NO. 46795-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN NMI MCEVOY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00674-6

BRIEF OF RESPONDENT

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SERVICE		
	Thomas E. Weaver Po Box 1056 Bremerton, WA 98337	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 13, 2015, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred by permitting testimony by law enforcement regarding their efforts to locate and apprehend McEvoy where the testimony was relevant to McEvoy's consciousness of guilt particularly given his law enforcement background?

2. Whether the trial court erred by finding the rental car and hotel receipts were adoptive admission where the receipts, which were reliable on their face, were relevant to show McEvoy's attempts to evade law enforcement and consistent with his admission that he had driven from Vermont to Washington?

3. Whether there was sufficient evidence to convict McEvoy of Count VIII, Violation of a Court Order, where there was evidence that he had returned to Ms. McEvoy's residence to check his mail and he was within 500 feet of the residence, a clear violation of the order?

4. Whether there was sufficient evidence to convict McEvoy of Felony Stalking where there was evidence that he contacted the victim in violation of a court order and in a harassing manner on two separate and distinct occasions?

5. Whether the two no contact order violations merge with Count X, Felony Stalking, for sentencing purposes only even though trial counsel did not raise the issue at sentencing?

6. Whether the trial court should have instructed the jury on the lesser included crime of misdemeanor Harassment where there was evidence that McEvoy had called his wife on May 13, 2014 and made statements that, when examining all of the circumstances, could only be interpreted as McEvoy threatening to find and kill Ms. McEvoy?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Brian McEvoy was charged by second information filed in Kitsap County Superior Court with Rape in the Second Degree (attempt) (domestic violence) (count I), Assault in the Second Degree (domestic violence) (count II), two counts of Felony Harassment (domestic violence) (Threat to Kill) (counts III and XII), Unlawful Imprisonment (domestic violence) (count IV), Assault in the Fourth Degree (domestic violence) (count V), Interfering with Reporting Domestic Violence (domestic violence) (count VI), Malicious Mischief in the Third Degree (domestic violence) (count VII), three counts of Violation of a Court Order (gross misdemeanor) (domestic violence) (counts VIII, IX, and XI), Felony Stalking (domestic violence) (count X), Attempting to Elude Pursuing Police Vehicle (count XIII) and Unlawful Possession of a Firearm in the Second Degree (count XIV). CP 45-55. A jury found McEvoy guilty of counts II through VIII and counts X through XIV, including the special

allegation that counts II through VIII and counts X through XII were committed against a family or household member. CP 161-177. The jury also found the aggravating circumstance on Count II that the offense was committed within sight or sound of the victim's or Defendant's minor children. CP 167. The jury acquitted McEvoy on Counts I and IX. CP 161, 164. The trial court imposed an exceptional sentence totaling 234 months minus five days. CP 227-239.

B. FACTS

1. Counts II through VII

Kara McEvoy and Brian McEvoy were married for sixteen years. RP (9/10) 431. McEvoy had been a deputy with the Kitsap County Sheriff's Office (KCSO) for approximately ten years. RP (9/9) 189. In April 2014, the two were having issues in their marriage, including a brief separation a few months prior. RP (9/11) 502-05.

On April 14, 2014, Ms. McEvoy got home between 6:00 p.m. and 6:15 p.m. and McEvoy demanded to know why she was late. RP (9/10) 432. Ms. McEvoy told him that she had been looking at apartments, which angered him. RP (9/10) 432. Ms. McEvoy left with a friend a few minutes later, leaving her car and a spare set of car keys at the home. RP (9/10) 433. Ms. McEvoy returned home around 11:00 p.m. and McEvoy was awake, sitting on the couch. RP (9/10) 434. She sensed that he was

very upset with her, so she tried to act calm and went about her business. RP (9/10) 434.

Ms. McEvoy went to her room with the intent of getting her stuff to leave and McEvoy followed her there. RP (9/10) 435. Once in the bedroom, he told her "You're not going to bed. You're going to suck my dick." RP (9/10) 435. McEvoy then laid down on the bed and pointed to his crotch. RP (9/10) 436. Ms. McEvoy told him that she was not going to do that and attempted to get her things to leave. RP (9/10) 436. McEvoy then got off the bed and grabbed Ms. McEvoy, throwing her on the bed telling her to "Suck my dick, bitch. Suck my cock. You're going to do this. I'm going to get something out of you." RP (9/10) 436. McEvoy was standing right in front of Ms. McEvoy and he would not let her get up—she started screaming, so he told her to shut up and hit her on the side of the head. RP (9/10) 437. He then struck her on the other side of her head and grabbed her hair, pulling her head down to his crotch, telling her to "suck his dick". RP (9/10) 437-38. He was pulling her hair hard enough that Ms. McEvoy could not get up or away and he pulled out a chunk of her hair in the front. RP (9/10) 438. The next day, Ms. McEvoy found that her head was extremely swollen, including a large bump. RP (9/11) 485. She also had bruising on her nose and under her eyes. RP (9/11) 487. It took three to four months for the hair that was

pulled out to grow back. RP (9/11) 637.

After McEvoy pulled out her hair, Ms. McEvoy started screaming for their 15 year old son Dylan to come help her because she could not leave the room. RP (9/10) 430, 439. Dylan came into the room and saw his mom curled up and covering her face while his dad hit her multiple times. RP (9/10) 390. At that point, their nine year old daughter Kaitlyn had awoken and she also came into the room. RP (9/10) 430, 440. Ms. McEvoy told Kaitlyn to call for help and both she and Dylan left. RP (9/10) 440-41. As Dylan headed to the kitchen to get his mom's phone to call 911, McEvoy grabbed his shirt in the hall, ripping it. RP (9/10) 391-92. He told his sister to go grab the phone, but McEvoy chased her down and was able to grab it before she was. RP (9/10) 392-93.

In the kitchen, McEvoy picked up his wife's phone and threw it on the floor repeatedly until it was smashed. RP (9/10) 441-442. Ms. McEvoy then grabbed her purse and keys and ran out of the house. RP (9/10) 442. As she was leaving, McEvoy said "Get back here bitch. I'm going to come get you." RP (9/10) 443. McEvoy grabbed both his and Dylan's phones and followed Ms. McEvoy outside. RP (9/10) 394. Ms. McEvoy was able to get into her car on the driver's side, where she locked the doors. RP (9/10) 443-44. McEvoy made a comment implying that he had done something to car and when Ms. McEvoy tried to start it, she

found that there was no power when she pressed down on the accelerator. RP (9/10) 444. The car had been working when she drove it earlier that day. RP (9/10) 444.

McEvoy began punching the driver's side window, saying "Hey bitch, I'm going to come fucking kill you." RP (9/10) 444-45. Ms. McEvoy was able to get the car started, but it would only travel at a slow rate of speed. RP (9/10) 445. McEvoy jumped on the hood of the car and began punching the windshield with both fists, causing it to crack. RP (9/10) 445. Ms. McEvoy drove the car towards a neighbor's house, but it stalled before she could get there. RP (9/10) 446-47. McEvoy got off the hood and using the spare key, opened the door and shoved her over to the passenger side. RP (9/10) 447. Ms. McEvoy began screaming and honking the horn, stopping after McEvoy threatened to kill her if she did not. RP (9/10) 448. She tried to get out of the car, but McEvoy had a strong grip on her hair and kept pulling her back. RP (9/10) 448-49. Ms. McEvoy finally told him that she would do what he wanted, so he turned down an unfamiliar dirt road. RP (9/10) 451. McEvoy opened the door and Ms. McEvoy saw that his hands were swollen, bloody and wrapped in her hair. RP (9/10) 451. McEvoy then ordered her out of the car and to open the hood, using his phone as a flashlight. RP (9/10) 452. Ms. McEvoy was hyperventilating and shaking so bad that he had to open the

hood for her, and she saw him reach towards the back and re-attach something. RP (9/10) 452. McEvoy ordered her back into the car and too scared to not comply, Ms. McEvoy did. RP (9/10) 453.

With the car now running normally, McEvoy headed back towards their house, but panicked when he thought he saw a police car and kept driving. RP (9/10) 454. He turned around and they could see their kids in the road, flagging them down. RP (9/10) 454. Ms. McEvoy begged him to let her out, but he continued driving past the house for a second time. RP (9/10) 454-55. McEvoy turned around again, returned to the house and kicked her out of the car, telling her several times that if she called the police, he would kill her. RP (9/10) 455. He eventually left and Ms. McEvoy called the police the next day, waiting because she took his threats seriously. RP (9/10) 456-57, 459.

2. Count VIII

On April 11, 2014, the Kitsap County District Court issued a Domestic Violence No Contact Order, preventing McEvoy from coming within 500 feet of Ms. McEvoy's residence, school, or place of employment. CP 378-79. The order also prevented him from having any contact with her at all, including in-person contact, telephone contact, or electronic communication. CP 378-79.

William Blaylock lives across the street from the McEvoys. RP

(9/12) 675. On the morning of April 12, 2014, Mr. Blaylock saw McEvoy go to the mailbox and get his mail. RP (9/12) 676. Mr. Blacklock then had a brief conversation with McEvoy where McEvoy told him twice that "he was not supposed to be here." RP (9/12) 676-77. Ms. McEvoy said that they did not receive much mail at the house because McEvoy was paranoid that someone would steal it; instead, bills had been sent to a P.O. Box for over fifteen years. RP (9/11) 493. Detective Nicole Menge found that the distance between the mailbox and the residence was less than 500 feet. RP (9/9) 207.

3. Counts X through XII

On May 13, 2014, Ms. McEvoy was at work where every call that comes in is recorded. RP (9/11) 513-14. McEvoy called her at work that day. RP (9/11) 521-22. During the call, which lasted several minutes, McEvoy stated that "You know what, Kara, you've got a very short time on this earth. You better hope somebody finds me before I find you. You've...you've ended...you've taken away my house, all my property and my kids; do you realize that?" CP 404. He also stated "Well, you'll...you'll...I'm gonna find you, Kara. You and I are gonna have one last reckoning I guarantee that." CP 405-06. He told her that she had "forced his hand" and that he was going to find her. CP 406. When she asked what he was going to do if he found her, McEvoy stated "Well, you'll find out...you'll find out. You know what? You've...you've made

it very difficult for me to do the right thing." CP 407. McEvoy ended the call stating "Hey, Kara, I'm gonna find you, that's all I gotta say." CP 408. Detective Menge found the phone call to be "chilling", noting that McEvoy's demeanor was unusually calm given what was being said. RP (9/9) 222.

Ms. McEvoy believed that McEvoy was threatening to find her and kill her, threats she took seriously because of their history. RP (9/11) 523. To her, his voice was calm and he sounded direct and focused, which scared her. RP (9/11) 524. Concerned that McEvoy was close by, Ms. McEvoy had a co-worker move her car and she left work, meeting up with a police escort. RP (9/11) 525. She then went to stay at a co-worker's house in Tacoma, a place that McEvoy had never been before. RP (9/11) 525.

4. Counts XIII and XIV

On May 19, 2014, law enforcement located McEvoy's vehicle at the Tides Tavern in Gig Harbor, Washington. RP (9/12) 729. Multiple law enforcement agencies responded to the scene, including the U.S. Marshall's Office, Kitsap County Sheriff's Office and Pierce County Sheriff's Office. RP (9/12) 729-30. Agent Raymond Fleck of the U.S. Marshall's Office encountered McEvoy in an alley near Tides Tavern. RP (9/15) 804. McEvoy raised his hands and Agent Fleck activated his police

lights. RP (9/15) 805-06. Agent Fleck, wearing a tactical vest with the US Marshall star logo on it, stepped out of his vehicle, drew his firearm, and yelled "Police." RP (9/15) 806-07. McEvoy responded by reversing his car out of the alley and driving away at a high rate of speed. RP (9/15) 806; RP (9/12) 730-31.

Agent Jacob Whitehurst of the U.S. Marshall's Office was in the area of Tides Tavern when he heard that McEvoy had been located. RP (9/12) 731-32. Agent Whitehurst drove to the intersection of Soundview and Grandview when he heard that McEvoy was headed in that direction. RP (9/12) 733-34. Agent Whitehurst was parked across both lanes of Soundview with his blue and red police lights on when he saw McEvoy heading towards at him a high rate of speed and it appeared that he was accelerating. RP (9/12) 734. Fearful that he was going to get hit, Agent Whitehurst pulled his car forward a bit and McEvoy swerved around him without slowing down. RP (9/12) 734. Agent Whitehurst followed McEvoy who turned into the parking lot of the Olympic Village Shopping Center. RP (9/12) 735. After driving erratically around the parking lot, McEvoy attempted to leave through another entrance where he rammed into the vehicle of another agent, which stopped his car. RP (9/12) 736.

McEvoy's vehicle was searched on May 19, 2014. RP (9/9) 257. During the search, Detective Menge located a pair of handcuffs in the

driver's side door compartment and a knife in a compartment behind the back seat. RP (9/9) 260, 265. A blue tarp was located behind the driver's seat containing screwdrivers and a pair of bolt cutters. RP (9/10) 275. Also located in the truck were a flashlight, latex gloves, a multi purpose tool and a roll of string. RP (9/10) 275. Detective Menge found multiples receipts in McEvoy's truck as well as a gray and black beanie cap and a pair of gloves inside the driver's compartment. RP (9/10) 295.

A .38 caliber Colt revolver in a soft case along with a bag of ammunition was also found in the vehicle under the seats. RP (9/10) 301, 305-06. McEvoy admitted that his mother had given him the gun when he was in Vermont to bring with him to Washington. RP (9/9) 229. Detective Chad Birkenfeld test fired the weapon and found that it was in working order. RP (9/12) 723-24. The protection order issued by the Kitsap County District Court on April 11, 2014 prevented McEvoy from possessing a firearm. CP 378-79.

III. ARGUMENT

A. LAW ENFORCEMENT TESTIMONY ABOUT THEIR EFFORTS TO LOCATE MCEVOY WAS PROPERLY ADMITTED BECAUSE IT WAS RELEVANT TO HIS CONSCIOUSNESS OF GUILT PARTICULARLY GIVEN MCEVOY'S LAW ENFORCEMENT BACKGROUND AND KNOWLEDGE OF LAW ENFORCEMENT PROCEUDRES; FURTHER, EVEN IF THE ADMISSION OF THIS TESTIMONY WAS IN ERROR MCEVOY CANNOT SHOW THAT THE TESTIMONY WAS PREJUDICIAL.

McEvoy argues that the trial court erred by allowing inflammatory and irrelevant comments and opinions by law enforcement about his guilt and their state of mind. This claim is without merit because their testimony was properly admitted to demonstrate that McEvoy's movements were related to consciousness of guilt, particularly given his knowledge of police procedures .

Unless an individual can show prejudice, erroneous admission of evidence is not reversible. *Floyd v. Myers*, 53 Wn.2d 351, 333 P.2d 654 (1959). Evidence is prejudicial when it materially or presumptively affects the outcome of a trial. *Thomas v. French*, 99 Wn.2d 95, 659 P.2d 1097 (1983). A violation of a defendant's constitutional "right of confrontation may be harmless error if 'the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.'" *State v. Johnson*, 61 Wn. App. 539, 549-50, 811 P.2d 687 (1991) citing *State v.*

Palomo, 113 Wn.2d 789, 799, 783 P.2d 575 (1989). "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

The gist of McEvoy's argument is that the detailing of his "innocuous" activities as he drove from Vermont to Washington was couched with highly inflammatory comments about the reaction of law enforcement in its efforts to locate him. He claims that by hearing the state of mind of four officers involved in looking for him, the jury was prejudiced, thus preventing him from having a fair trial.

It is true that an officer's state of mind is generally irrelevant unless that state of mind is relevant to a material issue in the case. *State v. Johnson*, 61 Wn. App. 539, 811 P.2d 687 (1991). Further, opinion testimony on a defendant's guilt is generally inadmissible because such testimony invades the province of the jury, who is the sole determiner of a defendant's guilt. *State v. Montgomery*, 163 Wn.2d 577, 589-90, 183 P.3d 267 (2008)

In the present case, trial counsel for McEvoy moved to suppress any discussion of law enforcement efforts to locate and arrest him. RP (9/3) 91. The State's intent in introducing the evidence was to

demonstrate that McEvoy, as a former law enforcement officer, was aware of law enforcement tactics when it came to locating an individual. RP (9/3) 105. Further, it was necessary to demonstrate that Ms. McEvoy's fear was reasonable because the efforts taken to locate McEvoy demonstrated that law enforcement was also concerned. RP (9/3) 107.

The trial court weighed the probative value of the evidence versus its prejudicial effect, noting that the conduct of the officers was "probative of a fact that the Defendant was apparently present in the state of Washington and not confined within a jail or other facility, such that the victim could feel safe that the Defendant couldn't come and find her or kill her." RP (9/3) 92. The trial court further found that the inference that could be drawn from the testimony of the officers' efforts to locate McEvoy is that he had a consciousness of guilt, which is generally admissible. RP (9/3) 93. The trial court admitted the efforts of law enforcement to locate McEvoy as relevant to consciousness of guilt, based in part on his knowledge of police procedures. RP (9/3) 112. During her testimony, Detective Menge testified that she had worked with McEvoy for approximately ten years when he was a deputy and the procedures that the sheriff's office used to locate individuals had not changed much and were procedures a deputy would be familiar with. RP (9/9) 188.

Evidence of flight, concealment or resistance is admissible if it

allows a reasonable inference to consciousness of guilt to the charged crime. *State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2001). Here, by his own admission McEvoy had driven across the country from Vermont to Washington. The rental car was in his mother's name; at a minimum, he had used her credit card at one hotel; and he had paid cash at two others. CP 380-93. The jury could easily infer that McEvoy was travelling under the radar both because he was aware of the techniques law enforcement would use to locate him and because he felt guilty about what he had done.

McEvoy argues that the testimony of Detective Earl Smith was completely irrelevant because he had no direct contact with McEvoy and his sole job was to coordinate the search behind the scenes. However, Detective Smith's testimony was consistent with the ruling of the court that McEvoy's efforts to evade law enforcement were relevant to his consciousness of guilt. Detective Smith's testimony was neither lengthy nor overly prejudicial; rather, his testimony simply provided an outline for the jury as to what the procedures of the Kitsap County Sheriff's Office were in cases such as this, procedures McEvoy was certainly familiar with. RP (9/12) 694-711. Further, Detective Smith's testimony provided context for the way this specific investigation was handled.

Additionally, any testimony by Detective Smith regarding his

concerns about the threat McEvoy posed to his family and police was tied to the threatening phone call McEvoy made to his wife on May 13, 2014. It was after hearing this phone call that Detective Smith became more concerned about Ms. McEvoy's safety because they now had reason to believe McEvoy was in Washington. RP (9/12) 701-02. It was at that point Detective Smith enlisted the help of the U.S. Marshall's office, knowing that their tools for locating individuals were more extensive than that of KCSO. RP (9/12) 704. Detective Smith was not expressing a personal opinion on McEvoy's guilt —rather, he was drawing reasonable inferences from the threatening phone call that the danger to Ms. McEvoy and her children had increased and he was providing context for the response by law enforcement.

McEvoy also raises multiple issues with the testimony of Marshalls Whitehurst and Fleck. The primary purpose in calling Agents Whitehurst and Fleck was for them to provide evidence regarding McEvoy's attempt to elude law enforcement as they were the agents on scene who tried to apprehend McEvoy when he fled. RP (9/12) 729-39; RP (9/15) 803-14. They also provided testimony about the support they provided to KCSO in their search for McEvoy.

McEvoy first takes exception to the explanation by Marshalls Whitehurst and Fleck about the type of crimes its task force handles,

arguing that the implication from this testimony was that McEvoy's case was extremely serious. But the fact that the Marshall's Office took McEvoy's case seriously does not, in and of itself, prejudice him. Moreover, this testimony was not a personal expression of McEvoy's guilt—instead, it was simply a description of their occupations. As Agent Fleck explained, their task force was often called in by jurisdictions that might lack the technical capabilities or the resources necessary to apprehend a fugitive. RP (9/15) 793. This testimony is consistent with Detective Smith's assertion that one of the main reasons they contacted the Marshalls for help was because they had resources KCSO did not. Further, Agent Fleck testified about some of the criteria they consider when deciding whether or not to take a case and how he applied those criteria to McEvoy, specifically noting that he was a ten year veteran of KCSO. RP (9/15) 794-98. There is also no evidence in the record that the jury was at all influenced by the fact that the task force only takes on very serious crimes. This testimony was harmonious with the Court's pre-trial ruling that this evidence was relevant to show McEvoy's consciousness of guilt in evading law enforcement and that his familiarity with the procedures used by KCSO gave him an added advantage.

McEvoy highlights what he believes to be the most prejudicial comment, testimony by Marshall Fleck that he had "determined that had

he not been brought into custody, he was going to kill his wife." RP (9/15) 809. He argues that Marshall Fleck's testimony that he had "determined" McEvoy's intent was an "egregious expression of his personal opinion" about his future intent and that by characterizing that his task force only apprehended the "worst of the worst", this expression of Marshall Fleck's personal opinion clearly influenced the jury. But, examining Agent Fleck's testimony in context, it is clear that he was not expressing a personal opinion about McEvoy's guilt.

In examining Marshall Fleck's testimony as a whole, it is clear that he was describing law enforcement's attempt to apprehend McEvoy as he led them on a high speed chase through the Gig Harbor area. RP (9/15) 808-10. It was nearing 4:00 PM on a Monday afternoon and McEvoy was driving down roads in excess of 80 mph and he would have fatally struck the car of another agent had that agent not moved. RP (9/15) 808-09. Marshall Fleck's comment was directly related to his own state of mind as he weighed the danger to the community of continuing the pursuit of McEvoy versus the danger to Ms. McEvoy if they were to terminate the pursuit. It was not a personal expression of McEvoy's guilt.

McEvoy relies on *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014), for his argument that there is no other interpretation of Agent Fleck's comment. This reliance is misplaced. *Lindsay* is a prosecutorial

misconduct that involves a lengthy discussion about multiple improper comments and arguments made by the prosecutor during both the trial and closing argument. A prosecutor in particular is held to a different standard and it is misconduct as well as a violation of the advocate-witness rule for a prosecutor to state his or her personal opinion. *Id.* at 437. The burden placed on a prosecutor as an officer of the court is much higher than what would be placed on a single comment made by Agent Fleck in explaining why his agency continued their pursuit of a fleeing suspect who had called and threatened to kill his wife. This is similar to the situation presented in *State v. Kirkman*, 159 Wash. 2d 918, 155 P.3d 125 (2007). There, a detective testified about the protocol used in interviewing a child relating to that child's ability to tell the truth. *Id.* at 930. The Court found that this was not a comment on whether or not the detective believed the child; instead, it provided context to the jury so it was able to evaluate the reasonableness of the child's responses. *Id.* at 931. Here, Agent Fleck's comment regarding McEvoy's 'intent' educated the jury on the decisions that were made by his agency as McEvoy evaded law enforcement.

In *State v. Montgomery*, a detective who followed the suspects from store to store as they bought ingredients commonly used in the manufacture of methamphetamine testified that it was his opinion that the defendants were gathering ingredients for that very purpose. *Id.* at 587-88.

The Court found this comment was error because it went to the sole disputed issue before the jury—the defendant's intent. *Id.* at 594. The Court noted that while a police officer's testimony does carry some indicia of reliability, their opinions on guilt is of low probative value because their area of expertise is determining whether or not an arrest should be made, not in determining guilt beyond a reasonable doubt. *Id.* at 595. The *Montgomery* court found error, but held that such error was harmless because the jury was given the instruction that they are the sole judges of credibility and that they are not bound by the opinions of expert witnesses, instructions they are presumed to follow. *Id.* at 595-96. The comment by Agent Fleck is distinguishable from the one given by the officer in the *Montgomery* case—if anything, he was commenting on his concerns for McEvoy's future conduct; he was not commenting on his culpability in the current charges. Additionally, the jury was given the same instructions as those given in *Montgomery.* CP 95, 100.

McEvoy also argues that because his multiple objections to the testimony by law enforcement were overruled, he was further prejudiced. But during pre-trial motions, the parties discussed the issue at length and trial counsel's motion to preclude such testimony was denied. RP (9/3) 91-112. The trial court's overruling of McEvoy's objections to this testimony was consistent with its pre-trial ruling.

McEvoy claims that because he objected and his objections were overruled each time, the implication is that the improper testimony is reliable. He relies on *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), but that case is clearly distinguishable. First, the comment in *Davenport* was made by a prosecutor during closing argument and the standards applied to a prosecutor are certainly different. Further, in *Davenport*, there was clear evidence on the record that the jury relied on this improper evidence. *Id.* at 764. Even assuming in the present case the Court finds the comments by the officers to be improper, there is zero evidence that jury relied on this in coming to a decision. Rather, there is properly admitted overwhelming evidence of McEvoy's guilt that led the jury to its decision. In fact, McEvoy was acquitted of two charges, a clear indication the jury was basing its decisions on the evidence and not on comments by law enforcement.

Finally, the closing argument by the State did not amplify the prejudice McEvoy claims he suffered. The closing argument properly described the steps that law enforcement took to apprehend McEvoy and tied Agent Fleck's statement regarding his concern that McEvoy would kill his wife if not caught to his own state of mind in determining whether or not pursuit of McEvoy should continue. RP (9/16) 920. This is not a case of egregious misconduct in closing argument; rather, the State

properly argued inferences based on the evidence consistent with the Court's pre-trial rulings. The testimony of law enforcement regarding the efforts they took to locate McEvoy was properly admitted, relevant to illustrate his consciousness of guilt and was not prejudicial.

B. THE TRIAL COURT PROPERLY ADMITTED RENTAL CAR AND HOTEL RECEPTS AS ADOPTIVE ADMISSIONS WHERE THE RECEIPTS WERE FOUND IN MCEVOY'S VEHICLE AND WERE CONSISTENT WITH HIS ADMISION THAT HE DROVE FROM VERMONT TO WASHINGTON; FURTHER, THE RECEIPTS WERE RELEVANT TO ILLUSTRATE HIS ATTEMPTS TO EVADE LAW ENFORCEMENT.

McEvoy next claims that the trial court erred by admitting the rental car and hotel receipts as adoptive admissions. This claim is without merit because these receipts were found in McEvoy's vehicle and illustrated his attempt to evade law enforcement and were consistent with his admission that he drove from Vermont to Washington. An error in the trial court's admission of evidence is reviewed for abuse of discretion. *State v. Demem*, 144 Wn.2d 753, 30 P.3d 1278 (2001).

During a search of McEvoy's vehicle, Detective Menge found multiple receipts, all in his name, including a receipt from the Country Inn and Sweets in Minnesota with an arrival date of 5/8/14 and a departure date of 5/9/14 (CP 382-83); a receipt for Best Western Plus Heritage Hotel

and Suites in North Dakota with an arrival date of 5/9/14 and a departure date of 5/10/14 (CP 384-85); a receipt for Missoula Val-U-Inn with an arrival date of 5/10/14 and a departure date of 5/11/14 (CP 386-87); a receipt for Holiday Inn Express and Suites in Tacoma with an arrival date of 5/12/14 and a departure date of 5/13/14 (CP 388-89); a receipt for Red Roof Inn Seattle Airport with an arrival date of 5/14/14 and a departure date of 5/15/14 (CP 390-91); and a receipt for Holiday Inn Express and Suites in Tacoma with an arrival date of 5/15/14 and a departure date of 5/16/14 (CP 392-93). Also located was a receipt for Hertz rental cars in the name of Gail McEvoy (McEvoy's mother)—the car was rented on 5/5/14 in Burlington, Vermont and returned on 5/13/14 in Seattle/Tacoma, and driven a total of 3255 miles (CP 380-81); RP (9/10) 347-48. On the receipt for the hotel in Missoula, Montana, Gail McEvoy's name also appears as it was her credit car that was used to pay for the room. CP 387. After McEvoy was arrested, Detective Menge located Gail McEvoy's credit card in his wallet. RP (9/15) 818-19. He also paid cash for at least two of his hotel stays. CP 384-85, 390-91.

The trial court noted the State's theory, that McEvoy was operating under the radar, made the content of the receipts relevant. RP (9/9) 248. The court further found that each receipt had an element of hearsay. RP (9/9) 248. The court ruled that the times that McEvoy left the hotels were

classic hearsay and that without a foundation that any time stamps were accurate, the times themselves were inadmissible. RP (9/9) 253. The court stated that the content of the statements were adoptive admissions based, in part, on the fact that McEvoy admitted that he had traveled from one place to the other. RP (9/9) 253-54.

While there are no Washington State cases directly on point, there are several federal decisions that provide some guidance. In *United States v. Marino,* 658 F.2d 1120, 1386 (1981), the government introduced numerous documents found in the defendants' possession, including airline tickets, receipts from a hotel, bank documents, customs entry for furniture, and items related to an informant. *Id.* at 1123. The Court held that those documents were properly admitted because, in part, the defendants' possession of those documents constituted an adoption. *Id.* at 1125. The Court reasoned that just as "silence in the face of an accusation may constitute an admission to its truth, possession of a written statement becomes an adoption of its contents. Adopted admissions are not hearsay and may be admitted into evidence." *Id.* at 1125. In *United States v. Ordonez*, 737 F.2d 793 (1984), the lower court admitted ledger entries that recorded cocaine transactions for the past year. *Id.* at 798. The Court reversed this decision, in part, because the court essentially admitted the ledgers 'because they were found' and because no proof or finding was

made about the identity of the persons who made the entries in the ledgers. *Id.* at 799. The Court further noted that the jury "was not advised that the entries in the ledger were not admissible for the truth of the matter asserted." *Id.* at 799. The Court distinguished the situation from *Marino*, noting that in *Marino*, the evidence was not admitted for the truth of the matter asserted and that the persons who made the entries were not identified at trial, thus the "testimony interpreting their meanings were not admissible as the admissions of a party." *Id.* at 800.

In *United States v. Jefferson*, 925 F.2d 1242, 916 (1991), the district court admitted a U.S. West pager bill to "assert both that Jefferson had purchased pager service from U.S. West and that he owed U.S. West money for this purchase." *Id.* at 1252. In a footnote, the Court noted that this situation was different from the one presented in *Marino*, because there were too many cases where "mere possession of a bill in no way constitutes an adoption of its contents. Common every day experience teaches us that disputes with creditors based upon inaccuracies contained in their bills is not a rarity." *Id.* at 1253, n.13. The *Jefferson* court did find, however, that admission of the bill was harmless error and noted that the "authenticity of the pager bill was not disputed. It was a bill from an established company that, on its face, gave every indicia of having been issued in the ordinary course of business." *Id.* at 1254. The government

did not call a custodian of records when it offered the pager bill for admission. *Id.* at 1252.

McEvoy argues that *Marino* is an anomaly, stating that the Ninth Circuit has consistently held that mere possession of a document is not admissible to prove its contents. He further posits that the most thorough "debunking" of the *Marino* case can be found in *United States v. Jefferson*. However, he mischaracterizes the findings in these cases.

Rather than a "debunking," the situation in *Jefferson* is clearly distinguishable from *Marino*. Of note is the fact that the court specifically used the word "bill" rather than the more generic "documents", clearly drawing a line between general documents and a bill where one may dispute charges. In *Jefferson*, the government offered the pager bill to prove that the defendant both purchased the pager and owed money whereas in *Marino*, the documents were not offered as proof that the individuals owed money or made a particular purchase; rather they were used to argue that the defendants had been in a particular area at a particular time.

What makes the present case even more distinguishable from *Jefferson* or *Ordonez* is that McEvoy admitted to driving from Vermont to Washington during the relevant time period. RP (9/9) 253-54. That admission was of particular significance to the trial court because it was an

acknowledgment by McEvoy that the receipts did indeed support the State's argument that McEvoy had made the trek from Vermont. Once he was in Washington, he jumped from hotel to hotel consistent with the theory that he was evading law enforcement.

Even if it was error to admit the receipts, any error here was harmless. Like *Jefferson*, the receipts on their face were what they appeared to be--receipts from hotel stays in various states across the United States, giving them an indicia of reliability. McEvoy claims that but for the admission of the receipts, the State would not have been able to argue that he drove across the United States with the intent of killing his wife. That is simply not the case—McEvoy admitted to Detective Menge that he had driven from Vermont to Washington. RP (9/9) 249-50. The State still would have been able to make the same argument. It was not error for the trial court to admit the receipts as adoptive admissions and even if the Court were to find error, any error here was harmless.

C. THERE WAS SUFFICIENT EVIDENCE TO CONVICT MCEVOY OF VIOLATION OF A PROTECTION ORDER ON APRIL 12, 2014 WHERE HE WENT TO THE FAMILY HOME AND WAS CLEARLY WITHIN 500 FEET OF THAT RESIDENCE; FURTHER, THE FACT THAT MS. MCEVOY WAS TEMPORARILY STAYING IN ANOTHER LOCATION THAT DAY DOES NOT CHANGE THE FACT THAT THE FAMILY HOME WAS STILL HER RESIDENCE.

McEvoy next claims that that there is insufficient evidence to convict him of violating a no contact order on April 12, 2014, because Ms. McEvoy was not living at the family residence at the time and the term "residence" is ambiguous. This claim is without merit because while Ms. McEvoy was temporarily staying at her mother's residence for a brief time period because of her fear of her husband, her belongings were still at the family residence and she returned to live at that residence after McEvoy left the state and she felt safe.

An insufficient claim admits that both the State's evidence and any inferences that can reasonably be drawn from this evidence are true. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Sufficient evidence supports a conviction if any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt when viewing that evidence in the light most favorable to the State. *State v. Hoisier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

McEvoy argues that the term "residence" is ambiguous and because the court order did not specify the address it did not put him on fair notice that he cannot approach a residence where his wife is not living. He proposes that the Court follow the definition of "fixed residence" found in RCW 9A.44.128(5), which defines it as "a building that a person lawfully and habitually uses as living quarters a majority of a week." Because Ms. McEvoy stayed with her mother for approximately ten days, McEvoy concludes that she had a different "residence" during this time period.

The definition proposed by McEvoy is one that specifically applies only in failure to register cases and the State does not agree that this is persuasive evidence of how the Legislature intended to define "residence." The trial court came to the same conclusion when trial counsel proposed this same definition be defined for the jury. RP (9/15) 863. In *State v. Vant*, 145 Wn. App. 592, 599, 186 P.3d 1149 (2008) the Court relied on the dictionary definition when determining what "residence" meant for purposes of violating a no contact order. Residence was defined as "the place where one actually lives or has his home distinguished from his technical domicile;...a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit." *Vant*, 145 Wn. App. at 599.

Here, it is clear that although Ms. McEvoy and her children were staying at her mom's residence for a few days, it was only on a temporary basis. RP (9/11) 492. She still considered the family home her "residence" and, in fact, she and the children returned there on April 13, 2014 to get more of their belongings for their temporary stay at her mom's house. RP (9/11) 492. She and her children returned to the home for good only when they felt safe, believing that McEvoy had left the state. RP (9/11) 493. Moreover, McEvoy's actions were not consistent with one who was aware that his wife was temporarily staying somewhere else. Rather, he chose to go check for mail despite the fact that they had sent the majority of their mail to a P.O. Box for the past 15 years and told a neighbor that he "wasn't supposed to be there." RP (9/11) 493; RP (9/12) 676-77. Any rational trier of fact could find beyond a reasonable doubt that the family home where McEvoy went under the guise of checking his mail was Ms. McEvoy's permanent dwelling place and that McEvoy plainly understood that being there violated the court order. Therefore, the evidence was sufficient that he violated the no contact order on April 12, 2014.

D. THERE WAS SUFFICIENT EVIDENCE TO CONVICT MCEVOY OF FELONY STALKING WHERE THERE WAS EVIDNCE THAT ON TWO DISTINCT OCCASIONS MCEVOY FOLLOWED OR HARASSED HIS WIFE WHILE THERE WAS A PROTECTION ORDER IN PLACE.

McEvoy next claims that there was insufficient evidence to convict him of Felony Stalking. He argues that the State did not meet the standard set out in *State v. Johnson,* ___Wn. App. ____, 342 P.3d 338 (2015) because it did not prove that on two separate occasions, McEvoy harassed or followed his wife in violation of the protection order. This claim is without merit because the State clearly proved two distinct incidents of harassing or following.

McEvoy concedes that the telephone call on May 13, 2014, would meet the definition of a harassing incident and the State agrees that the incident of May 11, 2014, is not applicable because the jury acquitted McEvoy of that incident. So the discussion centers on whether or not McEvoy's violation of the no contact order on April 12, 2014, constitutes a harassing incident. It is clear from the evidence that it does.

The definition of "harassment" in the stalking statute has the same definition as "unlawful harassment" which is defined as "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which

serves no legitimate or lawful purpose." RCW 10.14.020. "Repeatedly" is defined as harassing or following on "two or more separate occasions." RCW 9A.46.110(6)(e). A "separate occasion" has been interpreted to mean a "distinct, individual, noncontinuous occurrence or incident." *State v. Kintz*, 169 Wn.2d 537, 548, 238 P.3d 226 (2010).

On April 12, 2014, McEvoy went to his wife's residence under the guise of checking his mail. RP (9/12) 493. However, he had not received substantive mail at that address for 15 years—instead, bills were sent to a P.O. Box because he had a fear of their mail being stolen. RP (9/11) 493. Further, it was clear from his conversation with the neighbor Mr. Blaylock that he was aware that he should not be at the residence. RP (9/12) 676-77. Ms. McEvoy was frightened when she heard that her husband had been at the residence in violation of the order. RP (9/12) 492. McEvoy was aware that there was a no contact order in place stemming from events that had occurred a few days prior yet he made a conscious decision to go the Ms. McEvoy's residence not to "get his mail" but instead to see where she was. It was clearly a course of conduct that was intended to seriously alarm, annoy, or harass Ms. McEvoy. There was sufficient evidence to convict McEvoy of felony Stalking.

E. FOR SENTENCING PURPOSES ONLY, MCEVOY'S TWO MISDEMEANOR CONVICTIONS FOR VIOLATION OF A COURT ORDER WOULD MERGE WITH HIS CONVICTION FOR FELONY STALKING

McEvoy next claims that the two no contact order violations merge with the Felony Stalking for sentencing purposes. This issue was neither raised at the trial level in the defense sentencing memorandum nor during sentencing. CP 199-208; RP (10/13) 2-42. However, it is well established that a party may raise for the first time on appeal a challenge to a sentence if the basis is that the sentence is contrary to law. *State v. Armstrong*, 91 Wn. App. 635, 959 P.2d 1128 (1998). The State would agree that *State v. Parmlee*, 108 Wn. App. 702, 32 P.3d 1029 (2001), would apply to the present case and for sentencing purposes only, the two convictions for violation of a court order would merge with the Felony Stalking conviction. Therefore, McEvoy should not have been sentenced separately on those two misdemeanor counts.

F. IT WAS NOT ERROR FOR THE TRIAL COURT TO REFUSE TO INSTRUCT ON THE LESSER INCLUDED CHARGE OF MISDEMEANOR HARASSMENT FOR MCEVOY'S TELEPHONE CALL TO HIS WIFE ON MAY 12, 2014 WHERE, WHEN LOOKING AT ALL OF THE CIRCUMSTANCES, THE ONLY CONCLUSION FOR THE JURY TO DRAW WAS THAT MCEVOY WAS THREATENING TO KILL HER.

McEvoy next claims that the trial court erred when it refused to instruct on the lesser included charge of misdemeanor harassment. He argues that because the statements he made in the May 13, 2014 phone call to his wife could be interpreted as either threats to harm or threats to kill, the decision should have been placed in the hands of the jury. This claim is without merit because the only way for the jury to interpret McEvoy's threats were as threats to kill. A trial court's decision regarding the second prong of *Workman* is reviewed for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Trial counsel requested a jury instruction for the lesser included offense at trial. The trial court denied that request, finding that there was no evidence "upon which the jury can rely that only the lesser crime was committed." RP (9/15) 868. The trial court noted that while McEvoy never actually used the words "kill" or "hurt", the issue was whether or not there can only be an inference that a lesser crime was committed. RP

(9/15) 868. The trial court was persuaded by Ms. McEvoy's testimony that when she heard the threats from McEvoy, she was convinced he was going to kill her. RP (9/15) 868. Therefore, the facts did not support an inference that McEvoy only threatened bodily injury or that Ms. McEvoy feared bodily injury to the exclusion of death. RP (9/15) 868. McEvoy takes exception to this conclusion, arguing that the court's interpretation of *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), was too narrow. The State disagrees.

A person is guilty of harassment if, without lawful authority, the person knowingly threatens cause bodily injury to the threatened person; cause physical damage to the property of another; subjects a person to physical confinement or restraint; or maliciously do any other act that is intended to substantially harm a person with respect to his physical or mental health or safety and, by words or conduct, places the threatened person in reasonable fear that the threat will be carried out. RCW 9A.46.020. The crime is elevated to a felony if the threat is a threat to kill. RCW 9A.46.020(b).

In determining whether or not a jury instruction is warranted on a lesser charge, two requirements must be met: (1) each of the elements of the lesser offense must be a necessary element of the offense charged; and (2) the evidence in the case must support an inference that the lesser crime

was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The State would agree here that the first prong is met.

In *State v. C.G.*, the defendant told her teacher that she was going to kill him. At the hearing, the teacher testified that he believed CG would have harmed him or someone else. *C.G.*, 150 Wn.2d at 607. The Court held that in order to convict an individual of felony harassment, the State must prove the person threatened was placed in reasonable fear that the threat to kill would be carried out. *Id.* at 612. The Court further noted that "the nature of the threat depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." *Id.* at 611.

McEvoy argues that the threats were "ambiguous", claiming that everyone has a "short time on earth" and that he never specifically said what he would do when he found his wife. However, as the *C.G.* court noted, the nature of the threat depends on the facts and circumstances as a whole. Here, Ms. McEvoy had been terrorized by her husband about a month prior, an incident that resulted in the district court imposing a no contact order, an order that McEvoy almost immediately violated. She was so scared that she stayed with her mother until she knew McEvoy was no longer in the state. These incidents were exacerbated by a recent history of escalating domestic violence and a prior threat to kill. Further,

the tone of McEvoy's voice during the call was described as calm and chilling. RP (9/9) 222. Ms. McEvoy believed that he was threatening to find and kill her, certainly reasonable under these circumstances. RP (9/11) 523.

McEvoy argues that the analysis from *State v. Henderson,* 182 Wn.2d 734, 344 P.3d 1207 (2015) urges the Court to follow a more lenient rule which supports giving the lesser instruction. In *Henderson,* the Supreme Court found that it was error for the trial court to refuse an instruction on manslaughter in the first degree, basing its decision on two unique aspects in that case: conflicting eyewitness testimony and the fact that the definition of the lesser and greater crime were closer than usual to each other. *Id.*, 344 P.3d at 1213. But as the *Henderson* court noted, that case had unique factors not applicable in McEvoy's case. First, there is no conflicting testimony about what McEvoy said during the phone call to his wife: the call was recorded and transcribed for the jury. Second, the definitions of the lesser and greater crimes of harassment are not similar—a threat to cause bodily harm and a threat to kill are distinctly different. Given the circumstances of this case, there is only one conclusion for the jury to draw from McEvoy's call to his wife—he was threatening to find and kill her. Therefore, the trial court properly denied the request for a jury instruction on the lesser charge.

IV. CONCLUSION

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

DATED May 13, 2015.

Respectfully submitted,
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May 13, 2015 - 2:14 PM

Transmittal Letter

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