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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 327191

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

NOLAND DOMINGUEZ, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. **Mr. Dominguez's conviction should be overturned because the Anti-harassment Act violates the First Amendment when it is over-broadly applied to situations that do not involve a "true threat."**
- B. **The trial court abused its discretion by (1) allowing testimony pertaining to prior altercations between Mr. Medel and a third party and (2) failing to provide the jury with a limiting instruction.**
- C. **Assuming Mr. Medel had a subjective fear, there was insufficient evidence to prove that Mr. Medel's fear was reasonable when Mr. Dominguez never followed through with alleged past threats.**
- D. **Cumulative error violated Mr. Dominguez's constitutional due process right to a fair trial.**

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. **Whether Mr. Dominguez's conviction should be overturned because the Anti-harassment Act violates the First Amendment when it is over-broadly applied to situations that do not involve a "true threat."**
- B. **Whether the trial court abused its discretion by allowing testimony pertaining to prior altercations between Mr. Medel and a third party and failed to provide the jury with a limiting instruction.**
- C. **Whether, assuming Mr. Medel had a subjective fear, there was insufficient evidence to prove that Mr. Medel's fear was reasonable when Mr. Dominguez never followed through with alleged past threats.**
- D. **Whether cumulative error violated Mr. Dominguez's constitutional due process right to a fair trial.**

III. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On October 3, 2013, Noland Dominguez was charged with Harassment (Threat to Kill), a violation of RCW 9A.46.020(2)(b)(ii). Information P. 1-2. On April 24, 2014, Mr. Dominguez's motion for a new trial was granted based upon defense counsel's inability to provide effective assistance of counsel because the State did not provide proper discovery of prior conduct sought to be introduced under ER 404(b). RPII 137-138. On July 16, 2014, a new trial commenced before the Honorable Evan E. Sperline. RPI 143. On July 17, 2014, during motions in limine Mr. Dominguez sought to exclude 404(b) evidence that Mr. Medel's eye was gouged out by Manny Benavidez, which was a prior bad act that did not involve Mr. Dominguez; the court admitted the evidence based on a lack of affirmative evidence that the act did not occur. RPIII 183-185. On July 18, 2014, subsequent to a jury trial, Mr. Dominguez was found guilty of the crime of felony harassment. RPIII 364-365.

2. FACTS

a. Charges

On October 4, 2013, the State of Washington accused Mr. Dominguez by information with committing one found of Harassment

(Threat to Kill), 9A.46.020(2)(b)(ii) on or about June 5, 2013, in Grant County, Washington.

b. Substantive Facts

Noland Dominguez lived on the 700 block of South Grand Drive, in Moses Lake, Washington. RPI 143. His next-door neighbor is Gerardo Medel Jr. The following facts are not of the crime charged in the present case, rather, they merely provide context for the relationship between Mr. Dominguez and Mr. Medel:

On December 19, 2012, Investigative Sergeant Brian L. Jones, of the Moses Lake Police Department responded to a disturbance between neighbors at 734 South Grand Drive, in Moses Lake. RPII 267. When he arrived, the reporting party, Gerardo Medel, Jr., told Sgt. Jones of a confrontation that occurred between himself and Noland Dominguez which started over a property line dispute and a snow shoveling debacle. RPII 268. According to the testimony of Sgt. Jones, Mr. Medel espoused that Mr. Dominguez was shoveling snow from his property onto the driveway of Mr. Medel's property. RPII 268. Sgt. Jones testified that Mr. Dominguez told him that he picked up a flower pot and expressed to Mr. Model , "I'll break it over your head." However, Sgt. Jones also testified that various statements were exchanged between the neighbors and that he witnessed neither Mr. Dominguez's conduct nor his statements. RPII 268-

269. Sgt. Jones testified that Mr. Dominguez's conduct and statements were a direct reaction to Mr. Medel brandishing a pair of brass knuckles.

RPII 270. Sgt. Jones also testified that, because both parties were culpable in its escalation, he did not place Mr. Dominguez under arrest for this alleged interaction. RPII 270.

In light of the above mentioned situation, the following facts pertain to the crime charged in this case. On June 5, 2013, Patrol Officer Juan C. Serrato responded to an alleged harassment in progress at 734 South Grand Drive, in Moses Lake, again reported by Mr. Medel. RPII 272. Officer Serrato contacted both Mr. Medel and Mr. Dominguez to talk about the incident. RPII 272-273. When Officer Serrato arrived, the two men were in their respective homes. RPII 273. Officer Serrato testified that Mr. Dominguez confirmed that there was an altercation, and that there was a closed circuit video of the incident taken by a surveillance camera set up on Mr. Dominguez's property. RPII 275.

Officer Serrato testified that the video showed a dark-colored Jeep Cherokee pulling into the driveway of the Mr. Dominguez's home. It seemingly showed a shouting match between Mr. Dominguez and person or persons who were out of the field of view of the camera, but located in the direction of Mr. Medel's residence. RPII 275. Continuing, Officer Serrato said that he only viewed the video once, but did not obtain a copy,

and that Mr. Dominguez never crossed onto Mr. Medel's property. RPII 276-277. On the videotape, Officer Serrato never heard Mr. Dominguez threaten Mr. Medel on the videotape recording of the night of June 5, 2013. RPII 277-278. At the time Officer Serrato viewed the tape he did not place Mr. Dominguez under arrest nor did not find any weapons on Mr. Dominguez. RPII 279. Although the testimony is unclear, it appears that Mr. Dominguez was made aware of the charges against him by mail.

At trial, Mr. Medel testified that on June 5, 2013, at approximately 11:00 P.M., he observed Mr. Dominguez in the passenger seat of a Jeep Cherokee. RPII 216. Mr. Medel also testified that Mr. Dominguez was hanging out of the vehicle window, and was "telling me that he was going to kill me, calling me...a fucking snitch, saying he was going to blast me...." *Id.* at 217. Mr. Medel testified that the Jeep pulled into Mr. Dominguez's driveway, and that Mr. Dominguez got out of the car and stated, "I'm going to beat your fucking ass, you fucking snitch;" yet, Mr. Medel also testified that during this entire interaction Mr. Dominguez never cross the property line onto Mr. Medel's property. *Id.* at 217-19.

Furthermore, at trial, Mr. Medel testified that a man named Manny Benavidez, had previously gouged out his eye. RPII 215. During motions in limine, Mr. Dominguez objected to the admission of the testimony pertaining to Mr. Benavidez gouging out Mr. Medel's eye, but the Court

agreed with the state that it was admissible to show that Mr. Model was accustomed to threats escalating to violence and was relevant to his subjective fear on June 5, 2013. RPII 183-4.

The trial court balanced the evidence by asking whether the previous threats were acted upon by Mr. Dominguez to which the State responded that he had not. RPII 183-4. The court then asked if there was any affirmative evidence that the event did not occur, to which Mr. Dominguez responded in the negative. RPII 185. The Court allowed the evidence because it reasoned that its purpose was to establish on of the elements of the crime, and it was relevant to show that Mr. Medel's subjective fear of Mr. Dominguez was based on similar escalatory behavior between Mr. Model and Mr. Benavidez. RPII 185-7. The court did not provide a limiting instruction. *Id.*

VI. ARGUMENTS

A. Mr. Dominguez’s conviction should be overturned because the Anti-harassment Act violates the First Amendment when it is over-broadly applied to situations that do not involve a “true threat.”

RCW 9A.46.020, Washington’s anti-harassment statute, concerns itself with the issue of free speech. Further, it does not purport itself to regulate speech based upon when something is said, nor where it is that thing is said, nor the manner in which that thing is spoken, but “rather it seeks to regulate speech based on what is being said.” *State v. Williams*, 144 Wn.2d 197, 207, 26 P.3d 890 (2001). Thus, as this is a content based regulation, if this statute is held to be constitutional it must be narrowly tailored to regulate only threats and not idle talk, things said in jest, or mere hyperbole; for a regulation of anything more would amount to unconstitutional overbreadth. *State v. Ballew*, 167 Wn. App. 359, 364, 272 P.3d 925 (2012).

As this matter is deeply embedded in “the interpretation of constitutional provisions and legislative enactments,” it presents a question of law that the court reviews de novo. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011). Further, analyzing overbreadth under Article 1 § 5 of the Washington State Constitution follows the analysis under the First Amendment. *Id.* at 307. Though the court generally presumes that

legislative enactments are constitutional and the party challenging an enactment bears the burden of proving its unconstitutionality, “in the free speech context, the State usually bears the burden of justifying a restriction on speech. *Id.* (citing *Washington v. Recuenco*, 538 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

The Washington Supreme Court previously found that a law is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech. *City of Tacoma v. Luvone*, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992). Even in answering this question, however, the United States Supreme Court has announced that the overbreadth doctrine “allows attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.” *Broadrick v. Oklahoma*, 413 U.S. 6011, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (internal quotations omitted). As this relates to the present case, even if the court decides that the statements made by Mr. Dominguez fall squarely within the realm of unprotected “true threats,” this does not prohibit him from bringing this claim. The court in *Virginia v. Hicks*, in holding that “[t]he First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial

challenges,” reasoned that such an exception arises “out of concern that the threat of enforcement of an overbroad law may deter or chill constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.” 539 U.S. 113, 115-16, 119, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003).

In determining if this statute is overly broad, the court must first determine if the statute reaches a substantial amount of constitutionally protected speech. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). In *Williams*, the Court determined that RCW 9A.46.020 is aimed toward prohibiting “true threats.” *Id.* The court in *Williams* found the statute to reach constitutionally protected speech in that it “prohibits threats which would not properly be characterized as true threats to physical safety because it also prohibits threats to do any other act which is intended to substantially harm the person threatened ... with respect to his or her ... mental health or safety,” *Id.* The statute likewise reaches constitutionally protected speech in that its lack of a specific intent requirement for the speaker encompasses those who have spoken idly, in hyperbole, or in jest.

In *Virginia v. Black*, the United States Supreme Court defined a true threat as a statement “where the speaker *means* to communicate a

serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (citing *Watts v. U.S.* 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)). (Emphasis added). Conversely, the Supreme Court of Washington has declined to follow the intent requirement delineated in *Black* by embracing the concept that though the standard does require the defendant to have some mens rea as to the effects of his message, i.e. the hearer’s fear, the standard is merely simple negligence. *State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010). In footnote 3 of *Schaler* the court clarified that it meant not to attach criminal negligence, but true simple negligence. *Id.*

In *Schaler*, the majority’s opinion was based on the court’s belief that *Black* merely established an objective test as to whether, as a result of what was said, the hearer’s fear was reasonable. *Id.* at 283-84. However, the subjective intent requirement in *Black*, distinctly addresses the intent of the speaker to convey a threat. *U.S. v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (though declining to decide the issue of subjective test, the Court noted that objective test is “no longer tenable” after *Black*); *U.S. v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (subjective test supported by *Black*); *U.S. v. Cassel*, 408 F.3d 622,631 (9th Cir. 2005) (*Black*’s definition of true threat “embraces not only the requirement that the

communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim” [emphasis omitted]); *Brewington v. State*, 7 N.E.3d 946, 964 (Ind. 2014) (subjective test is consistent with the Court’s commitment to protection of the freedom of speech and expression).

The *Schaler* court was correct in utilizing an objective test to determine if the hearer was placed in a reasonable fear, but saying that a person has committed a crime when he or she has only intended to convey a joke, or to speak in hyperbole, or to speak idly is to expand the reach of this statute to a substantial area of constitutionally protected free speech. Though *Schaler* was correct in determining that the intent of the speaker to carry out the allegedly threatened thing is of no importance, the intentions of the speaker to convey a specific message, in this instance a threat, goes to the very heart of First Amendment protections of the content of speech and its exceptions for true threats.

Under *Schaler*, the statute requires no specific intent to convey a threat. Thus, the statute overbroadly encompasses constitutionally protected speech that does not amount to true threats. If simple negligence is the only standard applied to the speaker, one who merely intends to make a joke or one who is speaking in hyperbole to emphasize his point,

would be subject to criminal persecution. RCW 9A.46.020 is unconstitutionally overbroad because it sweeps within its regulation a substantial amount of constitutionally protected speech.

In the marketplace of ideas, words spoken will often be shocking, unpopular, or alarming and, in some instances, may even make the hearer extremely uncomfortable and upset. But in spite of the disfavor, and often because of the disfavor, of the thing said, it remains protected speech under the First Amendment. First Amendment protections of the content of speech are so sacrosanct that only in a few tightly drawn exceptions, will the court allow for content to be deemed presumptively unprotected. One such exception is when speech crosses over to the realm of “true threats” to inflict bodily injury or incitements of imminent lawlessness. However, even then, a statute that does not clearly delineate between what is a true threat and what is merely idle talk or hyperbole and that prohibits a substantial amount of protected speech will be found to be unconstitutionally overbroad.

Furthermore, the minimal intent requirement established for RCW 9A.46.020 leaves the objective ordinary person to guess whether what he is saying amounts to a true threat despite his lack of intent for it to do so, and it likewise will lead to arbitrary enforcement, in that it will encourage

officers, and latter courts, to shoot first and ask questions later, foregoing any analysis of whether what the person is saying is constitutionally protected speech.

Vagueness may invalidate a criminal statute for either of two reasons. First, the statute may fail to provide the kind of notice that will enable a person of ordinary intelligence to understand its prohibitions, and second, the statute may authorize and or even encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The courts have been especially cautious in the interpretation of vague statutes when First Amendment interests are implicated.” *City of Bellevue v. Lorang*, 140 Wn.2d 19, 31, 992 P.2d 496 (2000).

Though the language of RCW 9A.46.020 may not seem facially vague, when it is viewed through the lens of *stare desis*, the mens rea requirement is not well established and fails to denote an easily recognizable intent requirement as to whether the speaker must intend the consequence of inciting fear in the hearer or whether through simple negligence the only requirement is that the subjective fear of the hearer be reasonable.

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Sewell v. Georgia, 435 U.S. 982, 986, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1978) (emphasis in original). *See also*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927); *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

The present harassment statute does not allow such a person of ordinary intelligence to freely navigate between what he can legally say and what amounts to a proscribed threat. The language of RCW 9A.46.020 targets those who “knowingly threaten,” but the Court has attached mere simple negligence to this statute. Under the simple negligence requirement utilized by the Washington Supreme Court in *Schaler*, though the speaker may merely intend his message to be a joke or hyperbole (notwithstanding its appropriateness or tact), and thus constitutionally protected speech that does not amount to a threat, if it is perceived by the “reasonable hearer” to

be something more, the speaker has inadvertently sailed into unnavigable and treacherous waters. *See Schaler*, 169 Wn.2d 274, 236 P.3d 858.

Similarly, the statute will encourage a subjective and arbitrary enforcement of its prohibitions. A criminal statute is unconstitutionally vague when it leaves the standard of guilt to the variant views of ... different courts and juries. *State v. Spence*, 81 Wn.2d 788, 795, 506 P.2d 293 (1973). Without reference to the specific intent of the speaker, Officers, and later judges and juries, will be left to make *ad hoc* and subjective decisions as to where the line between constitutionally protected speech and true threats lies. This impermissibly places this policy decision of constitutional magnitude in the hands of those officers, judges, and juries.

B. The trial court abused its discretion because it (1) allowed testimony pertaining a past altercation between Mr. Model and a third party and (2) failed to provide the jury with a limiting instruction.

The State's evidence about Manny Benavidez gouging out Mr. Medel's eye referred to a separate incident that did not involve Mr. Dominguez, thus, admittance of this evidence by the trial court was an abuse of discretion because it was manifestly unreasonable. Moreover, because this evidence is more unfairly prejudicial than probative, the court

erred when it failed to provide a limiting instruction to the jury. A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." *Powell*, 126 Wn.2d at 258.

ER 404(b) prevents a trial court from admitting evidence of other crimes or acts to prove the character of a person and to imply that the person acted in conformity with that character. *State v. Foxhoven*, 161 Wn.2d 168, 174–75, 163 P.3d 786 (2007). Such evidence may be admissible for another purpose, however, such as to prove motive, plan or identity. ER 404(b). To admit evidence of prior misconduct, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose of the evidence; (3) decide whether the evidence is relevant to prove an element of the State's case; and (4) find that the probative value of the evidence outweighs its prejudice. *Foxhoven*, 161 Wn.2d 168 at 175. "This analysis must be conducted on the record." *Id.* If the evidence is admitted, the trial court must give the jury a limiting instruction. *Id.* "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." ER 403.

Prior to trial, Mr. Dominguez made a standing objection to the admission of the testimony pertaining to Mr. Benavidez gouging out Mr. Medel's eye. RPII 184-85. Mr. Dominguez's objection was imbedded in an argument that the State was trying to use unfairly prejudicial character evidence to show that because Mr. Medel has been in previous violent altercations, he is knowledgeable as to when a verbal threat invariably escalates into physical violence. RPII 183. Therefore, the State claimed that the evidence was relevant to show that because Mr. Medel and Mr. Dominguez had previous verbal altercations, which included Mr. Dominguez saying that he was going to break a pot over Mr. Medel's head and that Mr. Dominguez would gouge out Mr. Medel's other eye like Manny Benavidez, that the evidence pertaining to Manny Benavidez was relevant to show that the June 5, 2013 incident created a subjective and objective fear that the threats would be carried out. RPII 183.

The trial court balanced the evidence by asking whether the previous threats were acted upon by Mr. Dominguez to which the State responded that they were not. RPII 183-4. The court then asked if there was any affirmative evidence that the event did not occur, to which Mr. Dominguez responded in the negative; the court admitted the evidence. RPII 185.

Plainly, the result of the balancing test the trial court conducted unfairly prejudiced Mr. Dominguez. Mr. Medel's eye gouging occurred six months prior to the June 5, 2013 incident; the nexus of relevance is slim at best, but if relevant, it is unfairly prejudicial because that incident had nothing to do with Mr. Dominguez. Moreover, the prejudicial effect was compounded by a lack of a limiting instruction, to be explicitly provided to the jury. The court failed to mention to the jury that the eye gouging incident was not meant to prove propensity or culpability that any of Mr. Dominguez's comments would be carried into fruition.

The court failed to exclude evidence of Manny Benavidez gouging out Mr. Medel's eye which was substantially prejudicial because it confused the issue when the court failed to provide a limiting instruction; thereby, abusing its discretion and depriving Mr. Dominguez of his constitutional right to due process of law.

C. Assuming Mr. Medel had a subjective fear, there was insufficient evidence to prove that Mr. Medel's fear was reasonable when Mr. Dominguez never followed through with alleged past threats.

Challenging the sufficiency of the evidence is a challenge of constitutional magnitude and therefore it can be raised on appeal for the first time. *Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is insufficient to support a verdict if the jury cannot find that

each element of the offense was proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d, 216, 221-22, 616 P.2d 628 (1980). The State bears the burden of proving each element of the charged offense beyond a reasonable doubt. *Id.* Furthermore, a claim of insufficiency “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Mehrabian*, 175 Wn. App. 678, 699, 308 P.2d 660 (2013) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Circumstantial and direct evidence are equally reliable. WPIC 5.01 (2008).

The Washington statute on harassment states that a person is guilty of harassment if, without authority, the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to any other person...by threatening to kill the person threatened or any other person. RCW 9A.46.020(1)(a)(i), (2)(b)(ii). Though the analysis of this statute requires a finding that the person threatened had a subjective fear that the threat would be carried out, it likewise requires that that fear be reasonable. *State v. E.J.Y.*, 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

Thus, assuming the evidence establishes the complaining witness’s subjective fear, when determining if the evidence is sufficient the court must determine if “a rational trier of fact, viewing the evidence in the light

most favorable to the State, could have found beyond a reasonable doubt, using an objective standard, that the victim's fear...was reasonable." *State v. Alvarez*, 74 Wn. App. 250, 261, 872 P.2d 1123 (1994) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). And to this end, the court informed that this objectively reasonable fear is an important element in the statute, requiring that the defendant's conduct be considered in context and idle threats be sifted out from "threats that warrant the mobilization of penal sanctions." *Id.*

In *State v. Austin*, the defendant was charged with harassment under RCW 9A.46.020. *State v. Austin*, 65 Wn. App. 759, 760, 831 P.2d 747 (1992). At trial, the complaining witness testified that he was standing in the street in front of his home when the defendant "drove his car and swerved [within 5 feet of him]." *Id.* The witness further testified that the defendant drove by again at "about 40 miles per hour," slowed, rolled down his window and stated "[c]ome on, boy, lets fight" while pulling out a knife. *Id.* The defendant testified that the complaining witness was standing in the middle of the road with a baseball bat, that he drove over the center line because he did not want the complaining witness to hit his car, and that he neither stopped the car nor showed a knife, and that the complaining witness had threatened him in the past. *Id.* The court held that pulling a knife and saying "let's fight" does not constitute a threat to do

future harm, and because there was no threat to cause bodily injury in the future, the evidence was insufficient to support a harassment conviction.

Id.

Though RCW 9A.46.020(1)(a)(i) was revised from “knowingly threaten [] [t]o cause bodily injury in the *future*” to “knowingly threaten [] [t]o cause bodily injury *immediately* or in the future to the person threatened or to any other person.” (Emphasis added) between the *Austin* decision and now, the court’s analysis in that case regarding future harm should be similarly applied. In *Austin*, the court held that “let’s fight” does not constitute a future threat of harm. Linguistically, when parsing out the phrase, “let us fight,” it is indicative of a present sense statement of intent to partake in the act of fighting.

Second, in the present case, the court should hold, as the *Austin* court held about that defendant’s statement, that Mr. Dominguez’s statements do not constitute a threat of future harm. Given the context in which the statements were made, as the Jeep was driving by Mr. Medel’s house and pulling into Mr. Domniguez’s driveway, “I am going to kill you,” and “I am going to beat your ass” suggests that such conduct would be carried out immediately. Although it may be argued that “I am going...” is indicative of a future act, the semantics of such an argument

would logically mean that the immediacy prong in the statute is not necessary because technically all physical conduct that follows a verbal threat is in the future. Moreover, the legislative intent of the revision of RCW 9A.46.020(1)(a)(i) sought to create two standards by which one's threat is sufficient to constitute the crime, either a threat that may be perceived to be carried out immediately, or a threat perceived to be carried out in the future. Accordingly, these statements should be analyzed under the 'immediate' prong rather than the 'future' prong of the statute.

By disposing of the future prong analysis, only the immediacy prong remains. Even taking all of the State's evidence as true, the evidence is insufficient to prove that an objective fact finder could find beyond a reasonable doubt that Mr. Medel's subjective fear of immediate harm was reasonable given the circumstances.

First, and most dispositive, is Officer Serrato's testimony recounting what he saw on the video surveillance footage of Mr. Dominguez's driveway. Although the record is unclear as to whether the video also had sound, Officer Serrato did testify that the video showed Mr. Dominguez yelling in the direction of Mr. Medel's house, but that Mr. Dominguez never crossed the threshold between his property and Mr. Medel's property. Furthermore, Officer Serrato testified that he did not

hear, on the videotape, Mr. Dominguez make any of the statements claimed to have been made. Moreover, Officer Serrato testified that upon searching Mr. Dominguez's person, no weapons were found. The evidence that Mr. Dominguez never crossed the property threshold weighs heavily in favor of an objective factfinder finding reasonable doubt that such comments, even if proved to have been made, would produce a reasonable belief that the threat was immediate.

The property line in this case represented a literal line beyond which Mr. Dominguez never passed; therefore, Mr. Medel's fear of threat of immediate harm should be considered objectively unreasonable because Mr. Dominguez could not have "kill[ed]" Mr. Medel or "beat [his] ass" without venturing onto Mr. Model's property. Surely, it would be entirely different if Mr. Dominguez uttered such comments on Mr. Medel's driveway, lawn, porch, or from some other place exceedingly close proximity to his person. Finally, although a sufficiency analysis concedes that the comments were made by Mr. Dominguez, the lack of evidence on the video to support that Mr. Dominguez's threats were actually uttered, and the lack of a weapon found on Mr. Dominguez's person further supports the claim that there was reasonable doubt that the crime was committed and that Mr. Medel's subjective fear was objectively unreasonable.

Second, the sheer number of times that Mr. Medel and Mr. Dominguez have exchanged verbal altercations, never resulting in physical contact, suggests that comments made between the two parties constituted “all bark and no bite.” Of all the incidents reported to police, and testified to at trial, by Mr. Medel and other State witnesses, none resulted in Mr. Dominguez following through with such threats.

At trial, Mr. Medel testified that in one instance Mr. Dominguez threatened to break a flower pot over his head, yet the State’s witness, Sgt. Jones, testified that Mr. Dominguez’s comments were in response to Mr. Medel brandishing a pair of brass knuckles and he testified that Mr. Dominguez never acted on that notion. Furthermore, Mr. Medel testified that his subjective fear of Mr. Dominguez’s statements were a result of his experience with escalatory behavior that resulted in Manny Benavidez gouging out his eyes, yet Mr. Dominguez was never a party to that incident. Although it is true that intent to follow through with a threat is not an element of the charged crime, it strains logic that an objective factfinder would find Mr. Medel’s subjective fear of immediate harm reasonable. The two neighbors had often exchanged words but throughout their tumultuous relationship these situations never progressed to something more than mere words.

Previous incidents that Mr. Medel has been involved in are illustrative in determining what the court should hold is an objectively reasonable fear of harm. For example, on December 19, 2012, Mr. Medel's conduct of brandishing brass knuckles, when viewed objectively, suggests that he is no stranger to violent behavior. This fact is further evidenced by Mr. Medel's own testimony of the incident where Manny Benavidez gouged out his eye. Therefore, for Mr. Medel's subjective fear to rise to a level of objective reasonableness, conduct must constitute something more than mere words.

In regard to the incident on June 5, 2013, the question is not whether Mr. Medel subjectively feared the threat of immediate harm, rather it is whether, based on Mr. Dominguez's actions, Mr. Medel's subjective fear is objectively reasonable. Given that (1) Mr. Dominguez uttered nothing more than words, (2) Mr. Dominguez never acted on prior threats, and (3) inferring Mr. Medel's self-determined heightened understanding of when escalatory behavior results in harm, a rational trier of fact could not have found beyond a reasonable doubt that Mr. Dominguez's conduct on June 5, 2013, would cause Mr. Medel's subjective fear to rise to a level of objectively reasonable immediate threat of harm.

D. Cumulative error violated Mr. Dominguez’s constitutional due process right to a fair trial.

Every criminal defendant has the constitutional due process right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984); U.S. Const. Amend. V and XIV; Wash. Const. art 1, § 3. Under the cumulative error doctrine, a defendant is entitled a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. *State v. Coe*, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even when some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denied the defendant a fair trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

In the present case, the cumulative effect of the foregoing errors are commensurate of a violation of Mr. Dominguez’s constitutional right to a fair trial and requires this Court to reverse and remand. First, because the standard, against which the speaker’s intent is weighed, is simple negligence, the Anti-harassment Act is unconstitutionally overbroad because it sweeps within its prohibitions statements that do not constitute a “true threat,” i.e. statements made in hyperbole or jest, or statements that merely amount to idle talk.

Furthermore, the lack of specific intent language in the statute opens the door to arbitrary enforcement of what constitutes an objective reasonable subjective fear of harm. Second, the trial court abused its discretion by admitting evidence of Manny Benavidez's conduct, who is not a party to this case, which was prejudicial, and manifestly unreasonable because there was no limiting instruction. Third, the evidence was not sufficient, based on the lack of immediacy in the perceived threat, to constitute a finding that Mr. Medel's subjective fear was reasonable. Combined, these errors illustrate that Mr. Dominguez's constitutional right to a fair trial was violated, and remand is proper.

VII. CONCLUSION

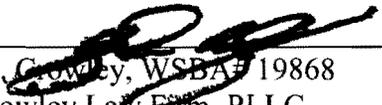
Mr. Dominguez respectfully requests that the court reverse the trial court's decision because the Anti-harassment Act is unconstitutionally overbroad because it sweeps within its prohibitions a substantial amount of protected speech and is likewise unconstitutionally vague because a person of ordinary intelligence cannot determine if the things he says will subject him to criminal liability.

Furthermore, the trial court abused its discretion by admitting 404(b) character evidence of an assault that did not involve Mr. Dominguez, which was significantly more prejudicial than probative, for which no limiting instruction was provided to the jury, which was

manifestly unreasonable, which deprived Mr. Dominguez his constitutional right to due process of law.

Lastly, even when taking all inferences as true, the evidence was not sufficient to establish that Mr. Medel's subjective fear was objectively reasonable. The threat cannot be considered to be a future threat and when viewed as an immediate threat, the fact that Mr. Dominguez never crossed the property line suggests that an immediate threat of harm is objectively unreasonable. Additionally, Officer Serrato, the State's witness, testified that he never heard Mr. Dominguez make the alleged threats on the video/audio tape recording. Assuming reversal is not found, the cumulative effect of each of the aforementioned errors deprived Mr. Dominguez his right to a fair trial, therefore, Mr. Dominguez requests a remand for a new trial.

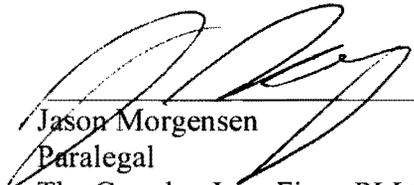
DATED this 9th day of March, 2015.



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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on March 9th, 2015, I filed the original by United States Postal Service, postage paid, to the Court of Appeals-Division III, at 500 N. Cedar St. Spokane, WA 99201, I placed a copy of this document in the United States Postal Service Mail, postage paid, to Grant County Prosecuting Attorney's Office, at P.O. Box 37, Ephrata, WA 98823, and a copy was mailed to Noland Dominguez, Moses Lake, WA.



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