

NO. 74538-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

SAID FARZAD,

Appellant.

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State of Washington

BRIEF OF RESPONDENT

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I. ISSUES

(1) The defendant chose to testify at an administrative hearing concerning suspension of his license to practice medicine. At the hearing, he was never told that he would be sanctioned for failure to testify. Was this testimony obtained in violation of his right against self-incrimination, so as to prevent it from being used at a criminal trial?

(2) At trial, the prosecutor said that he would only use the defendant's prior statements for impeachment. The defendant did not testify at trial, so the prior statements were never introduced. Nothing in the record indicates that the defendant's decision not to testify was based on the possibility of impeachment. On appeal, can the defendant challenge the ruling allowing his statements to be used for impeachment?

(2) Within a span of twenty minutes, the defendant made similar threats to three employees of a health care organization. There was no indication that his intent changed between these calls. He was charged with telephone harassment of two of the employees. The jury instructions, however, allowed him to be convicted for any of the three calls. Was the error in these

instructions “manifest,” so that it can be raised for the first time on appeal?

(3) If the issue can be raised, was the error in the instructions harmless, where the nature of the threats overwhelming indicated the defendant’s intent to threaten?

(4) If the conviction is affirmed, should appellate costs be imposed?

II. STATEMENT OF THE CASE

The defendant, Said Farzad, was a practicing psychiatrist. He prescribed medications for some of his patients. Molina Healthcare was responsible for paying pharmacists for these prescriptions. In accordance with their policies, Molina employees refused to authorize payment absent documentation of a need for the specific drugs that had been prescribed. Dr. Farzad was unhappy about these decisions. In early May, 2014, he made several phone calls to Molina complaining about their failure to authorize payment. He said that the people at Molina were “leeches” who were “sucking blood from the poor people.” 2 RP 193-205.

Between 3:17 and 3:27 on May 5, the defendant made phone calls to three Molina employees. 3 RP 474. In a phone call to

Michelle Raymond, he said that he wanted to come down with machine guns and shoot her manager. 2 RP 263. In a phone call to Kim Tran, he said that he was five minutes away and would bomb them when he got there. He said that he would shoot her director and would kill everyone there. 2 RP 333. (The record does not indicate in what order these two calls were made.) The last phone call was to Lisa Tyler. 2 RP 294. In it, the defendant said that "he was going to bring machine guns and kill everyone." 2 RP 292-93.

All three employees were frightened by these calls. Ms. Raymond testified that she was "shaking." 2 RP 271. Ms. Tran was so frightened that she "stood there for half an hour just looking at the parking." 2 RP 336. Ms. Tyler was "very shaken up." 2 RP 298. As a result of these incidents, Molina locked down the building and posted security guards. 2 RP 299.

The following day, Dr. Farzad was questioned by police. He claimed that he had talked about a particular patient who suffered from depression and was suicidal. He said that he told the Molina employee that "if this patient was to become upset, that this patient could bring a gun or some type of a firearm to Molina and shoot them." 3 RP 408. He claimed that he had only called Molina once

on May 5th. An inspection of his phone, however, showed that he had made five different phone calls. 3 RP 467-68.

About a week later, the defendant gave an interview to KIRO 7. A tape of this interview was introduced into evidence. In it, the defendant said that he was arguing with a Molina employee and "said something at that time that he blocked out then and he blocked out now." 3 RP 478-80.

As a result of these events, the Medical Quality Assurance Commission suspended Dr. Farzad's license to practice medicine. CP 86-89. On July 30, 2014, the Commission held a hearing to determine if he should be sanctioned for violation of medical standards of practice. The Notice of Hearing said: "Parties who fail to attend or participate in a hearing or other stage of an adjudicative proceeding may be held in default." The notice did not say that Dr. Farzad would be required to testify. CP 80. According to his testimony at the CrR 3.5 hearing, he chose to testify because "I wanted to clarify everything, because I thought that everything needs clarification." 11/13 RP 61.

The defendant was charged with felony telephone harassment and threatening to bomb. The information designated Ms. Tyler and/or Ms. Tran as victims of the telephone harassment.

CP 95. Prior to trial, he moved to suppress his testimony at the Medical Quality Assurance Commission hearing. CP 72-94. The prosecutor agreed that he would not use those statements at trial unless the defendant testified at trial contrary to his testimony at the hearing. 11/13 RP 64-65. The trial court ruled that the statements were voluntary and could be used for impeachment. 11/13 RP 71-73.

At trial, the defendant decided not to testify. He did not explain the reason for this decision. He also made no offer of proof concerning what his testimony would have been. 3 RP 385, 456. As a result, the defendant's statements at the administrative hearing were not used at trial.

The trial was unable to reach a verdict on either charge. On the charge of felony telephone harassment, it found the defendant guilty of the lesser offense of gross misdemeanor telephone harassment. CP 37-39; 5 RP 591-93. The court sentenced the defendant to 364 days' in jail, with the entire sentence suspended. CP 29-33.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY RULED THAT THE DEFENDANT'S TESTIMONY AT AN ADMINISTRATIVE HEARING WAS ADMISSIBLE FOR IMPEACHMENT.

1. Since The Defendant Has Not Shown That He Was Threatened With Sanctions For Refusing To Testify, His Voluntary Testimony Is Admissible At A Criminal Trial.

The trial court ruled that the defendant's testimony at an administrative hearing could be used for impeachment if he testified at trial. The defendant chose not to testify at trial, so the hearing testimony was never used. The defendant nonetheless contends that the court's ruling violated his constitutional right against self-incrimination.

"The general rule is that if a person desires not to incriminate himself or herself, he or she must invoke the protection of the Fifth Amendment privilege against self-incrimination rather than answer." State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172 (1992). An exception exists, however, for "situations where the assertion of the privilege is penalized." Id.; see Minnesota v. Murphy, 465 U.S. 420, 434, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).

[T]he "penalty" exception is available only if (1) the person gives answers that would incriminate him or her in a separate criminal proceeding and (2) the State makes express or implied assertions that exercise of the Fifth Amendment privilege will result in

the imposition of a penalty, be it economic loss or deprivation of liberty.

Post, 118 Wn.2d at 610. The defendant claims that he falls within this exception.

In deciding whether a statement falls under the “penalty exception,” most courts have used a “subjective/objective” test. Under this test, there are two requirements: (1) the defendant must subjectively believe that he was compelled to give a statement under threat of substantial penalty and (2) that threat must have been objectively reasonable. See, e.g., State v. Weichman, 292 Neb. 227, 233-34, 871 N.W.2d 768, 774-75 (2015); State v. Brockdorf, 291 Wis. 2d 635, 652-57 ¶¶ 25-35, 717 N.W.2d 657, 665-68 (2006); McKinley v. City of Mansfield, 404 F.3d 418, 436 n. 20 (6th Cir. 2005), cert. denied, 546 U.S. 1090 (2006); United States v. Vangates, 287 F.3d 1315-1321-22 (11th Cir. 2002); United States v. Frederick, 842 F.2d 382, 395 (D.C. Cir. 1988); but see United States v. Indorato, 628 F.2d 711, 716 (1st Cir. 1980) (“penalty exception” only applies if “the person being investigated is explicitly told that failure to waive his constitutional right against self-incrimination will result in” loss of job or other severe sanction);

State v. Aiken, 282 Ga. 132, 135, 646 S.E.2d 222, 225 (2007) (adopting “totality-of-the-circumstances test”).

Applying the “subjective/objective” analysis, there is no evidence that the defendant subjectively believed that he would be penalized for failing to testify. At the CrR 3.5 hearing, he explained that he *chose* to testify at the administrative hearing because he “wanted to clarify everything.” 11/13 RP 61. He never claimed that he believed that he would be sanctioned for failing to testify. Rather, he was concerned that he would be sanctioned if the evidence against him went unexplained. This is the choice that anyone must face when deciding whether to exercise his right against self-incrimination. “A party who asserts the privilege against self-incrimination must bear the consequence of lack of evidence.” United States v. Taylor, 975 F.2d 402, 404 (7th Cir. 1992). Confronting a person with this choice is not a “penalty” for exercising the privilege.

Even if the defendant had a subjective belief, it was not objectively reasonable. The defendant points out that he received a notice requiring him to “participate” in the administrative hearing. CP 81. “Participate” means “to take or have a part or share, as with others; partake; share.” <http://www.dictionary.com/browse/>

participate? (visited 9/30/16); see Moody v. Clarke County Bank, 181 Wash. 263, 266, 42 P.2d 803 (1935) (applying similar definition). A person could “participate” in a hearing by appearing and raising relevant legal and factual arguments. No reasonable person would say that someone who claims a valid privilege at a hearing has thereby refused to participate.

The defendant also cites WAC 246-16-890. That section is a non-exclusive list of “factors that may mitigate or aggravate the sanctions that should be imposed” for a violation of standards of professional conduct. The section does not specifically distinguish between aggravating or mitigating factors. There is no showing that the defendant was aware of this regulation when he decided to testify at the administrative hearing.

The list of factors includes the following:

(3) Factors related to the disciplinary process:

- (a) Admission of key facts;
- (b) Full and free disclosure to the disciplining authority;
- (c) Voluntary restitution or other remedial action;
- (d) Bad faith obstruction of the investigation or discipline process or proceedings;

(e) False evidence, statements or deceptive practices during the investigation or discipline process or proceedings;

(f) Remorse or awareness that the conduct was wrong;

(g) Impact on the patient, client, or victim.

WAC 246-16-890(3).

This list includes "admission of key facts" – which would be a mitigating factor. "Full and free disclosure" would likewise be a mitigating factor. There is no reference to *failure* to admit facts or *failure* to make disclosure. The corresponding aggravating factors are "bad faith obstruction" or "false evidence, statements or deceptive practice." The regulation thus indicates that mere silence is not an aggravating factor. It is only an aggravating factor if it is accompanied by deception or bad faith obstruction.

Such a policy does not violate the right against self-incrimination. Although a person cannot be punished for exercising his right to remain silent, he can be granted leniency because of his cooperation with the government. Mallette v. Scully, 752 F.2d 26, 30 (2d Cir. 1984). Punishment can also properly be enhanced because of a person's perjury. United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978). The regulations of the Department of Health are consistent with these standards.

In short, the defendant was not threatened with any penalty for exercising his right to remain silent at the administrative hearing. Rather, he faced the choice that always confronts a person choosing whether to testify on matters that might be incriminatory. He could decline to testify, thereby leaving the evidence against him un rebutted. Or he could choose to testify, at the risk that his testimony could later be used against him. By choosing the latter course of action, he waived his right against self-incrimination with respect to his testimony. The trial court properly ruled that this testimony could be used against him for impeachment.

2. Since The Defendant Was Not Sanctioned For Failing To Testify And His Statements Were Not Used Against Him At A Criminal Trial, Any Threats Did Not Result In A Constitutional Violation.

Even if the court believes that the defendant was threatened with a penalty, no constitutional violation resulted. When a person is threatened with a penalty for exercising his privilege against self-incrimination, that situation gives rise to two constitutional restrictions. If the attempt to override the privilege is unsuccessful, the State cannot constitutionally make good on the threat. If, on the other hand, the defendant fails to assert the privilege, the resulting

evidence cannot be used in a criminal prosecution. Murphy, 465 U.S. at 434-35.

In the present case, neither type of violation occurred. The defendant did not assert his privilege at the administrative hearing, so obviously he was not punished for asserting it. Although he did make statements, those statements were not used as evidence at the criminal trial. Consequently, any threat of sanctions at the hearing did not violate the defendant's constitutional rights.

The defendant nonetheless claims that he can raise the issue on appeal, citing State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), and State v. Greve, 67 Wn. App. 166, 834 P.2d 656 (1992). In both cases, the trial courts ruled that evidence could be used for impeachment. In Borsheim, the evidence consisted of statements made during an interrogation that violated Miranda requirements. See Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In Greve, it consisted of statements that resulted from an illegal arrest. Neither defendant testified, so the impeachment never occurred. This court nonetheless held that because the use of the evidence "raise[d] constitutional concerns," the issue could be raised on appeal. Borsheim, 140 Wn. App. at 371 n. 5; Greve, 67 Wn. App. at 169-70.

In each of those cases, the procedure that gave rise to the evidence was unconstitutional: an interrogation in violation of Miranda, and an illegal arrest. In the present case, in contrast, no unconstitutional procedure occurred at the administrative hearing itself. The procedure would become unconstitutional only if incriminating evidence was used at the trial. Since that never occurred, there was no violation. The holdings of Borsheim and Greve are therefore inapplicable.

3. This Court Should Reconsider Its Holding That A Person Who Does Not Testify Can Challenge The Admissibility Of Evidence For Impeachment, Since That Holding Is Contrary To Decisions From Both The Washington Supreme Court And Many Other State Courts.

If this court believes that the present case is governed by Borsheim and Greve, it should re-examine the holding of those cases. When this court decided Greve, it evidently believed that its holding was consistent with the law of other jurisdictions. It cited and followed a Vermont case, State v. Brunelle, 148 Vt. 347, 534 A.2d 198 (1987). Borsheim simply followed Greve. There are now several cases from other jurisdictions addressing this issue. A large majority of them have rejected the rule that was adopted by this court.

There are two jurisdictions other than Washington that follow the rule set out in Greve. Brunelle; United States v. Chischilly, 30 F.3d 1144, 1150-51 (9th Cir. 1994). Five states follow the opposite rule: a defendant who does not testify cannot challenge a ruling admitting improperly-obtained statements or post-arrest silence for impeachment. Wagner v. State, 347 P.3d 109 (Alaska 2015); People v. Boyd, 470 Mich. 363, 682 N.W.2d 459 (2004); State v. Conner, 163 Ariz. 97, 786 P.2d 948 (1990); Jordan v. State, 323 Md. 151, 156-59, 591 A.2d 875, 877-78 (1991); State v. Bruneau, 131 N.H. 104, 115, 552 A.2d 585, 592 (1988).

Two states apply an intermediate rule: a defendant can raise the issue without testifying only if other conditions are met. In Idaho, the issue can be raised only if the defendant (1) elects not to testify due to the trial court's decision, and (2) makes an adequate offer of proof as to the testimony he would have introduced. State v. Cherry, 139 Idaho 579, 582, 83 P.3d 123, 125 (2004). Since the defendant in the present case made no offer of proof, he would not be allowed to raise the issue under the Idaho rule. In California, the issue can be raised only if "the defendant raises a pure question of law based on undisputed facts." People v. Brown, 42 Cal. App. 4th 461, 471, 49 Cal. Rptr. 652, 658-59 (1996). Under this rule, a

defendant *would* probably be allowed to raise the issue under the facts of the present case.

In sum, the lineup is this: in six states, the defendant in the present case would not be allowed to challenge the ruling allowing admission of his statements for impeachment (Alaska, Arizona, Idaho, Maryland, Michigan, and New Hampshire). He would be allowed to challenge the ruling in three states (California, Vermont, and Washington) and one federal circuit (the 9th). This conflict demonstrates the need for a careful examination of this court's holding.

Most discussions of this issue begin with Luce v. United States, 469 U.S. 38, 42, 105 S.Ct. 460, 464, 83 L.Ed.2d 443 (1984). That case involved review of a ruling admitting a prior conviction for impeachment under Fed. R. Ev. 609(a). The court held that this ruling could not be reviewed unless the defendant testified and was impeached. The court set out three reasons for this holding: (1) "A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context." (2) "Any possible harm flowing from a [trial] court's in limine ruling permitting impeachment by a prior conviction is wholly speculative."

(3) Absent testimony by the defendant, it is impossible to determine whether any error was harmless. Luce, 469 U.S. at 41-42.

The Washington Supreme Court adopted the rule of Luce in State v. Brown, 113 Wn.2d 520, 533-40, 782 P.2d 1013 (1989) (plurality opinion); id. at 560-61 (Pearson, J., concurring). The court held that this rule was applicable to impeachment under both ER 609(a)(1) (impeachment with felony convictions) and (a)(2) (impeachment with convictions for crimes of dishonesty). In rulings under (a)(2), the trial court does not engage in any balancing of probative value against prejudicial effect. Nonetheless, “the desirability of a complete record for review to determine whether any error is harmless favors the Luce rule.” Id. at 541.

In Greve, this court held that the Brown rule was inapplicable because it did not involve a procedure that raised “constitutional concerns.” This distinction, however, has no bearing on the concerns addressed in Brown. That case did not rest on the lesser status of the rule involved. To the contrary, the court acknowledged “the constitutional significance of the ruling [allowing impeachment] on the defendant’s right to testify.” Brown, 113 Wn.2d at 539. The court nonetheless required the defendant to testify in order to (1) provide an adequate record for review of evidentiary rulings, (2)

ensure that the harm resulting from the trial court's ruling was not speculative, and (3) allow for a determination of whether any error was harmless. Id. at 535-36. These concerns are equally applicable to rulings allowing impeachment with evidence that may have been unconstitutionally obtained.

The application of the rule in this context was analyzed in Boyd. There, the defendant answered several questions under police interrogation, but he then "took the fifth." The trial court ruled that this statement was admissible. The defendant did not testify, and the statement was not admitted. The Michigan Supreme Court held that the trial court's ruling could not be challenged on appeal.

The Michigan Supreme Court had previously adopted the holding of Luce, in People v. Finley, 431 Mich. 506, 431 N.W.2d 19 (1988). The court held that this holding was equally applicable to impeachment with a defendant's silence:

Defendant and the dissent contend that the logic of Luce and Finley does not apply because the alleged error has constitutional implications...

The dissent and defendant ... fail to appreciate the constitutional implications present in Luce; Finley, and every case in which a defendant alleges that a trial court's ruling effectively prevented him from testifying. A defendant's right to testify in his own defense stems from the Fifth, Sixth, and Fourteenth amendments of the United States Constitution. Thus, a trial court's

ruling affecting a defendant's right to testify necessarily has constitutional implications. The lead opinion in Finley correctly stated, "A ruling in limine on impeachment by prior convictions does not present constitutional implications." The effect of such a ruling on a defendant's right to testify, however, does present constitutional implications. Therefore, the distinction that the dissent attempts to draw between this case and Finley is illusory. Any ruling, even if on a mere evidentiary issue, necessarily affects a defendant's constitutional rights if it has a chilling effect on the exercise of the right to testify.

...

Because the admissibility of post-Miranda silence depends on the factual setting in which the prosecutor seeks to admit it, we are faced with the same problem encountered in Luce and Finley, i.e., that defendant's claim of error is wholly speculative. Not only could the statement have been admitted to contradict a defendant who testified about an exculpatory version of events and claims to have told the police that version upon his arrest, but, as Luce suggests, it might not have been admitted at all, even if defendant had testified. As the Luce Court recognized, the trial court could have ultimately concluded that the statement was inadmissible, or the prosecution could have changed its trial strategy and not sought to admit the statement.

In addition, as Luce recognized, we cannot assume that the possible introduction of the "taking the fifth" statement motivated defendant's decision not to testify. The Luce Court rejected the notion that appellate courts can properly discern the effect of a ruling in limine on a defendant's trial strategy. Thus, it is equally possible that defendant simply chose to present his defense through his brother's testimony, which contradicted the complainant's allegations, rather than to testify himself and be subject to cross-examination. Because numerous factors undoubtedly

influence a defendant's decision whether to testify, we refuse to speculate regarding what effect, if any, a ruling in limine may have had on this decision.

Further, unlike the dissent, we appreciate the difficulty inherent in evaluating a trial court's ruling on a motion in limine when the evidence is never actually admitted. The dissent would have us review defendant's claim of error in a vacuum and engage in speculation regarding whether the statement would have been properly admissible. The speculative exercise that the dissent offers is exactly what we are seeking to avoid. Often, a factual record is necessary to determine the soundness of the trial court's ruling if for no other reason than to conduct a harmless error analysis. Extension of the Luce and Finley rule to the instant circumstance ensures that appellate courts are not forced to entertain abstract allegations of error.

Boyd, 470 Mich. at 373-77, 682 N.W.2d at 464-66 (footnotes and citations omitted).

The circumstances of the present case illustrate the soundness of this reasoning. The defendant never explained his reason for declining to testify. The record does not show what the defendant would have said if he had testified. Nor does it show the content of his testimony at the administrative hearing. So far as this record shows: (1) The defendant's decision may have had nothing to do with the ruling allowing impeachment. (2) If the defendant had chosen to testify, he may not have been impeached, because his trial testimony may have been consistent with his testimony at the administrative hearing. (3) If the defendant had testified and been

impeached, any resulting error may have been harmless, because the impeachment may have been too insubstantial to affect the verdict. Yet despite all these possibilities, the defendant contends that the hypothetical ruling allowing impeachment justifies automatic reversal.

This argument should be rejected. This court should repudiate Greve and Borsheim. Instead, it should adopt the majority rule as set out in Brown. If a defendant does not testify and is therefore never impeached, a hypothetical ruling allowing impeachment cannot be reviewed on appeal.

B. THE FAILURE TO IDENTIFY SPECIFIC VICTIMS IN THE JURY INSTRUCTIONS IS NOT REVERSIBLE ERROR.

1. Because There Was No Basis For The Jury To Acquit For The Charged Victims But Convict For An Uncharged Victims, The Impact Of Any Error In The Jury Instructions Is Not "Manifest."

The information alleged that the defendant, "with intent to harass, intimidate, torment, and embarrass Lisa Tyler and/or Kim Tran, did make a telephone call to that person." CP 95. The "to convict" instruction, however, said that the jury should convict the defendant if he made a telephone call to "another person," with intent to harass, intimidate, torment, or embarrass "that other person." Inst. no. 6, CP 50. The defendant claims that this

instruction allowed the jury to convict the defendant for acts not charged in the information.

No objection to this instruction was raised at trial. 3 RP 455. This being so, the issue can be raised only if it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). To establish that the issue was manifest, the defendant must "show how, in the context of the trial, the alleged error actually affected the defendant's rights." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If the impact of the error is purely abstract and theoretical, the error is not "manifest" and cannot be raised for the first time on appeal. State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

In the present case, the defendant made similar threats in telephone calls to three different people over a span of 20 minutes. 3 RP 474. Two of these people (Tyler and Tran) were named in the information; the other (Raymond) was not. 2 RP 262-63, 292-93, 333. The defense was that the defendant lacked the intent to communicate a threat. 4 RP 539-41. There is, however, no reason to believe that the defendant's intent changed between these calls. If the defendant intended to threaten Ms. Raymond, he equally intended to threaten Ms. Tyler and Ms. Tran. The possibility that

the jury might have convicted the defendant solely for the uncharged phone call is purely abstract and theoretical. This being so, the error is not "manifest" and cannot be raised for the first time on appeal.

2. In View Of The Overwhelming Evidence, Any Error In The Jury Instructions Was Harmless.

If the court does consider the issue, it should hold that any error was harmless. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result, despite the error." State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995). In a comparable situation, this court held it harmless error to instruct the jury on an alternative that is unsupported by the evidence, if there is overwhelming evidence of a proper alternative. State v. Jones, 22 Wn. App. 506, 512, 591 P.2d 816 (1979).

Here, there is overwhelming evidence of the defendant's guilt. Ms. Tyler and Ms. Tran testified that the defendant told her that he was going to get machine guns and kill everyone. 2 RP 292-93. Ms. Tran testified that he told her that he was going to bomb them and shoot their director. 2 RP 333. The defendant told police that he had not made these threats. 3 RP 425. In a television

interview, however, he said that he had "lost it." He also said that he had "blocked out" the things that he said. 3 RP 480. As defense counsel said in closing argument, "the critical issue here is not that words were said or the phone calls were made, it's what driving it. It's the intent." 4 RP 539.

Some members of the jury evidently had a reasonable doubt that the defendant intended to communicate a threat to kill. There is, however, no basis to doubt that the defendant intended to intimidate and harass Ms. Tyler and Ms. Tran. The evidence on the charge of gross misdemeanor harassment is overwhelming. As a result, any error in allowing the jury to consider a call to an uncharged victim is harmless.

If the court nevertheless grants a new trial, the trial should be on the original charges of felony telephone harassment and threats to bomb. A failure to agree on a charged offense is not an implied acquittal, even when combined with a guilty verdict on a lesser offense. If the defendant successfully appeals a conviction on a lesser offense, he may be retried on the original charge. State v. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007), aff'd on reconsideration, 165 Wn.2d 627, 200 P.3d 711, cert. denied, 558 U.S. 819 (2009).

C. APPELLATE COSTS SHOULD BE IMPOSED.

The defendant asks that if the conviction is affirmed, costs should not be imposed. RCW 10.73.160(3) specifically provides for an award of costs that includes recoupment of fees for court appointed counsel. Counsel is only appointed for defendants who are indigent. RCW 10.73.150. The Supreme Court has held that it is not necessary to determine the defendant's ability to pay before imposing appellate costs. The court pointed out that "it is nearly impossible to predict ability to pay over a period of 10 years or longer." Rather, the issue of inability to pay is properly resolved via motion to remit costs under RCW 10.73.160(4). State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997); see City of Richland v. Wakefield, no. 92594-1 (9/22/16) (discussing standards for remission of costs).

The defendant nonetheless argues that because he is indigent, he should not be required to pay. This argument is a "Catch-22." In the novel of that title, an airman could be removed from flight duty for mental illness, but only on his own request – and making the request proved that he wasn't mentally ill. See State v. Frederick, 100 Wn.2d 550, 558 n. 3, 674 P.2d 136 (1983), quoting J. Heller, Catch-22 (1961). Similarly, under the defendant's

argument, an indigent defendant can be required to recoup the costs of his appeal – but only if he isn't indigent. This argument is in effect a negation of the statute, which the Supreme Court has already held constitutionally valid. See State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).

The defendant relies on State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). There, this court held: "Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor." Id. at 389 ¶ 24. This analysis is contrary to Blank. It tries to do exactly what the Supreme Court considered "nearly impossible" – predict the defendant's ability to pay over a lengthy period. Blank, 131 Wn.2d at 242.

There is an extensive body of case law dealing with appellate court discretion to award costs. RCW 10.73.160(3) provides that "[c]osts ... shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." The statute thus preserved existing procedures for awarding costs. Under those procedures, the rule was that "[u]nder normal circumstances, the prevailing party on appeal would recover

appeal costs.” Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979).

Numerous cases provide examples of circumstances under which costs are properly denied. For example, they may be denied if reversal results from an error that was attributable to the successful appellant. See, e.g., Water Dist. No. 111 v. Moore, 65 Wn.2d 392, 393, 397 P.2d 845 (1964); In re Dill, 60 Wn.2d 148, 372 P.2d 541, 543 (1962); Ramsdell v. Ramsdell, 47 Wash. 444, 92 P. 278 (1907). Costs may be denied as a sanction for violations for appellate rules. See, e.g., Tyree v. General Insurance Co., 64 Wn.2d 748, 753, 394 P.2d 222, 226 (1964). They may be denied when the court decides the case on an issue that was not raised by either party. Hall v. American National Plastics, Inc., 73 Wn.2d 203, 205, 437 P.2d 693, 694 (1968). Costs may likewise be denied when the court decides the merits of a moot case. Such a decision is in the public interest, not for the benefit of either party. National Electrical Contractors Assoc. v. Seattle School Dist. No. 1, 66 Wn.2d 14, 23, 400 P.2d 778 (1965).

All of these examples share a fundamental feature. All of them are based on the issues raised and the manner in which they were argued. This distinction reflects the nature of the appellate

process. Appellate courts resolve cases on the basis of the record. “This court simply is not in a position either to take evidence or to weigh contested evidence and make factual determinations.” State v. Walker, 153 Wn. App. 701, 708 ¶ 17, 224 P.3d 814 (2009). Consequently, a decision to grant or deny costs cannot be based on matters such as ability to pay. That ability can rarely be predicted from facts in the record – to the extent that it is predictable at all. Instead, decisions about costs must be based on facts in the record.

In this case, the record provides no basis for denying costs. This was a standard appellate proceeding which the defendant brought for his own benefit. The only basis asserted by the defendant is his alleged inability to pay – which is not a proper basis for denial. Any issue of hardship should be resolved by using the statutory procedure for remission of costs. Blank, 131 Wn.2d at 242.

If the court nonetheless considers ability to pay, it should determine that the defendant is likely to have the ability to repay the costs resulting from his decision to appeal. At the time of the crime, the defendant was a practicing psychiatrist. His license to practice was suspended, based on a finding that he has a mental health

condition affecting his ability to practice. Sent. RP 603. At sentencing, defense counsel said that the defendant intended to seek reinstatement of his license. Sent. RP 605. If his condition is treatable, there is no reason to believe that he will be unable to resume the practice of psychiatry. If he does, he will have ample earning capacity to pay the costs of his appeal. Furthermore, even if he is not practicing medicine, his education and training should provide him with employment opportunities. If the defendant's appeal is unsuccessful, his litigation costs should be imposed on him, not the taxpayers.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on October 5, 2016.

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Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

SAID FARZAD,

Appellant.

No. 74538-7-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

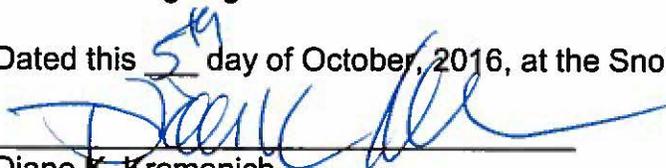
The undersigned certifies that on the 5th day of October, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Jennifer Sweigert, Nielsen, Broman & Koch, Sweigertj@nwattorney.net; and Sloanej@nwattorney.net.

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

Dated this 5th day of October, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office