Supreme Court No. 97416-1
COA No. 50879-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD COLLIER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Clifford Collier, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Mr. Collier seeks review of the unpublished opinion of the Court of Appeals in cause number 50879-6-II, filed June 11, 2019. ***State v. Collier***, 2019 WL 2447059. A copy of the decision is in the Appendix A at pages A-1 through A-20.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant has a constitutional right to present a complete defense. Mr. Collier's defense was that he was extremely concerned about the care of his daughter, S.L.C., while in the custody of her mother, Christina Manley. S.L.C. suffered from cerebral palsy and subsequently passed away after the charges were filed against Mr. Collier. Mr. Collier testified that he was extremely concerned about S.L.C.'s safety in the care of her mother and that he made threats to kill Ms. Manley because it was the "only way to get her attention." The court excluded testimony of S.L.C.'s death, which was relevant to show the seriousness of her medical condition and the reason for the drastic nature of Mr. Collier's communication with the child's mother. Was Mr. Collier deprived of his right to present a complete defense by the court's exclusion of evidence that S.L.C. passed away?

D. STATEMENT OF THE CASE

1. Procedural history:

Clifford Collier was charged by information filed in Pierce County Superior Court on October 10, 2016, with one count of felony harassment, two counts of telephone harassment-threat to kill, contrary to RCW 9.61.230(1)(c), (2)(b), and one count of violation of a no contact order. Clerk's Papers (CP) 3-6.

Prior to trial, the State moved to exclude evidence of the death of Mr. Collier's and Christina Manley's daughter, S.L.C. 3RP at 41-42. Defense counsel argued that his client was very worried about the care that S.L.C., who had cerebral palsy, was receiving from Ms. Manley, and that Mr. Collier had called Child Protective Services on several occasions, alleging that Ms. Manley was not taking care of their daughter. 3RP at 42. Counsel argued that the child's medical condition was relevant to Mr. Collier's state of mind that the evidence of her medical condition and subsequent death was therefore relevant. 3RP at 42-43. The court ruled that evidence of S.L.C.'s cerebral palsy had "permeated the fact pattern" of the case and was admissible. 3RP at 43. The court granted the motion, however, to exclude evidence that S.L.C. is deceased, ruling that the fact was not relevant. 3RP at 43.

Christina Manley met Mr. Collier in December 2008, and they moved in together in May 2009. 4RP at 284. They had two children, a son born

in 2013, and a daughter, S.L.C., who was born in 2010. 4RP at 201, 285. Ms. Manley and Mr. Collier and their children shared an apartment in University Place, Washington, in 2015. 4RP at 201-02. Ms. Manley testified that in 2015, during an argument Mr. Collier told her that he was going to kill her. 4RP at 202-03. She stated that as a result of the threat, she left their apartment and called 911. 4RP at 203. As a result of the incident, Mr. Collier was convicted of felony harassment. 4RP at 204. The court also entered a no contact order which prohibited him from having contact with Ms. Manley and their daughter S.L.C. 4RP at 204, 207. Ms. Manley stated that Mr. Collier complied with the no contact order, but that she would call him on occasions and had contact with him, including during the period between October 5 and October 7, 2015. 4RP at 207. Ms. Manley said that Mr. Collier wanted to have contact with their daughter, who could not walk or speak due to cerebral palsy. 4RP 207, 208, 221.

Ms. Manley denied that Mr. Collier made threats to her other than what she provided in a written statement she gave to Lakewood police on October 7, 2105. 4RP at 211. Ms. Manley acknowledged that she had conversations with Mr. Collier, and stated that she recorded portions of two conversations with Mr. Collier and gave them to Lakewood police. 4RP at 215. She testified that she did so because she wanted "to show [Mr. Collier] that he looked like an idiot." 4RP at 215. She stated that during the period between October 5 and October 7, 2015, he threatened to kill her during one

conversation. 4RP at 216. She stated that she did not take the threat seriously and, and that it was "more anger" and that she "[o]ne thousand percent do not believe that Cliff would harm me in any form or shape." 4RP at 216, 218. She stated that Mr. Collier suffers from a disability and that he will say things, but he would not act on it. 4RP at 217. Ms. Manley testified that he would do anything to have his daughter, and that that was what the incident "was all about." 4RP at 217. She stated that she called 911 because she was angry, that he would not leave her alone, and that he was persistent on having his daughter. 4RP at 217. Ms. Manley contacted Lakewood police and made the written statement on October 7, 2016 alleging that Mr. Collier threatened to kill her. 4RP at 211-12.

Ms. Manley testified that other than her written statement to police, she did not remember receiving any other threats from Mr. Collier during the period between October 5 and October 7, 2016. 4RP at 214.

Ms. Manley said that she recorded two telephone conversations with Mr. Collier to show him what "an idiot" he sounded like, and that only one of the calls contained a threat, that she was not afraid of him and that he would never hurt anyone. 4RP at 225.

Lakewood police officer Michael Merrill testified that Ms. Manley told him that she went into hiding at a motel following the conversation with Mr. Collier in the hope that Mr. Collier would not find her. 4RP at 246. Officer Merrill met with Ms. Manley that the Lakewood police station on

October 7, 2016, at which time she made the written statement. 4RP at 247. He also received a recording of a portion of two telephone conversations with Ms. Manley that she recorded. 4RP at 248. Officer Merrill stated that Ms. Manley seemed frightened when she met with him at the police department. 4RP at 252.

Bobbie Jones, a friend of Ms. Manley's, testified that Ms. Manley appeared to take the threat from Mr. Collier seriously. 4RP at 264. She stated that Ms. Manley took S.L.C. out of the house and went to a motel in another county. 4RP at 264. She stated that she heard a voice she identified as Mr. Collier tell Ms. Manley that he was going to kill them during a phone call on October 6, 2016. 4RP at 259-60. Ms. Jones stated that Ms. Manley appeared to take the threat seriously. 4RP at 264, 265.

Elizabeth Jones, who is the daughter of Bobbie Jones, stated that her mother received a call from Mr. Collier, which she heard on speakerphone. 4RP at 273. She stated that Mr. Collier threatened Ms. Manley in the call, but that she was not present and did not hear the call. 4RP at 273. She stated that she heard a call made by Mr. Collier to Bobbie Jones in which he threatened Ms. Manley. 4RP at 275. This was apparently told to Ms. Manley, who called Bobbie Jones and seemed "pretty upset." 4RP at 275.

Mr. Collier stated that a call in Exhibit 1 was initiated by either Ms. Jones or Ms. Manley and that he did not make the call. 4RP at 287-88. He acknowledged that he threatened to kill Ms. Manley in the call. 4RP at 288.

He stated that he threatened her because he did not believe that she was taking adequate care of S.L.C., and stated that he also called Child Protective Services. 4RP at 288. He stated that it was not his intent to harm her, but to "get her attention" because that was the only way that she responded to him. 4RP at 289, 293. He stated that while in custody on this matter, he had received a number of letters from Ms. Manley, but had not responded. 4RP at 290.

Defense counsel conceded that Mr. Collier violated the no-contact order as alleged in Count 4 because Mr. Collier and Ms. Manley lived together during the time that the order was in effect. 5RP at 344.

The jury found Mr. Collier guilty of telephone harassment as changed in Counts 2 and 3, and violation of a no contact order as charged in Count 4. 6RP at 363; CP 111, 112, 113 The jury found by special verdict that Mr. Collier and Ms. Manley are members of the same family or household. 6RP at 363; CP 114. RCW 9.61.230 provides in relevant part:

Telephone harassment.

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

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

....

(c) Threatening to inflict injury on the person or property of the

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

Mr. Collier appealed his convictions, arguing (1) that the trial court erred when it admitted evidence of other crimes, wrongs, or acts against the victim, (2) that the court violated his constitutional right to present a defense when the court admitted evidence of his daughter's medical conditions but refused to admit evidence of her death, and (3) that the State presented insufficient evidence to convict him of felony telephone harassment because he denied placing the calls and the victim testified at trial that she did not take the threats seriously.. By unpublished opinion filed June 11, 2019, the Court of Appeals, Division II, affirmed the convictions. See unpublished opinion.

Mr. Collier now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. The Trial Court Deprived Collier of His Right to Present a Defense

The Fifth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution guarantee that "[n]o person shall be deprived of life, liberty, or property, without due process of law." This right to due process includes the right to be heard and to offer testimony. ***Rock v. Arkansas***, 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (quoting ***In re Oliver***, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948)). The accused's right to due process "is, in essence, the right to a fair opportunity to defend *296 against the State's accusations." ***Chambers v. Mississippi***, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

A defendant's right to present testimony is also not absolute. A defendant must "at least make some plausible showing of how [a witness's] testimony would have been both material and favorable to his defense." ***United States v. Valenzuela–Bernal***, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). "The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." ***Taylor v. Illinois,*** 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); see also ***State v. Jones***, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). The defendant's right must yield to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." ***State v. Finch***, 137 Wn.2d 792, 825, 975 P.2d 967 (1999) (citing ***Chambers***, 410 U.S. at 302, 93 S.Ct. 1038). The defendant's right to present a defense is subject to "established rules of procedure and evidence designed to

assure both fairness and reliability in the ascertainment of guilt and innocence." ***Chambers***, 410 U.S. at 302.

A review of a Sixth Amendment right to present a defense claim is made under a three-step test. First, the evidence that a defendant desires to introduce " 'must be of at least minimal relevance.' " ***Jones***, 168 Wash.2d at 720, (quoting ***State v. Darden***, 145 Wash.2d 612, 622, 41 P.3d 1189 (2002)). A defendant only has a right to present evidence that is relevant. *Id.*; ER 401. If it is relevant, the burden shifts to the State to show that the relevant evidence " 'is so prejudicial as to disrupt the fairness of the fact-finding process at trial.' " ***Jones***, 168 Wn.2d at 720 (quoting ***Darden***, 145 Wn.2d at 622, 41 P.3d 1189). Third, the State's interest in excluding prejudicial evidence must also be balanced against the defendant's need for the information sought, and relevant information can be withheld only if the State's interest outweighs the defendant's need. *Id.* The same test is used to review claims that the right to confront witnesses was violated. ***State v. Lee***, 188 Wash.2d 473, 488, 396 P.3d 316 (2017).

Here the Court found that S.L.C.'s death was not relevant and that at the time that the State initially charged Collier, S.L.C. was still alive and that "her later death could not have been minimally relevant to the statutory elements concerning his mental state at the time the crimes were committed." ***Collier***, slip op. at 15. The fact of her death, however, serves to confirm that Mr. Collier was not "overreacting" or that he was needlessly concerned about his daughter, a fact that was tragically confirmed by her subsequent death. The fact of her death

would demonstrate to the jury that Mr. Collier's extreme action of threatening Ms. Manley was justifiable and understandable given the child's precarious medical conidiation, such that the defense should have been permitted to argue to the effect that her condition was so serious that she in fact later passed away.

To show a violation of the right to present a defense, the excluded evidence, that of S.L.C.'s death, must first be of at least minimal relevance. ***Jones***, 168 Wn.2d at 720. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The threshold to admit relevant evidence is very low. ***Darden***, 145 Wn.2d at 621. In this case, the gravity and seriousness of S.L.C.'s medical condition and the fact of her subsequent death was material to support both Mr. Collier's testimony that he made an alleged threat only to get Ms. Manley's attention and that she "[o]ne thousand percent does not believe that" Mr. Collier would harm her in any way and that she did not believe that he would carry out the alleged threat. RP at 218, 225. If the jury had learned that S.L.C.'s medical condition was life-threatening, Mr. Collier's admission that he threatened to kill Ms. Manley [RP at 288], but that he did so out of desperation in an attempt "to get her attention" [RP at 289] because of his concern about her inability to care for their children, and it was not his intent to harm her [RP at 291-92], the jury would be much more likely to accept his argument that it was not a "true threat" and that Ms. Manley was not placed in reasonable apprehension that he would carry

out the alleged threat.

The evidence was relevant and therefore could not be excluded unless: (1) it was "so prejudicial as to disrupt the fairness of the fact-finding process at trial;" and (2) the State's interest in excluding prejudicial evidence outweighed the defense need for the evidence. ***Darden***, 145 Wn.2d at 622. Neither the trial court's reasoning nor the record support either of these factors. The court ruled that evidence of S.L.C.'s cerebral palsy had "permeated the fact pattern" of the case and was admissible. 3RP at 43. The court granted the motion to exclude evidence that S.L.C. is deceased on the basis that it was not relevant. 3RP at 43. The fact of S.L.C.'s death, however, is highly relevant regarding whether Mr. Collier had the specific intent to harass her at the time of the call, or whether it was, as he testified, an effort to get Ms. Manley's attention. The fact that that S.L.C.'s medical condition was so serious that she in fact later died is relevant evidence that should have been considered by the jury when determining if Mr. Collier was making a "true threat."

The trial court erred in excluding the defense evidence of S.L.C.'s death denied Mr. Collier of his constitutional right to present a defense to the felony telephone harassment charge.

.F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: July 11, 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on July 17, 2019, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Kristie Barham, Pierce County Prosecutor, and copies were mailed by U.S. mail, postage prepaid, to the following Appellate:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 11, 2019.

PETER B. TILLER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 11, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CLIFFORD JAMES COLLIER, Appellant.	No. 50879-6-II UNPUBLISHED OPINION

GLASGOW, J. — A no contact order prohibited Clifford James Collier from contacting his former girlfriend, Christina Manley, and their disabled daughter. Nevertheless, Collier spoke with Manley by phone where a friend of Manley's could hear and record the conversations. During these conversations, Collier made multiple specific threats to harm Manley. Collier now appeals his resulting convictions for two counts of telephone harassment, but not his conviction for violation of a protective order.

Collier argues that the trial court erred when it admitted evidence of other crimes, wrongs, or acts against the victim. In addition, he claims the trial court violated his constitutional right to present a defense when the court admitted evidence of his daughter's medical conditions but refused to admit evidence of her death, which the superior court concluded was irrelevant. He also claims that the State presented insufficient evidence to convict him of felony telephone harassment because he denied placing the calls and Manley testified at trial that she did not take the threats seriously. Finally, he asserts that cumulative error denied him a fair trial.

We affirm Collier's convictions.

FACTS

In 2015, Collier pleaded guilty to felony harassment against his former girlfriend and mother of his two children, Christina Manley. In that incident, Collier threatened to kill Manley and their daughter, S.C.,[1] who had cerebral palsy and epilepsy. The trial court in that case entered a five year no contact order that prohibited contact between Collier and Manley and also entered a five year no contact order between Collier and S.C. The no contact orders did not prohibit Collier from having contact with the couple's younger son.

About 15 months after entry of the no contact orders, between October 5 and 7, 2016, Collier spoke on the phone with Manley, her friend Elizabeth Jones, and Elizabeth's mother, Bobbie Jones.[2] In one phone conversation between Manley and Collier that occurred on speakerphone, Bobbie and Elizabeth heard Collier make multiple specific threats of harm against Manley and her two children.

On October 5 and 6, 2016, Manley and Bobbie each recorded part of conversations with Collier. Manley was on the line during both of these calls. In one call, Collier threatened to kill the children and in the other, he threatened to kill Manley. Manley took Collier seriously enough that she fled with S.C. to another county and checked into a hotel under a different name. She ultimately went to the police station with Bobbie and Elizabeth to report the threatening phone calls.

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[1] Collier and Manley's daughter is referred to in the record in varying ways: S-.D, S.-DC, S.L.C., and S.D.C. We refer to the daughter as S.C.

[2] We refer to Elizabeth Jones and Bobbie Jones by their first names for clarity.

Bobbie told the police that Collier said he was going to kill Manley because she was not allowing him to see S.C. Collier talked about stabbing Manley in the neck, looking for a gun, and killing Manley if she tried to take their kids away. Bobbie played a voicemail that she alleged she received from Collier for Officer Michael Merrill. A male voice directed his message to Bobbie and Manley. He said that he was going to die with their son. Merrill kept copies of the voicemail and audio recordings from Manley and Bobbie, and then had Manley, Bobbie, and Elizabeth all complete handwritten statements.

The State charged Collier with four criminal domestic violence offenses. The State amended the charges twice. The final charges included one count of felony harassment premised on his threats to kill Manley, two counts of telephone harassment, and one count of violation of a protection order. The State designated each count as a domestic violence incident under RCW 10.99.020.

A. Pretrial Motions in Limine

1. Evidence of Collier's Other Crimes Under ER 404(b)

During pretrial motions, the State moved to admit evidence of Collier's criminal history under ER 404(b). The State argued that Collier's criminal history was relevant to Manley's state of mind—her "reasonable fear"—an essential element of felony harassment. Clerk's Papers (CP) at 36. The State also argued that Collier's prior conviction for felony harassment was necessary to establish the predicate offense in the alternative charges, including violation of a no contact order.

Collier argued that admitting his criminal history would be prejudicial because the jury's consideration of Manley's "reasonable fear" in this case should not be "tainted by a prior

conviction" for similar conduct in a prior case. 3 Verbatim Report of Proceedings (VRP) at 37-38. The trial court ruled, stating that "when I balance the probative value of the evidence against the unfair prejudicial effect, I find that it is probative." 3 VRP at 38.

2. Evidence of S.C.'s Medical Condition and Subsequent Death

S.C. died prior to trial. The State moved to exclude evidence of S.C.'s medical condition and subsequent death. The State argued that these facts were irrelevant to whether Collier had made threats to kill her mother because Collier raised no defense that made S.C.'s medical condition and death relevant and because Collier's concerns for S.C.'s wellbeing could not justify the alleged threats.

Collier responded that he had called Child Protective Services on several occasions to report that Manley was not taking proper care of S.C. and that S.C.'s medical condition was relevant to Collier's concern for her safety and his resulting state of mind at the time. The trial court denied the motion to exclude evidence of S.C.'s medical condition, but granted the motion to exclude the fact that she had since died.

B. Trial

By the time the jury trial began, Manley had become uncooperative, so the trial court granted the State's motion for a material witness warrant. The police arrested Manley and brought her to court.

The State called four witnesses: Manley, Merrill, Bobbie, and Elizabeth. The State also introduced three exhibits, including the audio recordings of Collier's threats, as well as certified copies of the two orders prohibiting contact between Collier and Manley, and Collier and S.C.

On direct examination, the State asked Manley: "At any point during that period of time [October 5-7], was he seeking to have contact with her [S.C.]? Was he asking to see her?" 4 VRP at 208. Manley replied: "Yes. That's what it's all about." 4 VRP at 208. She confirmed that she contacted the police and provided them with a written statement. She largely confirmed that Collier had made the threats against her and S.C. The prosecutor had Manley read the threats she wrote in her written statement:

> A. I will bury you in the ground and I will kill you.
>
> . . . .
>
> A. I'm looking for a gun. I will kill – kill you because I don't want to have to knife you to death. The streets told me I should.

4 VRP at 212. Manley did not remember receiving a call from Collier while staying with Bobbie and Elizabeth. However, she did testify:

> Q. So you remember telling Officer Merrill from the Lakewood Police Department – he was the officer you gave the handwritten statement to.
>
> A. Okay.
>
> Q. Do you remember telling him that during this period of time that the defendant told you that if you didn't let him see your daughter that he would find you and kill you both?
>
> A. Yes.
>
> Q. Any of the conversations that you had with Mr. Collier, did you record those?
>
> A. Yeah.
>
> Q. Okay. Was there a reason that you felt it was necessary to record *these specific calls from the defendant*?
>
> A. No. I just wanted to show him that he looked like an idiot.

Q. But you also provided copies of these recordings to the Lakewood Police Department, did you not?

A. I did.

4 VRP at 215 (emphasis added). When the prosecutor referred to the calls from the defendant, Manley did not interject to say that she had, in fact, placed the calls. Nor did defense counsel object to this line of questioning based on facts not in evidence or for any other reason.

Manley confirmed there were "two phone calls recorded." 4 VRP at 225. The trial court admitted the audio recordings of the calls into evidence.

On one recording dated October 5, 2016, Collier, Manley, and Bobbie were on the call. The jury heard Collier say, in part, "I will do what I have to do to protect my kids. And at the end, yes, I will bury her. And motherf***in' I'm killing my kids at the same time because I feel foster care and all that would be better than what she's doing to them." Ex. 1, Audio of Phone Calls, Oct. 5, 2016 at 1 hour, 25 min. to 1 hour, 38 min.

The jury also heard Collier say in the second recording dated October 6, 2016:

> Christina, it's really like that. I'm gonna attempt to kill you today straight up if you do not give her to me. I took it to the streets and everybody's with it. I'm looking for a burner to f***ing shoot you instead of trying to knife you. Because right now, I'm going to protect my daughter.

Ex. 1, Audio of Phone Calls, Oct. 6, 2016 at 56 min. to 1 hour 12 minutes. Only Collier and Manley can be heard on this call.

Manley testified that she did not take the threats seriously, and Collier's threats did not concern her. She testified: "I know it's part of Clifford's disability, so I know that he's not going to. He'll say things, but he's not going to." 4 VRP at 217. The prosecutor then asked:

> Q So despite the fact that the defendant told you specifically he's looking for a gun, if that doesn't work, he'll knife you to death, he'll bury both you and your daughter under the ground – the specificity of those threats did not cause you alarm or fear?
>
> A No, because I know Clifford will say anything he needs to say to be able to have his daughter. That's what this is all about. He's willing to do anything to have his daughter.
>
> . . . .
>
> Q Okay. So you call the police, but you didn't take the threats seriously; correct?
>
> A No. One thousand percent do not believe that Cliff would harm me in any form or shape.

4 VRP at 217-18. On cross-examination, Manley testified: "Cliff would not harm anyone. Cliff doesn't make me fear for my life." 4 VRP at 225.

Merrill testified that it is "[v]ery common" for victims of domestic violence to recant their prior statements. 4 VRP at 240-41. Merrill also testified that when Manley was at the station, "[s]he appeared to be frightened, very concerned about the welfare of her [son] who was in the custody of Mr. Collier." 4 VRP at 252.

Merrill further testified that he listened to at least two recordings: one recorded by Bobbie and one recorded by Manley. He said that Manley identified Collier as the male voice on the audio recordings. He also confirmed that, on the audio recordings, Collier said he "was going to shoot her, and if that didn't work, he was going to stab her and bury her." 4 VRP at 251.

Bobbie testified that she heard Collier make threats against Manley and their kids over the phone while Manley was talking with Collier on speakerphone in the car. Elizabeth was also present and was listening. Bobbie did not say who had placed the call, Collier or Manley. She

testified that "[Collier] talked about stabbing Christina in the neck. He talked about looking—riding around, looking for a gun, and he talked about that he wanted [S.C.]." 4 VRP at 260. She testified that Collier sounded "[l]ike he was at wit's end." 4 VRP at 262. The prosecutor asked Bobbie if it appeared that Manley was taking the threat seriously and she replied: "Yes, she took it serious." 4 VRP at 264. Bobbie testified that Collier made two additional calls to her on October 5 and 6 and threatened to kill Manley if she tried to take his kids away.

Elizabeth testified that on October 5, 2016, "he [Collier] called" her mom, Bobbie. 4 VRP at 272-73. Elizabeth testified that Collier "mentioned cutting [Manley's] throat and getting rid of the kids" on the phone call. 4 VRP at 273. Elizabeth did not indicate that Manley was with them at the time they received this call from Collier.

Collier testified but did not call any other witnesses. Collier explained that he had contacted Child Protective Services because he was concerned about S.C.'s care in light of her medical condition.

Collier acknowledged that he had pleaded guilty to felony harassment of Manley in 2015. He confirmed that he had two no contact orders in place. He also confirmed that he threatened to kill Manley. He did so, he said, "[b]ecause I believed that she was not taking the proper steps to take care of my daughter and do what she needed to be doing for her." 4 VRP at 288. Collier also confirmed that he threatened Manley because he wanted to see his daughter.

Collier testified that that Bobbie called him with Manley on the line. He said he did not intend to hurt Manley or follow through with his threats to kill her, but "[i]t was my intent to get her attention." 4 VRP at 289-92.

C. Verdict and Sentence

During deliberations, the jury asked: "Does the [l]aw mandate that the [d]efendant initiated the call?" CP at 71. The court answered that the jury should refer to their instructions. Instruction 10 provided,

> A person commits the crime of telephone harassment when, with intent to harass, intimidate, or torment another, he or she initiates a telephone call threatening to inflict injury on the person called or on any member of his or her family or household and the threat was a threat to kill the person called or any other person.

CP at 97.

The jury found Collier not guilty of felony harassment but found him guilty of telephone harassment as charged in counts 2 and 3. The jury also found him guilty of violation of a no contact order as charged in count 4. By special interrogatory, the jury found Collier, Manley, and their children to be members of the same family or household, relating to the domestic violence designation on each count.

Collier appeals his two convictions for telephone harassment, but not his conviction for violation of the no contact order.

ANALYSIS

I. Evidence of Collier's Prior Conviction for Felony Harassment

The trial court admitted evidence of Collier's prior harassment conviction under ER 404(b). Collier argues that the trial court erred when it did so, thereby denying him a fair trial. We disagree.

ER 404(b) prohibits a trial court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." For

a trial court to admit evidence of other crimes under ER 404(b), our Supreme Court has held that the trial court must:

> "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the [permissible] purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."

State v. Arredondo, 188 Wn.2d 244, 257, 394 P.3d 348 (2017) (quoting *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012)). "This analysis must be conducted on the record, and if the evidence is admitted, a limiting instruction is required." *Arredondo*, 188 Wn.2d at 257. We review each prong of the test for an abuse of discretion. *Id.*

Collier does not dispute that his prior harassment conviction occurred or that the trial court identified a permissible purpose for the admission of his prior conviction, namely, it tended to prove reasonable fear. Accordingly, we need not otherwise address prongs one and two.

Turning to the third prong, the trial court had to determine whether the evidence was relevant to prove an element of the crime charged. *Id.* "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401 (internal quotation marks omitted). The State argued that the evidence of Collier's prior conviction was relevant to prove Manley's state of mind or reasonable fear and Collier's violation of the no contact order. Collier did not contest that the evidence was relevant, but instead argued that it would be unduly prejudicial.

The State bore the burden of proving every element of felony harassment, including the element of "reasonable fear." *State v. Magers*, 164 Wn.2d 174, 183, 189 P.3d 126 (2008). In *Magers*, our Supreme Court recognized that a prior conviction of a crime against the current

victim was clearly admissible to prove the victim's reasonable fear. *Id.* at 181-82. The *Magers* court also concluded that it was "entirely appropriate" to put on evidence regarding entry of the no contact order that the defendant allegedly violated. *Id.*

Here, the State moved to admit evidence of Manley's "reasonable fear," which included Collier's prior guilty plea for felony harassment against Manley in 2015. CP at 2. The State also charged Collier with violating the 2015 no contact order and, therefore, it was appropriate for the State to present the order that arose from his prior conduct. *See Magers*, 164 Wn.2d at 181-82.

Collier relies on Manley's testimony that she was certain that Collier would not harm her. He claims that in light of her testimony, his prior harassment conviction does not make it more or less probable that his threats made in October 2016 placed Manley in reasonable fear.

Nevertheless, Manley's trial testimony does not render the trial court's exercise of discretion to admit his prior convictions for the purpose of addressing "reasonable fear" manifestly unreasonable or untenable. 3 VRP at 38. Objectively, Collier's prior felony harassment of Manley directly bears on the question of her "reasonable fear," despite her later recantation. Others testified to the fear she exhibited shortly after receiving Collier's threats, and his prior conviction had a tendency to make a fearful reaction more probable than it would be absent the prior conviction. We conclude that Manley's trial testimony did not undermine the admission of the prior conviction or establish an abuse of discretion.

Under the fourth prong, the trial court must weigh the probative value of the proffered evidence against its prejudicial effect. *Arredondo*, 188 Wn.2d at 257. On this prong, the trial court concluded that "when I balance the probative value of the evidence against the unfair prejudicial effect, I find that it is probative." 3 VRP at 38. We agree that there is no question

that Collier's prior guilty plea for felony harassment against Manley has a prejudicial effect, but that effect is outweighed by its probative value, especially in light of her conflicting testimony.

Finally, the trial court provided a limiting jury instruction to mitigate prejudice that stated: "You may have heard evidence concerning alleged misconduct by the defendant on dates other than that of the charged incidents. Such evidence may only be considered by you to the extent you find it relevant to the issue of whether Christina Manley had reasonable fear." CP at 93; *see Arredondo*, 188 Wn.2d at 264. Absent evidence to the contrary, we presume the jury followed the trial court's instructions. *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013).

In sum, we hold the trial court did not abuse its discretion when it admitted evidence of Collier's prior conviction under ER 404(b).

II. CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND FREE SPEECH

Collier argues that by excluding evidence of his daughter's death, the trial court violated his constitutional right to present a defense. Specifically, he claims that testimony concerning S.C.'s death was relevant because it had a tendency to show that his statements to Manley were not "true threats," but rather attempts to convince Manley to take better care of S.C. Reply Br. of Appellant at 5. We disagree.

A. Right to Present a Defense

Criminal defendants have a constitutional right to present a defense. U.S. CONST., amends. V, VI, XIV; WASH. CONST. art. I, §§ 3, 22; *e.g.*, *State v. Jones*, 168 Wn.2d 713, 719-20, 230 P.3d 576 (2010). In *Jones*, our Supreme Court reiterated its analysis for determining whether the exclusion of evidence violates a defendant's constitutional right to present a defense. *Id.* The evidence that a defendant desires to introduce "'must be of at least minimal relevance'"

because a defendant has no right to present irrelevant evidence. *Id.* at 720 (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)); *see also State v. Lee*, 188 Wn.2d 473, 479-80, 487-93, 396 P.3d 316 (2017) (starting with a determination of whether the excluded evidence was at least minimally relevant); *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017) (considering first whether the trial court had excluded relevant defense evidence).[3] A defendant must at least make some plausible showing of how the evidence he wants to present would have been both material and favorable to his defense. *State v. Gonzalez*, 110 Wn.2d 738, 750, 757 P.2d 925 (1988).

If the evidence is relevant, the burden shifts to the State to show that the relevant evidence "'is so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622). "The State's interest in excluding prejudicial evidence must also 'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" *Id.* at 720 (quoting *Darden*, 145 Wn.2d at 622). Where evidence is highly probative, it is less likely that it can validly be excluded without violating the constitutional right. *Jones*, 168 Wn.2d at 720-21.

This appeal also involves the overlay of another constitutional right, free speech. *See State v. Tellez*, 141 Wn. App. 479, 482, 170 P.3d 75 (2007). Under the First Amendment, the State can only criminalize "true threats." *Id.* "The existence of a true threat . . . is not an

[3] *See also State v. Blair*, 3 Wn. App. 2d 343, 350-52, 415 P.3d 1232 (2018); *State v. Horn*, 3 Wn. App. 2d 302, 310, 415 P.3d 1225 (2018). Each of these cases offers a slightly different framework for analyzing whether a defendant was deprived of their right to present a defense. But all of the majority and concurring judges participating in those cases agreed that this court should first review the trial court's assessment of relevance for abuse of discretion.

essential element of the crime [of telephone harassment]," but the jury must still be instructed on what amounts to a true threat. *State v. Meneses*, 149 Wn. App. 707, 713, 205 P.3d 916 (2009), *aff'd in part*, 169 Wn.2d 586 (2010). A true threat occurs when "'a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person.'" *Tellez*, 141 Wn. App. at 482 (applying this standard in a telephone harassment case) (alteration in original) (internal quotation marks omitted) (quoting *State v. Kilburn*, 151 Wn.2d 36, 43-44, 84 P.3d 1215 (2004)). Thus, Collier was entitled to argue to the jury that his threats did not rise to the level of true threats.

B. Relevance of S.C.'s Death to the Crimes Charged

The trial court admitted evidence concerning S.C.'s medical condition, including her cerebral palsy and epilepsy, but excluded any evidence concerning her death, concluding it was irrelevant.

We review the trial court's relevancy determination for abuse of discretion. *See Jones*, 168 Wn.2d at 720; *State v. Blair*, 3 Wn. App. 2d 343, 350-52, 415 P.3d 1232 (2018); *State v. Horn*, 3 Wn. App. 2d 302, 310-11, 415 P.3d 1225 (2018). To show a violation of the right to present a defense, the excluded evidence—namely, testimony or other evidence concerning S.C.'s death—must first be relevant. *See Jones*, 168 Wn.2d at 720; *Blair*, 3 Wn. App. 2d at 350-52; *Horn*, 3 Wn. App. 2d at 310-11. There is no constitutional right to present irrelevant evidence. *Jones*, 168 Wn.2d at 720. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Washington courts recognize that there is a low bar for admission of relevant evidence. *Darden*, 145 Wn.2d at 621.

The State argues that Collier's "state of mind was relevant only insofar as it touched on the mental state for" the crimes charged: felony harassment, telephone harassment, and violation of a protection order. Br. of Resp't. at 9-10. As to the statutory elements involving Collier's mental state, we agree that S.C.'s death was not relevant. When the State initially charged Collier, S.C. was alive. Therefore, her later death could not have been minimally relevant to the statutory elements concerning his mental state at the time the crimes were committed.

On appeal, though, Collier's main argument is that evidence of S.C.'s death was relevant insofar as it tends to show that his statements to Manley were not "true threat[s]." Br. of Appellant at 15. He argues that instead they were statements made "out of desperation in an attempt to get [Manley's] attention because of his concern about her inability to care for their children." Reply Br. of Appellant at 5 (internal quotation marks omitted). Thus, Collier argues, he had a right to elaborate on the context in which he made the statements, S.C.'s death was relevant to establishing that his concern for S.C.'s safety was justified, and his distress legitimately motivated his choice of words. We find this argument unpersuasive.

Collier's subjective intent or motivation was irrelevant. "The [true threat] test is an objective one." *Meneses*, 149 Wn. App. at 713. Moreover, it was not an abuse of discretion for the trial court to find the fact of S.C.'s later death was not probative. Collier testified that S.C. had cerebral palsy and epilepsy. He testified that he contacted Child Protective Services because he was concerned about how Manley was taking care of S.C. He also testified that he had no subjective intent to hurt Manley or S.C., but it was his intent to get her attention. Even Manley testified that she was "[o]ne thousand percent" sure that Collier would not hurt her. 4 VRP at

217-18. Considering the testimony presented at trial, S.C.'s later death was not relevant even in light of Collier's theory of the case.

Because Collier has not shown that evidence of S.C.'s later death was relevant, we conclude his constitutional argument fails. The trial court did not abuse its discretion when it found that evidence of S.C.'s later death was not relevant.

III. SUFFICIENCY OF THE EVIDENCE

Collier argues that the State presented insufficient evidence to convict him of felony telephone harassment. We disagree.

A. Standard of Review and Proof of Telephone Harassment

The standard for evaluating the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). In a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.* We defer to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence. *State v. Curtiss*, 161 Wn. App. 673, 693, 250 P.3d 496 (2011). Further, we view circumstantial evidence and direct evidence as equally reliable in evaluating the sufficiency of the evidence. *Id.*

To support a conviction for telephone harassment, the State must prove, among other things, that the defendant initiated the phone call with intent to harass or intimidate the person he was calling, and that the defendant threatened harm or death. RCW 9.61.230; CP at 99 (jury instruction on telephone harassment). Under RCW 9.61.230(1)(c), the State must prove the

defendant threatened to inflict injury on the person called or their household members. Whether the crime is a felony or misdemeanor depends on the nature of the threat. RCW 9.61.230. To support felony telephone harassment, the State must prove that the defendant threatened to kill the victim or any other person. RCW 9.61.230(2)(b).[4]

B. Evidence Proving Collier Initiated the Phone Calls

Collier argues the State failed to prove that he initiated the threatening telephone calls. We disagree.

In *State v. Lilyblad*, our Supreme Court explained that to prove telephone harassment, "[t]he person called must be the same person threatened" and the defendant must have initiated the call to the victim. 163 Wn.2d 1, 8-11, 177 P.3d 686 (2008). Even if someone other than the victim initially answered the phone, the elements of telephone harassment can still be met so long as at the time the defendant placed the call, he intended to reach the victim, and he ultimately communicated the threat to the intended person. *State v. Sloan*, 149 Wn. App. 736, 745, 205 P.2d 172 (2009).

The trial court admitted two audio recordings of calls involving Collier and Manley, which took place on October 5 and October 6. Both of the calls centered on Collier's desire to have visitation and/or custody of their daughter, S.C., who was in Manley's custody. Drawing inferences in favor of the State, a rational trier of fact could have concluded that Collier had a clear motive to initiate the calls to Manley because of his desire to have visitation and/or custody

[4] Collier also argues that the State failed to prove that Collier's threats caused Manley "reasonable fear." Br. of Appellant at 1-2. But "reasonable fear" is not an element of the felony telephone harassment statute. *See* RCW 9.61.230. Thus, the statute did not require the State to prove Manley's reasonable fear to support the telephone harassment convictions.

of their daughter. More importantly, when the State asked Manley at trial if there was a reason that she felt it was necessary to record the specific calls *from Collier*, Manley did not say that anyone other than Collier had placed the calls. Manley adopted the prosecutor's statement that Collier initiated the calls when she answered the State's question. While Collier testified that he did not initiate the calls, the jury was entitled to weigh Manley's and Collier's testimony, evaluate Collier's credibility, and resolve any conflicts in the testimony to determine whether Collier initiated the telephone calls. *See Curtiss*, 161 Wn. App. at 693.

Drawing all inferences in favor of the State, a rational jury could have concluded from the testimony that Collier placed the calls intending to reach Manley.

C. Evidence Proving "True Threats" and Intent to Harrass, Intimidate, or Torment

The trial court instructed the jury consistent with the applicable law that to be a true threat,

> a statement . . . must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement . . . would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP at 101. Collier argues that the State failed to prove beyond a reasonable doubt that he made a "true threat." Br. of Appellant at 20. We disagree.

"The test is an objective one." *Meneses*, 149 Wn. App. at 713. It is difficult to imagine a context in which an objectively reasonable person would not consider Collier's statements to be a serious expression of his intent to carry out the threats. In his calls, Collier uttered multiple specific threats to kill Manley with a gun or knife, bury her in the ground, or have the "street" come after her. Ex. 1; 4 VRP at 212, 251, 295. He repeated other threats of violence should Manley not allow him to see their daughter, despite the no contact order.

Manley's reaction at the time was consistent with the conclusion that Collier's statements were true threats. The State's witnesses testified to the fear Manley exhibited shortly after receiving Collier's threats. Manley took Collier seriously enough that she and her friend recorded the telephone calls, she fled to another county, she checked into a hotel under a different name, and she contacted the police. Collier relies on Manley's trial testimony that she was "[o]ne thousand percent" sure that Collier would not harm her or her children. *Id.* Nevertheless, Bobbie testified that Manley took the threats seriously at the time.

The same evidence supporting the true nature of the threats also supports a finding that Collier intended to harass, intimidate, or torment. Collier admitted that he threatened Manley and their children "to get her attention" because he wanted to see his daughter, reflecting an intent to intimidate. 4 VRP at 289, 291. The serious and specific nature of the threats also supports the necessary finding of intent.

The jury was entitled to weigh the testimony, resolve any conflicts, and draw reasonable inferences. *Curtiss*, 161 Wn. App. at 693. Viewing the evidence in the light most favorable to the State, we conclude that the evidence was sufficient for a reasonable jury to find Collier made true threats beyond a reasonable doubt. We also conclude that there was sufficient evidence to prove that Collier intended to harass, intimidate, or torment, regardless of Manley's statement at trial that she was not afraid.

IV. CUMULATIVE ERROR

Collier argues that cumulative error deprived him of a fair trial. We disagree. Based on the analysis above, we find no error that entitles Collier to relief. Therefore, there was no

cumulative error. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (cumulative error doctrine applies only where combined errors deny a defendant a fair trial).

CONCLUSION

We affirm Collier's convictions for telephone harassment. The trial court did not abuse its discretion when it admitted evidence of Collier's prior conviction under ER 404(b) or when it found that evidence of S.C.'s later death was not relevant. Moreover, the State presented sufficient evidence to prove Collier made "true threats" and that Collier initiated the telephone calls to Manley and threatened to kill her with intent to harass, intimidate, or torment.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Worswick, J.

Maxa, C.J.

THE TILLER LAW FIRM

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