Supreme Court No. 102200-0
Court of Appeals No. 57107-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AARON M. MYLAN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Aaron Mylan, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Aaron Mylan seeks review of the unpublished opinion of the Court of Appeals in cause number 57107-2-II, 2023 WL 4105263 (Slip op. June 21, 2023). A copy of the decision is attached as Appendix A, pages A-1 through A-20.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review where the State failed to prove Mr. Mylan's words that he would "kill" store employee David Hamilton-Ross were sufficient to allow the jury to find proof beyond a reasonable doubt that he committed felony harassment, where Mr. Mylan was frustrated and felt he was treated poorly by staff at the convenience store/gas station and responded angrily when denied use of the bathroom, and where Mr. Hamilton-Ross said that he felt the need to stand up for himself and engaged in a shouting

match with Mr. Mylan in which both responded with vulgarities, and where the alleged threats to kill were made in the context and under circumstances under which it was not objectively reasonable for Mr. Hamilton-Ross to fear that he would be killed?

2. Should this Court grant review where defense counsel was prejudicially ineffective by failing to request an instruction limiting the jury's consideration of testimony and consideration of body cam video in which Mr. Mylan said that he had previously been in prison, that he was "institutionalized," that he had been incarcerated "half [his] life," and that he was not afraid to go back to prison, and where the jury should have been instructed that such evidence was admitted for the limited purpose of showing that Mr. Hamilton-Ross was placed in reasonable fear by Mr. Mylan's statements?

3. Should this Court grant review where the trial court erred by finding that statements made to law enforcement officers by Mr. Mylan were non-custodial and not elicited in violation of

Miranda[1] after he was contacted by Corporal Jordan Ejde, who continued to engage Mr. Mylan in conversation while waiting for Officer John Chesney to arrive on the scene with a witness to perform a "field show up," and where Mr. Mylan's backpack was taken from him and placed in a patrol vehicle, thus causing Mr. Mylan to believe that he was not free to leave?

D. STATEMENT OF THE CASE

Aaron Mylan was convicted by jury of harassment. 2RP at 397, 398; CP at 142. The State presented evidence regarding a confrontation between Mr. Mylan and two employees at a convenience store/gas station that occurred on April 24, 2022. Store employee David Hamilton-Ross testified that Mr. Mylan walked into the West Hills 76 gas station in Bremerton, Washington and asked to use the restroom. 2RP at 301. Mr. Hamilton-Ross had just given the key to a mother and her child and told Mr. Mylan that someone was already using the restroom

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[1] ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

and that he would have to wait. 2RP at 302. Mr. Mylan walked to the bathroom and tried to enter and Mr. Hamilton-Ross told Mr. Mylan "Hey, what are you doing? I just told you you're going to have to wait." 2RP at 305. He said that Mr. Mylan started arguing and asking why the clerk was yelling and swearing at him. 2RP at 305. Mr. Hamilton-Ross moved to the front of the store behind the cash register while Mr. Mylan swore at him and called him racially charged names. 2RP at 306. Mr. Hamilton-Ross, who had been in the Marine Corps, stated "I stood up for myself" and told him that "I'm not Asian, you stupid c@nt. I'm Native." 2RP at 306, 316. He said that Mr. Mylan said "f@ck you, you n*gger. I'll kill you. I just got out of jail. I'm not scared to go back. I'll kill you right now." 2RP at 306. Mr. Hamilton-Ross pressed a panic button behind the counter and another store employee — Brett Berkompas -—called 911. 2RP at 306. Mr. Hamilton Ross testified that Mr. Mylan said that he would come back later. 2RP at 307. Mr. Hamilton-Ross said that Mr. Mylan would not leave the store and that he started to "get really scared" because he did not know "what he was going for in his backpack." 2RP at 307.

He said that Mr. Mylan made threats "dozens of times." 2RP at 307. Mr. Mylan left the store then came back after about five minutes and was at the door and yelling and then went back into the store and slammed a freezer door and yelled that he was going to kill him. 2RP at 308, 309.

Mr. Hamilton-Ross stated that Mr. Mylan chased him out of the store and said that he was going "to beat my ass." 2RP at 310-11. Mr. Hamilton-Ross said that he did not know what Mr. Mylan was going to do and thought he was going to get a weapon. 2RP at 312. He said that Mr. Mylan seemed mad enough to hurt or kill him. 2RP at 312.

Store surveillance video from the incident was played to the jury. 2RP at 302-05. Exhibit 3. Calls to 911 by the woman in the bathroom and by Mr. Berkompas were also played to the jury. 2RP at 289.

Officer John Chesney responded to the report of the incident and after talking with the two clerks left the store to look for the man described by the clerks. 2RP at 294. After learning that Corporal Ejde had made contact with Mr. Mylan at another

gas station, Officer Chesney returned to the station and picked up Mr. Hamilton-Ross and took him to where Corporal Ejde was with Mr. Mylan, and Mr. Hamilton-Ross identified Mr. Mylan as the man who had been in the store. 2RP at 295. A body camera video of Officer Chesney's contact and subsequent arrest of Mr. Mylan was played to the jury. 2RP at 297.

Officer Chesney responded a report of an incident at the station and contacted clerks who said that a shirtless man came into the store and wanted to use the rest room and when he was told it was occupied, had a disagreement that escalated into yelling, and that the man slammed the door to ice cream freezers and used racial slurs against the clerk. 1RP at 20-21. Officer Chesney left the store and drove in the area to look for a man matching the description given by the clerks. 1RP at 21. The officer was notified by Corporal Ejde that he had contacted a man matching the description at a nearby Pacific Pride gas station. 1RP at 21. Officer Chesney returned to the station and transported Mr. Hamilton-Ross to Corporal Ejde's location for a "field show up." 1RP at 22.

Prior to trial, the court heard testimony regarding the initial contact by Bremerton police officers with Mr. Mylan. Corporal Ejde had located Mr. Mylan on foot at the Pacific Pride gas station. 1RP at 8. Corporal Ejde stated that as he drove by, Mr. Mylan turned around and waved at him "like he wanted to talk to me." 1RP at 8. Corporal Ejde stopped his vehicle, got out and asked Mr. Mylan what was going on. 1RP at 9. Corporal Ejde stated that Mr. Mylan told the corporal that he walked into the 76 gas station and asked to use the bathroom and the clerk working there was disrespectful to him. 1RP at 10.

Corporal Ejde said that he engaged with Mr. Mylan "[j]ust to get him talking" and to "talk to him until officer Chesney got there." 1RP at 16, 17. Officer Chesney arrived at the scene with Hamilton-Ross a few minutes later to make an identification. 1RP at 10, 13.

Mr. Mylan told Officer Chesney that he thought the 76 clerk was being aggressive with him when told that he had to wait to use the bathroom that he felt disrespected by the clerk and that they started to yell at each other. 1RP at 23-24. He stated that the

clerk had brought up race first and that he had been to prison and that he knew many Asian and Native American people. 1RP at 24.

In addition to Corporal Ejde and Officer Chesney, two other Bremerton officers were present at the Pacific Pride station. Those officers stood about eight to ten feet away from Mr. Mylan. 1RP at 23, 28. Officer Chesney said that Mr. Mylan's backpack was taken from him and was in another officer's vehicle. 1RP at 28.

After being identified by Mr. Hamilton-Ross in the "field show up" as the person who was inside the 76 station, Mr. Mylan was handcuffed and placed under arrest for harassment and Officer Chesney read Mr. Mylan his constitutional warnings. 1RP at 25, 26, 30.

After hearing the testimony, the court found that statements by Mr. Mylan to police and recorded on Officer Chesney's body cam prior to being given his ***Miranda*** warnings were made freely and voluntarily. 1RP at 40.

The State also moved to introduce statements by Mr. Mylan to Officer Chesney and to the clerks in the 76 station that he had

been to prison several times and that he had "been incarcerated half my life." 1RP at 67-70. The court found that the statements by Mr. Mylan about having previously been in prison are relevant as an element of harassment and that the "probative value far outweighs the prejudicial effect" of the statements. 1RP at 72.

On appeal, Division 2 held that (1) there was sufficient evidence to support Mylan's felony harassment conviction, (2) the trial court did not err in denying a motion to suppress Mylan's statements to law enforcement officers that he had been in prison, (3) the admission of the 911 calls did not violate the confrontation clause because they were not testimonial, (4) we decline to consider Mylan's argument that his statements on body camera footage about being in prison were inadmissible under ER 404(b) because he did not preserve the issue at trial, (5) Mylan did not receive ineffective assistance of counsel when defense counsel failed to request a limiting instruction regarding the evidence about being in jail, and (6) there was no cumulative error warranting reversal.. ***Mylan***, 2023 WL 4105263, at *1-2, 19.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE FELONY HARASSMENT

In order to prove Mr. Mylan guilty of felony harassment, the prosecution had to prove that he 1) without lawful authority, 2) knowingly threatened to kill the person threatened or another, and 3) placed the person threatened in reasonable fear that the death would occur. See, ***State v. C.G.***, 150 Wn.2d 604, 610, 80 P.3d 594 (2003). Here, the Court of Appeals erred in affirming the conviction in the absence of sufficient proof.

The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a

reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 3; ***In re Winship***, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); ***Apprendi v. New Jersey***, 530 U.S. 466, 476–77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Sufficient evidence supports a conviction when, after reviewing evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "A sufficiency challenge admits the truth of the State's evidence and accepts the reasonable inferences to be made from it." ***State v. O'Neal***, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007).

Where a threat to kill is an element of a crime, the State must prove that the alleged threat was a "true threat" because of the danger that the criminal statute will be used to criminalize pure speech and impinge on First Amendment right. ***State v. Kilburn***, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); ***State v. Schaler***, 169 Wn.2d 274, 278, 236 P.3d 858 (2010). Because of the First Amendment implications of the felony harassment statute, this Court applies a heightened

standard of review when examining the sufficiency of the evidence. ***Kilburn***, 151 Wn.2d at 48-49. This "demands more than application of [the] …usual standard for sufficiency of the evidence," and imposes a duty on the appellate court to carefully ensure that only "true threats" are punished. ***Kilburn***, 151 Wn.2d at 48-49; ***State v. Trey M.***, 186 Wn.2d 884, 892, 383 P.3d 474 (2016). True threats are not protected speech because of the "fear of harm aroused in the person threatened and the disruption that may occur as a result of that fear." ***Kilburn***, 151 Wn.2d at 46.

A true threat is a serious threat, not one said in jest, idle talk, or political argument. ***Kilburn***, 151 Wn.2d at 43 (citing ***United States v. Howell***, 719 F.2d 1258, 1260 (5th Cir.1983)). Communications that "bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole" are not true threats. ***Schaler***, 169 Wn.2d at 283. The nature of a threat "depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." ***State v. C.G.***, 150 Wn.2d at 611.

Comments about harming people that are mere "puffery" or

made in jest are not true threats. ***Kilburn***, 151 Wn.2d at 43, 46. Thus, it is the context that makes a threat "true." The literal words used are only one factor, **C.G.,** 150 Wn.2d at 610, and frustrated hyperbole is not a true threat. ***State v. Kohonen***, 192 Wn. App. 567, 583, 370 P.3d 16 (2016); ***Schaler***, 169 Wn.2d at 283. It is not enough to show that a person said to another even the explicit words, "I'm going to kill you." ***C.G.***, 150 Wn.2d at 606. Felony harassment requires that the defendant knowingly threaten to kill the listener and that the threat is reasonably interpreted as "a serious expression of intention to… take the life" of the other. ***Kilburn,*** 151 Wn.2d at 43. Further, the nature of a threat depends on "all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." ***C.G.***, 150 Wn.2d at 606-607.

Here, the evidence was insufficient to prove a "true threat" to kill as opposed to Mr. Mylan's hyperbole or angry talk. There was not a real and "serious expression" of intent to kill but instead anger at Mr. Mylan's perception that he was being denied use of the bathroom and "profiled" due to his appearance or discriminated against because of his circumstances. It is more accurate to say

that Mr. Mylan, feeling disrespected by Hamilton Ross and repeatedly denied use of the bathroom, had a verbal outburst resulting in his yelling at the clerk and walking around the store and banging on things, and that although he used language that he would kill Mr. Hamilton-Ross, his words cannot be considered a true threat.

The circumstances show that Mr. Hamilton-Ross did not truly have an objectively reasonable fear that Mr. Mylan would act on the alleged threat and actually kill him. The record shows that Mr. Hamilton-Ross, who served in the Marine Corps, was shouting back and arguing back and forth with Mr. Mylan and called Mr. Mylan an extremely offensive name. 2RP at 306, 307, 313, 314. Mr. Hamilton-Ross testified that he felt that he "had to stand up for myself." 2RP at 307, 313, 316. Mr. Mylan did not physically attack Mr. Hamilton-Ross, did not initiate a fist fight and did not produce a weapon, but instead made repeated "laps" around the inside of the store, disturbing items on display. 2RP at 310. Taken in context and in light of the heightened scrutiny required, the alleged threats did not amount to genuine threats to kill Mr. Hamilton-Ross and did not place the clerk in the required "reasonable fear."

Because there was insufficient evidence to prove felony harassment, this Court should accept review and the conviction should be reversed and dismissed. See ***Kilburn***, 151 Wn.2d at 54; ***Kohonen***, 192 Wn. App. at 583.

2. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW BECAUSE COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO REQUEST A LIMITING INSTRUCTION FOR ADMISSION OF ER 404 EVIDENCE

Every accused person enjoys the right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. 1, § 22; ***Strickland v. Washington***, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused. ***Strickland***, 466 U.S. at 687; ***Thomas***, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. ***Thomas***, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable

performance. ***Strickland***, 466 U.S. at 689. Thus, trial strategy or tactics are not immune from attack: "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." ***Roe v. Flores-Ortega***, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. ***Thomas***, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome - lower than a preponderance standard. ***State v. Estes***, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Evidence of other crimes or bad acts for which the defendant is not on trial is among the most damaging and unfairly prejudicial evidence that a jury may hear in a criminal trial. ***State v. Saltarelli***, 98 Wn.2d 358, 360, 665 P.2d 697 (1982). Accordingly, evidence of a defendant's prior misconduct is categorically barred under ER 404(b) to demonstrate a defendant's propensity to commit the charged offense. ***State v. Holmes***, 43 Wn. App. 397, 400-401, 717 P.2d 766 (1986). ER 404(b). However, such evidence may be

admissible for other purposes, "depending on its relevance and the balancing of its probative value and danger of unfair prejudice." ***State v. Gresham***, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). A trial court can restrict the scope of a jury's consideration of evidence by issuing a limiting instruction. See ER 105. When error may be obviated by an instruction to the jury, the error is waived unless an instruction is requested. ***State v. Ramirez***, 62 Wn. App. 301, 305-06, 814 P.2d 227 (1991).

If evidence is offered for a limited purpose and a limiting instruction is requested, the court is usually obligated to give the instruction. ***State v. Gunderson***, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

Here, trial counsel was ineffective when he failed to request a limiting instruction following introduction of evidence that Mr. Mylan said that he had previously been in prison, was "institutionalized," that he knows people in prison, that he had been in prison half his life and that he was not afraid to go back. RP at 69, 71.

Prior to trial, the State moved to admit Mr. Mylan's statements

to Officer Chesney and the testimony of Mr. Hamilton Ross that Mr. Mylan said that he had been to prison before. RP at 69-72. The State argued that Mr. Mylan's statements were admissible to explain to the jury that Mr. Hamilton-Ross was put in reasonable fear of Mr. Mylan. RP at 71. The court admitted Mr. Mylan's statements to the effect that he had been to prison before and was not afraid to go back, with a minor redaction of Officer Chesney's statement to Mr. Mylan that making racial slurs was a crime in Washington. RP at 70, 72. The court engaged in virtually no evaluation of the statements, finding that they were relevant and that the provable value outweighed its prejudicial effect. RP at 72.

A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence. ER 105. ***State v. Summers***, 73 Wn.2d 244, 246–47, 437 P.2d 907 (1968). A juror's natural inclination is to reason that having previously committed an offense, the accused is likely to have reoffended by acting in conformity with that character. ***State v. Bacotgarcia***, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), review denied, 116 Wn.2d 1020 (1991). Failure to request a limiting

instruction was not tactical and no legitimate trial strategy can be discerned. This was not the type of evidence the jury could be expected to forget or naturally minimize. The lack of a limiting instruction allowed jurors to not only consider the prior misconduct as evidence that Mr. Mylan committed the charged crime but also to consider that evidence as proof of his propensity to commit it. "[W]here evidence could be relevant for multiple purposes, a jury cannot be expected to limit its consideration of that evidence to a proper purpose without an appropriate instruction to that effect." ***State v. Mohamed***, 186 Wn.2d 235, 244, 375 P.3d 1068 (2016). To jurors, propensity evidence is logically relevant. ***Holmes***, 43 Wn. App. at 400. Jurors in Mr. Mylan's case would have viewed statements that he was a felon and had been to prison half his life as evidence of propensity to commit the charged crime. Counsel had a duty to guard his client against the most damaging inferences that could be drawn from the prior misconduct evidence: that because he had committed crimes resulting in a prison sentence, he must have committed harassment.

The absence of a limiting instruction prejudiced the

outcome. The prosecutor hammered the ER 404(b) evidence home in closing argument, telling the jury that Mr. Mylan "used words, threats that he knew would put David Hamilton-Ross in fear of him," and that after walking into the store he says [']I will f@cking kill you. I've been to prison['']." RP at 380. A limiting instruction would not have unduly emphasized the highly prejudicial evidence; it would have reined in the jury's consideration of such evidence, ensuring it was not used for an improper propensity purpose.

The failure to give an ER 404(b) limiting instruction requires a new trial if, "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected."' ***Gresham***, 173 Wn.2d at 425 (quoting ***State v. Smith***, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). In the ineffective assistance context, prejudice results from a reasonable probability that the result would have been different but for counsel's deficient performance. ***Strickland***, 466 U.S. at 694. Without a limiting instruction, the jury was free to conclude Mr. Mylan acted in conformity with his character to commit crimes; i.e. he committed crimes before that resulted in incarceration so he must have

committed the crime alleged by the prosecution. In the absence of a limiting instruction, the temptation to either consciously or subconsciously be swayed by this improper propensity reasoning must have been considerable. ***Bacotgarcia***, 59 Wn. App. at 822.

If defense counsel had requested limiting instructions, there is a reasonable probability the outcome of the trial would have been different. Mr. Mylan was denied his right to effective assistance of counsel when defense counsel failed to request limiting instruction addressing the ER 404(b) evidence admitted at trial. Based on the foregoing, the case should be remanded for a new trial.

3. RESPECTFULLY, THE TRIAL COURT ERRED BY FAILING TO SUPPRESS INCRIMINATING STATEMENTS MADE BY MR. MYLAN IN RESPONSE TO CUSTODIAL QUESTIONING

The Fifth Amendment to the United States Constitution provides that no "person shall be compelled in any criminal case to be a witness against himself." The Washington Constitution, article 1, section 9, likewise provides, "no person shall be compelled in any criminal case to give evidence against himself."

To determine whether a suspect is in custody or

otherwise deprived of his freedom of action in a significant way, courts apply an objective standard as to whether a reasonable person in the same situation would perceive that he was free to leave. ***State v. Cunningham***, 116 Wn.App. 219, 228, 65 P.3d 325 (2003).

To preserve an individual's Fifth Amendment right to be free from compelled self-incrimination, police must inform a suspect of his or her constitutional rights before custodial interrogation takes place. ***Miranda***, 384 U.S. at 444-45.

In analyzing whether Mr. Mylan was in custody, the crucial inquiry is whether a reasonable person in his position would believe he or she was being subjected to a custodial interrogation. ***State v. Lorenz***, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004) (citing ***State v. Post***, 118 Wn.2d 596, 607, 837 P.2d 599 (1992)). Under the circumstances of this case, a reasonable person would believe they were not free to leave. Mr. Mylan initiated contact with Corporal Ejde, but the record shows that Mr. Mylan was a suspect from the onset and that the corporal freely acknowledged that he continued to engage him in conversation—resulting in incriminating statements—before arresting him and reading ***Miranda*** warnings.

1RP at 41-48, 76. Ultimately there were four police officers present on the scene after Mr. Mylan initially talked with Corporal Ejde. 1RP at 10. Mr. Mylan's backpack was taken from him by the police and placed in a police vehicle. 1RP at 27, 28. Corporal Ejde said that he had probable cause to arrest Mr. Mylan, but acknowledged that he kept Mr. Mylan talking until Officer Chesney arrived in his vehicle with Mr. Hamilton Ross for a "field show up." 1RP at 16. Corporal Ejde said that his purpose for the encounter to wait for Officer Chesney to arrive with Mr. Hamilton-Ross to make an identification. 1RP at 16.

A reasonable person under these circumstances would have believed he was in a custodial situation and that he was not free to leave. Similarly, it is reasonable to conclude that if he had attempted to leave, Corporal Ejde would have arrested him.

Similar circumstances led to a finding of custodial interrogation in ***State v. France***, 121 Wn. App. 394, 399-400, 88 P.3d 1003 (2004). In that case, police had probable cause to arrest France and knew his name, but asked questions about the crime before effectuating the arrest. Id. In finding France was in custody,

this Court noted he was told he was not free to leave until the matter was cleared up, the duration of his detention was uncertain, and it appeared police delayed arrest and ***Miranda*** warnings until after soliciting incriminating information. *Id.* A reasonable person under these circumstances would have believed he was being arrested, and the court correctly concluded he was in custody for purposes of ***Miranda***. ***France***, 121 Wn. App. at 399-400.

This case is closely analogous to France. Corporal Ejde opted to ask questions and elicit incriminating statements before arresting him and reading the ***Miranda*** warnings. Although Mr. Mylan initially waved at Corporal Ejde to stop him and made some spontaneous statements, the corporal acknowledged that he continued the encounter after Mr. Mylan made a number of admissions regarding his presence at the gas station, for the purpose of gaining time for Officer Chesney to arrive with Hamilton Ross to make an identification. Corporal Ejde knew that Mr. Mylan matched the description of the shirtless, bald, tattooed man in the store.

While the police did not inform Mr. Mylan that he would need

to remain until Officer Chesney and several more officers arrived at the scene, Corporal Ejde knew that Officer Chesney was transporting Mr. Hamilton-Ross. It is almost inconceivable that he would have let Mr. Mylan simply walk away and then face the proposition of telling his fellow officer that he had made the trip over with Mr. Hamilton Ross for nothing and that he had let Mr. Mylan leave.

The remedy for a ***Miranda*** violation is the suppression of the unwarned statements at trial. ***State v. Rhoden***, 189 Wn. App. 193, 199, 356 P.3d 242 (2015) (citing ***State v. Hickman***, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010)).

The admission of Mr. Mylan's statements was not harmless beyond a reasonable doubt. The State presented Officer Chesney's body cam in which Mr. Mylan made highly inculpatory statements; he acknowledged that he was at the 76 gas station, and confirmed that he had had a confrontation with Mr. Hamilton-Ross and told him that he would "beat his ass." 2RP at 368. In addition, as noted above, to prove felony harassment, the State was required to show that the threat was a "true threat," i.e., a serious expression of intention to carry out the threat rather than as something said in jest

or idle talk. Evidence that a threat was a serious expression of intent is frequently circumstantial rather than direct. During closing the State relied extensively on the statements by Mr. Mylan to police, arguing that Mr. Hamilton-Ross was placed in reasonable fear. 2RP at 368-69.

Based on the foregoing, Mr. Mylan submits that Division Two has erred by affirming the conviction and respectfully requests that this Court accept review.

F. CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the conviction for felony harassment.

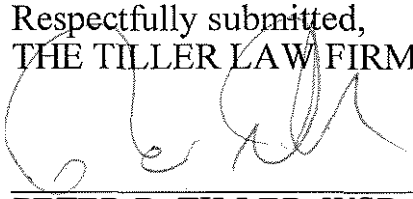
DATED: July 20, 2023.

Certification of Compliance with RAP 18.17:

This petition contains 4948 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

DATED: July 20, 2023.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

CERTIFICATE OF SERVICE

The undersigned certifies that on July 20, 2023, that this Petition was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 909 A Street, Ste. 200, Tacoma, WA 98402, a copy was emailed to Randall Sutton, Kitsap County Prosecutors Office and a copy was mailed by U.S. mail, postage prepaid, to the appellant at the following address:

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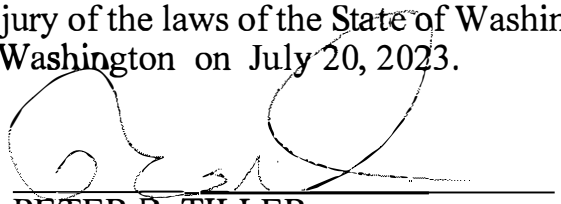
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 20, 2023.



PETER B. TILLER

Filed
Washington State
Court of Appeals
Division Two

June 21, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AARON MAURICE MYLAN, Appellant.	No. 57107-2-II UNPUBLISHED OPINION

MAXA, P.J. – Aaron Mylan appeals his conviction of felony harassment arising out of an incident at a gas station in which he threatened multiple times to kill a store clerk. Mylan told the clerk that he had been to jail and was not afraid to go back. Another store clerk and a woman in the restroom called 911 to report that the incident was occurring. Mylan repeated similar comments to investigating law enforcement officers.

We hold that (1) there was sufficient evidence to support Mylan's felony harassment conviction, (2) the trial court did not err in denying a motion to suppress Mylan's statements to law enforcement officers that he had been in prison, (3) the admission of the 911 calls did not violate the confrontation clause because they were not testimonial, (4) we decline to consider Mylan's argument that his statements on body camera footage about being in prison were inadmissible under ER 404(b) because he did not preserve the issue at trial, (5) Mylan did not receive ineffective assistance of counsel when defense counsel failed to request a limiting

instruction regarding the evidence about being in jail, and (6) there was no cumulative error warranting reversal.

Accordingly, we affirm Mylan's conviction, but we remand for the trial court to correct a scrivener's error in the judgment and sentence regarding Mylan's offender score.

FACTS

Background

On April 24, 2022, Mylan entered a gas station shirtless and carrying a backpack. Mylan wanted to use the restroom, but store clerk David Hamilton-Ross told him that it currently was in use. Mylan attempted to enter the restroom anyway. The two began yelling at each other and Mylan berated Hamilton-Ross with expletives and racial slurs. Mylan then told Hamilton-Ross, "I'll kill you. I just got out of jail. I'm not scared to go back. I'll kill you right now." 2 Report of Proceedings (RP) at 306.

Hamilton-Ross pushed the panic button and one of the other store clerks called 911. A woman in the restroom also called 911. Mylan continued to threaten to kill Hamilton-Ross and said, "Just wait. I'm not scared to go back to jail." 2 RP at 307.

Mylan briefly left the gas station and when he returned he began destroying property and threating the store clerks and customers. Hamilton-Ross left the gas station because he did not feel safe, and Mylan chased him out into the parking lot, threatening to beat him up and kill him. Mylan then left the area.

Officer John Chesney arrived at the gas station and interviewed Hamilton-Ross about the incident. Around the same time, Corporal Jordan Ejde was on patrol when he saw Mylan, who fit the description of the person involved in the gas station incident, on a sidewalk. Mylan waved

at Ejde like he wanted to talk with him. Ejde pulled over to report to Chesney that he found someone matching the description, and then he contacted Mylan and asked what had happened at the gas station. Mylan explained what had happened. Eventually, Chesney and other officers arrived on scene. The other officers were approximately eight to 10 feet away while Chesney spoke to Mylan.

Chesney asked Mylan what had occurred at the gas station. Mylan was cooperative and willingly spoke with Chesney. Chesney then read Mylan his *Miranda*[1] rights and arrested him.

The State charged Mylan with a hate crime and then later added the charge of felony harassment (threat to kill).

CrR 3.5 Hearing

The trial court held a CrR 3.5 hearing to determine whether the State could use Mylan's statements to law enforcement officers at trial. Ejde testified to the facts stated above. He also stated that when he contacted Mylan, Mylan was free to go at any point. Ejde did not read Mylan the *Miranda* warnings. Ejde's interaction with Mylan only lasted a few minutes before Chesney arrived.

Chesney testified that when he heard that Ejde had contacted a possible suspect, Chesney took Hamilton-Ross to Ejde's location to identify him. Chesney then contacted Mylan and introduced himself. Mylan was not in handcuffs or restrained during the interaction, nor did the officers control his movements or detain him.

Mylan told Chesney that he thought the store clerk was being aggressive with him when he told him to wait for the restroom and that made him upset. Mylan admitted that he told the

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

store clerk that he would beat him up. Mylan also told Chesney that he had been to prison. After talking with Mylan for around seven minutes, Chesney read Mylan his *Miranda* rights and placed him under arrest.

The trial court ruled that Mylan's statements were admissible, and made extensive oral findings of fact. These oral finding included the following:

> Corporal Ejde had contact with the defendant who met generally the description of a suspect in a potential investigation including that it was a white male who was balding, muscular build, with white sweats.
>
> He saw the defendant on the roadside. The defendant, apparently, when he saw Corporal Ejde, hailed him or waved him over. So Corporal Ejde went over to him and parked, got out of his car, and began to have the conversation with the defendant.
>
> . . . .
>
> There were no lights or sirens, no indication of a firearm being unholstered. There was no handcuffs. There was distance between the officer and the defendant during that period of time, including between eight and ten feet away.
>
> There was no directions to stay put or not leave. If he had attempted to walk off, Corporal Ejde probably would have let him walk away.
>
> . . . .
>
> When Officer Chesney had contact with the defendant, he had some information from the clerks of the gas station that he believed established probable cause to arrest for malicious harassment, I believe is what he described. At that time he also had the positive identification that Mr. Mylan was the person of interest in that investigation.
>
> During the conversation he had with Mr. Mylan, there were no handcuffs, the police cars were not activating their – had not been activating their overheads, the police officers that were on scene gave some distance to the defendant up to eight to ten feet. There were four police officers total which are not insignificant, but none of them were in such a way to – they were all eight to ten feet away.
>
> There is some questioning of the defendant without the advice of *Miranda*, but at that time Mr. Mylan was not under arrest in a way that would require – he was not – he was free to go, at least at that point. He was not under arrest that would require *Miranda* warnings to be given.
>
> He gave a recitation of his viewpoint of what happened at the gas station. The conversation at that point took about another seven to eight minutes, according to the officer.
>
> . . . .
>
> So what I find is that at this point the *Miranda* was not required during the contact with Corporal Ejde nor during the contact until arrest by Officer Chesney.

> The comments that were made were made freely and voluntarily, and any statement that was made potentially could be used in this trial, pending other evidentiary resources. That's the ruling of the Court on that.

1 RP at 37-41. The trial court did not enter written findings of fact or conclusions of law.

Pretrial Motions

Before trial started, the State raised the issue of the admissibility of the 911 calls recorded during the event because the two callers would not be present to testify.

The first call was from Brett Berkompas, the other store clerk working with Hamilton-Ross. Berkompas described to the 911 operator that there was a man inside their store antagonizing him and his coworker. Mylan's yelling could be heard in the background. Berkompas told the operator that they already asked Mylan many times to leave and that Mylan was "being extremely aggressive with his words. I'm sure you can hear." CP at 24. Berkompas was describing Mylan's appearance to the operator as Mylan and Hamilton-Ross were yelling at each other in the background. The operator asked if that was Mylan banging on things to which Berkompas affirmatively replied. Berkompas described the whole incident until Mylan left the store.

The second call was from Ashley Siva, who was in the restroom with her son during the altercation. Siva called 911 and told the operator that "there is a huge argument going on and I'm hearing people threatening to kill . . . somebody." CP at 38. She could not see anything so she relayed everything she was hearing to the operator. She described the slamming noises she was hearing and said that there was a lot of yelling.

The trial court noted that the statements were hearsay but ruled that they fit within the present sense impression exception to the hearsay rule. And the court ruled that because the

statements were describing events as they were occurring and were made for the purpose of requesting emergency help, they were nontestimonial. Therefore, the court ruled that the confrontation clause was not implicated by the 911 calls.

The trial court also addressed the issue of Chesney's body camera footage during his interaction with Mylan. As Mylan was describing what had happened, he made statements such as "I'm institutionalized" and "I've been incarcerated half my life." 1 RP at 67. Defense counsel recognized that the footage was admissible evidence, but asked that the statements about being in prison be edited out. The prosecutor commented that the relevance of Mylan's statement that he had been to prison went to Hamilton-Ross's reasonable fear. The court ruled that the body camera footage was admissible, stating that the probative value outweighed the prejudicial effect. Defense counsel did not object or reference ER 404(b).

Trial and Sentencing

At trial, Hamilton-Ross, Chesney, and Ejde testified to the facts above. Hamilton-Ross testified that he was really scared of Mylan's threats to kill him because Mylan was reaching inside his backpack and he did not know what Mylan had in there. Hamilton-Ross testified that Mylan threatened to kill him dozens of times. And when Mylan reentered the store and started banging on freezers, he continued to threaten Hamilton-Ross and his coworker. Hamilton-Ross went outside because he did not feel safe anymore, and Mylan chased him around outside while threatening to beat him up and kill him. Hamilton-Ross testified that he took the threats made against him seriously.

Chesney's body camera footage was admitted into evidence without objection, and defense counsel did not propose a limiting instruction. Mylan chose not to testify.

The jury found Mylan not guilty of a hate crime but guilty of harassment with a threat to kill.

At sentencing, the State calculated Mylan's offender score as 10 after not counting one of Mylan's 2017 convictions that was overturned on appeal. The trial court agreed with the State that Mylan's offender score was 10. But the court's judgment and sentence stated that his offender score was 11 instead of 10.

Mylan appeals his conviction.

ANALYSIS

A. SUFFICIENCY OF EVIDENCE – FELONY HARASSMENT

Mylan argues that the State failed to provide sufficient evidence needed to prove Mylan's conviction of harassment with a threat to kill. We disagree.

1. Legal Principles – Harassment

Under RCW 9A.46.020(1), a person is guilty of 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; [and]
> . . . .
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

Harassment is a gross misdemeanor unless the harassment involves "threatening to kill the person threatened or any other person." RCW 9A.46.020(2)(b)(ii). Harassment involving a death threat is a class C felony. RCW 9A.46.020(2)(b).

RCW 9A.46.020 criminalizes pure speech. *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004). Because the First Amendment to the United States Constitution prohibits laws that abridge the freedom of speech, the harassment statute must be applied in conformance with the

First Amendment. *Id.* But the First Amendment protection does not extend to certain unprotected speech, including "true threats." *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013). As a result, we interpret RCW 9A.46.020(1)(a) as prohibiting only unprotected true threats. *Id.*

We employ a reasonable person standard for what constitutes a "true threat" under the First Amendment. *State v. Trey M.*, 186 Wn.2d 884, 894, 383 P.3d 474 (2016). A "true threat" is a statement made in a context or under circumstances where a reasonable person would foresee that the statement would be interpreted as a serious expression of intent to inflict bodily harm upon or take the life of another person. *Id.* However, a communication using the wording of a threat but which in fact is merely a joke, idle talk, or hyperbole is not a true threat. *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

A statement can constitute a true threat even if the speaker has no actual intent to carry out the threat. *Kilburn*, 151 Wn.2d at 46. This is because a true threat arouses fear in the person threatened, and that fear does not depend upon the speaker's intent. *Id.* The only question is whether a reasonable speaker would foresee that the threat would be considered serious. *Trey M.*, 186 Wn.2d at 894.

Under RCW 9A.46.020(1)(b), the defendant's words or conduct also must place the person threatened in reasonable fear that the threat will be carried out. This provision requires both that the person threatened must subjectively fear that the threat will be carried out and that the victim's fear must be reasonable based on an objective standard, considering all the facts and circumstances of the case. *See State v. Cross*, 156 Wn. App. 568, 582, 234 P.3d 288 (2010),

cause remanded on other grounds, 172 Wn.2d 1009, 260 P.3d 208 (2011); *State v. E.J.Y.*, 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

2. Standard of Review

Ordinarily, the test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). When contesting the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Trey M.*, 186 Wn.2d at 905. Credibility determinations are made by the trier of fact and are not subject to review. *Id.* Circumstantial and direct evidence are equally reliable. *Id.* We apply this standard to the reasonable fear requirement.

However, because the true threat requirement implicates the First Amendment, we apply a heightened review for that requirement. *Kilburn*, 151 Wn.2d at 49. When assessing whether a statement is a true threat, we must engage in an independent review of the crucial facts that involve the legal determination of whether the speech is unprotected. *Id.* at 52. This review also may require us to look to the factual context in which the statement was made. *Id.* But we still defer to the fact finder on issues of credibility. *Id.* at 50.

3. True Threat Analysis

The question here is whether the State presented sufficient evidence that Mylan's threats to kill Hamilton-Ross were made in a context or under such circumstances that a reasonable person would foresee that it would be interpreted as a serious expression of an intention to kill

him. *See Trey M.*, 186 Wn.2d at 894. The defendant's demeanor is a key factor in making this determination. *Id.* at 906-07.

Here, Mylan's demeanor and actions provide a sufficient basis for concluding that Mylan's statements constituted a true threat. Mylan was angry and agitated, repeatedly threatened to kill Hamilton-Ross, and accompanied those threats with racial slurs. Mylan then chased Hamilton-Ross around the parking lot, again threatening to kill him. Mylan told Hamilton-Ross that he had been to jail and was not afraid of going back.

Based on an independent review of the crucial facts, we hold that there was sufficient evidence to establish that Mylan's threat to kill Hamilton-Ross was a true threat.

4. Reasonable Fear Analysis

We next consider whether the State presented sufficient evidence that Mylan's threat to kill Hamilton-Ross placed him in reasonable fear that he would carry out his threat to kill him. RCW 9A.46.020(1)(b). The question here is whether there was evidence that Hamilton-Ross subjectively feared that Mylan's threats would be carried out and whether that fear was objectively reasonable. *See Cross*, 156 Wn. App. at 582.

Here, Hamilton-Ross testified that he did not feel safe around Mylan and that he took his threats very seriously. Hamilton-Ross also was afraid that Mylan had something in his backpack that would assist in carrying out the threat. He testified that he thought Mylan was angry enough to hurt and kill him. Hamilton-Ross's testimony supports the inference that he subjectively feared that Mylan would carry out the threat to kill him.

Viewing the evidence in the light most favorable to the State, Hamilton-Ross's fear was objectionably reasonable. Mylan was angry and agitated, he incessantly threated to kill

Hamilton-Ross, he reached into his backpack where he might have had a weapon, and he chased Hamilton-Ross outside of the gas station. Mylan was banging on and destroying equipment and told Hamilton-Ross that he had been to jail and was not afraid of going back.

Mylan argues that Hamilton-Ross's fear was not objectively reasonable because Hamilton-Ross testified that he served in the Marine Corps and he stood up for himself by yelling back at Mylan. But these actions are not inconsistent with reasonable fear.

The evidence supports the inference that Hamilton-Ross's fear that Mylan would carry out the threats to kill him was objectively reasonable.

5. Summary

Drawing all inferences in the State's favor, a rational trier of fact could have concluded that Mylan's threats to kill Hamilton-Ross were true threats and that those threats placed Hamilton-Ross in reasonable fear that the threats would be carried out. Accordingly, we hold that the State presented sufficient evidence to support Mylan's conviction of harassment with a threat to kill.

B. ADMISSIBILITY OF PREARREST STATEMENTS

Mylan argues that the trial court erred in failing to suppress the statements he made to law enforcement officers before he received the *Miranda* warnings. We disagree.

1. Failure to Enter Written Findings

Initially, Mylan and the State agree that the trial court failed to enter findings of fact and conclusions of law after the CrR 3.5 hearing. Mylan argues that we should remand for entry of findings, but the State argues that even without the written findings, the trial court's oral findings are sufficient to enable review. We agree with the State.

The purpose of a CrR 3.5 hearing is to prevent "the admission involuntary, incriminating statements." *State v. Williams*, 137 Wn.2d 746, 751, 975 P.2d 963 (1999). Under CrR 3.5, the trial court must conduct an admissibility hearing before admitting a defendant's statement into evidence. CrR 3.5(c) requires the trial court to enter written findings of fact and conclusions of law after a CrR 3.5 hearing. Failure to enter written findings and conclusions after a CrR 3.5 hearing is error. *State v. Elkins*, 188 Wn. App. 386, 396, 353 P.3d 648 (2015). However, the failure to enter written findings and conclusions following a CrR 3.5 hearing is harmless error if the oral findings are sufficient to enable appellate review. *Id.*

Here, the trial court in its oral ruling specifically stated what facts it was finding and relying on in order to reach its decision. The court found that (1) Mylan initiated police contact by waving down Ejde; (2) he openly spoke to Ejde and was free to leave during that interaction; (3) at no time did any of the police cars have their lights or sirens on; (4) although Chesney asked him some questions, Mylan was not under arrest in any way that would require *Miranda* warnings; and (5) Mylan made his comments to the officers freely and voluntarily.

We hold that these findings and the trial courts conclusion that the statements were admissible are sufficient for appellate review.

2. Custodial Interrogation

Mylan argues that he was subjected to custodial interrogation before he was given his *Miranda* warnings. We disagree.

a. Legal Principles

The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the

Washington Constitution states "[n]o person shall be compelled in any criminal case to give evidence against himself." "Both provisions guarantee a defendant the right to be free from self-incrimination, including the right to silence." *State v. Pinson*, 183 Wn. App. 411, 417, 333 P.3d 528 (2014).

Miranda warnings are required when a person in custody is subjected to custodial interrogation. *State v. Mayer*, 184 Wn.2d 548, 556, 362 P.3d 745 (2015). A person is in custody when their freedom of action has been reduced in such a way as to resemble a formal arrest. *State v. Escalante*, 195 Wn.2d 526, 533, 461 P.3d 1183 (2020). The relevant inquiry for determining whether a person is in custody is "an objective one that asks how a reasonable person in the suspect's position would have understood the circumstances." *Id.*

> To determine whether a reasonable person in the suspect's position would feel restrained to the degree associated with formal arrest, a court examines the totality of the circumstances. Relevant circumstances may include the nature of the surroundings, the extent of police control over the surroundings, the degree of physical restraint placed on the suspect, and the duration and character of the questioning.

Id. at 533-34.

We review challenged findings of fact entered after a CrR 3.5 hearing for substantial evidence and review de novo whether the trial court's conclusions of law are supported by its findings of fact. *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013).

b. Analysis

Here, Ejde did not detain Mylan. Instead, Mylan waved down Ejde and wanted to talk with him. Ejde did not activate his lights. Ejde was by himself when he contacted Mylan, and stood eight to ten feet away. Ejde did not tell Mylan at any point that he was not free to leave,

and that if he tried to walk away, Ejde probably would have let him. The trial court's findings support the conclusion that Ejde's conversation with Mylan was not custodial.

When Chesney arrived, he did not activate his lights and did not place Mylan in handcuffs. Other officers were present, but they stood eight to 10 feet away. Chesney engaged in a conversion with Mylan, but there was no indication that Mylan was not free to go. The trial court's findings support the conclusion that Chesney's conversation with Mylan was not custodial.

We hold that the trial court did not err in finding that Mylan's statements to Chesney did not result from a custodial interrogation and were admissible.

C. ADMISSION OF 911 CALLS

Mylan argues that the trial court's admission of the 911 calls violated the confrontation clause. We disagree.

1. Legal Principles

The confrontation clause of the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution provide that accused persons have the right to confront witnesses against them. The confrontation clause precludes the admission of "testimonial" out-of-court statements if the declarant is unavailable and the defendant had no prior opportunity to cross-examine the declarant. *State v. Burke*, 196 Wn.2d 712, 725, 478 P.3d 1096, *cert. denied*, 142 S. Ct. 182 (2021). We review confrontation clause challenges de novo. *Id.*

We use the primary purpose test to determine whether out-of-court statements are testimonial. *Id.* at 726. "Statements are testimonial when they are made to establish past facts in

order to investigate or prosecute a crime." *Id.* However, statements made for another primary purpose are nontestimonial. *Id.* at 727. When the primary purpose of a statement is to "respond to an ongoing emergency, for example, 'it's purpose is not to create a record for trial and thus is not within the scope of the Clause.' " *Id.* at 726 (quoting *Michigan v. Bryant*, 562 U.S. 344, 370, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)). The Supreme Court in *Burke* stated,

> Statements made to assist police in addressing an ongoing emergency is a well-established nontestimonial purpose. For example, frantic statements to a 911 emergency operator describing the identity of an assailant in a domestic disturbance *in progress* were nontestimonial because the declarant was seeking help in the face of immediate danger.

196 Wn.2d at 727. In addition, statements made to persons other than law enforcement officers are less likely to be deemed testimonial. *Id.* at 728.

In determining whether a statement is testimonial, "we must objectively evaluate the statements and actions of both the declarant and the individual who hears the statements in light of the circumstances in which their conversation occurred." *Id.* at 726.

2. Analysis

Objectively viewing the statements made to the 911 operator by Berkompas and Siva in the light of the circumstances, we hold that their statements were nontestimonial. The primary purpose of each of their statements was to assist in an ongoing emergency.

Berkompas's statements to the 911 operator described the incident as it was happening. He gave operators a description of Mylan as he was in the gas station yelling at Hamilton-Ross and banging on equipment. Mylan could be heard in the background of the call. In addition, this statement was made to a 911 operator, not to the police.

Similarly, Siva's statements to the 911 operator described the ongoing altercation occurring outside of the restroom. She reported that she could hear men yelling at each other and one of them was threatening the other. Siva could not give a description of what Mylan looked like because she was locked in the restroom with her young son, but she was describing what she could hear through the door. She even described to the operator when things got quiet again because she thought Mylan had left the gas station.

Because the 911 calls described an ongoing emergency, we hold that they were nontestimonial and the trial court's admission of the statements did not violate the confrontation clause.

D. ADMISSION OF BODY CAMERA FOOTAGE

Mylan argues that the trial court erred in admitting Chesney's body camera footage, which included Mylan's statements about being in prison. We decline to address this issue.

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, this evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

A failure to object that evidence is inadmissible under ER 404(b) waives any claimed error on appeal. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). "We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial." *Id.*

Here, Mylan did not object to the admission of the body camera footage and did not reference ER 404(b) in the trial court. Accordingly, we decline to consider Mylan's ER 404(b) argument because he did not preserve the issue at trial.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Mylan argues that he was denied effective assistance because his defense counsel failed to request a limiting instruction for the admission of the body camera footage. We disagree.

1. Legal Principles

Ineffective assistance of counsel claims arise from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Vazquez*, 198 Wn.2d 239, 247, 494 P.3d 424 (2021). To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *Id.* at 247-48. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* Prejudice exists if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *Id.* at 248.

We apply a strong presumption that defense counsel's performance was reasonable. *Id.* at 247. Defense counsel's conduct is not deficient if it was based on legitimate trial strategy or tactics. *Id.* at 248. To rebut the strong presumption that counsel's performance was effective, the defendant bears the burden of establishing the absence of any legitimate strategic or tactical reason explaining defense counsel's conduct. *Id.*

2. Analysis

Here, Mylan would have been entitled to an ER 404(b) limiting instruction if defense counsel had requested one. If evidence of a defendant's prior bad acts is admissible for a proper purpose, the defendant is entitled to an appropriate limiting instruction. *State v. Gresham*, 173 Wn.2d 405, 423, 269 P.3d 207 (2012). But Mylan did not request a limiting instruction on the ER 404(b) evidence. And the trial court has no duty to give an ER 404(b) limiting instruction sua sponte. *State v. Russell*, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011) (citing ER 105).

We generally presume that defense counsel's choice not to request a limiting instruction was a tactical decision to avoid drawing further attention to the evidence, and therefore we place the burden on the defendant to rebut this presumption. *State v. Yarbrough*, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009). Here, Mylan does not meet his burden of establishing the absence of any legitimate strategic or tactical reason explaining his defense counsel's conduct. Mylan's statement did not reveal the nature of his previous offenses, and defense counsel may have decided to forgo a limiting instruction to avoid reemphasizing the fact that Mylan previously was in prison.

Because defense counsel's failure to request a limiting instruction may have been a legitimate trial tactic, Mylan does not show that his trial counsel's performance fell below an objective standard of reasonableness. Accordingly, Mylan's ineffective assistance claim fails.

F. CUMULATIVE ERROR

Mylan argues that cumulative errors throughout the trial prevented him from having a fair trial. We disagree.

Under the cumulative error doctrine, the defendant must show that the combined effect of multiple errors requires a new trial. *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). The cumulative error doctrine may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). This doctrine does not apply when "the errors are few and have little or no effect on the outcome of the trial." *Id.*

Here, Mylan has not demonstrated that any error denied him a fair trial. Therefore, we hold that the cumulative error doctrine is inapplicable.

G. SCRIVENER'S ERROR

Mylan argues, and the State concedes, that his judgment and sentence contains a scrivener's error regarding his offender score and that this court should remand to correct it. We accept the State's concession.

At sentencing, the trial court agreed with the State that Mylan's offender score was 10. However, the judgment and sentence showed that Mylan's offender score as 11. We remand to the trial court to amend the judgment and sentence to correct this error.

CONCLUSION

We affirm Mylan's conviction, but we remand for the trial court to correct the scrivener's error in the judgment and sentence regarding Mylan's offender score.

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.

MAXA, P.J.

We concur:

VELJACIC, J.

PRICE, J.

THE TILLER LAW FIRM

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