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ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE FELONY HARASSMENT BECAUSE JENNIFER CALDERON DID NOT FEAR THAT MR. CALDERON WOULD CARRY OUT HIS THREAT TO KILL HER.

Respondent fails to address Mr. Calderon’s first argument—that the evidence was insufficient for conviction of Felony Harassment. Brief of Respondent, pp. 3-10; *see* Appellant’s Opening Brief, pp. 1 (Assignments of Error Nos. 1-2; Issue No. 1), 6-7. This failure to argue the issue may be treated as a concession. *See, e.g., In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). In light of this, Mr. Calderon rests on the argument set forth in the Appellant’s Opening Brief.

II. THE INSTRUCTIONAL ERRORS WERE NOT HARMLESS BEYOND A REASONABLE DOUBT.

Respondent concedes that the court’s instructions were erroneous and relieved the prosecution of its burden to prove the “reasonable fear” element of Felony Harassment. Respondent also (apparently) concedes that the instructions failed to require proof of a “true threat.” Brief of Respondent, pp. 3-5.¹ In light of these concessions, the sole issue on

¹ The “reasonable fear” element contained in the statute is analytically different from the “true threat” requirement imposed by the First Amendment. *See* Appellant’s Opening Brief, pp. 1 (Assignments of Error Nos. 3-4, Issues Nos. 2-3), 8-11. The focus of the former is on the victim’s reasonable fear; the latter is directed to the accused person’s knowledge.

appeal is whether or not the errors were harmless under the stringent constitutional standard for harmless error.

Omission of an element from the court's instructions requires reversal. *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005). The error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). Respondent must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless Respondent proves that *any* reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). Respondent has not met these requirements.

Jennifer Calderon never testified that she feared Mr. Calderon would attempt to *kill* her. RP (10/15/09) 4-15. She clearly feared that he might try to *hurt* her, and that fear was unquestionably reasonable; however, such testimony is insufficient to establish Felony Harassment under RCW 9A.46.020. The statute requires actual, subjective fear that the defendant will attempt to kill (and not merely attempt to injure).

Because Jennifer Calderon never testified that she feared he would try to kill her, it cannot be said that the evidence was overwhelming on this point, or that the error was harmless beyond a reasonable doubt. *Burke, supra*.

Respondent erroneously conflates the missing element (that Jennifer Calderon reasonably feared that the threat to kill would be carried out)² with the missing “true threat” instruction (that the threat was made under circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage).³ But the “true threat” requirement is not equivalent to the statutory element that the person threatened be placed in reasonable fear.

Respondent’s error muddles the state’s harmless error argument. As a result, Respondent fails to correctly argue harmless error for either omission. Brief of Respondent, pp. 3-5. Respondent’s argument—that “the evidence is overwhelming that the defendant... placed the victim in reasonable fear that he may have killed her”—overlooks the fact that Jennifer Calderon did not testify that she feared he would try and kill her. Instead, as noted above, her testimony was that he would try to *harm* her.

² See RCW 9A.46.020.

³ See *State v. Johnston*, 156 Wn.2d 355, 360-361, 127 P.3d 707 (2006).

Such a fear, no matter how reasonable, is not sufficient to prove that she feared he would try to kill her. Presumably, Ms. Calderon knows her brother well enough to decide that he might have harmed her but would not try to kill her, in spite of his threats and his conduct. A reasonable jury could decide that she feared he would harm her, but that she did not fear he would try to kill her. Accordingly, it cannot be said that the errors were harmless beyond a reasonable doubt. *Burke, supra*.

Respondent makes no real attempt to address the “true threat” requirement. This failure to argue the issue is most likely due to Respondent’s lack of understanding, and thus might not qualify as a concession under *Pullman, supra*.

Although significant evidence supports the “true threat” element, it is not overwhelming. This is so because the two were brother and sister who knew each other well. A reasonable person in Mr. Calderon’s position—knowing the history of the relationship, including, presumably, their childhood together and their conflicts as adults—might not foresee that his threats to kill would be interpreted by his sister as a serious expression of an intention to inflict damage. It is significant that Ms. Calderon, when asked about her fear, responded by referring to his attempt to kick her, and not the fact that he held a knife to her throat:

I was scared because he tried to kick me in the face while I was walking by him and he told me - he was saying to himself, you know, I'd like to kick you in the face just to see you cry, break your nose and see. It's so funny, ha, ha, ha, you know.
RP (10/15/09) 9-10.

Furthermore, she told him he could "do whatever," and their mother told him to "Stop picking on [her]." RP (10/15/09) 9, 10. Under these circumstances, a reasonable jury could conclude that Mr. Calderon's statements should not be taken as a "true threat," in light of the history of the relationship between the siblings.

The errors were not trivial, formal, or merely academic. They prejudiced Mr. Calderon and likely affected the final outcome of the case. *Lorang*, at 32. Because the errors were not harmless, Mr. Calderon's conviction must be reversed. *Id.* The case must be remanded to the trial court for a new trial. *Id.*

III. MR. CALDERON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. The trial court should have inquired into Mr. Calderon's dissatisfaction with his attorney.

At his first hearing after the court entered a competency order, Mr. Calderon told the court he was dissatisfied with his lawyer. RP (9/28/09) 1-2. He had previously written and asked that his attorney be removed and new counsel appointed. Letter to Judge Godfrey (dated 9/24/09, filed

9/29/09), CP 16-17. Defense counsel affirmed that “[C]ommunications have broken down somewhat.” RP (9/28/09) 1-2. Although Mr. Calderon said he planned to seek private representation, this plan hinged upon a reduction in bail which would enable him to raise funds to do so. RP (9/28/09) 1-2. The trial court did not reduce bail. RP (9/28/09) 1-2.

Under these circumstances, the trial judge should have inquired into Mr. Calderon’s dissatisfaction. *State v. Lopez*, 79 Wn.App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998). Respondent erroneously argues that the judge had no duty to inquire because “[t]he defendant informed the court that he had the means and intended to hire his own attorney.” Brief of Respondent, p. 6. This is misleading, given the contingent nature of Mr. Calderon’s statement. RP (9/28/09) 1. Furthermore, the judge did not simply accept Mr. Calderon’s intention at face value; instead, he affirmatively refused to appoint new counsel:

There is your lawyer. Until I see something different, we are going to trial. If your dad hires somebody else, they have to come in here and take care of business. I am not going to appoint somebody else if you can hire somebody.
RP (9/28/09) 1-2.

The trial court’s failure to inquire into the problem was an abuse of discretion. *Lopez, supra*.

Respondent correctly notes that the court in *Lopez* found the error harmless. The defendant in that case did not establish actual ineffective assistance.⁴ Brief of Respondent, p. 6. This Court should not follow the harmless error analysis adopted by Division III in *Lopez*.

The problem with the *Lopez* approach is that it provides no remedy for the trial court's error if the appellant can't meet the high bar of the ineffective assistance of counsel standard. If defense counsel is ineffective, the conviction will be reversed for ineffective assistance regardless of whether or not the trial court abuses its discretion; thus no purpose is served by raising the trial court's error.

If the Court is not inclined to reverse Mr. Calderon's conviction because of the trial court's error, the Court should adopt a modified version of the test for ineffective assistance. Instead of requiring the appellant to show both deficient performance and prejudice, reversal should be required whenever the appellant can show deficient performance, regardless of whether or not counsel's failures are proved to have affected the outcome of trial.⁵ An accused person who is dissatisfied

⁴ Despite this, Respondent argues that *Lopez* "is not on point." Brief of Respondent, p. 6.

⁵ This is similar to the approach used by appellate courts to resolve cases in which the appellant can show that counsel was hampered by a conflict of interest. In such cases, reversal is required if there is an adverse effect—that is, where the attorney's behavior "seems to have been influenced" by the conflict. *State v. Jensen*, 125 Wn. App. 319, 331,

with her or his attorney can do no more than hope for a competent attorney—that is, one who provides adequate rather than deficient performance. In those cases where the court fails to inquire into a conflict, those litigants who received deficient representation should be entitled to a new trial.

This modified test requires the defendant to establish *some* negative consequence, without taking on the full burden of an ineffective assistance claim. It strikes a balance, recognizing the trial court's failure to adequately explore the problem without excusing the appellant from making a plausible showing. It therefore encourages the accused person to speak up at trial, and encourages the trial judge to explore any problems raised.

In this case, Mr. Calderon has demonstrated deficient performance (as set forth in the following section), and should be entitled to a new trial with competent counsel. Accordingly, his conviction must be reversed and the case remanded to the trial court. *Lopez, supra*; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

104 P.3d 717 (2005). Prejudice is presumed once the defendant makes this showing. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

B. Mr. Calderon was denied the effective assistance of counsel by his attorney's failure to object to inadmissible evidence and to propose appropriate instructions.

1. Defense counsel should have sought instructions on voluntary intoxication.

Conviction in this case required proof that Mr. Calderon knowingly threatened and intentionally assaulted his sister. Instructions Nos. 5, 7, Court's Instructions to the Jury, CP 21; RCW 9A.46.020. The jury could consider proof of voluntary intoxication to negate any proof establishing these mental elements. *State v. Kruger*, 116 Wn. App. 685, 691, 67 P.3d 1147 (2003).

Mr. Calderon was entitled to a voluntary intoxication instruction because the record includes substantial evidence that intoxication affected his ability to form each mental state: there was testimony that he was "on drugs," that he smelled of alcohol and could have been intoxicated, that he "passed out" at the jail, that he was "[v]ery agitated, aggressive, not himself, and violent," and that he'd been "talking in riddles to himself over and over..." RP (10/15/09) 6-7, 17-18, 30. This evidence met the standard set forth in *Kruger*. *Id.*, at 692.

Furthermore, a reasonable jury could have considered this evidence and decided that Mr. Calderon acted unintentionally and/or without knowledge. *Kruger*. The defense strategy was (in part) to cast

doubt on Mr. Calderon's ability to form the intent to commit a crime.

Accordingly, defense counsel was ineffective for failing to properly present the defense. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987).

Respondent argues that Mr. Calderon's defense ("that he did not threaten his sister") and his statement to police made it "unwise to argue in the alternative a diminished capacity [sic] defense." Brief of Respondent, p. 8. This is incorrect. Even if Mr. Calderon denied the offense, his attorney should have proposed the voluntary intoxication instruction to cast doubt on an essential element of each offense. If counsel thought that focusing on voluntary intoxication might distract the jury from a stronger argument, he was not required to highlight that instruction in closing.⁶

Without the instruction, the prosecutor was able to argue that "Drunk and mad is not a defense of this crime. What kind of society would we live in if all you had to do was plead I was drunk and mad." RP (10/15/09) 53. The jury had nothing to contradict this oversimplification. Accordingly, Mr. Calderon's conviction must be reversed and the case remanded for a new trial. *Tilton, supra*.

⁶ Respondent's suggestion—that it would be "unprofessional" to "cast a light" on his client's failure to testify—is wholly unwarranted. There is nothing to suggest that simply proposing the instruction would have emphasized Mr. Calderon's exercise of his right to remain silent.

2. Defense counsel should have objected to inadmissible evidence and sought limiting instructions.

Respondent is absolutely correct that some of the objectionable evidence admitted at trial may have been admissible for a limited purpose. Brief of Respondent, pp. 9-10. However, in order to limit the jury's consideration of such evidence, an attorney must object to the evidence and request a limiting instruction. *See State v. Russell*, 154 Wn.App. 775, 225 P.3d 478 (2010) (reversal required where trial court failed to provide a limiting instruction.)

Respondent suggests that Mr. Calderon's alleged conduct at the time of his arrest was "[r]es gestae evidence," admissible to "provide[] the jury with a more complete picture of events surrounding the crime." Brief of Respondent, citing *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999).⁷ "Res gestae" is an exception to ER 404(b). As with other evidence of bad acts, the court must identify the purpose for which the evidence is to be admitted, weigh its probative value against prejudice to the accused, and limit the jury's consideration to a proper purpose. *State v. Ra*, 144 Wn.App. 688, 701, 175 P.3d 609 (2008); *Russell*, *supra*.

⁷ Respondent's citation to *Elmore* is inapposite: that case involved the admission of res gestae evidence during the penalty phase of the case; the Supreme Court found the evidence admissible to show the circumstances of the murder, in accordance with paragraph two of RCW 10.95.060(3), which permits the introduction evidence relating to the facts and circumstances of the murder. *Elmore*, at 285-288.

Because defense counsel failed to object, the court never had the opportunity to make the determinations required by ER 401, ER 402, ER 403, and ER 404(b), and the jury was not instructed on how to use the evidence. *Ra, supra; Russell, supra.*

The admission of this testimony without limitation served no legitimate strategy and prejudiced Mr. Calderon. Accordingly, Mr. Calderon's convictions must be reversed and the case remanded for a new trial. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

CONCLUSION

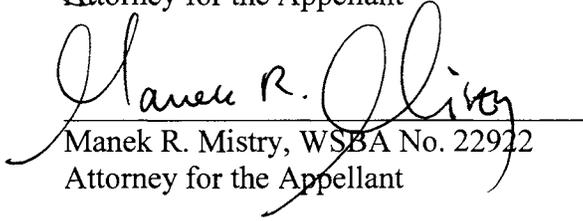
Mr. Calderon's Felony Harassment conviction must be reversed and the charge dismissed. If dismissal is not ordered, the charge must be remanded for a new trial. The assault conviction must also be reversed and the charge remanded for a new trial.

Respectfully submitted on March 26, 2010.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Jay Calderon
Grays Harbor County Jail
P. O. Box 630
Montesano, WA 98564

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 26, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 26, 2010.

Jodi R. Backlund # 22917

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