

68568-6

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NO. 68568-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN W. BRADFORD,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The defendant claims the stalking statute is unconstitutionally overbroad because it includes within its scope the sending of text messages. Should this Court reject this claim because the statute prohibits only communications (of any type) sent with the intent to harass?

2. The defendant claims the stalking statute is unconstitutionally vague because persons do not know what is constitutionally protected under the First Amendment. Should this Court reject the defendant's vagueness challenge because every statute must conform to the First Amendment (and other constitutional provisions)?

3. Should this Court reject the defendant's claim that no reasonable judge would have admitted text messages purportedly sent by the defendant and intended to be received by the victim?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with two counts of felony stalking (counts I and IV), two counts of violation of a no-contact order (counts II and III), violation of an anti-harassment order (count V), driving under the influence (count VI), hit and run

(count VII), and reckless endangerment (count VIII). CP 11-14. A jury found the defendant guilty as charged on all counts except count III, a charge that was dismissed upon motion of the State. CP 43-46, 48-52. The defendant received a standard range sentence of 13 months on the two felony stalking charges. CP 134. He received suspended sentences on the other non-felony convictions. CP 139.

2. SUBSTANTIVE FACTS

Vanida Vilayphone lives with her husband, Ron Mason, in the 2500 block of Nob Hill Avenue North on Seattle's Queen Anne Hill. 4RP¹ 71; 5RP 6. Vanida and Ron met in early 2006 and were married later that year. 4RP 72.

In early 2007, Vanida met the defendant through her good friend, Rose Smith. 4RP 73. The defendant had worked with and was friends with Rose, and he happened to join the two women one evening at a restaurant. 4RP 73.

During this time period, Vanida was having marital problems that she confided in with the defendant. 4RP 75. The two started

¹ The verbatim report of proceedings is cited as follows: 1RP—2/13/12, 2RP—2/14 & 2/15/12, 3RP—2/16/12, 4RP—2/21/12, 5RP—2/22/12, 6RP—2/23/12, 7RP—2/28/12, 8RP—2/29/12, 9RP—3/1/12 (closing), 10RP—3/1/12 (verdicts), 11RP—3/5/12, 12RP—3/30/12.

talking on the phone regularly, and a year later, by the beginning of 2008, the two began having an affair. 4RP 75.

Later, around the middle of 2009, Vanida tried to end her relationship with the defendant. 4RP 79. She repeatedly told him that what they were doing was wrong, that she wanted to work on her marriage, and that she did not want to see him anymore. 4RP 79. Defiantly, the defendant would not take no for an answer. Id. At times he would just ignore her when she would tell him it was over, acting as if she had not even said anything. 4RP 79.

Vanida was forced to change her cell phone number—twice, but this did not deter the defendant. 4RP 80; 5RP 128. He would call her work 10 to 20 times a day and harass her. 4RP 81. He also repeatedly showed up at her work, forcing Vanida to hide in the manager's office. 4RP 81, 87. Vanida ultimately had to quit her job because of the defendant's harassing behavior. 4RP 87.

In October of 2009, Vanida and Rose flew to London to attend Rose's sister's funeral. 4RP 82. Somehow the defendant was able to track Vanida down by contacting Rose's family. 4RP 83. The defendant called Vanida in London, crying, telling her he loved her, complaining that she had not called him, and asserting that she did not love him anymore. 4RP 83.

When Vanida returned from her trip to London, the defendant continued to try to contact her, now using Rose as a conduit. 4RP 85. This continued throughout 2010, with the defendant sending text messages to Rose and asking her to forward them to Vanida. 4RP 88. In the text, the defendant stated variously that he would hurt someone or burn his own house down with him inside if Vanida did not call him. 4RP 88. He also threatened to distribute to family members and neighbors a sex tape of the two of them. 4RP 88. He then left a copy of the sex tape on Ron's car in May of 2010. 5RP 122-23. It was around this time that Vanida told Ron all about her affair with the defendant. 5RP 123.

In addition to the above conduct of the defendant, Vanida and Ron began seeing the defendant outside their home, driving by 15 to 20 times a day, sometimes until 2:00 or 3:00 in the morning. 4RP 88-89. This behavior continued throughout 2010, with Vanida fearing for her life, suffering anxiety attacks, and feeling like she was a prisoner in her own home. 4RP 96.

Ron and Vanida talked about calling the police, but Vanida kept hoping that over time, the defendant would stop his obsessive behavior. 4RP 103. Vanida also felt very ashamed and

embarrassed at what had happened. 4RP 158. On December 5, 2010, copies (at least five) of the sex tape were placed on a number of cars in Vanida's neighborhood. 4RP 98-102; 6RP 106-10. On the outside of each envelope was written, "Happy Holidays," and inside was a DVD with a handwritten note with Vanida's name and her address on it. Id.

On December 30, 2010, Vanida obtained an anti-harassment order against the defendant. 4RP 104; 8RP 87. However, even after being served with the order, the defendant's stalking behavior continued throughout January of 2011. 4RP 106. He continued to try and contact Vanida by sending text messages to Rose, and he continued to drive by Vanida's house—sometimes parking his car on the street overnight. 4RP 106-07. In his messages, he indicated that it was a life and death situation, and that Vanida must call him. 4RP 108. Vanida called the police multiple times over the course of the month. 4RP 108.

One officer alone responded to Vanida's home in January of 2011 at least five times, with the officer noting that there were at least ten other reports taken in the month. 7RP 151-52. In the month of January, Rose Smith forwarded to Vanida the following text messages sent by the defendant:

On January 10, 2011, on Vanida's phone were the following text messages: "Have Vanida call me, please," "I know she's with you and all I am asking is for her to call me. I need to tell her a few things before it's all over," and "Would you please ask Vanida to call me. I really need to talk to her before it's too late." 7RP 135.

On January 15, 2011, the defendant texted "By the way, the video is getting distributed to neighbors." 7RP 139.

On January 16, 2011, the defendant texted, "Have Vanida check her Yahoo account," "Have Vanida give me a call, please, It is a life or death emergency. I know you have been passing my messages to her so you can pass this," and "I said it was life or death. Well, boom," followed by "smell gas? So do I." 7RP 141-43.

On January 20th of 2011, just days after the threatening text about an explosion, a UPS package was left on Vanida's front door addressed to her and sent by the defendant. 4RP 109; 6RP 24; 7RP 146-47. Fearing the package might contain a bomb, Ron and Vanida called the police. 4RP 109. After the package was x-rayed and subsequently opened by the police, it was found to contain a bottle of wine and a love letter from the defendant. 4RP 110; 6RP 26; 7RP 148.

On January 22, 2011, officers staked out Vanida's home in the hopes of capturing the defendant. 7RP 149-50. At approximately 9:15 that evening, the defendant was spotted driving past Vanida's house. 4RP 110; 7RP 154-57. He was then placed under arrest. Id.

On April 12, 2011, the defendant pled guilty to two counts of violation of an anti-harassment order and one count of stalking, for his actions in stalking Vanida in January of 2011. 8RP 87. From his arrest on January 22, 2011, until May 23, 2011, the defendant was unable to send text or e-mail messages to Rose or Vanida. 8RP 87.

On April 12, 2011, a no-contact order was entered prohibiting the defendant from having any contact with Vanida through April 12 of 2016. 3RP 4-5, Trial Exhibit 4. On that same date, an anti-harassment order was entered prohibiting the defendant from having any contact with Rose Smith through April 12 of 2016. 3RP 6, Trial Exhibit 5.

On June 24, 2011—during the current charging period (June 17 through July 23), Vanida was at a downtown restaurant/bar when the defendant walked in, approached her, and professed his love for her. 4RP 112. He left after Vanida threatened to call the

police. 4RP 114. This was shortly after the defendant was released from jail and a week after the defendant had appeared at the same bar when Vanida was present. 4RP 112-13.

After these two incidents, Vanida began to receive a number of text messages from the defendant via Rose. 4RP 115. On July 4th alone, she received five or six messages, all threatening that someone would get hurt if Vanida did not call him. 4RP 115-16. The texts also disclosed the home and work locations of Vanida's sister and brother. 4RP 117.

A forensic "phone dump," was conducted of Rose Smith's phone. 3RP 10. A phone dump transfers the information stored on a person's phone to a computer where it can be printed out. 3RP 10, 12, 61-63; see Trial Exhibit 8 (a 12 page condensed version of the texts from the defendant). The text messages Rose believed were sent by the defendant and recovered in the phone dump are as follows: 3RP 64, 68.

(1) Have her call me. I know about her and the bartender from Karma. I don't hate either you guys. I know I have brought on myself. June 28, 2011.

(2) Don't worry I will settle all of it in the next day or so! Thank you and yave [sic] a good night. June 28, 2011.

(3) Rons [sic] going to know that she went to his house instead of yours you know that right? It isn't that hard to figure out. June 28, 2011.

(4) It has always been a shame with her and you. It's a sad twist of affairs and it shouldn't have been. She was never honest with me, him or anybody. June 28, 2011.

(5) You need to guess who this is and yes it is the truth about her and the karma bartender. We all three know that's the truth. June 28, 2011.

(6) Who? And why am I doing this? Answer the first question and I will answer the second. June 28, 2011.

(7) Ok then have her meet me at gasworks to talk about things. June 28, 2011.

(8) I need an answer. June 28, 2011.

(9) Why is she doing this? I need answer. June 28, 2011.

(10) Hello? I need a reply. June 28, 2011.

(11) I just want to let everyone know that I am not mad and that I am sorry for everything that happened. I didn't know that I was making everyone scared. June 30, 2011.

(12) I am not mad at anyone and I am sorry for all the stress I caused. By doing what she did she destroyed my life. I just need to correct things. July 2, 2011.

(13) I never hurt anyone or ever would so I don't understand why she did what she did or wouldn't try to help me because that is all I asked for. July 2, 2011.

(14) I know that she is seeing the bartender from karma and that is sad because she was seeing him before we broke up. July 2, 2011.

(15) She used it to have me put where she did and all I asked for is honesty. I, you and she know the truth and she should tell ron [sic]. July 2, 2011.

(16) Last chance go reply. July 5, 2011.

(17) No other chance than today! July 5, 2011.

(18) Sorry but its [sic] true. July 5, 2011.

(19) Done did done. I told you its [sic] her and you I would send it to her family. July 5, 2011.

(20) I need to talk. July 6, 2011.

(21) She needs to call me tonight. July 6, 2011.

(22) So are you going to have her call me? I am sure that she shouldn't be that hard to get a hold of to ask, right? July 8, 2011.

(23) I guess the question should be Renton or SeaTac? July 8, 2011.

(24) I thought I asked her to call and I am still waiting. I really don't want to have to go to the next step. I am trying to be nice n [sic] make things right. July 9, 2011.

(25) She should call me tonight. Like now. July 10, 2011.

The defendant was finally arrested on July 23, 2011—just after Vanida received more texts, this time disclosing the location of her parents' home. 4RP 119, 121. At 2:20 in the morning, officers were dispatched to Vanida's home after receiving a 911 call from Ron Mason that the defendant was parked outside of his home. 5RP 19; 6RP 38. Ron was in bed when he heard a car door,

looked out the window, and saw the defendant's car parked diagonally in the middle of the street. 6RP 34. After calling 911, Ron went outside and pulled his truck into the road and stopped. 6RP 49. The defendant then drove his car down the street and rammed Ron's car. 6RP 49. He then backed up and rammed Ron's car again. 6RP 51. He then turned his car around and fled from the scene, striking at least six other vehicles on the way. 6RP 52; 7RP 69.

In his attempt to flee the scene, the defendant t-boned Officer Richard Bonesteel's patrol car as he was responding to the scene. 5RP 91; 6RP 62. Fire was called to check out the defendant and attend to a small laceration on his head. 5RP 31, 33. The defendant was intoxicated and resisted attempts to treat him. 5RP 31, 33. Taken to Harborview, the defendant refused to even give his name, and he had to be placed in restraints because he was so combative. 5RP 42-44. When a blood draw was attempted, the defendant began thrashing violently and started slamming his head against objects requiring that he be sedated. 5RP 47. The defendant's blood alcohol level—some 3 1/2 hours after he collided with the patrol car, was .20 grams per 100

milliliters of blood—two and a half times the legal limit to drive.

7RP 27, 38, 49; 8RP 49.

The defendant did not testify. Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE STALKING STATUTE DOES NOT PROHIBIT CONSTITUTIONALLY PROTECTED SPEECH.

The defendant contends that the stalking statute, RCW 9A.46.110, is constitutionally overbroad because—he asserts—the statute penalizes the sending of text messages—a form of protected speech. The defendant is mistaken. By inclusion of the *mens rea* element of intent to harass, the stalking statute does not prohibit any constitutionally protected speech, let alone a substantial amount of constitutionally protected speech required to find a statute facially overbroad and unconstitutional.

a. The Statute.

In pertinent part, a person commits the crime of stalking if, without lawful authority:

(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).

b. The Statute Is Not Overbroad.

The constitutionality of a statute is an issue of law that is reviewed de novo. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 114, 937 P.2d 154 (1997). In certain circumstances, a law may be overbroad if it sweeps within its prohibitions constitutionally protected free speech activities. Thornhill v. Alabama, 310 U.S. 88, 97, 60 S. Ct. 736, 84 L. Ed. 1093 (1940); City of Seattle v. Eze, 111 Wn.2d 22, 31, 759 P.2d 366 (1988). A statute regulating behavior and not pure speech will not be overturned unless the overbreadth is both real and substantial in relation to the statute's legitimate sweep. Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). A statute will be overturned only if the court is unable to place a sufficiently limiting construction on a

standardless sweep of legislation. City of Tacoma v. Luvone, 118 Wn.2d 826, 840, 827 P.2d 1374 (1992). Under the First Amendment overbreadth doctrine, a law may be invalidated on its face only if the law is “substantially overbroad.” City of Houston v. Hill, 482 U.S. 451, 458, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).

In determining overbreadth, “a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.” Hill, 482 U.S. at 458. The stalking statute does not reach any protected speech.

Certain categories of pure speech, such as libel, child pornography, fighting words and true threats, are by their very nature constitutionally unprotected because the speech is of such slight social value in relationship to the clear social interest in order and morality. State v. E.J.Y., 113 Wn. App. 940, 948-49, 55 P.3d 673 (2002) (citing Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)). These words “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Chaplinsky, 315 U.S. at 572. But this is not the only type of speech that is unprotected, as the defendant seems to assume in his argument. As the Supreme Court has

held, where there is a *mens rea* of an evil intent, otherwise protected speech is left unprotected by the First Amendment.

In Virginia v. Black,² the United States Supreme Court was asked to rule on a First Amendment challenge to Virginia's cross-burning statute. As the Court noted, cross-burning has long been used to convey a message—repugnant as it may be, and that cross-burning by itself, is protected speech under the First Amendment. Black, 538 U.S. at 360. But this finding did not end the Court's inquiry. The Court added that "[t]he protections afforded by the First Amendment...are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution." Id. at 358.

The Virginia cross-burning statute did not ban all cross-burning. This would have been unconstitutional because it would have banned cross-burning intended only to send a political message or make a particular statement. Id. at 365. Rather, Virginia's cross-burning statute banned only cross-burning done "with intent to intimidate." Id. at 362. With the inclusion of the

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

mens rea element of intent to intimidate, the Supreme Court held that the speech banned under the statute was removed from any First Amendment protection. Id. at 362-63. “A ban on cross burning carried out with the intent to intimidate is fully consistent with R.A.V.[³] and is proscribable under the First Amendment.” Id. at 363.⁴

The defendant does not address this point. Instead, he bases his argument on the faulty premise that all communication by text messaging is banned under the statute—it is not. The statute does not prohibit any constitutionally protected speech. Rather, it prohibits only communications wherein the perpetrator possesses an intent to harass. Under Black, supra, the inclusion of the requirement that the perpetrator acts with an intent to harass

³ Referring to R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). In R.A.V., the Court struck down an ordinance that banned certain symbolic conduct, including cross-burning, because the ordinance imposed “special prohibitions on those speakers who express views on disfavored subjects.” Black, at 361 (citing R.A.V., 505 U.S. at 391). The ordinance did not contain a *mens rea* element that required that the person intend to inflict any type of harm, fear or harassment. R.A.V., at 380.

⁴ The convictions before the Court in Black were ultimately vacated due to an unconstitutional legal presumption that was contained in another subsection of the Virginia cross-burning statute—a presumption that was included in the jury instructions. The legal presumption permitted a jury to find that any cross-burning was necessarily done with the intent to intimidate—even if the cross-burning was done for political or ideological reasons. This presumption, the Court held, could create situations where First Amendment protected speech was criminalized. Black, at 363-64.

resolves the First Amendment issue. As the Supreme Court has stated, the “United States Constitution does not create a right for any person to interfere with the rights of other persons.” State v. Lee, 135 Wn.2d 369, 390, 957 P.2d 741 (1998) (citing United States v. Guest, 383 U.S. 745, 768, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966)).⁵

This is consistent with how courts of this state have repeatedly ruled in other cases involving overbreadth First Amendment challenges to similar type statutes. For example, this Court faced an overbreadth First Amendment challenge to the telephone harassment statute that makes it unlawful to call “another person with intent to harass, intimidate, torment or embarrass ... such other person.” State v. Alexander, 76 Wn. App. 830, 832-33, 888 P.2d 175 (citing RCW 9.61.230), rev. denied, 127 Wn.2d 1001 (1995). Noting the plethora of cases that have rejected such challenges because the statutes in question contained “a specific intent requirement [that] sufficiently narrowed the laws’

⁵ In Lee, the Court upheld a prior version of the stalking statute from an overbroad and vagueness challenge where the defendant argued that the statute impacted constitutionally protected conduct.

proscriptions," this Court held that the intent to harass element of the telephone harassment statute defeated any First Amendment overbreadth challenge. Id. "[H]arassment," this Court stated, "is not a protected speech." Alexander, at 837 (citing State v. Dyson, 74 Wn. App. 237, 244, 872 P.2d 1115, rev. denied, 125 Wn.2d 1005 (1994), quoting Thorne v. Bailey, 846 F.2d 241, 243 (4th Cir.), cert. denied, 488 U.S. 984 (1988)).⁶

Finally, even if the stalking statute did infringe upon some constitutionally protected speech, the statute is not facially overbroad. A statute regulating behavior and not pure speech will not be overturned unless the overbreadth is both real and substantial in relation to the statute's legitimate sweep. Broadrick v. Oklahoma, supra. The Legislature enacted the entire harassment/stalking statutory scheme with the purpose of

⁶ See also City of Seattle v. Webster, 115 Wn.2d 635, 642, 802 P.2d 1333 (1990) (the inclusion of a specific intent element to Seattle's pedestrian interference ordinance saved it from being unconstitutionally overbroad); Seattle v. Slack, 113 Wn.2d 850, 784 P.2d 494 (1989) (prostitution loitering ordinance upheld because it required a specific intent element to engage in specific acts); State v. Billups, 62 Wn. App. 122, 813 P.2d 149 (1991) (criminal attempt statute not overbroad because it requires a specific intent); see also State v. Strong, 167 Wn. App. 206, 219-20, 272 P.3d 281, rev. denied, 174 Wn.2d 1018 (2012) ("when the threat is a part of verbal and other conduct whose criminal punishment can be justified independent of the speech, the wrong, collectively, is not guaranteed protection from criminal punishment").

protecting persons from serious personal harassment and invasion of their fundamental right to privacy. Lee, 135 Wn.2d at 390-91.⁷

“Personal rights,” are “found in the guaranty of privacy are fundamental to or implicit in the concept of ordered liberty.” Id. at 391. To this end, “[i]f the right to privacy offers any protection, that protection must include the right to be left alone.” Id. “In the case of stalking,” the Supreme Court has held, “the State has a legitimate interest in restraining harmful conduct. It may do so under the police powers...in protecting privacy interests of a segment of society from invasive oppressive behavior and harmful conduct.” Id. at 391-92. Whatever minor intrusion into the area of the First Amendment that may exist under the statute, it is not real and substantial in relation to the statute’s legitimate sweep.

⁷ The legislature stated its intention as follows:

The legislature finds that the 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. The legislature further finds that the protection of such persons from harassment can be accomplished without infringing on constitutionally protected speech or activity.

RCW 9A.46.010.

2. THE STALKING STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

The defendant contends that the stalking statute is unconstitutionally vague because a person would have to wonder whether or not his or her actions were constitutionally protected. This claim should be rejected. This would be true of every statute, and it is not the test for vagueness.

Statutes are presumed to be constitutional. Eze, 111 Wn.2d at 26. A party challenging a statute's constitutionality on vagueness grounds bears the heavy burden of proving its vagueness beyond a reasonable doubt. Id. A statute is void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). But the "vagueness test does not require a statute to meet impossible standards of specificity." Anderson v. City of Issaquah, 70 Wn. App. 64, 75, 851 P.2d 744 (1993). It is sufficient if the statute provides adequate notice of prohibited conduct and prevents arbitrary, discretionary enforcement. Haley, 117 Wn.2d at 739-40. In short, "[w]hat is

forbidden by the due process clause are criminal statutes that contain no standards and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.” City of Bellevue v. Lorang, 140 Wn.2d 19, 31, 992 P.2d 496 (2000) (citing State v. Maciolek, 101 Wn.2d 259, 267, 676 P.2d 996 (1984)).

Here, in order to prevail, the defendant must prove, beyond a reasonable doubt, that a person of common intelligence could not understand that when a perpetrator “intentionally and repeatedly harasses or repeatedly follows another person,” and where the perpetrator intends, knows or reasonably should know that the victim “is afraid, intimidated, or harassed” that the perpetrator would not understand that his actions are illegal. These are the elements of the crime and a person of common intelligence would not have to guess what actions are proscribed by the statute.

However, the defendant does not base his argument on the elements of the crime. Rather, the defendant bases his vagueness argument on a sentence contained in a definition of one of the elements.

Under the harassment statute, the term “harasses” “means unlawful harassment as defined in RCW 10.14.020.” RCW 9A.46.110(6)(c). “Unlawful harassment” means:

a knowing and willful **course of conduct** directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The **course of conduct** shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

RCW 10.14.020(2) (emphasis added). “Course of conduct” is then defined to mean:

a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. “Course of conduct” includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication, but does not include **constitutionally protected free speech**. **Constitutionally protected activity** is not included within the meaning of “course of conduct.”

RCW 10.14.020(1) (emphasis added).

The defendant contends that the inclusion of the phrases “constitutionally protected free speech” and “constitutionally protected activity,” leaves the statute unconstitutionally vague because what speech is protected by the First Amendment has been the “subject of considerable litigation and scholarly debate

since its [the First Amendment's] ratification.” Def. br. at 14. But this claim is nonsensical. The fact that the stalking statute includes in its provisions a statement that the statute must comply with constitutional provisions does not make the statute unconstitutionally vague. Every statute implicating speech would be unconstitutional under the defendant’s argument—regardless of whether or not the statute contained the language challenge here, because every statute must comport with the constitution. Under the statute, it is difficult to conceive of a situation wherein a perpetrator could engage in an act with the specific intent to harass his victim, and that a person of common intelligence would not understand that the actions are proscribed. And yet, for a statute to be found unconstitutionally vague, its terms must be “so loose and obscure that they cannot be clearly applied in any context.” City of Spokane v. Douglass, 115 Wn.2d 171, 182, n.7, 795 P.2d 693 (1990). The defendant’s argument has no merit.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TEXT MESSAGES PURPORTEDLY SENT BY THE DEFENDANT.

The defendant contends that the trial court erred in finding that the minimal foundational prerequisite for admitting the multitude of text messages purportedly sent by the defendant had been met.

Specifically, he claims that the texts were not sufficiently “authenticated or identified.” This claim is without merit. The trial court did not abuse its discretion in finding that the texts were exactly what they were purported to be, text messages from the defendant.

a. The Minimal Prerequisite Of Authentication And Identification.

The authentication and identification prerequisite for admissibility of evidence under ER 901 is minimal and quite simple: “authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). The proponent of the evidence need only make a *prima facie* showing of authenticity. State v. Payne 117 Wn. App. 99, 108-09, 69 P.3d 889 (2003), rev. denied, 150 Wn.2d 1028 (2004). This minimal bar is met if there is sufficient proof for a reasonable fact-finder to find in favor of authenticity. State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984). In making this preliminary determination, the court considers only the evidence offered by the proponent and disregards any contrary evidence offered by the

opponent. Rice v. Offshore Systems, Inc., 167 Wn. App. 77, 86, 272 P.3d 865, rev denied, 174 Wn.2d 1016 (2012). Contrary arguments go to the weight rather than to the admissibility of the exhibits in question. State v. Tatum, 58 Wn.2d 73, 76, 360 P.2d 754 (1961).

The trial court is not bound by the rules of evidence in making this preliminary admissibility determination. State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007) (citing ER 104(a)). The trial court may rely on lay opinion, hearsay, or any other evidence supporting the proponent's position. Id. While the court must find the evidence reliable, the evidence supporting admissibility need not itself be admissible. Id. For example, a sound recording does not need to be authenticated by any witness who has any personal knowledge of the events of the recording. Rather, a trial court could simply listen to the recording and determine admissibility based on a comparison of the voice to a known voice, or by the content of the conversation on the recording. Id.; Danielson, 37 Wn. App. at 471-72 (the content of a communication, such as a declarant's message in a communication, can be used and may alone be

sufficient to prove authentication). As the Williams court aptly put it, “the trial court may consider any information sufficient to support the *prima facie* showing that the evidence is authentic.” Williams, 136 Wn. App. at 501.

b. Standard Of Review And Argument.

The trial court’s decision to admit evidence is a discretionary determination. State v. Brown, 132 Wn.2d 529, 570, 940 P.2d 546 (1997). The decision will not be reversed absent an abuse of discretion, a standard met only upon a showing that no reasonable person would have taken the position adopted by the trial court. Id.; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

c. The Court’s Determination.

Here, there were a plethora of text messages admitted that were sent both within the charging period and prior to the charging period, the later messages deemed relevant and admissible pursuant to ER 404(b). See CP 70; CP ____, sub # 45. In terms of foundational requirements for the admission of the text messages, the defendant’s only objection was that the State had to prove the messages were actually from the defendant and the best evidence

rule.⁸ 1RP 24-25, 28-38; 2RP 25-33, 134-51. A myriad of evidence supported the trial court's conclusion.⁹

The defendant was having an affair with Vanida that was called off by Vanida to the dismay of the defendant. Over the course of the next few years, the defendant would follow Vanida, show up at locations she was present, would go to her work, would park outside her house, and would drive by her house sometimes as much as 15 to 20 times a day. It takes no stretch of imagination to presume that the text messages sent during the same time period demanding that Vanida call were from the defendant.

⁸ Any other arguments on appeal are waived. For example, the defendant seems to suggest that the State was required to provide some type of scientific evidence on the workings of cell phones and transmission of text messages. The defendant states that Tegland suggests text messages are authenticated pursuant to ER 901(b)(9), a rule pertaining to a "process or system." Def. br. at 18. In actuality, Tegland states that Washington does not have any special rules regarding text messages and that "[f]or purposes of the rules of evidence, these communications [e-mails and text messages] are treated the same as any other writing." 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 910.23 at 21 (5th ed. Supp. 2012). Consistent with the arguments made below, and in the State's response, Tegland, citing State v. Thompson, states that most jurisdictions require only that evidence support a finding of authenticity. Id. (citing State v. Thompson, 2010 ND 10, 777 N.W.2d 617 (N.D. 2010) (rejecting arguments for a more rigorous or new test regarding e-mails or text messages)). In any event, any attempt to create or apply some new rule has been waived as this was not the basis of the objection below. A party may only assign error in the appellate court on the specific ground of the evidence objection made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985). An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. Id. An objection must be sufficiently specific to inform the trial court and opposing counsel of the basis for the objection and to thereby give them an opportunity to correct the alleged error. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

⁹ No issue has been raised under the "best evidence rule."

Additionally, reference is made to a sex tape, a tape that presumably only two people knew about—Vanida and the defendant. In conjunction therewith, shortly after text messages were sent indicating that the sex tape would be distributed, copies of the tape—presumably a tape that only the defendant possessed—were left on cars in Vanida's neighborhood.

There were additional strong indicators present as well. For example, the text messages stopped when the defendant was in jail, having been arrested in January and released just prior to the current charging period. 8RP 87. Then, after the defendant was released from jail, he located and contacted Vanida twice at a downtown bar (one time professing his love for her), and the text messages started up yet again. Additionally, some of the text messages actually came from a specific address that was identified as a known address of the defendant. 4RP 49. And both Rose Smith and Vanida testified that the text messages were from the defendant. 3RP 119, 128-29; 4RP 27-56, 106, 108, 115, 152.

While the defendant may disagree with the trial court's determinations, that is not the standard. See State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004) (While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the

standard). What the defendant must prove is that no reasonable person would have taken the position adopted by the trial court and found that the messages were what they were purported to be, text messages from the defendant. Brown, at 570.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 19 day of February, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sarah Hrobsky, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BRADFORD, Cause No. 68568-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington

02-19-13

Date