

NO. 43727-9-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

---

---

STATE OF WASHINGTON,

Respondent,

v.

EDWARD STEINER,

Appellant.

---

---

ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CLALLAM COUNTY

Before the Honorable Robert L. George Wood, Judge

OPENING BRIEF OF APPELLANT

---

---

Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-9301

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR .....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
C. STATEMENT OF THE CASE.....	1
1. <u>Procedural facts:</u> .....	1
2. <u>Testimony at trial:</u> .....	3
D. ARGUMENT .....	5
1. <u>THE TRIAL COURT ERRED UNDER ER 404(b)WHEN IT ADMITTED EVIDENCE OF MR. STEINER’S DEMEANOR AT THE TIME OF ARREST AND TRANSPORT TO JAIL</u> .....	5
a. Standard of Review.....	6
b. The Trial Court improperly admitted highly prejudicial character evidence .....	7
2. <u>MR. STEINER’S CHALLENGE OF THE OFFICERS’ TESTIMONY IS PROPERLY PRESERVED FOR APPEAL, HOWEVER, IF THIS COURT DISAGREES, THEN HE WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL</u> ....	8
E. CONCLUSION.....	11

**TABLE OF AUTHORITIES**

<b><u>WASHINGTON CASES</u></b>	<b><u>Page</u></b>
<i>State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988), 113 Wn.2d 520, 782 P.2d 1013 (1989).....	9
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	5
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937(2009).....	6, 7
<i>State v. Freeburg</i> , 105 Wn. App. 492, 20 P.3d 984 (2001) .....	6
<i>State v. Goebel</i> , 40 Wn.2d 18, 240 P.2d 251 (1952).....	5, 7
<i>State v. Halstien</i> , 122 Wn.2d 109, 857 P.2d 270 (1993).....	5
<i>State v. Koloske</i> , 100 Wn.2d 889, 676 P.2d 456 (1984) .....	9
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997) .....	6
<i>State v. Lopez</i> , 107 Wn. App. 270, 27 P.3d 237 (2001).....	9, 10
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	5
<i>State v. Neil</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001) .....	6
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	9
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982) .....	5, 7
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	7
<b><u>UNITED STATES CASES</u></b>	<b><u>Page</u></b>
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 2052 (1984).....	9, 10
<b><u>REVISED CODE OF WASHINGTON</u></b>	<b><u>Page</u></b>
RCW 9A.46.020 .....	1
<b><u>CONSTITUTIONAL PROVISIONS</u></b>	<b><u>Page</u></b>
Wash. Const. art. 1, § 22.....	9
U. S. Const. Amend. VI.....	9

**EVIDENCE RULES**

**Page**

ER 404(b).....1, 5, 6, 7, 8, 9

**OTHER AUTHORITIES**

**Page**

5 K. Tegland, Wash. Prac., Evidence § 114, at 383-84 (3d ed. 1989).....5

**A. ASSIGNMENTS OF ERROR**

1. The trial court improperly admitted evidence of Appellant’s bad acts under ER 404(b), which unfairly influenced the outcome of the trial.

2. Appellant was denied his constitutional right to effective assistance of counsel.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in allowing the State to introduce evidence of appellant’s behavior—described as “belligerent”—following arrest when police officers initially contacted him and when he was transported to jail following arrest? Assignment of Error 1.

2. Did Appellant preserve his challenge to the demeanor testimony for appeal? Assignment of Error 2.

3. If Appellant did not preserve his challenge to the demeanor testimony for appeal, then was Appellant denied his right to ineffective assistance of counsel? Assignment of Error 2.

**C. STATEMENT OF THE CASE**

**1. Procedural facts:**

The State charged appellant Ed Steiner with Harassment (threat to kill), contrary to RCW 9A.46.020 by information filed in Clallam County Superior court on May 9, 2012. Clerk’s Papers [CP] 68.

Following a pre-trial CrR 3.5 hearing, the court ruled that Mr. Steiner's statements at the time of arrest, although custodial, were voluntary and admissible. Report of Proceedings [RP] at 53, 54.

Testimony at the hearing indicated that Mr. Steiner was "belligerent" with police after they arrived at his apartment and that he continued to be belligerent when he was transported to the Clallam County Jail. RP at 41, 42.

Defense counsel moved in limine to exclude testimony regarding Mr. Steiner's demeanor during arrest and transport. CP 62; RP at 54, 55.

Regarding the ruling, the trial court judge stated:

I think it's also circumstantial evidence that the behavior that he displayed toward the officers was the same that he exhibited towards the alleged victims minutes earlier.

So, taking all that into consideration, I think it is an inseparable part of the crime that provides a history of the crime, and it's relevant for the issues that I've indicated. I think it's highly probative of what was going on, [...] and it far outweighs any prejudicial effect that it could be having on Mr. Steiner.

RP at 57.

Jury trial in the matter started July 9, 2012, the Honorable George Wood presiding.

At the close of trial, the court instructed the jury that if it could not agree on the charge of harassment threat to kill, it could consider the lesser included offense of misdemeanor harassment. CP 30, 31; see WPIC 36.06.

Neither exceptions nor objections to the jury instructions were taken by counsel for the defense. RP at 150.

The jury found Mr. Steiner guilty of the lesser included offense of misdemeanor harassment. RP at 168; CP 18.

The Court imposed a standard range sentence of four and a half months on July 18, 2012. RP at 191; CP 12.

Timely notice of appeal was filed on July 18, 2012. CP 11. This appeal follows.

**2. Testimony at trial:**

Jarrett and Dawn Shore live near Mr. Steiner's apartment in Port Angeles, Clallam County, Washington. RP at 63. Mr. Shore testified that at approximately 5:00 p.m. on May 8, 2012, Mr. Steiner leaned out his first story window and said that he was going to "kick their asses." RP at 70. Ms. Shore called the police. RP at 72. Mr. Shore stated that while his wife was talking with the dispatcher, Mr. Steiner jumped out of his apartment

window and came toward them. He then turned and started to go back to his apartment and said “[‘]that’s it, tonight I’m coming over killing you, your wife. . . . [‘]” RP at 71.

Port Angeles Police Officer Alan Brusseau testified that he was dispatched to the apartment and contacted Mr. Steiner. RP at 100, 101. He stated that initially Mr. Steiner did not come out of his apartment, refused to open the door, used a “continual string of profanity,” and was “fairly belligerent.” RP at 101. Port Angeles Police Officer Justin Leroux testified that Mr. Steiner was placed under arrest and transported to the county jail. RP at 109, 110. Officer Leroux stated that while Mr. Steiner was handcuffed and in his vehicle, Mr. Steiner swore at him and was belligerent. RP at 111. He stated that Mr. Steiner said “something to the effect of you’re lucky I don’t kill you, and then something to the effect of you know what I’m going to do to you, I’m going to kill you.” RP at 112.

Mr. Steiner testified that he did not harass or threaten either of the Shores and that Ms. Shore was the one who yelled and threatened him. RP at 126, 130, 134, 139. Mr. Steiner also denied swearing at or threatening the police while being transported to jail. RP at 137, 138.

**D. ARGUMENT**

**1. THE TRIAL COURT ERRED UNDER ER 404(b) WHEN IT ADMITTED EVIDENCE OF MR. STEINER'S DEMEANOR AT THE TIME OF ARREST AND TRANSPORT TO JAIL.**

The jury heard evidence that Mr. Steiner was belligerent to police when he was initially contacted on May 8, 2012, and that he swore at and threatened Officer Leroux when he was being transported to jail. This evidence was not admissible under ER 404(b). Accordingly, the conviction should be reversed because the trial court erred when it admitted this evidence, which unfairly influenced the outcome of the trial.

It is well established that a defendant must only be tried for those offenses actually charged. Consistent with this rule, evidence of other bad acts must be excluded unless shown to be relevant to a material issue and more probative than prejudicial. *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982); *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), overruled on other grounds, *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

The term "bad act" includes "acts that are merely unpopular or disgraceful." *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (quoting 5 K. Tegland, Wash. Prac., Evidence § 114, at 383-84 (3d ed.

1989)). The State's utilization of evidence of Mr. Steiner's bad acts must be evaluated under ER 404(b), which provides:

(b) Other Crimes, Wrongs, or Acts. 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, absence of mistake or accident.

**a. Standard of Review**

This Court reviews the interpretation of an evidentiary rule de novo as a question of law. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937(2009). This Court reviews a trial court's decision to admit evidence under ER 404(b) for an abuse of discretion only if the trial court correctly interprets the rule. *Id.* A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." *State v. Neil*, 144 Wn.2d 600, 609, 30 P.3d 1255

(2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. *Fisher*, 165 Wn.2d 727.

**b. The Trial Court improperly admitted highly prejudicial character evidence**

Before admitting evidence under ER 404(b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence is being admitted. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Second, the court must determine that the proffered evidence is logically relevant to an issue. The test is "whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged." *Saltarelli*, 98 Wn.2d at 362 (quoting *Goebel*, 40 Wn.2d at 21). Evidence is logically relevant if it is of consequence to the outcome of the action and tends to make the existence of the identified fact more or less probable. *Saltarelli*, 98 Wn.2d at 361-62.

Third, assuming the evidence is logically relevant; the court must then determine whether its probative value outweighs any potential prejudice. *Saltarelli*, 98 Wn.2d at 362-63. As noted *supra*, admission of evidence under ER 404(b) is reviewed for an abuse of discretion. *Fisher*, 165 Wn.2d at 745.

Here, defense counsel moved in limine to suppress statements made to the officers during initial contact and to Officer Leroux during transport. CP 62; RP at 54. Defense counsel argued the statements were not within the res gestae exception to ER 404(b) because it occurred approximately thirty minutes after the incident with the Shores. RP at 54.

The trial court's erroneous admission of the testimony is reversible error. The testimony was highly prejudicial and did not constitute harmless error.

The admission of this evidence thus created the danger that the jury found Mr. Steiner guilty of misdemeanor harassment because it viewed him as a belligerent, volatile person deserving of punishment rather than because the State proved the charge beyond a reasonable doubt. Absent the testimony regarding Mr. Steiner's demeanor when arrested, the jury could have acquitted him of the lesser included misdemeanor offense. Because the trial court erred when it admitted this highly prejudicial evidence under the res gestae exception to ER 404(b), this Court should reverse the conviction.

2. **MR. STEINER'S CHALLENGE OF THE OFFICERS' TESTIMONY IS PROPERLY PRESERVED FOR APPEAL. HOWEVER, IF THIS COURT DISAGREES, THEN HE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Steiner's counsel objected to the admission of ER 404(b) evidence and the trial court made a final ruling admitting the evidence at the ER 404(b) hearing, and therefore the issue is properly preserved for appeal. See *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (party who loses evidentiary objection on a motion in limine "is deemed to have a standing objection where a judge has made a final ruling on the motion, '[u]nless the trial court indicates that further objections at trial are required when making its ruling.'" (quoting *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), overruled on other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), 113 Wn.2d 520, 782 P.2d 1013 (1989)).

However, should this Court determine that Mr. Steiner waived this issue due to his counsel's failure to specifically object to the officers' testimony, defense counsel rendered ineffective assistance.

The Sixth Amendment to the United States Constitution and art. 1, § 22 (amend 10) of the Washington Constitution guarantee an accused the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 2052 (1984); *State v. Lopez*, 107 Wn. App. 270, 275, 27 P.3d 237 (2001). An accused received ineffective assistance of counsel when (1) counsel's performance was deficient and (2) the deficient

performance prejudiced the accused. *Strickland*, 466 U.S. at 687-89; *Lopez*, 107 Wn. App. at 275. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88; *Lopez*, 107 Wn. App. at 275. Where counsel's conduct cannot be characterized as legitimate tactics, counsel has rendered ineffective assistance. *Strickland*, 466 U.S. at 687-89; *Lopez*, 107 Wn. App. at 277.

There was no legitimate tactic for defense counsel's failure to specifically object to the admission of testimony by Officers Brusseau and Leroux. Their testimony undermines confidence in the outcome of the trial.

Mr. Steiner's defense relied on his account of the events leading to his criminal charge. Accordingly, the jury's evaluation of his credibility was crucial to determining whether he was guilty of the offense. Allowing the jury to hear the highly prejudicial evidence of his alleged belligerence and threats toward the police not only likely affected the jury's credibility determination, but also made it likely that the jury found him guilty of the misdemeanor offense because it viewed him as having a highly combative and volatile demeanor.

Thus, defense counsel's failure to specifically object to the officers' testimony prejudiced him and denied his constitutional right to effective assistance of counsel.

**E. CONCLUSION**

For the reasons stated above, this Court should reverse Mr. Steiner's conviction.

DATED: January 10, 2013.

Respectfully submitted,  
THE TILLER LAW FIRM

---

PETER B. TILLER-WSBA 20835  
Of Attorneys for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on January 10, 2013, that this Appellant's Opening Brief was sent via JIS Link, to (1) Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, (2) and was sent by first class mail, postage pre-paid to the following:

Ms. Deborah Kelly  
Deputy Prosecuting Attorney  
Clallam County Prosecutor's Office  
223 East Fourth Street, Suite 11  
Port Angeles, WA

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

Mr. Edward J. Steiner  
2311 W. 18<sup>th</sup> Street, #106  
Port Angeles, WA 98363

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 10, 2013.

---

PETER B. TILLER

# TILLER LAW OFFICE

**January 10, 2013 - 4:08 PM**

## Transmittal Letter

Document Uploaded: 437279-AMENDED APPELLANT BRIEF - COA No. 43727-9-II.pdf

Case Name: State v. Edward Steiner

Court of Appeals Case Number: 43727-9

**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: \_\_\_\_
- 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
- Petition for Review (PRV)
- Other: AMENDED Opening Brief of Appellant

### Comments:

ATTN: SYL

Sender Name: Shirleen K Long - Email: [slong@tillerlaw.com](mailto:slong@tillerlaw.com)