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No. 51814-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARSHALL JAY LEWIS,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

In a misguided attempt to restart a romantic relationship, Marshall Lewis's rejected entreaties resulted in a series of intoxicated rants in text messages and telephone calls to his former lover as well as a New Year's morning drive to his former lover's residence which resulted in an unsuccessful attempt at confronting her. His actions resulted in Mr. Lewis being charged and convicted of first degree arson, residential burglary, cyberstalking, and telephone harassment.

Mr. Lewis's convictions must be reversed where the trial court failed to instruct the jury regarding "true threats," thus violating his First Amendment rights, failed to dismiss the matter under CrR 8.3 because of the State's late delivery of discovery, erred in admitting Mr. Lewis's phone records in the absence of evidence of sufficient authentication, and imposed discretionary Legal Financial Obligations (LFO) at sentencing on Mr. Lewis, who was indigent.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Lewis's First Amendment rights in failing to define "true threat" for the jury.

2. The trial court erred in failing to dismiss under CrR 8.3 for prosecutorial mismanagement.

3. To the extent it is deemed a finding of fact, in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 5 which stated:

The second *Brady* element has not been satisfied. Evidence that could have been discovered but for lack of due diligence is not a *Brady* violation.[] *State v. Lord*, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007); *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 916-17, 952 P.2d 116 (1998). Here, the Barnes report was referenced in the Davis insurance report that the defendant conceded in argument on the motion receiving about 4-6 months after the information was filed. Thus, the defendant was put on inquiry notice of the existence of the Barnes report and could have acquired the report through the exercise of due diligence.

4. To the extent it is deemed a finding of fact, in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 6 which stated:

Inasmuch as there was no suppression of the Barnes report by the State, the third *Brady* element has not been satisfied. It appears that prejudice is premised upon suppression and, if there is no suppression, there is, *ipso facto*, no prejudice. Even if the prejudice element stands alone, there is no probability that the result would have been different. The Barnes report did not exculpate the defendant; it simply drew no conclusions on the cause of the fires in the absence of further investigation. At best, it could have been used to impeach the Davis insurance report's statement that the Barnes report concluded that the fires were intentionally set.

5. In the absence of an adequate foundation, the trial court erred in admitting the Verizon phone records.

6. RCW 9.61.260 (cyberstalking) is overbroad and vague in violation of the First and Fourteenth Amendments.

7. The trial court erred in imposing discretionary Legal Financial Obligations (LFOs).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the First Amendment, threats are protected speech. The State can only ban “true threats.” Both cyberstalking and telephone harassment purport to ban threats, but the jury must be instructed that the State bears the burden of proving the threats were “true threats.”

The trial court instructed the jury on the definition of threats but failed to instruct the jury that it must find a “true threat.” Was Mr. Lewis’s rights under the First Amendment violated entitling him to reversal of his convictions for cyberstalking and telephone harassment?

2. Under CrR 8.3, a trial court may dismiss the matter where the defendant is prejudiced by governmental mismanagement. Discovery provided to the defendant on the eve of trial constitutes mismanagement by the State, and where the tardy discovery prejudices the defendant, his is entitled to dismissal under CrR 8.3.

The State provided Mr. Lewis with a potentially exculpatory report only days before trial. Did the trial court err in refusing to dismiss under CrR 8.3 where the trial court analyzed it under the wrong standard, and where the failure to provide timely discovery constituted governmental mismanagement which prejudiced Mr. Lewis?

3. Prior to admitting evidence, the proponent must establish a foundation authenticating the evidence. When admitting a business record, the proponent must produce some evidence showing the document is what it purports to be.

The State sought to admit Mr. Lewis's Verizon subscriber records despite the fact that the documents failed to identify themselves as Verizon documents and were indistinguishable from any other Microsoft Excel document. Did the State fail to authenticate these records entitling Mr. Lewis to reversal of his convictions where the improperly admitted evidence provided substantial of his guilt?

4. Is RCW 9.61.260 overbroad and vague in violation of the First and Fourteenth Amendments, where it criminalizes communications made with intent to "harass" or "embarrass" another person using "any lewd, lascivious, indecent, or obscene words,

images, or language, or suggesting the commission of any lewd or lascivious act”?

5. Recent amendments to the statutes authorizing imposition of Legal Financial Obligations (LFO) bar imposition of discretionary LFOs where the defendant is indigent. These amendments apply to all those whose appeal is pending at the time of the legislation’s passage. Is this Court required to strike the \$1000 in discretionary LFOs imposed by the trial court?

D. STATEMENT OF THE CASE

On January 1, 2016, a passerby observed smoke pouring from Kasey Cross’s home in Beaver, Washington. RP 335-36. Bob Stark called the fire department then went to the house to determine if anyone was inside. RP 336. Mr. Stark noticed the front door was partially open and the window next to the door handle was broken. RP 337, 352. He also found a plastic gas can on the rear porch missing its lid. RP 338. The firefighters found the cap to the gas can inside the house on the kitchen floor. RP 415, 559.

The fire investigator for the Clallam County Fire Department determined the fire had two origins; a utility closet under the stairwell and adjacent to the kitchen where the heaviest damage occurred, and

upstairs in Ms. Cross's bedroom. RP 549-50. The fire investigator opined that the cause of the fire was undetermined because there was no evidence of an ignition source. RP 563-66.

A private fire investigator hired by the insurance company agreed that there were two points of origin, but disagreed that the cause was undetermined. RP 639. This investigator opined the fire was intentionally set. *Id.*

The investigation began to focus on Marshall Lewis. Ms. Cross and Mr. Lewis had attended the same high school but were not friends. RP 453. They became reacquainted in 2014 via social media. RP 453. The relationship became a dating relationship then a serious relationship despite the fact Ms. Cross lived in Beaver in Clallam County and Mr. Lewis lived in Sedro Wooley in Skagit County. RP 453-56.

The relationship began to sour when Mr. Lewis briefly moved to La Push, approximately 15 minutes from Ms. Cross's residence. RP 457-58. Ms. Cross said she was troubled by Mr. Lewis's sudden move and, according to her, his increasing verbal and mental abuse. RP 458. According to Ms. Cross, Mr. Lewis became angry when she rebuffed his intent to move in with her. RP 459-60. The two began to see less

and less of each other and Ms. Cross claimed that by the summer of 2015, the relationship had ended although they continued to keep in touch by text and phone. RP 461-62. Mr. Lewis subsequently moved back to Sedro Wooley. RP 463.

Ms. Cross claimed that once Mr. Lewis returned to Sedro Wooley, he seemed to want more contact with her, mostly by text. RP 464. Ms. Cross refused to see Mr. Lewis and she stated that around Christmas 2015, Mr. Lewis's overtures increased. RP 465. When Ms. Cross ignored the attempt at contact, Ms. Cross stated she felt him becoming more angry. RP 466-67.

Ms. Cross made plans to travel to Florida for the holidays. RP 467. From December 30, 2015, to the following day, Mr. Lewis's texts and voice messages increased and became more demeaning. RP 469-70. Ms. Cross became concerned and contacted the Clallam County Sheriff's Office. RP 470-72.

Mr. Lewis was arrested on January 22, 2016. RP 786. Mr. Lewis admitted texting Ms. Cross on December 31, 2015, as well as leaving voice messages. RP 518-19. Mr. Lewis admitted he was extremely intoxicated on New Year's Eve 2015. RP 519. Mr. Lewis also admitted that on New Year's Day 2016, he drove to Ms. Cross's home but drove

home to Sedro Wooley when he discovered she was not home. RP 521. This was confirmed by video surveillance obtained by the Clallam County Sheriff's Office from the Washington State Ferries. RP 795-809.

Mr. Lewis was charged with one count of first degree arson, one count of residential burglary, one count of misdemeanor cyberstalking and one count of misdemeanor telephone harassment. CP 153.

Days prior to the beginning of trial, the prosecutor forwarded to Mr. Lewis a copy of the report prepared by Clallam County Fire Investigator Barnes (Barnes report) concluding the cause of the fire was undetermined. RP 61. Mr. Lewis moved to dismiss under CrR 8.3 for governmental mismanagement. CP 159-67; RP 57-63. The trial court analyzed the issue as a violation under *Brady v. Maryland*,¹ as opposed to late discovery under CrR 8.3, and denied the motion. CP 107-12.

During trial, the State attempted to admit Mr. Lewis's Verizon cell phone records thru Joseph Ninete, a senior analyst for Verizon and the company's custodian of records. RP 659-77. Mr. Ninete had not retrieved the records but they were obtained by way of search warrant:

Were you personally asked to retrieve any Verizon records related to a subscriber named Marshall Lewis?

¹ 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

A No.

RP 659. In addition, the records contained no identifying information on them indicating they were Verizon records:

And how are you able to tell if this is a Verizon Wireless document?

A This is how we would usually send it in response to a legal process. We would take the data which is always constant and provide it to law enforcement in response to a search warrant, in a file format that's pretty general and in this case it would be *an excel spreadsheet*.

...

Q Are you able to tell whether or not that is in fact a Verizon business record?

A Yes, I can.

Q And how are you able to tell that?

A By the format that it's on, the way this thing is, which search value, account number, last name, first name, middle name, business name, this is exactly what we would provide.

RP 660-62 (emphasis added). Despite these infirmaries, over Mr. Lewis's repeated objections, the trial court admitted the records:

Right, I mean, you've made an objection to say that you don't believe it can be identified as a Verizon business record. He's just testified that it is and it's exactly the form that they use, so overruled, so 90 is admitted.

RP 663.

In the trial court's instructions to the jury regarding cyberstalking and telephone harassment, the court instructed the jury using 11 WPIC 2.24 defining a "threat:"

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person, to cause physical damage to the property of a person other than the actor, or to do any other act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships.

CP 136. (A copy of the Instruction is in the Appendix). The court omitted the remaining portion of WPIC 2.24 defining a "true threat:"

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

11 WPIC 2.24. Although Mr. Lewis proposed jury instructions, he did not propose any regarding telephone harassment or cyberstalking or the definition of a threat. CP 147-54.

Mr. Lewis was convicted as charged. CP 113-17. Mr. Lewis moved the trial court to reconsider its decision not to dismiss for the late discovery, or in the alternative, to dismiss the convictions, which was denied by the trial court. CP 97-102.

At sentencing, in addition to the \$500 mandatory Victim Penalty Assessment, the trial court imposed \$1000 in discretionary costs, which included:

\$200 Filing Fee;

\$100 Domestic Violence Assessment;

\$100 Crime Lab Fee;

\$100 DNA Collection Fee;

\$500 Fees for Court Appointed Attorney.

CP 20.

E. ARGUMENT

1. The failure to instruct the jury on “true threat” requires reversal of the cyberstalking and telephone harassment counts.

- a. *Under the First Amendment, only “true threats” can be barred.*

The First Amendment, by incorporation into the Fourteenth Amendment due process clause, bars a state from “abridging the freedom of speech.” U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). Threats are speech, but a state may criminalize a “true threat.” *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). “A true threat is ‘a

statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” *Schaler*, 169 Wn.2d at 283, quoting *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). “A true threat is a serious one, not uttered in jest, idle talk, or political argument.” *State v. Hansen*, 122 Wn.2d 712, 718 n. 2, 862 P.2d 117 (1993) (internal quotation marks omitted); see *Black*, 538 U.S. at 359 (“The speaker need not actually intend to carry out the threat.”).

Where a threat to commit bodily harm is an element of a crime, the State must prove that the alleged threat was a “true threat.” *Kilburn*, 151 Wn.2d at 54; *State v. Kohonen*, 192 Wn.App. 567, 566, 370 P.3d 16 (2016). The subsections of the telephone harassment and cyberstalking with which Mr. Lewis was charged required proof of a threat to inflict injury on a person or their property. RCW 9.61.230(1)(c) (telephone harassment); RCW 9.61.260(1)(c) (cyberstalking). Thus, the trial court was required to instruct the jury regarding a “true threat” to avoid violating Mr. Lewis’s First

Amendment rights. *Schaler*, 169 Wn.2d at 283-84. The court did not, thus Mr. Lewis is entitled to reversal of these convictions.²

b. *The failure to instruct on “true threat” and define a mens rea requirement violated the First Amendment.*

The decision in *Schaler* controls here. In *Schaler*, Mr. Schaler was charged with two counts under the threats-to-kill provision of the harassment statute. *Schaler*, 169 Wn.2d at 281. At trial, he requested a jury instruction requiring the jury to find that he subjectively intended to communicate a threat. *Id.* The trial court also instructed the jury on the definition of “threat,” explaining that “threat” means to communicate, directly or indirectly, the intent to cause bodily injury immediately or in the future to the person threatened or to any other person. *Id.* at 285. No party requested an instruction on the definition of “true threat.” *Id.* at 284.

On appeal, Mr. Schaler challenged the jury instructions for the first time, arguing that the First Amendment required an explicit “true threat” instruction. *Id.* at 282. The Supreme Court held that the jury instructions were not sufficiently narrow to ensure that the jury would

² Although Mr. Lewis did not request a “true threat” instruction nor did he object to the trial court’s failure to define a “true threat,” he may nevertheless raise the issue for the first time on appeal as a manifest issue affecting a constitutional right. RAP 2.5(a)(3); *Schaler*, 169 Wn.2d at 287-88.

convict Mr. Schaler only if he had made a true threat. *Id.* at 287. The majority explained that a statute proscribing true threats must be read to reach only those instances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to take the life of another person. *Schaler*, 169 Wn.2d at 287. This required a mens rea of simple negligence as to the result of the threat. *Id.* The Supreme Court concluded, “Because the First Amendment requires negligence as to the result but the instructions here required no *mens rea* as to result, the jury could have convicted Schaler based on something less than a ‘true threat.’” *Id.* The Court therefore held that the jury instructions were erroneous for failing to include an instruction defining “true threat.” *Id.*³

³ The Supreme Court explained in a footnote that this would not likely be a recurring issue:

Although the instructions in this case erroneously failed to limit the statute’s scope to “true threats,” the problem is unlikely to arise in future cases. After our opinion in [*State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006)] limited the bomb threat statute’s scope to “true threats,” the Washington Pattern Jury Instructions Committee amended the pattern instruction defining “threat” so that it matches the definition of “true threat.” [11 WPIC 2.24, at 72] (“To be a threat, a statement or act must occur in a context ... where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat...”). Cases employing the new instruction defining “threat” will therefore incorporate the constitutional mens rea as to the result.

In a similar vein, in *State v. Johnston*, the trial court similarly failed to instruct on true threat in a threat to bomb prosecution. 156 Wn.2d 355, 358-59, 127 P.3d 707 (2006). The defendant and another were extremely intoxicated and had been observed drinking alcoholic drinks on an airplane that they had illegally brought on board. *Id.*, at 357-58. The men were met at the airport gate and Mr. Johnston was arrested for outstanding warrants. *Id.* Upset over his arrest, Mr. Johnston made several threats to “blow this place up,” claiming “all he needed was a Ryder truck and some nitro diesel fuel.” *Id.* the trial court refused to instruct the jury using Mr. Johnston’s proposed “true threat” instruction and the Supreme Court reversed. *Johnson*, 156 Wn.2d at 358, 364-65. The Court noted absent a “true threat” instruction, the threat to bomb statute was unconstitutionally overbroad. *Id.*, at 364.

Here, both statutes criminalize threats, which violate the First Amendment absent an instruction to the jury limiting it to “true threats.” Thus, the court here in failing to instruct on “true threat” violated Mr. Lewis’s rights under the First Amendment.

Schaler, 169 Wn.2d at 288 n. 5.

c. *The failure to instruct the jury on “true threat” was not a harmless error.*

Because the trial court failed to give the “true threat” instruction, it erred. Thus, this Court must reverse unless the error was “harmless beyond a reasonable doubt.” *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) “Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State must “prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman*, 386 U.S. at 24; *see also Schaler*, 169 Wn.2d at 288.

Further, the omission of the constitutionally required *mens rea* from the jury instructions is analogous to one in which the jury instructions omit an element of the crime. An omission of an essential element from the jury instructions may be harmless when it is clear that the omission did not contribute to the verdict. *Schaler*, 169 Wn.2d at 288, *quoting State v. Brown*, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002).

In *Schaler*, the Court stated that it could not know whether the jury determined that Mr. Schaler’s threats to kill his neighbors were “true threats.” There was evidence that Mr. Schaler said he wanted to

kill his neighbors, described planning to do so, and said he dreamt about the event. But he never explicitly said that he would do so and his behavior was at times erratic, and he was often contradictory. But, the Court noted that Mr. Schaler's utterances did not unequivocally lead to a finding of a true threat because they were also consistent with an impression that he was mentally unstable and lashing out somewhat incoherently at those around him. As a result, the Court concluded:

Thus, while the jury could have concluded that Schaler's statements were serious threats and that a reasonable speaker would so regard them, they could also have concluded that Schaler's threats were a cry for help from a mentally troubled man, directed toward mental health professionals who could help him. For this reason we cannot conclude on the record that there was "uncontroverted evidence" that Schaler's threats were true threats. Therefore, the omission of a true threat instruction was not harmless. Reversal is required because the jury was not asked to decide whether a reasonable person in Schaler's position would foresee that his statements or acts would be interpreted as a serious expression of intent to carry out the threat, and the evidence was ambiguous on the point.

Schaler, 169 Wn.2d at 289-90 (internal footnote omitted).

In *Johnston, supra*, the Supreme Court suggested that a drunken defendant's outbursts might not have been true threats, thus exacerbating the error under the First Amendment. *Johnston*, 156 Wn.2d at 364-65.

Here, Mr. Lewis admitted being extremely intoxicated when he made the text message and phone threats to Ms. Cross. Similar to *Johnston* and *Schaler*, the jury could have concluded that in light of this intoxication, Mr. Lewis's threats were not serious threats and did not constitute "true threats." Without the "true threat" instruction, the jury could have convicted Mr. Lewis on his words alone instead of based upon whether or not his statements constituted true threats. The trial court's error in failing to instruct on "true threat" was not harmless and this Court must reverse his convictions for cyberstalking and telephone harassment.

2. The State's mismanagement of the case prejudiced Mr. Lewis and the trial court erred in failing to dismiss for the mismanagement.

a. Disclosure of material facts on the eve of trial is mismanagement and under CrR 8.3 provides for dismissal.

Under CrR 8.3(b), "[t]he court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." The purpose of this rule is to see that a defendant is fairly treated. *State v. Whitney*, 96 Wn.2d 578, 580, 637

P.2d 956 (1981), *citing State v. Satterlee*, 58 Wn.2d 92, 361 P.2d 168 (1961). Dismissal of charges is an extraordinary remedy available when there has been prejudice to the rights of the accused which materially affected his rights to a fair trial. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A trial court's decision under CrR 8.3 is reviewed under the manifest abuse of discretion standard. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) . "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *Blackwell*, 120 Wn.2d at 830.

A defendant must show two things in order for the trial court to dismiss the charges under CrR 8.3(b). First, he must show arbitrary action or governmental misconduct. *Michielli*, 132 Wn.2d at 239. Governmental misconduct, however, "need not be of an evil or dishonest nature; simple mismanagement is sufficient." *Blackwell*, 120 Wn.2d at 831; *see also State v. Salgado-Mendoza*, 189 Wn.2d 274, 231, 236 P.3d 858 (2010) ("the party does not need to prove bad faith on the part of the prosecutor"). As the Supreme Court stated, "We repeat and emphasize that CrR 8.3(b) 'is designed to protect against arbitrary action or governmental misconduct . . .'" *State v. Cantrell*,

111 Wn.2d 385, 390, 758 P.2d 1 (1988), *quoting State v. Starrish*, 86 Wn.2d 200, 205, 544 P.2d 1 (1975).

Second, a defendant must show prejudice affecting his right to a fair trial. *Michielli*, 132 Wn.2d at 240.

b. The disclosure of the Barnes arson report on the eve of trial constituted governmental misconduct.

“Misconduct occurs when the prosecutor ‘inexcusably fails to act with due diligence,’ resulting in material facts not being disclosed ‘until shortly before a crucial stage in the litigation process.’” *Salgado-Mendoza*, 189 Wn.2d 420, *quoting State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980); *see also State v. Martinez*, 121 Wn.App. 21, 32-34, 86 P.3d 1210 (2004) (affirming dismissal for State’s prejudicial failure to provide evidence in a timely manner).

The trial court focused solely on whether the disclosure of the Barnes report violated due process under *Brady*. CP 109-11. But this analysis missed the point; the issue was not disclosure, the report was disclosed to Mr. Lewis prior to trial. The issue instead was whether the disclosure on the eve of trial constituted governmental misconduct which prejudiced Mr. Lewis, an issue the court never addressed. As a result, by analyzing the issue under the wrong legal standard, the court abused its discretion. *See State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d

86 (2009) (a court also abuses its discretion when it applies the wrong legal standard).

In *Salgado-Mendoza*, a driving while under the influence case, five months before trial, the State disclosed a list of nine potential toxicologist witnesses, only one of whom would testify. Two weeks before trial, Mr. Salgado-Mendoza filed a supplemental discovery request demanding, in part, that the State identify which toxicologist it actually intended to call. Mr. Salgado-Mendoza still had not received this information three days before trial. Alleging governmental misconduct, he filed a CrRLJ 8.3(b) motion to dismiss the case or suppress the toxicologist's testimony. The day before trial, the State narrowed the list to three names. On the morning of trial, the State identified the toxicologist who would testify. *Salgado-Mendoza*, 189 Wn.2d at 425. Based on these facts, the Supreme Court agreed that the State's delayed disclosure constituted misconduct under the rule. *Salgado-Mendoza*, 189 Wn.2d at 432.

This was the same problem faced by Mr. Lewis. While he may have known that Mr. Barnes was potentially a witness for the State, the fact he produced a report which contradicted that of Mr. Davis was not disclosed until the eve of trial.

c. *Mr. Lewis suffered prejudice from the disclosure on the eve of trial.*

Dismissal is appropriate when the State's misconduct prejudices the rights of the defendant in a manner that materially affects his right to a fair trial. CrR 8.3(b); *State v. Garza*, 99 Wn.App. 291, 295, 994 P.2d 868 (2000). One way to show actual prejudice is by showing that the State made a late disclosure of material facts. *Salgado-Mendoza*, 189 Wn.2d at 432. A delayed disclosure that presents "new facts" may actually prejudice the defendant by forcing him to choose between his right to a speedy trial and his right to representation by an adequately prepared attorney. *Id.*

For example, in *State v. Brooks*, the trial court dismissed the defendants' charges following the State's failure to provide the defense with certain discovery material until the eve of trial. 149 Wn.App. 373, 377-83, 203 P.3d 397 (2009). The appellate court affirmed the trial court's CrR 8.3(b) dismissal order, holding that the State's late disclosure of discovery material prejudiced the defendants because it "prevented defense counsel from preparing for trial in a timely fashion." *Brooks*, 149 Wn.App. at 390.

Here, upon receipt of the Barnes report, Mr. Lewis was required to move to continue the trial in order to investigate the new evidence.

CP 109; RP 50-56. This is precisely the sort of prejudice that resulted in dismissal in *Michielli*. 132 Wn.2d at 244-46. Mr. Lewis trial was scheduled to begin January 22, 2018, but was continued because of this late discovery to March 26, 2018. CP 225. As a result, Mr. Lewis suffered prejudice and the trial court erred in failing to dismiss the matter under CrR 8.3.

3. In the absence of an adequate foundation for admission, Mr. Lewis’s Verizon phone records were erroneously admitted.

a. The State was required to provide evidence of authentication as a condition precedent to the admission of the Verizon records.

“Authentication is a threshold requirement designed to assure that evidence is what it purports to be.” *State v. Payne*, 117 Wn.App. 99, 106, 69 P.3d 889 (2003).⁴ For example, the ER 901 allows

⁴ ER 901 states in relevant part:

The requirement of 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.

...

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

(1) *Testimony of Witness with Knowledge.* Testimony that a matter is what it is claimed to be.

...

documents to be admitted based on the testimony of witnesses with knowledge, or based on distinctive characteristics surrounding the document guaranteeing authenticity. ER 901(b)(1), (4); *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn.App. 736, 746-47, 87 P.3d 774, *review denied*, 153 Wn.2d 1016 (2004).

The State satisfies ER 901 if it introduces sufficient proof to permit a reasonable juror to find authenticity or identification. *State v. Danielson*, 37 Wn.App. 469, 471, 681 P.2d 260 (1984). “Rule 901 does not limit the type of evidence allowed to authenticate a document. It merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be.” *United States v. Jimenez Lopez*, 873 F.2d 769, 772 (5th Cir.1989).

(4) *Distinctive Characteristics and the Like*. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

b. The State failed to produce sufficient evidence for admission of the Verizon phone records.

Over Mr. Lewis's repeated objections, the trial court admitted the Verizon records as business records. RP 674-78. Admission of business records is governed by RCW 5.45.020, which provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

State v. Iverson, 126 Wn.App. 329, 337, 108 P.3d 799 (2005).

Although "the UBRA [Uniform Business Records as Evidence Act] is a statutory exception to hearsay rules," the act "does not create an exception for the foundational requirements of identification and authentication." *State v. DeVries*, 149 Wn.2d 842, 847, 72 P.3d 748 (2003); *State v. Hamilton*, 196 Wn.App. 461, 483, 383 P.3d 1062 (2016), *review denied*, 187 Wn.2d 1026 (2017).

Here, the Stated presented an employee who was the custodian of records for Verizon but did not produce the exhibits. This witness claimed the exhibits were Verizon records but not based upon personal knowledge or the distinctive character of the records. The only way the

witness could determine the records were Verizon records was because they were in a basic Microsoft Excel spreadsheet format.⁵ The exhibits were otherwise blank; they contained no Verizon banners or anything claiming it to be a Verizon document or that would distinguish these documents from any other Microsoft Excel spreadsheets.

Q So, if I were to present you with a piece of paper, the format of this is basically an Excel format?

A Correct.

Q There's nothing special about the font, right? I mean, it's not some sort of proprietary font that only Verizon somehow has access to?

A No.

Q There's nothing unique about the spacing that only Verizon can space the various sections the way it's spaced, correct?

A No, that's correct.

Q So, if I were to hand you a piece of paper that looked like this except the number say, the number instead of where the number three shows up, it was the number four, you'd look at that and say looks like a Verizon document, right?

⁵ “**Microsoft Excel** is a spreadsheet developed by Microsoft for Windows, macOS, Android and iOS. It features calculation, graphing tools, pivot tables, and a macro programming language called Visual Basic for Applications. It has been a very widely applied spreadsheet for these platforms, especially since version 5 in 1993, and it has replaced Lotus 1-2-3 as the industry standard for spreadsheets.” https://en.wikipedia.org/wiki/Microsoft_Excel (accessed 12/17/2018).

A Correct.

RP 669.

What the witness testified to was the document was an Excel spreadsheet that probably was a Verizon document because Verizon, like millions of other companies, uses Excel to create spreadsheets. This simply was not sufficient evidence to authenticate these documents as Verizon phone records. As a result, in light of the failure to authenticate these records, the court erred in admitting them as a business record.

c. The error in admitting the Verizon phone records was not a harmless error.

A trial court's evidentiary error that results in prejudice to the defendant is grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

The phone records were a critical part of the State's theory of the case as expressed in the State's closing argument. While the State produced surveillance footage of Mr. Lewis's car at the Ferry Terminals, there was no surveillance footage of Ms. Cross's home or

the surrounding area. In order to attempt to prove Mr. Lewis visited Ms. Cross's residence in Beaver, the State used the Verizon phone records to show the cellphone towers on which Mr. Lewis's cellphone "pinged" or bounced of:

Most of the yellow, those towers are in the Everett area and then down in the Edmonds area. In fact, tower 66 that he hit at 6:11 a.m., is the Edmonds ferry terminal, which we know from the ferry surveillance is where he was at the Edmonds ferry terminal and *there's the only tower that he pings in Clallam County, tower 20, just a couple miles away from 201821 Highway 101, in Beaver.* The next tower he hits, tower 29, in Port Townsend. As you can see from this map here, there's the tower 29 on the left and all those other ones that he had been hitting earlier in Snohomish and north King County and the last one he's hitting are 50, 441 and 164, 50 in the Anacortes area and the last two, 441 and 164 outside of Sedro Woolley and you can see that green pin in the middle, that's 106 North Central Avenue in Sedro Woolley and he hit there about 2:00, so he's hitting 29 a couple hours after he hit 20 and then hit 20 at 9:15 a.m., that's where he was, that general area.

RP 888 (emphasis added).

The phone records were the only evidence that Mr. Lewis may have gone to Ms. Cross's residence. The surveillance footage from the Washington State Ferries establishes only that Mr. Lewis arrived in Kingston and several hours later was seen leaving Port Townsend was meaningless without the phone records arguably putting Mr. Lewis in Clallam County near Beaver. Given the importance of this evidence to

the arson and burglary counts, the admission of the Verizon phone records was not harmless because, had the error not occurred, within reasonable probabilities, the outcome of the trial was materially affected. This Court should reverse Mr. Lewis's convictions.

4. The cyberstalking statute is unconstitutionally overbroad and vague.

a. The statute includes prohibitions on "lewd, lascivious, indecent, or obscene" communications made with intent to "harass" or "embarrass".

It is "often true that one man's vulgarity is another's lyric."

Cohen v. California, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

The cyberstalking statute provides in relevant part:

(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 to such other person or a third party:

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

(b) Anonymously or repeatedly whether or not conversation occurs; 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.

RCW 9.61.260 (emphases added).

As explained below, the statute is unconstitutionally overbroad and vague to the extent that it criminalizes communications made with intent to “harass” or “embarrass,” and to the extent it prohibits communications “[u]sing any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act.” *Id.*

b. The statute is unconstitutionally overbroad because it makes unlawful a substantial amount of protected speech, and is unconstitutionally vague because it is unclear and subject to arbitrary enforcement.

“A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities.” *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001), quoting *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000).

Criminal statutes require particular scrutiny and may be facially invalid if they make unlawful a substantial amount of constitutionally protected conduct.... This standard is very high and speech will be protected ... unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Id. (internal quotations omitted).

A law is unconstitutionally vague if it either: (1) fails to define the offense with sufficient definiteness that ordinary people can understand what is proscribed, or (2) fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *Williams*, 144 Wn.2d at 203. Although vagueness is a violation of the due process clause of the Fourteenth Amendment, courts “are especially cautious in the interpretation of vague statutes when First Amendment interests are implicated.” *Williams*, 144 Wn.2d at 204, *quoting Lorang*, 140 Wn.2d at 31.

In *Williams*, the Supreme Court held that the harassment statute was both unconstitutionally overbroad and unconstitutionally vague to the extent it criminalized threats to perform acts intended to substantially harm a person’s “mental health.” *Williams*, 144 Wn.2d at 201, *citing* RCW 9A.46.020(1)(a)(iv) (1992). The term “mental health” was impermissibly vague because it was not clear whether it referred to “mere irritation or emotional discomfort” or instead meant a diagnosed psychological condition. *Id.* at 204-05. And it was unconstitutionally overbroad because it was not limited to “true threats,” which by definition require an expression of intent to cause *physical* harm. *Id.* at 207-08.

Similarly here, the cyberstalking statute is both overbroad and vague. It is overbroad because, like the harassment statute, the cyberstalking statute prohibits not only true threats but also a substantial amount of constitutionally protected speech. For example, it criminalizes the sending of an electronic communication using “indecent” language with intent to “embarrass” the recipient. RCW 9.61.260(1)(a). Such a content-based restriction runs afoul of the First Amendment because this type of speech is not “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” *Williams*, 144 Wn.2d at 206. Indeed, such speech could be used for political purposes: one can imagine a communication sent as part of the transgender bathroom debate being swept up under this statute in light of the overbroad language prohibiting “indecent”⁶ words or images sent with intent to “embarrass.”

⁶ One definition of “indecent” is “using language that offends people: including behavior or ideas that people find offensive.” <http://www.merriam-webster.com/dictionary/indecent>. Communicating ideas that others find offensive is conduct lying at the core of First Amendment protection. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). There can be no doubt that a prohibition on this type of language criminalizes a substantial amount of constitutionally protected speech.

The term “harass” is also overbroad. “Harass” means “to annoy or bother (someone) in a constant or repeated way.”⁷ An electronic communication using indecent language or images sent with intent to annoy or bother someone falls within the protection of the First Amendment, and cannot be criminalized. As this Court explained when invalidating an anti-harassment ordinance, “[a] discussion of any political, social, economic, philosophic or religious topic might well vex, irritate or bother the listener.” *City of Everett v. Moore*, 37 Wn.App. 862, 864, 683 P.2d 617 (1984). This Court noted that the mailing of anti-abortion brochures had been improperly criminalized under a similar Colorado law. *Id.* at 865, citing *Bolles v. People*, 189 Colo. 394, 541 P.2d 80, 83 (1975).

Indeed, countless political tweets could be considered cyberstalking in light of the overbroad language prohibiting “lewd, lascivious, indecent, or obscene” electronic communications made with intent to “harass” or “embarrass.”

The First Amendment protects the principle that “debate on public issues should be uninhibited, robust, and wide-open, and that it

⁷ <http://www.merriam-webster.com/dictionary/harass>.

may well include vehement, caustic, and sometimes unpleasantly sharp attacks” against those with whom the speaker disagrees. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Because the cyberstalking statute sweeps this exchange of ideas within its prohibitions, it is unconstitutionally overbroad.⁸

In addition to being overbroad, the statute is vague. For example, does the word “embarrass” mean “to make uncomfortable” or is it limited to a graver form of emotional distress? The latter reading might cure the overbreadth problem but the former is consistent with the dictionary definition. Similarly, does the overbroad dictionary definition of “harass” discussed above apply, or is it a legal term of art with a narrower meaning? Does “indecent” mean “using language that offends people: including behavior or ideas that people find offensive”⁹ – which is clearly overbroad – or does it mean “sexually offensive or

⁸ In contrast to communications made with intent to “harass” or “embarrass,” communicating with intent to “intimidate” (or “torment”) likely falls outside the scope of First Amendment protection. *See Black*, 538 U.S. at 360 (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”). The problem is that the cyberstalking statute is not limited to intimidation. *See* RCW 9.61.260.

⁹ *See* <http://www.merriam-webster.com/dictionary/indecent>.

shocking”¹⁰ – which might not be? These ambiguities render the statute unclear and subject to arbitrary enforcement. It is therefore void for vagueness under the Fourteenth Amendment. *See Williams*, 144 Wn.2d at 203-06.

c. The remedy is reversal of the convictions and remand for a new trial.

Although the statute may be rendered constitutional by severing the offending terms, “[a]n appellate court must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written.” *Id.* at 213 (internal quotations omitted). Because Mr. Lewis was convicted under an unconstitutional statute, a new trial is required unless the State proves beyond a reasonable doubt that he has not been prejudiced by the unconstitutional provisions. *Id.*

The State cannot meet this burden. Although the jury was not instructed on the clause prohibiting “any lewd, lascivious, indecent, or obscene words, images, or language,” it *was* instructed that cyberstalking includes communicating with intent to “embarrass” or “harass.” *See* CP 155, 160-72. In light of the plethora of evidence that Mr. Lewis’s messages were either cries for help or journal entries, the

¹⁰ *See id.*

State cannot show an absence of prejudice. *See* Section (1)(f) above.

Accordingly, Mr. Lewis asks this Court to reverse his convictions, and remand for a new trial. *Williams*, 144 Wn.2d at 213.

5. The legislature recently changed the law as to legal financial obligations. Under *Ramirez*, these changes apply to cases on appeal. Applying the law in effect, the Court should order \$300 in legal financial obligations against Mr. Lewis stricken.

In 2018, the law on legal financial obligations changed. Laws of 2018, ch. 269. Now, it is categorically impermissible to impose discretionary costs on indigent defendants. RCW 10.01.160(3). Now, the previously mandatory \$200 filing fee cannot be imposed on indigent defendants. RCW 36.18.020(2)(h). It is also improper to impose the \$100 DNA collection fee if the defendant's DNA has been collected as a result of a prior conviction. RCW 43.43.7541.

Our Supreme Court recently held that these changes apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714, (2018). In other words, that the statute was not in effect at time of the trial court's decision to impose legal financial obligations does not matter. *Id.* at 747-48. Applying the change in the law, our Supreme Court in *Ramirez* ruled the trial court impermissibly

imposed discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.*

Here, Mr. Lewis was indigent at trial and the trial court found him indigent for the purpose of appeal. CP 3-5. The trial court imposed the \$200 filing fee against Mr. Lewis. CP 20. As in *Ramirez*, the change the law applies to Mr. Lewis's case because it is on direct appeal and not final. Accordingly, this Court should strike the \$200 filing fee. *Ramirez*, 191 Wn.2d at 747-48. In addition, Mr. Lewis has previously had his DNA collected as a result of prior convictions, thus this Court should also order the \$100 DNA collection fee stricken. CP 15 (recounting prior criminal convictions).

Finally, the \$100 Crime Laboratory fee (RCW 43.43.690), the \$100 Domestic Violence assessment (RCW 10.99.080) and the \$500 fee for court appointed counsel (RCW 9.94A.760) are all discretionary fees or costs that must be stricken in light of Mr. Lewis's continued indigency. *See* RCW 10.01.160(3) ("The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)").

The Court should order the \$1000 in discretionary legal financial obligations stricken.

F. CONCLUSION

For the reasons stated, Mr. Lewis asks this Court to reverse his convictions and remand for a new trial.

DATED this 4th day of January 2019.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

INSTRUCTION NO. 15

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person, to cause physical damage to the property of a person other than the actor, or to do any other act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships.

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Washington Pattern Jury Instructions—Criminal

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Washington Practice Series TM**Washington Pattern Jury Instructions--Criminal**

October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part I. General Instructions**WPIC CHAPTER 2. Definitions****WPIC 2.24 Threat—Definition****Threat means to communicate, directly or indirectly, the intent****[to cause bodily injury in the future to the person threatened or to any other person]; [or]****[to cause physical damage to the property of a person other than the actor]; [or]****[to subject the person threatened or any other person to physical confinement or restraint]; [or]****[to accuse any person of a crime or cause criminal charges to be instituted against any person]; [or]****[to expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule]; [or]****[to reveal any information sought to be concealed by the person threatened]; [or]****[to testify or provide information, or withhold testimony or information, with respect to another's legal claim or defense]; [or]****[to take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding]; [or]****[to bring about or continue a strike, boycott, or other similar collective action to obtain property that is not demanded or received for the benefit of the group which the actor purports to represent]; [or]****[to do any [other] act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships.]****To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in [jest or idle talk] [jest, idle talk, or political argument].****NOTE ON USE**

Use bracketed material as applicable. For directions on using bracketed phrases, see the Introduction to WPIC 4.20. Select from among the bracketed phrases so as to use only those that apply to the particular case. With regard to the bracketed clause relating to political argument, see the Comment below.

Use WPIC 2.03 (Bodily Injury—Physical Injury—Definition), as applicable, with this instruction.

Portions of this instruction may be used with, or as an alternative to, WPIC 115.52 (Intimidating a Witness—Threat—Definition), in combination with WPIC 115.51 (Intimidating a Witness—Threat to Former Witness—Elements). See the Comments to those instructions.

COMMENT

RCW 9A.04.110.

Threat. Several statutes supplement RCW 9A.04.110 with an additional definition of threat: "to communicate, directly or indirectly, the

intent immediately to use force against any person who is present at the time.” See RCW 9A.76.180(3)(a) (intimidating a public servant); RCW 9A.72.160 (intimidating a judge); RCW 9A.72.130 (intimidating a juror); and RCW 9A.72.110 (intimidating a witness).

A speaker need not actually intend to carry out a threat in order for the communication to constitute a threat, as long as the speaker objectively knows that the communication constitutes a threat. *State v. Kilburn*, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004); see also *State v. Side*, 105 Wn.App. 787, 790, 21 P.3d 321 (2001). A statement may constitute a threat even if it does not actually reach the victim. *State v. Hansen*, 122 Wn.2d 712, 717–18, 862 P.2d 117 (1993); *State v. Side*, 105 Wn.App. 787 at 790, 21 P.3d 321.

Use of the second bracketed phrase is proper in a prosecution under RCW 9A.76.160, threatening to bomb or injure property. *State v. Edwards*, 84 Wn.App. 5, 924 P.2d 397 (1996). A conditional threat to injure property in the future is within this definition. 84 Wn.App. at 11–12. See the Comment to WPIC 86.02 (Threatening to Bomb or Injure Property—Elements).

Use of the first bracketed phrase, which is the language of RCW 9A.04.110(27)(a), is error in a robbery case because that statutory definition refers to threat to do injury in the future. *State v. Gallaher*, 24 Wn.App. 819, 604 P.2d 185 (1979).

True threat. The constitution requires the prosecution to prove a true threat for many offenses, including: felony harassment involving a threat to kill (see cases cited earlier in this section); threats to bomb or injure property (see *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006)); threats involved in intimidating a judge (*State v. Hansen*, 122 Wn.2d 712, 862 P.2d 117 (1993)); threats to bomb a government building (*State v. Smith*, 93 Wn.App. 45, 966 P.2d 411 (1998)); and threats involved in intimidating a public servant (*State v. Stephenson*, 89 Wn.App. 794, 966 P.2d 411 (1997)); see also *State v. King*, 135 Wn.App. 662, 145 P.3d 1224 (2006) (holding that an instruction defining “true threat” is not needed for the crime of intimidating a former witness, RCW 9A.72.110; the crime's elements are such that they limit the statute's application to true threats and exclude constitutionally protected speech). An indirect threat may also constitute a true threat. *State v. Locke*, 175 Wn.App. 779, 789, 307 P.3d 771 (2013), review denied 179 Wn.2d 1021 (2014). The true threat requirement is imposed so that criminal statutes prohibiting threats do not target constitutionally protected speech. See *State v. Williams*, 144 Wn.2d 197, 207, 26 P.3d 890 (2001).

The requirement, however, is not an essential element of a harassment statute. *State v. Allen*, 176 Wn.2d 611, 628, 294 P.3d 679 (2013); *State v. Tellez*, 141 Wn.App. 479, 170 P.3d 75 (2007). Instead, the constitutional requirement of “true threat” merely defines and limits the scope of the essential threat element. *State v. Allen*, 176 Wn.2d at 630. The *Allen* court further stated that the current pattern instruction's definition of “threat” matches the definition of “true threat” and that the definition meets the requirements for establishing the constitutional mens rea in harassment cases. *State v. Allen*, 176 Wn.2d at 629. See also *State v. Boyle*, 183 Wn.App. 1, 7–8, 335 P.3d 954 (2014).

The pattern instruction does not use the term “true threat.” Instructing jurors using this term could unnecessarily confuse the issues by causing jurors to speculate about “false” threats. Accordingly, the committee incorporated the constitutional concepts into the instruction's final paragraph without directly referring to the legal term of art.

A true threat is defined as

a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of another person. A true threat is a serious threat, not one said in jest, idle talk, or political argument. Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

State v. Kilburn, 151 Wn.2d at 43–44 (citations omitted). See also *State v. J.M.*, 144 Wn.2d 472, 481–82, 28 P.3d 720 (2001).

A true threat can be found even when there is no actual intent to carry out the threat. *State v. Kilburn*, 151 Wn.2d at 44–48.

The instruction directs jurors to consider foreseeability from the standpoint of a reasonable person in the position of the speaker. This language incorporates the requirement that true threats be evaluated using an “objective standard that focuses on the speaker.” See, e.g., *State v. Kilburn*, 151 Wn.2d at 44.

True threat—political advocacy. The case law establishes that true threats are to be distinguished from constitutionally protected speech, including not only statements made in jest and idle talk, but also political arguments. See *State v. Kilburn*, 151 Wn.2d at 43; *State v. J.M.*, 144 Wn.2d at 477–78.

The context of political advocacy raises special considerations with regard to constitutionally protected speech. See, e.g., *Watts v. U.S.*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (holding that the statement “if they ever make me carry a rifle the first man I want in my sights is L.B.J.” in a political speech did not amount to a threat against the life of the President). For cases involving political speech, some additional instructions may be necessary to address these issues. For cases that do not involve political speech, practitioners may avoid these issues by omitting the bracketed reference to political arguments.

[Current as of December 2015.]

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 51814-7-II
)	
MARSHALL LEWIS,)	
)	
Appellant.)	

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