

No. 44415-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Ruslan Bezhenar,

Appellant.

Lewis County Superior Court Cause No. 12-1-00434-4

The Honorable Judge James Lawler

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Bezhenar's felony harassment conviction violated his Fourteenth Amendment right to due process.
2. The evidence was insufficient to prove the elements of felony harassment beyond a reasonable doubt.
3. The prosecution failed to prove that Mr. Bezhenar made a threat to kill.
4. The prosecution failed to prove that Officer Lowrey feared that Mr. Bezhenar would carry out a threat to kill.
5. The prosecutor committed misconduct that was flagrant and ill-intentioned.
6. The prosecutor committed misconduct that deprived Mr. Bezhenar of his Fourteenth Amendment right to a fair trial.
7. The prosecutor committed misconduct by minimizing and shifting the state's burden of proof in violation of Mr. Bezhenar's Fourteenth Amendment right to due process.
8. The prosecutor committed misconduct by "testifying" to "facts" not in evidence, and improperly bolstering the testimony of state witnesses, in violation of Mr. Bezhenar's due process right to a decision based solely on the evidence.
9. The prosecutor committed misconduct by giving a personal opinion on Mr. Bezhenar's guilt and by introducing improper opinions on guilt into evidence in violation of Mr. Bezhenar's Sixth and Fourteenth Amendment right to a jury determination of the facts.
10. The prosecutor committed misconduct by playing upon ethnic stereotypes in violation of Mr. Bezhenar's Fourteenth Amendment right to due process.
11. State witnesses provided improper opinion testimony that invaded the province of the jury.

12. State witnesses improperly characterized Mr. Bezhenar's ambiguous statements as "threats."
13. Mr. Bezhenar was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
14. Defense counsel unreasonably failed to object to prosecutorial misconduct.
15. Defense counsel unreasonably failed to object to improper opinion testimony.
16. Defense counsel unreasonably failed to request instructions on the lesser-included offense of misdemeanor harassment.
17. The trial court erred by imposing attorney fees in the amount of \$2,100.
18. The imposition of attorney fees without any findings regarding Mr. Bezhenar's present or future ability to pay violated his Sixth and Fourteenth Amendment right to counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for felony harassment requires proof that the defendant made a threat to kill. Here, the prosecution failed to prove that Mr. Bezhenar's ambiguous comments communicated a threat to kill. Did the conviction violate Mr. Bezhenar's Fourteenth Amendment right to due process because the evidence was insufficient to establish the elements of the offense?
2. The prosecution was required to prove that Officer Lowrey reasonably believed that a threat to kill would be carried out. Here, the state failed to introduce evidence that Officer Lowrey believed Mr. Bezhenar would carry out a threat to kill. Was the evidence insufficient for conviction?

3. A prosecutor may not commit misconduct that prejudicially infringes the accused person's Fourteenth Amendment right to a fair trial. Here, the prosecutor committed flagrant and ill-intentioned misconduct by minimizing and shifting the burden of proof, "testifying" to "facts" outside the record, improperly bolstering the credibility of state witnesses, providing a personal opinion on Mr. Bezhenar's guilt, introducing improper opinion testimony on the issue of guilt, injecting Mr. Bezhenar's ethnicity into the trial, and playing on ethnic stereotypes. Did the prosecutor's flagrant and ill-intentioned misconduct violate Mr. Bezhenar's Fourteenth Amendment right to due process?
4. A prosecution witness may not testify to an opinion on the accused person's guilt. Here, three police officers improperly opined that Mr. Bezhenar's ambiguous statements were threats. Did the improper opinion testimony invade the province of the jury in violation of Mr. Bezhenar's Sixth and Fourteenth Amendment right to a jury trial?
5. An accused person is guaranteed the effective assistance of counsel. Defense counsel unreasonably failed to object to prosecutorial misconduct and improper opinion testimony, and unreasonably failed to offer instructions on the lesser-included offense of misdemeanor harassment. Was Mr. Bezhenar deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
6. A trial court may only impose attorney fees upon finding that the offender has the present or likely future ability to pay. Here, the court imposed \$2,100 in attorney fees without making such a finding. Did the trial court violate Mr. Bezhenar's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Ruslan Bezhenar's mother owned a building in downtown Centralia, and she let her son use it as he wished. RP 51, 90, 94. It had an empty storefront at street level, and an apartment above. RP 24-26, 31, 100. Mr. Bezhenar had lived in the upstairs apartment for about two years when the residence was deemed "uninhabitable" because it did not have water and electricity flowing to it. RP 24, 27-28, 100. A sign posted in the second week of July 2012 indicated that any "unauthorized" person inside would be subject to arrest. RP 29-30, 94. The sign was posted on the front door; however, Mr. Bezhenar ordinarily used a side door. RP 110.

Mr. Bezhenar was in the building sleeping on July 13, 2012. A few others were in his apartment as well. RP 100-102. A person called police when they saw a man climb up a drain spout and go inside. RP 23-24. Police responded, surrounded the building, sent in a trained apprehension dog, and eventually arrested Mr. Bezhenar. RP 31-44.

While still at the building, Mr. Bezhenar made a remark to Officer Lowrey. RP 46. He either told him that he'd see Lowrey again, or that Lowrey would pay (for injuries Mr. Bezhenar had received from the bite

of the police dog). RP 107, 115. Lowrey responded “You said that last time I dealt with you.” RP 46.

According to Lowrey, Mr. Bezhenar told him that this time was different, and that he would “get” the officer. Lowrey believed he was being threatened with a lawsuit, and told Mr. Bezhenar to be sure to spell his name correctly. RP 46-47. Lowrey reported that Mr. Bezhenar said this was not about money, it was about revenge, and that the officer would be sorry. RP 47. Lowrey told Mr. Bezhenar that if he showed at the officer’s house he would be shot on sight. Mr. Bezhenar said it would be someone else who showed up. RP 47.

Other officers were in the area, but none heard what Mr. Bezhenar said. RP 68, 79-80. Mr. Bezhenar’s mother was also there, and heard no threats from her son. RP 92-93. Mr. Bezhenar denied making any threats to the officer. RP 108.

The state charged Ruslan Bezhenar with felony harassment, with an added allegation that the victim of the crime was a police officer performing his official duties. The state also charged him with criminal trespass. CP 1-2.

At trial, the prosecutor asked Officer Lowrey if he was afraid that Mr. Bezhenar would kill him, but the officer did not respond in the affirmative. Instead, he said that he was more afraid for his family. RP 47.

He stated that he took the threats seriously, that Mr. Bezhenar was crossing a line, and that the threats were different (and worse) than what he often hears. RP 48.

The defense did not offer, and the court did not give, any lesser included offense instructions. Court's Instructions, Supp. CP ¹.

During his closing argument, the prosecutor likened Mr. Bezhenar to mobsters:

[W]hen someone says, "Listen, you don't do this contract you'll be sleeping with the fishes," okay, he didn't say I'm going to killing [sic] you if you don't do this but you all know what was meant.
RP 158.

Later in his argument, the prosecutor used an analogy to describe the burden of proof and reasonable doubt:

Now, for an example, let's say I'm thinking of a city. You have no idea what city I'm thinking of right now. There's no way you could know. But I'm going to give you clues and at the end you're going to be satisfied beyond a beyond a reasonable doubt what city I'm thinking of.

Let's say it's a city by a body of water. And I apologize for that not being totally visible. Well, here are a few possibilities: We've got Boston, we've got Chicago, we've got Detroit, and we've got Seattle. But there's no way you can know what city I'm thinking of at this point. Not enough information.

Well, here's another clue. I'm not thinking of a huge

¹ According to the docket, the defense did not submit instructions.

city. So what's left? Not Chicago, Chicago is -- it's immense, so that's gone. So there's only three possibilities, Detroit, Boston, or Seattle. The city I'm thinking of is not in the Midwest. What does that mean? There goes Detroit. But you're still not sure. You have two possibilities. It could be either Boston or Seattle. Here's the final clue. It doesn't snow as much in the city I'm thinking about. What's the answer?

It's Seattle. You know that beyond a reasonable doubt that that's what -- that's the city I'm thinking of, done.
RP 163-64.

After the defense presented closing argument, the state urged the jury to convict because officers would be fired if they made this up. RP 171. Defense counsel raised no objections to any of the state's arguments.

The jury voted to convict on the harassment charge, and could not reach a verdict on the trespass charge. CP 4; Order on Mistrial, Supp. CP. It answered yes to a special verdict regarding Lowrey's status as an officer. Special Verdict, Supp. CP. Mr. Bezhenar had no criminal history. His standard range was one to three months in jail. CP 4-6. The trial judge imposed a sentence of nine months based on the aggravating factor. CP 6-7.

The court also assessed \$2,100 in attorney's fees. The court did not make a finding that Mr. Bezhenar had the present or likely future ability to pay. CP 4-16.

Mr. Bezhenar timely appealed. CP 17.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. BEZHENAR.

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found the charge proven beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. The state presented no evidence that Mr. Bezhenar threatened to kill Officer Lowrey.

The state charged Mr. Bezhenar with felony harassment for threatening to kill Officer Lowrey. CP 1-3. The jury instructions likewise provided that the jury needed to find that the threat had constituted a threat to kill. No. 6, Court's Instructions, Supp CP.

The testimony at trial, however, described only general threats to Officer Lowrey:

He told me he'd see me again, to which I replied, "You said that last time I dealt with you." And he continued making threats to me, telling me that this was different, that he was going to get me. RP 46 (testimony of Officer Lowrey).

... he made it clear that it was not going to be a lawsuit, this did not involve monetary issues, this was going to be dealt with a different way...He told me that this is about revenge, this is not a

lawsuit, and that I was going to be sorry... I told him that he was crossing the line and that if he showed up at my house he would be shot on sight. And he laughed and said not to worry, it wouldn't be him, it would be somebody that I didn't know that shows up to my house.

RP 47 (testimony of Officer Lowrey).

I can't recall with any specifics as to what he said. In reviewing my report, I had indicated that he had made veiled threats. I used the word "veiled." He never said anything specifically about "I'm going to kill you, I'm going to shoot you, I'm going to do anything." It was all veiled threats.

RP 80 (testimony of Officer Clary).

Officer Finch was the only other witness who testified regarding the alleged threats. She stated that all she heard of the threats was "something about it not being financial." RP 68.

Taking this evidence in the light most favorable to the state, no rational jury could have found beyond a reasonable doubt that Mr. Bezhenar threatened to kill Officer Lowrey. The testimony described only "veiled threats" and Mr. Bezhenar wanting revenge beyond the financial. The evidence does not give rise to a reasonable inference of threats to kill.

The state presented insufficient evidence that Mr. Bezhenar threatened to kill Officer Lowrey. Insufficient evidence requires reversal of his conviction and dismissal with prejudice. *Chouinard*, 169 Wn. App. at 903.

C. The state presented no evidence that any alleged threats placed Officer Lowrey in reasonable fear that Mr. Bezhenar would kill him.

A conviction for felony harassment based on a threat to kill must be supported by proof that the alleged victim was placed in reasonable fear that s/he would be killed. *State v. C.G.*, 150 Wn.2d 604, 612, 80 P.3d 594 (2003).

In *C.G.*, the alleged victim testified that a threat “caused him concern” that the accused “might try to harm him or someone else in the future.” *C.G.*, 150 Wn.2d at 606-07. The court found this testimony insufficient to establish reasonable fear the accused would carry out the threat to kill. *Id.*

Similarly, Officer Lowrey testified only that the threats placed him in fear that Mr. Bezhenar would “do something harmful”:

STATE: What did you take these threats to mean?

LOWREY: I took them to mean he was planning on doing something harmful to me or my family.

STATE: Were you in fear that he was going to kill you at some point?

LOWREY: I was more in fear for my family than me...

RP 47.

Officers Lowrey and Clary also testified that Officer Lowrey took the threats seriously. RP 48, 83.

The state presented no evidence that the threats placed Officer Lowrey in reasonable fear that Mr. Bezhenar would kill him. This failure

requires reversal of Mr. Bezhenar's conviction and dismissal with prejudice. *C.G.*, 150 Wn.2d at 612; *Chouinard*, 169 Wn. App. at 903.

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT DENIED MR. BEZHENAR A FAIR TRIAL.

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.*

An appellant can also raise prosecutorial misconduct for the first time on review if it creates manifest error affecting a constitutional right. RAP 2.5(a)(3). Prosecutorial misconduct that violates the constitutional rights of the accused requires reversal unless the court finds it harmless beyond a reasonable doubt. *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012) *review denied*, 176 Wn.2d 1006, 297 P.3d 68 (2013) (Fuller I). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008) (Jones I).

B. Numerous instances of prosecutorial misconduct require reversal of Mr. Bezhenar's conviction.

Prosecutorial misconduct can deprive the accused of a fair trial.

Glasmann, 175 Wn.2d at 703-04; U.S. Const. Amend VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's improper remarks warrant reversal, the court looks at their prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if there is a substantial likelihood that they affected the verdict. *Glasmann*, 175 Wn.2d at 704.

1. The prosecutor committed misconduct by minimizing the state's burden of proof.

Due process places the burden on the state to prove each element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 22; *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (*citing Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).² A prosecutor commits misconduct by making arguments shifting the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). The presumption of innocence

² This violation of Mr. Bezhenar's right to the presumption of innocence created manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

makes up the “bedrock principle upon which our criminal justice system stands.” *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010). A prosecutor’s misstatement of the state’s burden of proof “constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights.” *Id.*

A prosecutor commits misconduct by using an analogy that trivializes the reasonable doubt standard. *State v. Jones*, 163 Wn. App. 354, 363, 266 P.3d 886 (2011) *review denied*, 173 Wn.2d 1009, 268 P.3d 941 (2012) (Jones II) (“...discussing the reasonable doubt standard in the context of making an affirmative decision based on a game show, like analogizing the reasonable doubt standard to a partially completed puzzle, trivializes the State's burden”). This is particularly true where the state attempts to “quantif[y] the level of certainty required to satisfy its burden of proof” through the use of a “puzzle” analogy. *Fuller*, 169 Wn. App. at 825-26.

If you feel it in your gut today, if you feel it in your gut next week that he's guilty, then you are satisfied beyond a reasonable doubt. If you think he did it then you are satisfied beyond a reasonable doubt.
RP 163.

The argument that the jurors could convict if they “feel it in [their] gut” and “think he did it” misstated the law by minimizing the state’s burden of proof. *Johnson*, 158 Wn. App. at 685-86. A juror can “think”

that an accused person is guilty, or even “feel it in [his/her] gut,” without being convinced beyond a reasonable doubt.

The prosecutor also committed misconduct by comparing the state’s burden to a guessing game:

Now, for an example, let's say I'm thinking of a city. You have no idea what city I'm thinking of right now. There's no way you could know. But I'm going to give you clues and at the end you're going to be satisfied beyond a beyond a reasonable doubt what city I'm thinking of. Let's say it's a city by a body of water. And I apologize for that not being totally visible.

Well, here are a few possibilities: We've got Boston, we've got Chicago, we've got Detroit, and we've got Seattle. But there's no way you can know what city I'm thinking of at this point. Not enough information.

Well, here's another clue. I'm not thinking of a huge city. So what's left? Not Chicago, Chicago is -- it's immense, so that's gone. So there's only three possibilities, Detroit, Boston, or Seattle. The city I'm thinking of is not in the Midwest. What does that mean? There goes Detroit. But you're still not sure. You have two possibilities. It could be either Boston or Seattle. Here's the final clue. It doesn't snow as much in the city I'm thinking about. What's the answer?

It's Seattle. You know that beyond a reasonable doubt that that's what -- that's the city I'm thinking of, done.
RP 163-64.

The prosecutor illustrated this argument with PowerPoint slides depicting photos of the four cities, which he narrowed down in turn. State’s Closing PowerPoint, Supp. CP. The prosecutor’s analogy portrayed the state’s burden of proof as a choice that the jury could make

by answering three simple questions. This argument impermissibly trivialized the presumption of innocence and attempted to quantify the reasonable doubt standard. *Jones*, 163 Wn. App. at 363; *Fuller I*, 169 Wn. App. at 825-26. The prosecutor's arguments misstating and trivializing the state's burden of proof constituted flagrant and ill-intentioned misconduct. *Johnson*, 158 Wn. App. at 686. The prosecutor's misconduct requires reversal of Mr. Bezhenar's conviction. *Id.*

2. The prosecutor committed misconduct by bolstering the testimony of the state's witnesses with facts not in evidence.

A prosecutor commits misconduct by "testifying" during closing argument to "facts" not in evidence. *Glasmann*, 175 Wn.2d at 705. A prosecutor may not make arguments bolstering the credibility of a witness even if the evidence supports such an argument. *Jones I*, 144 Wn. App. at 293; U.S. Const. Amend. VI, XIV; art. I, § 22.³

Accordingly, a prosecutor commits misconduct by attempting to bolster a witness's credibility with prejudicial "facts" not in evidence. *Jones I*, 144 Wn. App. at 292-94. In *Jones*, the prosecutor argued that the law enforcement witnesses were credible because would suffer

³ This violation of Mr. Bezhenar's right to a fair trial created manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

professional repercussions if they relied on an untrustworthy informant.

Id. That argument impermissibly bolstered witness credibility with “facts” not in evidence. *Id.*

Similarly, at Mr. Bezhenar’s trial, the prosecutor argued that the state’s law enforcement witnesses would put their jobs on the line if they testified falsely. RP 171. The prosecutor stated that the jury should find state’s witnesses more credible than Mr. Bezhenar for that reason:

Honestly, think about credibility. Who has more to lose? The officers? I mean, they're going to put their career on the line for conspiring to make all this stuff up?
RP 171.

This argument improperly bolstered the testimony of the state’s three law enforcement witnesses with “facts” not in evidence. *Johnson*, 158 Wn. App. at 686. The state presented no evidence regarding the professional repercussions for police officers who provide unreliable testimony. This argument likely affected the jury’s verdict because the state’s case relied completely on the testimony of three police officers. The argument invited the jury to find the state’s witnesses more credible than the defense witnesses because of their status as police officers. The prosecutor’s misconduct prejudiced Mr. Bezhenar.

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by arguing that the state’s witnesses were inherently more

reliable than Mr. Bezhenar and his mother – the only defense witnesses. *Johnson*, 158 Wn. App. at 686. This prosecutorial misconduct requires reversal of Mr. Bezhenar’s conviction. *Id.*

3. The prosecutor committed misconduct by giving a personal opinion of guilt and introducing testimony providing opinions of Mr. Bezhenar’s guilt.

A prosecutor commits misconduct by providing a personal opinion of the guilt of the accused. *Glasmann*, 175 Wn.2d at 706. Testimony providing an opinion of guilt is, likewise, improper because it invades the exclusive province of the jury. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009); U.S. Const. Amend. VI, XIV; art. I, §§ 21, 22.⁴ A law enforcement officer’s opinion of guilt can be particularly harmful because the jury may lend it “a special aura of reliability.” *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009).

Whether a statement constitutes a threat is an element of the offense of harassment. RCW 9A.46.020; *State v. Mills*, 154 Wn.2d 1, 9, 109 P.3d 415 (2005).

⁴ This violation of Mr. Bezhenar’s right to a jury trial created manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

At Mr. Bezhenar's trial, the prosecutor repeatedly identified Mr. Bezhenar's alleged statements as "threats" in his questions to all three of the state's witnesses:

PROSECUTOR: What did you take these threats to mean?
RP 47.

...
PROSECUTOR: So you thought he was serious? You took these threats seriously?
RP 48.

...
PROSECUTOR: When these threats were being made to you by the defendant who else was in the general area?
RP 49.

...
PROSECUTOR: How did Officer Lowrey react to the threat?
RP 69.

...
PROSECUTOR: After hearing the defendant threaten Officer Lowrey, what did you do?
RP 81.

See also RP 49-51, 68-69, 79, 81-83.

Whether Mr. Bezhenar's alleged statements qualified as threats constituted a factual question for the jury. RCW 9A.46.020; *Mills*, 154 Wn.2d at 9. The prosecutor's repeated references to those statements as "threats" provided a personal opinion of guilt that invaded the province of the jury. *Glasmann*, 175 Wn.2d at 706. The prosecutor's elicitation of testimony identifying the statements as "threats" from each of the state's witnesses invited those witnesses to provide opinions of guilt as well.

The primary factual issue in Mr. Bezhenar's case was whether he had threatened Officer Lowrey. The prosecutor's repeated references to "threats" and elicitation of similarly improper opinions from each of the state's witnesses likely affected the jury's verdict. *Glasmann*, 175 Wn.2d at 714. The misconduct violated Mr. Bezhenar's constitutional right to a trial by jury. *Fuller I*, 169 Wn. App. at 813. The state cannot show that this constitutional violation was harmless beyond a reasonable doubt. *Id.*

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by providing a personal opinion of Mr. Bezhenar's guilt and eliciting improper opinion testimony from the state's witnesses.

Glasmann, 175 Wn.2d at 706; *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) *aff'd on other grounds*, 165 Wn.2d 870, 204 P.3d 916 (2009). This misconduct requires reversal of Mr. Bezhenar's conviction. *Glasmann*, 175 Wn.2d at 714.

4. The prosecutor committed misconduct by injecting Mr. Bezhenar's ethnicity into closing argument.

Prosecutors have a duty to "seek verdicts free from passion or prejudice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); *State v. Perez-Mejia*, 134 Wn. App. 907, 915-16, 143 P.3d 838 (2006). It follows that a prosecutor commits misconduct by making arguments invoking ethnic or religious prejudice. *Monday*, 171 Wn.2d at 676; *Perez-*

Mejia, 134 Wn. App. at 915-16. This type of misconduct violates the constitutional right to an impartial jury. U.S. Const. Amend VI, XIV; art. I, § 22;⁵ *Monday*, 171 Wn.2d at 676.

The *Monday* court found that the prosecutor injected racial prejudice into the proceeding by making repeated references to the “po-leese.” *Monday*, 171 Wn.2d at 679. Similarly, the *Perez-Mejia* court reversed based on the prosecutor’s reference to the accused’s “machismo” in a case alleging participation in a Central American gang. *Id.* In so holding, the court noted that several of the defense witnesses testified in Spanish using an interpreter. *Perez-Mejia*, 134 Wn. App. at 918.

It is a common stereotype that recent immigrants from Eastern Europe are involved in organized crime.⁶ Mr. Bezhenar is an ethnic Russian.⁷ During closing, the prosecutor referenced the mafia when encouraging the jury to infer that the alleged threat constituted a threat to kill. This argument improperly injected Mr. Bezhenar’s ethnicity into the

⁵ This violation of Mr. Bezhenar’s right to an impartial jury constituted manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

⁶ See e.g. Pavel Butorin, *I Want You to Off Azimoff: Eastern European Stereotypes on U.S. TV* (Sept. 5, 2012), <http://www.rferl.org/content/east-european-stereotypes-on-us-tv/24698997.html> (survey of portrayals of Eastern Europeans on television in the United States).

⁷ His ethnicity would have been clear to the jury based on his name, his accent, and the fact that his mother testified with a Russian interpreter at trial. RP 85-86.

proceeding:

But the bottom line is that he was threatening to kill Officer Lowrey. If you -- I don't know if you watch mobster movies, but when someone says, "Listen, you don't do this contract you'll be sleeping with the fishes," okay, he didn't say I'm going to killing [sic] you if you don't do this but you all know what was meant. RP 158.

This argument invited the jury to assume that Mr. Bezhenar was more likely to make a disguised threat to kill because of his ethnicity. This tactic violated Mr. Bezhenar's constitutional rights and the state cannot show that it was harmless beyond a reasonable doubt. *Perez-Mejia*, 134 Wn. App. at 920.

The prosecutor committed prejudicial misconduct by injecting Mr. Bezhenar's ethnicity into the trial. *Perez-Mejia*, 134 Wn. App. at 915-16. This improper argument requires reversal of Mr. Bezhenar's conviction. *Perez-Mejia* 134 Wn. App. at 921.

5. The cumulative effect of the prosecutor's misconduct requires reversal.

The cumulative effect of repeated instances prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *Glasmann*, 175 Wn.2d at 707.

At Mr. Bezhenar's trial, the prosecutor made a lengthy argument minimizing and trivializing the state's burden of proof, improperly

bolstered the testimony of all three of the state's witnesses with "facts" not in evidence, provided a personal opinion of guilt, elicited testimony providing improper opinions of guilt from state witnesses, and injected Mr. Bezhenar's nationality into closing argument. RP 47-51, 68-69, 79, 81-83, 158, 163-64, 171. The misconduct occurred at every point in the state's case. No curative instruction could have undone the combined prejudicial weight of these repeated instances of misconduct. *Glasmann*, 175 Wn.2d at 707. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Bezhenar's conviction. *Glasmann*, 175 Wn.2d at 714.

III. THE STATE'S WITNESSES PROVIDED IMPROPER OPINIONS OF MR. BEZHENAR'S GUILT.

A. Standard of Review.

Reviewing courts consider constitutional issues *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011).

Testimony providing an "explicit or nearly explicit" opinion of the guilt of the accused creates manifest error affecting a constitutional right. *King*, 167 Wn.2d at 332. An appellate court may consider such an error for the first time on appeal. RAP 2.5(a)(3).

B. The state’s witnesses provided explicit opinions of Mr. Bezhenar’s guilt by characterizing his statements as “threats.”

Testimony providing an improper opinion of the guilt violates the right to a jury trial. *Hudson*, 150 Wn. App. at 652; U.S. Const. Amend. VI, XIV; art. I, §§ 21, 22. Opinion testimony violates the “inviolable” right to trial by jury, which “vests in the jury the ultimate power to weigh the evidence and determine the facts.” *Hudson*, 150 Wn. App. at 652.

Neither a lay nor an expert witness may offer improper opinion testimony by direct statement or inference. *King*, 167 Wn.2d at 331. A law enforcement officer’s improper opinion testimony may be particularly prejudicial because it carries “a special aura of reliability.” *Id.*

Whether testimony provides an improper opinion turns on the circumstances of the case, including “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *Hudson*, 150 Wn. App. at 653.

In a harassment case, whether the accused’s statements qualify as “threats” is an element of the offense. RCW 9A.46.020; *Mills*, 154 Wn.2d at 9. Additionally, the First Amendment requires the state to prove that a statement constitutes a “true threat.” *State v. Schaler*, 169 Wn.2d 274,

283, 236 P.3d 858 (2010). An opinion of whether a statement constitutes a threat is, therefore, an opinion of guilt of a harassment charge.

Officers Lowrey and Clary both characterized Mr. Bezhenar's statements as "threats" throughout their testimony. RP 47-51, 79-80. Under the *Hudson* factors, these statements constituted improper opinions of Mr. Bezhenar's guilt. *Hudson*, 150 Wn. App. at 653. Turning first to the type of witness involved, as police officers, the jury likely attributed a "special aura of reliability" to Officers Lowrey and Clary's testimony. *Id.*; *King*, 167 Wn.2d at 331. Looking second to the nature of the testimony, the officers' explicit characterizations of the statements as "threats" brought them directly in line with the elements of the offense. *Hudson*, 150 Wn. App. at 653. Considering third and fourth the nature of the charge and the defense, Mr. Bezhenar's harassment charge put the question of whether his statements constituted threats directly at issue. *Id.* His defense of general denial put each element in play, including whether his statements qualified as threats. Analyzing, finally, the other evidence before the trier of fact, Officers Lowrey and Clary were the only witnesses who claimed to have heard Mr. Bezhenar's statements. *Id.*

The officers' characterizations of the statements as "threats" constituted improper opinions of guilt and invaded the exclusive province

of the jury. *Id.*; *Sutherby*, 138 Wn. App. at 617. The improper opinion testimony requires reversal of Mr. Bezhenar's conviction. *Id.*

IV. MR. BEZHENAR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel requires reversal if counsel provides deficient performance that prejudices the accused. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Ineffective assistance raises an issue of constitutional magnitude that a court can consider for the first time on appeal. *Id.*; RAP 2.5(a)(3).

B. Defense counsel provided ineffective assistance by failing to object to prosecutorial misconduct and improper opinion testimony.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amend. VI, XIV; *Strickland*, 466 US at 685.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kyлло*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

A failure to object constitutes ineffective assistance when counsel has no valid tactical reason to waive objection. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

1. Mr. Bezhenar's counsel unreasonably failed to object to prosecutorial misconduct.

In most cases, failure to object to prosecutorial misconduct waives the issue for appeal.⁸ *Glasmann*, 175 Wn.2d at 704. Misconduct that minimizes the state's burden of proof, provides a personal opinion of guilt, or inject ethnicity into the proceeding can be particularly prejudicial. *Johnson*, 158 Wn. App. at 685-86; *Glasmann*, 175 Wn.2d at 706; *Monday*, 171 Wn.2d at 676. Such improper arguments violate the right to a fair trial based on the evidence in the case. *Johnson*, 158 Wn. App. at 685-86; *Glasmann*, 175 Wn.2d at 706; *Monday*, 171 Wn.2d at 676.

Throughout the state's presentation of evidence and closing argument at Mr. Bezhenar's trial, the prosecutor committed numerous instances of misconduct. The prosecutorial misconduct served to trivialize the state's burden of proof, bolster the credibility of state witnesses with "facts" not in evidence, provide a personal opinion of guilt, elicit improper opinions of guilt from state witnesses, and inject Mr. Bezhenar's ethnicity

⁸ Exceptions exist for misconduct that is flagrant and ill-intentioned or that creates a manifest error affecting a constitutional right.

into the case. RP 47-51, 68-69, 79, 81-83, 158, 163-64, 171. Mr. Bezhenar's defense attorney did not object to any of the prosecutor's improper statements. RP 47-51, 68-69, 79, 81-83, 158, 163-64, 171.

The prosecutor's misconduct violated Mr. Bezhenar's presumption of innocence and right to a trial by jury. *Johnson*, 158 Wn. App. at 685-86; *Glasmann*, 175 Wn.2d at 706; *Monday*, 171 Wn.2d at 676. Mr. Bezhenar's attorney had no valid tactical reason not to protect his client from the prejudicial effect of this extensive misconduct. *Hendrickson*, 138 Wn. App. at 833.

Mr. Bezhenar's counsel provided ineffective assistance by unreasonably failing to object to prejudicial prosecutorial misconduct. *Hendrickson*, 138 Wn. App. at 833. Ineffective assistance of counsel requires reversal of Mr. Bezhenar's conviction. *Kyllo*, 166 Wn.2d at 871.

2. Mr. Bezhenar's counsel unreasonably failed to object to improper opinion testimony.

Failure to object to improper opinion testimony can waive the issue for appeal unless the testimony included an explicit or nearly explicit opinion of guilt or witness credibility. *King*, 167 Wn.2d at 332. Without a valid tactical reason, failure to object constitutes deficient performance. *Hendrickson*, 138 Wn. App. at 833.

In a harassment case, whether a statement constitutes a threat is an element that must be proven to the jury. RCW 9A.46.020; *Mills*, 154 Wn.2d at 9. At Mr. Bezhenar's trial, Officers Lowrey and Clary, the only witnesses who claimed to have heard Mr. Bezhenar's alleged statements, identified them as "threats" throughout their testimony. RP 47-51, 79-80. Mr. Bezhenar's defense attorney did not object to any of the improper opinion testimony. RP 47-51, 79-80.

Officers Lowrey and Clary improperly opined on Mr. Bezhenar's guilt in violation of his right to a trial by jury. *Hudson*, 150 Wn. App. at 652. Mr. Bezhenar's counsel failed to protect his client's constitutional rights by objecting to the improper testimony. Counsel had no valid tactical justification for this failure. *Hendrickson*, 138 Wn. App. at 833.

Whether Mr. Bezhenar threatened Officer Lowrey was the primary factual issue for the jury in his case. Counsel's failure to prevent testimony from the state's witnesses on this issue of guilt prejudiced Mr. Bezhenar.

Defense counsel provided ineffective assistance by failing to object to testimony providing an improper opinion of Mr. Bezhenar's guilt. *Hendrickson*, 138 Wn. App. at 833. Ineffective assistance of counsel requires reversal of Mr. Bezhenar's conviction. *Kyllo*, 166 Wn.2d at 871.

- C. Mr. Bezhenar’s attorney provided ineffective assistance by failing to request a lesser-included instruction for misdemeanor harassment.

An accused person has the unqualified right to have the jury consider an included offense⁹ if there is even the slightest evidence that the person committed only the included offense. RCW 10.61.006; *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984). Under most circumstances, counsel provides ineffective assistance by failing to request appropriate instructions on an included offense. *Richards v. Quarterman*, 566 F.3d 553, 569-570 (5th Cir. 2009); *Breakiron v. Horn*, 642 F.3d 126, 138-139 (3d Cir. 2011).

In some circumstances, a deliberate decision to forgo instruction on an included offense constitutes reasonable trial strategy. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011). In *Grier*, defense counsel proposed and then withdrew a lesser-included instruction. The record reflected that counsel consulted with the defendant before withdrawing the proposed instruction, and the defendant explicitly approved the decision on the record. *Grier*, 171 Wn.2d at 27. The narrow issue addressed by the Supreme Court was “whether Ms. Grier's defense counsel was ineffective in withdrawing a request for jury instructions on the lesser included

⁹ An offense is included within a greater crime if proof of the greater offense necessarily establishes the lesser offense. The evidence is viewed in a light most favorable to the accused person. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

offenses of first and second degree manslaughter after consulting with his client.” *Grier*, 171 Wn.2d at 20.

The Supreme Court noted that counsel’s decision could not necessarily be upheld simply because it fell within the realm of strategy:

Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.”

Grier, 171 Wn.2d at 33-34 (quoting *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)). Nonetheless, the court reversed the Court of Appeals, and reinstated the defendant’s conviction. *Grier*, 171 Wn.2d at 45.

The *Grier* court applied *Strickland* and found that counsel made a legitimate strategic choice under the circumstances. *Grier*, 171 Wn.2d at 42-45. However, the court did not hold that such a choice would always be reasonable. Instead, the court suggested that the legitimacy of an all-or-nothing strategy rests on two things: (1) defense counsel’s belief that “there is support for the decision” to pursue such a strategy, and (2) appropriate consultation between attorney and client. *Grier*, 171 Wn.2d at 39.

1. Defense counsel’s failure to propose a jury instruction on misdemeanor harassment constituted deficient performance.

As a preliminary matter, nothing in the record suggests that defense counsel actually chose to pursue an all-or-nothing strategy in this case. *See Hendrickson*, 129 Wn.2d at 78-79 (requiring “some support in the record” that counsel actually “made a tactical decision.”); *see also Richards*, 566 F.3d at 564. Nor is there any indication that Mr. Bezhenar personally consented to forgo his “unqualified right”¹⁰ to have the jury consider applicable included offenses.¹¹ This distinguishes his case from *Grier*, in which the defendant personally acquiesced to counsel’s strategy on the record. *Grier*, 171 Wn.2d at 26-27.

If counsel’s failure to pursue an included offense in Mr. Bezhenar’s case stemmed from a strategic choice, that choice was not a legitimate tactic under the circumstances of this case. First, Mr. Bezhenar was entitled to an instruction on misdemeanor harassment. *Fernandez-Medina*, 141 Wn.2d 448 at 454. Legally, misdemeanor harassment (based on a threat to cause bodily harm) is a lesser offense of felony harassment (based on a threat to kill). *Mills*, 154 Wn.2d at 7. Factually, the circumstances of Mr. Bezhenar’s alleged “veiled threats” give rise to an inference that he threatened only to cause harm to -- and not to kill --

¹⁰ *Parker*, 102 Wn.2d at 163-164.

¹¹ Furthermore, the record does not indicate that counsel ever consulted with Mr. Bezhenar regarding the option of pursuing an included offense.

Officer Lowrey. RP 80; *State v. Workman*, 90 Wn.2d 443, 448, 584 P.2d 382 (1978).

Second, the defense theory would have remained the same if the jury were instructed on the included offense. Mr. Bezhenar argued that the state did not prove a threat to kill Officer Lowrey. RP 166-170. This mirrors argument that counsel would have used to urge the jury to convict Mr. Bezhenar only of misdemeanor harassment.

Third, an outright acquittal was highly unlikely in Mr. Bezhenar's case. Three police officers testified that he had threatened Officer Lowrey, while only Mr. Bezhenar and his mother testified to the contrary. Mr. Bezhenar's mother had obvious credibility problems due to her affection for her son. Pursuing an all-or-nothing strategy based only on the testimony of Mr. Bezhenar and his mother was not a reasonable tactical choice.

Finally, the discrepancy in consequences between the greater and lesser offenses was more than "significant." *Grier*, 171 Wn.2d at 38-39. Mr. Bezhenar had no felony history.¹² His conviction for felony harassment changed that. Had counsel argued for a conviction of

¹² Mr. Bezhenar had a prior misdemeanor conviction. An additional misdemeanor conviction would not have changed his situation significantly. RP 185.

misdemeanor harassment, Mr. Bezhenar would not now be labeled a convicted felon. CP 4-16.

Mr. Bezhenar's felony conviction will have consequences far beyond his brief period of incarceration. *See e.g.* art. VI, § 3; RCW 29A.08.520 (regarding voting rights for felons); RCW 9.41.040 (criminalizing gun possession for felons); RCW 43.43.754 (regarding DNA collection for felons). A felony conviction will make it more difficult for Mr. Bezhenar to find employment and housing for the rest of his life. *See e.g.* G. J. Miller, *Collateral Consequences of Criminal Convictions: A Cost-Benefit Analysis*, 9 J.L. Econ. & Pol'y 119 (2012); M. Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U.L. Rev. 457 (2010); L. D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F.L. Rev. 193 (2004). It was not reasonable for Mr. Bezhenar's counsel to risk his client's felony-free record on an all-or-nothing strategy.

In sum, even if defense counsel did make a strategic choice (after consulting with Mr. Bezhenar), that choice cannot withstand scrutiny under *Strickland*. The circumstances known to counsel – the availability of the misdemeanor instruction, the lack of conflict in strategy between the two charges, the weakness of the defense case, and Mr. Bezhenar's lack of

prior felony convictions – made any strategic choice objectively unreasonable. Counsel provided deficient performance. *Strickland*.

2. Counsel’s failure to propose an instruction on misdemeanor harassment prejudiced Mr. Bezhenar.

Mr. Bezhenar suffered prejudice because of his attorney’s deficient performance. When defense counsel failed to propose instructions on misdemeanor harassment, Mr. Bezhenar lost his “unqualified right” to have the jury consider that charge. *Parker*, 102 Wn.2d at 163-164.

The *Grier* court assumed that jurors would not have convicted absent sufficient evidence. *Grier*, 171 Wn.2d at 42-44. This passage appears to foreclose a finding of prejudice when defense counsel forgoes the opportunity to seek instruction on an included offense. *Id.* This is incorrect for two reasons.

First, the prejudice analysis of *Grier* is *dicta*. *Bennett v. Smith Bundy Berman Britton, PS*, 176 Wn.2d 303, 317, 291 P.3d 886 (2013) (statements in an opinion that are not necessary to the decision of the case are *dicta* and do not control future cases). As *dicta*, it does not prevent a finding of prejudice in cases such as this one.

Second, under *Strickland*, a finding of prejudice requires “a reasonable probability” that counsel’s error affected the outcome. *Kyllo*, 166 Wn.2d at 862. A reviewing court must examine the strength of the

state's evidence, the arguments of counsel, and any other factor that could have influenced the verdict. *Grier's* suggestion—that jurors always follow the court's instructions—cannot be taken at face value and used to defeat meritorious appeals. The *dicta* in *Grier*, if interpreted to categorically prohibit a finding of prejudice, violates *Strickland*.

In this case, counsel's unreasonable failure to forgo instruction on misdemeanor harassment deprived Mr. Bezhenar of his unqualified right to have the jury consider applicable included offenses. Had counsel performed adequately, the jury would have considered the included offense. There is a reasonable probability that jurors would have voted to convict Mr. Bezhenar only of the lesser charge.

Juries are mysterious. Their verdicts are sometimes logically incomprehensible.¹³ Because of this, *Strickland's* "reasonable probability" standard provides the best test for evaluating prejudice. It should not be abandoned in favor of a *per se* rule that inflexibly substitutes a presumption (that jurors always understand and follow the court's instructions to the letter) for the complex reality that characterizes jury deliberations.

¹³ In *Grier*, for example, the jury convicted the defendant of murder but did not find that she was armed during commission of the offense—even though the victim died from gunshot wounds. *Grier*, 171 Wn.2d at 28-29.

Mr. Bezhenar's attorney provided deficient performance by unreasonably failing to propose an instruction on misdemeanor harassment. Mr. Bezhenar was prejudiced by this failure. Ineffective assistance of counsel requires reversal of Mr. Bezhenar's conviction. *Kyllo*, 166 Wn.2d at 862.

V. THE COURT ORDERED MR. BEZHENAR TO PAY THE COST OF HIS PUBLIC DEFENDER IN VIOLATION OF HIS RIGHT TO COUNSEL.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *State v. Jones*, No. 41902-5-II, 2013 WL 2407119, --- P.3d --- (June 4, 2013) (Jones III); *E.S.*, 171 Wn.2d at 702.

B. The court violated Mr. Bezhenar's right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining that he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amend. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974) (Fuller II). Under *Fuller II*, the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCWA 10.01.160(3).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.¹⁴ *Fuller II*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a

¹⁴ In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay". *Fuller II*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller II*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the accused has the present or future ability to repay the cost of court-appointed counsel before

ordering him/her to do so. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions”); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) (“In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute”).

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney’s fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns

Fuller on its head and impermissibly chills the exercise of the right to counsel. *Fuller II*, 417 U.S. at 53.

The lower court found Mr. Bezhenar indigent at both the beginning and the end of the proceedings. Order Assigning Lawyer, Supp CP; CP 31-33. Nonetheless, it ordered him to pay \$2,100 in fees for his court-appointed attorney without first entering a finding regarding his present or future ability to pay. RP 184-190; CP 9.¹⁵

The court violated Mr. Bezhenar's right to counsel. Under *Fuller*, it lacked authority to order payment for the cost of court-appointed counsel without first finding that he had the ability to do so. *Fuller II*, 417 U.S. at 53. The court's order for Mr. Bezhenar to pay attorney's fees must be vacated. *Id.*

CONCLUSION

The evidence was insufficient to prove that Mr. Bezhenar made a threat to kill. The state also failed to prove that Officer Lowrey feared Mr. Bezhenar would carry out a threat to kill. Because of these failures of

¹⁵ Although the court entered boilerplate language that it had "considered... the defendant's present and future ability to pay legal financial obligations..." no such consideration appears on the record and the court did not enter a finding that Mr. Bezhenar actually did have the ability to pay. CP 6.

proof, Mr. Bezhenar's conviction must be reversed and the case dismissed with prejudice.

In addition, the prosecutor committed misconduct that was flagrant and ill-intentioned. The prosecutor violated Mr. Bezhenar's right to a fair trial by minimizing the state's burden, bolstering the credibility of state witnesses, "testifying" to "facts" outside the record, conveying a personal opinion on Mr. Bezhenar's guilt, introducing improper opinion testimony, injecting Mr. Bezhenar's ethnicity into the case, and relying on ethnic stereotypes.

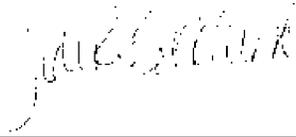
Furthermore, Mr. Bezhenar's counsel provided ineffective assistance by failing to object to the prosecutorial misconduct and improper opinion testimony and failing to propose a jury instruction on the lesser offense of misdemeanor harassment.

Finally, the court violated Mr. Bezhenar's right to counsel by ordering to pay the cost of his court-appointed attorney without first finding that he had the ability to do so.

If the case is not dismissed, Mr. Bezhenar's conviction must be reversed and the case remanded for a new trial. In the alternative, his order to pay the cost of his public defender must be vacated.

Respectfully submitted on July 22, 2013,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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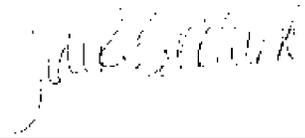
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 July 22, 2013.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

July 22, 2013 - 2:36 PM

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