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March 14, 2016  
Court of Appeals  
Division I  
State of Washington

No. 73755-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE KING,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Robert King was punished twice for the same offense of cyberstalking, in violation of the Double Jeopardy Clause.

2. Mr. King's multiple convictions encompassed the same criminal conduct for offender score purposes.

3. Mr. King received ineffective assistance of counsel due to his attorney's failure to argue his convictions encompassed the same criminal conduct.

4. Given Mr. King's established indigency, this Court should not impose appellate costs if the State substantially prevails.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Double Jeopardy Clause protects a person from being punished more than once for committing only a single "unit of prosecution" of a crime. The unit of prosecution for the crime of cyberstalking is each electronic communication, sent with the requisite intent and containing a threat to inflict injury on the recipient or any member of her family. Here, Mr. King allegedly sent a single text message containing a threat to inflict injury on the recipient's two daughters. Although Mr. King's alleged action amounted to only a single unit of prosecution, he was convicted twice for cyberstalking.

Do Mr. King's two cyberstalking convictions violate the Double Jeopardy Clause?

2. Multiple convictions encompass the "same criminal conduct" for offender score purposes if they occur at the same time and place, are committed against the same victim, and involve the same objective criminal intent. Here, Mr. King received multiple convictions after he allegedly engaged in a single, ongoing course of stalking and harassment, committed against the same person over a three-day time period, and performed with the same objective intent to harass. Did the multiple convictions encompass the same criminal conduct for offender score purposes?

3. If multiple offenses were part of a single course of conduct and involved the same victim, and a sentencing court could find they were committed with the same objective criminal intent, counsel's failure to argue same criminal conduct amounts to ineffective assistance of counsel. Here, Mr. King's multiple convictions encompassed the same criminal conduct but his attorney did not raise the issue at sentencing. Did Mr. King receive ineffective assistance of counsel in violation of the Sixth Amendment?

4. Given that the trial court found Mr. King is indigent and his indigency is presumed to continue throughout review, should this Court disallow appellate costs if the State substantially prevails?

C. STATEMENT OF THE CASE

Robert King and Bridgette Penter had a romantic relationship that lasted for a few months. RP 186-87. Mr. King lived with Ms. Penter in her house in Bellingham during the latter part of 2014. RP 190-93. On December 27, 2014, Mr. King left the house, saying he was going out to run an errand. RP 195. He never returned. RP 195.

Early on the morning of January 6, 2015, Ms. Penter received a series of text messages from Mr. King's phone. RP 198. In the messages, Mr. King asked her to return some of the things he had left at her house. RP 198. Ms. Penter did not have time to gather the things he asked for, as she was busy getting ready for work. RP 199. She told him she would put his things outside when she returned home from work later that day. RP 199.

Ms. Penter continued to receive text messages from Mr. King's phone while she was at work. RP 199. At around 9:15 a.m., she called the police because she thought the messages were becoming threatening. RP 199. The police told her to go home and set Mr.

King's things outside so that he could pick them up, which she did. RP 199-200. Mr. King came and picked up his things. RP 200.

Throughout that day, Ms. Penter continued to receive messages from Mr. King's phone that she felt were threatening. RP 204-11.

While she was still at work, and before she set his things outside, he sent a message, "I'm here now really don't have time for this you win let's see who can f\_\_\_ off who." RP 205; Exhibit 9. At 9:43, she received a text, "Watch what happens now." RP 206; Exhibit 12.

Later, at around noon, she received a message, "I watch him go in and come out." RP 207; Exhibit 14. She thought Mr. King was referring to a male friend who had spent the previous night at her house. RP 205.

At around 3:40 p.m., she received a message, "so like this nigga car getting shot up." RP 208; Exhibit 15. This time, she thought Mr. King was referring to a different friend who was at her house at that time.

RP 208. At 5:33 p.m., she received a message, "Dumb nigga I know what he drive." RP 208; Exhibit 16. Soon after, she received a text calling her a "hoe." RP 208; Exhibit 17. Then she received a text,

"Lead bullets alone a spoon [sic] to come shoot that mother f\*\*\*\*\* about 45 minutes." RP 209; Exhibit 18.

Ms. Penter received several more text messages the following day. At around 6:45 a.m., she received a text that said, “You going to tell me the truth or it get real bad I know everything you family kids all tell me or it gets real bad.” RP 216; Exhibit 29-30. According to Ms. Penter, Mr. King had accused her throughout their relationship of cheating on him with a friend. RP 207. At 6:52 a.m. that day, she received a text that said, “If anyone come in or out that house I’m shooting.” RP 217; Exhibit 31. About a half hour later, she received a text, “Be f\_\_\_ up to lose everything over lies.” RP 217; Exhibit 32.

Soon after, while Ms. Penter was at work, she received a message, “I’m throwing rock though [sic] window for that.” RP 218; Exhibit 34. A few minutes later, she received another message, “I’m giving you the choice of what when do you want me to break.” RP 219; Exhibit 35. Ms. Penter was worried about her house, so she returned home and called the police again. RP 218. When she got home, though, she saw nothing had happened to her house. RP 219.

At around 8:30 a.m., Ms. Penter received a text that said, “I’m going to do something if you don’t start being real with me.” RP 219; Exhibit 36. At 9:40 a.m., she received a text, “Snicth [sic] tell truth now.” RP 219; Exhibit 37. About an hour later, she received another

text, “You talkin to police.” RP 220; Exhibit 39. The police had just left her house. RP 220.

Ms. Penter continued to receive text messages throughout the day that she found concerning. At 11:17 a.m., she received a text, “You had dude over f\_\_\_ you talking about you keep pissing you off [sic] going make me do something.” RP 220; Exhibit 40. Soon after, she received a text, “I’m coming there with gun now tell me.” RP 220; Exhibit 42. A couple minutes later, she received the message, “I want truth I’m on your street now.” RP 221; Exhibit 43. Then, “I have gun play with me.” RP 221; Exhibit 44. Ms. Penter responded with texts saying she had never lied or cheated on Mr. King. RP 221.

That day, Ms. Penter received a message she believed amounted to a threat to harm her daughters. Ms. Penter had two adult daughters, one named Ona, whom Mr. King had met briefly, and Skylar, whom Mr. King had never met. RP 223-24. Her daughter Ona worked at a hospital. RP 223-24. At 2:21 p.m., Ms. Penter received a message that said, “Because I can’t get you, I’ll go after your daughters, your mother, your friends to play with my mother f’er crazy dude. Don’t mother f’er. Crazy dude. Don’t b\*\*\*\*.” RP 221-22; Exhibit 47, 48. At 3:39 p.m., she received a text that said, “You girls gone get rape and

die bitch.” RP 223; Exhibit 52. A few minutes later, a text came in that said, “Ok watch call val and see ask her if I’m go after kids.” RP 223; Exhibit 53. Ms. Penter assumed “val” referred to Mr. King’s wife whose name was Val. RP 223. A few minutes later, Ms. Penter received a text that said, “Say that to on a [sic] in Hospital.” RP 223; Exhibit 54. Ms. Penter assumed Mr. King was referring to Ona because she worked at a hospital. RP 223-24.

Ms. Penter called the police again. RP 225. She did not go back to work that day. RP 226.

The next morning, January 8, Ms. Penter returned to work. RP 226. While she was at work, she received a text from Mr. King’s phone saying someone had broken her window with a rock. RP 226. When Ms. Penter accused Mr. King of throwing the rock, she received a response saying it was a “Friend of friend.” RP 227. She went home on her lunch break and saw that someone had broken her bedroom window with a rock. RP 228. Again she called the police. RP 228.

Later that morning, Ms. Penter received text messages she believed amounted to a threat to burn her house. At around 11:00 a.m., she received a text that said, “I hear there more coming.” RP 228. At 11:10 a.m., a text came in that said, “I hear fire next.” RP 228. At

12:17 p.m. she received a text that said, “Burn.” RP 228. The police told Ms. Penter to pack her things and leave the house until Mr. King was arrested, which she did. RP 228. She stayed at a friend’s house for a few days. RP 229.

Ms. Penter received three more messages from Mr. King’s phone the next day, but that was the last she heard from him, and those messages were not admitted into evidence. RP 230.

Overall, Ms. Penter was concerned about the text messages because she thought they were about “[h]im threatening to kill me, him threatening with a gun, him threatening to burn my house, him threatening to rape and kill my children.” RP 230. Other people who were present when Ms. Penter received some of the text messages said she seemed upset by them. RP 376, 407, 422.

Over that three-day period, Mr. King was seen near Ms. Penter’s house at times. On the first morning, Ms. Penter and her mother saw him walking on the next street over from the house as they were driving to work. RP 199, 373. Ms. Penter saw him come to the house and pick up his things later that morning. RP 200. That night, she saw him standing outside her house in the bushes. 6/16/15RP 290. On the second day, she said he was walking past her house “nonstop.”

RP 225. She saw him at her workplace twice during that time period.  
6/17/15RP 337. A neighbor told her he saw Mr. King near the house  
one time. 6/17/15RP 338.

Mr. King was arrested on January 13. He denied breaking Ms.  
Penter's window or threatening her or her children. RP 359-60.

Mr. King was charged with five felony crimes arising from this  
incident: one count of threat to bomb or injure property under RCW  
9.61.160; one count of stalking under RCW 9A.46.110(1), (5)(b)(i)<sup>1</sup>;  
and three counts of cyberstalking under RCW 9.61.260(3)(b). CP 22-  
23. The State's theory was that Mr. King committed three separate  
counts of cyberstalking based on his threats to kill Ms. Penter and her  
two daughters. CP 22-23.

At trial, during closing argument, the prosecutor told the jury  
that count one, threat to injure property, was based on the alleged threat  
to burn Ms. Penter's house. RP 506. The prosecutor said the text  
message underlying that count was, "Watch what happen if you're not  
home. I hear fire next. Burn." RP 506.

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<sup>1</sup> Ordinarily, stalking is a gross misdemeanor. RCW  
9A.46.110(5)(a). Mr. King was charged with felony stalking based on his  
prior conviction for harassment of a person specifically named in a no-  
contact order or a non-harassment order. CP 25; see RCW  
9A.46.110(5)(b)(i). The parties stipulated to the existence of the prior  
conviction. CP 25.

As for the stalking count, the prosecutor told the jury it was based on all of the text messages Ms. Penter received over that three-day period, as well as the testimony that Mr. King was seen near her property several times during that period. RP 508.

Finally, the prosecutor told the jury the three separate cyberstalking charges were based on the alleged threats to kill Ms. Penter and her two daughters. RP 510-12. The prosecutor said the threat against Ms. Penter consisted of the message saying, “if anyone comes out of that house, I’m shooting. I have a gun. Play with me. I bet you will not be living there after today. It will be tonight.” RP 511-12. The threats against the two daughters were based on the message, “Watch if I go after kids. Your girl is going to get raped and die.” RP 512.

The jury found Mr. King guilty as charged on all five counts. CP 59-60. At sentencing, the court counted all five convictions separately in the offender score. CP 105.

#### D. ARGUMENT

**1. Mr. King’s two convictions for cyberstalking based on a single electronic communication threatening to kill Ms. Penter’s two daughters violated the Double Jeopardy Clause.**

As will be discussed below, the unit of prosecution for cyberstalking turns on the number of electronic messages sent, not the number of people threatened in the message. Here, Mr. King allegedly sent a single text message in which he threatened to kill both of Ms. Penter’s daughters. Because this conduct amounts to only a single unit of prosecution, Mr. King’s two convictions for cyberstalking violated his constitutional right to be free from double jeopardy.

*a. A person may not be convicted twice for committing only a single “unit of prosecution.”*

The Double Jeopardy Clause of the Fifth Amendment precludes the State from punishing a person twice for the same offense.<sup>2</sup> State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); U.S. Const. amend. V. When a person is convicted twice for violating a single statute, the question is “what act or course of conduct has the Legislature defined

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<sup>2</sup> Article I, section 9 of the Washington Constitution offers the same scope of protection as its federal counterpart. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

as the punishable act?” Id. at 634. The Legislature’s determination of the scope of the crime is the “unit of prosecution.” Id. The Double Jeopardy Clause protects a person from being convicted twice under the same statute for committing only one unit of the crime. Id.

A double jeopardy challenge may be raised for the first time on appeal. Adel, 136 Wn.2d at 631-32. The standard of review is *de novo*. State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005).

*b. The unit of prosecution for felony cyberstalking is each electronic communication sent with the requisite intent containing a threat to kill.*

Determining the unit of prosecution is a question of statutory interpretation and legislative intent. Adel, 136 Wn.2d at 634. If the Legislature did not denote the unit of prosecution in the statute, under the rule of lenity, the Court must construe any ambiguity in favor of the defendant. Adel, 136 Wn.2d at 634-35. All doubt must be resolved against turning a single transaction into multiple offenses. Id.

The first step in the unit of prosecution inquiry is to analyze the criminal statute. Adel, 136 Wn.2d at 635. The Court looks to the statute’s plain meaning to determine legislative intent. Ose, 156 Wn.2d at 144. Plain meaning is discerned from the ordinary meaning of the language at issue. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354

(2010). If the meaning is plain on its face, the Court gives effect to that plain meaning. Id. In determining plain meaning, the Court looks not only to the text of the statutory provision, but also at the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. Id. If, after this inquiry, the statute is susceptible to more than one reasonable interpretation, it is ambiguous. Id. Under the rule of lenity, the Court must give effect to the meaning favoring the defendant. Adel, 136 Wn.2d at 634-35.

Here, Mr. King was charged with felony cyberstalking under RCW 9.61.260(3)(b). CP 22-23. That statute provides:

(1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, *makes an electronic communication*<sup>3</sup> to such other person or a third party:

...

(c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.

...

(3) Cyberstalking is a class C felony if . . .

(b) The perpetrator engages in the behavior prohibited under subsection (1)(c) of this section by threatening to kill the person threatened or any other person. . . .

RCW 9.61.260(3)(b) (emphasis added).

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<sup>3</sup> “Electronic communication” includes “electronic text messaging.” RCW 9.61.260(5).

The plain language of this provision demonstrates the unit of prosecution is each “electronic communication” sent with the requisite intent and containing a threat to kill. Because the word “an” is used only to precede singular nouns, the Legislature’s insertion of the word “an” before “electronic communication” unambiguously demonstrates the Legislature’s intent that each electronic communication sent with the requisite intent and containing a threat to kill is a separate violation of the statute. See Ose, 156 Wn.2d at 146.

The Washington Supreme Court has consistently interpreted the Legislature’s use of the word “a” (or “an”) in criminal statutes as authorizing punishment for each individual instance of criminal conduct. Ose, 156 Wn.2d at 147. In Ose, for instance, the second degree possession of stolen property statute provided a person was guilty of the crime if “[h]e or she possesse[d] a stolen access device.” Id. at 145. The court concluded the Legislature’s use of the word “a” before “stolen access device” plainly indicated an intent to authorize punishment for each individual access device possessed. Id. at 147.

Numerous other supreme court cases have reached similar results, holding the Legislature’s use of the word “a” in a criminal statute indicates the Legislature’s intent that each instance of criminal

conduct be the unit of prosecution. See State v. Graham, 153 Wn.2d 400, 407-08, 103 P.3d 1238 (2005) (reckless endangerment statute providing person is guilty if he or she recklessly engages in conduct that creates a substantial risk of death or serious physical injury to “another person” authorizes separate punishment for each person endangered); State v. DeSantiago, 149 Wn.2d 402, 418, 68 P.3d 1065 (2003) (sentencing enhancement statute that applies when defendant or accomplice is armed with “a firearm” or “a deadly weapon” authorizes additional punishment for each weapon involved); State v. Westling, 145 Wn.2d 607, 611-12, 40 P.3d 669 (2002) (second degree arson statute providing person is guilty if he or she knowingly and maliciously caused “a fire or explosion” that damaged a building or any automobile demonstrates Legislature’s intent that punishment be based on each fire caused by defendant); State v. Root, 141 Wn.2d 701, 710-11, 9 P.3d 214 (2000) (Legislature’s use of words “a minor” in sexual exploitation of a minor statute authorized separate charge for each minor involved).

The Legislature is presumed to be aware of the supreme court’s prior interpretations of its statutory enactments. Ose, 156 Wn.2d at 148. Thus, when the Legislature enacts a criminal statute using similar

words as those previously interpreted by the supreme court, the court presumes the Legislature intended the current statute to be interpreted in the same way. Id. Applying that principle to the cyberstalking statute, this Court must presume the Legislature intended the words “an electronic communication” in RCW 9.61.260(3)(b) to mean that punishment is to be based on each electronic communication sent with the requisite intent containing a threat to kill.

The State’s charging decision in this case indicates the State believed the unit of prosecution for cyberstalking was each person threatened in the electronic communication. The supreme court’s decision in Westling demonstrates that assumption is inaccurate. In Westling, the court examined the second degree arson statute which provides a person is guilty if he or she “knowingly and maliciously causes *a fire* or explosion which damages . . . *any* . . . *automobile*.” Westling, 145 Wn.2d at 611 (quoting RCW 9A.48.030(1)) (emphases added). The court noted “any” means “every” and “all.” Id. Thus, “under the plain language of the statute, one conviction is appropriate where one fire damages multiple automobiles, i.e., by use of the word ‘any’ the statute speaks in terms of ‘every’ and ‘all’ automobiles damaged by one fire.” Id. at 611-12.

The statute at issue in this case is undistinguishable from the statute at issue in Westling for purposes of a unit of prosecution analysis. The cyberstalking statute provides a person is guilty if he or she, “with intent to harass, intimidate, torment, or embarrass any other person . . . makes *an electronic communication* . . . [t]hreatening to inflict injury on the person or property of the person called or *any member of his or her family*.” RCW 9.61.260(3)(b) (emphases added). As in Westling, the term “any” means “every” and “all.” Westling, 145 Wn.2d at 611. Thus, only one conviction is appropriate where a person sends one electronic communication containing a threat to injure multiple individuals of the recipient’s family. See id. at 611-12.

The Legislature’s purpose in enacting the cyberstalking statute further supports the conclusion the punishable act is the sending of the electronic communication. The focus of the statute is on protecting the person who receives the communication, not the members of her family who might be threatened with injury in the message.<sup>4</sup> This

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<sup>4</sup> If the State’s aim is to punish the defendant for every individual other than the recipient who is threatened with bodily injury in a text message, the State may pursue charges under the harassment statute. A charge of harassment would require proof that the person threatened learned about the threat and was placed in reasonable fear that the threat would be carried out. RCW 9A.46.020; State v. J.M., 144 Wn.2d 472, 481-82, 28 P.3d 720 (2001). Such proof was lacking in this case. There

demonstrates the Legislature could not have intended the unit of prosecution to depend upon the number of individuals threatened in a text message.

Comparing the crime of cyberstalking to the crime of telephone harassment demonstrates that the focus of the crime is on protecting the person who receives the message. The Legislature enacted the cyberstalking statute in 2004. Laws 2004, ch. 94, § 1. The crime is almost identical to the crime of telephone harassment, apart from the method of communication. 13A Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 1301 (2015-2016 ed.). Similar to felony cyberstalking, the elements of felony telephone harassment are: (1) the defendant made a telephone call to another person; (2) he intended to harass, intimidate, torment or embarrass that person when he initiated the call; (3) he threatened to kill the person called or any other person; and (4) the call was made or received in Washington. RCW 9A.02.030(2)(b); State v. Sloan, 149 Wn. App. 736, 741, 205 P.3d 172 (2009).

The purpose of the telephone harassment statute is to protect the privacy of *the individual who receives the harassing telephone call*, not

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was no evidence that either of Ms. Penter's daughters learned about the threat or were placed in reasonable fear.

any other individual mentioned during the call. State v. Lilyblad, 163 Wn.2d 1, 12-13, 177 P.3d 686 (2008). The statute aims to protect the public from conduct by persons who employ the telephone to torment others and from the intrusion of unwanted telephone calls. Id. “The gravamen of the offense is the thrusting of an offensive and unwanted communication upon one who is unable to ignore it.” Id. (quotation marks and citation omitted).

Consistent with this purpose, to prove the crime of telephone harassment, the State must prove the defendant intended to harass, intimidate, torment or embarrass *the person whom he intended to call*. Lilyblad, 163 Wn.2d at 8-9. The “victim” of the crime is deemed to be the recipient of the call. Id. Thus, the “person threatened” is the same as “[t]he person called.” Id.

A person may commit the crime of felony telephone harassment by threatening to kill someone other than the person whom she intended to call. State v. Lansdowne, 111 Wn. App. 882, 891, 46 P.3d 836 (2002). The issue in such a case is whether the defendant’s intent in threatening the third person was to intimidate or torment *the person who received the call*. Id. In Lansdowne, the defendant called an administrator at her daughter’s school and threatened to kill a third

person—a teacher at the school. Id. at 887. The Court upheld the conviction, holding “a reasonable fact finder could find that Ms. Lansdowne intended to intimidate [the administrator] and affect her conduct by using obscene language and threatening to kill [the teacher].” Id. at 891.

These cases applying the telephone harassment statute demonstrate the “victim” of the crime is the intended recipient of the telephone call. Because the crime of cyberstalking is modeled after the crime of telephone harassment, the same must be true for cyberstalking. The “victim” of the crime is the intended recipient of the electronic communication. Therefore, the Legislature cannot have intended that the unit of prosecution depend on the number of *other* individuals threatened with bodily injury in an electronic communication.

Cases involving the crime of general harassment provide further support for this conclusion. A person commits the crime of harassment if, without lawful authority, he or she “knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person” and “by words or conduct [he or she] places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1)(a)(i), (b). The purpose of the

harassment statute is to protect individuals from the fear of violence, the disruption that fear engenders, and the possibility that the threatened violence will occur. J.M., 144 Wn.2d at 478.

Under the harassment statute, “the person threatened is generally the victim of the threat, i.e., the person against whom the threat to inflict bodily injury is made.” J.M., 144 Wn.2d at 499. But “[t]he person to whom the threat is communicated may or may not be the victim of the threat.” Id. In other words, the recipient of the communication may be a “victim” even if a third person is the one threatened with bodily injury. Id. In J.M., the supreme court recognized such a situation could occur if, for example, the defendant communicated a threat to a parent to harm his or her child. Id. In that case, the person threatened, i.e., the “victim” of the crime, would not be the child but the parent who received the threatening message. Id.

That is precisely what happened here. Ms. Penter received an electronic message threatening to inflict bodily injury upon her two daughters. As the intended recipient of the message, *Ms. Penter* was the alleged “victim” of the crime, not her daughters. The unit of prosecution was the single threatening message, not each person

threatened in the message. Ose, 156 Wn.2d at 146-47; Westling, 145 Wn.2d at 611-12.

- c. *Mr. King committed a single unit of prosecution of cyberstalking because he sent only a single text message containing a threat to kill Ms. Penter's daughters.*

Once the “unit of prosecution” is determined, the next question is whether the defendant committed more than one unit of the crime.

State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007).

As discussed, the unit of prosecution for cyberstalking is each electronic communication sent with the requisite intent and containing a threat to kill. RCW 9.61.260(3)(b); Ose, 156 Wn.2d at 146-47. Only one conviction is appropriate where one message is sent containing a threat to kill multiple members of the recipient's family. RCW 9.61.260(3)(b); Westling, 145 Wn.2d at 611-12.

Here, to prove counts four and five, the State relied upon a single text message containing a threat to kill Ms. Penter's two daughters. Mr. King allegedly sent a text saying, “You girls gone get raped and die.” RP 223; Exhibit 52. The prosecutor told the jury counts four and five were based on the message, “Watch if I go after kids. Your girl is going to get raped and die.” RP 512.

Because the unit of prosecution was the single text message containing a threat to kill, only one crime was committed, not two. One of the convictions must be vacated and Mr. King must be resentenced. Westling, 145 Wn.2d at 612.

**2. Mr. King’s multiple convictions encompassed the same criminal conduct.**

Mr. King’s convictions for threat to injure property, stalking and cyberstalking encompass the same criminal conduct. They all involved the same victim, were committed with the same intent to harass, and occurred during a single ongoing course of conduct committed with the same overall purpose. Counsel’s failure to argue same criminal conduct at sentencing amounts to ineffective assistance of counsel.

When a person is convicted of two or more offenses, they count as only one crime in the offender score if they “encompass the same criminal conduct.” RCW 9.94A.589(1)(a). Two crimes encompass the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013); RCW 9.94A.589(1)(a).

If defense counsel does not argue same criminal conduct at sentencing, the argument is waived on appeal. State v. Phuong, 174

Wn. App. 494, 547, 299 P.3d 37 (2013). But a defendant may claim for the first time on appeal that he received ineffective assistance of counsel due to his attorney's failure to argue same criminal conduct at sentencing. Id.

To establish ineffective assistance of counsel, the defendant must show that counsel's representation was deficient and that his defense was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed .2d 674 (1984); U.S. Const. amend. VI. Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice results where ““there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*”” State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (alteration in original) (quoting Strickland, 466 U.S. at 694).

Defense counsel's failure to argue same criminal conduct at sentencing amounts to ineffective assistance of counsel if there is a reasonable possibility the sentencing court would have found the offenses encompassed the same criminal conduct had counsel so

argued. Phuong, 174 Wn. App. at 548. If multiple offenses were committed at the same time and place and involved the same victim, and a sentencing court could find they were committed with the same objective criminal intent, counsel’s failure to argue same criminal conduct amounts to deficient performance that prejudiced the defendant. Id.

Here, as discussed above, Mr. King’s convictions all involved the same victim—Ms. Penter.

The offenses were also committed with the same intent to harass and occurred during a single ongoing course of conduct demonstrating the same purpose. They therefore occurred at the same time and place and with the same objective criminal intent.

The crimes of stalking and cyberstalking both include the same statutory intent to harass element. To prove the crime of stalking, the State was required to prove Mr. King “intentionally and repeatedly harassed or followed Bridgette Penter,” with the intent “to frighten, intimidate, or harass” her, or he “knew or reasonably should have known” that she “was afraid, intimidated, or harassed.” CP 49-50 (to-convict instruction); RCW 9.46.110(1). Similarly, to prove cyberstalking, the State was required to prove Mr. King sent Ms. Penter

an electronic communication containing a threat to kill, with the intent to “harass, intimidate, torment, or embarrass” her. CP 53-55 (to-convict instructions); RCW 9.61.260(1)(c).

Although the crime of threat to injure property does not contain a statutory threat to harass element, the evidence shows Mr. King committed that crime with same criminal intent, and as part of the same course of conduct, as the stalking and cyberstalking offenses.

Whether two crimes involved the same criminal intent for purposes of RCW 9.94A.589(1)(a) is measured by determining whether the defendant’s criminal intent, viewed objectively, changed from one crime to another. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Intent, as used in this analysis, “is not the particular *mens rea* element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

Two crimes are part of a “single course of conduct” if during that conduct “there was no substantial change in the nature of the criminal objective.” State v. Edwards, 45 Wn. App. 378, 381-82, 725 P.2d 442 (1986), overruled on other grounds by State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987). If the second crime occurred while

the first crime was still in progress, and the second crime was committed in furtherance of the first crime, they are the same criminal conduct. Id. The question is “how intimately related the crimes are” and “whether, between the crimes charged, there was any substantial change in the nature of the criminal objective.” Phuong, 174 Wn. App. at 546-47 (quotation marks and citation omitted).

Similarly, multiple offenses need not occur simultaneously in order to meet the “same time” requirement. State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998). If the crimes occurred sequentially, the question is whether they “occurred in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme.” Id. (quotation marks and citation omitted).

Here, the crimes were part of a continuing sequence of conduct, committed with the same objective purpose to harass. The jury was specifically instructed that “to harass” means “to carry out a knowing and willful *course of conduct* directed at a specific person which seriously alarms, annoys, or harasses, or is detrimental to such person.” CP 46 (emphasis added); see RCW 10.14.020(2). The jury was further instructed that “course of conduct” means “a pattern of conduct

composed of a series of acts over a period of time, however short, demonstrating the same purpose.” CP 46; see RCW 10.14.020(1).

Thus, by finding Mr. King acted with an intent to “harass,” the jury necessarily found he engaged in a “pattern of conduct” demonstrating “the same purpose.” CP 46.

All of the crimes were “intimately related,” with no change in the criminal objective from one crime to the next. See Phuong, 174 Wn. App. at 546-47. They occurred in a single continuing sequence of conduct as part of a recognizable scheme to harass Ms. Penter. See Williams, 135 Wn.2d at 368. Therefore, the crimes occurred at the same time and place and with the same objective criminal intent.

All of the crimes were committed at the same time and place and involved the same victim, and the sentencing court could have found they were committed with the same objective criminal intent. Therefore, Mr. King received ineffective assistance of counsel due to his attorney’s failure to raise the issue at sentencing. Phuong, 174 Wn. App. at 548. Mr. King is entitled to a new sentencing hearing. Id.

**3. Any request that costs be imposed on Mr. King for this appeal should be denied because the trial court determined he does not have the ability to pay legal financial obligations.**

This Court has discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, \_\_\_ Wn. App. \_\_\_, 2016 WL 393719 (No. 72102-0-I, Jan. 27, 2016); RCW 10.73.160(1).

A defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 2016 WL 393719 at \*6. Here, the trial court did not require Mr. King to pay discretionary legal obligations. CP 108. At sentencing, the court said, "I will waive all legal financial obligations if they're not mandatory in this case. He's going to be incarcerated for some time, and after what I heard in the trial, I think his ability to pay would be very, very limited." 6/18/15RP 582-83. The trial court also found Mr. King is indigent and lacks the ability to pay any of the expenses of appellate review. Sub #65B.

Mr. King's indigency is presumed to continue throughout review absent a contrary order by the trial court. Sinclair, 2016 WL 393719 at \*7; RAP 15.2(f). Given Mr. King continued indigency, it is

appropriate for this Court to exercise its discretion and disallow appellate costs should the State substantially prevail. Sinclair, 2016 WL 393719 at \*7.

F. CONCLUSION

Mr. King was punished twice for the same offense in violation of the Double Jeopardy Clause because he received two convictions for cyberstalking based on the sending of only a single electronic message. One of the convictions must be vacated and Mr. King must be resentenced. Mr. King is entitled to be resentenced for the additional reason that his offenses encompass the same criminal conduct but his attorney did not raise the issue at sentencing.

Respectfully submitted this 14th day of March, 2016.

/s/ Maureen M. Cyr

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 73755-4-I
	)	
ROBERT KING,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF MARCH, 2016.

X \_\_\_\_\_ 

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