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No. 36432-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

SLOAN STANLEY,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON  
FOR THE COUNTY OF WALLA WALLA

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REPLY BRIEF

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TABLE OF CONTENTS

**A. ARGUMENT IN REPLY ..... 1**

**1. The trial court excluded witness testimony and the State’s audio surveillance critical to Mr. Stanley’s defense based on an error of law. ....1**

    a. Counterstatement of relevant facts..... 1

    b. The excluded audio surveillance and witness testimony was highly relevant..... 2

    c. The court excluded all evidence—including witness testimony from Mr. Temple and the entire contents of the wiretap—on the erroneous basis that it was “self-serving hearsay.” ..... 5

    d. Even if the court had not excluded the evidence on an invalid evidentiary basis, it had such high probative value that no evidentiary rule compelled its exclusion..... 9

    e. The exclusion of Mr. Stanley’s means of asserting his defense cannot be harmless..... 10

**2. The evidence was insufficient for four of Mr. Stanley’s felony harassment convictions and the conviction for intimidating a judge. 11**

    a. Statutes that criminalize speech must be strictly construed. .... 11

    b. There was insufficient evidence a threat was made against the four women the State selected as victims. .... 13

    c. Mr. Stanley was convicted of intimidating a judge without requiring the jury to find a *mens rea*. .... 16

**3. The trial court allowed the prosecutor to introduce irrelevant, highly prejudicial evidence, resulting in an unfair trial. .... 17**

    a. The admission of prejudicial propensity evidence far exceeded the purported basis for admission. .... 17

    b. The State fails to justify Mr. Burleson’s gratuitous testimony that Mr. Stanley was more frightening than a notorious serial killer. .... 18

    c. The prosecution’s bolstering of Mr. Burleson’s testimony when his credibility had not been attacked was reversible error..... 20

*i. The issue is adequately preserved for appellate review or may be reviewed as cumulative error under RAP 2.5(a).* ..... 20

*i. The State improperly bolstered its jailhouse informant.*..... 22

d. The Court’s error in refusing to disqualify the King County Prosecuting Attorney’s Office resulted in violation of the witness-advocate rule. ....	25
<b>4. The finding of “egregious lack of remorse” was based on conduct that inhered in the charged offense of felony harassment.....</b>	<b>27</b>
<b>5. Mr. Stanley’s standard range sentence was elevated to a de facto life sentence based on unconstitutional aggravating factors.....</b>	<b>29</b>
a. The “egregious lack of remorse” aggravator is unconstitutionally vague. ....	29
b. The aggravator is overbroad because it punishes protected speech and conduct.....	30
<b>B. CONCLUSION .....</b>	<b>31</b>

## TABLE OF AUTHORITIES

### **WASHINGTON STATE SUPREME COURT DECISIONS**

<i>State v. Arndt</i> , 194 Wn.2d 784, 453 P.3d 696 (2019).....	5, 9, 10
<i>State v. Baldwin</i> , 150 Wn.2d 448, 78 P.3d 1005 (2003).....	29
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 546 (1997).....	passim
<i>State v. C.G.</i> , 150 Wn.2d 604, 80 P.3d 594 (2003).....	12, 15
<i>State v. Clark</i> , 187 Wn.2d 641,, 389 P.3d 462 (2017).....	5
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	3, 5
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	5, 9, 10, 11
<i>State v. Kilburn</i> , 151 Wn.2d 36, 84 P.3d 1215 (2004).....	4, 12, 13, 15
<i>State v. Nickels</i> , 195 Wn.2d 132, 456 P.3d 795 (2020) .....	25
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	13
<i>State v. Stubbs</i> , 170 Wn.2d 117, 240 P.3d 143 (2010) .....	27, 28
<i>State v. Trey M.</i> , 186 Wn.2d 884, 383 P.3d 474 (2016) .....	16, 17

### **WASHINGTON COURT OF APPEALS DECISIONS**

<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	22
<i>State v. Bedada</i> , 79036-6-I, 2020 WL 2315785 (Wash. Ct. App. May 11, 2020) .....	5, 9, 11
<i>State v. Bland</i> , 90 Wn. App. 677, 953 P.2d 126 (1998).....	25, 26
<i>State v. Braham</i> , 67 Wn. App. 930, 841 P.2d 785 (1992) .....	22
<i>State v. Brush</i> , 5 Wn. App. 2d 40, 425 P.3d 545 (2018).....	29
<i>State v. Devore</i> , 2 Wn. App. 2d 651, 413 P.3d 58 (2018) .....	29
<i>State v. Epefanio</i> , 156 Wn. App. 378, 234 P.3d 253 (2010).....	27
<i>State v. Lazcano</i> , 188 Wn. App. 338, 354 P.3d 233 (2015).....	21
<i>State v. Pavlik</i> , 165 Wn. App. 645, 268 P.3d 986 (2011).....	6
<i>State v. Ragin</i> , 94 Wn. App. 407, 972 P.2d 519 (1999).....	18
<i>State v. Santos</i> , No. 36069-5-III (Wash. Ct. App. April 30, 2020).....	29
<i>State v. Wiebe</i> , 195 Wn. App. 252, 377 P.3d 290 (2016) .....	11

### **STATUTES**

RCW 9A.46.020.....	16, 28
--------------------	--------

### **RULES**

ER 401 .....	3, 5, 21
ER 801(d)(1)(ii) .....	7
ER 803(a)(3) .....	7

RAP 2.5(a) ..... 20, 22

**WASHINGTON CONSTITUTIONAL PROVISIONS**

Const. art. 1 § 22 ..... 9

**UNITED STATES COURT OF APPEALS DECISIONS**

*United States v. Johnston*, 690 F.2d 638 (7th Cir. 1982)..... 27  
*United States v. Ramirez*, 608 F.2d 1261 (9th Cir. 1979)..... 23

**FEDERAL CONSTITUTIONAL PROVISIONS**

Sixth Amendment ..... 9

**UNITED STATES SUPREME COURT DECISIONS**

*Beckles v. United States*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 886, 197 L. Ed. 2d 145  
(2017)..... 29  
*Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 192 L. Ed. 1  
(2015)..... 17

**OTHER AUTHORITIES**

Innocence Project, *Informing Injustice: the Disturbing Use of Jailhouse Informants*, <https://www.innocenceproject.org/informing-injustice> 23

## A. ARGUMENT IN REPLY

### 1. **The trial court excluded witness testimony and the State's audio surveillance critical to Mr. Stanley's defense based on an error of law.**

#### a. Counterstatement of relevant facts.

Long-time convict Randy Burleson and Sloan Stanley briefly shared a prison cell in 2016. RP 234. Nearly a year later, Mr. Burleson, through his defense attorney, contacted the King County Prosecutor's Office, alleging Mr. Stanley made threats to prior witnesses, a judge, and prosecutors over a year ago. RP 175; CP 1-2.

The State determined Mr. Burleson's "distinct lack of credibility" required additional evidence to support a criminal charge, and the State placed a vetted confidential informant in Mr. Stanley's cell as he was nearing release from prison. CP 2; RP 176, 345, 358. This informant, Billy Temple, at first told the State Mr. Stanley made threats that corroborated Mr. Burleson's claim. CP 1-4. The State charged Mr. Stanley with numerous counts of felony harassment and one count of intimidating a judge. CP 1-4; 7-11. However, audio from the wiretap proved Mr. Temple's claim was untrue, and Mr. Temple later admitted Mr. Stanley made no threats. RP 471; CP 1.

Pre-trial, the State offered to resolve these charges through a stipulated order of continuance (SOC) that would have resulted in dismissal of the charges. 6/14/18 RP 13. Mr. Stanley rejected this offer, insisting on proving his innocence through the audio recordings and Mr. Temple's testimony. 4/2/18 RP 28; 8/20/18 RP 31. When the State removed Mr. Temple from its witness list before trial, Mr. Stanley stated his intent to call Mr. Temple, securing a court order for his appearance at trial. 8/28/18 RP 35; 51; RP 176.

Mid-way through trial, after the State's witness, Detective Christiansen, testified about portions of the audio surveillance he thought were relevant to the charges, RP 347, the prosecutor urged the Court to prohibit Mr. Stanley from introducing the audio evidence or calling Mr. Temple as a witness, characterizing all of this evidence as "self-serving hearsay." RP 455; 460-65. The Court agreed with the State, and prohibited Mr. Stanley from presenting any of the State's evidence in his defense. RP 466-72; 603-05.

- b. The excluded audio surveillance and witness testimony was highly relevant.

"Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence.” ER 401. The threshold to admit relevant evidence is very low. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The State maintains on appeal that the excluded audio surveillance evidence and Mr. Temple’s testimony were irrelevant. BOR at 16. This claim inaccurately characterizes the scope of the proffered evidence.

First, the State characterizes the excluded evidence as “Stanley’s out-of-court statements.” Brief of Respondent (BOR) at 15. However, the audio surveillance also contained Mr. Temple’s statements, including his effort to encourage Mr. Stanley to make threats at the State’s direction. CP 1-2; RP 471. As Mr. Stanley argued to the trial court, that the State placed a confidential informant in Mr. Stanley’s cell to try to elicit threats was highly probative rebuttal evidence. RP 468. This evidence is all the more relevant where the State’s initial charging decision was based on Mr. Temple’s untrue claim that Mr. Stanley made a threat. RP 471. Besides tending to rebut Mr. Burleson’s claim that Mr. Stanley made a threat in 2016, this evidence also casts doubt on the State’s ability to assess the veracity of its own informants, including Burleson.

The State argues the trial court properly concluded Mr. Stanley’s state of mind in August of 2017, when the State placed a confidential informant in his cell to try to extract threats from him, was “not relevant to whether he made threatening statements to Burleson *a year earlier* in July

of 2016.” BOR at 16. This ignores the fact Mr. Stanley’s state of mind in 2017 was relevant to the State’s investigation of Mr. Burlison’s claim about what Mr. Stanley said in 2016, as evidenced by the State’s decision to place audio surveillance and an informant in his cell in 2017. CP 1-3. This time period was also relevant to the State when during trial, Detective Christiansen testified about the portions of the audio surveillance he found to be significant to the State’s case. RP 347.

The State further argues that because the charges of harassment and intimidating a judge do not require proof the defendant “intended to *carry out* his threats,” Mr. Stanley’s mental state at the time of his release date is not relevant. BOR at 17 (citing *State v. Kilburn*, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004)). The issue is not, as the State characterizes it, and as was true in *Kilburn*, whether he “intended to actually carry out the threat.” *Id.* Rather, the issue is whether Mr. Stanley made the threat Mr. Burlison claimed he did. The failure of the State’s own effort to confirm this uncorroborated allegation is relevant because it supported Mr. Stanley’s defense that he did not make the alleged threat.

The State’s argument that this evidence is not relevant, when it formed the basis of the State’s charging decision for these crimes and was part of the State’s case until it was shown to actually undercut it, simply

fails, because this evidence at a minimum tends to show it is less probable he made the threat the State claimed he did. *See* ER 401.

Where, as here, the trial court excluded relevant defense evidence, this Court must next determine as a matter of law whether the exclusion violated the constitutional right to present a defense. *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017) (citing *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010)).

- c. The court excluded all evidence—including witness testimony from Mr. Temple and the entire contents of the wiretap—on the erroneous basis that it was “self-serving hearsay.”

The State correctly cites to, but misapplies, *Jones*’ two-part test. Brief of Respondent (BOR) at 15 (citing *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019)). If evidence is “relevant, the burden is on the State to show that the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *State v. Bedada*, 79036-6-I, 2020 WL 2315785, at \*7 (Wash. Ct. App. May 11, 2020) (citing *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622)). The State simply cannot meet this burden here, where the sole basis for exclusion was an erroneous assertion that all of this evidence was “self-serving hearsay.”

On appeal the State claims the prosecutor “told the trial court that it believed this testimony was hearsay.” BOR at 12. Only in a footnote

does the State acknowledge the prosecutor's actual argument: "Although the deputy prosecutor referred to the testimony as 'self-serving hearsay,' he correctly argued that Stanley could not elicit from Temple his own out-of-court statements to prove their truth." BOR at 12 (citing RP 175).

This does not reflect the arguments presented or the court's ruling below. At trial, the prosecutor argued the entirety of the State's evidence—including the audio and Mr. Temple's testimony upon which the State had initially relied to charge Mr. Stanley with these offenses—should be prohibited because it was "self-serving hearsay." RP 473; 476 (the evidence "was not relevant and it was self-serving hearsay."). The trial court agreed, excluding all evidence related to the State's audio surveillance as "self-serving hearsay," confusing Mr. Stanley's argument for admission of Mr. Stanley's statements as "then existing mental state" with the excited utterance exception. RP 480; Brief of Appellant (BOA) at 16-18.

On appeal, the prosecutor does not even address *Pavlik's* clear holding that "there is no 'self-serving hearsay' bar that excludes an otherwise admissible statement." *State v. Pavlik*, 165 Wn. App. 645, 653, 268 P.3d 986 (2011); BOR at 15-18. Instead, the State attempts to recast the prosecutor's argument and court's erroneous ruling, arguing that the court properly exercised its discretion based on rulings the court did not

make. BOR at 16-17. Contrary to the State's claim on appeal, the prosecutor's motion to exclude all evidence related to its confidential informant and its surveillance of Mr. Stanley because it was "self-serving hearsay" trumped all other arguments for admission advanced by Mr. Stanley, including his argument that Mr. Temple's elicitation of Mr. Stanley's out-of-court statements were admissible under ER 803(a)(3)'s "then existing state of mind" exception. RP 460. Besides arguing the evidence was still "[c]lassic self-serving hearsay," the prosecutor also mistook defense counsel's argument under ER 803(a)(3) for the excited utterance exception, which the court agreed with. RP 461-62; 465. On appeal the prosecutor argues as if the court had ruled on specific out-of-court statements under ER 803(a)(3) when the court was merely agreeing with the prosecutor's misstatement of the applicable rule. BOR at 16; RP 461-62; 465.

Mr. Stanley also argued for the admissibility of portions of the audio surveillance evidence under ER 801(d)(1)(ii), but the court's ruling was once again trumped by its belief that this was "self-serving hearsay:"

**MR. ERNSDORFF:** No. I mean, **it's the same issue. It's self-serving hearsay.** That just because the Defendant testifies, you know, doesn't change the evidentiary rules.

**THE COURT:** Correct.

RP 482.

Nor did the court rule on Mr. Stanley's argument that this was general rebuttal evidence to the State's case. RP 468.

The audio evidence and Mr. Temple's testimony far exceeded Mr. Stanley's own statements objected to by the prosecutor below and on appeal, which is limited to his statements that he merely wanted to "debench" a judge and planned to file a civil lawsuit against the former witnesses.<sup>1</sup> BOR at 16. The excluded evidence concerns far more than Mr. Stanley's statements. It is evidence that the State directed Mr. Temple to elicit threats from Mr. Stanley to shore up its concerns about Mr. Burleson's claims; that Mr. Temple failed to elicit any threats and lied that he did, which caused the State to bring charges; and that the audio evidence ultimately exposed Mr. Temple's lies, which forced him to admit his claim that Mr. Stanley made threats was untrue. This all tends to show that Mr. Stanley did not make the threat Mr. Burleson claimed he did.

The trial court's wholesale exclusion of evidence and testimony based on a non-existent hearsay rule was an abuse of discretion because it "applie[d] the wrong legal standard" and "base[d] its ruling on an

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<sup>1</sup> Defense counsel described that when Mr. Temple directly asked Mr. Stanley if he "meant any harm towards these women," he expressly responded, "no. I'm a Christian. That's not the way we handle things. I intend to file a civil suit." RP 471.

erroneous view of the law.” *Arndt*, 194 Wn.2d at 799. This was the State’s sole argument for exclusion of the evidence. Because the trial court excluded the evidence on legally erroneous basis, the State simply cannot meet its burden “to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Darden*, 145 Wn.2d at 622.

- d. Even if the court had not excluded the evidence on an invalid evidentiary basis, it had such high probative value that no evidentiary rule compelled its exclusion.

On appeal, The State interprets *Jones* to mean that a trial court’s exclusion of evidence does not violate the defendant’s right to present a defense unless the evidence is “highly probative and is truly necessary to the defense—i.e. the defense is foreclosed without the evidence.” BOR at 18 (citing *Jones*, 168 Wn.2d at 720-21). This is contrary to the presumed admissibility of evidence relevant to the defense. “Evidence tending to prove an element of (or a defense to) a charge is deemed admissible ... in these instances, the probative value of such evidence is of such significance that its admission is required, regardless of the prejudice that might otherwise result from its admission.” *Bedada*, 2020 WL 2315785 at \*6 (citing *Arndt*, 194 Wn.2d at 812; *Jones*, 168 Wn.2d at 720)). In some instances of evidence of high probative value, “no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1 § 22.” *Arndt*, 194 Wn.2d at 812.

*Arndt* discussed a trial court’s interpretation of a rape shield law to preclude the defendant from presenting any evidence that the victim had voluntarily engaged in an “all-night, drug-induced sex party.” *Arndt*, 194 Wn.2d at 812-13 (citing *Jones*, 168 Wn.2d at 721). There, even though the court held the rape shield statute was inapplicable as a matter of law, the *Arndt* court reiterated *Jones*’ ruling that “even if the statute did apply, the fact that the ‘sex party evidence’ was Jones’s entire defense meant that the statute could not be invoked to bar the admission of such evidence without violating the Sixth Amendment.” *Id.* at 813.

Here, Mr. Stanley was clear: the excluded evidence was necessary to his entire defense, that he did not make the threat Mr. Burleson claimed he did. RP 477-83. It “showed there is no plan to kill anyone.” RP 477-83. It is the reason Mr. Stanley rejected the State’s offer to dismiss his case pre-trial, because he believed it exonerated him of the State’s charges. RP 481. Like in *Jones*, if believed, this evidence provided a complete defense to the State’s allegation he made a threat; there is no State interest that justifies its exclusion. *Jones*, 168 Wn.2d at 721.

- e. The exclusion of Mr. Stanley’s means of asserting his defense cannot be harmless.

The State argues that because Mr. Stanley called his friend Brian Delano as a witness, this ensured his right to present a defense and

rendered any error harmless. BOR at 18. But this was not the defense Mr. Stanley sought. “Implicit in the Sixth Amendment is a criminal defendant's right to control his defense.” *Bedada*, 2020 WL 2315785 at \*8 (citing *State v. Wiebe*, 195 Wn. App. 252, 259, 377 P.3d 290 (2016)).

The State also argues that because Detective Christiansen testified about the portions of the audio surveillance,<sup>2</sup> “the salient point of the evidence was actually before the jury.” BOR at 19. Absurdly, this is the very testimony Mr. Stanley objected to because it allowed the State to present its version of the audio. RP 347. This underscores the harm of the court’s ruling—it allowed the State to characterize the evidence, while depriving Mr. Stanley of the ability to present the evidence itself. The State cannot prove this error was harmless beyond a reasonable doubt. *Jones*, 168 Wn.2d at 724.

**2. The evidence was insufficient for four of Mr. Stanley’s felony harassment convictions and the conviction for intimidating a judge.**

- a. Statutes that criminalize speech must be strictly construed.

The State claims that Mr. Stanley’s sufficiency challenge to the alleged threats does not implicate the First Amendment because it relates

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<sup>2</sup> He stated the audio showed Mr. Stanley “talked about his firearm, that when he gets out. He talked about that he was very angry with the system, wanted to get back at, you know, them. His quote was, I want to handle them. He was talking about the -- the judge and everybody. Q But no -- no threats of bodily harm to them? A No.” RP 347.

to the “identity of the victims.” BOR at 20, n 6. This mistakes the “relevant constitutional question,” which is “whether there is sufficient evidence that a reasonable person in [the defendant’s] position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death.” *Kilburn*, 151 Wn.2d at 48.

Generalized threats such as those described by Mr. Burleson against unnamed persons must be scrutinized to determine whether they meet the definition of a “true threat.” *Kilburn*, 151 Wn.2d at 52. This requires the State to prove “that the victim is placed in reasonable fear that the threat made is the one that will be carried out. *State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003) (emphasis added).

The victim’s identity in relation to the threat is necessary to this determination. In *C.G.*, there was “no evidence that [the alleged victim] was placed in reasonable fear that [the defendant] would kill him.” *Id.* In *Kilburn*, testimony about the relationship between the alleged victim and defendant, including their past history and relationship, “make it difficult to conclude that [the defendant] would reasonably foresee his comments being taken seriously.” *Id.*

Individualized careful review of the alleged “threat” as told by Mr. Burleson reveals “a reasonable person in [Mr. Stanley’s] position would not foresee that his comments would be interpreted as a serious statement

of intent to inflict serious bodily injury or death” to the witnesses identified by the State. *Kilburn*, 151 Wn.2d at 48.

- b. There was insufficient evidence a threat was made against the four women the State selected as victims.

Even construed in the light most favorable to the State, Mr. Burleson’s testimony establishes, at most, threats to “three witnesses, a judge and a prosecutor.” RP 218, 219. This evidence does not survive even the more deferential standard argued by the State on appeal. BOR at 20 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

The State’s citations to the record do not establish otherwise. The State first cites the generalized statement that Stanley was “pissed off about the witnesses, and he couldn’t understand why they were testifying.” BOR at 21 (citing RP 214-15). This statement directly followed the prosecutor’s question about Mr. Stanley’s DOSA revocation: “after you talked a little bit about what your revocation was for...what did you observe?” Mr. Stanley’s DOSA revocation was central to Mr. Burleson’s story, but did not involve the four “witnesses” the State identified as the recipients of Mr. Stanley’s supposed threats. RP 214-15.

The State next summarizes Mr. Burleson’s testimony: “Stanley said he wanted to kill the women, the judge and the prosecutor from this

trial.” BOR at 21 (citing RP 217). However, these are the prosecutor’s words in a leading question, not Mr. Burlison’s:

Q: Let’s talk about some of the words he said.

A: Yeah. You want --

Q: What did he tell you? What did he say about the women, the judge and the prosecutor?

A: He wanted to fucking kill them.

Q: Is that his language?

A: That’s his language.

RP 217. The prosecutor also led Mr. Burlison to say that some of the women may have moved:

Q: Did he ever talk about whether they -- one or more of them had moved or not, do you recall that?

A: I think he said something about that he thought that they may have moved. The prosecution and the judge, though, wouldn’t be hard to find. I’m sure they still work where they work. That’s another thing that’s not good.

RP 220 (BOR at 21).

The prosecutor claims that on cross-examination, “[W]hen Stanley talked about his prior case to Burlison, he talked about killing the people involved.” BOR at 21 (citing 233). This testimony, however described only “three females.” RP 233-34.

The prosecutor’s attempt establish sufficient evidence comes from leading questions that failed to elicit testimony about a threat to a specific person, much less the four “witnesses” identified by the State:

Q: Okay. But did he ever talk about -- Did he ever individualize the women, talk about what they had -- how he had interacted with them outside before he got convicted?

A: Yeah. I think there was -- now that I'm -- I'm recalling, there was something about one -- maybe one of them was a bartender and he would drink with them or something like that.

Q: Okay.

A: It's starting to come back a little bit.

RP 240-41 (cited in BOR at 21). Though it is true that one witness testified she was a bartender, so was Jennifer Benz—RP 351—the only identifiable “witness” from Mr. Burleson’s testimony, because she was the only “witness” related to a DOSA revocation. The State does not address the fact that most specific identifying information about one of the “witnesses” was specific to Jennifer Benz—the person he contacted that resulted in his DOSA revocation, but whom the State did not select as one of the charged victims. RP 221.

The prosecutor strove to elicit from Mr. Burleson that a threat was made against specific witnesses, but ultimately failed to present sufficient evidence that the “the threat made is the one to be carried out” against Alyson Gray, Miriam Much, Leah Mesford, or Elizabeth Williams, whom the State selected as the recipients of these alleged vague threats. *C.G.*, 150 Wn.2d at 610; CP 63-65, 111, 116, 120, 124. The evidence was thus insufficient to establish these were “true threats” against any of the named witnesses. *Kilburn*, 151 Wn.2d at 43.

Though it is undisputed that Burleson stated the threat was only against three witnesses, the State argues on appeal that the jury could “reasonably infer that Burleson was simply wrong about the number of women who had been witnesses.” BOR at 23. This argument denies “the truth of the State’s evidence,” rather than admitting it. This is insufficient evidence for the State’s charges against four witnesses.

- c. Mr. Stanley was convicted of intimidating a judge without requiring the jury to find a *mens rea*.

The State argues that this Court is bound by the Supreme Court’s decision in *Trey M.* BOR at 25 (citing *State v. Trey M.*, 186 Wn.2d 884, 897-98, 383 P.3d 474 (2016)). This is wrong. The felony harassment statute at issue in *Trey M.* had a *mens rea* that the offense of intimidating a judge does not, and thus does not control.

Washington’s harassment statute is “not silent as to mental states.” *Trey M.*, 186 Wn.2d at 897-98. It requires a specific *mens rea*: “[w]ithout lawful authority, the person *knowingly threatens* ... [t]o cause bodily injury immediately or in the future to the person threatened or to any other person; ... [and] [t]he person by words or conduct places the person threatened in *reasonable fear* that the threat will be carried out. *Id.* (citing RCW 9A.46.020(1)(a)(i), (b)). *Trey M.* concluded that this statute requires both subjective and objective mental elements: “the speaker must

‘knowingly threaten’ and the fear of the person threatened must be objectively ‘reasonable.’ Because this is not a circumstance where the offense is silent on the *mens rea*, there is no gap for *Elonis* to fill.” *Id.* at 898. Unlike in *Trey M.*, conviction for intimidating a judge does not require knowledge or intent in directing the threat. There is thus the missing scienter required by *Elonis*.

Despite this plain absence of knowledge or intent in the statute at issue here, the State argues the statute requires “conscious wrongdoing” by requiring “the true threat be made *because* of a prior official act.” BOR at 26. But *Elonis* requires the State to show the defendant was aware of the fact that the communication contains a threat. *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2011, 192 L. Ed. 1 (2015). Here, as in *Elonis*, the jury instruction failed to require the jury to consider a “mental state,” which was error because what Mr. Stanley thinks “does matter.” *Id.* at 2011. Absent a *mens rea* requirement, there was insufficient evidence to sustain a conviction.

**3. The trial court allowed the prosecutor to introduce irrelevant, highly prejudicial evidence, resulting in an unfair trial.**

- a. The admission of prejudicial propensity evidence far exceeded the purported basis for admission.

Mr. Stanley does not dispute that the “earlier acts are necessary to put the threats in context.” *State v. Ragin*, 94 Wn. App. 407, 412, 972 P.2d 519 (1999). The problem here is that witnesses’ testimony about the “earlier” acts was used to show it was more likely Mr. Stanley made the current alleged threat over defense objection.

The State fails to address the specific instances cited in Mr. Stanley’s opening brief. BOR at 27-30; BOA at 35-38. Nor does the State address Mr. Stanley’s specific objection to admitting the e-mails from the prior offense as substantive evidence, which was not necessary to put the “threat in context,” because it had already been elicited from the witnesses during days of testimony about the prior conduct. BOR at 27-30. The State notes only that, after the court allowed the State to introduce Mr. Stanley’s past e-mails over his objection, he asked to complete the record and offer the nonthreatening e-mails. This does not address the error raised by Mr. Stanley on appeal which is that the e-mails were admitted as substantive evidence, when he requested their use be limited to refreshing the witnesses’ recollection.

- b. The State fails to justify Mr. Burleson’s gratuitous testimony that Mr. Stanley was more frightening than a notorious serial killer.

The State argues on appeal that Mr. Burleson’s testimony that Mr. Stanley scared him more than Gary Ridgway was relevant “to show that

Burleson had been around inmates who were serving life sentences, who ‘lived by a whole different element of thinking,’ and how he had to learn to get along with them, even if he did not really want to.” BOR at 37 (citing RP 202-04). How Mr. Burleson lived his life in prison is not a “fact that is of consequence to the determination” of this action, ER 401, but even it were, Mr. Burleson’s testimony about Gary Ridgway did not serve this claimed purpose.

The State claims this testimony was permissible because “Burleson’s credibility was central to the case.” BOR at 37. This is true only because the prosecutor made it so, contrary to established case law that prohibits the prosecution from crediting its own witness until his credibility is attacked. *State v. Bourgeois*, 133 Wn.2d 389, 402, 945 P.2d 546 (1997); BOA at 47-50. Mr. Burleson’s comparison of Mr. Stanley to a notorious serial killer in order to establish he is a person who does not “overreact to mere idle talk,” BOR at 37, exceeds any “anticipated” attack that may justify limited crediting of a witness on direct examination. *Bourgeois*, 133 Wn.2d at 403.

This Court must reject the State’s claim that this error was harmless because, as claimed by the State, “Mr. Burleson had no motive to lie.” BOR at 37. First, this argument underscores how irrelevant this planned testimony was. Mr. Burleson testified in great detail about his

altruistic motivations. RP 204-06. Without evidence of a motive to lie, there was no need for Mr. Burleson to shore up his credibility through a highly prejudicial comparison between Mr. Stanley and a serial killer.

Such an inflammatory comparison would influence the jury to convict on an improper basis. The jury would be far more willing to overlook the weakness of the State's evidence a threat was even made in favor of convicting a person whom a seasoned convict assured them was more dangerous than a known serial killer.

- c. The prosecution's bolstering of Mr. Burleson's testimony when his credibility had not been attacked was reversible error.<sup>3</sup>
  - i. *The issue is adequately preserved for appellate review or may be reviewed as cumulative error under RAP 2.5(a).*

The rule that that a witness's credibility must first be attacked before his credibility may be fortified is based on evidence and common-law rules. *Bourgeois*, 133 Wn.2d at 400. The State's claim on appeal that a relevance objection does not preserve the issue of improper bolstering is wrong. BOR at 34, note 12.

In *Bourgeois*, defense counsel objected on relevance grounds when the prosecutor asked the witness, "[D]o you want to be here today?"

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<sup>3</sup> The prosecutions' response addresses Mr. Stanley's arguments in a different order than Mr. Stanley raised them in his Opening Brief. Mr. Stanley's reply brief will follow the State's order of the issues it addressed to avoid confusion.

*Bourgeois*, 133 Wn.2d at 393-94. Several other similar questions followed. *Id.* at 394-95 (the witness “stated over defense counsel’s objection” that she was nervous and fearful about testifying, and that she did not want to “be involved” or “anger anybody by her testimony”). As in this case, these relevance objections were raised on appeal as “improperly bolstering the credibility of those witnesses.” *Id.* at 400.

Mr. Stanley objected on relevance grounds to several questions of the prosecutor’s extended, impermissible inquiry, including why Mr. Burleson pleaded guilty in the past rather than proceed to trial. RP 201-02. Mr. Stanley also objected on relevance grounds to Mr. Burleson bolstering his credibility by claiming his experience with known serial killer Gary Ridgway. RP 227-28. These claims are preserved for appellate review.

Additionally, if an issue raised for the first time on appeal is “arguably related” to issues raised in the trial court, this Court may exercise its discretion to consider newly articulated theories for the first time on appeal. *State v. Lazcano*, 188 Wn. App. 338, 361, 354 P.3d 233 (2015). Mr. Stanley objected to the question “what are you here for,” arguing, “This is going into conjecture, we are not hearing what the actual allegation is.” RP 206. Though counsel used the word “conjecture,” this is a relevance objection to testimony that had no bearing on the charged crime. ER 401. In context, this is certainly adequate for appellate review.

*State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (courts examine the propriety of an evidentiary ruling on appeal if the “specific basis for the objection is ‘apparent from the context’”).

Even if this Court disagrees, any perceived unpreserved errors should be factored into the court’s cumulative error analysis under RAP 2.5(a)(3). *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992) (where the cumulative effect of all these errors, preserved and not preserved, denied Alexander a fair trial, the court exercised its discretion under RAP 2.5(a)(3) to review all of his claims).

*i. The State improperly bolstered its jailhouse informant.*

The State does not appear to contest that the prosecution’s preemptive bolstering of Mr. Burleson was improper under *Bourgeois*, arguing only that this error was harmless: “Even if the State should have waited until after his cross-examination to ask the questions, Stanley’s clear defense was that Burleson was lying.” BOR at 35. The State supports this claim by Stanley’s testimony *after* the State presented its case, in which he stated that what Burleson said was “a lie.” BOR at 35 (citing RP 601-02; 605-06). Beyond refuting Mr. Burleson’s testimony, Mr. Stanley posited no motivation for Mr. Burleson’s lie—specifically noting there was no known animosity between them. RP 601, 615.

The State identifies nothing in the record establishing an inevitable attack on Mr. Burleson's credibility or on what grounds. To be sure, it is generally true that informant testimony should be distrusted, as it is a leading cause of wrongful conviction. *See e.g.* Innocence Project, *Informing Injustice: the Disturbing Use of Jailhouse Informants*, <https://www.innocenceproject.org/informing-injustice> (last accessed May 24, 2020). And it is also known that an informant may forego a direct promise for leniency, instead counting on future goodwill from the State so that a lack of direct incentive will make his testimony appear more credible. *See, e.g., United States v. Ramirez*, 608 F.2d 1261, 1266 (9th Cir. 1979) (“We are not unaware of the reality that the Government has ways of indicating to witness’s counsel the likely benefits from cooperation without making bald promises”). But until this is raised by the defense, it is not relevant. *Bourgeois*, 133 Wn.2d at 402.

The standard for harmless error cannot be, as claimed by the State, whether “such testimony would have been proper on redirect,” because there is no evidence Mr. Stanley would have challenged Burleson’s motivations for testifying where, as claimed by Burleson, he received no benefit for testifying. BOR at 35. Most importantly, redirect would have been limited by the scope of cross-examination, and inquiry into Mr. Burleson’s claimed altruism and his concern that Stanley was more

dangerous than Gary Ridgway would have been outside of this scope.

Rather, this error requires reversal when “within reasonable probabilities, it did not affect the outcome of trial.” *Bourgeois*, 133 Wn.2d at 403. The experienced prosecutor in this case surely went to such great lengths to credit Mr. Burleson because he deemed this necessary for conviction. The State’s effort to corroborate Mr. Burleson through Mr. Temple failed, and the State itself questioned Mr. Burleson’s credibility to such a degree that they did not bring charges against Mr. Stanley until they believed (wrongly) that Mr. Temple could corroborate Mr. Burleson’s claim. CP 1-3. Shoring up Mr. Burleson’s credibility was critical to the State’s ability to prove any threat was made. This far exceeded any anticipated attack on Mr. Burleson’s credibility. *Bourgeois*, 133 Wn.2d at 403. The State emphasized its bolstering of Mr. Burleson’s credibility in closing argument, arguing the jury should believe Mr. Burleson because of his altruistic motivation, “moral compass,” and personal peril in testifying against Mr. Stanley. RP 669-74.

Given the weakness of Mr. Burleson’s uncorroborated testimony, it cannot be said that this improper bolstering that exceeded any possible anticipated attack on cross-examination and which included highly prejudicial claims about Mr. Stanley’s dangerousness did not affect the trial outcome. Reversal is required.

- d. The Court's error in refusing to disqualify the King County Prosecuting Attorney's Office resulted in violation of the witness-advocate rule.

The State misunderstands the application of the witness-advocate rule in this case. BOR at 38-47. This violation arises from the court's refusal to disqualify the King County Prosecuting Attorney's Office from prosecuting a case involving its own prosecutor.

The State's reliance on *State v. Nickels* is misplaced. BOR at 42-43. The issue in *Nickels* was whether an elected county prosecutor's prior involvement in a defendant's case should presumptively disqualify the entire prosecutor's office from prosecuting the defendant in the same case. *State v. Nickels*, 195 Wn.2d 132, 134, 456 P.3d 795 (2020). This does not address the conflict that arises when a prosecuting agency prosecutes a case in which it alleges a fellow prosecutor is a victim based on that person's role prosecuting the case for the same agency.

This question is governed by *State v. Bland*, which addressed the witness-advocate problem that arises when a prosecuting agency calls one of its employees as a witness in the case. *State v. Bland*, 90 Wn. App. 677, 681, 953 P.2d 126 (1998). *Bland* provides that when this issue arises, "courts should consider whether the testifying deputy can be an objective witness, whether the dual positions artificially bolster the witness's

credibility or make it difficult for the jury to weigh the testimony, and whether the dual role raises an appearance of unfairness.” *Id.* at 680.

In *Bland*, the prosecutor testified only in her capacity as a social worker, therefore she “had no special personal interest stemming from her work with the prosecutor’s office” and so her “dual role” as prosecutor and witness did not affect her objectivity. *Bland*, 90 Wn. App. at 681. Here, prosecutor Brenner’s “dual role” as prosecutor and witness artificially bolstered his credibility, which is the exact problem the witness-advocate rule is meant to address. This issue is preserved through Mr. Stanley’s motion to recuse the prosecutor in this case. RP 36-42; CP 47; *Bland*, 90 Wn. App. at 678 (appellate issue raised through defense motion to disqualify prosecutor’s office).

To be clear, Mr. Stanley does not claim that Mr. Brenner, as an alleged victim, should not be able to testify in a criminal prosecution. BOR at 46 (claiming “if Stanley’s argument were correct, no prosecutor-victim could ever testify about his victimization; anyone could then threaten a prosecutor with impunity.”). The issue is whether the court should have recused King County Prosecutors from prosecuting the case in which Mr. Brenner was an alleged victim based through his role as a King County Prosecutor. This issue raises the concerns that underlie the witness-advocate rule, including the risk that a testifying prosecutor will

not be a fully objective witness given his position as an advocate for the government, the fear that the prestige or prominence of a government prosecutor's office will artificially enhance his credibility as a witness, that the "dual roles" of a prosecutor and witness confuses the trier of fact as to whether the prosecutor speaks as an advocate or a witness, and broader concern for public confidence in the administration of justice. *United States v. Johnston*, 690 F.2d 638, 643 (7th Cir. 1982). As discussed in detail in Appellant's Opening Brief, Prosecutor Brenner's testimony reflected each of these problems, and resulted in an unfair trial. BOA at 43-47.

**4. The finding of "egregious lack of remorse" was based on conduct that inhered in the charged offense of felony harassment.**

Whether this Court views Mr. Stanley's challenge to the "egregious lack of remorse" aggravator, which elevates the permissible punishment based on ongoing harassment that is already contemplated by the felony harassment statute, as a sufficiency challenge or as a question of applicability, the legal justification for a sentence is reviewed de novo. *See State v. Stubbs*, 170 Wn.2d 117, 124, 240 P.3d 143 (2010) (whether the Legislature contemplated the injuries actually inflicted in defining, and setting the standard range for, the crime of conviction); *State v. Epefanio*, 156 Wn. App. 378, 391, 234 P.3d 253 (2010) (whether the relevant time

period is sufficient to support the jury's conclusion the abuse here was for a "prolonged period of time," this is a question of law reviewed de novo).

On appeal the State argues that the harassment statute's mental state requirement that a person "knowingly" threaten someone is different from being "indifferent and remorseless about it." BOR at 54-55. But this is not the test for whether the legislature accounted for the conduct alleged in the standard range sentence. The question is whether the legislature contemplated the injuries suffered in setting the standard range sentence. *Stubbs*, 170 Wn.2d at 124.

The State cites no separate conduct beyond the State's evidence that supported its charge for felony harassment that could support the egregious lack of remorse aggravator. BOR at 53-54. The State claims that the alleged threats showed Mr. Stanley "*continued* to blame the victims and the system for his crimes," "despite having listened to [their] previous testimony in the cyberstalking trial about the effect of his relentless and graphic threats to kill them." BOR at 54. This on-going alleged conduct is precisely what felony harassment punishes by elevating the offense of harassment to a felony if the person has a previous harassment conviction against the same person. RCW 9A.46.020(1), (2)(b).

Whether viewed as misapplication of this aggravator to the crime of felony harassment or as a question of sufficiency of facts beyond those

contemplated by statute, this Court should reverse the aggravator where the conduct alleged in support is accounted for in the offense of felony harassment.

**5. Mr. Stanley’s standard range sentence was elevated to a de facto life sentence based on unconstitutional aggravating factors.**

- a. The “egregious lack of remorse” aggravator is unconstitutionally vague.

The State responds to Mr. Stanley’s due process vagueness challenge, arguing *stare decisis* requires this Court to follow *Baldwin* under BOR at 56 (citing *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003)). Justice Pennell’s dissent in *State v. Santos* shows the Court of Appeals’ continued reliance on *Baldwin*, as in *State v. Brush*, 5 Wn. App. 2d 40, 44, 425 P.3d 545 (2018) and *State v. Devore*, 2 Wn. App. 2d 651, 413 P.3d 58 (2018), is misguided. *State v. Santos*, No. 36069-5-III, \*44 (Wash. Ct. App. April 30, 2020) (J. Pennell, dissenting) (unpublished). These decisions have relied on *Beckles v. United States*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017). As Justice Pennell observes, “*Beckles* held a vagueness challenge is not viable in the unique context of the federal sentencing guidelines.” Slip op. at 56. Federal guidelines, unlike Washington’s are “purely advisory.” Slip op. at 48. Because in Washington aggravating factors are legally analogous to elements,

“Washington’s sentencing statutes should be judged under the vagueness standard generally applicable to statutory sentencing enhancements.” Slip. op. at 49.

As applied to Mr. Stanley, this aggravator fails to give notice to a person of ordinary intelligence what the statute proscribes, where the State charged Mr. Stanley with the “egregious lack of remorse,” despite the fact that it was the State’s control over the allegations that created the extreme distress to the victims. *See e.g.* RP 774 (the State only told the witness about Mr. Burlison’s threat, not the fact that its subsequent investigation revealed that Mr. Stanley voiced no intent to harm the witnesses, even when prodded to do so, shortly before his scheduled release). The State controlled the narrative of the claimed threat in relation to the witnesses, not Mr. Stanley. No reasonable person could anticipate an indirect threat would constitute an “egregious lack of remorse” towards the people the State selected as recipients of the claimed threat. This Court should reverse.

b. The aggravator is overbroad because it punishes protected speech and conduct.

The State claims “Mr. Stanley makes no attempt to explain how the aggravator punishes speech or expressive conduct.” BOR at 60. This misses his argument. This aggravator, when applied to felony harassment,

which in turn is based on previous conduct of words and feeling alone (here cyberstalking), renders this aggravator overbroad because it punishes conduct that may include protected speech—including sentiment, feeling, or belittling words. BOA at 64; CP 137.

## **B. CONCLUSION**

Based on the foregoing, Mr. Stanley seeks reversal and remand of his convictions, or alternatively, reversal of his sentence.

DATED this 26th day of May, 2020.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 36432-1-III
	)	
SLOAN STANLEY,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

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