SUPREME COURT NO. 98292-9
COURT OF APPEALS NO. 78033-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD JOHN HEUTINK,

Petitioner.

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

The Honorable Charles R. Snyder, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Donald John Heutink, the appellant below, seeks review of the court of appeals decision in State v. Heutink, ___ Wn. App. 2d ___, ___ P.3d ___, 2020 WL 774070, No. 78033-6-I (Feb. 18, 2020) (Slip op.).

B. ISSUES PRESENTED FOR REVIEW

1. A person commits the crime of stalking by repeatedly harassing or following another person and the other person is placed in fear that the stalker intends to injury any person or property of any person. RCW 9A.46.110(1). However, the statute is conditional, stating that a person commits the crime of stalking "if, without lawful authority and under circumstances not amounting to a felony attempt of another crime." Evidence in the record shows circumstances amounting to felony attempts of another crime under any plausible interpretation of the undefined "felony attempt of another crime." Should this condition precedent of the crime of stalking have been included in the charging documentation and proved to the trier of fact and, given the condition was not satisfied in this case, result in reversal of Heutink's conviction and dismissal of this case?

2. Does the "under circumstances not amounting to a felony attempt of another crime" fail to provide ascertainable standards of enforcement, rendering the stalking statute unconstitutionally vague?

3. Was the evidence insufficient to persuade a rational trier of fact that a reasonable person in the alleged victim's position would have feared injury of herself, others, or property?

4. Does Heutink satisfy all RAP 13.4(b) review criteria?

C. STATEMENT OF THE CASE

This case involves the crime of felony stalking under RCW 9A.46.110. CP 9-10 (information alleging Heutink stalked ex-wife Kristi). Heutink was convicted of stalking under RCW 9A.46.110(1) and (5)(b)(ii), which makes stalking a class B felony when it violates a protective order.

Heutink and Kristi had a 12-year marriage and four children, and divorced in November 2016. RP 99-101. Kristi expressed discomfort with Heutink's inability to calm down during the couple's dissolution proceedings, apparently because Heutink was staring at her. RP 101.

Kristi had obtained a September 2016 protection order because Heutink continually wrote letters, stopped by, texted her, "wouldn't take no for an answer, wouldn't just absorb that this was done." RP 103. Kristi said Heutink's communications violated the no-contact order. RP 105. After the divorce, Kristi obtained December 2017 no-contact orders, but she said Heutink continaed to text, email, call, send messages through third parties, and send gifts. RP 106-07. Kristi said she felt intimidated because Heutink

approached her while she was buckling the children into the car "with kind of blank look on this face." RP 108-09.

Around the same time, Kristi discovered a GPS tracking app installed on her phone that she did not install. RP 109-10. She speculated that Heutink may have known where she was at certain times he attempted to contact her. RP 110. Kristi also changed churches and testified Heutink showed up to the same service when no-contact orders were in place; when there was an arrangement for them to attend differently scheduled services, Heutink did not comply once, making Kristi uncomfortable and nervous, promptly her to obtain a permit to carry a concealed firearm. RP 110-14, 166-67. There were never any threats of violence or actual violence from Heutink, however. RP 169-71.

Kristi moved in May 2017 and did not tell Heutink; however, Kristi testified Heutink showed up at her house in August 2017, knocked on the door, but eventually left. RP 114-15. Krisit got her gun out and described her son as terrified. RP 114-15. Kristi said that another time during the summer of 2017, when Kristi let her dog out, it chased a figure whom Kristi saw run away. RP 116. Kristi described other incidents from 2016 and 2017 where she suspected Heutink of being in the shop at their former home, breaking into the Christmas decorations or where she suspected Heutink of

stealing her wedding ring and then deliberately placing it next to a dragon figurine he had "maybe" sent in August 2016. RP 116-20.

After the August 2017 incident, Kristi obtained additional no-contact orders for her and the children. RP 123-24. At the hearing, Kristi said she did not feel safe because Heutink was asked by the commissioner to "quit staring" and "look forward instead of turning your body so you're staring at them." RP 125. Kristi said Heutink violated these new no-contact orders by texting her from a friend's phone and by sending flowers to her and to her attorney. RP 127-30, 145, 147, 149, 164. Heutink also allegedly send postcards and letters to the children via Kristi's father and Kristi said she was scared by this. RP 137-40.

Kristi expressed fear that Heutink violated no-contact orders. But he never threatened her, acted physically violent toward her, or injured her property. The only physical incident she could describe in their entire relationship was Heutink throwing a can of beer against a wall. RP 140-41.

A detective who interviewed Heutink, said Heutink was "yelling and spitting" in anger but was still respectful. RP 185, 207. Heutink exclaimed, "I'm getting fucked over" and asked whether Kristi's attorney was "scared." RP 187. Heutink also said the detective should tell Kristi's pastor and attorney "that they're lucky I'm in here." RP 202. But he never threatened violence or expressed intent to injure anyone. RP 202, 204.

The trial court admitted other witnesses expressions of their fears. Kristi stated Heutink's probation officer had contacted her recommending she enroll in the witness protection program. RP 21-30, 95-96, 141. Two pastors stated that Heutink was very angry about the end of his marriage but neither stated Heutink was threatening or violent toward them or Kristi. RP 168-71, 177. Kristi's sister allegedly received a text from Heutink: "I hope you all like the ways things are going. I have a lot more up my sleeve and this is going to be a long hot summer." RP 122. But never were there threats of physical injury or actual physical violence to persons or property at any time.

The jury found Heutink guilty of felony stalking based on the protective-orders-violation means. CP 44-45. In a bifurcated proceeding, Kristi testified Heutink would frequently become angry and call her names, but never described an instance of physical violence. RP 340, 342, 351. The jury found Heutink subjected Kristi to an ongoing pattern of psychological abuse. CP 55.

The trial court rejected the state's request for a statutory maximum sentence of 10 years and instead imposed an exceptional sentence of 10 months.

Heutink appealed. CP 74. He focused on the "under circumstances not amounting to a felony attempt of another crime" language in RCW

9A.46.110(1), contending that if there were such circumstances, the crime of stalking did not apply. Br. of Appellant at 11-33. Rather than analyze the plain language of the provision in question, the court of appeals relied on the legislature's supposed policy of broadly punishing stalking and harassment crimes. Slip op., 11. Based on State v. Ward, 148 Wn.2d 803, 64 P.3d 640 (2003), the court stated that the "under circumstances" language in the statute applied only when other "felony attempt[s]" were charged alongside stalking, also noting Heutink's arguments would place other defendants facing stalking charges in "awkward" positions. Slip op., 11-13. When it finally reached the language in question, the court of appeals claimed it was "clear that the phrase 'under circumstances not amounting to a felony attempt of another crime' is the legislature's way of telling us that it does not intend for circumstances amounting to both stalking and some other felony attempt to lead to punishment for both crimes" in the double jeopardy context only. Slip op. 13-14. This seemed "clear" only to the panel who considered Heutink's appeal, as neither party nor the legislature discussed double jeopardy in relation to the enactment of this language.

Heutink also argued the stalking statute was vague given the lack of definition of "felony attempt" and given the arbitrary results created by the "under circumstances not amount to a felony attempt" language. Br. of Appellant at 11-18, 31-33. The court of appeals held that because the

challenged language was not essential to the crime of stalking, its potential ambiguity does not matter, emphasizing prosecutors have broad charging discretion. Slip op., 16. Heutink additionally contended there was insufficient evidence of a reasonable person's fear of his intent to injure persons or property, given that he had never acted injuriously or even threatened injury to anyone or -thing. Br. of Appellant at 49-52. The court of appeals faulted Heutink for citing no authority that proof of injury or injurious threats was necessary and concluding "that Kristi's fear of injury was one that a reasonable person in the same situation would experience." Slip op., 24. The question, however, was whether Kristi's fear that Heutink intended to injury her, another person, or property was reasonable. CP 29; RCW 9A.46.110(1)(b).

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE JUDICIARY IS NOT EMPOWERED TO IGNORE THAT THE LEGISLATURE INCLUDED "UNDER CIRCUMSTANCES NOT AMOUNTING TO A FELONY ATTEMPT OF ANOTHER CRIME" AS A CONDITION PRECEDENT OF THE CRIME OF STALKING

It is elementary that when interpreting the meaning of the statute, courts begin with the statute's language, and if that language is clear, the language is given effect. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). The judiciary must "interpret statutes to give effect to all the language used so that no portion is rendered meaningless or unnecessary."

Cornu-Labat v. Hops. Dist. No. 2 of Grant County, 177u Wn.2d 221, 231, 298 P.3d 741 (2013). "Plain language that is not ambiguous does not require construction." State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). If more than one interpretation of a statute is reasonable, then the statute is ambiguous, the court may resort to methods of construction, and the statute is strictly construed in favor of the accused. Id. at 192-93.

The "under circumstances not amounting to a felony attempt of another crime" has never before been interpreted by the courts. Yet the court of appeals fails to apply the basic statutory interpretation principles discussed in the preceding paragraph, instead beginning with its view of the legislative policy objectives and a discussion of case law. Slip op., 11-13. Review of the important issue of statutory interpretation is warranted under RAP 13.4(b)(1) and (4).

"Felony attempt of another crime" is not defined anywhere in Washington statutes. It could mean an attempt to commit any felony or an attempt that is actually criminalized as a felony. See Br. of Appellant at 15-17. Because there are two reasonable interpretations, this aspect of the statute is ambiguous.

More to the point in this case, however, is that whatever "felony attempt of another crime" means, if such a felony attempt has occurred, the crime of stalking has not. Indeed, criminal liability for stalking is

conditional: it only exists "under circumstances not amounting to a felony attempt of another crime." RCW 9A.46.110(1). The statute could not be plainer that "under circumstances not amounting to a felony attempt of another crime" is a necessary predicate to commit the crime of stalking.

Here, there were numerous instances of "felony attempts" of other crimes that appear in the record. Even taking the stricter interpretation that "felony attempt" means an attempt that is criminalized as a felony, this is true. According to Kristi, Heutink showed up at her house in August 2017 when no-contact orders were in effect, knocked and rattled on the doorknob to "check[] to see if the door was open. You could see it moving." RP 114-15. This was an attempted residential burglary, which criminalizes a substantial step toward entering unlawfully in a dwelling with an intent to commit a crime. RCW 9A.28.020(1); RCW 9A.52.025(1). Heutink's rattling on the doorknob constituted a substantial step to entry and, given the no-contact orders in existence, Heutink arguably evinced an intent to commit a crime against a person. Completed residential burglary is a class B felony and an attempted residential burglary is thus a class C felony. RCW 9A.28.020(3)(c); RCW 9A.52.025(2). Thus, there were circumstances amounting to a felony attempt of another crime. These circumstances negate Heutink's criminal liability for stalking, yet the state did not charge these

circumstances and the jury was not asked to find the circumstances beyond a reasonable doubt, in contravention of the statute's plain language.

The court of appeals fails to begin or end with the plain language of the "under circumstances" clause. Review of the important and novel issue of statutory interpretation is warranted. RAP 13.4(b)(1), (4).

Rather than grapple with the plain language, the court focused on the Ward decision. Slip op., 11-12. But Ward addressd a different statute, concluding that the purpose of the "does not amount to assault in the first or second degree" language in RCW 26.50.110(4) was to "elevate no-contact order violations to a felony when *any* assault is committed. The legislature did not need to increase the penalty for first or second degree assault since in their own right the crimes are class A and B felonies respectively." 148 Wn.2d at 812 (citations omitted). The court emphasized that all assault convictions connected to violating a no-contact order "will result in felony, either through the assault itself or through the application" of the no-contact order statute. Id.

These rationales do not apply here. There is no indication that the legislature intended to elevate nonfelony offenses to felony offenses by operation of the "under circumstances not amount to a felony attempt" language. The legislature already directed the circumstances misdemeanor stalking is elevated to a felony offense in the stalking statute itself. RCW

9A.46.110(5). Given that conditional "under circumstances" clause, the legislature has instead expressed that the crime of stalking is disfavored and should apply only in circumstances where other felony attempts do not. Ward is neither helpful nor controlling.

The court of appeals rejected Heutink's argument that the legislature intended stalking charges to cede to other felony attempts, stating this was "not a reasonable interpretation, because the legislature articulated a need for the crime by creating the stalking statute." Slip op., 12. Heutink agrees the legislature deemed the crime of stalking necessary, but it did so only "under circumstances not amounting to a felony attempt of another crime" as RCW 9A.46.110(1) plainly states. The court of appeals rejects Heutink's interpretation by ignoring the language in question.

The court also opined that defendants might be placed in the awkward position of arguing conduct amounts to another felony and, in cases where the misdemeanor is charged, that conduct constituted a more severe crime. Slip op., 12-13; cf. Ward, 148 Wn.2d at 812-13 (if state had to disprove first or second degree assault, "the defendant would be placed in the awkward position of arguing that his conduct amounts to a higher degree of assault than what the State has charged").

Heutink isn't placed in an awkward position. As discussed, some of his conduct amounted to an attempted residential burglary, which is a class C

felony. RP 115; RCW 9A.52.025(2); RCW 9A.28.020(3)(c). Stalking is a class B felony where, as here, a protective order is in place. RCW 9A.46.110(5)(b). Heutink does not feel awkward about arguing that he should have been charged with the class C attempted burglary and the state's failure to do so negates his criminal liability under the plain language of the stalking statute. And, had the state provided notice of the "under circumstances" clause in its charging document, Heutink would have received notice the state was required to charged other attempted criminal conduct where applicable, just as the legialture intended.

But, in any event, the defense is accustomed to taking awkward positions when those positions support a theory of relief. If the circumstances in a stalking trial show felony attempts of other crimes, why couldn't a defendant reasonably argue dismissal for insufficient evidence after the state rests, in a posttrial motion, or on appeal? Mandatory joinder would foreclose the state from charging and proceeding on new charges related to the same conduct and jeopardy would have attached. The role of defense is to make efficacious arguments on behalf of the accused and Heutink fails to see why their level of awkwardness has anything to do with whether such arguments merit relief or why awkwardness could excuse courts from applying statutes the way the legislature wrote them.

When it finally arrives at the statute's language, the court of appeals claims it is "clear" that the "under circumstances not amounting to a felony attempt" clause relates to double jeopardy. Slip op., 13-14. In other words, the prosecution may ask the jury to convict on stalking and a felony attempt of another crime, but apparently stalking would be vacated if convictions resulted for both.[1] Slip op., 14.

This point seems clear only to the court of appeals. Heutink did not address the potential double jeopardy implications of the language in question in his briefing, nor did the state. Nor does Heutink find any indication in the legislative history that the legislature was at all concerned about double jeopardy. In fact, the legislature's final bill report states rather unequivocally, "The crime of stalking does not apply where the behavior amounts to a felony attempt to commit some other crime." FINAL B. REP. on Engrossed Substitute H.B. 2702, 52nd Leg., Reg. Sess., at 2 (Wash. 1992 (emphasis added).

The court of appeals reaches its double jeopardy interpretation by ignoring the language in the statute. Where other behavior could be criminalized by circumstances amounting to felony attempt of another crime,

[1] Heutink agrees that the legislature did not intend punishment for both stalking and some other felony attempt of another crime. But this is because a felony attempt of another crime negates the crime of stalking under the RCW 9A.46.110(1)'s plain language, not because of post hoc double jeopardy concerns.

stalking does not apply. The statute says so and so does the final bill report. The court of appeals pulls the double jeopardy interpretation out of thin air because it fails to give credence the language of the stalking statute as written. Violating basic principles of statutory interpretation, the court of appeals decision merits RAP 13.4(b)(1), (2),[2] and (4) review.

Finally, the parties' briefing and the court of appeals decision demonstrate that the stalking statute is subject to multiple interpretations. Heutink contends that his interpretation is soundest given that he applies the statute as written. But the statute creates ambiguity at the very least. Where a penal statute is ambiguous, it must be interpreted in the defendant's favor. Evans, 177 Wn.2d at 193. This carries constitutional dimensions because it "helps further the separtaio;n of powers doctrine and guarantees that the legislature has independently prohibited particular conduct prior to any criminal law enforcement." Id. (citing United States v. Bass, 404 U.S. 336, 348-49, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1981); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95, 5 L. Ed. 37 (1820)). Because the court of appeals has interpreted the stalking statute based on policy and concerns about double jeopardy that were never expressed by the legislature, rather than based on the plain language, it treads on the legislative power to define

[2] Numerous court of appeals opinions recite the basic rules of statutory interpretation that direct focus to the statute's language first. This principle was violated by the court of appeals in this case, creating a RAP 13.4(b)(2) conflict with virtually every court of appeals statutory interpretation case.

crimes. The legislature has criminalized stalking by excluding circumstances amounting to felony attempt of another crime. To the extent this is unclear, the statute must constitutionally be construed in Heutink's favor to ensure proper deference to the language the legislature has enacted, meriting review as a matter of constitutional import. RAP 13.4(b)(3).

2. BECAUSE IT IS APPARENTLY SUBJECT TO WILDLY VARIANT INTERPRETATIONS, THE STALKING STATUTE IS VAGUE

Even Heutink is incorrect in that the statute is unambiguous and prohibits liability for stalking when other felony attempts are present, the words "under circumstances not amounting to a felony attempt of another crime" render the statute incapable of definite enforcement and therefore vague.

A law is vague if it is not sufficiently definite so that persons of ordinary intelligence can understand what conduct is prohibited or if it does not provide ascertainable standards of guilt to protect against arbitrary enforcement." State v. Myles, 127 Wn.2d 807, 903 P.2d 797 (1995). The stalking statute meets this standard.

RCW 9A.46.110 does not specify what precise conduct is proscribed. It proscribes stalking as long as it is not performed "under circumstances not amounting to a felony attempt of another crime." "Felony attempt" is not defined anywhere and it could mean either an attempted

felony or an attempt crime that is criminalized as a felony. And this case shows that the statute is enforced arbitrarily. As discussed, there is evidence in the record that Heutink committed an attempted residential burglary, which would satisfy either potential definition of "felony attempt." Here, the state charged and proceeding with stalking without regard to the "not amounting to" language. This is definition of arbitrary: no one could predict whether a defendant will be charged with stalking or some other felony attempt of another crime.

The court of appeals pointed out that the prosecution is afforded broad charging discretion in rejecting his vagueness claim. Slip op., 16. This just begs the question. Heutink knows prosecutors have discretion to bring charges. The question is whether the statute fails to provide ascertainable standards such that it would lead to arbitrary enforcement, i.e., whether there is a risk prosecutors would arbitrarily enforce the statute. Claiming that the prosecutor has discretion does not answer the question of whether the statute necessarily leads to arbitrary use of that discretion.

The answer here is clear that the statute is enforced arbitrarily because the prosecution could have charged Heutink with a felony attempt but chose to proceed on stalking. Neither Heutink nor any other defendat could ascertain the stalking statute's standards of enforcement. The court of appeals conflicts with correct vagueness analysis undertaken by this court on

the constitutional question of vagueness, meriting review. RAP 13.4(b)(1), (3).

3. THERE WAS INSUFFICIENT EVIDENCE OF REASONABLE FEAR OF INJURY GIVEN THAT HEUTINK HAD NEVER ACTED VIOLENTLY OR THREATENED SUCH ACTS

Due process requires the state to prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. CONST. amend. XIV; CONST. art. I, § 22; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The appellate court reviews a sufficiency challenge by viewing the evidence in the light most favorable to the state and determining whether the evidence would enable a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The question here comes down to whether it was reasonable for Kristi to fear that Heutink intended to injure her, others, or property. Kristi expressed fear at Heutink's noncompliance with no-contact orders and Heutink acknowledges he expressed anger to Kristi and to others about the dissolution of the marriage. But Heutink never was physically violent and never threatened physical violence. Because he never acted violently or

threatened violence, it is unclear what evidence made fear of Heutink's intent fo injure persons or property a reasonable fear.

The only physical act ever attributed to Heutink was throwing a can against a wall once in the course of the 12-year marriage. RP 40-41. Heutink'sother behaviors, such as sending flowers and gifts and following, were not violent. And his threats that others were "lucky I'm in here [jail]" or that he had "more up his sleeve and it was going to be a long, hot summer" does not convey violence; at most it conveys continued harassment or stalking behavior. RP 122, 202. Third parties reported their fears for Kristi, but this was based only on Heutink's expressions of anger or staring at Kristi during court proceedings, not violence or threats of injury. RP 141, 185, 202, 204, 207, 210-11.

For fear of injury to be reasonable, there should be some evidence that violence was threatened or might reasonably be expected based on past experience. Here, there was no such evidence and all reports indicated Heutink had never injured persons or property or threatened to do so.

The court of appeals indicated Heutink cited no authority to support the contention that actually violence or threatened actual violence was necessary was not supported by any authority. Slip op., 23-24. The reasonableness of fear of injury in the absence of injury or threats of injury is thus an open question that should be considered. And the court of appeals

assumes that any person who violates court orders, makes vague threats (none of them to injury persons or property), and has no history of actual violence should cause reasonable fear of injury to persons or property. This issue presents an important constitutional question regarding the reasonableness of fear element of the stalking statute that should be reviewed. RAP 13.4(b)(3)-(4).

E. CONCLUSION

Because he satisfies every RAP 13.4(b) review criteria, Heutink asks that this petition for review be granted.

DATED this 19th day of March, 2020.

Respectfully submitted,

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APPENDIX

FILED
2/18/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. DONALD JOHN HEUTINK, Appellant.	No. 78033-6-I DIVISION ONE PUBLISHED OPINION FILED: February 18, 2020

APPELWICK, C.J. — Heutink appeals his conviction for felony stalking. He argues that in the stalking statute the phrase "under circumstances not amounting to a felony attempt of another crime" is an essential element of the crime.[1] He contends that his conviction must be reversed because the State failed to plead this element in the information, and failed to prove it beyond a reasonable doubt to the jury. Further, he asserts that the trial court erred in admitting impermissible hearsay testimony from Kristi.[2] He also asserts that the court erred in admitting evidence that others feared for Kristi's safety, because such evidence was irrelevant, unduly prejudicial, and improper opinion testimony. He contends that the State failed to prove beyond a reasonable doubt that Kristi's fear of injury was reasonable. Last, he argues that certain legal financial obligations should be stricken from his judgment and sentence. We affirm Heutink's conviction, but

[1] RCW 9A.46.110(1).
[2] We use Kristi Heutink's first name for clarity.

remand to the trial court to strike the criminal filing fee, jury demand fee, and domestic violence assessment.

FACTS

Donald Heutink and Kristi Heutink were married for a little over 12 years and have four children together. They separated on December 2, 2015. After the separation, Kristi stayed in the family home with the children, and Heutink moved out.

Prior to dissolving their marriage, Kristi sought a protection order against Heutink. Heutink had been writing her letters and coming to the house, and would not stop calling or texting her despite Kristi asking him to stop. A few days before she obtained the order, Heutink sent Kristi a text message saying that he wanted to come to the house and pick up some items. Heutink had not lived at the house for close to a year by that time. Kristi repeatedly asked Heutink what he needed, and told him that she would have someone bring him the items. Heutink responded by saying that he was "coming to get [her]." At that point, Kristi called the police.

Before the police arrived, Kristi saw Heutink coming down her driveway. She locked all the doors and called 911. The 911 dispatcher explained to her that somebody was already on the way. Heutink then knocked on the door for a minute or two. After the police arrived, Heutink refused to leave, and Kristi eventually left the house while two sheriffs remained with him. On September 6, 2016, the trial court granted Kristi a temporary order for protection. Heutink did not comply with the order.

On November 21, 2016, Heutink and Kristi dissolved their marriage. A few weeks later, Kristi obtained another temporary order for protection against him. The order became permanent on December 29, 2016. Heutink failed to comply with the order. He continued to text, call, and e-mail Kristi, send her messages through other people, send her gifts, and go to her home. His violations resulted in a court proceeding the following March. On March 15, 2017, he was convicted of violating the order for protection.

In early spring of 2017, Kristi discovered a Christmas ornament hanging in the shop on her property. Her ornaments would usually be packed away with her Christmas items. On another occasion, Kristi was visiting Lummi Island with some friends and her kids, and noticed that Heutink was driving behind her. She discovered an application on her Google Play store called "GPS [(Global Positioning System)] Tracker." She had not installed the application, but it was linked to her cell phone.

In May 2017, Kristi moved to a new home and did not tell Heutink where she had moved. That August, while the order for protection was still in effect, Heutink showed up at her home. Kristi had been watching television with their son late at night when she heard Heutink's truck pull into the driveway. She called 911, got her gun, and stood in her kitchen with the gun. Through a window, she saw Heutink walk up to the front door. He knocked on the door for a while. Kristi heard the doorknob rattling and saw it moving. Heutink eventually left, and an officer arrived.

One evening in the summer of 2017, Kristi's dog began scratching at the door. She testified that this was not normal for her dog. When Kristi opened the door, she saw a figure between her house and her neighbor's house that started running. Her dog chased after the figure.

After these incidents at her new home, Kristi sought a restraining order against Heutink. The hearing on the order took place on September 21, 2017. At the hearing, Heutink stared at Kristi and glared at her attorney. At one point, the commissioner had to tell Heutink to stop staring at them. The commissioner entered a restraining order that protected not only Kristi but their four children. Heutink refused to sign the order, stomped out of the hearing, and slammed the door on his way out.

Less than a month later, on October 8, 2017, Kristi received a text message from a person named Levi Stuit. The text message stated that Heutink was wondering if he could see the boys, and asked where and when they should meet up so that Heutink could see them. Kristi recognized Stuit's name but did not know him. Because the restraining order prohibited any indirect contact between her and Heutink, she reported the text message to the police. Stuit turned out to be Heutink's friend and former coworker. On the day that Kristi received the text message from Stuit, he had left his phone in Heutink's car and did not have access to it. The messages had been deleted by the time Stuit got his phone back.

A few days later, on October 10, 2017, Kristi received flowers at her home with a card that said, "'Have a good day.'" The flowers arrived the day before her and Heutink were set to go to trial. Around that time, Heutink had gone into a

flower shop and ordered flowers for Kristi. He had refused to give his name, paid with cash, and left. Kristi's attorney also received flowers from Heutink that month.

Kristi grew more concerned after learning about an October 12, 2017 interview that Heutink had with Detective Kenneth Gates. Gates relayed to Kristi specific threats Heutink had made regarding her attorney, Patricia Woodall, and her former pastor, Chuck Kleinhesselink. During the interview, Gates tried talking to Heutink about the flowers that were sent to Kristi and Woodall. Gates testified that Heutink responded by saying, "'F*** Woodall. Is she scared?'" He also testified that, at one point, Heutink raised his voice and stated, "'Woodall should be scared.'" At the end of the interview, Gates asked Heutink if he had a solution to see his kids. Gates testified that Heutink said he did not have a solution, and then stated, "'A felony.'" Last, Gates explained that Heutink had made specific threats towards Woodall and Kleinhesselink. Heutink stated, "[Y]ou also should tell Pastor Chuck and Woodall that they're lucky I'm in here."

Later in October, Heutink mailed a letter and postcard to Kristi's father's house. The letter and postcard were addressed to their children. In November 2017, Heutink mailed another letter to Kristi's father's house. The letter, addressed to Kristi's father and stepmother, directed them to communicate certain information to Kristi. Heutink sent four more postcards to Kristi's father's house in December. He addressed the postcards individually to each of their four children.

The State charged Heutink with one count of stalking (domestic violence) and three aggravating factors for his conduct between December 2, 2015 and December 29, 2017. Over a defense objection at trial, the court allowed Kristi to

testify that, at one point, her sister relayed a "threat" she had received from Heutink. She testified that her sister had shown her a text message from Heutink's phone number that said, "I hope you all like the way things are going. I have a lot more up my sleeve, and this is going to be a long hot summer." The court also allowed Kristi to testify that, in October 2017, Jake Wiebusch (Heutink's probation officer) contacted her to express his concerns about her safety. She testified that Wiebusch told her to consider relocating with her family and gave her information about the witness protection program. At the CrR 3.5 suppression hearing before trial, Heutink objected to Kristi's testimony about Wiebusch. He did not object to the testimony at trial.

Several witnesses at trial were allowed to testify regarding their fear for Kristi's safety. First, two of Heutink's and Kristi's pastors testified that they were concerned for Kristi's safety based on Heutink's behavior. At the CrR 3.5 suppression hearing before trial, Heutink stated that he would be objecting to the pastors' testimony. At trial, he did not object to their testimony about their concern for Kristi.

Second, Pamela Englett, a pro tem commissioner for the Whatcom County Superior Court, testified at trial. During her testimony, the State asked her if she was concerned for Kristi's safety at the end of the September 21 hearing on the restraining order. Heutink objected to the question, and the court sustained the objection. The State then asked her if she had made any requests of others in the courtroom regarding Kristi. Commissioner Englett responded that she had. She

explained that she had asked a deputy to go with Kristi and her attorney to Kristi's car, because she was concerned for their safety. Heutink did not object.

A jury found Heutink guilty of felony stalking. It also returned three special verdicts. First, it found that Heutink violated the order protecting Kristi, but it was not unanimous that the stalking was connected to any of the court proceedings. Second, it found that Heutink and Kristi were members of the same family or household. Third, it found that the offense was committed "within the sight or sound of the victim's children who were under the age of 18."

The case then proceeded to the second phase of a bifurcated trial on whether the offense was part of an ongoing pattern of psychological abuse manifested by multiple incidents over a prolonged period of time. The jury found that the offense was part of such a pattern.

At sentencing, the trial court imposed an exceptional sentence of 18 months. It also noted that it would be ordering Heutink to pay "mandatory minimum legal financial obligations that go along with a conviction of this sort which will include a [deoxyribonucleic acid] sample and filing fee and victim's fund assessment." In addition to these fees, the judgment and sentence imposed a domestic violence assessment and a jury demand fee.

Heutink appeals.

DISCUSSION

Heutink makes five arguments. First, he argues that the phrase "under circumstances not amounting to a felony attempt of another crime" in the stalking statute is an essential element of the crime. RCW 9A.46.110(1). Second, he

argues that the trial court erred in admitting impermissible hearsay testimony from Kristi. Third, he argues that the trial court erred in admitting evidence that others feared for Kristi's safety, because such evidence was irrelevant, unduly prejudicial, and improper opinion testimony. Fourth, he argues that the State failed to prove beyond a reasonable doubt that Kristi's fear of injury was reasonable. And fifth, he argues that certain legal financial obligations should be stricken from his judgment and sentence.

I. Essential Element of Stalking

Heutink argues that the phrase "under circumstances not amounting to a felony attempt of another crime" in the stalking statute is an essential element of the crime. Id. Because the information filed by the State failed to include this language, he contends that the State's charging documents were deficient.[3] Thus, he argues that this court must reverse his conviction. He also asserts that the trial court's failure to instruct the jury on this element, and the State's failure to prove the element beyond a reasonable doubt, require reversal.[4]

Criminal defendants have a constitutional right to be informed of the nature and cause of the charges against them. U.S. CONST. amend. VI; WASH CONST. art. I, § 22. To be constitutionally adequate, a charging document must include all

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[3] Heutink failed to raise this argument below. But, the sufficiency of a charging document may be challenged for the first time on appeal because it involves a question of constitutional due process. State v. Ward, 148 Wn.2d 803, 813, 64 P.3d 640 (2003). As a result, we consider the argument.

[4] Heutink also failed to raise this argument below. But, omitting an element of the crime charged is a manifest constitutional error under RAP 2.5(a)(3). State v. Scott, 110 Wn.2d 682, 688 n.5, 757 P.2d 429 (1988) ("Examples of 'manifest' constitutional errors in jury instructions are . . . omitting an element of the crime charged."). Therefore, we consider the argument

essential elements of the crime, both statutory and nonstatutory. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An essential element is one whose specification is necessary to establish the very illegality of the behavior. State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). The primary purpose of the rule is to give defendants sufficient notice of the charges so that they can prepare an adequate defense. Kjorsvik, 117 Wn.2d at 101. We review challenges to the sufficiency of a charging document de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).

Further, the State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995). "It is reversible error to instruct the jury in a manner that would relieve the State of this burden." Id. at 714. We review the legal sufficiency of jury instructions de novo. State v. Walker, 182 Wn.2d 463, 481, 341 P.3d 976 (2015).

Since it is the legislature that defines crimes, we first look to the relevant statute to determine the elements of the crime. State v. Gonzales-Lopez, 132 Wn. App. 622, 626, 132 P.3d 1128 (2006). Our objective is to determine and give effect to the legislature's intent by ascertaining the plain meaning of the statute. State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). In doing so, we look to the text of the provision, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Id. If the statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and we look to the legislative history of the statute and the circumstances surrounding its

enactment to determine legislative intent. Id. "Common sense informs our analysis, as we avoid absurd results in statutory interpretation." State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008). We review the criminal statute de novo. Budik, 173 Wn.2d at 733.

The stalking statute provides in part,

> A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
>
> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
>
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
>
> (c) The stalker either
>
> (i) Intends to frighten, intimidate, or harass the person; or
>
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

RCW 9A.46.110(1) (emphasis added). Stalking is a gross misdemeanor crime, but is elevated to a class B felony if the stalking violates any protective order protecting the person being stalked. RCW 9A.46.110(5)(a)-(b).

Heutink argues that if there are "circumstances amounting to a felony attempt of another crime, the stalking statute plainly and unmistakably provides that the crime of stalking has not been committed." He contends that such circumstances exist here.

Stalking is a crime of harassment. RCW 9A.46.060(33). In passing the harassment statutes, the legislature found, "[T]he prevention of serious, personal harassment is an important government objective. Toward that end, this chapter is aimed at making unlawful the repeated invasions of a person's privacy by acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim." RCW 9A.46.010. The legislature has indicated that it intended a broad definition of the type of conduct that could constitute stalking or harassment. State v. Becklin, 163 Wn.2d 519, 527-28, 182 P.3d 944 (2008).

Heutink and the State both rely on State v. Ward, 148 Wn.2d 803, 64 P.3d 640 (2003). There, the State Supreme Court looked at similar statutory language in the context of felony violation of a no-contact order. Id. at 810. The statute at issue provided that "'[a]ny assault that is a violation of an order issued under this chapter . . . and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony.'" Id. (alterations in original) (quoting RCW 26.50.110(4)).

The petitioners argued that the provision "does not amount to assault in the first or second degree" functioned as an essential element of felony violation of a no-contact order. Id. at 811. The court disagreed. Id. at 813. First, it looked to its holding in State v. Azpitarte, 140 Wn.2d 138, 995 P.2d 31 (2000). Ward, 148 Wn.2d at 811. There, the court vacated Azpitarte's conviction because the jury may have relied on his second degree assault conviction instead of an uncharged fourth degree assault in finding him guilty of felony violation of a no-contact order. Azpitarte, 140 Wn.2d at 142. As a result, the Ward court interpreted the provision

to mean that if a defendant is charged and convicted of first or second degree assault, the statute proscribes the use of that assault to enhance a no-contact violation to a felony. 148 Wn.2d at 812.

Next, the court noted that the purpose of the provision was to elevate no-contact violations to a felony when any assault is committed. Id. The legislature did not need to increase the penalty for first or second degree assault, because both of those crimes are felonies. Id. The court also addressed what would happen if it were to interpret the language as requiring the State to disprove first or second degree assault as an essential element of the crime. Id. at 812-13. It explained, "[T]he defendant would be placed in the awkward position of arguing that his conduct amounts to a higher degree of assault than what the State has charged." Id. at 813. It noted that "[s]uch an interpretation does not advance the legislature's purpose of assuring victims of domestic violence maximum protection from abuse . . ., nor does it support the statute's intent to penalize assaultive violations of no-contact orders more severely than nonassaultive violations." Id.

Heutink argues that, unlike Ward, the "circumstances not amounting to" language in the stalking statute expresses that the crime of stalking is disfavored and should apply only in circumstances where other felony attempts do not. This is not a reasonable interpretation, because the legislature articulated a need for the crime by creating the stalking statute.

Heutink also contends that, unlike Ward, a defendant would not necessarily be placed in the position of arguing that his conduct amounts to more serious charges. For example, he states that some of his own conduct amounted to

attempted residential burglary, a class C felony, compared to his elevated stalking charge, a class B felony. But, if we were to interpret the language at issue as requiring the State to disprove felony attempts of other crimes, a defendant would still be placed in the awkward position of arguing that his conduct amounts to some other felony. Depending on whether the defendant was charged with gross misdemeanor or felony stalking, the defendant may have to argue that his conduct constitutes a more severe crime. Such an interpretation would not support the legislature's objective of preventing serious, personal harassment.

There are times when circumstances amounting to stalking may also amount to some other felony attempt, even though the elements of both crimes are not identical. Washington courts have long recognized a prosecuting attorney's charging discretion, including discretion to determine the nature and number of available charges to file. State v. Rice, 174 Wn.2d 884, 902-03, 279 P.3d 849 (2012). This discretion is part of the inherent authority granted to prosecuting attorneys as executive officers under the state constitution. Id. at 903-04. As a result, a prosecuting attorney has discretion to charge a defendant with stalking, some other felony attempt, or both.

The double jeopardy clauses of the federal and state constitutions bar multiple punishments for the same offense. State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). However, "[a] legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct." Id. at 77. The double jeopardy clause prevents the sentencing court from prescribing greater punishment than the legislature intended. Id. "If the legislature intends to impose

multiple punishments, their imposition does not violate the double jeopardy clause." Id.

With these principles in mind, it is clear that the phrase "under circumstances not amounting to a felony attempt of another crime" is the legislature's way of telling us that it does not intend for circumstances amounting to both stalking and some other felony attempt to lead to punishment for both crimes. A prosecuting attorney may charge a defendant with stalking and some other felony attempt. It may also ask the jury to convict on both charges. But, a defendant cannot be punished for both crimes if the convictions are based on the same conduct.

Our interpretation is similar to the Ward court's interpretation of the statute governing felony violation of a no-contact order. As stated above, the language at issue provided that "'[a]ny assault that is a violation of an order issued under this chapter . . . and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony.'" Ward, 148 Wn.2d at 810 (alterations in original) (quoting RCW 26.50.110(4)). The State Supreme Court interpreted this language to mean that, if a defendant is charged and convicted under RCW 9A.36.011 or RCW 9A.36.021, the statute proscribed the use of that conviction to enhance a no-contact violation to a felony. Id. at 810-11. Similarly, under the stalking statute, if a defendant is charged and convicted of a felony attempt of another crime, the conduct that forms the basis of that conviction cannot also support a stalking conviction. This is not an issue here, because Heutink was charged and convicted only of felony stalking.

Our interpretation of the stalking statute means that the language at issue is not an essential element of the crime. It need not be pleaded or proved. Accordingly, the information and jury instructions were sufficient. The State was not required to prove the absence of circumstances amounting to a felony attempt of another crime.

Alternatively, Heutink argues that the stalking statute is void for vagueness. The party challenging a law as void for vagueness bears the burden of proving it unconstitutional. In re Det. of M.W., 185 Wn.2d 633, 661, 374 P.3d 1123 (2016). We presume the statute is constitutional. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). A statue is unconstitutionally vague if either (1) it does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is proscribed, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Watson, 160 Wn.2d 1, 6, 154 P.3d 909 (2007). If a statute does not involve First Amendment rights, the vagueness challenged is to be evaluated by examining the statute as applied under the particular facts of the case. Id. We review the constitutionality of a statute de novo. Id. at 5-6.

Heutink argues that the ambiguity in the term "felony attempt" does not enable a defendant to determine whether or not specific conduct can be criminalized as stalking. Specifically, he argues that the term could be synonymous with "attempted felony," and does not depend on whether the attempt is criminalized as a felony or a misdemeanor. On the other hand, he argues that it could mean an attempted crime that qualifies as a felony under the criminal

attempt statute. Heutink argues next that the phrase "under circumstances not amounting to a felony attempt of another crime" leads to arbitrary enforcement. He asserts that, because of this language, the State "appears to enjoy a tremendous amount of discretion to decide whether or not to charge and pursue" stalking convictions.

The challenged portion of the stalking statute is not an essential element of the crime. Thus, any claimed ambiguity in the statute does not come into play in charging or convicting a defendant.[5] Rather, the challenged language prevents a defendant from being punished twice for the same conduct. Specifically, it prevents Heutink from being charged and convicted of both stalking and some other felony attempt crime based on his stalking conduct. It does not fail to specify what conduct is proscribed. Nor does it fail to provide an ascertainable standard of guilt.

And, the state constitution grants prosecuting attorneys broad charging discretion. Rice, 174 Wn.2d at 903-04. Heutink cites no authority that would limit this broad discretion under the stalking statute. Thus, he has failed to meet his burden to prove that the stalking statute is unconstitutionally vague.

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[5] Heutink makes this same ambiguity argument to support his assertion that sufficient evidence does not support his stalking conviction. He contends that the evidence shows circumstances amounting to one attempted felony crime and two attempted crimes that qualify as felonies. For similar reasons, we need not address this argument. The State was not required to prove the absence of such circumstances.

II. Evidentiary Rulings

A. Hearsay

Heutink argues that the trial court erred in admitting evidence of his alleged threats by allowing Kristi to testify regarding the contents of text messages that he allegedly sent to her sister. Similarly, he argues that the court erred in allowing Kristi to testify that his probation officer, Wiebusch, contacted her to recommend that she relocate her family and join the witness protection program. He contends that this testimony constituted impermissible hearsay, was extremely prejudicial, and deprived him of his right to a fair trial.

As an initial matter, the State argues that Heutink waived any error regarding a hearsay objection to Kristi's testimony about Wiebusch. "A party may assign evidentiary error on appeal only on a specific ground made at trial." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Likewise, a party cannot appeal a ruling admitting evidence unless that party makes a timely and specific objection to its admission. ER 103(a)(1); State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

A different situation is presented when evidentiary rulings are made pursuant to motions in limine. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). The purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered at trial. Id. Unless the trial court indicates that further objections at trial are required, the losing party is deemed to have a standing objection where a judge has made a final ruling. Id. But, when the court "refuses to rule, or makes only a tentative ruling subject to evidence

developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial." State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

At the CrR 3.5 hearing, Heutink objected to Kristi testifying about what Wiebusch told her. He stated, "[M]y objection to this is it's a conclusion that Mr. Wiebusch makes, and she relied on the conclusion, not anything that's related to Mr. Heutink." He explained that he was concerned that the jury would infer that Wiebusch was an expert witness. He also objected "to the nature of the conversation as it's really inflammatory to say that she should go into the witness protection . . . organization." Heutink did not object to Kristi's testimony about Wiebusch at trial.

Heutink did not raise a hearsay objection to Kristi's testimony at the CrR 3.5 hearing. As a result, he did not preserve a claim of error on that basis. While we generally will not review an unpreserved error, we will review such an error if it is of constitutional magnitude. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An issue of constitutional magnitude is presented if it relates to a defendant's right to confront witnesses. See State v. Koepke, 47 Wn. App. 897, 911, 738 P.2d 295 (1987) (allowing a defendant to raise an alleged evidentiary error for the first time on appeal because it may have affected his constitutional right to confront witnesses). Because Wiebusch did not testify at trial and was not available for cross-examination, we review Heutink's hearsay argument regarding Kristi's testimony about Wiebusch.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. We review whether or not a statement was hearsay de novo. State v. Hudlow, 182 Wn. App. 266, 281, 331 P.3d 90 (2014). We review the admission of evidence under hearsay exceptions for abuse of discretion. Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 450, 191 P.3d 879 (2008).

The trial court admitted the testimony at issue based on the effect it had on Kristi as the listener, not to show her sister's or Wiebusch's state of mind. "Out-of-court statements offered to show their effect on the listener, regardless of their truth, are not hearsay." Henderson v. Tyrrell, 80 Wn. App. 592, 620, 910 P.2d 522 (1996). To be admissible on that basis, the listener's state of mind must be relevant to some material fact. Id. Kristi testified that after her sister showed her the text message from Heutink stating that it was "going to be a long hot summer," she applied for another no-contact order. She also testified that after Wiebusch suggested she join the witness protection program, she felt more scared than she already was. Accordingly, the testimony was not hearsay and the trial court properly admitted the testimony to show its effect on Kristi.[6]

[6] Heutink relies on State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980), and State v. Sublett, 156 Wn. App. 160, 231 P.3d 231 (2010), aff'd, 176 Wn.2d 58, 292 P.3d 715 (2012), to support his argument. Parr and Sublett address testimony admitted under the state of mind exception to the hearsay rule. See 93 Wn.2d at 98; 156 Wn. App. at 198. Under that exception, a statement of the declarant's then existing state of mind is admissible. ER 803(a)(3). As established above, the testimony at issue was admitted to show the effect it had on Kristi as the listener. It was not hearsay, and did not need to be admitted under an exception to the hearsay rule. Therefore, Parr and Sublett do not control.

To the extent that Heutink objects to this testimony based on relevance and prejudice, there is no error. This testimony was relevant to the only disputed issue at trial: whether Kristi's fear of injury was reasonable. The evidence is strong and unfavorable, but that does not mean that it is unfair or unduly prejudicial. Heutink does not demonstrate otherwise.

B. Opinion Testimony Improper, Irrelevant, and Prejudicial

Heutink argues next that the testimony of witnesses expressing their fear for Kristi's safety was not relevant and should not have been admitted. Specifically, he contends that Commissioner Englett's and the two pastors' testimony expressing their fear for Kristi was not probative of whether Kristi's fear of injury was reasonable. Even if the testimony was relevant, Heutink argues that it was unduly prejudicial under ER 403. Last, he asserts that the testimony constituted improper opinion testimony and invaded the role of the jury.

As an initial matter, the State argues that Heutink waived any evidentiary error by failing to object to the pastors' and Commissioner Englett's testimony when it was offered. At the CrR 3.5 hearing, Heutink objected to the pastors testifying about their opinion of Heutink. The State had not yet decided whether to call the pastors to testify. The trial court noted that the pastors' testimony as to their observed behavior of Heutink in Kristi's presence would be relevant, but that it was "very concerned" about testimony regarding what the pastors thought of Heutink and Kristi. The court did not make a definitive ruling limiting the pastors' testimony.

Heutink failed to object after the pastors testified that they were concerned for Kristi's safety. Because Heutink failed to object to the pastors' testimony based on relevance and prejudice before trial, and failed to renew his improper opinion objection at trial, we decline to review whether it was error to admit their testimony.

Heutink did object based on relevance when the State asked Commissioner Englett if she was concerned for Kristi's safety at the hearing on the restraining order. The trial court sustained the objection. The State then asked Commissioner Englett if she made "any requests of others in the courtroom regarding Kristi . . . when she left the courtroom." Commissioner Englett responded that she "asked the deputy to be sure and go with them out to her car" because she was concerned for Kristi's and Woodall's safety. Heutink did not object to this response. Because Heutink failed to object at all, we decline to review whether it was error to admit this testimony.

III. Sufficiency of Evidence

Heutink argues that the State failed to prove beyond a reasonable doubt that Kristi's fear of injury was reasonable.

The sufficiency of the evidence is a question of constitutional law that we review de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id.

Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012).

The trial court instructed the jury that, to convict Heutink of felony stalking, it had to find that the State proved seven elements beyond a reasonable doubt. Among those elements, the jury had to find that Kristi's fear of injury to herself, another person, or her property "was one that a reasonable person in the same situation would experience under all the circumstances."

While Heutink and Kristi were still married, he texted her that he wanted to pick up some items from their family home after not having lived there for almost a year. Kristi asked him what he needed so that she could have someone else drop off the items, and he responded by saying that he was "coming to get [her]." He showed up at the house and refused to leave after police arrived. He then failed to comply with multiple orders of protection Kristi obtained against him. He continued to text, call, and e-mail Kristi, send her messages through other people, send her gifts, and go to her home.

Kristi eventually moved to a new home and did not tell Heutink where she had moved. In August 2017, while an order for protection was in place, he showed up at Kristi's home late one night, knocked on the door, and rattled the doorknob. In September 2017, she was granted a restraining order against Heutink protecting her and their children for one year. At the hearing on the order, the commissioner had to tell Heutink to stop staring at Kristi and her attorney, Woodall. Heutink

refused to sign the order, stomped out of the hearing, and slammed the door on his way out.

Once the restraining order was in effect, Kristi received a text message from Heutink's friend Stuit. The text message stated that Heutink was wondering if he could see the boys, and asked when and where they should all meet up. On the day that the text message was sent, Stuit had left his phone in Heutink's car and did not have access to it. A few days later, Kristi received flowers at her home with a card that said, "'Have a good day.'" She received the flowers the day before she and Heutink were set to go to trial. Heutink had gone into a flower shop and ordered flowers for Kristi, but refused to give his name.

Kristi grew more concerned after learning about an interview that Heutink had with Detective Gates a few days after she received the flowers. Gates relayed to Kristi specific threats Heutink had made regarding Woodall and her former pastor, Kleinhesselink. During the interview, Heutink raised his voice and stated, "'Woodall should be scared.'" He also stated, "[Y]ou . . . should tell Pastor Chuck and Woodall that they're lucky I'm in here." At the end of October 2017 and into November and December 2017, Heutink mailed multiple letters and postcards to Kristi's father's house. One letter, addressed to Kristi's father and stepmother, directed them to communicate certain information to Kristi.

Heutink concedes that "[he] violated numerous protection orders," which "caused Kristi significant fear and intimidation." He also concedes that "[he] behaved inappropriately and had difficulty controlling his emotional responses to the end of his relationship." But, he contends that without evidence that he was

actually violent or threatened actual violence, insufficient evidence supports that Kristi's fear was reasonable. He cites no authority to support this contention.

Viewing the evidence in a light most favorable to the State, a rational trier of fact could find that Kristi's fear of injury was one that a reasonable person in the same situation would experience. Accordingly, the evidence is sufficient to support Heutink's conviction.

IV. Legal Financial Obligations

A. Criminal Filing Fee and Jury Demand Fee

Heutink argues that the criminal filing fee and jury demand fee should be stricken from his judgment and sentence. He relies on House Bill 1783[7] and State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018). In Ramirez, the State Supreme Court held that House Bill 1783 applies prospectively to cases on appeal. 191 Wn.2d at 747. House Bill 1783 amended RCW 36.18.020(2)(h) and RCW 10.46.190 to prohibit courts from imposing the criminal filing fee and jury demand fee on indigent defendants. LAWS OF 2018, ch. 269, §§ 9, 17(2)(h).

Heutink claimed indigency and moved the trial court for an order allowing him to seek review of his judgment and sentence at public expense. He attached a declaration to the motion that stated he was "determined to be eligible for an attorney at public expense and this determination continues to be in effect." The trial court granted his motion.

[7] ENGROSSED SUBSTITUTE H.B. 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783).

The State concedes that both the criminal filing fee and jury demand fee should be stricken pursuant to the trial court's order of indigency. We accept the State's concessions and remand for the trial court to strike the criminal filing fee and jury demand fee.

B. Domestic Violence Assessment

Heutink argues next that the domestic violence assessment should be stricken from his judgment and sentence. RCW 10.99.080(1) provides in part that courts "may impose a penalty assessment not to exceed one hundred dollars on any adult offender convicted of a crime involving domestic violence." (Emphasis added.)

The State concedes that the assessment should be stricken, because the trial court indicated it was going to impose only mandatory legal financial obligations. We accept the State's concession and remand for the trial court to strike the domestic violence assessment.

We affirm Heutink's conviction, but remand to the trial court to strike the criminal filing fee, jury demand fee, and domestic violence assessment.

WE CONCUR:

NIELSEN KOCH P.L.L.C.

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