Supreme Court No. 101936-0
Court of Appeals No. 83053-8-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

ROLF MIFFLIN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Rolf Mifflin, the petitioner, asks this Court to grant review of Court of Appeals' decision terminating review, issued on March 27, 2023. The decision is attached in the appendix.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Whether the "intent to injure" language in the stalking statute, RCW 9A.46.110(1)(b), is limited to physical injury—as opposed to emotional or psychological injury—when the statute already requires the "harassed" person to have suffered "substantial emotional distress" and a broader interpretation creates constitutional doubt about the validity of the stalking statute?

2. Whether the trial court erred in telling the jury to reread instructions in response to the jury's question on if the "intent to injure" element for stalking was limited to physical injuries when the instructions did not answer this question?

C. THIS PETITION FOR REVIEW SHOULD BE STAYED PENDING THIS COURT'S DECISION IN *RIVERS*.

This Court is reviewing a case with a similar issue in State v. Rivers, No. 100922-4. As framed by the commissioner, the issue is: "Whether in this prosecution for second degree fwassault and interfering with domestic violence reporting, the trial court erred in responding to the jury's inquiry about the intent necessary to commit the charged assault by referring the jury to the court's instructions." Mr. Mifflin asks that this Court stay consideration of this petition until Rivers is decided.

D. STATEMENT OF THE CASE

Mr. Mifflin refers this Court to his statement of the case set out in his opening brief.

As relevant to the issues presented, Mr. Mifflin was charged with stalking based on his acts of sending letters and gifts to a woman he was romantically interested in. His unwanted advances caused this woman, Lucretia Hoverter, to experience emotional distress.

Despite a dearth of evidence that Mr. Mifflin intended to injure Ms. Hoverter, a fact necessary to prove Mr. Mifflin guilty of stalking, the jury found him guilty.

The jury did so despite defense counsel's argument that the evidence did not prove beyond a reasonable doubt that Mr. Mifflin intended to *physically* injure Ms. Hoverter. RP 1185-86 (emphasis added). Defense counsel was emphatic on this requirement:

> It's about what objectively is reasonable and if it's reasonable for her to fear that he would actually injure her, that her physical safety was at risk. We know there were no threats in any of the letters or contact. There was no mention of any desire to harm or injure. There was no physical in-person contact. And all of that, again, disproves this—the reasonableness of her fear.

RP 1189 (emphasis added).

The court instructed the jury that, "[i]f, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been

unable to answer, write the question out simply and clearly." CP 136.

Heeding this instruction, the jury asked the court whether the requirement of reasonable fear of intent to injure was limited to physical injuries, as opposed to emotional or psychological injuries:

> Is there a legal definition of 'injure' with regard to the second criteria for misdemeanor and felony stalking charges? (e.g. does injure mean physical injury or could emotional/psychological damage also qualify?)

CP 106.

Consulting with the parties, the court indicated it had briefly researched the issue, but did not find anything. Although the jury instructions did not answer the jury's question and the jury's question indicated the jury was confused on the scope of the term "to injure," the court stated its "first impulse" was "to simply indicate to the jury to rely upon the instructions that have been provided." RP 1206.

The prosecution represented that there was a jurisprudential tradition of not providing additional instructions or guidance to the jury when they ask questions, to which the court expressed agreement:

> MS. RAMIC: . . . [F]irst of all, that traditionally courts kind of avoid giving additional instructions or—
>
> THE COURT: Uh-huh.
>
> MS. RAMIC: —guidance to the jury, right? And we never want to do that.

RP 1206 (emphasis added). While briefly arguing that the verb "injure" was not limited to physical injuries because the words "physical" or "bodily" do not precede it, the prosecution ultimately argued the court should not provide the jury an additional instruction. RP 1207-08.

Consistent with her closing argument, defense counsel argued the statute required reasonable fear of a *physical* injury. She argued that the court should so instruct the jury because the jury needed clarification that this was the law. RP 1208-09.

The court disagreed with defense counsel that "intends to injure" meant "physically." RP 1210. The court told the jury to rely on the instructions already provided. RP 1210; CP 107.

Mr. Mifflin challenged this ruling on appeal. The Court of Appeals held the trial court did not err because "the jury instructions accurately reflected the plain language of the stalking statute which does not restrict the term 'injure' to only physical injuries." Slip op. at 5. In other words, the Court of Appeals ruled that the stalking statute does *not* require proof of intent to cause a physical injury and that intent to cause mere emotional or psychological injury is sufficient.

E. ARGUMENT

1. The Court should grant review to hold that the "intent to injure" language in the stalking statute requires proof of intent to *physically* injure.

An essential element of stalking is that the alleged victim be placed in reasonable fear that the defendant intends "to injure" a person or property. RCW 9A.46.110(1)(b). Under a plain meaning analysis, this requires fear of *physical* injury.

The jury, however, was not instructed that to convict Mr. Mifflin of the stalking charges, the alleged victim, Ms. Hoverter, must have been placed in reasonable fear that Mr. Mifflin intended to *physically* injure her.[1] CP 126, 130. Critically, there was reason to doubt that the evidence proved this, as defense counsel argued to the jury. RP 1185-86, 1189. But even after the jury asked whether the "to injure" language meant a "physical injury," as opposed to "emotional/psychological damage," the court refused to answer. Instead, the court told the jury to "rely upon the Court's instructions provided to the jury." CP 106-07. But those instructions did not answer the jury's question.

The prosecution below contended there was no error because the term "to injure" in RCW 9A.46.110(1)(b) encompasses injuries beyond physical or bodily harm, and

[1] Because the evidence did not support a finding that Ms. Hoverter was placed in fear that Mr. Mifflin intended to injure another person or property, the jury was not instructed on those alternatives.

includes "any manner of injury to person (including reputational or emotional)." Br. of Resp't at 15. The prosecution's position is that being "fearful of continued emotional harm" is enough. Br. of Resp't at 20, n. 7. Notwithstanding how much conduct this would criminalize or the First Amendment implications, the Court of Appeals agreed.

A plain language analysis, which examines the dictionary to determine ordinary meaning and the statutory context, proves the prosecution and the Court of Appeals wrong. State v. Barnes, 189 Wn.2d 492, 495, 403 P.3d 72 (2017). Turning to the dictionary, the word "injure" means "to inflict bodily hurt on <injured by a falling brick>." Webster's Third New International Dictionary, 1164 (1993); see also https://www.merriam-webster.com/dictionary/injure (defining word to mean "to inflict bodily hurt on").

To be sure, the word "injure" sometimes is used in the broader sense. But that does not mean the stalking statute uses it in that sense.

Context proves the term "injure" in the stalking statute refers to the physical sense. The other aspects of the statute already requires that the purportedly "harassed" victim to have suffered "substantial emotional distress" due to a course of conduct by the defendant on at least two separate occasions. RCW 9A.46.110(1)(a),(b), (d), (f)[2]; see State v. Nguyen, 10 Wn. App. 2d 797, 808-14, 450 P.3d 630 (2019). But this alone is not enough to prove stalking, no matter how repetitive or substantial the emotional distress the defendant causes the other

[2] This is the current stalking statute. The legislature amended the stalking statute in 2021. Laws of 2021, Ch. 215. In doing so, it did not make substantive changes to stalking statute at issue. Former RCW 9A.46.110 (2019). Instead of referring to former RCW 10.14.020 for the meaning of "harasses," the legislature put the language from that provision into RCW 9A.46.110.

person by their course of conduct. In addition, there must be reasonable fear the defendant intends to injure.

If reasonable fear of injury includes reasonable fear of an additional act of *harassment*, it is odd the legislature simply did not make the fear requirement as simply being in fear of further harassment rather than injury.[3] "Harasses" means a "course of conduct" that "would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress." RCW 9A.46.110(6)(d).[4]

This is broader than fear of a physical injury, and reasonable fear of a physical injury to person or property will cause reasonable and substantial emotional distress in a person.

A hypothetical amended version of subsection (1)(b) illustrates that the legislature would have enacted a different

[3] In cases concerning "repeatedly following" rather than "repeatedly harasses" under RCW 9A.46.110(1)(a), this would be fear of a first act of harassment.

[4] Former RCW 9A.46.110(6)(c) (2019); Former RCW 10.14.020(2) (2019).

statute if it meant fear of substantial emotional harm to be sufficient, rather than fear of physical injury. This could easily be accomplished by replacing the fear of injury requirement in subsection (b) with a fear of harassment requirement. The amended subsection would read: "The person being harassed or followed is placed in fear that the stalker intends to ~~injure~~ <<harass>> the person~~, another person, or property of the person or of another person~~. The ~~feeling of~~ fear <<of harassment>> must be one that a reasonable person in the same situation would experience under all the circumstances."

Of course, this is not the statute the legislature drafted. But it is the statute that the prosecution convinced the Court of Appeals to enact through its broad reading of the word "injure." It is not the judiciary's role to rewrite or fix statutes, even if the legislature would approve. State v. Reis, 183 Wn.2d 197, 215, 351 P.3d 127 (2015); State v. Soto, 177 Wn. App. 706, 715-16, 309 P.3d 596 (2013).

Moreover, when people speak of a person intending to injure a person or property, it is generally in the *physical* sense absent context indicating otherwise. For example, this Court used the phrase in the physical sense in setting out the standard for when a defendant may be restrained in court:

> It is clear that the existence of one or more factors does not necessarily mean that a defendant should be restrained. Courts must only consider those factors which indicate that compelling circumstances that some measure is needed to maintain security of the courtroom. The trial court must base its decision to physically restrain a defendant on evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom. To do otherwise is an abuse of the trial court's discretion.

State v. Finch, 137 Wn.2d 792, 850, 975 P.2d 967 (1999) (cleaned up) (emphases added). Although neither the words "bodily" or "physical" precede the word "injure," the context of this sentence shows this Court meant physical injury. The same is true for the stalking statute.

Interpreting the statute to include emotional or psychological injuries is not a natural reading given that the statute includes reasonable fear that the defendant intends to injure "property of the person or of another person." RCW 9A.46.110(1)(b). With some exceptions, it is nonsense to fear that property (which is generally non-sentient) will suffer emotional or psychological injury. Thus, given the use of the word "property" in the subsection, the term injure is best read in the sense of physical harm.

Of course, the term "to injure" may sometimes be used in a non-physical sense. For example, the forgery statute requires proof of "intent to injure or defraud." RCW 9A.60.020(1). Given the pairing of the term with defraud, injure encompasses monetary loss. See Jongeward v. BNSF R. Co., 174 Wn.2d 586, 601, 278 P.3d 157 (2012) (phrase "otherwise injure" must be read with associated words and limited the scope of this term); State v. Simmons, 113 Wn. App. 29, 32, 51 P.3d 828 (2002) (readings these two words to be synonymous when paired).

While it is inappropriate for a court to legislate and add words to a statute, it is not improper to infer an additional word if that is what the statute implies. See State v. Blake, 197 Wn.2d 170, 190 n.13, 481 P.3d 521 (2021) (court would have read in word "knowingly" into drug possession statute despite it not being explicit if it were interpreting the statute for the first time). For example, although the bribery statute[5] does not contain the word "corrupt" before the word "intent," this Court held the statute requires proof of "corrupt intent." State v. O'Neill, 103 Wn.2d 853, 858-59, 700 P.2d 711 (1985).

Delineating what is meant by "to injure" is the role of the judiciary. Holding that "to injure" refers to physical or bodily harm is not legislating. Rather, it is expounding on what is meant by the term.

It is also well established that jury instructions often must do more than more mirror statutory language. Jury instructions

[5] RCW 9A.68.010(1)(a).

must make the law manifestly clear. State v. Weaver, 198 Wn.2d 459, 466, 496 P.3d 1183 (2021). Thus, instructions may need to include additional words or requirements that are not explicitly set forth in the statute. Id.

Mr. Mifflin's reading of the stalking statute is correct for an additional reason: the constitutional doubt canon of construction. Statutes must be interpreted to avoid constitutional doubts or problems. Utter v. Bldg. Indus. Ass'n of Washington, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 247-51 (2012) ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt"). Here, the Court of Appeals' interpretation raises significant First Amendment issues that are better avoided, if reasonably possible.

In general, the government has no power to restrict or punish expression because of its message, its ideas, its subject matter, or its content. Brown v. Entm't Merchants Ass'n, 564

U.S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011). Only in a limited number of categories is this permissible. United States v. Stevens, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010). This consists of advocacy intended and likely to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and speech presenting a grave and imminent threat that the government has the power to prevent. United States v. Alvarez, 567 U.S. 709, 717, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) (plurality).

Harassing speech that causes another person substantial emotional distress is not on the list of categories outside the protection of the First Amendment. Therefore, it is entitled to constitutional protection. DeJohn v. Temple Univ., 537 F.3d 301, 316 (3d Cir. 2008) ("there is no 'harassment exception' to the First Amendment's Free Speech Clause"); see State v. Brush, 5 Wn. App. 2d 40, 54-55, 425 P.3d 545 (2018) (recognizing that "several types of protected speech

conceivably could result in psychological abuse" of another person). This can be contrasted with speech that communicates a true threat of unlawful violence, which is unprotected. See Virginia v. Black, 538 U.S. 343, 359-60, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (plurality) (setting out definition) Watts v. United States, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969) (statement about shooting the President was not a true threat); N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 927-29, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (speeches advocating boycott were protected despite references to physical violence, calls to "discipline" those who did not follow boycott, and that law enforcement could not protect everyone).

The Court of Appeals' reading exposes a great swath of protected speech to criminal prosecution under the stalking statute. Repeated speech that causes substantial emotional distress and reasonable fear of future substantial emotional distress is criminalized as stalking. This likely makes the statute

unconstitutionally overbroad because it prohibits a substantial amount of constitutionally protected free speech. See Stevens, 559 U.S. at 473 (setting out standard). The requirement of reasonable fear of physical injury limits the scope of the statute. Thus, to avoid creating constitutional doubt, the statute should be read to require fear of physical harm, not mere psychological harm. Blake, 197 Wn.2d at 215-16 (Stevens, J., concurring in part, dissenting in part); Utter, 182 Wn.2d at 434-35.

Additionally, Mr. Mifflin's interpretation is supported by the rule of lenity. Under the rule of lenity, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." United States v. Davis, __ U.S. __, 139 S. Ct. 2319, 2333, 204 L. Ed. 2d 757 (2019). If more than one reasonable interpretation of a criminal statute exists, the statute must be interpreted in the defendant's favor. City of Seattle v. Winebrenner, 167 Wn.2d 451, 462, 219 P.3d 686 (2009). Here, Mr. Mifflin's interpretation of "injure" in the stalking statute is reasonable. Accordingly, his narrower interpretation should

have been adopted by the Court of Appeals.

The Court of Appeals did not engage with any of these arguments. Instead, the Court rejected Mr. Mifflin's argument because he cited "to no case that has interpreted the stalking statute to require fear of physical injury only." Slip op. at 4. But there was no case addressing the issue.

The Court of Appeals' mode of analysis conflicts with precedent, which requires that the principles of statutory interpretation actually be applied. RAP 13.4(b)(1), (2). Interpretation of the statute implicates constitutional principles of free speech, making this issue the kind that should be decided by this Court. RAP 13.4(b)(3). Proper interpretation of the stalking statute is a matter of substantial public interest, meriting review. RAP 13.4(b)(4).

To properly address this issue, the Court should also grant review of the related issue set out below on whether the trial court should have directly answered the jury's question on the meaning of the "to injure" requirement.

2. The Court should grant review on the intertwined issue of whether the trial court erred by not answering the jury's question on if the "intent to injure" element was limited to physical injury, as opposed to emotional or psychological injury.

The related issue is whether the trial court erred in failing to actually answer the jury's question on if the "intent to injure" element required proof of intent to *physically* injure.

Based on its holding that the statutory language "to injure" is not limited to physical injuries, the Court of Appeals held the trial court did not err in telling the jury to reread its instructions. This was error for the reasons outlined above. Moreover, because the law required a direct and correct answer by the trial court, the trial court erred in telling the jury to read instructions that did not answer the question.

The trial court has a responsibility to ensure the jury understands the law. State v. Backemeyer, 5 Wn. App. 2d 841, 849, 428 P.3d 366 (2018). When a court is "[c]onfronted with an inquiry that show[s] the jury misunderstood the applicable law, the court [is] obligated to correct the jury's

misunderstanding." State v. Sanjurjo-Bloom, 16 Wn. App. 2d 120, 128, 479 P.3d 1195 (2021). It is "incumbent upon the trial court to issue a corrective instruction" when a deliberating jury indicates an erroneous understanding of the law that applies in a case. State v. Campbell, 163 Wn. App. 394, 402, 260 P.3d 235 (2011).

Consistent with caselaw, where a deliberating jury seeks clarification on the law, "Trial judges should make every effort to respond fully and fairly to questions from deliberating jurors. Judges should not merely refer them to the instructions without further comment." Wash. State Jury Comm'n Recommendation 38; see also Comment to 11A Wash. Prac.: Pattern Jury Instructions: Crim. 151.00 (4th ed. 2016). Recommendation 38 encourages judges to respond in a way "to ensure juror comprehension."

Here, given the jury's confusion and that the answer to the jury's question was not clearly set forth in the court's instructions, the court was required to provide a supplemental

instruction. As argued, the stalking statute requires fear that the defendant intends to *physically* injure a person or property. Fear that the defendant intends to cause emotional or psychological damage is insufficient. Applied in this case, this meant that to convict Mr. Mifflin, the jury had to find Ms. Hoverter reasonably feared Mr. Mifflin intended to inflict a *physical* injury upon her.

The jury's question to the court establishes that the jury was unclear about the kind of fear necessary to convict Mr. Mifflin of stalking. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (jury's inquiry about definition of accomplice indicated it had a misunderstanding of the law). Taking seriously defense counsel's argument that the fear requirement meant reasonable fear that Mr. Mifflin would inflict a physical injury upon Ms. Hoverter, the jury expressed confusion as to whether counsel's recitation of the law was correct. As the court's instructions invited, the jury sought clarification. But rather than answer the jury's question, the

court left the jury in the dark, creating a significant risk that jury would convict Mr. Mifflin based on a misunderstanding of the law. Id. at 764-65.

This was contrary to precedent. In Sanjurjo-Bloom, the jury's note demonstrated the jury misunderstood a police witness' testimony about prior contact with Mr. Sanjurjo-Bloom and was improperly considering it as propensity evidence. 16 Wn. App. 2d at 127-28. The defense requested a limiting instruction, but the court instead "compounded its error" by simply telling the jury to base its decision on the evidence already admitted. Id. at 128. The Court of Appeals held the trial court's failure to give a limiting instruction when the jury's note indicated the jurors misapprehended the law was error. Id. Because the jury's question "went to the heart of th[e] issue" and because the evidence was sufficient but not overwhelming, the Court of Appeals reversed the conviction. Id. at 129.

Similarly, in State v. Backemeyer, 5 Wn. App. 2d 841, 428 P.3d 366 (2018), the appellate court considered a self-defense instruction. The jury asked two questions regarding whether the defendant's potentially illegal act of possessing marijuana in a bar negated his right to be in the bar and his right to use self-defense. Id. at 846-47. The defendant agreed to the court's decision to respond, "Please read your instructions." Id. at 847.

The Court of Appeals reversed and remanded for a new trial, holding the defendant "was denied effective assistance of counsel when the jury's questions to the court made it manifest that the jury did not understand the law of self-defense and counsels' agreed response did not provide the jury any clarity." Id. at 848. The court stated that had counsel requested a tailored instruction rather than the "generic response," it saw "no reason why, if asked, the trial court would have refused such a request." Id. at 849. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."

Id. at 849-50 (quoting Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S. Ct. 402, 90 L. Ed. 350 (1946)).

And in Campbell, the jury requested clarification on the special verdict form. Over objection, the court merely referred the jury to the existing instructions. 163 Wn. App. at 398-99. Campbell held "the trial court abused its discretion in determining not to further instruct the jury." Id. at 397. Where a jury's question suggests a misunderstanding of the jury instructions, the court must give further instructions. Id. at 402.

As in the discussed cases, the jury's question indicated misunderstanding of the law that the trial court was obliged to correct. The court should have provided the jury a concrete and correct answer to its question. Specifically, that to convict Mr. Mifflin of the stalking charges, element (2) required the prosecution to prove Ms. Hoverter was placed in reasonable fear that Mr. Mifflin intended to physically injure her. Instead, the court referred the jury back to the instructions the jury already read and which did not answer the question.

This was error and the Court should grant review. Review is proper so this Court can properly review the meaning of the stalking statute's "intent to injure" language and hold it requires intent to physically injure. Moreover, as stated earlier, this Court is reviewing a similar issue in Rivers on whether a trial court erred in responding to a jury's question by referring the jury back to instructions. Thus, review is merited. RAP 13.4(b)(4). As requested, this petition should be stayed until Rivers is decided.

F. CONCLUSION

For the reasons outlined, this Court should grant review and review the two issues presented.

This document contains 4,226 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 26th day of April, 2023.

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROLF G. MIFFLIN, Appellant.	No. 83053-8-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — Rolf Mifflin appeals his convictions for felony stalking and misdemeanor stalking. He contends for the first time on appeal that the to-convict instruction did not contain all of the essential elements of stalking because RCW 9A.46.110(1) requires fear of physical injury only. Mifflin waived this argument. He further maintains that the trial court erred in response to a jury question during deliberation by failing to further instruct the jury that the State had to prove that the victim was placed in reasonable fear that Mifflin intended to physically injure her. The plain text of the stalking statute does not restrict that the feared injury be of a physical nature only. We affirm.

FACTS

Mifflin was charged with one count of felony stalking, one count of misdemeanor stalking, and two counts of violation of protective order involving

his conduct toward Lucretia Hoverter.

After the parties presented their cases at trial, the court discussed proposed jury instructions with the parties. During discussion of stalking to-convict instructions, Mifflin successfully argued that irrelevant language related to third parties be removed and that the to-convict instruction should read that Hoverter "was placed in reasonable fear that the Defendant intended to injure her." The court so instructed. Mifflin never raised any concern as to a missing element in these instructions.

During deliberations, the jury asked the court, "Is there a legal definition of 'injure' with regard to the second criteria for misdemeanor and felony stalking charges? (eg. does injure mean physical injury or could emotional/psychological damage also qualify?)." The court consulted with the parties on what answer, if any, should be provided. The prosecutor stated that under the rules of statutory construction, the injury did not need to be physical because the stalking statute did not include the definition of injury as physical injury. Defense counsel argued that the term applied to physical injury only and the court should clarify that for the jury. The court agreed with the State and instructed the jury to "rely upon the court's instructions provided to the jury." The jury found Mifflin guilty on all counts.

Mifflin appeals.

DISCUSSION

Mifflin does not raise a sufficiency of the evidence argument so we need not discuss the underlying facts supporting the convictions. Mifflin initially

identified only one assignment of error: "The trial court failed to instruct the jury on all of the essential elements of the crime of stalking." He added a second assignment of error in supplemental briefing: "The court erred by failing to answer the jury's inquiry about the meaning of the word 'injure' in the 'to-convict' instructions for stalking."

A to-convict instruction must contain all of the elements of the crime, serving as a "'yardstick by which the jury measures the evidence to determine guilt.'" State v. Tyler, 191 Wn.2d 205, 216, 422 P.3d 436 (2018) (quoting State v. France, 180 Wn.2d 809, 815, 329 P.3d 864 (2014)).

The State argues that Mifflin waived this argument. We agree. Generally, we will not consider issues raised for the first time on appeal. RAP 2.5(a). A party may claim an error for the first time on appeal if it concerns "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, [or] (3) manifest error affecting a constitutional right." RAP 2.5(a).

Although the omission of an element from a to-convict instruction is of "sufficient constitutional magnitude to warrant review when raised for the first time on appeal," if the instructions properly inform the jury of the essential elements of the crime, an error in defining terms that describe the elements of the crime is not an error of constitutional magnitude. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); see State v. Saunders, 177 Wn. App. 259, 269, 311 P.3d 601 (2013) (explaining that definitional terms that clarify the meaning of essential elements are not essential elements that must be included in a to-convict instruction).

Washington's stalking statute, former RCW 9A.46.110(1) (2013), provides the following:

> (1) 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.

The statute also defines several terms. Former RCW 9A.46.110(6) (2013). "Injure" is not one of the terms defined in the statute. Mifflin does not dispute that the court's to-convict jury instructions accurately reflected the language of the statute. Former RCW 9A.46.110(1)(b) (2013) required the person being harassed or followed be place in fear that the stalker "intend[ed] to injure the person." Both the to-convict stalking instructions for the misdemeanor and felony counts required the State to prove that Hoverter was placed in reasonable fear that the defendant intended to "injure" her. Mifflin cites to no case that has interpreted the stalking statute to require fear of physical injury only. Mifflin has not established a manifest error affecting a constitutional right. Accordingly, he has waived this argument.

Mifflin's second assignment of error is based on the same presumption in his first assignment of error—that the fear of injury must be physical injury.

Mifflin argues that the trial court should have responded to the jury's question on the legal meaning of "injure" by further instructing the jury that the State was required to prove that Hoverter was place in reasonable fear that Mifflin intended to physically injure her.

It is within the trial court's discretion to answer jury questions and give further instructions. State v. Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). Any instructions given must accurately state the law. State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). We review whether jury instructions accurately reflect the law de novo. Becklin, 163 Wn.2d at 525.

The trial court did not abuse its discretion in answering the jury question by directing the jury to refer to the court's instructions provided. As already discussed, the jury instructions accurately reflected the plain language of the stalking statute which does not restrict the term "injure" to only physical injuries.

We therefore affirm.

Coburn, J.

WE CONCUR:

Cheung, J.

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83053-8-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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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: April 26, 2023

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