No. 46795-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

BRIAN McEVOY

AMENDED BRIEF OF APPELLANT

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Assignments of Error

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2. The trial court erred by admitting the rental car and hotel receipts as adoptive admissions.

3. The evidence is insufficient to convict Mr. McEvoy of violating the No Contact Order on April 12, 2014.

4 The evidence is insufficient to convict Mr. McEvoy of Felony Stalking

5 The two No Contact order Violations merge with the Felony Stalking

6 The trial court erred by refusing to instruct on the lesser included charge of Misdemeanor Harassment.

Issues Pertaining to Assignments of Error

1. Over repeated objections, the trial court allowed the State to introduce evidence of the largely futile efforts of law enforcement to locate and apprehend Mr. McEvoy, testimony that included inflammatory opinions by the law enforcement of his guilt and irrelevant statements of the officers' state of mind? Did the trial court err by overruling these objections and allowing this prejudicial testimony?

2. Did the trial court err by finding the rental car and hotel receipts were not hearsay because they were adoptive admissions?

3. Mr. McEvoy was convicted of violating a No Contact Order on April 12, 2014 when he returned to his family residence to check the mailbox. Was the evidence sufficient to convict him when the undisputed testimony was that his wife, the protected party, had vacated the residence and moved in with her mother?

4. Felony Stalking requires proof that the defendant on two occasions both contacted the protected party of a no contact order and did so in a harassing manner. Conceding that Mr. McEvoy contacted his wife in a harassing manner on May 13,

2014, was the evidence sufficient to sustain a conviction for Felony Stalking when the only other alleged contact was on April 12, 2014, when he checked the mailbox of his former residence?

5. Do the two No Contact Order violations merge with the Felony Stalking?

6. Mr. McEvoy telephoned his wife on May 13, 2014 and made several aggressive statement, but did not directly threaten to kill her, for which he was charged with Felony Harassment. Should the trial court have instructed the jury on the lesser included charge of Misdemeanor Harassment?

B. Statement of Facts

Background

Brian McEvoy was charged by second amended information with 14 criminal charges CP, 45. The charges were:

Charge	Incident Date	Special Allegations
I-Attempted second degree rape	April 9, 2014	DV (family or household member)
II-Second degree assault	April 9, 2014	DV (family or household member)
		Committed in presence of minor children
III-Felony harassment	April 9, 2014	DV (family or household member)
IV-Unlawful imprisonment	April 9, 2014	DV (family or household member)
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VII-Third degree malicious mischief	April 9, 2014	DV (family or household member)
VIII-Violation of no contact order	April 12, 2014	DV (family or household member)

IX-Violation of no contact order	May 11, 2014	DV (family or household member)
X-Felony stalking	April 12, 2014 -May 19, 2014	DV (family or household member)
XI-Violation of no contact order	May 13, 2014	DV (family or household member)
XII-Felony harassment	May 13, 2014	DV (family or household member)
XIII-Attempt to elude	May 19, 2014	
XIV-Unlawful possession of firearm in the second degree	May 19, 2014	

The victim of each of the counts was Ms. McEvoy's estranged wife, Kara McEvoy, except for the last two counts, which do not have a named victim, and Count V, where the named victim is his teenage son, DM, who was fifteen years old at all times relevant to this case. RP, 385. The McEvoys also have a daughter, KM, who was nine years old. RP, 414. Mr. McEvoy pleaded not guilty to all 14 counts. RP, 9. At trial, the jury found him not guilty of Court I, attempted second degree rape, and count IX, violation of no contact order from May 11, 2014. CP, 161, 164. The jury convicted him of the remaining 12 counts, including all special allegations. CP, 162-177.

Brian McEvoy was a prior police officer with the Kitsap County Sheriff's Office, working there from approximately the late-1990's until 2008 or 2009. RP, 189. As such he was familiar with basic police procedures and practices. RP, 188. The State's lead investigator was Kitsap County Detective Nicole Menge. RP, 186. On April 9, 2014, Brian McEvoy lived with his wife and two children at 15755 Fairview Lake Road SW in Port Orchard. RP, 784.

Chronology of Events

Kara McEvoy testified at length about the events the night of April 9, extending into the early morning hours of April 10. In 2013-14, the McEvoy marriage was having difficulties and Ms. McEvoy decided the best course of action was a trial separation and for her to move out of the house. RP, 432. After getting off work at 5:00, she went apartment shopping. RP, 432. She arrived home around 6:00 and told her husband of her plan. RP, 432. He got very upset, claiming she had "flat-lined" their marriage. RP, 432. After a short conversation, she left to meet a friend. RP, 433. When she got home, around 11:00, Mr. McEvoy seemed upset, so she laid down her purse in the kitchen and went to the bedroom, with Mr. McEvoy following. RP, 434-35.

In the bedroom, Ms. McEvoy said she was tired and wanted to go to bed, but Mr. McEvoy said, "You're not going to bed. You're going to suck my dick." RP, 435. Ms. McEvoy refused and went to her closet, causing Mr. McEvoy to grab her and push her onto the bed, repeatedly saying to her, "Suck my cock." RP, 436. He then hit her for the first time in their relationship, causing him to have a strange look, like a "person try[ing] a new ice cream flavor for the first time and you kind of let the flavor get in your mouth and think about it." RP, 435. He then hit her again and grabbed her hair, forcing her head to his crotch, saying, "Suck my dick." RP, 435-36. In the process, a small chunk of hair was ripped from her scalp. RP, 436.

Ms. McEvoy started screaming for DM to wake up and come help. RP, 439. After between two and five minutes, DM came into the bedroom, saw what was happening and said, "Stop hitting her. Hit me instead." RP, 439-40. Mr. McEvoy pushed DM away, ripping his shirt. RP, 440. Ms. McEvoy yelled for the kids to get the phone, which caused everyone to race to the kitchen, where all the phones were. RP, 440-41. Mr. McEvoy won the race and smashed one of the phones. RP, 441.

Ms. McEvoy ran out of the house, with Mr. McEvoy following her. RP, 443. He chased her around the yard for a short while until she

was able to get to her car. RP, 443. Mr. McEvoy was making threats, saying, "Hey bitch, I'm going to come fucking kill you." RP, 445. She turned on the car, but when she tried to accelerate, the car would not function normally. RP, 444. She was able to put the car in reverse and was backing up when Mr. McEvoy jumped on the hood of the car and starting punching the windshield with his fists, cracking the windshield. RP, 445. Mr. McEvoy then got off the car and, using a spare key, was able to get into the vehicle on the driver's side. RP, 447. He pushed Ms. McEvoy over onto the passenger side and got into the driver's seat. RP, 447. Mr. McEvoy drove the car slowly a short distance while repeatedly telling her, "Suck my cock." RP, 449. Finally, in an effort to diffuse the situation, she agreed to perform oral sex. RP, 550. At that moment, Mr. McEvoy looked down at his bloody hands and had what Ms. McEvoy later described as a "moment of clarity." RP, 603. He said, "Oh, I deserve this. What have I done to myself?" RP, 603. From that point, the assaultive behavior ceased. RP, 606.

Mr. McEvoy told her to get out of the car and he opened the hood, instructing Ms. McEvoy to hold his phone, which he had set to be used as a flashlight. RP, 452. He appeared to attach some wires and they both got back into the vehicle. RP, 452-53. When he started the car, it ran like normal. RP, 453. They drove back to the house where the kids were out

on the road. RP, 454. When they got to the house, Ms. McEvoy got out of the car and told her husband, "Get the fuck out of here." RP, 455. She then went into the house with the kids and into KM's bedroom. RP, 455. Eventually, Mr. McEvoy left. RP, 457. Ms. McEvoy's injuries from the altercation were a goose egg on his forehead and a missing chunk of hair. RP, 485. She had bruising on her head and arm. RP, 485. There were no broken bones or impairment of essential body functions. RP, 612.

After the altercation, Ms. McEvoy decided to also leave the house with the kids and stay with her mother. RP, 614. She stayed at her mother house that night and every night thereafter for ten nights, returning on April 19. RP, 615.

According to his trial testimony, DM went to bed around 10:00. RP, 389. He woke up to the sound of screaming and his mom yelling, "[DM], come help." RP, 390. DM left his bedroom and went into his parent's bedroom, where he saw his dad hitting his mom in the face. RP, 390. DM did not ever hear his father say, "Suck my cock." RP, 408. His mom was "curled up, protecting her face with her arms." RP, 390. DM demanded his father stop, which caused Mr. McEvoy to stop hitting Ms. McEvoy and look at him. RP, 391. Ms. McEvoy then instructed DM to call 911. RP, 391. When DM tried to walk down the hall towards the

kitchen and the closest available phone, Mr. McEvoy used his hand to stop DM and prevent him from proceeding further. RP, 391. DM described the maneuver as a "straight arm" movement, similar to one used by football players trying to prevent being tackled. RP, 412. Mr. McEvoy pulled down on DM's shirt, causing it to rip. RP, 391. DM then instructed his sister, KM, to go get the phone. RP, 392. But before she could walk to the kitchen, Mr. McEvoy "stopped her and pushed her aside, gently" and proceeded to the kitchen to get the phones. RP, 393. Ms. McEvoy ran out of the house and towards her car. RP, 394. Mr. McEvoy grabbed two phones and car keys and followed her out the door. RP, 394. DM did not see what happened next. RP, 394.

DM, concerned because all of the phones had been taken, decided to take his sister to their grandmother's house driving his father's truck. RP, 395. As he was leaving, he saw his mother's vehicle returning, so he returned to the house. RP, 398. When the car got to the residence, Mr. McEvoy was driving and Ms. McEvoy was in vehicle crying. RP, 398. After a short conversation, Mr. McEvoy left the house. RP, 399.

Initially Ms. McEvoy was not going to report the incident. RP, 458. But the next morning, after speaking to her mother and brother, she called 911. RP, 458. On April 10, 2014, at 10:40 a.m., Sheriff's Deputy

Frederick Breed responded to the 911 call. RP, 653, 670. He went to the address and spoke to Kara McEvoy. RP, 655. She described an altercation the previous night involving her husband, Brian McEvoy. RP, 655. Later that day, Mr. McEvoy was stopped driving a car on Highway 16 and arrested. RP, 657. Deputy Breed responded and had a short conversation with Mr. McEvoy. RP 658. The conversation continued at the jail. RP, 659. Mr. McEvoy said he did not punch Kara, but did pull her hair in an effort to defend himself. RP, 661. Mr. McEvoy was booked for fourth degree assault. RP, 673.

The next day, April 11, Mr. McEvoy appeared in court for a first appearance on the charge of fourth degree assault. RP, 686-92. The Court entered a no contact order prohibiting him from contacting Kara McEvoy or coming within 500 feet of "her residence." RP, 690. The address of her residence, 15755 Fairview Lake Road SW in Port Orchard does not appear on the document. RP 693.

On April 12, 2014, William Blaylock was out doing yard work at his home neighboring the McEvoy residence. RP, 675. He saw Mr. McEvoy's truck pull up and Mr. McEvoy get out and go to the mailbox. RP, 676. Mr. Blaylock asked Mr. McEvoy how he was doing and he answered, "Not good." He then added, "I'm not supposed to be here. I've

got to go." RP, 677. The distance from the mailbox to the top of the McEvoy driveway is 122 feet. RP, 202. When Mr. McEvoy was interviewed on May 22, he stated his intent was to pick up his mail and he specifically picked a time when he knew no one would be home. RP, 336.

Mr. McEvoy was arrested on April 14 at the Westwind Hotel in Gig Harbor for the no contact order violation. RP, 195-96, 313. He was subsequently released from jail, probably on bail, although the exact circumstances and date of his release do not appear in the record. RP, 317-18.

On April 17, 2014 Detective Menge re-interviewed Ms. McEvoy about the events of April 9. RP, 196, 317-18. At that time, Detective Menge observed bruising on her person and a chunk of missing hair from the top of her head. RP, 197. She took photographs of her observations. RP, 197. As a result of that interview, Detective Menge requested an arrest warrant for the additional charge of attempted second degree rape and the Court authorized it. RP, 317-18.

On April 19, Mr. McEvoy flew from Seatac airport to Vermont through the Detroit airport. RP, 834. Mr. McEvoy's mother and family live in Vermont. RP, 834.

The jury learned the following information from receipts seized during the May 19 search of Mr. McEvoy's vehicle. These receipts were objected to by the defense at trial and the subject of an extended discussion prior to their admission. RP, 320. On May 5, Mr. McEvoy rented a car from Hertz in Burlington, Vermont. RP 321, Ex. 60A1. On May 8, Mr. McEvoy rented a hotel room in Albertville, Minnesota. RP, 321. On May 9, he stayed at the Best Western in Dickinson, North Dakota. RP, 322. On May 10, he was in Missoula, Montana at the Value Inn. RP, 322. According to that receipt, he checked out sometime on May 11. RP, 323. There was no hotel receipt for the night of May 11. RP, 323. On May 12, a hotel receipt was admitted indicating he slept at the Holiday Inn Express in Tacoma. RP, 323

In the late evening hours of May 11, Mother's Day, Ms. McEvoy was at the residence with the children and her brother, Kyle Koehn. RP, 754. The children went to bed around 10:00 p.m. RP, 757. According to DM's testimony, while he was getting undressed for bed, he saw his father walking in their yard. RP, 402. DM came out of his bedroom and announced to the family, "Dad's here." RP, 759. After some discussion, Mr. Koehn retrieved a pistol, DM grabbed a baseball bat, and the two of them went outside to investigate. RP, 771. They did not see anything

unusual. RP, 773, 786. The two of them looked for any evidence of Mr. McEvoy for about fifteen minutes but did not see anything. RP, 786

Ms. McEvoy reported the alleged sighting to Detective Menge the next day. RP, 210 DM was interviewed at school on May 13, 2014 about what he saw RP, 210. After his arrest, Mr. McEvoy was asked about this alleged contact and he denied being at the house. RP, 324. It should be noted that this alleged incident was charged in Count IX of the amended information, Violation of No Contact Order, and the jury acquitted him of this Count.

Mr. McEvoy was scheduled to be in court on the morning of May 13 for his pending fourth degree assault charge. Mr. Koehn attended the hearing, but Mr. McEvoy did not. RP, 773.

Sometime on May 13, Mr McEvoy returned the rental car to Hertz at Seatac Airport. RP, 328.

On May 13, 2014, Mr. McEvoy telephoned Ms McEvoy at work RP, 221. The phone call was recorded by Ms. McEvoy's work phone system, Northwest Physician's Network. RP, 221. During the conversation, Ms. McEvoy texted Detective Menge to say Mr. McEvoy was on the phone with her. RP, 219. Detective Menge later spoke to her

on the phone and she sounded afraid. RP, 219. Detective Menge later listened to the call and described Ms. McEvoy's voice as "chilling." RP, 221. The recorded call was later transcribed and played for the jury. Exhibit 47A.

On May 14, according to a hotel receipt recovered from his vehicle, Mr. McEvoy slept at the Red Roof Inn in Seatac on International Boulevard. RP, 331.

On May 15, Mr. McEvoy went to the Shuttlepark 2 Airport Parking in Seatac and picked up his truck at 11:43 a.m. RP, 826-27. This information was introduced by the defense through Oscar Garcia, the custodian of records at Shuttlepark 2 Airport Parking. RP, 821. Later that day, according to a hotel receipt recovered from his vehicle, he rented a hotel room at the Holiday Inn Express in Tacoma. RP, 334.

The alleged sighting of Mr. McEvoy by DM the night of May 11 and the telephone call on May 13 caused a panic in the Sheriff's Office. The State introduced an enormous amount of evidence of the efforts made to locate Mr. McEvoy and the defense repeatedly objected to this testimony. Detective Menge testified she instructed officers to conduct periodic surveillance on the McEvoy residence as well as Ms. McEvoy's place of work, RP, 212. During this line of questioning, the defense made

several objections, each of which was overruled. RP, 212. At that point, the Court excused the jury and held a colloquy on the record about the admissibility of police procedures to locate Mr. McEvoy. RP, 213. The defense position was that, in order to get into the "nitty-gritty" of the police efforts, the State needed to show a nexus between Detective Menge's actions and Mr. McEvoy's consciousness of guilt. RP, 215. Stated another way, "unless there's evidence of [Mr. McEvoy's] actions to thwart [capture], there's no consciousness of guilt. And if there's no consciousness of guilt, there's no relevance." RP, 216. The Court overruled the objection and the defense requested a standing objection to the entire line of inquiry. RP, 216. When the jury returned, Detective Menge testified that over the next week, she investigated his cell phone records, looked up his bank and credit card records, contacted local and federal police agencies, and contacted car rental companies. RP, 218.

At trial the State also called Lieutenant Detective Earl Smith to testify about the efforts made by law enforcement to locate Mr. McEvoy. RP, 694. He is the supervisor in the detective's unit of the Kitsap Sheriff's Office. RP, 694. Other than coordinating the search efforts behind the scenes, Detective Smith had no direct role in Mr. McEvoy's arrest or investigation. RP, 705. He was the supervisor who assigned Detective Menge to the case, although at trial he could not even recall that fact. RP,

189, 698. He testified when he heard the May 13 recording, he became very alarmed and stepped up his efforts to locate Mr. McEvoy. RP, 700. When asked to clarify, defense counsel objected and the court overruled. RP, 701. Detective Smith clarified that when it was believed Mr. McEvoy was in Vermont, he knew the family was safe, but when he learned he was back in Washington, he assigned more detectives to the case and asked other law enforcement agencies to assist. RP, 702. When asked for further explanation of what efforts he made, defense counsel again objected saying, "Your honor, again, I don't know how any of this is relevant to what Mr. McEvoy did." RP, 703. The Court again overruled the objection. Describing the situation as "very serious what was going on," Detective Smith detailed how he sent multiple emails to Kitsap, Pierce, and Mason counties, and contacted at least nine police agencies. RP, 703, 709. As an officer safety precaution, he ordered two-person patrol cars. RP, 705. At his request, the Pierce County Sheriff's Office activated their SWAT unit, although it was ultimately never used. RP, 708. He deployed surveillance teams around the courthouse. RP, 708. Multiple leads for Mr. McEvoy's whereabouts turned out to be dead ends. RP, 706. Because he was "very, very concerned about the kids," he initially contacted the principal and the school resource officer, but ultimately pulled the kids out of school. RP, 709. This statement was objected to and the court let it

stand. RP, 710. When DM was pulled from school, he arranged for him to leave in a patrol car with a surveillance team watching. Surveillance teams were set up at Ms. McEvoy's place of work and, at one point, he had a plain clothes detective remove her from work while a surveillance team followed in the hope Mr. McEvoy would follow her, although he never appeared on the scene. RP, 710-11. Eventually, Detective Smith decided to request the aid of the U.S. Marshall's Office. RP, 703.

U.S. Marshalls Jacob Whitehurst and Raymond Fleck were among the Marshall's assigned to the case on May 16. RP, 728, 792. Their sole job as part of the Pacific Northwest Violent Officer Task Force is to locate and apprehend fugitives. RP, 727. The Marshall's Office only gets involved if it is a violent crime or a sex crime and, according to Marshall Whitehurst, "we know that great bodily harm and/or death is likely to occur or is imminent if this person is not apprehended." RP, 728. Marshall Fleck was even more descriptive. He described the Pacific Northwest Violent Officer Task Force as "responsible, for lack of a better term, the worst of the worst." RP, 793. The Task Force has certain criteria and the case has to be one of homicide, imminent assault, or certain types of sex cases. RP, 794. Reviewing those criteria, and specifically the fact that "there was a potential for targeted acted [sic] of violence," and the situation "posed an imminent threat," Marshall Fleck approved the use of

the Pacific Northwest Violent Officer Task Force to locate and arrest Mr. McEvoy. RP, 798-99.

On May 19, 2014, Kyle Koehn received several calls from Mr. McEvoy. RP, 223, 780. Mr. Koehn was working with law enforcement to try and track the calls and would talk with him as long as he could, about fifteen minutes each. RP, 780. With Mr. Koehn's assistance, law enforcement figured out Mr. McEvoy somewhere in Gig Harbor. RP, 223.

Shortly before 4:00 in the afternoon, a Marshall located Mr. McEvoy's truck at the Tides Tavern in Gig Harbor. RP, 729, 809. Marshall Fleck saw the vehicle leaving the Tides Tavern and turn down an alley. RP, 804. When he did, the two vehicles were nose-to-nose. RP, 805. Mr. McEvoy held up his hands as if to surrender. RP, 806. When Marshall Fleck got out of his car to detain him, however, Mr. McEvoy put the car in reverse and backed out of the alley. RP, 806. Mr. McEvoy pulled onto Grandview Road and traveled at a high rate of speed, estimated to be 85 miles per hour in a 35 mile per hour zone. RP, 809. Marshall Whitehurst responded and positioned his vehicle on Grandview Road to act as a roadblock, blocking both lanes of travel with his emergency lights on. RP, 733-34. Soon thereafter he saw Mr. McEvoy's truck approaching him at a high rate of speed and not slowing down. RP,

734. Trying to avoid getting rammed, Marshall Whitehurst moved his vehicle forward a short distance, which was enough for Mr. McEvoy to go around it. RP, 734.

At that point, Marshall Fleck testified as follows during the State's direct examination:

> So at this point, I had to assess whether or not to continue the pursuit or not. The roads were dry. It was well lit. It was daylight hours. But traffic was starting to pick up. I think this was probably pretty close to 4:00 on a Monday afternoon in Gig Harbor. But at that point, we – I determined that had he not been brought into custody, he was going to kill he wife. So we continued the pursuit –
>
> Defense counsel: I'm going to object to that last comment and move to strike.
>
> Prosecutor: Your honor, it goes to his state of mind.
>
> The Court: Overruled.
>
> Marshall Fleck: So we continued the pursuit for that reason.

RP, 809.

Eventually, the Marshall's were able to block him in at a strip mall, the Olympic Village, and Mr. McEvoy rammed his truck into one of the police cars, ending the pursuit. RP, 736. Mr. McEvoy was promptly taken into custody and handcuffed RP, 739. A search was later conducted of the vehicle and many items were seized, including a firearm and a great deal

of paperwork, including the car rental and hotel receipts referenced earlier RP, 301.

The Trial

Prior to trial, both parties filed motions in lime. Of particular importance to this appeal is Mr. McEvoy's first motion, that the court suppress all evidence of law enforcement efforts to locate and arrest him. CP, 14. The motion cited *State v. Aaron, supra* and *State v. Johnson, supra*. The motion was described by the defense as being "very important" to the defense. RP, 35. The defense argued strenuously that between the dates of May 13 and May 19, 2014, any evidence of law enforcement efforts to locate and arrest Mr. McEvoy was irrelevant and unfairly prejudicial. RP, 66-68. In response, the State argued that the efforts by law enforcement were admissible to prove the reasonableness of Ms. McEvoy's fear. RP, 69. The State argued that law enforcement had a subjective belief that Mr. McEvoy was traveling from Vermont to Kitsap County with the sole intent of killing his wife. RP, 72. This motion was denied in part and granted in part. CP, 57. The Court ruled initially that the fact that Mr. McEvoy was present in the state and not in custody was admissible as evidence of the reasonableness of the victim's fear. RP, 92. The Court also ruled that any direct evidence of his efforts to avoid capture were admissible to show a consciousness of guilt.

RP, 93. The fact that Mr. McEvoy missed a court appearance on May 13 and a warrant was issued for his arrest was admissible. RP, 94-95. Due to the issuance of the warrant, the fact that law enforcement was directed to locate and arrest Mr. McEvoy was admissible. RP, 95. But the details of the efforts by law enforcement to locate and apprehend him were more prejudicial than probative and not admissible. RP, 94. The State then moved for reconsideration based upon the fact that he was an ex-police officer and had training and experience in police tactics. RP, 105. The Court reconsidered its ruling and held that his awareness of police procedures made the details of law enforcement's efforts to locate him admissible as evidence of consciousness of guilt. RP, 112.

The defense also brought a motion to exclude the hotel and car rental receipts. RP, 68. The receipts were recovered on May 19, 2014 during the search of Mr. McEvoy's vehicle. RP, 87. The hotel receipts include information such as the date of arrival, date of departure, and amount paid. RP, 88. Because the State was not bringing in the custodian of records to lay the foundation for any of the documents, the defense argued the documents were hearsay statements and not admissible as business records. RP, 68. The Court had an extended discussion about the admissibility of the documents. RP, 230-54. The State made two arguments for admissibility. First, the State argued the receipts were not being offered for the truth of the matter

asserted. RP, 234-35. The Court disagreed and held that unless admitted for their truth, the documents were not relevant. RP, 246-47, 253.

Second, the State argued the documents were admissible as adoptive admissions. RP, 236. Ultimately, the Court agreed with this argument and admitted the documents. RP, 253-54. The court held, however, that the times on the receipts, for instance the time he left the hotel in Missoula, were "classic hearsay" because "we can't necessarily rely on the time stamp as being an accurate time stamp." RP, 253. Eventually, the documents were admitted at trial with the times redacted from the documents. RP, 285-93, Exhibits 60A, 60B, 60C, 60D, 60E, 60F, & 60G.

The defense proposed a jury instruction defining "residence" based upon RCW 9A.44.128(5). RP, 847. The court denied the proposed instruction. RP, 863. The defense requested the Court instruct the jury on the lesser included charge of misdemeanor harassment on Count XII. RP, 851. CP, 66 The Court denied the lesser included instruction. RP, 868.

At sentencing, the Court imposed the maximum allowable sentence. The Court imposed 120 months on Count II, second degree assault, to be run consecutive to all other sentences. The Court imposed a top of the range sentence on the remaining felony counts to be run concurrent with each other, with the largest sentence being 54 months on

the stalking charge. The Court imposed 364 days each with 0 days suspended on the five gross misdemeanor charges, to be run consecutive to all other sentences. The net result was a sentence of 234 months (minus five days). CP, 230.

C. Argument

1. The trial court erred by allowing inflammatory and irrelevant comments and opinions by law enforcement about Mr. McEvoy's guilt and intent and the state of mind of the officers.

"The worst of the worst."

"I determined that had he not been brought into custody, he was going to kill he wife."

It was "very serious what was going on."

There was an "imminent threat" of violence.

Law enforcement was "very, very concerned about the kids" and "very alarmed."

"We know that great bodily harm and/or death is likely to occur or is imminent is this person is not apprehended."

It was necessary to order more detectives, "two-person patrols," and activate "the SWAT unit."

These inflammatory phases are among those heard by the jury about the efforts employed by law enforcement to locate and apprehend Mr. McEvoy between May 13 and May 19. The reality is that, as far as can be objectively determined, Mr. McEvoy was doing nothing in particular. He returned the Hertz rental car on May 13 in Seatac and apparently wandered around the city of Seatac without a vehicle for two days, sleeping one of those nights at the Red Roof Inn next to the Airport. On May 15, he picked up his truck from the Shuttlepark 2 Airport Parking and drove to Tacoma where he spent the night at the Holiday Inn Express. No one saw him and no one communicated with him until Mr. McEvoy called Mr. Koehn on May 19. Despite these innocuous activities, the State was permitted to introduce highly inflammatory testimony about the reaction of law enforcement and their efforts to locate him.

The entirety of Detective Smith's testimony was completely irrelevant. Detective Smith had no direct contact with Mr. McEvoy between May 13 and May 19. His sole job was to coordinate the search behind the scenes. This included assigning more detectives to the case, deploying surveillance teams around the courthouse, and enlisting the aid

of nine other police agencies. He felt the situation posed such a significant threat to police safety that he ordered two-person patrol cars and secured the use of the Pierce County SWAT unit. Describing himself as "very, very concerned about the kids," he initially contacted the principal and the school resource officer, but ultimately pulled the kids from school. Two unsuccessful ruses were attempted to lure Mr. McEvoy out of hiding, the first when DM was pulled from school and the second when Ms. McEvoy left work to go into hiding herself. But neither ruse was successful: Mr. McEvoy was apparently nowhere near his son's school or his wife's work when the ruses were employed. Ultimately, Detective Smith decided to request the aid of the U.S. Marshall's Office. All of these efforts by law enforcement and the state of mind of the investigators were completely irrelevant and only served to prejudice Mr. McEvoy's chance of getting a fair trial.

The jury heard evidence of the efforts to locate Mr. McEvoy and the state of mind of four officers, Detectives Smith and Menge and Marshalls Fleck and Whitehurst. This testimony completely irrelevant and it is nearly impossible to justify its admission. "[T]he officer's state of mind in reacting to the information he learned from the dispatcher is not in issue and does not make 'determination of the action more probable or less probable than it would be without the evidence.'" State v. Aaron, 57 Wn.

App. 277, 281, 787 P.2d 949 (1990), citing ER 401. "Out-of-court declarations made to a law enforcement officer may be admitted to demonstrate the officer's or the declarant's state of mind only if their state of mind is relevant to a material issue in the case; otherwise, such declarations are hearsay." *State v. Johnson*, 61 Wn. App. 539, 546, 811 P.2d 687 (1991.

In addition, many of the comments constituted impermissible opinions as to the defendant's guilt. As a general proposition, opinion testimony is frowned upon in the courtroom, but the Courts are particularly critical when the opinions constitute "expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 *(2008)*. Opinion testimony from police officers has a high potential for undue prejudice because "the police officers' testimony carries an aura of reliability." *Montgomery* at 595. But "police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt." *Montgomery* at 595.

The testimony of Marshalls Fleck and Whitehurst significantly amplified the prejudice. As Marshalls assigned to the Pacific Northwest

Violent Officer Task Force, the jury learned they only undertake cases that constitute the "worst of the worst." They also testified Mr. McEvoy posed an "imminent threat" to his wife and that they only take cases where "great bodily harm and/or death is likely to occur or is imminent." These comments constituted impermissible opinions of Mr McEvoy's intent and the subjective beliefs of the officers

The single most prejudicial comment came from Marshall Fleck, however, when he said, "I determined that had he not been brought into custody, he was going to kill he wife." In one recent case, the Supreme Court disapproved of a similar opinion being proffered by the prosecutor, saying, "[L]abeling [the defendant's] testimony "the most ridiculous thing *I've ever heard*" is an obvious expression of personal opinion as to credibility There is no other reasonable interpretation of the phrase." *State v Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014) (emphasis in the original). In Mr. McEvoy's case, Marshall Fleck not only testified he had an opinion about Mr McEvoy's intent, he testified he had "determined" his intent This word, when stated by a federal Marshall whose sole job is to locate and apprehend the "worst of the worst," is an egregious expression of his personal opinion about Mr McEvoy's future intent

Mr. McEvoy was further prejudiced by the fact that the trial court refused to sustain his objections or give limiting instructions. See *State v Allen*, __ Wn.2d __, 341 P.3d 268 (decided January 15, 2015) ("[T]he trial court twice overruled Allen's timely objections in the jury's presence, potentially leading the jury to believe that the "should have known" standard was a proper interpretation of law."); *State v Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (overruling timely and specific objections lends "an aura of legitimacy to what was otherwise improper argument"). Mr. McEvoy repeatedly attempted to object to the prejudicial testimony of the two detectives and two Marshalls, but the trial court consistently overruled the objections. When defense counsel tried to stymie Detective Smith's testimony, saying at one point, "Your honor, again, I don't know how any of this is relevant to what Mr. McEvoy did," the Court overruled the objection. And when the comment by Marshall Fleck that he had "determined" Mr. McEvoy was going to kill his wife was promptly objected to, along with a request to strike the testimony, the Court again overruled the objection without comment. All told, in addition to raising this issue as a motion in limine (RP, 35), defense counsel's objections were overruled eight separate times. RP, 211 212 (three objections), 701, 703, 710, 809. Defense counsel also requested a standing objection to the entire line of inquiry. RP, 216.

The prejudice was also amplified by the prosecutor's closing argument where they emphasized both the threat assessment done by the Marshall's office as well as Marshall Fleck's opinion as to Mr. McEvoy's intent. The prosecutor stated, "The Marshall Service does a threat assessment. They look at the facts of the case. They look at the type of case. They look at the person who's suspected of the case. They look at the overall threat assessment to decide whether or not they're going to adopt the case. They have limited resources, but they, in fact, adopt the case And they devote multiple resources. They take on the cost of apprehending him. He's considered a fugitive at this point." RP, 917 Later the prosecutor argued, "And as we're doing this chase, as we're doing the pursuit, I get to the point where I have to decide, is this too much of a risk to the public? Is that risk -- is that a risk I'm willing to take in order to take this person into custody? If I don't take this person into custody, is he going to -- do I think he's going to go kill his wife? These are all of the factors that Fleck has in his head about whether or not, do I call off the pursuit, or do I keep going in order to get this guy?" RP, 920.

In determining the prejudice to Mr. McEvoy's trial, there are several recent cases involving prosecutorial misconduct which provide a helpful guide. In *Lindsay*, the Supreme Court unanimously reversed a conviction for comments arguably less egregious than those made about Mr. McEvoy,

holding there was a "substantial likelihood" they "affected the jury's verdict." *Lindsay* at 443. In another recent case, the Court reversed a conviction due to prosecutorial misconduct and held that, despite the fact that the State had a strong case and the defendant's sole defense at trial was "State's failure to meet its burden of proof and to produce evidence in support," a new trial was required *State v Walker*, __ Wn.2d __ (decided January 22, 2015). This Court should reverse each of Mr. McEvoy's convictions and remand for a new trial

2. The trial court erred by admitting the rental car and hotel receipts as adoptive admissions.

After Mr. McEvoy's arrest and a search warrant was obtained, his truck was searched and multiple documents were recovered. Among the documents was a car rental receipt and several hotel receipts. The trial court correctly ruled these documents were being proffered for the truth of the matter asserted. But the Court ruled they were not hearsay pursuant to ER 801(d)(2)(i), holding Mr. McEvoy's possession of the documents constituted an adoptive admission. This conclusion was error.

The foundation normally required to admit business records in Washington is well established. Washington uses the Uniform Business Records as Evidence Act to determine whether business records, which would otherwise be inadmissible hearsay, are admissible. There is a five

prong analysis. To be admissible under the business records exception, the business record must (1) be in record form; (2) be of an act, condition, or event; (3) be made in the regular course of business; (4) be made at or near the time of the fact, condition, or event; and (5) the court must be satisfied that the sources of information, method, and time of preparation justify admitting the evidence *State v. Fleming*, 155 Wn.App. 489, 499, 228 P 3d 804 (2010) In order to meet this foundation, the trial court is required to hear from either the person who made the record or "testimony by one who has custody of the record as a regular part of his work or who has supervision of its creation will be sufficient to introduce the record." *Fleming* at 499.

In this case, the State made no effort to call the custodian of records from either Hertz or any of the hotels. (In contrast, the defense did call the custodian of records from Shuttlepark 2 in order to introduce parking records). The trial court skirted this issue by finding that the documents were not hearsay pursuant to ER 801(d)(2)(ii), an adoptive admission. The rule reads: "A statement is not hearsay if – The statement is offered against a party and is. . . a statement of which the party has manifested an adoption of belief in its truth." In this case, the receipts were located in Mr. McEvoy's truck at the time of his arrest. The trial court concluded that possession of the receipts manifested an adoption of belief in their truth. Ironically,

although the trial court concluded Mr. McEvoy had manifested a belief in the truth of the location and dates contained on the documents, the court ruled that he had not manifested a belief in the truth of the times, which the court characterized as "classic hearsay." Therefore, the trial court ordered the documents redacted to excise the times, but not the dates, contained on the documents.

The issue of whether documents found on or near a suspect's person are hearsay appears to be one of first impression in Washington. The trial court relied on the case of *United States v. Marino*, 658 F.2d 1120 (6th Cir. 1981) in reaching this conclusion. In *Marino*, the suspect was arrested with receipts from Peru. He was charged with delivering drugs in interstate commerce. The Court concluded, "[T]his evidence was admissible because the defendants' possession of the tickets and other documents constituted an adoption. Just as silence in the face of an accusation may constitute an admission to its truth, possession of a written instrument becomes an adoption of its contents. Adopted admissions are not hearsay and may be admitted into evidence." *Marino* at 1125 (citations omitted).

The *Marino* case appears to be an anomaly, however. An American Jurisprudence article discussing this issue said the following, "Proof that a document was received is insufficient, alone, to establish an adoption of the

information contained in it. Although there are sources to the contrary [citing *Marino*], generally mere possession of a written instrument does not necessarily constitute an adoption of the contents." 29A Am Jur 2d Evidence §815, citing *FCX v. Caudill*, 354 S.E.2d 767 (1987).

The Ninth Circuit has consistently held that mere possession of a document is not admissible to prove the contents of the document. In one case, the Ninth Circuit discussed the *Marino* case and rejected its analysis. *United States v. Ordonez*, 737 F.2d 793 (1983), citing *Poy Coon Tom v. United States*, 7 F.2d 109 (9th Cir. 1925).

The most thorough debunking of the *Marino* case is found in the Tenth Circuit. See *United States v. Jefferson*, 925 F.2d 1242 (10th Cir. 1991). In *Jefferson*, the government introduced a pager receipt as evidence the defendant used a pager. The Court held it was error to admit the receipt, saying, "Our conclusion that the district court's admission of the pager bill into evidence over the appellant's hearsay objection was erroneous is supported by a number of cases holding that a receipt introduced as evidence of payment for a good or service constitutes hearsay." *Jefferson* at 1252, citations omitted. The Court had the following to say about *Marino*:

> We are aware of the approach taken by the Sixth Circuit in *United States v. Marino,* 658 F.2d 1120, 1125 (6th Cir.1981), where it held that an airline ticket used at trial to prove that "the defendants traveled in interstate commerce ... was admissible because the defendants' possession of the documents constituted an adoption." *Id.* The court stated: "Just as silence in the face of an accusation may constitute an admission to its truth, possession of a written statement becomes an adoption of its contents." *Id.* We decline to apply the approach taken by the Sixth Circuit in *Marino* to this case. We can think of too many cases where the mere possession of a bill in no way constitutes an adoption of its contents. Common every day experience teaches us that disputes with creditors based upon inaccuracies contained in their bills is not a rarity. *See generally Larson v. Dumke*, 900 F.2d 1363, 1369 (9th Cir.), *cert denied*, 498 U.S. 1012, 111 S.Ct. 580, 112 L.Ed.2d 585 (1990) ("What we know as men and women we must not forget as judges.").

Jefferson, footnote 13

In Mr. McEvoy's case, the State introduced numerous business records but made no effort to call a custodian of records who could verify the accuracy of the records. The Court admitted the records relying on an anomalous case out of the Sixth Circuit that has been consistently debunked and has not been followed in either Washington or the Ninth Circuit. The admission of the receipts was error.

The next issue is whether the erroneous admission of the receipts was harmless. The error was not harmless, particularly on the stalking and harassment charges. The receipts allowed the State to argue to the jury that Mr. McEvoy rented a car in Vermont and drove across the United

States with the intent of killing his wife. The jury heard testimony about his day-to-day progress across the 3000 miles of the country, culminating in Missoula, Montana on May 10. He checked out of the Missoula hotel on May 11. The jury heard evidence that it takes about eight to nine hours to drive from Missoula, Montana to Port Orchard, Washington. RP, 535. None of this information was known to law enforcement or Ms. McEvoy until after his arrest on May 19. In the late night hours of May 11, DM allegedly sees his father in his back yard. The jury heard he missed court on May 13 and dropped off the rental car at Seatac that same day. May 13 is also the date Mr. McEvoy called his wife at work and threatened her, saying he "gonna find [her]." The receipts permitted the State to reconstruct his whereabouts and argue, particularly on the Stalking charge, that he was driving across the United States with the intent of killing her. The receipts were highly prejudicial. It was reversible error to admit the receipts.

3. The evidence is insufficient to convict Mr. McEvoy of violating the no contact order on April 12, 2014.

Mr. McEvoy was convicted of two counts of violating the no contact order. He challenges the sufficiency of the evidence to convict him of Count VIII. Count VIII was alleged to have occurred on April 12, 2014 when his neighbor, William Blaylock, observed him check his

mailbox at the end of his driveway. The mailbox is 122 feet from the residence. The no contact order prohibited him from coming within 500 feet of the residence of Ms. McEvoy, but did not specify a specific address.

Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn App 789137 P 3d 892 (2006) The problem in this case is that the term "residence" is ambiguous as applied. On April 9, Ms. McEvoy moved out of the residence at 5755 Fairview Lake Road SW in Port Orchard and moved in with her mother. She was there for 10 days until she believed Mr McEvoy was in Vermont, and then she moved back into the family home

RCW 26.50.110(1)(ii) and (iii) authorize a court to exclude a "person from a residence, workplace, school, or day care" and within "a specified distance of a location." In *Seattle v May*, the Supreme Court clarified when no contact orders may be collaterally challenged and set forth three circumstances: (1) orders that are void, (2) orders that are inapplicable to the crime charged (i e , the order either does not apply to the defendant or does not apply to the charged conduct), and (3) orders

that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct). *Seattle v. May*, 171 Wn.2d 847, 854, 256 P.3d 1161 (2011). Before a person can be convicted of violating a court order, the order itself must be of sufficient specificity to put the reader on fair notice of what is prohibited. This is necessary for fundamental due process, as well as double jeopardy concerns. See *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 284, 9125 L.Ed.2d 556 (1993) (a conviction for criminal contempt for violating a civil protection order barred a subsequent prosecution for violating the protection order). In this case, Mr. McEvoy challenges whether the Order in this case gives him fair warning of the prohibited conduct.

Chapter 26.50 RCW does not define the term "residence." In a different context, the legislature defined the term "fixed residence" to mean "a building that the person lawfully and habitually uses as living quarters a majority of the week." RCW 9A.44.128(5)[1]. Although this definition is only applicable to chapter 9A.44 RCW, it is persuasive evidence of what the legislature deems to be a residence. Applying this

[1] Mr. McEvoy requested the jury be instructed on the term "residence" and proposed a jury instruction based upon RCW 9A.44.128, but the court denied the instruction.

statute, Ms. McEvoy was using her mother's residence as her living quarters from April 9 through April 19.

That the term "residence" did not give Mr. McEvoy fair warning of the prohibited conduct is made clearer by the fact that, had Mr. McEvoy come within 500 feet of his mother-in-law's residence knowing his wife was living there, he almost certainly would have been charged with that violation. Mr. McEvoy was entitled to fair notice of what the prohibited conduct was. A general court order prohibiting him from coming within 500 feet of Ms. McEvoy's residence without specifying which address is insufficient to put Mr. McEvoy on fair notice that he cannot approach a residence that his wife is not living at. Count VIII of the amended information should be dismissed for insufficient evidence.

4. The evidence is insufficient to convict Mr. McEvoy of Felony Stalking.

In *State v. Johnson*, __ Wn.App. __ (decided Feb. 2, 2014) the Court of Appeals did a detailed analysis of the felony stalking statute, RCW 9A.46.110, and concluded "to convict Johnson of the crime of felony stalking, the State has the burden of proving beyond a reasonable doubt that on at least two separate occasions, he harassed or followed Wojdyla in violation of a protection order." The facts of *Johnson* involved multiple harassing incidents prior to the issuance of the

protection order and one harassing incident after the issuance of the protection order. The Court of Appeals dismissed for lack of sufficient evidence. The Court declined to remand to enter a conviction on the lesser charge of misdemeanor stalking.

"Follows" means "deliberately maintaining visual or physical proximity to a specific person over a period of time." "Harassment" in the stalking statute has the same meaning as "unlawful harassment," as defined by RCW 10.14.020. RCW 9A.46.910. "Unlawful harassment" means "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

In this case, the State alleged three incidents of "harassing or following." The first was when Mr. McEvoy checked his mailbox on April 12. The second was when he allegedly was seen in his yard by DM on May 11. The third was when he called his wife at work on May 13. Mr. McEvoy concedes that the May 13 phone call qualifies as a harassing incident in violation of the no contact order.

The first incident does not count as a harassing incident in violation of the no contact order for two reasons. First, as argued above,

the no contact order is ambiguous as to what his wife's residence was given Ms. McEvoy's decision to move in with her mother. Second, even if this Court disagrees with this analysis, it is uncontested that Ms. McEvoy was not present at the house when he arrived as she was at work and Mr. McEvoy knew she was at work. When Mr. McEvoy was interviewed on May 22, he stated his intent was to pick up his mail and he specifically picked a time when he knew no one would be home. RP, 336. Assuming arguendo that going to the mailbox was a technical violation of the no contact order, it does not qualify as a deliberate attempt by Mr. McEvoy to keep Ms. McEvoy in visual or physical proximity, nor does it qualify as a course of conduct intended to seriously alarm, annoy, or harass.

The second incident does not qualify as an incident of following or harassment because the jury acquitted him of that allegation. In order for an incident to qualify as an underlying offense, the jury must unanimously agree beyond a reasonable doubt that it qualifies. See, generally, *State v Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984).

The State presented evidence of only one harassing incident in violation of the no contact order. The evidence is, therefore, insufficient

to convict Mr. McEvoy of felony stalking. That charge should be dismissed.

5. The two no contact order violations merge with the felony stalking.

In the event this Court affirms the two no contact order violations and the felony stalking conviction, the next issue is whether the two violations merge with the felony stalking. In *State v. Parmelee*, 108 Wn App. 702, 32 P.3d 1029 (2001), the Court held that because two violations of no contact order are necessary to convict a person of felony stalking, the violations merge into the stalking charge. Mr. McEvoy should not have been sentenced separately for the two violations.[2]

6. The trial court erred by refusing to instruct on the lesser included charge of misdemeanor harassment.

At trial, the State charged Mr. McEvoy with felony harassment for threatening to kill his wife on May 13. On that date, Mr. McEvoy telephoned his wife at work and the phone call was recorded by her employer's recording system. The call was later transcribed and a full transcript appears as an appendix to this Brief. During the call, Mr. McEvoy never uses the words "kill" or "murder" to threaten her. Mr. McEvoy argued the issue whether the call constitutes a threat to kill or a

[2] It is worth noting that the trial court gave him the maximum allowable sentence on each count, 364 days, with 0 days suspended

threat to harm is a jury question and the jury should be instructed as to the lesser included offense.

The relevant portion of the harassment statute, RCW 9A.46.020(1)(a)(i), defines harassment as "knowingly threaten[ing] to cause bodily injury immediately or in the future to the person threatened or to any other person." It is normally a gross misdemeanor, but can be elevated to a Class C felony when the "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).

When a party seeks a lesser included offense, the Court must review whether the proposed lesser charge is a lesser offense both legally and factually. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978) First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. Misdemeanor harassment has been found to be a lesser included offense of felony harassment legally. *State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003).

The trial court refused Mr. McEvoy's proposed instruction because, in the view of the trial court, there was no way to interpret his

phone call except as a threat to kill. Under the court's interpretation of the case law, a lesser included instruction may only be given when the there is evidence that only the lesser crime was committed. RP, 868. The court relied on *State v. C.G.* and found that because Ms. McEvoy interpreted the statements as a threat to kill, the jury was required to find that as well. In *C.G.*, a student told her vice-principal she wanted to kill him, but the vice-principal did not interpret the threat as an actual threat to kill. The Supreme Court said, "We thus conclude that under the plain language of RCW 9A.46.020, supported by the related statute, RCW 9A.46.010, the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out." *State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003).

The trial court's interpretation of *C.G.* was too limiting. In order to be guilty of felony harassment, the offender must "knowingly threaten to cause bodily injury" by "threatening to kill the person" and "by words or conduct places the person threatened in reasonable fear that the threat will be carried out." The issue in *C.G.* was whether the victim must be placed in actual fear that the threat of death would be carried out, but the State must still prove that the threat was a threat to kill. The way the Supreme Court interpreted the statute, "the threat to kill is effectively substituted for a threat to cause bodily injury without killing." *C.G.* at 597.

Regardless of how the victim interprets the threat, whether the threat constitutes a threat to cause bodily injury or a threat to kill is a factual question that should be left for the jury

The day after Mr. McEvoy filed his opening Brief, the Washington Supreme Court decided *State v. Henderson* __ Wn 2d __ (decided March 26, 2015). In *Henderson,* the Supreme Court reversed a murder conviction because the trial court improperly refused a lesser included instruction. The majority quoted Justice Brennan where he said, "Where one of the elements of the crime charged remains in doubt, but the defendant is plainly guilty of *some* offense, *the jury is likely to resolve its doubts in favor of conviction*." *Henderson* at __, quoting *Keeble v. United States*, 412 U.S. 215, 212-13, 93 S.Ct. 1933, 36 L.Ed 2d 944 (1973). As a result, "To minimize that risk, we error on the side of instructing juries on lesser included offenses." *Henderson* at __, citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (1000).

There is a very interesting footnote in *Henderson* dissent, however, that is worth comment. The dissent said:

> These are the distinctions we must address, because, as just explained, our court has stated that 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 "

> *Fernandez-Medina,* 141 Wn 2d at 455. 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). But the parties in this case have not argued that issue.

Henderson at __ (Justice McCloud, dissenting) (footnote 4). As this footnote suggests, the rule that the lesser charge be committed to the exclusion of the greater charge appears to violate the requirement that, when a reasonable doubt exists as two which of two charges he is guilty, the defendant shall be convicted of the lowest charge. It has been noted that juries often apply a rule of lenity in the deliberation room and the current rule restricts that opportunity. See *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988) (noting that the apparently inconsistent verdicts were permissible as jury lenity). It is time to dispense with this rule and apply a more lenient rule that, as the majority suggests, errors on the side of giving the instruction.

In this case, the following statements by Mr. McEvoy were argued by the State to be threats to kill. "You know what, Kara, you've got a very short time on this earth. You better hope somebody finds me before I find you. You've . . you've ended . . . you've taken away my house, all my property and my kids; do you realize that?" Later, he said, "My point is I

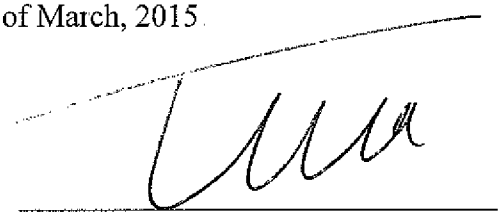
am going to find you. That's my point." Ms. McEvoy then asked, "And then what?" To which he said, "Well, you'll find out." He ended the call by saying, "Hey, Kara, I'm gonna find you, that's all I gotta say."

Whether these statements constitute threats to kill or threats to harm is ambiguous. As defense counsel pointed out at trial, all of us have a "short time on earth." RP, 862. And the threat, "I'm gonna find you," does not state specifically what he intended to do when he did find her. Defense counsel argued at the trial level that whether the threats constituted a threat to harm or a threat to kill is "an inference," and the trial court initially seemed to agree. RP, 859. Applying the both the majority and the dissenting analysis from *Henderson*, the trial court failed to error on the side of giving the lesser included instruction and reversal is required. At the very least, the trial court should have allowed the jury to consider this question. This Court should reverse the felony harassment conviction and remand for a new trial to allow the jury to consider the lesser included offense.

D Conclusion

The convictions for violating the no contact order and felony stalking should be reversed for insufficient evidence. This Court should reverse all the remaining convictions and remand for a new trial. At the new trial, the rental car and hotel receipts should be excluded from evidence unless the State can lay a proper foundation. At the new trial, the Court should instruct on the lesser included offense of misdemeanor stalking. In the alternative, Mr. McEvoy should be resentenced on the no contact order violations, which merge with the felony stalking charge.

DATED this 2nd day of March, 2015.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

Recorded call of Brian McEvoy calling Kara McEvoy ORIGINAL
Case Report No. K14-003484
Date:

OP: Please note that all calls may be monitored or recorded for quality assurance. Thank you for calling the Northwest Physicians Network Member Service Department. Please select the appropriate option from the following menu. Providers, Health Care Facilities or Health Plans...ca...

K: Healthcare services, this is Kara.
BM: Hey Kara, is Kara McEvoy available?

K: Sure, let me get you over to her.
KM: Heathcare Services, this is Kara.
BM: Hello Kara, how you doing?

KM: Good.
BM: Good. You're. ..you're satisfied with the way things are going?

KM: Uh, what are you doing calling me?
BM: Why not? What difference does it make at this point then.

KM: I don't know. It sounds like you're really screwing up
BM: Oh really

KM: Uh, yeah.
BM: Well, how's that?

KM: Uh, you didn't show up to the court date today.
BM: Well, you filed false rape claims against me.

KM: I did not file anything that was false.
BM: Well, oh really. Did I rape you?

KM: It's called attempted.
BM: You know what, Kara, you've got a very short time on this earth. You better hope somebody finds me before I find you. You've... you've ended. ..you've taken away my house, all my property and my kids; do you realize that?

KM: You are the one that made all those choices.
BM: Oh, really? It was my choice to have everything in my life ended? That was my choice?

KM: Why did you decide to attack me?
BM: Kara, do you think I deserve to be in prison for what I did?

KM: You know what, I'm gonna let the courts decide that.
BM: Really. I'm asking you what you think.

KM: Why don't you just turn yourself in?
BM: Why...why...I am...I have no intention of doing that. You must be kidding me. They have a million dollar bond out for me, like I'm America's most wanted.

KM: Why...
BM: Do you realize what you've done Kara?

KM: Don't be blaming me for anything.
BM: You...you filed rape charges against me. You must be kidding me. Is...is this...is this... this...that's what you think of me? You want me in prison for five years?

KM: I didn't say that.
BM: Well, wh...what do you think should happen?

KM: I don't know. I just think that you've been really making some bad decisions lately.
BM: Really

KM: Oh, you don't agree?
BM: Well, I've been forced into it.

KM: Oh, okay You're not gonna take any, um, responsibility for it?
BM: I take responsibility for what happened that night I hit you, and I should've been charged with a misdemeanor and that was it. But that's...you changed your...you went down to San Diego and talked to your little friends and you were...you were told to file rape charges and (unintelligible)...

KM: No I was not.
BM: ...(unintelligible)

KM: That is not...
BM: Oh, you didn't dis... you didn't tell them that I told you to suck my dick and that's how these rape charges got...got filed.

KM: I put that in the police report.
BM: Alright. I... I...I just hope you can, uh, live with the consequences of what's gonna happen.

KM: Yeah, what's gonna...what's that gonna be?
BM: Well, you'll ...you'll...I'm gonna find you, Kara. You and I are gonna have one last

reckoning, I guarantee that.

KM: What are you meaning by that?
BM: You know...you know what? You forced my hand.

KM: Oh, really.
BM: (Unintelligible) Yeah

KM: Um, whaa...and by saying I was...
BM: Hey...

KM: ...gonna move out into an apartment?
BM: Make sure ..make sure you tattle on me when we get off the phone...you say, and he called me; make sure you tattle.

KM: Yeah. Well, where are you?
BM: Would I tell you?

KM: I...
BM: Why would I tell you so you can tell on me?

KM: What's your point? What...what point are you making by calling me right now?
BM: You're...my...my point is I am going to find you. That's my point.

KM: And then what?
BM: Well, you'll find out...you'll find out. You know what? You've...you've made it very difficult for me to do the right thing.

KM: You've made all those choices yourself.
BM: Well, let me ..let me ask you this. What are your feelings towards me, Kara?

KM: Uh, I think you're really sick and mentally off and you have a really...a big problem.
BM: No, I...

KM: You..
BM: ..I asked you what your feelings were towards me.

KM: Uh, you scare me.
BM: Are...are you glad that you've taken ev...my whole life is done now. Are you glad about that?

KM: You know what? The last time I talked to you I said that I was gonna move out into an

apartment and I was gonna pay all the bills and you were gonna stay at the home and look for a jobs.

BM: Yeah, and you know what? You...my job opportunity with Pape was destroyed by you and your friend Sue per the email I got from (unintelligible).

KM: I told your brother...

BM: (Unintelligible)

KM: ...I forwarded it to your brother and it was his choice, he didn't forward it onto you

BM: I...I got it and I...I had the interview.

KM: Yeah

BM: Oh, and they said, uh, I hope your family situation improves and I hope your life gets back together. That was the response.

KM: Well, I don't know why they said that

BM: Kara, I can't wait...

KM: I never talked to that...

BM: ...to see you.

KM: Listen...listen to me...

BM: I can't wait to see you.

KM: Did somebody force you to attack me that day?

BM: No.

KM: Oh, did you not plan it out?

BM: No, I didn't plan it.

KM: You had ou...oh, really, how about with my car?

BM: What about your car?

KM: Uh, that you unhooked something so my car wouldn't work.

BM: (Laughs) yeah, alright.

KM: Oh, you remember doing that?

BM: Eh...and you...you also claimed that I was at the house trying to get...get my motorcycle the other day too when I wasn't even in the state.

KM: Yeah. Um, we saw...Dylan saw you walking in the yard.

BM: Yeah, okay.

KM: Oh, you're saying you're not in the state?
BM: That's correct

KM: Oh. . oh, really. Yeah. .
BM: Yeah.

KM: . . . where. . where are you at then?
BM: Why . . why, you want to come visit me?

KM: Eh. . . . no, actually I don't.
BM: Hey, Kara, I'm gonna find you, that's all I gotta say.

KM: Listen I'm . . (end of recording)

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March 02, 2015 - 1:46 PM

Transmittal Letter

Document Uploaded: 3-467950-Amended Appellant's Brief.pdf

Case Name: State of WA v Brian McEvoy
Court of Appeals Case Number: 46795-0

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

Letter

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

STATE OF WASHINGTON, Respondent, vs. BRIAN McEVOY, Defendant	Court of Appeals No.: 46795-0-II DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action, and:

On March 2, 2015, I e-filed a Motion for Leave to File Amended Brief of Appellant and the Amended Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and on that same date, a copy of said Brief was emailed to Kitsap County Deputy Prosecuting Attorney Randall Sutton through the Court of Appeals transmittal system

On March 2, 2015, I deposited into the U.S. Mail, first class, postage prepaid, true and correct copies of the Motion for Leave to File Brief of Appellant and the Amended Brief of Appellant to the defendant:

Brian McEvoy, DOC #377945
Monroe Correctional Complex
16550 177th Avenue SE • PO Box 777
Monroe, WA 98272

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: March 2, 2015, at Bremerton, Washington.

Alisha Freeman

The Law Office of Thomas E. Weaver
P O. Box 1056
Bremerton, WA 98337
(360) 792-9345

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March 02, 2015 - 2:03 PM

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Case Name: State of WA v Brian McEvoy
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