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NO. 57469-8-I

57420

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEVE HEDDRICK,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 NOV -2 PM 4:30

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY YU, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Where, following a 90-day restoration of competency period, the court entered uncontested findings of fact and conclusions of law finding the defendant competent to stand trial, and where the defense counsel later thought that there was a reason to doubt her client's competency, but withdrew the motion, was it an abuse of discretion for the trial court to rely on the previously entered uncontested findings?

2. The to-convict instruction contained each essential element of felony harassment, including that the jury had to find the victim subjectively feared the defendant's threat, and that her fear was objectively reasonable. Thus, the jury necessarily had to find that the victim knew of the threat. Does the defendant's contention that the to-convict had to list "actual knowledge" as an essential element, fail?

3. This Court has held that the admission of improper opinion evidence is not a manifest error affecting a constitutional right. Where the defendant failed to object below to allegedly inadmissible opinion evidence, should this Court decline to review his claim?

4. Opinion evidence, if rationally based on a witness' perception and helpful to the jury, is admissible under ER 701. Here, the trial court permitted two officers to testify that based on their direct observations of the defendant's demeanor and the circumstances under which he said he was "going to take one of those bitches with me," the defendant was serious. Was it within the trial court's broad discretion to admit this testimony?

5. Was it error for the officers to testify that, based on their direct observations, the defendant was serious when he made his threat, where the court instructed the jury as to each essential element and it was up to the jury to apply the facts to the law?

6. A defendant may not assign error on appeal where the basis of the objection is different from that argued below. At trial, counsel objected to a question on grounds that the response called for speculation. Although the court sustained the objection, the court did not strike the response. On appeal, the defendant claims that the court erred because the unstricken response contained improper character evidence. Has the defendant waived appellate review of the issue?

7. The defendant claims certain statements made by the prosecutor during closing argument and trial constituted

misconduct. Should this Court agree that the defendant's failure to object bars appellate review, that he has not shown the statements amounted to misconduct, and that he has not proven that but for the alleged misconduct there is a substantial likelihood he would not have been found guilty?

8. In order to prevail on a claim of ineffective assistance of counsel, the defendant must prove both counsel's deficient performance, and that the deficiency prejudiced him. Having failed to establish error in his earlier arguments, appellate counsel recasts his claims as ineffective assistance of counsel. Even if this Court finds meritorious some of the defendant's alleged errors, the unchallenged evidence overwhelmingly establishes the defendant's guilt. Has the defendant failed to establish actual prejudice?

9. Should this Court agree that the defendant's failure to prove multiple trial court errors, and substantial prejudice, bars him from prevailing in a claim under the "cumulative error" doctrine?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Steve Heddrick, with one count of felony harassment. CP 32. A jury convicted Heddrick as charged. CP 102. Heddrick timely appeals.

2. SUBSTANTIVE FACTS

Steve Heddrick and Patricia Anderson began dating when she was 16 or 17 years old. 11RP 43.¹ Soon after they had their first of two children, Heddrick began beating Anderson. 11RP 43-45.

In one instance, Heddrick drove Anderson's Camaro into the river. She told Heddrick that the car would not make it and she put the car in park. 11RP 48-49. Heddrick pulled her out of the car and beat her with a big stick, "clubbing [her] over the back and [her] front leg." 11RP 49-50.

Sometimes when they fought, Heddrick would not let Anderson leave. 11RP 54. Other times, she would manage to get away and run to a relative's house—often she had to leave the children behind—just to save herself. 11RP 43, 54. Heddrick kicked her, hit her, and called her ugly names, but she was too scared to tell anyone. 11RP 46-47, 54.

¹ The State's designation of the verbatim report of proceedings **differs from the appellant's**. The State received the RPs in a different format than identified in n.2 of Br. of App. Accordingly, this is the State's designation: 1RP (9/8/04; 10/14/04; and 1/20/05); 2RP (7/14/05); 3RP (7/18/05); 4RP (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 (10/10/05); 11RP (10/11/05); 12RP (10/12/05).

Finally, in 2000, Anderson could not take any more abuse. 11RP 56. She ended the relationship and got a protection order because she was scared and she "didn't want to be with him no more." 11RP 56.

On August 21, 2000, Anderson and her two children were living with her aunt, Norma Corwin. 11RP 27-32, 63. Anderson and Heddrick's daughter, Nina, was about eight years old and their son, Ed, was about six or seven years old. 11RP 28. Heddrick was not permitted to be at the residence. 11RP 29.

Around midnight, Heddrick showed up; he'd been drinking, and he wanted to see the children. 11RP 32, 59-60. Anderson only opened the door a crack because she was scared. 11RP 34, 60. Heddrick pushed his way inside. 11RP 34, 61. Despite Corwin's and Anderson's repeated pleas to leave, Heddrick refused. 11RP 34, 37, 63. Then things turned violent. 11RP 35.

Heddrick swung at Anderson three times, striking her twice. 11RP 36. Anderson testified, "He started calling me all kinds of names, go ahead and call the cops bitch, I don't care if they come and get me and (witness crying) saying all kinds of stuff, and he hurt me." 11RP 61. By then, the two children had come from the back room and were present during Heddrick's assault. 11RP 61.

Corwin called the police, but before the officers arrived, Heddrick left. 11RP 35, 37, 63-64. Heddrick was convicted of first-degree burglary, domestic violence, for this instance. CP 58.

On May 13, 2004, King County Sheriff's Deputy Mark Wojdyla and Department of Corrections Officer Eric Steffes drove to Clallam Bay Correctional Facility to transport Heddrick back to King County for charges arising out of alleged violations of a no-contact order.² 3RP 5-6. During the transport, Heddrick made some comments about being mistreated at Clallam Bay, then he appeared agitated when he began talking about the Anderson family. 12RP 17. He was pretty agitated with Rosemary (Patricia Anderson's mother) threatening to take his kids away. 3RP 105; 12RP 18. According to Wojdyla and Steffes, Heddrick said, "[t]hat 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." 12RP 19, 37-39.

Steffes became so concerned over Heddrick's remarks that he wrote down verbatim much of what Heddrick said. 12RP 33.

² During pretrial hearings, it was established that Anderson had intercepted many letters that Heddrick wrote to their two children, ostensibly in violation of no-contact orders. She brought those letters in to the substation of the King County Sheriff's Office located on the Muckleshoot reservation. 3RP 28.

According to Steffes, Heddrick said that it was "not over ... between he and the Andersons." 12RP 36. Heddrick claimed that the Anderson family "had been killing him for years," and he stated, "If they keep putting me through hell, I will be taking one of those bitches with me." 12RP 21, 39.

The following day, Wojdyla went to Patricia Anderson's home and told her of Heddrick's comments. 11RP 64; 12RP 22. She was visibly scared—afraid that Heddrick would try to carry out his threat, and fearful for her family, her children and her mom. 11RP 66; 12RP 23. Anderson testified that she interpreted Heddrick's words as a threat to her life. 11RP 67. She said that she is still fearful because she knows that Heddrick "won't give up." 11RP 68.

C. ARGUMENT

1. A COMPETENCY HEARING WAS NOT REQUIRED BECAUSE NO LEGITIMATE QUESTION OF COMPETENCY EXISTED.

Heddrick claims that the trial court violated his due process rights because, "after making a threshold determination that there was a reason to doubt Heddrick's competency," the court did not conduct an evidentiary hearing. Br. of App. at 5, 7. Heddrick's

claim is unfounded.³ Defense counsel withdrew her motion to contest competency; she unequivocally stated, "I was not and am not contesting competency at this time." 11RP 15. Thus, because there was no legitimate question of Heddrick's competency, the trial court did not abuse its discretion by not holding an evidentiary hearing.

a. Relevant Procedural History.

On September 8, 2004, defense counsel, Ms. Brown, advised the court that she had reason to doubt Heddrick's competency and that she was pursuing an independent psychological evaluation. 1RP 3-6. Although Heddrick had been evaluated for a district court case, the report by Western State Hospital (WSH) staff psychiatrist, Brian Waiblinger, MD, did not specify whether Heddrick was, in fact, competent. CP 104-09.

On October 14, 2004, after reviewing Dr. David White's psychological report and addendum, and after the State and

³ Heddrick's position, that the court found reason to doubt his competency, is not unreasonable given the "boiler-plate" language used in the order. See CP 38 ("THIS MATTER coming on in open court upon the motion of the defense, and there being *reason to doubt the defendant's fitness to proceed....*") (emphasis supplied). The caption of the order states it is for "PRETRIAL COMPETENCY EVALUATION," which is also inaccurate.

defense jointly asked the court to find Heddrick incompetent, the Honorable Michael J. Trickey signed an order committing Heddrick to WSH for a 90-day restoration period. 1RP 11-13; CP 94-96, 112-15, 118-28.

On January 20, 2005, after reviewing WSH staff psychiatrist Dr. Steven Marquez's report, CP 130-34, Judge Trickey asked defense counsel if she had a position regarding Dr. Marquez's finding of competency. 1RP 18-19. Defense counsel deferred to the court. 1RP 19. Judge Trickey ruled: "Looking at Dr. Marquez's report, I think there is a basis to find he's been restored to competency and that he can assist counsel and he understands the charges." 1RP 20. The parties then signed agreed findings of fact and conclusions of law. CP 7-8,141.⁴

On July 14, 2005, trial began before the Honorable Mary Yu. 2RP 1-2. Pretrial hearings were held July 14, 18-20. 3RP-5RP. Jury selection began on July 20. 5RP 73.

⁴ An evidentiary hearing was not needed to determine Heddrick's competency because neither party contested the findings contained in the report. See, e.g., State v. Higa, 38 Wn. App. 522, 685 P.2d 111 7 (1984) (no error where court reviewed WSH report concluding that, although Higa had a paranoid personality with obsessive-compulsive traits, he was competent to stand trial, and defense made no request for a formal evidentiary hearing).

On July 21, 2005, court detail notified Judge Yu's bailiff that Heddrick refused to go to court; he threw himself on the floor of the elevator and fought with transport officers. 6RP 2-3. Defense counsel, Ms. Lapps, voiced concerns about mental health issues possibly contributing to Heddrick's absence. However, she did not have particular concerns regarding Heddrick's competency. 6RP 5.

Because Heddrick had a pending custodial assault charge, it was possible that his absence was attributable to on-going strife with jail personnel. 6RP 6. Thus, in order to determine whether Heddrick had voluntarily absented himself from court, and to allow Lapps time to consult with Heddrick and to "assess the situation to see whether there are some issues that need further assessment in terms of his own mental health," the court recessed the trial and set a status conference for July 27. 6RP 19-21, 28.

On July 27, Lapps indicated that given the applicable legal standard, she believed Heddrick was competent. 7RP 6. She expressed concern about Heddrick's mental health and his ability to assist counsel; however, she felt that she could not provide the court with any more substantive information without violating attorney/client communications. 7RP 6-7. The court noted that throughout the four days of pretrial hearings, and in particular,

when the court advised Heddrick of his CrR 3.5 rights, it seemed "he truly and fully appreciated what the Court was advising him of." 7RP 7-8. Lapps agreed. 7RP 8. The court inquired, "What other evidence is there that he is legally incompetent at this point?" 7RP8. Lapps replied, "Well, Your Honor, that's actually the struggle that I have had." 7RP 8. Lapps explained:

It has been very clear to me from the beginning that Mr. Heddrick understood that he has a right to trial, and that he has a right to a plea. He was offered a plea. He turned that down.

We are in trial. We've had numerous discussions about procedures for [CrR 3.5 hearings], for testifying.

And I would agree with the Court's assessment, he asked an intelligent question in terms of ... distinguishing his testimony under three-five from in trial, and which applies....He asked intelligent questions in regard to that.

I think that, for the most part, he can recite what the charges are. His standard range, I think, is unclear to him, as well as to me, because there are a number of issues in terms of whether there's a community custody point.

....

What it really comes down to is really the communication between attorney and client and the ability to assist.

7RP 8-9. Lapps then reiterated her concern that she could not be more specific without violating attorney/client privilege. 7RP 9.

The court then inquired:

So is the ultimate issue at this point for the Court to simply remain in recess until all of this is completed in terms of giving you an opportunity to submit a request to have a private evaluation, to allow the private evaluation to occur, and then perhaps for the Court to reconvene at a certain point in the future to reassess the situation? Is that what you are asking?

7RP 10. Lapps responded, "That would be my request. I think if the Court orders or allows a competency evaluation to go forward in this ... we would need to wait for a report." 7RP 10.

Over Heddrick's strenuous objection ("I've already been evaluated and found competent." 7RP 18), the court signed the proposed order. CP 142. On August 1, 2005, Judge Yu signed an agreed order for a pretrial competency evaluation by WSH. 38-41.⁵

On September 26, Lapps told the court that Dr. White had not yet seen Heddrick.⁶ 9RP 3-4. Lapps felt she needed Dr. White's assessment, because she believed "there is a mental health issue or neurological issue" affecting Heddrick's ability to

⁵ It is not clear from the record whether WSH ever conducted an evaluation or generated a report as a result of this order. The deputy prosecutor reported to the court that there was confusion at WSH over the scope of the evaluation because Heddrick informed WSH that the custodial assault case had been dismissed (it had not been) and that he was only to be evaluated for the felony harassment case. See 8RP 2-3, 5-6. The court file does not contain any psychological evaluations post Dr. Marquez's January 17, 2005 report.

⁶ Lapps chose Dr. White because he previously evaluated Heddrick. CP 126.

effectively communicate with counsel. 9RP 3. Judge Yu set a telephonic status conference for September 29. 9RP 5.

On September 29, the court entered a written order directing Dr. White to file a written report upon completion of his evaluation, and the court set another status conference for October 6. CP 143.

Trial resumed on October 10, 2005. CP 144-45. During the October 11th proceedings, Lapps summarized the October 6th telephonic hearing:

At that time, I informed the Court that an independent evaluation with an expert hired by the defense had been completed.

And when I speak of evaluation, I'm talking about a competency evaluation.

My evaluator's assessment was that Mr. Heddrick was, in fact, competent to proceed. Given his assessment, I am not – *I was not and am not contesting competency at this time.*

I did not feel it was necessary for Doctor White to produce a written evaluation, partially *because I was not contesting the issue*, and also in – out of consideration for the amount of money that it would have cost in addition to what he had already spent to produce a written evaluation, so *the defense's agreeing and has agreed that Mr. Heddrick is competent to proceed.*

11RP 14-15 (emphasis supplied).⁷

⁷ Heddrick concedes that a defendant may waive his statutory right to a written expert report. Br. of App. at 14 (citing State v. Israel, 19 Wn. App. 776, 779, 577 P.2d 631 (1978)).

b. Due Process Requirements.

An accused in a criminal case has a fundamental right not to be tried while incompetent to stand trial. Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); State v. Eldridge, 17 Wn. App. 270, 562 P.2d 276 (1977). The failure to observe procedures adequate to protect this right is a denial of due process. State v. Marshall, 144 Wn.2d 266, 279, 27 P.3d 192 (2001).

In Washington, an "incompetent person" may not be tried, convicted, or sentenced for an offense so long as the incapacity continues. RCW 10.77.050. A defendant is incompetent if he "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(14); see also State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991). A competency evaluation is required whenever "there is reason to doubt" the defendant's competency. RCW 10.77.060(1)(a).⁸ The defense bears the burden of establishing a reason to doubt the defendant's

⁸ In pertinent part, RCW 10.77.060(1)(a) provides:

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

competency. Lord, at 903. A motion to determine competency must be supported by a factual basis and will not be granted merely because it was filed. Id. at 901. The motion is not of itself sufficient to raise a doubt regarding competency. Id. The question is whether "a legitimate question of competency" exists. Marshall, 144 Wn.2d at 279.

"A reason to doubt' is not definitive, but vests a large measure of discretion in the trial judge." City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). In exercising its discretion in determining the threshold question, considerable weight should be given to the attorney's opinion regarding her client's competency and ability to assist in the defense. Id. at 442. A trial judge's determination of competency to stand trial should not be disturbed on appeal absent an abuse of discretion. Eldridge, 17 Wn. App at 279.

c. Defense Counsel Withdrew Her Motion; Thus, There Was No Reason To Doubt Heddrick's Competency.

In this case, the trial court did not abuse its discretion by not holding a formal evidentiary hearing to determine competency. Heddrick was found competent on January 20, 2005, and the presiding court entered findings of fact and conclusions of law to

that effect. CP 7-8. No new information was presented to Judge Yu to alter the status quo. Lapps, concerned about violating attorney/client privilege, could not provide the court with any factual basis for her apprehension concerning Heddrick's ability to assist counsel. Further, after the court allowed Lapps a full opportunity to confirm or dispel any concerns about Heddrick's competency, Lapps withdrew her motion, explicitly telling the court that her expert found Heddrick competent, and that she was not challenging competency: "Mr. Heddrick is competent to proceed." 11RP 14-15.

As this Court has recognized, the role of counsel is unique when determining the competency of her client. See State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978). Not only is the lawyer the client's representative, she is also an officer of the court. Id. She has the closest contact with the defendant, which is why considerable weight is given to the lawyer's representations regarding the defendant's competency. Id.; Gordon, 39 Wn. App. at 442. Here, counsel's representations were not based simply on her close contact with Heddrick; she also had her expert's opinion—which left no legitimate question of Heddrick's competency.

Moreover, our courts have repeatedly stated that a defendant's demeanor and actions in court are relevant to whether there is a reason to doubt competency. See, e.g., State v. Johnston, 84 Wn.2d. 572, 576, 527 P.2d 1310 (1974) (no error in failing to hold a formal evidentiary hearing to determine competency where the trial judge had properly considered, among other factors, the defendant's appearance, demeanor, conduct, and the statements of counsel); State v. Hicks, 41 Wn. App. 303, 309, 704 P.2d 1206 (1985) ("Deference is given to the trial court's competency determination because of its personal observation of the defendant's behavior and demeanor that is claimed to have demonstrated incompetency."); State v. Higa, 38 Wn. App. 522, 525, 685 P.2d 1117 (1984) (no error in failing to hold formal evidentiary hearing where trial judge had many opportunities to observe the defendant, his demeanor, and his ability to express himself, and defense made no request for such a hearing).

In this case, Judge Yu had four days of pretrial hearings in which to observe Heddrick's demeanor and his ability to express himself. She noted that during the CrR 3.5 hearing, after advising Heddrick of his rights, it appeared that he "truly and fully appreciated what the Court was advising him of." 7RP 7-8.

Further, Lapps affirmatively represented to the court that Heddrick seemed to understand the nature of the charge, the legal process, and the consequences of conviction, all appropriate considerations for a court when determining whether there is a factual basis for a motion to determine competency. See Gordon, 39 Wn. App. at 442.

Finally, nothing in the record suggests that Judge Yu ever observed any inappropriate behavior, or behavior that would provide *reason to doubt* Heddrick's competency. Because Heddrick never made a threshold showing of a reason to doubt his competency, the trial court properly relied on the January 20, 2005 determination of competency. See State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992). Under the facts of this case, Judge Yu did not abuse her discretion.

Heddrick contends that the court found him competent without an evidentiary hearing. Br. of App. at 5 (citing to the October 10 transcripts at pages 3-5). Heddrick is mistaken. The court was addressing Heddrick's custodial assault case, and entered an order finding him competent under that cause number (05-1-07161-0). 10RP 3; CP 145. In the instant case, the court did

not need to find Heddrick competent; he was presumed competent pursuant to the agreed findings entered on January 20th. CP 7-8.

Because there was no evidence before the trial court that raised a legitimate doubt about Heddrick's competence to stand trial, his reliance on cases that hold a defendant has a constitutional right to an evidentiary hearing when competency is at issue is misplaced.⁹ The State does not disagree that due process requires procedural safeguards to ensure that a defendant is not tried, convicted, or sentenced, while incompetent. The disagreement lies in whether there was a legitimate reason to doubt Heddrick's competency.

Heddrick cites to examples of his troubling behavior as indicative of his incompetency to stand trial. Br. of App. at 9-10 and n.7. However, each of the instances to which he refers occurred prior to the court finding Heddrick competent. Moreover, Heddrick ignores two important aspects of Dr. White's October 2004 report: First, it was written on October 11, 2004, prior to the 90-day restoration period and, therefore, prior to the court's finding of competency; and second, Dr. White qualified his diagnosis, "*At the*

⁹ Heddrick cites to Pate v. Robinson, 383 U.S. 375, 378, 385 S. Ct. 836, 15 L. Ed. 2d 815 (1966) and Williams v. Woodford, 384 F.3d 567, 603 (9th Cir. 2004).

present time, I do not believe that Mr. Heddrick is able to assist his attorney is his own defense." CP 126 (emphasis added).

Additionally, each of Heddrick's psychological reports is consistent to the extent that each evaluator, whether the author of the report or another assessor whose evaluation is referenced therein, opined that Heddrick had a good understanding of the legal system, his current charges, his consequences upon conviction, etc. Where Dr. White's opinion diverged was his conclusion that Heddrick could not assist his counsel.¹⁰ However, Dr. White left open the possibility that, with psychiatric treatment, Heddrick's competency could be restored. CP 126. That is precisely what occurred here. CP 7-8; 11RP 14-15.

Once Heddrick's counsel confirmed that there was no factual basis for her motion, she appropriately withdrew it. The court, therefore, had no reason to doubt Heddrick's competency.

¹⁰ Compare CP 119 (Dr. Gleyzer opined that Heddrick was "competent to proceed") and CP 122 (Dr. Thomas concluded, "Regarding Mr. Heddrick's capacity to ... participate in his own defense, it is our clinical opinion that he does have the capacity to proceed with his case.") and CP 133 (Dr. Marquez concluded, "It is our opinion that Mr. Heddrick has obtained sufficient clinical stability to rationally work with his attorney in his defense.") with CP 126 (Dr. White opined, "*At the present time*, I do not believe that Mr. Heddrick is able to assist his attorney in his own defense.") (Emphasis added).

Accordingly, Judge Yu's reliance on the July 20, 2005 findings of fact and conclusions of law was not an abuse of discretion.

2. THE "TO-CONVICT" INSTRUCTION CONTAINED EACH ESSENTIAL ELEMENT.

Heddrick claims that the "to-convict" instruction omitted an essential element of the charged crime. Specifically, he contends the State bore the burden of establishing that Patricia Anderson had "actual knowledge" of his threat. Br. of App. at 16. To the extent that the State needed to prove that Heddrick's threat to inflict bodily injury was communicated to Anderson, Heddrick is correct. The law requires a defendant to knowingly threaten a person and that the person threatened be aware of the threat and placed in reasonable fear that the threat would be carried out. But the jury could not have concluded that Anderson was in reasonable fear that Heddrick would carry out his threat, unless it necessarily concluded that Anderson *knew* of the threat. Thus, because the jury instructions contained each essential element of the charged crime, Heddrick's claim must be rejected.

The State charged Heddrick with felony harassment. CP 32; RCW 9A.46.020. The statute provides:

- (1) A person is guilty of harassment if:
- (a) Without legal authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person;
 - ...and (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out....

RCW 9A.46.020;¹¹ CP 53.

"Threat" is defined as, among other things, "to communicate, directly or indirectly, the intent ... [t]o cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(26)(a); CP 57. With regard to communicating the threat, the defendant must be aware that he is communicating a threat. State v. J.M., 144 Wn.2d 472, 481, 28 P.3d 720 (2001). It is not, however, necessary for the defendant to knowingly communicate the threat either directly or indirectly to the person threatened, provided the person threatened finds out about the threat, and the perpetrator's words place the person threatened in reasonable fear

¹¹ A conviction under RCW 9A.46.020(2) is a class C felony. It provides in relevant part:

The person has previously been convicted ... of any crime of harassment, as defined in RCW 9A.46.060, of the same victim.

The parties stipulated that Heddrick had previously been convicted of felony burglary, domestic violence (a crime of harassment as defined by RCW 9A.46.060) of Patricia Anderson. CP 58.

that the threat will be carried out. Id. at 477; State v. Kiehl, 128 Wn. App. 88, 93, 113 P.3d 528 (2005).

The trial court instructed the jury that in order to convict Heddrick, it had to find proof beyond a reasonable doubt of each of the following elements:

- (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. Thus, in order for the jury to convict Heddrick, it had to find, among other elements, that Heddrick's knowing threat to cause bodily injury to Anderson placed Anderson in reasonable fear that the threat would be carried out immediately or in the future. CP 53.

Anderson had actual knowledge of the threats because Deputy Wojdyla communicated Heddrick's threat to her. 11RP 64-68, 74-75; 12RP 21-23. The day after Wojdyla and Steffes transported Heddrick, Wojdyla went to Anderson's house and told her that Heddrick claimed that the Anderson family "had been killing

him for years" and "if they keep putting me through hell, *I will be taking one of those bitches with me.*" 12RP 39 (emphasis supplied).

Anderson testified that when she learned of the threats, she was afraid—after years of suffering violent abuse, she stated that she knows Heddrick "won't give up." 11RP 45-46, 49, 54, 59-61, 68. She said, "I was scared thinking he was threatening my life." 11RP 67. Because the jury found beyond a reasonable doubt that Anderson was in reasonable fear of Heddrick carrying out his threat of bodily injury, it necessarily found that she had actual knowledge of the threat. Accordingly, Heddrick's claim fails.

Heddrick misapprehends the courts' decisions in State v. J.M., *supra* and State v. Kiehl, *supra*. Neither case added an essential element; rather, each case clarified the elements. For instance, in J.M., the court rejected J.M.'s contention that the word "knowingly" in the statute meant that the perpetrator must know or should know that the threat will be communicated to the person threatened. J.M., 144 Wn.2d at 477. Rather, the element is satisfied provided the person threatened finds out about the threat and is placed in reasonable fear that the threat will be carried out. Id.

Similarly, in Kiehl, Division III of this Court reiterated the decision in J.M. Kiehl, 128 Wn. App. at 93. There, the defendant, upset with his sentencing judge, told his mental health counselor, Ms. Clark, that "he was going to kill [the judge]." Kiehl, at 90. Ms. Clark reported the threat to the judge, but the judge did not testify, nor was any evidence presented that he was aware of the threat and placed in reasonable fear that the threat would be carried out. Id. at 90-91.

On appeal, the court rejected the State's argument that, because Ms. Clark was the person to whom Kiehl communicated the threat, she was the person the State must prove was placed in reasonable fear that the threat would be carried out. Id. at 92-93. Rather, the court reiterated that knowledge of the threat by the person threatened is a predicate to the State's ability to prove that the person threatened was placed in reasonable fear. Id. at 93.

Unlike in Kiehl, where there was no evidence that the judge knew of the defendant's threat, and therefore could not be in reasonable fear that the threat would be carried out, here Anderson had actual knowledge of Heddrick's threats and she was in reasonable fear that Heddrick would carry out his threats.

The trial court properly instructed the jury as to each essential element of the charged crime. Accordingly, this Court should affirm Heddrick's conviction for felony harassment.¹²

3. RAP 2.5(a) PRECLUDES REVIEW OF HEDDRICK'S CLAIM THAT THE COURT PERMITTED IMPROPER OPINION EVIDENCE.

Heddrick contends that the court permitted improper opinion evidence when it allowed Deputy Wojdyla and Officer Steffes to testify that Heddrick's threats seemed serious. However, because Heddrick failed to object to the testimony below, he has waived this claim on appeal. Furthermore, because the harassment statute criminalizes "true threats," which are determined under an objective standard, the testimony was properly admitted because it provided the necessary context for the trier of fact to assess whether a reasonable person would foresee that Heddrick's statements would be interpreted as a serious expression of an intention to inflict bodily harm upon another. Moreover, the testimony was rationally based on the perception of the witnesses and was helpful to an

¹² Because there was no error in the jury instructions, the State will not further address Heddrick's claim that "failure to instruct on an essential element is automatic reversible error." Br. of App. at 18. However, in light of Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), the State disagrees that an error in the "to-convict" instruction constitutes automatic reversible error.

understanding of a fact in issue. Heddrick's request for reversal should be denied.

a. The Admissibility Of Improper Opinion Evidence Is Not Manifest Constitutional Error.

Heddrick claims for the first time on appeal that Deputy Wojdyla and Officer Steffes improperly opined that Heddrick made a "knowing' threat" and that he was lying when he claimed that he was not serious about the threat. Counsel for Heddrick did not object to the testimony below. 12RP 19-20, 25, 39-40.¹³ Under RAP 2.5(a), Heddrick has waived any challenge on appeal with respect to this issue. Because the admission of testimony alleged to constitute an opinion on guilt is not an error of constitutional magnitude, it may not be raised for the first time on appeal. City of Seattle v. Heatley, 70 Wn. App. 573, 583-86, 854 P.2d 658 (1993). Heddrick's reliance on State v. Kirkman,¹⁴ State v. Saunders,¹⁵ and State v. Dolan¹⁶ as support for his argument that the admission of improper opinion testimony is a manifest constitutional error, is misplaced. This Court specifically rejected Division II's analysis in

¹³ Counsel objected to one question and answer on the basis of speculation, which the court sustained. 12RP 40. This objection, however, is not relevant to the issues raised here.

¹⁴ 126 Wn. App. 97, 107 P.3d 133, *review granted*, 155 Wn.2d 1014 (2005).

¹⁵ 120 Wn. App. 800, 811, 86 P.3d 232 (2004), *review denied*, 156 Wn.2d 1034 (2006).

¹⁶ 118 Wn. App. 323, 330, 73 P.3d 1011 (2003).

Kirkman. See State v. Warren, 134 Wn. App. 44, 54-58, 138 P.3d 1081 (2006). The court in Saunders stated only that, “[t]he admission of opinion testimony *may* be manifest error affecting a constitutional right.” Saunders, 120 Wn. App. at 811 (emphasis added).¹⁷ Dolan cites to State v. McFarland¹⁸ as authority for an appellant’s right to raise the admission of improper opinion testimony for the first time on appeal. Dolan, 118 Wn. App. at 323 (citing McFarland, 127 Wn.2d at 334). Yet, McFarland did not involve the admissibility of improper opinion testimony; the issue there was whether the appellants could challenge for the first time on appeal a warrantless arrest. Thus, Dolan is not helpful to Heddrick.

Because Heddrick did not object at trial, this Court should decline to address this issue. Even if this Court considers Heddrick’s claim, it is apparent that the court properly admitted the testimony to provide the jury with evidence helpful to an understanding of a fact in issue.

¹⁷ Ironically, Saunders cites to State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), as authority. Yet, in Justice Alexander’s concurring opinion he points out that the parties agreed that error, if any, in admitting the opinion evidence was not of constitutional magnitude. Demery, at 766 (Alexander, C.J., concurring).

¹⁸ 127 Wn.2d 322, 899 P.2d 1251 (1995).

b. Had An Objection Been Raised, The Evidence Would Properly Have Been Admitted.

The admission of evidence lies within the sound discretion of the trial court. State v. Norlin, 134 Wn.2d 570, 576, 951 P.2d 1131 (1998). A decision to allow certain evidence will not be reversed absent a showing of abuse of discretion, a standard met only when the appellate court concludes that no reasonable person would have taken the position adopted by the trial court. State v. Demery, 114 Wn.2d 753, 758, 30 P.3d 1278 (2001). Where reasonable minds could take differing views, the court has not abused its discretion. Demery, 144 Wn.2d at 758. This Court has expressly declined to take an expansive view of claims that testimony amounts to an opinion on guilt. Heatley, 70 Wn. App. at 579. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704; State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993); State v. Ferguson, 100 Wn.2d 131, 667 P.2d 68 (1983); Heatley, at 577. While a witness may not testify to his opinion as to the guilt of a defendant, "under modern rules of evidence, an opinion is not improper merely because it involves ultimate factual issues." Id. at 578. After all,

"[i]t is the very fact that such opinions imply that the defendant is guilty, which makes the evidence relevant and material." Id. Thus, a witness is allowed to render an opinion when the opinion is rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. ER 701; Halstien, 122 Wn.2d 109; Ferguson, 100 Wn.2d 131. This is especially true, the Supreme Court has stated, when the opinion is express in terms that make it clear that the testimony is a lay opinion based upon perceptions. Halstien, at 128; Ferguson, at 141.

Here, Wojdyla's and Steffe's opinions regarding the seriousness of Heddrick's threat was admissible at the discretion of the court. In both cases, any opinion they had was based upon their observations, was expressly stated as such, and was helpful in describing Heddrick's demeanor.

Wojdyla testified that once Heddrick began talking about the Anderson family, he "appeared agitated." 12RP 17. Wojdyla noted that when Heddrick said, "No one would come between he and his children, no law, no court, no cop, nobody," Heddrick "conveyed a sense that he was pretty upset." 12RP 19-20. When Heddrick said that the Anderson family had been killing him for years, and that if

they "kept putting him through hell, that he was going to take one of those bitches out with him," Wojdyla interpreted Heddrick's remarks as a serious threat to kill Patricia or Rosemary Anderson. 12RP 21.

Similarly, Officer Steffes took seriously Heddrick's comments, such as "it's not over" between him and the Andersons, "based on the tone of his voice and the conviction of his words." 12RP 36. According to Steffes, Heddrick became more agitated and angrier. 12RP 37. Steffes said:

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 (*sic*) with his words.

12RP 40.

Although courts must exercise care when government officials express their opinions, as those opinions may unduly influence the fact-finder,¹⁹ neither Wojdyla nor Steffes said anything about Heddrick's guilt. And while they did express an opinion about an issue that was ultimately for the jury to decide, it was not improper because it was helpful to the jury in its determination of a fact in issue. See State v. E.J.Y., 113 Wn. App. 940, 953, 55 P.3d

¹⁹ State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985), *overruled on other grounds by Heatley*, 70 Wn. App. at 585-86.

673 (2002) (victim testified that "because of E.J.Y.'s facial expression, she felt he was upset and believed E.J.Y. had meant what he said.").

The State had to prove that Heddrick's threat was a "true threat." J.M., 144 Wn.2d at 477-78; CP 53. "A true threat is a serious threat, not one said in jest, idle talk, or political argument." Id. A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another individual. State v. Kilburn, 151 Wn.2d 36, 43-44, 84 P.3d 1215 (2004); State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001); J.M., at 477-78. *See also* CP 52. "[W]hether a true threat has been made is determined under an objective standard that focuses on the speaker." Kilburn, at 44. The objective standard focuses on whether a reasonable speaker would foresee that the recipient of his words would take the statement seriously. State v. Johnston, 156 Wn.2d 355, 361 n.5, 127 P.3d 707 (2006) (citations omitted).

In order to assess whether Heddrick's threat was a "true threat," the jury was entitled to hear evidence about the context and circumstances under which Heddrick made the threats.

Consequently, Heddrick's demeanor and the fact that he made his comments to two law enforcement officers was probative evidence.

Heddrick's claim that the officers improperly testified that his threats were made "knowingly" is specious.²⁰ Heddrick subjectively knew that he was communicating a threat when he said, "if they (Patricia and Rosemary Anderson) keep putting me through hell, *I will be taking one of those bitches with me.*" 12RP 39 (emphasis supplied). The officers' recitation of what Heddrick said did not constitute an impermissible opinion as to whether Heddrick's threat was made knowingly.

Moreover, it is somewhat misleading to claim that the officers opined that Heddrick was lying when Heddrick said that he was not serious about his statements. His mischaracterization underscores why context is so important. It was not until after Heddrick had worked himself up into a state of agitation, believing that he had been falsely imprisoned as a result of the Andersons hiring a "high-priced attorney," blaming Rosemary Anderson for trying to take away his children, feeling that the family had put him through hell, threatening to take "one of the bitches with him," and

²⁰ "A person 'acts knowingly' ... when he is aware of a fact, facts, or circumstances or result described by a statute defining an offense," i.e., has subjective knowledge. RCW 9A.08.010(1)(b)(i); CP 54.

then being reminded by Officer Steffes that he was in the presence of two law enforcement personnel, that Heddrick said he was not serious. 12RP 18-19, 36-40. The fact that Wojdyla and Steffes perceived Heddrick's comments as threats, and not "idle talk, joking, or puffery," did not constitute impermissible opinion evidence—it explained why they felt the need to warn the Andersons. 12RP 21-23, 40-43. See also 5RP 44 (court rules pretrial that, in response to prosecutor's question regarding why they decided to tell Anderson what the comments were, the officers may testify that they perceived Heddrick's comments as threats). Even after Wojdyla and Steffes testified about their perceptions, which were rationally based on their own observations, the jury still had to decide the ultimate issues: Was the threat a true threat? Was Patricia Anderson subjectively fearful? If so, objectively viewed, was her fear reasonable? CP 53.

Heddrick relies on State v. Jones, 117 Wn. App. 89, 68 P.3d 1153 (2003), as support for his argument. In Jones, the defendant was charged with possessing a firearm, which was found under the vehicle's seat. The officer testified that he did not believe Jones's claim that he did not know the firearm was in the car. Jones, at 91. The appellate court held that the improper opinion evidence was

reversible error because it addressed the sole issue in the case. Id. at 92. Here, the jury had myriad issues to resolve. Moreover, as pointed out above, neither officer commented on Heddrick's veracity or guilt.

Heddrick also argues that Wojdyla's and Steffe's opinion testimony is similar to that found inadmissible in State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999). There, a state trooper testified about his opinion of the defendant's state of mind in a prosecution for attempting to elude. Farr-Lenzini, at 461-62. The trooper testified that "the person driving that vehicle was attempting to get away from me and knew I was back there and [was] refusing to stop." Id. at 458. Division II held that this testimony was reversible error because the driver's state of mind was a core element of the offense, the trooper testified to the defendant's guilt without an adequate factual basis, and there was a credible alternative explanation for his observations. Id. at 461-66.

Here, neither officer made a direct statement about Heddrick's guilt. The testimony does refer to Heddrick's state of mind; i.e., that the threats were made seriously, or were true threats, and thus relates to a core element of the offense. Unlike the trooper's testimony in Farr-Lenzini, however, Wojdyla and

Steffes had substantial factual bases for their opinions, drawn from direct observations and personal experience during the incident.²¹

The trial court, therefore, properly admitted the testimony.

c. Any Error Was Harmless.

If this Court were even to consider this issue on appeal, Heddrick's claim should be rejected. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996).

Wojdyla told Anderson of Heddrick's threat the day after it occurred. 12RP 39. Anderson testified that when she learned of the threats, she was afraid—after years of suffering violent abuse, she stated that she took Heddrick's words to mean: "he was threatening my life." 11RP 45-46, 49, 54, 59-61, 67-68. The same

²¹ Heddrick is mistaken in his claim that neither Wojdyla nor Steffes had any familiarity with Heddrick's "individual characteristics and idiosyncrasies" prior to transporting him. Br. of App. at 25. During a pretrial hearing, Steffes testified about the background research he conducted prior to going to Clallam Bay. He reviewed the letters that Heddrick had written in violation of the no-contact order, he reviewed all of the Department of Corrections data, which included Heddrick's criminal history, family information, and infraction history while incarcerated. Steffes said that Heddrick's seven pages of infractions were the most that he had seen for one person. The infractions ranged from fighting to flooding his cell to sexual harassment to a couple of "disease transfers." 3RP 28-31. Prior to transporting Heddrick, Steffes reviewed the information with Wojdyla and did some "game planning." 3RP 32.

result would have been reached in the absence of the error; thus, error, if any, was harmless.

4. THE OFFICERS' TESTIMONY DID NOT CONTAIN AN IMPROPER LEGAL CONCLUSION.

Heddrick contends that the trial court erred because it permitted Wojdyla and Steffes to refer to Heddrick's statements as "threats." In essence, he argues that the officers' use of the word "threat" was tantamount to relieving the State of its burden of having to prove each essential element, because the testimony expressed an improper legal conclusion; i.e., told the jury what decision to reach. Heddrick's claim is without merit. The officers did not use the word "threat" as a legal conclusion; rather, they used the word to describe Heddrick's demeanor, why they took the statements seriously, and why they communicated the statements to Rosemary and Patricia Anderson.

Pretrial, the court ruled that the officers could use the word "threat" in response to questioning by the State as to why they decided to tell Anderson about the comments. Judge Yu said that generally she would prefer that the officers refer to the comments as comments or statements, but that in explaining why they told

Anderson about the remarks, "they could say they perceived them as threats." 5RP 44.

As Heddrick properly concedes, testimony is not objectionable merely because it includes comments on the ultimate issue of fact. Here, the ultimate issue was not simply whether Heddrick's words constituted a threat, but more specifically, did the words constitute a "true threat"?

As pointed out above, the assessment of whether a threat is a true threat is objective; it focuses on whether a reasonable speaker would foresee that the recipient of his words would take the statement seriously. Johnston, 156 Wn.2d at 361 n.5. Thus, it was entirely permissible for Steffes to opine that Heddrick's comments, made in front of two law enforcement officers, sounded "as a threat." 12RP 38.

Heddrick's assertion that the prosecutor abused the trial court's ruling is not borne out by the record. Heddrick quotes three passages from the record; in each passage the prosecutor refrained from using the word "threat." She asked Wojdyla what Anderson's reaction was when he "told her *those things*"; she asked Steffes his reaction to the *comment*, "it was not over"; and she referred to Heddrick's remarks that "no law, no court, no cop,

nobody was going to get between him and his children” as a *comment* and a *statement*. (Br. of App. at 27 (emphasis supplied)).

Citing State v. Olmedo, 112 Wn. App. 525, 49 P.3d 960 (2002), Heddrick contends that the officers’ testimony constituted an inadmissible legal conclusion, analogous to an expert offering an improper opinion on guilt. “Improper legal conclusions include testimony that a particular law applies to the case, or testimony that the defendant’s conduct violated a particular law.” Olmedo, at 532.

This case, however, is unlike Olmedo, in which an expert testified at trial (where one charge was unlawful storage of anhydrous ammonia) that certain tanks used to store anhydrous ammonia were illegal under standards set by the Department of Transportation (DOT). Id. at 529. Whether the storage tank was approved was a core element. Id. at 532. The testimony was improper because the expert’s opinion required the application of the law defining a DOT-approved tank to the specific facts. Id. at 533. Moreover, the error in Olmedo was not harmless because the trial court failed to define a DOT-approved tank. Thus, “the jury was left to speculate on the definition of an approved tank, or accept [the expert’s] conclusion.” Id.

Unlike in Olmedo, the trial court in this case properly instructed the jury on each essential element of the charged crime, including what constitutes a true threat. CP 52. Thus, here, the jury was not left to speculate on the definition of a core element. Furthermore, the officers simply described what they perceived; i.e., how Heddrick appeared (agitated) and his demeanor (angry, pretty upset, venomous). Unlike in Olmedo, it was then up to the jury to apply the law to the facts.

Even if the court erred by allowing the officers to use the word "threat," any error was harmless beyond a reasonable doubt. Wojdyla's and Steffe's perception of Heddrick's remark as a "threat" merely corroborated Anderson's testimony. Anderson testified repeatedly that she was frightened by Heddrick's threat. See, e.g., 11RP 66-68, 74-75. Moreover, even if the officers had referred to Heddrick's words as comments, statements, declarations, or remarks, the jury would have reached the same conclusion—Heddrick's words, that the Anderson family "had been killing him for years" and "if they keep putting me through hell, *I will be taking one of those bitches with me,*" constituted a true threat.

5. HEDDRICK OBJECTED AT TRIAL TO A RESPONSE ON THE BASIS THAT IT CALLED FOR "SPECULATION"; HE MAY NOT ASSIGN ERROR ON THE BASIS THAT THE RESPONSE CONTAINED IMPROPER CHARACTER EVIDENCE.

Heddrick claims that the court erred because it improperly admitted character evidence. Heddrick, however, cannot assign error to the court's admission of the evidence on that basis, because it was not the basis of his objection at trial.

a. The Pertinent Testimony.

During the State's direct examination of Wojdyla, he testified that Heddrick seemed agitated about Rosemary Anderson threatening to take away his children. 12RP 18. According to Wojdyla, Heddrick stated, "No one would come between he and his children, no law, no court, no cop, nobody." 12RP 19. The deputy prosecutor then asked Wojdyla whether he took Heddrick's remarks more seriously because Heddrick said them in front of the police:

Q. [Heddrick] 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 is going to do what he needs to do, doing whatever to get his, you know,

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.*

The Court: Sustained.

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

The 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 supplied).

b. Heddrick Has Waived Appellate Review.

Heddrick contends that after the trial court sustained the objection, it should have stricken the response. Heddrick is correct. However, a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). Because the specific objection made at trial, "speculation," is not the basis Heddrick is arguing before this Court, he has lost his opportunity for review. Id.

6. HEDDRICK'S CLAIMS OF PROSECUTORIAL MISCONDUCT MUST BE REJECTED.

Heddrick alleges that the prosecutor committed misconduct in her closing argument, and during her questioning of Wojdyla and

Steffes. However, he fails to establish that the State erred in closing argument or its case-in-chief, or that he should be excused from failing to object below, or that the conduct resulted in prejudice to him sufficient to question the legitimacy of his conviction.

In order to sustain a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and that the misconduct had a prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672; 904 P.2d 245 (1996). A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

After each instance of purported misconduct, Heddrick either did not object or did not request a curative instruction. Therefore, appellate review is precluded unless he can show that the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been

neutralized by an admonition to the jury. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

a. The Prosecutor Relied On Admitted Evidence In Arguing For A Conviction.

Heddrick's allegation that the prosecutor urged the jury to convict him based on statements that Anderson denied ever hearing, is baseless. The prosecutor relied on admitted evidence, and urged the jury to convict Heddrick on that evidence. There is no misconduct where the prosecutor does no more than argue facts in evidence or suggest reasonable inferences from the evidence. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

That is the case here.

Heddrick's claim, that Anderson was unaware of any of Heddrick's other statements, such as "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," mischaracterizes the record. Wojdyla testified that he specifically told Anderson what Heddrick had said during the transport. 12RP 23. Anderson acknowledged that Wojdyla read his report to her about "specific things that Mr. Heddrick said." 11RP 66. She testified that "I'm scared of [Heddrick] and about ... what he said to

the police he was going to do." 11RP 66. Anderson took Heddrick's words, "I'm going to take those bitches with me," as him threatening her life. 11RP 67.

On cross-examination, defense counsel pressed Anderson for details of what else Wojdyla told her. 11RP 73-75. Anderson said that she could not remember exactly what Wojdyla said. 11RP 74-75. She recalled only "part of the report he read to me." 11RP 75.

There is a distinction between a witness failing to recall the exact words that she was told, and never having been told the words at all. Here, Wojdyla read his report to Anderson, which included the language that the prosecutor used in her closing argument. Though Anderson may not have recalled Heddrick's specific language, she confirmed that Wojdyla had read his report to her, that it contained the threat, and that she was in fear as a result of the threat. 11RP 66-68, 74. There was no misconduct. And again, no objection was raised to preserve the issue.²²

²² Heddrick's claim that, had Anderson recalled his other remarks, the State would have had to elect an act that formed the basis of the crime is equally baseless. An exception to the requirement that either the State elects an act upon which it relies for the conviction, or the court must provide a unanimity instruction, is a continuing course of conduct. State v. Petrich, 101 Wn.2d 566, 571-72, 683 P.2d 173 (1984).

b. The Prosecutor's Argument Was Not Intended To Evoke Emotion Or Sympathy.

Heddrick contends that the prosecutor made an improper argument by asking the jurors to put themselves in Anderson's position. His claim should be rejected. In arguing that Anderson's fear was reasonable, the prosecutor, without objection, asked the jurors to consider all of Anderson's prior experiences with Heddrick; i.e., to put themselves in her position. This argument was not intended to evoke emotion or sympathy but to demonstrate the reasonableness of Anderson's fear.

Heddrick alleges that the prosecutor made a prohibited "golden rule" argument. Such an argument based upon the biblical "golden rule" standard of conduct for individuals, which states: "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) (quoting New Testament, Luke 6:31). Such argument is improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. Adkins, at 139.

A prosecutor has a duty to seek a verdict free of prejudice and based on reason. State v. Husun, 73 Wn.2d 660, 663, 440

P.2d 192 (1984). Had the prosecutor here asked the jurors to put themselves in the place of the victim to invoke a sense of prejudice or passion, the argument would have been improper.

Here, however, the prosecutor focused on the elements of the crime. One of the elements of felony harassment that the State must prove beyond a reasonable doubt is that, "by the defendant's words or conduct, the victim was placed in reasonable fear that the threat would be carried out." RCW 9A.46.020. In attempting to show that Anderson's fear was reasonable, the prosecutor in closing stated:

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. This argument was made without objection.

The prosecutor's argument was used for one purpose—to show that the victim's fear was reasonable. The argument did not encourage the jurors to be less than neutral or to decide the case based on anything other than the evidence. Indeed, the prosecutor

told the jury to "[g]o back and review all of the evidence." 12RP 68.
Heddrick has failed to prove misconduct.

In the other instances about which Heddrick complains, none of the statements, except "if you were Patricia Anderson, would you feel threatened if you had her experience," asks the jury to put itself in Anderson's shoes. Again, this argument was proper because it was intended to show that the victim's fear was reasonable. The other statements, while they phrased the argument in terms of "you," did not ask the jurors to put themselves in the victim's place. Taken in context, the prosecutor's use of the word "you" really argued in terms of what a reasonable person would do. Although the prosecutor's comments may have been inartfully worded, they were not improper.

c. The Prosecutor Did Not Impermissibly Opine
That Heddrick Was Guilty.

Heddrick alleges that the prosecutor violated the court's pretrial ruling in referring to Heddrick's statements as "threats" in four of her questions, and that in so doing she rendered improper opinion testimony. This claim should be rejected. As discussed above, the State did not merely have to prove that Heddrick made a

threat, it had to prove that he "knowingly threatened" Anderson, and that the threat was a "true threat." CP 53.

A review of the pages cited by Heddrick (attached as Appendix A), shows that the prosecutor kept within the letter and the spirit of the court's pretrial ruling.²³ Initially, the prosecutor was laying the foundation for whether Wojdyla took Heddrick's comments seriously, so she could then inquire why he communicated the comments to Anderson. *Compare* 12RP 21-22 *with* 5RP 44. The prosecutor then asked a series of questions designed to establish that Heddrick's comments were knowingly made and constituted a true threat. Appendix A. This was not only proper, but it was without objection.

Heddrick's reliance on State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) and State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) is misplaced. In Reed, the prosecutor called the defendant a liar, stated that defense counsel did not have a case, referred to the defendant as clearly a "murder two," and asked rural jurors whether they were going to let city lawyers make their decision. Reed, at 145-46.

²³ A review also demonstrates that the prosecutor referred to Heddrick's remarks as "comments" and "things." 12RP 21-23.

In Stith, the prosecutor violated a motion in limine that prohibited any mention of the defendant's prior drug conviction, argued facts not in evidence, and gave impermissible opinion testimony when he claimed the defendant "was just coming back and he was dealing again." Stith, at 21-22. Later, in rebuttal, the prosecutor argued that there were safeguards in the system to prevent police officer perjury and that probable cause had already been determined. Id. The thrust of each improper statement was that if there was any question about the defendant's guilt, he would not be in court. Id. at 22.

The obviously flagrant and ill-intentioned remarks present in Reed and Stith are not comparable to any remark made by the prosecutor in the instant case. Such analogy should be soundly rejected.

d. Heddrick's Re-characterization Of The Admission Of Opinion Evidence As Misconduct Is Baseless.

Heddrick recasts his argument concerning the admissibility of Wojdyla's and Steffe's opinions that Heddrick's comments were serious as misconduct. His argument, which the State fully addressed above, is no more meritorious under this theory than it was in its original form.

- e. The Defendant Is Barred From Raising The Issues Of Misconduct For The First Time On Appeal.

This Court need not even reach the issue of the propriety of the prosecutor's arguments or the alleged improper conduct during the State's case-in-chief because the defendant cannot show that he should be excused from having failed to object at trial. Absent an objection, a defendant will not be allowed to raise the issue of prosecutorial misconduct for the first time on appeal unless he can show that the misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the resulting prejudice. Stenson, 132 Wn.2d at 719.

Even assuming that any of the instances alleged by Heddrick constituted misconduct, Heddrick cannot show how a simple objection and curative instruction for any of the alleged instances of misconduct would not have obviated the potential prejudice. Heddrick seemingly concedes this point because his primary argument for why the alleged instances of misconduct are preserved for appellate review is the "cumulative effect" of error.

In support of his argument, Heddrick relies on State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956), where the court found prejudicial error due to the prosecutor's repeated references to his

personal opinion of the defendant's guilt. This case is distinguishable because, unlike the situation in Case, the prosecutor here relied on facts in evidence to support her closing argument. She rendered no personal opinion regarding Heddrick's guilt.

Equally inapposite is State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000). There, during cross-examination of a witness through whom the defense intended to introduce its theory of the case (that this was not a robbery, but a drug deal gone bad), the prosecutor objected to defense counsel's characterization of events as an "altercation," exclaiming, "This was not an altercation. It was a robbery." Id. The comment was improper and, coupled with several other instances of misconduct, none of which is present here, warranted reversal of Henderson's conviction. Id. at 804-05.

Heddrick asserts that the officers' opinions, that his remarks were serious, were prejudicial because their credibility played a crucial role in determining whether Heddrick knowingly threatened Anderson. But Heddrick omits much of the prosecutor's argument.

The prosecutor had already reviewed with the jury the definition of "knowingly." 12RP 62-63; CP 54. She said,

In other words, 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 is reasonable that you would know those are the kinds of things you shouldn't be saying? That those are the kinds of things that could get you in trouble?

12RP 63. The portion of the omitted argument refers to the combined law enforcement experience of Wojdyla and Steffes, and the rarity of such an occurrence: "Basically, people just don't make comments like Mr. Heddrick made. They just don't make threats about people to law enforcement so blatantly." 12RP 67.

Looking at the prosecutor's remarks in context, there is no evidence of ill intent. Moreover, the court instructed the jury that they were "the sole judges of the credibility of witnesses...." CP 46. The jury is presumed to have followed the court's instructions. State v. Swan, 114 Wn.2d 613, 662, 790 P.2d 610 (1990).

f. Heddrick Has Failed To Establish A Substantial Likelihood That The Outcome Was Affected.

Finally, the defendant must prove that there was a "substantial likelihood" that the challenged comments affected the verdict. Pirtle, 127 Wn.2d at 672. None of the challenged comments was of such significance or of such gravity that Heddrick can show that, but for the comments, he likely would not have been found guilty. This is especially true when one considers the fact

that the jurors were specifically instructed that “the lawyers’ statements are not evidence” and that “[y]ou must disregard any remark, statement, or argument that is not supported by the evidence or the law.” CP 46. The jury is presumed to have followed the court's instructions. Swan, 114 Wn.2d at 662.

7. HEDDRICK HAS FAILED TO ESTABLISH THAT HIS COUNSEL WAS INEFFECTIVE.

Heddrick recasts all of his previous arguments under the catch-all theory of ineffective assistance of counsel. In essence, Heddrick argues that, if he has failed to demonstrate error under any of his prior theories, then this court should reverse his conviction because (1) the failure to preserve any of the alleged errors constitutes deficient performance; and (2) but for the failure to preserve the error, “there is a reasonable probability that the outcome may have been different.” Br. of App. at 48. Heddrick’s same arguments, re-couched as a claim of ineffective assistance, should be rejected.

To demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel performed deficiently, and (2) the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice results where there is a reasonable probability that but for counsel's deficient performance, the outcome would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). If Heddrick fails to satisfy either prong of this test, this Court need not address the other prong. Hendrickson, at 78.

Heddrick cannot sustain his burden. As argued extensively above, error did not occur. Consequently, counsel was not deficient for failing to object.

Furthermore, irrespective of the prosecutor's or the officers' characterization of Heddrick's remarks as a "threat," it is difficult to imagine that any reasonable trier of fact, given the context in which Heddrick uttered the words, would ascribe any other meaning than threat to "I am going to take one of those bitches with me." Heddrick does not challenge any of the testimony by Wojdyla or Steffes that described his demeanor at the time that he made his comments as "agitated," "angry," "pretty upset," and "venomous."

Moreover, the other evidence unchallenged on appeal establishes that Anderson reasonably feared Heddrick's true threats. Therefore, Heddrick cannot show prejudice.

**8. HEDDRICK IS UNABLE TO SUSTAIN HIS BURDEN
IN SEEKING REVERSAL PURSUANT TO THE
"CUMULATIVE ERROR" DOCTRINE.**

Heddrick alleges that the cumulative effect of numerous trial errors deprived him of his right to a fair trial. An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Here, as explained above, Heddrick has failed to satisfy this burden.

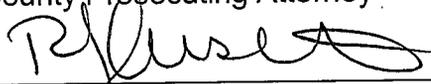
D. CONCLUSION

For all of the reasons stated above, the State respectfully asks this Court to affirm Heddrick's conviction for felony harassment.

DATED this 2 day of November, 2006.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

By: 

RANDI J. AUSTELL, WSBA #28166
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

1 that.

2 THE COURT: I am not going to strike that. I
3 sustained the objection, again, in that it was based on
4 speculation. Go ahead.

5 Q. BY MS. MILLER: Deputy, after the comments were
6 made that "no one will come between me and my children, no
7 law, no court, no cop, nobody," did defendant make any
8 further comments about going to prison or the Anderson
9 family?

10 A. He said that the Anderson family had basically
11 been killing him for years, and that if they kept putting
12 him through hell, that he was going to take one of those
13 bitches out with him.

14 Q. What did you interpret that to mean?

15 A. That he was going to kill one of them.

16 Q. And did you take that threat seriously when he
17 said it?

18 A. I did.

19 Q. Thank you. Would you describe to the jury what
20 his demeanor was when he made that specific comment?

21 A. He was agitated.

22 Q. And do you remember specifically if Officer
23 Steffes was taking any notes at that point in time?

24 A. Yes, he was.

25 Q. Deputy, I asked you a question earlier about when

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1 you do transports. Can you estimate very roughly for the
2 jury, in your over four years in law enforcement, how many
3 transports you have done?

4 A. I have been in law enforcement approximately,
5 including my military career, approximately 23 years, and
6 I have probably done thousands of transports.

7 Q. And out of those thousands of transports that you
8 have done, could you tell the jury how many times you have
9 made a determination that there may have been a reason to
10 make a referral to a prosecutor's office for criminal
11 charges?

12 A. I would say no more than three to four times.

13 Q. And on those three to four times, how many of
14 them had to deal with some kind of harassment, verbal
15 threats, or death threats?

16 A. This would be the first one. One.

17 Q. And, Deputy, after you took Mr. Heddrick to where
18 he was going, did you make a determination as to whether
19 or not a referral to the King County prosecutor's office
20 would be appropriate in this case?

21 A. That was after I talked to the victim.

22 Q. And when was it that you went and talked to
23 Ms. Anderson? The next day?

24 A. I believe it was, sometime in the afternoon.

25 Q. Was that the first opportunity that you had --

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1 A. Right.

2 Q. -- to speak with her? And you had no reason to
3 fear for her safety in between the time when the threat
4 was made and the time you talked to her; is that correct?

5 A. That's correct.

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

9 A. I did.

10 Q. And do you have specifically remember what her
11 reaction was when you told her those things?

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

16 Q. Could you see in terms of her facial expression
17 her reaction to the words when you explained what the
18 defendant had said?

19 A. Right. I could tell that there was fear just by
20 visibly looking at her.

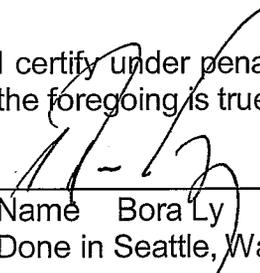
21 Q. Based on the information that you heard in the
22 car on the 13th and your conversation with Ms. Anderson on
23 the 14th, all that information, did you make a
24 determination about whether or not it was appropriate to
25 contact our office about a possible criminal charge?

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. STEVE HEDDRICK, Cause No. 57469-8-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name Bora Ly
Done in Seattle, Washington

11-02-06
Date

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