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REC'D

JAN 31 2014

King County Prosecutor
Appellate Unit

NO. 70444-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MOHAMED OSMAN,

Appellant.

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

The Honorable Leroy McCullough, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The limiting instruction contained an impermissible judicial comment on the evidence in violation of article IV, section 16 of the Washington Constitution.

2. The court erred in admitting appellant's statements to police in violation of his Fifth Amendment right to be free from coerced self-incrimination.

Issues Pertaining to Assignments of Error

1. Washington's constitution prohibits judges from commenting on the evidence. In this case, jury instructions limited the jury's use of certain evidence to the limited purpose of "evaluating the reasonable fear of the complainant." Because this instruction suggested the existence of the complainant's reasonable fear, a disputed element of three of the charged offenses, had already been established, was the instruction a comment on the evidence warranting a new trial?

2. Under Miranda v. Arizona,¹ statements made in response to custodial interrogation are presumed coerced and inadmissible unless preceded by a warning informing the accused of the rights to counsel and to remain silent. During his arrest, appellant was questioned about his identity by two officers and gave incriminating answers. Did the trial

¹ Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

court err in concluding appellant was not subject to interrogation and in failing to suppress the statements?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Mohamed Osman with two counts of felony stalking, one count of felony harassment, and one count of misdemeanor violation of a no-contact order. CP 23-26. The State also alleged the crimes were committed against a family or household member and were aggravated domestic violence offenses. CP 23-26. The jury acquitted Osman of felony harassment and answered “no” to the special verdict on aggravated domestic violence. CP 163-69, 181-84. However, the jury convicted Osman of both counts of stalking and violating a no-contact order and found the crimes were committed against a family or household member. CP 163-69. The court imposed a standard range sentence of 20 months. CP 188, 190. Notice of appeal was timely filed. CP 185-86.

2. Substantive Facts

a. Background

Osman was born in Somalia and came to the United States at the age of 12 or 13. 26RP² 91-93. His family settled in Maine and Connecticut; he

² There 33 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – 9/7/12; 2RP – 11/2/12; 3RP – 12/21/12; 4RP – 1/10/13; 5RP – 1/17/13; 6RP – 1/22/13; 7RP – 1/25/13; 8RP – 1/29/13; 9RP – 1/30/13; 10RP – 2/4/13; 11RP – 2/19/13; 12RP –

has only one cousin in Washington. 26RP 94. He met Khadro Jama in Maine in 2006 when he was working part time and attending Tufts University. 26RP 94-98. He thought she would be an excellent wife, but he was not ready to settle down. 26RP 99-100.

He testified the couple was forced to move in together when she became pregnant after ensuring him she was taking birth control. 26RP 100. The couple lived very separate lives, and Osman was often away at school. 26RP 102. He testified they never married because her aunt and uncle did not approve of him going out and spending time with other women. 26RP 100. Nevertheless, Osman testified, he was the breadwinner, and did not permit Jama to work. 27RP 99. He encouraged her to stay home with the children and work on her degree. 27RP 100. Initially, Osman testified, Jama told him he could continue to live his single life and she would not complain. 26RP 101. However, after the children were born, she began telling him what to do. 26RP 101-02.

In November 2008, Jama moved to Washington with Osman's encouragement. 26RP 103. He testified he was sad to be unable to see the children, but Jama wanted to live near her family, so he bought her a ticket

2/20/13; 13RP – 2/21/13; 14RP – 2/25/13; 15RP – 2/26/13; 16RP – 2/27/13; 17RP – 2/28/13; 18RP – 3/12/13; 19RP – 3/13/13; 20RP – 3/14/13; 21RP – 3/18/13; 22RP – 3/19/13; 23RP – 3/20/13; 24RP – 3/21/13; 25RP – 3/25/13; 26RP – 3/26/13; 27RP – 3/27/13; 28RP – 3/28/13; 29RP – 4/1/13; 30RP – 4/2/13; 31RP – 4/4/13; 32RP – 4/8/13; 33RP – 5/10, 5/23/13.

and took her to the airport. 26RP 103; 27RP 101. After Jama and the children moved, Osman stayed in touch with them by phone and video chatting on the internet. 26RP 103-04.

Khadro Jama testified she was born in Somalia, and came to the United States at age 13 with her family. 23RP 11-15. She explained her family was close, but there was disagreement about whether to live traditional Somali ways. 23RP 17-19. The family settled in Seattle because of the strong Somali community. 23RP 21. Jama testified that, in Somali culture, men are always higher than women and the culture and family must be protected no matter what. 23RP 29. She testified Somalis view police as the enemy and do not like following United States law; they believe problems should be solved within the family or by going to elders or the mosque. 23RP 30-31.

Jama testified she met Osman in Maine in 2004 because the aunt she lived with was a friend of Osman's mother. 23RP 32. She testified the two began talking by phone because dating is not allowed. 23RP 33. To preclude any impropriety, her aunt asked them to get engaged, and they did so in August 2004. 23RP 34-35. She testified she and Osman were married in a religious ceremony in her uncle's store in August 2005. 23RP 34-36. She described it as not a legal marriage, but one that was recognized by her community. 23RP 34-35.

By the time of the wedding, Jama testified, she was no longer sure she wanted to marry Osman, but felt she had to. 23RP 35. Their first child was born in 2007, and a second arrived in 2008. 23RP 38-40. Osman came and went as he pleased, and the couple fought because she wanted him to change his ways. 23RP 38-40. Jama testified she always worked, and Osman never supported the family financially. 28RP 56.

In mid-2008, she claimed she told Osman not to come home and went to an Imam who declared the marriage over. 23RP 48. In November 2008, Jama moved back to her family in Seattle. 23RP 49. By 2010, she was employed and living in her own apartment with the children. 23RP 50-53.

b. March 2010 – January 2011

Evidence of incidents pre-dating the charged offenses was admitted under ER 404(b). CP 102-03. Osman testified he flew to Seattle on March 4, 2010, planning to spend his tax return on a two-week visit to see his children. 26RP 104-05. Jama picked him up at the airport. 26RP 105. He had a return ticket for March 15, but did not tell her this. 26RP 105. Shortly after he arrived, the couple began “fooling around” and he gave her the impression he would be staying. 26RP 106-07. When he tried to leave the night of March 15, she became angry, blocked the doors, and would not let

him go. 26RP 107. She called 911, and he was arrested while waiting for a taxi to the airport. 26RP 108.

Jama recalled the incident differently. She claimed Osman simply showed up at her door one night. 23RP 54, 57. She told him he was a guest, and could stay two weeks. 23RP 58-59. At the end of the two weeks, she claimed, it took two days of arguments and a threat to call the police before he would leave. 23RP 59. She claimed that, as she was trying to close the door behind him, he punched her in the neck. 23RP 60. She admitted there were no marks on her neck and the case was dismissed. 25RP 4, 7. He denied hitting her, and testified that, on the contrary, she hit him. 26RP 114.

Osman was in the King County jail from March 15 to March 17, 2010. 26RP 89-90. After his release, he stayed in the area with a cousin because he was not permitted to leave the state while on bail. 26RP 109.

On April 20, 2010, Osman testified he received two emails from Jama in which she apologized for calling the police and explained she was only angry about him seeing other women and wanted to reunite with him. 26RP 110-11, 116-17; Exs. 51, 52.

Osman was arrested again April 23, 2010. 26RP 112. He testified he was working in his cousin's store when he noticed a veiled woman who came in the store and left without buying anything. 26RP 112-13. Later, he went outside to smoke and was arrested. 26RP 113. He testified he never

saw Jama that day until he noticed her laughing at him as he was being driven away in the police car. 26RP 115. He testified his cousin could corroborate, but the police never contacted her even though the name of her store was in the police report. 27RP 110-13, 121.

Jama testified she saw Osman in the parking lot on her way to Western Union to pay a bill. 23RP 62-64. She claimed he twisted her hand to grab her phone, took her money, and made her drop her keys. 23RP 65. She testified bystanders tried to help, but they did not return to speak to police, and she did not describe them to police. 25RP 14-16.

Osman was again in the King County Jail from April 23, 2010 until May 14, 2010. 26RP 89-90. He was charged with robbery and violating the no-contact order, but the case was later dismissed. 26RP 115-16.

On June 6, 2010, Osman testified, he went with Jama to her home to visit her and the children despite a no-contact order because he believed the order was not valid. 26RP 118-20. He testified Jama picked him up, but when they arrived back at the apartment, the children were not there. 26RP 118. Osman offered to pick them up at her father's, but Jama went herself. 26RP 118, 120. By the time she returned, her roommate had also returned, and she accused Osman of cheating on her with the roommate. 26RP 120. Not wanting a fight, Osman left. 26RP 120. He was arrested while waiting for the train. 26RP 120.

Jama's account of events was very different. She testified she was asleep on the couch when she heard someone trying to open her back door. 23RP 72. She saw Osman come in and told him to leave. 23RP 72. When he told her he had a key, she told him to give it back and leave. 23RP 72. She called the police, but Osman ran out. 23RP 73-74. Detective Fry took a statement from Jama's roommate, who did not seem reluctant to talk, but did not testify at trial. 26RP 17-22.

Osman was in the King County Jail from June 6, 2010 until October 19, 2010. 26RP 89-90. He was charged with residential burglary but pled guilty to criminal trespass. 26RP 121-22. After his release, he could not leave the state because he was required to do anger management classes and parental planning as a condition of his sentence. 26RP 131-32.

Osman testified he stayed with Jama again in November/December 2010 because he wanted to see her and the children. 27RP 75-76. Despite all her false accusations, he tried to cooperate with Jama. 27RP 138. During that time, she set ground rules and insisted he stop acting like a single man and stop spending time with non-Muslims. 27RP 76-77. Osman testified he tried for two months, but moved out at the end of December.³ 27RP 77. However, he left his things at Jama's apartment, and told her his departure

³ Jama admitted she let Osman stay with her again, but testified it was three days at most. 25RP 82-83.

was only temporary. 27RP 77-78. On January 8, he testified, Jama asked him to come home and he refused. 27RP 78.

Jama testified she came home that afternoon and saw Osman in front of her door. 23RP 74. He followed her to the back door saying he needed to talk to her. 23RP 74-75. She threatened to call the police if he did not go away and went inside. 23RP 75. He knocked on the doors and windows, every 30 minutes, all night. 23RP 75. She fell asleep on the couch, and woke to find him in her living room holding her phone and keys. 23RP 76. Jama testified she managed to grab the phone away from Osman to call the police, and he ran out. 23RP 76, 78.

The following week, on January 14, 2011, Detective Alspach was dispatched to Jama's apartment to investigate a no-contact order violation at about three a.m. 21RP 56-58. She found a man's shoe inside the apartment, but did not find Osman there. 21RP 59-60. Osman denied being at Jama's apartment on January 8 or 14, 2011. 26RP 123. The jury acquitted him of any wrongdoing on those dates. 25RP 22-23.

On January 27, Jama testified, she heard someone trying to get in the back door and saw Osman. 23RP 78. She threatened to call the police and braced a chair against the door. 23RP 78. Alspach was again sent to investigate. 21RP 60-61. When she arrived, another officer was detaining Osman. 21RP 61. Osman's statement at the time reflected his testimony at

trial. 21RP 65-67. He admitted going to Jama's apartment that day after she asked him to take the children to a doctor's appointment. 26RP 123-24. He stayed the whole day, playing with the children, and then playing video games and chatting on the computer into the night. 26RP 124-25. When Jama saw him chatting with someone on Facebook, she broke his laptop. 26RP 125. He debated how to get home, because it was too late to catch the train. 26RP 125. By the time he left, the police were waiting and arrested him. 26RP 125.

Osman explained he was trying to work out a way to share custody of the children.⁴ 26RP 127. But each time, before he could get his life on track and go to court for a parenting plan, he ended up in jail. 26RP 128. Osman was in custody from January 27, 2011 until March 23, 2011. 26RP 89-90. Upon his release, he stayed with friends, found a job, and tried to find a lawyer to go to family court. 26RP 128-29. He felt trapped because every time he refused to violate the no-contact order, Jama called the police claiming he had done so, and he went to jail. 26RP 129; 27 RP 75. He testified that, after this incident, he stopped trying to cooperate with her. 28RP 42-43.

⁴ Jama testified Osman never attempted to discuss a parenting plan with her. 28RP 57.

c. May 12, 2011

Counts III and IV, felony harassment and misdemeanor violation of a no-contact order, refer to the events of May 12, 2011. CP 25-26.

On that day, Wendy Harnos, a co-worker of Jama's testified, she was working after hours when another employee came to her office saying there was a man outside. 21RP 78-82. When she looked up from her work a few minutes later, the other employee introduced the man from outside as Jama's brother, but explained Jama was not in her office. 21RP 83-86. After a few minutes of small talk, Jama arrived and seemed a little put off. 21RP 87. Harnos and the other employee walked the man to the door. 21RP 87. Harnos testified Jama did not go outside with the man, but waved him away and went back to her meeting. 21RP 90, 95. Harnos noted Jama did not seem as "light" about the situation as she and the other employee, and the man seemed a bit sheepish. 21RP 88. Two days later, Harnos identified the man in a photo-montage emailed her by police. 21RP 91-92.

Jama testified she was at work that day when she was told her brother Hassan was outside for her. 23RP 81-82. She went to see who it was and saw Osman. 23RP 81-82. She told him to go home, but later a co-worker let him in. 23RP 82. She testified she believed the no-contact order admitted as exhibit 3 prohibited him from coming to her work that day. 23RP 86-88. Later, Jama admitted it must have been a different incident

where Osman used the name Hassan. 24RP 109. Jama does not have a brother named Hassan. 23RP 81-82.

After work, that same day, Jama testified she picked up the children from daycare and went home to find Osman waiting in the parking lot. 23RP 88-89. When she told him to leave and threatened to call the police, she claimed he told her “Go ahead, I have nothing to lose and this is the last time you call the police. I’m going to kill you.” 23RP 90.

Detective Alspach responded to Jama’s 911 call, but could not find Osman. 21RP 15-17, 40-43. Jama admitted telling police Osman may have been upset at learning she had just gotten married. 25RP 34. She testified that was not true and she was referring to what Osman believed had happened. 25RP 34, 37-38.

Osman denied going to Jama’s work, daycare provider, or apartment on May 12, 2011. 26RP 133. He testified he did not even know how to get to where she worked and had no car. 26RP 133-34. He was simply arrested on May 20, at a friend’s apartment after using the bathroom. 26RP 134-35. In his jacket pocket he had an email. 26RP 136-37. He told the arresting officer he wanted the document with him in jail because it was proof Jama was making up her allegations and he wanted to give it to his attorney. 21RP 54. He told Alspach that, in the email, Jama admits she made up the allegations and wants to get back together with him. 21RP 55. He told

Alspach he would beat this charge as he has beaten the other ones. 21RP 55.

Osman was in the King County Jail from May 20, 2011 until June 14, 2011.

26RP 89-90.

d. October – November 2011

Count I alleges felony stalking occurring between October 14 and November 3, 2011. CP 23.

Jama testified that, on October 18, 2011, Osman was waiting for her when she arrived at work. 24RP 7. He was still there every time she had a break and when she left at 5 p.m. 24RP 8. When she arrived at her children's daycare after work, Osman was there, so she drove around outside while phoning her daycare provider for help. 24RP 9. Osman followed her car on foot. 24RP 9. The daycare provider came outside with her husband and the children. 24RP 9. When the daycare provider's husband yelled at Osman, he ran away. 24RP 9. Neither the daycare provider nor her husband testified at trial.

Jama testified she drove to her father's apartment. 23RP 102; 24RP 10. When she arrived, she looked at the text messages she had received en route. 24RP 11. The texts said Osman knew she was at her father's and was going to break into her car. 24RP 12. At that point, she went outside, saw Osman, and called the police. 24RP 12. Jama testified he did not actually break into her car that day but had done so in the past. 25RP 48.

Jama also claimed Osman had been calling and texting her all day. 23RP 102. She described aspects of the messages that indicated to her it was Osman, including certain Somali words, references to their children, and requests to meet at the Safeway near her father's apartment. 24RP 18-30. Some she interpreted as a threat against their children. 24RP 30-31, 38.

Officer Workman responded to Jama's 911 call. 22RP 7-10. On her phone, she showed him two missed calls labeled "Mohamed Osman" that evening. 22RP 11, 14. There were also two received calls, 42 missed calls and 25 texts from a 779 number that day. 22RP 21-22. There were also 15 calls from a blocked number. 22RP 21-22. Workman called the 779 number and got voicemail. 22RP 23. He called the number labeled with Osman's name, and a male answered saying he had the wrong number when he asked for Osman. 22RP 23. Workman took photographs of the text messages, which were admitted at trial. 22RP 23-24; Ex. 14.

Detective Honda tried to do follow-up investigation. 22RP 69. In addition to the events of October 18, Jama also described to Honda an incident on October 14 when she saw Osman in the parking lot outside her work at 9 a.m. when she arrived. 24RP 4-5, 7. She noticed him there throughout the day, and he was still there when she left at 5 p.m. 24RP 4-5. He stood right in front of her and tried to prevent her from leaving. 24RP 6.

When Honda initially called Jama, Jama was busy and called back later. 22RP 68-69. On November 9, the recorder failed to record Jama's statement. 22RP 71. On the 15th, Jama said she would call back in a few days but failed to do so. 22RP 72. Honda's impression was that Jama both did and did not want to cooperate with the investigation, that she was reluctant and afraid. 22RP 73-74. Honda never obtained a recorded statement about the October 18 incident. 22RP 74.

On October 24, Osman was arrested again. 26RP 138-39. He denied contacting Jama in October 2011 in any way. 26RP 142. He testified the text messages do not reflect the way he talks. 26RP 143. He was in custody from October 24, 2011 until July 3, 2012. 26RP 89-90.

Exhibit 50 is another email from Jama's account to Osman's on October 23, 2011, which he did not see until he was released from detention the following July. 26RP 145. The email references Jama calling the police in order to keep Osman in Seattle with her. 26RP 146-47; Ex. 50.

e. July 2012

Count II alleges felony stalking occurring between July 8 and July 29, 2012. CP 24.

Osman testified that, when he was released from detention on July 3, 2012, he stayed with friends and began trying to establish a life in Seattle. 27RP 79. He denied contacting Jama. 27RP 80. On July 15 he ran into

Jama's sister Muna,⁵ who offered to arrange for him to pick up his things from Jama's storage unit near the Kent Safeway. 27RP 80-82. They arranged to meet on July 25 at the Safeway, but the storage unit had closed by the time they got there. 27RP 80-82.

He arranged to meet Muna again July 29 to get his things. 27RP 83. Muna also offered to bring the children to see him. 27RP 83. While waiting for her at the Safeway, he used the courtesy phone because he had left his phone at home to recharge. 27RP 83. Muna was delayed, and he did not want to appear to be loitering, so he asked her to meet him at the library, where there was also a small fountain where the children could cool off on the hot July day. 27RP 84. While waiting at the library, he went outside once to smoke and noticed police, but did not see Jama. 27RP 85.

Jama testified her sister never was permitted to take her children anywhere in a car, and she did not believe her sister arranged for Osman to pick up his luggage. 28RP 59. She testified she began receiving text messages again on July 8, 2012. 24RP 42-44. She again recognized the number because she answered a call from that number and heard Osman's voice. 24RP 42-44. Some of the texts made her sad because he denied the children were his and talked about taking his name off their birth certificate. 24RP 49-50.

⁵ Muna Jama is referred to by her first name to distinguish her from her sister Khadro Jama. No disrespect is intended.

On July 19, in the middle of the night, Jama testified, Osman called saying he knew her new address. 24RP 51. She was alarmed because she had just moved and had not given the address to anyone. 24RP 51. She had also gotten texts and calls from him throughout that day. 24RP 51-52. When, she answered one call, Osman described the man she was with (her brother) and told her something would happen to him if he did not treat the children well. 24RP 52. Jama said she did not tell her brother about this because he was too young. 24RP 52.

She did not call the police until the next day, July 20, 2012. 22RP 130; 24RP 39-40. Prior to that day, Jama testified, she did not want to talk to police because every time she did, she was harassed by members of the Somali community. 24RP 53. She testified Osman had also made comments that he knew she was working with a lady cop. 24RP 54.

On July 20, 2012, Detective Honda testified Jama appeared afraid and shaken, and showed her text messages on her phone: two from July 8, nine the next day, ten on the 15th, eight on the 16th, one on the 18th, and twelve on the 19th. 22RP 76-79. Honda called the number and asked for Osman. 22RP 97. The first time a male voice answered, "it depends who is asking." 22RP 97. The second time, the call went to voicemail. 22RP 97.

Honda testified Jama told her family and co-workers witnessed some incidents but did not give Honda their contact information. 22RP 99. On

one occasion, Honda met Jama's brother, who seemed willing to talk, but Jama did not want him involved. 22RP 101. Jama told her Osman had contacted her at her daycare as well, but would not give the name of the daycare provider. 22RP 103.

On July 23, Jama told Honda Osman came to her work claiming to be her brother Hassan, but she did not call the police. 22RP 129. Honda did not talk to anyone at Jama's office about this incident. 22RP 132-33. Jama told Honda Osman followed her and a friend to a restaurant but did not tell Honda the name of the friend she was with. 22RP 130.

On July 26, 2012, Honda talked with Jama about an event that had occurred the night before. 22RP 89-90. Jama testified she was followed a couple of times by a green Honda with a woman driver and a male passenger. 25RP 95-96. At one point, she saw the passenger was Osman. 25RP 99-100. Jama told Honda the woman approached her in Safeway telling her she was making things worse by speaking with the police. 22RP 95. The woman came very close to Jama and mumbled about what he is capable of if she did not drop what she was doing. 25RP 97-98. Jama said she had begun bringing her brother and father with her everywhere because of the confrontations and harassment, and they were with her at Safeway, but Honda did not talk with them about this incident. 22RP 110, 129. The court

admitted a surveillance video from Safeway showing Osman outside the store on July 25, 2012. 25RP 109-10; Ex. 19.

A Safeway employee testified he let a man use the courtesy phone twice on July 29, 2012. 21RP 96-100. The man's first conversation began normally, then escalated to angry and loud, and then ended with laughter. 21RP 100. In the second conversation, the man became extremely loud and angry. 21RP 100-02. The man was tall, with short hair and dark skin and was not speaking English. 21RP 101-02. The employee pointed out the man in a surveillance video, both at trial and the day police inquired. 21RP 109-10.

On July 29, Jama testified, Osman called her from Safeway saying "You have no idea what I'm capable of." 24RP 57. She called 911 because she was afraid and the Safeway is only one block from her father's apartment. 24RP 57. She showed the officers texts referring to the children, asking her to meet him, and talking about an Islamic teaching that women are sneaky. 24RP 61-68; Ex. 12. One message said, in a Muslim country ,she would be stoned for disobeying her husband and lying. 24RP 71-72. She testified the reference to point of no return means if she continues working with the police she will be killed. 24RP 72-75. Officer Rogers testified she seemed scared. 21RP 121-22.

Jama testified she went to the library that afternoon knowing Osman would be there. 24RP 80, 97-99. She claimed that, when she saw him, he began following her around the parking lot, calling her, and texting her. 24RP 80-81. She drove to the nearby post office to call 911. 24RP 81-82.

Rogers and another officer arrested Osman in the library. 21RP 135. When asked his name, Osman gave a name and date of birth that could not be verified and was not his own. 21RP 132-33. He said he had no identification with him.⁶ 21RP 133. At trial, he admitted he had a Washington identification with him that day, but did not give it to the police when they asked. 28RP 34-35. Jama identified Osman when the officer brought him to the front of the library. 24RP 82-83.

Officer Quinonez transported Osman to jail. 26RP 55. She testified Osman was smiling and confident and told her he would be out of jail in no time, that he had been arrested on charges like this several times before and it would never stick because Jama would never testify against him. 26RP 57-58.

f. E-Mails and Job Application

The court admitted four emails from Jama's account to Osman's. Exs. 4, 50, 51, 52. Both Osman and Jama denied writing the emails. 25RP 30; 26RP 42; 27RP 73-74. The emails contradict Jama's testimony and

⁶ Additional facts pertinent to the admissibility of Osman's statements are discussed in argument section C.2. below.

admit her allegations against Osman are false. Exs. 4, 50, 51, 52. Jama testified she would prefer death to reconciling with Osman. 25RP 103. She testified she was never jealous; on the contrary, she wished he would take up with another woman and leave her alone. 28RP 59-60.

According to expert testimony by Larry Karstetter, the April 20, 2010 emails from Jama's account to Osman's did not appear faked or spoofed. 27RP 20, 28. The IP address for the sender was assigned to Comcast for a 30-to-50-mile area around Renton. 27RP 31, 43-44. The IP address for the October 23, 2011 email was assigned to Integra for North Seattle, Lakewood, and Everett. 27RP 46. Karstetter testified there would be no way to tell if the owner of the Osman account had accessed the Jama account to send the emails. 27RP 37. Anyone with the password could access the account. 27RP 56-57.

Jama testified she created her email account many years before she met Osman and never emailed with him except perhaps once when she first moved to Washington. 25RP 31-32; 28RP 55. She testified she did not even know his email address. 28RP 55.

Jama testified that when Osman lived with her he had access to her computer and email account because she left the account logged on and open on her computer. 28RP 57-58. She also testified that when they lived in Maine, he knew her username and password, and she never changed it.

28RP 58. She testified she knew Osman had her password because he once emailed a friend in Malaysia from her account, and the friend wrote Jama back asking who Osman was. 28RP 68-69. Jama testified Osman had access to her email account until she changed the password on May 23, 2011. 25RP 103-05. Later, in rebuttal, she testified she did not change the password until she heard about the additional emails for the second time. 28RP 66. Jama testified her internet provider was always Comcast; she had never heard of Integra. 28RP 52. Osman testified he never had the password to Jama's email account. 27RP 73-74.

Detective Fry testified Jama's email address was associated with accounts at a site called photobucket and a dating website called tagged.com. 26RP 38-39. Jama denied ever having an account at either site. 26RP 38-39. The emails related to this case could not be found in Jama's sent or deleted mail files going back to October 2011. 26RP 40-41. Other emails were in the folders, but not these specific ones. 26RP 41-42. In the email in exhibit 4, Jama introduces herself, spelling her first name "Khadra" with an "a," which is also the way it appears in her contact listing in Osman's account. 28RP 4-5. The emails also repeatedly use the word "they" instead of "the" and "their" instead of "there." Exs. 50, 51, 52. These same errors occur occasionally in texts Jama claims were from Osman and in Osman's job application. Exs. 12, 42.

Osman's job application lists Darius Dennis as a coworker and gives Dennis' phone number, the same as the number Jama received texts from on October 18, 2011. 28RP 10-11; Ex. 42. Osman testified Dennis is someone he does business with and sees about twice a week. 27RP 86; 28RP 14. He testified he met Dennis at Jama's apartment because Dennis is a good friend of Jama's sister. 27RP 88; 28RP 16. Jama denied ever having met Dennis or filling out a job application for Osman. 28RP 58, 88-90.

C. ARGUMENT

1. THE LIMITING INSTRUCTION SUGGESTING JAMA'S REASONABLE FEAR HAD ALREADY BEEN ESTABLISHED WAS A JUDICIAL COMMENT ON THE EVIDENCE IN VIOLATION OF ARTICLE IV, SECTION 16 OF THE WASHINGTON CONSTITUTION.

The limiting instruction proposed by the defense stated that evidence of uncharged acts could be considered for the sole purpose of weighing "whether Ms. Jama had reasonable fear for purposes of the stalking and harassment charges." CP 117. But the court declined to give this instruction. 29RP 51-52. Instead, it instructed the jury these instances could be considered "only for the purposes of evaluating the reasonable fear of the complainant, the delay in reporting of the complainant, and the intent of the defendant." CP 131. This phrasing communicated to the jury an assumption that reasonable fear existed and needed only to be evaluated. Because it suggested an element of the offense was a foregone conclusion, this

instruction was a judicial comment on the evidence in violation of article IV, section 16 of Washington's constitution.

The Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV § 16. The purpose of this prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

Therefore, it is error for a judge to instruct the jury that matters of fact have been established as a matter of law. State v. Baxter, 134 Wn. App. 587, 593, 141 P.3d 92 (2006). The court's personal feelings need not be expressly conveyed to the jury; error occurs even when they are merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "The touchstone of error . . . is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). A judicial comment on the evidence is a manifest constitutional error that may be raised for the first time on appeal. Levy, 156 Wn.2d at 719-20.

The constitutional prohibition on judicial comments on the evidence is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). For example, in State v. Becker, 132 Wn.2d 54, 935 P.2d 1321

(1997), the defendant was convicted of delivering cocaine. Id. at 54-55. The special verdict form for the school zone enhancement asked the jury to determine whether the defendants were “within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program [YEP] School at the time of the commission of the crime?” Id. at 64. The Supreme Court agreed the “to wit” phrase was an impermissible comment on the evidence that relieved the state of its burden to prove the enhancement beyond a reasonable doubt. Id. The court reversed, concluding the verdict form literally instructed the jury that YEP was a school. Id. at 64-65. A similar instruction in State v. Akers, 136 Wn.2d 641, 965 P.2d 1078 (1998), which referred only to the “Youth Employment Program” without using the word “school” was still an improper comment on the evidence. Id. at 644.

The limiting instruction in this case is analogous to the “to wit” instruction in Becker because it also strongly suggests to the jury that a disputed fact has been established as a matter of law. The stalking statute requires proof Jama feared injury to herself, another person, or her property. RCW 9A.46.110. Additionally, it requires proof that fear was reasonable. RCW 9A.46.110. By instructing the jury it could “evaluate” Jama’s reasonable fear, Instruction 6 suggested to the jury both of these questions were settled because one cannot evaluate something that does not exist.

The defense's proposed instruction avoided this problem by asking the jury "whether" Jama had reasonable fear, thereby leaving the decision on the existence of this element for the jury. CP 117. The later part of the same instruction also avoids the problem with respect to the element of intent. CP 131. The instruction also tells the jury to "evaluate" the intent of the defendant, but this does not amount to a judicial comment because the mere existence of "intent" is not an element. The element is the specific intent to frighten, intimidate, or harass. RCW 9A.46.110. Therefore, asking the jury to evaluate Osman's intent merely asks them whether he intended to frighten, intimidate or harass on the one hand, or, on the other hand, whether his intent was to communicate with his children, or further some other legitimate goal. As to intent, the instruction leaves it to the jury to decide whether intent to harass has been established.

By contrast, there is no open-ended way to interpret the instruction that the jury may evaluate the complainant's reasonable fear. If reasonable fear exists at all, and the instruction strongly suggests it does, that element of the offense is satisfied. This suggestion in the jury instructions violates the constitutional prohibition on judicial comments on the evidence. See State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006) ("A judge need not expressly convey his or her personal feelings on an element of the offense; it is sufficient if they are merely implied.").

A comment in violation of article 4, section 16 is presumed prejudicial and the State bears the burden to show that no prejudice resulted. Levy, 156 Wn.2d at 723-25. The standard jury instruction that judicial comments on the evidence should be disregarded is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the evidence is harmless, the Washington Supreme Court has looked to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed); Levy, 156 Wn.2d at 726 (subject of comment “never challenged in any way by defendant”; harmless). In this case, the comment involved a central and disputed issue. Whether Jama was afraid was vehemently contested at trial, with the defense arguing she was angry, and perhaps irritated, but not afraid. 30RP 5, 25. By failing to instruct the jury in such a way as to preserve the presumption of innocence as to every element of the offense, the court impermissibly commented on the evidence, and a new trial is required.

2. THE COURT WRONGLY FAILED TO SUPPRESS AN INCRIMINATING STATEMENT MADE BY OSMAN IN RESPONSE TO CUSTODIAL INTERROGATION.

To preserve an individual’s Fifth Amendment right to be free from compelled self-incrimination, police must inform a suspect of his or her

rights before custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). “Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” Id. Statements elicited in noncompliance with this rule must not be admitted as evidence at trial. Id. at 444, 476-77.

Any response to custodial interrogation is deemed incriminating if used by the State against the accused at trial. Rhode Island v. Innis, 446 U.S. 291, 301 n.5, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Osman’s statements to the arresting officers at the Kent library are incriminating because the State used them against him at trial to show consciousness of guilt. 21RP 131-33.

a. The Trial Court Correctly Determined Osman Was in Custody.

The trial court correctly determined Osman was in custody because his freedom of movement was curtailed to a level associated with formal arrest. 9RP 100; CP 99. The Miranda safeguards apply “as soon as a suspect’s freedom of action is curtailed to a degree associated with formal arrest.” State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997) (quoting Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L.

Ed. 2d 317 (1984)). The inquiry is objective, asking whether a reasonable person would have felt his or her freedom was so curtailed under the circumstances. D.R., 84 Wn. App. at 836 (citing State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989)). In this case, there were at least four police officers at the library the day Osman was arrested. 8RP 42-43. Knowing he matched the second, more-detailed description Jama had given, two officers approached him and requested identification. 8RP 42-43, 45-46. Osman was not free to leave and, if he had attempted to leave, he may have been cited for obstructing. 8RP 57-58. Immediately after he answered their questions, the officers handcuffed Osman, brought him to the front of the library to be identified by Jama, and then read him his Miranda rights. 8RP 58, 76. The court concluded, “It was clear he could not go anywhere, there was not one but several officers who were present. It was a public library, but it was still a controlled environment, so it was custodial.” 9RP 100.

Similar circumstances led to a finding of custodial interrogation in State v. France, 121 Wn. App. 394, 399-400, 88 P.3d 1003 (2004) aff’d on reconsideration, 129 Wn. App. 907, 910-11, 120 P.3d 654 (2005). In that case, police had probable cause to arrest France and knew his name, but asked questions about the crime before effectuating the arrest. Id. In finding France was in custody, the court noted he was told he was not free

to leave until the matter was cleared up, the duration of his detention was uncertain, and it appeared police delayed arrest and Miranda warnings until after soliciting incriminating information. Id. Osman was also a named suspect in a crime, and police opted to ask questions and elicit incriminating statements before arresting him and reading the Miranda warnings. 8RP 41-48, 76. A reasonable person under these circumstances would have believed he was being arrested, and the court correctly concluded he was in custody for purposes of Miranda. Berkemer, 468 U.S. at 440; France, 121 Wn. App. at 399-400.

b. The Officers' Questions About Osman's Identification Were Interrogation Because They Were Likely to Elicit Incriminating Statements.

However, the court determined the officers' questions did not constitute interrogation because they were not asked to elicit incriminating information, but merely to confirm Osman's identity before arresting him. 9RP 100-01. The court applied the exception for routine booking questions. CP 99. This conclusion is in error for three reasons. First, under some circumstances, a request for identification may be interrogation likely to elicit incriminating information. Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 191, 124 S. Ct. 2451, 2461, 159 L. Ed. 2d 292 (2004). Second, the Court erred in looking at the officers' subjective intent, rather than whether the questions were reasonably likely

to elicit an incriminating response. 9RP 100-01; Innis, 446 U.S. at 301. Finally, the questions here were not actually part of a routine procedure for booking Osman into jail. 8RP 45-49, 57-58. Whether interrogation has occurred is a mixed question of law and fact reviewed de novo. United States v. Chen, 439 F.3d 1037, 1040 (9th Cir. 2006); United States v. Foster, 227 F.3d 1096, 1102 (9th Cir. 2000).

Police questions regarding name, address, height, weight, eye color, date of birth, and current age qualify as interrogation for Miranda purposes. Pennsylvania v. Muniz, 496 U.S. 582, 601-02, 608-10, 110 S. Ct. 2638, 110 L. Ed.2d 528 (1990). In Muniz, a four-justice plurality concluded the biographical answers provided in response to interrogation were nonetheless admissible because the questions fell within a “routine booking question” exception to Miranda protection for questions to secure biographical data necessary for booking or pretrial procedures. Muniz, 496 U.S. at 601-02 (Brennan, J., plurality opinion).⁷ One justice rejected the routine booking exception altogether while maintaining the answers

⁷ The plurality opinion in Muniz regarding the booking exception is not binding. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed.2d 260 (1977). In Muniz, however, no concurring opinion joined with the plurality in regards to the routine booking exception issue, and therefore there is no holding in relation to that issue.

were the product of custodial interrogation. Muniz, 496 U.S. at 608-10 (Marshall, J., concurring in part and dissenting in part).⁸

Since Muniz, the Court has recognized a request for identification may be interrogation that requires Miranda warnings. Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 191, 124 S. Ct. 2451, 2461, 159 L. Ed. 2d 292 (2004). Hiibel was convicted of obstruction for refusing to provide identification and argued his conviction violated the Fifth Amendment privilege against coerced self-incrimination. Id. at 180-82, 189. The Court rejected this argument because there was no way Hiibel's name could "furnish a link in the chain of evidence needed to prosecute' him." Id. at 190 (quoting Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)). The court also concluded a person's name was unlikely to be incriminating because it is insignificant. Hiibel, 542 U.S. at 191. Thus, under the facts of Hiibel, the Court found no Fifth Amendment violation. Id. at 190-91. However, the Court strongly suggested that, under some circumstances, a request for identification could elicit an incriminating statement: "a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual." Id. at 191.

⁸ The four remaining justices did not reach the booking exception issue. Muniz, 496 U.S. at 608 (Rehnquist, J., concurring in part and dissenting in part).

The Fifth Amendment violation suggested in Hiibel has come to fruition here. By asking for Osman's identification, police elicited incriminating statements because his responses were used as evidence of guilt. Officer Rogers testified at trial that Osman gave a name and date of birth that he could not verify. 21RP 131-33. An initial objection to hearsay was sustained, but the court allowed the answer to stand after the prosecutor argued, in the presence of the jury, that it showed Osman's guilty conscience. 21RP 133. Rogers then specifically testified Osman gave a name other than his own and denied having any identification on his person. 21RP 133. These requests for identification were interrogation, rather than routine booking procedure, because they led to a "link in the chain of evidence needed to convict." Hiibel, 542 U.S. at 191.

In general, interrogation refers to "any words or actions on the part of the police. . . that the police should know are reasonably likely to elicit an incriminating response." State v. Sargent, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988) (quoting Innis, 446 U.S. at 301). The likelihood of eliciting an incriminating response is determined by reference to the perceptions and perspective of the suspect, not the intent of the police. Id.

The court in this case committed an error of law by basing its decision on the police officers' subjective intent. In ruling on this issue, the court stated, "We look at the purpose of the question, whether it was to

elicit incriminating information or was it for some other purpose.” 9RP 100. But the standard is not whether police intended to elicit incriminating information. It is whether they reasonably should have known that, from the suspect’s perspective, the question was likely to elicit an incriminating response. Sargent, 111 Wn.2d at 650. Therefore, the court’s ruling on this issue is an error of law.

The officers reasonably should have, and did in fact, know their questions were likely to elicit incriminating information because Officer Rogers testified he knew people often give false names when asked by police. 8RP 47. The officers knew Osman would either tell the truth, which would incriminate him in violating the protection order, or lie or refuse to provide identification, which would incriminate him by showing consciousness of guilt. 8RP 47. Any response he could give was likely to be incriminating. Police questioning of Osman’s identity constituted interrogation because an objective officer could reasonably foresee he would give an incriminating statement. Sargent, 111 Wn.2d at 650. Under the correct standard, the questions constituted interrogation. Innis, 446 U.S. at 301; Sargent, 111 Wn.2d at 650.

c. The Interrogation Was Not Part of a Routine Booking Procedure.

Although routine booking questions are interrogation, Washington courts have found they fall under an exception to the protection of Miranda. State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987); State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1992). As discussed above, the United States Supreme Court has not established such an exception. But even assuming it exists, the questions in this case were not part of a routine booking procedure.

“[B]ooking is essentially a clerical procedure, occurring soon after the suspect arrives at the police station.” United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir.1983). To qualify for the application of the exception, the questions must be asked during a true booking. Mata-Abundiz, 717 F.2d at 1280. Such is not the case here. See also State v. Stevens, 181 Wis.2d 410, 434, 511 N.W.2d 591 (1994), overruled on other grounds, Richards v. Wisconsin, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed.2d 615 (1997) (refusing to extend booking exception to questions regarding name and residence asked at time of arrest); United States v. Ortiz, 835 F. Supp. 824, 835 (E.D. Pa. 1993) (if routine booking questions are to receive “the Muniz vaccine,” they must be made as part of a lawful arrest; premise of the Muniz plurality was that the defendant was already

subject to “booking” and therefore questions about “biographical data” were not investigatory and thus exempt from Miranda).

The routine booking exception does not apply in this case. Osman was not being booked into jail at the time of his statements; he was being arrested in the Kent library. 8RP 45-49, 57-58. Officers wanted to verify Osman’s name so they could arrest him for violating the no-contact order. 8RP 64, 68-69.

d. Reversal Is Required Because Osman’s Statements Must Be Deemed Involuntary and Were Used to Incriminate Him at Trial.

Incriminating statements obtained in violation of Miranda are deemed involuntary as a matter of law. Sargent, 111 Wn.2d at 648. Admission of statements in violation of Miranda is an error of constitutional magnitude. State v. Wilson, 144 Wn. App. 166, 185, 181 P.3d 887 (2008). Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The presumption of prejudice may only be overcome if the error was harmless beyond a reasonable doubt, that “it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained.” State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

The State cannot show this error did not contribute to the verdict. To prove stalking, the State was required to show Osman's state of mind, namely, the intent to harass or intimidate. RCW 9A.46.110. Evidence of state of mind is frequently circumstantial rather than direct. As the jury weighed the circumstantial evidence on both sides, it cannot be said that learning Osman gave a false name to police did not contribute to the jury's finding of guilt, particularly when the prosecutor specifically argued this incident showed consciousness of guilt. 21RP 133. The State cannot show the erroneous admission of Osman's statements did not contribute to the jury's verdict on the stalking charges. Reversal is required.

D. CONCLUSION

Because the trial court improperly commented on the evidence in violation of Article 4, Section 16 of Washington's Constitution and admitted Osman's statements in violation of the Fifth Amendment, his convictions should be reversed.

DATED this 31st day of January, 2014.

Respectfully submitted,
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MOHAMED OSMAN,

Appellant.

COA NO. 70444-3-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATE MAIL.

[X] MOHAMED OSMAN
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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JAN 31 PM 4:21

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JANUARY 2014.

X Patrick Mayovsky