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King County Prosecutor
Appellate Unit

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NO. 57469-8T

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

STATE OF WASHINGTON,

Respondent,

v.

STEVE HEDDRICK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary Yu, Judge

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BRIEF OF APPELLANT
(Corrected)

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding appellant competent to stand trial without adhering to adequate procedural safeguards.

2. The trial court erred in giving a "to convict" instruction that omitted a necessary element of the crime. CP 53 (Instruction 7).

3. The trial court erroneously allowed witnesses to give improper opinion testimony and legal conclusions regarding appellant's guilt and veracity.

4. The trial court erroneously allowed unduly prejudicial character testimony to be considered by the jury.

5. Prosecutorial misconduct deprived appellant of his constitutional due process right to a fair trial.

6. Ineffective assistance of counsel deprived appellant of his constitutional due process right to a fair trial.

7. Cumulative error denied appellant of his constitutional due process right to a fair trial.

Issues Pertaining To Assignments Of Error

1. Did the trial court violate appellant's constitutional right to due process when it found appellant competent without holding an evidentiary hearing on the issue, when the court had previously made a threshold determination that there was reason to doubt competency?

2. Did the trial court deny appellant a fair trial by giving a "to convict" instruction for felony harassment that omitted the element that the victim have knowledge of the threat, thus relieving the state of its burden of proving each element of the crime?

3. Did the trial court deny appellant a fair trial when it allowed law enforcement officers to repeatedly state a legal conclusion that appellant's statements constituted "threats," the existence of which comprised an element of the crime of felony harassment?

4. Did the trial court deny appellant a fair trial when it allowed law enforcement officers to express their opinion as to appellant's guilt and veracity by testifying they believed appellant was "sincere" in making threatening statements but was lying in claiming lack of seriousness, thus conveying to the jury their opinion that the "knowingly threaten" element of the crime had been established?

5. Did the trial court deny appellant a fair trial when it allowed the jury to consider, over counsel's objection, a law enforcement officer's character testimony that appellant had "a disregard for the law?"

6. Did prosecutorial misconduct deny appellant a fair trial where the prosecutor (1) exhorted the jury to convict appellant for harassment based on threatening statements of which the victim had no knowledge; (2) deliberately elicited opinion testimony of appellant's guilt and veracity from

law enforcement witnesses; (3) repeatedly inserted a legal conclusion as to appellant's guilt during examination of law enforcement witnesses; and (4) made an improper "golden rule" argument during closing argument?

7. Was appellant denied effective assistance of counsel because defense counsel failed to preserve for appellate review any of the errors listed above?

8. With reference to the errors cited above, did cumulative error deprive appellant of his constitutional right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

The state charged appellant Steven Ray Heddrick Jr. with one count of felony harassment, allegedly committed against Patricia Anderson.¹ CP 32; 2RP² 4, 14; RCW 9A.46.020(1)(2). On October 10, 2005, a jury trial was held before the Honorable Mary Yu, and a guilty verdict returned. CP 102; 11RP-12RP. The court sentenced Heddrick to a maximum

¹ The State also charged Heddrick with two counts of misdemeanor violation of a court order, but those charges were dismissed with prejudice before trial. CP 33; 2RP 4, 14; RCW 26.50.110(1).

² The Verbatim Report of Proceedings is contained in fourteen volumes, designated as follows: 1RP - 9/8/04, 10/14/04, 1/20/05; 2RP - 7/14/05; 3RP - two consecutively paginated volumes from 7/18/05; 4RP - two consecutively paginated volumes from 7/19/05; 5RP - 7/20/05; 6RP - 7/21/05; 7RP - 7/27/05; 8RP - 8/29/05; 9RP - 9/26/05 and 11/23/05; 10RP - two consecutively paginated volumes from 10/10/05; 11RP - 10/11/05; 12RP - 10/12/05.

standard range sentence of 22 months. CP 72. This appeal timely follows.
CP 77-78.

2. Substantive Facts

a. Pre-trial

From the outset of this case in June 2004, the court, defense counsel, and the state expressed recurrent doubts about Heddrick's competency to stand trial due to his behavior, which included refusals to meet with his attorney or voluntarily appear in court.³ A series of psychiatric reports diagnosed Heddrick as suffering from chronic psychotic problems and severe delusions, including paranoid schizophrenia.⁴ On October 14, 2004, the court found Heddrick incompetent and ordered him committed to Western State Hospital.⁵ Pursuant to court order, Heddrick

³ CP 89-93; 1RP 3-17.

⁴ CP 103-09 (Order on Criminal Motion and attached Psychological Report by Dr. Brian Waiblinger, hereinafter "Waiblinger Report"); CP 110-15 (Motion, Certificate and Order for Sealing Documents and attached Addendum to Psychological Report by Dr. David White, hereinafter "White Addendum"); CP 116-28 (Motion, Certificate and Order for Sealing Documents and attached Psychological Report by Dr. David White, hereinafter "White Report").

⁵ CP 94-96 (Order Finding Defendant Incompetent and Committing for Further Evaluation and Treatment, hereinafter "Incompetency Finding").

was forcibly medicated to restore his competency.⁶ On January 20, 2005, the court found Heddrick competent. CP 7-8. On July 27, 2005, however, the court again made a threshold determination that there was "reason to doubt" Heddrick's competency and ordered another expert evaluation pursuant to RCW 10.77.060. CP 38-41. The evaluator, however, did not produce a written report. 11RP 14-15. On October 6, 2005, defense counsel told the court during a telephonic status conference that the evaluator had orally informed her that Heddrick was competent. 11RP 14-15. Defense counsel also told the court that she no longer contested competency. 11RP 14-15. On October 10, 2005, the court found Heddrick competent without an evidentiary hearing on the matter and the case proceeded directly to trial. 10RP 3-5; 11RP 14-15.

b. Trial

In May 2004, Deputy Mark Wojdyla and Officer Eric Steffes transported Heddrick from Clallam Bay Correctional Facility to another location. 12RP 14-15. During transport, Heddrick made a number of statements regarding his ex-girlfriend, Patricia Anderson, and Patricia's mother, Rosemary Anderson. 12RP 18-19, 21, 28, 36-39. These statements included: (1) he was in jail because of the "high-priced, tribal

⁶ CP 129-34 (Motion and Order to Seal Documents and attached Psychological Report by Dr. Steven Marquez at 4, hereinafter "Marquez Report"); Incompetency Finding at 2.

attorney that the Anderson family had hired"; (2) it was "not over" "between he and the Andersons"; (3) no one would come between he and his children, "no law, no court, no cop, nobody"; (4) "I am not taking this shit, and they can't keep putting me in prison"; (5) the Anderson family "had been killing him for years"; and (6) "[i]f they keep putting me through hell, I will be taking one of those bitches with me." 12RP 36-39.

Patricia Anderson testified that Deputy Wojdyla told her about one of the statements Heddrick made during transport: "He says those bitches are killing me slowly, you know, it's [sic] going to take one of them with me." 11RP 66-67. Anderson said she took the statement to mean that he was threatening her life and that she was afraid he might hurt her in the future. 11RP 67-69. Anderson did not remember hearing about any other statements Heddrick may have made during transport. 11RP 73-75. Anderson also testified that Heddrick had physically abused her in the past, with the last incident occurring in 2000. 11RP 45-46, 49-50, 54, 63. Norma Corwin, Anderson's aunt, corroborated one of these incidents. 11RP 36.

Deputy Wojdyla and Officer Steffes testified about the statements Heddrick made during transport, including the statements Anderson did not recall ever hearing. 12RP 18-19, 21, 28, 36-39. The officers, as well as the prosecutor, repeatedly referred to Heddrick's statements as "threats"

during the course of examination. 12RP 21-23, 36, 38, 43. The court had ruled pre-trial that the officers could testify they perceived the statements as "threats" to explain why they contacted Anderson. 5RP 44. The officers further testified that Heddrick was sincere when he made these statements, and that they disbelieved Heddrick when he claimed he was not serious in making the statements. 12RP 20, 25, 40.

C. ARGUMENTS

1. THE COURT VIOLATED HEDDRICK'S DUE PROCESS RIGHTS IN FINDING HIM COMPETENT TO STAND TRIAL WITHOUT OBSERVING ADEQUATE PROCEDURAL REQUIREMENTS.

After making a threshold determination that there was reason to doubt Heddrick's competency to stand trial, the court violated Heddrick's due process rights in finding him competent without conducting an evidentiary hearing on the matter. Incompetency Finding; 10RP 3-5; 11RP 14-15. Reversal is required.

"It is fundamental that no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues." State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). The conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under the Fourteenth Amendment's due process clause. Pate v. Robinson, 383 U.S. 375, 378, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). The constitutional standard

for competency to stand trial is whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." In re Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (citing Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)) (internal quotation marks omitted). Under Washington statute, a criminal defendant is incompetent if (1) he lacks an understanding of the nature of the proceeding; or (2) is incapable of assisting in his defense due to mental disease or defect. RCW 10.77.010(14).

The "[f]ailure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process," which includes the right to a fair trial. Fleming, 142 Wn.2d at 863. Accordingly, if the court makes a threshold determination that there is "reason to doubt" the defendant's competency pursuant to RCW 10.77.060, the court must appoint experts and order a formal competency hearing. State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). This is not merely a statutory mandate. Once the court finds that there is reason to doubt competency, a defendant is constitutionally entitled to an evidentiary

hearing on the issue of his competency to stand trial. Pate, 383 U.S. at 377, 385-86; State v. Israel, 19 Wn. App. 773, 776, 577 P.2d 631 (1978).

Here, despite an initial finding of incompetence and later doubt about Heddrick's ability to assist counsel, the court ultimately found Heddrick competent without conducting the required evidentiary hearing. 10RP 3-5; 11RP 14-15; Pate, 383 U.S. at 386; Israel, 19 Wn. App. at 776, 777-78. A defendant whose competency is in doubt cannot waive his right to a competency hearing and the issue can be raised for the first time on appeal. Medina v. California, 505 U.S. 437, 449, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); Pate, 383 U.S. at 378, 384. Heddrick's due process right to an evidentiary hearing therefore remained intact despite defense counsel's decision not to contest competency, as it was incumbent upon the court to conduct a formal hearing on its own motion. Pate, 383 U.S. at 385; Williams v. Woodford, 384 F.3d 567, 603 (9th Cir. 2004) ("state trial judge must conduct a competency hearing, regardless of whether defense counsel requests one, whenever the evidence before the judge raises a bona fide doubt about the defendant's competence to stand trial.").

The court, defense counsel, and the state expressed persistent doubts about Heddrick's competency to stand trial because of Heddrick's troubling behavior, which included repeated refusal to meet with his attorney or voluntarily come to court. CP 89-93; 1RP 3-17. Psychiatric reports

provided to the court diagnosed Heddrick as suffering from chronic psychotic problems and severe delusions, including paranoid schizophrenia.⁷ On September 8, 2004, the court ordered a competency evaluation pursuant to RCW 10.77.060. CP 92; 1RP 3-11.

Dr. David White, having been retained by defense counsel to conduct the evaluation, described Heddrick as suffering from "chronic mental health problems that result in strong persecutory and somatic delusions." White Report at 10. Dr. White concluded that Heddrick was incompetent to stand trial because he was unable to assist his attorney in his own defense due to mental illness. White Addendum at 6; White Report at 11. Heddrick repeatedly refused to meet with his attorney or attend court hearings in July and August 2004. White Addendum at 3. When Heddrick finally allowed defense counsel Dana Brown to meet with him, Heddrick denied he had ever refused to meet with her in the past. White Addendum at 3. Based on his examination of Heddrick and discussion with defense counsel, Dr. White concluded that Heddrick had difficulty grasping that Brown was representing him on the felony harassment charge and that he had difficulty remembering information that she had told him. White Addendum at 6. Dr. White also noted that Heddrick had exhibited delusional beliefs about his former attorney Pamela Studeman, (who had

⁷ Waiblinger Report; White Report; Marquez Report.

recently represented him in another criminal matter) and the prosecuting attorney in that case. White Report at 9, 11. Specifically, Heddrick believed that his attorney had been replaced by an imposter and that an imposter had replaced the original prosecuting attorney as well. White Report at 9.

On October 14, 2004, the court found Heddrick to be incompetent based on Dr. White's report and the mutual agreement of the state and defense counsel. Incompetency Finding; 1RP 11-17. The court ordered Heddrick committed to Western State Hospital for 90 days pursuant to RCW 10.77.060. Incompetency Finding. Heddrick was not present, as he had once again refused to come to court. 1RP 11.

Following a period of involuntary confinement and forced medication at Western State Hospital, the court on January 20, 2005 granted the state's motion finding Heddrick competent.⁸ In making its determination, the court reviewed a report prepared by Dr. Steven Marquez but did not conduct an evidentiary hearing.⁹ The state conceded "the report is not (inaudible) strongest he's competent." 1RP 18. Defense counsel deferred to the court as to whether Heddrick should be found competent despite her own concerns. 1RP 19. Contrary to the order's assertion, the transcript

⁸ CP 7-8; Marquez Report at 4; 1RP 18-21.

⁹ Marquez Report; 1RP 18-20.

shows the court did not question Heddrick prior to finding him competent. CP 7; 1RP 18-20. Dr. Marquez's report stated that Heddrick was "fundamentally paranoid and delusional," but concluded that Heddrick was competent to stand trial:

It is our opinion that Mr. Heddrick has obtained sufficient clinical stability to rationally work with his attorney in his defense. His clinical symptoms, though troubling and significant, appear to be adequately contained at this point in time. While prone to expressing some delusional material, it is confined and attributed to his psychiatric behavior for the most part.

Marquez Report at 4,5. Curiously, this report made no mention of Dr. White's earlier report that concluded Heddrick was incompetent. 1RP 19-20.

On July 27, 2005, the court once again made a threshold determination that there was reason to doubt Heddrick's competency and ordered another evaluation pursuant to RCW 10.77.060. CP 38-41. By this time, Tracy Lapps had been substituted for Dana Brown as Heddrick's attorney. CP 97-101. In support of her motion for evaluation, Lapps advised the court there was a problem with whether Heddrick could assist in his own defense and communicate with his attorney, and that the "same issues" had materialized again. 7RP 9-10. The prosecutor shared defense counsel's concern and agreed that further inquiry was warranted based on her own personal observations. 7RP 5, 14.

On October 11, 2005, the court made a record of a telephonic conference on October 6 during which defense counsel informed the court that the evaluator had concluded Heddrick was competent. 11RP 14-15. Counsel stated that she did not feel it was necessary for the evaluator, Dr. White, to produce a written report because she no longer contested competency and "out of consideration for the amount of money that it would have cost in addition to what we already spent to produce a written evaluation." 11RP 15. Without reviewing any written report, conducting an evidentiary hearing or questioning Heddrick himself, the court found Heddrick competent and the case immediately went to trial. 10RP 4-5; 11RP 14-15.¹⁰

A defendant whose competency is in doubt cannot waive his constitutional right to a competency hearing. Pate, 383 U.S. at 384; Williams, 384 F.3d at 603. In this case, the court itself made a finding that there was reason to doubt Heddrick's competency. CP 38-41. Because the right to such a hearing cannot be constitutionally waived, and in light of Heddrick's significant history of mental illness and inability to assist in his own defense, the court erred in not conducting an evidentiary hearing to determine competency. Pate, 383 U.S. at 377, 385; Williams, 384 F.3d

¹⁰ A written order finding Heddrick competent is not present in the Clerk's Papers.

at 603; Israel, 19 Wn. App. at 776, 777-78. At minimum, due process requires that the court make findings of fact and conclusions of law after an evidentiary hearing on the matter of competency.¹¹ Israel, 19 Wn. App. at 776, 777-78. Although a defendant may waive his statutory right to a written expert report, no court has ever held that due process is satisfied in the absence of both a report and an evidentiary hearing. Id. at 779.

Due process was not satisfied where the court found Heddrick competent based on an oral representation from defense counsel regarding the ultimate conclusion reached by the evaluator. While counsel's opinion as to her client's competency and ability to assist in the defense are factors which should be considered, counsel's oral representation regarding competency, standing alone, was not a sound basis to find Heddrick competent, especially in light of the court's previous finding that Heddrick was incompetent and Heddrick's extensive history of severe mental problems. Id. at 779. The court had an independent duty to make its own determination of competency. Pate, 383 U.S. at 385; Williams, 384 F.3d at 603. Without a written report, the court had no means to determine whether the doctor's ultimate conclusion regarding Heddrick's competence

¹¹ Although written findings and conclusions were entered following the court's initial finding of competency, no such findings or conclusions were entered for the later competency determination. CP 7-8.

was justified. Heddrick's protestations that he was competent, meanwhile, are immaterial because it is "contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp." Medina, 505 U.S. at 450 (citation omitted); 7RP 18-20. The court therefore needed to hold an evidentiary hearing so that it could make findings of fact and conclusions of law as to competency. Israel, 19 Wn. App. at 777-78.

Remand on the competency issue is impractical at this point due to the passage of time, the absence of a contemporaneous written competency report, and the otherwise total lack of an adequate record on which to base a determination that Heddrick was indeed competent to stand trial. Pate, 383 U.S. at 387; Drope v. Missouri, 420 U.S. 162, 183, 95 S. Ct. 896, 904, 43 L. Ed. 2d 103 (1975). This Court should therefore reverse the conviction because the court's failure to adhere to adequate procedural safeguards in determining competency violated Heddrick's right to a fair trial. Pate, 383 U.S. at 377, 385-86; Israel, 19 Wn. App. at 776, 777-78.

2. THE COURT VIOLATED HEDDRICK'S RIGHT TO A FAIR TRIAL BY GIVING A "TO CONVICT" INSTRUCTION THAT OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.

Where the court issues a summary instruction setting forth each element of the crime necessary to convict, the instruction "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Omission of an element in the "to convict" instruction impermissibly relieves the state of its burden to prove every essential element beyond a reasonable doubt. State v. Eastmond, 129 Wn.2d 497, 503, 919 P.2d 577 (1996). "It cannot be said that a defendant has had a fair trial . . . if the jury might assume that an essential element need not be proved." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The adequacy of a challenged "to convict" jury instruction is reviewed de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

To prove Heddrick guilty of felony harassment, the state had to prove Patricia Anderson had actual knowledge of the threat. In State v. J.M., the Washington Supreme Court considered whether the harassment statute required the perpetrator to know the threat would be communicated to the person threatened. State v. J.M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001). The Court concluded the harassment statute (RCW 9A.46.020),

read as a whole, required that (1) "the perpetrator knowingly threaten to inflict bodily injury by communicating directly or indirectly the intent to inflict bodily injury"; (2) "*the person threatened must find out about the threat* although the perpetrator need not know or should know that the threat will be communicated to the victim"; and (3) "words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out." 144 Wn.2d at 482 (emphasis added). J.M. recognized the victim's actual knowledge of the threat as a distinct element of the crime. The court in State v. Kiehl, following J.M., likewise recognized that an element of felony harassment is "the person threatened learn of the threat," which is a necessary predicate to the element that a person be placed in reasonable fear that the threat will be carried out. State v. Kiehl, 128 Wn. App. 88, 93, 113 P.3d 528 (2005).

Here, the "to-convict" instruction provides:

To convict the defendant of the crime of Felony Harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 13th 2004 the defendant knowingly threatened to cause bodily injury to Patricia Anderson[;]
- (2) That the words or conduct of the defendant placed Patricia Anderson in reasonable fear that the threat would be carried out; immediately or in the future;
- (3) That the defendant was previously convicted of committing the crime of Burglary -- Domestic Violence against the person threatened[;]
- (4) That the defendant acted without lawful authority;
- (5) That the threat was a true threat; and

(6) That the acts occurred in the State of Washington.

CP 53 (Instruction 7).

Instruction 7 fails to include the essential element that Anderson learned of the threat. The failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal. Mills, 154 Wn.2d at 6. The erroneous "to convict" instruction here therefore requires reversal even though defense counsel failed to raise contemporaneous objection at trial. The failure to instruct on an essential element is automatic reversible error because it relieves the state of its burden to prove each element of the crime beyond a reasonable doubt. Smith, 131 Wn.2d at 265; State v. Gonzalez-Lopez, 132 Wn. App. 622, 637, 132 P.3d 1128 (2006).

3. THE COURT VIOLATED HEDDRICK'S RIGHT TO A JURY TRIAL BY ALLOWING LAW ENFORCEMENT WITNESSES TO GIVE IMPROPER OPINIONS AND LEGAL CONCLUSIONS REGARDING HEDDRICK'S GUILT AND VERACITY.

The state's use of improper opinion testimony to establish essential elements of the crime violated Heddrick's right to a jury trial. To prove that Heddrick's threats were "knowingly" made, Officer Steffes and Deputy Wojdyla testified that they believed Heddrick was sincere in making threatening statements, but that he was lying when he claimed his statements were not serious. 12RP 19-20, 25, 40. The officers also repeatedly

expressed an improper legal conclusion that Heddrick made a "threat," the existence of which constitutes an element of the crime. 12RP 22, 23, 36, 38. This requires reversal of Heddrick's conviction.

No witness, lay or expert, may opine as to the defendant's guilt or veracity. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); State v. Jones, 117 Wn. App. 89, 92, 68 P.3d 1153 (2003). A witness may not offer such an opinion by direct statement or inference. Black, 109 Wn.2d at 348; Jones, 117 Wn. App. at 92. In addition, a witness may not testify that "the defendant's conduct violated a particular law" and thereby give an opinion as to guilt. State v. Olmedo, 112 Wn. App. 525, 532, 533, 49 P.3d 960 (2002).

Opinion testimony on the guilt or veracity of the defendant violates the defendant's constitutional right to a jury trial and is unfairly prejudicial to the defendant because it invades the exclusive fact-finding province of the jury. Demery, 144 Wn.2d at 759; Black, 109 Wn.2d at 348; Olmedo, 112 Wn. App. at 533. The goal in prohibiting witnesses from expressing an opinion about the defendant's guilt is to avoid having witnesses tell the jury what result to reach. State v. Cruz, 77 Wn. App. 811, 815, 894 P.2d 573 (1995).

a. Law Enforcement Officers Expressed Their Personal Belief About Heddrick's State Of Mind, Thereby Giving Improper Opinions Regarding His Veracity And Guilt.

Heddrick's state of mind was a core issue at trial; to convict Heddrick for the crime of harassment, the state needed to prove that Heddrick "knowingly" threatened Anderson. RCW 9A.46.020(1)(a)(i); CP 53 (Jury Instruction 7). "Knowingly threaten" means that "the defendant must subjectively know that he or she is communicating a threat, and must know that the communication he or she imparts directly or indirectly is a threat of intent to cause bodily injury to the person threatened or to another person." J.M., 144 Wn.2d at 481. In addition, "[i]t must...be a real or serious threat. Idle talk, joking, or puffery does not constitute a knowing communication of an actual intent to cause bodily injury." Id. at 482. Officer Steffes and Deputy Wojdyla both offered their personal opinion that Heddrick made a "knowing" threat.

The relevant testimony elicited by the state is as follows:

Q: And when he said those comments, can you describe what his temperament is like?

A [Steffes]: When he said the quote about if they keep putting him through hell, and he will be taking one of those bitches with me, he was, I would say that was the, in our conversation that was the time where he was the most angry and venomous with his words.

Q: Did you take him as being serious?

A: I took him, I definitely took him as being serious. Yes.

Q: Did you ask him if he was serious?

A: We, I reminded him at that point that he was with two law enforcements officers, and at that time he said he was not serious about his statements.

Q: When he told you he wasn't serious about the things he was saying, what was your reaction to that?

A: I felt he said it to, because he realized he had said more than perhaps --

Lapps: Objection. Speculation.

Court: Sustained.

Q: *Did you take him as being sincere in his comment?*

A: *No, I did not.*

12RP 39-40 (emphasis added).

Q: When you were in the car on the 13th, did you have any question about the sincerity of Mr. Heddrick's threats?

A [Wojdyla]: I believed that he was sincere in what he was saying. He definitely seemed agitated.

Q: Did you ever ask him if he was sincere in what he was saying?

A: I believe there was a question that was asked. I can't remember if I asked it or if Officer Steffes did, and Mr. Heddrick said he wasn't serious. But he said it with such conviction when he was talking that he was agitated enough, it left no doubt in my mind that he was sincere about the comments that he had made as to the Anderson family.

12RP 25.

A [Wojdyla]: He said that no one would come between he and his children, no law, no court, no cop, nobody. He said basically that he was not going to take this shit anymore.

Q: Deputy, when he made those comments, what did you think?

A: Well, I thought he was pretty sincere. I mean, he was agitated. He conveyed a sense that he was pretty upset.

12RP 19-20.

The officers' opinion that Heddrick lied to them in claiming he was not serious is exactly the type of testimony that is routinely prohibited as

improper opinion. A witness cannot testify, directly or indirectly, that the defendant lied about a material fact at issue. Jones, 117 Wn. App. at 92; see also State v. Saunders, 120 Wn. App. 800, 813, 86 P.3d 232 (2004) (holding officer testimony that defendant's answers to questions "weren't always truthful" to be improper opinion).

In State v. Jones, where the defendant was charged with unlawful possession of a firearm, an officer testified "you know, I just didn't believe him" in regards to the defendant's claim that he did not know the gun was in the car. Jones, 117 Wn. App. at 90, 91. The court held that admission of this improper opinion about the defendant's credibility was reversible error. In so holding, the Jones court recognized the only issue in the case was constructive possession of the gun, which came down to whether Jones knew the gun was under his seat. The defendant's knowledge of the gun was an indispensable element of the crime, and thus the officer's improper opinion required reversal. Id. at 92.

Similarly, the state here was required to prove that Heddrick "knowingly" made a threat against Anderson. To meet this burden, the state needed to prove that Heddrick was not engaging in "[i]dle talk, joking, or puffery" when he made his statements. J.M., 144 Wn.2d at 482. Officer Steffes and Deputy Wojdyla both testified that they did not believe Heddrick when he told them he was not serious, which conveyed to the jury

their belief that Heddrick's threats were "knowingly" made. As in Jones, the officers' testimony that they did not believe Heddrick when he denied the seriousness of his statements was an improper comment on Heddrick's credibility and, by extension, his guilt.

Deputy Wojdyla's testimony that he believed Heddrick was sincere when he made his threatening statements also constitutes improper opinion about guilt and veracity. Given Heddrick's attendant claim that he was not serious about the statements, Wojdyla's comments on Heddrick's sincerity were but another way of expressing Wojdyla's belief that Heddrick was lying when he said he was not serious. Jones, 117 Wn. App. at 92.

Further, Wojdyla's comments regarding Heddrick's sincerity were not admissible as lay testimony under ER 701. A lay witness may give only "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." ER 701. When analyzing the admissibility of lay opinion testimony, the court must first determine whether the opinion "relates to a core element or to a peripheral issue." State v. Farr-Lenzini, 93 Wn. App. 453, 462, 970 P.2d 313 (1999). "Where the opinion relates to a core element that the State must prove, there must be a substantial factual basis supporting the opinion," and "the closer the tie between an opinion and the ultimate issue of fact,

the stronger the supporting factual basis must be." Id., 93 Wn. App. at 460, 462-63. In addition, lay witness opinions based on factual observations susceptible to more than one rational inference are especially troubling and militate against a finding that a proffered opinion is proper when it touches upon an ultimate issue. Id. at 463, 464.

In State v. Farr-Lenzini, the defendant's state of mind was also a core issue; she was charged with attempting to elude a police officer, which included an element of willfulness. The apprehending officer offered his opinion that "the person driving that vehicle was attempting to get away from me and knew I was back there and [was] refusing to stop." 93 Wn. App. at 463. The factual foundation for this opinion was that the defendant (1) hit the brakes as she entered an intersection and as she went through a stop sign; (2) accelerated "extremely hard" as she came out of her turn; and (3) swiveled her head rapidly side to side as she checked the intersection. Id., at 456, 463-64. The court held that the officer's testimony constituted improper opinion as to guilt because there was an insufficient factual basis for the opinion, and there were rational alternative inferences which could be drawn from the defendant's behavior. Id., at 464-465.

Here, Deputy Wojdyla based his opinion addressing the core element of Heddrick's state of mind on cursory factual observations. The sole

factual foundation supporting Deputy Wojdyla's opinion was that Heddrick appeared "agitated" and "conveyed a sense that he was pretty upset." 12RP 20, 23. Wojdyla's conclusory observation provides inadequate foundational support for his opinion regarding Heddrick's state of mind. *Id.*, at 464-465. Further, Heddrick's "agitation" is readily susceptible to a rational alternative explanation, as there is no necessary connection between a state of agitation and sincerity. Common sense dictates that one can be agitated and insincere, and vice versa. Such a connection drawn by Wojdyla is especially spurious because neither he nor Officer Steffes had ever met Heddrick prior to transporting him and thus they had no familiarity with Heddrick's individual characteristics and idiosyncrasies, including the manner in which he joked or conveyed a serious statement. 12RP 16, 38. Finally, even if an adequate factual foundation for Wojdyla's opinion regarding sincerity had been laid, the opinion was still impermissible because it inferentially expressed his personal belief that Heddrick had lied to him in claiming lack of seriousness. *Jones*, 117 Wn. App. at 92.

b. Law Enforcement Officers Testified That An Element Of The Crime Had Been Established, Thereby Giving An Improper Legal Conclusion Regarding Heddrick's Guilt.

The court further erred when it ruled pre-trial that the officers could testify they perceived Heddrick's statements as "threats" in connection with why they decided to tell Anderson of the statements. 5RP 44. As a result

of this ruling, Deputy Wojdyla and Officer Steffes referred to Heddrick's statements as "threats" throughout the course of their testimony. 12RP 22, 23, 36, 38. The state's own use of the term "threat" in questioning the officers compounded the prejudicial effect of their testimony. 12RP 21, 22, 23. As the existence of a "threat" is an element of the crime of felony harassment under RCW 9A.46.020, the trial court's admission of such testimony amounted to an improper legal conclusion and opinion regarding Heddrick's guilt. Demery, 144 Wn.2d at 759; Black, 109 Wn.2d at 348; Olmedo, 112 Wn. App. at 532.

Prior to trial, defense counsel moved the court to preclude use of the term "threat" on the ground of undue prejudice. 5RP 42. The court ruled as follows:

[I]n terms of using the word "threat" generally. I would really ask that those two officers refer to the comments as comments or statements. *They can respond when you ask them why it is they decided to tell Ms. Anderson what these comments were, of course, they could say they perceived them as threats*, but I would rather not have them continue to refer to certain statements as threats because that then really gets to their conclusions as to what they are, they really are in the course of when they are going to be communicating those comments to Ms. Anderson.

5RP 44 (emphasis added).

Relying upon this ruling, the prosecutor repeatedly elicited testimony from Deputy Wojdyla and Officer Steffes in which they referred to Heddrick's statements as "threats:"

Q: So, when you went and talked to her the next day, did you specifically tell her what things Mr. Heddrick had said in the vehicle to you and Officer Steffes?

A [Wojdyla]: Yes.

Q: And do you have [sic] specifically remember what her reaction was when you told her those things?

A: She -- you could see that she was visually scared. *She was scared that he would be able or would try to carry out the threats.* She was fearful for her family, her children, her mom.

12RP 23 (emphasis added).

In reference to Heddrick's alleged statement that "it was not over"

"between he and the Andersons," the prosecutor asked:

Q: What was your reaction to that comment?

A [Steffes]: I took it seriously based on the tone of his voice and the conviction of his words. I took it seriously. *I took it as a threat.*

12RP 36 (emphasis added).

Later on, the prosecutor asked Officer Steffes:

Q: So, when he made the comment that no law, no court, no cop, nobody was going to get between him and his children, did it strike you as odd that he would make that statement to two law enforcement officers?

A: Yes. I thought it was pretty bold, and I again I took it seriously. You know, *it sounded again as a threat.* It's something to take very seriously.

12RP 38 (emphasis added).

Pursuant to ER 704,¹² "a witness may testify as to matters of law, but may not give legal conclusions." Olmedo, 112 Wn. App. at 532. Improper legal conclusions include "testimony that the defendant's conduct violated a particular law." Id. In State v. Olmedo, the court reversed a conviction for unlawful storage of anhydrous ammonia because the state's witness testified that the container was not approved by the Department of Transportation. The lack of such approval constituted a core element of the crime. In so testifying, the witness inferentially expressed an opinion that the defendant breached the legal standards for propane tanks used to store the ammonia. Id. at 532-33.

Here, as in Olmedo, the officers' testimony that Heddrick's statements were "threats" presupposes the establishment of an element of the crime that the State had the burden of proving beyond a reasonable doubt. The officers' repeated characterization of Heddrick's statements as "threats" are not factual opinions. They are legal conclusions which manifest themselves as improper opinions on Heddrick's guilt. It was for the jury, not the law enforcement officers, to decide whether Heddrick's statements constituted "threats" and whether the State had proven this element of the crime. The officers, as lay witnesses, were free to testify

¹² ER 704 provides: "Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

about what they heard Heddrick say without attaching a legally conclusive term to his statements. Use of legal conclusions usurps the jury's responsibility to reach its own conclusions as to whether the overheard statements amounted to a "threat" under the law. Olmedo, 112 Wn. App. at 533.

c. The Errors Are Preserved For Review.

The erroneous admission of the officers' opinion testimony regarding Heddrick's state of mind is preserved for review in spite of defense counsel's failure to raise a contemporaneous objection. Improper opinion testimony regarding the veracity or guilt of the defendant is an error that may generally be raised for the first time on appeal pursuant to RAP 2.5(a) because it is a manifest error affecting a constitutional right. State v. Kirkman, 126 Wn. App. 97, 106, 107 P.3d 133 (2005); State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 1194 (2004); State v. Dolan, 118 Wn. App. 323, 330, 73 P.3d 1011 (2003). An error is "manifest" if it had "practical and identifiable consequences in the trial of the case." State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000) (internal quotation marks omitted). It is well-established that opinion testimony on the guilt or veracity of the defendant invades the fact-finding province of the jury and is a violation of the constitutional right to a trial by jury. Demery, 144 Wn.2d at 759; Black, 109 Wn.2d at 348. Further, the improper opinion

testimony given by Deputy Wojdyla and Officer Steffes is manifest because it had the identifiable effect of telling the jury what to believe regarding an indispensable element of the crime. Without being force-fed these opinions, the jury would have had only Heddrick's statements and the officers' observation that Heddrick appeared "agitated" and "upset" by which to infer whether he "knowingly" made the threats.

The erroneous admission of the officers' legal conclusions is also preserved for review. "Unless the trial court indicates that further objections at trial are required when making its ruling, the party losing the pretrial motion is deemed to have a standing objection." State v. Koloske, 100 Wn.2d 889, 895, 676 P.2d 456 (1984). Because the officers' use of the term "threat" were all within the scope of the court's pre-trial ruling, a contemporaneous objection to each statement was not required. Defense counsel's pre-trial motion to entirely prohibit use of the term "threat" by the state's witnesses was sufficient to preserve the issue for review. 5RP 42. In any event, the admission of such testimony, because it amounts to an impermissible opinion on the guilt of the defendant, is an error of constitutional magnitude that may be raised for the first time on appeal. Kirkman, 126 Wn. App. at 106; Saunders, 120 Wn. App. at 811; Dolan, 118 Wn. App. at 330.

d. The Improper Opinion Testimony Was Prejudicial.

An error of constitutional magnitude is presumed prejudicial, and the state bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The courts employ the "overwhelming untainted evidence" test to determine if a constitutional error is harmless. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). A constitutional error is harmless only when the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The evidence of Heddrick's state of mind rested entirely upon the officers' scant observations and self-serving conjecture. By testifying that Heddrick lied when he said he was not serious about making his statements, the officers told the jury what result to reach regarding a crucial element of the crime. Cruz, 77 Wn. App. at 815. The untainted evidence was not so overwhelming as to necessarily lead the jury to find that Heddrick "knowingly" threatened Anderson. Opinion testimony from a law enforcement officer is especially likely to influence the jury and thereby deny the defendant a fair and impartial trial. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992). Because the officers' testimony addressed an

element of the crime as well as Heddrick's credibility, the error cannot be deemed harmless beyond a reasonable doubt. The judgment should therefore be reversed on this ground alone.

The state further relied upon the legal conclusions of two law enforcement officers to meet its burden of proof that Heddrick's statements constituted "threats." Again, due to the aura of reliability that surrounds officer testimony, the jury was more likely to be swayed by the officers' perception of Heddrick's statements as "threats" in determining whether the state had proven the existence of a threat as an element of the crime. Demery, 144 Wn.2d at 765. Under such circumstances, it cannot be said that the error was harmless. This Court should therefore reverse the conviction on this ground as well.

4. THE COURT VIOLATED HEDDRICK'S RIGHT TO A FAIR TRIAL WHEN IT ALLOWED THE JURY TO CONSIDER UNDULY PREJUDICIAL CHARACTER EVIDENCE.

The court violated Heddrick's right to a fair trial when it denied counsel's motion to strike an officer's testimony which had no purpose but to show Heddrick's criminal propensity. See State v. Newton, 109 Wn.2d 69, 73, 743 P.2d 254 (1987) (right to fair trial implicated where evidence introduced to show bad character and criminal propensity).

The prosecutor elicited the following testimony from Deputy Wojdyla on direct examination:

Q: Well, you are a law enforcement officer?

A: Right.

Q: And he was making these comments about no court, no cop, nobody is going to get between me and my kids. Is that something you hear often from people?

A: No.

Q: And so, hearing that from somebody who you were transporting, did that make you think or take it any more seriously?

A: Sure. I mean, the way that was put was basically that he was going to do what he needs to do, doing whatever to get his, you [sic], children back, and nobody is going to be stepping in between that, nobody. *I mean, he is telling us basically that he has a disregard for the law.*

Ms. Lapps: Objection. Speculation.

Court: Sustained:

Ms. Lapps: And I would ask the Court to strike that.

Court: I am not going to strike that. I sustained the objection, again, in that it was based on speculation. Go ahead.

12RP 20-21 (emphasis added):

When a trial court sustains an objection to the admission of improper testimony but declines to grant a motion to strike the evidence from the record, the testimony remains in the record for the jury's consideration. State v. Swan, 114 Wn.2d 613, 659, 790 P.2d 610 (1990); State v. Stackhouse, 90 Wn. App. 344, 361, 957 P.2d 218 (1998).

Due to the court's denial of counsel's motion to strike, the jury remained free to consider the officers' testimony that Heddrick had "a disregard for the law" for any purpose whatsoever, including as evidence of Heddrick's criminal propensity. ER 404(b) prohibits the admission of evidence to show the character of a person to prove the person acted in conformity with it

on a particular occasion. The purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995).

A trial court abuses its discretion when it is based upon untenable grounds or untenable reasons. State v. Vermillion, 112 Wn. App. 844, 855, 51 P.3d 188 (2002). The trial court here abused its discretion because, having sustained the objection, there was no sound reason to deny counsel's motion to strike the inherently prejudicial testimony, thereby leaving the jury free to consider the testimony as evidence of Heddrick's criminal propensities.

An evidentiary error is prejudicial and requires reversal if, "within reasonable probabilities, the trial's outcome would have been materially affected had the error not occurred." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The outcome would not have been affected if the evidence erroneously admitted is of minor significance in reference to the evidence as a whole. Id.

The testimony offered by Officer Wojdyla had no other purpose but to implant in the minds of the jury the idea that Heddrick was a lawbreaker so brazen that he knowingly committed a crime in front of two law enforcement officers. "A trial in which irrelevant and inflammatory matter

is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Evidence is unduly prejudicial when the evidence is likely to stimulate an emotional response rather than a rational decision. State v. Powell, 126 Wn.2d 244, 264, 839 P.2d 615 (1995). A law enforcement officer's improper testimony may particularly affect a jury because of its "special aura of reliability." Demery, 144 Wn.2d at 765. The officer's statement that Heddrick "had a disregard for the law" was inflammatory and had the natural consequence of encouraging the jury to convict Heddrick based on the officer's opinion that Heddrick was an inveterate lawbreaker. The trial court should have stricken this testimony from the record so that the jury could not use the evidence in its deliberations. The court's failure to do so necessitates reversal.

5. NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT VIOLATED HEDDRICK'S RIGHT TO A FAIR TRIAL.

Misconduct by a prosecutor may violate a defendant's due process right to a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). A defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

a. The Prosecutor Urged The Jury To Convict Heddrick Based On Threatening Statements That Ms. Anderson Denied Ever Hearing.

It is misconduct for the prosecutor to mischaracterize the evidence or draw unreasonable inferences from it. State v. Rice, 120 Wn.2d 549, 572, 844 P.2d 416 (1993); State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808 (1991). Prosecutors are also prohibited from making prejudicial statements that are not supported in the record or encouraging the jury to render a verdict on facts not in evidence. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); State v. Stover, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992).

The prosecutor here began her closing argument by reciting the statements Heddrick had made in the officers' presence:

It's not over. I am not taking this shit. No one is coming between me and my children. The Anderson family has been killing me slowly for years. If they keep doing it, I am going to take one of those bitches with me.

12RP 58-59.

The prosecutor then proceeded to argue why the jury should convict Heddrick for harassment of Anderson based on those statements. 12RP 59-69. The problem is that Anderson repeatedly testified that she remembered learning about only one of these statements ("He says those bitches are killing me slowly, you know, it's [sic] going to take one of them

with me."). 11RP 66-67, 74, 75. There was no evidence that Anderson was aware of any other statements made by Heddrick.

To convict Heddrick for the crime of harassment, the prosecutor needed to prove (1) knowledge on the part of Anderson that a threat had been made and (2) that a reasonable person would fear the threat would be carried out. RCW 9A.46.020, J.M., 144 Wn.2d at 482; Kiehl, 128 Wn. App. at 93. It was improper for the prosecutor to encourage the jury to convict Heddrick based on statements that Anderson never learned about and which therefore could not have placed her in reasonable fear of harm.¹³

b. The Prosecutor Intentionally Elicited Improper Opinion Testimony Regarding The Veracity And Guilt Of Heddrick.

As set forth above, the prosecutor purposely elicited opinion testimony from Officer Steffes and Deputy Wojdyla that Heddrick was sincere when he made the threats but lying when he said he was not serious. 12RP 19-20, 25, 40. No witness may give a direct or indirect opinion

¹³ Had there been evidence that Anderson had knowledge of other remarks made by Heddrick, then the court would have needed to give an appropriate jury unanimity instruction. "When the prosecution presents evidence of several acts that could form the basis of the crime, either the state must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act." State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984)).

regarding a defendant's veracity because it is the jury's exclusive responsibility to determine questions of credibility and guilt. Demery, 144 Wn.2d at 759; Jones, 117 Wn. App. at 92.

The prosecutor acted improperly in asking the officers to give their opinion regarding Heddrick's sincerity or lack thereof on three occasions. Not only is the danger of prejudice greater when a law enforcement officer gives such an improper opinion, but the cumulative effect of improper questions regarding the veracity of the defendant heightens their prejudicial effect. Demery, 144 Wn.2d at 765; State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996).

c. The Prosecutor Stated Her Own Legal Conclusions As To Heddrick's Guilt During Examination.

The prosecutor violated the court's pre-trial ruling in referring to Heddrick's statements as "threats" on four separate occasions when questioning state witnesses. 12RP 21-23. The prosecutor, in effect, testified that Heddrick's statements were "threats," which presupposes the establishment of an element of the crime that the state had the burden of proving beyond a reasonable doubt.

A witness may not testify that "the defendant's conduct violated a particular law." Olmedo, 112 Wn. App. at 532. In addition, no witness may opine as to the defendant's guilt, whether by direct statement or by inference. Black, 109 Wn.2d at 348. These prohibitions apply to

prosecutors as well. It is misconduct for a prosecutor to express a personal opinion regarding the guilt of the defendant or to otherwise give a personal assurance that the defendant is guilty. State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984); State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993). The prosecutor, as an officer of the court, has a duty to see that an accused receives a fair trial. Charlton, 90 Wn.2d at 664-65.

By repeatedly offering a personal legal conclusion embedded within her questions, the prosecutor here attempted to sway the jury into believing that a central element of the crime had been established. It was for the jury, not the prosecutor, to decide whether Heddrick's statements constituted "threats" and whether the state had proven this element of the crime beyond a reasonable doubt. Olmedo, 112 Wn. App. at 533.

d. The Prosecutor Made Comments In Closing Argument Designed To Appeal To The Jury's Passion, Prejudice And Sympathies.

The prosecutor made an improper "golden rule" argument during closing. 12RP 63, 64, 65-66. The biblical "golden rule" commands "do unto others as you would have them do unto you." Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 139, 750 P.2d 1257 (1988). "Urging the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position," is an improper argument because it

"encourages jurors to depart from neutrality and decide the case on the basis of personal interest rather than on the evidence." Id., 110 Wn.2d at 139 (citation and internal quotes omitted); see also State v. Thach, 126 Wn. App. 297, 317, 106 P.3d 782 (2005) (applying golden rule analysis in criminal case).

The prosecutor argued to the jury that the "reasonable fear" element of felony harassment had been proven beyond a reasonable doubt, stating:

So, when you are considering the reasonableness of her fear, whether she actually believed those threats could be carried out, you have to consider all her prior experiences. And I am going to ask you to put yourself in her position. If you knew where Mr. Heddrick was, and if you knew that very soon he might be coming back to the community that you lived in, and he said something like that, would you think he might do something? Considering the things that he has done in the past, would you think he might come back?

12RP 65-66.

The prosecutor's golden rule rhetoric did not stop here. In arguing that the "true threat" element of the crime had been established, the prosecutor challenged: "If you heard these words, what would you think? If someone said these words to you, would you feel threatened? If you were Patricia Anderson, would you feel threatened if you had had her experience?" 12RP 64. Finally, in arguing that the "knowingly threaten" element of the crime had been proven, the prosecutor asked "if you were Mr. Heddrick, and you were sitting in the back of a patrol car with two

officers, and you made those comments, do you think it was reasonable to know that those are the kinds of things you shouldn't be saying? That those are the kind of things that could get you in trouble?" 12RP 63.

The prosecutor's golden rule statements were not collateral or insignificant to the central issues in the case. The prosecutor's golden rule comments encouraged the jury to rely upon their personal interests and sympathies rather than the evidence in deciding whether Anderson had a "reasonable fear" and whether Heddrick "knowingly" threatened her. "It is the nature of the argument itself which establishes its impropriety: the jury is invited to decide the outcome of the case based on sympathy, prejudice or bias, rather than on the evidence and the law." Adkins, 110 Wn.2d at 142.

- e. The Prosecutorial Misconduct Issues are Preserved for Review Because They Created Incurable Prejudice.

Defense counsel did not object to the following instances of misconduct: (1) comments during closing argument which were calculated to encourage the jury to render a verdict based on facts not in evidence; (2) elicitation of opinion testimony regarding the guilt and veracity of Heddrick; (3) legal conclusions stated in questions to State witnesses regarding an element of the crime; and (4) the golden rule argument in closing. If there is no objection at trial, a claim of misconduct is waived

unless the misconduct is so flagrant or ill-intentioned that it creates incurable prejudice. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Incurable prejudice will be found if there is a substantial likelihood the misconduct affected the jury's verdict, and a properly timed curative instruction could not have prevented the potential prejudice. Id. The cumulative effect of error may be so flagrant that no instruction can erase their combined prejudicial effect. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000). Here, there has been no waiver of the issues because the cumulative effect of the prosecutor's multiple acts of misconduct was so flagrant that it amounted to incurable prejudice.

First, the prosecutor's elicitation of opinion testimony is preserved for review. A central issue at trial was whether Heddrick "knowingly," rather than jokingly, made threatening statements. The officers, by testifying that they believed Heddrick to be sincere when he made the statements but that they did not believe Heddrick when he claimed he was only joking, placed both their own credibility and the credibility of Heddrick front and center. Indeed, the prosecutor during closing argument stated flatly that "[t]his case comes down to its credibility." 12RP 60. The prosecutor continued:

The question is did he, did he knowingly do it? You heard testimony from the officers. They were so concerned about what he did that they asked him, you know, you should probably consider what you are saying; you are saying it in front of law enforcement officers. And the defendant said, oh, I'm not serious. Ladies and Gentlemen of the jury, I ask you to very carefully consider how many years of law enforcement experience you had sitting on that stand . . . they had no doubt he was serious . . . They had no doubts he could and likely would follow through on the threats. . .

12RP 66-67.

Because credibility played a crucial role when it came to proof of the "knowingly threaten" element of the crime, the officers' opinions were material and highly prejudicial. Jerrels, 83 Wn. App. at 508. A law enforcement officer's opinion as to whether a necessary element of the crime had been established could not easily be disregarded even if the jury had been instructed to do so. Demery, 144 Wn.2d at 765. Also, the improper questions were asked three different times, giving them a cumulative effect. The prosecutor's elicitation of improper opinion testimony in this case therefore created incurable prejudice. Jerrels, 83 Wn. App. at 508.

Further, the prosecutor's misconduct in repeatedly referring to Heddrick's statements as "threats" during examination, thus drawing a legal conclusion as to the establishment of an element of the crime, are preserved for appeal because of the flagrant nature of their impropriety. Comments that reflect the prosecutor's personal assurances to the jury as to the

defendant's guilt are so flagrant that no instruction can cure the prejudice. Stith, 71 Wn. App. at 22. Professed prosecutorial opinions regarding guilt during the witness phase of the trial are especially prejudicial because a prosecutor's statements made during trial "carr[y] an aura of special reliability and trustworthiness." Demery, 144 Wn.2d at 763.

Finally, the prosecutor's mischaracterization of the evidence and use of "golden rule" rhetoric in closing argument are also preserved for review because, when taken together with the elicitation of improper opinion testimony and the prosecutor's legally conclusive comments during examination, their cumulative effect created incurable prejudice. Case, 49 Wn.2d at 73; Henderson, 100 Wn. App. at 804.

f. Numerous Instances Of Prosecutorial Misconduct Make It Substantially Likely That The Verdict Was Affected.

A defendant who alleges prosecutorial misconduct must establish its prejudicial effect in order to reverse the conviction. Dhaliwal, 150 Wn.2d at 578. Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Id. Factors the court reviews in determining prejudicial effect include: "(1) the seriousness of the irregularity; (2) whether the statement at issue was cumulative evidence; (3) whether the jurors were properly instructed to disregard the remarks of counsel not supported by the evidence; and (4)

whether the prejudice was so grievous that nothing short of a new trial could remedy the error." State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To determine whether misconduct warrants reversal, the court considers its cumulative effect on the jury. State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Taken as a whole, the prosecutor's misconduct, both during the witness phase of the trial and in closing argument, demonstrates a substantial likelihood that the outcome was affected. The elicitation of improper opinion testimony and the prosecutor's legal conclusions made during questioning went to critical elements of the State's case and created incurable prejudice. Jerrels, 83 Wn. App. at 508. Moreover, it is well-established that "[a] trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." Miles, 73 Wn.2d at 70. The State's tactics used during closing, including making an argument for guilt based on facts not in evidence and encouraging the jury to rely on personal interest and sympathy, fit squarely within that category. In addition, the instances of

misconduct were not isolated, but occurred repeatedly and throughout the course of the trial. Their cumulative effect increases the likelihood of a tainted verdict. Suarez-Bravo, 72 Wn. App. at 367. Furthermore, the aura of special reliability and trustworthiness which surrounds the prosecutor and law enforcement officers only served to heighten the prejudicial impact of misconduct upon the jury. Demery, 144 Wn.2d at 763. This Court should therefore reverse the judgment due to prosecutorial misconduct.

6. HEDDRICK WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In the event that this Court rules defense counsel failed to preserve one or more of the errors presented above for review, then Heddrick's counsel was ineffective. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (failure to preserve error can constitute ineffective assistance and justifies examination of substantive issues on appeal). Specifically, defense counsel failed to object to (1) various instances of prosecutorial misconduct; (2) improper opinion testimony offered by the officers; (3) improper legal conclusions given by the officers regarding use of the term "threat"; and (4) improper admission of unduly prejudicial testimony regarding threatening statements of which Anderson had no knowledge.

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. State v. Osborne, 102 Wn.2d 87,

99, 684 P.2d 683 (1984); Ermert, 94 Wn.2d at 849. The standard of review for an assertion of ineffective assistance of counsel involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). First, the defendant must show that counsel's performance was deficient. Thomas, 109 Wn.2d at 225. Second, the defendant must show that the deficient performance prejudiced the defense. Id., at 225-26. To satisfy the first prong, the defendant must show that counsel's performance fell below an objective standard of reasonableness. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); Strickland, 466 U.S. at 688. To satisfy the second prong, the defendant must show there is a reasonable probability that but for counsel's performance, the result would have been different. McNeal, 145 Wn.2d at 362; Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The defendant need not show that counsel's deficient performance more likely than not altered the outcome in the case. Id. at 693.

Analysis of the issues already briefed above and their prejudicial impact need not be repeated here. Suffice it to say that, if indeed counsel failed to preserve any one of these errors for review, then that failure constitutes deficient performance and, but for failure to preserve the error,

there is a reasonable probability that the outcome may have been different. McNeal, 145 Wn.2d at 362; Strickland, 466 U.S. at 693, 694.

To the extent, if any, that this Court rules the use of threat terminology by the officers during testimony actually violated the pre-trial order mandating its exclusion, then counsel's performance was also ineffective in failing to preserve that error for review because she failed to timely object to use of the term "threat" on these occasions. 5RP 44, 12RP 23, 36, 38; State v. Sullivan, 69 Wn. App. 167, 171, 847 P.2d 953 (1993) (allowance of standing objection to introduction of evidence, thus preserving issue for appeal, allowed only to party losing pre-trial motion to exclude evidence).

7. CUMULATIVE ERROR DENIED HEDDRICK HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant is entitled to a new trial when errors, even though individually not reversible error, cumulatively produce a trial that is unfair. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v.

Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether cumulative error denied the defendant a fair trial. Ermert, 94 Wn.2d at 848.

Here, an accumulation of errors, as discussed above, materially affected the outcome of the trial: (1) the court found Heddrick competent in the absence of procedural due process; (2) the court issued a "to-convict" instruction which omitted a necessary element of the crime; (3) the court allowed witnesses to give legal conclusions and improper opinion testimony as to Heddrick's veracity and guilt; (4) the court allowed the jury to consider unduly prejudicial evidence of Heddrick's criminal propensity; (5) prosecutorial misconduct during witness examination and closing argument; and (6) ineffective assistance of counsel in failing to preserve errors for review on appeal. Reversal is required because these cumulative errors denied Heddrick his constitutional right to a fair trial.

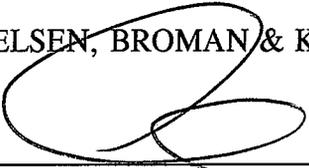
D. CONCLUSION

For the reasons stated, this Court should reverse Heddrick's conviction.

DATED this 21st day of December, 2006.

Respectfully Submitted,

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