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Division III
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No. 36582-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
RICHARD JAMES ROBERTS,
Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. The State committed misconduct by referring to facts not in evidence.
2. The State committed misconduct by vouching for the victim witness.

II. STATEMENT OF THE CASE

The defendant, Richard Roberts, girlfriend Tammy Chadek was in Regional Hospital in Yakima, Washington recovering from a stroke. Ms. Chadek felt that she was treated rudely by a doctor and called Roberts to complain. RP 215-16, 231-32, 334-37.

The first witness who testified was Mr. Adam Frankovic, who was a registered nurse at Astria Regional Hospital and on the date of this crime was filling in as the nursing supervisor. RP 214-15. In that capacity Mr. Frankovic was responsible for taking care of the hospital at night; he was the administrator and responsible for the overall operation of the hospital. RP 215.

On the evening of October 18, 2017, he received two calls from a person later identified as the defendant herein. The caller identified himself to Mr. Frankovic as the significant other of a patient in room 447, Tammy, later identified as Tammy Chadek. RP 215-16.

The first call came into the administrator and was transferred to

Mr. Frankovic. The caller stated that he was looking for the doctor who was consulting with Ms. Chadek. Mr. Frankovic explained what his position was with the hospital. RP 216-17.

According to Mr. Frankovic's testimony Roberts then proceeded to yell and scream and threaten to "blow the fucking doctor's head off and shoot up the hospital." RP 216. Roberts then proceeded to state to Mr. Frankovic that "he was going to come shoot up the hospital, blow it up and kill me and blow my head off as well." RP 216. Mr. Frankovic testified he took these threats seriously based on Roberts "...the tone of his voice, very angry, yelling, screaming to the point I couldn't get in words to help calm him down. I tried to tell him that's not okay. Calm down; we can figure this out. After that I couldn't get any words in. He continued on and on and on cussing and threatening the hospital.... "he stated he was on his way. Everything added up to this man was serious." RP 216-17, 244-45, 249-50

This witness testified more extensively on redirect regarding the second phone call he received from Roberts:

I introduced myself as Adam, the nursing supervisor. He again went into a tirade that he's coming to shoot us up, blow us up, blow my head off. At that point I said, YPD has been contacted, and you are not allowed on the premises. This call is over.
RP 243-44

Because of his safety concerns Mr. Frankovic called security and put the hospital on lockdown, indicating to security there should not be any visitors allowed into Ms. Chadek's room, security then called the Yakima Police Department. RP 217-18

Mr. Frankovic contacted Ms. Chadek in an attempt to determine who exactly had made the threatening calls, he told her about the threats made by Roberts. Ms. Chadek became angry and told Mr. Frankovic "...get the fuck out..." When officers arrived and Mr. Frankovic took them to Chadek's room she pointed at Mr. Frankovic and stated "...he's not allowed in here. He needs to get the fuck out." RP 227-8.

On cross examination Roberts' counsel engaged in this exchange with Mr. Frankovic:

Q. How many phone calls were there?

A. There was one that I took, and there was another one made to the telemetry floor.

Q. Just for you, how many phone calls did you take?

A. One. I spoke to him twice. The initial one was from the operator to me. Then the next one he had called the floor and I was handed the phone.

Mr. Frankovic confirmed during cross examination that he was in fact in fear after the threats Roberts made on the phone. He testified that Roberts was yelling and cursing, and he was nervous and shocked after the calls. RP 237-38. As Mr. Frankovic was leaving Chadek's room she stated, without prompting, "He didn't mean it, he didn't mean it." RP 222,

On cross examination Mr. Frankovic testified he was not updated as to any information the officers had received during their phone conversation with Roberts. He was not informed Roberts claimed to not have a weapon, that he didn't want to hurt anyone, and Mr. Frankovic was not told Roberts was not in route to the hospital. RP 241.

On redirect Mr. Frankovic testified more about the second phone call stating:

...when I got up to the ACU unit after putting the hospital on lockdown, I was handed a phone. It went from **Pam, who's the monitor tech to the ACU charge nurse, who didn't say anything and handed it to me.** I asked who it was. They said that it was the significant other of 447 again. RP 244 (Emphasis added).

Redirect by the State continued later and during that portion of Mr.

Frankovic's testimony the State asked:

Q. There was testimony -- Mr. Webster asked you about the fact that a lady named Pamela Hunter took one of these phone calls that we've been discussing.

MR. WEBSTER: Your Honor, objection. That was not testified to.

MR. SOUKUP: I believe it was.

MR. WEBSTER: It was not.

THE COURT: I believe the testimony was it was actually answered by her, handed to a charge nurse and then handed to the witness.

MR. WEBSTER: I don't believe we've had that name come up in testimony.

THE COURT: Go ahead.

Q. (By Mr. Soukup) Have you worked with Ms. Hunter

over the years?

A. I have.

Q. What's her job assignment been at Regional?

A. She's the monitor tech on the tele unit.

Q. Does she have medical issues when she's placed under stress?

A. She does.

MR. WEBSTER: Objection.

THE COURT: All right. This is now beyond the scope of any redirect.

MR. SOUKUP: Okay. RP 256-7

During the State's final redirect examination of this witness Mr. Frankovic testified that he did not know if the calls came from a "land line" or a cell phone and stated he had no knowledge of Roberts' location at the time the calls were placed to the hospital. That those calls could have in fact originated from within the hospital. RP 248

After this redirect counsel for Roberts had no further questions and when this witness was excused there were no motions to dismiss this case. RP 258-59.

The State addressed the court regarding the unavailable witness, Ms. Hunter, at the next recess indicating that it wanted to recall Mr. Frankovic to elicit testimony regarding the reason Ms. Hunter was not called to testify. Counsel for Roberts objected stating:

MR. WEBSTER: Your Honor, I object to her or him being recalled for that purpose. We tried -- prior to my investigator, Tyler Haueter leaving, we tried for a long time to contact her. We requested interviews through the State to interview Ms. Hunter. She's excluded as a witness. All

that is irrelevant anyway, her name has been brought up by the State. None of that is relevant. Her testimony has been excluded. I don't know if Your Honor needs me to say more. RP 303

There was further discussion of this issue regarding Ms. Hunter.

The totality of that discussing is set forth in Appendix A. The court stated

“At this point, my impression is that the mention of her name was so innocuous. I don't really know if it will (sic) picked up.” RP 304

Counsel for Roberts responded “Your Honor, it was innocuous. Her name was briefly mentioned. I did not intend to go there. I didn't intend on asking for a missing witness instruction under the circumstances. I had not anticipated going there, Judge. I don't anticipate going there.” RP 304-5.

Officer Guju was the next State's witness. This officer spoke to Mr. Frankovic and Ms. Chadek and then initiated a call to Roberts. Officer Guju testified that Roberts was “extremely agitated, would barely let (Officer Guju) get a word in...he was concerned that officers were going to arrive at his residence and were about to arrest him...” Roberts did tell this officer he did not have any firearms. Roberts also told this officer something to the effect of “see what happens” during the discussion of officers coming to his home. RP 262-3, 264, 266

Officer Schad was the officer who actually arrested Roberts. His

testimony indicated the officers went to the address where Roberts lived. The officers made contact with the defendant at the travel trailer where Roberts lived. When contacted Roberts was yelling and saying that he had done nothing wrong. When Officer Schad placed Roberts under arrest "...he was resistive and very animated, talking loudly, saying he hadn't done anything." RP 272-3. Roberts made other statements to this officer, he continued to state he hadn't done anything wrong and that when he called, he was trying to get to someone who could take away the jobs of the people he was upset with. RP 273-4, 278. He was upset, agitated, speaking quickly, loudly. RP 276

Roberts' demeanor was also observed by and testimony was elicited from Officer Hinton. RP 298-9

The first witness for the defense was Marie Holestine, a long-time friend of the defendant who was present in the 5th wheel trailer where Roberts resided at the time he made the calls to the hospital, to Ms. Chadek and to 911. Her testimony was that he was upset, angry, pacing, said he was going to the hospital and cussed but she denied Roberts made any threats to anyone other than to indicate he wanted to get the jobs of those who were allegedly mistreating his fiancé. RP 323-25, 330-31

Ms. Chadek testified. Her testimony was that she was in the hospital due to a stroke. She stated a doctor was rude because he asked her

questions about what she was doing prior to the stroke, that “He just wanted to know what I was doing, directly asking me a rudeness question.” She denied that Mr. Frankovic came into her room regarding her treatment or that she had told him to “get the fuck out” saying she had told him to “get the hell out.” RP 343-45.

Roberts stood on his right to remain silent and did not testify in his trial. RP 347-8.

The State’s closing covers twenty-four pages of the verbatim report of proceedings. (Appendix B.) RP 383-394,402-13. There was only one objection lodged:

MR. SOUKUP: ...I'm going to answer the things that Mr. Webster had to say. He's doing his best to do his job to get a result for his client.

MR. WEBSTER: Your Honor, objection.

THE COURT: The lawyers' remarks are not evidence. You are to disregard any statement that is not evidence or not the law as I have given it to you.

The portions of the State’s closing which Roberts did not object to but now claims were error are as follows:

He was very specific in the language he quoted. His assistant had received those threats. (RP 384)

...

Why would he take the stand and testify under oath that that’s what Mr. Roberts said to him back on September 18th, 2017? (RP 384).

...

Was he intentionally not telling the truth when he called the police department that evening when he came up and testified under oath?

(RP 385).

...

I can't understand why he would say those things unless they were true is what I'm arguing to you.

(RP 386).

...

What makes a lot of sense and he was telling the truth. He didn't have a motive not to tell the truth.

(RP 406).

The defense did not object to any of these statements or move for a mistrial. RP 384-86, 406.

Roberts was found guilty by the jury of felony harassment of another - threat to kill. (RP 418).

III. ARGUMENT

1. **Response to Issue 1. Prosecutorial misconduct.**

- a. **The Appellant has failed to meet his burden of establishing both improper conduct during the State's closing argument and the resulting prejudice which could not be cured by instruction by the court.**
- b. **The State did not improperly vouch for the victim/witness.**

A defendant alleging prosecutorial misconduct bears the burden of first establishing "the prosecutor's improper conduct and, second, its prejudicial effect." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). This court will evaluate a prosecutor's challenged statements "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Courts

review allegations of prosecutorial misconduct during closing argument in light of the entire argument, the issues in the case, the evidence discussed during the argument, and the court's instructions. State v. Sakellis, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011).

Response allegation 1(a) – The State did not refer to facts not in evidence.

In this case the prosecutor expressed reasonable inferences from the evidence. The State referenced individuals who were present and were part of the physical process which resulted in Mr. Frankovic being handed the phone which resulted in the conviction before this court.

The parties agreed to not discuss the threats made to Ms. Hunter, that did not preclude the reference to her as being present. There was literally nothing in the State's case which could be considered use of information or evidence that was not before the jury.

The jury was never told there had been an additional count charged against this defendant which involved Ms. Hunter. What the State said in the middle of an explanation to the jury of why Mr. Frankovic's testimony was reasonable. The State argued "**his assistant had received those threats.**" RP 384. (Emphasis added.) This is the totality of the alleged egregious statement made by the State's attorney. The State did not indicate that this assistant was threatened or that charges had been filed

and subsequently dropped, it merely stated “His assistant had received those threats.” RP 384

Roberts cites In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704–06, 286 P.3d 673 (2012), Glasmann is factually distinguishable. In Glasmann the State’s attorney used a slide show containing slides “...that graphically displayed his personal opinion that Glasmann was “guilty, guilty, guilty of the crimes charged by the State.”” Id at 700. One of the most important portions of the opinion in Glasmann is “[t]he prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.” Id at 704. The Glasmann court goes on to state “When viewed as a whole, the prosecutor's repeated assertions of the defendant's guilt, improperly modified exhibits, and statement that jurors could acquit Glasmann only if they believed him represent the type of pronounced and persistent misconduct that cumulatively causes prejudice demanding that a defendant be granted a new trial.” Id at 710.

Clearly the statement made in this case did not nor were they such that they would inflame the passions or prejudices of the jury. The statements here clearly did not rise to the level of those in Glasmann.

The court in Glasmann states “...In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the

prosecutor's conduct was both improper and prejudicial....To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict... Because Mr. Glasmann failed to object at trial, the errors he complains of are waived unless he establishes that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. Id. at 705.

Here there was one short sentence about an assistant of the victim having received a call with threats. The fact is there was testimony presented to the jury that these threatening phone calls had come into the hospital. That the calls had been "received" by a staff person answering the phones, clearly a job not done by Mr. Frankovic, a nurse and the acting administrator for the hospital, therefore there is literally nothing the State's attorney stated in closing that was not already before the jury.

Ms. Hunter was listed as a witness and the court told the entire pool that she was a potential witness during voir dire. RP 27-28, 74, 76, Hunter was mentioned in direct, limited but mentioned that she had taken the call. There was an objection to the use of her name, the court overruled that then the State asked another question and the court shut the State down. RP 256-57.

In closing at RP 384 the State said “assistant”, it did not use Ms. Hunter’s name and the statement was supported by the testimony of Mr. Frankovic.

The following passage is from the initial direct testimony of Mr. Frankovic:

Q. Tell me about this conversation you had with this gentleman.

A. So he called. **The call came into the administrator and was transferred to me.** He was looking for the doctor who was consulting with the patient in 447. I explained that I was not the doctor, but I was a nursing supervisor. He had a complaint. I said, I can help you try and figure this out. After that, he went into yelling and screaming, threatening to, and I quote, blow the fucking doctor's head off and shoot up the hospital. RP 216)Emphasis added)

On cross examination the following occurred:

Q. How many phone calls were there?

A. There was one that I took, and there was another one made to the telemetry floor.

Q. Just for you, how many phone calls did you take?

A. One. I spoke to him twice. The initial one was from the operator to me. **Then the next one he had called the floor and I was handed the phone.** RP 235 (Emphasis added.)

And again, on re-direct:

Q. So tell us about the second call.

A. So on the second call, when I got up to the ACU unit after putting the hospital on lockdown, I was handed a phone. It went from Pam, who's the monitor tech to the ACU charge nurse, who didn't say anything and handed it to me. I asked who it was. They said that it was the significant other of 447 again. RP 244

...

Q. There was testimony -- Mr. Webster asked you about the fact that a lady named Pamela Hunter took one of these phone calls that we've been discussing.

MR. WEBSTER: Your Honor, objection. That was not testified to.

MR. SOUKUP: I believe it was.

MR. WEBSTER: It was not.

THE COURT: I believe the testimony was it was actually answered by her, handed to a charge nurse and then handed to the witness.

MR. WEBSTER: I don't believe we've had that name come up in testimony.

THE COURT: Go ahead.

Q. (By Mr. Soukup) Have you worked with Ms. Hunter over the years?

A. I have.

Q. What's her job assignment been at Regional?

A. She's the monitor tech on the tele unit.

Q. Does she have medical issues when she's placed under stress?

A. She does.

MR. WEBSTER: Objection.

THE COURT: All right. This is now beyond the scope of any redirect. RP 256-7.

There was never an objection lodged, there was no move to strike or to admonish the jury to disregard what was testified to or the form of the question. A defendant who fails to object to the State's improper act at trial waives any error, unless the act was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). In making that determination, the courts "focus less on whether the prosecutor's

misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” Emery, 174 Wn.2d at 762.

This court recently affirmed this standard in State v. Barbarosh, Slip Opinion, COA #36010-5-III, (August 29, 2019):

To demonstrate prejudice, the defendant must show a substantial likelihood that the prosecutor’s misconduct affected the jury’s verdict. Thorgerson, 172 Wn.2d at 443. A failure to object to an improper remark waives review of the 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 an admonition to the jury.”” Id. (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). In making that determination, the court “focus[es] less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Response allegation 1(b) – The State vouch for any witness.

Improper vouching occurs if the prosecutor (1) places the prestige of the government behind the witness, or (2) indicates that evidence not presented at trial supports the witness’s testimony. State v. Robinson, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015). However, there is a difference between the prosecutor’s personal opinion, as an independent fact, and an opinion based upon or deduced from the evidence. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Misconduct occurs only when it is clear and unmistakable that the prosecutor is not arguing

an inference from the evidence but is expressing a personal opinion. *Id.* at 54.

As discussed above, Roberts for the first time on appeal claims the State committed two types of misconduct. The second alleged misconduct is that the State improperly vouched for the credibility of Mr. Frankovic. Roberts did not preserve this claim below and has not shown he may do so in this appeal; this court should decline to reach this issue.

"Generally, witnesses are not permitted to testify regarding the veracity of another witness because such testimony invades the province of the jury as the fact finder in a trial." State v. Demery, 144 Wn.2d 753, 764, 30 P.3d 1278 (2001). The State may not vouch for a government witness's credibility. State v. Coleman, 155 Wn.App. 951, 957, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016, 245 P.3d 772 (2011). The trier of fact has sole authority to assess witness credibility. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

As stated earlier, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. "Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error." State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007)

'Manifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim." Id at 936.

Here, Roberts' claim is the State's closing argument, not actual testimony, but the portion of the trial the jury is instructed is not evidentiary, the State's attorney not a witness, vouched for Mr. Frankovic. Roberts attorney did not object to this argument, therefore, he must demonstrate that this claim falls within the scope of RAP 2.5. Roberts fails to establish a viable reason this allegation meets the requirements of that rule.

The next question he must answer is whether this error is manifest, that this comment had practical and identifiable consequences in the trial. The comment was fleeting and did not name the other person, did not state explicitly that because Ms. Hunter had received a call with threats that the jury should lend more credence to Mr. Frankovic's testimony. This was not an explicit statement by the State's attorney that he believed Mr. Frankovic. In context, it is strikingly different than when a prosecutor directly asks a witness about the credibility of another witness or where the credibility assessment is the focal point of the witness's answer. In short, because Roberts fails to show actual prejudice, this court can only come to one conclusion, this is not a manifest constitutional error.

The State has wide latitude in drawing and expressing reasonable

inferences from the evidence, including inferences about credibility. State v. Thompson, 169 Wn. App. 436, 496, 290 P.3d 996 (2012). This court has ruled that a prosecutor commits misconduct by personally vouching for a witness's credibility. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The defendant has the burden of establishing that (1) the State acted improperly, and (2) the State's improper act prejudiced the defendant. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. Id. at 760-1.

Roberts claims the State committed error in closing presenting alleged evidence;

But, you know, she did -- was able to and had the courage to take the stand, swear an oath to tell the truth in front of all these people that she's never met before with the person that she says did all this in the room and tell you that that was something that happened.
RP 343.

This was within the prosecutor's wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. The prosecutor did not make a personal comment about Mr. Frankovic's credibility or indicate that the alleged other information not presented to the jury supported his credibility. He did not say or imply that he personally believed Mr. Frankovic. The State's attorney did not

make some attempt to bolster the testimony of Mr. Frankovic by stating the support person, the assistant, had received the threats and as such, the prosecutor did not improperly vouch for Mr. Frankovic.

Read in context, it is clear all the State's attorney was trying to do was to make the jury fully aware that this victim was not a person who would be prone to flights of fancy. Mr. Frankovic was the person literally in charge of a hospital. Clearly locking that facility down was not something he took lightly. It was only done after he and he alone was threatened with death on more than one occasion by a person whom he testified was making credible threats to his and other hospital staff's safety.

Roberts does not claim that because of the broad nature of his threats to not just harm Mr. Frankovic but others at the hospital this overarching testimony should not have been presented to the jury. His claim is that these passing references to one of the people at the hospital, Ms. Hunter, an assistant, an employee of the hospital like so many others whose safety was threatened by Roberts, were somehow amplified to the jury or the jury would somehow divined there had been charges laid and dismissed.

Threats of this nature while made to one specific person affected all those in the hospital. The action taken by Mr. Frankovic was not to

somehow isolate himself to mitigate this threat but to literally lock-down the entire hospital thereby insuring or attempting to insure, the safety of all those in the facility.

These two allegations raised by Roberts are woven together. There was no vouching on the part of the State. The State's attorney was not saying to the jury "I am telling you that because Mr. Frankovic got up here under oath and testified that you must believe him." What the State's attorney was pointing out is that this is a professional whose job is to address problems and resolve them as a stand-in hospital administrator. He stood before the jury and swore on oath, the jury literally watched that occur with all the witness's mere feet from where they were seated. The State was not using some code word to hint to the jury that they needed to believe this witness.

In State v. Embry, 171 Wn.App. 714, 287 P.3d 648 (2012) the court discussed, State v. Gregory, indicating "[i]n Gregory, a murder and rape case, Gregory argued that the State impermissibly characterized him as "evil" and a "menace to society." Gregory, 158 Wn.2d at 863, 147 P.3d 1201. The Supreme Court held in that case that the State may draw inferences from the evidence, and these inferences could have been justified given Gregory's criminal history and the facts of the case. Gregory, 158 Wn.2d at 863, 147 P.3d 1201. The court further reasoned

that neither of the comments drew objection, and an instruction to the jury to disregard these brief characterizations could have neutralized any prejudice. Gregory, 158 Wn.2d at 863-64, 147 P.3d 1201. The court ultimately declined to hold that the State's comments denied Gregory due process. Gregory, 158 Wn.2d at 864, 147 P.3d 1201.

Even if this court were, for the sake of argument, to take the statement made in closing argument, they do not come near to the nature of those in Gregory and the Washington State Supreme court found no error there.

Once again, there was no objection to this alleged error during closing argument. As such, the appellant has waived the right to assert prosecutorial misconduct unless the misconduct was so “flagrant and ill-intentioned” that it caused enduring and resulting prejudice that a curative instruction could not have remedied. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted).

The evidence in this case was overwhelming. Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The

purpose of the harmless error rule is to prevent setting aside convictions for small errors or defects that have little, if any, likelihood of changing the result of the trial.

State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). A harmless error is one which is trivial, formal or merely academic and which affects in no way the outcome of the case. Even basic constitutional rights are subject to the harmless error analysis. See, e.g., State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995).

IV. CONCLUSION

For the foregoing reasons, the State asks this court to deny this appeal and affirm the conviction. The State shall not be requesting cost upon completion of this appeal.

Respectfully submitted this 23rd day of September 2019,

s/David B. Trefry
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APPENDIX A

(The jury left the courtroom.)

THE COURT: All right. Our jury has left the courtroom. What do we need to talk about tonight?

MR. SOUKUP: Well, I would like to recall Adam Frankovic on the subject of Ms. Hunter. I think I told the court the situation with her. Basically she doesn't work at the hospital anymore. We're having a hard time getting ahold of her.

I did research myself Friday evening and was able to contact her at the place she's living right now and talk to her about the case. She explained to me that she doesn't
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react well to stress, and she would have medical issues if she were to testify. I told her at that point, that's fine.

I won't call you.

Then on, I think, Monday she faxed me a note from a doctor, it looked like, that said she can't testify. It's going to stress her out too much and cause her to be hospitalized, I believe, is the gist of it. So I made the decision not to call her.

It has now come up that she took a phone call from the gentleman. I'm sure the jury is wondering about that.

I've also talked to Mr. Frankovic about Ms. Hunter. He's worked with her in the past. He's aware that she, first of all, does not do well with stress. She has had medical issues from being exposed to stress in the past. If I understand it right, that has something to do with why she didn't work at the hospital. It was sometimes stressful doing that job, part of which was answering the phone. I would like to have him testify to that by way of an explanation as to why this witness is not testifying.

THE COURT: So the limited purpose would be for testimony regarding why this particular witness is not testifying?

MR. SOUKUP: Yeah. I can't testify to my conversation with her.

THE COURT: Right.

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MR. SOUKUP: The fax, I don't think it's a document. It's probably going to run into some issues. He does have personal knowledge of medical issues that she's had. Obviously I would just have to leave it at that. I can't say in argument that's why I didn't call her. I would be testifying. I think that would -- it's important. Of course, defense counsel would like to argue that the state didn't present evidence of this and that. There's a reasonable explanation here that I think I can explain with admissible evidence. That's why I seek to do this.

MR. WEBSTER: Your Honor, I object to her or him

being recalled for that purpose. We tried -- prior to my investigator, Tyler Haueter leaving, we tried for a long time to contact her. We requested interviews through the state's to interview Ms. Hunter. She's excluded as a witness.

All that is irrelevant anyway, her name has been brought up by the state. None of that is relevant. Her testimony has been excluded. I don't know if your Honor needs me to say more.

THE COURT: Well, this is what I'm summarizing that the state is saying. I haven't heard one way or another if you would make this argument. The argument is, if it was so big, why didn't you hear from her? It's all that type of argument. That's kind of what Mr. Soukup is

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saying. I don't want to be hemmed in on that.

MR. WEBSTER: Right.

THE COURT: He wants to be able to kind of preempt any argument like that by saying why she couldn't be here.

Did I understand your argument correctly?

MR. SOUKUP: Yes, your Honor.

THE COURT: Could it just simply be shelved by a stipulation that you're not going to make that type of argument to the jury?

MR. WEBSTER: What argument is that, Judge, just so I can be clear.

THE COURT: Making an argument about -- I want to

make sure I get the name right -- that Ms. Hunter isn't here and she should be here. If it was such a big deal you would have had Ms. Hunter here and the like.

At this point, my impression is that the mention of her name was so innocuous. I don't really know if it will be picked up. If you're in agreement not to make that type of empty-seat type of argument, I think that would satisfy any concerns that the state would have.

MR. SOUKUP: It would.

MR. WEBSTER: Your Honor, it was innocuous. Her name was briefly mentioned. I did not intend to go there. I didn't intend on asking for a missing witness instruction under the circumstances. I had not anticipated going there,

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Judge. I don't anticipate going there.

THE COURT: With that, Mr. Soukup, does that address your concern?

MR. SOUKUP: If I don't anticipate going there means he's not going to go there, yes, it does.

MR. WEBSTER: I'm not going there.

MR. SOUKUP: Thank you.

THE COURT: Then how I'm going to say we're handling it is by not going there. If it comes out in the defense case --Are you going to rest first things in the morning, Mr. Soukup?

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APPENDIX B

MR. SOUKUP: Thank you, your Honor.

Good afternoon, ladies and gentlemen. Basically at this time your job is pretty straightforward . We talked in jury selection about the elements of the crime. That's a checklist of the things I have to prove beyond a reasonable doubt.

As we talked about in jury selection, I don't have to prove anything else beyond a reasonable doubt. It's just the things on this list. I think that is going to come up in the argument.

I think some of the things that came up in the trial didn't have too much to do with the things that are actually on the list that I have to prove beyond a reasonable doubt. There's always things that you're not going to know about what happened. There's a million details and million things that happen. You're not going to know every single thing. The part I have to prove beyond a reasonable doubt are the elements of the crime. The judge gave you the elements of the crime of harassment.

Ladies and gentlemen, if you believe Mr. Frankovic when he took the stand and testified, you believe he told you the truth when he testified, and you're going to see in a minute

all those elements are fulfilled. His testimony, if you believe it, fulfills all those elements I have to prove the

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case beyond a reasonable doubt.

What it comes down to is you believe Mr. Frankovic. Do you believe him beyond a reasonable doubt? Is there some reason a reasonable person would say I doubt it, that I doubt that he was telling the truth?

As a starting point, I'm going to say what would that reason be? What are the reasonable explanations why Mr. Frankovic would call the Yakima Police Department and state he got a phone call from this gentleman and that he said, quote, that fucking doctor, I'm going to blow his head off, that I'm going to come to the hospital and shoot people, that I'm going to blow up the hospital, specifically to Mr. Frankovic, that I'm going to come and kill you, that I'm going to kill you, blow your head off?

What are the reasonable explanations why he would tell the police that he received a phone call where Mr. Roberts said that? Why would he take the stand and testify under oath that that's what Mr. Roberts said to him back on September 18th, 2017?

Was he mistaken about that? I would suggest that it doesn't seem reasonable to suggest that he was mistaken about that. It doesn't seem the kind of thing a person would be mistaken about.

He was very specific in the language he quoted. His

assistant had received those threats. I would imagine those

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words would be burned into memory, not something he would be likely to forget as much as he might like to.

Once again, does memory have something to do with it?

No. These are very, very specific statements that he testified to. We have to ask. Was he intentionally not telling the truth when he called the police department that evening when he came up and testified under oath? Does that make sense? Would a reasonable person have a doubt and doubt him based on the possibility he may not be telling the truth?

Let me ask you something we talked about in jury selection. Wouldn't you agree that people ordinarily don't lie unless they have a motive, unless it benefits them? They think about the implications of telling the truth and decide, well, not telling the truth is going to work out better for me.

There might be some pathological liars that go around lying about things for recreation, to just entertain themselves when there's no reason to lie at all. I think our common sense and our common experience tells us that ordinarily people don't lie unless they have a motive, unless they gain something.

What about Mr. Frankovic? He's a nurse. He's in a profession where his job is helping people. He's in this administrative role that night. Part of his job is to make

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sure things are safe.

He calls the police. He tells them, I got this phone call. It means locking down the hospital. The police respond, taking a statement from him, going out and contacting someone about it.

What is his motive to do all that? Everyone agrees he's never met Mr. Roberts. He doesn't know him from Adam.

Why would he make up that crazy story unless it was something that actually happened?

There's just no reasonable explanation for that, ladies and gentlemen. That's why I say, when you look at the definition beyond a reasonable doubt, that's what I'm going to argue to you that any reasonable person would say he was apparently telling the truth.

I just can't figure out what his motive would be to lie. It's not the kind of thing that he would be mistaken about. It's not something that his memory would be foggy.

I can't understand why he would say those things unless they were true is what I'm arguing to you.

Let's take a look at the elements. I'll tell you why I say his testimony fulfills the elements. This is important.

You are the sole judges of the credibility of the witnesses.

In some trials it's not a big deal. In this trial it is.

If you believe him the elements are fulfilled.

Just one last thought before we talk about that, and

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that is emotion. In trials there's going to be emotions.

We saw the defense witnesses exhibit them when they testified. Ms. Chadek, it's terrible she had a stroke.

Apparently she has issues she struggles with. That's very unfortunate. She has emotions that she's sad about it.

This is a process that we do in a rational manner.

That's the only thing that's fair. Emotions can be based on appearances. What we're doing here is looking at the facts and what's been proven beyond a reasonable doubt.

Mr. Frankovic testified that he received this call from a person that we know now is the defendant. The defendant admitted that he was the person that made this call. He also identified himself as Tammy Chadek's boyfriend. We know that he is Tammy Chadek's boyfriend or significant other.

He knowingly threatened to kill Adam Frankovic immediately or in the future. Knowingly just means that he knew it was a threat when he made it. Obviously when you're saying I'm going to kill you and I'm going to blow your head off, the person saying that would know that was a threat.

He's going to do it in the future when he comes to the hospital, he says.

The words or conduct of the defendant placed Adam Frankovic in reasonable fear that the threat to kill would be carried out. Mr. Webster spent a lot of time on it, and

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I'm sure he will in closing argument, too. Remember the

issue here. I only have to prove things on this list, not things that aren't on the list.

What I have to prove is that at the time Mr. Frankovic heard the threat he actually had fear the threat would be carried out, and he testified he did. He was afraid that the person was going to come to the hospital and kill him and shoot him, and that fear was reasonable.

Mr. Webster asked a lot of questions about, well, it never happened or there are police officers there, right?

As it turned out, it didn't happen. At that time,

Mr. Frankovic couldn't travel in the future and know whether it was going to happen or not. That's why he was afraid.

This person is talking to him. The whole thing is crazy just to make these statements, call up the hospital and make the statements on the phone to someone that works at the hospital.

On top of that, it wasn't just this threat. He's going to blow up the whole place, shoot everyone up. He's angry and yelling, yelling when he's saying these things. At that time he doesn't know it's going to turn out they actually didn't do that.

The question is was it reasonable for him to have that fear at that time? I would argue to you, sure, it was.

Sure, it was. Our common experience, we know these things

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happen all the time sadly. The defendant acted without lawful authority. There's no evidence he had a right to

call the hospital and threaten to kill people. That's not an issue.

The threat was made or received in the State of Washington. We know the hospital was in a State of Washington. We know that Mr. Roberts' home was in the State of Washington. That's really a nonissue.

The big issues are was Mr. Frankovic telling the truth.

Was it reasonable for him to have fear? If they are issues, I would argue to you, ladies and gentlemen, they are pretty straightforward under this evidence.

The definition of threat you have in your jury instructions. One thing about a threat that I'll just kind of talk about briefly, a threat means what you would think it means. It's to communicate the intent to cause bodily injury. It's not just bodily injury but actual death.

To be a threat, it can't be a joke. I have a 15 and 17-year old sons. They threaten each other all the time. They're messing around. My wife asks me, why do they do that? It's because they're boys. It's a jest. It's puffery. It's idle talk.

To be a threat, a statement or act must be in the context or under such circumstances that a reasonable person under the position of the speaker, the person making the

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threat, would foresee the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than something said in jest, idle

talk, puffery or political argument.

I have to show Mr. Roberts made the threats, that he understood it would be received as a threat. If he was getting ready to play pool with his friends, I'm going to kill you, obviously he's using the words that I'm going to kill you in pool.

On the other hand, he's calling up the hospital all angry. I'm going to blow the place up, shoot everyone. I'm going to kill you, blow your head off. Any reasonable person would foresee that that is a not going to be taken as idle talk, a jest or puffery. It's a serious threat, and anyone would perceive it as being one.

Okay. This is really the cornerstone. A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Sometimes in these arguments people want to stop there and say a reasonable doubt is doubt for which a reason exists. As you can see, there's a little bit more.

The reason we're going to talk about in a minute. The word reasonable is really important. You can have reasons to doubt something, but is it a reasonable doubt? Is it a doubt a reasonable person would have? Would a reasonable

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person say I doubt that Mr. Frankovic was telling the truth?

It's such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all the evidence or lack of evidence. That's

what's this trial is about. Everyone had a chance to put on their evidence. Everyone got a chance to talk to the people that testified, to cross examine them. Everyone had that chance now.

If from such consideration you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. Once again, it's really difficult and impossible to see why Mr. Frankovic would make these statements unless they were true. He's in the helping profession.

Not only that, it's a responsibility . So he's going to go up on this crazy thing where he calls the police and makes this false allegation and comes to court and testifies under oath about this false allegation? He's got a responsible job. His job is taking care of people. We'll talk about the defense witnesses a little bit, too. One thing just kind of as a start. I think it's important to understand what happened here. We talked about the fact he received this call and received these threats.

It was supposed to be apparently about the fact Ms. Chadek was upset with a doctor. She felt like he had talked to

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her, rudely. Okay.

You kind of see the thought process or lack thereof that's going on here. Mr. Frankovic's job that night was to take patient complaints and consider them. He didn't hear anything about it. Mr. Rogers called him on the phone

and threatened to come out and shoot people and kill them and kill him. That's the first he'd heard about it.

He went in and talked to Ms. Chadek. She said, the doctor talked to me rudely. When he started asking about Richard Roberts, she just went off and started yelling at him and cursing at him, telling him to get of her room.

Apparently from what we hear about things that Mr. Roberts said and did that night, that was his attitude, too.

I know that Mr. Roberts gave them his address and everything when they were trying to contact him. I will point out he wasn't extremely rational when they found him at his residence. He fully struggled with the officer trying to keep from getting handcuffed. He was in an angry state of mind.

Even his witness, Ms. Holestine, talks about he's pacing and yelling. He's swearing. Is he angry then? She won't really say that.

Ms. Chadek, when she testified, I hope I was polite to her. When we brought up the subject of the whole thing and the thing with the doctor, you could see her ire started to

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rise, too. It's all about this uncontrollable anger.

One last thing I want to point out. I'll sit down and defense counsel will get a chance. Another thing, I don't have to prove that he intended to do it. When you look through the list and see what it says the state has to prove beyond a reasonable doubt, that he intended to go and kill

Mr. Frankovic, no, it doesn't. Just saying it is enough.

That makes sense, doesn't it, ladies and gentlemen?

Here is Mr. Frankovic just trying to do his job that evening. A call comes into his place of employment. All the sudden he has to worry that someone is going to come to the hospital and shoot.

I don't have to show that Mr. Roberts intended to do that. I only have to show that he made that threat and that it was reasonable for Mr. Frankovic, being in his shoes at that time, from his point of view, to believe the threat would be carried out.

Security cameras don't stop shootings. Security guards don't necessarily stop shootings, especially unarmed ones like we know the ones were that night at Regional. Crazy things unfortunately happen in our world all the time. When he gets the call out of the blue from this person who's yelling at him about a doctor being rude to his girlfriend and says I'm going to kill you and blow your head off and blow the place up, it was entirely reasonable for him to

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believe this is something that could happen.

I'll ask you to return a verdict of guilty to the charge. Thank you.

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DECLARATION OF SERVICE

I, David B. Trefry, state that on today's date, September 23, 2019, emailed a copy of the Brief of Respondent to Ms. Jill Reuter jill@ewalaw.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of September 2019 at Yakima, Washington.

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