NO. 101849-5
(COA NO. 82961-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

K.S.-M.,

Petitioner.

PETITION FOR REVIEW

CHRISTOPHER PETRONI
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Federal Opinions

Non-Washington State Court Opinions

Constitutional Provisions

Statutes

Rules

Other Authorities

A. INTRODUCTION

The cyberstalking statute regulates pure speech, and it does so in the largest and most ubiquitous public forum in history—the Internet and social media. What's more, the amount of protected speech that the statute criminalizes dwarfs the unprotected speech that falls within its scope. The statute also defines no standards for determining what speech is prohibited.

The predictable result of this overbroad, vague regulation of speech on social media is that teenagers are punished for their online speech. That is what happened to 15-year-old K.S.-M. here, and it will continue to happen until this Court intervenes.

K.S.-M.'s social media posts were childish and ill-considered. Above all, however, they were speech. By affirming her cyberstalking conviction, the Court of Appeals violated her First Amendment rights.

B. IDENTITY OF PETITIONER

Petitioner K.S.-M. asks for review of the decision affirming her conviction of cyberstalking.

C. COURT OF APPEALS DECISION

K.S.-M. seeks review of the unpublished decision in *State v. K.S.-M.*, No. 82961-1-I (Wash. Ct. App. Feb. 27, 2023) (unpub.).

D. ISSUES PRESENTED FOR REVIEW

1. Where a statute criminalizes speech, the prosecution must prove that the speech is unprotected. Cyberstalking is making an "electronic communication" using "lewd, lascivious, indecent, or obscene" words or images. A "communication" is speech. The prosecution offered no evidence K.'s speech fell in an unprotected category. Her conviction violates the First Amendment as interpreted by this Court's and the Court of Appeals's binding decisions.

2. The prosecution had to prove the pictures K. posted were "lewd, lascivious, indecent, or obscene" beyond a reasonable doubt. The prosecution did not submit the pictures, and the descriptions in the record contain no evidence the subject dressed or posed in a licentious or crudely sexual way. The prosecution presented insufficient evidence to convict K. of cyberstalking, and the Court of Appeals's opinion upholding K.'s conviction violates due process.

3. A criminal statute is overbroad under the First Amendment if it outlaws a substantial amount of protected speech and comparatively little unprotected conduct. The conduct the cyberstalking statute outlaws is "mak[ing] an electronic communication," a form of pure speech. By criminalizing communications that are merely "indecent," the statute prohibits a large amount

of protected speech and relatively little unprotected speech. The statute is overbroad and unconstitutional.

4. A criminal statute is unconstitutionally vague if it lacks sufficiently definite standards to prevent arbitrary enforcement based on subjective values. The cyberstalking statute contains no standards to determine which communications are "lewd, lascivious, indecent, or obscene," leaving police, prosecutors, and courts to rely on their own subjective reactions. The statute is unconstitutionally vague.

E. STATEMENT OF THE CASE

Fifteen-year-old A.[1] took pictures of herself partially clothed and sent them to her boyfriend. CP 40, 44–45. After they broke up, the boy sent A.'s pictures to his new girlfriend, K. CP 44.

---

[1] For clarity, this brief shortens A.L. to "A." and K.S.-M. to "K."

In April 2020, K. posted the pictures of A. on the photo-sharing social media app Snapchat. CP 40–41, 44–45, 47. A.'s mother called the police. CP 38.

K. admitted posting the pictures. CP 45. She told the police they showed A. "sitting on the counter" in "[p]ink velvet shorts." CP 45. A.'s mother told police they showed A. "in a bra & underwear." CP 40. The police collected the pictures. CP 44.

The police reports contain a conclusory opinion the pictures showed A. "posing in a sexual manner." CP 44. The reports also note A.'s mother described the pictures as "sexually inappropriate." CP 38.

The prosecution charged K. with cyberstalking, alleging she made "an "electronic communication . . . using lewd, lascivious, indecent, and obscene" images. CP 52. As part of a diversion contract, K. stipulated the juvenile court could determine guilt based on the police

reports and any other materials the prosecutor submitted. CP 54–55.

At K.'s trial, the prosecution submitted only the police reports and not the pictures themselves. CP 26–47. The only description of the pictures was the statements K. and A.'s mother gave to the police. CP 40, 45.

The trial court found beyond a reasonable doubt the pictures were "lewd, lascivious, indecent and obscene." CP 24 ¶ 1. The court also found the pictures showed A. "posing in a sexual nature [sic]." CP 24 ¶ 2. The court found K. guilty of cyberstalking. CP 25.

F. ARGUMENT

1. **The Court of Appeals affirmed K.'s cyberstalking conviction without proof her speech fell in an unprotected category.**

The state and federal constitutions guarantee freedom of speech. Const. art. I, § 5; U .S. Const.

amend. I. Only a handful of "well-defined and narrowly limited classes of speech" fall outside this protection. *United States v. Stevens*, 559 U.S. 460, 468–69, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)).

The cyberstalking statute burdens speech. It prohibits "an electronic communication" falling in one of a categories with intent to "harass [or] intimidate." Former RCW 9.61.260(1).[2] The category at issue outlaws communications using "lewd, lascivious, indecent, or obscene words, images, or language." Former RCW 9.61.260(1)(a); RCW 9A.90.120(1)(a)(i). An "electronic communication" is speech, and the statute outlaws that speech based on its content.

---

[2] The Legislature recodified the cyberstalking statute at RCW 9A.90.120 after K's conviction. Laws of 2022 ch. 231, § 4.

Because the "lewd or lascivious" prong burdens speech, a conviction under the prong violates the First Amendment unless the prosecution proves the speech is unprotected. *State v. Kilburn*, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004).

Not only did the prosecution fail to prove K.'s social media posts were unprotected speech, but it also did not prove the posts were "lewd, lascivious, indecent, or obscene." Former RCW 9.61.260(1)(a); RCW 9A.90.120(1)(a)(i). By affirming the conviction anyway, the Court of Appeals contravened this Court's and its own precedent and deprived K. of her rights to free speech and due process. RAP 13.4(b)(1)–(b)(3).

a. The First Amendment requires proof the pictures K. posted were unprotected speech.

Courts read a statute that criminalizes speech "with the commands of the First Amendment clearly in mind." *Watts v. United States*, 394 U.S. 705, 707, 89 S.

Ct. 1399, 22 L. Ed. 2d 664 (1969). The prosecution must prove the speech falls in an unprotected category—"libelous speech, fighting words, incitement to riot, obscenity, . . . child pornography," and "true threats." *Kilburn*, 151 Wn.2d at 42–43.

For example, because a threat is speech, courts read statutes prohibiting threats to require proof of a "true threat"—a statement that communicates "a serious expression of intention to inflict bodily harm upon or to take the life" of another. *Kilburn*, 151 Wn.2d at 43 (quoting *State v. Williams*, 144 Wn.2d 197, 208–09, 26 P.3d 890 (2001)).

The Court of Appeals has already read the cyberstalking statute's "threat" prong to require proof of unprotected speech. The statute outlaws "an electronic communication" that "[t]hreat[ens] to inflict . . . injury." Former RCW 9.61.260(1)(c); RCW

9A.90.120(1)(a)(iii)–(iv). Due to "the danger that the criminal statute will be used to criminalize pure speech and impinge on First Amendment rights," the Court of Appeals held the prosecution must prove the communication was a "true threat." *State v. Kohonen*, 192 Wn. App. 567, 575, 370 P.3d 16 (2016).

The "lewd or lascivious" prong targets speech in the same manner as the "threat" prong. The only difference between the two prongs is the content of the communication—one prohibits threats, and the other prohibits "lewd, lascivious, indecent, or obscene words, images, or language." Former RCW 9.61.260(1)(a), (1)(c); RCW 9A.90.120(1)(a)(i), (1)(a)(iii)–(iv). If a threatening message is speech, so is a lewd or lascivious one. *Kohonen*, 192 Wn. App. at 575.

After K.'s conviction, the Legislature overhauled the cyberstalking statute to codify the "true threat"

requirement. RCW 9A.90.120(1)(b); Laws of 2022 ch. 231, § 1. It made no substantive change to the "lewd or lascivious" prong. *Id.* The cyberstalking statute continues to target speech, even after this amendment.

Just as the "threat" prong requires a "true threat," this Court should read the "lewd or lascivious" prong to require proof the speech is unprotected. *Kohonen*, 192 Wn. App. at 575. One candidate is obscenity—speech that "appeals to the prurient interest" and "depicts or describes, in a patently offensive way, sexual conduct." *Smith v. United States*, 431 U.S. 291, 299, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977) (quoting *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)). Another is child pornography—speech that "*visually* depict[s] sexual conduct by children." *New York v. Ferber*, 458 U.S. 747, 764, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

The cyberstalking statute covers obscene messages and pornographic images of children, but it extends beyond these unprotected categories. Though the words "lewd, lascivious, . . . or obscene" call to mind the obscenity doctrine, the statute does not expressly limit the prohibited speech to obscenity. *See State v. Dyson*, 74 Wn. App. 237, 244, 872 P.2d 1115 (1994) (comparing statutory language to obscenity and citing *Chaplinsky*). And the statute goes beyond the lewd or obscene to sweep in speech that is merely "indecent." Former RCW 9.61.260(1)(a); RCW 9A.90.120(1)(a)(i).

Though the cyberstalking statute plainly targets a "communication," the Court of Appeals held it does not burden speech at all. The statute's mens rea element, the Court reasoned, somehow converted the actus reus of the statute from speech to non-speech conduct. Slip op. at 5–6. The non-speech conduct,

according to the Court, is "the selection of a victim and directing the speech in such a way as to cause a specific harm to them." *Id.* (quoting *State v. Mireles*, 16 Wn. App. 2d 641, 654, 482 P.3d 942 (2021)).

The Court of Appeals's opinion is directly opposed to its published precedent that the cyberstalking statute burdens speech. *Kohonen*, 192 Wn. App. at 575. This alone warrants review. RAP 13.4(b)(2).

The Court of Appeals's decision also rests on authority that does not stand for the propositions cited. In *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 533 (2003), the U.S. Supreme Court held that a specific intent to intimidate converted the protected act of cross burning into an unprotected "true threat." *Id.* at 359–60, 363. There is no support in *Black* for the notion the Legislature can turn speech into non-speech by adding a specific intent element. *See* slip op. at 7.

In *State v. Talley*, 122 Wn.2d 192, 858 P.2d 217 (1993), this Court upheld a hate crime statute because it punishes selecting a victim *based on* "*race, color, religion*," or other prohibited grounds. *Id.* at 198–99 (emphasis added) (quoting RCW 9A.36.080). Speech enters the equation only as evidence of discriminatory intent. *Id.* at 210–11. The deliberate selection of a victim based on a protected status is not part of the offense of cyberstalking. Former RCW 9.61.260(1)(a); RCW 9A.90.120(1)(a)(i); *see* slip op. at 6–7.

The Court of Appeals's holding that the cyberstalking statute does not burden speech is contrary to basic First Amendment principles. RAP 13.4(b)(3). The Court reached its conclusion only by misconstruing this Court's precedent. RAP 13.4(b)(1); *Talley*, 122 Wn.2d at 198. This Court should grant review and hold the "lewd or lascivious" prong of the

cyberstalking statute requires proof the accused person's speech was unprotected.

b. The prosecution did not prove the pictures K. posted fell in an unprotected category under the First Amendment.

K.'s right to due process requires the prosecution to "prov[e] all the elements of an offense beyond a reasonable doubt." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (citing, *e.g.*, Const. art. I, § 3; U.S. Const. amend. XIV). Where the offense burdens speech, courts independently review the evidence to ensure the speech is unprotected. *Kilburn*, 151 Wn.2d at 52. Courts carry out this independent review in cyberstalking cases. *Kohonen*, 192 Wn. App. at 577.

Speech is obscenity if it "appeals to the prurient interest" and "depicts or describes, in a patently offensive way," "'hard core' sexual conduct." *Miller*, 413

U.S. at 24, 27. The speech also must "lack[] serious literary, artistic, political, or scientific value." *Id.* at 24.

Speech is child pornography if it "*visually* depict[s] sexual conduct by children." *Ferber*, 458 U.S. at 764. Examples are photographs of "nude" children featuring "a lewd exhibition [of] or . . . graphic focus on the genitals." *Osborne v. Ohio*, 495 U.S. 103, 112–13, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). Washington's child pornography statutes hew to this definition. RCW 9.68A.011(4); RCW 9.68A.070(1)(a), (2)(a).

Because the prosecution chose not to introduce A.'s pictures themselves, the only evidence of the pictures' content were the witness statements in the police reports. CP 26–47. K. told the police the pictures showed A. "sitting on the counter wearing bootie shorts," which she described as "[p]ink velvet shorts."

CP 45. A.'s mother said the pictures showed A. "in a bra & underwear," without more. CP 40.

Independent review of these facts reveals no evidence the pictures were either obscene or pornographic. *Kilburn*, 151 Wn.2d at 52. It is difficult to conceive how pictures of a teenager in a bra and shorts—the equivalent of a bathing suit—could ever depict "patently offensive 'hard core' sexual conduct." *Miller*, 413 U.S. at 27. The eyewitness descriptions also do not show the pictures involved "lewd exhibition" of or drew "graphic focus" to A.'s genital area. *Osborne*, 495 U.S. at 112–13.

None of the above is to suggest posting pictures of one's peers without consent is acceptable behavior. But K.'s expression of "teenage frustration" toward her ex-boyfriend's previous girlfriend does not fall outside the First Amendment's protections merely if it was "mean-

spirited," or even if it was "hurtful or vile." *State v. D.R.C.*, 13 Wn. App. 2d 818, 828–29, 467 P.3d 994 (2020); *Kohonen*, 192 Wn. App. at 583.

The prosecution did not prove the pictures K. posted to social media were unprotected speech. Accordingly, K.'s conviction of cyberstalking violates the First Amendment and due process. *Rich*, 184 Wn.2d at 903; *Kohonen*, 192 Wn. App. at 583. This Court should grant review and reverse the conviction. RAP 13.4(b)(3).

c. The prosecution did not prove beyond a reasonable doubt K.'s social media posts were "lewd, lascivious, indecent, or obscene."

Even if K.'s conviction of cyberstalking does not implicate the First Amendment, the conviction still must be reversed because the prosecution did not prove the pictures were lewd, lascivious, indecent, or obscene.

Because the pictures are not in the record, the prosecution's only evidence is the descriptions in the police reports. These descriptions reveal that A. wore a "bra & underwear" in the pictures, that the underwear consisted of "[p]ink velvet shorts," and that A. was "sitting on the counter." CP 40, 45. The record contains no more information about A.'s pose or how revealing her clothing was.

This information is not enough to find A.'s pictures were so crudely sexual that they were "lewd, lascivious, . . . or obscene." Former RCW 9.61.260(1)(a); RCW 9A.90.120(1)(a)(i). "Lewd" means "sexually unchaste or licentious,"[3] "lascivious" means "filled with

---

[3] "Lewd," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/lewd.

or showing sexual desire,"[4] and "obscene" means "disgusting to the senses" or "abhorrent to morality or virtue."[5] Merely that A. was partially clothed is not enough to conclude any of these descriptors apply.

There is also no basis to find A.'s pictures were "indecent." Without more information than the clothes A. wore, the record does not permit the conclusion A.'s pictures were "grossly improper or offensive." "Indecent," *Merriam-Webster.com Dictionary*.[6]

The police report's conclusory opinion that the pictures showed A. "posing in a sexual manner" is not evidence. CP 29; *See State v. Hutchins*, 73 Wn. App.

---

[4] "Lascivious," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/lascivious.

[5] "Obscene," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/obscene.

[6] https://www.merriam-webster.com/dictionary/indecent.

211, 217, 868 P.2d 196 (1994) (officer's opinion insufficient evidence of intent to deliver); *State v. Nusbaum*, 126 Wn. App. 160, 167–68, 107 P.3d 768 (2005) (conclusory opinion in a search warrant affidavit not probable cause). Even if A.'s pose was "sexual" in some unspecified way, that does not establish the pictures were licentious, disgusting, abhorrent, or grossly improper or offensive.

A.'s mother's conclusory statement the pictures were "sexually inappropriate" is insufficient for the same reasons. CP 38. A.'s mother's opinion is no substitute for specific facts showing the images were lewd, lascivious, indecent, or obscene.

The Court of Appeals merely summarized the evidence and asserted it was sufficient, without attempting to define "lewd," "lascivious," "indecent," or

"obscene" or explaining how the scant descriptions in the record satisfied these terms. Slip op. at 13–14.

K.'s conviction of cyberstalking rested on insufficient evidence and violated her right to due process. *Rich*, 184 Wn.2d at 903. This Court should grant review. RAP 13.4(b)(3).

2. The cyberstalking statute's "lewd or lascivious" prong is overbroad because it proscribes far more protected than unprotected online speech.

A statute is overbroad if it "reaches a substantial amount of constitutionally protected conduct." *Mireles*, 16 Wn. App. 2d at 649. Statutes burdening speech may be invalid "even if they also have legitimate application." *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989) (quoting *City of Houston v. Hill*, 482 U.S. 451, 459, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987)).

The cyberstalking statute reaches pure speech on the Internet and social media, the most ubiquitous forum for public debate in human history. And the statute is not narrowly tailored to achieve any compelling state interest. Some unprotected speech falls within the "lewd or lascivious" prong, but it sweeps in a far greater amount of protected speech. The statute violates the First Amendment.

a. The cyberstalking statute proscribes speech and only speech.

The core act of cyberstalking is "mak[ing] an electronic communication." Former RCW 9.61.260(1); RCW 9A.90.120(1). An "electronic communication" is "the transmission of information" by electronic means and includes "internet-based communications." Former RCW 9.61.260(5); RCW 9A.90.120(8). "Communication" and "transmission of information" are longer ways to say "speech." *See State v. Immelt*, 173 Wn.2d 1, 9, 267

P.3d 305 (2011) (an act is "speech" if it is "intended to communicate a message that will be understood").

As explained, the Court of Appeals misapplied this Court's and the U.S. Supreme Court's precedent in concluding the cyberstalking statute does not burden speech. *Supra*, at 12–15.

b. As applied to social media messages, the cyberstalking statute is a content-based regulation of speech in a public forum.

The degree to which a state may regulate speech depends on where that speech takes place—whether the forum is public or nonpublic. *Huff*, 111 Wn.2d at 926–27. In a public forum, a regulation of speech based on its content must survive strict scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

The predominant public forum of the present day is the Internet and social media. *Packingham v. North*

Carolina, 582 U.S. 98, 137 S. Ct. 1730, 107, 198 L. Ed. 2d 273 (2017). Without a doubt, the Internet and social media are now "the most important places . . . for the exchange of views." *Id.* at 104.

By including "internet-based communications" within its scope, the cyberstalking statute regulates speech in a public forum. Former RCW 9.61.260(5); RCW 9A.90.120(8).

The statute also regulates speech based on content. It does not outlaw *all* electronic communications, but only those that use "lewd, lascivious, indecent, or obscene words, images, or language." Former RCW 9.61.260(1)(a); RCW 9A.90.120(1)(a)(i). The statute defines the offense "*only* by reference to the content of speech." *Boos v. Barry*, 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988).

The Court of Appeals recognized the cyberstalking statute regulates speech in a public forum, but nevertheless upheld it based on authority interpreting the telephone harassment statute. Slip op. at 5–6 (citing *Dyson*, 74 Wn. App. at 243); *Mireles*, 16 Wn. App. 2d at 653 (same). And it did so despite acknowledging that the telephone harassment statute regulates speech in a *nonpublic forum* and that a "less stringent standard" applies to such a regulation. *Mireles*, 16 Wn. App. 2d at 649–50, 653.

c. The cyberstalking statute is not narrowly tailored to advance any compelling government interest.

Because the cyberstalking statute is a content-based restriction on speech, it is "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). The statute violates the First Amendment unless the

prosecution proves it "is necessary to serve a compelling state interest." *City of Bellevue v. Lorang*, 140 Wn.2d 19, 29–30, 992 P.2d 496 (2000).

The U.S. Supreme Court recognizes "a compelling interest in protecting the physical and psychological well-being of minors." *Sable Comms. of Cal. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989). However, the Legislature did not aim the cyberstalking statute only at messages to children. The stattue criminalizes an electronic communication made against "any other person," regardless of age. Former RCW 9.61.260(1); RCW 9A.90.120(1).

The statute also covers more speech than necessary, reaching posts that are "*indecent*[] or obscene." Former RCW 9.61.260(1)(a); RCW 9A.90.120(1)(a)(i) (emphasis added). The Court of Appeals has read "indecent" and "obscene" to mean

"hardly suitable: unseemly" and "taboo in polite usage." *State v. Lansdowne*, 111 Wn. App. 882, 891–92, 46 P.3d 836 (2002) (quoting Webster's 3d New Int'l Dict. 1147, 1557 (1993)). Unseemly and impolite messages might transgress social norms, but they remain speech "that a robust contemporary society must tolerate because of the First Amendment." *State v. Bishop*, 368 N.C. 869, 879, 787 S.E.2d 814 (2016).

Nor does the statute require that the message caused any harm, or even that anyone but the speaker knew about it. A statute criminalizing speech that harms no minor at all is not narrowly tailored to protecting minors from harm. *Bishop*, 368 N.C. at 878.

Finally, the statute's intent element is too broad to limit it to harmful communications because it sweeps in posts intended merely to "harass." Teenagers

do not need the criminal law to protect them "from online annoyance." *Bishop*, 368 N.C. at 878–79.

The prosecution cannot identify any other "serious substantive evil" that justifies criminalizing the content of online speech. *Hill*, 482 U.S. at 461 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 (1949)). The "lewd or lascivious" prong fails strict scrutiny.

d. The cyberstalking statute prohibits a substantial amount of protected speech.

A statute is overbroad if it criminalizes a "*substantial*" amount of protected speech, both "in an absolute sense" and "relative to the statute's plainly legitimate sweep." *Immelt*, 173 Wn.2d at 11 (quoting *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)). This standard raises two questions: (1) how much protected speech the statute prohibits, and (2) whether the amount of

impermissibly burdened speech is substantial compared to the conduct the statute proscribes consistently with the First Amendment. *Williams*, 144 Wn.2d at 208.

The "lewd or lascivious" prong reaches protected speech. The statute criminalizes social media posts that are merely "indecent." But the First Amendment protects indecent and even outrageous speech "to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988). That "society may find speech offensive is not a sufficient reason for suppressing it." *Id.* at 55 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978)).

Limiting the statute to messages intended to "harass" does not exclude protected speech from its

scope. People who use the public forum of the Internet and social media should expect to encounter speech that "trouble[s]" or "annoy[s]" them. *Rynearson v. Ferguson*, 355 F. Supp. 3d 964, 970 (W.D. Wash. 2019). Indeed, people may direct repeated and annoying social media posts at "public figures and public officials," and the First Amendment protects their right to do so. *Id.*

If Hustler Magazine published its "Jerry Falwell talks about his first time" parody advertisement on Instagram, it would run afoul of the cyberstalking statute. *Hustler Magazine*, 485 U.S. at 48. So would a person who posted on Facebook "a political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice," if the person intended the post to bother another specific person. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 667, 93 S. Ct. 1197, 35 L. Ed. 2d 618 (1973).

So, for that matter, would a person who posted pictures of "a jacket bearing the words 'Fuck the Draft'" and directed the posts at the Selective Service System's Twitter account. *Cohen v. California*, 403 U.S. 15, 16, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). All three examples are protected speech. *Hustler Magazine*, 485 U.S. at 56–57; *Papish*, 410 U.S. at 669–70; *Cohen*, 403 U.S. at 26.

By proscribing "indecent" speech that is intended to "harass," the statute sweeps in protected speech. The only remaining question is whether the amount is "substantial" compared to the conduct the statute permissibly outlaws. *Immelt*, 173 Wn.2d at 11.

The only "conduct" the cyberstalking statute proscribes is speech. *Supra*, at 23–24. The statute regulates the content of speech in a public forum—the Internet and social media—and is not narrowly

tailored to any compelling state interest. *Packingham*, 582 U.S. at 104; *Perry Educ. Ass'n*, 460 U.S. at 45; *supra*, at 25–29. Accordingly, the "lewd or lascivious" prong's sweep is legitimate only to the extent it prohibits communications that fall into an unprotected category.

The "lewd or lascivious" prong covers some unprotected speech—obscenity and child pornography. Former RCW 9.61.260(1)(a); RCW 9A.90.120(1)(a)(i); *Ferber*, 458 U.S. at 764; *Miller*, 413 U.S. at 24, 27. In fact, the Court of Appeals recognized the words "lewd," "lascivious," and "obscene" invoke the obscenity standard. *Dyson*, 74 Wn. App. at 244 (citing *Chaplinsky*, 315 U.S. at 571–72).

Messages that are merely indecent, however, are protected. *Dyson*, 74 Wn. App. at 244; *Hustler Magazine*, 485 U.S. at 55–56.

Given how narrow the standards for obscenity and child pornography are, the amount of protected speech falling within the "lewd or lascivious" prong dwarfs the unprotected speech. *See Ferber*, 458 U.S. at 764; *Miller*, 413 U.S. at 24 (defining child pornography and obscenity). The statute burdens a substantial amount of protected speech. It is overbroad.

The cyberstalking statute's "lewd or lascivious" prong is overbroad. This Court should grant review and strike the statute down under the First Amendment. RAP 13.4(b)(3).

3. The cyberstalking statute's "lewd or lascivious" prong is impermissibly vague because it includes no standards for what online speech is prohibited.

A criminal statute must define the offense so that ordinary people can understand what is prohibited and provide concrete standards to prevent arbitrary enforcement. *Lorang*, 140 Wn.2d at 30; *Williams*, 144

Wn.2d at 203–04. Statutes burdening speech must be especially clear. *Lorang*, 140 Wn.2d at 31.

The cyberstalking statute not only criminalizes pure speech based on content, but it does so in terms that leave ordinary people guessing what speech is and is not prohibited and allow law enforcement to rely on subjective standards. It is unconstitutionally vague.

First, the statute does not define "lewd, lascivious, . . . or obscene words, images, or language." Former RCW 9.61.260(1)(a); RCW 9A.90.120(1)(a)(i). The First Amendment does not allow a blanket prohibition of "obscene" speech. The Legislature must "specifically defin[e]" the content it intends to outlaw. *Miller*, 413 U.S. at 24. The same requirement applies to statutes that outlaw child pornography. *Ferber*, 458 U.S. at 764.

The cyberstalking statute provides no notice of what makes a message lewd, lascivious, or obscene and no standards to guide enforcement. Former RCW 9.61.260(1)(a); RCW 9A.90.120(1)(a)(i). The statute therefore cannot outlaw even obscenity or child pornography consistently with the First Amendment. *Ferber*, 458 U.S. at 764; *Miller*, 413 U.S. at 24.

Second, reasonable people may disagree about whether a communication is "indecent." The difference is not academic here. Few would find the pictures A. took of herself in clothing equivalent to a bathing suit "grossly improper or offensive." CP 40, 45; "Indecent," *Merriam-Webster.com Dictionary*.[7] If "indecent" means any image that is "unseemly" or "inappropriate," more

[7] https://www.merriam-webster.com/dictionary/indecent.

people would conclude A.'s pictures fit the bill. *Id.* The statute provides no guidance.

The Court of Appeals held the heightened First Amendment standard of clarity does not apply based on its erroneous holding the cyberstalking statute does not regulate speech. Slip op. at 10; *supra*, at 12–15.

The First and Fourteenth Amendments do not permit such a rudderless statute. *Williams*, 144 Wn.2d at 203–04; *Lorang*, 140 Wn.2d at 31. This Court should grant review and strike the "lewd or lascivious" prong of the cyberstalking statute as unconstitutionally vague. RAP 13.4(b)(3).

G. CONCLUSION

This Court should grant review.

Per RAP 18.17(c)(10), the undersigned certifies this brief of appellant contains 4,860 words.

DATED this 29th day of March, 2023.

Christopher Petroni, WSBA #46966
Washington Appellate Project - 91052
Email: wapofficemail@washapp.org
chris@washapp.org

Attorney for K.S.-M.

Petitioner's Appendix

1. Court of Appeals's Unpublished Opinion
2. Former RCW 9.61.260, Cyberstalking
3. RCW 9A.90.120, Cyber Harassment

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. K.M.S.-M., Appellant.	No. 82961-1-I UNPUBLISHED OPINION

BOWMAN, J. — K.M.S.-M. appeals her conviction for misdemeanor cyberstalking. She argues the cyberstalking statute is unconstitutionally overbroad and vague. And she challenges the sufficiency of the evidence supporting her conviction. We affirm.

FACTS

In April 2020, K.M.S.-M. and A.L., both juveniles, had an argument over social media. K.M.S.-M. then posted pictures on Snapchat[1] of A.L. "posing in a sexual manner" to " 'piss off' " A.L. A.L.'s mother said the pictures were "sexually inappropriate" and showed her daughter wearing only "a bra & underwear." K.M.S.-M. described the pictures of A.L. as " 'nudes' " and said they showed A.L. " 'sitting on the counter wearing bootie shorts and that was it.' " A friend of A.L.'s

[1] Snapchat is a social media app. Along with live video chatting, Snapchat allows users to send photographs, videos, and messages to their followers. Any picture, video, or message is available to the receiver for only a short time before it becomes unavailable.

saw the pictures on Snapchat and also described them as "nudes" or "private pictures."

The State charged K.M.S.-M. with one count of misdemeanor cyberstalking. K.M.S.-M. entered a diversion agreement under which the State would dismiss the charge if she participated in the "Way Out" program and wrote an apology letter to A.L. Under the agreement, K.M.S.-M. stipulated to the admissibility of the police reports should she "fail to successfully complete the diversion contract." The court would then determine her guilt based on "the police reports and other materials submitted by the prosecuting authority."

K.M.S.-M. did not complete diversion. So, the court held a diversion termination hearing, considered the police reports and witness statements in the record, and found K.M.S.-M. guilty of misdemeanor cyberstalking.

K.M.S.-M. appeals.

ANALYSIS

K.M.S.-M. argues the cyberstalking statute is unconstitutionally overbroad and vague. She also challenges the sufficiency of the evidence supporting her conviction.

Overbreadth

K.M.S.-M. says the cyberstalking statute under former RCW 9.61.260(1)(a) (2004)[2] is unconstitutionally overbroad. We review the

[2] The legislature recodified RCW 9.61.260 as RCW 9A.90.120 in 2022. LAWS OF 2022, ch. 231, § 4. Because the State charged K.M.S.-M. under the former statute, all citations in this opinion are to the 2004 version of RCW 9.61.260 that was in effect in 2020.

constitutionality of statutes de novo. State v. Mireles, 16 Wn. App. 2d 641, 649, 482 P.3d 942, review denied, 198 Wn.2d 1018, 497 P.3d 373 (2021).

Both the federal and Washington constitutions protect the right to free speech. U.S. CONST. amend. I; WASH. CONST. art. I, § 5. Our overbreadth analysis under article I, section 5 of the Washington Constitution follows that of the First Amendment to the federal constitution. Mireles, 16 Wn. App. 2d at 649. A statute is overbroad under the Washington and federal constitutions if it unlawfully prohibits a substantial amount of protected speech. Id. In determining whether a statute is overbroad, we first consider whether the statute reaches a substantial amount of constitutionally protected speech. Id. If so, we then determine whether the constitution allows regulation of the protected speech. Id.

The standard for regulating protected speech depends on the forum in which the speech occurs. Mireles, 16 Wn. App. 2d at 649. Speech in nonpublic forums may be regulated if the " 'distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral.' " Id. at 650[3] (quoting City of Seattle v. Huff, 111 Wn.2d 923, 926, P.2d 572 (1989)). Speech in public forums is subject to valid time, place, and manner restrictions that are " 'content-neutral, and narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " Id. at 649-50[4] (quoting Huff, 111 Wn.2d at 926).

[3] Internal quotation marks omitted.

[4] Internal quotation marks omitted.

We will not overturn a "statute which regulates behavior, and not pure speech, . . . 'unless the overbreadth is both real and substantial in relation to the ordinance's plainly legitimate sweep.' " City of Seattle v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990)[5] (quoting Seattle v. Eze, 111 Wn.2d 22, 31, 759 P.2d 366 (1988)). And even if a statute impermissibly regulates a substantial amount of protected speech, we will not overturn it unless we cannot place a sufficiently limiting construction on the statute. Mireles, 16 Wn. App. 2d at 650.

RCW 9.61.260 reads, in pertinent part:

> (1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephonic harassment, makes an electronic communication to such other person or a third party:
>
> (a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;
>
> . . . .
>
> (5) For the purposes of this section, "electronic communication" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. "Electronic communication" includes, but is not limited to, electronic mail, [I]nternet-based communications, pager service, and electronic text messaging.

We recently considered whether RCW 9.61.260(1)(a) is unconstitutionally overbroad in Mireles. In that case, we recognized that the language of the cyberstalking statute mirrors the telephone harassment statute. Mireles, 16 Wn. App. 2d at 650. That statute reads, in pertinent part:

> (1) Every person who, with intent to harass, intimidate, torment, or embarrass any other person, shall make a telephone call to such other person:

[5] Internal quotation marks omitted.

> (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act . . .
>
> . . . .
>
> is guilty of [telephone harassment].

RCW 9.61.230.

The language of the telephone harassment statute withstood constitutional scrutiny in State v. Dyson, 74 Wn. App. 237, 872 P.2d 1115, review denied, 125 Wn.2d 1005, 886 P.2d 1133 (1994). In Dyson, we concluded that although the telephone harassment statute "contains a speech component," it is

> clearly directed against specific conduct—making telephone calls with the intent to harass, intimidate, or torment another while using lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act.

Id. at 243. So, the telephone harassment statute constitutionally regulates "conduct implicating speech," not speech itself. Id.; see also State v. Talley, 122 Wn.2d 192, 210-11, 858 P.2d 217 (1993) (upholding a subsection of the malicious harassment statute against an overbreadth challenge because it primarily regulated conduct, and its "incidental impact" on speech was minimal); Virginia v. Black, 538 U.S. 343, 363-65, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (cross burning may be proscribed with intent to intimidate, but cross burning without additional proof of the requisite intent to intimidate may not be proscribed).

Relying on Dyson, Talley, and Black, we determined in Mireles that even though the cyberstalking statute impacts speech in public forums, the intent requirement of the statute "sufficiently limits the statute's reach to conduct" such that it does not prohibit a substantial amount of protected speech. Mireles, 16

Wn. App. 2d at 653-54.[6] The statute "punishes not the content of speech but, rather, the selection of a victim and directing the speech in such a way as to cause a specific harm to them." Id. at 655. As a result, we concluded that RCW 9.61.260(1)(a) was not unconstitutionally overbroad. See Id. at 655-56.

K.M.S.-M. argues that Mireles "did not go far enough." She says we inaptly compared the cyberstalking statute to the telephone harassment statute because RCW 9.61.260(1)(a) regulates "speech and only speech," whereas the "core conduct the telephone harassment statute criminalizes—'mak[ing] a telephone call'—is not speech."[7] Indeed, according to K.M.S.-M., "a person can commit telephone harassment without speaking at all." But in support of her argument, K.M.S.-M. cites to subsection (1)(b) of the telephone harassment statute, which prohibits calls made "[a]nonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues." RCW 9.61.230. And it is subsection (1)(a) of the telephone harassment statute proscribing calls made with the intent to harass, intimidate, or torment that Mireles found to be analogous to the cyberstalking statute. 16 Wn. App. 2d at 653; RCW 9.61.230.

K.M.S.-M. also argues that Mireles interprets too broadly our Supreme Court's holding in Talley. According to K.M.S.-M., the malicious harassment statute at issue in Talley survived constitutional scrutiny only because it punished

[6] Still, we struck the term "embarrass" from RCW 9.61.260(1), concluding that such a broad term does sweep "a substantial amount of protected speech within reach of the statute." Id. at 654-55.

[7] Quoting RCW 9.61.230(1) (alteration in original).

selecting a victim based on race, color, religion, or "other prohibited grounds." K.M.S.-M. claims speech "enters the equation only as evidence of the defendant's discriminatory intent." But the court's holding in Talley was not so narrow. The court held the malicious harassment statute was not constitutionally overbroad because it punishes conduct. Talley, 122 Wn.2d at 204. The statute does not proscribe "thought or belief, but rather victim selection." Id. This "tight nexus between criminal conduct" and the statute protects "free speech guaranties." Id. Like the malicious harassment statute in Talley, the cyberstalking statute does not punish speech. Rather, it punishes criminal conduct—selecting a victim and using electronic communication to harass, intimidate, or torment that person. RCW 9.61.260(1).

Finally, K.M.S.-M. contends Mireles mistakenly suggests that the United States Supreme Court in Black held that " 'a mens rea of evil intent' can make 'otherwise protected speech unprotected by the First Amendment.' "[8] K.M.S.-M. is correct that Black does not stand for the proposition that "evil intent" can convert speech from protected to unprotected. Still, the Court in Black held that Virginia's cross-burning statute "does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." Black, 538 U.S at 362. That holding aligns with our conclusion in Mireles that "the intent requirement of the cyberstalking statute sufficiently limits the statute's reach to conduct." Mireles, 16 Wn. App. 2d at 654.

[8] Quoting Mireles, 16 Wn. App. 2d at 653.

K.M.S.-M. articulates no compelling reason for us to deviate from our holding in Mireles. As a result, we conclude that RCW 9.61.260(1)(a) is not overbroad.

Vagueness

K.M.S.-M. argues the cyberstalking statute is unconstitutionally vague. We disagree.

The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution require that statues afford citizens a fair warning of prohibited conduct. State v. Murray, 190 Wn.2d 727, 736, 416 P.3d 1225 (2018). In Washington, we review vagueness claims under the federal due process test, which requires that the statute provide (1) adequate notice of the proscribed conduct and (2) adequate standards to prevent arbitrary enforcement. Dyson, 74 Wn. App. at 246. We presume statutes constitutional unless the party challenging it can prove its unconstitutionality beyond a reasonable doubt. Id.

A statute "is 'void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.' " Eze, 111 Wn.2d at 26 (quoting O'Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988)). But a statute is not unconstitutionally vague just because it fails to define some terms; we attribute to those terms their plain and ordinary dictionary definitions. In re Pers. Restraint of Troupe, 4 Wn. App. 2d 715, 723, 423 P.3d 878 (2018). And we do not require " 'impossible standards of specificity.' " Dyson, 74 Wn. App. at 246 (quoting Eze, 111 Wn.2d at 26). That is, " '[a] statute is not unconstitutionally vague merely because a

person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.' " Id. (quoting Eze, 111 Wn.2d at 27). If persons " 'of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement, it is not wanting in certainty.' " Id. at 246-47 (quoting Eze, 111 Wn.2d at 27). For a statute to be unconstitutionally vague, its terms must be so loose and obscure that no one can apply them clearly in any context. State v. Alphonse, 147 Wn. App. 891, 907, 197 P.3d 1211 (2008).

K.M.S.-M. argues that the "lewd, lascivious, indecent, or obscene" language of the cyberstalking statute[9] "provides no notice of what kinds of content make a communication lewd, lascivious, or obscene, and it provides no standards to guide law enforcement." She also argues that "the statute does not identify a standard by which to judge whether a communication includes 'indecent' speech."

We have already considered and upheld the language K.M.S.-M. challenges in Alphonse. There, a jury convicted the defendant of both felony and misdemeanor telephone harassment. Alphonse, 147 Wn. App. at 897-98. The defendant argued that the language of RCW 9.61.230(1)(a) was vague because "he must guess whether his use of certain words is 'indecent,' 'lewd,' or 'lascivious,' " and "some of the words he used may be deemed by some to be 'indecent,' 'lewd' or 'lascivious,' but may be commonly used by others." Alphonse, 147 Wn. App. at 907-08.

[9] RCW 9.61.260(1)(a).

We noted that both the United States Supreme Court and the Washington Supreme Court "have held that the word 'obscene' is not unconstitutionally vague," and that "[o]ur courts have also commonly defined the terms 'indecent' and 'obscene.' " Alphonse, 147 Wn. App. at 907-08. We rejected the defendant's argument, holding that common use of offensive language is not equivalent to ignorance of its offensive nature. Id. at 908. And we concluded that the statute's specific intent element serves to further dispel any vagueness concerns, including limiting the amount of protected speech that "will be subject to an inordinate amount of police discretion when the State may charge only those complaints that are made with criminal intent." Id. at 908-09.

Under Alphonse, the standard of what amounts to lewd, lascivious, indecent, or obscene language is not so obscure that persons of common intelligence must guess at its meaning or differ in its application. Nor does the language lack adequate standards to prevent arbitrary enforcement by law enforcement.

K.M.S.-M. argues Alphonse is not analogous because "[u]nlike the cyberstalking statute, the telephone harassment statute does not proscribe pure speech." But, as explained above, the cyberstalking statute proscribes conduct, not speech. We conclude that RCW 9.61.260(1)(a) is not unconstitutionally vague.

Sufficiency of the Evidence

K.M.S.-M. also challenges the sufficiency of the evidence supporting her cyberstalking conviction. She argues that there is insufficient evidence showing her posts were lewd, lascivious, indecent, or obscene.[10]

Sufficiency of the evidence is a question of law we review de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Evidence is sufficient to support a conviction if any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that we can reasonably draw from it, so we draw all reasonable inferences from the evidence in favor of the State and against the defendant. Id. And we consider circumstantial and direct evidence equally reliable. State v. Cardenas-Flores, 189 Wn.2d 243, 266, 401 P.3d 19 (2017). But we defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Rodriquez, 187 Wn. App. 922, 930, 352 P.3d 200 (2015).

To prove misdemeanor cyberstalking, the State had to show:

> That [K.M.S.-M.], on or about the 17th day of April, 2020, with intent to harass, intimidate, [or] torment . . . [A.L.], did make an electronic communication to that person or a third party using lewd,

[10] K.S. also argues that because the statute proscribes a substantial amount of speech, the State must show that her speech was unprotected under the First Amendment, i.e., that it amounts to obscenity or child pornography. But, as discussed above, the cyberstalking statute does not proscribe a substantial amount of speech. It proscribes the conduct of using electronic communications to harass or intimidate another.

> lascivious, indecent, or obscene words, images, and language, or suggesting the commission of a lewd and lascivious act.

See RCW 9.61.260(1)(a), (2).

As an initial matter, the State argues that "considering the stipulated nature of the bench trial," K.M.S.-M. waived her challenge to the sufficiency of the evidence under the invited error doctrine. The invited error doctrine prohibits a party from setting up an error at trial and then challenging that error on appeal. In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). To determine whether a party invited error, we consider whether they affirmatively assented to the error, materially contributed to it, or benefited from it. Id. The party inviting error must do so knowingly and voluntarily. State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014). And the party asserting invited error has the burden of proof. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970, abrogated on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Citing State v. Ellison, 172 Wn. App. 710, 291 P.3d 921 (2013), the State contends the invited error doctrine bars K.M.S.-M. from challenging her stipulated facts. In Ellison, the defendant stipulated to the trial court's CrR 3.6 findings that police were responding to a " 'domestic violence/unwanted person call' " and that he had " 'possession and control' " of a backpack at the time of his arrest. Id. at 715. The defendant then argued that the trial court's findings should not be binding on appeal. Id. Division Two of our court held that because the defendant stipulated to the findings of fact, he was precluded from challenging them on appeal under the invited error doctrine. Id. Unlike the defendant in

Ellison, K.M.S.-M. did not stipulate to findings of fact. Instead, she agreed to "submit the case on the record," which entailed stipulating to only the admissibility of "police reports and other materials submitted by the prosecuting authority." She agreed that if she failed to successfully complete diversion, the judge would read those materials "at the time of the termination hearing and, based solely upon that evidence, . . . decide if [she is] guilty or not guilty of the crime(s) charged." Invited error does not bar K.M.S.-M. from challenging the sufficiency of the evidence contained in those documents.

Even so, we reject K.M.S.-M.'s argument that insufficient evidence showed her posts were lewd, lascivious, indecent, or obscene. A.L. was 15 years old when K.M.S.-M. posted the photos. A.L. said that K.M.S.-M. "has had the photos for approximately one year," which suggests A.L. was 14 years old or younger when she took them. A.L.'s mother described the photos as "sexually inappropriate" and showed A.L. "in a bra & underwear." K.M.S.-M. described the photos as " 'nudes' " that showed A.L. " 'sitting on the counter wearing bootie shorts and that was it.' " And Arlington Police Detective Stephanie Ambrose reported that the photos showed A.L. "posing in a sexual manner."[11]

A rational trier of fact viewing the evidence in a light most favorable to the State could find that the pictures K.M.S.-M. posted were lewd, lascivious,

[11] K.S. objects to Detective Ambrose's description as a "conclusory opinion." But Detective Ambrose did not offer the statement as her opinion. Rather, she says that another detective assigned her the case, that she "reviewed the case," and that she "read that victim [A.L.] . . . had taken photographs of her[self] posing in a sexual manner."

indecent, or obscene. Sufficient evidence supports the trial court's conclusion that K.M.S.-M. committed the crime of misdemeanor cyberstalking.

K.M.S.-M. fails to show that the cyberstalking statute is unconstitutionally overbroad or vague. And sufficient evidence supports her conviction. We affirm.

WE CONCUR:

Former RCW 9.61.260 Cyberstalking

(1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:

(a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;

(b) Anonymously or repeatedly whether or not conversation occurs; or

(c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.

(2) Cyberstalking is a gross misdemeanor, except as provided in subsection (3) of this section.

(3) Cyberstalking is a class C felony if either of the following applies:

(a) The perpetrator has previously been convicted of the crime of harassment, as defined in RCW 9A.46.060, with the same victim or a member of the victim's family or household or any person specifically named in a no-contact order or no-harassment order in this or any other state; or

(b) The perpetrator engages in the behavior prohibited under subsection (1)(c) of this section by threatening to kill the person threatened or any other person.

(4) Any offense committed under this section may be deemed to have been committed either at the place from which the communication was made or at the place where the communication was received.

(5) For purposes of this section, "electronic communication" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. "Electronic communication" includes, but is not limited to, electronic mail, internet-based communications, pager service, and electronic text messaging.

RCW 9A.90.120 Cyber Harassment

(1) A person is guilty of cyber harassment if the person, with intent to harass or intimidate any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to that person or a third party and the communication:

(a)(i) Uses any lewd, lascivious, indecent, or obscene words, images, or language, or suggests the commission of any lewd or lascivious act;

(ii) Is made anonymously or repeatedly;

(iii) Contains a threat to inflict bodily injury immediately or in the future on the person threatened or to any other person; or

(iv) Contains a threat to damage, immediately or in the future, the property of the person threatened or of any other person; and

(b) With respect to any offense committed under the circumstances identified in (a)(iii) or (iv) of this subsection:

(i) Would cause a reasonable person, with knowledge of the sender's history, to suffer emotional distress or to fear for the safety of the person threatened; or

(ii) Reasonably caused the threatened person to suffer emotional distress or fear for the threatened person's safety.

(2)(a) Except as provided in (b) of this subsection, cyber harassment is a gross misdemeanor.

(b) A person who commits cyber harassment is guilty of a class C felony if any of the following apply:

(i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order;

(ii) The person cyber harasses another person under subsection (1)(a)(iii) of this section by threatening to kill the person threatened or any other person;

(iii) The person cyber harasses a criminal justice participant or election official who is performing the participant's official duties or election official's official duties at the time the communication is made;

(iv) The person cyber harasses a criminal justice participant or election official because of an action taken or decision made by the criminal justice participant or election official during the performance of the participant's official duties or election official's official duties; or

(v) The person commits cyber harassment in violation of any protective order protecting the victim.

(3) Any criminal justice participant or election official who is a target for threats or harassment prohibited under subsection (2)(b)(iii) or (iv) of this section, and any family members residing with the participant or election official, shall be eligible for the address confidentiality program created under RCW 40.24.030.

(4) For purposes of this section, a criminal justice participant includes any:

(a) Federal, state, or municipal court judge;

(b) Federal, state, or municipal court staff;

(c) Federal, state, or local law enforcement agency employee;

(d) Federal, state, or local prosecuting attorney or deputy prosecuting attorney;

(e) Staff member of any adult corrections institution or local adult detention facility;

(f) Staff member of any juvenile corrections institution or local juvenile detention facility;

(g) Community corrections officer, probation officer, or parole officer;

(h) Member of the indeterminate sentence review board;

(i) Advocate from a crime victim/witness program; or

(j) Defense attorney.

(5) For the purposes of this section, an election official includes any staff member of the office of the secretary of state or staff member of a county auditor's office, regardless of whether the member is employed on a temporary or part-time basis, whose duties relate to voter registration or the processing of votes as provided in Title 29A RCW.

(6) The penalties provided in this section for cyber harassment do not preclude the victim from seeking any other remedy otherwise available under law.

(7) Any offense committed under this section may be deemed to have been committed either at the place from which the communication was made or at the place where the communication was received.

(8) For purposes of this section, "electronic communication" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. "Electronic communication" includes, but is not limited to, email, internet-based communications, pager service, and electronic text messaging.

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 of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 82961-1-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:

☒ respondents Matthew Pittman & Bradley Bartlett
[matthew.pittman@co.snohomish.wa.us]
[bradley.bartlett@co.snohomish.wa.us]
Snohomish County Prosecutor's Office
[Diane.Kremenich@co.snohomish.wa.us]

☐ Attorney for other party

TAYLOR HALVERSON, Legal Assistant
Washington Appellate Project

Date: March 29, 2023

WASHINGTON APPELLATE PROJECT

March 29, 2023 - 2:39 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82961-1
Appellate Court Case Title:	State of Washington, Respondent v. K.M.S-M, Appellant
Superior Court Case Number:	20-8-00289-5

The following documents have been uploaded:

- 829611_Petition_for_Review_20230329143347D1572960_5012.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp_032923-5.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- bradley.bartlett@co.snohomish.wa.us
- diane.kremenich@snoco.org
- matthew.pittman@co.snohomish.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Christopher Mark Petroni - Email: chris@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20230329143347D1572960