

FILED  
Court of Appeals  
Division II  
State of Washington  
2/16/2018 2:30 PM  
NO. 50879-6-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD JAMES COLLIER,

Appellant.

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

The Honorable Karena Kirkendoll, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR.**

1. The trial court violated appellant's constitutional right to present a complete defense in when it prohibited testimony that the appellant's daughter was deceased.

2. The State presented insufficient evidence to prove that Mr. Collier made a "true threat."

3. The State presented insufficient evidence to prove Mr. Collier acted with the intent to harass, intimidate, or torment at the time the phone calls were initiated.

4. The State presented insufficient evidence to prove Mr. Collier initiated the calls, portions of which were recorded by Ms. Manley.

5. The trial court erred when it improperly admitted propensity evidence under Evidence Rule 404(b).

6. The trial court's admission of propensity evidence under ER 404(b) violated the appellant's right to a fair trial.

7. Cumulative error deprived Mr. Collier of a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A defendant has a constitutional right to present a complete defense. Mr. Collier's defense was that he was deeply concerned about Ms. Manley's care of their daughter, S.L.C., who suffered from cerebral palsy and subsequently passed away. Mr. Collier explained that he was so concerned about S.L.C.'s safety in the care of Ms. Manley, he threatened 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 his communication with Ms. Manley. 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? Assignment of Error 1.

2. The Fourteenth Amendment right to due process requires the prosecution to prove all essential elements of a crime beyond a reasonable doubt. To prove felony telephone harassment (threat to kill), the prosecution must prove that the threat to kill placed the person threatened in reasonable fear that the threat to kill would be carried out. Must the charges of felony telephone harassment be dismissed where the prosecution failed to establish sufficient evidence Ms. Manley was placed in reasonable fear that the threat to kill would be carried out? Assignments of Error 2 and 3.

3. A conviction for felony telephone harassment required proof beyond a reasonable doubt that the threats made were "true threats." Must Mr. Collier's convictions be reversed where the State failed to prove beyond a reasonable doubt that he made "true threats"? Assignments of Error 2 and 3.

4. A conviction for telephone harassment requires proof beyond a reasonable doubt that the defendant initiated the telephone call

and that the it was made with the intent to harass, intimidate, or torment. Furthermore, the State must prove beyond a reasonable doubt that the requisite intent was formed at the time the phone call was initiated. Must Mr. Collier's convictions for telephone harassment be reversed where the State failed to so prove these elements beyond a reasonable doubt? Assignment of Error 4.

5. Did the trial court err by admitting evidence of prior bad acts of felony harassment against Ms. Manley to show "reasonable fear" under ER 404(b)? Assignments of Error 5 and 6.

6. Even where no single error standing alone may merit reversal, an appellate court may nonetheless find a defendant was denied a fair trial where cumulative errors created a reasonable probability that the jury's verdict would have been different had the errors not occurred. In light of the above errors, does the cumulative error doctrine require reversal of Mr. Collier's convictions? Assignment of Error 8.

### C. STATEMENT OF THE CASE

#### 1. Procedural facts:

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. The State filed a second amended information on

May 1, 2017, which alleged, using identical language for both Counts 2 and 3:

That Clifford James Collier, in the State of Washington, during the period between the 5<sup>th</sup> day of October, 2016 and the 7<sup>th</sup> day of October, 2016, did unlawfully and feloniously with intent to harass, intimidate, torment, or embarrass any other person, did: 1) make a telephone call to such other person threatening to inflict injury on the person or property of the person called or any member of his/her family or house, and 2) the threat was a threat to kill the person threatened or any other person, contrary to RCW 9.61.230(1)(c)(2)(b), a domestic violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

CP 27-29.

*a. ER 404(b) evidence*

Before trial, the State moved to admit evidence of a prior conviction for domestic violence felony harassment against Ms. Manley in 2015. CP 30-39 (State's Trial Brief, filed May 1, 2017, at 2). The prosecutor submitted Mr. Collier's prior conviction for felony harassment in June, 2015, which resulted in entry of no contact orders prohibiting Mr. Collier from contacting Ms. Manley and their daughter S.L.C. for five years. CP 31. The prosecutor argued that the incident involving Ms. Manley was admissible because it "pertains to why she believed that the threats may reasonably be carried out and why she was in reasonable fear that those threats would be carried out." 3Report of Proceedings<sup>1</sup> (RP) at 34-37.

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<sup>1</sup>The record of proceedings consists of eight volumes, which are designated as follows: 1RP April 13, 2017; 2RP April 17, 2017, (motion for continuance); 3RP May 1, 2017,

The State also argued that the prior conviction for harassment was offered to “show the reasonableness of the state of mind of Ms. Manley[.]” 3RP at 36.

Defense counsel objected, arguing the prior conviction was impermissibly prejudicial under ER 403, and that Ms. Manley, who had expressed prior reluctance to cooperate to the extent that a material witness warrant was sought by the prosecution (3RP at 45), may not testify that she was in fear of Mr. Collier’s alleged statements. 3RP at 37.

After hearing argument, the trial court permitted testimony regarding the prior conviction for harassment in which Ms. Manley was the victim, as well as statements allegedly made to her by Mr. Collier. 3RP at 38. The court further explained the acts offered by the prosecutor were admissible for several reasons:

I do find by a preponderance of the evidence that the act occurred before. The purpose for which the evidence would be admitted has been discussed already, and it’s to go to Ms. Manley’s reasonable fear. It is relevant for that purpose. And when I balance the probative value of the evidence against any unfair prejudicial effect, I find that it is probative.

3RP at 38.

The court gave a limiting instruction to the jury stating that evidence of misconduct by Mr. Collier may only be considered regarding the issue of

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(motions in limine, jury trial); 4RP May 2, 2017 (jury trial); 5RP May 3, 2017, (jury trial); 6RP May 4, 2017, (jury trial); 7RP May 19, 2017, (sentencing); and 8RP July 7, 2017, (sentencing).

whether Ms. Manley “had reasonable fear that the threats alleged in Counts I, II, and III would be carried out.” CP 93; (Jury Instruction 6).

*b. Exclusion of evidence of death of Mr. Collier and Ms. Manley’s daughter*

Prior to trial, the State moved to exclude evidence of the death of Mr. Collier’s and Ms. 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.

*c. Jury inquiries, conviction, and sentencing*

The matter came on for jury trial on May 1, 2, 3, and 4, 2017, the Honorable Karena Kirkendoll presiding. 3RP at 28-181, 4RP at 185-297, 5RP at 301-355, 6RP at 359-366, and 7RP at 369-374.

Following closing arguments and reading of the instructions, the jury began deliberation at 1:25 p.m. on May 3, 2017. Jurors submitted a

written request at 2:48 p.m. which asked:

Per instruction # 12 – Counts II & III Sec # 1 & 2. Does the law mandate that the defendant initiated the call[?]

SRP at 352; CP 71. The State responded that “it doesn’t really matter whether it was Harassment or VPO, I’m pretty sure the law does not mandate that.” SRP at 352. Defense counsel agreed and the court, in its written response, instructed the jury to “please refer to your jury instructions.” SRP at 352; CP 71.

The jury also submitted another inquiry asking:

Per instruction # 12 who do Counts II and III apply to – what are the charges[?]

SRP at 353; CP 72.

Defense counsel stated that the “issue was that the victim was not named in two of the counts.” SRP at 353. The court instructed the jury to “please refer to your jury instructions.” SRP at 354; CP 72.

On May 4, the court received the following inquiry from the jury:

Can the jury get the dates and times of the (2) recorded calls as well as the 911 call[?]

6RP at 359; CP 84.

After discussion with counsel, the court instructed the jury to “please reread jury instruction # 1.” 6RP at 361; CP 84.

The jury found Mr. Collier guilty of telephone harassment as charged 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. He was acquitted of Count 1. CP 110.

After a continuance so that defense counsel could research the issue of same criminal conduct, the matter came on for sentencing on July 7, 2017. 7RP at 370, 8RP at 378-96. The State argued that Mr. Collier had an offender score of "7" and a standard range of 33 to 43 months. 8RP at 383. The State recommended a midrange sentence of 38 months. 8RP at 384. Defense counsel requested a sentence at the bottom of the range. 8RP at 387.

Although not argued by the defense, the court ruled that the two felony counts were not the same criminal conduct. 8RP at 393. The court accepted the State's recommendation and sentenced Mr. Collier to 38 months for Counts 2 and 3, and 364 days for Count 4, to be served concurrently. 8RP at 392; CP 36, 145. After inquiring about Mr. Collier's ability to pay, the court waived non-mandatory fees and imposed legal financial obligations consisting of a \$500.00 crime victim penalty assessment, \$100.00 DNA collection fee, and \$200.00 filing fee. 8RP at 389-90; CP 35.

Timely notice of appeal was filed on July 10, 2017. CP 159. This appeal follows.

**2. Trial testimony:**

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, prohibiting him from having contact with Ms. Manley and their daughter S.L.C. 4RP at 204, 207. Exhibits 2 and 3. 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 provided to Lakewood police on October 7, 2105. 4RP at 211. Ms. Manley acknowledged that she had conversation 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. She denied that she registered in a hotel under an assumed name, saying that it was the idea of her family friends Bobbie Jones and her daughter, who registered under their name using and using their credit card. 4RP at 219.

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. The recordings were admitted over defense objection as Exhibit 1 and played to the jury. Exhibit 1.

She stated that after he was jailed, she wrote five or six letters to him, including one on March 21, 2017. She wrote to him using the return address of Amy Brown because of the no contact order. 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 at 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. The recordings were played to the jury 4RP at 254. Exhibit 1. 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, 2016j. 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.

During closing, defense counsel argued that the State had not proven who initiated the telephone calls other than a call he made to Bobbie Jones. 5RP at 340. Counsel argued that of the recorded calls, the State did not prove who initiated the calls. 5RP at 340, 341. 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. SRP at 344.

**D. ARGUMENT**

**1. BY EXCLUDING EVIDENCE OF THE DEATH OF MR. COLLIER'S DAUGHTER, THE COURT VIOLATED HIS RIGHT TO PRESENT A COMPLETE DEFENSE**

The trial court did not allow evidence that S.L.C., who suffered from cerebral palsy and was extremely medically fragile, subsequently passed away. In so doing, the court violated Mr. Collier's due process right to present a complete defense. This evidence of S.L.C.'s death was relevant because the defense theory was that Mr. Collier was so concerned about Ms. Manley's inability to care for their daughter that he took the drastic step of threatening her in order to "get her attention." The proffered testimony supported the reasonableness of Mr. Collier's concern about the level of care that his daughter was receiving in Ms. Manley's care. The court's ruling prejudiced Mr. Collier's right to have the jury consider all relevant evidence. Reversal is required because the State cannot show this error was harmless beyond a reasonable doubt.

***a. Defendants have a constitutional right to present a complete defense***

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee the

right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide persons accused of crimes the right to present a complete defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Cheatam*, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). These constitutional protections include the right to present one's own version of the facts and to argue one's theory of the case. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The right to present a defense is a fundamental element of due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *Washington v. Texas*, 388 U.S. at 19; *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Claimed violations of the Sixth Amendment are reviewed de novo. *Jones*, 168 Wn.2d at 720.

*b. By excluding evidence of the death of Mr. Collier's daughter, the court violated the defendant's right to present a complete defense*

Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Relevant evidence may only be excluded if its probative value is substantially outweighed by the danger

of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." *State v. Harris*, 97 Wn.App. 865, 872, 989 P.2d 553 (1999). Thus, the threshold to admit relevant evidence is very low and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

The State moved in limine to exclude any evidence of S.L.C.'s medical condition and her subsequent death, arguing that it was not relevant and did not constitute a legal defense. 2RP at 41; CP 31-32. Defense counsel objected, and the court permitted testimony regarding S.L.C.'s cerebral palsy, but excluded testimony that she was deceased. 2RP at 43.

The court erred in sustaining the State's relevance objection regarding the death of S.L.C. Mr. Collier's defense was predicated on his fear that his daughter was in danger in the mother's care, and that he had to take the drastic step of threatening her during the telephone call in order to "get her attention" because it was "the only way she responds to me." 4RP at 289. The fact that S.L.C. suffered from cerebral palsy was significant, but the fact that her medical condition was so precarious that she later succumbed is highly relevant to the jury's determination of whether Mr. Collier was sufficiently worried about his daughter that he used threatening language in order to gain Ms. Manley's attention, not as a "true threat."

The fact of S.L.C.'s death was relevant because it reflected directly

on whether Mr. Collier actually had the intent to carry out his threat, or whether he used rough, alarming language to, as he testified, get Ms. Manley's attention.

The improper exclusion of evidence violated Mr. Collier's constitutional right to present a complete defense. Reversal is required unless the State demonstrates the error was harmless beyond a reasonable doubt. *Kilgore*, 107 Wn. App. at 178.

*c. The error was not harmless beyond a reasonable doubt.*

The State bears the burden to prove constitutional errors harmless beyond a reasonable doubt. *Jones*, 168 Wn.2d at 724; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The State cannot meet its burden. The trial court's error was not harmless given the nature of the evidence in this case. An evidentiary error requires reversal if, within reasonable probability, the error materially affected the verdict. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Mr. Collier admitted that he threatened to kill Ms. Manley, but denied that he had the intent to do so. 4RP at 288. The defense theory was that Mr. Collier was extremely worried about Ms. Manley's ability to care for their daughter that he had to take extraordinary measures to get her attention and impress upon her the seriousness of their daughter's condition. The court's exclusion of the fact that S.L.C. later passed away deprived Mr. Collier of the ability to impress upon the jury the

precariousness of S.L.C.'s medical condition in October, 2016 and that, under the circumstances, Mr. Collier's threat was reasonable. Given the totality of the circumstances, it is probable the jury's decision was materially affected by the court's ruling excluding the fact of her death, which prevented the jury from fully understanding Mr. Collier's desperation. Thus, the error was prejudicial and this Court should reverse.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. COLLIER OF FELONY TELEPHONE HARASSMENT

a. *The State must prove each element of a crime beyond a reasonable doubt.*

The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. at 364; *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

U.S. Const. amends. 6, 14; Wash. Const. art 1, § 3, 21, 22. The test for determining the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The existence of a fact cannot rest upon "guess, speculation, or

conjecture.” *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). “Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). “[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff’d*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)); see also RAP 2.5(a)(2).

*b. There was insufficient evidence to prove beyond a reasonable doubt that Mr. Collier made “true threats,” a necessary element for Counts 2 and 3*

Where a statute attempts to criminalize pure speech by the use of a threat, both the federal and state constitutions require that only “true threats” be proscribed. Here, the State’s amended information alleged Mr. Collier was guilty of felony telephone harassment when he threatened to kill Ms. Manley. CP 27-29. RCW 9.61.230 provides in relevant part:

(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.

(2) The person is guilty of a class C felony punishable according to chapter 9A.20 RCW if either of the following applies:

....

(b) That person harasses another person under subsection (1)(c) of this section by threatening to kill the person threatened or any other person.

Washington courts have consistently interpreted statutes criminalizing threatening language as proscribing only true threats, which are not protected by the First Amendment. *State v. Kilburn*, 151 Wash.2d 36, 43, 84 P.3d 1215 (2004); *State v. Williams*, 144 Wash.2d 197, 208, 26 P.3d 890 (2001); *State v. J.M.*, 144 Wash.2d 472, 477–78, 28 P.3d 720 (2001).

In determining whether sufficient evidence of “true threats” supports the verdict, the relevant question is “whether there is sufficient evidence that a reasonable person in [the defendant’s] position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death.” *Kilburn*, 151 Wn.2d. at 48; *State v. Brown*, 137 Wn.App. 587, 591, 154 P.3d 302 (2007). Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker. *Kilburn*, 151 Wn.2d at 44; *State v. Johnston*, 156 Wn.2d 355, 364, 127 P.3d 707 (2006). A true threat “must be a serious threat, and not just idle talk, joking or puffery.”

*Kilburn*, 151 Wn.2d at 46.

Because the sufficiency of the evidence inquiry implicates core First Amendment protection, the objective standard is “a difficult standard to satisfy,” and an appellate court must independently review the constitutionally critical facts in the record that bear on the question of whether a true threat was made. *Kilburn*, 151 Wn.2d. at 53-54; *Johnston*, 156 Wn.2d at 365 (“whether a statement constitutes a true threat is a matter subject to independent review”).

*c. The State failed to prove beyond a reasonable doubt that Mr. Collier made a “true threat”*

A reasonable person in Mr. Collier’s place would not foresee that Ms. Manley would take his threat as “real,” given that she testified that she did not take him seriously, that she was “one thousand percent” sure that Mr. Collier would harm her in any way, and that she recorded the portions of the two calls to show him that he sounded like “an idiot.” 4RP at 216, 218. She stated that she was not concerned by the threat and that she knew “it’s part of Clifford’s disability[,]” and that she knew he was not going to harm her. 4RP at 217, 218. She stated that she knew “Clifford will say anything he needs to say to be able to have his daughter” and that the incident was about access to their daughter. 4RP at 217.

Under these facts, Mr. Collier’s convictions for felony telephone harassment must be reversed because there is insufficient evidence that the statements constituted “true threat.”

*d. The State failed to prove that Mr. Collier initiated the phone calls and that the calls were made with intent to harass or intimidate*

Telephone harassment with a threat to kill comprises the following essential elements: (1) the defendant made a telephone call to another person; (2) the defendant intended to harass, to intimidate, to torment or to embarrass that other person when he initiated the call; (3) the defendant threatened to kill the person called or any other person; and (4) the call was made or received in Washington. RCW 9.61.230; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 36.75, at 663 (3d ed. 2008).

This definition of telephone harassment was given to the jury:

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 97; (Jury Instruction 10) (emphasis added).

The “to convict” instruction stated:

To convict the defendant of the crime of telephone harassment as charged in Counts II and III, each of the following elements must be proved beyond a reasonable doubt:

- 1) That between October 5<sup>th</sup> and 7<sup>th</sup>, 2016, the defendant made a telephone call to another person;
- 2) That at the time *the defendant initiated* the phone call the defendant intended to harass, intimidate or torment the other person;

- 3) That the defendant threatened to kill the person called or any member of the family or household of the person called; and
- 4) That the phone call was made or received in the State of Washington.

CP at 99; (Jury Instruction 12) (emphasis added).

The jury was instructed that in order to convict Mr. Collier of telephone harassment, the phone call must be initiated by the defendant and must be placed to the person threatened. This is a correct statement of Washington law; an element of the crime of telephone harassment (RCW 9.61.230) is the intent to harass or intimidate at the time the phone call is initiated. *State v. Lilyblad*, 163 Wn.2d 1, 13, 177 P.3d 686 (2008) (“the crime of telephone harassment requires proof that the defendant formed the intent to harass the victim at the time the defendant initiates the call to the victim”). An essential element of a crime is one that must be proven to “establish the very illegality of the behavior.” *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing *United States v. Cina*, 669 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991 (1983)). An element need not be listed in the statute defining the crime to be considered essential. *Johnson*, 119 Wn.2d at 147. Here, the essential elements are that the defendant made a threat to kill during a telephone call initiated by the defendant to another person with the intent to harass, intimidate, or torment that person. The making of a threat to kill during a telephone call made

with the intent to harass, intimidate, or torment someone elevates the crime to felony telephone harassment. RCW 9.61.230(2)(b).

Here, the State failed to prove that Mr. Collier initiated the calls that Ms. Manley partially recorded. The jury acknowledged this deficiency in the evidence when it asked the court in its first question “[d]oes the law mandate that the defendant initiated the call[?]” CP 71.

*e. The failure of the State to prove all elements of the charges requires that all convictions be reversed and dismissed with prejudice.*

Both counts of felony telephone harassment against Mr. Collier required proof of a true threat. A reasonable person in Mr. Collier’s position would not foresee that his comments made to Ms. Manley would be taken as more than an attempt to make her understand the gravity of their daughter’s medical condition and the vital importance of taking proper care of S.L.C. *Kilburn*, 151 Wn.2d at 46. Moreover, the call must be initiated by the defendant and the intent to harass, intimidate, or torment must be formed at the initiation of the phone call. “[T]elephone harassment requires that the defendant form the specific intent to harass at the time the defendant initiates the call to the victim.” *Lilyblad*, 163 Wn.2d at 4. Where the evidence was insufficient to prove that the threats made were “true threats,” and failed to show that Mr. Collier placed the two partially recorded calls, reversal of both counts is required, and double jeopardy prohibits retrial. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900

(1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

3. **ADMISSION OF PRIOR BAD ACTS EVIDENCE  
DENIED MR. COLLIER HIS RIGHT TO A FAIR  
TRIAL**

*a. Evidence Rule 404(b) prohibits the admission  
of propensity evidence.*

It is well settled the accused must be tried only for those offenses actually charged. *State v. Aho*, 137 Wn.2d 736, 744, 975 P.2d 512 (1999). Consistent with this rule, evidence of other bad acts must be excluded unless relevant to a material issue and more probative than prejudicial. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008); *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). ER 404(b) prohibits admission of prior acts evidence to prove the defendant's propensity to commit the charged offense. *State v. Mendoza*, 139 Wn.App. 693, 713, 162 P.3d 439 (2007), *aff'd*, 165 Wn.2d 913, 205 P.3d 113 (2009). In other words, evidence of other misconduct may not be admitted merely to show the accused is a criminal type. *State v. Brown*, 132 Wn.2d 529, 570, 940 P. 2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). It is presumed, therefore, that evidence of prior bad acts is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

The reason for the exclusion of prior bad acts is clear – such evidence is inherently and substantially prejudicial. *State v. Carleton*, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (citing *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995)).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

If prior bad acts are presented for admission, the evidence must not only fit a specific exception to ER 404(b), but must also be “relevant and necessary to prove an essential ingredient of the crime charged.” *State v. Tharp*, 96 Wn.2d 591, 596, 637 P.2d 961 (1981). In doubtful cases, such evidence should be excluded. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The admissibility of ER 404(b) evidence is reviewed for an abuse of discretion. *Id.*

Where the only relevance of the other acts is to show a propensity to commit similar bad acts, the erroneous admission of prior bad acts may result in reversal. *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001); *State v. Pogue*, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person’s character, and showing a person acted in conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

ER 404(b) provides evidence of other crimes, wrongs, or acts may be admissible for other purposes. When determining whether evidence is

admissible under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

Here, over objection, the trial court admitted evidence of Mr. Collier's prior conviction for felony harassment. 3RP at 38. By motion in limine, the State had moved to admit this prior incident under ER 404(b). CP 30-39. Mr. Collier objected, arguing that the admission of the prior incident would be highly prejudicial, and that it was not relevant, considering the no-contact order was already admissible. 3RP at 37. Following argument, the trial court admitted the prior incident, in order to show "Ms. Manley's reasonable fear" 3RP at 38.

*b. The trial court erred by finding that evidence of the prior conduct was relevant to the offense charged.*

In the context of ER 404(b), [t]he trial court must first consider the relevance of prior bad acts by deciding whether the evidence makes the existence of any fact that is of consequence to the determination of the action more or less probable. *State v. Schaffer*, 63 Wn. App. 761, 768, 822 P.2d 292 (1991), aff'd 120 Wn.2d 616 (1993) (citing ER 402); ER 401. Even if the record could fairly be read to show the trial court

conducted the requisite balancing analysis, the evidence would still be inadmissible because it was either irrelevant or its prejudicial effect outweighed its probative value. To be admissible, evidence must be logically relevant, that is, necessary to prove an essential element of the crime charged. *State v. Hernandez*, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), rev. denied, 140 Wn.2d 1015 (2000) (citing *State v. Robtoy*, 98 Wn.2d 30, 42, 653 P.2d 284 (1982)).

When a defendant is charged with felony harassment, evidence of a prior violent act or threat may be admitted to show the victim's fear was reasonable. See, e.g., *State v. Barragan*, 102 Wn. App. 754, 758-60, P.3d 942 (2000) (victim's knowledge of previous violent acts); *State v. Binkin*, 79 Wn. App. 284, 286-87, 902 P.2d 673 (1995), overruled on other grounds, *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002) (prior threat to harm victim's unborn child). Here, Ms. Manley never testified that the prior incident contributed to a fear that Mr. Collier would carry out his later threat to kill, and in fact she denied that she was placed in fear at all, and instead testified that she was certain that he would not harm her. 4RP at 216-17. The prior bad acts did not make it any more or less probable that the threat uttered in October, 2016 placed Ms. Manley in reasonable fear.

*c. Erroneous admission of the 404(b) evidence affected the outcome of the trial, requiring reversal.*

An appellate court should reverse on ER 404(b) grounds if it determines within reasonable probabilities the outcome of the trial would have been different had the error not occurred. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); *State v. Tharp*, 96 Wn.2d at 599. Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only if the evidence is trivial, of minor significance in reference to the evidence as a whole, and in no way affected the outcome. *State v. Oswald*, 62 Wn.2d 118, 122, 381 P.2d 617 (1963).

Here, reversal of the convictions is required because there is a reasonable probability that juror consideration of the prior bad acts evidence tainted deliberation on whether the State proved that Mr. Collier committed telephone harassment and that Ms. Manley was in reasonable fear. A juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. *State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). The improperly admitted evidence made Mr. Collier look like a chronically enraged abusive bully, the very type of propensity inference that ER 404(b) is designed to prohibit. The admission of the evidence prejudiced Mr. Collier because it allowed the jury to infer he acted in conformity with his character and therefore likely committed the criminal acts charged by the State.

Admission of the prior bad act evidence was highly prejudicial. Reversal of Counts 2 and 3 is required.

**4. CUMULATIVE ERROR DEPRIVED MR. COLLIER OF A FAIR TRIAL**

Pursuant to the cumulative error doctrine, even where no single error standing alone merits reversal, a reviewing court may nonetheless find the combined errors denied a defendant a fair trial. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine requires reversal where the cumulative effect of otherwise nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 150 (1992).

Here, Mr. Collier contends that each error set forth above, viewed alone, engendered sufficient prejudice to merit reversal. Alternatively, however, he argues the errors, taken together, created a cumulative and enduring prejudice that was likely to materially affect the jury's verdict and the integrity of the verdict cannot be assured. This Court must reverse his convictions in Counts 2 and 3 and order a new trial.

E. CONCLUSION

For the foregoing reasons, Mr. Collier respectfully requests this Court reverse his convictions and dismiss, or, in the alternative, reverse and remand for a new trial.

DATED: February 16, 2018.

Respectfully submitted,  
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on February 16, 2018, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Ms. Michelle Hyer, Pierce County Prosecutor and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

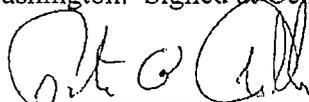
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 16, 2018.



PETER B. TILLER

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**Superior Court Case Number:** 16-1-04048-1

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