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

STATE OF WASHINGTON,

Respondent,

v.

KALI ADELBAI ETPISON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01827-18

BRIEF OF RESPONDENT

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SERVICE	<p>Peter B. Tiller Po Box 58 Centralia, Wa 98531-0058 Email: ptiller@tillerlaw.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 2, 2018, Port Orchard, WA _____ Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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COUNTERSTATEMENT OF THE ISSUES

1. No ER 404(b) evidence was offered or admitted in the case.
2. Whether Etpison's knowing, intelligent, and voluntary waiver of his privilege to be tried by 12 jurors (twice) waives the issue of juror misconduct that resulted in an 11 person jury?
3. Whether the trial court properly excluded testimony about the defendant's military career?
4. Whether sufficient evidence supports the conviction for witness intimidation?

I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kali Adelbai Etpison was initially charged by information filed in Kitsap County Superior Court with third degree assault, domestic violence (DV) and two counts of fourth degree assault, DV. CP 1-3. Later, a first amended information charged third degree assault, DV, two counts of fourth degree assault, DV, third degree malicious mischief, DV, obstructing a law enforcement officer, witness intimidation, DV, and misdemeanor harassment, DV. CP 82-86. A second amended information charged all the same crimes but added fourth degree assault to count I (third degree assault) in the alternative. CP 93. Count I was charged with a date-range of November 21, 2017 to November 28, 2017; the other crimes were alleged to have occurred on November 29 or November 30. CP 92-

Pretrial, it was established that Etpison was military reserve. 1RP 7. The defense conceded that Etpison would not wear a uniform to court. Id. The state moved in limine to exclude testimony of Etpison's military honors or accomplishments. CP27 (motion #13). During hearing, the prosecution asserted that it was intended that all reference to his military service be excluded. 1RP 12. The court heard argument on the issue of reference to Etpison's military career. 1RP 11-20. The trial court reserved ruling, asking the parties to provide additional authority. 1RP 20-21.

The next day, the defense had no further argument on the military issue. 2RP 37. The trial court ruled that the defense was "restricted" in presenting evidence of Etpison's military career. 2RP 37. The trial court ruled that such evidence is irrelevant, having nothing to do with the incident in question. Id.

When the state rested (5RP 672), the defense moved to dismiss the third degree assault allegation in count I. 5RP 673. The trial court granted the motion. 5RP 676. The trial court ruled that count I would be given to the jury as forth degree assault only. 5RP 677.

After closing argument, the trial court received a jury note that said

It came to our attention that one of the jurors looked at the court docket to see what charges he (the defendant) was being charged with. Is that a problem for us or can we proceed it was during jury selection and it was shared he was still in jail.

CP 150. The presiding juror was asked into court and was questioned. 7RP 909. The presiding juror added to the statement in the note that the juror who looked up the information said that she thought Etpison had been in jail since he was arrested. 7RP 910. Apparently, most of the jurors did not think this information mattered but one had an issue with the situation. Id. The length of time Etpison sat in jail mattered to the one juror. 7RP 911.

The juror having the issue was asked into court. 7RP 917. The juror was asked whether she could put aside the external information and decide the case solely on the evidence received in court. 7RP 918. The answer was no; the juror felt that the external information made a difference to her. 7RP 918-19. The court and the parties agreed to release that juror. 7RP 928.

The juror who looked up the information was asked into court. 7RP 922. She said that she looked up the charges after the jury was chosen and she was trying to refresh her memory about the charges. 7RP 923. She had found out about the charges on the jail website. 7RP 925. She said that the information received, charges and custody status, would have no impact on her decision of the case. 7RP 927.

As the issue progressed, the defense opined that since excusing the affected juror and the offending juror would leave the jury at 11 (10 plus recalling the excused alternate), there should likely be a mistrial. 7RP 932.

The trial court asked the parties if there was agreement as to a mistrial. *Id.* The state agreed that a mistrial seemed to be indicated (“I think we probably just are” starting over). *Id.*

But the defense was not in agreement. The defense asked that the offending juror and the affected juror be removed. 7RP 934. After consultation with Etpison, defense counsel agreed to proceed with 11 jurors. *Id.* The offending juror was released. 7RP 937. The trial court addressed Etpison directly, asking “It is my understanding that you specifically at this point waiving your right to a 12-jury trial and you are willing to with the decision of 11; is that correct?” 7RP 940. Etpison replied “Yes.” *Id.*

The trial court and the parties then spoke to each remaining juror in turn. 7RP 941-961. Each remaining juror said the external information would have no effect on their deliberations, each would decide the case on the evidence received in court, and each understood that Etpison was at that point still presumed to be innocent. *Id.* The remaining jurors were further instructed to ignore the external information. 7RP 962-63.

After that, the defense reaffirmed its willingness to go forward. 7RP 964. The trial court again directly spoke to Etpison and advised him of his right to a 12 person jury and inquired whether he wanted to proceed with less than 12 jurors. 7RP 965. Etpison answered “Yes.” *Id.* The state concurred with proceeding with 11 jurors. 7RP 966.

Etpison was convicted of fourth degree assault on counts I, and acquitted of fourth degree assault on counts II and III. CP 188. He was also convicted of third degree malicious mischief, obstructing a law enforcement officer, intimidating a witness, and harassment. CP 189. On counts I, IV, VI, and VII, the jury gave affirmative answers to the domestic violence special interrogatories. CP 190-93.

Etpison was sentenced to 15 months on the felony intimidation count with the remaining gross misdemeanor sentences concurrent. CP 207-08. Etpison timely appealed. CP 220.

B. FACTS

Police were dispatched to a domestic incident at an apartment in Bremerton near midnight on November 29, 2017. 4RP 437. Upon arrival, the police were unable to access the apartment because of a locked outer door. 4RP 438. As they tried to gain entry, a woman “burst” through the door. *Id.* The woman seemed panicked and frightened. *Id.* As she spoke to law enforcement in a panicked manner, she said “he has a bat.” 4RP 439.

Police identified the woman as Jasmine Etpison, 5RP 642. A second officer described her demeanor as “scared, frantic, very nervous.” 5RP 640. Ms. Etpison reported that her husband was intoxicated, had a baseball bat with which he was hitting the walls, and the couples’ children were in the

apartment. 5RP 642. She then ran off around the building. Id.

Officers were unable to catch the outer-door when Ms. Etpison ran out but another apartment tenant eventually let them into the building. 5RP 643. Three officers went to the apartment in question and knocked. Id. Initially there was no response. Id. When the door finally opened, police could not see anyone. 5RP 644. They observed Etpison hidden behind the door. Id. Etpison slowly came out from behind the door. Id.

Police ordered Etpison to come out into the hallway. 5RP 646. He stood in the doorway glaring at the officers. Id. The look on his face was such that police thought he might be preparing to fight them. Id. Police pulled out a Taser because Etpison would not come out. 5RP 647-48. Etpison continued to ignore police commands. 5RP 648. Police gave Etpison a countdown and then deployed the Taser. Id. Etpison fell down and he was taken into custody. 5RP 649. Police found a baseball bat behind the door where Etpison was hiding. 5RP 658.

Police checked on the children, who appeared to be fine. 5RP 649. Then Ms. Etpison was re-contacted. 5RP 650. She was still scared and she and an officer went behind the building while Etpison was being transported. Id. At this time, police observed a “purplish and yellow” bruise on her arm. 5RP 651. She told police that Etpison had caused the bruise.

Ms. Etpison testified that on November 29, 2017, Etpison had been

drinking. 5RP 475-76. For an unknown reason, he was upset and took a baseball bat and “beat up” a little closet in the living room. 5RP 476. As the incident progressed, Etpison was hitting around with the bat and yelling at the children. 5RP 477. He yelled at one child about being a crybaby and then he slapped both children on the face. 5RP 477-78. Ms. Etpison did not say anything at this point out of fear he would use the bat on her. 5RP 478-79. She took one child to his room while Etpison continued to yell at the other child. 5RP 480.

Ms. Etpison came out and Etpison was holding the other child to the floor. 5RP 481. During the whole time, Etpison continued to hit things with the bat and destroy them. 5RP 482. His voice was angry when he yelled at the children. 5RP 489. Ms. Etpison texted a co-worker to call the police because she was afraid Etpison would hear her if she called. 5RP 490.

After Etpison was removed, Ms. Etpison went back into the apartment and was talking to the officers. 5RP 497. There police saw what Ms. Etpison described as a “big bruise” on her arm. Id. Etpison had caused the bruise on Thanksgiving Day. Id. One of the children had bumped Etpison’s elderly father. 5RP 498. The elderly father yelled at the child and Ms. Etpison told him not to yell because the child did not mean to bump him. Id. This upset Etpison. Id. He called Ms. Etpison and her family names in an angry voice. Id. The two argued and Etpison punched her three

or four times. 5RP 499. The hitting hurt and the next day Ms. Etpison saw bruising develop. 5RP 500.

The night Etpison was arrested, he called Ms. Etpison from the jail. 5RP 500. He wanted to know whether she had called the police. Id. He then told her, in their native tongue of Palaun, that if he gets out he is going to do something to her. 5RP 502. She felt threatened “a little bit.” Id. She feared for the safety of herself and the children. 5RP 503. She thought he might do her physical harm (not the children). Id. This exchange caused her concerns about cooperating with law enforcement. 5RP 503-04.

The trial court was advised that there are no certified Palauan interpreters in the state. 5RP 558. Imelda Nakamura was called to interpret. 5RP 557. Ms. Nakamura was born in Palau, graduated high school there, and spent nearly ten years living there after college. 5RP 558. Her family spoke only Palauan at home. 5RP 560. She still speaks the language at her home with her Palauan husband. 5RP 560-61. Ms. Nakamura had experience interpreting Palauan in courts in the state of Oregon. Id. The trial court qualified Ms. Nakamura to translate. 5RP 587.

Ms. Nakamura testified that when Etpison was speaking to Ms. Etpison from the jail he said “I’m telling you when I get out. . . you better run. When I get out you will feel the consequences.” 5RP 602-03. Further, Ms. Nakamura testified that the “feel the consequences” part is meant to convey that you will feel the consequences both physically and “mental or

psychological or emotional.” 5RP 606.

II. ARGUMENT

A. COUNSEL WAS NOT INEFFECTIVE FOR NOT CHALLENGING OR LIMITING ER 404(B) EVIDENCE BECAUSE NO SUCH EVIDENCE WAS ADDUCED AT TRIAL.

Etpison argues that Ms. Etpison’s testimony regarding the bruise on her arm that was caused by Etpison on Thanksgiving was propensity evidence and that counsel was ineffective for not challenging that evidence and for not seeking a limiting instruction on the jury’s use of that evidence. This claim is without merit because Ms. Etpison’s testimony about the Thanksgiving Day assault was direct evidence of the assault charged in count I.

As noted above, count I of the information involved a date-range different than all the other charges. That count was alleged to have occurred before the primary incident on December 29-30, 2017. The felony, third degree assault, was dismissed but the state had charged fourth degree assault in the alternative. CP 93. Etpison was found guilty on the fourth degree assault charge.

As there is no prior bad act evidence in this case, ER 404(b) does not apply. The state has no further argument on this claim.

B. ETPISON WAIVED ANY ISSUE WITH REGARD TO JUROR MISCONDUCT BY ACCEPTING AN 11 PERSON JURY.

Etpison next claims that he should receive a new trial because of juror misconduct. This claim is without merit because being fully advised, including having viewed the entire jury one at a time affirm that the outside-the-record information would have no effect on deliberations or the presumption of innocence during those deliberations, Etpison waived the issue.

Since this issue turns on Etpison's waiver, without a mistrial motion, the standard of review is de novo. *State v. Benitez*, 175 Wn. App. 116, 128, 302 P.3d 877 (2013) ("We review a jury trial waiver de novo."). Another case about juror misconduct provides that "We review a trial court's investigation of juror misconduct for abuse of discretion." *State v. Gaines*, 194 Wn. App. 892, 896, 380 p.3d 540 (2016) *review denied* 186 Wn.2d 1028 (2016). Thus insofar as Etpison assails the trial court on this issue, the trial court's actions should be reviewed for abuse of discretion. However, this issue turns on whether or not Etpison made a "knowing, intentional, and voluntary" waiver of his privilege to be tried by 12 jurors. *State v. Benitez*, 175 Wn. App. 116, 127, 302 P.3d 877 (2013).

The trial court record must adequately establish the knowing intelligent and voluntary waiver. *Benitez*, 175 Wn, App. at 128. An extensive colloquy is not required; “only a personal expression of waiver from the defendant is required.” 175 Wn. App. at 128-29.

In *State v. Lane*, 40 Wn.2d 734, 737, 246 P.2d 474 (1952) a waiver of a jury of 12 was considered. There, a juror became ill and was excused. Both defendants and the state had agreed to excuse the juror and proceed with 11 jurors. 40 Wn.2d at 735. The Supreme Court noted that the constitutional right to a jury trial cannot be impaired by legislative or judicial action. 40 Wn.2d at 736. But because a defendant cannot be deprived of the jury trial right “it does not follow that he cannot waive it.” *Id.* Thus, “[a] right which can be waived is, in fact, a privilege.” *Id.*

The *Lane* Court listed reasons a defendant may wish to proceed with 11 jurors.

These defendants were not compelled to proceed with eleven jurors. They must have thought it would be to their advantage to do so. The presence of defense witnesses who might not be available later, satisfaction with the personnel of the jury as drawn, a desire not to have the cause delayed, reluctance to re-examine the jurors on voir dire to obtain another jury from the same panel, among other considerations, might explain such a decision by them or by the defendants in any criminal trial.

40 Wn.2d at 737. Getting to the heart of the matter, the Supreme Court said

Whatever the reason, provided he acts intelligently, voluntarily, free from improper influences (as did these accused who had the

advice of counsel), and there being no legislative policy or constitutional mandate prohibiting it, we conclude that an accused can waive his privilege of trial by a jury of twelve and submit his cause to eleven jurors as did these defendants.

Id. Further, the waiver of the privilege to have 12 jurors does not divest the trial court of jurisdiction.

A more recent juror misconduct case indicates that, aside from Etpison's waiver, the trial court properly questioned the jurors in this case. *State v. Gaines*, 194 Wn. App. 892, 380 P.3d 540 (2016), *review denied* 186 Wn.2d 1028 (2016). A juror found information about Gaines' prior criminal history and communicated the same to some other jurors. 194 Wn. App. at 895. The trial court discharged the offending juror and questioned those that had heard the remark. Id. The trial court concluded that the remaining jurors would follow the trial court's instructions and decide the case impartially. Id.

The Court of Appeals noted that the jury receiving outside evidence is misconduct and is presumed to be prejudicial. 40 Wn. App. at 897. Gaines complained that it was improper for the trial court to question jurors as to their subjective states regarding the extrinsic evidence. But the *Gaines* Court distinguished between pre-verdict questioning and post-verdict questioning. After verdict, a trial judge is not to consider jurors' post-verdict statements. But before verdict, "a trial court may ask questions of the jurors' subjective ability to disregard extrinsic information before there

is a verdict to potentially impeach.” 40 Wn. App. at 898. Thus the trial court in the present case did not err in questioning the jurors just as the *Gaines* trial court had.

Etpison twice responded in the affirmative to the trial court’s query as to proceeding with 11 jurors. He was represented by counsel. His waiver of a 12 person jury was knowing, intelligent and voluntary. This issue fails.

C. EVIDENCE OF ETPISON’S MILITARY CAREER WAS IRRELEVANT TO THE ISSUES TRIED IN THE CASE AND WAS THEREFORE PROPERLY EXCLUDED.

Etpison next claims that it was error for the trial court to exclude any mention of his military career. This claim is without merit because good character evidence presented by means other than reputation may be excluded and because the evidence was irrelevant and lacked probative value as to any issue in the case. Further, since the evidence excluded is neither relevant nor possessed of probative value, its exclusion was harmless.

The trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). But the trial court’s interpretation of an evidence rule is reviewed de novo. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207

(2012). Taken together, if the trial court correctly interprets the rule, the admissibility question is a matter of discretion. *Id.* Moreover, a trial court's evidentiary ruling may be affirmed on any correct ground. *Gresham*, 173 Wn.2d at 419, *citing Nast v. Michels*, 107 Wash.2d 300, 308, 730 P.2d 54 (1986).

First, showing that defendants routinely give the jury background information does not foreclose a particular act of discretion by the trial court in excluding particular parts of a defendant's background if the same is bereft of relevance and likely prejudicial to the opposing party. Here, the state expressed the prejudice: that jurors may know that domestic violence convictions will result in a firearms prohibition and therefore end a military career. 1RP 12. The prosecutor did not assert that discussions of Etpison's military career would serve to bolster his credibility, as Etpison argues, but rather that it may engender sympathy. The prosecutor added that since the military service information is irrelevant, relevance cannot be favorably balanced against prejudice. 1RP 15-16.

The trial court challenged the defense to establish the relevance of the proposed evidence. 1RP 17. The defense could only articulate that it was background information and never tied evidence of military service to any fact in issue in the case. 1RP 18-20. The defense was invited to provide further authority, but none was provided. 2RP 37.

Etpison notes that the prohibition here was based on the trial court's finding that evidence of his military career was neither probative nor relevant. Brief at 25. Etpison advances no argument to the contrary. Thus it remains that the trial court was correct in this finding. His desire to speak of his military service still lacks probative value and relevance. Thus, even if it was error to disallow the military career testimony, the lack of relevance and probative value shows that the error was harmless.

In a case where the defendant wore his military uniform and testified as to his distinguished military career, the Washington Supreme Court held those actions had the effect of placing the defendant's character in issue. *State v. Gregory*, 79 Wn.2d 637, 646, 488 P.2d 757 (1971) *overruled on other grounds State v. Rogers*, 83 Wn.2d 553, 556, 520 P.2d 159 (1974). Under ER 404(a), character evidence is not admissible to prove that the defendant acted in conformity therewith. But a "pertinent trait" may be offered by the defendant. "{A} pertinent character trait is one that tends to make the existence of any material fact more or less probable than it would be without evidence of that trait." *State v. Eakins*, 127 Wn.2d 490, 495-96, 902 P.2d 1236 (1995). Thus, the term 'pertinent' is synonymous with the word 'relevant.' *City of Kennewick v. Day*, 142 Wn.2d 1, 11 P.3d 304 (2000).

Moreover, a defendant is constrained to offer reputation evidence

only. ER 405. Thus allowing Etpison to speak about his military career would be tantamount to allowing him to advance good character evidence that is other than by reputation. And this follows from Etpison's inability to identify a purpose other than 'background.' That is, he has no argument that the fact of his military career, let alone commendations or other positive aspects of that career, is relevant to or probative of any material issue in the trial.

Finally, since Etpison makes no argument that the fact of his military career is relevant, its exclusion was harmless. On this nonconstitutional issue, the harmless error standard asks whether "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). Here, evidence of Etpison's military career had no tendency to make the existence of any fact of consequence to the determination of the action more or less probable. ER 401. Even if exclusion was error, that error was harmless.

D. THERE WAS SUFFICIENT EVIDENCE OF WITNESS INTIMIDATION.

Etpison next claims that insufficient evidence supports his conviction for intimidation. Where the state proved a threat to a person who had just been victimized in a domestic violence incident in which her

children were involved and that threat induced the victim to consider not cooperating with authorities, the evidence is sufficient to support conviction.

It is well settled that

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences therefrom. We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. In evaluating the sufficiency of the evidence, circumstantial evidence is as probative as direct evidence.

State v. Garbaccio, 151 Wn.App. 716, 742, 214 P.3d 168 (2009) (internal citation omitted). Appellate courts defer to the trier of fact on issues of “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn.App. 672, 675, 935 P.2d 623 (1997).

The second amended information, under which the matter went to trial, charged each of the alternatives for intimidation of a witness found in RCW 9A.72.110. CP 97. The state was required to prove only one of these alternatives:

Where, under a penal statute, a single offense can be committed in different ways or by different means and the several ways or

means charged in a single count are not repugnant to each other, a conviction may rest on proof that the crime was committed by any one of the means charged.

State v. Dixon, 78 Wn.2d 796, 803, 479 P.2d 931 (En Banc) (1971); *see also*

State v. Munson, 120 Wn. App. 103, 107, 83 P.3d 1057 (2004) (quoting

Dixon and applying same rule). The statute, in relevant part, provides

(1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:

(a) Influence the testimony of that person;

(b) Induce that person to elude legal process summoning him or her to testify;

(c) Induce that person to absent himself or herself from such proceedings; or

(d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

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(3) As used in this section:

(a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in *RCW 9A.04.110(27).

(b) "Current or prospective witness" means:

(i) A person endorsed as a witness in an official proceeding;

(ii) A person whom the actor believes may be called as a witness in any official proceeding; or

(iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child.

The statute refers to RCW 9A.04.110(27) regarding the definition of threat. RCW 9A.04.110(28) provides, in part, that

(28) “Threat” means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; or

(b) To cause physical damage to the property of a person other than the actor; or

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(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships;

The facts pertaining to this issue are repeated from above. The night Etpison was arrested, he called Ms. Etpison from the jail. 5RP 500. He wanted to know whether she had called the police. Id. He then told her, in their native tongue of Palaun, that if he gets out he is going to do something to her. 5RP 502. She felt threatened “a little bit.” Id. She feared for the safety of herself and the children. 5RP 503. She thought he might do her physical harm (not the children). Id. This exchange caused her concerns about cooperating with law enforcement. 5RP 503-04.

The defense raised an issue that the Palaun words used were not actually a threat of physical harm. E.g, 5RP 574-75 (defense attacks the interpreting witness’s qualification by confounding translation with interpretation). But Ms. Etpison testified about the Paluan words used: “It basically means that if he gets out, then he’s going to do something to me,

or something like that.” 5RP 502. Further, she said the words are common parlance in the language, when “people are mad, they say that.” Id. Finally, she explained that “It means that they want to do something. They are going to get you.” Id.

Thus Ms. Etpison, a Palauan speaker, heard the Palauan words of Etpison as a threat. And her perception was correct according to the neutral interpreter.

The evidence, then, was sufficient to establish that Etpison conveyed his “intent” to do physical harm or to harm Ms. Etpisons’ health, safety, or personal relationships (the incident in question involved their children). She said the threat scared her, but more to the point, she said that Etpison’s threat made her think about not cooperating with law enforcement. 5RP 503-04. Failing to cooperate entails most if not all of the alternative elements of the statute. She may hide from process, absent herself from the proceeding, change her testimony, or not provide details to law enforcement specifically with regard to the allegations of crimes against the children. Moreover, the statute speaks of an “attempt” to influence the witness, making it unnecessary to prove that she actually did or did not do any of these things.

State v. Scherck, 9 Wn. App. 792, 514 P.2d 1393 (1973), involved a challenge to a tampering conviction under an older statute. But the issue

raised still seems to be current: Scherck argued that his utterances were not really threats. The response of the Court of Appeals well-covers Etpison's meaning of the words argument:

The jurors were required to consider the inferential meaning as well as the literal meaning of Scherck's conversation with the witness. The literal meaning of words is not necessarily the intended communication. The true meaning of words may be lost if they are lifted out of context.

9 Wn. App. at 794; *See State v. Graham*, 198 Wn. App. 1059, (at page 2), __P.3d__, (2017) (UNPUBLISHED AND UNBINDING; cited here to show that the rule from *Scherck* is still the law). Here, the jury heard Ms. Etpison's testimony that at least the inferential meaning was a threat. And, again, the independent interpreter agreed with Ms. Etpison's understanding. In a light most favorable to the state, these two witnesses provided sufficient evidence.

State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007) does not change the result. There, burglars were discussing their crime after the fact and in front of a third person. 162 Wn.2d at 426. The third person was threatened that she would "pay" if she spoke to the police. *Id.* The state charged the case as "did attempt [to] influence the testimony of such person." 162 Wn.2d at 429 (alteration by the court). Since the evidence only showed that the threat was to stop the third party from reporting, the evidence fell short of establishing an attempt to influence testimony. 162

Wn.2d at 429-30.

In the present case, the state charged all the alternatives in the statute, not just an attempt to influence testimony. Shown in this case are a threat that was taken seriously, under circumstances that make it obvious that law enforcement or prosecution may require further cooperation, and said cooperation may go to reporting or providing information regarding an allegation of child abuse. The evidence was sufficient.

III. CONCLUSION

For the foregoing reasons, Etpison's conviction and sentence should be affirmed.

DATED November 2, 2018.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Tina Robinson", written in a cursive style.

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KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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