IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES RANDALL STAFFORD, Appellant.	No. 40156-8-II UNPUBLISHED OPINION

James Randall Stafford appeals his conviction of third degree assault of a law enforcement officer, arguing that the trial court erroneously admitted a police officer's testimony that a police dispatcher had advised him that Stafford would "assault police officers when they arrived on scene." Report of Proceedings (RP) at 133. Because the trial court should not have admitted this irrelevant evidence, and because the erroneous admission of this evidence prejudiced Stafford, we reverse his conviction.

FACTS

I. Background

On September 18, 2009, Officer Perry Houts and Sergeant Kim Yamashita of the Washougal Police Department and Clark County Deputy Sheriff Christopher Nicholls responded to a disturbance at a property in Washougal, Washington. Stafford lived on the property with his mother. When the officers arrived on the scene, they spoke with Stafford's relatives near the property's main residence. The relatives told the officers that Stafford had made "threats." RP at 118.

The officers proceeded to Stafford's recreational vehicle (RV), which was located about

75 feet away from the main residence. Stafford had locked himself inside. The officers informed Stafford that he was under arrest for harassment and ordered him to exit the RV. When Stafford refused, the officers attempted to enter through an open window. Using a knife, Yamashita cut the window screen to allow Nicholls to tear it off. Stafford was "moving around frantically" in the RV, causing it to "rock[] back and forth." RP at 75.

When Nicholls removed the window screen, Yamashita attempted to push a shelving unit that was blocking entry out of the way. Yamashita was struck by objects that came out of the window. Yamashita testified that, although it was dark in the trailer, she could see Stafford's arm make a throwing motion. Nicholls testified that he could not see inside the trailer, but that the objects emerged from the trailer "at quite a high rate of speed." RP at 116. Stafford denied throwing any objects at the officers; he testified that the objects fell off the shelving unit when Yamashita tried to push it out of the way.

After the incident at the window, Stafford exited the RV. He was agitated and aggressive, and he refused to comply with the officers' orders to stop and get on the ground. The officers used a taser to subdue and arrest him. The State charged him, in relevant part, with third degree assault of a police officer.[1]

At trial, Stafford's counsel cross-examined Nicholls as follows:

> Q: When you got to the scene of this incident, you talked to the relatives?
>
> A: Yes, I did.
>
> Q: Okay. And at that time, you formed an opinion to arrest Mr. Stafford, based upon what they told you; isn't that correct?

[1] RCW 9A.36.031(1)(g).

A: Yes, sir.

Q: All right. You didn't solicit or get his side of the story?

[STATE]: Objection, Your Honor. Relevance.

[DEFENSE]: He's the officer that made the decision to arrest.

THE COURT: This question may be answered. You may answer it.

A: At that point in time, no, I did not solicit his.

Q: All right. Now you tried a crowbar on the door of the camper; is that correct?

A: Yes, I did.

Q: All right. But you did not have an arrest warrant at that time?

A: No, sir; I did not.

Q: You didn't have a search warrant?

A: No, sir; I did not.

Q: This would not have been a hot pursuit case?

A: With the facts we had had from the family and dispatch in regards to the threats that were made—

Q: And those—

A: —I—

Q: And those were from the family, not Mr. Stafford or anything; correct?

A: Correct.

Q: Now were you aware that they were having a running argument at that time?

A: I was unaware of that.

RP at 117-19.

Before its redirect examination of Nicholls, the State moved the trial court outside of the jury's presence for permission to ask Nicholls "what he heard from dispatch" in order to explain the officers' manner of arrest. RP at 124. In an offer of proof, Nicholls testified that dispatch informed him that "Mr. Stafford was being irrational and would assault police officers if they had arrived on the scene." RP at 126. Stafford objected, arguing that this testimony was hearsay, highly prejudicial, and irrelevant. The trial court ruled that it would allow Nicholls's testimony because Stafford had "open[ed] the door a crack" about the officers' state of mind when they approached the scene. RP at 127. At the State's request, the trial court agreed to provide a limiting instruction.

Accordingly, during the State's redirect of Nicholls, the following exchange occurred:

Q: [Y]ou also said you were informed some things from Dispatch; is that correct?

A: Yes, sir.

. . . .

Q: Relating to what you were informed—can you tell the jury relating to what you were informed about Mr. Stafford—

THE COURT: Stop.

Q: —by Dispatch?

THE COURT: All right. Ladies and gentlemen, I am now instructing you that the answer to this question you're not to accept it as truth, but only to—for it to be shown how it affected this officer's conduct at the scene. Okay? You may answer.

A: Thank you, Your Honor. Dispatch advised that Mr. Stafford was acting irrational and that he would assault police officers when they arrived on scene.

RP at 132-33.

During deliberations, the jury sent a written note to the trial court, which asked, "Did the objects fly out of the window before Officer Yamashita pushed on the shelf[?]" Clerk's Papers (CP) at 54. The trial court responded, "Rely on the evidence presented in court." CP at 54.

The jury convicted Stafford of third degree assault. He appeals.

ANALYSIS

I. Admission of Evidence

Stafford contends that the trial court erred by allowing Nicholls to relate the content of the dispatcher's statement. He argues that this testimony was irrelevant. We agree.

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Abuse of discretion occurs when a trial court's decision to admit evidence is "manifestly unreasonable or based upon untenable grounds or reasons." *Magers*, 164 Wn.2d at 181 (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

A. Relevance

Evidence that is not relevant is not admissible. ER 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." ER 801(c). A statement is not hearsay if offered to explain its effect on the listener rather than the truth of its content. *See State v. Roberts*, 80 Wn. App. 342, 352, 908 P.2d 892 (1996); *State*

v. Jessup, 31 Wn. App. 304, 315, 641 P.2d 1185 (1982). But even if an out-of-court statement is offered to explain its effect on the listener, it is not admissible unless it is relevant. *See State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006); *see also State v. Stamm*, 16 Wn. App. 603, 559 P.2d 1 (1976) ("Out-of-court statements are admissible to show a declarant's state of mind only if said state of mind is 'relevant to a material issue in the cause.'") (quoting *State v. Murphy*, 7 Wn. App. 505, 509, 500 P.2d 1276 (1972)).

Edwards is instructive. There, an officer testified that a confidential informant told him that the defendant sold cocaine. *Edwards*, 131 Wn. App. at 614. On appeal, the parties debated whether the confidential informant's statement was hearsay. *Edwards*, 131 Wn. App. at 614. The State argued that the statement was not hearsay because it explained why the officer initiated an investigation of the defendant. *Edwards*, 131 Wn. App. 614. But the *Edwards* court rejected this argument, holding that the officer's state of mind was not relevant to the issue of whether the defendant had sold cocaine. 131 Wn. App. at 614.

In *State v. Aaron*, 57 Wn. App. 277, 787 P.2d 949 (1990), the court addressed a similar issue. In that case, a resident surprised a burglar in her house, causing the burglar to flee. *Aaron*, 57 Wn. App. at 278. The burglar hid or dropped a videocassette recorder (VCR) in some bushes behind the house. *Aaron*, 57 Wn. App. at 278. Later that day, neighbors observed a man get out of a car and use a blue jeans jacket to push his way through the bushes. *Aaron*, 57 Wn. App. at 279. The neighbors called the police and reported the car's license number. *Aaron*, 57 Wn. App. at 279. The police dispatcher relayed the license number to the responding officer and told the officer about the blue jeans jacket. *Aaron*, 57 Wn. App. at 279-80. The officer stopped the car

about three blocks from the burgled house and noticed a blue jeans jacket on the car's passenger seat after the defendant exited the vehicle. *Aaron*, 57 Wn. App. at 279. The officer searched the jacket and discovered a watch and jewelry that had been taken in the burglary. *Aaron*, 57 Wn. App. at 279. At trial, the officer testified, over the defendant's objection, that the dispatcher had told him that the suspect used a blue jeans jacket to push his way through the bushes. *Aaron*, 57 Wn. App. at 279. The State argued that the testimony was not inadmissible hearsay; rather, the State offered it "to show the officer's state of mind in explaining why he acted as he did." *Aaron*, 57 Wn. App. at 279-80. On appeal, the court held that the officer's testimony that the dispatcher told him about the blue jeans jacket was not relevant:

> If the legality of the search and seizure was being challenged, either at a suppression hearing or at trial, the information available to the officer as the basis for his action would be relevant and material. However, the officer's state of mind in reacting to the information he learned from the dispatcher is not in issue and does not make "determination of the action more probable or less probable than it would be without the evidence." ER 401. Accordingly, the dispatcher's statement was not relevant for another purpose. It seems clear that the State introduced [the officer's] testimony solely to suggest to the jury that the jacket containing the watch and jewelry stolen from [the victim] belonged to [the defendant].

Aaron, 57 Wn. App. at 280.

Similarly, Nicholls's testimony that the dispatcher informed him that Stafford "was acting irrational[ly] and . . . would assault police officers when they arrived on scene" was irrelevant to the determination of whether Stafford, in fact, assaulted Yamashita. RP at 133. Although the State here claims—like it did in *Aaron*—that the dispatcher's statement was not inadmissible hearsay because it did not offer the statement to prove the truth of the matter asserted, Nicholls's state of mind in reacting to the dispatcher's statement had no probative value

for a fact of consequence.[2] *See Aaron*, 57 Wn. App. at 279-80. What Nicholls and the other officers thought or felt when they approached Stafford did not make it more or less likely that Stafford actually assaulted Yamashita. Because Nicholls's testimony was irrelevant, the trial court should have excluded it.

B. "Opening the Door"

The State argues that the trial court correctly concluded that the defense "opened the door" to Nicholls's testimony about the dispatcher's statement because the defense had inquired into Nicholls's state of mind during cross-examination. We disagree.

The "opening the door" doctrine governs the admissibility of certain types of evidence at trial. *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). Under the doctrine, when a party "opens the door" by raising a matter at trial, the opposing party may introduce evidence to explain, clarify, or contradict the party's evidence. *Jones*, 144 Wn. App. at 298 (citing 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007)). The purpose of the doctrine is to prevent a party from raising a subject and then dropping it at an advantageous time, which "might well limit the proof to half-truths." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); *see also State v. Hartzell*, 156 Wn. App. 918, 926, 933-35, 237 P.3d 928 (2010) (a defendant may open the door to otherwise inadmissible hearsay by eliciting an

[2] *See also State v. Johnson*, 61 Wn. App. 539, 545-47, 811 P.2d 687 (1991) (holding that the trial court should not have admitted a police officer's testimony about an informant's out-of-court statement recorded in a search warrant affidavit where the officer's state of mind in executing the warrant was not at issue; thus, the informant's statement was inadmissible hearsay); *State v. Lowrie*, 14 Wn. App. 408, 412-13, 542 P.2d 128 (1976) (holding that the trial court should not have admitted a detective's testimony that an informant told him that the defendant was involved in the crime because "neither the making of the [informant's] statement . . . nor the resultant police action was in issue.").

incomplete and misleading hearsay version of events during cross-examination).

Here, Stafford did not open the door to Nicholls's testimony about the dispatcher's statement. During the relevant portion of cross-examination, Stafford asked Nicholls whether Nicholls had decided to arrest him after speaking with his family and without getting his side of the story and whether Nicholls had obtained a search warrant or an arrest warrant before attempting the arrest. Stafford also asked Nicholls about the manner in which the police attempted to enter the RV.

The dispatcher's statement, in contrast, consisted of the family's prediction about Stafford's actions if the police responded to the scene. The statement did not explain, clarify, or contradict Nicholls's testimony that he decided to arrest Stafford based only on Stafford's threats against his family. Nor did the statement explain, clarify, or contradict Nicholls's testimony that he made the decision to arrest Stafford before getting his side of the story. Further, the statement did not explain, clarify, or contradict Nicholls's testimony that he decided to arrest Stafford without an arrest or search warrant or that he attempted to arrest Stafford by using a crowbar on the RV's door. Accordingly, Stafford did not "open the door" to the admission of this statement during redirect.

C. The Limiting Instruction

Here, the trial court provided a limiting instruction, which directed the jury to consider the dispatcher's statement only for its effect on Nicholls's conduct at the scene. We presume that jurors follow limiting instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). However, a limiting instruction assumes that the trial court admitted the evidence for a permissible purpose; the limiting instruction constrains the jury's consideration of the evidence to

that use. *See* ER 105. Here, Nicholls's testimony about the dispatcher's statement had no permissible purpose: either it was irrelevant or it was inadmissible hearsay. Further, this testimony did not explain, clarify, or contradict the testimony that Stafford elicited during his cross-examination of Nicholls. No limiting instruction can make inadmissible evidence admissible. Further, curative instructions fail to remedy the admission of hearsay that a defendant will commit a future crime. *See State v. Miles*, 73 Wn.2d 67, 70-71, 436 P.2d 198 (1968). In *Miles*, the State charged the defendants with robbing a liquor store in Grandview. 73 Wn.2d at 67. Over a hearsay objection, the trial court allowed one of the officers involved in the defendants' arrest to testify about the contents of a Teletype that he had received from the Yakima County sheriff's office, which had led to the defendants' arrest. *Miles*, 73 Wn.2d at 68. The officer testified that the Teletype described the defendants and their car and stated that "they were headed for Spokane and were going to duplicate the robbery committed in Grandview." *Miles*, 73 Wn.2d at 68. The trial court denied the defendants' motion for a mistrial and instructed the jury as follows:

> Ladies and gentleman of the jury, the Court has allowed the witness to testify as to the basis of why, as to the information which he received as his roll call progressed on, I guess it was March 17th, 1966. You are instructed to disregard that last portion of the testimony of this officer, other than that relating to two subjects in an automobile. That's the only part you may consider. The rest of it has no bearing in this trial and no bearing upon any outcome of this trial, and it really has no bearing on this man's testimony. All we are concerned with is that he had information concerning two people in a car, and from there you may proceed.

Miles, 73 Wn.2d at 68.

On appeal, the defendants in *Miles* argued that the officer's testimony that "they were going to duplicate the crime in the Spokane area" was so prejudicial that "no instruction could erase its effect from the minds of the jury." 73 Wn.2d at 69. Our Supreme Court agreed:

> While it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.
>
> We conclude that the testimony of the police officer, concerning an alleged plan to perpetrate a robbery like the one with the commission of which the defendants were charged, was so prejudicial in nature that its effect upon the minds of the jurors could not be expected to be erased by an instruction to disregard it. Therefore the defendants were denied a fair trial and a new trial must be ordered.

Miles, 73 Wn.2d at 71 (citation omitted).

Nicholls's testimony that the dispatcher told him that Stafford would assault police officers prejudiced Stafford in a manner similar to the way that the officer's testimony about the Teletype prejudiced the defendants in *Miles*. In both cases, a police officer relied on the hearsay of another law enforcement officer to testify that the defendant would commit a future crime. The only significant difference is that, in *Miles*, the trial court admitted the hearsay in a prosecution for a crime that had already occurred at the time the non-testifying law enforcement officer made the hearsay statement. Here, the dispatcher's hearsay statement prejudiced Stafford even more because it answered the jury's ultimate question in the form of an accusation made through the dispatcher by the family members with whom Stafford had a running conflict. Such evidence was likely to "impress itself upon the minds of the jurors" such that its effect "could not be expected to be erased by an instruction to disregard it." *Miles*, 73 Wn.2d at 71.

D. Harmless Error

Evidentiary error is grounds for reversal only if it results in prejudice. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An error is prejudicial if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Neal*,

144 Wn.2d at 611 (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

The jury had difficulty determining whether Stafford assaulted Yamashita. During deliberations, the jury asked the trial court if the objects flew out of the window before Yamashita pushed on the shelf. There is a reasonable probability that hearing the content of the dispatcher's statement affected the jury's decision to convict. The limiting instruction may not have cured the statement's prejudicial effect. Accordingly, because the erroneous admission of the dispatcher's statement prejudiced Stafford, we reverse.

II. Other Claims

Stafford raises two other claims in this appeal. He asserts that (1) the to-convict instruction did not include the crime's essential elements, and (2) the trial court erred by prohibiting him from contacting Yamashita or Houts for 5 years. We do not reach these claims because we reverse Stafford's conviction based on the trial court's improper admission of the content of the dispatcher's statement.

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

Penoyar, C.J.

I concur:

Johanson, J.

Hunt, J. — (dissenting) I respectfully dissent from the majority's holding that the trial court manifestly abused its discretion and committed reversible error when it allowed Deputy Chris Nicholls to testify on redirect examination: "Dispatch advised that Mr. Stafford was acting irrational and that he would assault police officers when they arrived on scene." Report of Proceedings (RP) at 133**.** In my view, the State was entitled to elicit this single-sentence testimony on redirect examination *after* Stafford introduced this subject on cross-examination by questioning Nicholls about what he had known about the situation before he arrived at the scene. Moreover, before allowing the State to elicit this single sentence from Nicholls on redirect, the trial court took extra care to give the jury this limiting instruction:

> Ladies and gentlemen [of the jury], I am now instructing you that the answer to this question you're not to accept it as truth, but only to—for it to be shown how it affected this officer's conduct at the scene.

RP at 132–33.

For these reasons, I would hold (1) that the trial court's evidentiary ruling was not a manifestly unreasonable or untenable decision that constituted an abuse of discretion; and (2) that admitting this evidence presumably did not affect the jury's verdict because (a) the trial court accompanied admission of this statement with a limiting instruction, which the law presumes the jurors followed, and (b) there was additional independent evidence of Stafford's assault against Sergeant Yamashita. I would affirm his conviction.

I. Standard of Review

The majority recites the well-settled rule that a trial court abuses its discretion to admit evidence when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." Majority at 5 (citing *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995))). But, as we have previously noted in other decisions, "An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court." *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997) (citing *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)). The majority does not persuade me that "no reasonable person would take the view adopted by the trial court" here, especially in light of (1) its precautionary, limiting instruction to the jury before allowing the disputed evidence and (2) its allowing this limited evidence only to provide a true context for the jury's consideration after Stafford first introduced the topic but had elicited an incomplete and misleading version.

II. Admissibility

A. Relevance

I agree with the majority that evidence must be relevant to be admissible. ER 402. I respectfully disagree with the majority, however, that this disputed evidence was not relevant for the limited purpose for which the trial court admitted it.

The threshold for relevance is very low; even minimally relevant evidence is admissible. *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. This

definition of "relevance" accords the trial court broad discretion in determining whether evidence is relevant. *See State v. Johnson*, 12 Wn. App. 548, 551, 530 P.2d 662 (1975). As with other evidentiary rulings, "[t]he trial court's rulings on relevance . . . should only be reversed for an abuse of discretion." *State v. Anderson*, 44 Wn. App. 644, 652, 723 P.2d 464 (1986). We review a trial court's relevancy rulings for manifest abuse of discretion. *Gregory*, 158 Wn.2d at 835.

The majority concludes that dispatch's relayed information to Deputy Nicholls was irrelevant and, therefore, inadmissible because, in the majority's view, what the arresting officers knew about Stafford's actions and condition before they arrived at the scene had no probative value to aid the jury in determining whether Stafford's assault of Yamashita was more or less likely to have occurred. Majority at 7-8. I respectfully disagree.

In my view, the trial court reasonably found this evidence relevant to the background questions of why the officers went to the scene and why Nicholls had acted the way he did during the confrontation with Stafford, especially in response to the factual inquiry that Stafford had first cross-examined Nicholls about—what he (Nicholls) had known before he arrived at the scene. How could what dispatch told Nicholls have *not* been relevant to the subject to which Stafford has just opened the door on cross-examination?

B. Stafford "Opened the Door"

Nonetheless, the majority posits that Stafford's cross-examination of Nicholls did not open the door to what Nicholls had heard from dispatch. Majority at 8-9. Again, I respectfully disagree. When the defendant raises a particular subject at trial, he opens the door to further testimony on that subject. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), holding:

> [W]hen a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

In other words, as the majority correctly notes, when a party "opens the door" by raising a subject, the opposing party may introduce evidence to explain, to clarify, or to contradict the other party's evidence. Majority at 8; *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). Nevertheless, the majority declines to apply this rule here.

The record is clear that it was Stafford who first raised the subject of Nicholls' state-of-mind at the scene when, during cross-examination, Stafford asked Nicholls what he knew and of what he was aware before he arrived:[3]

> Q: [Y]ou didn't have an arrest warrant at that time?

[3] On cross-examination, Stafford first raised the issue of what Nicholls had actually known about the situation when he arrived at the scene. Stafford questioned Nicholls about (1) whether, after arriving at the scene and speaking with Stafford's relatives, he, Nicholls, had decided to arrest Stafford; (2) whether Nicholls had first tried to obtain Stafford's side of the story; and (3) whether this was a "hot-pursuit" case, in light of Nicholls' having used a crowbar to try to gain entrance into the camper despite his having no arrest warrant. When Nicholls began explaining his actions with reference to the information he had received from Stafford's family and from dispatch, Stafford asked Nicholls whether he had been aware that Stafford was having a running argument with his family at that time.

In contrast, the State had elicited from Nicholls on direct examination only general testimony that "911 dispatch gave some details about the Defendant's demeanor at that time and how he would react if police were to show up." RP at 112–13. Before redirect and with the jury excused, the State (1) argued that Stafford's cross-examination had opened the door to the state of mind of the officers and (2) moved for permission to address that point by asking what Nicholls had heard from dispatch. Stafford countered that this would just be "throw[ing] mud on the Defendant based upon hearsay from other people" and that it would be "highly prejudicial" and "irrelevant." RP at 126–27.

The trial court agreed with the State. But it carefully instructed the State about how to proceed on redirect to correspond to the court's limiting instruction to the jury to consider Nicholls' testimony about his state of mind *only* for that narrow purpose. Thus, when the State asked Nicholls on redirect to tell the jury what dispatch had informed him, the trial court immediately stopped the examination, gave the limiting jury instruction, and then said to Nicholls, "You may answer." RP at 133.

A: No sir; I did not.

Q: You didn't have a search warrant?

A: No, sir; I did not.

Q: This would not have been a hot pursuit case?

A: With the facts we had had from the family and dispatch in regards to *the threats that were made—*

Q: And those—

A: —I—

Q: *And those were from the family, not Mr. Stafford or anything; correct?*

A: Correct.

Q: Now were you aware that they were having a running argument at that time?

A: I was unaware of that.

RP at 118-19.

With this line of questioning, Stafford not only elicited how Nicholls had handled Stafford's arrest, but also specifically inquired whether Nicholls had heard Stafford's version of the events before making the arrest and why Nicholls had arrested Stafford without a warrant. When Nicholls began referring to information he had heard from dispatch and family members about threats that had been made, Stafford interrupted and asked Nicholls whether "this would not have been a hot pursuit case;" but instead of allowing Nicholls to answer the "hot pursuit" question, Stafford interrupted to clarify whether the facts about the threats "were from the family and dispatch," not from Stafford. RP at 119. Stafford then dropped his inquiry into what

Nicholls had known before the arrest; in so doing, he created an ambiguity at best and misimpression at worst as to *who* had made the threats about which Nicholls had heard before arriving at the scene.

Stafford's further cross-examination about Nicholls' actions left the jury with other incomplete information to the extent that the cross-examination focused on the officers' apparently aggressive actions towards Stafford in trying to remove him from the trailer and immediately arresting him, instead of just leaving him alone. This cross-examination made it necessary for the State to elicit on redirect dispatch's statement about Stafford's family having relayed his threat to harm officers—to clarify and to explain why Nicholls had arrested Stafford without first hearing his version of the events and obtaining an arrest warrant. Without this information about what Nicholls knew, namely his state-of-mind, the jury would have been left with an incomplete version of the officers' actions when they confronted Stafford. It was Stafford's cross-examination that made Nicholls' state-of-mind during the arrest relevant.

Because it was Stafford who opened the door to the statement he now challenges on appeal, we cannot say that no reasonable person would have taken the view adopted by the trial court or that the trial court manifestly abused its discretion in allowing this carefully limited evidence. Therefore, I would uphold the trial court's allowing the State on redirect to elicit what Nicholls had learned from dispatch, for the limited purpose of showing his state of mind when he arrived on the scene, to correct the incomplete picture that Stafford had created on cross-examination.

C. Hearsay: Limiting Instruction

I acknowledge that, even when relevant, out-of-court statements may be inadmissible for

other reasons, such as violation of the rules of evidence governing hearsay. And I agree with the majority's implication that, had the trial court admitted Nicholls' statement for a broader, improper purpose, such as to prove that Stafford assaulted Yamashita as charged, this statement would have been prejudicial inadmissible hearsay under ER 801(c). Majority at 10. But this is not what happened here: Here, the trial court admitted the statement, not to prove the truth of the matter asserted, namely that Stafford actually intended to assault an officer and was likely to follow through on this threat, but rather because on cross-examination Stafford had opened the door to Nicholls' state of mind on arriving at the scene based on what dispatch had told him, exploring on cross-examination part, but not all, of the pertinent details. Thus, this short limited inquiry on redirect was relevant to this topic recently opened by Stafford himself.

Furthermore, the trial court's limiting instruction prevented the jury from considering Nicholls' statement for an improper purpose, namely the truth of the matter asserted—that Stafford had, in fact, threatened to assault officers arriving at the scene. The record shows that even before allowing Nicholls to explain what he had learned from dispatch, the trial court explicitly instructed the jury that it could not accept the statement as truth that Stafford assaulted a law enforcement officer; rather, it could consider the statement only as it bore on how it may have affected Nicholls' conduct when he responded to the family's reported disturbance. Because Nicholls' statement was not offered or admitted to prove the truth of what the dispatcher had told him, it was not hearsay. *See* ER 801(c).

I would hold that the trial court did not improperly admit this statement as hearsay, it did not violate the rules of evidence, it did not err, and it did not abuse its discretion. Therefore, reversal of Stafford's conviction is not warranted.

III. No Prejudicial Error

But even assuming, without agreeing, that the majority is correct that the dispatcher's statement was irrelevant "to a fact of consequence" and, therefore, inadmissible, I further respectfully disagree with the majority's implication that such "error" justifies reversal of Stafford's conviction. In my view, the majority does not persuasively explain how the evidence was reasonably likely to have affected the jury's verdict in a material way when (1) the trial court expressly admonished the jury to consider the one-sentence testimony only for the limited purpose of "how it affected this officer's conduct at the scene," RP at 132-33; and (2) we must follow the well settled presumption that the jury followed the trial court's instructions. *See State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995) (citing *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994)).

A. Well-Settled Presumption: Jury Follows Court's Instructions

Citing *State v. Miles*, 73 Wn.2d 67, 68–71, 436 P.2d 198 (1968), the majority speculates that the "limiting instruction *may not* have cured the statement's prejudicial effect" and that there is a reasonable probability that the dispatcher's statement to Nicholls affected the jury's decision to convict Stafford.[4] Majority at 12 (emphasis added). Not only is *Miles* distinguishable (*see* in

[4] In support of this speculation, the majority notes that, during deliberations, the jury asked the trial court if the objects Stafford allegedly threw at Yamashita "flew" out of the window before or after Yamashita pushed on the shelf. Majority at 12; Clerk's Papers at 54. First, it is not the role of the appellate court to speculate about what the jury might have been thinking during its deliberations; on the contrary, the jury's deliberations "inhere in its verdict." *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) ("The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict."). Second, nothing in the record suggest that the jury disobeyed the trial court's limiting instruction or that the jury considered dispatch's statement to Nicholls as a pivotal piece of substantive evidence in deciding Stafford's guilt.

Section II. B of this dissent, *infra*), but also the majority essentially disregards the well-settled presumption that the jury followed the court's instructions. *See Lough*, 125 Wn.2d at 864. In my view, the record provides no evidence or other justification to override this presumption here.[5]

Therefore, following this rule here, we must presume that the jury followed the trial court's timely limiting instruction, which expressly forbade the jury from considering dispatch's statement to prove the charged assault and, instead, instructed it to consider the statement only in connection with how the statement may have affected Nicholls' actions at the scene. Because of the presumption that the jury followed the trial court's limiting instruction, we must also presume that the dispatcher's statement, even if erroneously admitted, did not affect the outcome of the trial in a material way.

B. *Miles* Distinguished

As I previously noted, the majority cites *Miles* for the proposition that curative

[5] In light of its different procedural posture under otherwise analogous circumstances, *State v. Aaron* illustrates my prejudicial error analysis. 57 Wn. App 277, 281, 787 P.2d 949 (1990). In *Aaron*, Division I held that a trial court had abused its discretion and committed prejudicial error in refusing to give a requested limiting instruction when it admitted evidence of what a 911 dispatcher had told a testifying police officer. *Aaron*, 57 Wn. App. at 281-83.

Contrasting *Aaron*'s prejudice-focused analysis with the facts here illustrates that Stafford was not prejudiced. First, in finding prejudicial error, the *Aaron* court accorded substantial weight to the court's erroneous refusal to give the jury a limiting instruction. *Aaron*, 57 Wn. App. at 282-83. Here, in contrast, there was no such prejudicial error; instead, the trial court carefully explained to the State the limited parameters within which it could elicit the single statement from Nicholls, *before* it even heard the testimony.

Second, the *Aaron* court stated that (1) it "seem[ed] clear" that the dispatcher's testimony in that case was hearsay, proffered *solely* to implicate Aaron as the thief, not to establish the officer's state-of-mind; especially in the absence of a limiting instruction, and (2) that the evidence materially affected the outcome of the trial by directly tying "the defendant to the jacket and hence to possession of items taken in the burglary." *Aaron*, 57 Wn. App. at 280, 283. Here, however, the trial court explicitly instructed the jury that it could consider the statement *solely* for "how it affected this officer's conduct at the scene" and "not to accept it as truth." RP at 132–33.

instructions fail to remedy hearsay accusations that a defendant will commit a future crime. Majority at 10. Although the majority aptly describes the situation in *Miles*, *Miles* does not apply to the situation here: Both the facts and the trial court's limiting instructions are significantly distinguishable in these two cases.

In *Miles*, a Spokane policeman had received a message that two suspects wanted for robbing a state liquor store in Grandview were going to duplicate that robbery in Spokane. *Miles*, 73 Wn.2d at 68. Over Miles' hearsay objections, the trial court allowed the policeman's testimony for the purpose of explaining how he had happened to assist in the defendants' arrest. *Miles*, 73 Wn.2d at 68. Consistent with this purpose, the trial court gave a partially limiting instruction to the jury that it could not consider testimony about the defendants' plans to commit the future robbery in Spokane. *Miles*, 73 Wn.2d at 69.

Our Supreme Court, however, held that this limiting instruction was not sufficient:

> We conclude that the testimony of the police officer, concerning an alleged plan to perpetrate a robbery like the one with the commission of which the defendants were charged, was so prejudicial in nature that its effect upon the minds of the jurors could not be expected to be erased by an instruction to disregard it.

Miles, 73 Wn.2d at 71. Borrowing from *Miles*, the majority here concludes that its only option is to reverse Stafford's conviction, reasoning as follows: Because the limiting instruction in *Miles* could not cure prejudice resulting from an assertion that the *Miles* defendants would commit a second future crime, identical to the crime they had just committed, the trial court could not cure any potential prejudice. Majority at 10-11. Attempting to analogize *Miles* to the facts here, the majority states: "In both cases, a police officer relied on the hearsay of another law enforcement officer to testify that the defendant would commit a future crime." Majority at 11. The record

does not support this assertion; on the contrary, Nicholls did not rely on the dispatcher's statement to testify that Stafford *would* commit a future crime, namely an assault against a police officer responding to the scene.[6] Furthermore, as previously noted, the trial court specifically instructed the jury *not* to consider the testimony for this purpose.

The hearsay prediction in *Miles* was that defendants would commit an additional future crime for which they were not even prosecuted and for which there was no other evidence besides the hearsay allegation. Moreover, when the Supreme Court determined that the prejudicial effect of the prediction could not be cured, it relied on the following factors: (1) that the prediction was not relevant or necessary to prove an element of the crime charged, and (2) that the "testimony was calculated to and undoubtedly did implant in the minds of the jury the idea that the defendants had committed other robberies of this type and were therefore most likely to have committed the one charged." *Miles*, 73 Wn.2d at 69-70.

The Supreme Court went on to note, "It is true that there was no reference to past acts; but the inference is strong that the Yakima County sheriff had sufficient knowledge of the defendants' activities to form a judgment about their future plans." *Miles*, 73 Wn.2d at 70. Thus, the Supreme Court implied that the hearsay prediction functioned as an overly prejudicial, bald claim of the defendants' criminal characters and propensities to commit the crime of which they were accused at trial, despite the trial court's attempt to limit its effect.

Here, in contrast, there was substantial other independent evidence from three eye witnesses and Stafford, who testified about Stafford's actions in relation to Stafford's assault of

[6] And I reiterate, nor could the jury have used this testimony for such an improper purpose when it, presumably, followed the trial court's limiting instruction not to do so.

Sergeant Yamashita. This independent evidence would have overshadowed dispatch's short warning to Nicholls en route to the scene, even if, as the majority speculates, the jury had disobeyed the trial court's limiting instruction and considered the statement for the truth asserted. For example, Officer Houts testified that the trailer, in which Stafford had locked himself, was a "chaotic scene," with Stafford causing it to rock back and forth and that Stafford appeared very agitated when attempting to flee, "using language and yelling at the top of his lungs and his arms were flailing" after officers gained entry to the trailer. RP at 72, 75.

Sergeant Yamashita testified that (1) a battery, a pipe clamp, and other debris hit her while she tried to gain entrance to the trailer; (2) she could see a silhouette of Stafford inside the dark trailer and could see him throw the debris out the window at her; (3) the debris was "projected out" with a "lot of force" and could not have "spilled" out of the trailer in light of the force and angle with which it flew out of the trailer, RP at 97, 108; (4) the bookshelf in front of the trailer's window could not have been the source of the debris because it was facing into the trailer's interior; and (5) the battery flung from the trailer left a mark on her forehead.

Officer Nicholls testified that Stafford was in a very aggressive stance with clenched fists, appearing very agitated, before Officer Houts used his TASER on Stafford when he attempted to flee. And Stafford himself testified that he had a rusty spike in his back pocket when he came out of the trailer. This separate substantive evidence that the State presented to prove the charged assault not only overshadowed dispatch's short statement, but also it was sufficient to support the jury's guilty verdict, independent of dispatch's statement to Nicholls.

C. Analysis of Prejudicial Error: *Mutch*

In *State v Mutch*, decided June 9, 2011, the Washington Supreme Court admonishes that

trial court error does not necessarily warrant automatic reversal of a criminal conviction, albeit in a different context than the one we address here.[7] *See State v. Mutch*, 171 Wn.2d. 646, 254 P.3d 803 (2011). Nevertheless, our Supreme Court instructs that, rather than engage in a limited cursory review to discern trial court error, we must review the whole record and context to determine whether a reversible error is "manifestly apparent." *See Mutch*, 171 Wn.2d at 664 The mere *possibility* that an erroneous instruction affected a verdict does not warrant automatic reversal, absent some further inquiry by a reviewing court into the record below. *See Mutch*, 171 Wn.2d at 664

Here, despite *Mutch*'s admonition, the majority appears to conclude that reversal is warranted solely because the trial court, in the majority's view, improperly admitted one statement that was either irrelevant or hearsay. *See* Majority at 10. The majority apparently justifies this conclusion, at least in part, by asserting that "[n]o limiting instruction can make inadmissible evidence admissible." Majority at 10. But, again, this assertion ignores the broad discretion accorded to trial courts in making evidentiary rulings. Because the trial court here gave a limiting instruction, the presumption here is that the jury did not improperly use this statement as evidence of Stafford's guilt. Furthermore, even if dispatch's statement was hearsay or irrelevant, it would not warrant reversal in light of the lack of prejudice to Stafford from the limited admission of this evidence, much of which he had already himself elicited on cross-examination, and the other trial testimony from eyewitness Nicholls about having seen Stafford assault Yamashita as charged.

[7] *Mutch* involved reviewing the entire record to determine whether it is "manifestly apparent" that reversible error was *not* present even where the trial court gave a faulty jury instruction.

Review of the record and context under the *Mutch* standard makes clear that Stafford fails to show "manifestly apparent" prejudicial error. *See Mutch*, 171 Wn.2d at 664. On the contrary, we cannot reasonably say that reversible error is "manifestly apparent" where (1) the trial court expressly and properly limited the jury's consideration of the dispatcher's statement; (2) the jury asked the trial court questions, which indicated it was deciding the case based on the available evidence; and (3) the State produced other direct evidence of Stafford's guilt at trial. Therefore, error, if any, was not "manifestly apparent"; rather, error, if any, was harmless.

For this reason, coupled with the absence of abuse of trial court discretion, I respectfully dissent from the majority's decision to reverse the trial court on this discretionary evidentiary point. I would affirm.

Hunt, J.