

NO. 41695-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

STACY ROBERT SMITH,

Appellant.

AMENDED BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iv

B. ASSIGNMENT OF ERROR

 1. Assignment of Error 1

 2. Issue Pertaining to Assignment of Error 1

C. STATEMENT OF THE CASE

 1. Factual History 2

 2. Procedural History 9

D. ARGUMENT

I. THE TRIAL COURT’S REFUSAL TO GRANT A MISTRIAL AFTER A JUROR EXPRESSED HER OPINION ON GUILT BEFORE THE CLOSE OF EVIDENCE DENIED THE DEFENDANT HIS RIGHT TO A FAIR AND IMPARTIAL JURY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT 16

II. THE TRIAL COURT’S ADMISSION OF EVIDENCE OF THE DEFENDANT’S PROPENSITY TO COMMIT ASSAULTS DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT 19

E. CONCLUSION 24

F. APPENDIX

 1. Washington Constitution, Article 1, § 3 25

 2. Washington Constitution, Article 1, § 21 25

3. United States Constitution, Sixth Amendment	25
4. United States Constitution, Fourteenth Amendment	25
5. ER 403	26

TABLE OF AUTHORITIES

Page

Federal Cases

Bruton v. United States,
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) 19

Remmer v. United States,
347 U.S. 227, 98 L.Ed.654, 74 S.Ct. 450 (1954) 17

Smith v. Phillips,
455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982) 16

United State v. Bagnariol,
665 F.2d 877 (9th Cir.1981) 16

State Cases

State v. Acosta, 123 Wn.App. 424, 98 P.3d 503 (2004) 20, 21, 23

State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001) 20

State v. Ford, 137 Wn.2d 472, 973 P.2d 472 (1999) 19

State v. Kendrick, 47 Wn.App. 620, 736 P.2d 1079 (1987) 20

State v. Murphy, 44 Wn.App. 290, 721 P.2d 30 (1986) 17, 18

State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001) 20

State v. Rose, 43 Wn.2d 553, 262 P.2d 194 (1953) 17

State v. Seagull, 124 Wn.2d 719, 881 P.2d 979 (1994) 16

State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963) 19

Constitutional Provisions

Washington Constitution, Article 1, § 3 19
Washington Constitution, Article 1, § 21 16
United States Constitution, Sixth Amendment 16
United States Constitution, Fourteenth Amendment 19

Statutes and Court Rules

ER 403 19, 21

Other Authorities

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) 20

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's refusal to grant a mistrial after a juror expressed her opinion on guilt before the close of evidence denied the defendant his right to a fair and impartial jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment.

2. The trial court's admission of evidence of the defendant's propensity to commit assaults denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court's refusal to grant a mistrial after a juror, in front of other jurors, expresses an opinion on guilt before the close of evidence deny a defendant the right to a fair and impartial jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment?

2. In a prosecution for third degree assault against a police officer, does a trial court's admission of evidence that the defendant has a propensity to commit assaults deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

Factual History

Jennifer Johns and the defendant Stacy Robert Smith have been in a relationship for about eight years and have had one child together. RP 147-148.¹ Jennifer also has a 10-year-old daughter, Shania, from a prior relationship who also lives with them. RP 149-151. Shania considers the defendant her father. *Id.* For the past year, the family has lived in the house at 1117 7th Avenue in Longview. *Id.* As of May of 2010, the defendant was out of work, although Jennifer worked regularly. *Id.*

On May 3, 2010, Jennifer and the defendant got into a heated argument when he asked for some money and the car so he could go purchase some beer. RP 152-156. At the time, the defendant did not have a valid driver's license and Jennifer didn't want him to drive. *Id.* At one point, the defendant went out behind the house to get the car out of the garage, so Jennifer decided to call 911. *Id.* When asked the nature of her emergency, Jennifer responded as follows: "My boyfriend is trying to take my car and he's very – totally unreasonable and he doesn't have a license and he is freaking out." RP 33. After the 911 operator obtained names and addresses, Jennifer repeated: "He's freaking me out because I won't give him money for

¹The record on appeal includes two volumes of continuously numbered verbatim reports of the trial and sentencing, identified herein as "RP [page #.]"

beer” RP 34. The 911 operator then asked if the defendant had been violent that day, if he had been using drugs, or if he had been drinking. *Id.* Jennifer replied that he was “[j]ust yelling,” that he had not used any drugs, and that he had not been drinking “[b]ecause [she wouldn’t] give him any money.” *Id.*

Within a short time, Longview officers arrived on the scene. RP 39-41. However, by that point, the defendant had left on foot. *Id.* After interviewing Jennifer and determining that no crime had occurred, they left, telling her to call 911 again if the defendant returned. *Id.* About 30 minutes later, the defendant did return, and this time Shania called 911. RP 41-45.

The following is the complete text of that call.

DISPATCH: 911, what is your emergency? Hello. 911.

CALLER: (Crying is heard.) Hello?

DISPATCH: Hi, this is 911, what’s going on?

CALLER: I need them back here, please.

DISPATCH: You need them back here. Where is here?

CALLER: (Crying heard.)

DISPATCH: What’s going on? What’s going on?

CALLER: Hello?

DISPATCH: This is 911. What is going on? (Call appears to have been disconnected.)

DISPATCH: Hi, this is 911, what's going on?

CALLER: I am (inaudible).

DISPATCH: Uh-huh.

CALLER: And, he is after my mom and he says (inaudible).
(Yelling is heard in the background.)

DISPATCH: Okay. What's your – what's your stepdad's name?

CALLER: Stacy Smith.

DISPATCH: Stacy Smith.

CALLER: Stacy Smith.

DISPATCH: I'm sorry. What's the first name?

CALLER: Stacy.

DISPATCH: Stacy?

CALLER: Yeah. (Loud yelling is heard in the background.)

DISPATCH: S-T-A-C-E-Y?

CALLER: No E.

DISPATCH: No E?

CALLER: Yeah.

DISPATCH: Has he assaulted your mom?

CALLER: Not yet.

DISPATCH: Okay. How old are you?

CALLER: Ten.

DISPATCH: And, was that your mom that originally called?

CALLER: Yes.

DISPATCH: What is your mom's name?

CALLER: Jennifer Johns.

DISPATCH: Okay. What's your name?

CALLER: Shaniah Long.

DISPATCH: Shaniah Long?

CALLER: Yes.

DISPATCH: What's going on now, Shaniah?

CALLER: He's – he went out but he is taking my mom's car.

DISPATCH: Okay. Is he still there?

CALLER: He's outside.

DISPATCH: I'm sorry. What?

CALLER: He's outside.

DISPATCH: He's outside?

CALLER: Yes.

DISPATCH: Is he still there, though, he hasn't left?

CALLER: No.

DISPATCH: If he leaves, what kind of car is he going to get in, do you know?

CALLER: What kind of car is it (inaudible)? (Yelling is heard in the background.) It's a silver Camry.

DISPATCH: It's a what?

CALLER: A silver Camry.

DISPATCH: A silver Camry? Is it still there?

CALLER: Yes.

DISPATCH: Is it – can you still see it outside?

CALLER: Let me go look. My mom's –

DISPATCH: Your mom's what?

CALLER: Do you want to talk to my mom?

DISPATCH: Is she willing to talk to me?

CALLER: Yeah.

DISPATCH: Okay.

2nd CALLER: Hello?

DISPATCH: Jennifer, this is 911. Has he left?

2nd CALLER: No.

DISPATCH: Okay. He's still standing outside?

2nd CALLER: Yes.

DISPATCH: Okay. Have you been assaulted Jennifer?

2nd CALLER: No.

DISPATCH: Okay. What is the fight over tonight?

2nd CALLER: (Crying.) I have to go. I have to take care of my kids.

DISPATCH: I have an officer pulling up there now, okay?

2nd CALLER: (Crying.)

RP 41-45.

On this second occasion, Longview Officers Angel, Blanchard, and Kelly arrived at the house at the same time. RP 45-47. Officer's Blanchard and Kelly went to the front door, while Officer Angel went around back. RP 92-94. Once Officer Angel got behind the house, he saw the defendant through a fence walking toward the open back door. RP 48-50. Seeing this, Officer Angel climbed over the fence while identifying himself and yelling for the defendant to stop. *Id.* According to Officer Angel, the defendant ignored his commands and entered through the back door into a laundry room, at which point he turned around to face the officer. *Id.* Officer Angel then entered the back door and grabbed the defendant's left arm with his right hand, and ordered him to come outside. RP 50-53. The defendant immediately pulled away, and Officer Angel again grabbed the defendant's arm. *Id.* According to Officer Angel, this time the defendant pulled away and used both hands to shove the officer in the chest, which caused him to step back. *Id.*

Under Officer Angel's version of events, once the defendant shoved him, the officer grabbed the defendant a third time in an attempt to put him in hand cuffs. RP 53-56. As he did this, the defendant used his right hand

to hit the officer an open hand blow to the chin. *Id.* By this time, Officer Blanchard joined the struggle, and the two of them were able to get the defendant to the ground on his face and put him in handcuffs, which the defendant tried to resist by attempting to put his arms under his body. RP 57-59. Officer Blanchard was able to get the defendant's arms out by striking the defendant twice under his left armpit. RP 96-99.

Although Officer Angel believed that Officer Blanchard arrived in the back yard just after the defendant struck him with an open palm, according to Officer Blanchard, he got into the laundry room just after the defendant pushed Officer Angel. RP 95-99. At least, that is what Officer Blanchard thought had happened because the first thing he saw was the defendant's arms extended towards Officer Angel as if he had just pushed him. *Id.* Officer Blanchard then saw Officer Angel grab the defendant, at which point Officer Blanchard and Officer Angel were able to get the defendant to the floor of the laundry room and get handcuffs on him after Officer Blanchard twice hit the defendant. *Id.* Officer Blanchard did not claim that he had seen the defendant hit Officer Angel. *Id.*

Jennifer Johns provided a third version of the events in the laundry room. RP 161-165. According to her, once Officer Blanchard ran around back, she walked though the house to the doorway to the laundry room. *Id.* Once at that point, she saw the defendant enter and start to close the back

door. *Id.* As he did, the two Officers shoved the door open, which hit the defendant. *Id.* The two officers then grabbed the defendant and threw him to the ground. *Id.* At this point, one officer held the defendant down while the other officer kicked and hit him. *Id.* According to Jennifer, at no point did the defendant resist the officers in any way. *Id.*

Procedural History

By information filed May 6, 2010, the Cowlitz County prosecutor charged the defendant Stacy Smith with third degree assault, obstructing a law enforcement officer, and resisting arrest. CP 1-2. The case later came on for trial before a jury. RP ii. During pretrial proceedings, the parties stipulated to the authenticity of the tapes of both 911 calls, and the defense stipulated to the admissibility of the first call. RP 2. However, the defense objected to the admissibility of the second call. RP 6-7. During argument on this issue, the prosecutor made an offer of proof to the court, claiming that Jennifer Johns' daughter said the following during the call: "My step-dad's freaking out and throwing things at my mom and they almost hit her." RP 7. In fact, as a review of the transcript of the second 911 call reveals, Shania Long made no such statement. RP 41-45. However, based upon the prosecutor's offer of proof, the court ruled the tape admissible as a statement of a "present sense impression" of the speaker. RP 6-10.

After pretrial motions and *voir dire*, the court gave the jury its

standard preliminary instructions. RP 13-18. These included the following instructions prohibiting the jurors from discussing the case prior to the beginning of deliberations, requiring them to keep an open mind, and prohibiting them from coming to any opinion about the case before all of the evidence was presented:

Until you are in the jury room for those deliberations, you should not discuss the case with the other jurors or with anyone else. Don't remain within the hearing of anybody who is discussing the case.

Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case is submitted to you for your deliberation.

RP 13, 18.

Once the court had instructed the jury, the state presented its opening statement, the defense reserved its opening, and the state called Officer Angel as its first witness. RP 19-20. At the beginning of his evidence, the court admitted both 911 tapes into evidence and the prosecutor played them for the jury. RP 33-39, 41-45. The second tape included Shania Long's answer "Not yet," to the 911 operator's question as to whether or not the defendant had assaulted her mother. RP 42. After Officer Angel testified, the state called Officers Blanchard and Kelly as its next two witnesses. RP 80, 109. The court then adjourned for the day, giving the jury the following warning:

JUDGE WARNING: All right. We will start back up at nine

o'clock tomorrow morning, Ladies and Gentlemen. And, you are excused for the evening. I just remind you not to discuss the case with anyone, at this point in time.

RP 131.

At the beginning of trial the next day, the bailiff informed the court that one of the jurors had approached her and stated that another juror had expressed an opinion about the case in front of the other jury members. RP 133-135. Upon hearing this information, the defense moved for a mistrial. RP 135-136. Prior to ruling on the motion, the court questioned the juror who had approached the bailiff and had her identify the juror who had expressed the opinion about the case. RP 136. The court then questioned that juror, whose last name was Sandstrom. RP 137-139. She stated the following concerning her comments to the other jurors the previous afternoon:

I said I could make a decision right now, which I know is wrong. And I shouldn't have said that. . . . We were in a conversation about – one of the girls was saying she has a hair appointment today and that she hoped that it went quickly and I said that and I shouldn't have.

RP 139.

At this point, the defense renewed its motion for a mistrial. RP 140. However, the court denied the motion, and at the request of the state, excused juror Sandstrom and replaced her with the alternate. RP 140-143. The court then reconvened the case in front of the jury and the stated rested. RP 146.

BRIEF OF APPELLANT - 11

At this point, the defense then called Jennifer Johns as its only witness. RP 147-178. During cross-examination, the court twice cautioned the prosecutor about making testimonial statements in front of the jury instead of propounding proper questions to the witness. RP 172-173. The first such exchange occurred when the prosecutor cross-examined Jennifer about her claims on direct that what she really wanted when she called 911 was for the police to take the defendant to the hospital because she was worried he would harm himself. RP 173. This exchange went as follows:

Q. You think it was urgent for the police to come back in that situation?

A. I think he needed to go to the hospital.

Q. You know if you listen to those calls, you never mentioned anything in the calls about him going to the hospital.

A. Well, they asked if he was – if anyone was hurt.

Q. Do you recall mentioning that in those calls?

A. No.

Q. Okay. And you never mentioned anything about him trying to kill himself.

A. I'm pretty sure I did.

Q. No, we listened to them and that's not there.

A. Well, –

JUDGE WARNING: Counsel, just ask questions.

RP 173.

The second exchange followed directly after the first and went as follows:

Q. Okay. Do you recall your daughter getting on the phone?

A. Yes.

Q. Are you aware if she – the defense attorney said, she said, her step-dad, the Defendant is freaking out and throwing things and almost hit her mom.

A. I don't think that she said that he almost hit me.

Q. She did say that.

JUDGE WARNING: Okay. Counsel, just limit yourself to questions. Don't argue with the witness.

RP 174.

Once again, as a review of the transcript of the 911 call reveals, Shania Long did not make a claim that the defendant had thrown anything at her mother. RP 41-45. In spite of this fact, the prosecutor twice repeated this claim to the jury during closing argument and rebuttal. RP 211-212, 241. The first occurred during closing argument when the prosecutor stated the following:

But, throwing things and almost hit my mom, that girl – I mean, you hear it – you heard it on the tape. You can judge for yourselves. Almost hitting her? This is an extreme situation. And then, “Has he assaulted your mom?” “Not yet.”

. . . .

And what that – what that tells us about the Defendant, a little bit is, he is not calm, he is very angry at Jennifer Johns, yelling, he’s arguing, he’s doing violent things. He’s throwing things.

RP 211 (lines 10-14 and 21-25) and RP 212 (lines 1-2).

The prosecutor repeated this misstatement of the evidence during rebuttal argument when he said the following:

I mean, would we think it was okay for the police not to respond to a “Get them back here, please”, “My step dad’s freaking out and throwing things and almost hit my mom”, “Has she been assaulted?”, “Not yet”? They had to get back there.

RP 241.

Following argument, the jury retired for deliberation. RP 253. After conferring for ninety minutes, the jury returned verdicts of guilty on each count. RP 253-256. The court later imposed a sentence within the standard range on the felony and concurrent suspended sentences on the misdemeanors. RP 259-264; CP 39-51. The defendant then filed timely notice of appeal. CP 52.

ARGUMENT

I. THE TRIAL COURT’S REFUSAL TO GRANT A MISTRIAL AFTER A JUROR EXPRESSED HER OPINION ON GUILT BEFORE THE CLOSE OF EVIDENCE DENIED THE DEFENDANT HIS RIGHT TO A FAIR AND IMPARTIAL JURY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every person charged with a crime in the state of Washington has the right to a fair trial in front of an impartial jury of 12 persons who must reach a unanimous verdict before a conviction can be entered. *State v. Seagull*, 124 Wn.2d 719, 881 P.2d 979 (1994); *Smith v. Phillips*, 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982). The trial judge is encumbered with the duty to be watchful for juror irregularities, and to take steps to determine that a defendant’s right to a fair and impartial jury has not been prejudiced. *Id.* As the United States Supreme Court has stated: “Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” *Smith*, 455 U.S. at 217.

In *United States v. Bagnariol*, 665 F.2d 877 (9th Cir.1981), the Ninth Circuit Court of Appeals squarely put the duty upon the trial court to hold an evidentiary hearing upon hearing of possible juror misconduct. In this case,

the court learned after trial that one of the jurors had conducted his own investigation at a Seattle library. In addressing how the court should have proceeded upon receiving this information, the Ninth Circuit stated:

The trial court, upon learning of a possible incident of juror misconduct, must hold an evidentiary hearing to determine the precise nature of the extraneous information. The defendant is entitled to a new trial if the judge finds a “possibility that the extrinsic material could have affected the verdict.”

United States v. Bagnariol, 665 F.2d at 885.

In *State v. Murphy*, 44 Wn.App. 290, 721 P.2d 30 (1986), the court of appeals clarifies the fact that communications by or with jurors are *per se* misconduct. Furthermore, once established, such misconduct gives rise to a presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. *State v. Murphy*, 44 Wn.App. at 296 (citing *Remmer v. United States*, 347 U.S. 227, 229, 98 L.Ed.654, 74 S.Ct. 450 (1954); *State v. Rose*, 43 Wn.2d 553, 557, 262 P.2d 194 (1953)).

For example, in *State v. Rose*, *supra*, the defendant was convicted of manslaughter, and appealed, arguing that the trial court erred in refusing to grant a mistrial upon his complaint of juror misconduct. In support of his motion, the defendant had presented the affidavits of people who had seen communications between jurors and others during the trial and during deliberations. However, the trial court summarily denied the motion. On appeal, the Washington Supreme Court reversed and remanded for a new

trial, finding that there was a “prima facie presumption of prejudice” and that the burden was on the state to disprove it beyond a reasonable doubt. Since the state had failed to do so, reversal was required.

In the case at bar, one of the jurors informed the court through the bailiff that another juror had disregarded the court’s instructions requiring them to keep an open mind and disregarded the court’s instructions prohibiting them from discussing the case prior to deliberations. When the court questioned the offending juror, she admitted that she had violated the court’s instructions, had come to a conclusion about the case prior to receiving all of the evidence, and had expressed her opinion in front of other jurors. The context in which she made her offending statements was particularly troubling, because she admitted that she had spoken improperly during a conversation with another juror who wanted the case to come to a quick close so as not to miss her hair appointment.

As the court explains in *Murphy, supra*, this admission of misconduct by the juror gives rise to a presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. In this case, the state cannot meet this burden because the trial court failed to hold an evidentiary hearing in which it determined which jurors participated in the conversation with the offending juror, which jurors heard the conversation, and how that participation or hearing affected their ability to fairly try the case. Absent

such an evidentiary hearing, this court should reverse the defendant's convictions and remand for a new trial.

II. THE TRIAL COURT'S ADMISSION OF EVIDENCE OF THE DEFENDANT'S PROPENSITY TO COMMIT ASSAULTS DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine

whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham’s treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503

(2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

Turning to the case at bar, the trial court allowed the state to play the second 911 tape in front of the jury without redacting the following exchange between Shania Long and the 911 operator:

DISPATCH: Has he assaulted your mom?

CALLER: Not yet.

RP 42.

Had Shania Long answered this question in the negative, the defense would have no claim that this exchange was more prejudicial than probative. However, her answer was not in the negative. Rather, her answer of “not yet” constituted a statement of her opinion that the defendant was going to assault her mother. Not only is such a statement inadmissible as speculative, but it created in the juror’s minds the impression that the defendant must have assaulted Officer Angel in the manner Officer Angel claimed because the defendant obviously was getting ready to assault someone. The error in admitting this evidence was exacerbated by the fact that the prosecutor twice argued to the jury that Shania Long’s answer of “not yet” was strong evidence that the defendant had assaulted Officer Angel. The first instance occurred during closing argument when the prosecutor stated the following:

But, throwing things and almost hit my mom, that girl – I mean, you hear it – you heard it on the tape. You can judge for yourselves. Almost hitting her? This is an extreme situation. And then, “Has he assaulted your mom?” “Not yet.”

. . . .
And what that – what that tells us about the Defendant, a little bit is, he is not calm, he is very angry at Jennifer Johns, yelling, he’s arguing, he’s doing violent things. He’s throwing things.

RP 211 (lines 10-14 and 21-25) and RP 212 (lines 1-2).

The prosecutor then repeated this claim on rebuttal when he said the following:

I mean, would we think it was okay for the police not to respond to a “Get them back here, please”, “My step dad’s freaking out and throwing things and almost hit my mom”, “Has she been assaulted?”, “Not yet”? They had to get back there.

RP 241.

This evidence was even more prejudicial than the defendant’s assaultive history in *Acosta* because in the case at bar it was a claim that the defendant had an assaultive demeanor very close to the time the police officer claimed that the defendant assaulted him. Thus, in the same manner that this type of evidence was more prejudicial than probative and denied the defendant a fair trial in *Acosta*, so this evidence was more prejudicial than probative and denied the defendant a fair trial in the case at bar. Consequently, in the same manner that the court in *Acosta* granted the defendant a new trial, so this court should reverse the defendant’s convictions and remand for a new trial.

CONCLUSION

This court should reverse the defendant's convictions and remand for a new trial based upon (1) juror misconduct and (2) the erroneous admission of evidence that was more prejudicial than probative.

DATED this 23rd day of November, 2011.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ER 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

HAYS LAW OFFICE

November 23, 2011 - 9:47 AM

Transmittal Letter

Document Uploaded: 416956-Amended Appellant's Brief.pdf

Case Name: State vs R.S Smith

Court of Appeals Case Number: 41695-6

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

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

 Brief: Amended Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Cathy E Russell - Email: **jahayslaw@comcast.net**

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

sasserm@co.cowlitz.wa.us