

FILED
Court of Appeals
Division II
NO. 31814-7-II
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
3/20/2019 8:00 AM
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARSHAL J. LEWIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00022-2

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence guilt was so overwhelming that the absence of a true threat instruction was harmless error?
2. Whether the trial court properly exercised its discretion by denying the motion to dismiss for an alleged discovery violation because there was no there was no prejudice to the defendant due to the late discovery of Capt. Barnes fire investigation report?
3. Whether the trial court's admission of Verizon phone records was not an abuse of discretion because there was an adequate foundation for admission?
4. Whether the trial court's admission of Verizon phone records was not prejudicial because there was other substantial and independent evidence showing that Lewis was present near the victim's home at the time of the arson?
5. Whether the cyberstalking statute is not unconstitutionally overbroad and vague because they adequately inform the public of the prescribed conduct?
6. Whether the court should order \$300 of legal financial obligations to be stricken when the record does not establish Lewis was indigent?

II. STATEMENT OF THE CASE

Lewis Marshal was convicted by a jury of Arson in the First Degree for burning down his ex-girlfriend's home down on or about Jan. 1, 2016. The defendant was also convicted of Cyberstalking and Telephone Harassment. The defense was provided discovery showing that a Capt. Barnes was part of the Fire District that responded to the fire scene and that he investigated the fire. CP 205. The State notified the defense that Capt. Barnes was a witness for the State when it filed its omnibus application on Feb. 19, 2016. CP 179–180. Barnes is listed as Captain of the County Fire District #1 on the omnibus application. The State also notified the defense that Barnes would be called upon to testify when the State filed a separate witness list on April 1, 2016. CP 186.

The two fire investigation reports

Lyn Davis' fire investigation report, Jan. 13, 2016 (hereinafter "Davis Report").

A fire cause investigation was conducted by Lynn Davis and his report, the Davis Report, was submitted to Farmers Insurance on Jan. 13, 2016. CP 454–57. The State provided the Davis Report to the defense. CP 161, 210. Davis' first sentence in the "interview" section of his report declares that Barnes is the Fire Marshal of Clallam County Fire District. The second sentence of his report states, "He was responsible for investigation of

the fire.” CP 210.

Then Davis referenced that “[Barnes] said that the fire appeared suspicious and he has turned over the investigation to the Clallam County Sheriff’s Office [CCSO].” CP 210. In the “conclusion” section of the same report, Davis states, “The fire was investigated by Clallam County Fire District #1. Their Fire Marshal, Justice Barnes, determined that the fires were intentionally set and has turned over the follow-up investigation to the Clallam County Sheriff’s Office.” CP 211.

Davis concluded that the fire was an arson fire set at two locations. CP 212. Davis’ stated that his opinion was based on his own knowledge of the facts and information available to date. CP 212. Davis also stated that if additional information becomes available which has any bearing on his opinion, then he would amend or supplement his opinions accordingly. CP 212.

Capt. Barnes fire investigation report dated April 11, 2016 (hereinafter “Barnes Report”).

Barnes role shifted into a fire investigator role at that time to investigate the fire to determine origin and cause of the fire. RP 559. About three months after Davis completed his report, Barnes utilized the Davis Report in completing the Barnes Report on Apr. 11, 2016. CP 214; RP 563, 569.

Barnes stated in his report that “With the current information, the ignition source and the points of origin are unknown. Until additional evidence is provided, the cause of the two fires is undetermined.” CP 217.

Discovery of the Barnes Report

The deputy prosecutor learned about the Barnes Report while interviewing Capt. Barnes Wed., Jan. 17, 2018 in preparation for trial. CP 171. The deputy prosecutor demanded and obtained the Barnes Report Wed., Jan. 17, 2018 after business hours and provided it to the defense on Thurs., Jan. 18, 2018, before the trial set the following Monday, Jan. 22. RP 5 (Jan. 19, 2018).

The State turned over volunteer Capt. Barnes’ report (hereinafter “Barnes Report”) promptly after it was received. RP 61, 64, 542–43; CP 214–218. The defense made it clear on multiple occasions that the prosecution was diligent in providing the Barnes Report to the defense. RP 6 (Jan. 19, 2018); RP 61. 62, 63–64, 67,

Jan. 19, trial date stricken

On Fri., Jan. 19, 2018, the day after the prosecution provided the Barnes Report to the defense, the parties appeared before the court and agreed to strike the trial date. State’s Supp. RP (1/19/2018). The defense stated that they needed time to investigate the new evidence. *Id.*

Lewis agreed to strike the trial date of Jan. 22, 2018 and apparently

was considering whether to enter into plea negotiations. RP 51, 52. According to his counsel, the Jan. 22 trial date was stricken with Lewis' agreement to allow "Mr. Lewis to make a decision about where we stood relative to a plea negotiations and whether he wished to pursue perhaps either motions to dismiss relative to the discovery matter or just proceed to trial." RP 51.

Feb. 9 motion to continue trial and decision for file motion to dismiss

On Feb. 9, 2018, the defense moved to continue the trial beyond the current Feb. 21, 2018 speedy trial date. RP 51–52. Lewis had discussed with his attorney about the possibility of entering plea negotiations and had not yet decided whether he wanted to enter plea negotiations, file a motion to dismiss, or go to trial until the hearing on Feb. 9, 2018. RP 51–52. On Feb. 9, 2018, the defense pointed out that the new discovery was largely duplicative to discovery Lewis had already received except for volunteer Capt. Barnes narrative report on his investigation of the fire. RP 50–51.

Continuance of the trial beyond Feb. 21, 2018 and the motion to dismiss

At the hearing on Feb. 9, 2018, the defense indicated that it planned to file a motion to dismiss due to late discovery from the fire district after Lewis instructed his counsel to file a motion to dismiss for late discovery. RP 51. On Feb. 9, 2018, the court found good cause to continue the trial to Mar. 26, 2018. RP 54. The court granted a continuance beyond the speedy trial

expiration of Feb. 21 because Lewis wanted his attorney to file a motion to dismiss and his counsel expressed his need for time to prepare the motion. RP 51–52. Lewis objected to the continuance requested by his counsel and stated that he was not waiving any speedy trial. RP 54. Lewis’ counsel then raised the issue of the new trial date of Mar. 26, 2018. RP 55. Lewis’ counsel pointed out that it was Lewis that wanted counsel to file the motion to dismiss based on the late discovery. RP 51–52.

The trial court stated to Lewis that he could either go to trial without the motion to dismiss or allow his counsel time to prepare the requested motion. RP 55. The trial court pointed out that Lewis had made it clear that Lewis “decided [he] wanted the motion to dismiss to be generated before [his] trial date.” RP 55. Lewis’s counsel pointed out that the State also had logistical issues rescheduling the witnesses and the prosecution agreed that was correct. RP 55–56. The trial court then found good cause to continue the trial to Mar. 26, 2018. RP 56. Lewis then asked for assurance that he would get his motion to dismiss although he was not willing to sign the trial continuance order. RP 56.

The defense eventually signed the motion to dismiss on Mar. 8, 2018 and filed it on Mar. 15, 2018. CP 159. The State filed its response Mar. 13, 2018. CP 168.

Motion to dismiss Mar. 19, 2018

Lewis' attorney announced Lewis' motion to dismiss on the record on Mar. 2, 2018. RP 57. Trial was scheduled until Mar. 26, 2018. RP 57. The motion was set to be argued on Mar. 15, 2018. RP 58. The motion was actually argued on Mar. 19, 2018. RP 59.

The court addressed the arguments raised by the defense, whether there was a *Brady* Violation and if so whether dismissal was appropriate under CrR 8.3. CP 159–67. The issue raised was whether the defendant was prejudiced by the State's mismanagement of exculpatory evidence. CP 166–67. Defense counsel stated:

The basis for the motion is the delay of the presentment of the exculpatory evidence, essentially due to and the caption of the argument is unfortunate in this context, but the context, well it can be called governmental mismanagement, it would normally be called prosecution's mismanagement, more accurately characterized as governmental mismanagement and that governmental mismanagement is attributable to the government's investigator and not getting materials to law enforcement and the law enforcement not securing the materials and providing them to the prosecution so they can do what they ultimately did, which is promptly provide that to the defense. We've provided the court with the case law, for the analysis of why that should result in dismissal. I don't think there's a need for me to go through that at this point in time.

RP 63–64.

The court, in denying the motion to dismiss, concluded that the Barnes Report was not suppressed and therefore there was no prejudice to Lewis. CP 111 (Findings of Fact and Conclusions of Law).

Trial March 2018

Capt. Barnes was a part time volunteer firefighter for 16 years and had been a fire investigator for three years. RP 543. Barnes had 40 hours of fire investigation training. RP 542–43. Barnes had investigated only two or three fires by the time he was involved in investigating the fire in the instant case. RP 543.

Barnes was called as a witness and testified that it was his conclusion at the time of his investigation as set forth in the Barnes Report that the cause of the fire was undetermined. RP 563–66. At trial, Barnes testified that it is the practice of the fire department, that when they see something they believe is criminal, they call the local law enforcement or county level to take the criminal investigation and then they collaborate on scene. RP 544.

Barnes testified that review of additional materials could have affected his determination that the cause of the fire was undetermined such as if accelerants had been found. RP 565–66. Barnes defined “undetermined” to mean that the cause cannot be proven with an acceptable degree of certainty. RP 573. Barnes also testified that the fact the two origin sources of the fires would be a good clue that the fire was incendiary which means an fire that is intentionally set where it shouldn’t be. RP 568. Barnes testified that he found no evidence that the fire was accidental. RP 568.

Capt. Barnes testified that an “accelerant” “[c]ould be any, could be

fuel, like gasoline, diesel, transmission fluid, anything to increase the heat release rate of a fire.” RP 566. Barnes testified that he never reviewed any reports from the Washington State Patrol Crime Laboratory and was not aware of accelerants being found. RP 564, 573.

Mark Strongman, Washington State Patrol Forensic Scientist, Materials Analysis Section (RP 737) testified that that he detected gasoline in the samples B6371 (a liquid from gas can on back porch), B6404 and B6405 (two pieces of foam rubber from the mattress) collected from the scene by CCSO Deputy Cameron. RP 402–03, 422–25, 750–51, 756. Strongman testified that his job is to determine whether materials contain an ignitable liquid and gave gasoline as an example of an ignitable liquid. RP 740–41. Strongman testified that an accelerant has a more intention to it and that an ignitable liquid may be used to accelerate a fire but whether an ignitable liquid is used as an accelerant is up to the opinion of someone else. RP 741. The CCSO received the results of the lab testing of Items B6404 and 6405 by Washington State Patrol on Sept. 27, 2016.

Davis had had been a professional fire investigator for 24 years. RP 615. Davis was also employed in law enforcement for five years in the arson section of the Portland Fire Bureau. RP 615–16. Davis had investigated several thousand fires including about 1500 for law enforcement. RP 616. Davis taught Incendiary Fire Analysis for 20 years at Western Oregon

University. RP 617. Davis had also been qualified to testify as an expert about 30 times. RP 618.

III. ARGUMENT

A. A TRUE THREAT IS NOT AN ESSENTIAL ELEMENT OF CYBERSTALKING AND TELEPHONE HARASSMENT AND THE ABSENCE OF A TRUE THREAT INSTRUCTION IN THIS CASE IS HARMLESS BEYOND A REASONABLE DOUBT.

1. Statement of Facts pertaining to a True Threat Instruction.

The victim in this case, Ms. Cross testified that she received several hostile text messages and phone calls from Lewis. RP 452. Ms. Cross contacted the Sheriff's office because she was concerned that Lewis claimed he was coming across the sound with some friends. RP 453. After Cross and Lewis connected on Facebook, their conversations continued over the phone and developed into a dating relationship although Lewis lived in Sedro Wooley, WA, across the Puget Sound and far from Cross's residence in Beaver, WA. RP 454–56. Overtime Lewis began verbally and mentally abusing Cross calling Cross a white bitch, complaining about her clothing and makeup, and that she was “nothing better than a fuck toy.” RP 458–59. Lewis invited himself to move in with Cross and her children much to Cross's surprise. RP 459. Lewis eventually moved to La Push to be closer to Cross. RP 460. The relationship continued to deteriorate to the point that it

fizzled out by summer of 2015. RP 461. The relationship ended mutually but Lewis continued to text Cross. RP 462. Cross blocked Lewis on Facebook. RP 462. Lewis kept trying to contact Cross even after he moved back across the Puget Sound. RP 464. Cross continually denied Lewis' requests to get together for holidays. RP 465. Lewis began asking when Cross's children were going to see their biological dad for Christmas and when was Cross going to be alone and what would she be doing. RP 465. Cross had plans to go to Florida after Christmas. RP 466. Cross and Lewis communicated and the Lewis kept pressing Cross to get together with him. RP 466-67. Lewis began to start sounding angry and increasingly hostile with Cross that Cross would not agree to get together with Lewis. RP 467.

Lewis' attempts to contact Cross increased and Cross began to feel intimidated as she felt there was a progression and that the situation had quickly escalated. RP 468-69. Eventually Lewis texted Cross asking if she would like to make \$400 that night and that he was bringing three friends with him and that, "we'll pass you around and fuck you, you'll make some money at it. You know, like, we'll pass you around and fuck you like the whore you are." RP 469-70. Cross felt disgusted, sickened, and afraid. RP 470. Ms. Cross identified screen shots of the texts between herself and Lewis as described and dated Dec. 31, 2015 and the texts were admitted in evidence. RP 470-71. Cross continued to receive text messages, in particular, "if you

don't respond to me I'm going to be fucking this tonight" and attached to the message was a photo of a naked woman, sitting in a mirror, taking a selfie or something with her female parts exposed. RP 473. Then Lewis texted "we're at your house, we're on your front porch, we see your car, where are you?" RP 473. Lewis was not aware that Cross was in Florida. RP 467. Cross also received a screen shot in a text message from Lewis, a picture of Mr. Cross naked. RP 479.

On the morning of Jan. 1, 2016, Cross woke up to find 30 missed phone calls and two voice messages. RP 480–81. Lewis stated as follows:

One, I just want to say, I love you. I really do, actually. Happy New Year. I don't wish anything bad towards you. I really do love you, even though you're probably out getting fucked by some guy or a couple guys, but I do love you, but I want you to call me today, so yeah, get good rest and call me. All right, love you, bye.

RP 482.

Then Lewis stated as follows in the second voicemail:

Kasey, if you don't call me in the morning when you go to see your kids, we're gonna follow you. *I want to know who the fuck was that guy who answered your phone.* I don't give a fuck, you call me in the morning when you get this goddamn message, when you go to see your kids or we're gonna follow you when you meet your kids.

RP 482 (emphasis added)

Ms. Cross heard about the fire and her house that very day. RP 484–85.

2. The absence of a true threat definitional instruction was harmless beyond a reasonable doubt

The State concedes that the jury was not instructed on the definition of a true threat. A true threat is not an essential element of harassment statutes and is only definitional. *See State v. Allen*, 176 Wn.2d 611, 629, 294 P.3d 679 (2013) (“[T]he Court of Appeals has repeatedly held the true threat requirement is not an essential element of harassment statutes.”) (citing *State v. Tellez*, 141 Wn. App. 479, 170 P.3d 75 (2007); *State v. Atkins*, 156 Wn. App. 799, 236 P.3d 897 (2010)).

Therefore, the absence of a true threat definitional instruction is subject to harmless error analysis. *See State v. Williams*, 158 Wn.2d 904, 917, 148 P.3d 993 (2006) (failure to include an essential element in a “to convict” instruction requires reversal unless it was harmless) (citing *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

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.

“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].” WPIC 2.24 (threat definition)

“Under the *Neder* test for harmless error, it must appear beyond a reasonable doubt that the error did not contribute to the ultimate verdict.” *See Williams*, 158 Wn.2d at 917 (citing *Neder*, 527 U.S. at 9).

The facts and circumstances in this case demonstrate that no reasonable person would take Lewis’ threats to gang rape Cross to be made out of jest or idle talk. Lewis was increasingly expressing more anger, more possessiveness, was abusive mentally, was willing to embarrass and repetitively harass Cross, and showed a jealous rage by referring to Cross as a whore and demanding to know who the man was that answered her phone. These circumstances show a pattern that began slowly and increased in frequency until they escalated dramatically. A reasonable person with the knowledge Ms. Cross had would take the threats seriously as Lewis demonstrated that he had an obsessive sexual interest in Ms. Cross.

Therefore, the instructional error was harmless beyond a reasonable doubt because there is no reasonable possibility that the absence of the instruction would have had an effect on the verdict.

B. THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS UNDER CrR 8.3 FOR LATE DISCOVERY OF THE BARNES REPORT BECAUSE THE PROSECUTOR'S OFFICE WAS DILIGENT IN OBTAINING THE REPORT AND PROVIDING IT TO DEFENSE AS SOON AS IT WAS DISCOVERED, AND THERE WAS NO PREJUDICE RESULTING FROM THE LATE DISCOVERY.

A trial court has “wide latitude in imposing sanctions for discovery violations” and a trial court’s denial of a motion to dismiss due to a discovery violation is reviewed for manifest abuse of discretion. *State v. Farnsworth*, 133 Wn. App. 1, 13, 130 P.3d 389 (2006) (citing *State v. Dunivin*, 65 Wn. App. 728, 731, 829 P.2d 799 (1992); *State v. Woods*, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001)).

“Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

“The prosecutor has a duty to disclose and to preserve evidence that is material and favorable to the defendant.” *Blackwell*, 120 Wn.2d at 826 (citing CrR 4.7(a)(3). “Failure to do so will generally be held to violate the accused's constitutional right to a fair trial.” *Blackwell*, 120 Wn.2d at 826 (citing *State v. Mak*, 105 Wn.2d 692, 704, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)).

Dismissal under CrR 8.3(b) requires “a showing of arbitrary action or governmental misconduct. . . .” *Blackwell*, 120 Wn.2d at 831 (citing *State v. Lewis*, 115 Wn.2d 294, 298, 797 P.2d 1141 (1990)). “[G]overnmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient.” *Id.* (citing *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980)).

“Dismissal is an extraordinary remedy, available only when there has been prejudice to the accused that materially affected his right to a fair trial.” *Farnsworth*, 133 Wn. App. at 13–14 (citing *Woods*, 143 Wn.2d at 582).

“Thus, before a trial court exercises its discretion to dismiss, a defendant must prove that it is more probably true than not that (1) the prosecution failed to act with due diligence, and (2) material facts were withheld from the defendant until shortly before a crucial stage in the litigation process, which essentially compelled the defendant to choose between two distinct rights.” *Id.* at 14 (citing *Woods*, 143 Wn.2d at 583).

- 1. The prosecution did not violate the discovery rules because the Barnes Report was not in possession of the prosecuting attorney’s staff and therefore there was no misconduct or mismanagement.**

“CrR 4.7 governs criminal discovery.” *Blackwell*, 120 Wn.2d at 826 (citing *State v. Pawlyk*, 115 Wn.2d 457, 471, 800 P.2d 338 (1990)). “The scope of criminal discovery is within the trial court’s discretion.” *Id.* at 826.

“Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged.” CrR 4.7(a)(3).

“The prosecutor's general discovery obligation is limited, however, ‘to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.’” *Blackwell*, at 826 (quoting CrR 4.7(a)(4)).

Here there is no dispute that the prosecution did not have possession or knowledge of the Barnes Report until Jan. 17, 2018, 4 days before the scheduled trial date. The prosecution discovered the existence of the Barnes Report on Wednesday, Jan. 17, 2018 while interviewing Capt. Barnes in preparation for trial on Jan. 22. The defense made it clear on multiple occasions that the prosecution was diligent. RP 6 (Jan. 19, 2018); RP 62, 63, 67.

Lewis cites to *State v. Salgado-Mendoza*, to support his argument that the late discovery was prosecutorial mismanagement. 189 Wn.2d 420, 435, 403 P.3d 45 (2017). In *Salgado-Mendoza* the State failed to provide the name of its toxicologist until the day of trial. *Salgado-Mendoza*, 189 Wn.2d at 433. *Salgado-Mendoza* is distinguishable.

CrRLJ 4.7(a)(1)(i) obligated the State to disclose the name of the

toxicologist it intended to call. *Salgado-Mendoza*, 189 Wn.2d at 434–35. The State gave a list of nine witnesses instead and never narrowed the list for five months and did not narrow it down to three until the day before the trial. *Id.* at 435. The State knew it had to call a witness and that it must disclose its witnesses in a timely manner.

The *Salgado-Mendoza* Court, referring to *Blackwell*, emphasized that the prosecutor did not communicate with the court about the State's inability to extract a name from the Toxicology Laboratory, which is required under CrRLJ 4.7(d) so the court could issue subpoenas. *Id.* at 434 n.8 (referring to *Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993)). Additionally, it was the defendant rather than the prosecutor that repeatedly brought up the issue. *Salgado-Mendoza*, 189 Wn.2d at 434. Ultimately the *Salgado-Mendoza* Court finding that the mere late disclosure was insufficient to establish prejudice held that the District Court did not abuse its discretion in the denying the motion to suppress. *Salgado-Mendoza*, 189 Wn.2d at 439–40.

Here, the State was clearly not in possession of the Barnes Report and there was no demand for the information under CrR 4.7(d) as there was in *Salgado-Mendoza*.

Therefore, the late discovery of the Barnes Report did not constitute a violation of CrR 4.7 because the prosecution had neither possession nor knowledge of the Barnes Report until Jan. 17, 2018.

2. The prosecution acted with diligence by immediately demanding the Barnes Report after discovering its existence while interviewing Capt. Barnes.

Deputy prosecutor Johnson immediately demanded the Barnes Report after business hours on Jan. 17 when he discovered its existence. Johnson made sure the Barnes Report was provided to defense counsel the very next morning. This is the definition of diligence. The defense made it clear on multiple occasions that the prosecution was diligent. RP 6 (Jan. 19, 2018); RP 62, 63, 67,

Moreover, the defense had access to Barnes to interview him as he was listed as a witness since Feb. 2017, the year prior to the scheduled trial. *See State v. Mullen*, 171 Wn.2d 881, 896, 259 P.3d 158 (2011) (quoting *United States v. Dupuy*, 760 F.2d 1492, 1501 n. 5 (9th Cir.1985)) (no *Brady* violation where “means of obtaining the exculpatory evidence has been provided to the defense.”); *State v. Lord*, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007) (“Evidence that could have been discovered but for lack of due diligence [by the defense] is not a *Brady* violation.)). The defense could have contacted Barnes about his investigation to obtain the potentially exculpatory information.

The defense was provided discovery showing that Capt. Barnes was part of the Fire District that responded to the fire scene and that he investigated the fire. CP 205. The defense had notice that Barnes would be

called upon to testify as early as Feb. 19, 2016 when the State filed its omnibus application listing Barnes as a witness (CP 180) and again when the State filed a separate witness list on April 1, 2016 (CP 186). The defense had Barnes contact information because he is listed as Captain of the County Fire District #1 on the omnibus application.

Perhaps more importantly, putting the defense on notice, was the fire investigation report that it did have from Lynn Davis. CP 210. Davis' first sentence declares that Barnes is the Fire Marshal of Clallam County Fire District. The second sentence of his report states, "He was responsible for investigation of the fire." CP 210. The defense was therefore put on notice that it should interview the State's witness and the individual that was responsible for the investigation.

Therefore, dismissal would not be appropriate on the basis of a discovery violation because the State acted with diligence in obtaining and providing discovery as soon as its existence was revealed.

3. **The late discovery did not prejudice Lewis by impermissibly forcing him to choose between his right to a speedy trial and adequate representation because there was plenty of time to interview Barnes before expiration of speedy trial and Lewis chose instead to use that time to explore and file a motion to dismiss due to the late discovery.**

Here, the Lewis fails to establish that he was impermissibly prejudiced by the late discovery of evidence due to the lack of diligence by

the State. *See State v. Smith*, 67 Wn. App. 847, 854, 841 P.2d 65 (1992) (citing *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980)).

Lewis' right to a speedy trial by Feb. 21, 2018 was not compromised by the late provision of the Barnes Report. Rather, it was compromised by Lewis' desire, as he expressed on Feb. 9, 2018, to pursue a motion to dismiss on the basis that the State provided the Barnes Report late. Thus, defense counsel moved to continue, not due to the need to investigate Barnes' opinion, but rather, to spend the remaining time between Feb. 9 and Feb. 21 to file a motion to dismiss which Lewis demanded he do.

Furthermore, on Feb. 9, 2018, the court found good cause to continue the trial and granted a continuance beyond the speedy trial expiration of Feb. 21 because Lewis wanted his attorney to file a motion to dismiss and his counsel expressed his need for time to prepare the motion. RP 51–52.

The court rules clearly allow the trial court to grant a continuance “when required in the administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense.” *State v. Smith*, 67 Wn. App. 847, 852, 841 P.2d 65 (1992) (citing CrR 3.3(h)(2); *State v. Guloy*, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 89 L.Ed.2d 321, 106 S.Ct. 1208 (1986)). *Price* does not bar a court's exercise of discretion to continue a trial in the administration of justice under CrR 3.3 beyond the speedy trial date to allow the defense to address new discovery.

See Smith, 67 Wn. App. at 853 (citing *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980)). Finally, *Price* did not create a per se rule of dismissal in such situations where “untimely discovery by the State affects the defendant's ability to prepare the defense within the speedy trial period.” *Smith*, at 853.

State v. Smith, is instructive and similar to the facts in this case where late discovery may generate a potential conflict between a defendant's right to a speedy trial and right to adequate counsel. *Smith*, 67 Wn. App. at 853.

In *State v. Smith*, the defendant Smith was caught selling cocaine to undercover Officer Saucier. After the deal, Smith left the scene and was arrested by another team of officers. *Smith*, at 849. An Officer Keefe arrested a man name Johnson during the same incident at the same location. Both arrests were documented under the same investigative report. In addition to reports regarding the Smith drug deal, the State provided the incident report from Officer Keefe detailing Johnson's arrest and the discovery of marijuana and cocaine on Johnson's person. The State also provided forensic scientist Ms. Holler's laboratory test results confirming the substance which Smith sold to Saucier as cocaine.

The day of trial scheduled for Sept. 11, 1989, the State provided to the defense a year-old follow up report by Officer Keefe detailing Johnson's arrest, and a new lab report dated Aug. 10, 1989 from a different forensic scientist, Edward Suzuki, showing drug test results for the marijuana and

cocaine. The prosecution stated it requested the new lab report when it found out Ms. Holler had left the area and was not available to testify. *Smith*, at 850.

The defense moved to dismiss the case because the defendant was prejudiced by being forced to choose between the right to a speedy trial and counsel's ability to prepare a defense. On the *last day* before the expiration of the speedy trial period, the trial court denied the motion to dismiss and continued the trial due to late discovery.

On appeal, the *Smith* Court held the trial court did not abuse its discretion in resolving the discovery violation by continuing the trial beyond the speedy trial date under CrR 3.3. *Smith*, at 854. Furthermore, the *Smith* Court, applying the rule in *Price*, held "Smith has not shown the late discovery 'impermissibly prejudiced' the preparation of his defense." *Id.* (citing *Price*, 94 Wn.2d 810).

The *Smith* Court determined that the new reports regarding Johnson did not inject any new facts into the case which would require a continuance beyond the speedy trial date in order to prepare for trial as there was nothing inconsistent with what the defense already knew regarding Johnson's arrest. *Smith*, at 854–55.

Here, *unlike Smith*, the late discovery was provided more than a month before the expiration of speedy trial under CrR 3.3. Therefore, there was plenty of time available and no need to continue beyond speedy trial at

that point.

Similar to *Smith*, the defense in this case had Capt. Barnes information a year in advance and was also notified that Barnes was responsible for the fire investigation for the County Fire District. The defense was notified on multiple occasions almost a year before the trial that Capt. Barnes was a witness for the State, in both the omnibus application and witness list. The existence of the Barnes Report was also easily discoverable with a phone call, just as the prosecution demonstrated on Jan. 17.

Also, like *Smith*, The Barnes Report reveals that there was little to prepare in relation to the defense raising the question of whether a continuance was even warranted in order to provide more time for the defense to investigate the report. First, the Barnes Report was *inconclusive* as to the cause of the fire and pointed out that it could not make a conclusion absent further evidence. CP 217; CP 161–62 (“[w]ith the current information, the ignition source and point of origin are unknown. Until additional evidence is provided the cause of the fire is undetermined.”).

This means Barnes did not rule out arson and thus the Barnes Report was not exculpatory. This also means his opinion was subject to change if more evidence could be reviewed. Barnes was already scheduled to be present to testify and he could have easily been interviewed before Jan. 22, 2018.

Furthermore, the potential to use the report to impeach investigator Lyn Davis was minimal at best because Davis clearly did not rely upon the later Barnes report with the inconclusive opinion to conduct his own investigation. Additionally, Davis stated first in his report that Barnes turned the investigation over to CCSO for follow up investigation after because he became suspicious. Thus Davis' second statement in his report that Barnes determined that the fire was set intentionally and then turned the investigation over to CCSO for follow up investigation was plausibly just an assumption on Davis' part because Barnes became suspicious the fire was a crime. This statement is not unreasonable.

As in *Smith*, there was little information for the defense to utilize in the Barnes Report and it had no effect on the State's theory of the case, thus a continuance of the Jan. 22 probably not even necessary.

Ultimately, Lewis' right to a speedy trial by Feb. 21, 2018 was not compromised by the late provision of the Barnes report. Rather, it was compromised by Lewis' desire to pursue a motion to dismiss as he expressed on Feb. 9, 2018. Defense counsel moved to continue, not due to the need to investigate Barnes' opinion, but rather, to spend the remaining time between Feb. 9 and Feb. 21 to file a motion to dismiss which Lewis demanded he do.

Lewis was not prejudiced by the prosecutions late disclosure of the Barnes report because he was not forced to choose between his right to

adequate counsel and right to speedy trial. Therefore, the trial court did not abuse its discretion in denying the motion to dismiss and this Court should affirm the conviction.

4. The Court did not employ the wrong legal standard in considering the defense argument that there was a *Brady* Violation and therefore did not abuse its discretion.

Lewis argues that the trial court addressed the wrong issue by addressing whether the State's failure to provide the Barnes Report until the week before trial constituted a *Brady* violation and therefore abused its discretion by employing the wrong legal standard. Br. of Appellant at 20.

The defense's motion to dismiss before the trial court focused on whether a *Brady* Violation had occurred. CP 165–166. This is clear because the defense argued, “Because, here, the State failed to fulfill its duty to learn of and disclose favorable evidence that was generated by one of its lead investigators, and because the evidence is impeaching and material, Mr. Lewis' due process rights were violated under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).” CP 165.

Therefore, the trial court did not abuse its discretion by addressing the legal standards under *Brady*. Had the court failed to consider the defendant's *Brady* arguments, then there may have been an abuse of discretion.

Moreover, the court did consider whether the defendant was prejudiced by the late disclosure of the Barnes Report. The court determined

that the Barnes Report was disclosed and therefore there was no prejudice to his right to a fair trial. CP 111. There was no dispute that the Barnes Report was disclosed prior to trial as pointed out by Lewis. Br. of Appellant at 20.

The trial court did not address whether the defendant was prejudiced by being forced to give up his right to a speedy trial in order to protect his right to representation by adequate counsel. This is only because the defendant did not argue this before the trial court. The defendant claimed prejudice to his right to a speedy trial (CP 166) but did not support this with any evidence or even argument as to how his right to a speedy trial was violated, either in the defense brief on his motion to dismiss or at oral argument. CP 159–167; RP 59–64, 68–70. This may be because the speedy trial clock was not set to expire until Feb. 21, 2018, more than a month after the Barnes Report was provided to the defense.

Lewis still fails to address how the late discovery prejudiced his right to a speedy trial when there was still a month on the speedy trial clock and Lewis decided to use that time to file a motion to dismiss rather than proceed to trial. After all, even defense counsel pointed out the Barnes Report “is just a conclusion that the cause of the fire is undetermined.” RP 61. Lewis does not address how it would take more than just a couple days to investigate this matter.

The trial court did not err by not considering prejudice to Lewis’s

right to a speedy trial because it was not argued at all. *See Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (issues unsupported by adequate argument and authority need not be considered); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims that are insufficiently argued); *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (appellate court need not consider pro se arguments that are conclusory or fail to cite authority); *State v. Berrysmith*, 87 Wn. App. 268, 279, 944 P.2d 397 (1997) (appellate court need not reach pro se argument that is unsupported by authority).

Therefore the Court should find the trial court did not abuse its broad discretion in resolving the discovery issue by denying the motion to dismiss. This Court should affirm.

C. THERE WAS NO BRADY VIOLATION BECAUSE THE BARNES REPORT WAS NOT SUPPRESSED BY THE STATE, IT WAS NOT MATERIAL AS IT WAS CLEARLY NOT EXCULPATORY, AND THE REPORT WAS ONLY POTENTIALLY IMPEACHING.

- 1. The Barnes Report was not suppressed by the State because the State provided the Report before trial and also provided all the information necessary to interview Barnes to find out what the result of his investigation was.**

The defense had access to Barnes to interview him almost a year prior to the scheduled trial as he was listed as a witness since Feb. 2017. *See State v. Mullen*, 171 Wn.2d 881, 896, 259 P.3d 158 (2011) (quoting *United States*

v. Dupuy, 760 F.2d 1492, 1501 n. 5 (9th Cir.1985)) (no *Brady* violation where “means of obtaining the exculpatory evidence has been provided to the defense.”); *State v. Lord*, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007) (“Evidence that could have been discovered but for lack of due diligence [by the defense] is not a *Brady* violation.)). Any failure to obtain possibly exculpatory information from Barnes about his investigation was due to failure to contact Barnes and interview him.

As argued above, the defense was provided discovery showing that Capt. Barnes investigated the fire and was a witness for the State. CP 180, 186, 205, 210. The defense was therefore put on notice that it should interview the State’s witness and the individual that was responsible for the investigation.

Because the defense had ready access to the late discovery for over a year simply by making a phone call to Capt. Barnes, the State may not be charged with suppressing the Barnes Report and a *Brady* violation.

2. The Barnes Report was not exculpatory because it was inconclusive as to the cause of fire absent further evidence.

The Barnes Report concluded (“[w]ith the current information, the ignition source and point of origin are unknown. *Until* additional evidence is provided the cause of the fire is undetermined.”). CP 161–62 (emphasis added). It should be pointed out that the Davis Report made it clear that his

report and opinion was subject be amended or supplemented if more information was obtained.

Barnes defined “undetermined” to mean that the cause cannot be proven with an acceptable degree of certainty. RP 573. Further, Barnes testified that review of additional materials could have affected his determination that the cause of the fire was undetermined. RP 565. As an example he said that if he found an accelerant present such as gasoline. Barnes never reviewed the Washington State Patrol Crime Laboratory testing results by Mr. Strongman confirming the presence of gasoline on mattress foam. Barnes never amended his report or finding the cause of the fire was “undetermined.”

Barnes conclusion in his report clearly does not rule out arson. Therefore the Barnes Report is not exculpatory.

3. **The “undetermined” finding in the Barnes Report was at best potentially impeaching because Davis’ statement that Barnes determined the fire was set intentionally is consistent with his understanding that Barnes believed the fire to be suspicious.**

The Jan. 13, 2016 Davis Report referenced his interview¹ with Barnes and that Barnes told him “the fire appeared suspicious and he has turned over the investigation to the Clallam County Sheriff’s Office [CCSO].” CP 210. In

¹ Barnes testified that he and Davis spoke over the phone and then Davis routed his report to Barnes. RP 571.

the later conclusion section of the same report, Davis states, “The fire was investigated by Clallam County Fire District #1. Their Fire Marshal, Justice Barnes, determined that the fires were intentionally set and has turned over the follow-up investigation to the Clallam County Sheriff’s Office.” CP 211 (emphasis added).

These statements are not inconsistent. It would not be unreasonable, for instance, for Davis to assume that the reason Barnes was suspicious and turned over the investigation to the Sheriff’s Office was because Barnes determined the fire had been set intentionally. The crime of arson requires an intentional act and so before an investigator could become suspicious of a crime, one would have to be sufficiently suspicious that the fire was set intentionally.

In fact, Barnes testified that is the practice of the fire department to call the local law enforcement or county level to take the criminal investigation when they see something they believe is criminal. RP 544.

It was not unreasonable for Davis to state that Barnes *determined* that a fire had been intentionally set due to Barnes stated suspicion that it was a criminal act requiring him to turn the investigation over to CCSO.

Further, it is clear that Davis, in Jan. 2018, was not making representations about Barnes’ “determination” from the *Barnes Report* and clearly did not rely upon the Barnes Report in making his own determination

because the Barnes Report had yet to be completed for another few months.²

Thus it was highly unlikely that the “undetermined” conclusion in the Barnes Report could be used to impeach Davis. At best, the “undetermined cause” conclusion in the later Barnes Report is only potentially impeaching.

Moreover, Davis had far more experience in such investigations than Barnes. Capt. Barnes was a part time volunteer firefighter for 16 years and had only been a fire investigator for three years. RP 543. Barnes had only 40 hours of fire investigation training. RP 542–43. Barnes had investigated only two or three fires by the time he was involved in investigating the fire in the instant case. RP 543.

Davis on the other hand had been a professional fire investigator for 24 years. RP 615. Davis was also law enforcement for five years in the arson section of the Portland Fire Bureau. RP 615–16. Davis had investigated several thousand fires including about 1500 for law enforcement. RP 616. Davis’ pedigree is extensive as shown by his certifications, his 20 years of teaching Incendiary Fire Analysis for Western Oregon University. RP 617. Davis had also been qualified to testify as an expert about 30 times. RP 618.

With this backdrop, it was highly unlikely that the “undetermined” finding in the Barnes Report would be impeachable material at all.

² At argument for the motion to dismiss, Lewis’ counsel stated that the insurance company (Davis Report) reached the conclusion that the fire was arson “in substantial part due to the conclusions reached in the Barnes’s report.” RP 60.

Therefore, there was no *Brady* violation and the court did not err in denying the motion to dismiss.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION ADMITTING THE VERIZON PHONE RECORDS IN EVIDENCE AND THERE WAS NO PREJUDICE BECAUSE LEWIS' STATEMENT THAT HE WENT TO THE VICTIM'S HOME WAS ADMITTED IN THE STATE'S CASE IN CHIEF AND THERE WAS OTHER INDEPENDENT EVIDENCE THAT LEWIS WAS AT THE VICTIM'S HOME.

1. The Verizon phone records were properly admitted.

“The trial court has wide discretion to determine the admissibility of evidence, and the trial court's decision whether to admit or exclude evidence will not be reversed on appeal unless the appellant can establish that the trial court abused its discretion.” *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (citing *State v. Rivers*, 129 Wn.2d 697, 709–10, 921 P.2d 495 (1996)).

“A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court.” *Demery*, at 758 (citing *State v. Sutherland*, 3 Wn. App. 20, 21, 472 P.2d 584 (1970)). “Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. *Id.* (citing *Sutherland* at 22).

“Authentication is a threshold requirement designed to assure that

evidence is what it purports to be.” *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 746–47, 87 P.3d 774 (2004). ER 901 sets forth a number of ways that evidence may comply with the rule. *Id.* For example, the rule allows documents to be admitted based on the testimony of witnesses with knowledge, or based on distinctive characteristics surrounding the document guaranteeing authenticity. *Id.*

Here, the State needed only evidence showing that the Verizon phone records are more likely than not to be what they are purported to be. Joseph Ninete, Senior Analyst from Verizon for five years, testified to his extensive knowledge of how records are produced at Verizon. RP 649–59. Ninete was shown an exhibit 90 and asked if he recognized it. RP 659. Ninete explained that he did recognize it and identified it as subscriber information for a particular phone number. RP 659. Ninete testified that the format of the information contained in it was the general format Verizon uses when providing a response to legal process. RP 660. Ninete was able to tell it was a Verizon business records because of the format, the search value, account number, last name, first name, middle name, business name as that is exactly what Verizon would provide. RP 662.

It would be reasonable to conclude that the documents are what they were purported to be because Ninete was acutely familiar with such documents, was qualified to interpret the information on the documents, and

he recognized the information immediately and testified how he recognized it and also how and when such records are created.

Therefore, the court did not abuse its discretion in admitting the phone records.

2. The admission of the Verizon cell phone log was not prejudicial.

“We will not reverse due to an error in admitting evidence that does not result in prejudice to the defendant. *State v. Thomas*, 150 Wash.2d 821, 871, 83 P.3d 970 (2004) (citing *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). “Where the error is from violation of an evidentiary rule rather than a constitutional mandate, we do not apply the more stringent ‘harmless error beyond a reasonable doubt’ standard.” *Id.* (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997))

“Instead, we apply “the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Thomas*, 150 Wn.2d at 871 (citing *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). “The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Id.* (citing *Bourgeois*, 133 Wn.2d at 403).

Here, the Verizon records affirmed what other evidence established. *See State v. Fraser*, 170 Wn. App. 13, 28, 282 P.3d 152 (2012). Lewis

admitted to Sgt. Keegan that he did drive to the victim's home on New Year's Day 2016. RP 521. This statement was admitted in the State's case-in-chief as a party admission. RP 521. Lewis also had admitted he was extremely intoxicated New Year's Eve 2015. RP 519. Lewis' DNA was found on a gas can and bottle of Vodka at the scene of the arson along with evidence of a break in and gasoline on the bed. RP 65. Finally, surveillance was admitted in evidence showing Lewis crossed the ferry to Kingston New Year's Day 2016. RP 795–809.

Therefore, Lewis was not prejudiced because there is no reasonable probability that the outcome of the trial would have been materially affected absent the admission of the Verizon records.

E. THE CYBERSTALKING AND TELEPHONE HARASSMENT STATUTES MIRROR EACH OTHER AND ARE CONSTITUTIONAL BECAUSE THEY ADEQUATELY INFORM OF THE PROSCRIBED CONDUCT.

The cyberstalking statute language in RCW 9.61.260, “with intent to harass, intimidate, torment, or embarrass any other person, . . . : Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act” substantially mirrors the telephone harassment statute language in RCW 9.61.230, “with intent to harass, intimidate, torment or embarrass any other person . . . : Using any lewd, lascivious, profane, indecent, or obscene words or language, or

suggesting the commission of any lewd or lascivious act.”

The telephone harassment statute has been upheld against constitutional challenges. *See, e.g., State v. Alexander*, 76 Wn. App. 830, 888 P.2d 175 (1995) (pointing out that “the statute before us primarily regulates conduct, with minimal impact on speech” and “the statutory provision . . . receives minimal constitutional protection.” (quoting *State v. Dyson*, 74 Wn. App. 237, 240, 243, 244, 872 P.2d 1115 (1994))).

Moreover, “the specific intent requirement, which places the focus of the statute on the caller, sufficiently narrows the scope of the proscribed conduct.” *Alexander*, 76 Wn. App. at 839 (citing *Seattle v. Huff*, 111 Wn.2d 923, 927, 767 P.2d 572 (1989) (*Huff* II); *Dyson*, 74 Wn. App. at 245 n. 5).

There is nothing different in the language employed in both the Cyberstalking statute and the Telephone Harassment statutes. The Cyberstalking statute is not unconstitutional due to over breadth or vagueness.

F. THE LEGAL FINANCIAL OBLIGATIONS SHOULD BE UPHELD BECAUSE THE RECORD DOES NOT SHOW LEWIS WAS INDIGENT OR THAT HIS DNA HAS ALREADY BEEN PROVIDED.

“[T]he legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing [mandatory legal financial] obligations.” *State v. Lundy*, 176 Wn. App. 96, 102–03, 308 P.3d 755 (2013).

Amendments to statutes pertaining to discretionary costs imposed on

a criminal defendant following conviction apply to defendants whose appeals were pending when the amendments were enacted. *State v. Ramirez*, 426 P.3d 714, 722 (Wash., 2018).

The amendment to the costs statute RCW 10.01.160(3) applies to defendants that are indigent as defined in RCW 10.101.010(3)(a)–(c). “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).” RCW 10.01.160(3). Indigency on the basis that a defendant was assigned counsel falls under RCW 10.101.010(3)(d): “Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.”

Moreover, claims of error on direct appeal must be supported by the existing record on review. *See* RAP 9.1. A claim of error based on a factual assertion that the defendant is indigent necessarily fails on direct appeal if there is nothing in the record to show the defendant actually established indigency. *See State v. Thibodeaux*, 430 P.3d 700, 703, 2018 WL 6174962, at *3 (Wn. App. 2018); *State v. Lewis*, 194 Wn. App. 709, 721, 379 P.3d 129, review denied, 186 Wn.2d 1025, 385 P.3d 118 (2016); *State v. Thornton*, 188 Wn. App. 371, 374, 353 P.3d 642 (2015).

In *Ramirez*, the court ordered certain fees stricken because the record showed that the defendant established indigency on the record when he filed a

declaration including a financial statement section in his motion for indigency. *Ramirez*, 191 Wn.2d at 744–44.

Here the record shows Lewis does have the ability to pay as Lewis has an extensive occupational history and can work 60 hours per week as a chef. RP 992.

Therefore, Lewis’s claim he is indigent solely on the basis that he could not afford counsel at trial or on appeal has no merit. This Court should affirm the legal financial obligations.

IV. CONCLUSION

The absence of the true threat definitional instruction was harmless because no rational person would perceive the threats as made idly or in jest. The court did not err in denying the motion to dismiss because there was no prejudice to Lewis’s right to a speedy trial due the late discovery of the Barnes Report. The trial court properly exercised its discretion in allowing the Verizon phone records and their admission did not have an impact on the outcome. The cyberstalking statute, employing essentially the same language as the telephone harassment statute is not unconstitutional because it primarily proscribes conduct and the specific intent require narrows the scope of the proscribed conduct. Finally, Lewis is not indigent for purposes of RCW 10.01.160(3).

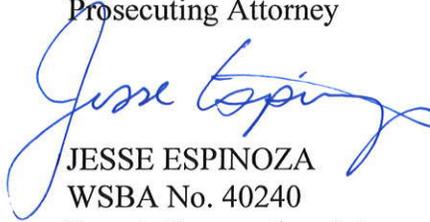
Therefore, the State requests the Court to affirm the conviction and

the legal financial obligations.

Respectfully submitted this 19th day of March, 2019.

MARK B. NICHOLS

Prosecuting Attorney

A handwritten signature in blue ink, appearing to read "Jesse Espinoza", is written over the typed name and title of the Deputy Prosecuting Attorney.

JESSE ESPINOZA

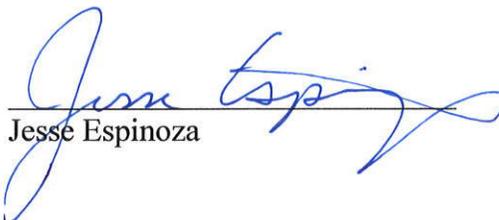
WSBA No. 40240

Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Thomas M. Kummerow after business hours on Mar. 19, 2019.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

March 19, 2019 - 6:54 PM

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