Supreme Court No. ____
COA No. 86044-5-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN R. WAGNER,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Sean Wagner, the petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' decision termination review. RAP 13.3, 13.4.

B. COURT OF APPEALS DECISION

Mr. Wagner seeks review of the Court of Appeals' decision dated April 21, 2025, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The hate crime offense only penalizes conduct, and the State must prove the defendant threatened the victim because of their protected status. The jury convicted Mr. Wagner of a hate crime because he threatened a Black animal control officer. But Mr. Wagner was aggressive and hostile to several people, not just the officer. And while Mr. Wagner uttered racial slurs, this does not prove he specifically targeted the victim because of her race. The Court of Appeals disagreed, holding Mr. Wagner's racial

slurs and "the racial symbolism of his tattoos" demonstrated he targeted the officer because of her race. Slip Op. at 7–8.

The Court of Appeals' decision undermines this Court's precedent and the First Amendment. This Court held a person does not commit a hate crime solely because they uttered racial slurs during the commission of an offense. Likewise, the First Amendment requires a tight nexus between speech and conduct. As the Court of Appeals' decision here signifies, courts are misapplying both principles of law. This Court should grant review. RAP 13.4(b)(1), (b)(3), (b)(4).

2. Police cannot subject a person to custodial interrogation without first advising them of their rights to silence and counsel. Statements obtained in violation of this rule are inadmissible. While Mr. Wagner sat on the bumper of a patrol car in handcuffs, Officer Ceban asked him what type of tattoo he had. In response, Mr. Wagner displayed his swastika tattoo and made incriminating statements about his

associated beliefs. No officer advised Mr. Wagner before he made this statement. Nevertheless, the trial court refused to suppress Mr. Wagner's expressive conduct and statements, and the State repeatedly used this evidence at trial.

The Court of Appeals resolved this issue by holding the admission of Mr. Wagner's response was harmless beyond a reasonable doubt. It used the "overwhelming evidence" test and focused on the "untainted" evidence in the record. It did not address the nature of the error or whether the error contributed to the jury's verdict. This Court is currently considering what standard courts must use when determining whether an error is harmless beyond a reasonable doubt. This Court should either stay this case or grant review to resolve whether the improper admission of Mr. Wagner's response to Officer Ceban was harmless beyond a reasonable doubt. RAP 13.4(b)(1), (b)(3).

D. STATEMENT OF THE CASE

Sean Wagner was with his children in Edmonds when they learned a snowstorm had made it impossible to get home. 10/19/23 RP 1085. They decided to stay at a motel in Edmonds to wait for the snow to thaw. 10/19/23 RP 1085–86. Mr. Wagner and his children had four dogs. 10/19/23 RP 1086–87; 8/16/23 RP 244.

On a cool sunny day, Mr. Wagner took his kids to dinner. 10/19/23 RP 1088, 1090. Because he did not want to risk any damage to the motel room, Mr. Wagner left his dogs inside his truck. 10/19/23 RP 1089–90.

Officer Tabatha Shoemake, an animal control officer, responded to the motel and found the dogs. 10/18/23 RP 806–07. She determined it was too hot for the dogs to be in the truck, so she removed them to a nearby shelter. 10/18/23 RP 807–10, 814–15, 817, 894.

Mr. Wagner returned an hour later and became enraged when he saw someone had taken his dogs.

10/19/23 RP 1091. He called Officer Shoemake and demanded his dogs back. 10/19/23 RP 1092. She informed him that he would need to wait until the next day to retrieve his dogs. 10/19/23 RP 1092. In response, Mr. Wagner said he needed to get the dogs that night, as he was leaving Edmonds in the morning. 10/18/23 RP 821. When Officer Shoemake repeated that he could not get the dogs until the next day, Mr. Wagner told her to "fuck off" and hung up the phone. 10/18/23 RP 822.

Mr. Wagner immediately went to the animal shelter to get his dogs back. 10/19/23 RP 1094. When he arrived, he spoke with the manager of the shelter, Kerri Tenniswood, who is white. 10/18/23 RP 896; CP 330. Ms. Tenniswood told Mr. Wagner the shelter was closed and he needed to come back the next day to get his dogs. 10/19/23 RP 1094; 10/18/23 RP 894. This angered Mr. Wagner even more, who began yelling that he wanted his dogs back. 10/19/23

RP 1095. He grabbed a stick and shook it at Ms. Tenniswood. 10/18/23 RP 902; 10/19/23 RP 1096.

Officer Shoemake came outside to confront Mr. Wagner. 10/18/23 RP 834. Ms. Tenniswood and Officer Shoemake again told Mr. Wagner he needed to return the next day to get his dogs. 10/18/23 RP 837. Mr. Wagner replied by calling Officer Shoemake, who is Black, "a dumb fucking [n-word]." 10/19/23 RP 1098; 10/18/23 RP 905.

Ms. Tenniswood and Officer Shoemake went back inside the shelter after this exchange. 10/19/23 RP 1098. Mr. Wagner kept pacing around the building until he saw a white woman leave the shelter and get in her car. 10/19/23 RP 1099; 10/18/23 RP 851–52. Mr. Wagner yelled and cursed at the woman, chased her car, called her a "dog stealer," and "flipped them off." 10/19/23 RP 1099; 10/18/23 RP 851–52.

Officer Shoemake eventually went back outside of the shelter. 10/19/23 RP 1099. Mr. Wagner approached her

and said several derogatory, racist comments. 10/19/23 RP 1099. Officer Shoemake alleged that, during this interaction, Mr. Wagner "said he was going to kick my ass." 10/18/23 RP 853. He was "10 to 12 feet" away from her when he allegedly said this. 10/18/23 RP 855.

Officer Shoemake further alleged that, after Mr. Wagner threatened her, he walked toward her and held his phone to her face. 10/18/23 RP 855, 861. Officer Shoemake said Mr. Wagner showed her a picture of "men with rifles and a flag with a swastika on it." 10/18/23 RP 862. She also alleged Mr. Wagner said, "See this? We're going to fix this. We're going to make this right." 10/18/23 RP 862–63. Officer Shoemake responded by pulling out her taser, ending the confrontation. 10/18/23 RP 863–64.

Deputy Jonathan James was one of the first responding officers. 10/19/23 RP 981. He exited his squad car and called Mr. Wagner over to him. 10/19/23 RP 981. Deputy James said Mr. Wagner "walked toward me at a

brisk pace, and he was quite elevated in his tone and his demeanor, and he was shouting and cursing." 10/19/23 RP 982. Mr. Wagner displayed "preattack indicators" given his "closeness, his speed in which he walked," and that his "fist was balled and that his chest" was "squared up to" Deputy James'. 10/19/23 RP 983, 990. Concerned that he was about to be assaulted, Deputy James placed Mr. Wagner in handcuffs and placed him on the bumper of a squad car. 10/19/23 RP 990.

Another officer, Officer Dan Ceban, arrived and watched Mr. Wagner while other officers interviewed Officer Shoemake and Ms. Tenniswood. 10/18/23 RP 953. Officer Ceban asked Mr. Wagner about a tattoo that was partially visible on his chest. 10/18/23 RP 953–54.

Because he was still handcuffed, Mr. Wagner responded by asking Officer Ceban to unzip his jacket. 10/18/23 RP 955. Officer Ceban unzipped his jacket and saw a swastika tattoo on Mr. Wagner's chest. 10/18/23 RP

955. Officer Ceban did not respond, and another officer came and took Mr. Wagner to jail. 10/18/23 RP 958; 10/19/23 RP 1003.

The State charged Mr. Wagner with a hate crime offense, alleging he threatened Officer Shoemake because of her race. CP 369. Before trial, Mr. Wagner moved to suppress his response to Officer Ceban under the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). CP 147–54.

At the CrR 3.5 hearing, officers testified that, before they arrived at the shelter, they knew Mr. Wagner was using racial slurs and hostile language toward Officer Shoemake. 6/2/23 RP 27, 29, 36, 40–41, 50–52. By the time Officer Ceban arrived, Mr. Wagner was sitting in handcuffs. 6/2/23 RP 70, 75, 78. Officer Ceban testified that, at first, he just "sat there and watched over him . . . During that time period of awkward silence, just staring at each other, I tried to engage in casual conversation." 6/2/23 RP 70. He said he

did so because "sitting there in awkward silence can sometimes just feel weird, and so it was a way to kind of break the tension and pass the time[.]" 6/2/23 RP 70–71.

This began when Officer Ceban noticed Mr. Wagner "had some black ink showing on his chest, so I just asked him about a tattoo he had." 6/2/23 RP 71. Officer Ceban did not administer *Miranda* warnings before he asked Mr. Wagner about his tattoo. 6/2/23 RP 73, 78, 80.

Mr. Wagner responded by asking Officer Ceban to unzip his jacket, and Officer Ceban complied. 6/2/23 RP 72–73. Officer Ceban saw Mr. Wagner's chest tattoo of a large "eagle perched atop a swastika." CP 144; 6/2/23 RP 71. Mr. Wagner then spoke about the "Nationalist Party," saying he was following orders and would die for his beliefs. 10/18/23 RP 957.

The trial court found Mr. Wanger was in custody under *Miranda* when Officer Ceban asked him about the tattoo. 6/2/23 RP 90; CP 145. It also found Mr. Wagner's

conduct in displaying his tattoo and his statements were "responsive" to Officer Ceban's question. 6/2/23 RP 90.

But the court declined to suppress Mr. Wagner's statements and expressive conduct. 6/2/23 RP 95. It focused on Officer Ceban's testimony that he did not know Mr. Wagner was being detained "for a potential racially motivated crime." CP 145. Because Officer Ceban lacked this knowledge, the court found, "The question by [Officer] Ceban to make conversation was not reasonably likely to elicit an incriminating response." CP 145.

At trial, Officer Ceban testified about his interaction with Mr. Wagner. He explained how Mr. Wagner displayed his swastika tattoo at the shelter. 10/18/23 RP 955. He also repeated Mr. Wagner's custodial statements. 10/18/23 RP 957–58.

The State called Christopher Magyarics, an expert in extremism and hate symbols, to testify. Mr. Magyarics went through all five of Mr. Wagner's tattoos. 10/19/23 RP

1018–26. Each of these tattoos, Mr. Magyarics explained, have a clear association with white supremacist beliefs. 10/19/23 RP 1027–28.

The jury convicted Mr. Wagner as charged. 10/23/23 RP 1207; CP 35. On appeal, Mr. Wagner argued the State failed to prove the victim selection element of the hate crime offense and the court erred by admitting Mr. Wagner's custodial statements and expressive conduct. The Court of Appeals affirmed. Slip Op. at 1, 6–10.

E. LAW AND ARGUMENT

1. The Court of Appeals misapplied this Court's precedent and contravened the First Amendment right to free expression.

Mr. Wagner's statements to Officer Shoemake were odious and hateful, but those statements were not criminal. Instead, to prove its case, the State needed to demonstrate Mr. Wagner specifically targeted Officer Shoemake due to her race. Because the evidence demonstrated Mr. Wagner was aggressive toward several other people and not just

Officer Shoemake, the State failed to prove Mr. Wagner targeted Officer Shoemake because of her race.

The Court of Appeals disagreed. It held Mr. Wagner's racial slurs and the "racial symbolism of his tattoos" demonstrated he targeted Officer Shoemake because of her race. Slip Op. at 7–8. This holding contravened this Court's precedent and the strict protections of the First Amendment. This Court should grant review. RAP 13.4(b)(1), (b)(3).

a. To prove a hate crime offense, the State must prove the defendant threatened the victim because of their race.

To convict Mr. Wagner of a hate crime offense, the State needed to prove beyond a reasonable doubt that he threatened Officer Shoemake "because of" her race. RCW 9A.36.080(1)(c). As used in the statute, "because of" means "'by reason of' or 'on account of.'" *State v. Read*, 163 Wn. App. 853, 865, 261 P.3d 207 (2011) (quoting *State v. Talley*, 122 Wn.2d 192, 213, 858 P.2d 217 (1993)). This requirement "is characterized as the element of 'victim selection.'" *State*

v. Johnson, 115 Wn. App. 890, 896, 64 P.3d 88 (2003) (quoting *State v. Pollard*, 80 Wn. App. 60, 65, 906 P.2d 976 (1995)).

Because the hate crime offense under RCW 9A.36.080(1)(c) targets a defendant's threatening language, the statute criminalizes "a form of pure speech." *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). This applies even if the threat manifests as hate speech. *Matal v. Tam*, 582 U.S. 218, 246, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017); a*ccord State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469, 511, 441 P.3d 1203 (2019). Accordingly, RCW 9A.36.080(1)(c), "'which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind.'" *Williams*, 144 Wn.2d at 207 (quoting *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)).

To protect these "free speech guaranties," this Court has construed the victim selection element as requiring a

"tight nexus" between a defendant's speech and their conduct. *Talley*, 122 Wn.2d at 204. This ensures the statute only punishes a defendant for acting "on particularly offensive beliefs, not the beliefs themselves." *Id*. at 201. Indeed, "A person is free under the statute to make his or her odious bigoted thoughts known to the world so long as those words do not cross the boundary into" criminally threatening behavior. *Id*. at 211; *see* RCW 9A.36.080(1)(c).

b. The State did not prove Mr. Wagner threatened Officer Shoemake because of her race, and the Court of Appeals erred by concluding otherwise.

The record demonstrates Mr. Wagner behaved aggressively toward several other people and not just Officer Shoemake. Because this proof does not show he specifically targeted Officer Shoemake "because of" her race, the State failed to prove victim selection.

Mr. Wagner was aggressive and hostile to Ms. Tenniswood and the unknown women in the car—both of whom are white—before he allegedly told Officer Shoemake

he would "kick her ass." 10/18/23 RP 851–54, 896, 902, 905, 931, 933–34. After he interacted with Officer Shoemake, Mr. Wagner was belligerent and hostile toward another white witness, Deputy James. Mr. Wagner displayed "preattack indicators" as he aggressively approached Deputy James. 10/19/23 RP 983.

Mr. Wagner's indiscriminately hostile tirade to various people indicates he did not threaten Officer Shoemake because of her race. Because Mr. Wagner was hostile to everyone he encountered—not just Officer Shoemake—"it cannot be said the offense was committed *because of the bias*." *In re M.S.*, 896 P.2d 1365, 1377 (Cal. 1995) (emphasis in original).

Two decisions from the Court of Appeals illustrate this point. In *Read*, the defendant confronted the victim in "an aggressive manner" while yelling and clenching his fists, without also confronting the white lot attendant. 163 Wn. App. at 868–69. In *Johnson*, the defendant "hurled abuse" at

only the female victim, while he was "polite and cooperative with" the male officer. 115 Wn. App. at 894. In both cases, the court found victim selection because the defendant was only hostile to a particular person. But here, Mr. Wagner interacted with several people in a similarly hostile manner.

The Court of Appeals minimized Mr. Wagner's overall temperament. It found he selected Officer Shoemake due to her race largely because he used racial slurs and he had racially symbolic tattoos. Slip Op. at 7–8. This holding is problematic for several reasons.

First, the hate crime offense "does not criminalize uttering biased remarks during the commission of another crime and that the State must show that the defendant selected his victim on a basis listed in the statute." *Pollard*, 80 Wn. App. at 65; *accord Talley*, 122 Wn.2d at 211. Mr. Wagner's use of racial slurs amounts to little in this case, especially since he was hostile to virtually everyone he encountered.

Second, this Court held the State must prove a "tight nexus between criminal conduct" and the defendant's reason for selecting the victim. *Talley*, 122 Wn.2d at 204. Requiring a tight nexus protects "free speech guaranties." *Id.*

But the Court of Appeals did not require such a nexus. Instead, it found Mr. Wagner committed a hate crime because he uttered racial slurs while he interacted with Officer Shoemake. Slip Op. at 6–7. It found as such even though Mr. Wagner was generally hostile to everyone he encountered. These facts do not demonstrate a "tight nexus."

The Court of Appeals treatment of this issue is not an outlier. Since *Talley*, the Court of Appeals has expansively construed the hate crime offense. Under the Court of Appeals' precedent, a defendant's bias toward a victim does not need to be a "substantial factor." *Pollard*, 80 Wn. App. at 69–70. The Court of Appeals even found victim selection where the defendant had equivocal mixed motivations in

selecting victims. *State v. Haq*, 166 Wn. App. 221, 282, 268 P.3d 997 (2012). These holdings are difficult to reconcile with *Talley*'s requirement of a tight nexus.

Without this Court's intervention, courts will continue to lower the requirements for proving victim selection. To ensure the hate crime offense does not impair First Amendment rights, this Court should grant review. RAP 13.4(b)(1), (b)(3).

2. The Court of Appeals resolved the *Miranda* violation under the "overwhelming evidence" test, which this Court is currently considering. This Court should either stay this case or grant review and properly determine harmlessness.

Mr. Wagner's expressive conduct in displaying his swastika tattoo and statements about the Nationalist Party should have been suppressed. He displayed his tattoos and made these statements while he was in custody, and he did so in response to Officer Ceban's interrogative questioning. Because Mr. Wagner was never advised of his rights under *Miranda*, the court erred by admitting this evidence.

The Court of Appeals did not necessarily disagree. Instead, it affirmed because it thought the admission of Mr. Wagner's expressive response was harmless beyond a reasonable doubt. Slip Op. at 8–10. It employed the "overwhelming evidence" test in its analysis. Slip Op. at 9–10. Because this Court is currently considering the propriety of that test, the Court should either stay this case or grant review and correctly determine harmfulness.

a. Officers must advise a suspect of their rights under Miranda *before subjecting them to custodial interrogation.*

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "The Fifth Amendment privilege against self-incrimination applies only to coerced testimonial evidence." *State v. Lozano*, 76 Wn. App. 116, 118–19, 882 P.2d 1191 (1994). The protections established by the Court in *Miranda v. Arizona* sweep broader than the Fifth Amendment, however. *Id*. at 119.

In *Miranda*, the Court "extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police." *New York v. Quarles*, 467 U.S. 649, 654, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). The Court established these protections because custodial interrogation "is inherently coercive[.]" *Id.*

"[L]aw enforcement officers are required to provide a suspect with *Miranda* warnings prior to questioning the suspect in a custodial setting." *State v. Rhoden*, 189 Wn. App. 193, 199, 356 P.3d 242 (2015). Specifically, these warnings "must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State." *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004).

Here, the trial court found: 1) Mr. Wagner was in custody when he was questioned by Officer Ceban; 2) Mr. Wagner's statements and conduct were responsive to Officer Ceban's question; but 3) Officer Ceban did not "interrogate"

Mr. Wagner. CP 145; 6/2/23 RP 90. The first two conclusion are correct, while the third is erroneous.

b. Officer Ceban subjected Mr. Wagner to custodial interrogation.

Officer Ceban subjected Mr. Wagner to interrogation because his question about Mr. Wagner's tattoo was reasonably likely to elicit an incriminating response.

The term "interrogation" under *Miranda* refers "to any words or actions on the part of the police . . . that the police *should know* are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (emphasis added). "Incriminating response" refers to "any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial." *Id.* at 301 n.5.

This definition focuses on the perceptions of the suspect, not the police. *Id.* at 301. Indeed, the Court in *Innis* repeatedly clarified that the standard addresses what the

police "should know," not what they actually know. *Id*. at 301–03. Applying this standard reveals that Officer Ceban's question represented the functional equivalent of express questioning.

Every officer but Officer Ceban knew Officer Shoemake needed backup because Mr. Wagner was being hostile and yelling racial slurs. 6/2/23 RP 27, 29, 36, 40–41, 50–52. It does not matter that only Officer Ceban lacked this knowledge. *See State v. Sargent*, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988) ("The standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts. The subjective intentions of the officer are not at issue.").

A reasonable officer in Officer Ceban's position would have known Mr. Wagner may have committed a hate crime. Asking such a suspect about their chest tattoo is likely to elicit an incriminating response. *See* William Y. Chin, *War and White Supremacists: How Use of the Military in War Overseas*

Empowers White Supremacists at Home, 11 S.J. Pol'y & Just. 8, 22 (2017) ("White supremacists often use tattoos to show their white supremacist affiliation.").

No officer advised Mr. Wagner of his rights under *Miranda* before Officer Ceban subjected him to interrogative questioning. As a result, Mr. Wagner's expressive conduct and statements to Officer Ceban should have been suppressed. *E.g., State v. Spotted Elk*, 109 Wn. App. 253, 258, 34 P.3d 906 (2001) (holding expressive conduct can constitute a testimonial act under *Miranda*).

The Court of Appeals did not address whether the trial court erred in admitting Mr. Wagner's response to Officer Ceban. Instead, it resolved the issue entirely on harmlessness. Slip Op. at 8–10.

c. The Court of Appeals incorrectly found the improper admission of Mr. Wagner's statements and expressive conduct was not harmless beyond a reasonable doubt.

The admission of Mr. Wagner's statements and expressive conduct was not harmless beyond a reasonable doubt. "Eliciting testimony about and commenting on a suspect's postarrest silence or partial silence is constitutional error and subject to our stringent constitutional harmless error standard." *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012). "[P]rejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

A constitutional error is harmless if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (internal quotation marks omitted) (quoting *Neder v. United States*, 527 U.S. 1,

15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). This test focuses on "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

The erroneous admission of Mr. Wagner's response had an immense effect at trial. Mr. Wagner's expressive conduct in revealing his swastika tattoo was likely extremely unsettling for many of the jurors. *See State v. Stein*, 193 Wn. App. 1003, 2016 WL 1090639, at *3 (March 21, 2016) ("[I]t would be difficult 'to find a more reviled group to associate with than the Nazi party.' Some jurors would have such a strong emotional reaction to the swastika tattoo that it would override their ability to decide the case rationally.") (*see* GR 14.1(a)). His subsequent statements threatened the rise of the "Nationalist Party" and that anyone in opposition should be prepared to die. 10/18/23 RP 957.

This gripping performance demonstrated Mr. Wagner's deeply held, offensive beliefs in a manner that no other evidence did. The jurors were likely deeply offended by these beliefs. *See United States v. Hazelwood*, 979 F.3d 398, 411 (6th Cir. 2020).

The extremely prejudicial nature of this evidence does not require in-depth explanation. This evidence likely convinced the jury to convict Mr. Wagner simply "because a bad person deserves punishment." *Old Chief v. United States*, 519 U.S. 172, 181, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (internal quotations omitted).

Likewise, this evidence did not occupy a minimal role at trial. During his opening statement, the prosecutor went through a detailed, step-by-step description of Mr. Wagner's expressive conduct and statements. 10/18/23 RP 791–92. He returned to this subject during closing, arguing Mr. Wagner's statements and conduct showed he was "willing to die" for his beliefs and that he cared more about those beliefs

than his children. 10/20/23 RP 1175–76. In short, the prosecutor repeatedly used Mr. Wagner's statements as substantive evidence of guilt.

The Court of Appeals did not properly consider the impact of Mr. Wagner's response at trial. Instead, it affirmed Mr. Wagner's conviction because it found "overwhelming untainted evidence" of guilt. Slip Op. at 10. In so holding, the court primarily focused on the other evidence at trial. It ignored the deeply prejudicial nature of Mr. Wagner's response to Officer Ceban.

This Court is currently considering whether courts must apply the "contribution" or "overwhelming evidence" tests when determining whether an error is harmless beyond a reasonable doubt. *State v. Cristian Magaña Arévalo*, Case No. 103586-1; *State v. Ahmed Wasuge*, Case No. 103530-6. This Court should stay this case pending a resolution in those two cases. Alternatively, this Court should grant review and determine whether the improperly admitted

evidence of Mr. Wagner's response was harmless beyond a reasonable doubt. RAP 13.4(b)(1), (b)(3).

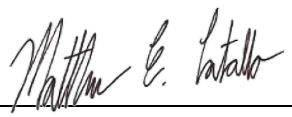
F. CONCLUSION

Mr. Wagner respectfully asks this Court to accept discretionary review. RAP 13.4(b).

This petition is 4,434 words long and complies with RAP 18.7.

DATED this 15th day of May 2025.

Respectfully Submitted



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

STATE OF WASHINGTON, Respondent, v. SEAN ROBERT WAGNER, Appellant.	No. 86044-5-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Sean Wagner appeals his conviction for a hate crime offense, arguing there was insufficient evidence to support his conviction, the trial court erred when it denied his motion to suppress statements made before he was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and the court erroneously admitted evidence of his tattoos. We conclude there was sufficient evidence to support Wagner's conviction. We further conclude that any error in admitting Wagner's statements to the police was harmless, and the trial court did not abuse its discretion in admitting evidence of Wagner's tattoos. We affirm Wagner's conviction.

I

On April 14, 2021, Tabatha Shoemake, a former senior animal control officer, was dispatched to a motel to conduct an animal welfare check regarding dogs left in a vehicle. Shoemake removed the dogs from the vehicle, left a note for the owner, and brought the dogs to a local animal shelter. After checking the

dogs into the shelter, she received information from dispatch that the owner of the dogs, later identified as Wagner, had called. Shoemake testified that when she called Wagner back, he was "pretty angry" and was "yelling a lot and cursing." Shoemake gave Wagner the shelter's address and told him he could pick up the dogs the next morning.

The manager of the shelter, Kerri Tenniswood, notified Shoemake that Wagner had arrived and was "very angry." Shoemake called for a second unit to assist and went outside to speak with Wagner. Shoemake testified that when Wagner first saw her, he "stopped and looked at me and clenched his fists and squinted and—and it was when you look at somebody and you know that—just the hatred." Shoemake again told Wagner he needed to wait until the next day to retrieve his dogs. Shoemake testified Wagner walked by her, leaned in about 6 to 12 inches away from her face, and called her a universally known offensive racial epithet.

Shoemake testified that she asked Tenniswood "to kind of keep everybody inside, because I didn't know what he was going to do. And the fact that it became more of a—a racial thing and was more focused on that than the dogs, I kind of just wanted to keep everybody inside." Shoemake observed Wagner "screaming a lot," and running towards and cursing at a White woman who was driving out of the parking lot. Shoemake testified that after Wagner chased the car, he turned around and "just focus[ed] on [her] at that point." Wagner began approaching her "[v]ery aggressively," "red-faced," and screamed other racial epithets. Shoemake testified Wagner threatened to "kick [her] ass," which she took seriously. Wagner

continued to approach Shoemake yelling racial epithets, made racial comments comparing Black children to excrement, and told Shoemake to "go back to Africa where [she] belong[s]."

Shoemake stopped walking, and Wagner got closer to her, prompting Shoemake to tell Wagner to step back. Shoemake testified that when Wagner did not move, she thought he was going to assault her. Wagner held his phone a few inches away from Shoemake's face and showed her a photo of men with rifles and a flag with a swastika on it. Shoemake testified that Wagner stated, " 'We're going to fix this,' " and " 'See this? We're going to fix this. We're going to make this—we're going to make this right.' " Shoemake interpreted this statement as "getting rid of all [B]lack people . . . whether it's sending us back to Africa or something else." During this interaction, Shoemake "key[ed] up her mic[rophone]" on her radio so "the people that are listening to the radio and dispatch [could] hear what's being said." An Edmonds police officer, testified that he heard the call and stated, "I heard anxiety in [Shoemake's] voice that I've never heard before and with repeated radio transmissions, that was elevating and ratcheting up quickly with fear. Again, fear that I've never heard in her voice before."

Tenniswood, a White woman, testified that while Wagner was "hostile and angry," he did not insult or threaten her, and she did not fear he would attack her. Tenniswood stated that Wagner's "whole focus was on [Shoemake]. His—everything he was screaming, the racial slurs, the insults, that was all towards

[Shoemake]." Tenniswood described how what she observed was different than her own interactions with Wagner,

> The difference is that he was—he was very aggressive with her. He was in very close contact. With me on the front doorstep, he was walking away; with her, he was—he was leaning in and getting into her space, and he was raging. Yeah, he—big difference. I—when I saw him, like, on the roof, it was more like a temper tantrum, and—but this was more, like, rage.

Tenniswood testified that Wagner "treated [Shoemake] like she wasn't human. He was—you know, at that point, it wasn't—this wasn't about his dogs anymore. He was—with the racial slurs and the insults, he was treating her like she wasn't human."

An arriving deputy placed Wagner in handcuffs and physically sat Wagner on the bumper of his patrol car, citing concern for officer safety. Edmonds Police Officer Dan Ceban testified he was asked to watch over Wagner while the deputies conducted their investigation. Officer Ceban testified that he asked about a black ink mark he saw on Wagner's chest. Wagner asked Officer Ceban to unzip his jacket, and Officer Ceban testified that he saw "an eagle and a swastika that [he] recognized as symbols for the Nazi party." Officer Ceban testified that Wagner said,

> "That's right, the Nationalist Party." He then continued to make multiple statements about he knows that I'm following orders, but he's also following orders, and he's just waiting for the right moment, and when they do come, they will win, and there's nothing we can do about it. He then continued to say that he hopes that I'm ready to die for my beliefs and my kids, because he is, and that the Nationalist Party will inevitably regain control, and there's nothing we can do about it.

Wagner was arrested and booked into the jail. A booking officer observed and photographed the swastika tattoo and several others. The State charged Wagner with a hate crime offense. In a pretrial motion, Wagner moved to exclude testimony regarding his tattoos.[1] The trial court denied Wagner's motion and stated it was probative as potential evidence of victim selection. During trial, the State introduced testimony from Christopher Magyarics, a research fellow with the Anti-Defamation League Center of Extremism, who testified about the symbolism of Wagner's tattoos. Magyarics testified that Wagner's tattoos included an eagle and swastika tattoo, a "Totenkampf" symbol, a "Vegvísír," and a "Valknot," and the German words "Ruhm" and "Ehre." Magyarics testified these symbols have been appropriated by white supremacists and explained that while Naziism mainly consisted of anti-Semitism, the ideology was also hostile towards individuals who were non-Caucasian.

In addition to the tattoos and Magyarics's testimony, the State introduced as an exhibit a letter Wagner wrote to the Snohomish County District Court in which he stated, "I outlined that I believe Africa is for Africans and they should all be shipped back. That is a realistic political perspective founded on ideas of

[1] Wagner received a "provisional" ruling admitting the tattoo evidence from a different judge. The State argues that because Wagner assigned error to this provisional ruling, as opposed to the later ruling before the judge who oversaw trial, we should decline review. Wagner did not assign error to the subsequent evidentiary ruling as required by RAP 10.3(g). However, under RAP 1.2(a), a " 'technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review.' " State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981) (quoting Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 710, 592 P.2d 631 (1979)). Wagner re-raised the issue to the trial court, and his argument on appeal challenges the trial court's ruling. Justice would not be served by deciding this based on technical compliance or noncompliance with the rule.

nationalism and is protected by the constitution." A jury convicted Wagner of a hate crime offense. Wagner appeals.

II

Wagner argues the State presented insufficient evidence he threatened Shoemake because of her race. We disagree.

Due process requires the State to prove beyond a reasonable doubt every element of a crime. State v. Rodriquez, 187 Wn. App. 922, 930, 352 P.3d 200 (2015). In reviewing a claim for insufficient evidence, this court considers " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.' " State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis added) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Wagner cites State v. Read, 163 Wn. App. 853, 863-64, 261 P.3d 207 (2011), which provides an additional analytical framework for hate crime offenses. Read states that because a hate crime offense implicates First Amendment rights, we must "conduct 'an independent examination of the whole record' to assure the conviction 'does not constitute a forbidden intrusion into the field of free expression.' " Id. (quoting State v. Kilburn, 151 Wn.2d 36, 50, 84 P.3d 1215 (2004)). This standard requires that we "independently review only crucial facts, that is, those facts so intermingled with the legal question that it is necessary to analyze them in order to

pass on the constitutional question." State v. Locke, 175 Wn. App. 779, 790, 307 P.3d 771 (2013).

The jury was instructed that to convict Wagner of a hate crime, the State needed to prove beyond a reasonable doubt that (1) on April 14, 2021 Wagner threatened a specific person, (2) Wagner placed that person in reasonable fear of harm to person, (3) *Wagner acted because of his perception of the person's race, color, ancestry, or national origin*, and (4) Wagner acted maliciously and intentionally. (Emphasis added.); RCW 9A.36.080. The hate crime statute is not aimed at speech, but "aimed at criminal conduct and enhances punishment for that conduct where the defendant chooses his or her victim because of their perceived membership in a protected category." State v. Talley, 122 Wn.2d 192, 201, 858 P.2d 217 (1993). Thus, "[a] person may not be convicted of uttering biased remarks during the commission of another crime." State v. Johnson, 115 Wn. App. 890, 896, 64 P.3d 88 (2003). Instead, a hate crime must rest on proof that the defendant selected the victim because of the victim's apparent membership in the protected class. Id.

Wagner argues that because he "behaved aggressively toward everyone," the State cannot prove he singled out Shoemake because of her race. However, Wagner's behavior towards others does not undermine the evidence at trial showing that Wagner threatened Shoemake because of her race. Wagner's motive for saying the things he said to Shoemake is a question of fact. His explicit use of racial epithets was circumstantial evidence that his actions toward Shoemake were because of his perception of her race. RCW 9A.36.080.

Furthermore, while true that Wagner was upset about his dogs, the evidence at trial shows that Wagner did not direct any threat at Tenniswood or the arresting officer, both White individuals. Wagner's threatening behavior was directed toward only Shoemake. A rational jury could find the because-of element was met based on Wagner's explicit racial epithets, his disparate treatment of persons of different apparent race, and the racial symbolism of his tattoos, and certainly considering all three together. We conclude the evidence was sufficient that Wagner threatened Shoemake because of her race.

III

Wagner argues that in the absence of Miranda warnings, the trial court should have suppressed statements he made to the police as well as his display of his swastika tattoo in response to Officer Ceban's inquiry.

A

The parties provide differing theories as to the analysis surrounding the admissibility of Wagner's swastika tattoo. Wagner argues the display of the tattoo was expressive conduct responsive to Officer Ceban's inquiry about his tattoo and was thus testimonial. The State has two theories, first that Officer Ceban conducted a search of Wagner's person after Wagner expressly consented, and second, that the tattoo was physical evidence and thus could not be excludable due to a Miranda violation.

At trial, Deputy Jun Wu, a corrections deputy from the county jail, testified that he observed and photographed five tattoos on Wagner's body during the booking process. The State admitted photographs of the tattoos as exhibits 20

through 22. Wagner has never objected to Deputy Jun Wu's observations—Deputy Jun Wu's testimony to his observations, or the photographic evidence of the tattoos that Deputy Jun Wu authenticated—either on a constitutional basis or otherwise. Nothing in our record shows that Deputy Jun Wu's observation of the tattoos was related to or derived from Officer Ceban's inquiry at the scene. The tattoos were independently proved without objection and Officer Ceban's testimony describing the swastika tattoo was cumulative of the photographic evidence of the tattoo. Any error in allowing Officer Ceban's description of the swastika tattoo was harmless because it was strictly cumulative. See State v. Flores, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008) (evidence that is merely cumulative of overwhelming untainted evidence is harmless).

B

Likewise, any error in admitting Wagner's statements to Officer Ceban was harmless.

Constitutional errors are prejudicial unless the State establishes beyond a reasonable doubt that any reasonable juror would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). When determining whether the constitutional error is harmless, this court applies the untainted evidence test and asks whether the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426.

The untainted evidence at trial showed that Wagner, upon seeing Shoemake in person, started using racial epithets, told Shoemake to "go back to Africa where [she] belong[s]," and threatened to "kick [her] ass." Wagner showed

Shoemake a photo of men with rifles and a flag with a swastika on it, and told her " 'We're going to fix this,' " which Shoemake interpreted as a threat. Tenniswood testified how her interactions with Wagner were different than what she observed between Wagner and Shoemake, and stated that the "only time [Wagner's demeanor] changed is when he was interacting with [Shoemake]." Tenniswood stated, "[I]t didn't seem to be about the dogs anymore." Both Tenniswood and the arresting officer testified that Wagner did not insult, threaten, or attack them. Wagner testified that he believed in white separation, and Black individuals should go back to Africa, which he reaffirmed in his letter to the county district court judge. Deputy Jun Wu authenticated photographs showing Wagner's swastika tattoo with its clear racist meaning. Magyarics testified that Wagner's tattoos had certain meanings within white supremacist groups including animus towards non-Caucasians.

In comparison to this evidence, Wagner's additional comments to Officer Ceban referring to a Nationalist Party was cumulative and only relatively less clearly indicative of race-based victim selection than other trial evidence. Any error in admitting the statements would be harmless because "any reasonable trier of fact would have reached the same result," State v. Brown, 140 Wn.2d 456, 468-69, 998 P.2d 321 (2000), based on "the 'overwhelming untainted evidence,' " State v. Thompson, 151 Wn.2d 793, 808, 92 P.3d 228 (2004) (quoting State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)).

IV

Wagner argues the trial court abused its discretion by admitting evidence of his tattoos in violation of ER 403. We disagree.

A trial court's evaluation of relevance under ER 401 and its balancing of probative value against prejudicial effect under ER 403 will be overturned only for manifest abuse of discretion. State v. Russell, 125 Wn.2d 24, 78, 882 P.2d 747 (1994). This occurs when " 'the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.' " State v. Case, 13 Wn. App. 2d 657, 668, 466 P.3d 799 (2020) (internal quotation marks omitted) (quoting State v. Lile, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017)).

Evidence is relevant "if it makes the existence of a fact of consequence more or less probable to be true than without the evidence." State v. Arredondo, 188 Wn.2d 244, 259, 394 P.3d 348 (2017); ER 401. "The threshold to admit relevant evidence is very low" and "[e]ven minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). To prove that Wagner was guilty of a hate crime offense, the State had to prove that Wagner acted because of his perception of Shoemake's race. RCW 9A.36.080. As the testimony at trial established, Wagner's tattoos depicted symbols of white supremacy and racial hatred towards Black individuals. That Wagner had these tattoos made it more likely that he chose to threaten Shoemake because she was Black. It was therefore directly relevant to an issue the jury was required to decide.

The evidence was also not unfairly prejudicial. "Evidence causes unfair prejudice when it is 'more likely to arouse an emotional response than a rational

decision by the jury.' " City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009) (internal quotation marks omitted) (quoting State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)). "[T]he burden of demonstrating unfair prejudice is on the party seeking to exclude the evidence," here, Wagner. State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999). The "linchpin word is 'unfair' " and the court must "weigh the evidence in the context of the trial itself." State. v. Bernson, 40 Wn. App. 729, 736, 700 P.2d 758 (1985).

Where the State must prove that a defendant chose a victim because of the victim's race, evidence that the defendant harbors animus against that race is highly probative and admissible. See Talley, 122 Wn.2d at 211 (a defendant's discriminatory beliefs may offer circumstantial evidence of victim selection). Wagner's tattoos evidencing that animus were not unfairly prejudicial any more than Wagner's use of racial epithets, or his declaration that he believed Black people needed to go back to Africa. Wagner's tattoos evidencing directly relevant racial animus were more probative than unfairly prejudicial. The trial court did not abuse its discretion in admitting the tattoos.

Affirmed.

Birk, J.

WE CONCUR:

Feldman, J.

Díaz, J.

WASHINGTON APPELLATE PROJECT

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