No. 96071-2

COA # 48839-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN BAKER,

Petitioner/Appellant.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO

AND

THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
LEWIS COUNTY

APPELLANT'S PETITION FOR REVIEW

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A. IDENTITY OF PARTY

John Baker, appellant in the court of appeals, Division Two, is the Petitioner.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4.(b)(3), Petitioner seeks review of a portion of the unpublished decision of the court of appeals, Division Two, in State v. Baker, __ Wn. App. __ (2018 WL 2946160), issued on June 12, 2019.[1]

C. ISSUES PRESENTED FOR REVIEW

1. In order to comply with the First Amendment, this Court has defined a "true threat" as a statement made in a context "wherein a reasonable person would foresee" that the statement would be interpreted by someone hearing it "as a serious expression of intention to inflict bodily harm upon or to take the life of another person." State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001).

   Where the defendant is accused of felony harassment, the Court has further held that the state must show a "true threat to kill," instead of a threat to injure. State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003).

   a. Should this Court grant review to address the continuing currency of our state's "reasonable person" standard where the U.S. Supreme Court has subsequently held in Elonis v. United States, __ U.S. __, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015), that allowing a standard of whether a "reasonable person hearing it" would be threatened is improper and reduces the *mens rea* element of the crime to negligence?

   b. In State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1214 (2004), this Court held that a reviewing court

[1] A copy is attached hereto as Appendix A.

must apply a heightened standard of review to a sufficiency question when the issue is whether the state proved the true threat it claimed. Did the court of appeals err in applying a different, two-part standard, using an improperly low standard to determine whether there had been a "threat to kill?"

c. Where Mr. Baker argued that the evidence was insufficient to prove a threat to kill and a resulting fear that a threat to kill - rather than injure - would be carried out, does the reviewing court apply the heightened standard of review to both the fact that a threat has been made and the degree of threat, as this Court has in the past, or is it proper to apply the heightened standard only to part of the test and bifurcate the question, applying a far more deferential standard regarding whether threats were "to kill," as Division Two here did?

D. OTHER ISSUES SUPPORTING REVIEW

2. Should review be granted on all of the issues raised by the Petitioner in his Statement of Additional Grounds for Review?

E. STATEMENT OF THE CASE

1. Procedural posture

Petitioner John Baker was charged with and convicted after jury trial in Lewis County superior court with three counts of "domestic violation" of a restraining order, two counts of felony harassment (threats to kill), one count of first-degree criminal trespass with a domestic violence enhancement, and one count of felony stalking, also with a domestic violence enhancement. CP 100-105, 159-69, 211-220. Mr. Baker appealed and, on June 12, 2018, the court of appeals, Division Two, reversed and dismissed one of the

counts of felony harassment, reversed the second count of felony harassment for failure to give a "lesser included" instruction, and otherwise affirmed. See App. A. This Petition timely follows.

2. Facts relevant to issues on review

Petitioner John Baker was accused of the charged crimes for several incidents involving Baker and a former girlfriend, Karen Harmon. 3RP 82-84. Baker was now dating another woman and Taylor another man who had previously dated each other, and there were ongoing issues with Harmon not letting Baker see his son or the other kids. 3RP 233, 271. Their new dates, Adam Taylor and April Delavergne, were also fighting over custody of their formerly shared dog. RP 3RP 277-78. Harmon got a "protection" order which she thought made Baker upset. 3RP 95-96.

The incidents at trial were disputed and there were serious problems with Harmon's credibility, as she admitted that she had lied to a deputy about one incident (Count I), claiming to have been alone in a car when she was not, stating she was driving when she was not and only telling the truth after being confronted. 3RP 231, 244, 424-25. The incident involved cutting Harmon off in her car and threatening her; Baker denied it and was convicted of felony violation of a court order for this incident (count I). 3RP 240, 331-32.

Another incident involved Baker driving by and making no gestures, Taylor and another getting in a car and running into him and Delavergne hanging out of Baker's car yelling obscenities and

"flipping" them off. 3$P 112, 196-97, 253. Shortly after that Baker was alleged to have sent a text message saying "I guess you will call the cops now" and "I hope you know what you're doing." 3RP 147-48. There was no copy of the text and the only evidence was Harmon's recollection because her phone broke. 3RP 147. Baker was convicted of felony violation of a court order for this incident (count II).

A third incident involved a woman named Debra Schang, to whom Baker had expressed frustration about not seeing his kids and said he thought about killing Taylor every day and did not "care what the repercussions[.]" 3RP 74. He also said he would not do it because he still held out hope to see his kids. 3RP 78-79. Schang never told Taylor anything about this threat. 3RP 77, 80. Baker was convicted of felony harassment for this incident (count III).

The fourth incident involved Baker having gone into Harmon's extra home, where she did not live, going in without breaking in and taking a list of items which changed over time. 3RP 201-202. Baker had once lived there and had property there, so Harmon had arranged at one point to have him let in but it had fallen through, and that some of the items she reported "missing" were things Baker's grandmother had given them. 3RP 152, 154-55. An officer admitted there was no proof the items did not belong to Baker. 3RP 202, 433. Baker was convicted of criminal trespass for this incident (count IV).

Count five was based on an incident where Baker drove up to

Taylor's truck with Delavergne in the cab and Baker and Taylor had a conversation, starting with Baker saying, "I understand me and you have a problem," "I understand you like to fish," and then, "[w]hy don't I rent a boat and we go down to the Cowlitz down from where I'm at and we settle this." 3RP 268-69. Taylor said the tone was "mean" and he told Baker, "I'm not going anywhere with you," but the two men kept talking. 3RP 269. Taylor would testify he felt the "fishing" comment was a threat. 3RP 311. He did not say whether he thought it was a threat to kill or anything similar, and the two would talk with Baker taking an angry tone at time and threatening to sue, at one point saying something about standing outside the window of their house and seeing Taylor eat with his family at his grandmother's table and holding a gun. 3RP 282. But the conversation continued with sharing of dog food and other things and the two were on better terms at the end. 3RP 282-84. Baker was convicted of felony harassment for this incident.

On review, the court of appeals agreed with Mr. Baker that there was insufficient evidence to prove felony harassment (threat to kill) for the conversation between Schang and Baker, because the threat was never conveyed to Taylor as required under State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001). App. A at 9-10.

The court rejected Mr. Baker's argument, however, that there was insufficient evidence to prove the "threat to kill" for count V felony harassment, rejecting Mr. Baker's arguments that the state

had failed to show a sufficient "true threat" as required under the First Amendment. App. A at 9-11. The court nevertheless reversed and remanded on that count for the failure to give a requested "lesser included" instruction. App. A at 12-13.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. REVIEW SHOULD BE GRANTED BECAUSE THE DEFINITION OF WHEN THERE IS A "TRUE THREAT" UNDER THE FIRST AMENDMENT IS A SIGNIFICANT ISSUE OF THE FIRST AMENDMENT AND HAS GREAT PUBLIC IMPORTANCE

It is axiomatic that the state and federal due process clauses require the government to bear the burden of proving every element of a charged crime, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Farnsworth, 185 Wn.2d 768, 374 P.2d 1152 (2016); Fourteenth Amend.; Art. 1, § 3.

Where the crime involves criminalizing speech, however, there is an additional burden this Court has repeatedly recognized, stemming from the First Amendment right to freedom of speech. See State v. Schaler, 169 Wn.2d 274, 278, 236 P.3d 858 (2010); State v. Kilburn, 151 Wn.2d at 49-50; State v. Williams, 144 Wn.2d 197, 206-207, 26 P.3d 890 (2001). Because the First Amendment protects even "truly objectionable" speech, the state may only criminalize and convict a person for making "true threats." See Schaler, 169 Wn.2d at 278.

This Court has addressed the issue of felony harassment and

the interplay between the state's due process burden of proof and the First Amendment rights involved. See Schaler, supra, Kilburn, supra. In those cases, the Court made it clear that the state may only criminalize "true threats," not statements which "bear the wording of threats" but are hyperbole, "idle talk," political argument or the like. See Schaler, 168 Wn.2d at 283.

Further, this Court has held that a reviewing court facing this issue applies a heightened standard of review when examining the sufficiency of the evidence. Kilburn, 151 Wn.2d at 48-49. Instead of just applying the same "sufficiency of the evident" standard, the appellate court is required to carefully ensure that only a "true threat" was punished. Id; State v. Trey M., 186 Wn.2d 884, 892, 383 P.3d 474 (2016). In this state, currently, the definition of 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 person." Trey M., 186 Wn.2d at 894 (quotations omitted).

Recently, in Elonis, the U.S. Supreme Court has rejected the idea that liability for making a statement should depend on whether a "reasonable person" would hear the comment as a threat even if there is no proof of whether the defendant *intended* a threat. It held that the "reasonable person hearing it" standard was improper because it "reduces culpability on the all-important element of the

crime to negligence." 135 S. Ct. at 2011. Other courts have similarly rejected the idea that, in this First Amendment context where governmental restraint is a very serious concern, it is improper for there to be a conviction unless the government proves that the speaker intended to cause the specific fear of harm, rather than on the feeling of someone who heard what was said. See e.g., Brewington v. State, 7 N.E. 3d 936, 964-65 (Ind. 2014), cert. denied, __ U.S. __, 135 S. Ct. 970 (2015).

In Trey M., this Court did not retreat from the "objective person hearing the threat" standard, despite the holding of Elonis. This Court should grant review, to determine whether this "objective person hearing it" standard runs afoul of the First Amendment and Elonis.

Review should also be granted under RAP 13.4(b)(3), because the court of appeals decision is wrong as a matter of law and Mr. Baker's fundamental rights to a full, fair and meaningful appeal under Article 1, section 22, are involved. Mr. Baker was charged with and convicted of felony harassment for count V, the count involving the conversation at the truck. To prove that a defendant has committed felony harassment as opposed to misdemeanor harassment, the state must show that a person "without lawful authority" "knowingly threatens" to kill someone immediately or and the person threatened is placed in reasonable fear by the words or conduct of the person making the threat that the threat to kill will be

carried out. RCW 9A.46.020(2)9b)(ii); C.G., 150 Wn.2d at 610.

In this case, on appeal, Mr. Baker argued that there was insufficient evidence to support the conviction for felony harassment, because the state had failed to prove that the threats were threats to kill or that Taylor was placed in the required "reasonable fear" that he would be *killed*, the requirement for the felony offense as opposed to the misdemeanor. Brief of Appellant ("BOA") at 26-31.

In ruling on this issue, the court of appeals first recognized that this Court has required a higher standard on review. App. A at 9-10. But Division Two then held:

> The context surrounding Baker's threats to Taylor in the alley . . . suggests that a reasonable speaker in Baker's position would have foreseen that his or her statements would be interpreted by the listener as a **serious expression of intent to inflict bodily harm or kill.**

App. A at 10-11 (emphasis added). The Court concluded that a "rational jury could determine that a reasonable speaker in Baker's place would foresee that the fishing comment and the comment about watching Harmon and Taylor eat dinner would be interpreted by a listener as **a serious expression of intent to inflict bodily harm or kill**." App. A at 11 (emphasis added)

The court of appeals then went on to apply "the same standards applicable to a general sufficiency of the evidence challenge discussed above when evaluating whether the State has presented sufficient evidence of a true threat," citing, State v. Boyle,

183 Wn. App. 1, 6, 335 P.3d 954 (2014). Applying those discretionary standards, the court of appeals took the evidence in the light most favorable to the state and concluded that some rational trier of fact could have concluded that Baker had made a threat to kill. App. A at 11-12.

This Court should grant review under RAP 13.4(b)(3). The court of appeals did not apply the standard this Court has repeatedly set forth in cases like Kilburn, and C.G., supra. Instead of asking solely whether there was a "true threat to kill" using the heightened standard required by this Court in those cases, Division Two applied its own new bifurcated test, applying the heightened standard to only one part and then far lesser, more forgiving standard to the other. That is not a standard this Court has previously applied. See, e.g., C.G., 150 Wn.2d at 611. Indeed, this Court has specifically rejected the idea that proving a reasonable fear of some kind of bodily harm is sufficient to prove a "true threat" to kill under the First Amendment. C.G., 150 Wn.2d at 611.

The issue of a "true threat" is a significant question of constitutional law, because it involves not only due process but also the First Amendment. This Court has been careful to explicitly require heightened review in order to ensure that fundamental rights of defendants are not violated when the state criminalizes speech. In cases like Kilburn and C.G. and Trey M., the Court has repeated the importance of ensuring that only a true threat of the required level

can support a conviction for felony harassment. The Court should grant review in this case to address the lack of evidence to prove felony harassment in this case.

G. OTHER ISSUES PRESENTED FOR REVIEW

2. REVIEW SHOULD ALSO BE GRANTED ON ALL THE ISSUES PETITIONER RAISED PRO SE

Mr. Baker filed a pro se RAP 10.10 Statement of Additional Grounds for Review ("SAG") in the Court of Appeals. See App. A at 12, 20-21. Division Two rejected all of his arguments without appointing counsel to assist or research the issues raised. See App. A; see also RAP 10.10(f). This Court has not yet resolved the issue of how a Petitioner who has filed a SAG should seek review of that SAG in such circumstances.

In State v. Brett, 126 Wn.2d 136, 206, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996), this Court held that it would not address arguments parties tried to incorporate by reference from other cases. However, this Court has not disapproved of incorporation by reference of arguments raised pro se when counsel has not been appointed on those issues pursuant to RAP 10.10. Thus, to comply with RAP 13.7(b) and raise all issues in this Petition without making any representations about their relative merit as required by the WSBA Rules of Professional conduct, incorporated herein by reference are the arguments Mr. Baker, raised in his RAP 10.10 SAG. This Court should grant review on those issues as well.

H. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 12th day of July, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at the Lewis County Prosecutor's Office at appeals@lewiscountywa.gov, and to appellant/Petitioner John C. Baker, DOC 942288, Coyote Ridge CC, P.O. Box 769, Connell, WA. 99326.

DATED this 12th day of July, 2018.

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NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.
John BAKER, Appellant.

No. 48839–6–II
|
June 12, 2018

Appeal from Lewis County Superior Court, 15–1–00333–4, Honorable Richard Lynn Brosey, J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

Bjorgen, J

***1** John Baker appeals from his convictions of three counts of felony violation of a court order, two counts of felony harassment, and one count each of criminal trespass and felony stalking, as well as the superior court's imposition of legal financial obligations (LFOs). He argues that (1) the superior court infringed on his right to a public trial, (2) the State presented insufficient evidence to convict him of both counts of felony harassment, (3) the superior court improperly

refused to instruct the jury on a lesser included offense to one of Baker's felony harassment charges, (4) the prosecution committed misconduct at trial, (5) he received ineffective assistance of counsel, (6) cumulative error warrants a new trial, and (7) the superior court abused its discretion by imposing LFOs as part of his sentence. He also argues in his statement of additional grounds (SAG) that (8) his jury was biased.

We affirm Baker's convictions for felony violation of a court order, criminal trespass, and felony stalking. We reverse Baker's conviction for felony harassment as alleged in count 3 for insufficient evidence, and we reverse Baker's conviction for felony harassment as alleged in count 5 because the superior court erred by failing to instruct the jury on misdemeanor harassment as a lesser included offense. Finally, we do not reach the LFO issue. We remand for further proceedings consistent with this opinion.

FACTS

Sometime during 2000 or 2001, Kathy Harmon met Baker and the two began a relationship. In 2004, Harmon and Baker had a son. After Baker and Harmon separated in 2014, Baker began dating Sophie Delavergne and Harmon began dating Adam Taylor. On January 26, 2015, Harmon acquired a protection order prohibiting Baker from having contact with her and her son in common with Baker.

On February 18, Baker spoke with a friend, Debra Schang. Schang knew Baker through her son-in-law, but the two did not "really have a relationship," and did not have much contact. Verbatim Report of Proceedings (VRP) (Vol. 1) at 72. Baker asked about his son's school schedule, which made Schang uncomfortable because she worked at Baker's son's school and was aware of Baker's disagreements with Harmon. According to Schang, Baker told her that "he had been watching the school and saw [Taylor] pick up his son, and that he wanted to kill [Taylor]." VRP (Vol. 1) at 74. Schang stated that she was worried Baker would attempt to kill Taylor and informed the school district of her conversation with Baker. She did not tell Taylor about the threats Baker made against him.

On April 23, Taylor encountered Baker and Delavergne in an alley near Taylor's stepfather's residence. According to Taylor, Baker told him, "I know you and me got a problem.... I understand you like to fish. Why don't I rent a boat and we go down to the Cowlitz down from where I'm at and we settle this." VRP (Vol. 2) at 268–69. Taylor refused, and the two continued to talk, with Baker stating that he "had a real problem with [Taylor] hanging around his kid." VRP (Vol. 2) 269–70. Baker also told Taylor, "To be honest with you, the other night I was in

the driveway next to your truck holding a .45 [handgun]" while watching Taylor have dinner with Harmon and her children. Baker also told Taylor that he had seen a story on the news about a divorced husband who killed his ex-wife and gained custody of their children. Taylor was scared by Baker's comments and thought that Baker might attempt to kill him. During the conversation, Taylor saw Delavergne, who was in Baker's vehicle, point between the seats of the vehicle and mouth "[Baker has] got a gun." VRP (Vol. 2) at 275.

***2** On September 29, the State charged Baker in its fourth amended information with three counts of felony violation of the January 26 protection order, two counts of felony harassment, and one count each of first degree criminal trespass and felony stalking. The State also charged a fourth count of felony violation of a court order as an alternative to the felony stalking charge. Felony harassment as charged in count 3 related to the threats Baker made during his conversation with Schang, and felony harassment as charged in count 5 related to the threats Baker made to Taylor in the alley.[1]

1 Because Baker raises specific challenges to only his convictions on the two felony harassment counts, we do not independently discuss the facts related to the remaining charges.

At trial the State and Baker entered a stipulation that Baker had "twice been previously convicted for violating the provisions of a court order in Washington state." VRP (Vol. 1) at 61. The trial court accepted the stipulation and supporting exhibits, explaining, "[T]hey form the foundation of the [S]tate's charging a violation of protection orders." VRP (Vol. 1) at 44. During trial, witnesses testified to the facts recounted above. In addition, Harmon's daughter S.S.[2] testified that she was scared when she saw Baker drive past her family's home.

2 We refer to Harmon's daughter as S.S. because she was a juvenile at the time of the events and when she testified at trial.

There were three instances where a discussion was held off the record. The following excerpts from the record show the context of the off the record discussions. The discussions themselves were not transcribed. The first occurred during testimony about the route Baker drove through Pe Ell on the date of an alleged protection order violation:

> (Jury not present.)
>
> [Court]: So the question is, is it a fair and accurate representation of what it purports to be, which is a map of Pe Ell?
>
> ....
>
> [Court]: So you are telling me the Google map shows a different location for the bank?

[Defense]: So I don't have the bank listed on the—

[Prosecution]: The witness says it's wrong too. I think it's wrong.

[Defense]: Okay.

[Witness]: I think it's showing the bank on the wrong side of the road.

(Discussion off the record)

[Court]: It's been a while since I've been to Pe Ell, but isn't there a convenience store at the intersection of SR 6 and this Pe Ell Avenue, the one that goes eventually to Pe Ell–McDonald Road?

....

[Prosecution]: I will withdraw the [map] and come back with another one tomorrow.

[Defense]: Thank you.

VRP (Vol. 1) at 115–18.

Immediately after the State agreed to withdraw the map, a second discussion was held off the record:

(Discussion off the record)

[Court]: All right. So the bailiff has been informed—this is on the record—that Juror No. 1 apparently disclosed to the bailiff that she had overheard a conversation downstairs in the lobby, I assume on the first floor, apparently by the security guards.

[Bailiff]: Yes. She was getting fingerprinted she said.

[Court]: And apparently there was some discussion there that she overheard to the effect that the defendant was going to plead yesterday and didn't.

....

[Court]: Okay. Did you discuss this with any other jurors?

[Juror 1]: Absolutely not.

VRP (Vol. 1) at 118–21.

After Baker objected to the State's attempt to admit a recording of statements he made to Officer Stephen Heller, another discussion was held off the record during Heller's description of how he copied and stored the audio file of Baker's statements:

> [Prosecution]: What did you do with the SIM card with the recording of the conversation between you and Mr. Baker?
>
> ***3** [Witness]: Upon completion of my initial report for this incident, I removed the SIM card from—

(Discussion off the record)

> [Court]: No, he's not going to have the mike. You are just going to have to listen to what he has to say.
>
> [Witness]: Upon completion of my incident report, I removed the SIM card from the department-issued recorder, inserted it into my department-issued computer, and removed the file from the SIM card into the computer and then transferred it into the report itself.

VRP (Vol. 3) at 489–90. Beyond the context in which the discussions occurred, the record does not contain any information concerning what was specifically discussed off the record in any of these instances.

As noted above, during the trial one of the jurors informed the court that she had overheard that Baker was going to agree to a plea deal the day before trial, although he ultimately chose to plead not guilty. The court questioned the juror who had overheard the comments, determined that the juror had not told any of the other jurors what she had overheard, and replaced the juror with an alternate juror.

Baker requested the trial court to instruct the jury on misdemeanor harassment as a lesser included offense to felony harassment as charged in count 5. Defense counsel argued that Baker's comments to Taylor in the alley, the fishing comment and the comment about the gun, assuming they were threats, could have been interpreted as threats to do something other than kill Taylor, such as to fight or injure him. The State opposed giving the lesser included instruction, arguing that the fishing threat was either "a threat to drown and to kill [Taylor], or it's not a threat at all." VRP (Vol. 5) at 690.

The trial court agreed that Baker's statements could be interpreted as an implied threat, but denied the lesser included instruction. The court noted that there was not any evidence that the threat was anything other than the implication of taking Taylor out on the river and drowning him. The court asked whether arguing any other inference from Baker's comments would be inviting the jury to speculate. Finally, the court explained, "[F]rom my perspective, it appears to me that there is no evidence here except of the implied threat to kill." VRP (Vol. 5) at 696–97.

During closing argument, the State encouraged the jurors to evaluate the credibility of the witnesses and emphasized the reactions of various witnesses while testifying:

> The manner in which the witness testified. When—in voir dire there was some discussion about what do you look for when someone is testifying? A lot of people talk about looking you in the eye and shaking or appearing uncertain. And a lot of that can be from being nervous, but there is a quality of evasiveness to the defendant's testimony that is unmistakable. And it definitely bears on credibility. When someone is being evasive and not cooperative and basically trying to avoid answering questions, that bears on their credibility. And we saw a lot of that in [Baker]'s testimony. We saw some of that in [Delavergne]'s testimony as well.
>
> ....
>
> You have got the reasonableness of the witness's statement in the context of the other evidence, and basically that's talking about corroboration. We do have corroboration in this case from a witness who typically would be really probably more favorable to the defendant. She's related to him. She lives in a small town. She's afraid of him, and that's Debbie Schang.

***4** VRP (Vol. 5) at 736–37. Baker did not object.

During its closing argument, the defense attempted to identify several inconsistences in the testimony of the State's witnesses and attempted to mitigate the impact of S.S.'s demeanor and her testimony that she was scared when she saw Baker drive past her family's home:

> And lastly, there was some emotion in this case. Without a doubt. It was very upsetting to see [S.S.] up here crying.... John Baker is not charged with one single crime against [S.S.]. Her feelings in this was to do nothing [sic] but to prejudice you against him.

VRP (Vol. 5) at 799.

During rebuttal, the State commented:

> [Harmon and Taylor] reported what happened because they were afraid. This whole family is afraid.
>
> You can see why [Harmon] is taking this so seriously in how her family is reacting to this; what effect this is having on [Harmon's daughter] [S.S.]. It's disturbing to see [S.S.] upset. She wasn't upset about testifying. She was upset because she is deadly afraid of what the defendant is going to do to her family. [Harmon] is also upset about that.

> And I would ask you to assess the facts. Don't use sympathy or prejudice. Assess the facts. Emotion shows part of the facts. Emotion goes into assessment of credibility.... And it's helpful to assessing the credibility of the witnesses and judging the evidence in this case.

VRP (Vol. 5) at 804. Baker did not object.

The jury found Baker guilty of three counts of felony violation of a protection order, two counts of felony harassment, criminal trespass, and felony stalking. In addition, the trial court ordered Baker to pay $4,200 in discretionary LFOs.

Baker appeals his convictions and imposition of discretionary LFOs.

ANALYSIS

I. PUBLIC TRIAL RIGHT

Baker argues that the trial court violated his right to a public trial by holding a discussion off the record without conducting the required *Bone–Club*[3] analysis. We disagree.

3 *State v. Bone–Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant a " 'public trial by an impartial jury.' " *State v. Sublett*, 176 Wn.2d 58, 70–71, 292 P.3d 715 (2012) (quoting WASHINGTON CONSTITUTION art. I, § 22). We review whether a defendant's public trial right has been violated de novo as a question of law. *State v. Whitlock*, 188 Wn.2d 511, 520, 396 P.3d 310 (2017). We engage in a three step analysis in making that determination. *Whitlock*, 188 Wn.2d at 520. First, we must determine whether the proceeding at issue implicates the public trial right. *Whitlock*, 188 Wn.2d at 520. Second, we consider whether the proceeding at issue was closed. *Whitlock*, 188 Wn.2d at 520. Finally, we decide whether the closure was justified. *Whitlock*, 188 Wn.2d at 520.

In this case, the parties dispute the second prong of the public trial right analysis, whether a closure occurred. Our Supreme Court has held that a closure " 'occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.' " *Sublett*, 176 Wn.2d at 71 (quoting *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)). A closure may also occur when "a portion of a trial is held someplace 'inaccessible' to spectators, usually in chambers." *State v. Love*, 183 Wn.2d 598, 606, 354 P.3d 841 (2015) (quoting *Lormor*, 172 Wn.2d at 93), *cert. denied*, 136 S.Ct. 1524 (2016). Our Supreme Court has also held that a defendant asserting a violation of his public trial rights bears the burden to show that a closure occurred. *State v. Njonge*, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014). If the record on appeal is incomplete:

> ***5** "[T]he appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent."

Njonge, 181 Wn.2d at 556 (quoting *State v. Jasper*, 174 Wn.2d 96, 123–24, 271 P.3d 876 (2012)).

Baker has not demonstrated that a closure occurred during his trial based on the record before us. There is nothing in the record to imply that there was a conference held in the judge's chambers or that the judge sealed the courtroom such that it was " 'completely and purposefully closed to spectators so that no one may enter and no one may leave.' " *Sublett*, 176 Wn.2d at 71 (quoting *Lormor*, 172 Wn.2d at 93). Further, there is no indication that the off the record discussions were inaccessible or inaudible to the public or that the public was otherwise effectively excluded from the discussion. We do not "presume the existence of facts as to which the record is silent." *Njonge*, 181 Wn.2d at 556. We also note that the off the record discussions could have been about any number of topics, such as the passing of documents. Because the context does not suggest that the public could not observe, listen to, and evaluate the discussions, we hold that Baker's public trial right claims fail because he has not carried out his burden to demonstrate on the record that a closure occurred.

II. SUFFICIENCY OF THE EVIDENCE

Baker argues that the State presented insufficient evidence for a jury to convict him of the two felony harassment charges. The State concedes that it did not present sufficient evidence for a

jury to convict Baker of felony harassment as alleged in count 3, but maintains that it presented sufficient evidence with respect to felony harassment as alleged in count 5. As noted above, count 3 was based on Baker's threat to kill Taylor during his conversation with Schang, and count 5 was based on his threats to Taylor in the context of fishing and on watching Taylor and Harmon eat dinner while he had a gun. We accept the State's concession as to count 3 and hold that the State presented sufficient evidence to convict Baker of felony harassment as alleged in count 5.

In evaluating the sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* We do not review credibility determinations, which are reserved for the trier of fact. *Id.* In addition, we consider direct and circumstantial evidence equally reliable in evaluating the sufficiency of the evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

In order to prove felony harassment, the State was required to prove beyond a reasonable doubt that Baker, without lawful authority, knowingly threatened immediately or in the future to kill the person threatened or any other person. RCW 9A.46.020(2)(b)(ii). The State is also required to show beyond a reasonable doubt that Baker, by words or conduct, placed the person threatened in reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(b). Our Supreme Court has held that while the threat to kill may originally be made to a third party, "the *person threatened* must find out about the threat although the perpetrator need not know nor should know that the threat will be communicated to the victim." *State v. J.M.*, 144 Wn.2d 472, 482, 28 P.3d 720 (2001) (emphasis added).

A. Count 3 Felony Harassment (February 18, 2015)

***6** Schang testified that she did not communicate Baker's threats to Taylor. On the evidence before us, the State has failed to show that the threat alleged in count 3 placed Taylor in fear that the threat would be carried out. Therefore, we accept the State's concession that it did not present sufficient evidence for a jury to convict Baker of felony harassment as alleged in count 3.

B. Count 5 Felony Harassment (April 23, 2015)

1. Sufficient Evidence of True Threat

Baker argues that the State presented insufficient evidence that his threats to Taylor regarding fishing and watching Taylor and Harmon eat dinner while he had a gun were "true threats." Br. of Appellant at 27–31. This characterization matters because true threats are among the categories of pure speech that are unprotected by the First Amendment. *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). We hold that Baker's statements were true threats.

A threat is a true threat if "[c]onsidering the entire context, a reasonable speaker [in the defendant's] place would foresee that [his or her] statements ... would be interpreted by a listener as a serious expression of intention to inflict bodily harm." *State v. Trey M.*, 186 Wn.2d 884, 907, 383 P.3d 474 (2016). True threats also include those comments that a reasonable speaker would foresee being interpreted by a listener as serious expressions of intention to kill. *Kilburn*, 151 Wn.2d at 43, 53. "[W]hether a true threat has been made is determined under an objective standard that focuses on the speaker." *Kilburn*, 151 Wn.2d at 44. Our Supreme Court has commented that "the First Amendment does not require that the speaker intend to carry out a threat for it to constitute a true threat." *Kilburn*, 151 Wn.2d at 46.

We review "constitutional questions de novo, and in a case involving pure speech, we engage in an independent review of the entire record to ensure a conviction" does not violate constitutional protections. *State v. Boyle*, 183 Wn. App. 1, 6, 335 P.3d 954 (2014). We use the same standards applicable to a general sufficiency of the evidence challenge discussed above when evaluating whether the State has presented sufficient evidence of a true threat. *Boyle*, 183 Wn. App. at 6–7.

The determination of whether a threat is a true threat and therefore not protected under the First Amendment involves consideration of the entire context in which a threat is made. For example, in *Kilburn*, our Supreme Court determined that a juvenile's threat that he would "bring a gun to school tomorrow and shoot everyone," was not a true threat. 151 Wn.2d at 39, 52–53. The court reasoned that based on the "smiling" and "giggling" demeanor of the speaker, the speaker's lack of a history of violent behavior, and the prior amicable relationship between the speaker and listener, a reasonable person in the place of the speaker would not foresee that their comments would be interpreted as a serious threat. 151 Wn.2d at 52–53.

On the other hand, in *Trey M.*, our Supreme Court determined that a juvenile's statement that he was developing a specific plan to shoot or bomb other children at school before killing himself was a true threat. 186 Wn.2d at 888–89, 907. The court reasoned that unlike the circumstances in *Kilburn*, Trey's demeanor did not suggest that he was joking, Trey had previous conflicts involving teasing with his intended targets, and Trey "fail[ed] to acknowledge that shooting the boys would be wrong." 186 Wn.2d at 907.

***7** The context surrounding Baker's threats to Taylor in the alley on April 23 suggests that a reasonable speaker in Baker's position would have foreseen that his or her statements would be interpreted by the listener as a serious expression of intention to inflict bodily harm or kill. First, Baker and Taylor did not have a prior amicable relationship. At trial, Taylor testified that he knew Baker before he began dating Harmon and that he had problems with him. Taylor also described another incident that occurred on January 27 involving Baker during which he swerved in front of Taylor's vehicle, forced Taylor to stop, and began to approach Taylor's vehicle before trying to get something out of the back of his car. Taylor drove away and later gave a statement to the police about the incident.

Second, Baker's demeanor did not indicate that he intended his comment as a joke. Taylor testified that Baker appeared angry when he told Taylor that he had a problem with him being around his son and when Baker told Taylor that he had been watching him and Harmon eat dinner while holding a gun. Taylor also stated that Baker was angry when discussing how Taylor and Harmon lived together. Taylor further recalled that Baker's tone was "mean" when he made the fishing comment. VRP (Vol. 2) at 269. Additionally, Taylor testified that at another point in the conversation Baker appeared despondent and that Baker told him, "I ain't got much time, so I don't got much to live for these days." VRP (Vol. 2) at 285. The jury could have interpreted Baker's despair as indicating that the deterrent of a long potential criminal sentence no longer had much effect.

Baker argues that Taylor's reactions to his threats and Taylor's willingness to continue participating in the conversation show that his comments were not true threats. "[W]hether a true threat has been made is determined under an objective standard that focuses on *the speaker*." *Kilburn*, 151 Wn.2d at 44 (emphasis added). Additionally, Taylor testified at trial that he continued the conversation with Baker in the hopes of deescalating the situation, rather than due to a lack of fear. With this evidence, a rational jury could determine that a reasonable speaker in Baker's place would foresee that the fishing comment and the comment about watching Harmon and Taylor eat dinner would be interpreted by a listener as serious expressions of intention to inflict bodily harm or kill. Therefore, we hold that the State presented sufficient evidence that Baker's threats were true threats not protected under the First Amendment.

2. Sufficient Evidence of Felony Harassment

Baker argues that the State did not present sufficient evidence that he threatened to kill Taylor as alleged in count 5. He contends that the context of the threats would not permit a reasonable jury to find that Taylor had a reasonable belief that Baker would kill him, similar to the circumstances in *State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003). In *C.G.*, our Supreme Court reversed the defendant's conviction for felony harassment based on her threat "I'll kill

you," because her victim stated that he was afraid she might harm him, but did not testify that he feared she would kill him. 150 Wn.2d at 607, 610, 612. In contrast to the victim in *C.G.*, Taylor testified that Baker's comments made him scared and he thought that Baker might kill him. Taylor also testified that Delavergne indicated that Baker had a firearm during his conversation in the alley and that Baker had mentioned having a gun while watching Taylor eat dinner. Viewing the evidence in the light most favorable to the State, a rational jury could find that Baker threatened to kill Taylor in the alley and that Taylor was placed in reasonable fear that the threat would be carried out. Therefore, we hold that the State presented sufficient evidence to support the charge of felony harassment as alleged in count 5.

C. SAG—Sufficiency of Evidence of Prior Court Order Violations

***8** In his SAG, Baker asserts that the State presented insufficient evidence that he had violated two prior qualifying court orders as alleged in the three counts of felony violation of a court order. The State charged Baker with three separate counts of felony violation of the January 26, 2015 protection order under RCW 26.50.110 based on his contact with Harmon on January 27, 2015, February 10, 2015, and June 9, 2015. The January 27 contact involved an encounter on a highway, the February 10 contact occurred while Harmon was driving around Pe Ell, and the June 9 contact concerned Baker's driving past Harmon's home. RCW 26.50.110(5) states in part that a violation of a court order is elevated from a gross misdemeanor to a class C felony "if the offender has at least two previous convictions for violating the provisions of an order issued under [a qualifying chapter]."

In *State v. Case*, our Supreme Court held that an agreed stipulation that a defendant had violated two prior qualifying court orders satisfies the State's obligation to prove that element beyond a reasonable doubt. 187 Wn.2d 85, 91, 384 P.3d 1140 (2016). Baker's stipulation to that effect was read to the jury on the record and the trial court confirmed that the stipulation was for the purpose of providing foundational evidence for the three charges of felony violation of a court order. Therefore, we hold that the State presented sufficient evidence that Baker had two prior convictions for violating qualifying court orders as alleged in the three counts of felony violation of a court order.

III. Lesser Included Offense Jury Instruction

Baker argues that the trial court erred by failing to instruct the jury on misdemeanor harassment

as a lesser included offense to felony harassment as charged in count 5 regarding the threats in the alley. We agree.

Both the State and the defendant have a statutory right to present an instruction to the jury on lesser included offenses if the evidence presented at trial supports an instruction. *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). Failure to give a lesser included instruction when the defendant is entitled to one constitutes reversible error. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005). We apply the two part analysis articulated in *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978), to determine whether a defendant is entitled to a lesser included offense instruction. *State v. Porter*, 150 Wn.2d 732, 736, 82 P.3d 234 (2004).

The *Workman* analysis includes a legal and factual prong. *Gamble*, 154 Wn.2d at 463. Under the legal prong, each element of the lesser included offense must be a necessary element of the charged offense. *Workman*, 90 Wn.2d at 447–48. Under the factual prong, the evidence must permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997). To be entitled to an instruction on a lesser included offense, each of these prongs must be met. *See Porter*, 150 Wn.2d at 736.

To satisfy the *Workman* factual prong, a defendant must be able to identify evidence that "affirmatively establish[es] the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." *State v. Fernandez–Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). However, the fact that the defendant raises inconsistent theories at trial does not preclude an instruction on a lesser offense if supported by the evidence because " 'an inconsistent defense goes to the weight of, but does not entirely negate' the evidence supporting the lesser included instruction." *Fernandez–Medina*, 141 Wn.2d at 459 (quoting *State v. McClam*, 69 Wn. App. 885, 890, 850 P.2d 1377 (1993)). In reviewing the evidence under the factual prong, we view the evidence in the light most favorable to the party requesting the instruction. *Fernandez–Medina*, 141 Wn.2d at 455–56.

***9** In the present appeal, the parties dispute only whether sufficient evidence was presented at trial to merit an instruction on misdemeanor harassment as a lesser included offense to felony harassment as charged in count 5. We review a trial court's determination on whether sufficient evidence supports the giving of a lesser included offense instruction for an abuse of discretion. *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *Id.* A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, reaches an outcome that is outside the range of acceptable choices, such that no reasonable person could arrive at that outcome. *Id.*

A person commits misdemeanor harassment if, without lawful authority, he or she knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to any other person and, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1). The difference between misdemeanor and felony harassment involves the type of threat that was made: "[t]he offense of harassment is elevated from a misdemeanor to a felony when the threat is a threat to kill." *State v. Mills*, 154 Wn.2d 1, 12, 109 P.3d 415 (2005). Our Supreme Court has held that "the nature of a 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." *C.G.*, 150 Wn.2d at 611.

Viewing the evidence in the light most favorable to Baker, his threats to Taylor in the alley are sufficiently ambiguous to permit a rational jury to find that he only committed misdemeanor harassment. Neither of Baker's threats to Taylor in the alley, the fishing comment and the mention of the gun, was a literal and direct threat. Although a jury could find that Baker's comments to Taylor in the alley were veiled threats, the jury would still need to infer how and to what extent Baker intended to carry out his threats. Considering all the facts in the light most favorable to Baker, a rational jury could determine that Baker's threats to Taylor were not threats to kill, but instead were threats to inflict bodily harm or injury short of death. Therefore, we hold that the trial court abused its discretion by refusing to instruct the jury on misdemeanor harassment as a lesser included offense to felony harassment as charged in count 5.

IV. PROSECUTORIAL MISCONDUCT

Baker contends that the prosecutor engaged in improper vouching by commenting on the evasiveness of Baker's and Delavergne's testimony and by her comments on fear. Baker argues also that the prosecutor improperly argued facts not in evidence concerning Schang and improperly invited the jury to reach a verdict on the basis of emotion. We disagree.

A. Standards

To establish a claim of prosecutorial misconduct, Baker must demonstrate that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). To establish prejudice, there must be a substantial likelihood that the misconduct affected the jury

verdict. *In re Glasmann*, 175 Wn.2d at 704. Because Baker did not object to the alleged misconduct during trial, his arguments are waived unless he can establish that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *In re Glasmann*, 175 Wn.2d at 704.

B. Vouching

In general, a prosecutor may improperly vouch for a witness in two ways: (1) by expressing his or her personal belief as to the veracity of the witness or (2) by indicating that evidence not presented at trial supports a witness's testimony. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). " 'It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.' " *Ish*, 170 Wn.2d at 196 (quoting *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)). However, a prosecutor has "wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). The prosecutor has particularly wide latitude in circumstances where he or she is "rebutting an issue the defendant raised in his closing argument." *Lewis*, 156 Wn. App. at 240. The prosecution is also "entitled to comment upon the quality and quantity of evidence the defense presents." *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009).

1. Comment on Evasive Testimony—Impropriety

***10** Baker argues that the prosecution engaged in improper vouching by commenting on the evasiveness of Baker's and Delavergne's testimony. As set out above, the prosecution stated in closing argument:

> The manner in which the witness testified. When—in voir dire there was some discussion about what do you look for when someone is testifying? A lot of people talk about looking you in the eye and shaking or appearing uncertain. And a lot of that can be from being nervous, but there is a quality of evasiveness to the defendant's testimony that is unmistakable. And it definitely bears on credibility. When someone is being evasive and not cooperative and basically trying to avoid answering questions, that bears on their credibility. And we saw a lot of that in [Baker]'s testimony. We saw some of that in [Delavergne]'s testimony as well.

VRP (Vol. 5) at 736.

The jury was instructed that in evaluating a witness's testimony, it could consider "the manner of the witness while testifying." Clerk's Papers (CP) at 121. In context, the prosecution's reference to the witnesses' evasiveness appears to relate to the manner and quality of the witnesses' testimony, rather than an opinion that the witnesses themselves were evasive people and therefore untrustworthy. Similarly, the prosecution's use of the phrase "we saw," appears to direct the jury to examine the evidence at trial, rather than imply that the prosecution " 'has special knowledge of evidence not presented to the jury,' " or that the prosecution was attempting to "align the jury against [the defendant] on racial or socioeconomic grounds." *State v. Robinson*, 189 Wn. App. 877, 894–95, 359 P.3d 874 (2015) (quoting *United States v. Bentley*, 561 F.3d 803, 812 (8th Cir. 2009)); VRP (Vol. 5) at 736. Therefore, we hold that the prosecution's comments regarding Baker's and Delavergne's evasive testimony do not constitute vouching because they represent appropriate inferences drawn from the evidence at trial rather than personal opinions.

2. Comments Regarding Schang

i. Impropriety

Baker claims that the prosecution improperly argued facts not in evidence when it discussed Schang's testimony. At trial, the prosecution argued that Schang's testimony was particularly important because she was related to Baker and therefore would be more inclined to testify positively about him. VRP (Vol. 5) at 737. Schang testified that she did not "really have a relationship" with Baker and that she had a closer relationship with Harmon, she also testified that Baker is her son-in-law's uncle. VRP (Vol. 1) at 72. Thus, the prosecutor's argument that Schang would be more inclined to testify favorably about Baker because she was related to him was a reasonable inference from the evidence at trial. It was not improper.

The prosecutor also stated that Schang was afraid of Baker. Schang did not testify that she was personally scared or afraid of Baker, although she did testify that she was worried about the children and that Baker might attempt to kill Taylor. The inference that Schang was personally afraid of Baker cannot reasonably be drawn from this evidence. Therefore, the prosecutor's comment that Schang was afraid of Baker was improper.

ii. Flagrant and Ill–Intentioned

***11** Although we hold that the prosecution's argument regarding Schang's fear of Baker was improper, Baker's claim of prosecutorial misconduct fails because he has not shown that the misconduct was so flagrant and ill-intentioned that it could not have been cured by an appropriate instruction. The prosecution did not repeatedly emphasize the improper argument during its closing, and a timely objection would likely have been able to reorient the prosecution's comments to Schang's testimony at trial. Additionally, the jury was instructed to "disregard any remark, statement, or argument that is not supported by the evidence." CP at 121. In the absence of evidence to the contrary, we presume that the jury followed the court's instructions. *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). Therefore, we hold that the prosecution's comments were not so flagrant and ill-intentioned that they could not have been remedied by a curative instruction.

C. Appeal To Emotion

Baker argues that the prosecution committed misconduct by inviting the jury to reach a verdict based on emotions rather than the evidence presented at trial. He contends that the prosecution's comment to the jury that it could consider a witness's emotions as part of its evaluation of the facts of the case and the witness's credibility was improper. He also asserts that the prosecution committed misconduct by inviting the jury to convict based on their emotions rather than the evidence. We hold that the prosecution's argument that the jury could consider emotions in determining credibility was proper and that the prosecution's emphasis on S.S. and her family's fear, while improper, could have been cured by a remedial instruction.

1. "Emotions" Comment—Impropriety

The prosecution commits misconduct by asking the jury to convict based on their emotions rather than the evidence. *State v. Fuller*, 169 Wn. App. 797, 821, 282 P.3d 126 (2012). At trial, the prosecution urged the jury to consider the emotional state of the various witnesses as part of evaluating the credibility of the witnesses and other evidence at trial. In context, the prosecution's argument did not attempt to encourage the jury to decide the case based on the jury's emotional reaction to the evidence. The prosecution expressly couched its comments

regarding emotional reactions in terms of "assessing the credibility of the witnesses and judging the evidence in this case." VRP (Vol. 5) at 804.

Further, the prosecution's comments about emotions appears to be part of its response to the defense's argument that S.S.'s emotional state had no relevance to the issues at trial. More particularly, the prosecution's argument suggests that S.S.'s emotional reaction to Baker corroborates Taylor's and Harmon's interpretation of Baker's comments as serious threats, thereby **bolstering** Taylor's and Harmon's credibility. As noted, a prosecutor may comment on witness credibility based on the evidence, *Lewis*, 156 Wn. App. at 240, and has wide latitude in rebutting an issue raised in closing argument. *Lewis*, 156 Wn. App. at 240. For these reasons, the prosecutor did not improperly invite the jury to resolve the case based on the emotional reactions of the witnesses.

2. Comments Regarding Fear

i. Impropriety

Baker maintains that the prosecution committed improper vouching when it told the jury that Harmon's whole family was afraid of Baker and that Harmon's daughter S.S. was "deadly afraid" of what Baker might do to her family. Br. of Appellant at 40. S.S. testified at trial that she was afraid for her and her family's safety after seeing Baker's vehicle, but never stated that she was "deadly afraid" of Baker. VRP (Vol. 3) at 376. Additionally, there is no evidence in the record that any of Harmon's children, other than S.S., felt afraid of Baker, despite the prosecution's statement that the entire family was afraid. Based on the testimony at trial, the prosecution's arguments regarding the family's fears drifted beyond the bounds of permissible inferences from the evidence into appeals to the jury's sympathy for the family. Our Supreme Court has stated that sympathy is an emotional, rather than reasoned, response. *State v. Pirtle*, 127 Wn.2d 628, 677, 904 P.2d 245 (1995). It is misconduct for the prosecution to invite the jury to convict based on their emotions. *Fuller*, 169 Wn. App. at 821. We hold that the prosecution's arguments regarding the family's fears were improper.

ii. Flagrant and Ill–Intentioned

***12** Despite the impropriety, Baker's prosecutorial misconduct argument fails because he has not established that the misconduct could not have been cured by an appropriate instruction. In closing, the prosecution encouraged the jury "to assess the facts. Don't use sympathy or prejudice." VRP (Vol. 5) at 804. Additionally, the jury was instructed to "reach [their] decision based on the facts proved to [them] and on the law given to [them], not on sympathy, prejudice, or personal preference." CP at 123. In the absence of evidence to the contrary, we presume that the jury followed the court's instructions. *Montgomery*, 163 Wn.2d at 596. Given these features and the nature of the comments, we hold that the prosecution's comments were not so flagrant and ill-intentioned that they could not have been remedied by a curative instruction. Therefore, Baker's claim of prosecutorial misconduct fails.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Ineffective Assistance With Regard To Prosecutorial Misconduct

Baker argues that he received ineffective assistance of counsel "[t]o the extent that counsel's failure [to object to the alleged prosecutorial misconduct] is seen as an[ ] impediment to relief on any of the misconduct." Br. of Appellant at 41–42.

To establish ineffective assistance of counsel, Baker must demonstrate that: (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness under the circumstances and (2) he was prejudiced as a result of his counsel's performance. *State v. Larios–Lopez*, 156 Wn. App. 257, 262, 233 P.3d 899 (2010). A defendant is prejudiced by counsel's deficient performance if but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 889 P.2d 1251 (1995). We presume that defense counsel's representation was effective and Baker must demonstrate that there was no legitimate or strategic reason for defense counsel's conduct. *McFarland*, 127 Wn.2d at 335–36.

Baker offers a single conclusory sentence that "[c]ounsel sat mute while the prosecution repeatedly committed misconduct which directly affected the crucial issue in the case," as his argument that he received ineffective assistance of counsel. Br. of Appellant at 42. Baker does not offer any reasoning as to why counsel was deficient with respect to any of the specific prosecutorial misconduct issues. Baker bears the burden to show that there was no legitimate or

strategic reason for defense counsel's conduct. *McFarland*, 127 Wn.2d at 335–36. We do not consider conclusory arguments unsupported by citation to authority or rational argument. *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). Therefore, we decline to consider this argument.

B. SAG—Ineffective Assistance

In his SAG, Baker contends that he received ineffective assistance of counsel because his counsel knew that he was on drugs during his trial, that Baker's son had killed himself, and that Baker was "not in [his] right mind." SAG at 1. Under RAP 10.10(c), a SAG need not contain references to the record or citation to authorities. However, "the appellate court will not consider a [SAG] if it does not inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Although the record does show that one of Baker's sons had killed himself in 2015, he does not explain how his counsel's possession of this knowledge caused his counsel to perform deficiently. Therefore, we decline to consider this argument.

The record before us does not present any evidence of Baker's remaining contentions. If Baker wishes to bring a claim of ineffective assistance of counsel based on matters that are outside the appellate record, he must do so by means of a personal restraint petition. *See McFarland*, 127 Wn.2d at 338 n.5 ("[A] personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record."); RAP 16.3. Therefore, we hold that Baker's claim of ineffective assistance of counsel raised in his SAG fails.

VI. CUMULATIVE ERRORS

***13** Baker argues that the cumulative errors caused by prosecutorial misconduct and ineffective assistance of counsel entitle him to a new trial. Under the cumulative error doctrine, "a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). The doctrine does not apply where the errors are few and have little to no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Although we agree that some of the prosecution's arguments were improper, the arguments were not so egregious that they resulted in a trial that was fundamentally unfair. We hold that Baker has not established that cumulative error entitles him to a new trial.

VII. TRIAL LFOS

Baker argues that the trial court abused its discretion by failing to adequately inquire into his ability to pay before imposing discretionary LFOs. Because we reverse Baker's conviction on both counts of felony harassment and remand for further proceedings, we do not reach this issue.

VIII. SAG—JUROR BIAS

In his SAG, Baker argues that his jury was biased because they were told that he was going to accept a plea deal, but later decided to proceed to trial. "The presence of a biased juror cannot be harmless, and allowing a biased juror to serve on a jury requires a new trial without a showing of prejudice." *State v. Lawler*, 194 Wn. App. 275, 282–83, 374 P.3d 278, *review denied*, 186 Wn.2d 1020 (2016). The record shows that during trial, one of the jurors informed the court that she had overheard a court security guard mention that Baker was going to agree to a plea deal the day before trial, although he ultimately chose to plead not guilty.

The trial court questioned the juror who had overheard the comments, determined that the juror had not told any of the other jurors what she had overheard, and replaced the juror with an alternate. Although one of the jurors did acquire information that would have biased her had she continued to serve as a juror, the court promptly confirmed that the bias had not infected the remainder of the jury and excused the biased juror. Therefore, based on the record on appeal we hold that Baker's jury was not biased.

CONCLUSION

We affirm Baker's convictions for three counts of felony violation of a court order, criminal trespass, and felony stalking. We reverse Baker's conviction for felony harassment as alleged in count 3 for insufficient evidence. We also reverse Baker's conviction for felony harassment as

alleged in count 5 because the superior court erred by failing to instruct the jury on misdemeanor harassment as a lesser included offense. Finally, we do not reach Baker's challenge to the imposition of discretionary LFOs. We remand for proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Worswick, P.J.

Melnick, J.

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