

NO. 41695-6-II
Cowlitz Co. Cause No. 10-1-00410-3

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

STATE OF WASHINGTON,

Respondent,

v.

STACY ROBERT SMITH,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
ERIC BENTSON/ #38471
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

TABLE OF CONTENTS

	PAGE
I. STATE’S RESPONSE TO ASSIGNMENT OF ERROR	1
II. ISSUES PERTAINING TO THE STATE’S RESPONSE TO THE ASSIGNMENT OF ERROR	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT	8
A. BECAUSE THERE WAS NO SHOWING THAT THE EXCUSED JUROR’S COMMENT AFFECTED THE VERDICT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENSE MOTION FOR A MISTRIAL.....	9
B. BECAUSE SMITH DID NOT RAISE THE “PROPENSITY” ISSUE AT TRIAL HE IS PRECLUDED FROM ARGUING IT ON APPEAL; FURTHER, THE EVIDENCE WAS ADMISSIBLE TO SHOW OFFICER ANGEL WAS PERFORMING HIS OFFICIAL DUTIES AT THE TIME OF THE CONTACT, AND THIS WAS AN ESSENTIAL ELEMENT OF THE OBSTRUCTING AN OFFICER CHARGE.	12
1. BECAUSE SMITH’S SOLE OBJECTION TO SHANIA LONG’S STATEMENTS ON THE 911 CALL WAS FOR HEARSAY, HE FAILED TO PRESERVE HIS “PROPENSITY” CLAIM FOR REVIEW.....	13
2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING SHANIA LONG’S STATEMENTS ON THE 911 CALL BECAUSE THEY WERE RELEVANT TO SHOW THAT THE POLICE WERE PERFORMING THEIR OFFICIAL DUTIES, AND THIS WAS AN	

ELEMENT OF THE OBSTRUCTING AN OFFICER CHARGE.....	18
V. CONCLUSION	22
EXHIBIT 1.....	23

TABLE OF AUTHORITIES

	Page
Cases	
<i>Fleenor v. Erickson</i> , 35 Wn.2d 891, 215 P.2d 885 (1950)	9
<i>Herberg v. Swartz</i> , 89 Wn.2d 916, 578 P.2d 17 (1978).....	13
<i>Richards v. Overlake Hosp. Med. Ctr.</i> , 59 Wn.App. 266, 796 P.2d 737 (1990).....	9
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971)	10
<i>State v. Acosta</i> , 123 Wn.App. 424, 98 P.3d 503 (2004)	17
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997) <i>cert. denied</i> , 532 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d322 (1998).....	19
<i>State v. Dinges</i> , 48 Wn.2d 152, 292 P.2d 361 (1956).....	20
<i>State v. Fagalde</i> , 85 Wn.2d 730, 539 P.2d 86 (1975).....	13
<i>State v. Hartwig</i> , 45 Wn.2d 76, 273 P.2d 482 (1954).....	20
<i>State v. Hughes</i> , 118 Wn.App. 713, 77 P.3d 681 (2003).....	19
<i>State v. Jamison</i> , 25 Wn.App. 68, 604 P.2d 1017 (1979).....	13
<i>State v. Jordan</i> , 79 Wn.2d 480, 487 P.2d 617 (1971).....	19
<i>State v. Kerr</i> , 14 Wn.App. 584, 544 P.2d 38 (1975).....	9
<i>State v. Kirwin</i> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	15
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995)	19
<i>State v. Lynn</i> , 67 Wn.App. 339, 835 P.2d 251 (1992)	15

<i>State v. Mack</i> , 80 Wn.2d 19, 490 P.2d 1303 (1971)	19
<i>State v. Mathes</i> , 47 Wn.App. 863, 737 P.2d 700 (1987)	14
<i>State v. Miles</i> , 73 Wn.2d 65, 436 P.2d 198 (1968)	20
<i>State v. Mott</i> , 74 Wn.2d 804, 447 P.2d 85 (1968).....	20
<i>State v. Pappas</i> , 195 Wn. 197, 80 P.2d 770 (1938).....	13
<i>State v. Price</i> , 126 Wn.App. 617, 109 P.3d 27 (2005).....	14
<i>State v. Robinson</i> , 171 Wn.2d 292, 253 P.3d 84 (2011).....	15
<i>State v. Saunders</i> , 132 Wn.App. 592, 132 P.3d 743 (2006)	14
<i>State v. Silvers</i> , 70 Wn.2d 430, 423 P.2d 539 (1967).....	12
<i>State v. Sims</i> , 77 Wn.App 236, 890 P.2d 521 (1995).....	14
<i>State v. Tharp</i> , 27 Wn.App. 198, 616 P.2d 693 (1980), <i>aff'd</i> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	19
<i>State v. White</i> , 60 Wn.2d 551, 374 P.2d 942 (1962).....	10
<i>State v. Williamson</i> , 131 Wn.App. 1, 86 P.3d 1221 (2005).....	9
<i>State v. Irving</i> , 24 Wn.App. 370, 601 P.2d 954 (1979)	19

Statutes

RCW 9A.76.020(1).....	21
-----------------------	----

Other Authorities

RAP 2.5(a)	13, 15, 16
------------------	------------

Rules

ER 403	17
ER 404(b).....	17, 19

I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not abuse its discretion in denying Smith's motion for a mistrial because there was no showing that the excused juror's comment regarding having formed an opinion affected the verdict; Smith's claim that Shania Long's portion of the 911 call was inadmissible "propensity" evidence has not been preserved because he did not object to the admission of the evidence on these grounds at trial; further, this evidence was relevant to show Officer Angel was performing his official duties—an essential element of the obstructing an officer charge

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

- A. Did a juror's comment that she could make a decision prior to hearing all the evidence, deprive Smith of the right to a fair and impartial trial, when the trial court replaced this juror and the comment itself did not express an opinion as to guilt or innocence?**
- B. Did the trial court err in admitting "propensity" evidence by playing a 911 call when Smith did not object on these grounds at trial, and it was admissible to show the police were performing their official duties when they responded?**

III. STATEMENT OF THE CASE

On May 3, 2010, officers from the Longview Police Department responded to a 911 call made by Jennifer Johns at 6:25 p.m. RP at 32, 39-40; Exhibit #1 at 1-8. During the phone call, Ms. Johns told dispatch that her boyfriend Stacy Smith was "freaking out" and trying to take her car,

because she refused to give him money for beer. Exhibit #1 at 1-2. When police arrived Smith was not present, and Officer Chris Angel spoke with Ms. Johns. RP at 40. Ms. Johns was upset and crying. RP at 40. As the police were leaving, Ms. Johns repeatedly expressed her concern that Smith would return. RP at 40. The police instructed her to lock the doors, and if Smith returned, to call 911. RP at 40.

At 7:30 p.m., Johns called dispatch again. RP at 41; Exhibit #1 at 9. Johns exclaimed: "I need them back here, please." Exhibit #1 at 9. Johns was heard crying and the sound of a phone being hung up was heard. Exhibit #1 at 9. Johns' 10 year-old daughter, Shania Long, then got on the phone, and the following exchange occurred between Shania and the dispatcher:

DISPATCH: This is 911, what's going on? (A female voice is heard yelling in the background.)

LONG: My stepdad –

DISPATCH: Uh-huh.

LONG: He is freaking out on my mom and he is like, throwing stuff across the room and like, almost hitting her and she's –

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

LONG: Stacy Smith.

DISPATCH: Jason Smith?
LONG: Stacy Smith.
DISPATCH: I'm sorry. What's the first name?
LONG: Stacy.
DISPATCH: Stacy?
LONG: Yeah.
DISPATCH: S-T-A-C-E-Y?
LONG: No E.
DISPATCH: No E?
LONG: Yes.
DISPATCH: Has he assaulted your mom?
LONG: Not yet.

Exhibit #1 at 9-10.

Upon receiving this second call, Officer Angel returned to Johns' residence. RP at 45. Officer Angel observed Smith in the backyard. RP at 46. Due to having observed Johns distressed and scared of Smith returning roughly 45 minutes earlier, and Long's statement that Smith was "freaking out," Officer Angel believed he was dealing with an urgent situation. RP at 47. Both to ensure safety and to investigate, Officer Angel believed it necessary to contact Smith outside of the residence. RP at 47.

Officer Angel observed Smith moving toward the house. RP at 48. Officer Angel yelled at Smith to stop and sit down on the porch. RP at 48. Smith looked at Officer Angel, then moved faster toward the house. RP at 48. Again, Officer Angel yelled at Smith to stop and sit down on the porch. RP at 49. Smith quickly entered the backdoor of the house. RP at 49. Because Smith entered the house, Officer Angel was concerned for the safety of those inside. RP at 50. Officer Angel approached the door Smith had entered and observed Smith looking toward the inside of the house yelling to someone in the front part of the house. RP at 50.

Officer Angel told Smith to come outside and reached for his arm. RP at 50. Smith would not come outside. RP at 50. Officer Angel then reached for Smith's arm to escort him outside. RP at 50. Smith pulled away from Officer Angel. RP at 51. Officer Angel was concerned that if he did not get Smith outside of the house, Smith would access a weapon, harm a person inside the house, or be harmed himself. RP at 52. To ensure safety, Officer Angel took hold of Smith's left arm. RP at 52.

Smith pulled his arm away then shoved Officer Angel in the chest with both hands forcing him out of the threshold of the door. RP at 52. Officer Angel stepped back in and grabbed Smith by the arm to arrest him. RP at 53. Smith attempted to pull his arm away, however because Officer Angel had a firm grip, the two of them turned approximately 180 degrees

into the laundry room. RP at 53. Officer Angel attempted to place Smith's arm behind his back. RP at 53. Smith then turned and punched Officer Angel in the face with the heel of his right hand, with what is known as a "palm-heel" strike. RP at 53-54.

Officer Angel continued to struggle with Smith, and as he did, Officer Angel told Smith to get on the ground. RP at 55-56. Smith continued to resist and pull away. RP at 56. Officer Chris Blanchard arrived and assisted Officer Angel in taking Smith to the ground. RP at 57. Smith pulled his arm underneath his body. RP at 57. Eventually, with Officer Blanchard's assistance, Officer Angel was able to get Smith's arm behind him and handcuff him. RP at 57-58.

During pretrial motions, Smith objected to Shania Long's portion of the 911 call as hearsay. RP at 6-7. The court ruled that her portion of the call was admissible as a present sense impression that was relevant to show why the police responded as they did. RP at 9. Other than this objection, no other objections to playing the calls were made, and the parties agreed that the phone calls were otherwise authentic and admissible. RP at 2-3. At trial, when the State moved to play the phone calls, the court verified that Smith stipulated to them being played. RP at 32. Both phone calls were then played in their entirety for the jury. RP at 33, 41; Exhibit #1 at 1-13.

Prior to all of the evidence having been presented, the bailiff informed the court that one of the jurors had informed her that another juror had told her she had formed an opinion. RP at 134. Smith's attorney moved for a mistrial. RP at 135. The juror who reported the comment, Ms. Winters, was questioned outside the presence of the other jurors. RP at 135-36. Ms. Winters stated that another juror, Ms. Swanstrom told her she had already formed an opinion. RP at 136. Ms. Winters did not hear Ms. Swanstrom say she had made up her mind, but only that she had an opinion. RP at 137. Ms. Swanstrom did not state to Ms. Winters what that opinion was. RP at 138. After speaking with Ms. Winters, the court questioned Ms. Swanstrom outside the presence of the other jurors. RP at 138. Ms. Swanstrom told the court that after hearing another female say that she hoped the trial would go quickly, she had stated that she could make a decision right now. RP at 139.

The court excused Ms. Swanstrom from the jury and replaced her with the alternate. RP at 142. Because, as described by both Ms. Swanstrom and Ms. Winters, Ms. Swanstrom's comment did not indicate what her decision would have been, the court determined that the problem was resolved by excusing Ms. Swanstrom. RP at 141-42. To avoid creating an issue where none existed, the court did not discuss the issue further with the other jurors. RP at 142. The court then brought the jury

back into the courtroom and reminded them not to discuss the case until the time came for deliberations. RP at 146.

During closing argument, the State argued that Shania Long's statements made it imperative for the police to respond. RP at 211. Smith's attorney argued that Smith had not committed a crime, therefore there was nothing for the police to investigate. RP at 230-31. Smith's attorney reasoned that the State could not prove the obstructing charge because the police were not investigating a crime at the time of Officer Angel's contact with Smith, and therefore the police were not performing their official duties. RP at 231. On rebuttal, the State responded to this argument by arguing that Shania Long's statements made it necessary for the police to respond and investigate. RP at 240-41. At the conclusion of the trial, Smith was found guilty of assault in the third degree, obstructing an officer, and resisting arrest. RP at 255.

When the case was originally transcribed for appeal, the portion of Shania Long's statement where she stated, "He is freaking out on my mom and he is like, throwing stuff across the room and like, almost hitting her and she's --" was transcribed as inaudible. Exhibit #1 at 9; RP at 41. After, the State objected to the report of proceedings, a hearing was held in Superior Court to settle the record. The trial judge entered an order replacing the 911 calls in the verbatim report of proceedings with a second

transcription of these calls. CP 53. This second transcription was entered as Exhibit #1. Subsequently, Smith withdrew an argument that had been made based on the original incomplete record. Although Smith withdrew this argument, his brief still contains the text of the second 911 call as originally transcribed. Appellant's Brief at 3-7. When the court settled the record, this portion of the transcript was replaced by Exhibit #1. Exhibit #1 at 9-13.

IV. ARGUMENT

Smith's convictions for assault in the third degree, obstructing an officer, and resisting arrest should be affirmed. First, the trial court did not abuse its discretion by denying Smith's motion for a mistrial after it had excused the juror who indicated she had reached an opinion on the case but did not reveal anything substantively about this opinion. Second, Smith's claim that "propensity" evidence was admitted against him should not be considered, because he raises this claim for the first time on appeal. Finally, Shania Long's portion of the 911 call was relevant to show the police were performing their official duties. Because this was an essential element of the crime of obstructing a law enforcement officer, it was admissible.

- a. Because there was no showing that the excused juror's comment affected the verdict, the trial court did not abuse its discretion in denying the defense motion for a mistrial.**

The trial court did not err when it denied Smith's motion for mistrial, because nothing about the excused juror's comment affected the verdict. With regard to questions of juror misconduct, "[a] new trial is only warranted when (1) the juror's actions actually constituted misconduct and (2) the misconduct affected the verdict." *State v. Williamson*, 131 Wn.App. 1, 7, 86 P.3d 1221 (2005) (citing *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App. 266, 271, 796 P.2d 737 (1990)). This requires a "strong, affirmative showing" of juror misconduct. *Id.* (citing *Richards*, 59 Wn.App. at 271). "Whether the alleged misconduct exists, whether it is prejudicial and whether mistrial is declared are all matters for the discretion of the trial court." *Id.* "Unless it clearly appears the court abused its discretion, the ruling will not be disturbed." *State v. Kerr*, 14 Wn.App. 584, 591, 544 P.2d 38 (1975) (citing *Fleenor v. Erickson*, 35 Wn.2d 891, 215 P.2d 885 (1950)). Abuse of discretion only occurs when the trial court's discretion is "manifestly unreasonable" or is exercised on "untenable grounds or for untenable reasons." *Williams*, 131 Wn.App. at 7 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482

P.2d 775 (1971)). The defendant bears the burden of proving abuse of discretion. *See id.*

In *Kerr*, prior to voir dire one of the jurors commented, “Here comes the enemy,” as Kerr’s defense attorney entered the courtroom. 14 Wn.App. at 591. This comment did not come to light until after the jury had been sworn in. *Id.* The court denied a motion for mistrial, noting that the remark had been made laughingly and that the juror had responded with humor during voir dire. *Id.* The court reasoned that although the juror had failed to be “properly solemn” during voir dire, he was questioned by both sides and stated he had no prejudice against the defendant or his attorney. *Id.* Kerr appealed his conviction, arguing that the mistrial for juror misconduct should have been granted. *Id.* at 585.

The Court of Appeals explained that under the law: “[a] juror holding certain preconceptions is not disqualified, provided he can put these ideas aside and decide the case on the basis of the evidence and the law as instructed by the court.” *Id.* 591 (*citing State v. White*, 60 Wn.2d 551, 374 P.2d 942 (1962)). Because the decision to grant or deny a mistrial is in the discretionary function of the trial court, unless it is clear that the trial court abused its discretion the ruling will not be disturbed on appeal. *Id.* (citation omitted). Because there was no substantiation in the record that the juror harbored bias against the defense, the Court of

Appeals found that trial court's denial of the motion for mistrial had been proper. *Id.*

Here, unlike *Kerr*, where the offending juror actually remained on the jury, the juror who made the comment was excused and was not involved in deciding the outcome of the case. There is no evidence that the jurors who ultimately decided the case were affected by the comment made by this juror. Further, the comment itself simply indicated that Ms. Swanstrom had already formed an opinion; her comment did not indicate what her opinion was. Because the evidence before the court was that the excused juror had expressed having formed an opinion prior to the end of the case, and this juror did not remain on the jury, the trial court did not abuse its discretion when it denied Smith's motion for a mistrial.

Smith claims that an evidentiary hearing was not held to determine which jurors participated in the conversation. However, this claim is incorrect. The trial court individually questioned both Ms. Winters and Ms. Swanstrom about their conversation outside the presence of the other jurors. Through this questioning, the court was able to determine that the comment was merely that Ms. Swanstrom stated she had already formed an opinion, but had made no statement as to what that opinion was. Because no substantive comments regarding the case had been made, further discussion of the incident was unnecessary. Accordingly, there

was no showing of prejudice, and the court did not abuse its discretion when it denied Smith's motion for a mistrial.

b. Because Smith did not raise the "propensity" issue at trial he is precluded from arguing it on appeal; further, the evidence was admissible to show Officer Angel was performing his official duties at the time of the contact, and this was an essential element of the obstructing an officer charge.

Because Smith's only objection to Shania Long's statements at trial was for hearsay, he failed to preserve his "propensity" issue for review, further there was no error in admitting these statements because they were admissible to prove an essential element of the obstructing an officer charge. It is a long-held rule that failure to object to the admission of evidence at trial waives the issue on appeal: "This court has consistently held that, to preserve an alleged trial error for appellate review, a defendant must timely object to the introduction of the evidence or move to suppress it prior to or during the trial. Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of the facts." *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). Smith's argument for "propensity" fails for two reasons. First, because he did not object to the admission of the evidence on these grounds at trial, he has failed to preserve the issue for review. Second, the admission of the

evidence was not error, because it was admissible to show the police were performing their official duties when they responded as they did.

1. Because Smith's sole objection to Shania Long's statements on the 911 call was for hearsay, he failed to preserve his "propensity" claim for review.

Because Smith only objected to the admission of Shania Long's portion of the 911 call on hearsay grounds, he failed to preserve his new argument that the statements were inadmissible as "propensity" evidence for review. "[A]n issue, theory, or argument not presented at trial will not be considered on appeal." *State v. Jamison*, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). Under RAP 2.5(a), an appellate court "may refuse to review any claim of error which was not raised in the trial court." This rule requires parties to bring purported errors to the trial court's attention, thus allowing the trial court to correct them.¹ See *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975). Long ago, the Washington Supreme Court stated: "If an objection naming a specific, but untenable, ground be overruled, it cannot upon appeal be made to rest upon another ground which, although tenable, was not called to the attention of the court during the trial." *State*

¹ Requiring parties to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error.

v. Pappas, 195 Wn. 197, 200, 80 P.2d 770 (1938). More recently, this fundamental rule has been restated as follows:

A party who objects to the admission of evidence on one ground at trial may not on appeal assert a different ground for excluding that evidence. And a theory not presented to the trial court may not be considered on appeal.

State v. Price, 126 Wn.App. 617, 637, 109 P.3d 27 (2005).

Appellate courts have regularly refused to consider new arguments that were not raised at trial. In *State v. Sims*, 77 Wn.App 236, 238, 890 P.2d 521 (1995), the court refused to hear the appellant's argument that hearsay statements were improperly admitted as excited utterances because the declarant had made inconsistent statements that indicated fabrication, when the argument had not been presented to the trial court, was not preserved for appeal. In *State v. Saunders*, 132 Wn.App. 592, 607, 132 P.3d 743 (2006), trial counsel had objected at trial to admission of the victim's statements as hearsay, but on appeal the defendant argued that the statements included an identification of the perpetrator and thus fell outside the medical diagnosis exception; because this was a new argument against the statements, the court refused to consider it. In *State v. Mathes*, 47 Wn.App. 863, 868, 737 P.2d 700 (1987), trial counsel had objected to the admission of a document as a recorded recollection, arguing the document was not authenticated because the witness had no

independent recollection of the events, however on appeal, the argument shifted to a claim the document was not authenticated as the witness had not signed it. Though the objection remained the same, authentication, the appellate court steadfastly refused to consider the new claim. *Id.*

Although an argument must be raised at trial to be preserved for review, in certain, limited circumstances, appellate courts will consider arguments raised for the first time on appeal, but only where the legal standard for consideration had been satisfied. “The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’” *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). Under RAP 2.5(a), an error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right.

In *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992), the Court of Appeals explained that the parameters of a “manifest error affecting a constitutional right” are not unlimited stating:

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on

appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.

The Court further explained that an appellate court must first satisfy itself that the alleged error is of constitutional magnitude before considering claims raised for the first time on appeal. *Id.* at 343. But this does not mean that any claim of constitutional error is appropriate for review. For a reviewing court to consider such a claim, it must be “manifest,” otherwise the word “manifest” could be removed from the rule. *Id.* The court stated: “[P]ermitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders, and courts.” *Id.* at 344.

The court then provided the proper approach for analyzing whether an alleged constitutional error may be reviewed on appeal under RAP 2.5(a). *Id.* at 345. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. *Id.* Second, the court must determine whether the alleged error is “manifest;” an essential part of this determination requires a plausible showing that the alleged error had practical and identifiable consequences in the trial. *Id.* The term “manifest” means “unmistakable,

evident or indisputable as distinct from obscure, hidden or concealed.” *Id.* An error that is abstract and theoretical, does meet this definition. *Id.* at 346. Third, if the court finds the alleged error is manifest, then the court must address the merits of the constitutional issue. *Id.* at 345. Fourth, if the court determines an error was of constitutional import, it must then undertake a harmless error analysis. *Id.*

Here, Smith’s only objection to Shania Long’s portion of the 911 call was for hearsay. After the trial court ruled her portion of the call was admissible as a present sense impression, Smith made no further objection. Then, just prior to playing the 911 calls, the trial court judge specifically asked Smith’s attorney whether Smith stipulated to the calls being played. RP at 32. Smith’s attorney then confirmed with the judge that Smith was agreeing that the 911 calls were to be played. RP at 32. Now, Smith claims the trial court abused its discretion in admitting this evidence. However, on appeal he raises entirely new grounds. Without an objection from Smith that the statements were improper as “propensity” evidence under ER 404(b) or prejudicial under ER 403, the trial court was never asked to exercise its discretion. A trial court judge should not be required to raise *sua sponte* objections to evidence at trial.

While Smith maintains that the admission of this evidence amounts to constitutional error, his asserted constitutional grounds are simply that

the evidence was inadmissible and prejudicial.² Considering that anytime inadmissible evidence is admitted it is arguably prejudicial, this argument assumes that every time inadmissible evidence is admitted, a constitutional error would occur. But even if such an argument had merit, as explained in *Lynn*, every alleged claim of constitutional error does not create a right to appeal when the issue was not preserved with an objection at trial. Only when there is a showing of a manifest error affecting a constitutional right, does a party have the right to appeal if the issue was not preserved for review with an objection at trial. Here, it is highly questionable whether Smith's claim even suggests a constitutional error, much less one that is manifest. Thus, his claim fails both the first and second prongs of the test set forward in *Lynn*. Because Smith failed to raise the issue that he now raises on appeal, and this issue is a simple question of the admissibility of evidence rather than a manifest error affecting a constitutional right, his argument on this issue should not be heard.

2. The trial court did not abuse its discretion in admitting Shania Long's statements on the 911 call because they were relevant to show that the police were performing their official duties, and this was an element of the obstructing an officer charge.

² Smith's reliance on *State v. Acosta*, 123 Wn.App. 424, 429, 98 P.3d 503 (2004), ignores the fact that Acosta's attorney preserved the issue for appeal by objecting at trial.

Even if the trial court were required to refuse to admit evidence where no objection was made, the trial court here did not err in admitting Shania Long's portion of the 911 call, because it was relevant to the police response to demonstrate the police were performing their official duties, which was an element of the obstructing charge. "Where another offense constitutes 'a link in the chain' of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in 'order that a complete picture be depicted for the jury.'" *State v. Hughes*, 118 Wn.App. 713, 725, 77 P.3d 681 (2003) (quoting *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997) *cert. denied*, 532 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d322 (1998)). "In addition to the exceptions identified in ER 404(b), our courts have previously recognized a 'res gestae' or 'same transaction' exception, in which 'evidence of other crimes is admissible to complete the story of the crime on trial by proving its immediate context of happenings in time and place.'" *State v. Lane*, 125 Wn.2d 825, 833, 889 P.2d 929 (1995) (quoting *State v. Tharp*, 27 Wn.App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981)). In *State v. Tharp*, the court explained:

Our courts have previously recognized the so-called "handiwork" exception, *State v. Irving*, 24 Wn.App. 370, 601 P.2d 954 (1979), and an exception for criminal acts which are part of the whole deed, *State v. Jordan*, 79 Wn.2d 480, 487 P.2d 617 (1971). An exception is also

recognized for evidence that is relevant and necessary to prove an essential element of the crime charged. *State v. Mack*, 80 Wn.2d 19, 490 P.2d 1303 (1971).

27 Wn.App. at 204.

In *State v. Mott*, 74 Wn.2d 804, 806, 447 P.2d 85 (1968), the court dealt with the issue of the admissibility of evidence of other wrongs when it was essential to proving a crime that is charged. Mott was convicted of grand larceny by receiving stolen goods. *Id.* at 804. To prove this crime, the State was required to show that Mott had known the goods were stolen. *Id.* at 805. At trial, the court had permitted evidence that Mott had participated in previous thefts of telephone wire from the same owner. *Id.* Mott argued that the trial court erred by permitting this evidence to prove knowledge that the goods were stolen. *Id.* The Supreme Court found that this evidence was admissible to prove intent, accident or mistake, as well as a common scheme or plan. *Id.* at 806. The Court then stated: “[B]ut even if it had no value in proving any of these things it was admissible. The test of admissibility is whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged.” *Id.* (citing *State v. Miles*, 73 Wn.2d 65, 436 P.2d 198 (1968); *State v. Dinges*, 48 Wn.2d 152, 292 P.2d 361 (1956); *State v. Hartwig*, 45 Wn.2d 76, 273 P.2d 482 (1954)). The evidence of the other offenses was necessary to prove Mott knew the wire in question was stolen and was

therefore relevant to that question. *Id.* Because Mott's guilty knowledge was an "essential element of the crime which it was incumbent on the state to prove," the evidence was admissible. *Id.*

Here, as in *Mott*, Shania Long's phone conversation was admissible to prove an essential element of the crime. RCW 9A.76.020(1) states: "A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." Thus, to prove the crime of obstructing an officer, the State must prove beyond a reasonable doubt that the officer is discharging his or her official duties. Without a proper understanding of the event that occurs to elicit a police response, a jury would be unable to distinguish between an officer who is performing his or her official duties and an officer who is simply using his or her position to exercise authority for an unlawful reason.

In the present case, Shania Long's phone conversation created the need for an urgent police response. Because the State was required to prove Officer Angel was performing his official duties, it was necessary for the jury to hear why he was giving orders to Smith and physically using force to remove him from the house. Without having heard the content of Long's phone conversation, Officer Angel's actions to prevent Smith from entering the residence would have made little sense. Thus,

Long's phone conversation was admissible to prove an essential element of the crime, and the trial court did not abuse its discretion by admitting it for this purpose.

V. **CONCLUSION**

For the above stated reasons, Stacy Smith's conviction should be affirmed.

Respectfully submitted this 19th day of January, 2012.

SUSAN I. BAUR
Prosecuting Attorney

By:



ERIC H. BENTSON
WSBA # 38471
Deputy Prosecuting Attorney
Representing Respondent

IN THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF COWLITZ

STATE OF WASHINGTON,)	Cowlitz County No. 10-1-00410-3
)	
Plaintiff/Respondent.)	Court of Appeals No. 41695-6-II
)	
vs.)	
)	
STACY ROBERT SMITH,)	
)	
Defendant/Appellant.)	
)	
)	

911 CALLS



May 3, 2010
Call A
Call B

Sharon A. Ball
Court Transcriptionist
107 Birch Street
Lakeview, OR 9763-1259
(360) 751-0199

EXHIBIT 1

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 (Beginning of 911 Call from May 3, 2010, noted on
2 recordings as Call A.)

3 DISPATCH: 911, what is your emergency?

4 CALLER 1: Um -- my boyfriend is trying to take my
5 car. And, he is saying very -- something
6 unreasonable and he doesn't have a license. He is
7 freaking out.

8 DISPATCH: What is the address?

9 CALLER 1: 1117 - 7th.

10 DISPATCH: House or apartment?

11 CALLER 1: House.

12 DISPATCH: And, you are in Longview, is that right?

13 CALLER 1: Uh-huh.

14 DISPATCH: And, what is your boyfriend's name?

15 CALLER 1: Stacy.

16 DISPATCH: Stacy what?

17 CALLER 1: Smith.

18 DISPATCH: Spell the last name.

19 CALLER 1: S-M-I-T-H.

20 DISPATCH: Smith. Okay. And, where is he at right
21 now?
22

23 CALLER 1: In the garage. No. He's in the house,
24 now. Yeah, you're not taking my car.

25 (Yelling in the background.)

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 CALLER 1: You tried.
2 DISPATCH: You guys live there together?
3 CALLER 1: Yes. (Yelling in the background.)
4 Well, he isn't really -- he lives off me but -- yeah.
5 I just need him out of here. He's -- I don't like
6 the way he treats my kids and he is seeming crazy.
7 DISPATCH: Okay. So, what -- what do you mean by
8 being crazy?
9 CALLER 1: He's freaking out and yelling because I
10 won't give him money for beer and I'm just tired of
11 it.
12 DISPATCH: Okay. Has he been violent with you at
13 all today?
14 CALLER 1: Just yelling at me.
15 DISPATCH: So, it has only been verbal today?
16 CALLER 1: Yes.
17 DISPATCH: Okay. Okay. What's your last name?
18 CALLER 1: Johns.
19 DISPATCH: Jones?
20 CALLER 1: Johns. J-O-H-N-S.
21 DISPATCH: And, your first name?
22 CALLER 1: Jennifer. (Caller begins to cry.)
23 DISPATCH: And, a phone number for you, Jennifer?
24
25

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 CALLER 1: 261-4599.

2 DISPATCH: And, what kind of vehicle is it?

3 (Pause.) Jennifer?

4 CALLER 1: Huh?

5 DISPATCH: What kind of vehicle is it?

6 CALLER 1: It's a '91, Eagle Challenge.

7 DISPATCH: And, what color is it?

8 CALLER 1: White.

9 DISPATCH: White. And, he hasn't taken it, though,
10 right?

11 CALLER 1: No.

12 DISPATCH: Okay. Are you going to be okay until I
13 can get somebody out there with you?

14 CALLER 1: Yeah.

15 DISPATCH: Okay. And, is he still inside the
16 house?

17 CALLER 1: No.

18 DISPATCH: No. He went back outside?

19 CALLER 1: Uh-huh.

20 DISPATCH: Is -- is he out in the garage?

21 CALLER 1: No, he's back in the house now.

22 DISPATCH: Oh, now he is back in the house?

23 CALLER 1: Uh-huh.
24
25

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 DISPATCH: And, does he know that you are calling
2 911?

3 CALLER 1: Yeah.

4 DISPATCH: Okay. And, how old is --

5 CALLER 1: He's just trying to take my car.

6 (Yelling in the background.)

7 DISPATCH: He has the keys?

8 CALLER 1: Yeah.

9 DISPATCH: He does have the keys?

10 CALLER 1: Yeah.

11 DISPATCH: If he leaves, I need you to tell me,
12 okay?

13 CALLER 1: All right.

14 DISPATCH: Okay. What is his middle initial?

15 CALLER 1: R.

16 DISPATCH: R like Robert?

17 CALLER 1: Yeah.

18 DISPATCH: And, what is his date of birth?

19 CALLER 1: 08/06/83.

20 DISPATCH: 08/06 of '83?

21 CALLER 1: Yeah.

22 DISPATCH: Okay. Is he still inside, Jen?

23 CALLER 1: No.
24
25

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 DISPATCH: He want back outside?

2 CALLER 1: Yeah.

3 DISPATCH: Okay. I need to know if he takes the
4 vehicle or not, okay?

5 CALLER 1: All right.

6 DISPATCH: And, is the vehicle off the alley or off
7 the 7th Avenue side?

8 CALLER 1: The 7th Avenue.

9 DISPATCH: Out front? Okay.

10 CALLER 1: Yeah.

11 DISPATCH: Can you see the vehicle?

12 CALLER 1: No, and he hasn't taken it out of the
13 garage yet. My other car is out front. But, he
14 moved it so he could leave.

15 DISPATCH: Are you able to see if he actually
16 leaves, Jennifer?

17 CALLER 1: Yes.

18 DISPATCH: Okay. Tell me if he does, okay?

19 CALLER 1: Okay.

20 DISPATCH: Is he still there?

21 CALLER 1: Yes.

22 DISPATCH: Where exactly is he at? Is he in the
23 garage or --?

24
25

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 CALLER 1: Yes.

2 DISPATCH: He's in the garage? What is he wearing?

3 CALLER 1: Um -- a white t-shirt with a white
4 sweater and jeans.

5 DISPATCH: White t-shirt, white sweater and jeans?

6 CALLER 1: Yeah.

7 DISPATCH: Okay. Okay. Jennifer, they are not
8 seeing the car. Did he leave?

9 CALLER 1: It's still in the garage.
10

11 DISPATCH: It's still in the garage?

12 CALLER 1: Yes. When I -- when I went out there he
13 started it and he seen me pick up my phone and he
14 started freaking out on me.

15 DISPATCH: Okay. So, I thought you said it was out
16 in front of the residence on 7th.

17 CALLER 1: My other car is that he already tried to
18 take. It's a Camry.

19 DISPATCH: Okay. You're at 1117 - 7th, right?

20 CALLER 1: Yeah.

21 DISPATCH: Okay. Has he been drinking today?

22 CALLER 1: No, because I won't give him any money.

23 DISPATCH: Okay. He wants to go drink?

24 CALLER 1: Uh-huh.
25

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 DISPATCH: How about any drugs?

2 CALLER 1: No.

3 DISPATCH: Any weapons that he carries with him?

4 CALLER 1: No.

5 DISPATCH: How old is your child?

6 CALLER 1: They're ten and four.

7 DISPATCH: Ten and four. Are they in the house
8 with you?

9 CALLER 1: The four-year-old is. And, the other
10 one is at ballet.

11 DISPATCH: Jennifer, I want you to stay in the --
12 in your house, okay?

13 CALLER 1: All right.

14 DISPATCH: And, we are going to have an officer
15 come and contact you. They are going to check the
16 garage first. Okay?

17 CALLER 1: All right.

18 DISPATCH: So, if anything changes, you call me
19 right back.

20 CALLER 1: Okay.

21 DISPATCH: All right. Thanks, Jennifer.

22 CALLER 1: All right.

23 DISPATCH: Bye-bye.

24
25

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CALLER 1: Bye.

(End of first 911 call from May 3, 2010, noted on recordings as Call A.)

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 (Beginning of second 911 call from May 3, 2010,
2 noted on recordings as Call B.)

3 DISPATCH: This is 911. What is your emergency?

4 Hello. 911. (Crying is heard.)

5 CALLER 1: Hello?

6 DISPATCH: Hi. This is 911. What's going on?

7 CALLER 1: I need them back here, please.

8 DISPATCH: You need them back here. Where is
9 "here"? (Crying is again heard.) What is going on?

10 (The sound of a phone being hung up is heard.)

11 CALLER 1: Hello.

12 DISPATCH: This is 911. What is going on?

13 (The sound of a phone being hung up is heard.)

14 CALLER 2: Hello. (This is a different voice from
15 the previous notation of CALLER 1.)

16 DISPATCH: Hi. This is 911, what's going on? (A
17 female voice is heard yelling is heard in the
18 background.)

19 CALLER 2: My step-dad --

20 DISPATCH: Uh-huh.

21 CALLER 2: He is freaking out on my mom and he is,
22 like, throwing stuff across the room and like, almost
23 hitting her and she's --

24 DISPATCH: Okay. What's your -- what's your step-
25

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 dad's name?
2 CALLER 2: Stacy Smith.
3 DISPATCH: Jason Smith?
4 CALLER 2: Stacy Smith.
5 DISPATCH: I'm sorry. What's the first name?
6 CALLER 2: Stacy.
7 DISPATCH: Stacy?
8 CALLER 2: Yeah.
9 DISPATCH: S-T-A-C-E-Y?
10 (Female voice is still yelling.)
11 CALLER 2: No E.
12 DISPATCH: No E?
13 CALLER 2: Yes.
14 DISPATCH: Has he assaulted your mom?
15 CALLER 2: Not yet.
16 DISPATCH: Okay. How old are you?
17 CALLER 2: Ten.
18 DISPATCH: And, what that your mom that originally
19 called?
20 CALLER 2: Yeah.
21 DISPATCH: What is your mom's name?
22 CALLER 2: Jennifer Johns.
23 DISPATCH: Okay. What's your name, hon?
24
25

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 CALLER 2: Shaniah Long.
2 DISPATCH: Shaniah Long?
3 CALLER 2: Yes.
4 DISPATCH: What's going on now, Shaniah?
5 CALLER 2: He -- he -- he went out but he keeps
6 taking my mom's cars.
7 DISPATCH: Okay. Is he still there?
8 CALLER 2: He's outside.
9 DISPATCH: I'm sorry. What?
10 CALLER 2: He's outside.
11 DISPATCH: He's outside?
12 CALLER 2: Yes.
13 DISPATCH: Is he still there, though? He hasn't
14 left?
15 CALLER 2: Yes.
16 DISPATCH: If he leaves, what kind of car is he
17 going to get in, do you know?
18 CALLER 2: Uh -- what car is it, Mama?
19 (Female voice yelling is heard again in the
20 background.)
21 CALLER 2: It's a silver Camry.
22 DISPATCH: It's a what?
23 CALLER 2: A silver Camry.
24 DISPATCH: A silver Camry. Is it still there?
25

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CALLER 2: Yes.

DISPATCH: Okay. Is it -- can you still see it outside?

CALLER 2: I don't know but my mom is going to be on the phone right now.

DISPATCH: Your mom is what?

CALLER 2: Do you want to talk to my mom?

DISPATCH: Is she willing to talk to me?

CALLER 2: Yes.

DISPATCH: Okay.

CALLER 2: Here, Mom.

CALLER 1: Hello?

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

CALLER 1: No.

DISPATCH: Okay. Are you still standing outside?

CALLER 1: Yeah.

DISPATCH: Okay. Have you been assaulted, Jennifer?

CALLER 1: No.

DISPATCH: Okay. What is the fight over tonight?

CALLER 1: (Crying is heard.) (Inaudible). I have to go. I have to take care of my kids.

DISPATCH: Okay. I have an officer pulling up

State of Washington v. Stacy Robert Smith
Cowlitz County Cause No. 10-1-00410-3
Court of Appeals Cause No. 41695-6-II

1 there now, okay?

2 CALLEE 1: (Crying heard.)

3 (The sound of a phone being hung up is heard.)

4 (End of the 911 call from May 3, 2010, noted on
5 recordings as Call B.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

I, Sharon A. Ball, do hereby certify:

That I am a court-approved transcriber for the State of Washington, County of Cowlitz;

That the annexed and foregoing transcript of digitally recorded proceedings was transcribed by me to the best of my ability;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the transcript is a true and correct record of all audible portions of the recorded testimony, including questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing proceedings. Areas of the record, which were not decipherable for any reason, are noted as [inaudible].

Dated this 2nd day of September 2011.



Sharon A. Ball
107 Birch Street
Lakeview, OR 97630-1259
(360) 751-0199

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
jahays@qwestoffice.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 20th, 2012.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

January 20, 2012 - 12:00 PM

Transmittal Letter

Document Uploaded: 416956-Respondent's Brief.pdf

Case Name: State v. Stacy Robert Smith

Court of Appeals Case Number: 41695-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

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

jahays@qwestoffice.net