

No. 44415-I-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**RUSLAN BEZHENAR,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Did the State not present sufficient evidence to prove beyond a reasonable doubt that Bezhenar committed Harassment – Threat to Kill?
- B. Was the witnesses' use of the word "threat" an improper opinion testimony of Bezhenar's guilt of Harassment – Threat to Kill?
- C. Did the Deputy Prosecutor commit prosecutorial misconduct on several occasions during the trial?
- D. Did Bezhenar receive effective assistance from his trial counsel?
- E. Did the trial court improperly impose the cost of indigent attorney fees?

## II. STATEMENT OF THE CASE

In the late afternoon or early evening hours of July 13, 2013 Centralia Police Department received a call regarding suspicious circumstances at 712 Market Street in Centralia, Washington. RP 21-22. The caller had seen an unknown male climb up a drain spout on the side of the building and enter the building through a back window of a residence. RP 23-24. The building's address was actually 708 West Main Street<sup>1</sup> and is owned by Galina Bezhenar<sup>1</sup> and her husband. RP 90. The City of Centralia had posted the building as uninhabitable because there was no water or electricity

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<sup>1</sup> Galina Bezhenar will be referred to as Galina to avoid confusion, no disrespect is intended.

currently running to the building. RP 24, 27. There was a sign posted on the front door of the building which stated:

This structure has been deemed unfit for habitation per CMC Title 18. Any unauthorized person found within these premises is subject to arrest and prosecution to the full extent of the law. Removal of this sign is a gross misdemeanor and is punishable by a fine of \$5,900 and one year in jail. Centralia Building Department...

CP 29-30. Centralia Police Officers Mike Lowrey, Patricia Finch, David Clary, and Sergeant Stacy Denham all responded to the call.

RP 24. Officer Ramirez, a K-9 officer, was also called out to the scene. RP 24. It was still daylight and the weather was nice. RP 32-33.

Officer Lowrey and Officer Finch were the first officers to arrive at the scene. RP 57. Officer Lowrey spoke to the reporting party and learned that she had not seen anyone exit the building. RP 24-25. Officer Lowrey and Officer Finch set up containment around the building. RP 25, 57. Officer Lowrey attempted to make contact with the person, or persons, inside the building by way of the front door. RP 57. Officer Lowrey began a series of announcements, "This is the police. Come downstairs. We know you're inside. Police. Open the door. Come downstairs. This

building has been posted. You're trespassing. Come downstairs..."

RP 31.

Officer Clary arrived within minutes of Officer Finch and Officer Lowrey. RP 59. Officer Clary climbed the chain link fence at the back of the building in an attempt to get to the back of the building. RP 74. Officer Clary ultimately ended up climbing up onto the roof of the building. RP 74. Officer Clary was able to see the second story, rear of the building, where the male was observed entering the building. RP 74.

Officer Clary saw a woman appear at the window, look out of the window, and then close the window. RP 76. Officer Clary shouted at the woman to come back to the window, stay at the window, and open the window. RP 76. The woman shook her head at Officer Clary. RP 76. Officer Clary identified himself as a police officer, stating, "This is the police. Open the window now." RP 76.

Officer Lowrey continued to announce the police presence very loudly. RP 60-61. Officer Lowrey informed the people in the building that they needed to come out of the building and that the building would be searched by a K-9. RP 60-61.

Eventually two woman, Breanna Carothers and Shannon West, slid out the front door. RP 34-35. The door locked behind the

two woman and the police were still unable to gain access to the building. RP 35. The woman would not tell Officer Lowrey who else was inside the building. RP 35.

Sergeant Denham requested the fire department respond with a ladder truck to allow the police to gain access to the building by the upstairs window. RP 36. The fire department arrived and the ladder was set up. RP 36. Officer Lowrey, Officer Finch and Officer Ramirez, along with K-9 Lobo, climbed the ladder to make the entry into the building. RP 36-37. The officers opened the window and announced their presence. RP 37. Officer Lowrey announced, "Centralia Police Department. You need to come out now. We know you're in there. Centralia Police Department. Come out with your hands up. We know you're in there." RP 37. The officer did not get any response from the people inside the building. RP 37. Officer Lowrey announced that the building would be searched by a K-9. RP 63-64. The announcement finally got a response when Lobo began barking and the people inside the building realized the K-9 was actually on the scene. RP 37.

The officers saw Bezhenar come out of the kitchen area of the apartment. RP 38. According to Officer Lowrey, Bezhenar "was very aggressive verbally, telling me to - - pardon my language - -

get the fuck out of his house, I had no right to be there, I needed to leave, this is bullshit...” RP 38-39.<sup>2</sup> Officer Lowrey instructed Bezhenar to keep his hands up, walk slowly towards Officer Lowrey, and to turn around and get on the ground. RP 39. Bezhenar eventually complied with Officer Lowrey’s commands. RP 39. Darcie Negrete came out from another section of the house and complied with officer’s commands. RP 39-40. Bezhenar was instructed to get up and walk backwards towards the window, which he did. RP 40. Bezhenar was handcuffed by Officer Lowrey. RP 65. Bezhenar refused to come out the window and had to be physically removed out of the apartment, through the window, by Officer Lowrey. RP 41, 65. After being taken out of the window Bezhenar let go of Officer Lowrey and started to fall towards Officer Ramirez. RP 42. Lobo, who is an apprehension dog, reached up and grabbed onto Bezhenar’s arm. RP 42. Officer Ramirez immediately<sup>3</sup> told Lobo to release Bezhenar and Lobo complied. RP 42.

Bezhenar was taken down the ladder and attended to by emergency medical technicians who treated the dog bite on Bezhenar’s arm. RP 46. There was an exchange between

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<sup>2</sup> The State is using Bezhenar’s exact words to demonstrate his demeanor with the police. No disrespect to this Court is intended by the inappropriate language.

<sup>3</sup> Bezhenar in his testimony refutes that Officer Ramirez immediately gave the release command to Lobo. RP 106.

Bezhenar and Officer Lowrey. RP 46-47. Bezhenar told Officer Lowrey that Bezhenar would get Officer Lowrey. RP 46. Officer Lowrey believed Bezhenar was saying he was going to sue Officer Lowrey but Bezhenar made it clear that it was not a monetary issue. RP 46-47. Bezhenar informed Officer Lowrey this was about revenge and Officer Lowrey would be sorry. RP 47. Officer Lowrey warned Bezhenar that he was crossing a line and Officer Lowrey would shoot Bezhenar if he came to Officer Lowrey's house. RP 47. Bezhenar laughed at Officer Lowrey and stated it would not be Bezhenar who showed up at Officer Lowrey's house. RP 47. These threats were different than the run of the mill threats Officer Lowrey has heard over the course of his time as a police officer. RP 47-48. Officer Lowrey took the threats very seriously. RP 47-48.

Bezhenar was charged by information with Count I, Harassment Threat to Kill, and Count II, Trespassing in the First Degree. CP 1-3. The State included a special allegation that the Harassment offense was committed against a law enforcement officer while the officer was performing his official duties. CP 2.

Bezhenar testified during the trial. RP 99. Bezhenar, who used an interpreter for the trial, explained he was sleeping during the incident. RP 99. Bezhenar testified that his parents own the

building and he had his parent's permission to live in the building, and had in fact, been living at the apartment for two years. RP 100. Bezhenar stated he did not know the police were there until he received a phone call from his father. RP 100-01. Bezhenar testified he walked out from the kitchen to find Officer Lowrey and Officer Finch outside the window with their tasers pointed at him. RP 101-02. Bezhenar explained when Officer Lowrey told him to get down on his knees and put his hands behind his back he was shocked and asked why. RP 102. Bezhenar also claimed that Officer Finch tased him and said, "Let's make him a meal." RP 103. Bezhenar also denied threatening Officer Lowrey. RP 108, 115. Bezhenar acknowledged that he did tell Officer Lowrey he was going to pay for this because someone was going to have to pay for the cost of his medical care. RP 107. Bezhenar also testified that Officer Lowrey was acting childish and like a "street punk." RP 107-08.

Galina testified on her son's behalf. RP 88. Galina explained she went down to the building because someone from the police department asked her to come down with her keys to the building. RP 88-89. Galina said Bezhenar was allowed to be in the building. RP 90. Galina testified when she arrived she saw Officer Lowrey

bent over Bezhenar, yelling at him and being very aggressive and mean. RP 91, 97. Galina stated Bezhenar did not threaten the police officer, but could not recall specifically what Bezhenar said to the officer. RP 92-93. There was rebuttal testimony that Galina had not been close enough to Bezhenar to hear anything that was said between Officer Lowrey and Bezhenar. RP 115-17.

The jury found Bezhenar guilty of Count I, Harassment – Threat to Kill, but could not reach a verdict on Count II, Criminal Trespass in the First Degree, and a mistrial was declared for Count II. RP 177-78; CP 60. The jury also found that the Harassment – Threat to Kill was committed against a law enforcement officer per the special verdict form. RP 179; CP 59. Bezhenar was sentenced to an exceptional sentence of nine months. CP 4-16. He timely appeals his conviction. CP 17-30.

The State will supplement the facts as necessary throughout its argument below.

### **III. ARGUMENT**

#### **A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE BEZHENAR COMMITTED HARASSMENT – THREAT TO KILL.**

The State presented sufficient evidence to sustain the trial court's conviction for Harassment – Threat to Kill. The evidence introduced proved Bezenhar threatened to kill Officer Lowrey in the future and Officer Lowrey was placed in reasonable fear that the threat would be carried out.

##### **1. Standard Of Review.**

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

##### **2. There Was Sufficient Evidence Presented To Prove Bezenhar Committed The Crime Of Harassment – Threat to Kill.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant

challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

In a charge of Harassment – Threat to Kill the State must prove that without lawful authority, the person knowingly threatens to kill immediately, or in the future, the person threatened or any

other person. RCW 9A.46.020(2)(b)(ii). Because the harassment statute criminalizes speech, the threat must be a true threat to overcome the protections of the First Amendment. *State v. Tellez*, 141 Wn. App. 479, 482-83, 170 P.3d 75 (2007). “A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or take the life of another person.” *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (internal quotations and citations omitted). The person threatened may be placed in reasonable fear by not only the words of the person threatening but also their conduct. RCW 9A.46.020(1)(b).

In this case the State was required to prove that Bezhenar did knowingly threaten to kill Officer Lowrey, immediately or in the future, and Officer Lowrey was placed in reasonable fear that the threat to kill would be carried out. RCW 9A.46.020(2)(b)(ii); CP 44. Bezhenar argues because he never uttered the words, “I am going to kill you” or “you are dead,” the State did not sufficiently prove he committed the crime Harassment – Threat to Kill. Brief of Appellant 8-9. Bezhenar argues his statements, veiled threats, did not give rise to a reasonable inference that the statements were threats to

kill. Brief of Appellant 9. Bezhenar also argues there was not sufficient evidence presented that Officer Lowrey was placed in reasonable fear that Bezhenar would kill him. Brief of Appellant 10-11.

The testimony the State elicited from Officer Lowrey was sufficient to prove the crime of Harassment – Threat to Kill. The following is the exchange between the deputy prosecutor and Officer Lowrey regarding Bezhenar’s threats:<sup>4</sup>

Q Did you have any further contact with the defendant?

A I did.

Q And where was that contact?

A When we were doing some other stuff there, casework, he was making comments to me stating that he was going to – he was going to get me. He told me he'd see me again, to which I replied, "You said that last time I dealt with you." And he continued making threats to me, telling me that this was different, that he was going to get me.

We hear it a lot on patrol. I hear it quite often that I'm going to sue you or I'm going to get you or I'm going to own your house. I mean, it's a common occurrence. So my reply is only, "Just do me a favor and spell my name right in a lawsuit." You know, I hear it all the time so we kind of let it slide off. But stating that to him, he made it clear that it was not going to be a

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<sup>4</sup> The State is aware that it is block quoting a large passage of the verbatim report of proceedings. The State believes that it is important to read the entire exchange in context and not in brief snippets of testimony.

lawsuit, this did not involve monetary issues, this was going to be dealt with a different way.

Q How did he say that it was going to be dealt with?

A He told me that this is about revenge, this is not a lawsuit, and that I was going to be sorry.

I told him that he was crossing the line and that if he showed up at my house he would be shot on sight. And he laughed and said not to worry, it wouldn't be him, it would be somebody that I didn't know that shows up to my house.

Q What did you take these threats to mean?

A I took them to mean he was planning on doing something harmful to me or my family.

Q Were you in fear that he was going to kill you at some point?

A I was more in fear for my family than me. When you take the job you realize it's a dangerous job. But there's lines that you cross and when you start threatening your family, have a newborn baby, my wife, that's too much. And then going further and even stating -- saying that it's not going to be me, it's going to be somebody you don't know, it just -- I believed it 100 percent, so much so that I called not only my current wife, I called my ex-wife as well just because she still lives halfway local and depending on how you find an address, God forbid you find her address and show up thinking that I'm there and do something to her and my kids up there so...

Q So you thought he was serious? You took these threats seriously?

A Absolutely. I've been threatened, 15 years, probably 3, 400 times minimum, lawsuits, even people saying, "I'm going to -- if I see you off duty I'm going to kick

your rear." They don't make that nice of a statement. But I've been threatened hundreds and hundreds of times, probably three I've taken serious.

Q Was this instance one of them?

A This was one of them.

Q And what was the distinction? How was this different?

A The detail that he was stating, that it was not financial, it was about revenge, stating that he was going to get me, following it up with it would be somebody that I didn't know. If he's talking about lawsuit, why would it need to be somebody I didn't know that came up to me or went to my house? And this was after I said, "If you show up at my house you will be shot, and followed up directly by him stating, "It's not going to be me. It's going to be somebody you don't know." I'm pretty sure he's not there to serve me papers.

RP 46-49. When asked by the deputy prosecutor if he was in fear that Bezhenar was going to kill him Officer Lowrey did not state, no, his answer instead infers yes, but he is more afraid for his family than for himself. RP 47. Officer Lowrey explains how when you become a police officer you realize it is a dangerous job, but placing his family in that type of danger, his wife and newborn child, that scared Officer Lowrey even more. RP 47. Officer Lowrey explained when Bezhenar told Officer Lowrey it would not be Bezhenar showing up at Officer Lowrey's house, and therefore, he would not be shot on sight, that it would be someone Officer

Lowrey did not know, it was that statement that placed Officer Lowrey in reasonable fear Bezhenar would kill him, or at least have someone else kill Officer Lowrey for Bezhenar. RP 47-48. Lowrey stated he believed Bezhenar's threat 100 percent. RP 47. Officer Lowrey took the threat so seriously he called his ex-wife because what if Bezhenar found her address and thought Officer Lowrey was up there. RP 48. Officer Lowrey clearly believed that Bezhenar was capable of hunting him down and killing him. RP 46-48.

The jury, alone, gets to determine credibility. *Myers*, 133 Wn.2d at 38. Reviewing courts defer to the jury for determination in credibility because the jury witnessed the testimony first hand, the jury saw the demeanor or the witnesses as they testified, and it is the jury who resolves conflicting testimony. *State v. McCreven*, 170 Wn. App. 444, 477, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The jury saw Officer Lowrey's demeanor when he testified. Officer Lowrey could not even finish his sentence when he responded about what could happen if Bezhenar went looking for Officer Lowrey to kill him and found Officer Lowrey's family instead, "God forbid you find her [his ex-wife] address and show up thinking that I am there and do something to her and my kids up there so..." RP 48. Officer Lowrey

had a reasonable fear that Bezhenar, or someone in his place, would carry out Bezhenar's threat to kill Officer Lowrey.

Therefore, when this Court views the evidence in the light most favorable to the State, any rational jury could find beyond a reasonable doubt that Bezhenar was threatening to kill Officer Lowrey and that threat was a true threat. This Court should affirm Bezhenar's conviction for Harassment – Threat to Kill.

**B. THE WITNESSES' USE OF THE WORD THREAT WAS PERMISSIBLE. IF THE USE OF THE WORD THREAT WAS IN ERROR, BEZHENAR CANNOT RAISE FOR THE FIRST TIME ON APPEAL BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.**

Bezhenar argues, for the first time on appeal, that police officers' testimony using the word threats to describe the statements Bezhenar made to Officer Lowrey was improper opinion testimony and requires this Court to reverse Bezhenar's conviction. Brief of Appellant 23-25. It was permissible for the witnesses to use the word threat. If this Court were to find the use of word threat is a constitutional error, the alleged error is not manifest and therefore, Bezhenar cannot raise this issue for the first time on appeal.

**1. The Officers' Use Of The Word "Threat" Was Not An Impermissible Opinion Of The Ultimate Issue, Whether Bezhenar Was Guilty Of Harassment – Threat To Kill.**

Generally a witness may not give an opinion, while testifying, of the veracity or guilt of a defendant. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). This rule applies to both lay and expert witnesses. *King*, 167 Wn.2d at 331. The reason for this rule is "such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." *Id.* (internal quotations and citations omitted). A law enforcement officer's testimony can carry a "special aura of reliability" and therefore may be especially prejudicial to the defendant. *Id.* (internal quotations and citations omitted). The reviewing court will consider a number of factors and circumstances to determine if there was impermissible opinion testimony, "(1) including the type of witnesses involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *Id.* at 332-33.

Bezhenar argues Officer Lowrey and Officer Clary impermissibly characterized Bezhenar's statements to Officer Lowrey as threats "throughout their testimony." Brief of Appellant 24. Bezhenar alleges that because he was charged with

Harassment – Threat to Kill that the use of the word “threat,” an element of the crime, is an impermissible opinion of Bezhenar’s guilt. Brief of Appellant 24. The use of the common word “threat” does not constitute an error and is not an impermissible opinion by the officers of Bezhenar’s guilt.

First to state that the word “threat” was used throughout the testimony of Officer Lowrey and Officer Clary is a gross exaggeration. See RP 20-51, 69-82. Officer Lowrey only stated once during the State’s direct examination that Bezhenar’s statements were a threat. RP 46. On two other occasions Officer Lowrey testifies about being threatened on the job and he also discussed that it crosses the line when a person threatens his family. RP 47-48. Officer Clary characterized Bezhenar’s statements as threats three times during direct examination, two of those were Officer Clary characterizing the statements as “veiled threats.” RP 79-80. Officer Clary used the word threat during cross-examination in response to the question, “How did you interpret the threats?” RP 83. The word threat was not prolifically used throughout the officers’ testimony.

The use of the word “threat,” a commonly used word in the English language, by the officers was not an improper opinion of

Bezhenar's guilty. Bezhenar argues that "threat" is an element of the crime of Harassment and therefore use of the word is an improper opinion of Bezhenar's guilt. Brief of Appellant 23-24. The State was required to prove Bezhenar threatened to kill Officer Lowrey. RCW 9A.46.020; CP 1-3, 44. In a harassment case the State has to prove that a threat, as defined in WPIC 2.24, was made. The definition of threat in WPIC 2.24, commonly referred to as a true threat, is what the jury was instructed upon and is an element of the crime of harassment. See CP 44, 47. This is in contrast to the everyday common use of the word "threat." The officers did not use the word threat to testify that the statements made by Bezhenar, in a context or under such circumstances where a reasonable person, in Bezhenar's position, would foresee that Bezhenar's statements would be interpreted as a serious expression of intention to carry out the threat rather than something Bezhenar said in jest or idle talk. WPIC 2.24; WPIC 36.07.01; WPIC 36.07.02; RP 46-48, 79, 81, 83; CP 47.

While the testimony did come from police officers, the specific nature of the testimony is not impermissible. Bezhenar's defense was general denial. Bezhenar testified that, while he said you are going to pay, it was in reference to a monetary issue

regarding the cost of treating his injuries and he denied making any other threatening statements to Officer Lowrey. RP 107, 115. Bezhenar presented testimony from his mother, Galina, to support his denial that he made threats to Officer Lowrey. RP 92. The evidence, as testified by Officer Lowrey, regarding what Bezhenar said to Officer Lowrey is outlined above in the sufficiency of evidence argument. Looking at all of these factors, the officers' fleeting use of the word "threat," a common word in the English language, is not an impermissible opinion of Bezhenar's guilt of the crime of Harassment – Threat to Kill. There was no error and testimony was permissible.

**2. If The Testimony Was Impermissible It Is Not A Manifest Constitutional Error And Therefore Bezhenar May Not Raise The Issue For the First Time On Appeal.**

The State is not conceding the use of the word threat was in error. Arguendo, Bezhenar did not object when the officers used the word threat to describe his statements to Officer Lowrey. RP 46-48, 79, 81, 83. Bezhenar must show that the alleged error is a manifest constitutional error to raise it for the first time in his appeal.

**a. Standard of review**

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

**b. Bezhenar did not object to the witnesses' use of the word threat and cannot raise the issue for the first time on appeal because the alleged error is not a manifest constitutional error.**

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (citations omitted).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must

be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

Admission of opinion testimony, without objection, from a witness regarding the guilt of the defendant is not automatically reviewable as a manifest constitutional error. *State v. Blake*, 172 Wn. App. 515, 530, 298 P.3d 769 (2012). If the testimony is improper opinion testimony then it must be determined if the defendant was prejudiced by the testimony. *O'Hara* 167 Wn.2d at 99. "Important to determination of whether opinion testimony prejudices the defendant is whether the jury was properly

instructed.” *Blake*, 172 Wn. App. at 531. If the jury is properly instructed this eliminates the possibility of prejudice. *Id.*

The alleged error does encompass a constitutional right, the right to a trial by jury, and therefore the only question is whether the alleged error is manifest. U.S. Const. amend. VI, XIV; Const. art. I, § 21, 22; *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). Bezhenar did not object to the use of the word threat by the officers. RP 46-48, 79, 81, 83. Bezhenar has not shown that he was prejudiced by the officers’ use of the word threat.

Bezhenar simply states, “Testimony providing an ‘explicit or nearly explicit’ opinion of guilt of the accused creates a manifest error affecting a constitutional right.” Brief of Appellant 22. (citing to *King* at 332). Bezhenar does not explain or argue how he was prejudiced by the alleged improper statements, likely because he uses this conclusory statement that the error is a manifest error. But, *King* actually states, “[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not *automatically* reviewable as a ‘manifest constitutional error.’ But, ‘an explicit or nearly explicit’ opinion on the defendant’s guilt or a victim’s credibility **can** constitute manifest error.” *King* at 332 (italics original, bold emphasis added). The distinction between Appellant’s

version and the actual wording in *King* is important. There must be a showing that the error is manifest, that Bezhenar was actually prejudiced by the error, and Bezhenar has failed to meet this burden. There is no prejudice, and therefore, the error is not manifest and cannot be raised for the first time on appeal.

**C. THE STATE CONCEDES THAT THE DEPUTY PROSECUTOR DID COMMIT PROSECUTORIAL MISCONDUCT IN TWO INSTANCES, MINIMIZING THE STATE'S BURDEN OF PROOF AND BOLSTERING THE OFFICERS' TESTIMONY. THIS MISCONDUCT WAS HARMLESS AND NOT PREJUDICIAL, THEREFORE BEZHENAR IS NOT ENTITLED TO REVERSAL OF HIS CONVICITON.**

Bezhenar argues that the deputy prosecutor committed prosecutorial misconduct<sup>5</sup> on several occasions throughout the trial. Brief of Appellant 11-22. The State concedes that the deputy prosecutor did commit prosecutorial misconduct in two instances but argues the other conduct at issue was not prosecutorial misconduct. Bezhenar has not made the required showing that he was prejudiced by the misconduct and his conviction should be affirmed.

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<sup>5</sup> "Prosecutorial misconduct" is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct. *State v. Fisher*, 165 Wn. 2d 727, 740, fn1, 202 P.3d 937 (2009).

### **1. Standard Of Review.**

The standard for review of claims of prosecutorial misconduct is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

### **2. Bezhenar Has Not Shown That He Was Prejudiced By The Deputy Prosecutor Minimization Of The Burden Of Proof.**

A claim of prosecutorial misconduct is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury.” *State v. Thorgerson*, 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

To prove prosecutorial misconduct, it is the defendant’s burden to show that the deputy prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692,

726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn. 2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007(1998).

A prosecutor commits prosecutorial misconduct when he or she shifts the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). Misconduct is committed when a prosecutor trivializes the reasonable doubt standard by using an improper analogy. *State v. Fuller*, 169 Wn. App. 797, 825-26, 282 P.3d 126 (2012). This is particularly true when the analogy likens the beyond a reasonable doubt standard to every day decisions or quantifies the amount necessary to overcome beyond a reasonable doubt. *Fuller*, 169 Wn. App. at 825-26.

Bezhenar argues the deputy prosecutor trivialized the burden of proof two different times. First, when the deputy prosecutor stated,

If you feel it in your gut today, if you feel it in your gut next week that he's guilty, then you are satisfied beyond a reasonable doubt. If you think he did it then you are satisfied beyond a reasonable doubt.

Brief of Appellant 13, citing RP 163. The second alleged instance of misconduct is when the deputy prosecutor used the following example:

Now, for an example, let's say I'm thinking of a city. You have no idea what city I'm thinking of right now. There's no way you could know. But I'm going to give you clues and at the end you're going to be satisfied beyond a beyond a reasonable doubt what city I'm thinking of.

Let's say it's a city by a body of water. And I apologize for that not being totally visible. Well, here are a few possibilities: We've got Boston, we've got Chicago, we've got Detroit, and we've got Seattle. But there's no way you can know what city I'm thinking of at this point. Not enough information.

Well, here's another clue. I'm not thinking of a huge city. So what's left? Not Chicago, Chicago is -- it's immense, so that's gone. So there's only three possibilities, Detroit, Boston, or Seattle.

The city I'm thinking of is not in the Midwest. What does that mean? There goes Detroit. But you're still not sure. You have two possibilities. It could be either Boston or Seattle. Here's the final clue. It doesn't snow as much in the city I'm thinking about. What's the answer? It's Seattle. You know that beyond a

reasonable doubt that that's what -- that's the city I'm thinking of, done.

Brief of Appellant 14, citing RP 163-64.

The State concedes that both examples trivialize the burden of proof and were improper. The first statement attempts to quantify the level necessary to find the defendant guilty beyond a reasonable doubt and also tells the jury to convict if they “think he did it.” The second statement by the deputy prosecutor equates reasonable doubt with a guessing game. While this approach has not been found to be misconduct in any published opinion that the State could locate, the State cannot in good conscious argue that such a tactic does not trivialize the burden of proof.<sup>6</sup> The question now becomes, because there was no objection, was the conduct so flagrant and ill-intentioned that even if there had been a neutralizing instruction to the jury the resulting prejudice endures? *Thorgerson*, 152 Wn.2d at 443. Bezhenar has not met the requisite showing that he was prejudiced by the deputy prosecutor’s improper statements.

The question then becomes, when evaluating the entire record, “is there a substantial likelihood that the prosecutor’s

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<sup>6</sup> Bezhenar cites to a portion of *State v. Jones*, 163 Wn. App. 354, 266 P.3d 866 (2011), *review denied* 173 Wn.2d 1009, 268 P.3d 941 (2012) that is unpublished. The State is sure this was an inadvertent error. The prosecutorial misconduct section of *Jones* is all unreported, but the State does acknowledge that the game show analogy would be similar to the argument made by the deputy prosecutor in this case.

misconduct affected the jury verdict, thereby denying the defendant a fair trial”? *State v. Davenport*, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984). The context of the record includes the instructions that are given to the jury and evidence addressed in the argument. *Monday*, 171 Wn.2d at 675.

Bezhenar was not prejudiced by the deputy prosecutor’s comments because there is not a substantial likelihood that the comments affected the outcome of the trial. The trial court properly instructed the jury. CP 36-58. The jury had the proper reasonable doubt instruction. WPIC 4.01; CP 40. The jury was unable to reach a verdict for Count II, Criminal Trespass in the First Degree. CP 60. The evidence in the case, as outlined above, was sufficient for any jury to convict Bezhenar of Harassment – Threat to Kill. Bezhenar fails to explain to this court how he was prejudiced by the deputy prosecutor’s misconduct. See Brief of Appellant 12-15. There is not a substantial likelihood that the deputy prosecutor’s misconduct affected the outcome of the jury verdict. This court should affirm Bezhenar’s conviction.

**3. The Deputy Prosecutor Impermissibly Bolstered The Testimony Of The Officers With Facts That Were Not Admitted Into Evidence, But Bezhenar Was Not Prejudiced By The Deputy Prosecutor's Misconduct.**

It is prosecutorial misconduct for a prosecutor to reference to evidence outside the record. *Fisher*, 165 Wn. 2d at 747 (citation omitted). The reviewing court is not required to reverse for such misconduct when the defendant's trial counsel failed to request a curative instruction. *Id.* (citation omitted). "[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

Jurors are instructed that they must decide a case based upon the evidence that was presented at trial and accept the law as given in the jury instructions. WPIC 1.02. Jurors are also instructed that a lawyer's remarks, arguments or statements are not evidence, the law is contained in the instructions and the jury must disregard any statement, argument or remark by the lawyer that is not

supported by the law in the instructions or the evidence. WPIC 1.02. A jury is presumed to follow the jury instructions. *State v. Yates*, 161 Wn.2d 714, 163, 168 P.3d 359 (2007) (citations omitted).

Bezhenar argues that the deputy prosecutor committed prosecutorial misconduct by bolstering the officers' testimony with facts not in evidence. Brief of Appellant 15. A prosecutor is not allowed to improperly bolster the credibility of a witness' testimony. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). "[I]t is generally improper for prosecutors to bolster a police witness' good character even if the record supports such argument." *Jones*, 144 Wn. App. at 293.

The State concedes that the deputy prosecutor did improperly bolster the officers' testimony by using facts not in evidence. The deputy prosecutor impermissibly said,

Honestly, think about credibility. Who has more to lose? The officers? I mean, they're going to put their career on the line for conspiring to make all this stuff up?

RP 171. First, there was no evidence presented about what consequences the officers would face if they made up testimony. See RP. Second, this statement improperly bolsters the officers' credibility by telling the jury that the officers would not lie because

their failure to tell the truth would have professional repercussions beyond this trial.

Bezhenar failed to object to the deputy prosecutor's statements. A curative instruction and an admonishment to the jury to disregard the prosecutor's argument would have sufficiently cured the possible resulting prejudice incurred by the improper statements. Because this prejudice could have been cured had a timely objection been raised, Bezhenar waived his right to raise the issue for the first time on appeal. Further, relying in part on the State's argument above, there is not a substantial likelihood that the deputy prosecutor's misconduct affected the outcome of the jury verdict.

**4. The Deputy Prosecutor Did Not Give A Personal Opinion Of Bezhenar's Guilt, Nor Did The Deputy Prosecutor Elicit Testimony From Witnesses Which Improperly Opined Bezhenar's Guilt.**

A prosecutor may not express an individual opinion regarding the guilt of the defendant, independent of the evidence admitted. *In re Glassman*, 175 Wn.2d 696, 679, 286 P.3d 673 (2012). Bezhenar argues that the deputy prosecutor committed misconduct by personally expressing to the jury an opinion regarding Bezhenar's guilt by characterizing Bezhenar's statements to Officer Lowrey as threats. Brief of Appellant 17-19. Bezhenar

also argues the deputy prosecutor committed misconduct by eliciting testimony from the officers identifying Bezhenar's statements to Officer Lowrey as threats. Brief of Appellant 18-19. Bezhenar argues this was an improper opinion regarding his guilt because the jury had to decide did he threaten to kill Officer Lowrey to find him guilty of Harassment – Threat to Kill. Brief of Appellant 17-19.

There was no prosecutorial misconduct committed by the deputy prosecutor's use of the word "threat" nor did the elicited testimony from the witnesses improperly ask the officers' to opine Bezhenar's guilt. As argued above, the use of the word "threat," a commonly used word in the English language, did not improperly convey to the jury that the deputy prosecutor believed Bezhenar was guilty of Harassment – Threat to Kill. Nor did eliciting questions, asking the witnesses about the "threat," improperly elicit opinions of Bezhenar's guilt. The State relies on its argument above, that the use of "threat" is not an improper opinion testimony, and therefore, Bezhenar cannot show there was any error, and if there was an error, it was waived, because there was no prejudice incurred as a result of the use of the word "threat."

## **5. The Deputy Prosecutor Did Not Inject Ethnicity Into His Closing Argument.**

Bezhenar argues to this Court that the deputy prosecutor improperly invoked ethnic prejudice, against recent Eastern European immigrants, by using a mobster reference to discuss what a veiled threat was. Brief of Appellant, 19-21. Bezhenar's argument is reaching at best and argues facts that are not in evidence. There was no direct evidence that Mr. Bezhenar is an ethnic Russian.<sup>7</sup> See Brief of Appellant 20. It can be inferred that Bezhenar's mother came from a Russian speaking country because she relied upon the services of a Russian speaking interpreter while she testified at the trial. RP 85-86. The name Bezhenar does not automatically alert a person that Bezhenar is an ethnic Russian. The State could also find no evidence in the record that Bezhenar spoke with a Russian accent. See RP.

The deputy prosecutor used an example of a veiled threat to illustrate to the jury that just because a person does not come out and state, "I'm going to kill you" it does not mean the person is not threatening to kill you. RP 158. The deputy prosecutor stated,

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<sup>7</sup> The State is unsure what Bezhenar means by an "ethnic Russian." Is Bezhenar asserting that he recently immigrated from Russia? Or is Bezhenar asserting that his cultural heritage is Russian? There is no evidence of either apart from his mother speaking Russian.

But the bottom line is that he was threatening to kill Officer Lowrey. If you - - I don't know if you watch mobster movies, but when someone says, "Listen, you don't do this contract you'll be sleeping with the fishes," okay, he didn't say I'm going to killing [sic] you if you don't do this but you all know what was meant.

RP 158. This statement does not invoke the type of stereotyping and prejudice that the prosecutor improperly used in *State v. Monday*, 171 Wn.2d at 678-79. In *Monday* the deputy prosecutor made statements such as, "black folk don't testify against black folk", called the police, "the po-leese", and called to the jury's attention that the witness was African American. *Monday*, 171 Wn.2d at 676-79.

A prosecutor may not appeal to the passion and prejudice of the jury, and may not use ethnic stereotypes (or other testimony) to invoke ethnic prejudices. *Id.* at 676. The Supreme Court found such behavior to be prosecutorial misconduct. *Id.* When the deputy prosecutor in Bezhenar's case used his sleeping with the fishes example he did not mention race, suggest the phrase was used by a particular ethnicity, or suggest that certain recent immigrants of a particular ethnic group are more prone to be involved in mob activity. See RP 157-59. The prosecutor was merely using an example from the movies he believed people could relate to in an

attempt to convey what a veiled threat is. There was no misconduct on the part of the deputy prosecutor for using his mobster example.

#### **6. There Is No Cumulative Error Warranting Reversal.**

The doctrine of cumulative error applies in situations where there are a number of trial errors, which standing alone may not be sufficient justification for a reversal of the case, but when those errors are combined the defendant has been denied a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted).

The only errors that occurred are the two that the State already conceded above. The other allegations of prosecutorial misconduct are not founded. The two errors conceded to above, even combined, did not deny Bezhenar a fair trial. Therefore, the cumulative error doctrine does not apply. This Court should find no cumulative error and affirm the conviction.

#### **D. BEZHENAR RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.**

Bezhenar's attorney provided competent and effective legal counsel throughout the course of his representation.

Bezhenar's assertion that his attorney was ineffective is false. The State concedes that Bezhenar's attorney's performance

was deficient in regards to failing to object to the prosecutor's bolstering of the officers' testimony and the prosecutor's trivialization of the burden of proof. Bezhenar's attorney was not deficient in any other areas of his representation of Bezhenar. Bezhenar cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

### **1. Standard Of Review.**

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *McFarland*, 127 Wn.2d at 335 (citations omitted).

### **2. Bezhenar's Attorney Was Not Ineffective During His Representation Of Bezhenar Throughout The Jury Trial.**

To prevail on an ineffective assistance of counsel claim Bezhenar must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if

counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

**a. Bezhenar's attorney was deficient but not ineffective for failing to object to prosecutorial misconduct.**

The State is only conceding that Bezhenar's attorney was deficient for failing to object to the misconduct the State conceded to above, the trivializing of the burden of proof and the bolstering of the officers' testimony. The State maintains that the other alleged

acts of misconduct were not misconduct and therefore, no objection would be necessary or sustained if it was raised.

An attorney can be deficient and not be ineffective because Bezhenar must have suffered prejudice from his attorney's deficient performance for it to be ineffective. *Horton*, 116 Wn. App. at 921. As argued above, the outcome of the trial was not affected by the prosecutor's acts of misconduct. Bezhenar must show that but for his attorney's failure to object to the trivialization of the burden of proof and the bolstering of the officers' testimony the outcome of the trial would have been different. See *Id.* at 921-22. Bezhenar has not made such a showing and his ineffective assistance of counsel argument fails.

**b. Bezhenar's attorney did not unreasonably fail to object to improper witness testimony.**

As argued above, the officers' use of the word "threat" was not impermissible opinion testimony. It is not ineffective to fail to object to testimony that is permissible and relevant. An objection would have done nothing to change the outcome of the trial because it would not have been sustained. Bezhenar's attorney was not ineffective when he failed to object to Officer Lowrey and Officer Clary's use of the word "threat."

**c. Bezhenar's attorney was not ineffective for failing to request a lesser-included instruction for the non-felony harassment.**

In a trial setting, if an attorney's conduct can be characterized as legitimate tactics or trial strategy the attorney's performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If an attorney's actions are trial tactics or the theory of the case the reviewing court will not find ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33. Because there is a strong presumption that an attorney's performance in his or her representation of the client was reasonable, "[t]o rebut this presumption the defendant bears the burden of establishing the absence of any *conceivable* legitimate tactic explaining counsel's performance." *Id.* at 42. *Grier* goes on to state, "Although risky, an all or nothing approach was at least conceivably a legitimate trial strategy to secure an acquittal." *Id.*

Either party in a criminal action, the defense or the prosecution, has the right to request the jury be instructed on a lesser included offense or an inferior degree offense. RCW 10.61.003; RCW 10.61.006; *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). This right is established by statute and case but it is not absolute. *Gamble*, 154 Wn.2d at 462-63. The party

seeking the inclusion of an instruction on a lesser included or inferior degree offense must satisfy a factual and legal inquiry by the trial court regarding whether the inclusion of such an instruction is proper. *Id.* at 463.

While there is no doubt that Harassment, as defined in RCW 9A.46.020(1) is a lesser included offense of Harassment – Threat to Kill as defined in RCW 9A.46.020(2)(b)(ii). In Bezhenar’s case it was a legitimate trial tactic to not request the lesser included offense of the gross misdemeanor harassment. This is clear at the close of evidence when Bezhenar’s attorney argues a motion to dismiss for lack of evidence proving Bezhenar actually threatened to kill Officer Lowrey. RP 129. The tactic is even clearer when reviewing the attorney’s closing argument. RP 167-69.

And you might say that based on the testimony of the officers that Mr. Bezhenar behaved inappropriately when discussing things with Officer Lowrey. You might even say that he threatened him, which could be a harassment charge. But your duty here today is to decide whether each of the elements of the specific crime he’s charged with have been proven beyond a reasonable doubt. And that specific crime, a more serious crime, harassment-threat to kill, that’s the charge in count one you will be deciding today.

RP 167. Bezhenar’s attorney goes on, reminding the attorney that no one testified that Bezhenar threatened to kill Officer Lowrey. RP 168. Bezhenar’s attorney gives multiple examples of what a threat

to kill would be and how nothing of the sort was testified to during the trial. RP 168. Bezhenar's attorney states, "Again, as to count one, there has been no evidence presented as to one specific element (threat to kill). Therefore, you cannot convict and I'm asking you to find a verdict of not guilty on that case." RP 169.

It was completely reasonable, given the testimony in which not one of the officer uttered the words, "Bezhenar threatened to kill Officer Lowrey" for Bezhenar's attorney to take an all or nothing approach. "That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." *Grier*, 171 Wn.2d at 43. Because it was a reasonable trial tactic, Bezhenar has not made the required showing that his attorney's performance was deficient and his ineffective assistance claim fails. This Court should affirm Bezhenar's conviction.

**E. BEZHENAR CANNOT RAISE FOR THE FIRST TIME ON APPEAL THE SENTENCING COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.**

Bezhenar argues, for the first time on appeal, that the sentencing court impermissibly assessed the cost of attorney fees without proper findings of his ability to pay. Brief of Appellant 36-40. The alleged error is not a manifest constitutional error and

therefore, Bezhenar cannot raise this issue for the first time on appeal.

### **1. Standard Of Review**

A claim of a manifest constitutional error is reviewed de novo. *Edwards*, 169 Wn. App. at 566.

### **2. Bezhenar Did Not Object To The Imposition Of Attorney Fees And Cannot Raise The Issue For The First Time On Appeal Because The Alleged Error Is Not A Manifest Constitutional Error.**

The Washington State Supreme Court determined that the imposition of legal financial obligations alone is not enough to implicate constitutional concerns. *State v. Curry*, 118 Wn.2d 911, 917 n.3, 829 P.2d 166 (1992). A defendant's failure to object at his sentencing hearing to the court's finding that the defendant has the current or likely future ability to pay legal financial obligations can preclude appellate review of the sufficiency of the evidence that supports the finding. *State v. Blazina*, 171 Wn. App. 906, 911, 301 P.3d 492 (2013).

There was no objection to the imposition of legal financial obligations at the sentencing hearing. RP 184-87. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may

refuse to review any claim of error not raised in the trial court); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal).

The sentencing court did not make an affirmative finding that Bezhenar had the present or future ability to pay. CP 6. The boiler plate language of the judgment and sentence does state,

The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 6. Below this statement are two potential check boxes, neither of which is checked. CP 6. While there was not an oral ruling regarding the above statement, it does not mean that the sentencing court did not consider the items listed based upon its knowledge of the defendant and his reason for indigency. Bezhenar was 33 years old when he was sentenced to nine months. CP 4, 7.

There is nothing in the record that would support Bezhenar's inability in the future to make payments on his legal financial obligations.

Moreover, even though the affirmative finding was not made in this case, because the determination that the defendant either has or will have the ability to pay during initial imposition of court costs at sentencing is clearly somewhat "speculative," the time to examine a defendant's ability to pay is when the government seeks to collect the obligation. *State v. Crook* 146 Wn. App. 24, 27, 189 P.3d 811, *review denied* 165 Wn.2d 1044, 205 P.3d 133 (2008); *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009). Another reason to refuse to review the issue at this time is that the superior courts often keep the financial declaration (reviewed at the time public counsel is appointed) under seal and not accessible to the prosecutor. This type of documentation, as stated above, could have been what the sentencing court considered in this case.

The State notes that an appellant making this claim should provide a fair review of the record, i.e. the transcript of the hearing at which public counsel is appointed (at which time the court inquired into a defendant's employment and assets) and the

financial declaration form, if any. Bezhenar's first appearance was July 16, 2012 at which time counsel was appointed. Supp. CP PA.<sup>8</sup> This hearing has not been transcribed.

The alleged error is not of constitutional magnitude. Even, if this Court finds the error alleged by Bezhenar is an error of constitutional magnitude, the error is not manifest because there is not a sufficient record for this Court to review the merits of the alleged error. *O'Hara*, 167 Wn.2d at 99; *McFarland*, 127 Wn.2d at 33. Under RAP 2.5(a) Bezhenar cannot raise the imposition of legal financial obligations for the first time on appeal and this Court should affirm the sentencing court's imposition of legal financial obligations.

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<sup>8</sup> The State will file supplemental Clerk's papers designating the Clerk's minutes from the preliminary appearance hearing.

**IV. CONCLUSION**

For the foregoing reasons, this court should affirm Bezhenar's conviction.

RESPECTFULLY submitted this 27<sup>th</sup> day of September, 2013.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

# LEWIS COUNTY PROSECUTOR

## September 27, 2013 - 3:51 PM

### Transmittal Letter

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Court of Appeals Case Number: 44415-1

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