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Court of Appeals
Division I
State of Washington

Supreme Court No. ________

(Court of Appeals No. 74204-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SLOAN PATRICK STANLEY,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Sloan Stanley, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. Stanley*, No. 74204-3-I (Slip Op. filed September 5, 2017). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Is RCW 9.61.260 overbroad and vague in violation of the First and Fourteenth Amendments, where it criminalizes communications made with intent to "harass" or "embarrass" another person using "any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act"? RAP 13.4(b)(3), (4).

2. Did the State present insufficient evidence to prove a true threat to kill on counts six and nine, where Mr. Stanley made vague and passive pronouncements about his wishes and desires that the recipients die, but did not express an intent to kill, and where his admittedly abhorrent statements were surrounded by cries for help?

3. Is the "simple negligence" mens rea for true threats insufficient under the First Amendment, and did the trial court err in denying Mr.

Stanley's motion to instruct the jury that the mens rea is knowledge or intent?[1]

C. STATEMENT OF THE CASE

Sloan Stanley endured what the prosecutor in this case called a "horrific childhood," during which he was abandoned by his mother and tormented by his alcoholic father. RP (10/14/15) 313; ex. 8 at 12, 16, 44, 50, 67, 73, 77, 80. But he persevered, graduated from college, became an engineer, and moved to Seattle. RP (7/27/15) 803; ex. 18.

Mr. Stanley frequently went out to the neighborhood bars after work and on weekends. One of his standard destinations was the Atlantic Crossing. He became acquainted with some of the other regular customers, including Alyson Gray, Miriam (or "Mia") Much, and Leah Mesford. He also got to know the bartenders, including Dionna Couch and Elizabeth ("Liz") Williams. RP (7/23/15) 519-20, 578-81; RP (7/27/15) 646-48.

Mr. Stanley remembers staying at the Atlantic Crossing well past closing on June 10-11, 2010. He has a memory of being there with Ms. Gray, Ms. Much, and Ms. Williams. He remembers all three expressing an interest in him sexually, after which he fondled and/or kissed each of them briefly. He also remembers telling them stories that were essentially

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[1] This Court rejected this argument in *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016), but Mr. Stanley raises it for preservation purposes.

predictions of future events that ultimately occurred. He woke up at around 5:30 a.m., and realized he and the others had fallen asleep at the bar. He went home and slept for a while, then went to work. Ex. 18.

Mr. Stanley only saw the women a few more times that summer, and they did not acknowledge the events of June 10. Ex. 18. Mr. Stanley's work took him to England in the fall of 2010. While there, he was beaten and robbed one night while waiting for a cab. He briefly lost consciousness, and the cab driver took him to the hospital. Ex. 19.

Although he was released in short order, the hit to the head caused lingering problems with his sense of smell, headaches, and memory. Ex. 4 at 6; ex. 20 at 4, 10. Mr. Stanley reflected on the night of June 10, and wondered what really happened. He was concerned because he was romantically interested in Ms. Gray but remembered fondling her friends. He was also worried about whether the head injury had caused him to make up memories. RP (7/29/15) 957-59.

In an effort to gain understanding, Mr. Stanley obtained the contact information for Ms. Gray and exchanged e-mail messages with her starting in December of 2010. Ex. 4 at 1. They discussed work, school, and other activities. Ex. 4 at 3-5. Mr. Stanley told Ms. Gray about the head injury he had sustained while he was in England. He asked Ms. Gray out, but she told him she was seeing someone. Ex. 4 at 6-9. Mr. Stanley also

asked Ms. Gray about the events of June 10, 2010, but Ms. Gray said she did not remember anything about that night. Ex. 4 at 5, 11. Mr. Stanley became very frustrated. He asked Ms. Gray to help him "clear up these memories" because "it might help me clear the fog on the events of the night my head got hit." Ex. 4 at 14.

Ms. Gray stopped responding to Mr. Stanley's messages, and Mr. Stanley became irate. He said, "This is not a [expletive] game. This has been eating away at me for some time and now more than ever. I don't know what your [expletive] problem is and why you are lying about this night but I assure [you] I will not [expletive] let this go." Ex. 4 at 15.

Ms. Gray eventually asked Mr. Stanley to stop contacting him. Ex. 10 at 20. This upset Mr. Stanley because he wanted to know what happened the night of June 10, 2010. He swore at Ms. Gray and called her names. Ex. 4 at 21. She responded by saying she had "no recollection" of the night he described, and again asked him to stop contacting her. Ex. 4 at 22. Mr. Stanley insisted that he only wanted to know what happened:

> Please I'm begging you, just level with me. I don't understand what the big deal is. I'll do anything in return if you just level with me. Please, I just want to put these memories to rest. There is [no] way I could [have] dreamed it up and I'm not making it up.

Ex. 4 at 24. He sent a few more messages, but Ms. Gray did not respond.

Mr. Stanley hoped one of the other women would be able to help him clear up his memories. He e-mailed Ms. Much and explained, "All I want is someone to help me with memories of that Thursday night you know which one I'm talking about, we were there til 5:30 in the morning …. Alyson makes it sound like I'm making it up." Ex. 20 at 2. Ms. Much did not respond, but Mr. Stanley kept e-mailing her and asking her what happened on the night in question. Ex. 20 at 3, 7. When he did not receive any response, he called her names. Ex. 20 at 8, 12.

In the meantime, Mr. Stanley continued to e-mail Ms. Gray. He told her she and her friends were being "cruel" by ignoring his requests for help, and he repeatedly begged her to reveal what happened. Ex. 4 at 28, 29. When she didn't answer, he called her names. Ex. 4 at 30. He also became despondent, and talked about killing himself. Ex. 4 at 42. He said, "Oh, how I wish you could just explain to me what is going on." *Id.* On July 7, 2011, Ms. Gray again asked Mr. Stanley not to contact her, and advised him to seek professional help. Ex. 10 at 43.

In August, Mr. Stanley again asked Ms. Much to tell him what happened that night over a year earlier. He said, "Can't you see I just want help with my memories. I'm not going to cause any trouble I just want to know what memories are real or not." Ex. 20 at 10. He became more and more despondent, and in September wrote that the ordeal was making him

"physically sick." Ex. 20 at 11. He called Ms. Much names, and used expletives liberally. Ex. 20 at 12. But he also begged for help and said he was suicidal: "You['re] killing me. Is that what you want you want me to kill myself? I can't function anymore. This is to[o] much. Please make it stop. Please, I'm begging. My head can't handle this." Ex. 20 at 12. He continued to send messages to Ms. Much asking her to tell him what happened on June 10 of 2010, and saying that not knowing what happened gave him terrible headaches and made him feel crazy. Ex. 20 at 13. He repeatedly lamented that he was in emotional pain and felt like committing suicide. Ex. 20 at 14.

Ms. Gray and Ms. Much called the police in January of 2012. RP (7/23/15) 589. The responding officer observed that Mr. Stanley appeared to use these communications as an "outlet," but told the women they could obtain restraining orders. RP (7/27/15) 828. Ms. Gray and Ms. Much decided not to take that step, and instead deleted or stopped using the accounts at which they had received messages from Mr. Stanley. RP (7/23/15) 589-90.

Mr. Stanley continued sending messages to Ms. Gray, Ms. Much, and Ms. Williams, as well as Leah Mesford. Exs. 4, 5, 8, 10, 20. Some messages were abhorrent; for example, he said "I will [expletive] kill you [expletive]." Ex. 4 at 58; *see also* ex. 4 at 49-50, 58; ex. 8 at 16, 57, 67; ex.

10 at 11. There were also many messages in which Mr. Stanley called the women terrible names, but did not threaten them. *See, e.g.,* ex. 4 at 15, 21, 28, 53, 60; ex. 5 at 8; ex. 8 at 1, 13, 26, 33, 36, 47, 54, 58, 64; ex. 10 at 4, 25, 26, 29, 30, 32.

But the frightening messages were surrounded by dozens of messages that were cries for help. RP (7/27/15) 674-75, 704, 722; ex. 4 at 16, 17 ("Please can you find it in your heart to help me resolve this?"), 24 (Please, I just want to put these memories to rest), 42, 44, 51, 52 ("please help me"), 53 ("please help me. I don't [know] what to do. I can't go on anymore."), 54, 55 ("I am scared. Please help me. Please."), 58 ("I want to be free of this. Please."), 62 ("I am really hanging on to life by a thread. I don't [know] what to do anymore. Please listen and help. Please."); ex. 5 at 2 ("please just tell me what happened. I really im in a lot of pain because of this. Please."), 5 ("you could help to give me my life back."), 7 ("please help me. Please. … please the pain is to much."), 8 ("oh please do something. Please."), 9 ("oh Liz, please don't hate me. Please care about me. I just am really having a hard time."), 11, 12, 13, 14 ("I'm begging."), 15, 17 ("please Liz, please put away your hatred for me and just help me with these memories. Please do something Liz, please."), 18, 19 ("help me."), 24 ("please. Oh please just end this."), 28 ("just help me liz. Please."), ex. 8 at 12 ("please I'm begging you just talk to me"), 13

("Please Leah"), 14 ("please make this end. I feel sick. … I need your help with this. Please."), 19 (I wanna … die. Please help me."), 20, 22 ("please just help me, please. … I am in so much pain. … please help me. Please I beg you."), 25, 39 ("please give me some hope … Please Leah! Please Leah!"), 40, 42 ("please care. Do something please. … I am hurting more than ever. Please help me."), 52, 53, 56, 58, 72, , 75, 76; ex. 10 at 12 ("please help I can't take it anymore. Please."), 13 ("please just help me. … I am really hurtin from all this."), 14, 18, 22, 23, 25, 31, 32 ("please help me. Please help me. I can't deal with life anymore. Please mia help me."), 34.

Many messages were akin to diary entries, and the recipients even described them as such. RP (7/27/15) 782 ("I felt so much like he was almost journaling to me in a way"). *See also* ex. 4 at 42, 47; ex. 5 at 3, 4, 8, 9, 10, 11, 12, 15, 16, 20, 21; ex. 8 at 5, 14, 17, 30, 31, 33, 39, 43, 44, 45, 59; ex. 10 at 7, 8, 15, 18, 19, 34.

Notwithstanding the mixed context, the State charged Mr. Stanley with nine counts of felony cyberstalking: three with Ms. Gray as the alleged victim, three with Ms. Much as the alleged victim, two with Ms. Mesford as the alleged victim, and one with Ms. Williams as the alleged victim. CP 48-51. Mr. Stanley was dissatisfied with his appointed counsel,

so he made a successful motion to proceed pro se. RP (3/27/15) 120-27; RP (4/1/15) 131-35.

Mr. Stanley told the jury that he did not mean to threaten anyone but just wanted to know what happened that night in June of 2010. RP (7/29/15) 957. The women testified that Mr. Stanley's messages scared them, but also acknowledged that many messages were cries for help. RP (7/23/15) 587-88, 592; RP (7/27/15) 654, 704, 721-22, 777-82.

Mr. Stanley asked the court to instruct the jury that the State must prove he intended his statements to be taken as true threats or knew that they would be taken as true threats. RP (7/21/15) 179-85; 203-16; RP (7/30/15) 1124; CP 145. The court rejected his proposed instructions, and instead instructed the jury using the negligence standard for true threats. CP 158; RP (7/30/15) 1118, 1124. Mr. Stanley was convicted of all nine counts as charged. CP 175-83.

In the opening brief, Mr. Stanley argued the trial court violated his First Amendment rights by instructing the jury using the negligence standard for true threats. This Court later rejected the same argument in *Trey M.*, which the Court of Appeals followed. Slip Op. at 6-8. The Court of Appeals also rejected a sufficiency challenge to counts six and nine under the negligence standard. Slip Op. at 8-12.

The Court of Appeals was more receptive to another argument: Mr. Stanley argued that the cyberstalking statute is unconstitutionally vague and overbroad to the extent that it criminalizes communications made with intent to "harass" or "embarrass," and to the extent it prohibits communications "[u]sing any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act." The Court of Appeals held any error was harmless but noted:

> **We are troubled by the breadth of the intent to embarrass portion of the cyberstalking statute**. Although the telephone harassment statute cases have held that the intent to embarrass is not unconstitutionally overbroad, contemporary electronic communication, social media, and internet postings are broad in scope. A variety of political and social commentary, including caustic criticism of public figures, may be swept up as an intent to embarrass someone while using rough language.

Slip Op. at 19-20 (emphasis added).

Mr. Stanley seeks review in this Court. RAP 13.4(b) (3), (4).[2]

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[2] The Court of Appeals also intimated that Mr. Stanley did not thoroughly brief this issue. Slip Op. at 20. Mr. Stanley respectfully disagrees. Please see Opening Brief at 47-55 and Reply Brief at 8-13.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The question of whether the cyberstalking statute is unconstitutionally overbroad and vague is a significant question of law under the First and Fourteenth Amendments, and is a matter of substantial public interest in the Internet Age.

The cyberstalking statute is unconstitutionally overbroad and vague to the extent that it criminalizes communications made with intent to "harass" or "embarrass," and to the extent it prohibits communications "[u]sing any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act." RCW 9.61.260. It is overbroad because using indecent language that merely bothers or embarrasses someone is protected speech under the First Amendment. And it is vague because the terms at issue have a wide array of definitions, so it is not clear what conduct is prohibited and the ban is subject to arbitrary enforcement. U.S. Const. amends. I, XIV; *see, e.g., State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001); *City of Everett v. Moore*, 37 Wn. App. 862, 683 P.2d 617 (1984).

Because this issue is a matter of substantial public interest and presents a significant question of constitutional law, this Court should grant review. RAP 13.4(b)(3), (4).

a. The statute includes prohibitions on “lewd, lascivious, indecent, or obscene” communications made with intent to “harass” or “embarrass”.

The cyberstalking statute provides:

(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 9.61.260 (emphases added).

b. The statute is unconstitutionally overbroad because it makes unlawful a substantial amount of protected speech, and is unconstitutionally vague because it is unclear and subject to arbitrary enforcement.

"A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities." *Williams*, 144 Wn.2d at 206 (quoting *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000)).

> Criminal statutes require particular scrutiny and may be facially invalid if they make unlawful a substantial amount of constitutionally protected conduct…. This standard is very high and speech will be protected … unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Id. (citing *Lorang*, 140 Wn.2d at 26-27) (internal quotations omitted).

A law is unconstitutionally vague if it either: (1) fails to define the offense with sufficient definiteness that ordinary people can understand what is proscribed, or (2) fails to provide ascertainable standards of guilt

to protect against arbitrary enforcement. *Williams*, 144 Wn.2d at 203 (citing *Lorang*, 140 Wn.2d at 30). Although vagueness is a violation of the due process clause of the Fourteenth Amendment, courts "are especially cautious in the interpretation of vague statutes when First Amendment interests are implicated." *Williams*, 144 Wn.2d at 204 (quoting *Lorang*, 140 Wn.2d at 31).

In *Williams*, this Court held that the harassment statute was both unconstitutionally overbroad and unconstitutionally vague to the extent it criminalized threats to perform acts intended to substantially harm a person's "mental health." *Williams*, 144 Wn.2d at 201 (citing RCW 9A.46.020(1)(a)(iv) (1992)). The term "mental health" was impermissibly vague because it was not clear whether it referred to "mere irritation or emotional discomfort" or instead meant a diagnosed psychological condition. *Id.* at 204-05. And it was unconstitutionally overbroad because it was not limited to "true threats," which by definition require an expression of intent to cause *physical* harm. *Id.* at 207-08.

Similarly here, the cyberstalking statute is both overbroad and vague. It is overbroad because, like the harassment statute, the cyberstalking statute prohibits not only true threats but also a substantial amount of constitutionally protected speech. For example, it criminalizes the sending of an electronic communication using "indecent" language

with intent to "embarrass" the recipient. RCW 9.61.260(1)(a). Such a content-based restriction runs afoul of the First Amendment because this type of speech is not "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Williams*, 144 Wn.2d at 206. Indeed, such speech could be used for political purposes: one can imagine a communication sent as part of the transgender bathroom debate being swept up under this statute in light of the overbroad language prohibiting "indecent"[3] words or images sent with intent to "embarrass."

The term "harass" is also overbroad. "Harass" means "to annoy or bother (someone) in a constant or repeated way."[4] An electronic communication using indecent language or images sent with intent to annoy or bother someone falls within the protection of the First Amendment, and cannot be criminalized. As the Court of Appeals explained when invalidating an anti-harassment ordinance, "[a] discussion of any political, social, economic, philosophic or religious topic might

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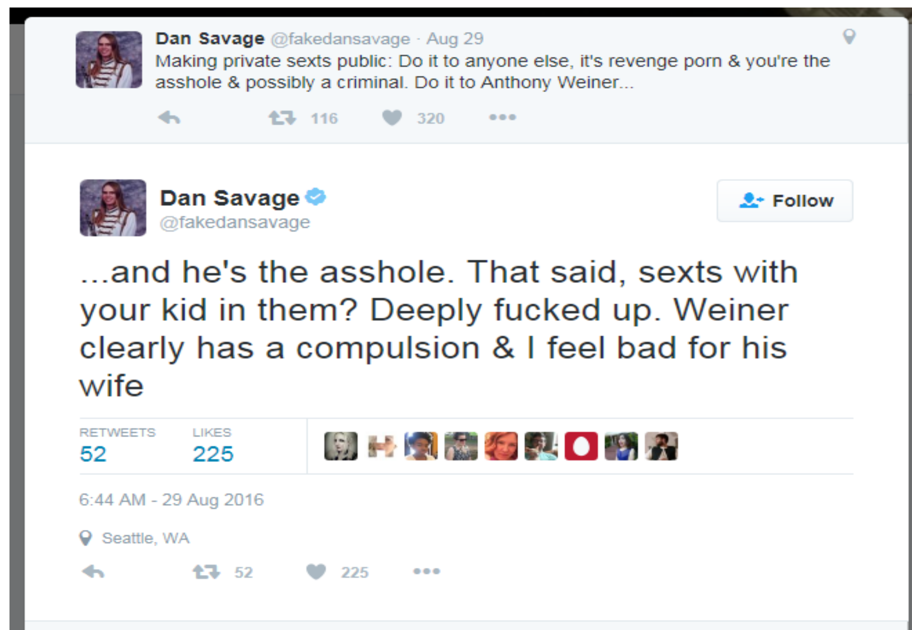
[3] One definition of "indecent" is "using language that offends people : including behavior or ideas that people find offensive." http://www.merriam-webster.com/dictionary/indecent. Communicating ideas that others find offensive is conduct lying at the core of First Amendment protection. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).There can be no doubt that a prohibition on this type of language criminalizes a substantial amount of constitutionally protected speech.

[4] http://www.merriam-webster.com/dictionary/harass.

well vex, irritate or bother the listener." *City of Everett v. Moore*, 37 Wn. App. 862, 864, 683 P.2d 617 (1984). The court noted that the mailing of anti-abortion brochures had been improperly criminalized under a similar Colorado law. *Id.* at 865 (citing *Bolles v. People*, 189 Colo. 394, 541 P.2d 80, 83 (1975)).

Indeed, countless political tweets could be considered cyberstalking in light of the overbroad language prohibiting "lewd, lascivious, indecent, or obscene" electronic communications made with intent to "harass" or "embarrass." The following are some examples from Mr. Stanley's opening brief:

[5]



While many (perhaps most) would be offended by the above missives, it is "often true that one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). The First Amendment protects the principle that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well

[5] Rob Morrow is the chairman of the Republican Party of Travis County, Texas.

include vehement, caustic, and sometimes unpleasantly sharp attacks" against those with whom the speaker disagrees. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Because the cyberstalking statute sweeps this exchange of ideas within its prohibitions, it is unconstitutionally overbroad.[6]

In addition to being overbroad, the statute is vague. For example, does the word "embarrass" mean "to make uncomfortable" or is it limited to a graver form of emotional distress? The latter reading might cure the overbreadth problem but the former is consistent with the dictionary definition. Similarly, does the overbroad dictionary definition of "harass" discussed above apply, or is it a legal term of art with a narrower meaning? Does "indecent" mean "using language that offends people : including behavior or ideas that people find offensive"[7] – which is clearly overbroad – or does it mean "sexually offensive or shocking"[8] – which might not be? These ambiguities render the statute unclear and subject to

[6] In contrast to communications made with intent to "harass" or "embarrass," communicating with intent to "intimidate" (or "torment") likely falls outside the scope of First Amendment protection. *See Virginia v. Black*, 538 U.S. 343, 360, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."). The problem is that the cyberstalking statute is not limited to intimidation. *See* RCW 9.61.260.

[7] *See* http://www.merriam-webster.com/dictionary/indecent.

[8] *See id.*

arbitrary enforcement. It is therefore void for vagueness under the Fourteenth Amendment. *See Williams*, 144 Wn.2d at 203-06.

c. The issue is of broad public interest as demonstrated by challenges to the statute in other courts.

The Court of Appeals is not alone in being troubled by the scope of this statute. Just last week a litigant made the same arguments in federal court that Mr. Stanley made in the Court of Appeals:

> "We think that cannot be constitutional," he told the judge. "If you think of much of what goes on in elections, President Trump might have been guilty of cyberstalking Secretary Clinton."

http://www.theolympian.com/news/local/article174935556.html#storylink=cpy. The government responded only on procedural grounds and refused to defend the constitutionality of the statute even when directly asked. *Id.* ("Washington's law against cyberstalking faces a dubious future after the state Attorney General's Office took a pass on defending its constitutionality during a federal court hearing Friday."). But the government emphasized that state courts should have the opportunity to address the constitutionality of the statute before federal courts evaluate the claim. *Id.*

This Court should take that opportunity, and should grant review in this case to evaluate the constitutionality of a statute that imposes sweeping prohibitions on electronic communications. RAP 13.4(b)(3), (4).

2. This Court should also grant review of the instructional and sufficiency issues.

As noted, the court denied Mr. Stanley's motion to provide a "true threat" jury instruction with a mens rea of intent or knowledge, rather than using the "reasonable person" standard. This Court rejected a similar argument in *Trey M.*, 186 Wn.2d at 888. Mr. Stanley nevertheless raises the issue here to preserve it.

Mr. Stanley also asks this Court to grant review of the sufficiency challenge on counts six and nine. In concluding the statements were true threats, the Court of Appeals failed to account for the complete context. The context included dozens of requests for help as well as mundane diary entries, and the court unduly minimized these surrounding statements. *Compare* Slip Op. at 8-12 *with* exs. 5, 10; RP (7/27/15) 654, 782.

E. CONCLUSION

For the reasons set forth above Sloan Stanley respectfully requests that this Court grant review.

DATED this 1st day of October, 2017.

/s Lila J. Silverstein
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WSBA #38394
Attorney for Petitioner

APPENDIX A

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,	)	No. 74204-3-I
v.	)	
SLOAN PATRICK STANLEY, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: September 5, 2017

VERELLEN, C.J. — Following a jury trial, Sloan Stanley was convicted of nine counts of felony cyberstalking. He now appeals, contending that (1) the trial court incorrectly instructed the jury on what constitutes a "true threat," (2) the State presented insufficient evidence that he made true threats to kill as charged in counts six and nine, (3) the cyberstalking statute is unconstitutionally overbroad and vague, in violation of the First Amendment, and (4) the prosecutor committed prejudicial misconduct during closing argument. We affirm the convictions.

FACTS

In 2009, Sloan Stanley began patronizing the Atlantic Crossing Pub in Seattle's Roosevelt district. Elizabeth Williams worked as a bartender at the pub. Friends Alyson Gray, Miriam Much, and Leah Mesford lived in the neighborhood and frequented the pub.

While at the pub, Stanley would make small talk with Gray, Much, and Mesford, but appeared to focus specifically on Gray, which made Gray uncomfortable. Stanley and Gray's relationship were mere acquaintances, and they did not exchange contact information.

In July 2010, Stanley got into an argument with the kitchen manager at the pub and threatened to slit his throat. Williams kicked Stanley out and told him he was permanently banned from the pub. As Stanley was leaving, he threatened to shoot up the pub.

In December 2010, Stanley found Gray's email address on the internet and began emailing her. Gray had since moved out of the neighborhood and no longer patronized the Atlantic Crossing Pub. The emails were initially friendly, and Gray responded courteously. In his emails, Stanley asked Gray about the night of June 10, 2010. Stanley apparently believed there had been some form of encounter between him, Gray, Much, and Williams that night but he could not remember. Stanley's emails quickly became hostile and aggressive. Gray told him not to contact her anymore, but Stanley continued to send Gray emails for months. The emails were "dark" and they "terrified" Gray.[1]

Gray told Much about the emails and learned Stanley also had been sending similar emails to Much, questioning her about the night of June 10, 2010. Much initially responded to Stanley's emails, telling him she did not know what he was talking about, but she soon began to delete the emails and did not respond. Like the emails to Gray,

[1] Report of Proceedings (RP) (July 23, 2015) at 588.

Stanley's emails to Much became increasingly hostile and threatening. Much changed her email address, but Stanley began sending her private messages through Facebook.

Despite being banned from the Atlantic Crossing Pub, Stanley tried to enter the pub on April 18, 2011, and the police were called. A week later, on April 25, 2011, Stanley entered the pub and refused to leave. Williams called the police. By the time an officer arrived, Stanley had left. One of Stanley's ex-roommates was at the pub and gave the officer Stanley's telephone number. The officer called Stanley and told him not to return to the pub and not to contact anyone there. Stanley agreed he would not.

In January 2012, after continuing to receive messages from Stanley, Gray and Much contacted the police. An officer reviewed Stanley's messages and suggested the women close their social media accounts, change their email addresses, and get restraining orders against Stanley. Gray and Much changed their contact information but decided against a restraining order so as not to further agitate Stanley.

In June 2012, Much created a new Facebook account and Stanley immediately began using the name "Erwin Jenkins" to send messages. Much did not respond. Like his previous emails, Stanley's messages were aggressive and threatening: "[I] want to kill you people. [I] want to strangle you with my bare hands until you are no longer breathing you fucking whore."[2] Much was very frightened by the messages, which continued for two more years, until May 2014.

Meanwhile, Stanley also sent messages to Mesford through Facebook. Consistent with the theme of his messages to Gray and Much, Stanley repeatedly asked Mesford what happened that June 2010 night. Stanley's messages were

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[2] Ex. 10 at 21.

threatening. Just two weeks into messaging Mesford, Stanley told her, "I'm going to cut the little fucking heart out of your dog and shove it down your throat and make you fucking choke on it. I like all the death in this world. [I] want to see more. I want to see society tremble."[3] Stanley sent Mesford hundreds of messages, many describing the horrific ways in which he wanted to kill her.[4] In the messages, Stanley also mentioned he had stopped by Mesford's place of work and had been to her apartment complex. Mesford eventually quit checking the messages, but later discovered many more from Stanley and realized "they had progressed into more threatening" messages.[5] Mesford became concerned she had not "realize[d] the severity of the situation."[6]

Stanley also used the name Erwin Jenkins to send Williams harassing and threatening messages on Facebook. Beginning in January 2013, his messages continued for a year and a half and became increasingly aggressive. When Williams discovered the messages, she felt "fearful and threatened."[7]

After previously cancelling her online accounts in 2012 to avoid Stanley, Gray rejoined Facebook in early 2014. Within a couple of weeks, Stanley started using the name Erwin Jenkins to send her vulgar threatening messages. Gray was "terrified."[8] She blocked him, but he began sending messages to her business accounts.

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[3] Ex. 8 at 4.

[4] Id. at 6-7 (telling Mesford he would break into her house with a rag of ether, inject her with horse tranquilizer, and bind her so tightly that her limbs would need to be amputated); Ex. 8 at 16 (telling Mesford he would slit her throat).

[5] RP (July 27, 2015) at 736.

[6] Id. at 721.

[7] Id. at 663.

[8] RP (July 23, 2015) at 592.

Between May and August 2014, Stanley sent Gray nearly 50 messages, threatening and harassing her. For example, on June 26, 2014: "[I] want to kill you fucking whores. I can't fight this feeling anymore[. I] will find you and [I] will fucking kill you you fucking worthless fucking whore. . . . I swear to god [I] will fucking kill you."[9] On August 12, 2014, Stanley wrote her, "[I]'ll find you and put a bullet in your fucking head. . . . [I] will fucking kill you you worthless fucking whore. [I] will fucking find you."[10] And on August 17, 2014, Stanley messaged Gray, "I am ready to hunt you down and fucking kill you. [I] swear to fucking god something bad will happen. . . . I'll send you all to hell."[11] In August 2014, Gray called the police again and reported the messages. She obtained a permanent stalking protection order against Stanley.

Detective Rande Christensen spoke to Stanley on the phone in late September 2014. When Detective Christensen told Stanley that Gray, Much, Mesford, and Williams were alleging harassment, Stanley admitted he had been harassing the women for four years and that he used the made-up name Erwin Jenkins. He also admitted he threatened to kill the women. Detective Christensen arranged an in-person interview with Stanley on October 3, 2014. During the recorded interview, Stanley told Detective Christensen that the purpose of his messages was to "break [the women] down" so they would talk to him.[12] He said he threatened the women to "increase their stress" and to "scare" them.[13] When asked how he would feel if someone made similar

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[9] Ex. 4 at 49-50.

[10] Id. at 58.

[11] Id. at 61.

[12] Pretrial Ex. 4 at 46.

[13] Id. at 74.

threats to him, Stanley admitted he would be concerned and would report the threats to the police. Detective Christensen arrested Stanley.

The State charged Stanley with nine counts of felony cyberstalking (counts 1 through 3 with Gray as the alleged victim; counts 4 through 6 with Much as the alleged victim; counts 7 and 8 with Mesford as the alleged victim; and count 9 with Williams as the alleged victim). Stanley represented himself at trial. A jury convicted him of all nine counts. The court sentenced Stanley to 25 months in custody and 25 months on community custody.

Stanley appeals.

ANALYSIS

I. Jury Instruction 9

Stanley argues the trial court incorrectly instructed the jury on what constitutes a "true threat." His argument fails.

"True threats" are an unprotected category of speech under the First Amendment.[14] "A true threat is 'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.'"[15] "The speaker of a 'true threat' need not actually intend to carry it out."[16] Instead, it is enough that a reasonable speaker would foresee that the threat would be considered serious.[17]

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[14] State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004).

[15] State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting id. at 43).

[16] Id. (quoting Kilburn, 51 Wn.2d at 46).

[17] Id.

Here, the court properly instructed the jury as to this standard in Instruction 9:

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.
>
> *To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk, or political argument.*[18]

Nevertheless, Stanley argues that the United States Supreme Court's decisions in Virginia v. Black[19] and Elonis v. United States[20] require a subjective test when evaluating "true threats" under the First Amendment. But our Supreme Court in State v. Trey M. expressly rejected this exact argument.[21] Stanley acknowledges this precedent, yet relies on State v. Tyler for the proposition that the Court of Appeals should follow the United States Supreme Court rather than the Washington Supreme Court on issues of federal constitutional law.[22]

Stanley misreads the observation in Tyler that when the most recent pronouncement on an issue of federal constitutional law comes from the United States

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[18] Clerk's Papers (CP) at 158 (emphasis added).

[19] 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

[20] __ U.S. __, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015).

[21] 186 Wn.2d 884, 908, 383 P.3d 474 (2016) ("We reject the invitation of appellant and amicus to abandon this court's settled precedent, which applies an objective (reasonable person) test in determining a true threat for First Amendment purposes. Appellant does not convince us that either the Supreme Court's recent decision in Elonis or its previous decision in Black require such a change.").

[22] 195 Wn. App. 385, 389, 382 P.3d 699 (2016), disagreed with by State v. Johnson, 188 Wn.2d 742, 399 P.3d 507 (2017) (following a United States Supreme Court decision regarding the Fourteenth Amendment right to due process instead of a contrary Washington Supreme Court opinion because "[t]he United States Supreme Court is the paramount authority on the federal constitution").

Supreme Court, this court applies that analysis rather than a contrary Washington Supreme Court opinion that *predates* the United States Supreme Court's.[23] Here, the most recent pronouncement is from our Supreme Court. Because "[i]t is error for the Court of Appeals not to follow directly controlling authority by the Supreme Court," we are bound by the decision in Trey M.[24]

II. Sufficient Evidence

Stanley contends the State presented insufficient evidence that he made true threats to kill Much and Williams as charged in counts 6 and 9 under the objective reasonable person test. We disagree.

As charged, cyberstalking is defined as threats to kill a person made by electronic communication to such person or a third party with intent to harass, intimidate, torment or embarrass.[25] In reviewing a sufficiency of the evidence claim, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[26] Because the crime of cyberstalking implicates First Amendment rights, we must conduct "'an independent examination of the whole record'" to assure the conviction "'does not constitute a forbidden intrusion on the field of free expression.'"[27]

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[23] Id. at 392-98.

[24] State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009).

[25] RCW 9.61.26(3)(b).

[26] State v. Witherspoon, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

[27] Kilburn, 151 Wn.2d at 50 (internal quotation marks omitted) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)).

An independent review of the record is "not complete de novo review."[28] Review is limited to "those 'crucial facts' that necessarily involve the legal determination whether the speech is unprotected."[29] "Crucial facts" are those facts that are "so intermingled with the legal questions as to make it necessary, in order to pass on the constitutional question, to analyze the facts."[30] An independent constitutionally-based review requires us to give due regard "to the trial judge's opportunity to observe the demeanor of the witnesses" and the trial court's determination as to credibility.[31]

"Whether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke."[32]

With respect to Much, Stanley concedes that two of his messages to her constitute true threats to kill under the objective reasonable person test,[33] but argues insufficient evidence supports a third conviction. He relies on State v. Kohonen.[34]

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[28] Id. at 50-52.

[29] Id. at 52.

[30] Id. at 51.

[31] Bose, 466 U.S. at 499-500.

[32] Kilburn, 151 Wn.2d at 46.

[33] Appellant's Br. at 45; Ex. 10 at 11 ("Do you know [I] get very strong feelings of wanting to kill you all. . . . I become consumed with a rage that is starting to be uncontrollable. . . . *I am warning you at least one of you will be dead because I am not going out alone.*" (emphasis added); Ex. 10 at 20 (*I'm going to make you fucking pay bitch.* All you fucking whores. *I'm going to send you back to hell where you fucking belong* you fucking worthless fucking whore." (emphasis added)).

[34] 192 Wn. App. 567, 370 P.3d 16 (2016).

In Kohonen, a teenager "tweeted" two messages stating that she "still wanted to punch" a classmate, and that the classmate "must[ ]die."[35] When the classmate later discovered the Twitter posts, the classmate felt angry and embarrassed by them but was not frightened because she did not think Kohonen would actually hurt her. This court looked at the words in the context they were uttered, including the identity of the speaker (a teenager), the audience (a group of Twitter followers, approximately 100 of Kohonen's peers), the medium used to communicate the words (a popular social media platform used for "thoughts," "feelings," and "inside jokes with friends"), the greater environment in which the words were made (high school), and the classmate's lack of fear to conclude there was no true threat.

Here, in contrast, over the course of two years, Stanley, an adult, sent hundreds of private messages to Much's email and Facebook accounts, a person he barely knew, demanding information from her. When Much did not provide the information he sought, Stanley quickly became hostile, aggressive, verbally abusive, and threatening. Contrary to his assertion on appeal, Stanley's messages were not merely a desire for or a prediction of violence. He messaged Much:

> *Something bad is going to happen.* I won't stand by and let you do this.[36]
>
> I don't know what to do anymore. [H]ow do [I] get out of this hell. [I] want to kill you people. *[I] want to strangle you with my bare hands until you are no longer breathing you fucking whore for what you've done to me. . . . [T]hings cannot continue on the path they are on or no one will be alive. . . . [Y]our time is coming.*[37]

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[35] Kohonen, 192 Wn. App. at 571.

[36] Ex. 10 at 21.

[37] Id.

> I'm gonna get my fucking revenge.[38]
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> Should [I] live up to your image of me. Should I fucking drag you bitches behind a fucking car and stomp on little bitch [Joey's] face till it's a fucking pancake. Huh, speak up bitch.[39]

Further, unlike the alleged victim in Kohonen, Much took Stanley's messages seriously and reported them to the police. And Stanley's admissions that he threatened to kill the women to "break [them] down,"[40] "increase their stress,"[41] and "scare"[42] them supports a reasonable inference that Stanley had the intent to intimidate the women.

Given the entire context, a reasonable person in Stanley's position would foresee that the statement, "I want to strangle you with my bare hands until you are no longer breathing you fucking whore for what you've done to me. . . . [Y]our time is coming"[43] would be interpreted by Much as a serious expression of intent to inflict death. We conclude the evidence was sufficient for a jury to find that Stanley made a true threat to kill Much as charged in count 6.

Likewise, the evidence was sufficient for a jury to find that Stanley made a true threat to kill Williams as charged in count 9. Stanley sent multiple messages to Williams over the course of a year and a half. The messages were abusive, calling her names and telling her that she deserved to rot in hell. Stanley told Williams, "I hope someone

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[38] Id. at 24.

[39] Id. at 29.

[40] Pretrial Ex. 4 at 46.

[41] Id. at 74.

[42] Id.

[43] Ex. 10 at 21.

walks into your shitty bar and shoots you, fucking whore."[44] Like the other victims, Stanley told Williams that she deserved to die, that he wanted to watch her die, and that he wanted to kill her. Stanley also described Williams' motorcycle in the messages, causing her concern that he was following her. Finally, on September 21, 2014, Stanley told Williams, "[Y]ou dumb fucking bitch. [Y]ou['re] to[o] stupid to realize that you should never fuck with a schizophrenic. *I'll make [you] famous bitch and send you to hell.*"[45]

Considering all of Stanley's messages and the context in which they were made, a rational trier of fact could conclude that a reasonable person in Stanley's position would foresee that the statement, "I'll make [you] famous bitch and send you to hell," would be viewed by Williams as a serious expression of intent to inflict death.

While Stanley's messages to both women included pleas for help and self-serving statements about how he would never hurt anyone, the fact finder was not required to find these statements credible in light of Stanley's repeated vicious threats of violence. After our independent review of the record, we conclude there was sufficient evidence that Stanley made true threats to kill Much and Williams as charged in counts six and nine under the objective reasonable person test.

III. Cyberstalking Statute

Stanley argues the cyberstalking statute, RCW 9.61.260, is facially unconstitutional because it criminalizes First Amendment speech. A statute is unconstitutionally overbroad on its face if it prohibits a substantial amount of protected

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[44] Ex. 5 at 13.

[45] Id. at 27 (emphasis added).

speech.[46] But a statute that regulates behavior rather than purely speech will not be overturned unless the overbreadth is both real and substantial when compared to the statute's plainly legitimate sweep.[47]

Under RCW 9.61.260(1), a person may be convicted of cyberstalking if "with intent to harass, intimidate, torment, or embarrass any other person," the person "makes an electronic communication to such other person or a third party: (a) [u]sing any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act," or "(c) [t]hreatening to inflict injury on the person . . . or any member of his or her family or household." Cyberstalking is a felony if the threat to injure is a threat to kill.[48] Stanley argues the statute is facially overbroad "to the extent that it criminalizes communications made with intent to 'harass' or 'embarrass.'"[49]

We reject his challenge that intent to "harass" is overbroad. The cyberstalking statute mirrors the telephone harassment statute, RCW 9.61.230,[50] which has been

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[46] City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

[47] City of Seattle v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990) (quoting Seattle v. Eze, 111 Wn.2d 22, 31, 759 P.2d 366 (1988)); see also Virginia v. Hicks, 539 U.S. 113, 122, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

[48] Cyberstalking is a gross misdemeanor, but is elevated to a class C felony when "[t]he perpetrator engages in the behavior prohibited in subsection 1(c) of this section by threatening to kill the person threatened or any other person." RCW 9.61.260(3)(b).

[49] Appellant's Br. at 48.

[50] RCW 9.61.230 provides: "(1) Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person: (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or (b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or (c) Threatening to inflict injury on the person or property of the

upheld against numerous constitutional challenges.[51] Specifically, in State v. Alexander, this court reevaluated the constitutional sweep of the term "harass" as used in a municipal ordinance closely paralleling RCW 9.61.230 and held that the term does not render the ordinance unconstitutionally overbroad.[52] Noting that several other decisions have rejected overbreadth challenges because the statutes in question contained "a specific intent requirement [that] sufficiently narrowed the laws' proscriptions," the Alexander court concluded that the mens rea element of the telephone harassment statute defeated any First Amendment overbreadth challenge.[53]

Stanley nevertheless claims there is a distinction between telephonic and electronic communication. He argues "'[t]he gravamen of [telephone harassment] is the thrusting of an offensive and unwanted communication upon one *who is unable to ignore it*'" but the "cyberstalking statute is not so targeted" because "a recipient *is* able

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person called or any member of his or her family or household; is guilty of a gross misdemeanor, except as provided in subsection (2) of this section."

[51] See, e.g., City of Seattle v. Huff, 111 Wn.2d 923, 927-30, 767 P.2d 572 (1989) (ordinance which prohibited telephonic threats of physical or property damage directed to listener or member of listener's family made with intent to harass, intimidate, or torment was not unconstitutionally overbroad or vague); State v. Alphonse, 147 Wn. App. 891, 903-09, 197 P.3d 1211 (2008) (telephone harassment statute's prohibition against use of "lewd, lascivious, profane, indecent, or obscene words or language" was not unconstitutionally overbroad or unconstitutionally vague as applied to defendant's conduct); State v. Alexander, 76 Wn. App. 830, 888 P.2d 175 (1995); State v. Dyson, 74 Wn. App. 237, 244-45, 872 P.2d 1115 (1994).

[52] 76 Wn. App. 830, 836, 888 P.2d 175 (1995); see also Alphonse, 147 Wn. App. at 900; Huff, 111 Wn.2d at 928.

[53] Alexander, 76 Wn. App. at 836; see also Alphonse, 147 Wn. App. at 901-02 (recognizing that the telephone harassment statute "'regulates conduct implicating speech, not speech itself' by requiring an intent to harass, intimidate, torment, or embarrass when the speech is uttered'" (quoting Dyson, 74 Wn. App. at 243)).

to ignore an electronic communication."[54] Stanley's argument is not compelling. A recipient of a telephone call can change their phone number or ignore the call just as readily as a recipient of an electronic message can cancel their Facebook or email account or ignore the message. Further, as the Alexander court noted, the focus of the statute "is on the caller and his or her intentions, not the effect the telephone call might have on the recipient."[55] And our Supreme Court "has recognized that substantial privacy interests, which the State may recognize and protect, are involved *when communication intrudes into the privacy of the home*."[56]

> "The extent to which a state may regulate such expression is 'dependent upon a showing that substantial privacy interests [of others] are being *invaded in an essentially intolerable manner*.' . . . [T]he privacy interest of a listener *in the privacy of his home will be accorded greater protection, along with the commensurate restrictions on unwanted discourse,* than would be permitted in a public forum.[57]

In today's culture, where personal devices especially are omnipresent, the internet is arguably as intrusive as the telephone, providing a cyberstalker substantial access into the private space of a person emailed or messaged.[58]

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[54] Reply Br. at 9-10 (second alteration added) (quoting Alexander, 76 Wn. App. at 837-38).

[55] Alexander, 76 Wn. App. at 838.

[56] Id. at 837.

[57] Id. (emphasis added) (quoting People v. Taravella, 133 Mich. App. 515, 519, 350 N.W.2d 780 (1984).

[58] See generally Michael Barrett Zimmerman, *One-Off & Off-Hand: Developing an Appropriate Course of Liability in Threatening Online Mass Communication Events*, 32 CARDOZO ARTS & ENT. L.J. 1027 (2014); Nichole Galusha-Troicke, *Gone Are the Days of Stalking by Rotary Phones: H.B. 2549 Amending Arizona Stalking Statutes*, 6 PHOENIX L. REV. 797 (2013); Amy C. Radosevich, *Thwarting the Stalker: Are Anti-Stalking Measures Keeping Pace with Today's Stalker?*, 2000 U. ILL. L. REV. 1371 (2000).

Citing to the dictionary definition of "harass," Stanley argues that sending an indecent or lewd electronic communication with the intent to "annoy or bother someone in a repeated way" cannot be criminalized under the First Amendment.[59] But the only authority Stanley cites for that proposition is City of Everett v. Moore.[60] As the Alexander court explained, the ordinance at issue in Moore was unconstitutionally overbroad because it prohibited any written or telephonic communication "'likely to cause annoyance or alarm.'"[61] Not only did the ordinance focus solely on the perceptions of the recipient but words like "annoyance" and "alarm" proscribed a large amount of innocuous speech.[62] In contrast, the intent to harass element of the telephone harassment statute "proscribes only speech that is *intended to abuse* the listener."[63] Because the intent to harass element of the cyberstalking statute likewise proscribes only speech that is intended to abuse the listener, Stanley's argument fails.

Stanley also argues that the terms "harass" and "indecent" as used in the cyberstalking statute are unconstitutionally vague. He argues that because these terms "have a wide array of definitions," "it is not clear what conduct is prohibited."[64] Stanley further argues this encourages arbitrary enforcement.

This court analyzes vagueness claims under the Fourteenth Amendment due process test, which requires the challenger to demonstrate beyond a reasonable doubt

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[59] Appellant's Br. at 51.

[60] 37 Wn. App. 862, 683 P.2d 617 (1984).

[61] Alexander, 76 Wn. App. at 838 (quoting id. at 863).

[62] Id.

[63] Id. at 838 (emphasis added).

[64] Reply Br. at 8.

that the statute either (1) fails to sufficiently define the offense so that ordinary people can understand what conduct is proscribed, or (2) fails to provide ascertainable standards of guilt to protect against arbitrary enforcement.[65]

"Determining whether a statute sufficiently defines an offense 'does not demand impossible standards of specificity or absolute agreement.'"[66] "For a statute to be unconstitutional, its terms must be 'so loose and obscure that they cannot be clearly applied in any context.'"[67] "Where, as here, the statute requires proof of specific criminal intent, the remaining terms are less vague or indefinite than they might otherwise be considered."[68]

"Courts usually scrutinize allegedly vague statutory language in the context of the entire statute and in light of common understanding, dictionary definitions, and common sense."[69] "Our courts have . . . commonly defined the term[ ] "indecent" as "'not decent . . . altogether unbecoming: contrary to what the nature of things for which circumstances would dictate as right or expected or appropriate: hardly suitable: unseemly.'"[70] "Harass" means "to vex, trouble, or annoy continually or chronically."[71]

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[65] Dyson, 74 Wn. App. at 246.

[66] Alphonse, 147 Wn. App. at 907 (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)).

[67] Id. (internal quotation marks omitted) (quoting Douglass, 115 Wn.2d at 182 n.7).

[68] State v. Stark, 66 Wn. App. 423, 434, 832 P.2d 109 (1992).

[69] Alexander, 76 Wn. App. at 841.

[70] Alphonse, 147 Wn. App. at 908 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1147 (1993)) (citing State v. Lansdowne, 111 Wn. App. 882, 891-92, 46 P.3d 836 (2002)).

[71] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1031 (2002).

In City of Seattle v. Huff,[72] Huff argued that a municipal ordinance[73] prohibiting telephonic threats of physical injury or property damage directed to a listener or a member of the listener's family made with the intent to "harass, intimidate," or "torment," was unconstitutionally vague.[74] Our Supreme Court disagreed. The court explained, "The ordinance provides adequate notice to persons of common understanding as to the specific intent, the type of threat, and the person(s) to whom the threat must be directed. For these reasons we also find the ordinance provides adequate standards to prevent arbitrary enforcement."[75]

Similarly, in State v. Alphonse, this court rejected the defendant's argument that the telephone harassment statute's prohibition against the use of "lewd, lascivious, profane, indecent, or obscene words or language" was unconstitutionally vague as applied to the defendant.[76] The defendant claimed that "because some of the words he used may be deemed by some to be 'indecent,' 'lewd,' or 'lascivious' but may be commonly used by others, a person must guess whether using these words would constitute criminal conduct."[77] The court explained that the statute contained a specific intent element, which dispelled any vagueness concerns, and the defendant used

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[72] 111 Wn.2d 923, 767 P.2d 572 (1989).

[73] "'A person is guilty of making telephone calls to harass, intimidate, torment or embarrass any other person if, with intent to harass, intimidate, torment or embarrass any other person, he makes a telephone call to such other person: . . . 3. Threatening to inflict injury on the person or property of the person called or any member of his family.'" Id. at 924 (quoting SMC 12A.06.100(A)(3)).

[74] Id. at 929.

[75] Id. at 930.

[76] 147 Wn. App. 891, 907-08, 197 P.3d 1211 (2008).

[77] Id. at 908.

obscene language specifically to offend, humiliate, or torment the victim.[78] Thus, "[h]is claim that he was unsure whether using such language fell within the statutory prohibitions [was] neither logical nor credible."[79] Additionally, the defendant failed "to demonstrate how protected speech will be subject to an inordinate amount of police discretion when the State may only charge those complaints that are made with criminal intent."[80] The court concluded, "Because it includes an intent element, RCW 9.61.230 defines the proscribed conduct in reference to the caller, not the recipient, and thereby contains sufficient guidelines to prevent arbitrary enforcement."[81]

The cyberstalking statute similarly requires the defendant's intent to "harass, intimidate, [or] torment" another in connection with certain conduct.[82] In this context, the terms "harass" and "indecent" are specific enough that persons of common intelligence can ascertain when their intent falls within the statute's prohibitions. For the same reasons, the statute provides sufficient standards to prevent arbitrary enforcement.

We conclude that Stanley fails to meet his burden of demonstrating that the terms "harass" and "indecent" as used in the cyberstalking statute are unconstitutionally vague.[83]

We separately address Stanley's constitutional challenges to the "intent to embarrass" provision of the cyberstalking statute. We are troubled by the breadth of the

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[78] Id.

[79] Id.

[80] Id. at 909.

[81] Id. at 909 (citing Alexander, 76 Wn. App. at 842-43).

[82] RCW 9.61.230.

[83] See Huff, 111 Wn.2d at 930.

intent to embarrass portion of the cyberstalking statute. Although the telephone harassment statute cases have held that the intent to embarrass is not unconstitutionally overbroad,[84] contemporary electronic communication, social media, and internet postings are broad in scope. A variety of political and social commentary, including caustic criticism of public figures, may be swept up as an intent to embarrass someone while using rough language. Stanley's opening brief was filed prior to our Supreme Court's decision in Trey-M. He emphasized the true threat issue. The briefs contain a limited discussion of free speech in the context of electronic communications with an intent to embarrass. In view of the limited briefing, we do not decide whether the intent to embarrass in the cyberstalking statute renders the statute unconstitutionally overbroad. Even assuming the term is unconstitutionally overbroad, any error is harmless beyond a reasonable doubt in this setting.

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury could have reached the same result in the absence of the error.[85] "'Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.'"[86]

> "An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless. 'A harmless error is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the outcome of the case*.'"[87]

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[84] Alexander, 76 Wn. App. at 834-36 (held the term "to embarrass" as used in RCW 9.61.230 did not render the statute unconstitutionally overbroad); Alphonse, 147 Wn. App. at 900.

[85] City of Bellevue v. Lorang, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

[86] Id. (quoting State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)).

[87] Id. (quoting State v. Smith, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997)).

Stanley was charged with and the jury was instructed only on the felony charge of threats to kill. The jury was not instructed on the "lewd, lascivious, indecent, or obscene" subsection of the statute. While the jury was instructed on the intent "to harass, intimidate, torment, or embarrass," a conviction required the jury to find Stanley "threatened to kill" his victims.[88] Especially in light of Stanley's admissions that he harassed and threatened to kill the women[89] to "break [them] down,"[90] "increase their stress," and "scare"[91] them, no reasonable jury would conclude that Stanley's intent in privately messaging the women was to "embarrass" them with threats to kill. Therefore, even assuming the intent to embarrass portion of the cyberstalking statute is overbroad, the State has met its burden of showing beyond a reasonable doubt that a jury would have convicted Stanley with or without an intent to embarrass instruction. For the same reason, even assuming intent to embarrass is unconstitutionally vague, any error was harmless beyond a reasonable doubt.

IV. Closing Argument

Stanley contends the prosecutor committed two instances of misconduct during closing argument. We disagree.

To prevail on a claim of prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial.[92] This court determines if

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[88] See CP at 160-73; RCW 9.61.260.

[89] Ex. 10 at 21; Ex. 4 at 49-50, 61.

[90] Pretrial Ex. 4 at 46.

[91] Id. at 47.

[92] State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006).

the defendant was prejudiced under one of two standards of review.[93] If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict.[94] If the defendant did not object at trial, the issue is waived unless the "prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice."[95] Under this heightened standard, the defendant must show that (1) "'no curative instruction would have obviated any prejudicial effect on the jury'" and (2) the misconduct resulted in prejudice that "'had a substantial likelihood of affecting the jury verdict.'"[96]

Stanley contends, and the State concedes, that the prosecutor misstated one fact in closing argument: that Much received messages from Stanley "after she returned from Spain."[97] Stanley objected, and the trial court overruled the objection. While it is improper for prosecutors to argue facts not in evidence,[98] Stanley fails to establish prejudice. Stanley contends "the wrongful overruling of this objection" prejudiced him "because the judge denigrated him in the eyes of the jury."[99] But immediately after overruling the objection, the judge stated, "Whether or not the facts are correct is

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[93] State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

[94] Id.

[95] Id. at 760-61.

[96] Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

[97] RP (July 30, 2015) at 1139. All of the messages Stanley sent to Much were received by her in Washington before she left for Spain.

[98] State v. Turner, 167 Wn. App. 871, 882, 275 P.3d 356 (2012).

[99] Reply Br. at 13.

something that the jury will decide," and "Mr. Stanley, if there is something that you want to point out in your closing, that you think was wrongly stated, you are welcome to do that."[100] The judge did not denigrate Stanley before the jury.

Stanley also contends the State misstated the law and shifted the burden of proof when the prosecutor told the jury "my burden to prove elements beyond a reasonable doubt only applies to the elements, only applies to your to convict instructions."[101] Stanley contends the prosecutor's argument suggests that the State did not need to prove a true threat beyond a reasonable doubt. But the true threat requirement merely defines and limits the scope of the essential threat element in the cyberstalking statute and is not itself an essential element of the crime that must be included in the to convict instruction.[102] Moreover, Stanley did not object at trial and does not establish that any prejudice could not have been cured by a curative instruction.[103]

Therefore, Stanley's prosecutorial misconduct claims fail.

V. Statement of Additional Grounds

Stanley filed a pro se statement of additional grounds in which he raises various issues. Several issues echo those already raised in his brief and addressed in this opinion; notably, whether Washington applies an objective rather than subjective intent to threaten in determining what constitutes a true threat and whether the State presented sufficient evidence that he made true threats to kill. Many of his challenges

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[100] RP (July 30, 2015) at 1139.

[101] Id. at 1136.

[102] State v. Allen, 176 Wn.2d 611, 626-30, 294 P.3d 679 (2013).

[103] See Emery, 174 Wn.2d at 760-61.

pertain to the credibility of witnesses and the persuasiveness of the evidence and are not subject to review on appeal.[104]

Stanley raises several challenges to the admissibility of evidence, including the admissibility of statements made to Detective Christensen, the admission of jail phone calls, and the suppression of an alleged incident involving a bartender who was friends with the four women. He ignores that "[d]ecisions involving evidentiary issues lie largely within the sound discretion of the trial court."[105] Stanley also raises several other issues related to the court's discretionary rulings, including rulings on motions in limine and rulings on calling subpoenaed witnesses after Stanley released them. But he fails to establish that any of the challenged rulings were unreasonable or based on untenable grounds.[106]

Stanley makes several prosecutorial misconduct claims. Where a defendant fails to object to the challenged conduct, he must show that the conduct was so flagrant and ill intentioned that a jury instruction could not have cured any resulting prejudice.[107] Stanley fails to make such a showing here.

Stanley contends the trial judge exhibited bias. "'An appearance of fairness claim requires proof of actual or potential bias. Mere speculation is not enough.

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[104] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 970 (1990) (matters pertaining to the credibility of witnesses, conflicting testimony, and the persuasiveness of the evidence are the exclusive province of the jury).

[105] State v. Nava, 177 Wn. App. 272, 289, 311 P.3d 83 (2013).

[106] See Falk v. Keene Corp., 53 Wn. App. 238, 247, 767 P.2d 576 (1989).

[107] State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Furthermore, we presume a judge performs his or her duties without prejudice.'"[108] Stanley fails to establish actual or potential bias.

Stanley contends his convictions violate the merger clause. He argues that "the most that should have been charged is 4 counts, one for each victim."[109] The merger doctrine applies where the legislature has clearly indicated that in order to prove a particular degree of crime, the State must prove not only that the defendant committed that crime but that the crime was accompanied by an act defined as a crime elsewhere in the criminal statutes.[110] Cyberstalking is not a crime separated into degrees, and cyberstalking does not require proof of another crime. Stanley makes no showing that the merger doctrine applies.

Stanley also contends the accumulation of errors in this case require a new trial. Multiple errors may justify reversal even if the errors individually do not warrant reversal.[111] But because Stanley has failed to establish any errors, the cumulative error doctrine does not apply.

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[108] State v. Afeworki, 189 Wn. App. 327, 356, 358 P.3d 1186 (2015) (quoting State v. Harris, 123 Wn. App. 906, 914, 99 P.3d 902 (2004) abrogated on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)), review denied, 184 Wn.2d 1036 (2016).

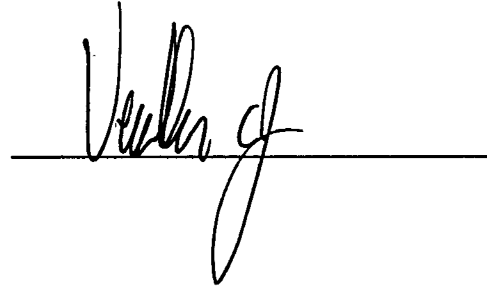
[109] Statement of Additional Grounds at 41.

[110] State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983); see also State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001) (merger doctrine relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code).

[111] State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

Most, if not all, of Stanley's remaining issues depend on facts that are not a part of the record on appeal.[112] If Stanley "wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition."[113]

Affirmed.



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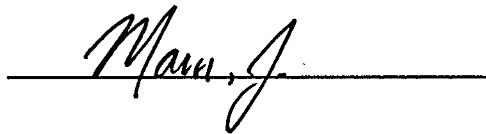

[112] Specifically, information a potential witness might have provided, revocation of his release on DOSA, suggestions that additional investigation would have been productive, e.g., relationship of a bartender with King County officials, allegations of vindictive prosecution, speedy trial rulings.

[113] State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74204-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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