

COURT OF APPEALS NO. 40238-6-II

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

KELLEY SUZANNE STEPHENS,

Defendant/Appellant.

Pierce County Superior Court Cause Number No. 09-1-03105-5

**The Honorable Eric Schmidt, Judge Pro Tem
Presiding at the Trial Court**

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Jury instructions 11 and 12 misstated the applicable law Ms. Stephens' case and are presumptively prejudicial.
2. The trial court erred by instructing the jury on an unresolved question of law and fact in jury instructions 11 and 12.
3. Jury instructions 11 and 12 constituted a comment on the evidence.
4. The instructional errors violated Ms. Stephens' due process rights.
5. The trial court erred when it admitted evidence of prior and subsequent contacts Ms. Stephens had with the police.
6. Absent the inadmissible evidence, the evidence was insufficient to convict Ms. Stephens of the crimes of third degree assault and obstruction of a law enforcement officer.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did jury instructions 11 and 12 misstate the applicable law where the police utilized a misdemeanor bench warrant that named Mr. Clinton to gain entry into Ms. Stephens' home, but the jury was instructed on the law pertaining to entering the home of a suspect rather than a third party ? (Assignment of error number one)
2. Was it error for the trial court to instruct the jury on a mixed fact and law issue that should properly be decided by the bench? (Assignment of error number two)
3. Did jury instructions 11 and 12 constitute an impermissible comment on the evidence where the court instructed the jury that the police entry into Ms.

Stephens' home was proper as a matter of law, and implicitly directed the jury that Ms. Stephens' objection to the entry was meritless and unreasonable? (Assignment of error number three)

4. Did the instructional errors violate Ms. Stephens' due process rights and are the errors reviewable for the first time on appeal? (Assignment of error number four)
5. Did the trial court commit reversible error when it admitted evidence of contact between Deputy Jank and Ms. Stephens that occurred prior and subsequent to the crimes charged here where the evidence was inadmissible under ER 401, 402 and 404 (b)? (Assignment of error number five)
6. Did the state prove the mens rea of the crimes charged beyond a reasonable doubt absent the inadmissible evidence? (Assignment of error number six)

III. STATEMENT OF THE CASE

A. Procedural History

On June 29, 2009, the defendant/appellant, Kelley Suzanne Stephens, was charged by Information with one count of third degree assault.¹ CP 1. On December 3, 2009, an Amended Information was filed which added the charge of obstructing a law enforcement officer (conduct only, not false statement).² CP 7-8.

Ms. Stephens was convicted as charged by jury on December 18,

¹ RCW 9A.36.031 (1)(g)

² RCW 9A. 76.020(1)

2009. CP 71-72. On January 15, 2010, the trial court imposed a sentence of sixteen (16) days for the assault conviction (15 days of which were converted to community service) and three hundred sixty-five (365) days with three hundred sixty-four (364) suspended for the obstructing charge. CP 73-83, 84-88. A timely Notice of Appeal was filed on the same date. CP 92.

B. Summary of Trial Testimony

1. State's Case In Chief

Pierce County Sheriff's Deputy Eric Jank testified that on June 28, 2009 he saw Timothy Clinton in the front yard of Ms. Stephens' house. Deputy Jank recognized Mr. Clinton and believed that Mr. Clinton "had a felony warrant." RP III 79. Deputy Jank testified that he "just drove by" the residence. RP III 79. After seeing Mr. Clinton, Deputy Jank pulled in front of Ms. Stephens' house. He saw Mr. Clinton "crouched down behind some bushes." RP III 80. When Deputy Jank exited his vehicle Mr. Clinton ran to the back of the house, and Deputy Jank lost sight of him. Deputy Jank then confirmed a warrant, and called for a backup and a K-9 unit. RP III 82.

Deputy Jank proceeded to the front of the house and "stayed in the front yard watching." RP III 82. Deputy Miller arrived as backup

within three to four minutes. RP III 82. Deputy Jank testified that while he was standing in the front yard of Ms. Stephens' home Mr. Clinton "came running back from the back side somewhere and went up the stairs into the house." RP III 82. Deputy Jank yelled at him to stop. Deputy Jank then moved to the back of the home. Deputy Miller arrived and posted himself at the front of the house.

While standing at the back of the home Deputy Jank observed Ms. Stephens exit her home through the back door. Ms. Stephens identified herself as the property owner. RP III 107. She said she did not see where Mr. Clinton had gone. At this point Deputy Jank had already decided to wait for the K-9 unit to arrive before entering the home. He asked Ms. Stephens to step aside so the plan to enter and arrest Mr. Clinton could be executed. RP III 84. Ms. Stephens requested to see a warrant and stated it was her constitutional right to do so. RP III 84. Deputy Jank told her he was not required to show her a warrant. Ms. Stephens then refused to step out of the way. "She turned her back and said we weren't going in the residence and started to walk up onto the back porch." RP III 85.

Deputy Jank testified that based on a similar previous encounter with Ms. Stephens he thought she was going to try to close or lock the

door. RP III 85-86. Deputy Jank followed Ms. Stephens up the back stairs. He testified that she attempted to forcefully “slam” the glass slider door. Deputy Jank inserted his arm and was struck by “the track of the door” on the back of his left arm. RP III 86-87. Deputy Jank testified that Ms. Stephens was looking directly at him when she attempted to slam the door, thus leading him to conclude it was not an accident. Deputy Jank sustained no visible injuries. RP III 87. He grabbed the door with his right hand, “threw open” the door, and “grabbed her.” RP III 89. Deputy Jank then “got her in a hold” called an “arm bar.” RP III 89. Ms. Stephens began to yell and thrash. Deputy Jank handcuffed her and placed her on a chair on the front porch. Deputy Miller threatened to tase her and pulled out his taser. At that point Ms. Stephens “calmed down.” Deputy Jank then placed her in the back of his patrol car. RP III 89.

After Ms. Stephens was secured in the patrol car and the K-9 unit arrived, the officers yelled for Mr. Clinton to exit the house. A boy, who was not Mr. Clinton, came out. Deputy Jank testified that the K-9 unit was required because Mr. Clinton always carried a knife. RP III 91. The K-9 entered the home and secured Mr. Clinton. Deputy Jank testified that Ms. Stephens’ actions did not necessarily hinder the

performance of his duties, but the couple of minutes it took to deal with her did delay his efforts to take Mr. Clinton into custody. RP III 97, 110.

Pierce County Deputy Dennis Miller testified that he responded to the call by Deputy Jank to Ms. Stephens' residence and assisted in the arrest of Mr. Clinton. RP 12-15-09, 21-22.³ Deputy Miller saw Ms. Stephens speaking with Deputy Jank. He heard her tell Deputy Jank that he was not coming in her home. He also saw her try to "close that door on Deputy Jank." RP 12-15-09, 26. Deputy Miller testified that he is the warrant officer, and that Deputy Jank had not gone to Ms. Stephens' house specifically to serve the warrant on Mr. Clinton on this day. RP 12-15-09, 44. Neither he nor Deputy Jank had a hard copy of the "felony" warrant in his possession. RP 12-15-09, 18, 44.

2. Defense Case

Defense witness Terry Christian, who is an acquaintance of Ms. Stephens, testified that he was present at Ms. Stephens' home during the June 28, 2009 incident. Also present were Mr. Christian's son, a

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The transcript of the December 15, 2009 p.m. session proceeding is unnumbered. It will, therefore, be referenced by date and page number.

friend named Tim, and Tim's relative Joe. Only Joe was inside the home with Ms. Stephens. Mr. Christian first saw a police officer (Deputy Jank) arrive in the backyard of the house "between the rear of the house and the work shed." RP III 115. The officer, who had his weapon drawn, asked "Where did he go." Mr. Christian responded: "He went that way." The officer then told everyone present to leave immediately. RP III 115. Mr. Christian described the officer's demeanor as "perturbed" and apparently "unhappy" about having to chase Mr. Clinton. RP III 116.

Mr. Christian also testified that he had replaced the wheels on the sliding glass door of the home, and that the door was working smoothly on June 28, 2009. Mr. Christian did not see the contact between Officer Jank and Ms. Stephens. RP III 116.

Kelley Stephens testified on her own behalf. Ms. Stephens testified that she is fifty (50) years old and has no prior criminal history whatsoever. RP III 121. She is the owner of the residence in question and has resided there for seven years. Timothy Clinton was her boyfriend. He lived at her house "on occasion." RP III 137.

On June 28, 2009, Ms. Stephens was caring for Joe who is

eighteen (18) years old and autistic. RP III 123. Joe was inside the house eating pizza when Ms. Stephens saw a police vehicle from her living room window. Ms. Stephens was also caring for two indoor cats and a dog named Murphy. RP III 124. She identified herself to Officer Jank and told him she had not seen Mr. Clinton enter the house. Deputy Jank told her that there was an outstanding “felony” warrant for Mr. Clinton’s arrest. Ms. Stephens knew this to be false because Mr. Clinton was on probation for a misdemeanor. Ms. Stephens requested to see a warrant before she would allow Deputy Jank to enter. RP III 126. After Deputy Jank told her she had no rights because the warrant was not for her, Ms. Stephens decided to secure Joe and the pets before permitting the deputy to enter. She started up the back porch steps, opened the door, and stepped in . When she turned around Deputy Jank had one hand on the screen door and the other on the door frame. Instantaneously, as she attempted to close the sliding door, Deputy Jank stuck his arm in. He grabbed her with his other hand. He then placed her in a hold, handcuffed her, and sat her on Murphy’s chair which was right by the door. RP III 126-127.

Ms. Stephens testified that she believed she had “search and

seizure” rights under the Fourth Amendment and that she also believed the police were required to produce a warrant before entering her home. RP III 129. Ms. Stephens testified that she did not slam the door or intend for it to touch Deputy Jank. Nor did she knowingly attempt to hinder or delay Deputy Jank. RP III 130,135, 146.

Ms. Stephens testified that on the previous occasion when the police had come to arrest Mr. Clinton she had allowed them to come in. On this occasion, however, she was concerned about Joe and the pets, as well as the absence of a warrant. She was also concerned about Deputy Jank’s truthfulness, because he had told her that there was a felony warrant for Mr. Clinton, which she knew to be false. RP III 144-145.

Over defense counsel’s objections Ms. Stephens was cross-examined about another occasion in which the police had followed Mr. Clinton to Ms. Stephens’ home after observing him driving on a suspended license. That incident occurred on December 4, 2009. Ms. Stephens denied that she was uncooperative with the police on the December 4th occasion. They had not asked to come in and she answered their questions to the best of her ability. RP III 147-152.

3. State's Rebuttal

Deputy Jank was recalled as a rebuttal witness. He testified that Ms. Stephens was not cooperative during his subsequent December 4, 2009 contact with her. RP III 157. Deputy Jank also responded to additional questions about the previous incident that had occurred in March of 2008. RP III 158-159.

IV. ARGUMENT

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY THAT THE MISDEMEANOR ARREST WARRANT FOR MR. CLINTON AUTHORIZED THE ENTRY INTO MS. STEPHENS' HOME.

Prior to trial the State brought a Motion in Limine to prevent Ms. Stephens from testifying that it was her belief that she had a constitutional right to object to the police entering her home without a warrant and without showing her a copy of the warrant. The trial court denied the prosecutor's motion. The court reasoned that Ms. Stephens' beliefs at the time were relevant to her actions. RP 1 5-9. Unable to exclude Ms. Stephens' testimony the state instead sought to invalidate it through Jury Instructions 11 and 12. The instructions read as follows:

Instruction No. 11

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

Instruction No. 12

A valid misdemeanor arrest warrant gives police authority to enter a suspect's residence to make the arrest. The officer need not possess a physical copy of the warrant to make the arrest. CP 28-48.

In Ms. Stephens' case, the police entered her home on the basis of a misdemeanor (alleged probation violation) bench warrant for Timothy Clinton.⁴ Notably, Mr. Clinton's address was not listed as the same as Ms. Stephens on either the warrant or the summons in the cause number under which the warrant was obtained. Exhibits 5, CP 19, Supplemental CP _____. (See Appendix A and B.)

Washington law is well settled that it is imperative the law be stated correctly to the jury: "[T]he defense attorney is only required to argue to the jury that the facts fit the law; the attorney should not have to convince the jury what the law is." *State v. LeFaber*, 128 Wn.2d

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Appellant has filed a motion to Supplement the Designation of Clerks papers to include Exhibit 5 and the relevant summons in Pierce County Superior Court Cause No. 08-1-05174-1.

896,903,912 P.2d 369 (1996). Proper jury instructions “must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.” *State v. Clausing*, 147 Wn.2d 620,626-27,56 P,3d 550 (2002).

In Ms. Stephens’ case jury instructions 11 and 12 misstated the applicable law and, constituted an impermissible comment on the evidence.

1. Jury Instructions 11 and 12 misstated the applicable law.

Where a jury instruction misstates the law the misstatement must be presumed prejudicial to the defendant. Likewise, a jury instruction that misstates the law is presumed to have misled the jury. Reversal is, therefore, required without any showing by the defendant of prejudice. The only exception to the mandatory reversal is where the state can affirmatively demonstrate from the record that the instructional error was harmless. *State v. Wanrow*, 88 Wn.2d 221,559 P.2d 548 (1977).

The state may not attempt to minimize a misstatement of law in an instruction by invoking the rule that an instruction is ‘sufficient’ if

counsel may satisfactorily argue his theory of the case. State v. Wanrow, 88 Wn.2d 221,235, 559 P.2d 548 (1977).

This is a mistaken application of the rule and will cause widespread mischief in civil as well as criminal cases if adopted here. The test of ‘sufficiency’ is just that and is not a rule to be applied where the instruction is an erroneous statement of the law [O]f what significance is it that counsel may or may not be able to argue his theory to the jury when the jury has been misinformed about the law to be applied.

Id. (Emphasis added).

As applied to Ms. Stephens’ case jury instructions 11 and 12 constituted a patent misstatement of the law because both apply to the authority of the police to enter a suspect’s residence, not the home of a third party. Whether Mr. Clinton was a resident of Ms. Stephens’ home was a mixed question of fact and law that had not been determined by the trial court. The analysis for making the determination is governed by established federal and Washington state law. The correct statement of law applicable to Ms. Stephens’ case must include the following analysis:

The police have a limited power to enter a third party residence to execute a misdemeanor arrest warrant only if the state establishes that:

(1) the entry is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches or investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an actual resident of the home, and (4) said named person is actually present at the time of entry.

State v. Hatchie, 161 Wn.2d 390,166 P.3d 698 (2007).

Moreover, when considering whether the police have probable cause⁵ to believe the suspect is an actual resident of the home “only the facts and knowledge available to the officer at the time” of the entry can be considered. State v. Winterstein, 167 Wash.2d 620,220 P.3d 1226 (2009).

The importance of the distinction between the law that allows the entry into a suspect’s home versus a third party’s home to execute an arrest warrant was highlighted in State v. Hatchie, Supra.

In Steagald, the United State Supreme Court held an arrest warrant, by itself, does not allow the police to enter a third person’s residence. Steagald, 451 U.S. 204, see also Hocker v. Woody, 95 Wn.2d 822,825,631 P.2d 372 (1981). To intrude into a third party’s residence, the police need at least a search warrant. This is because [t]he third party’s privacy interest in being free from unreasonable invasion of his home is

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Article I, section 7 of Washington’s constitution requires “probable cause” as “a minimum standard for determining when an officer has reason to believe a place to be entered is a suspect’s residence” State v. Hatchie, Supra at 397.

distinguishable from the suspect's interest in avoiding unreasonable seizure.

Furthermore, while instruction 11 quotes RCW 10.31.040 nearly verbatim, instruction 12 does not accurately state the law cited by the state in support of the instruction; namely RCW 10.31.030 and State v. Hatchie, 161 Wn.2d 390,166 P.3d 698 (2007). CP 28-48.

The trial court committed reversible error by giving the jury instructions that misstated the applicable law. Prejudice is presumed.

2. Jury Instructions 11 and 12 constituted an impermissible comment on the evidence.

Article IV, § 16 of the Washington Constitution, provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A court cannot instruct the jury that matters of fact have been established as a matter of law. State v. Becker, 132 Wn.2d 54,64,935 P.2d 1321 (1997).

In Becker, the defendant was charged with a drug offense with an enhancing allegation that the offense took place within a thousand yards of a school. In its special verdict form, the court stated Seattle's Youth Education Program was a school.

By effectively removing a disputed issue of fact from the jury's

consideration, the special verdict form relieve the State of its burden to prove all elements of the sentence enhancement statute. Whether the state produced sufficient evidence for a rational juror to find YEP was a school is irrelevant to whether the jury instruction was correctly drafted.

Becker, 132 Wn.2d at 64 (emphasis added; conviction reversed).

In *State v. Primrose*, 32 Wn.App. 1, 645 P.2d 714 (1982), the defendant was charged with bail jumping. The court instructed the jurors that the defendant had presented no proof of a lawful excuse for his failure to appear in court. The appellate court found this instruction improper because whether Primrose had a lawful excuse was a question of act for the jury. *Id.* At 4.

In the case at bar, instructions 11 and 12 were likely interpreted by the jury as a directive from the court not only that the police acted properly, but also that Ms. Stephens acted improperly by questioning their authority. The instructions also required the jury to assume the fact that Mr. Clinton resided at Ms. Stephens' on the date the police entered her home. Whether there was probable cause to believe Mr. Clinton was residing at Ms. Stephens' home was a question of fact and law that should have been decided by the court under the proper standards as set forth in *State v. Hatchie, Supra*.

Furthermore, as the trial court noted, Ms. Stephens' beliefs about her constitutional rights were relevant, and important to establish her state of mind at the time of the incident. Ms. Stephens' state of mind was relevant to the mens rea of the crimes charged. Instructions 11 and 12 effectively directed the jury to discount her beliefs and, thus her state of mind. The instructions constituted a comment on the evidence and undermined the presentation of Ms. Stephens' theory of the case.

B. THE INSTRUCTIONAL ERRORS ARE OF CONSTITUTIONAL MAGNITUDE.

Ms. Stephens' trial counsel objected fully to jury instruction number 11. RP III 160. His objection to number 12 was, however, equivocal. Initially counsel stated that proposed instruction number 12 was "appropriate." RP III 161. Minutes later he expressed concern that number 12 did not accurately state the legal authority cited by the state. RP III 162. A discussion ensued concerning the police authority to search a third party's residence. Defense counsel's remarks concerning instruction 12 concluded with "My only concern is I don't want to misstate the law. If that's not the law - -." RP III 164.

In the event this Court determines the objection to instruction

number 12 was inadequate, the error may still be raised on appeal because it is a manifest error affecting a constitutional right under RAP 2.5 (a)(3). In the absence of an objection at trial, “an appellate court will consider a claimed error in an instruction if giving such an instruction invades a fundamental right of the accused.” State v. Becker, 132 Wn.2d 54,64,935 P.2d 1321 (1997).

“A fair trial in a fair tribunal is a basic requirement of due process.” In re Murchison, 349 U.S. 133,136, 75 S. Ct. 623,99 L.Ed. 942 (1955). Notions of fundamental fairness require an accused be given “a meaningful opportunity to present a complete defense.” State v. Wittenbarger, 124 Wn.2d 467,474,880 P.2d 517 (1994); see also In re Welfare of Hansen, 24 Wn.App. 27,36,599 P.2d 1304 (1979) (due process principles require party be given a full and meaningful opportunity to present evidence). “[T]he right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies” is a fundamental element of due process as protected under the Fourteenth Amendment. Washington v. Texas, 388 U.S. 14,19,87 S.Ct. 1920,18 L.Ed. 2d 1019 (1967).

Here, Ms. Stephens was deprived of her right to due process and

a fair trial by the improper instruction of the jury. It is Ms. Stephens' contention that the lower court objections were sufficient as to both instructions. If not, however, the instructional errors are still reviewable.

C. THE ADMISSIBLE EVIDENCE WAS INSUFFICIENT TO CONVICT MS. STEPHENS OF THIRD DEGREE ASSAULT AND OBSTRUCTING A LAW ENFORCEMENT OFFICER.

Ms. Stephens was convicted of third degree assault in violation of RCW 9A.36.031(1)(g), and obstructing a law enforcement officer in violation of RCW 9A.76.020(1). CP 1 7-8. "A person commits the crime of assault in the third degree when he or she assaults a person who is a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." RCW 9A.36.031 (1)(g); WPIC 35.20; CP 28-48. "An assault in an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person." WPIC 35.50(1); CP 28-48. "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." WPIC 10.01; CP 28-48.

Under RCW 9A.76.020(1) “A person commits the crime of obstructing a law enforcement officer when he or she willfully hinders, delays, or obstructs any law enforcement officer in the discharge of the law enforcement officer’s official powers or duties.” WPIC 120.01; CP 28-48. “Willfully means to purposefully act with knowledge that this action will hinder, delay, or obstruct a law enforcement officer in the discharge of the officer’s official duties.” WPIC 120.02.01; CP 28-48.

Here, the state presented scant evidence that Ms. Stephens *intentionally* assaulted Deputy Jank or that she *willfully* hindered or delayed his activities. The primary evidence relied upon by the state to establish the mens rea of the crimes were the prior and subsequent contacts Deputy Jank had with Ms. Stephens about which he testified in detail. As will be discussed below, however, the evidence regarding Deputy Jank’s prior and subsequent contacts with Ms. Stephens was improperly admitted by the trial court.

1. The trial court’s ruling admitting evidence of Deputy Jank’s prior and subsequent contacts with Ms. Stephens were in error.

Ms. Stephens unsuccessfully moved to exclude testimony concerning prior and subsequent police contact with her. RP 1 12-13;

RP 12-15-2009 (p.m. session), RP III 147-149. Specifically, the evidence pertained to a March 15, 2008 (15 + months prior to the instant arrest), and a December 4, 2009 incident (5+ months following the current arrest).

Regarding the March 15, 2008 contact, Deputy Jank testified that Mr. Clinton had run into Ms. Stephens' home while attempting to avoid the police on that date. Ms. Stephens had come to a bedroom window, told the officer Mr. Clinton was not inside, and then attempted to close the window. A couple of minutes later she opened the front door and allowed the police in. Mr. Clinton was then arrested on misdemeanor warrants in the living room. RP III 91-94.

The December 4, 2009 contact involved Deputy Jank, again pursuing Mr. Clinton, who was allegedly driving on a suspended license. Deputy Jank saw Mr. Clinton run from a vehicle into Ms. Stephens' home. Ms. Stephens told Deputy Jank that she had been driving the vehicle. RP III 149-152, 156-159.

The trial court's rulings admitting the evidence of these prior and subsequent contacts between Deputy Janks and Ms. Stephens were in error.

a. **The evidence of prior and subsequent police police contacts was irrelevant under ER 401.**

ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

“A trial court’s relevancy determinations [under ER 401] are reviewed for manifest abuse of discretion.” *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006).

A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court’s decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Grandmaster Sheng-Yen Lu, 110 Wn.App. at 99, 38 P.3d 1040.

Here, the state argued that the past and subsequent contacts between Ms. Stephens and Deputy Janks were relevant to the assault

charge. CP 14-18, RP III 147-148. On the contrary, Ms. Stephens had/has never been charged with either assaulting or obstructing a police officer. Deputy Jank's contact with her on other occasions was irrelevant to the charges here.

b. Because the evidence of the prior and subsequent police contacts was irrelevant it was inadmissible under ER 402.

Under ER 402, "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

As discussed above, the evidence of prior and subsequent police contacts between Ms. Stephens and Deputy Dank was irrelevant to the crimes charged and to any issue properly before the jury since Ms. Stephens had no prior history of assaulting or obstructing a police officer.

c. The trial court erred in admitting the evidence of prior and subsequent police contacts under ER 404(b).

Under ER 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show

action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

The state filed a written motion to admit evidence of the March 2008 prior contact. The trial court relied on ER 404(b) as a basis for the admission of evidence, stating: “It is a prior bad act under ER 404(b) but I think it falls under the knowledge and absences of mistake exception to 404(b) so I’ll allow that line of testimony.” The trial court failed to explain its ruling relating it to the evidence in any manner. Further, the court failed to conduct the requisite procedural requirements to admit evidence under ER 404(b).

i. The trial court failed to follow the requisite procedure to admit evidence under ER 404(b).

To determine admissibility of evidence under ER 404(b), the trial court must engage in a three-part analysis established in *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). First, the court must identify the purpose for which the evidence will be admitted. Second, the evidence must be materially relevant. Third, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. *Saltarelli*, 98 Wn.2d at 362-66, 655 P.2d 697. Further, to avoid error, the trial court must identify the purpose of the evidence and conduct the balancing test on the record. *State v. Jackson*, 102 Wn.2d 689, 693-94,

689 P.2d 76 (1984). Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith.

State v. Wade, 98 Wn.App. 328, 333-334, 989 P.2d 576 (1999).

Here, the trial court did not conduct the required three-part analysis. While the court alluded to the 404(b) exception upon which it relied, the court failed to elaborate or explain its reasoning or the relevance of the 404(b) evidence to the instant charges. Of equal importance the trial court failed to balance the probative value of the highly prejudicial evidence against the unfair effect it could have on the jury.

ii. The trial court abused its discretion in admitting evidence of the prior and subsequent police contacts under ER 404(b).

A trial court's ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. State v. Mason, 160 Wn.2d 910, 933-934, 162 P.3d 396 (2007), *cert. denied* 128 S.Ct. 2430, 171

L.Ed.2d 235 (2008).

“In weighing the admissibility of the evidence to determine whether the danger of unfair prejudice substantially outweighs probative value, a court considers (1) the importance of the fact that the evidence intends to prove, (2) the strength of inferences necessary to establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction.” *State v. Kendrick*, 47 Wn.App. 620, 628, 736 P.2d 1079, *review denied* 108 Wn.2d 1024 (1987).

“Evidence can be admitted under ER 404(b) only if the trial court finds the evidence serves a legitimate purpose, *is relevant to prove an element of the crime charged*, and, on balance, the probative value of the evidence outweighs its prejudicial effect.” *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003), *citing State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Substantial prejudicial effect is inherent in ER 404(b) evidence. *Lough*, 125 Wn.2d at 863, 889 P.2d 487. Therefore, prior bad acts are admissible only if their probative value is substantial. *Lough*, 125 Wn.2d at 863, 889 P.2d 487.

Given that there was no evidence Ms. Stephens had ever assaulted or been charged with obstructing a police officer the prior and subsequent contacts Ms. Stephens had with the police had no relevance to the charges here. The 404(b) evidence did not tend to prove any fact much less any element of the crimes charged. Moreover, the incidents were far removed in time from the present charges. The only possible inference such evidence would support would be the precise propensity inferences that ER 404(b) is intended to prevent. Additionally, no limiting instruction was given.

2. *Without the evidence of the prior and subsequent police contacts the State's evidence was insufficient to prove the mens rea of the crimes charged beyond a reasonable doubt.*

Aside from the inadmissible 404(b) propensity evidence, the remaining evidence was slight to prove that Ms. Stephens intentionally assaulted or willfully obstructed Deputy Jank. Whether Ms. Stephens "slammed" the door was a disputed fact, which the jury must have decided against Ms. Stephens. The slamming of the door, however, would be insufficient to establish intent. It is equally feasible that if Ms. Stephens attempted to close the door forcefully she did not first see

that Deputy Jank had stuck his arm in the way of the door. The entire incident happened in a matter of seconds.

The other evidence the state argued was that while slamming the door, Ms. Stephens looked Deputy Jank in the eyes and, therefore, that she intended to assault him. This argument is unpersuasive because if Ms. Stephens was looking into Deputy Jank's eyes she could not simultaneously be looking at his arm as he was sticking it in the door.. Additionally, the act of looking into Deputy Jank's eyes would not establish proof beyond a reasonable doubt that Ms. Stephens intended to close his arm in the door.

With regard to the obstructing charge, Officer Jank testified that Ms. Stephens did not hinder his duties. He did not intend to enter the home or arrest until after the K-9 unit arrived. Deputy Jank testified, however, that Ms. Stephens may have delayed the arrest of Mr. Clinton by a couple of minutes. This conclusion was not reasonable given that he did not intend to enter the home or arrest Mr. Clinton until the K-9 unit arrived.

Absent the impermissible 404(b) testimony, the evidence presented by the state did not establish Ms. Stephens' guilt of either

crime beyond a reasonable doubt.

V. CONCLUSION

For all of the foregoing reasons and conclusions, Ms. Stephens respectfully requests that this Court reverse her conviction of third degree assault and obstructing a law enforcement officer.

DATED this 16th day of August, 2010.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Sheri Arnold", written over a horizontal line.

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

FILED
COURT OF APPEALS

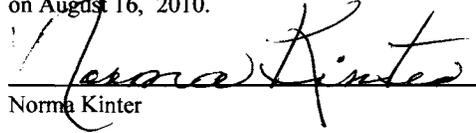
10 APR 15 PM 12:04

STATE COURT CLERK

BY _____
CLERK

CERTIFICATE OF SERVICE

The undersigned certifies that on August 16, 2010, she delivered in person to the Pierce County Prosecutor, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by United States mail appellant, Kelley S. Stephens, 21506 131st Street East, Bonney Lake, Washington 98391, true correct copies of this brief. This statement is certified to be true and correct under penalty of perjury. Signed at Tacoma, Washington on August 16, 2010.


Norma Kinter

APPENDIX A

Bench Warrant

CLEARED

ORIGINAL

4467 7/2/2009 88015

2864 5/6/2009 88116

DOC # 897448

DATE 6-28-09

MAY 06 2009

08-1-05174-1



08-1-05174-1 32367949 SHRTBW 07-02-09

IN COUNTY CLERK'S OFFICE
FILED
MAY 05 2009 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-05174-1

FILED
IN COUNTY CLERK'S OFFICE

vs.

BENCH WARRANT

A.B. JUL - 1 2009 P.M.

TIMOTHY ROY CLINTON,
BOOKING #: 2809058065
CHRI #: 910438038

Defendant.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

LKA: 21506 146TH ST E, BONNEY LAKE, WA 98391

TO ALL PEACE OFFICERS IN THE STATE OF WASHINGTON, GREETINGS:

WHEREAS, an order of court has been entered directing the Clerk of the above entitled court to issue a warrant for the arrest of the above named defendant TIMOTHY ROY CLINTON

SEX MALE; RACE WHITE; EYES BROWN; WEIGHT 160; HEIGHT: 5'10"; DOB 12/05/69; POLICE AGENCY WA02714; DATE OF VIOLATION 10/9/08; POLICE AGENCY CASE NO. 08002684;

You are hereby commanded to forthwith arrest the said TIMOTHY ROY CLINTON, for the crime(s) of UNLAWFUL SOLICITATION TO POSSESS A CONTROLLED SUBSTANCE, said defendant having violated the conditions of probation as ordered by the court and bring said defendant into court to be dealt with according to law. BAIL IS TO BE SET IN OPEN COURT.

WITNESS THE HONORABLE
Judge of the said court and seal thereof affixed
This _____ day of April, 2009.

ROSANNE BUCKNER

KEVIN STOCK
Clerk of the Superior Court

By _____

This is to certify that I received the within bench warrant on the 28 day of June 2009, and by virtue thereof on the 28 day of June 2009 I arrested the within named defendant, and now have defendant in full custody.

Extradition: Washington Only Seattle States Only Nationwide
Warrant Service Fee \$15/Return Fee \$5/Mileage \$ _____ /TOTAL \$ _____

Tank 02020 PCSD
PEACE OFFICER

wji

Records Specialist f buchanan

Employee # 167

ORDER BENCH WARRANT -1
OrderBenchWarrant.doc

is signing for and at the direction of the listed officer.

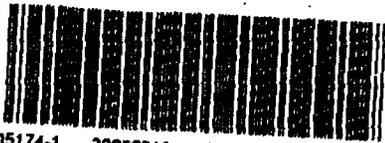
6-28-09 Time: 2146

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

ORIGINAL

APPENDIX B

Summons



08-1-05174-1 30856816 SM 11-05-08

FILED
IN COUNTY CLERK'S OFFICE

A.M. NOV 04 2008 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] Deputy

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-05174-1

vs.

TIMOTHY ROY CLINTON,

SUMMONS

Defendant.

21506 146TH ST E
BONNEY LAKE, WA 98391

36015 52ND AVE S
AUBURN, WA 98001

GREETINGS:

YOU ARE HEREBY SUMMONED TO BE AND APPEAR IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY, in Criminal Division I, Room 260, County-City Building, Tacoma, Washington, on the 14 day of NOVEMBER, 2008, at the hour of 1:30 PM, to enter your plea of guilty or not guilty to the charge of: **UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE; UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE - FORTY GRAMS OR LESS OF MARIHUANA; DRIVING WHILE IN SUSPENDED OR REVOKED STATUS IN THE FIRST DEGREE.** In the event of an unscheduled change in court rooms, please verify room number on the computer monitors located on either the first or second floor.

FAILURE TO APPEAR WILL RESULT IN A BENCH WARRANT BEING ISSUED FOR YOUR ARREST

WITNESS THE HONORABLE VICKI L. HOGAN
Judge of the Superior Court and the seal thereof affixed.

NOV 04 2008
This day of October, 2008.

KEVIN STOCK
Clerk of the Superior Court

I hereby certify that I mailed the within summons on the _____ day of November, 2008.

By [Signature]

mld