

No. 44415-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Ruslan Bezhenar,

Appellant.

Lewis County Superior Court Cause No. 12-1-00434-4

The Honorable Judge James Lawler

Appellant's Reply Brief

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ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND MR. BEZHENAR GUILTY OF FELONY HARRASSMENT.

A. The state presented no evidence that Mr. Bezhenar threatened to kill Officer Lowrey.

To convict Mr. Bezhenar of felony harassment, the state was required to prove that he threatened to kill Officer Lowrey. CP 44. The testimony at trial, however, described only general, “veiled” threats. RP 46-47, 68, 80. The state argues that Lowrey’s testimony permits the inference that the officer reasonably feared being killed. Brief of Respondent, pp. 12-15. Respondent does not address Mr. Bezhenar’s argument that no rational trier of fact could have found beyond a reasonable doubt that his statements constituted threats to kill. Brief of Respondent, pp. 9-16.

To convict Mr. Bezhenar, the state needed to prove *both* that he threatened to kill Lowrey and that Lowrey was placed in reasonable fear of being killed. CP 44; *State v. C.G.*, 150 Wn.2d 604, 612, 80 P.3d 594 (2003). The state’s response focuses on Lowrey’s testimony that he took Mr. Bezhenar’s statements seriously and feared for his family as a result. Brief of Respondent pp. 9-16.

Respondent ignores Mr. Bezhenar's argument that his alleged statements that Lowrey "was going to be sorry"¹ and that he was going to seek revenge beyond the financial² did not rise to the level of threats to kill. Respondent's failure to address this issue may be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009) (the absence of argument on a point may be treated as a concession).

The state presented insufficient evidence that Mr. Bezhenar threatened to kill Officer Lowrey. His conviction must be reversed and the case dismissed with prejudice. *State v. Chouinard*, 169 Wn. App. 895, 903, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. The state presented no evidence that any alleged threats placed Officer Lowrey in reasonable fear that Mr. Bezhenar would kill him.

A conviction for felony harassment based on a threat to kill must be supported by proof that the alleged victim was placed in reasonable fear that s/he would be killed. *C.G.*, 150 Wn.2d at 612. The state presented no evidence that Mr. Bezhenar's statements placed Lowrey in fear of being killed. Respondent points only to testimony indicating that Lowrey was

¹ RP 47.

² RP 46-47, 80.

placed in reasonable fear that he or his family would be harmed. Brief of Respondent, pp. 12-14. The state cannot point to any evidence proving that Lowrey was specifically placed in fear of being killed.

Evidence that the alleged victim was placed in reasonable fear of being generally harmed is not sufficient to prove that s/he was in reasonable fear of being killed. *C.G.*, 150 Wn.2d at 612. Testimony from the alleged victim that a threat “caused him concern” that the accused “might try to harm him or someone else in the future” does not prove that the alleged victim feared being killed. *C.G.*, 150 Wn.2d at 606-07.

Lowrey testified that he took Mr. Bezhenar’s statements to mean that “he was planning on doing something harmful to [him] or [his] family.” RP 47. When asked directly whether he feared being killed, Lowrey responded only that he “was more in fear for [his] family than for [himself].” RP 47. Respondent claims that this evidence demonstrates that “Officer Lowrey clearly believed that Bezhenar was capable of hunting him down and killing him.” Brief of Respondent, p. 15. Lowrey did not testify, however, that he was afraid of being killed. RP 20-54. No rational trier of fact could have found beyond a reasonable doubt that Mr. Bezhenar’s statements placed Lowrey in reasonable fear of being killed. *C.G.*, 150 Wn.2d at 612.

The state presented no evidence that the statements placed Officer Lowrey in reasonable fear that Mr. Bezhenar would kill him. This failure requires reversal of Mr. Bezhenar's conviction and dismissal with prejudice. *C.G.*, 150 Wn.2d at 612; *Chouinard*, 169 Wn. App. at 903.

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT DENIED MR. BEZHENAR A FAIR TRIAL.

A. Mr. Bezhenar was prejudiced by the prosecutor's misconduct of minimizing the state's burden of proof.

Respondent concedes that the prosecutor committed misconduct by making arguments that minimized the state's burden of proof. Brief of Respondent, p. 28.³ Prosecutorial misconduct prejudices the accused if there is a substantial likelihood that it affected the verdict. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The state argues that Mr. Bezhenar was not prejudiced by the prosecutor's improper arguments because the jury was properly instructed. Brief of Respondent, p. 29.

If proper jury instructions cured all improper arguments, however, claims of prosecutorial misconduct would almost never succeed. In fact,

³ As noted by Respondent, appellate counsel inadvertently cited to the unpublished portion of *State v. Jones* in the opening brief. *State v. Jones*, 163 Wn. App. 354, 266 P.3d 866 (2011) (Jones I); Brief of Respondent, p. 28 n. 6. Appellate counsel apologizes to the court for this oversight.

prosecutorial misconduct can be so flagrant that even a specific, curative instruction cannot undo the prejudicial effect. *Glasmann*, 175 Wn.2d at 707.

The prosecutor's improper minimization of the state's burden of proof prejudiced Mr. Bezhenar. There was no direct evidence that Mr. Bezhenar threatened to kill Lowrey or that Lowrey was placed in reasonable fear of being killed. A rational jury would have had reasonable doubt as to those elements. The prosecutor misstated the burden of proof by telling the jurors that they should convict if they "feel it in [their] gut" that Mr. Bezhenar was guilty. RP 163. There is a substantial likelihood that the prosecutor's misconduct affected the outcome of the trial. RP 163; *Glasmann*, 175 Wn.2d at 704.

The prosecutor's arguments misstating and trivializing the state's burden of proof constituted flagrant, ill-intentioned, prejudicial misconduct. *State v. Johnson*, 158 Wn. App. 677, 686, 243 P.3d 936 (2010). Prosecutorial misconduct requires reversal of Mr. Bezhenar's conviction. *Id.*

- B. Mr Bezhenar was prejudiced by the prosecutor's misconduct of bolstering the testimony of the state's witnesses with facts not in evidence.

Respondent concedes that the prosecutor committed misconduct by improperly bolstering officer testimony with "facts" not in evidence.

Brief of Respondent, p. 31. Again the state argues that Mr. Bezhenar was not prejudiced by the prosecutor's misconduct because the jury was properly instructed. Additionally, respondent points out that the improper argument was in response to arguments by defense counsel. Brief of Respondent, p. 30.

An accused person cannot invite or "open the door" to prosecutorial misconduct. *State v. Jones*, 144 Wn. App. 284, 299, 183 P.3d 307 (2008) (Jones II). The state's defense of the prosecutor's improper statements as responses to Mr. Bezhenar's arguments is misplaced.

Likewise, the fact that the jury was properly instructed is not dispositive of the prejudice analysis. The *Jones* court found misconduct based on the prosecutor's improper bolstering of police witness credibility with facts not in evidence. *Jones II*, 144 Wn. App. at 293-94. Despite the lack of objection below (and, presumably, proper jury instructions), the court found that the misconduct had prejudiced the accused because the case turned entirely on witness credibility. *Jones II*, 144 Wn. App. at 300.

Likewise, Mr. Bezhenar's case turned on witness credibility and the prosecutorial misconduct prejudiced his defense. The state's case relied solely on the testimony of three police officers. The prosecutor argued that police witnesses were more believable than the defense witnesses because their jobs were on the line. RP 171. The prosecutor's improper argument invited the jury to find the state's witnesses more credible than the defense witnesses because of their status as police officers. There is a substantial likelihood that the misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by arguing that the state's witnesses were inherently more reliable than Mr. Bezhenar and his mother – the only defense witnesses. *Johnson*, 158 Wn. App. at 686. This prosecutorial misconduct requires reversal of Mr. Bezhenar's conviction. *Id.*

C. The prosecutor committed misconduct by giving a personal opinion of guilt and introducing testimony providing opinions of Mr. Bezhenar's guilt.

A prosecutor commits misconduct by providing a personal opinion of the guilt of the accused. *Glasmann*, 175 Wn.2d at 706. Testimony providing an opinion of guilt is, likewise, improper because it invades the province of the jury. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009); U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22.

The prosecutor made repeated references to Mr. Bezhenar's statements as "threats" and elicited police testimony labeling the statements as "threats." RP 47-49, 69, 81. Respondent argues that "threat" is a commonly-used word and, thus, cannot constitute an improper opinion of guilt. Brief of Respondent, p. 33.

Testimony employing commonly-used words, however, can make up an improper opinion of guilt. The inquiry turns not on the verbiage, but on whether the testimony provides an opinion regarding an ultimate factual issue. *Hudson*, 150 Wn. App. at 656. For example, it is misconduct for a prosecutor to express an opinion that an incident was "robbery" rather than an "altercation" when the defense theory is that no robbery took place. *State v. Henderson*, 100 Wn. App. 794, 804, 998 P.2d 907 (2000).

Whether a statement constitutes a threat is an element of the offense of harassment. RCW 9A.46.020; *State v. Mills*, 154 Wn.2d 1, 9, 109 P.3d 415 (2005). The question of whether Mr. Bezhenar's statements were threats presented the primary disputed issue in the case. The prosecutor's repeated references to "threats" and elicitation of similarly improper opinions from each of the state's witnesses likely affected the jury's verdict. *Glasmann*, 175 Wn.2d at 714. The misconduct violated Mr. Bezhenar's constitutional right to a jury trial. *State v. Fuller*, 169 Wn.

App. 797, 813, 282 P.3d 126 (2012) (FullerI). The state cannot show that this constitutional violation was harmless beyond a reasonable doubt. *Id.*

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by providing a personal opinion of Mr. Bezhenar's guilt and eliciting improper opinion testimony from the state's witnesses.

Glasmann, 175 Wn.2d at 706; *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) *aff'd on other grounds*, 165 Wn.2d 870, 204 P.3d 916 (2009). This misconduct requires reversal of Mr. Bezhenar's conviction. *Glasmann*, 175 Wn.2d at 714.

- D. The prosecutor committed misconduct by injecting Mr. Bezhenar's ethnicity into closing argument.

Mr. Bezhenar relies on the argument in his Opening Brief.

- E. The cumulative effect of the prosecutor's misconduct requires reversal.

The cumulative effect of repeated instances prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *Glasmann*, 175 Wn.2d at 707.

Respondent concedes that the prosecutor made improper arguments minimizing the state's burden of proof and bolstering the credibility of police witnesses. Brief of Respondent, 28, 31. Additionally,

the prosecutor gave an improper opinion of Mr. Bezhenar's guilt, elicited similarly improper opinions from the state's witnesses, and injected Mr. Bezhenar's ethnicity into the proceeding. Even if each instance, standing alone, did not prejudice Mr. Bezhenar, the combined effect was so prejudicial that it could not have been cured by an instruction. *Id.*

The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Bezhenar's conviction. *Glasmann*, 175 Wn.2d at 714.

III. THE STATE'S WITNESSES PROVIDED IMPROPER OPINIONS OF MR. BEZHENAR'S GUILT BY REPEATEDLY CHARACTERIZING HIS STATEMENTS AS "THREATS."

Testimony providing an improper opinion of the guilt violates the right to a jury trial. *Hudson*, 150 Wn. App. at 652; U.S. Const. Amends. VI, XIV; art. I, §§ 21, 22. Each of the witnesses who claimed to remember Mr. Bezhenar's statements to Lowrey classified them as "threats" in their testimony. RP 47-51, 79-80. Respondent claims that the testimony did not provide an improper opinion of guilt because "threat" is a commonly-used word and the jury was instructed regarding the definition of a "true threat."

As noted above, however, the inquiry into whether testimony invades the province of the jury turns on whether it embraces the ultimate issue of guilt, not on the words used. *Hudson*, 150 Wn. App. at 656.

Additionally, while the jury was instructed on the legal concept of a “true threat,” the instruction does not use the term “true threat.” CP 47. Rather, the definition instruction as well as the to-convict instruction for the harassment charge refer only to “threats.” CP 44, 47. Rather than differentiating the legal concept of a true threat from the commonly-used word “threat,” as claimed by Respondent, these instructions likely strengthened the link between the opinion testimony and Mr. Bezhenar’s guilt in the jurors’ minds.

The officers’ characterizations of the Mr. Bezhenar’s statements as “threats” constituted improper opinions of guilt and invaded the exclusive province of the jury. *Id.*; *Sutherby*, 138 Wn. App. at 617. Mr. Bezhenar’s conviction must be reversed. *Id.*

IV. MR. BEZHENAR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Mr. Bezhenar’s counsel unreasonably failed to object to prosecutorial misconduct.

Respondent concedes that Mr. Bezhenar’s attorney provided deficient performance by failing to object to prosecutorial misconduct

trivializing the state's burden of proof and bolstering officer testimony. Brief of Respondent, pp. 36-37. Counsel also provided ineffective assistance by failing to object to the misconduct of providing an improper opinion of Mr. Bezhenar's guilt, eliciting similarly improper opinions from state witnesses, and injecting Mr. Bezhenar's ethnicity into the trial. Respondent argues that the first set of arguments did not prejudice Mr. Bezhenar and that the second set were not improper. Brief of Respondent, pp. 38-39.

Mr. Bezhenar was prejudiced by his counsel's failure to object. . . *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The prosecutor's misconduct – conceded to by the state -- violated Mr. Bezhenar's presumption of innocence and right to a trial by jury. *Johnson*, 158 Wn. App. at 685-86; *Glasmann*, 175 Wn.2d at 706. As noted above, Mr. Bezhenar's case was very close on the issue of whether his statements constituted threats to kill and whether Lowrey was placed in reasonable fear of being killed. The improper arguments minimized the reasonable doubt standard and encouraged the jury to find the state's witnesses more credible because of their status as police officers. There is a substantial likelihood that these acts of prosecutorial misconduct affected the outcome of Mr. Bezhenar's trial. *Glasmann*, 175 Wn.2d at 706.

The prosecutor also committed misconduct by providing and eliciting improper opinions that Mr. Bezhenar's statements were "threats" and by injecting Mr. Bezhenar's ethnicity into the proceeding. *Glasmann*, 175 Wn.2d at 706; *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). As argued above and in the Opening Brief, these improper arguments invaded the exclusive province of the jury and violated Mr. Bezhenar's right to a fair trial. *Glasmann*, 175 Wn.2d at 706; *Monday*, 171 Wn.2d at 676. The prosecutor's misconduct prejudiced Mr. Bezhenar by invading the exclusive province of the jury and encouraging the jury to rely on stereotype rather than the facts of the case. *Id.* Defense counsel had no valid tactical reason for failing to protect his client from the prejudicial effect of this misconduct. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

Mr. Bezhenar's counsel provided ineffective assistance by unreasonably failing to object to prejudicial prosecutorial misconduct. *Hendrickson*, 138 Wn. App. at 833. Ineffective assistance of counsel requires reversal of Mr. Bezhenar's conviction. *Kyllo*, 166 Wn.2d at 871.

B. Mr. Bezhenar's counsel unreasonably failed to object to improper opinion testimony.

Without a valid tactical reason, failure to object constitutes deficient performance. *Hendrickson*, 138 Wn. App. at 833. Defense

counsel did not object at trial to numerous instances of opinion testimony classifying Mr. Bezhenar's statements as "threats." RP 47-51, 79-80. Respondent argues that such objections would have been overruled because the statements were not improper. Brief of Respondent, p. 39.

As outlined above, the state's justifications for the officers' references to Mr. Bezhenar's statements as "threats" – the fact that the term is commonly used and that the jury was instructed on the legal concept of "true threat" – do not undo the fact that the testimony provided an improper opinion under the *Hudson* factors. *Hudson*, 150 Wn. App. at 652.

Counsel's failure to prevent testimony from the state's witnesses on the ultimate issue of guilt prejudiced Mr. Bezhenar. Whether Mr. Bezhenar threatened Officer Lowrey was the primary factual issue for the jury in his case. The officers' improper opinions invaded the exclusive province of the jury. *Id.*

Defense counsel provided ineffective assistance by failing to object to testimony providing an improper opinion of Mr. Bezhenar's guilt. *Hendrickson*, 138 Wn. App. at 833. Mr. Bezhenar's conviction must be reversed. *Kyllo*, 166 Wn.2d at 871.

- C. Mr. Bezhenar's attorney provided ineffective assistance by failing to request a lesser-included instruction for misdemeanor harassment.

Mr. Bezhenar relies on his argument in the Opening Brief.

V. THE COURT ORDERED MR. BEZHENAR TO PAY THE COST OF HIS PUBLIC DEFENDER WITHOUT FIRST DETERMINING THAT HE HAD THE ABILITY TO PAY IN VIOLATION OF HIS RIGHT TO COUNSEL.

A court impermissibly chills an the exercise of the right to counsel by ordering an accused to pay the costs of a public defender without first finding that s/he has the ability to pay. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974) (Fuller II). The court ordered Mr. Bezhenar to pay \$2,100 in fees for his court-appointed attorney without first entering a finding regarding his present or future ability to pay. RP 184-190; CP 9. Respondent argues that the court's lack of a finding does not mean that it did not consider Mr. Bezhenar's ability to pay. Brief of Respondent, pp. 44-45.

The state speculates that the court could have reviewed Mr. Bezhenar's financial declaration when ordering him to pay attorneys fees. Brief of Respondent, p. 45. *Fuller* is clear, however, that a court must actually find that the accused has the present or future ability to pay before ordering the cost of a court-appointed attorney. *Fuller II*, 417 U.S. at 45. The state acknowledges that no such finding was made in this case. Brief of Respondent, p. 44.

The state also argues that the proper time to determine a person's ability to pay legal financial obligations is at the time of collection. Brief of Respondent, p. 45. As argued in Mr. Bezhenar's Opening Brief, the Washington cases establishing that scheme turn *Fuller* on its head and impermissibly chill the right to counsel. *Id.*

The court violated Mr. Bezhenar's right to counsel. Under *Fuller*, it lacked authority to order payment for the cost of court-appointed counsel without first finding that he had the ability to do so. *Fuller II*, 417 U.S. at 53. The court's order for Mr. Bezhenar to pay attorney's fees must be vacated. *Id.*

CONCLUSION

The evidence was insufficient to prove that Mr. Bezhenar made a threat to kill or that Officer Lowrey feared being killed. Because of these failures of proof, Mr. Bezhenar's conviction must be reversed and the case dismissed with prejudice.

In addition, the prosecutor committed misconduct that was flagrant and ill-intentioned. The prosecutor violated Mr. Bezhenar's right to a fair trial by minimizing the state's burden, bolstering the credibility of state witnesses, "testifying" to "facts" outside the record, conveying a personal opinion on Mr. Bezhenar's guilt, introducing improper opinion testimony,

injecting Mr. Bezhenar's ethnicity into the case, and relying on ethnic stereotypes. Mr. Bezhenar was prejudiced by each improper argument.

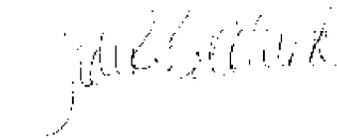
Furthermore, Mr. Bezhenar's counsel provided ineffective assistance by failing to object to the prosecutorial misconduct and improper opinion testimony and failing to propose a jury instruction on the lesser offense of misdemeanor harassment.

Finally, the court violated Mr. Bezhenar's right to counsel by ordering to pay the cost of his court-appointed attorney without first finding that he had the ability to do so.

If the case is not dismissed, Mr. Bezhenar's conviction must be reversed and the case remanded for a new trial. In the alternative, his order to pay the cost of his public defender must be vacated.

Respectfully submitted on October 15, 2013,

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CERTIFICATE OF SERVICE

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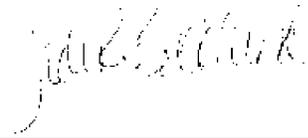
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING **IS** TRUE AND CORRECT.

Signed at Olympia, Washington on October 15, 2013.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

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