the jury. Both a defendant's right to a jury trial and to effective assistance of counsel are issues of constitutional magnitude. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000); *State v. We*, 138 Wn. App. 716, 730, 158 P.3d 1238 (2007). Having shown the errors are of constitutional magnitude, he must show the errors are manifest.

In the context of ineffective assistance, Ahmin Smith must show his counsel performed deficiently and, as a result, suffered actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show deficient performance based on the failure to object to the admission of testimony, Smith must

show that the trial court would likely have sustained the objection. *In re Det. of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); *In re Det. of Strand*, 139 Wn. App. 904, 912, 162 P.3d 1195 (2007), *aff'd*, 167 Wn.2d 180, 217 P.3d 1159 (2009). Thus, he must show Deputy Newport's testimony and exhibit 105 were likely inadmissible and as a result of admitting the evidence he suffered prejudice. As Smith admits, the test is the same for establishing practical and identifiable consequences from invading the fact-finding province of the jury. Br. of Appellant at 12-13; *We*, 138 Wn. App. at 722-23.

The burden is on Ahmin Smith to show his counsel performed deficiently. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). This court starts with the strong presumption that counsel's representation was effective. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). To rebut this presumption, a defendant must demonstrate trial counsel's conduct could not be characterized as a legitimate trial strategy or tactic. *Grier*, 171 Wn.2d at 17; *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Ahmin Smith argues the court would have sustained the objection because Deputy Kevin Newport's testimony and the exhibit invaded the province of the jury by opining on a question of ultimate fact—the guilt of Smith. Smith is correct that no witness may

opine on the guilt of the accused. *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). But neither Newport nor the exhibit opined on his guilt.

To determine whether a witness's testimony constitutes improper opinion testimony, courts consider the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and other evidence before the trier of fact. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). When a police officer opines impermissibly, it raises additional concerns because an officer's testimony often carries a special aura of reliability. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007); *State v. Rafay*, 168 Wn. App. 734, 806, 285 P.3d 83 (2012).

Ahmin Smith focuses on Deputy Kevin Newport's profession and ignores the other factors. Deputy Newport repeatedly testified that he "arrest[ed]" Smith for "felony harassment." RP at 248, 252, 254. Written on exhibit 105, a brown bag containing Ahmin Smith's cell phone, is "Felony harassment . . . suspect Smith, Ahmin." Neither is a comment on Smith's guilt. Newport testified as to why he arrested Smith. He did not declare him guilty. Smith might as well have objected to the use of jury instructions, since the instructions also stated the State charged him with felony harassment.

Smith's defense was that someone else sent the text messages. He did not contend the messages were never sent. Balancing these factors in light of the other evidence, the trial court would unlikely have sustained an objection.

Ahmin Smith fails to show counsel performed deficiently or that he was denied his right to a jury trial. Therefore, this court need not address the remaining ineffective assistance prong. *State v. Hendrickson*, 129 Wn.2d at 78.

Improper Comment on Ahmin Smith's Right to Remain Silent

Ahmin Smith next argues that Deputy Kevin Newport violated his Fifth Amendment right to remain silent when he testified that Smith did not want to talk to him. "No person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V; *see also* CONST. art. I, § 9. The right against self-incrimination is liberally construed. *State v. Holmes*, 122 Wn. App. 438, 443, 93 P.3d 212 (2004). The right seeks to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Whether a comment on a defendant's silence is of constitutional proportions depends on whether the comment was direct or indirect. *Holmes*, 122 Wn. App. at 445. If direct, the defendant need not prove the error was manifest. *State v. Romero*, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002); RAP 2.5(a)(3). Instead, the State must prove the alleged error harmless beyond a reasonable doubt. *Romero*, 113 Wn. App. at 794.

A law enforcement officer makes a direct comment when he or she explicitly references that a defendant invoked his or her right to remain silent. *State v. Pottorff*, 138 Wn. App. 343, 346, 156 P.3d 955 (2007); *Romero*, 113 Wn. App. at 793. For example,

in *Romero*, this court found a police officer made a direct comment about the defendant's right to remain silent when the officer testified, "I read him his *Miranda* warnings, which he chose not to waive, would not talk to me." 113 Wn. App. at 793. Similarly, a court found an officer made a direct comment when the officer testified he read the defendant his *Miranda* rights and the defendant refused to talk. *State v. Curtis*, 110 Wn. App. 6, 9, 37 P.3d 1274 (2002).

On the other hand, a law enforcement officer makes an indirect comment on the right to remain silent when a jury could infer from the comment the defendant attempted to exercise his right to remain silent. *Pottorff*, 138 Wn. App. at 347. For example, a court found a police officer made an indirect comment when the officer testified the defendant claimed he was innocent and agreed to take a polygraph, but only after discussing the matter with his attorney. *State v. Sweet*, 138 Wn.2d 466, 480, 980 P.2d 1223 (1999). Courts deem an indirect comment on silence as not reversible error absent a showing of prejudice. *State v. Lewis*, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996); *Sweet*, 138 Wn.2d at 481. Critical to this determination of prejudice is whether there is a legitimate purpose behind the witness's comment other than to inform the jury that the defendant refused to talk to police. *Romero*, 113 Wn. App. at 789; *Curtis*, 110 Wn. App. at 13-14.

Deputy Kevin Newport testified that, as he walked up the driveway to Ahmin Smith's home, he told Smith he needed to talk to him. Newport explained that he sought

to "get a reaction, see how he was going to react one way or the other, at that point." RP at 252. Smith started to stand and appeared as if he was going to go inside his home. "At that point the 'I want to talk to you' wasn't going to work so [Newport] told him basically that he was under arrest for harassment, felony harassment." RP at 252. Newport testified that Smith "got up, was on the porch at that point saying 'I don't want to talk to you,' went inside the residence and closed the door." RP at 253.

Ahmin Smith maintains that Deputy Newport's testimony served no purpose other than to inform the jury the former exercised his constitutional right to remain silent. The State argues that Newport sought to explain to the jury how he conducted his investigation. But the manner of the investigation was not relevant to the issue at hand, the guilt or innocence of Ahmin Smith. Assuming the investigation was relevant, Deputy Newport could have explained how he conducted his investigation without referencing Smith's choice not to speak to police. Where, as here, there is no relevant purpose for referencing Smith's refusal to talk to police, courts find the witness directly commented on a defendant's right to remain silent. *Romero*, 113 Wn. App. at 789; *Curtis*, 110 Wn. App. at 13-14.

The State also argues Deputy Kevin Newport's comments are mere references to Ahmin Smith's silence, which were not intended to be used as substantive evidence of his guilt. "[I]t is constitutional error for a police witness to testify that a defendant refused to speak with him or her." *Romero*, 113 Wn. App. at 790 (citing *Easter*, 130 Wn.2d at 241).

Newport testified that Smith told him, "I don't want to talk to you." RP at 253. Deputy Newport directly commented on Smith's right to remain silent. A direct comment is an error of constitutional magnitude. *Romero*, 113 Wn. App. at 790-91.

Since Ahmin Smith shows a constitutional error, this court reviews the comment on Smith's silence under the constitutional harmless error analysis. *Romero*, 113 Wn. App. at 790-91. Unlike the other errors Smith alleged for the first time on appeal, Smith need not show the error is manifest. Instead, this court must decide if the error was harmless error beyond a reasonable doubt. *Easter*, 130 Wn.2d at 242. We conclude any error is harmless because the State never again brought up his silence and because of the overwhelming evidence against Smith.

Ahmin Smith contends Deputy Kevin Newport's comments prejudiced him because the other evidence against him was weak. To substantiate his claim, Smith emphasizes that one juror reportedly said the case was not a slam dunk. But in determining whether an error was harmless beyond a reasonable doubt, a reviewing court does not consider a comment by one juror.

The State never attempted to exploit the fact that Ahmin Smith refused to speak to police. Courts generally refuse to reverse a conviction when the comment on the defendant's silence is brief, the testimony does not imply guilt from the refusal, and the prosecutor did not refer to the statement in argument. *Lewis*, 130 Wn.2d at 706-07.

Deputy Kevin Newport's comment on Smith's refusal was brief, he did not imply guilt from the comment, and the State never referred to Smith's refusal in argument.

Overwhelming evidence supports Ahmin Smith's conviction. The jury saw 92 messages sent from Ahmin Smith's phone. Crystal Miller-Smith and her family testified that those gruesome threats made them fearful that he would carry them out. While Smith contends someone else sent the messages, Miller-Smith testified that she spoke with Smith over the phone between messages. On that call, she recognized his voice and he continued to threaten her. When Deputy Newport arrived at Smith's home to arrest him, Newport observed Smith on his phone, apparently texting. The texts ended with Smith's arrest. In light of this evidence, Deputy Newport's testimony that Smith refused to speak with him was harmless beyond a reasonable doubt.

Unreasonable Seizure

The third and last error Ahmin Smith argues is of constitutional dimension is Deputy Kevin Newport's decision to open Smith's door and arrest him without a warrant. Smith argues he preserved this issue. If this court disagrees, he argues Deputy Newport's conduct is of constitutional dimension, for two reasons, such that an objection was unnecessary. First, he argues his counsel provided ineffective assistance for refusing to raise this issue. Second, he argues Deputy Newport's seizure violated his rights under the Fourth Amendment to the United States Constitution and article I, section 22 of Washington's Constitution. Both ineffective assistance and an unreasonable seizure can

be of constitutional dimensions. *State v. Jones*, 163 Wn. App. 354, 359-60, 266 P.3d 886 (2011); *We*, 138 Wn. App. at 730.

The State contends Ahmin Smith did not preserve this issue. While Smith requested a suppression hearing, his counsel did not. When a defendant is represented by competent counsel, the attorney has the ultimate authority in deciding which legal arguments to advance. *State v. Bergstrom*, 162 Wn.2d 87, 95, 169 P.3d 816 (2007); *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). That authority expressly extends to decisions about whether to seek suppression of unconstitutionally obtained evidence. *Henry v. Mississippi*, 379 U.S. 443, 451-52, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965); *see also* 3 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 11.6, Counsel's Control Over Defense Strategy (2d ed. 2004). Both of Smith's defense counsel declined to seek a CrR 3.6 hearing. Emma Paulsen, the counsel he dismissed, explained that "regardless of what the officers did in apprehending him, no evidence or information . . . was gathered as a result of that arrest." RP at 18. His second counsel, Michael Lynch, concurred. The State is entitled to rely on these representations advanced by defense counsel. *Bergstrom*, 162 Wn.2d at 96. Therefore, Smith's objections did not preserve the alleged error for appeal.

Even if this court considered Ahmin Smith's objection, his failure to specifically object barred him from claiming error. *State v. Embry*, 171 Wn. App. 714, 741, 287 P.3d 648 (2012). Smith repeatedly moved for a CrR 3.6 hearing, arguing Deputy Kevin

Newport illegally arrested him. But Smith never identified the testimony he wished the court to suppress.

Ahmin Smith's counsel's representations also bar him from raising the issue as a manifest constitutional deprivation of his right to be free from unreasonable seizures. Appellate courts do not review even manifest constitutional issues, if expressly recognized at trial and deliberately not litigated. *Johnson v. United States*, 318 U.S. 189, 199-200, 63 S. Ct. 549, 87 L. Ed. 704 (1943); *State v. Valladares*, 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983); *State v. Hayes*, 165 Wn. App. 507, 515, 265 P.3d 982 (2011); *State v. Walton*, 76 Wn. App. 364, 370, 884 P.2d 1348 (1994). Both defense counsel articulated deliberate reasons for not requesting a CrR 3.6 hearing. They had the express authority to decide whether to seek suppression of purported unconstitutionally obtained evidence. *Henry*, 379 U.S. at 451-52. Their decisions waived Smith's ability to raise the issue on appeal. *Hayes*, 165 Wn. App. at 515-17.

To avoid the waiver, Ahmin Smith argues counsel provided ineffective assistance when they refused to request a CrR 3.6 hearing. A criminal defendant is entitled to a reasonably competent counsel to help assure the fairness of our adversary process. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This right stems from the coextensive protections enumerated in both the federal and Washington Constitutions. U.S CONST. amend. VI; CONST. art. I, § 22. To meaningfully protect an accused's enumerated right to counsel, the United States Supreme Court held

an accused is entitled to "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. at 686. Under *Strickland*, courts apply a two-prong test: whether (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Strickland*, 466 U.S. at 690-92. To prevail on his or her claim, a defendant must satisfy both prongs. *Hendrickson*, 129 Wn.2d at 78. If a defendant fails to establish one prong of the test, this court need not address the remaining prong. *Hendrickson*, 129 Wn.2d at 78.

To satisfy the first prong, the defendant must show that, after considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The burden is on the defendant to show deficient performance. *Grier*, 171 Wn.2d at 17. This court starts with the strong presumption that counsel's representation was effective. *Studd*, 137 Wn.2d at 551. To rebut this presumption, a defendant must demonstrate trial counsel's conduct could not be characterized as a legitimate trial strategy or tactic. *Grier*, 171 Wn.2d at 17; *Hendrickson*, 129 Wn.2d at 77-78. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe*, 528 U.S. at 481. To show deficient performance based on the failure to object to the admission of testimony, Smith must show that the trial court would likely have sustained the objection. *Stout*, 159 Wn.2d at 377; *Strand*, 139 Wn. App. at 912.

Ahmin Smith does not contest that Deputy Kevin Newport possessed probable cause or could make a warrantless arrest. Smith contends the trial court would have suppressed testimony regarding his post-arrest statements and actions because Deputy Kevin Newport arrested him inside his home without exigent circumstances.

The Washington Constitution and the Fourth Amendment prohibit police from making a warrantless entry into a suspect's residence to effectuate an arrest without exigent circumstances. CONST. art. I § 7; *Payton v. New York*, 445 U.S. 573, 576, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *State v. Holeman*, 103 Wn.2d 426, 428-29, 693 P.2d 89 (1985). Since Deputy Kevin Newport lacked a warrant, the State must show exigent circumstances merited Newport opening Smith's door to arrest him.

The State bears the burden of proving that the exigent circumstances exception applies. *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). Appellate courts look at the totality of the circumstances to determine whether the evidence supports a finding of exigency. *Smith*, 165 Wn.2d at 518. This court considers six factors in analyzing the situation:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry is made peaceably.

State v. Cardenas, 146 Wn.2d 400, 406, 47 P.3d 127 (2002).

The evidence supports the finding that the exigent circumstances permitted warrantless entry and Smith's arrest. The gruesome threats to murder four people were extremely grave. Crystal Miller-Smith did not know whether Ahmin Smith possessed any weapons, but the number and nature of the threats supported a belief that Smith could be armed. The information was trustworthy. Deputy Kevin Newport observed the text messages sent to Miller-Smith, Miller-Smith verbally confirmed the messages were sent from her husband, and when Newport arrived at Smith's home, he appeared to be texting. Deputy Newport knew Smith was on the premises because he saw Smith deliberately walk into his home after Newport announced that he was under arrest. Although the record does not indicate if Smith would escape if not swiftly apprehended, the darkness lent conditions for escape. Smith was not peaceably detained. Newport and two officers dragged Smith from his home and onto the ground before handcuffing him.

The State need not prove all six factors to show exigent circumstances. *State v. Allen*, 178 Wn. App. 893, 911, 317 P.3d 494, *review granted*, 180 Wn.2d 1008, 325 P.3d 913 (2014). The balance of factors establishes exigent circumstances leading to Ahmin Smith's arrest. Therefore, counsel was unlikely to succeed in suppressing any statements made after the allegedly illegal arrest.

Trial counsel's reasons behind their respective decisions not to seek a CrR 3.6 hearing are reflected in the record. They articulated that "regardless of what officers did in apprehending him, no evidence or information . . . was gathered as a result of that

arrest." RP at 18. "So whether or not the arrest process was lawful, it d[id] not impact the evidence which the State . . . present[ed] at trial." RP at 118. Defense counsel's decisions may not have been strategic, but they were reasonable. *Roe*, 528 U.S. at 481.

Even assuming the arrest was illegal and the trial court would have suppressed the statements Deputy Newport attributed to Smith, Smith establishes no prejudice from the evidence. Smith contends he was prejudiced because the evidence against him was weak. Smith argues little evidence connects him to the text messages and the victims testified that he could carry out the threats, not that he would. We already addressed these arguments in another context and will address them again below. In short, Smith fails to show the result would have been different had the court excluded the evidence of Smith's conduct with officers.

Bad Act Evidence

Ahmin Smith argues the court erred by permitting Deputy Kevin Newport to testify to Smith's bad behavior after the arrest. Smith contends allowing this evidence was error since it was irrelevant to any of the charged elements and unduly prejudiced him. Smith waived any objection to his post-arrest behavior as bad act evidence. *State v. Chase*, 59 Wn. App. 501, 508, 799 P.2d 272 (1990). He may not raise the admission of bad act evidence for the first time on appeal because it is not of constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); *Chase*, 59 Wn. App. at 508.

Sufficiency of the Evidence

Ahmin Smith contends insufficient evidence underlies his convictions for felony harassment. He argues the victims, Crystal Miller-Smith, Mark Miller, Deb Miller, and Deborah McDonald, did not believe he would carry out the threats and that the text messages stated Deb Miller would live so she could watch him harm her husband, Mark Miller.

A defendant who argues insufficient evidence supports his conviction admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When reviewing a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the State to determine whether "any rational trier of fact could have found guilt beyond a reasonable doubt." *Romero*, 113 Wn. App. at 797 (citing *Salinas*, 119 Wn.2d at 201). This court does not review credibility determinations made by the jury. *Romero*, 113 Wn. App. at 798.

A person is guilty of felony harassment if the person knowingly threatens to kill someone, immediately or in the future, and the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020; *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003). The person threatened need not hear of the threat from the defendant so long as the threatened person learns of the threat and, as a result, feared the threat would be carried out. *State v. Kiehl*, 128 Wn. App. 88,

93, 113 P.3d 528 (2005). The statute requires the person threatened both subjectively feel fear and that fear must be reasonable. RCW 9A.46.020(1)(b); *State v. E.J.Y.*, 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

Ahmin Smith argues the victims did not believe he would carry out the threats, but only thought it *possible* he could carry out those threats. The State argues the victims' belief that Ahmin Smith could carry out the threats is sufficient to uphold his conviction. In *E.J.Y.*, the court found sufficient evidence where the victim testified that she was a "little frightened." 113 Wn. App. at 953. The State argues the witnesses' testimony here passes this low bar. But the *E.J.Y.* court made this statement "'[a]ssuming the evidence establish[ed] the victim's subjective fear.'" 113 Wn. App. at 953 (quoting *State v. Alvarez*, 74 Wn. App. 250, 260-61, 872 P.2d 1123 (1994), *aff'd*, 128 Wn.2d 1, 904 P.2d 754 (1995)) (some alteration in original). In other words, the State asks this court to conflate the subjective fear requirement with the requirement that the fear the victim felt was reasonable.

Next, the State equates the victims' beliefs that Smith could carry out the threats with a "conditional threat." This court upheld a defendant's conviction, where the defendant threatened to "kick [an officer's] ass, if [he] wasn't in handcuffs." *State v. Cross*, 156 Wn. App. 568, 580, 234 P.3d 288 (2010), *remanded*, 166 Wn. App. 320 (2012). The court found a conditional threat falls under the definition of a threat established in RCW 9A.04.110. *Cross*, 156 Wn. App. at 582. But the officer still had to

subjectively fear that Cross would have carried out the threat had he not been handcuffed. *See Cross*, 156 Wn. App. at 583-84. Unlike the officer in *Cross*, Smith's victims did not testify they feared he *would* carry out the threats.

Ahmin Smith's victims testified that they believed it very possible he could carry out the threats. Thus, Ahmin Smith urges the court to reverse his conviction because the victims did not use the magic word "would." But courts review both victims' words and conduct when analyzing their fear. *E.J.Y.*, 113 Wn. App. at 953. Smith's threats caused Crystal Miller-Smith enough fear that she approached her father, Mark Miller, to show him the texts. She testified that she "had no idea what he was capable of at that point, he was so angry and—threatening that [she] didn't—didn't feel like [she] could just wait to see what he would do." RP at 374-75. Miller-Smith testified that she was very upset and concerned for the safety of herself and her family. She deemed Smith capable of carrying out the threats and feared for her and her father's safety. The fear also led her to call police and change the locks on her home.

Mark Miller testified that the texts shocked him and caused him to fear for his safety. Out of fear for his family's safety, Miller turned on the exterior lights to his home and set out game cameras. Both Crystal Miller-Smith's mother, Deborah McDonald, and stepmom, Deb Miller, were also shocked, scared, and upset by the threats because they believed "it very possible" Ahmin Smith could carry out those threats since he knew where they lived. Viewing the words and conduct of the victims in the light most

favorable to the State, a reasonable jury could find they subjectively feared Smith would carry out his threats, regardless of whether the victims used talismanic words.

Ahmin Smith also contends insufficient evidence supports his conviction for threatening to kill Deb Miller for another reason. He argues the text messages show Deb would live so she could watch the harm done to her husband. But other text messages indicated Smith would "murk [Crystal Miller-Smith's] whole family;" that he would "murk hi[m] & wife," ostensibly Mark Miller and his wife Deb Miller; and that "bye 10 am [Miller-Smith's] whole family will b dead;" Smith "[g]uaranteed =)." Exs. 10, 19, 20, 53. Viewed in the light most favorable to the State, Smith threatened to kill Deb Miller.

Competency

Ahmin Smith contends the court erred when it expressed concern for his competency but did not hold a competency hearing.

Criminal defendants who lack the capacity to understand the nature and object of the proceedings against them, to consult with counsel, and to assist in preparing their defense may not be subjected to trial. *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed 2d 102 (1975); *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 932, 952 P.2d 116 (1998). A competency hearing is required "[w]henever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency." RCW 10.77.060(1). Thus, unless an insanity defense is raised, a hearing is required only

if the court makes a threshold determination that there is reason to doubt the defendant's competency. *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991).

The determination of whether a competency examination should be ordered rests generally within the discretion of the trial court. *State v. Heddrick*, 166 Wn.2d 898, 903, 215 P.3d 201 (2009). This court reviews a trial court's exercise of discretion for abuse. *Lord*, 117 Wn.2d at 901. A court abuses its discretion when it exercises it on untenable grounds, for untenable reasons, or uses an incorrect legal standard. *Heddrick*, 166 Wn.2d at 903.

In determining whether to order a formal inquiry into the competence of an accused, courts consider the defendant's appearance, demeanor, conduct, personal and family history, past behavior, and medical and psychiatric reports. *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967); *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). Courts also give considerable weight to the attorney's opinion regarding his client's competency and ability to assist the defense. *Lord*, 117 Wn.2d at 901.

Ahmin Smith's personal and family history, past behavior, and medical and psychiatric reports are absent from the record, as is any mention of his appearance or demeanor. The conduct that piqued the trial court's concern and his counsel's opinion about his client's competency are recited above. The court's concern stemmed from its frustration with Smith's recalcitrance rather than his ability to aid in his own defense. No

evidence was presented that Smith is delusional, only that he refused to understand the law and maintained an obsession with a claim he was recorded.

The trial court reflected for a day whether to order a competency review. The next day, the court considered a motion by Ahmin Smith to serve as co-counsel. When denying the motion, the court observed that Smith was competent to stand trial.

On appeal, Ahmin Smith contends his statements reflected possible psychosis, obsession, delusional thinking, paranoia, or other potential mental defects. But Smith presents no evidentiary support for his possible diagnoses. Smith could not accept the lack of recordings, but many people are obstinate in their beliefs without any psychosis. As his trial counsel acknowledged, "Mr. Smith hasn't demonstrated any lack of ability regarding appreciate [sic] of where he is and what's going on." RP at 139. Weighing Smith's conduct in light of his counsel's representation, the court correctly concluded Smith was competent. The record confirms the court's decision not to hold a competency hearing.

Cumulative Error

Ahmin Smith contends cumulative errors warrant reversing his convictions. The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors materially affected the trial's outcome. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994). The only trial error was allowing Deputy Kevin Newport to testify that Smith refused to talk to him. That error is harmless beyond a reasonable doubt.

Therefore, cumulative errors did not deny Ahmin Smith a fair trial.

Statement of Additional Grounds (SAG)

Ahmin Smith contends the State improperly withheld exculpatory evidence and repeats his appellate counsel's argument that Deputy Kevin Newport's arrest was illegal. Neither argument has merit. We previously addressed the latter argument.

Ahmin Smith argues the State withheld phone records for August 12-13, 2012, and evidence that text messages continued to be sent to Crystal Miller-Smith while he was in custody. He also contends the phone records in the record on appeal are different from the records admitted at trial.

Ahmin Smith continued to send text messages until after 1 a.m. on August 13, 2012. The phone records admitted at trial only cover August 12. Smith presents no evidence that the State withheld records for August 13. There is no evidence the State possessed those records. Similarly, there is no evidence that Smith sent text messages after Deputy Newport arrested Smith. Contrary to Smith's contention, the phone records the superior court forwarded to this court are the originals, stamped as exhibit 55, and dated January 3, 2013, the day the trial court admitted the records.

Motion to Terminate Services of Appellate Counsel

On April 9, 2014, Ahmin Smith moved this court to terminate the assistance of his appellate counsel and appoint new counsel. Smith argues his appellate counsel provided ineffective assistance when she refused his request to raise certain issues.

We deny Ahmin Smith's motion because RAP 10.10 affords him the opportunity to present an SAG. This opportunity provides an effective remedy. The SAG permitted him to raise any issues he believed appellate counsel did not adequately address. RAP 10.10. The court informed him of this right in a letter dated June 3, 2013, and he exercised his right in an SAG and an amendment to the SAG, respectively filed on July 29 and August 22. In his SAG, he raised some of the issues he contends his trial counsel refused to raise.

Additionally, Ahmin Smith's appellate counsel's refusal to assert Smith's additional arguments does not constitute ineffective assistance for the same reasons we deny the issues raised in the SAG. Those issues lack merit. The remaining issues that he raised with his lawyer but not in his SAG must wait. To substantiate these claims, Smith requires additional evidence. The appropriate avenue for addressing these claims is a personal restraint petition. *State v. McFarland*, 127 Wn.2d at 335.

CONCLUSION

We deny Ahmin Smith's motion for termination of the services of appellate counsel and affirm Smith's convictions.

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A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, J.