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NO. 86119-6

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRYAN EDWARD ALLEN,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
1. THIS COURT SHOULD NOT APPROVE JURY INSTRUCTIONS THAT COMMENT ON THE EVIDENCE IN VIOLATION OF ARTICLE 4, SECTION 16 OF THE WASHINGTON CONSTITUTION	4
a. The Washington Constitution Prohibits Judicial Comment On The Evidence.....	5
b. A Jury Instruction That Tells Jurors How To Weigh The Testimony Of An Eyewitness Is A Prohibited Comment On The Evidence	11
c. Other States With Constitutional Prohibitions On Judicial Comment On The Evidence Do Not Allow Cautionary Instructions On Eyewitness Testimony	14
d. The Instruction Cautioning Jurors On The Testimony Of An Accomplice Is A Comment On The Evidence.....	16
e. Instructions Cautioning Jurors On Eyewitness Testimony Are Not Effective.....	20
2. THE TERM "TRUE THREAT" IS NOTHING MORE THAN A TERM OF ART THAT DESCRIBES THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF ANY CRIME.....	23

a.	The Charging Document And Jury Instructions	24
b.	The Elements Of The Crime Of Harassment	25
3.	THE PROSECUTOR PROPERLY RELIED ON INFERENCES FROM THE FACTS IN ARGUING WITNESS CREDIBILITY	30
D.	<u>CONCLUSION</u>	31

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Quercia v. United States, 289 U.S. 466,
53 S. Ct. 698, 77 L. Ed. 1321 (1933)..... 5

United States v. Cassel, 408 F.3d 622
(9th Cir. 2005)..... 29

United States v. Fuller, 387 F.3d 643
(7th Cir. 2004)..... 29

United States v. Lockhart, 382 F.3d 447
(4th Cir. 2004)..... 29

United States v. Telfaire, 469 F.2d 552
(D.C.Cir. 1972)..... 11, 14, 15

United States v. Tello, 707 F.2d 85
(4th Cir. 1983)..... 5

Vicksburg & Meridian R. Co. v. Putnam, 118 U.S. 545,
7 S. Ct. 1, 30 L. Ed. 257 (1886)..... 5

Virginia v. Black, 538 U.S. 343,
123 S. Ct. 1536, 155 L. Ed.2d 535 (2003)..... 28

Washington State:

Bardwell v. Ziegler, 3 Wash. 34,
28 P. 360 (1891)..... 6

Christensen v. Munsen, 123 Wn.2d 234,
867 P.2d 626 (1994)..... 18

Gianini v. Cerini, 100 Wash. 687,
171 P. 1007 (1918)..... 8

<u>In re Detention of R.W.</u> , 98 Wn. App. 140, 988 P.2d 1034 (1999).....	9
<u>State v. Allen</u> , 101 Wn.2d 355, 678 P.2d 798 (1984).....	28
<u>State v. Allen</u> , 161 Wn. App. 727, 255 P.3d 784 (2011).....	4, 12, 17, 22
<u>State v. Ammlung</u> , 31 Wn. App. 696, 644 P.2d 717 (1982).....	11
<u>State v. Atkins</u> , 156 Wn. App. 799, 236 P.3d 897 (2010).....	23, 26
<u>State v. Brown</u> , 111 Wn.2d 124, 761 P.2d 588 (1988).....	12
<u>State v. Carothers</u> , 84 Wn.2d 256, 525 P.2d 731 (1974).....	17, 18, 20
<u>State v. Cheatam</u> , 150 Wn.2d 626, 81 P.3d 830 (2003).....	22
<u>State v. Crotts</u> , 22 Wash. 245, 60 P. 403 (1900).....	10
<u>State v. Delker</u> , 35 Wn. App. 346, 666 P.2d 896, <i>rev. denied</i> , 100 Wn.2d 1016 (1983).....	11
<u>State v. Edwards</u> , 23 Wn. App. 893, 600 P.2d 566 (1979).....	11
<u>State v. Faucett</u> , 22 Wn. App. 869, 593 P.2d 559 (1979).....	10
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	25
<u>State v. Guzman-Cuellar</u> , 47 Wn. App. 326, 734 P.2d 966 (1987).....	11

<u>State v. Hall</u> , 40 Wn. App. 162, 697 P.2d 597, <i>rev. denied</i> , 104 Wn.2d 1001 (1985).....	11
<u>State v. Harris</u> , 102 Wn.2d 148, 685 P.2d 584 (1984).....	17
<u>State v. Hermann</u> , 138 Wn. App. 596, 158 P.3d 96 (2007).....	9, 10
<u>State v. J.M.</u> , 144 Wn.2d 472, 28 P.3d 720 (2001).....	26
<u>State v. Johnston</u> , 156 Wn.2d 355, 127 P.3d 707 (2006).....	23, 27, 30
<u>State v. Jordan</u> , 17 Wn. App. 542, 564 P.2d 340 (1977).....	11
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004).....	26
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	25
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	9, 10
<u>State v. Laureano</u> , 101 Wn.2d 745, 682 P.2d 889 (1984).....	11, 12
<u>State v. Lewis</u> , 156 Wn. App. 230, 233 P.3d 891 (2010).....	30
<u>State v. Madsen</u> , 168 Wn.2d 496, 229 P.3d 714 (2010).....	22
<u>State v. Mellis</u> , 2 Wn. App. 859, 470 P.2d 558 (1970).....	9, 13
<u>State v. Miller</u> , 72 Wash. 174, 130 P. 356 (1913).....	7, 13

<u>State v. Moon</u> , 45 Wn. App. 692, 726 P.2d 1263 (1986).....	22
<u>State v. Schaler</u> , 145 Wn. App. 628, 186 P.3d 1170 (2008), <i>rev'd. on other grounds</i> , 169 Wn.2d 274 (2010)	27
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	25
<u>State v. Sloan</u> , 149 Wn. App. 736, 205 P.3d 172, <i>rev. denied</i> , 220 P.3d 783 (2009).....	27
<u>State v. Smith</u> , 103 Wash. 267, 174 P. 9 (1918).....	8, 13
<u>State v. Tellez</u> , 141 Wn. App. 479, 170 P.3d 75 (2007).....	23, 26
<u>State v. Thompson</u> , 132 Wash. 124, 231 P. 461 (1924).....	7
<u>State v. Walters</u> , 7 Wash. 246, 34 P. 938 (1893).....	6
<u>State v. Watkins</u> , 53 Wn. App. 264, 766 P.2d 484 (1989).....	11
<u>State v. Williams</u> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	26
<u>State v. Willoughby</u> , 29 Wn. App. 828, 630 P.2d 1387, <i>rev. denied</i> , 96 Wn.2d 1018 (1981)	20

Other Jurisdictions:

<u>Conley v. State</u> , 270 Ark. 886, 607 S.W.2d 328 (1980).....	15
<u>Garden v. State</u> , 815 A.2d 327 (2003)	15

<u>Hopson v. State</u> , 327 Ark. 749, 940 S.W.2d 479 (1997).....	15
<u>In re Robert T.</u> , 307 Wis.2d 488, 746 N.W.2d 564 (2008).....	30
<u>Lenoir v. State</u> , 77 Ark. App. 250, 72 S.W.3d 899 (2002).....	15
<u>People v. Dail</u> , 22 Cal.2d 642, 140 P.2d 828 (1943).....	18, 20
<u>People v. Guiuan</u> , 18 Cal.4 th 558, 957 P.2d 928 (1998).....	18
<u>State v. Baumann</u> , 125 Ariz. 404, 610 P.2d 38 (1980).....	19
<u>State v. Brims</u> , 168 N.J. 297, 774 A.2d 441 (2001).....	16
<u>State v. Bussdieker</u> , 127 Ariz. 339, 621 P.2d 26 (1980).....	19
<u>State v. Clark</u> , 85 S.C. 273, 67 S.E. 300 (1910).....	19
<u>State v. Clopten</u> , 223 P.3d 1103 (Utah 2009).....	21, 22
<u>State v. Copeland</u> , 226 S.W.3d 287 (Tenn. 2007).....	22
<u>State v. Gates</u> , 182 Ariz. 459, 897 P.2d 1345 (1994).....	14
<u>State v. Henderson</u> , 208 N.J. 208, 27 A.3d 872 (2011).....	16
<u>State v. Mikell</u> , 257 S.C. 315, 185 S.E.2d 814 (1971).....	19

<u>State v. Patterson</u> , 337 S.C. 215, 522 S.E.2d 845 (1999)	16
<u>State v. Robinson</u> , 165 N.J. 32, 754 A.2d 1153 (2000)	16
<u>State v. Robinson</u> , 274 S.C. 198, 262 S.E.2d 729 (1980)	16
<u>State v. Rogers</u> , 4 Ariz. App. 198, 419 P.2d 102 (1966).....	14
<u>State v. Scott</u> , 37 Nev. 412, 142 P. 1053 (1914).....	10
<u>State v. Settle</u> , 111 Ariz. 394, 531 P.2d 151 (1975).....	14
<u>State v. Sowell</u> , 85 S.C. 278, 67 S.E. 316 (1910)	19
<u>State v. Valencia</u> , 118 Ariz. 136, 575 P.2d 335 (1977).....	14

Constitutional Provisions

Federal:

U.S. Const. amend. I	23, 26, 27, 28
----------------------------	----------------

Washington State:

Const. art. 1, § 22	22
Const. art. 4, § 16	1, 4, 6, 8, 9, 11, 13, 18, 22

Other Jurisdictions:

Ariz. Const. art. 6, § 27	18, 19
---------------------------------	--------

Ark. Const. art. 7, § 23.....	14
Del. Const. art. IV, § 19.....	15
Nev. Const. art. 6, § 12	10
S.C. Const. art. V, § 21	15, 19

Statutes

Washington State:

RCW 9.61.160	27
RCW 9A.36.011.....	28
RCW 9A.46.020.....	24, 25

Rules and Regulations

Washington State:

ER 401	22
ER 403	22
ER 702	22

Other Authorities

Benedict Carey, <i>Fraud Case Seen as a Red Flag for Psychology Research</i> , New York Times, November 3, 2011.....	17
Brian L. Cutler & Steven D. Penrod, <i>Mistaken Identification: The Eyewitness, Psychology, and the Law</i> (1995) at 256.....	20
Cindy J. O'Hagan, <i>When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony</i> , 81 Geo. L. J. 741 (March 1993).....	21

Edward Stein, <i>The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification</i> , 2 Law, Probability & Risk 295 (December 2003)	21
http://pss.sagepub.com/content/22/11/1359	17
http://www.nytimes.com/2011/11/03/health/research/noted-dutch- psychologist-stapel-accused-of-research- fraud.html?_r=1&scp=8&sq=benedict+carey&st=nyt	17
Joseph P. Simmons et al., <i>False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant</i> , Psychological Science 22, 1359-66 (2011).....	17
WPIC 2.04.....	28
WPIC 2.24.....	25
WPIC 6.05.....	16
WPIC 35.04.....	28
WPIC 36.07.02.....	24

A. ISSUES

1. Whether an instruction cautioning jurors on potential difficulties with cross-racial identification is a prohibited judicial comment on evidence in violation of article 4, § 16 of the Washington Constitution.

2. Whether the definition of "true threat" is an element of felony harassment, such that it must be included in the charging document and in the "to convict" jury instruction.

3. Whether the prosecutor's arguments on witness credibility, which were based on inferences from the evidence, were proper.

B. STATEMENT OF THE CASE

On August 6, 2009, at about 7:00 p.m., Gerald Kovacs, a special education teacher in the Renton School District, was walking in the University District in Seattle when he was approached by two men who tried to sell him marijuana. RP¹ 5-7. When Kovacs told the two to "F____ off," they began screaming and cursing at him. RP 8, 9-10.

After this initial encounter, Kovacs went on his way, but he soon noticed that the men were following him. RP 10. When Kovacs asked why, the man in the black hooded sweatshirt said, "I'm going to kill you, you bitch." RP 11. He lifted up his shirt, revealing what appeared to be a

¹ "RP" refers to the verbatim report of proceedings for October 21, 2009.

handgun. RP 11-13. Kovacs ran to a nearby gas station and called 911.
RP 12-14.

Both men were African-American. RP 9. The younger of the two was wearing a red "hoody"; the other wore a black "hoody," black jeans, a hat, and fancy gold-or-silver-rimmed sunglasses. Id. Kovacs described the older man as "[a]bout my size, maybe a little bigger."² Id. Kovacs told the 911 operator that the older man was "wearing like a black hoodie and jeans and he had like a baseball cap on and he had these big, he had like big sunglasses on with gold, it [sic] kind of gold on the frames." RP (911)³ 3.

The 911 dispatch call went out at 7:25 p.m. RP 48. A Seattle Police officer arrived at the Chevron Station at 47th and Brooklyn at 7:32 p.m. RP 46-48. Meanwhile, at 7:28 p.m., a University of Washington Police officer spotted two people who generally matched the description of the suspects standing on a corner at approximately 47th and University Way; the two looked at the officer, and began to walk away. RP 37-40. When the officer approached, the man wearing a white t-shirt ran, while

² Kovacs is about five feet nine inches tall, and weighs about 200 pounds. RP 32. Allen is about six feet one inch tall, and weighs about 280 pounds. RP 65-66.

³ The 911 call was played for the jury; it is transcribed in the report of proceedings dated October 22, 2009.

the other (Bryan Allen) stopped. RP 40-41. Neither a gun nor marijuana was found in Allen's possession. RP 44.

Kovacs was transported in the back of a patrol car to a location "near where this all occurred." RP 16, 51. Allen was not in handcuffs. RP 51. Kovacs identified Allen without hesitation: "He was wearing the exact same clothes that he had on earlier, he was wearing the baseball hat, the black hoody, and he had the glasses.⁴ He didn't have them on, but he had them with him, and the officers told him to put them on his face. And I said, yeah, definitely, that is one hundred percent him." RP 16, 51-52.

On cross-examination, defense counsel asked one of the officers if he was "aware of studies suggesting that cross racial identifications can be more difficult for people." RP 57. The officer responded that he was aware of that. Id. In closing argument, counsel reminded the jury that "we also talked a lot yesterday in jury selection and then with the officer today, the dangers of cross racial identification. And, it came up a lot in jury selection, and our own experiences." RP 96. Counsel pointed out that "we know from our experience, but from [the officer's] testimony, we know that there are more dangers, there's a risk of danger with cross racial identification." RP 97.

⁴ The responding officer said that the sunglasses were distinctive: "80's retro with huge lenses." RP 52.

Defense counsel also submitted two alternative proposed instructions cautioning the jury about cross-racial identification.⁵ RP 75-76; CP 61-62; State v. Allen, 161 Wn. App. 727, 733, 255 P.3d 784 (2011). These instructions would have told the jury that psychological studies and human experience show that many people have more difficulty identifying members of a different race than members of their own race. CP 61-62; Allen, at 733. The trial court declined to give either instruction. RP 75.

C. ARGUMENT

1. THIS COURT SHOULD NOT APPROVE JURY INSTRUCTIONS THAT COMMENT ON THE EVIDENCE IN VIOLATION OF ARTICLE 4, SECTION 16 OF THE WASHINGTON CONSTITUTION.

Allen contends that the trial court erred in refusing his proposed instructions cautioning the jury on potential difficulties with cross-racial eyewitness identification. The trial court properly declined to so instruct the jury. The proposed instructions are a judicial comment on the evidence in violation of article 4, § 16 of the Washington Constitution. Where specialized knowledge will assist the trier of fact, it should be conveyed through the testimony of a qualified expert.

⁵ Allen's proposed instructions are attached in Appendix A.

a. The Washington Constitution Prohibits Judicial
Comment On The Evidence.

The common-law practice of allowing judges to comment on the evidence at a jury trial has long been the rule in the federal courts. This practice was described by the United States Supreme Court well over one hundred years ago:

In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts

Vicksburg & Meridian R. Co. v. Putnam, 118 U.S. 545, 553, 7 S. Ct. 1, 30 L. Ed. 257 (1886).

The practice has persisted in the federal courts. See, e.g., Quercia v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L. Ed. 1321 (1933) ("Under the Federal Constitution the essential prerogatives of the trial judge [including commenting on the evidence] as they were secured by the rules of the common law are maintained in the federal courts."); United States v. Tello, 707 F.2d 85, 88 (4th Cir. 1983) ("The broad rule governing the role of federal judges in commenting on evidence has remained

constant over the years."). The laws of many states similarly allow judicial comment on the evidence.⁶

In derogation of the common law, the Washington Constitution explicitly prohibits judges from commenting on the evidence: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. 4, § 16. By including this provision, "the framers of the constitution could not have more explicitly stated their determination to prevent the judge from influencing the judgment of the jury on what the testimony proved or failed to prove." Bardwell v. Ziegler, 3 Wash. 34, 42, 28 P. 360 (1891). The court described Washington's prohibition as "more restrictive than the constitutional provisions of any other state."⁷ Id.

The courts of Washington have from the beginning taken the prohibition on judicial comment very seriously. As early as 1893, the Washington Supreme Court found that a trial court had overstepped its boundaries and commented on the evidence in violation of article 4, § 16. State v. Walters, 7 Wash. 246, 34 P. 938 (1893). Reversing the conviction, the court emphasized the importance of the prohibition:

⁶ The relevant law in some other states will be discussed infra.

⁷ To this day, Washington's constitution appears to be one of the few state constitutions containing this type of provision, and Washington's prohibition stands almost alone in its specificity. Similar constitutional provisions in other states will be discussed infra.

It is doubtless true that, in jurisdictions where the judges are permitted to state the facts and to sum up the evidence, such instructions as that now under consideration would not be deemed erroneous, but, where the "supreme law" declares that judges shall not charge juries with respect to matters of fact, nor even comment thereon, the rule must be different. It is not the *quantum* of any particular comment, but all comment whatever, that is inhibited by the constitution; and, therefore, courts should be extremely careful to confine their instructions solely to declaring the law. All remarks and observations as to the facts before the jury are positively prohibited

Id. at 250 (italics in original).

The courts strictly applied this prohibition. In 1924, the court reversed a conviction for burglary because the trial court had instructed the jury that "[t]he law recognizes that the defense of an alibi is one easily fabricated, easy to prove and hard to disprove." State v. Thompson, 132 Wash. 124, 125, 231 P. 461 (1924). Examining cases and constitutional provisions from other states, the court concluded that "no state has a constitutional provision so strict as ours in regard to the prohibition of the right of the court to comment on the facts." Id. at 126.

The court in Thompson relied on a number of Washington cases that rejected instructions cautioning jurors about the testimony of a witness. Id. at 126-28. In State v. Miller, 72 Wash. 174, 130 P. 356 (1913), the court rejected an instruction that, like the one proposed in this case, cautioned jurors about the testimony of a particular *class* of witness.

The proposed instruction told the jury to "closely scrutinize" the testimony of police witnesses and weigh it "with great care," due to the "almost unavoidable tendency of such witnesses to overdraw their testimony." Id. at 176. Observing that "[t]here might possibly be some ground for the giving of such an instruction in jurisdictions where the court may comment upon the facts," the court concluded that the instruction would have been a "direct violation" of article 4, § 16. Id. at 176, 177.

In Gianini v. Cerini, 100 Wash. 687, 171 P. 1007 (1918), the trial court refused to instruct the jury that casual statements made in conversation and testified to by the listener should be scrutinized with great caution as "the weakest character of evidence." Id. at 689. The Supreme Court approved of the refusal in no uncertain terms:

In view of the constitutional inhibition against comment on the facts by trial judges in their charge to juries, it has not been the policy of this court to encourage the giving of cautionary instructions. There are very few classes of evidence of any kind in which inherent weakness may not be found in the light of the facts of a particular case, and it would open the door to serious abuses to permit *nisi prius* judges, under the guise of cautioning the jury, to express their views concerning the weight and probative force of testimony.

Id. See also State v. Smith, 103 Wash. 267, 269, 174 P. 9 (1918) ("it is not proper for the court to violate the constitutional prohibition against

commenting upon the evidence by instructing the jury that it should regard the testimony of any class of witnesses with caution or suspicion").

Washington courts continue to guard against judicial comments on the evidence. In an earlier attempt to induce the court to caution the jury as to an entire class of witnesses, a defendant charged with rape asked the court to instruct the jury that such a charge is "easily made" and "difficult to disprove," and that the alleged victim's testimony should be examined "with caution." State v. Mellis, 2 Wn. App. 859, 862, 470 P.2d 558 (1970). Relying on article 4, § 16, the court rejected the instruction, observing that "the purpose of the constitutional prohibition against a judge commenting on the evidence is to prevent the jury from being influenced by knowledge conveyed to it by the court." Id.

This Court has in more recent times reemphasized the importance of the principle: "Our prior cases demonstrate adherence to a *rigorous standard* when reviewing alleged violations of Const. art. 4, § 16." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (italics added).

The Court of Appeals has followed suit, rejecting instructions that purported to tell the jury how to weigh any aspect of the evidence. See In re Detention of R.W., 98 Wn. App. 140, 144-45, 988 P.2d 1034 (1999) (proposed instruction on weight to give to certain evidence was an impermissible comment on the evidence); State v. Hermann, 138

Wn. App. 596, 606-07, 158 P.3d 96 (2007) (same); State v. Faucett, 22 Wn. App. 869, 875-77, 593 P.2d 559 (1979) (proposed instruction cautioning jurors on witness testimony rejected as comment on the evidence).

The courts of this state are right to be concerned about the extent to which comments on the evidence invade the province of the jury as the "sole judge of the weight of the testimony." State v. Crotts, 22 Wash. 245, 250, 60 P. 403 (1900). Courts in this state and elsewhere have long recognized that the words of the trial judge are extremely influential:

[I]t is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

Lane, 125 Wn.2d at 838 (quoting Crotts, 22 Wash. at 251). This is a special concern in states where judicial comment is prohibited:

That juries listen with eagerness to words and utterances of the trial judge, to glean from him his conclusions on the matter pending, is a fact not to be disputed, and it was that fact, as much as any other thing, that caused the framers of our Constitution to set forth that: "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." Article 6, § 12.

State v. Scott, 37 Nev. 412, 142 P. 1053, 1059 (1914).

- b. A Jury Instruction That Tells Jurors How To Weigh The Testimony Of An Eyewitness Is A Prohibited Comment On The Evidence.

Washington courts have repeatedly rejected instructions that attempt to tell jurors how to weigh the testimony of an eyewitness.⁸ In most cases, the proposed instruction was derived from the model instruction adopted in the federal courts in United States v. Telfaire, 469 F.2d 552 (D.C.Cir. 1972).⁹ One court described the problem with this type of instruction:

A federal judge is not constitutionally prohibited from commenting upon "matters of fact," Const. art. 4, § 16, and conceivably the instruction might be appropriate in a federal court trial. But patently, the focus and "emphasis" of the instruction is upon the credibility of identification witnesses. Credibility is a factual question. We believe that the instruction is impermissibly slanted to the degree that it should not be given in Washington.

State v. Jordan, 17 Wn. App. 542, 545, 564 P.2d 340 (1977).

The specific aspect of eyewitness identification at issue in this case is the ability of a member of one race to accurately identify a member of another. This Court, in State v. Laureano, 101 Wn.2d 745, 767-69, 682

⁸ State v. Jordan, 17 Wn. App. 542, 544-46, 564 P.2d 340 (1977); State v. Edwards, 23 Wn. App. 893, 896-97, 600 P.2d 566 (1979); State v. Ammlung, 31 Wn. App. 696, 700-01, 644 P.2d 717 (1982); State v. Delker, 35 Wn. App. 346, 348-49, 666 P.2d 896, *rev. denied*, 100 Wn.2d 1016 (1983); State v. Hall, 40 Wn. App. 162, 166-67, 697 P.2d 597, *rev. denied*, 104 Wn.2d 1001 (1985); State v. Guzman-Cuellar, 47 Wn. App. 326, 336-37, 734 P.2d 966 (1987); State v. Watkins, 53 Wn. App. 264, 275, 766 P.2d 484 (1989).

⁹ The full text of the Telfaire instruction is attached in Appendix B.

P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 111

Wn.2d 124, 761 P.2d 588 (1988), upheld the trial court's refusal to give the following cautionary instruction on how to evaluate such testimony:

In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. If this is also your own experience, you may consider it in evaluating the witness's testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of defendant's race that he would not have greater difficulty in making a reliable identification.

Id. at 767-68 n.1. Citing to Court of Appeals opinions and out-of-state cases, the Court agreed that such instructions are "impermissibly slanted to the degree that [they] should not be given in Washington." Id. at 768-69.

The Court of Appeals in this case, "follow[ing] the Supreme Court's lead in *Laureano*," held that the trial court did not err in refusing to instruct the jury on cross-racial eyewitness identification. Allen, 161 Wn. App. at 745. In a concurring opinion, however, two judges suggested that an instruction on cross-racial identification should be approved in Washington; they proposed the following instruction in the belief that it would "advise the jury of the pitfalls inherent in such evidence without commenting upon it":

Testimony of a witness identifying a person of another race who is a stranger to the witness should be considered with care, because research shows that some people have greater difficulty accurately identifying members of a different race.

Id. at 757 (Ellington, J., concurring).

An instruction that tells jurors what "research shows" will undoubtedly result in the jury being "influenced by knowledge conveyed to it by the court," and is thus a prohibited comment on the evidence. See Mellis, 2 Wn. App. at 862. Washington courts have long rejected the practice of "commenting upon the evidence by instructing the jury that it should regard the testimony of any class of witnesses with caution or care." Smith, 103 Wash. at 269; Miller, 72 Wash. at 176. Contrary to the concurrence's suggestion, the proposed instruction would be a prohibited comment on the evidence, in violation of article 4, § 16.

This Court must be mindful of the "slippery slope" argument against instructions cautioning jurors on the perils of a particular type of evidence, such as cross-racial identification. Once courts start down the path of telling jurors how they should weigh certain evidence in a particular type of case, it is difficult to see where the boundary would lie. The framers of the Washington Constitution wisely and unequivocally rejected this path when they made article 4, § 16 the law of this state.

c. Other States With Constitutional Prohibitions On
Judicial Comment On The Evidence Do Not Allow
Cautionary Instructions On Eyewitness Testimony.

Washington's prohibition on judicial comment on the evidence appears to be nearly unique in its specificity. Arizona, the only state whose constitutional prohibition is identical to Washington's, has rejected specific instructions on eyewitness testimony as comments on the evidence. State v. Valencia, 118 Ariz. 136, 575 P.2d 335, 336-37 (1977). Arizona courts have distinguished between jurisdictions like California and the federal system, where judicial comment on the evidence is allowed, and their own courts, where comment is prohibited. See State v. Gates, 182 Ariz. 459, 897 P.2d 1345, 1349-50 (1994); State v. Rogers, 4 Ariz. App. 198, 419 P.2d 102, 107-08 (1966). Arizona has explicitly aligned itself with Washington: "[W]e are in accord with recent cases from the state of Washington interpreting an identical provision of their state constitution." State v. Settle, 111 Ariz. 394, 531 P.2d 151, 153 (1975).

Several other states have constitutional provisions that are similar to Washington's. The Arkansas constitution provides that "[j]udges shall not charge juries with regard to matters of fact, but shall declare the law." Ark. Const. art. 7, § 23. Based on this provision, the courts of that state have rejected Telfaire-type instructions as comments on the evidence.

Conley v. State, 270 Ark. 886, 607 S.W.2d 328, 330 (1980); Hopson v. State, 327 Ark. 749, 940 S.W.2d 479, 480-81 (1997).¹⁰

Delaware's constitution similarly prohibits judges from instructing juries "with respect to matters of fact." Del. Const. art. IV, §19. Rejecting a jury instruction on cross-racial identification, Delaware's Supreme Court considered the validity of such instructions in light of the state's constitution:

Presenting the proposition that cross-racial identifications are less likely to be accurate in the context of a jury instruction raises that proposition to the level of a rule of law, which implies a degree of certainty that social science rarely achieves, and comes perilously close to a comment on the evidence contrary to the constitutional restriction. Delaware Constitution of 1897, art IV § 19. Even if the scientific evidence on this issue may be said to be conclusive, that scientific evidence is still more appropriately considered a matter of fact to be presented by an appropriate expert, who can explain the applicability and limitations of the information. Including a jury instruction on the issue does little more than suggest a judicial bias against the reliability of the eyewitness testimony.

Garden v. State, 815 A.2d 327, 341 (2003).

South Carolina's constitution also prohibits judges from instructing juries "in respect to matters of fact." S.C. Const. art. V, § 21. South Carolina courts have rejected Telfaire-type instructions on the basis of this

¹⁰ Arkansas has also upheld, against a due process challenge, a trial court's refusal to specifically instruct the jury on cross-racial identification. Lenoir v. State, 77 Ark. App. 250, 72 S.W.3d 899, 905 (2002).

prohibition. State v. Robinson, 274 S.C. 198, 262 S.E.2d 729, 731 (1980);
State v. Patterson, 337 S.C. 215, 522 S.E.2d 845, 854-55 (1999).

The New Jersey Supreme Court attracted much attention recently when it mandated a jury instruction on cross-racial identification whenever such identification is at issue. State v. Henderson, 208 N.J. 208, 299, 27 A.3d 872, 926 (2011). This is wholly in keeping with New Jersey law, under which trial courts may comment on the evidence. See State v. Robinson, 165 N.J. 32, 754 A.2d 1153, 1161 (2000) ("we leave it to the sound discretion of the trial court to decide on a case-by-case basis when and how to comment on the evidence"); State v. Brims, 168 N.J. 297, 774 A.2d 441, 446 (2001) ("[t]rial courts have broad discretion when commenting on the evidence during jury instruction"). The law in Washington is to the contrary.

- d. The Instruction Cautioning Jurors On The Testimony Of An Accomplice Is A Comment On The Evidence.

The Court of Appeals in this case drew a parallel between the instruction telling the jury to view the testimony of an accomplice with caution (WPIC 6.05)¹¹, and an instruction cautioning the jury on cross-

¹¹ WPIC 6.05 instructs that: "Testimony of an accomplice, given on behalf of the [State] [City] [County], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth."

racial identification. Allen, 161 Wn. App. at 743-45. In drawing the analogy, the court relied on State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974), *overruled on other grounds by* State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984), wherein this Court found that a cautionary instruction on accomplice testimony was not a comment on the evidence.

This analogy is not persuasive. The cautionary attitude of the courts toward the testimony of an accomplice was "garnered from many years of observation of the prosecutorial process," and consequently "[t]he courts have an expertise upon this subject." Carothers, 84 Wn.2d at 268. The same cannot be said for the multifarious aspects of the psychology of eyewitness identification. It is not the courts, but psychologists, in whom this expertise resides. And like any field that is subject to ongoing study, the research in this area is constantly evolving.¹²

¹² Some researchers have questioned the methodology used in empirical studies in this field. See Joseph P. Simmons et al., *False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant*, *Psychological Science* 22, 1359-66 (2011) (demonstrating the ease with which statistically significant evidence for a false hypothesis may be accumulated and reported) (also available at <http://pss.sagepub.com/content/22/11/1359>). And according to some experts in the field, publication in respected, peer-reviewed journals is not a guarantee of the validity of the underlying work. See Benedict Carey, *Fraud Case Seen as a Red Flag for Psychology Research*, *New York Times*, November 3, 2011, available at http://www.nytimes.com/2011/11/03/health/research/noted-dutch-psychologist-stapel-accused-of-research-fraud.html?_r=1&scp=8&sq=benedict+carey&st=nyt.

Significantly, the court in Carothers treated the cautionary instruction on testimony of an accomplice as "a rule of law" that has "long found favor in the law."¹³ Id. at 269. Treating this instruction as a rule of law takes it out of the realm of comments on the evidence. See Christensen v. Munsen, 123 Wn.2d 234, 249, 867 P.2d 626 (1994) ("An instruction which does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge under Const. art. 4, § 16."). Current psychological research on potential problems with cross-racial identification, no matter how well supported empirically, hardly rises to the level of a rule of law.

Moreover, in reaching its decision, the Carothers court noted that "we are cited to no opinion of any court which has criticized [the cautionary instruction on accomplice testimony] nor has our research disclosed any critical comment from within or without the courts." 84 Wn.2d at 268. But criticism of this instruction may be found in states that, like Washington, forbid judges from commenting on the evidence.

As noted above, Arizona appears to be the only state that has a constitutional prohibition that is as restrictive as Washington's, in that it specifically prohibits "comments" on the evidence. Ariz. Const. art. 6,

¹³ California has also treated this instruction as a codification of the common law. See People v. Dail, 22 Cal.2d 642, 140 P.2d 828, 834-35 (1943); People v. Guivan, 18 Cal.4th 558, 957 P.2d 928, 932-33 (1998).

§ 27. In accordance with this prohibition, the Arizona courts have rejected various instructions cautioning jurors as to specific testimony. See State v. Baumann, 125 Ariz. 404, 610 P.2d 38, 44 (1980) (rejecting cautionary instruction requiring the jury to "scrutinize more closely the testimony of a witness who provides evidence because of a plea agreement than it would the testimony of an ordinary witness," as an "impermissible comment on the evidence"); State v. Bussdieker, 127 Ariz. 339, 621 P.2d 26, 29 (1980) (rejecting proposed instructions telling the jury that "[t]he evidence of an accomplice should be received with great caution" and "[t]he testimony of an accomplice ought to be viewed with distrust," as constitutionally prohibited comments on the evidence).

South Carolina's constitution provides that "[j]udges shall not charge juries in respect to matters of fact," but it lacks a specific provision prohibiting judicial "comment" on the evidence. S.C. Const. art. V, § 21. The South Carolina Supreme Court has nevertheless held that the trial court is prohibited from cautioning the jury as to the testimony of an accomplice. State v. Sowell, 85 S.C. 278, 67 S.E. 316, 317-18 (1910). Accord State v. Clark, 85 S.C. 273, 67 S.E. 300, 301-02 (1910); State v. Mikell, 257 S.C. 315, 185 S.E.2d 814, 820 (1971).

In any event, this instruction must be deemed an outlier, based as it is on the courts' special "expertise" on the subject of accomplice

testimony. See Carothers, 84 Wn.2d at 268. The potential bias inherent in the testimony of an accomplice is undeniable, and it may be wise to remind jurors of this.¹⁴ Moreover, given the instruction's deep roots in the common law, courts have generally treated it as a statement of law, rather than a comment on the evidence. Id. at 269, 269 n.2; Dail, 140 P.2d at 834-35. Acceptance of this instruction provides no support for a cautionary instruction based on empirical research on the psychology of eyewitness identification.

e. Instructions Cautioning Jurors On Eyewitness Testimony Are Not Effective.

The utility of jury instructions as a safeguard against mistaken eyewitness identifications has been criticized by a number of researchers. One of the main problems with instructions is that they point to factors that *could* influence an identification, but do not explain *how* the factors influence memory, or the potential magnitude of any effect. Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 256 (1995). Analyzing experiments designed to measure the efficacy of such instructions, the authors found that the results

¹⁴ At least one Washington case has recognized the unique nature of the cautionary instruction on accomplice testimony. See State v. Willoughby, 29 Wn. App. 828, 832, 630 P.2d 1387, *rev. denied*, 96 Wn.2d 1018 (1981) ("The important protective purpose served by the cautionary accomplice instruction distinguishes this instruction from somewhat comparable but disfavored instructions which either focus undue attention upon particular evidence . . . or are impermissibly slanted.").

provided "little evidence that judges' instructions concerning the reliability of eyewitness identification enhance juror sensitivity to eyewitness identification evidence." *Id.* at 263. They concluded that such instructions do not serve as an effective safeguard against mistaken identifications, and that expert testimony is more effective. *Id.* at 264. See also Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, 2 *Law, Probability & Risk* 295, 302-03 (December 2003) (conveying research results in a conclusory manner in jury instructions is less effective than expert testimony in educating jurors about cognitive biases and errors involved in eyewitness identification); Cindy J. O'Hagan, *When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony*, 81 *Geo. L. J.* 741, 753-57 (March 1993) (expert testimony, unlike jury instructions, can respond to the particular facts of a case and can furnish jurors with information needed to evaluate identification), 754 n.82 ("To instruct the jury about the contents of certain studies, which may contradict other studies, probably encroaches on the state's cross-examination rights.").

Courts have come to a similar conclusion. The Supreme Court of Utah found that cautionary instructions do little to help jurors recognize a mistaken identification; expert testimony is the best method to educate jurors on the relevant factors. *State v. Clopten*, 223 P.3d 1103, 1106-11

(Utah 2009). See also State v. Copeland, 226 S.W.3d 287, 300 (Tenn. 2007) (concluding that instructions are not sufficient to educate the jury on problems with eyewitness identification, and that expert testimony can serve as a safeguard against mistaken identification).

Rejecting jury instructions in such cases does not mean that this Court must leave defendants without a means to challenge eyewitness identification. Rather, the right to present a defense may be protected by other means. See Const. art. 1, § 22. While courts are prohibited by article 4, § 16 from issuing special cautionary instructions, expert testimony is nevertheless available where appropriate. This Court in State v. Cheatam, 150 Wn.2d 626, 649, 81 P.3d 830 (2003), declined to adopt the relatively restrictive Moon¹⁵ test, instead leaving trial courts with broad discretion to "carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony." Where expert testimony meets the criteria of ER 401, 403 and 702, it should be admitted.¹⁶

¹⁵ State v. Moon, 45 Wn. App. 692, 726 P.2d 1263 (1986), *abrogated by Cheatam*, 150 Wn.2d at 649.

¹⁶ The Court of Appeals below, in advocating for a cautionary instruction, made reference to the cost of expert witnesses. Allen, 161 Wn. App. at 757 (Ellington, J., concurring). This Court recently and unequivocally stated: "Courts must not sacrifice constitutional rights on the altar of efficiency." State v. Madsen, 168 Wn.2d 496, 509, 229 P.3d 714 (2010). Neither may courts contravene constitutional mandates in the name of efficiency. Prohibited jury instructions should not be substituted for expert testimony properly admitted under the rules of evidence.

2. THE TERM "TRUE THREAT" IS NOTHING MORE THAN A TERM OF ART THAT DESCRIBES THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF ANY CRIME.

Allen contends that it is error not to include the following language in every charging document and "to convict" jury instruction involving a verbal threat:

A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.

He argues that this language is not merely definitional, but is an element of every criminal statute involving a verbal threat. This is inconsistent with existing case law. See e.g., State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006); State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007); State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010). The term "true threat" is a term of art used to describe the permissible scope of threat statutes for First Amendment purposes. The language describing what constitutes a true threat is definitional, no different from language used to define "intent," "recklessness" or "great bodily harm." This language need not be included in the charging document or the "to convict" instruction.¹⁷

¹⁷ Allen does not challenge the language in the definition of "true threat" given to the jury, nor does he claim that there was not sufficient evidence for the jury to have found that he made a "true threat."

a. The Charging Document And Jury Instructions.

The State alleged by information that Allen "knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Gerald Kovacs, by threatening to kill Gerald Kovacs, and the words or conduct did place said person in reasonable fear that the threat would be carried out." CP 1; RCW 9A.46.020.

The court gave the jury a "to convict" instruction that read in pertinent part:

To convict the defendant of the crime of felony harassment . . . each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 6, 2009, the defendant knowingly threatened to kill Gerald Kovacs immediately or in the future;
- (2) That the words or conduct of the defendant placed Gerald Kovacs in reasonable fear that the threat would be carried out;
- (3) That the defendant acted without lawful authority;
and
- (4) That the threat was made or received in the State of Washington.

CP 21; see also WPIC 36.07.02.

The court also gave the following definitional instruction:

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat rather than as something said in jest or idle talk.

CP 20 (emphasis added); see also WPIC 2.24. Allen affirmatively agreed to these instructions. RP 76-79.

b. The Elements Of The Crime Of Harassment.

A charging document is sufficient if it sets forth all elements of the offense. State v. Kjorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). Jury instructions satisfy due process if the jury is "informed of all the elements of the offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted." State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). While a "to convict" instruction should contain all the essential elements of the crime, it "*need not contain all pertinent law such as definitions of terms.*" State v. Fisher, 165 Wn.2d 727, 754-55, 202 P.3d 937 (2009) (emphasis added).

As charged and convicted here, a person commits the crime of felony harassment if he knowingly threatens to kill immediately or in the future the person threatened, and the words or conduct place the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020. The statute sets out all the elements of the crime.

In defining the constitutional limits of the harassment statute, this Court has stated that to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001). A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Kilburn, 151 Wn.2d at 43.

Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, at 44. The relevant question is whether a reasonable person in the defendant's position would foresee that, taken in context, a listener would interpret the statement as a serious threat. Kilburn, at 46. Here, the trial court gave an instruction incorporating that definition of "true threat." Because the instructions included all the elements in the "to convict" instruction, as well as a proper definitional instruction addressing First Amendment concerns, Allen's argument fails.

This is consistent with Tellez, supra, and Atkins, supra, wherein the courts rejected the argument that the language defining a "true threat"

must be charged in the information and included in the "to convict" instruction. See also State v. Sloan, 149 Wn. App. 736, 205 P.3d 172, *rev. denied*, 220 P.3d 783 (2009); State v. Schaler, 145 Wn. App. 628, 186 P.3d 1170 (2008), *rev'd. on other grounds*, 169 Wn.2d 274 (2010). It is also consistent with this Court's decision in Johnston, *supra*.

Johnston was charged with threats to bomb under RCW 9.61.160. At trial, Johnston proposed a definition of threat that included "true threat" language. The trial court refused to give the instruction. On appeal, Johnston challenged this decision. Johnston, 156 Wn.2d at 358, 364. Before this Court, Johnston and the State agreed that, for First Amendment purposes, the threats to bomb statute must be construed to limit its application to "true threats." Johnston, at 359, 363. The parties also agreed, and this Court concurred, that the jury instructions were erroneous because they did not define "true threat." Johnston, at 364, 366. This Court accordingly remanded the case, requiring that the jury be "instructed on the *meaning* of a true threat" on retrial. Johnston, at 366 (emphasis added).

In this case, the State does not dispute that it was required to prove that Allen's threat was a "true threat." As instructed here, the jury was required to find beyond a reasonable doubt that Allen "knowingly threatened to kill Gerald Kovacs" and that the threat occurred "in a context

or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat." CP 20, 21. Allen has cited no case, and the State has found none, holding that the language defining a "true threat" is a separate element that must be included in the charging document and the "to convict" jury instruction for felony harassment, or for any other crime that contains a threat element.¹⁸ The cases cited by Allen in his petition for review do not support his argument.

In Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed.2d 535 (2003), the Court was asked to rule on the constitutionality of a statute proscribing content-based conduct; specifically, whether Virginia's cross-burning statute violated the First Amendment. The Court held that a state could proscribe cross-burning done with the intent to intimidate, but that the statute violated the First Amendment because it contained a presumption that any cross-burning was done with the intent to intimidate, even if the cross was burned for political or ideological reasons. 583 U.S.

¹⁸ Allen's position is similar to that of a person charged with (for example) first-degree assault, which requires the intent to inflict "great bodily harm." See RCW 9A.36.011(1). The charging document and the "to convict" instruction must contain the statutory element of "great bodily harm," which will be defined for the jury as "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." See WPIC 2.04, 35.04. See also State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984) (generally a trial court must define technical words or expressions used in the jury instructions).

at 363-64. Black did not determine, or even discuss, what must be included in the charging documents or jury instructions. In any event, the Washington harassment statute does not proscribe content-based conduct.

In United States v. Cassel, 408 F.3d 622 (9th Cir. 2005), the court analyzed the constitutionality of a statute making it illegal for a person to interfere with a federal land sale. In reviewing the threats portion of the statute, the court used the term "element," but described the constitutional limitations on crimes involving threats as "definitions." Id. at 633.

In United States v. Fuller, 387 F.3d 643 (7th Cir. 2004), the court used the term "element," but again, the court was not deciding the issue currently before this Court. Rather, the court in Fuller was asked to determine whether the test for determining a "true threat" was subjective or objective. Id. at 646. The court did not hold that the definition of "true threat," must be charged in the information and included in the "to convict" instruction.

In United States v. Lockhart, 382 F.3d 447 (4th Cir. 2004), the court again used the term "element," but the holding of the case supports the State's position. Lockhart's indictment read that she "knowingly and willfully made a threat to inflict bodily harm and to take the life of the president." Id. at 450. The court held that this language, which is

substantially similar to the language used to charge Allen, included all the essential elements of the crime. Id.

In In re Robert T., 307 Wis.2d 488, 746 N.W.2d 564 (2008), the court, interpreting Wisconsin's threats to bomb statute, held that "'true threat' is a constitutional term of art used to describe a specific category of unprotected speech." Id. at 568. Citing this Court's decision in Johnston, supra, the Wisconsin court held that the statute was constitutional so long as the threat proscribed is limited to a "true threat." 746 N.W.2d at 568.

None of the cases cited by Allen support his argument that the definition of "true threat" must be charged in the information and included in the "to convict" instruction. Allen was properly charged and the jury was properly instructed on all the elements of the crime of felony harassment. The jury found beyond a reasonable doubt that his threat to kill Gerald Kovacs was a "true threat."

3. THE PROSECUTOR PROPERLY RELIED ON
INFERENCES FROM THE FACTS IN ARGUING
WITNESS CREDIBILITY.

The State relies on the arguments set out in the Brief of Respondent filed in the Court of Appeals, at pages 15-18. In addition, the State relies on State v. Lewis, 156 Wn. App. 230, 240-41, 233 P.3d 891 (2010) (where prosecutor argued that witness's testimony was credible

based on specific evidence admitted at trial, the argument was a proper inference, not an improper personal opinion).

D. CONCLUSION

The State urges this Court to reject the petitioner's invitation to embark on the path of approving instructions cautioning the jury as to specific testimony or evidence. Such a practice would violate this state's constitutional prohibition on judicial comment on the evidence. Where properly admitted under the rules of evidence, expert testimony is the appropriate vehicle to convey necessary information to the jury.

DATED this 9th day of December, 2011.

Respectfully submitted,

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JURY INSTRUCTIONS PROPOSED BY ALLEN

“In this case, the identifying witness is of a different race than the defendant. In the experience of many, it is more difficult to identify members of a different race than member’s [sic] of one’s own [race]. Psychological studies support this impression. In addition, laboratory studies reveal that even people with no prejudice against other races and substantial contact with persons of other races still experience difficulty in accurately identifying members of a different race. Quite often people do not recognize this difficulty in themselves. You should consider these facts in evaluating the witness’s testimony, but you must also consider whether there are other factors present in this case.”

“In this case, the defendant, Bryan [Allen], is of a different race than Gerald Kovacs, the witness who has identified him. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness’[s] original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race. You may also consider whether there are other factors present in this case which overcome any such difficulty of identification.”

APPENDIX A

TELFAIRE INSTRUCTION

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of providing [sic] identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

[In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight—but this is not necessarily so, and he may use other senses.]^{FN*}

FN* Sentence in brackets ([]) to be used only if appropriate. Instructions to be inserted or modified as appropriate to the proof and contentions.

APPENDIX B

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

[(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

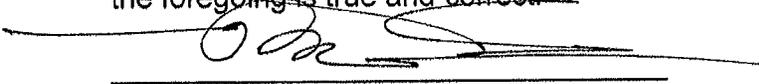
(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator or the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

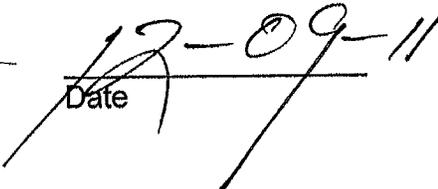
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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Susan F. Wilk**, the attorney for the petitioner, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Supplemental Brief of Respondent**, in **STATE V. BRYAN EDWARD ALLEN**, Cause No. **86119-6**, in the Supreme Court of the State of Washington.

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



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Sent: Friday, December 09, 2011 1:57 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dwyer, Deborah; 'Maria Riley'; 'susan@washapp.org'
Subject: Bryan Edward Allen/Case # 86119-6

Dear Supreme Court Clerk,

Attached please find the **Motion for Permission to File Overlength Supplemental Brief and Supplemental Brief of Respondent** in the above-mentioned case.

Please advise me if there are any difficulties with these electronic filings. Thank you very much.

Sincerely yours,

Bora

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