IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STACY ROBERT SMITH, Appellant.	No. 41695-6-II UNPUBLISHED OPINION

Hunt, P.J. —Stacy Robert Smith appeals his jury convictions for third degree assault, obstructing a law enforcement officer, and resisting arrest. He argues that the trial court erred in denying his motion for a mistrial based on juror misconduct and in improperly admitting propensity evidence contained in a recorded 911 phone call. We affirm.

FACTS

Stacy Robert Smith asked his girlfriend, Jennifer Johns, for money and access to her car so he could purchase alcohol; because he did not have a valid driver license, she refused. The disagreement evolved into yelling. Johns called 911 stating, "[M]y boyfriend is trying to take my car. And, he is saying very—something unreasonable and he doesn't have a license. He is freaking out." Report of Proceedings (RP) (911 Calls) (May 3, 2010) at 1. When Longview

Police Department Officer Chris Angel and several other officers arrived, Smith was no longer present. They told Johns to lock her doors and to call 911 if Smith returned.

An hour later, Johns called 911 and asked the police to return. In the middle of the phone call, Johns' 10-year-old daughter, SL[1] came on the line and had the following conversation with dispatch:

> DISPATCH: Hi. This is 911, what's going on? (A female voice is heard yelling [. . .] in the background.)
> [SL]: My step-dad—
> DISPATCH: Uh-huh.
> [SL]: 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 step-dad's name?
> [SL]: Stacy Smith.
> [. . .]
> DISPATCH: Has he assaulted your mom?
> [SL]: Not yet.

RP (911 Calls) (May 3, 2010) at 9-10.

Angel returned to Johns' house, began walking around to the back, saw Smith walking toward the house, and ordered Smith to stop. Ignoring Angel's order, Smith continued toward the house and entered through the back porch door. Angel approached near the back door, ordered Smith to come outside, and attempted to take hold of Smith's arm. Smith pulled away; Angel again grabbed Smith's left arm. Using both hands, Smith shoved Angel's chest, causing him to step backward. Angel again took Smith's arm; Smith struck Angel in the chin. Another officer arrived and helped Angel force Smith to the ground and place him under arrest.

[1] To provide some confidentiality to Johns' juvenile daughter, we use her initials throughout this opinion.

The State charged Smith with third degree assault of a law enforcement officer, obstructing a law enforcement officer, and resisting arrest. Smith moved in limine to exclude SL's statements to the 911 dispatcher on hearsay grounds. The court overruled this objection.

Before trial began, the trial court instructed the jury not to discuss the case with other jurors or with anyone else. The next day, the court questioned a juror who had reportedly made improper statements about the case to another juror the night before. The juror said:

> I said that I could make a decision right now, which I know is wrong. . . . [O]ne of the girls was saying she has a hair appointment today and that she hoped that [the trial] went quickly and I said that and I shouldn't have.

2 Verbatim Report of Proceedings (VRP) at 139. Smith moved for a mistrial. The trial court denied the motion, stating, "The comment . . . was not one that in any way, shape or form intimates which direction the particular juror was leaning, just that she had—was in a position to—she had arrived at an opinion at this point." 2 VRP at 141-42. The court promptly excused the juror from the panel.

The jury found Smith guilty of all charges. Smith appeals.

ANALYSIS

I. Juror Misconduct

Smith first argues that the trial court denied his right to a fair and impartial jury under the Washington Constitution, article 1, section. 21, and the Sixth Amendment[2] when it denied his motion for a mistrial after a juror made a statement reflecting that she had already formed an

[2] Washington Constitution, article 1, section 21 provides, "The right of trial by jury shall remain inviolate. . . ." The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. Const. amend VI.

opinion. We disagree, holding that the trial court protected Smith's rights by excusing this juror.

We review for abuse of discretion a trial court's denying a motion for mistrial based on juror misconduct. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). A court abuses its discretion when its decision "is manifestly unreasonable or rests on untenable grounds." *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). A decision is manifestly unreasonable if the court adopted a position that no reasonable person would take. *Griffin*, 173 Wn.2d at 473. A decision rests on untenable grounds if the trial court applies the wrong legal standard or relies on facts unsupported in the record. *Griffin*, 173 Wn.2d at 473. Although a showing of juror misconduct may give rise to a presumption of prejudice, the State may overcome this presumption with an adequate showing that the misconduct did not affect the deliberations. *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009) (citing *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30 (1986)). Such is the case here.

The juror's improper statement was that she had formed an opinion about the case; but she had not communicated to anyone the substance of her opinion, namely whether it was guilty or not guilty. The trial court's excusal of this juror was a reasonable response: It prevented her from tainting the other jurors and removed her from the jury's later deliberations. Because, therefore, this juror's comment did not likely affect the outcome of Smith's trial, the State has overcome the presumption of prejudice flowing from the juror's premature opinion. We hold that the trial court did not abuse its discretion when it denied Smith's motion for mistrial. *Griffin*, 173 Wn.2d at 473.

II. Propensity Evidence

Smith next argues for the first time on appeal that SL's 911 response to the dispatcher—that he (Smith) had "not yet" assaulted Johns—was impermissible propensity evidence under ER 404(b). Amended Br. of Appellant at 21. Because Smith did not preserve this issue for appeal, we do not address the merits of his argument.

When Smith objected to SL's statements to the 911 dispatcher, he argued only that they were inadmissible hearsay. He did not object that this evidence was propensity evidence, inadmissible under ER 404(b). To preserve an evidentiary objection for appeal, the defendant must have made a specific objection at the trial court. *State v. Jones*, 163 Wn. App. 354, 365, 266 P.3d 886 (2011)[3], *review denied*, 173 Wn.2d 1009 (2012). If a party objects to the admission of evidence on one ground at trial, that party may not assert on appeal a different ground for excluding the evidence. *State v. Price*, 126, Wn. App. 617, 637, 109 P.3d 27 (2005) (citing *State v. Kilponen*, 47 Wn. App. 912, 918, 737 P.2d 1024 (1987)). Because Smith objected below on hearsay grounds only, we do not consider his newly raised claim that these

[3] In *Jones*, we stated, "We do not generalize specific objections such that the existence of a pretrial motion to suppress evidence seized preserves *any* claim of error with respect to that evidence." *Jones*, 163 Wn. App. at 365 (emphasis in original).

statements were inadmissible propensity evidence.[4]

We affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

Hunt, P.J.

We concur:

Van Deren, J.

Bridgewater, J.P.T.

[4] Where an error violates an evidentiary rule, as opposed to a constitutional mandate, the error is not prejudicial unless it is reasonably likely that the trial's outcome would have been materially affected had the error not occurred. *Price*, 126 Wn. App. at 638 (citing *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004)). Therefore, we note that even if Smith had preserved this propensity issue with a timely objection below, any error was harmless. The assault charge was based on Smith's assault of Officer Angel, who testified that Smith struck him. In light of this testimony, it is unlikely that the jury would have used SL's earlier 911 call statement that Smith had "not yet" assaulted Johns as propensity evidence to convict Smith of assaulting Officer Angel; thus, Smith does not meet his burden to show that the outcome of the trial would have been materially affected had the trial court not allowed into evidence the child's statements to the 911 dispatcher.