Supreme Court No. 100677-2
(COA No. 82303-5-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP MARSHALL,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Phillip Marshall, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Marshall seeks review of the Court of Appeals decision dated January 24, 2022, a copy of which is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it determined Mr. Marshall's statement of what could happen in the future was a true threat unprotected by the First Amendment?

2. Did the Court of Appeals fail to apply this Court's requirement that prior domestic violence

evidence must have an overriding probative value before it can be admitted?

D. STATEMENT OF THE CASE

Emma Land and Phillip Marshall lived in a tent off Kellogg Road in Bellingham. RP 53-54, CP 51. Their relationship broke apart. RP 55, 89. Ms. Land left to live with her mother. *Id.*

On September 19, 2019, Mr. Marshall went to the RV where Ms. Land stayed to speak with her. RP 60, CP 52. They walked back to their tent to talk more. *Id.* Once at the tent, Ms. Land claimed Mr. Marshall began fighting with her. RP 61, CP 52. As Ms. Land tried to leave the tent, Mr. Marshall grabbed her bag. RP 63, CP 52. Ms. Land claimed Mr. Marshall stomped on the bag and damaged her cell phone. RP 67, CP 52.

Mr. Marshall then said, "I could just kill you right fucking here, and nobody would even care." RP

84, 63. In her testimony, she told the court, "I felt like that statement that he had made was partially him showing some self-control and restraint, but I knew it was more, he was more than capable." RP 91-92.

Ms. Land left the tent. Mr. Marshall asked her to come back. RP 67. When she did not, he threw her phone towards her. RP 67. She called the police and then walked to the Olive Garden restaurant, where she waited for the police to arrive. RP 69.

The government sought to introduce evidence of an incident Ms. Land claimed occurred a week before the charged acts at the trial. RP 27. Over defense objections, the court allowed the prosecution to use this evidence in its case-in-chief. RP 94, CP 58.

In his non-jury trial, the court found Mr. Marshall guilty of felony harassment and malicious

mischief. CP 53-54. The court imposed a residential drug offender sentencing alternative sentence. CP 62.

E. ARGUMENT

1. This Court should review whether Mr. Marshall made a "true threat" unprotected by the First Amendment.

The Court of Appeals held that sufficient evidence established that a reasonable person in Mr. Marshall's position would have foreseen his statement would be interpreted as a serious expression of an intent to inflict the harm threatened. App 5. This Court should accept review of whether this holding conflicts with this Court's holdings on protected speech. Because it does not and because it involves a significant question of constitutional law, this Court should grant review. RAP 13.4(b).

To establish harassment, the government must prove Mr. Marshall's words were not protected speech.

State v. Allen, 176 Wn.2d 611, 630, 294 P.3d 679 (2013) (plurality opinion). 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." *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). It is not an idle statement, a joke, or even a "hyperbolic expression[ ] of frustration." *State v. Kohonen*, 192 Wn. App. 567, 583, 370 P.3d 16 (2016).

Importantly, the First Amendment protects all sorts of speech, even when the sentiment is hurtful or vile. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); *Collin v. Smith*, 447 F. Supp. 676, 686 (N.D. Ill. 1978). This protection even extends to threats that are specific and troubling. *Kilburn*, 151 Wn.2d at 39.

The focus of the true threat analysis is on the speaker. The test is objective. *State v. Trey M.*, 186 Wn.2d 884, 893, 383 P.3d 474 (2016). To determine sufficiency, this Court examines whether a reasonable person in the speaker's position would foresee their statement would be interpreted as a serious expression of intent to cause physical harm. *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001).

The Court of Appeals' determination that sufficient evidence established Mr. Marshall made a true threat conflicts with this Court's rulings. Of course, the words Mr. Marshall spoke are critical. Mr. Marshall never said he was going to kill or intended to kill Ms. Land. Instead, he told her he "could" kill her and nobody would notice her death. RP 84.

While this statement is alarming and cruel, it is not a threat to kill. Instead, it is an expression of Mr.

Marshall's anger and an attempt to belittle Ms. Land's worth. A threat of what Mr. Marshall could do if he wanted to and what he intended to do are not the same thing. *Kilburn*, 151 Wn.2d at 39. The Court of Appeals fails to make this distinction.

Further, this Court should look to the context in which Mr. Marshall spoke, which the Court of Appeals does not do in its opinion. The fight between Ms. Land and Mr. Marshall started with Mr. Marshall trying to reconcile with Ms. Land. RP 60. Mr. Marshall became increasingly frustrated and angry with their conversation. RP 61. He became so mad that he grabbed Ms. Land's bag, causing it to empty. RP 63. He then tried to break things that fell out of the bag, including her phone. RP 67. He then made his belittling statement.

But Mr. Marshall did not chase Ms. Land after she left the tent. RP 68. Te asked her to return, but he did not pursue her. RP 69. He continued to be angry, mainly at her calling the police, but made no further threats towards her. RP 72. Rather than chase her, Mr. Marshall left in the opposite direction on his bicycle. RP 69.

Following Kilburn, the Court of Appeals should have held that Mr. Marshall did not make a true threat as is required to prove felony harassment. *Kilburn*, 151 Wn.2d at 49. Because this conflict also involves a significant question of Mr. Marshall's First Amendment rights, this Court should grant review. RAP 13.4(b).

2. This Court should review whether the trial court deprived Mr. Marshall of a fair trial when it permitted the government to introduce prior act evidence that did not have an overriding probative value.

The Court of Appeals found that the introduction of prior act evidence did not deprive Mr. Marshall of his right to a fair trial. App 6. This opinion conflicts with this Court's opinion in *State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014), and in *State v. Ashley*, 186 Wn.2d 32, 43, 375 P.3d 673 (2016). Review should be granted. RAP 13.4(b).

Persons should only be tried for the crimes they are accused of committing and not for their other bad. U.S. Const. amend. XIV; Const. art. 1, § 22; *State v. Goebel*, 36 Wn.2d 367, 368, 218 P.2d 300 (1950); *Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

Prior act evidence is generally inadmissible. *Gunderson*, 181 Wn.2d at 921 (2014) (citing ER 404(b)); *see also State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). Prior act evidence prejudices an accused even when it is minimally relevant, "where the minute peg of relevancy [is] entirely obscured by the dirty linen hung upon it." *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *Goebel*, 36 Wn.2d at 379).

To satisfy the requirements of this Court's evidentiary rules, the trial court must find that the evidence will be used for a limited purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b); *see also* ER 403. Other than these exceptions, evidence of prior bad acts is presumptively

inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Even if the evidence is admissible under ER 404(b), it should be excluded if the danger of unfair prejudice substantially outweighs the probative value of the relevant evidence. *Smith*, 106 Wn.2d at 776; *see also* ER 403. Doubts as to the admissibility of prior act evidence should be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The government relied on *State v. Magers*[1] to ask the court to admit evidence of an incident it claimed happened a week before the charged event. CP 39. The government contended Ms. Land and Mr. Marshall got into a fight where he strangled her. *Id*. The government claimed this evidence was necessary to

[1] 164 Wn.2d 174, 189 P.3d 126 (2008).

prove whether Ms. Land's fears were objectively reasonable. *Id.*

The trial court correctly observed that this Court limited *Magers* in *Gunderson*, 11/22 (PM) RP 55. *Gunderson* recognizes the *Magers* Court "took great care to specifically establish that 'evidence that [the defendant] had been arrested for domestic violation and fighting and that a no-contact order had been entered following his arrest was relevant to assess the credibility of [the complaining witness] *who gave conflicting statements about [the defendant's] conduct*." *Gunderson*, 181 Wn.2d at 925. (*quoting Magers*, 164 Wn.2d at 186 (emphasis added in *Gunderson*)). This Court refused to extend *Magers* "where there is no evidence of injuries to the alleged victim and the witness neither recants nor contradicts prior statements." *Id.* at 925.

This holding should have guided the Court of Appeals. "Much like in cases involving sexual crimes, courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high." Gunderson, 181 Wn.2d at 925 (*citing State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)). To limit its prejudicial effect, prior domestic violence should be limited to cases where the government has established an "overriding probative value," such as an inexplicable recantation or conflicting account of events. *Id.*

The Court of Appeals limits *Gunderson* to circumstances where the government tries to introduce prior act evidence for impeachment purposes. App 8. *Gunderson* does not only apply to prior act evidence but requires the court to find an overriding probative value

before admitting prior domestic violence evidence. 181 Wn.2d at 925. The Court of Appeals' rejection of this principle should be reviewed.

The Court of Appeals also conflicts with this Court's opinion in *Ashley*, 186 Wn.2d at 43. In *Ashley*, the government sought to introduce the prior act domestic violence evidence to show lack of consent and for credibility purposes. *Id.* at 36. This Court held that the court did not err in allowing the prior act evidence to be used to show lack of consent but did err when it allowed the evidence to be used for credibility purposes. *Id.* at 43-44.

Here, the court allowed the evidence to show that Ms. Land's fear was reasonable. RP 94. However, in its motion to use prior act evidence, the government recognized that this was largely a credibility question. RP 37 ("Your Honor, she is in my mind a domestic

violence victim, and so it's hard for me to get information from her.") As such, the use of the prior act evidence in this case is similar to the use disapproved of in *Ashley*, which was to establish credibility. 186 Wn.2d at 44. For this purpose, the use of the prior act evidence was improper.

This Court should grant review to clarify that trial courts should only admit prior acts of domestic violence where the evidence has an overriding probative value. *Gunderson*, 181 Wn.2d at 925. Otherwise, the prejudicial effect of the evidence is simply too high. Because the Court of Appeals failed to apply the analysis this Court laid out in *Gunderson*, this Court should grant review. RAP 13.4(b).

F. CONCLUSION

Based on the preceding, Mr. Marshall respectfully requests that review be granted pursuant to RAP 13.4(b).

This petition is 2,066 words long and complies with RAP 18.17.

DATED this 22nd day of February 2022.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. PHILLIP DANIEL MARSHALL, Appellant.	No. 82303-5-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Phillip Marshall appeals his convictions for felony harassment and third degree malicious mischief. He contends that the evidence was insufficient to support his harassment conviction and that the trial court erred in admitting ER 404(b) and hearsay evidence. We disagree and affirm.

FACTS

Marshall and E.L. were in an "up and down" intimate relationship for nearly two years. E.L. ended the relationship in September 2019 following a fight in which Marshall blackened her eye and choked her to the point where she could not breathe.

In the middle of the night on September 19, about a week after the assault, Marshall persuaded E.L. to return to the tent where he lived in some woods near Bellingham. He did so by telling E.L. that he wanted to make amends and "prove his

love" to her. But as soon as they entered the tent, Marshall's demeanor changed. He went from being apologetic to accusatory and demeaning.

After arguing with Marshall for several hours, E.L. insisted on leaving the tent because she "was afraid that [she] would end up getting injured if [she] stayed." Marshall stood in her way and blocked the exit. When she tried to walk by Marshall, he yanked the bag E.L. was carrying off of her arm, dumped its contents, stomped on them, and cracked the screen of her cell phone. E.L. tried to gather her things and collect the bag because that was her "last chance to get help if [she] needed it," but as she did so, Marshall pressed his forehead against hers and angrily said: "You know I could kill you right now? You know that, don't you?" or "I could just kill you right fucking here, and nobody would even care."

At that moment, E.L. believed that Marshall "was very capable of" killing her and did not "know what he might do." Also, "[b]ecause of the week before, [E.L.] was scared," "afraid that he was going to hit [her] again if [she] didn't get out of there before it got worse," and "afraid he would hurt [her]" again. So she ran "as quickly as" she could out of the tent.

Marshall tried to coax E.L. back by offering to return her phone but she refused. He then threw the phone at her and went back inside the tent. E.L. retrieved the phone and, "[b]efore it was a minute in [her] hands," she called 911 while walking to a nearby Olive Garden restaurant to wait for a police officer.

Whatcom County 911 operator Midnightblue Danskine received E.L.'s "domestic violence call" around 10:00 a.m. on September 19. According to Danskine, E.L. "was crying and speaking very quickly and having a hard time fully getting her words out.

She sounded as if she was hyperventilating or having difficulty getting air." E.L. reported being in a fight with her boyfriend, whom she identified as Phillip Marshall. She also reported being scared of Marshall, how "he might have a knife and an air soft gun," and that "she was leaving the woods to get away from him."

Bellingham Police Officer Tyler Reed responded to the 911 call and interviewed E.L. He described E.L. as being "visibly upset," "crying," "distraught," and "emotional." This conversation was recorded on Officer Reed's body-worn camera.

The State charged Marshall with one count of felony harassment and one count of third degree malicious mischief, both with domestic violence aggravators.

At the bench trial, the State introduced evidence of Marshall's prior incident of domestic abuse. E.L. testified about Marshall's threat on September 19 and a prior time when he strangled and blackened her eye. The earlier altercation involved "15 minutes of wrestling around" until she could not "fight back anymore." The State called Danskine to testify about the 911 call and Officer Reed to discuss his encounter with E.L. Officer Reed described the location of Marshall's tent as not an "easily publicly accessible space," and "pretty well hidden up in the woods." The State also presented the officer's body-worn camera recording, which the trial court admitted.

Marshall did not testify and rested without calling any witnesses. The trial court found him guilty as charged. Marshall appeals.

ANALYSIS

A. Sufficiency of Evidence

Marshall argues that the State failed to provide sufficient evidence that he made a true threat to kill E.L. We disagree.

In reviewing a challenge to the sufficiency of the evidence, we must determine "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." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We review circumstantial evidence and direct evidence with equal weight. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). And we defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In harassment cases, we apply "the rule of independent review" to determine what constitutes a true threat. State v. Kilburn, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004). The purpose on independent review is to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." Kilburn, 151 Wn.2d at 50. Thus, independent review is "limited to review of those 'crucial facts' that necessarily involve the legal determination" of whether there was a true threat and "does not extend to factual determinations such as witness credibility." Kilburn, 151 Wn.2d at 52; State v. Johnston, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006).

To convict Marshall of felony harassment, the State had the burden of establishing that he knowingly threatened to kill and, by words or conduct, placed E.L. in reasonable fear that the threat would be carried out. RCW 9A.46.020(1), (2)(b)(ii). Because RCW 9A.46.020 criminalizes pure speech, the State must also prove that the

alleged threat was a "true threat." State v. Kohonen, 192 Wn. App. 567, 575, 370 P.3d 16 (2016). Whether a statement is a "true threat" is determined through an objective standard that focuses on the speaker. Kilburn, 151 Wn.2d at 44. "The question is whether a reasonable person in the speaker's position would foresee that the threat would be interpreted as a serious expression of intention to inflict the harm threatened." Kohonen, 192 Wn. App. at 575-76 (citing State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013)).

> A true threat is a serious threat, not one said in jest, idle talk, or political argument. Kilburn, 151 Wn.2d at 43 (citing United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983)). Stated another way, communications that "bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole" are not true threats. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). The nature of a threat "depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) . . . Consistently with this recognition, our court has held that "[w]hether a statement is a true threat or a joke is determined in light of the entire context" and that a person can indirectly threaten to harm or kill another. Kilburn, 151 Wn.2d at 46, 48. Further, "[t]he speaker of a 'true threat' need not actually intend to carry it out. It is enough that a reasonable speaker would foresee that the threat would be considered serious." Schaler, 169 Wn.2d at 283 (citation omitted).

Kohonen, 192 Wn. App. at 576-77 (alterations in original) (quoting State v. Locke, 175 Wn. App. 779, 790, 307 P.3d 771 (2013)).

Thus, the dispositive question is not whether the evidence establishes that Marshall intended to kill E.L., but whether sufficient evidence establishes that a reasonable person in Marshall's position would have foreseen that his statements would be interpreted as a serious expression of an intent to inflict the harm threatened. Given the facts here, we conclude that such evidence was adduced.

A week before September 19, 2019, Marshall blackened E.L.'s eye and strangled her to the point that she could no longer breathe. E.L. terminated the relationship and Marshall later lured her to his tent that was "pretty well hidden up in the woods" under the guise of reconciliation. Once inside the tent, Marshall immediately became combative and engaged in a lengthy argument. A frightened E.L. tried to leave the tent but Marshall blocked her and tried to destroy her only means of calling for help. When she tried to gather her things, Marshall put his forehead to E.L.'s and angrily said he "could kill her" right there. He made these statements in the midst of a heated argument, and after preventing E.L. from leaving and physically assaulting her a week before. He did not make these statements in jest or idle chat. E.L. believed he was capable of killing her and was afraid that he would hurt her again.

Viewing these facts in a light most favorable to the State, sufficient evidence supported the trial court's determination that Marshall made a true threat to kill.

B. Prior Domestic Violence

Marshall next contends that the trial court erred by admitting ER 404(b) evidence of his prior physical altercation with E.L. to show her state of mind during the September 19 incident. We disagree.

Before trial, the State gave notice and moved to introduce evidence of Marshall's "previous violent altercations" with E.L., specifically the one involving "strangulation and punching [E.L.] in the eye, a week prior to this incident." It argued that the prior act of violence against E.L. was relevant to prove her state of mind for the purposes of determining "whether her apprehension and fear that the threat would be carried out was objectively reasonable." Marshall opposed the motion. The trial court considered

the parties' arguments but determined that it needed to hear E.L.'s testimony before it could rule on whether the prior bad act evidence was admissible. After E.L. testified, the trial court found that the prior incident was admissible for the limited purpose of showing E.L.'s state of mind and determining whether her fear was reasonable. We review a trial court's decision to admit or exclude evidence under ER 404(b) for abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Powell, 126 Wn.2d at 258.

Under ER 404(a), evidence of a person's character is not admissible when it is offered "for the purpose of proving action in conformity therewith on a particular occasion." The same evidence, however, may be admitted for proper purposes that include "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Prior acts of violence are admissible under ER 404(b) when they are relevant to prove an element of the crime. State v. Ashley, 186 Wn.2d 32, 41, 375 P.3d 673 (2016).

Here, to prove felony harassment, the State had to establish that Marshall's threat placed E.L. "in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(b). The State introduced ER 404(b) evidence of a prior act of domestic abuse between Marshall and E.L. to establish that her fear of his threat was reasonable. The trial court ruled that this evidence was admissible for this purpose. The trial court did not abuse its discretion in doing so because state of mind evidence in domestic violence harassment cases is relevant and admissible. State v. Fisher, 165 Wn.2d 727,

744, 202 P.3d 397 (2009) ("Washington courts have recognized that evidence of misconduct is admissible to prove the alleged victim's state of mind.").

Marshall also mistakenly relies on State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014). There, the trial court admitted evidence of the defendant's prior acts of domestic violence against the alleged victim to impeach the credibility of the alleged victim's testimony that he did not assault her. Gunderson, 181 Wn.2d at 920-21. On review, the Gunderson court held that the trial court erred in admitting the evidence. 181 Wn.2d at 919-20. Here, the ER 404(b) evidence was relevant to proving an element of felony harassment. And, unlike Gunderson, the evidence was not admitted to bolster E.L.'s credibility.

C. The 911 Call

Marshall claims that the trial court erred when it admitted statements E.L. made to the 911 operator because they did not qualify under the excited utterance exception to the hearsay rule. We review a trial court's decision to admit a hearsay statement under the excited utterance exception for an abuse of discretion. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Generally, hearsay is inadmissible. ER 802. Under ER 803(a)(2), however, a hearsay statement is admissible as an excited utterance if it is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress or

excitement of the event, and (3) the statement relates to the event." State v. Magers, 164 Wn.2d 174, 187-88, 189 P.3d 126 (2008).

Marshall challenges only the second factor, arguing that the State failed to establish that E.L. "was still under the influence of the event or that so little time had passed that [E.L.] did not have time to reflect on what she would say to the 911 operator." Although the record does not reveal the exact time E.L. exited the tent, it does establish that E.L. called 911 within a minute of retrieving her phone and while still in the process of escaping from Marshall. In view of these circumstances, it is apparent that the passage of time between Marshall's threat and E.L.'s 911 call was brief and E.L. was still under the stress of the incident.

We thus conclude that the trial court acted within its discretion in admitting E.L.'s statements as excited utterances. Marshall's claim of error fails.

D. Body-Worn Camera

Finally, Marshall contends that the trial court erred when it admitted the body-worn camera recording. After reviewing the recording in chambers, the trial court determined that E.L.'s statements to Officer Reed were excited utterances.[1] But Marshall has not designated this recording as part of the appellate record and we have no means of reviewing the evidence the trial court considered in making its ruling. As the party seeking review, Marshall bears the burden of perfecting the record to provide us with all the relevant evidence. RAP 9.1(a), 9.6(a), (b)(3); State v. Vazquez, 66 Wn. App. 573, 583, 832 P.2d 883 (1992). His failure to do so precludes review of this issue.

[1] The record shows that audio difficulties hindered playing the recording in the courtroom. Because the parties had viewed the recording, they did not object to the trial court viewing it in chambers and later discussing its admissibility with them on the record.

We affirm.[2]

Mann, C.J.

WE CONCUR:

[2] Although Marshall assigns error to several findings of fact by the trial court in his briefing, he provides no argument or authority on why such findings were improper. Thus, these assignments of error are waived and we will not consider them. RAP 10.3(6); State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82303-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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