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No. 71810-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARVIN KRONA,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Marvin Krona was arrested by Snohomish County Sheriff's deputies while seated in a parked car. It was apparent that Mr. Krona was exceedingly intoxicated and he was taken to the hospital to get medical approval before being booked into jail. Mr. Krona had difficulty standing upright and went in and out of consciousness. Mr. Krona was in handcuffs or in four-point restraints in his hospital bed throughout this incident. He was uncooperative and threatened everyone he had contact with, including law enforcement, the aid crew, medical staff, and hospital security.

Mr. Krona's harassment conviction violates the First and Fourteenth Amendments to the United States Constitution because his verbal abuse did not constitute a "true threat" and no reasonable criminal justice participant would fear that Mr. Krona would carry out the countless idle threats he made while in a drunken stupor. Moreover, the unconstitutional admission of testimony that Mr. Krona had threatened other police officers in the past separately warrants reversal and remand for a new trial. Lastly, the trial court miscalculated Mr. Krona's offender score.

B. ASSIGNMENTS OF ERROR

1. Mr. Krona's harassment conviction violates due process because the evidence was insufficient to allow a rational trier of fact to find the elements beyond a reasonable doubt.

2. Mr. Krona's harassment conviction violates his First Amendment rights because no rational trier of fact could find that his drunken tirade constituted a "true threat."

3. The admission of testimony that Mr. Krona had previously threatened law enforcement officers, resisted arrest, and was considered dangerous by other non-testifying police officers violated his Sixth Amendment confrontation rights and the Rules of Evidence.

4. The trial court misapplied RCW 9.94A.525, resulting in a miscalculation of Mr. Krona's offender score on both his driving under the influence and harassment convictions.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. Evidence is insufficient if no rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. Was there insufficient evidence to prove that a reasonable criminal justice participant would

have reasonably feared that Mr. Krona's threat would be carried out where he was extraordinarily intoxicated, fully restrained, and directed empty threats to everyone with whom he had contact?

2. A "true threat" is a statement made in a context and under such circumstances that a reasonable person would foresee that it would be interpreted as a serious expression of intent to inflict bodily harm upon another person. Under the First Amendment only a true threat suffices for a harassment conviction. Was there insufficient evidence to prove that Mr. Krona's words were a "true threat" where a reasonable person in his place would not have foreseen that the listener would interpret the statement as a serious expression of his intentions?

3. The Confrontation Clause of the Sixth Amendment provides that an accused has the right to be confronted with the witnesses against him. A criminal defendant must have a meaningful opportunity to cross examine adverse witnesses. An out of court statement is testimonial if its primary purpose is to establish past facts relevant to later prosecution. Did the admission of evidence that Mr. Krona had previously threatened law enforcements officers, resisted arrest, and was considered dangerous by other non-testifying officers violate his confrontation rights under the Sixth Amendment? Should this evidence

also have been excluded because it was inadmissible hearsay, unfairly prejudicial, and improper propensity evidence?

4. Where an offender score is legally erroneous due to misapplication of the statute, a reviewing court must reverse the sentence regardless of whether the appellant previously raised the argument. Former RCW 9.94A.525(2)(e) (2011) exclusively governs calculation of an offender score for driving under the influence. Did the trial court miscalculate Mr. Krona's driving under the influence offender score by including convictions that were not listed in RCW 9.94A.525(2)(e)?

5. Prior class C felony convictions shall not be included in the offender score if the individual has spent five consecutive years in the community without committing any crime that subsequently results in a conviction. Did the trial court miscalculate Mr. Krona's harassment offender score by including convictions that had washed?

D. STATEMENT OF THE CASE

On July 13, 2013, law enforcement responded to a 911 call from James Grout, who reported that he observed a gray Oldsmobile hit his fence. 3/3/14 RP 58. Mr. Grout had seen the vehicle before and associated it with the Krona family that lived at the end of the easement

that ran through Mr. Grout's property. 3/3/14 RP 59. Mr. Grout could not see who was driving the car on this occasion. *Id.*

Snohomish County Sheriff Deputies Daniel Johnson, Jacob Navarro, and Thomas Koziol arrived and observed the gray Oldsmobile parked in a field north of the Krona residence. 3/3/14 RP 134. The driver's side door was open and the engine was not running. 3/4/14 28, 33, 39, 42, 60. Deputies observed Marvin Krona sitting in the vehicle. 3/3/14 RP 115. They also noticed three full beer cans and two empty ones in the vehicle. 3/3/14 RP 115.

Mr. Krona was placed under arrest. 3/3/14 RP 116. The deputies noted that he was extraordinarily intoxicated, had difficulty standing, and had extremely slurred speech. 3/3/14 RP 116-17, 122. Once law enforcement tried to place Mr. Krona into the back of a patrol vehicle, he became uncooperative and began yelling. 3/4/14 RP 43. Mr. Krona was taken to the hospital prior to being transported to the jail. 3/3/14 RP 123-24.

Mr. Krona threatened everyone he came into contact with during the next few hours, including medical personnel both in the ambulance and at the hospital. 3/4/14 RP 126. Mr. Krona was placed in four-point restraints at the hospital and continued his unruly behavior. 3/4/14 RP

126. Mr. Krona was so severely intoxicated that he attempted to urinate on the hospital floor and slipped in and out of consciousness. 3/3/14 RP 126, 140. A blood draw was conducted pursuant to a warrant prior to Mr. Krona's discharge from the hospital. 3/3/14 RP 129.

Mr. Krona was charged with driving under the influence, harassment against a criminal justice participant,[1] and driving while license revoked. CP 99-100. Deputy Navarro testified at trial that while at the hospital, Mr. Krona said he would find Deputy Navarro and kill him. 3/3/14 RP 126. The jury returned guilty verdicts on all counts. CP 56-59; 3/5/14 RP 4-5. Pertinent facts are addressed in further detail in the argument sections below.

E. ARGUMENT

1. Mr. Krona's harassment conviction violates due process and his right to free speech because there was insufficient evidence for a rational trier of fact to find all the elements beyond a reasonable doubt.

A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). A reviewing court must reverse a conviction for insufficient evidence where no

[1] While the evidence showed that Mr. Krona threatened many people during this incident, he was only charged with harassment for his threats directed towards Deputy Navarro. CP 78.

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *Id.* at 16. Such inferences must be "logically derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption." *Bailey v. Alabama*, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

On an appeal of a conviction for harassment, reviewing courts apply the rule of independent review because the sufficiency of evidence question involves the essential First Amendment question of whether the defendant's statements constituted a "true threat" and therefore unprotected speech. *State v. Kilburn*, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004). Appellate courts must review those "crucial" facts that necessarily involve the legal interpretation of whether the speech is protected. *Id.* Because of the First Amendment implications, a harassment conviction based upon a threat requires that "the State satisfy both the First Amendment demands – by proving a true threat was made – and the statute, by proving all the statutory elements of the crime." *Id.* at 54.

a. No rational trier of fact could find that a reasonable criminal justice participant would be fearful that Mr. Krona would carry out any threats made.

A defendant is guilty of harassment if, without lawful authority, he "knowingly threatens ... [t]o cause bodily injury immediately or in the future to the person threatened or to any other person" and "by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(a)(i), (b). This offense is a class C felony if the defendant "harasses a criminal justice participant who is performing his or her duties at the time the threat is made" or "because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties." RCW 9A.46.020(2)(b)(iii)-(iv).

When the threat involves a criminal justice participant, "the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances." RCW 9A.46.020(2)(b). "Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat." *Id.*

The evidence failed to establish that Deputy Navarro's fear from the threat was a fear that a reasonable criminal justice participant would

have under the circumstances. Mr. Krona was so extremely intoxicated that he had to be taken to the hospital in order for the jail to receive medical approval to book him. 3/3/14 RP 123-24. Mr. Krona could not stand properly upon exiting the car and officers placed him on the ground so that he would not fall. 3/3/14 RP 117, 137. Mr. Krona's speech was extremely slurred and he went in and out of consciousness at the hospital. 3/3/14 RP 122, 140.

Mr. Krona threatened everyone he came into contact with that evening, including the aid crew, medical staff, hospital security, and law enforcement. 3/3/14 RP 124, 126. At one point, Mr. Krona was so intoxicated that he attempted to urinate on the hospital floor. 3/3/14 RP 126. Deputy Navarro never previously had contact with Mr. Krona and testified that Mr. Krona did not know where he lives. 3/3/14 RP 140. Deputy Navarro never expressed any concern about the threats made by Mr. Krona to his field training officer, Deputy Johnson. 3/4/14 RP 47.

Mr. Krona was in handcuffs or restrained to a hospital bed throughout the contact with Deputy Navarro. 3/3/14 RP 116, 125, 126. Mr. Krona testified that he recalled being "foul mouthed," but did not have a full memory of what he said. 3/4/14 RP 124. Under these circumstances, no reasonable criminal justice participant would fear

that this fully restrained, remarkably intoxicated individual, who was threatening every single person with whom he had contact, would actually carry out his numerous idle threats. Moreover, no reasonable criminal justice participant would fear that Mr. Krona would single him out of all the people threatened and carry out his threat in the future.

No rational trier of fact could find this necessary element beyond a reasonable doubt. Mr. Krona's conviction for harassment violates his due process rights because the State failed to prove this essential element of the crime.

b. Mr. Krona's harassment conviction constitutes an unconstitutional infringement on protected speech because there was insufficient evidence to establish a "true threat."

Under the First Amendment only a true threat suffices for a conviction for felony harassment. *Kilburn*, 151 Wn.2d at 41. Because RCW 9A.46.020 criminalizes speech, it "must be interpreted with the commands of the First Amendment clearly in mind." *Id.* (quoting *State v. Williams*, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001)). To avoid unconstitutional infringement of protected speech, the harassment statute must be read as clearly prohibiting only "true threats." *Williams*, 144 Wn.2d at 208.

A "true threat" is "a statement made in a context and under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intent to inflict bodily harm upon or to take the life" of another person. *Id.* at 208-09. A true threat is a serious threat, as opposed to one "said in idle jest, idle talk, or political argument." *Kilburn*, 151 Wn.2d at 43 (quoting *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1984)). Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker. *Id.* at 44.[2]

"An appellate court must be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech." *Id.* at 49. The relevant question is "whether a reasonable person in the

[2] The United States Supreme Court recently granted certiorari in *Elonis v. United States*, 134 S. Ct. 2819, June 16, 2014. The Third Circuit affirmed the defendant's conviction for harassment in *United States v. Elonis*, 730 F.3d 321 (3rd Cir. 2013). The case presented the question of whether the true threats exception to speech protection under the First Amendment requires a jury to find the defendant subjectively intended his statements to be understood as threats. *Id.* at 323. The Third Circuit held that an objective standard applies and a true threat occurs when a reasonable speaker would foresee the statement would be interpreted as a threat. *Id.* at 332. The Ninth Circuit has previously held that speech may be deemed a true threat only upon proof that the speaker subjectively intended the speech as a threat. *United States v. Cassel*, 408 F.3d 622, 632-33 (9th Cir. 2005).

defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke." *Id.* at 46.

"To determine whether a speaker has made a true threat, an appellate court must review the constitutionally critical facts in the record that are necessarily involved in the legal determination whether a true threat was made." *Id.* at 54. Mr. Krona testified that he remembered getting "foul mouthed," but he did not remember much of what he said during his arrest and at the hospital. 3/4/14 RP 124. He could not stand without falling over and was restrained during his entire tirade. 3/3/14 RP 116, 125, 126, 137. A reasonable person in Mr. Krona's situation (i.e., either handcuffed or restrained to a bed, in and out of consciousness, and exceedingly drunk) would not have foreseen that Deputy Navarro would interpret his invective as a serious threat.

Mr. Krona's poor behavior was an expression of his frustration at being, in his view, arrested for a crime he did not commit. 3/4/14 RP 121. While the words he chose to use were ugly and disrespectful, they were also protected by the First Amendment because they did not constitute a true threat. As such, Mr. Krona's harassment conviction contravenes the First Amendment and must be reversed.

c. The remedy is reversal and dismissal with prejudice.

A defendant whose conviction has been reversed due to insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982) (citing *Hudson v. Louisiana*, 450 U.S. 40, 44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981)). Consequently, this Court should reverse and dismiss the harassment conviction with prejudice.

2. The admission of evidence concerning Mr. Krona's history of threats directed towards law enforcement violated his confrontation rights.

Over Mr. Krona's objection, the trial court allowed testimony that law enforcement had previously deemed Marvin Krona a potential danger to police officers because of his past behavior of threatening officers and other misconduct. CP 109-10; 3/3/14 RP 12-13. Three separate officers testified about a warning associated with Mr. Krona's name that showed up in their computer system, which assigned him the status of a "dangerous individual."

Deputy Navarro testified that he ran Marvin Krona's name through the computer system and saw that he "had an officer caution for threats to kill law enforcement and prior resisting arrest." 3/3/14 RP 112. Deputy Koziol testified that he provided cover while Deputy

Navarro approached the gray Oldsmobile because "the information we had was that the person might be dangerous." 3/4/14 RP 28. Deputy Johnson testified that Marvin Krona's name "was flagged in the computer as a potential threat towards officers" and noted that the entry was made recently. 3/4/14 RP 39-40. Deputy Johnson then further offered, "Obviously whenever you have somebody that has an officer safety caution that you're going to be wanting to request a second unit for the potential threats." 3/4/14 RP 41.

Mr. Krona objected to the admission of this evidence and argued, among other evidentiary objections, that it was inadmissible because it violated his constitutional right to confront witnesses under the Sixth Amendment. CP 109-10; 3/3/14 RP 12. The trial court overruled Mr. Krona's objections because "the state of mind of the officer on this issue is a material element[.]" 3/3/14 RP 13.

Appellate courts review an alleged violation of the confrontation clause de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). The prosecution has the burden of establishing that statements are non-testimonial. *State v. O'Cain*, 169 Wn. App. 228, 235, 279 P.3d 926 (2012) (citing *State v. Koslowski*, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009)). As discussed below, the admission of this evidence

violated Mr. Krona's Sixth Amendment right to confront and cross examine witnesses who bear testimony against him.

a. The Confrontation Clause prohibits out of court testimonial statements of a witness who does not appear at trial from being admitted against a defendant.

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Admission of testimonial statements denies the defendant the opportunity to test accusers' statements "in the crucible of cross examination." *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The confrontation clause applies not only to in-court testimony, but also to out-of-court statements introduced at trial, regardless of their admissibility under the evidence rules. *Id.* at 50-51.

An out of court statement is testimonial if the primary purpose is to establish or prove past events relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The admission of testimonial statements of a witness who does not appear at a criminal trial violates the Confrontation Clause of the Sixth Amendment unless (1) the witness is unavailable to testify,

and (2) the defendant had a prior opportunity for cross examination. *Crawford*, 541 U.S. at 53-54.

Statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial are testimonial. *Id.* at 52. Statements are testimonial when the circumstances objectively indicate that there is no ongoing emergency and the primary purpose is to establish or prove past events. *Davis*, 547 U.S. at 822.

b. The testimony at trial that Mr. Krona had previously threatened law enforcement, resisted arrest, and was considered dangerous by police was testimonial.

The evidence that Mr. Krona was dangerous and had a history of threatening law enforcement and resisting arrest was testimonial because it was an assertion of past events. Mr. Krona could not cross examine the officer or officers who entered that caution into the computer system. Cross examination would have revealed the circumstances that led to the caution, allowing the jury to independently assess how to consider this evidence.

"Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347

(1974). Cross examination is the "greatest legal engine ever invented for discovery of the truth." *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (quoting *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)). "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

Neither Mr. Krona nor the jury had the benefit of having this testimony subjected to cross examination to uncover bias, expose error, and reveal the truth. Mr. Krona had a constitutional right to confront and cross examine the declarant of this testimonial statement, which was made for the purpose of establishing and proving a past and specific fact: that Mr. Krona was dangerous because he had previously threatened law enforcement officers. Mr. Krona had no opportunity to assess the reliability of this evidence by testing it "in the crucible of cross-examination." *See Crawford*, 541 U.S. at 60. Because the evidence was testimonial and Mr. Krona had no opportunity to cross

examine the witness about these assertions, its admission violated the Sixth Amendment.

c. The violation of Mr. Krona's Sixth Amendment rights was prejudicial beyond a reasonable doubt.

Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980); *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 411, 425, 705 P.2d 1182 (1985). The error can only be harmless if the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant's guilt. *Id.* at 426. A conviction must be reversed "where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." *Id.*

As previously discussed, there was insufficient evidence that a reasonable criminal justice participant would reasonably fear a threat made by an individual who was so intoxicated he could not stand and was threatening everyone with whom he had contact. Moreover, Mr. Krona's diatribe did not constitute a true threat as required under the

First Amendment. This evidence improperly bolstered the otherwise absent proof that Deputy Navarro's fear was reasonable.

Because the untainted evidence would not necessarily lead to a finding of guilt, the State cannot establish that admission of Mr. Krona's prior threats and behavior toward law enforcement in violation of his confrontation rights was harmless beyond a reasonable doubt. This Court should reverse and remand for a new trial.

3. The admission of evidence concerning his prior threats against and behavior towards law enforcement also violated the Rules of Evidence.

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Failure to adhere to the requirements of an evidentiary rule can be an abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

a. Mr. Krona's history of threats and resisting arrest was inadmissible hearsay.

"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). Unless an exception or

exclusion applies, hearsay is inadmissible. ER 802. Appellate courts review whether or not a statement was hearsay de novo. *Neal*, 144 Wn.2d at 607.

The trial court concluded that the law enforcement caution was relevant to Deputy Navarro's state of mind. 3/3/14 RP 13. However, the statement is only relevant if it is truthful and thus it was offered for the truth of its matter: that Mr. Krona was dangerous because he had previously threatened law enforcement.

"A statement is not hearsay if it is used only to show the effect on the listener, *without regard to the truth of the statement*." *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (emphasis added). In *Edwards*, a detective testified that he initiated his investigation of the defendant based on statements from a confidential informant. 131 Wn. App. at 614. The State argued that this testimony was not offered to prove the truth of the confidential informant's statement to the detective, but only to explain why the detective began to investigate that particular person. *Id.* The court held that the statement was inadmissible hearsay because it was only relevant if offered for its truth. *Id.*

None of these deputies had personal knowledge of Mr. Krona's prior incidents with law enforcement. *See* 3/3/14 RP 140; 3/4/14 RP 28, 40-41. Deputy Navarro was the only law enforcement officer whose state of mind was relevant because he was the alleged victim of the harassment charge. However, the court also permitted Deputy Johnson and Deputy Koziol to testify about Mr. Krona's alleged history of threatened violence towards police officers. 3/4/14 RP 28, 40-41. If this evidence was to show only Deputy Navarro's state of mind, Deputy Koziol and Deputy Johnson should not have been permitted to testify in this manner because their knowledge of Mr. Krona's past threats is not relevant to Deputy Navarro's state of mind.

The prosecutor's comments during closing argument illustrate that this evidence was admitted for its truth:

> Deputy Navarro knows from his reliance as a reasonable criminal justice participant on the state database this is a person who has previously threatened law enforcement officers. In his mind, this is something he has every reason to be afraid of.

3/4/14 RP 162. The State argued that Deputy Navarro's fear was reasonable because Marvin Krona has threatened law enforcement on previous occasions. This argument undoubtedly asserts the truth of the computer system's officer safety caution and links the truth of this

history of threatened violence to Deputy Navarro's fear being reasonable.

The additional testimony from Deputy Koziol and Deputy Johnson and the prosecutor's closing argument further demonstrate that the evidence was offered for the truth of the matter it asserted: that Mr. Krona had resisted arrest and directed threats toward law enforcement on previous occasions and therefore Deputy Navarro should not reasonably fear Mr. Krona intended to carry out the threats directed at him. The admission of this evidence violated ER 801 and ER 802 and was manifestly unreasonable.

b. The officer safety caution was unfairly prejudicial and should have also been excluded under ER 403.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. In doubtful cases the scale should be tipped in favor of the defendant and exclusion of evidence. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (2003) (citing *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision and which creates an undue tendency to suggest a decision on an improper basis. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

Mr. Krona's history of prior threats towards law enforcement was of minimal relevance to Deputy Navarro's fear. If the computer safety caution had indicated that Mr. Krona had a history of actually committing assaults against police officers, that information would be substantially more probative of Deputy Navarro's state of mind. The fact that Mr. Krona had made past threats, but presumably never carried any out because no officer testified about a history of actual assaultive behavior directed at law enforcement, was of nominal relevance. It established little if anything other than that Mr. Krona did not follow through with his prior threats.

While the probative value of this evidence is questionable, its prejudicial nature is undeniable. This evidence informed the jury that Mr. Krona had previously engaged in conduct perceived to be violent and invited the jury to speculate regarding the circumstances of these prior incidents. The prejudicial effect of informing the jury that he had previously threatened to kill law enforcement, the same conduct with which he was currently charged, outweighed any minimal relevance it may have had. This evidence had a high likelihood to arouse an emotional response and invite a decision on an improper basis. As such, the trial court abused its discretion in allowing this testimony.

c. The admission of Mr. Krona's history of threatened violence violated ER 404(b).

"ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). This rule has no exceptions. *Id.* at 421. Accordingly, the State bears a substantial burden to show admission of prior misconduct is appropriate for a purpose other than propensity. *Id.* at 420.

Evidence of a prior act may be admissible for purposes other than propensity, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Before a trial court admits evidence of prior misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Close cases must be resolved in favor of exclusion. *Thang*, 145 Wn.2d at 642; *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

i. The trial court failed to engage in the required balancing test on the record.

To avoid error, the trial court must identify the purpose of admitting the evidence and conduct the balancing test on the record. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). The record must in some way show that the court, after weighing the consequences of admission, made a conscious determination to admit or exclude the evidence. *Id.* (citing *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)).

The court did not balance the probative value of admitting Mr. Krona's prior threats to police against its prejudicial effect. *See* 3/3/14 RP 12-13. "Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." *Tharp*, 96 Wn.2d at 597. Failure to engage in this balancing process is error. *State v. Carleton*, 82 Wn. App. 680, 685, 919 P.2d 128 (1996).

The Washington Supreme Court has stated that it "cannot overemphasize the importance of making such a record." *Jackson*, 102 Wn.2d at 694. The process of articulating prejudice and comparing it to probative value ensures a thoughtful consideration of their relative weight. *Id.*

There are only two circumstances in which failure to weigh prejudice on the record under ER 404(b) is harmless error. *Id.* The first circumstance is when the record is sufficient for the reviewing court to determine that even if the trial court had weighed the evidence's probative value against its prejudicial effect, the evidence still would have been admitted. *Id.* (citing *State v. Gogolin*, 45 Wn. App. 640, 645-46, 727 P.2d 683 (1986)). As previously discussed, any probative value of Mr. Krona's prior bad acts directed towards police was considerably outweighed by the highly prejudicial nature of this evidence. If the trial court had properly considered the relative weight of probative value and prejudice, it would have excluded evidence of Mr. Krona's perceived dangerousness based on his prior threats and attempts at resisting previous arrests. Consequently, the first circumstance in which a failure to articulate balancing may be harmless is inapplicable.

The second circumstance is when, considering the other untainted evidence, the appellate court concludes that the jury would have reached the same verdict even if the trial court had excluded the evidence. *Carleton*, 82 Wn. App. at 686. The jury would have likely reached a different verdict if Mr. Krona's prior bad acts had been

properly excluded because there was insufficient evidence that his "foul mouthed" tirade constituted a true threat that would cause a reasonable criminal justice participant to reasonably fear that Mr. Krona had the present or future ability to carry out these threats.

Because neither of the two circumstances are present, the trial court's failure to weigh prejudice on the record was not harmless error and requires reversal.

ii. The officer safety caution was improperly admitted for the purpose of establishing Mr. Krona's propensity to threaten law enforcement officers.

"In no case ... regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Mr. Krona's previous threats were used by the State throughout the trial to establish Mr. Krona's dangerousness and propensity. All law enforcement witnesses were permitted to testify about Mr. Krona's prior alleged misconduct. The State argued in closing argument that Deputy Navarro's fear was reasonable because Mr. Krona had previously threatened other police officers. 3/4/14 RP 162. The jury was never instructed regarding the limited purpose of this evidence and

was never prohibited from using this evidence to find that Mr. Krona was more likely to have engaged in this aggressive behavior on this occasion because he had engaged in similar behavior on prior occasions.

This evidence improperly established Mr. Krona's propensity to threaten and act uncooperatively with police officers. The admission of this evidence to show he acted in conformity therewith was an abuse of discretion.

d. The admission of this evidence was prejudicial error and requires reversal.

Error is prejudicial if there is a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. *Tharp*, 96 Wn.2d at 599. Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

Mr. Krona was highly intoxicated, fully restrained, and in and out of consciousness when he made empty threats toward Deputy Navarro and every other person with whom he had contact. Permitting the jury to hear evidence that he had engaged in similar conduct on prior occasions created a reasonable probability that the outcome of the

trial would have been different if the error had not occurred. Because the error was prejudicial, reversal is required.

4. The trial court miscalculated Mr. Krona's offender score for both his driving under the influence and harassment convictions.

Where an offender score is legally erroneous due to misapplication of the SRA, a reviewing court must reverse the sentence regardless of whether the appellant previously raised the argument. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 872, 50 P.3d 618 (2002). A sentence that is based upon an incorrect offender score is "a fundamental defect that inherently results in a miscarriage of justice." *Id.* at 867-68 (citing *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997)). A defendant cannot waive a challenge to a miscalculated offender score because an improperly calculated score lacks statutory authority. *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950 (2010). A sentencing court's offender score calculation is reviewed de novo. *Id.* at 687.

a. The trial court miscalculated Mr. Krona's driving under the influence offender score by including convictions other than those specific offenses listed in former RCW 9.94A.525(2)(e) (2011).

RCW 9.94A.525 governs the calculation of an offender score. Subsection 2(e) of that statute provides:

> If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) ... prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) the prior convictions were committed within five years since the last date of release from confinement ... or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055. [3]

Former RCW 9.94A.525(2) (2011).

Only those specific classes of offenses listed in RCW 9.94A.525(2)(e) may be used to calculate an offender score for driving under the influence. *State v. Morales*, 168 Wn. App. 489, 498, 278 P.3d 668 (2012); *State v. Jacob*, 176 Wn. App. 351, 360, 308 P.3d 800 (2013). Those prior convictions that are included in the calculation of

[3] The legislature amended this subsection effective September 28, 2013. Laws of 2013, 2d Spec. Sess., ch. 35, §8. Mr. Krona was arrested for this offense on July 13, 2013. CP 99-100. Any sentence imposed under the Sentencing Reform Act shall be determined in accordance with the law in effect when the current offense was committed. RCW 9.94A.345.

the offender score under subsection (2)(e) are limited to felony driving under the influence, felony physical control of a vehicle while under the influence, and serious traffic offenses. *Morales*, 168 Wn. App. at 493. "Serious traffic offenses" include non-felony driving under the influence (RCW 46.61.502), non-felony actual physical control while under the influence (RCW 46.61.504), reckless driving (RCW 46.61.500), and hit and run an attended vehicle (RCW 46.52.020(5)). RCW 9.94A.030(44).

i. Mr. Krona's prior convictions for taking a motor vehicle without permission and attempting to elude should not have been included in his DUI offender score.[4]

The Judgment and Sentence indicates that a 1985 taking a motor vehicle without permission conviction and a 1995 attempting to elude conviction were used for purposes of calculating Mr. Krona's offender score. CP 30. Neither of these convictions falls within the class of offense in former RCW 9.94A.525(2)(e) and therefore should not have been included in his driving under the influence offender score.

[4] The Judgment & Sentence did not distinguish which prior convictions were used in calculating in the driving under the influence offender score and which were used in calculating the harassment offender score. *See* CP 30. The trial court did not engage in any oral analysis at sentencing regarding Mr. Krona's offender score. *See* 4/3/14 RP 12-15. However, in the Judgment & Sentence, these two convictions are listed in Section 2.2 as "prior convictions constituting criminal history for purposes of calculating the offender score[.]" CP 30.

RCW 9.94A.525(2)(c) governs scoring of class C felony convictions "except as provided in (e) of this subsection." By its express terms, subsection (2)(c) defers to subsection (2)(e) to calculate the offender score for driving under the influence. Therefore, the sentencing court erred when including these convictions in its calculation of Mr. Krona's driving under the influence offender score.

ii. The trial court erroneously included Mr. Krona's other current offense conviction for harassment in his driving under the influence offender score.

"Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589." RCW 9.94A.525(1). "[T]he sentencing range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score[.]" RCW 9.94A.589(1)(a).

Consequently, Mr. Krona's other current conviction for harassment under the same cause number should be treated as a prior conviction when calculating his offender score and is subject to the same restrictions of former RCW 9.94A.525(2)(e) previously discussed. It therefore should not have been included in his offender score.

b. The trial court miscalculated Mr. Krona's offender score on his harassment conviction because the evidence provided showed that two of his prior felony convictions wash.

The State bears the burden of proof at sentencing. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); U.S. Const. amend. XIV; Const. art. I, § 3. Bare assertions that are unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction. *Hunley*, 175 Wn.2d at 910. While the preponderance of evidence standard is not overly difficult to meet, the State must at least introduce "evidence of some kind to support the alleged criminal history." *Id.* (quoting *Ford*, 137 Wn.2d at 480).

A defendant's failure to object to the State's assertions of criminal history at sentencing does not constitute an acknowledgement of the asserted history. *Id.* at 912. "There must be some affirmative *acknowledgment* of the facts and information alleged at sentencing in order to relieve the State of its evidentiary obligations." *Id.* "To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant." *Ford*, 137 Wn.2d at 482.

The State provided certified copies of the judgments or dockets for all the prior convictions listed in the Judgment and Sentence. CP 30; Sent. Exs. 1-4.[5] While the evidence provided by the State establishes the existence of the 1985 taking a motor vehicle and 1995 attempting to elude convictions, the State did not meet its evidentiary burden to prove that each of these convictions should be counted in the offender score. The State established that Mr. Krona was convicted of taking a motor vehicle without permission in 1985 and ordered to serve 60 days of confinement. Sent. Ex. 4. The next conviction for which the State provided proof was attempting to elude; the judgment on that conviction entered July 21, 1995. *Id.*

Class C prior felony convictions, other than sex offenses, shall not be included in the offender score if "since the last date of release from confinement (including full time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender has spent five consecutive years in the community without committing any crime that subsequently results in a conviction." Former RCW 9.94A.525(2)(c) (2011). The State failed to prove that

[5] Exhibits 1 and 2 were admitted on March 24, 2014, which was the original date for the sentencing hearing. 3/24/14 RP 5-6. The sentencing hearing was subsequently continued to April 3, 2014. 3/24/14 RP 18. Exhibits 3 and 4 were admitted at the sentencing hearing on April 3, 2014. 4/3/14 RP 2.

Mr. Krona did not spend five years in the community without committing a crime that resulted in conviction after his release on the 1985 charge. CP 30; Sent. Exs. 1-4. Rather, the State's evidence shows he did not obtain a subsequent criminal conviction until 1995, approximately 10 years later. *See id.* As such, the trial court should not have included the 1985 conviction in the calculation of Mr. Krona's offender score.

Similarly, Mr. Krona's 1995 conviction for attempting to elude a police vehicle should not have been included because the State did not establish that it did not "wash out" pursuant to RCW 9.94A.525(2)(c). The State's evidence established that he was convicted on July 21, 1995. Sent. Ex. 4. While Mr. Krona obtained other convictions within the five years after his initial release, the State's evidence established that he was arrested on September 7, 2002 for driving under the influence. CP 30. He was not subsequently arrested again until May 9, 2008, which is more than five years after his 2002 arrest. *Id.* Therefore, this crime free period indicated by the State's evidence also causes the 1995 attempting to elude conviction to wash. The inclusion of the 1985 and 1995 convictions in Mr. Krona's sentencing score contravened RCW 9.94A.525(2)(c).

c. This Court should reverse and remand for resentencing.

The trial court misapplied RCW 9.94A.525 and erroneously calculated Mr. Krona's offender on both counts. This Court should accordingly reverse and remand for resentencing.

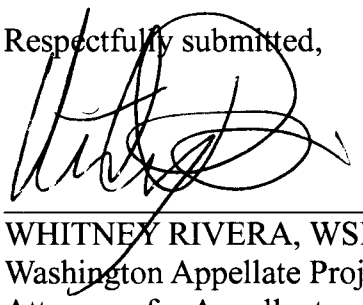
F. CONCLUSION

This Court should reverse and dismiss the harassment conviction because there was insufficient evidence of an essential element in violation of due process and because it constitutes an infringement on Mr. Krona's First Amendment rights. Additionally, reversal and remand for a new trial is required because of the prejudicial admission of evidence concerning Mr. Krona's prior history of threatening law enforcement officers, which violated his Sixth Amendment confrontation rights and the Rules of Evidence. In the event that the sentence remains in effect, this Court should remand for resentencing because the trial court miscalculated Mr. Krona's offender

score on both the driving under the influence and harassment convictions.

DATED this 4th day of November, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, MARVIN KRONA, Appellant.	)))))))))	NO. 71810-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 4TH DAY OF NOVEMBER, 2014.

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