Supreme Court No. 93388-0
Court of Appeals No. 46795-0-II

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

BRIAN MCEVOY,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

PETITION FOR DISCRETIONARY REVIEW

STATE V. MCEVOY

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I. IDENTITY OF PETITIONER

Petitioner Brian McEvoy, DOC #377945, respectfully requests that this Court accept review of Division Two's decision terminating review.

II. COURT OF APPEALS DECISION

On June 14, 2016, Division Two entered an unpublished opinion in No. 46795-0-II affirming Mr. McEvoy's convictions, but remanding for resentencing due to a legal error by the trial court. See Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Whether Division Two erred in finding harmless error—particularly as to the harassment and stalking counts—where officers testified: "I determined that had he not been brought into custody, he was going to kill his wife"; they only dealt with "the worst of the worst"; "We know that great bodily harm and/or death is likely to occur or is imminent if this person is not apprehended"; it was "very serious what was going on"; there was an "imminent threat" of violence; they used "two-person cars because of concern for safety"; a SWAT team was activated; and they were "very, very concerned about the kids" and "very alarmed"?

2. Whether Division Two erred in finding harmless error—particularly as to the harassment and stalking counts—where the trial court admitted unauthenticated hotel, rental car, and airline receipts as adoptive admissions, Mr. McEvoy merely possessed the receipts, and the state argued that the receipts showed that he drove across the country with the intent to kill his wife?

3. Whether Division Two erred in finding the evidence sufficient to convict Mr. McEvoy of violating a no contact order on April 12, 2014 where the order specified that he could not come within 500 feet of the residence of Ms. McEvoy, but provided no address, and he retrieved mail from their former shared residence, but knew that she was residing elsewhere and would not be there?

4. Whether Division Two erred in finding the evidence sufficient to convict Mr. McEvoy of felony stalking based upon the April 12, 2014 mailbox incident which, even assuming it violated the order, was not intended to harass or annoy because Ms. McEvoy was not even residing there and he had no idea she would ever find out?

5. Whether Division Two erred in ignoring the conflict between RCW 9A.04.100(2)'s directive that when a jury has a reasonable doubt as to which degree of a crime a defendant committed it must convict on the lowest degree and the judicially-created rule that a lesser included offense instruction is proper when the evidence supports an inference that the defendant committed *only* the lesser included offense and not the charged crime and Mr. McEvoy provided specific argument and citation in his Amended Brief?

6. Whether Division Two erred in finding that the trial court properly refused to instruct the jury on the lesser included charge of misdemeanor harassment where Mr. McEvoy's alleged threat to kill was equivocal; Ms. McEvoy believed he was trying to find and *hurt* her; and the issue was thus a factual question for the jury?

IV. STATEMENT OF THE CASE

Brian and Kara McEvoy were separating in the spring of 2014 after 19 years together, but he was having difficulty adjusting. He had already endured the loss of his career as a Kitsap County Sheriff's Office deputy, and he was now losing his family. He was also still recovering from a bad motorcycle accident for which he required surgery in late January to repair his severed Achilles tendons. These factors culminated in a series of terrible decisions that will forever plague him for the emotional and physical pain and suffering he caused his family and also because his bizarre actions were so aberrant and out-of-character.

On September 18, 2014, the jury in Kitsap County Superior Court No. 14-1-00674-6 acquitted Mr. McEvoy of attempted second degree rape and one count of violating a no contact order, but found that: on on April 9-10, 2014, he committed second degree and fourth assault, unlawful imprisonment, interfering with domestic violence reporting, and third

degree malicious mischief; on April 12, 2014, he committed one count each of felony harassment and violating a no contact order by visiting his mailbox; on May 13, 2014, he committed one count each of felony harassment and violating a no contact order by calling his wife and making threats; he committed felony stalking as based upon the two violations of a no contact order; and on May 19, 2014, he attempted to elude a pursuing police vehicle and unlawfully possessed a firearm in the second degree. The jury entered same household special verdicts on all counts and found that the second degree assault was within sight or sound of the victim's children. Despite Mr. McEvoy's lack of criminal history, the court imposed the maximum possible sentence of over 19 years.

On direct review, Division Two rejected Mr. McEvoy's claims that reversal was required, but remanded for resentencing in which the two no contact order violations would merge with felony stalking.

A. Officer Opinion and Search Testimony

Prior to trial, Mr. McEvoy moved to suppress all evidence of law enforcement efforts to locate and arrest him. App. A at 5-6. The concern was that lead case agent Detective Nicole Menge's factual recitation would permit the overly prejudicial inference that he drove across the country with intent to kill his wife. RP 65-68. The court partially granted the motion, but upon the state's motion, reconsidered and found that Mr. McEvoy's knowledge of police procedures made details of the search efforts admissible as evidence of consciousness of guilt. App. A at 5-6.

At trial, Menge testified that she had officers conduct periodic surveillance on the McEvoy residence and Ms. McEvoy's workplace. RP 212. After a colloquy prompted by several overruled defense objections, the court acknowledged Mr. McEvoy's standing objection. RP 215-16. Menge then testified that she investigated his cell phone, bank, and credit card records; contacted many local and federal police agencies; and contacted car rental companies. See App. A at 6; RP 218.

Lieutenant Detective Earl Smith testified that after the May 13 phone call and Mr. McEvoy's absence from a May 13 court date, there were "a lot more efforts" to find him. App. A at 5-6; RP 700. He believed that as Mr. McEvoy was back in Washington, the McEvoy family was no longer safe so he: assigned more personnel, sent out a statewide bulletin, and asked for assistance from other law enforcement agencies, including the United States Marshal Service for its tracking and surveillance capabilities. Id. at 7; RP 700-703. Officers used "two-person cars because of concern for safety"; Smith activated a SWAT team and deployed surveillance around the courthouse; officers called often "to ensure [Ms. McEvoy's] safety, the family's safety, officer safety, and even Mr. McEvoy's safety"; as it was "very serious what was going on" and he was "very, very concerned about the kids," he pulled them from school while a surveillance unit watched; surveillance teams were stationed around Ms. McEvoy's workplace; and a plain-clothes detective drove her car in hopes that Mr. McEvoy might follow. Id. at 7-8; RP 705-11.

Pacific Northwest Violent Offender Task Force Marshals Jacob Whitehurst and Raymond Fleck were assigned to the case. Whitehurst testified that they get involved only if there is "a violent or sex offense type crime, imminent threat type situation ... like, we know that great bodily injury and/or death is likely to occur or is imminent, if this person is not apprehended." Id. at 8; RP 727-28. Fleck was even more graphic, stating that his task force is "responsible for apprehending, for lack of a better term, the worst of the worst." Id.; RP 793. He approved the use of his unit after conducting a threat assessment and finding that: there was a homicide, imminent assault, or sex offense; "there was a potential for targeted act[s] of violence"; and Mr. McEvoy "posed an imminent threat." Id.; RP 793-99. He declared: "I determined that had he not been brought into custody, he was going to kill his wife." Id.; RP 809. Defense counsel again lodged objection, but to no avail. Id.

In closing, the state highlighted Fleck's threat assessment, the Marshal Service's limited resources, and his decision to accept the case. RP 917. The state also referenced Fleck's determination that Mr. McEvoy was going to kill his wife if left at large. RP 920.

B. Adoptive Admissions

During a search of Mr. McEvoy's vehicle, officers located receipts showing that: on April 19, 2014, he flew through Detroit to Vermont; on May 5, he rented a car in Burlington, Vermont; on May 8, he rented a hotel room in Albertville, Minnesota; on May 9, he stayed in Dickinson,

North Dakota; on May 10, he was in Missoula, Montana, and checked out on May 11. On May 12, he paid for a room in Tacoma. He returned the rental car to SeaTac Airport on May 13. On May 14, he paid for a room in SeaTac, and on May 15, he stayed in Tacoma. RP 320-34, 833-34.

Mr. McEvoy objected to this evidence as hearsay. RP 68. The court admitted the receipts as "adoptive admissions," but ordered redaction of any time stamps as "classic" unreliable hearsay. RP 250-54.

In closing, the state emphasized that the receipts showed that Mr. McEvoy "stewed, planned, calculated his way back to have his last reckoning with his wife." RP 917. By using his mom's credit cards—despite his own financial difficulties—the state argued that the only inference was that he was trying to avoid detection. RP 925. In closing reply, the state again referenced the receipts to argue that Mr. McEvoy traveled across the country to stalk and kill his wife. RP 1000-01.

C. The April 12, 2014 Mailbox Incident

On April 11, 2014 the court issued a no contact order prohibiting Mr. McEvoy from coming within 500 feet of his wife's "residence." RP 690. The order provided no address. RP 693. While Ms. McEvoy believed her "residence" was the home she formerly shared with Mr. McEvoy, she was staying with her mother at the time. RP 492-93.

The next day, neighbor William Blaylock saw Mr. McEvoy retrieve mail from the McEvoy home. Mr. McEvoy told him: "Well, I went to the mailbox to get my mail ... I'm not supposed to be here." RP

675-77. In a later interview, he stated that he picked a time when nobody would be home, and nobody was, in fact, home at the time. RP 336-37.

The defense proposed a jury instruction which defined "residence" based upon RCW 9A.44.128(5) as "a building that a person lawfully and habitually uses as a living quarters a majority of the week." RP 846-50. The court denied the proposed instruction. RP 863.

D. Lesser Included Offense Instruction—Harassment

On May 13, 2014, Mr. McEvoy called his wife at work; the conversation was recorded. During the call, Mr. McEvoy stated, among other, more mundane things: "[Y]ou've got a very short time on this earth. You better hope somebody finds me before I find you"; "I just hope you can, uh, live with the consequences of what's gonna happen"; "I'm gonna find you, Kara. You and I are going to have ne last reckoning, I guarantee that"; Hey, Kara, I'm gonna find you, that's all I gotta say." App. A at 4.

At trial, Ms. McEvoy shared that she thought her husband was "trying to find me and hurt me, and he was threatening ... [t]o kill me." She believed the threats. App. A at 22; RP 523. The court concluded that the sole inference was that Mr. McEvoy threatened to kill her, but opined: "If she had testified, 'I thought he was going to hurt me bad or that he might kill me' ... a lesser included might fit the facts ..." RP 868.

E. Felony Stalking

Mr. McEvoy conceded that his May 13, 2014 phone call constituted one harassing incident, but argued that the April 12, 2014

incident did not qualify because he knew no one was home, and no one was actually there. But, Division Two found, in "a much closer question," that because he had little mail there and kept a separate post office box, his prior actions "circumstantially demonstrated his intent to harass or follow Kara under the guise of checking the mail." App. A at 19-20.

F. Division Two's Failure to Review

Mr. McEvoy filed his Opening Brief on February 24, 2015. The following day, this Court filed its opinion in State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207 (2015). On March 2, 2015, Mr. McEvoy filed an Amended Brief with three pages specifically devoted to argument that Henderson compels a trial court to err on the side of lenity when determining whether to grant an instruction on a lesser included offense. The Court commented only that "an issue of this magnitude requires much more briefing than Mr. McEvoy provided here." App. A at 21 n.9.

V. ARGUMENT

A. Review is Required Because Division Two Failed to Properly Apply the Constitutional Harmless Error Test as to the Improper Officer Testimony on Guilt and Intent

While Division Two properly held that admission of the egregious opinion statements by officers about Mr. McEvoy's guilt and intent was error, it somehow found such error harmless.[1] This significant question of state and federal constitutional law mandates review.

[1] The Court also dismissed Mr. McEvoy's claim that the state's argument incorporating the offensive testimony was improper, App. A at 13 n.4. But, he had a standing objection. RP 215-16; See State v. McDaniel, 155 Wn.App. 829, 853 n.18, 230 P.3d 245 (2010).

Whitehurst and Fleck's impermissible opinions on guilt and intent violated Mr. McEvoy's "constitutional right to have a critical fact to his guilt determined by the jury." State v. Quaale, 182 Wn.2d 191, 201-202, 340 P.3d 213 (2014). Such error is harmless "only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." Id. at 202. But, it seems impossible that testimony that the Marshals deal only with the "worst of the worst" imminent threats and Mr. McEvoy would kill his wife if left at large, which the state emphasized in closing, could possibly be harmless.

Division Two, paradoxically, analogized Fleck's declaration to a similar statement in State v. Edwards, 131 Wn.App. 611, 613, 128 P.3d 631 (2006). App. A at 12-13. But, on analogous facts, the Edwards Court found reversible error. In Edwards, an informant told an officer that "Olin" dealt cocaine and provided Olin's contact number. Id. at 613. The police set up a controlled buy, identified who they believed to be "Olin Sorensen," obtained a search warrant, instead found Olin H. Edwards, and arrested him. The defendant moved to exclude the officer's testimony about the informant, but was denied. The jury convicted on possession with intent to deliver, but could not render verdicts on the two delivery counts. On retrial, the jury convicted on both delivery counts. Id. The Edwards made short order in finding reversible error. Id. at 614-616.

In State v. Aaron, a burglary case, the Court found that admission of police dispatch hearsay that the defendant used a blue jeans jacket to

push through bushes was reversible error where officers found the jacket on the front seat of a car the defendant had just exited and located evidence of the burglary in it. 57 Wn.App. 277, 787 P.2d 949 (1990). As the inadmissible hearsay directly tied the defendant to the jacket and possession of the stolen items, it was reversible error. Id. at 282-83.

In Quaale, finally, a DUI prosecution, the Court found that an officer's opinion that he had "no doubt the defendant was impaired" as based solely upon the HGN field sobriety test was reversible error. 182 Wn.2d at 197-201. Because the officer's assertion "'cast an aura of scientific certainty,' significantly increasing the weight the jury likely attached to it," the error could not be harmless. Id. at 202.

Here, in order to find Mr. McEvoy guilty of felony harassment for his statements in his May 13, 2014 phone call, the jury had to find that he threatened to kill his wife. See RCW 9A.46.020(2)(b)(ii). There was, however, no definitive threat to kill, but rather only ambiguous threats. Ms. McEvoy actually stated that she thought he was going to hurt her—not kill her. The jury then heard that the law enforcement agent who actually confronted Mr. McEvoy, looked him in the face, and caused his arrest was sure he was going to kill his wife. That officer testimony "carries an aura of reliability," State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008), and that the court's overruling of timely and specific objections "lent an aura of legitimacy to what was otherwise improper argument," State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213

(1984), further amplified the prejudice. The state also emphasized Fleck's quasi-scientific threat assessment and subsequent opinion on guilt in closing. This is surely reversible error calling for this Court's review.

And, this incident also supported the stalking conviction, which also must be reversed due to the constitutionally violative testimony.

Given, finally, the egregious nature of the testimony, which infected the entire trial, reversal of all counts is the remedy.[2]

B. Review is Required Because Division Two Failed to Properly Apply the Constitutional Harmless Error Test to the Improperly Admitted Receipts, which is a Violation of the State and Federal Confrontation Clause and an Issue of Substantial Public Importance

Although Division Two assumed, correctly, that the trial court erred in admitting hotel, rental car, and airline receipts as adoptive admissions, the Court perpetuated such error by finding harmless error. The receipts, offered to show that Mr. McEvoy travelled across the country, violated his state and federal rights to confrontation and fair trial. Const. art. I §§ 3, 22; U.S. Const. Amend. V-VI. That the trial court admitted the receipts as adoptive admissions where the issue is open in this state is an issue of substantial public interest for this Court.

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[2] Division Two also erred in finding the search effort testimony proper because the trial court failed to apply the correct test and confidently find the following inferences: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." McDaniel, 155 Wn.App. at 854. Admission of this irrelevant and prejudicial evidence was reversible error, especially in conjunction with the other errors, and Division Two's decision thus conflicts with other appellate decisions.

Under the Sixth Amendment, testimonial evidence against a defendant is prohibited unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. State v. Jasper, 174 Wn.2d 96, 109, 271 P.3d 876 (2012) (citation omitted). "Testimony" means a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. (citation omitted). Here, then, the receipts—without foundation or additional testimony—were an affirmation made to prove that Mr. McEvoy did, in fact, travel by rental car from Vermont to Washington and violated his confrontation rights. See, e.g., United States v. Tin Yat Chin, 288 F. Supp. 2d 240, 242 (E.D.N.Y. 2003) ("Papers kept by an individual solely for personal reasons do not qualify as business records"), vacated in part, 371 F.3d 31 (2d Cir. 2004) (finding that the district court imposed too high of a bar for authentication); State v. Bonit, 2005-0795 (La. App. 1 Cir. 2/10/06), 928 So. 2d 633, 640 (finding a confrontation error where the trial court admitted evidence as a business record without testimony by a witness with personal knowledge to show how the record was made or if it was identical to the computer record).

And, while business records are "presumptively reliable if made in the regular course of business with no motive to falsify," State v. Ziegler, 114 Wn.2d 533, 538, 789 P.2d 79 (1990), the trial court's redaction of the as unreliable dooms any argument that the receipts are business records.

The error permitted the state to provide a city-by-city travelogue of how Mr. McEvoy left Vermont and traveled overland across the country

with the intention of killing of his wife—information unknown to Ms. McEvoy and thus irrelevant and especially prejudicial as to the harassment and stalking counts. Particularly in conjunction with the testimony that Mr. McEvoy was the "worst of the worst," an "imminent threat," and he would kill his wife if not arrested, this evidence materially affected the outcome of the case, mandates reversal, and warrants review. See State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2002).

This issue of whether mere possession evinces an intent to adopt the contents of a document is open in Washington and of substantial public interest. The weight of authority is that it does not. See, e.g., United States v. Ordonez, 737 F.2d 793 (9th Cir. 1983); United States v. Jefferson, 925 F.2d 1242 (10th Cir. 1991); 29A Am.Jur.2d § 815 (2015) ("... generally, mere possession of a written document does not necessarily constitute an adoption of its contents") (citing White Indus., Inc. v. Cessna Aircraft Co., 611 F.Supp. 1049 (W.D.Mo. 1985); FCX, Inc. v. Caudill, 85 N.C.App. 272, 354 S.E.2d 767 (1987)).

C. Review is Required Because Division Two Erred in Finding the Evidence Sufficient to Convict Mr. McEvoy of Violating a no Contact Order on April 12, 2014, which is a Significant Question of Constitutional Law

Division Two erred in (1) concluding—without analysis—that the evidence was sufficient and (2) refusing to consider Mr. McEvoy's constitutional claims. App A. at 17 n.6.

"A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment ..." In re Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (citations omitted). The question is whether, viewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. (citations omitted). RCW 26.50, though, does not define residence. Nor does RCW 26.50.110(1)(a)(i) penalize a restrained party's personal belief; an actual violation is required.

Here, Mr. McEvoy was convicted of violating a no contact order which did not specify the address of the prohibited residence. The order stated only that he could not be within 500 feet of Ms. McEvoy's residence. On April 9, Ms. McEvoy moved in with her mother, with whom she resided on April 12. The proverbial catch-22 is that Mr. McEvoy would seemingly have been in violation had he gone within 500 feet of his mother-in-law's residence *or* their former shared home.

As part of its gatekeeping role, then, the trial court should have excluded the order because it could not "be constitutionally applied to the charged conduct" and "fail[ed] to give [Mr. McEvoy] fair warning of the relevant prohibited conduct." Seattle v. May, 171 Wn.2d 847, 854, 256 P.3d 1161 (2011). To rectify the error, the defense proposed an instruction defining residence as based upon what the Legislature iterated in RCW 9A.44.128(5), which the court declined. Given his lack of due process notice, reversal is required and this Court's review is warranted.

D. Review is Required Because Division Two Erred in Finding the Evidence Sufficient to Convict Mr. McEvoy of Felony Stalking, a Significant Constitutional Question

Division Two erred in finding the evidence sufficient to support a felony stalking conviction because Mr. McEvoy committed only one qualifying act of harassment. App. A at 17 n.7, 18-19. For conviction, the evidence had to demonstrate that on at least two occasions, Mr. McEvoy harassed or followed his wife in violation of a protection order. State v. Johnson, 185 Wn.App. 655, 669-70, 342 P.3d 338 (2015). "Harass" means willful conduct towards a specific person which "seriously alarms, annoys, harasses, or is detrimental ... and which serves no legitimate or unlawful purpose." RCW 10.14.020(2); RCW 9A.46.110(6)(c). "Follow" means "deliberately maintaining visual or physical proximity to a specific person over a period of time." RCW 9A.46.110.6(b).

As argued above, the April 12 incident was not a violation because the order was void for lack of due process notice. And, as Mr. McEvoy knew nobody was home and had the lawful purpose of retrieving his mail, he neither harassed nor followed Ms. McEvoy. It is only by happenstance that she even discovered the action, for had Mr. McEvoy not encountered Blaylock, nobody would have been any the wiser. While Mr. McEvoy did maintain a post office box where he had some documents sent, he did have correspondence in the mailbox. As the conviction thus lacks sufficient factual foundation, reversal is required and review is warranted.

E. Review is Required Because Mr. McEvoy's Claim that the Rule that a Lesser Included Offense Instruction is Proper Only Where There is No Inference that the Defendant Committed the Greater Crime Conflicts with the Statutory Directive that if there is Doubt, the Defendant Shall Be Convicted of Only the Lowest Degree, is A Significant Constitutional Issue of Substantial Public Interest

Division Two declined to consider whether the court-created rule that instruction on a lesser included offense is required where the evidence supports an inference that the defendant committed *only* the lesser—to the exclusion of the charged crime—is in conflict with RCW 9A.04.100(2) because Mr. McEvoy offered insufficient briefing. App. A at 21 n.9. This was a significant error of constitutional law and is a mater of substantial importance beckoning for this Court's review.

Both the defendant and the state "have a statutory right to present lesser included offense instructions to the jury." State v. Gamble, 154 Wn.2d 457, 462, 114 P.3d 646 (2005); RCW 10.61.006; RCW 9A.04.100(2). The option to convict on a lesser included offense is

> crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free. In some cases, that will create a risk that the jury will convict the defendant despite having reasonable doubts ... To minimize that risk, we err on the side of instructing juries on lesser included offenses.

Henderson, 182 Wn.2d at 736. A jury thus "must be allowed to consider a lesser included offense if the evidence, when viewed in the light most favorable to the defendant, raises an inference that the defendant

committed the lesser crime instead of the greater crime." Id. (citing State v. Fernandez–Medina, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000)).

But, the requirement that the defendant must commit only the lesser offense—to the exclusion of the charged crime—is a recently fabricated rule with no legal foundations, was wrong upon its inception, and is contrary to both statute and a defendant's constitutional rights.

1. The Classic *Workman* Test for Lesser Included Offenses

To establish that an offense is a lesser included, (1) each of the elements of the lesser must be a necessary element of the charged offense (the legal/notice prong) and (2) the evidence must support an inference that the lesser crime was committed (the factual prong). See, e.g., State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (citing State v. Snider, 70 Wn.2d 326, 326-27, 422 P.2d 816 (1967) (citing State v. Gallagher, 4 Wn.2d 437, 447, 103 P.2d 1100 (1940) ("the lesser degree of crime must be submitted to the jury along with the greater degree unless the evidence positively excludes any inference that the lesser crime was committed") (quoting State v. Foley, 174 Wash. 575, 580, 25 P.2d 565 (1933) (citing State v. Gottstein, 11 Wash. 600, 191 P. 766 (1920)).

The Gottstein Court, finally, determined that

> the lesser crime **must be** submitted to the jury along with the greater, unless the evidence positively excludes any inference the lesser was committed, and **it is not incumbent upon the defendant, before such an instruction will be given, to show facts from which a jury might draw the conclusion that the lesser crime and not the greater was in fact committed**.

11 Wash. at 602 (emphasis added).

From this clarification in 1920 in Gottstein through 2000, then, the rule has always remained the same—the evidence need only support an inference that the defendant committed the lesser included offense.

2. The *Fernandez-Medina* Additional Requirement

The Fernandez-Medina Court reasoned that if interpreted too literally, the factual prong would be unnecessarily redundant. Id. The Court thus concluded that the factual test "necessarily" requires a more particularized factual showing than required for other jury instructions—that the evidence "must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." Id. (emphasis in original).

For support, the Court cited to State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990), overruled by State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015) (en banc). But, the Bowerman Court grafted upon this additional requirement that the facts must exclude any inference that the defendant committed the greater based only on Workman and seemingly from whole cloth. 115 Wn.2d at 805. The Court also cited State v. Peterson, 133 Wn.2d 885, 948 P.2d 381 (1997), as to inferior degree offenses, but which is irrelevant given that misdemeanor harassment is a lesser included offense of felony harassment. See State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003).

The Fernandez-Medina dissent, in turn, noted how courts, including the majority, errantly conflated the concepts of inferior degree and lesser included offenses, which have different standards—the latter requiring merely an inference that the defendant committed the lesser crime. 141 Wn.2d at 462-65 (Ireland, J., dissenting) (citations omitted).

3. *State v. Henderson*

More recently, the three-Justice dissent in Henderson noted:

> [A] defendant is not entitled to an instruction on a lesser included offense unless the evidence raises an inference that the defendant committed the lesser offense 'to the exclusion of the charged offense' ... I infer some discomfort with that standard in the majority's opinion. I share that discomfort; indeed, it arguably stands in tension with the statutory directive that '[w]hen a crime has been proven against a person, and there exists a reasonable doubt as to which of two or more degrees he or she is guilty, he or she *shall* be convicted only of the lowest degree.' RCW 9A.04.100(2) (emphasis added).

State v. Henderson, 182 Wn.2d 734, 748 n.4, 344 P.3d 1207 (2015) (McCloud, J., dissenting). Here, though, this issue of substantial public importance is specifically before this Court, which should accept review.

F. Division Two Erred in Finding that the Trial Court Properly Refused to Instruct on Misdemeanor Harassment Because the Alleged Threat to Kill was Ambiguous and Open to Interpretation, a Significant Constitutional Error

Although Mr. McEvoy threatened his wife on May 13, 2014, the nature of the threat was a question for the jury. The trial and appellate courts both thus erred on this matter of substantial public importance.

To convict Mr. McEvoy of felony harassment, the state had to prove beyond a reasonable doubt not only that he threatened to kill his

wife, but also that she had a "reasonable fear that the threat to kill would be carried out." C.G., 150 Wn.2d at 608 (citing RCW 9A.46.020). In C.G., the defendant threatened to kill his teacher; but, the teacher testified only that he believed the defendant might try to hurt him or another. at 595-97. He did not testify that the defendant would kill him. Id. at 597. The Court thus reversed the defendant's felony harassment conviction, and suggested that a lesser included offense instruction might be appropriate under similar circumstances. Id. at 611-12.

Here, Division Two specifically held that Ms. McEvoy's testimony that McEvoy "was trying to find me and *hurt me*, and was threatening ... [t]o kill me" was sufficient to eliminate any inference that he committed only the lesser misdemeanor offense. C.G., then, is almost perfectly analogous—except C.G. actually made a threat to kill! Given that a court must view the evidence in the light most favorable to the proponent of the instruction, Mr. McEvoy's ambiguous threats simply were not threats to kill—or at least posed a legitimate question for the jury.

VI. CONCLUSION

For the foregoing reasons, this Court should accept review and grant appropriate relief to Mr. McEvoy.

DATED this 12th day of July, 2016.

JOHN HENRY BROWNE, WSBA #4677
Attorney for Brian McEvoy

APPENDIX

APPENDIX A

(Division Two's Decision Terminating Review)

Filed
Washington State
Court of Appeals
Division Two

June 14, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRIAN McEVOY, Appellant.	No. 46795-0-II UNPUBLISHED OPINION

BJORGEN, C.J. — Brian McEvoy appeals his convictions for second degree and fourth degree assault, two counts of felony harassment, unlawful imprisonment, interfering with reporting domestic violence, third degree malicious mischief, two counts of violation of a no contact order, felony stalking, attempting to elude a pursuing police vehicle, and second degree unlawful possession of a firearm.

McEvoy argues that the trial court erred when it (1) admitted law enforcement testimony about their search efforts and opinion testimony about McEvoy's dangerousness or guilt; (2) admitted hotel, rental car, and airline ticket receipts found in his vehicle as adoptive admissions; (3) denied his request for a jury instruction on misdemeanor harassment as a lesser included offense to his felony harassment charge; and (4) sentenced him without merging the felony

stalking conviction with the two convictions for violation of a no contact order. He also makes several claims in his statement of additional grounds (SAG).

We hold that the trial court did not abuse its discretion in admitting the testimony about law enforcement search efforts, but do find it abused its discretion in admitting the officers' opinion testimony that amounted to characterizing McEvoy as a dangerous or guilty individual. Nonetheless, we find those errors harmless beyond a reasonable doubt because of overwhelming untainted evidence of guilt. We further hold that if admission of the receipts was erroneous, the error was harmless; that the trial court did not abuse its discretion in denying the misdemeanor harassment jury instruction; that the sentencing court erred by not merging the no contact order convictions; and that all SAG claims fail.

Accordingly, we vacate McEvoy's two convictions for violation of a no contact order and remand for resentencing reflecting that. We affirm McEvoy's other convictions.

FACTS

Brian McEvoy and Kara McEvoy[1] were married for 16 years and had two children together: DM and KM. McEvoy worked as a deputy with the Kitsap County Sheriff's Office for approximately 10 years, ending in the late 2000's.

I. APRIL 9 & 10 DOMESTIC VIOLENCE ASSAULT

On April 9, 2014, Kara arrived at the home on Fairview Lake Road that she shared with McEvoy, DM, and KM. McEvoy asked Kara why she was home "late." Report of Proceedings (RP) (Sept. 10, 2014) at 204. Kara, planning to separate from McEvoy, told him that she had

[1] We refer to Kara McEvoy by her first name to avoid confusion between her and the appellant. No disrespect is intended.

been out looking at apartments. At this, McEvoy became angry. Kara left the home for a while, but returned later that night.

When Kara came back, she found McEvoy sitting on a couch. As Kara went to her bedroom, McEvoy followed her and told her, "You're not going to bed. You're going to suck my dick." RP (Sept. 10, 2014) at 435. After she refused, McEvoy grabbed her and threw her onto the bed. He repeated several times his command to perform oral sex. Kara began screaming, but he told her to "shut up" and hit her on the side of the head twice. *Id.* at 437. He then grabbed her hair, pulling her head down to his crotch and repeating his command.

Kara screamed for DM and KM to come help. Both woke up and found McEvoy attacking Kara. Kara told them to call 911. As DM proceeded down the hall to get to a phone, McEvoy stopped him by putting his hand out on his chest, pulling down on his collar and ripping his shirt off his body. McEvoy then caught up with KM as well and pushed her aside. McEvoy got to Kara's cell phone and threw it on the floor repeatedly until it was smashed.

Kara grabbed her keys and went outside to her car. McEvoy ran after her and indicated that he had rigged the vehicle so it would not work. Kara was able to start the car, but it would only go a very limited speed. McEvoy punched on the driver's side window and then jumped on the hood of the vehicle, punching the windshield and continuing to yell at Kara. Eventually the vehicle stalled and McEvoy used a spare key to enter the driver's side of the vehicle, hit Kara in the head, and pushed her over to the passenger side. Kara honked the horn to try to get somebody's attention, but McEvoy said, "You better stop honking the horn, or I'm going to kill you," which caused her to stop honking. RP (Sept. 10, 2014) at 448. McEvoy then pulled her hair while simultaneously driving the vehicle and repeating his command for her "to suck [his] cock." RP (Sept. 10, 2014) at 449.

After a while, McEvoy pulled over and fixed the vehicle so they could return to the Fairview home. McEvoy indicated that he would kill Kara if she called the police. Nonetheless, the morning of April 10, Kara contacted the police to report the incident. As a result, a domestic violence no contact order was filed against McEvoy on April 11 barring McEvoy from coming within 500 feet of Kara's "residence."

II. April 12 Mailbox Incident

On April 12, 2014, William Blaylock, a neighbor who knew McEvoy and Kara, saw McEvoy pull up in his truck and go to the mailbox, which was less than 500 feet from the Fairview home. McEvoy then contacted Blaylock, and after a brief exchange, told him, "Well, I went to the mailbox to get my mail. . . . I'm not supposed to be here." RP at 677. He repeated that he was not supposed to be there and then left. Although Kara, DM, and KM were living with Kara's mother temporarily, she still considered that home to be her "residence." RP (Sept. 10, 2014) at 492-493.

III. May 13 Phone Call

On May 13, while Kara was at work, she received a call from McEvoy that was recorded. During the phone call, McEvoy made the following statements to Kara:

> You know what Kara, you've got a very short time on this earth. You better hope somebody finds me before I find you.
> . . . .
> I just hope you can, uh, live with the consequences of what's gonna happen.
> . . . .
> I'm gonna find you, Kara. You and I are gonna have one last reckoning, I guarantee that.
> . . . .
> Hey, Kara, I'm gonna find you, that's all I gotta say.

Clerk's Papers (CP) at 403-08. Based on McEvoy's treatment of Kara in the past, she believed that he was threatening to kill her. Because McEvoy failed to appear at a scheduled court date

on the same day as this phone call, law enforcement efforts to locate McEvoy were heightened greatly.

IV. MAY 19 ARREST

On May 19, law enforcement located McEvoy's vehicle at a tavern. Raymond Fleck, an assistant chief with the United States Marshal Service, turned down an alley near the tavern and found himself face-to-face with McEvoy in his vehicle. McEvoy raised his hands as if to surrender to Fleck. When Fleck began to exit his vehicle to arrest McEvoy, McEvoy put his vehicle in reverse and began backing up. McEvoy then drove down a nearby road at a high rate of speed, and Jake Whitehurst of the United States Marshal Service, used his vehicle to block the road McEvoy was driving down. At the last moment, Whitehurst moved his vehicle out of the way so that McEvoy would not crash into it. McEvoy continued to speed down the roads until his vehicle collided with another officer's vehicle in a shopping mall parking lot.

McEvoy was arrested and he and his vehicle were searched, disclosing a firearm, which McEvoy was not allowed to possess. In McEvoy's wallet, officers located a credit card belonging to Gail McEvoy, who was McEvoy's mother.[2] Officers also found receipts for motels, a rental car, and an airline ticket.

V. PROCEDURE

Pretrial, McEvoy filed a number of motions in limine, one of which was to suppress the receipts noted above as inadmissible hearsay. The court denied this motion, finding the receipts to be adoptive admissions. The second pertinent motion in limine was McEvoy's request to suppress any testimony regarding law enforcement's efforts to search for him between the May 13 phone call and his eventual arrest on May 18. The court initially granted the motion. However,

[2] We refer to Gail McEvoy by her first name. We intend no disrespect.

after hearing more argument, the court reconsidered its position and allowed testimony regarding police search efforts of McEvoy. The trial court reasoned that testimony about the search was relevant because of McEvoy's prior law enforcement experience and ability to avoid the police with his knowledge of their techniques, which could show his consciousness of guilt. The trial court noted that the issue was "still somewhat evolving" and that it "can't micromanage the information" until witnesses began testifying. RP (Sept. 3, 2014) at 106, 113. Consistent with the limited scope of the motion in limine, McEvoy objected to many aspects of the police officers' search efforts testimony as outlined in detail below.

1. Nicole Menge's Testimony

Nicole Menge, a deputy sheriff with the Kitsap County Sheriff's office, testified that McEvoy had knowledge and experience about law enforcement's ability to investigate because of his own prior law enforcement training. Menge testified that based, in part, on the May 13 phone call, she "started to make some efforts to locate him at that time." RP (Sept. 9, 2014) at 212. She asked officers to maintain surveillance of the Fairview residence and to conduct surveillance of Kara's workplace. Menge testified that she acquired numerous cell phone records, global positioning system (GPS) data for those phones, and bank and credit card records, and that she contacted local and federal agencies and airport and rental car companies in an effort to locate him. The defense objected to this line of testimony several times, but was overruled.

2. Earl Smith's Testimony

Earl Smith, a lieutenant with the Kitsap County Sheriff's office, testified that after he heard the May 13 phone call there were "a lot more efforts [in] locating Mr. McEvoy."

RP (Sept. 12, 2014) at 700. After the defense objected and was overruled, Smith testified that upon learning that McEvoy had returned to Washington from Vermont, he became concerned and started "deploying more assets to the investigation, more detectives" and "asked other law enforcement agencies to assist." RP (Sept. 12, 2014) at 701-02. After testifying that he sent out a "statewide bulletin to all law enforcement agencies" to locate McEvoy, defense counsel objected again, which was overruled. RP (Sept. 12, 2014) at 702-03. Smith then testified that he contacted local law enforcement about the situation with McEvoy and also enrolled the help of United States Marshal Service because of their capabilities for electronic surveillance and tracking.

Smith also testified that while attempting to locate McEvoy, officers used "two-person cars because of concern for safety." RP (Sept. 12, 2014) at 705. In the context of talking about McEvoy's arrest at a motel, he stated that a special weapons and tactics team (SWAT) had been activated, but never had to be utilized because he had already been taken into custody. In regard to McEvoy possibly appearing in court, Smith testified that they "deployed some surveillance teams, in and around the courthouse. . . to see . . . if he would show up." RP (Sept. 12, 2014) at 708.

Because he did not show up, Smith recounted the numerous entities and people they contacted to ensure safety. Smith stated that the children were eventually removed from the school because he was "very, very concerned about the kids." RP (Sept. 12, 2014) at 709. He also testified that DM was "put in a patrol car, taken from the school, while [police] had [a] surveillance team watching, in case something would happen . . .[t]his was very serious what was going on." RP (Sept. 12, 2014) at 709. Smith also testified about how they protected Kara

and how they had surveillance teams around her work place. He testified that a plain-clothes detective drove Kara's vehicle around to ensure that McEvoy was not following that vehicle.

3. Fleck's and Whitehurst's Testimony

Whitehurst and Fleck were among those assigned to McEvoy's case. Whitehurst testified that, as part of the United States Marshal's violent offender task force, his role was to apprehend wanted fugitives with felony warrants, "typically a violent or sex offense type crime, imminent threat type situation . . . like, we know that great bodily injury and/or death is likely to occur or is imminent, if this person is not apprehended." RP (Sept. 15, 2014) 727-28. Fleck gave a similar description of the violent offender task force, but also stated that they are "responsible for apprehending, for lack of a better term, the worst of the worst." RP (Sept. 15, 2014) at 793. When Fleck discussed his decision on whether to pursue McEvoy during the May 18 incident, he testified: "I determined that had he not been brought into custody, he was going to kill his wife." RP (Sept. 15, 2014) at 809. Defense counsel objected to this statement, which was overruled.

4. Verdicts

Based on the testimony of these law enforcement officers, Kara, DM, and others, the jury found McEvoy guilty of second degree and fourth degree assault, two counts of felony harassment, unlawful imprisonment, interfering with reporting domestic violence, third degree malicious mischief, two counts of violation of a no contact order, felony stalking, attempting to elude a pursuing police vehicle, and second degree unlawful possession of a firearm.[3] McEvoy appeals.

[3] McEvoy was acquitted of second degree attempted rape and one count of violation of a no contact order. The jury rendered special verdicts on all convictions that McEvoy and Kara were members of the same family or household. The jury also returned an additional special verdict on the second degree assault conviction that it had been "committed with the sight or sound of the victim's children." CP at 167.

ANALYSIS

I. LAW ENFORCEMENT TESTIMONY

McEvoy argues that the testimony from Smith, Menge, Fleck, and Whitehurst about locating him was irrelevant and prejudiced his ability to get a fair trial. He also argues that several statements from these officers were improper opinion testimony. We disagree as to the testimony regarding the officers' search efforts, but agree that some of their opinion testimony was improper and amounted to characterizing McEvoy as a dangerous and guilty individual. However, because we find there was overwhelming untainted evidence of guilt for each of his convictions, these errors were harmless.

1. Search Efforts Testimony

"Evidence which is not relevant is not admissible." ER 402. 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. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)).

"Evidence of flight is admissible if it creates 'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt *or was a deliberate effort to evade arrest and prosecution.*'" *State v. McDaniel*, 155 Wn. App. 829, 853-54, 230 P.3d 245 (2010) (emphasis added) (quoting *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001)). "Our law does not define what circumstances constitute flight, so 'evidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible' if the trier of fact can reasonably infer the defendant's consciousness of

guilt of the charged crime." *Id.* at 854 (quoting *Freeburg*, 105 Wn. App. at 497-98. "Such evidence 'tends to be only marginally probative as to the ultimate issue of guilt or innocence[, so] the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.'" *Id.* (alteration in original) (quoting *Freeburg*, 105 Wn. App. at 498).

McEvoy first argues that the law enforcement testimony from Menge, Smith, Whitehurst, and Fleck regarding the search efforts, as outlined above, was irrelevant and prejudicial. We disagree. McEvoy missed a court appearance on May 13, which resulted in the issuance of bench warrants for his arrest. McEvoy's threatening phone call to Kara occurred the same day. The four law enforcement officers testified about some of their search efforts in trying to find McEvoy before his eventual arrest on May 18. The trial court allowed this evidence primarily because McEvoy was a trained police officer for 10 years, who would be aware of the current techniques that law enforcement would employ to capture him. Therefore, the jury could have inferred that McEvoy was conscious of his guilt and that his actions were a "'deliberate effort to evade arrest and prosecution.'" *McDaniel*, 155 Wn. App. at 854 (quoting *Freeburg*, 105 Wn. App. at 497).

McEvoy also argues that the trial court abused its discretion because it did not find that any probative value of the search efforts evidence was substantially outweighed by its unfair prejudice. ER 403. Although it is arguable that some of the search efforts evidence may have been cumulative, the probative value is substantial given McEvoy's extensive experience as a police officer. The court did not abuse its discretion.

McEvoy finally contends that the trial court's refusal to sustain his multiple objections further amplified the prejudice. He objected several times during Menge's testimony, but the

trial court overruled the objections based on its pretrial ruling admitting testimony about the officers' search efforts. The rest of the overruled objections were in a similar vein. Even if the trial court did not properly sustain some of the objections, McEvoy does not show that any potential prejudice from this evidence substantially outweighed its probative value.

Accordingly, we hold that the trial court did not abuse its discretion in admitting the search efforts testimony.

2. Improper Opinion Testimony

McEvoy next argues that Fleck's and Whitehurst's opinion testimony was improper because it essentially characterized him as a dangerous and guilty individual. We agree.

"Opinions on guilt are improper whether made directly or by inference." *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *Id.* In determining whether statements are impermissible opinion testimony, the trial court will consider the circumstances of the case, including the following factors: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (internal quotation marks omitted) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Some areas, however, are clearly inappropriate for opinion testimony in criminal trials, including personal opinions as to the defendant's guilt, the intent of the accused, or the veracity of witnesses. *Quaale*, 182 Wn.2d at 200. Police officers' opinions on guilt particularly have low probative value because their area

of expertise is in determining when an arrest is justified, not in opining when there is guilt beyond a reasonable doubt. *Montgomery*, 163 Wn.2d at 595.

McEvoy cites several instances of improper opinion testimony, including Fleck's and Whitehurst's testimony that they are involved in cases with imminent threats of violence in which "great bodily harm or death is likely to occur" or cases with people that are the "worst of the worst." Br. of Appellant at 24; RP (Sept. 15, 2014) 727-28, 793. In the most questionable of these comments, Fleck stated, "I determined that had he not been brought into custody, he was going to kill his wife." Br. of Appellant at 24; RP (Oct. 15, 2014) at 809. We agree that these comments were improper.

Fleck's and Whitehurst's comments about the types of cases in which they are involved generally implied McEvoy's guilt. The jury could have inferred that Fleck and Whitehurst only got involved in McEvoy's case because there was a high probability that he was going to severely harm or kill Kara. Fleck's comment that they only get involved in the "worst of the worst" cases amplifies the impropriety. Because testimony from police officers carries an aura of reliability, *Montgomery*, 163 Wn.2d at 595, the jury may have been influenced by these improper comments when determining whether McEvoy threatened to kill his wife, whether he severely assaulted her during the April 9/10 incident, and whether he was stalking or harassing her.

We also agree that Fleck's comment as to his state of mind, where he stated, "I determined that had he not been brought into custody, he was going to kill his wife" was improper. RP at 809. This comment is similar to the one in *State v. Edwards*, 131 Wn. App. 611, 613, 128 P.3d 631 (2006), where a police detective testified that a confidential informant had told him the defendant was dealing crack cocaine, which prompted his subsequent

investigation into the defendant. The *Edwards* court held that this evidence was improper substantive evidence of the defendant's guilt because the defense never challenged why the police detective began investigating the defendant. *Id.* at 614-15. Similar to *Edwards*, Fleck's state of mind when he decided to further pursue McEvoy was irrelevant because the defense never challenged why Fleck continued to pursue him. Instead, the jury could have believed this to be substantive evidence of McEvoy's guilt of the charged offenses. *See also State v. Aaron*, 57 Wn. App. 277, 279-81, 787 P.2d 949 (1990) (officer's "state of mind" that the dispatcher had told him the burglar had a jean jacket was irrelevant and was only offered to be substantive evidence of the defendant's guilt); *State v. Johnson*, 61 Wn. App. 539, 545, 811 P.2d 687 (1991) (officer's testimony as to information from a confidential informant recorded in a search warrant affidavit was improper to admit as "state of mind" evidence since the defendant did not challenge the validity or execution of the search warrant.).

Fleck's and Whitehurst's testimony regarding the types of cases they get involved in, coupled with Fleck's opinion that McEvoy was going to kill his wife, reasonably implied that McEvoy was a dangerous person who was guilty of the charged crimes. Accordingly, we hold these comments were improper.[4]

[4] McEvoy also argues that the prosecutor's references to Fleck's and Whitehurst's opinion testimony was improper. Even if improper, McEvoy never objected to the prosecutor's comments and a curative instruction could have been remedied any prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (when a defendant fails to object to the challenged portions of the prosecutor's argument, she or he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice).

3. Harmlessness Beyond a Reasonable Doubt Due to Overwhelming Untainted Evidence

We next examine whether this evidence, though improper, was harmless beyond a reasonable doubt due to overwhelming untainted evidence. We hold that there is overwhelming untainted evidence supporting each of McEvoy's convictions.

The "overwhelming untainted evidence" test allows us to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). In examining whether error is harmless beyond a reasonable doubt due to overwhelming untainted evidence, we examine both the State's evidence and the defendant's evidence controverting the State's case. *State v. Watt*, 160 Wn.2d 626, 639, 160 P.3d 640 (2007). We look only at the evidence that was properly admitted at trial to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* at 636. If the State's and defendant's evidence are directly in dispute on a charge, it is less likely for us to uphold the conviction due to overwhelming untainted evidence. *See State v. Damon*, 144 Wn.2d 686, 694-95, 25 P.3d 418 (2001). Because we find overwhelming untainted evidence of guilt, we uphold all of McEvoy's convictions.

First, we uphold the second degree assault conviction against Kara based on the April 9/10 incident. Second degree assault requires the State to prove that the defendant "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm" on a person. RCW 9A.36.021(1)(a). Kara's testimony, her brother's testimony, and photographic evidence[5] supply overwhelming untainted evidence to uphold the conviction.

[5] At trial, photographs depicting Kara's injuries were admitted. They showed Kara with a lump on her head, bruises, and a chunk of her hair missing that took several months to grow back.

Second, we uphold the fourth degree assault conviction for conduct against DM during the April 9/10 incident. Fourth degree assault requires the State to prove that the defendant "assault[ed] another." RCW 9A.36.041(1). Kara's and DM's testimony together supplies overwhelming evidence supporting this conviction.

Third, we uphold the felony harassment conviction against Kara based on the April 9/10 incident. A person is guilty of misdemeanor harassment if.

> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
> . . .
> (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

RCW 9A.46.020(1). A person is guilty of felony harassment if "the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person." RCW 9A.46.020(2)(b)(ii). Kara testified that McEvoy repeatedly threatened to kill her throughout the incident, saying, for example, "Hey, bitch, I'm going to come fucking kill you." RP at 445, 448, 455. Although the evidence for this conviction rested solely on Kara's testimony, McEvoy presented no evidence to controvert this portion of her testimony. Kara's testimony therefore supplies overwhelming evidence, and we uphold this conviction.

Fourth, we uphold the unlawful imprisonment conviction against Kara based on the incident on April 9/10. "A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1). Kara testified that once McEvoy entered the vehicle, he beat her on the head and then pulled her hair so she could not leave the vehicle. Similarly to the felony harassment conviction discussed above, the unlawful imprisonment

conviction rested solely on Kara's testimony. However, McEvoy presented no evidence to controvert that testimony. Accordingly, we uphold this conviction.

Fifth, we uphold the interfering with reporting domestic violence conviction based on the April 9/10 incident. Interfering with reporting domestic violence requires the State to prove that the defendant "[c]ommit[ed] a crime of domestic violence, as defined in RCW 10.99.020" and "[p]revent[ed] or attempt[ed] to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system." RCW 9A.36.150. Kara's and DM's testimony supplies overwhelming evidence, and we therefore uphold this conviction.

Sixth, we uphold the third degree malicious mischief conviction based on the April 9/10 incident. Third degree malicious mischief requires the State to prove that the defendant "[k]nowingly and maliciously cause[d] physical damage to the property of another." RCW 9A.48.090. Kara's and DM's testimony and the photographic evidence supply overwhelming evidence of this, and we therefore uphold this conviction.

Seventh, we uphold the no contact order violation based on the April 12 mailbox incident. Violation of a no contact order requires the State to prove that an order was granted and the respondent or person to be restrained knows of the order. RCW 26.50.110(1)(a). It also requires the State to show a violation of one of the order's restraint provisions, which could include, "prohibiting contact with a protected party," "excluding the person from a residence," or "prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location." RCW 26.50.110(1)(a)(i)-(iii). The State submitted a no contact order filed on April 11 that fulfilled the required elements above. Blaylock's testimony provided overwhelming evidence that McEvoy knew of the order, and Kara's, Blaylock's, and Menge's

testimony supplied overwhelming evidence that he violated it. Therefore, we uphold the conviction.[6]

Eighth, we uphold the no contact order violation based on the May 13 phone call. The phone call was recorded and played for the jury, Kara testified that she received the phone call, and McEvoy admitted to making it. There was also a no contact order that was in place prohibiting McEvoy from contacting Kara. We find overwhelming evidence, and therefore uphold this conviction.

Ninth, we uphold the felony harassment conviction based on the May 13 phone call. The admitted May 13 phone call, Kara's testimony, admitted ER 404(b) evidence, and Menge's testimony supply overwhelming evidence of this offense, and we uphold this conviction.[7]

Tenth, we uphold the attempting to elude police vehicle conviction based on the May 19 incident. Attempting to elude a police vehicle requires the State to prove that a person "willfully fail[ed] or refuse[d] to immediately bring his or her vehicle to a stop and . . . dr[ove] his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop." RCW 46.61.024(1). Fleck's and

[6] McEvoy also argues, under the guise of a sufficiency of the evidence challenge, that the no contact order imposed after the April 9/10 incident is "ambiguous as applied" and did not give "fair notice" because the term "residence" is not specified with a specific address in the no contact order. Br. of Appellant at 37-38; CP at 378-79. Both parties ask us to define "residence." We decline to do so, however, as we only need to find that there is overwhelming evidence that McEvoy believed he came within 500 feet of Kara's "residence" when he went to the mailbox to check his mail—not what the legal definition of residence in the no contact order would be. Finding overwhelming evidence that McEvoy knew the Fairview home was Kara's residence as understood from the no contact order, we decline to address this issue further.

[7] McEvoy argues that there is insufficient evidence to support his felony stalking conviction. Because we hold that there was overwhelming untainted evidence of this conviction, we necessarily find the evidence sufficient as well.

Whitehurst's testimony as well as photographic evidence supply overwhelming evidence of guilt, and we uphold the conviction.

Eleventh, we uphold the second degree unlawful possession of a firearm conviction. Second degree unlawful possession of a firearm requires the State to prove that a person "owns, has in his or her possession, or has in his or her control any firearm . . . (ii) [d]uring any period of time that the person is subject to a [protective] order . . . that:

> (A) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;
> (B) Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> (C)(I) Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; and
> (II) By its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

RCW 9.41.040(2)(a).[8] The State submitted a no contact order to the jury which satisfies the elements stated above. Testimony and photographic evidence established that a .38 caliber colt revolver was found in McEvoy's vehicle after he was arrested. Therefore, finding the elements met, we uphold this conviction due to overwhelming untainted evidence.

Twelfth, we uphold the felony stalking conviction. A person commits the crime of stalking if, without lawful authority

> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

[8] We note that the date of the commission of this crime was May 19, 2014. The current version RCW 9.41.040 was not in effect until June 12, 2014. McEvoy was charged based on the current version of RCW 9.41.040. The jury was also instructed on the current version of RCW 9.41.040; McEvoy did not object. Thus, the current version of RCW 9.41.040 became the law of the case, *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998), and we follow that in assessing the second degree unlawful possession of a firearm conviction.

> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
>
> (c) The stalker either:
>
> (i) Intends to frighten, intimidate, or harass the person; or
>
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

RCW 9A.46.110. The statute elevates the crime of stalking from a gross misdemeanor to a class B felony when in violation of a no contact order protecting the person being stalked. RCW 9A.46.110(5)(b)(ii). The State must show that on "at least two separate occasions, [the defendant] harassed or followed [the victim] in violation of a protection order." *State v. Johnson*, 185 Wn. App. 655, 670, 342 P.3d 338, *review denied*, 184 Wn.2d 1012 (2015). Harassment is defined, in part, as "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose." RCW 10.14.020(2); RCW 9A.46.110(6)(c). Following is defined, in part, as "deliberately maintaining visual or physical proximity to a specific person over a period of time." RCW 9A.46.110(6)(b).

McEvoy's felony stalking conviction rested on the no contact order violations from the April 12 mailbox incident and May 13 phone call. Clearly, overwhelming untainted evidence exists to support the May 13 phone call as an episode of following or harassing. However, whether the record contains overwhelming untainted evidence that McEvoy checked his mail on April 12 to "harass" or "follow" Kara is a much closer question.

McEvoy submitted evidence that he intended to pick a time where he knew nobody would be at the residence. Kara's absence at the residence when McEvoy picked up his mail

corroborated his claim. On the other hand, the State's evidence showed that McEvoy admitted to violating the no contact order; that McEvoy hardly had any mail at the home mailbox and kept a separate post office box where the family's bills and bank statements would go; and that his actions during the prior April 9/10 incident circumstantially demonstrated his intent to harass or follow Kara under the guise of checking the mail. We find this evidence in the aggregate, despite McEvoy's defense, shows that the mailbox incident was an incident of following or harassing. All told, we do not see a reasonable possibility that the use of the improperly admitted evidence discussed above was necessary to reach a guilty verdict. Accordingly, like the other convictions, we uphold the felony stalking conviction.

II. ADOPTIVE ADMISSIONS

Next, McEvoy argues that the trial court abused its discretion in admitting hotel, rental car, and airline ticket receipts found in his vehicle as adoptive admissions. Assuming without deciding that the trial court erred, we find their admission harmless. "An evidentiary error is harmless unless it was reasonably probable that it changed the outcome of the trial." *In re Det. of Mines*, 165 Wn. App. 112, 128, 266 P.3d 242 (2011). Because we hold above that there was overwhelming untainted evidence of McEvoy's guilt as to each conviction as noted above, we necessarily find that it was not reasonably probable that admission of the receipts changed the outcome of the trial. Accordingly, any error in admitting these receipts was harmless.

III. LESSER INCLUDED JURY INSTRUCTION TO FELONY HARASSMENT

McEvoy argues that "[t]he trial court erred by refusing to instruct on the lesser included charge of misdemeanor harassment" to the greater offense of felony harassment. Br. of Appellant at 42. We disagree.

1. Legal Principles

A defendant is entitled to a lesser included jury instruction if two prongs are met. First, under the legal prong each of the elements of the lesser offense must be a necessary element of the offense charged. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Second, under the factual prong the evidence must support an inference that the included crime was committed. *Id.* at 448. Here, the State concedes that the legal prong is met, which we accept. *State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (observing that misdemeanor harassment with the threat to cause bodily injury is a lesser included offense to felony harassment with the threat to kill). The closer issue is whether the factual prong is met.

We review a trial court's decision regarding the factual prong for abuse of discretion. *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015). When evaluating whether the evidence supports an inference that the lesser crime was committed, we view the evidence in the light most favorable to the party who requested the instruction. *Id.* at 742. "If a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense."[9] *Id.* at 736.

We hold the trial court did not abuse its discretion in denying McEvoy a misdemeanor harassment instruction. The trial court properly found that a reasonable juror could only find that McEvoy's comments during the May 13 phone call were a threat to kill and placed Kara in

[9] Citing 182 Wn.2d at 748-49, n.6 (McCloud, J., dissenting), McEvoy argues that this rule violates RCW 9A.04.100(2). RCW 9A.04.100(2) states that when a crime has been proven and there exists a reasonable doubt as to which of two or more degrees he or she is guilty, the defendant shall be convicted only of the lowest degree. However, an issue of this magnitude requires much more briefing than McEvoy has provided here. *See Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012). Therefore, we do not reach it.

reasonable fear that the threats to kill would be carried out. RCW 9A.46.020. First, no reasonable juror could find that McEvoy's comments "Kara, you've got a very short time on this earth," coupled with his later comment "I'm gonna find you, Kara. You and I are gonna have one last reckoning, I guarantee that" implied that he was only going to "cause bodily injury" and not kill. RCW 9A.46.020(1)(a), 2(b)(ii). Although McEvoy argues that these comments are "ambiguous," the implications of these two threats, along with McEvoy repeatedly telling Kara he is going to come "find" her, demonstrate that a reasonable juror could not rationally conclude that he was only planning to cause bodily injury to her. Br. of Appellant at 47.

As to whether a reasonable juror could only infer that Kara was placed in reasonable fear that the threat would be carried out, McEvoy argues that the trial court's reliance on *C.G.*, 150 Wn.2d at 611 was improper. We disagree. In *C.G.*, the victim's testimony was that he only feared bodily injury—not death—and therefore, the court reversed the defendant's felony harassment conviction. *Id.* at 607, 610. Here, the trial court found that none of Kara's testimony could have allowed a juror to reasonably infer she was only afraid of being harmed; rather, "she was only concerned that he was going to kill her." RP at 868. Indeed, Kara testified directly that McEvoy "was trying to find me and hurt me, and he was threatening . . .[t]o kill me." RP at 523. Based on that evidence, the trial court did not abuse its discretion in finding a reasonable juror could only conclude that McEvoy's threat placed her in fear for her life.

Accordingly, the trial court did not abuse its discretion in denying McEvoy the misdemeanor harassment instruction.

IV. MERGER

McEvoy argues, and the State concedes, that both convictions for violating a no contact order, which he was individually sentenced on, must be vacated because they merge with the

felony stalking conviction. We accept the State's concession and agree with McEvoy. In *State v. Parmelee*, 108 Wn. App. 702, 711, 32 P.3d 1029 (2001), Division One of our court held that a conviction for violating a no contact order must be merged if used as a basis for a felony stalking conviction. McEvoy's two no contact order violations were the basis for his felony stalking conviction, yet he was convicted of all three offenses. The entry of multiple convictions for the same offense offends double jeopardy. *State v. Knight*, 162 Wn.2d 806, 813, 174 P.3d 1167 (2008). Therefore, we vacate those convictions and remand for resentencing accordingly.

V. SAG CLAIMS

McEvoy's SAG makes several ineffective assistance of counsel claims. To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). If a defendant fails to establish either prong, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Representation is deficient if it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33.

As an initial matter, we find the record insufficient to review McEvoy's claims (1) that his first defense counsel was deficient when he advised McEvoy to leave Washington and skip a court appearance, and (2) that his trial counsel failed to listen to phone calls and provide them to the sentencing court, which would have allegedly resulted in more leniency in his sentence. If McEvoy wishes to raise these issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

McEvoy also argues that his trial counsel was ineffective for failing to retain an expert witness that would testify about his medical condition, which may have impacted the jury verdicts. Although the record contains evidence that McEvoy had surgery for a medical issue several months before the April 9/10 incident, there is also evidence that he had mostly recovered by the time the April 9/10 incident occurred. Without more evidence that he was still injured and that it may have affected his actions as related to his convictions, it was a reasonable tactic for McEvoy's counsel to not bring an expert who would not have helped his defense.

McEvoy also contends that his trial counsel was ineffective for failing to request a venue change because Kitsap County was prejudiced against him. However, this claim is without merit as defense counsel could have believed that the process of voir dire is an equally effective process for vetting jury members. *Cf. In re Pers. Restraint of Lord*, 123 Wn.2d 296, 305, 868 P.2d 835 (1994).

The rest of McEvoy's SAG, in general, argues that Kitsap County was prejudiced against him because he was an officer for 10 years. However, in the absence of any actual evidence in the record of prejudice against McEvoy stemming from his position as an officer, we find this meritless.

Accordingly, we dismiss McEvoy's SAG claims.

CONCLUSION

We vacate both of McEvoy's convictions for violating a no contact order and remand for

resentencing consistent with this opinion. We affirm McEvoy's other convictions.

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.

Bjorgen, C.J.
BJORGEN, C.J.

We concur:

Melnick, J.
MELNICK, J.

Sutton, J.
SUTTON, J.

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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

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

BRIAN MCEVOY, Petitioner v. STATE OF WASHINGTON, Respondent.	SUPREME COURT NO. _____ COURT OF APPEALS, DIV II NO. 46795-0-II DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent a copy of the "Petition for Discretionary Review" to:

Kitsap County Prosecuting Attorney
614 Division Street
Port Orchard, WA 98366

and to: Brian McEvoy, DOC # 377945
Monroe Correctional Complex-TRU
PO Box 777
Monroe, WA 98272

Dated this 12th day of July, 2016.

Lorie J. Hutt