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State of Washington  
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NO. 36432-1-III

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 THE  
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

---

AMENDED OPENING BRIEF

---

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## A. INTRODUCTION

The State charged Sloan Stanley with six felony harassment counts and intimidating a judge based on information from two jail informants. The State believed its first informant, Randy Burleson, lacked credibility, and so placed another informant, Billy Temple, into Mr. Stanley's cell with an audio recorder. The evidence obtained through Billy Temple did not ultimately support Mr. Burleson's claim Mr. Stanley made threats to kill witnesses, a judge, and a prosecutor.

Mr. Stanley denied he had made the threats. He turned down an offer of a stipulated order of continuance (SOC) because he believed the audio surveillance and Mr. Temple's testimony were exonerating. But at trial, the court prohibited Mr. Stanley from calling Mr. Temple or presenting the favorable evidence from the audio surveillance on the erroneous evidentiary basis that it was "self-serving hearsay," in violation of Mr. Stanley's right to present a defense. The court made a number of other erroneous evidentiary rulings that allowed the State to artificially bolster its case in violation of evidence rules designed to ensure a fair trial.

Mr. Burleson's testimony was the State's only evidence that Mr. Stanley made any threats, but his testimony was insufficient to support conviction in counts 1-4 and 7. Despite the pre-trial offer of an SOC, at sentencing, the court improperly imposed an exceptional sentence of 33.5

years based on the unconstitutionally vague and overbroad aggravating factor of “egregious lack of remorse.”

## B. ASSIGNMENTS OF ERROR

1. The trial court erroneously excluded witness and audio evidence in violation of his right to present a defense.

2. The State presented insufficient evidence of felony harassment.

3. The evidence was insufficient evidence to support conviction for intimidating a judge.

4. The court admitted propensity evidence in violation of ER 404(b) and ER 403.

5. The trial court erroneously denied Mr. Stanley’s motion to recuse the King County Prosecutor’s Office.

6. The court allowed the State to impermissibly bolster the credibility of its witness, Mr. Burleson.

7. The trial court erred in imposing an exceptional sentence based on “egregious lack of remorse” where the conduct supporting this factor is accounted for in the offense of conviction and standard sentence range.

8. The trial court impermissibly enhanced Mr. Stanley’s sentence based on the unconstitutionally vague “egregious lack of remorse” aggravator in counts 1-4.

9. Where Mr. Stanley's conviction is based on words alone, the "egregious lack of remorse" aggravator is constitutionally overbroad in violation of the First Amendment.

#### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has a constitutional right to present relevant and material evidence to establish a defense under the Sixth and Fourteenth Amendments and Article I, § 22. Did the court's refusal to allow Mr. Stanley call the second informant and introduce audio from the State's surveillance violate Mr. Stanley's constitutional right to present a defense?

2. The First Amendment requires a statute criminalizing pure speech to be narrowly construed. Where the State's evidence was insufficient to establish an alleged "threat" was made against the four people named in counts 1-4, must Mr. Stanley's convictions be reversed?

3. Did the State fail to prove a "true threat" for the offense of intimidating a judge, where this offense lacks a *mens rea*?

4. Under ER 404(b) and ER 403, evidence of prior misconduct is inadmissible when not relevant to a material purpose or when its prejudice exceeds its probative value.

a. Did the court err in allowing prejudicial testimony and argument that Mr. Stanley's past threats were similar to the alleged threats?

b. Did the trial court violate ER 403 by allowing the witnesses to read out loud and admit into evidence e-mails from Mr. Stanley's 2015 offense for cyberstalking, where their cumulative prejudice far outweighed the claimed relevance to an undisputed element?

c. Did the trial court err in allowing Mr. Burleson to testify Mr. Stanley scared him more than Gary Ridgway, a notorious serial killer?

5. Courts generally disfavor allowing a participating prosecutor to testify at a criminal trial. Did the trial court abuse its discretion in refusing to recuse the prosecutor's office from Mr. Stanley's case where the prosecuting attorney impermissibly served as both witness and advocate?

6. Unless the defense attacks a State's witness's credibility, the State may not bolster its own witness on direct examination. Did the court err in allowing the prosecutor to credit its jail informant, Mr. Burleson, on direct examination when his credibility had not been attacked and the bolstering far exceeded any possibly anticipated cross-examination?

7. A court may not impose an exceptional sentence based on a fact taken into account in the offense and standard range. Did the trial court err in imposing an exceptional sentence based on an "egregious lack of remorse," where Mr. Stanley's words and conduct were accounted for in his conviction and the standard sentencing range?

5. A statute is void for vagueness if it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited. Is the “egregious lack of remorse” aggravator void for vagueness as applied to Mr. Stanley?

6. Does the aggravator “egregious lack of remorse” violate the First Amendment because it punishes constitutionally protected speech?

#### D. STATEMENT OF THE CASE

1. The State charges Mr. Stanley with threats to kill based on the statements of two jail informants, Randy Burleson and Billy Temple.

The State charged Sloan Stanley with numerous counts of felony harassment and intimidating a judge based on allegations from two prison inmates, Randy Burleson Billy Temple. CP 1-4; 7-11. Mr. Burleson contacted Detective Christiansen and told him that when celled with Mr. Stanley in prison, Mr. Stanley repeatedly stated he was going to kill “the fucking Judge, the Prosecutor and the four bitches.” CP 2. Concerned about Mr. Burleson’s “distinct lack of credibility,” the prosecutor and detective “set up an operation” to place Mr. Temple into Mr. Stanley’s cell to gain more credible evidence of the alleged threats. CP 2; RP 345, 358.

Mr. Temple was vetted and placed in Mr. Stanley’s cell along with an audio recorder. CP 2; RP 346. Before obtaining the audio surveillance, the detectives claimed Mr. Temple told them about Mr. Stanley making

specific threats and plans to obtain a gun and track down his “intended Victims.” CP 3.

The prosecution charged Mr. Stanley with seven felony harassment and one count of intimidating a judge. 11/1/17 RP 2; CP 1-4; 7-11. Four months later, the State had only provided Mr. Stanley with 30 of the 144 hours of audio it had collected. CP 23. Mr. Stanley insisted on obtaining the entirety of the audio surveillance collected from his cell, arguing it was *Brady* material. 4/2/18 RP 20.

2. Believing the audio intercept and Mr. Temple will establish his innocence, Mr. Stanley rejects the State’s offer of an SOC.

The State offered to resolve Mr. Stanley’s case through a stipulated order of continuance.<sup>1</sup> 6/14/18 RP 13. Mr. Stanley rejected the offer, believing the audio surveillance and Mr. Temple’s testimony would establish his innocence. 4/2/18 RP 28; 6/14/18 RP 14; 8/20/18 RP 27. Mr. Stanley asked to be released on bail with the same conditions offered in the SOC. 6/14/18 RP 8, 13. The court denied the request. 6/14/18 RP 14.

Not until seven months after charging Mr. Stanley did the State finally provide him with all the audio surveillance it had collected. 8/20/18 RP 16, 27-28; *see also* RP 475, 478.<sup>2</sup> Mr. Temple also admitted Mr.

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<sup>1</sup> King County District Court LCrRLJ 8.3.

<sup>2</sup> RP citation without dates refers to the consecutively paginated record starting on 9/5/18 in Vol. 1-4. Individual hearings that are not consecutively paginated include a date.

Stanley never made any direct threats of harm towards any women while they were in the cell together. RP 471.

Mr. Stanley continued to reject the offer of an SOC, insisting on a trial to prove his innocence. 8/20/18 RP 22. Two weeks before trial, Mr. Stanley requested the State's witness list, which the State had not yet provided. RP 8/20/18 RP 31.

A week before trial, during Mr. Stanley's scheduled motions in limine, the State amended the Information, dismissing two counts of felony harassment. 8/28/18 RP 35; CP 63. The State maintained six counts of felony harassment against some of the participants from Mr. Stanley's 2015 cyberstalking trial, including King County prosecutor Wes Brenner and the four victims in that case, Alyson Gray, Miriam Much, Elizabeth Bell, and Leah Mesford. CP 63-65. The State also maintained the charge of intimidating a judge for the Honorable Jeffrey Ramsdell, who presided over the 2015 trial. CP 66.

The charges were brought by King County, but the Venue was changed to Walla Walla. CP 47. The court denied Mr. Stanley's request to recuse the King County Prosecutor from prosecuting a case involving its own prosecutor. 8/28/18 RP 37-42. Having received the State's witness list by this time, Mr. Stanley noted his surprise that the State did not intend to call Mr. Temple to testify at trial. 8/28/18 RP 51.

Mr. Stanley stated his intent to call Mr. Temple. 8/28/18 RP 35.

The judge signed a material witness warrant for Mr. Temple and the defense obtained orders of transport from both DOC and Spokane County Jail for Mr. Temple to be transported for trial. RP 176, 453-54, 459.

3. After trial begins, the court prohibits Mr. Stanley from calling Billy Temple or introducing the State's audio surveillance.

Detective Christiansen testified about the parts of the audio surveillance he thought supported the charges, though he admitted the audio contained no threats. RP 347. After nearly five days of testimony from the State's witnesses about their fear and Mr. Stanley's past conduct, the State objected to Mr. Stanley calling Mr. Temple or the State's audio, arguing it would be "self-serving hearsay" and irrelevant. RP 455; 460-65. Mr. Stanley offered various bases for admission and argued the centrality of this evidence to his defense. RP 460-66. The trial court granted the State's motion to exclude Mr. Temple's testimony and the audio. RP 466-67. Mr. Stanley moved for a mistrial, which the court denied. RP 472-483.

Mr. Stanley testified and denied making the threats Mr. Burleson claimed he did. RP 601-02. The court prohibited Mr. Stanley from testifying about the content of the State's audio surveillance. RP 603-05.

4. Mr. Burleson's testimony is the sole evidence Mr. Stanley made a threat in 2016; the majority of the State's evidence is about Mr. Stanley's prior offenses from 2015.

Rather than evidence about the new allegations, most of the State's case involved evidence from Mr. Stanley's prior cyberstalking convictions from 2015. CP 63-65; RP 243-327; 331-338; 368-446; 486-551.

In 2014, Mr. Stanley readily admitted to sending e-mail threats to the four women. RP 333. He cooperated with police, providing the detective all the e-mails he sent through e-mail and Facebook. RP 332, 335, 349. Mr. Stanley told the detective he did not intend the women ill will, but that he wanted to scare them, which he did. RP 349, 607. At the time, Mr. Stanley said he wanted to understand an incident each of the women denied happened, but which he became obsessed with soon after he suffered a traumatic brain injury. RP 350; *see e.g.* RP 517; 767-68.

Mr. Stanley represented himself at his 2015 trial. RP 324. Though Mr. Stanley would get upset about legal rulings and procedural issues, he never made threats to the judge or trial participants. RP 324. After Mr. Stanley's conviction for sending these messages in 2014-15, he never tried to contact the women or the prosecutor again. RP 283-84, 289, 320, 323, 336, 351, 444, 548.

Mr. Stanley was out of custody on a DOSA sentence without incident for three months following his 2015 convictions. RP 613.

However, his DOSA was revoked in 2016 for using an electronic device. RP 353; CP 2. Mr. Stanley was housed with Mr. Burleson for about two weeks after his DOSA was revoked. RP 234. About a year later, Mr. Burleson told the detective who investigated Mr. Stanley's 2015 case that Mr. Stanley made the threats alleged in this case. CP 1-2; CP 63-65. The prosecutor and detective told the alleged victims what Mr. Burleson and Mr. Temple told them, which terrified them. RP 285, 323.

At trial, Mr. Burleson provided the only evidence that Mr. Stanley made a threat in 2016. Mr. Burleson provided very little information about the content of the alleged threats other than that Mr. Stanley threatened to kill "three female witnesses, a judge and a prosecutor." RP 239. He did recall that one of the "witnesses" was the person Mr. Stanley contacted in violation of his DOSA. RP 218. This person, Jennifer Benz, was a bartender who worked with and knew the 2015 cyberstalking victims. RP 337-38, 351, 353-54, 556. The State did not charge Mr. Stanley with harassing Ms. Benz. CP 63-66.

The State sought to bolster Mr. Burleson's credibility on direct examination. Mr. Burleson testified he was risking his life by testifying with no incentive from the State. RP 203-06. The State improperly elicited from Mr. Burleson that he was more scared of Mr. Stanley than of the notorious killers he had known in prison. RP 202-06; 227-28. Judge

Ramsdell and Prosecutor Brenner improperly credited Mr. Burleson's claims based on their experience from Mr. Stanley's previous trial. RP 303-04, 306, 396.

Mr. Stanley admitted the communications he sent that resulted in his 2015 cyberstalking convictions were threatening and inexcusable. RP 607, 761. Mr. Stanley offered to stipulate to the element of reasonable fear to prevent the previous witnesses from testifying. CP 63; 8/28/18 RP 43-50. The State refused his offer to stipulate and called the victims to testify at length and read the e-mails from the 2015 trial over Mr. Stanley's objection. RP 43-46, 164-69, 260-65, 435-41, 497-502, 538-39.

5. Mr. Stanley is convicted and sentenced to serve an exceptional sentence of 33.5 years.

Mr. Stanley was convicted on all counts. CP 148-154. The jury also found each of the charged aggravators, "egregious lack of remorse" for four of the harassment charges, and the aggravator of harassing an officer of the court for Mr. Brenner. CP 155-160; 298. At sentencing, the harassment charge against Judge Ramsdell was dismissed on double jeopardy grounds, but his conviction for intimidating a judge remained. CP 296.

Mr. Stanley's prior criminal history consisted of the nine prior cyberstalking convictions from 2015. CP 7, 298. With his offender score,

Mr. Stanley faced a standard range sentence of 77-102 months. CP 298. In stark contrast to the pre-trial offer, the prosecutor requested an exceptional sentence of 402 months. 6/14/18 RP 13; CP 284. As Mr. Stanley noted, this sentence exceeds the top of the standard range sentence for murder in the second degree for an offender with a 9+ offender score. CP 280. A defendant sentenced for first degree murder would face only a slightly longer sentencing range of 411-458 months. CP 280.

The trial court imposed the requested sentence, sentencing 42 year-old Mr. Stanley to a de facto life sentence of 33.5 years. CP 298.

#### E. ARGUMENT

**1. The trial court violated Mr. Stanley’s due process right to present a defense by prohibiting him from calling a witness and introducing critical evidence.**

- a. Mr. Stanley has a due process right to call witnesses and present evidence relevant to his defense.

The right of the accused to defend against the State’s accusations is guaranteed by the state and federal constitutions. U.S. Const. amend. VI, XIV; Const. arts. I, § 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). The right to present witnesses to establish a defense is “a fundamental element of due process of law.” *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

The right to present a defense is intended to ensure “fairness and reliability in the ascertainment of guilt and innocence,” and the right to “a fair opportunity to defend against the State’s accusations.” *Chambers*, 410 U.S. at 294, 302. This includes the “right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.” *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L. Ed.2d 798 (1988) (quoting *Washington*, 388 U.S. at 19).

The threshold to admit relevant evidence is low. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Evidence is relevant if it “make[s] the existence of any fact of consequence more probable or less probable than it would be without the evidence.” *Id.* at 624.

If the State moves to exclude relevant evidence, it bears the burden of proving the evidence is so prejudicial “as to disrupt the fairness of the fact-finding process at trial” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Next, the court must balance the State’s interest to exclude the prejudicial evidence versus the defendant’s need for the evidence. *Id.* Only when the State’s interest outweighs the defendant’s need can the court withhold the evidence. *Id.* For 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.” *Id.* (internal citations and emphasis omitted).

This Court reviews de novo an evidentiary ruling infringing the constitutional right to present a defense. *Jones*, 168 Wn.2d at 719. When the constitutional error arises from an adverse evidentiary ruling, courts review the evidentiary ruling for abuse of discretion. *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017).

b. The audio from the State's surveillance and Billy Temple's testimony was highly relevant to Mr. Stanley's defense.

The court erroneously denied Mr. Stanley's request to call Mr. Temple as a witness and to introduce portions of the audio surveillance that were highly relevant to his defense.

Mr. Stanley selected relevant portions of the audio surveillance from when Mr. Temple was in Mr. Stanley's cell. RP 177-78, 459-60; 464, 481. The audio contradicted Mr. Burlson's description of how Mr. Stanley talked about his 2015 case. RP 460, 464, 471-72, 477-78. Mr. Stanley discussed filing civil suits, and his belief the judge in his prior case should be "debenched." *Id.*

The State claimed Mr. Temple told them Mr. Stanley made threats when they charged Mr. Stanley with felony harassment. CP 1-2. Evidence to the contrary was relevant to Mr. Stanley's defense that he did not make the alleged threats. This evidence undermined the State's case.

Still, the State claimed this evidence was not relevant because the recording was done nearly a year after Mr. Burleson claimed Mr. Stanley made the threats. RP 476. However, Mr. Burleson did not report these alleged threats to the State until nearly one year after he claimed the threats were made. CP 2.

The State's own charging document reflects the period in which it collected the evidence Mr. Stanley sought to introduce at trial, alleging Mr. Stanley committed the charged crimes between June 2016 and August 2017. CP 64-66. This includes the period when the State placed Mr. Temple and a recording device in Mr. Stanley's cell. CP 1-2.

The evidence obtained by the State days before Mr. Stanley's scheduled release date could not be more relevant to felony harassment's element of knowingly threatening to cause bodily injury "immediately or in the future to the person threatened." RCW 9A.46.020(1)(a)(i); CP 61-65; RP 479. Especially where Mr. Burleson claimed Mr. Stanley made the alleged threat while incarcerated, the only harm Mr. Stanley could intend under those circumstances is "in the future;" thus his intent immediately prior to his release is highly relevant to the State's allegations.

Moreover, the State considered the audio evidence relevant before it sought to prohibit Mr. Stanley from introducing it. The prosecutor asked Detective Christiansen about the audio over Mr. Stanley's objection: "The

jury is going to hear that recording and so I would object to the detective testifying to it now when the jury is going to hear it.” RP 347. The prosecutor then asked if the detective heard any “statements made by Mr. Stanley that were of interest” to his investigation on the recording. RP 347. The detective admitted there were no threats of bodily harm on the audio but that specific portions of the recording were of interest, including Mr. Stanley talking about “his firearm,” that Mr. Stanley was “very angry with the system, wanted to get back at, you know, them.” RP 347. Detective Christiansen quoted Mr. Stanley as saying, “I want to handle them.” RP 347. The detective explained, “he was talking about the—the judge and everybody.” RP 347.

Mr. Stanley sought to introduce the portions of the State’s evidence contradicting Mr. Burleson’s claim Mr. Stanley threatened to cause bodily injury on his release from prison. RP 177-78, 459-60, 470-72, 477-79, 481. This evidence was the core of Mr. Stanley’s defense, thus meeting the threshold for relevant evidence a defendant is entitled to present in his defense. *Jones*, 168 Wn.2d at 720.

- c. The trial court erroneously excluded this evidence as “self-serving hearsay.”

The trial court prohibited Mr. Stanley from presenting relevant evidence on the erroneous basis it was “self-serving hearsay.”

No evidence rule excludes “self-serving hearsay.” *State v. Pavlik*, 165 Wn. App. 645, 651, 268 P.3d 986 (2011). Rather, admissibility is addressed under the recognized exceptions to the hearsay rule. *Id.* at 654. In *Pavlik*, after determining the trial court’s reliance on “self-serving hearsay” was invalid, this Court looked to whether the court had another basis for excluding the evidence. *Pavlik*, 165 Wn. App. at 654. *Pavlik* was unclear whether the trial court was “erroneously trumped” by the “self-serving” hearsay argument, or whether the court alternatively excluded the evidence under the excited utterance rule. *Id.* at 654. Though in *Pavlik* it appeared the court excluded the evidence based on another valid basis, *Pavlik* did not decide this question because exclusion of the single statement was harmless error. *Id.* at 655-66.

The prosecutor objected to Mr. Stanley calling Mr. Temple or playing relevant portions of the audio, arguing it was “classic self-serving hearsay.” RP 174-75, 455. Mr. Stanley argued this was not hearsay, because it qualified as then existing state of mind, emotion, sensation or physical condition such as intent, plan, motive, design, mental feeling. RP 460 (citing ER 803(a)(3)). Mr. Stanley specifically asked the court if the audio would be admissible for a non-hearsay purpose, such as consistent statements, if he testified. RP 480-42. *See* ER 801(d)(1)(ii). Mr. Stanley also argued this evidence rebutted Mr. Burleson’s testimony. RP 468.

In response, the State confused the hearsay exception argued by Mr. Stanley with the “excited utterance” exception. ER 803(a)(2); RP 460-61 (arguing the exception applies “usually minutes within the actual incident that’s the basis for the charged crime.”). Unlike in *Pavlik*, where it was unclear if the court’s exclusion of the evidence was entirely based on the invalid basis of “self-serving hearsay,” here there is no question the trial court adopted the State’s mistaken legal arguments:

THE COURT: Based on the research that I have done with reference to the self-serving hearsay, which was one year post Mr. Burleson’s statements, if you will, that based on that passage of time, those statements are not under the stress or the excitement and it is not after the incident. And because of that, they will not come in and the motion for mistrial is denied.

RP 480; *see also* RP 483.

The Court’s ruling erroneously barring relevant evidence as “self-serving hearsay” was an abuse of discretion because it was based on an error of law. *Pavlik*, 165 Wn. App. at 650-51. The court’s erroneous ruling deprived Mr. Stanley of the opportunity to present evidence critical to his defense. *Jones*, 168 Wn.2d at 724.

- d. The erroneous ruling denied Mr. Stanley evidence critical to his defense and requires reversal of his convictions.

The State must prove an error of constitutional magnitude is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed.2d 705 (1967). This Court must be “convinced

beyond a reasonable doubt that any reasonable jury would have reached the same result without the error.” *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Relevant considerations include the strength of the State’s case, the plausibility of the defense, and the overall significance of the erroneously excluded evidence. *State v. Romero-Ochoa*, 193 Wn.2d 341, 348-49, 440 P.3d 994 (2019).

The State had to prove Mr. Stanley made a threat. CP 63-66. Mr. Burleson’s testimony was the only evidence the State introduced for this critical element. No other admissible evidence corroborated his claim. *Cf. Romero-Ochoa*, 193 Wn.2d at 364 (overwhelming circumstantial evidence can render constitutional error harmless beyond a reasonable doubt).

From the start, the State sought additional evidence due to Mr. Burleson’s “distinct lack of credibility.” RP 357. The State placed a vetted informant in Mr. Stanley’s cell. CP 1-2. But rather than corroborate its first unreliable informant, the new evidence undercut the State’s charges. RP 177-78, 459-60, 470-72, 477, 479, 481. This evidence was consistent with Mr. Stanley’s defense. *See Romero-Ochoa*, 193 Wn.2d at 348 (erroneously excluded evidence is significant if consistent with the defense theory).

This evidence supported Mr. Stanley’s unwavering assertion he did not make the threats claimed by Mr. Burleson. 8/20/18 RP 22; RP 470-71,

477-78. Mr. Stanley rejected the State's offer of an SOC based on evidence he believed showed his innocence. RP 481. Mr. Stanley was clear prior to trial he intended to use the recordings and call Mr. Temple as a witness. 6/26/18 RP 14; 8/20/18 RP 28; 8/28/18 RP 35. If Mr. Stanley's counsel had known the court would exclude this evidence, they would have proceeded differently. RP 470-72. This evidence would have rebutted Mr. Burlison's testimony, the only evidence at trial that Mr. Stanley made any threat. The audio and Mr. Temple's testimony were strong evidence Mr. Stanley made no threats, but only expressed frustration with his legal matters and an intention to pursue civil litigation.

Denying Mr. Stanley the right to present this evidence was such a profound deprivation of his constitutional right to present evidence and witnesses in his favor that reversal is required. *Jones*, 168 Wn.2d at 725.

**2. Mr. Stanley's convictions for felony harassment and intimidating a judge should be reversed for insufficient evidence under the First and Fourteenth Amendments.**

- a. This court reviews de novo the validity of a conviction based on speech alone.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000). A conviction based on insufficient evidence violates due process. *Jackson v. Virginia*, 443

U.S. 307, 316, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence in the light most favorable to the prosecution, any rational trier could find the elements of the crime beyond a reasonable doubt.” *Id.* at 319.

For a challenge to the sufficiency of evidence that implicates core First Amendment rights, “[i]t is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court’s findings.” *State v. Kilburn*, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004). Rather, the “rule of independent review” requires an appellate court to freshly examine “crucial facts” that bear on the constitutional question. *Id.* at 52.

b. Because it criminalizes pure speech, the harassment statute is strictly construed.

The federal and state constitutions guarantee freedom of speech. U.S. Const. amend. I; Const. art. 1, sec. 5; *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); *Kilburn*, 151 Wn.2d at 41.

When a criminal statute implicates speech, the State must prove both the statutory elements of the offense and that the speech was unprotected by the First Amendment. *Kilburn*, 151 Wn.2d at 54. A person commits harassment if, “without lawful authority,” he “knowingly

threatens” to “cause bodily injury immediately or in the future to the person threatened or to any other person,” and these words or conduct place the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i), 2(b); CP 64-65. This statute criminalizes pure speech. *Kilburn*, 151 Wn.2d at 41.

A statute that imposes criminal liability based on speech alone must comport with the First Amendment. *State v. J.M.*, 144 Wn.2d 472, 477, 28 P.3d 720 (2001) (citing *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). To avoid an infringement of protected speech, this statute must be read as prohibiting only “true threats.” *Kilburn*, 151 Wn.2d at 43. To the extent the statute could possibly be deemed ambiguous, it must be interpreted strictly in Mr. Stanley’s favor. *See State v. Evans*, 177 Wn.2d 186, 194, 298 P.3d 724 (2013).

*i. Mr. Burlison’s testimony about the “threat” did not support the State’s charges in counts 1-4.*

The language of the harassment statute is plain: “the statute as a whole requires that the perpetrator knowingly threaten to inflict bodily injury by communicating directly or indirectly the intent to inflict bodily injury; the person threatened must find out about the threat although the perpetrator need not know nor should know that the threat will be

communicated to the victim; and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out.” *J.M.*, 144 Wn.2d at 482-83 (emphasis added).

This statute does not require the person to whom the threat is communicated to be the victim of the threat or that the defendant know his threat will be communicated to the victim. *J.M.*, 144 Wn.2d at 488.

The statute does, however, require the State prove “the person threatened was placed in reasonable fear of ‘the threat’—the actual threat made.” *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003) (emphasis added). A generalized threat is not enough as the State is required to prove “the victim is placed in reasonable fear that the threat made is the one that will be carried out.” *C.G.*, 150 Wn.2d at 610 (emphasis added).

There was insufficient here evidence that “the threat made is the one that will be carried out” against the women the State selected as victims in counts 1-4. *C.G.*, 150 Wn.2d at 610; CP 63-65.

Mr. Burleson’s testimony was the only evidence the State introduced to establish any threat was made. RP 363. Mr. Burleson came to know Mr. Stanley through being celled with him after their DOSAs were revoked in 2016. RP 208, 242. Mr. Burleson described the DOSA revocation as the context for Mr. Stanley’s purported ire:

Q: Okay. So after you talked a little bit about what your revocation was for, what his revocation was for, how did the conversation -- What -- What did you observe after that?

A: A Oh, he was very -- He was angry, super angry. [...]

A Yeah. He did -- At the beginning when we first started this two week life together, I guess you would call it, he was pissed off about the witnesses and he couldn't understand why they were testifying and blah, blah, blah And then he's -- Like, as the time grew on, he would get more agitated, jump off the bunk, make actions. Like, he started talking about how he wanted to kill these three girls, a judge and a prosecutor.

RP 214-15 (emphasis added).

The prosecutor again asked Mr. Burleson to clarify exactly who

Mr. Stanley had threatened:

A: Yeah. There were three witnesses. And one -- one of the women witnesses is one that they -- why they revoked his DOSA.

Q: And what exactly did he say about those women?

A: He wished -- He wished he could kill them. He wanted to kill them. He wants to, by his words, not mine.

RP 218.

In response to additional questions about the "threat," Mr.

Burleson said Mr. Stanley said he was going to: "Kill some people; a judge, a prosecutor and three women witnesses. And I don't know their names. I don't -- I just know that's the terminology he gave me." RP 219.

The only specifics about any of these people were related to Mr.

Stanley's DOSA revocation:

Q: Did he ever tell you that he knew where the witnesses were currently located?

A: No. But I assumed he did because he got out on probation and contacted one and that's why they revoked his DOSA. So I'm assuming that if he was able to do that, he knew where they were.

RP 220.

In response to leading questions, Mr. Burleson, provided generic confirmation they 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.

RP 220.

Despite the prosecutor's continued efforts, all Mr. Burleson could provide about the "witnesses" was related to the DOSA revocation:

Q: I don't think we quite finished talking about what he said about where the women were located, and if he could find them. Can you finish that?

A: Yeah. Like I said, I don't recall him saying he knew exactly where they were, but I'm assuming he did because he contacted one of them.

RP 221. Even with repeated efforts to obtain more detail from Mr.

Burleson, he repeatedly confirmed the alleged threats were made against "five people," the "judge, prosecutor and three witnesses." RP 225, 239.

When pressed, the most specific information he could provide about the women was "maybe one of them was a bartender and he would drink with them or something like that." RP 240. The prosecutor tried

again to get Mr. Burleson to identify the four women from the 2015 case, none of whom were involved with his DOSA revocation:

Q: So I'm asking you to remember if you can what Mr. Stanley said to identify the women. So you think one was --Mr. Stanley said one was a bartender?

A: I think -- I think I recollect that one may have been --worked at a bar or something. And they had -- they were drinking there and then something may have happened. That's -- I'm picturing it and remember it, but I can't, like, put my finger on it --

Q: Okay.

A: -- to make a clear statement to the jury and say, yes or no. So I -- I can't answer really that question.

Q: But he was -- But he was focused on the women that testified against him?

A: Yes. There were three women that testified against him.

RP 241.

Consistent with Mr. Burleson's testimony, the detective confirmed that when he interviewed him, Mr. Burleson only described three witnesses, and the detective made a mistake when he wrote down four witnesses. RP 342. At the close of the State's case, the court denied Mr. Stanley's motion for directed verdict based the failure to prove a threat was made to the specific individuals identified in counts 1-4. RP 555-56.

*ii. The State's evidence was insufficient as to counts 1-4.*

The harassment statute requires that "the threat made and the threat feared" are the same. *C.G.*, 150 Wn.2d at 609. This means the "victim was placed in reasonable fear that the same threat, i.e., 'the threat,'

would be carried out.” *Id.* at 610. Here, the testimony was insufficient to establish the “victims” charged by the State were the ones threatened.

The “to convict” instruction required the jury find beyond a reasonable doubt Mr. Stanley “knowingly threatened to cause bodily injury” to four specifically named people. CP 63-65; 111, 116, 120, 124.

The only evidence specific to the intended victims of the alleged threat was one witness was a “bartender” and one of the “witnesses” was involved in the DOSA revocation. RP 218, 220-21, 241.

The evidence established the only “witness” Mr. Stanley contacted related to his DOSA was Ms. Benz, who the State did not charge Mr. Stanley with harassing. RP 337-38, 353-54, 556; CP 63-65. None of the women included in the charges for felony harassment were involved with the DOSA revocation or had been contacted by him after the trial in 2015. RP 351, 289, 548, 444, 518.

Mr. Burlson provided no information about who the witnesses were or from what proceeding, other than in relation to Mr. Stanley’s DOSA revocation. It is unknown how many other “witnesses” were involved in Mr. Stanley’s prior trial or revocation proceedings the State could have charged Mr. Stanley with harassing, or on what grounds the State elected to choose these particular four “witnesses.”

Even if this Court broadly construed a “victim” of a “threat made,” the evidence would only sustain conviction against three, not four “witnesses.” *C.G.*, 150 Wn.2d at 610. And where one of three “witnesses” identified by Mr. Burleson was related to the DOSA revocation, this left two unnamed witnesses who could have been the subject of the alleged threat. However, Mr. Burleson’s vague description was insufficient to establish that any of the four specific women identified in the “to convict” instruction were the “the victims” of the threat made. *Id.* at 610.

- c. The offense of intimidating a judge criminalizes pure speech without requiring a *mens rea*, rendering Mr. Stanley’s conviction insufficient under the First and Fourteenth Amendments.

To be exempt from constitutional protections, a true threat must include proof the defendant intended to cause fear of harm. The distinction turns on the actual intent of the speaker, not on the reactions of others hearing the speech. *See Elonis v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2001, 2009-12, 192 L. Ed. 2d 1 (2015). This scienter requirement is necessary to comply with the First Amendment. *United State v. Waggy*, \_\_\_ F.3d \_\_\_, 2019 WL 4197607 (9th Cir. 2019) (finding telephone harassment statute complies with First Amendment because it requires proof caller has specific intent to harass). A threat made without intent criminalizes potentially innocent conduct. *See, e.g., Rehaif v. United*

*States*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2191, 2196, 204 L. Ed. 2d 594 (2019) (recognizing “scienter’s importance in separating wrongful from innocent acts”).

In *Elonis*, a federal statute criminalized “any communication containing any threat ... to injure the person of another.” 135 S. Ct. at 2004 (citing 18 U.S.C. § 875(c)). This statute only required “that a communication be transmitted and that the communication contain a threat. It does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain a threat.” *Id.* at 2008. The question in *Elonis* was whether the statute required the defendant to be aware of the threatening nature of the communication, and if not, whether the First Amendment did. *Id.* at 2004.

The Court emphasized that just because a statute does not specify a required mental state does not mean none exists. *Elonis*, 135 S. Ct. at 2009. The “rule of construction reflects the basic principle that ‘wrongdoing must be conscious to be criminal.’” *Id.* *Elonis* emphasized that the accused “must be ‘blameworthy in mind’ before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like.” *Id.* (internal citations omitted). This requires courts to “interpret

criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.” *Id.*

Elonis’s conviction failed because it was “premised solely on how his posts would be understood by a reasonable person,” a standard inconsistent with “the conventional requirement for criminal conduct—*awareness* of some wrongdoing.” *Id.* (emphasis in original) (internal citations omitted). Having liability turn on whether a “reasonable person” regards the communication as a threat reduces criminal culpability to mere “negligence,” which courts “have long been reluctant to infer.” *Id.* (internal citations omitted). The *Elonis* court reversed Elonis’s conviction where the jury was instructed the Government need prove only a reasonable person would regard his communications as threats. *Id.* at 2012.

After *Elonis*, Washington’s felony harassment was challenged in *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016). Trey M. was convicted under the harassment statute, RCW 9A.46.020. *Id.* at 895. Unlike the statute in *Elonis*, this statute requires proof of a mental element—that the defendant “knowingly threatens...” *Trey M.*, 186 Wn.2d at 895 (citing RCW 9A.46.020(1)(a)(i)). *Trey M.* read *Elonis* to create a “gap-filling rule” that stands for the “presumption” of a scienter requirement when the statute is otherwise silent. *Id.* at 897. Because the

harassment statute at issue was not silent as to mental state, there was “no gap for *Elonis* to fill.” *Id.* at 898.

By contrast, the lack of a *mens rea* in the intimidating a judge statute creates the “gap” *Elonis* requires be filled. CP 174-83. A person commits the offense of “intimidating a judge” when he “directs a threat to a judge because of a ruling or decision of the judge in any official proceeding...” RCW 9A.72.160(1). Notably absent is a *mens rea*. See *State v. Hansen*, 122 Wn.2d 712, 717, 862 P.2d 117 (1993); *J.M.*, 144 Wn.2d at 487.

The jury was provided a definition of a “threat,” which means “to communicate, directly or indirectly the intent to cause bodily injury in the future to the person threatened or to any other person.” RCW 9A.72.160 (2)(a), (b); RCW 9A.04.110(28)(a); CP 136. As in *Elonis*, Mr. Stanley’s conviction fails, where the State need only prove a reasonable person would regard the communication as a threat. *Elonis*, 135 S. Ct. at 2012.

*Elonis* avoided the First Amendment problem by deciding this as a matter of statutory construction, invalidating *Elonis*’s conviction under the statute absent a showing he “*intended* to issue threats or *knew* that his communications would be viewed as threats.” *Trey M.*, 186 Wn.2d at 896 (citing *Elonis*, 135 S. Ct. at 2012) (emphasis in original). The same result must follow here where like in *Elonis*, and unlike in *Trey M.*, RCW

9A.72.160(1) does not require the accused *knowingly* or *intentionally* “direc[t] a threat to a judge.” *Elonis*, 135 S. Ct. at 2011-12.

d. Mr. Stanley is entitled to reversal of his convictions.

A conviction based on insufficient evidence must be reversed. *Kilburn*, 151 Wn.2d at 54. Double jeopardy prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)). Mr. Stanley’s convictions for harassment in counts 1-4 were based on insufficient evidence where the evidence failed to establish “the victims” identified by the State were placed in reasonable fear of the “threat made.” *C.G.*, 150 Wn.2d at 609-10. Mr. Stanley’s conviction for intimidating a judge lacks sufficient evidence he knew or intended to direct a threat to a judge as required to establish evidence sufficient to support this conviction. These convictions must be reversed.

**3. The court erroneously admitted a large amount of highly prejudicial propensity evidence, and allowed the prosecutor to impermissibly credit its own witnesses.**

a. A fair trial requires fair procedures.

A “fair trial in a fair tribunal” is a basic element of due process. *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); U.S. Const. amend. XIV; Const. art. I, §§ 3, 21, 22. The

presumption of innocence flows from this right. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). The presumption of innocence is based on the principle that “a defendant must be tried for what he did, not for who he is.” *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977). It is fundamental under our state constitution that a person is tried only for the offense charged, not for uncharged conduct. *State v. Gehrke*, 193 Wn.2d 1, 6, 434 P.3d 522 (2019).

Evidence rules reflect these requirements by “narrowly confin[ing] the trial contest to evidence that is strictly relevant to the particular offense charged.” *Williams v. People of State of N.Y.*, 337 U.S. 241, 247, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). This is necessary “to prevent a time consuming and confusing trial of collateral issues” and prevent conviction based on other misconduct. *Id.* A trial court’s review of evidentiary decisions should also consider “the defendant’s constitutional rights.” *State v. Blair*, 3 Wn. App.2d 343, 357, 415 P.3d 1232 (2018) (Worswick, J., concurring).

b. The prosecutor elicited propensity evidence in violation of ER 404(b) and ER 403.

The trial court wrongly allowed the prosecution to elicit evidence from Mr. Stanley’s prior offenses, purportedly to establish the undisputed element of reasonable fear.

ER 404(b) is a categorical bar to admission of evidence of a prior bad act for the purpose of proving a person's character and showing action in conformity with that character. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). The same evidence may, however, be admissible for the illustrative purposes cited in ER 404(b), "depending on its relevance and the balancing of its probative value and danger of unfair prejudice." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

ER 404(b) is read in conjunction with ER 403, which requires the trial to court to exercise discretion and evaluate whether relevant evidence is unfairly prejudicial. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Evidence of other misconduct is presumed inadmissible; the burden of demonstrating relevance to the material issue is on the proponent of the evidence. *Gresham*, 173 Wn.2d at 42.

For harassment, evidence about the complaining witness's knowledge of the accused's prior violent acts may be relevant to the reasonable fear element. *State v. Ragin*, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999); RCW 9A.46.020(1)(a)(i), 2(b); CP 63-66.

The prosecutor sought to introduce evidence of Mr. Stanley's prior conduct towards Ms. Gray, Ms. Williams, Ms. Medford, and Ms. Much by introducing the e-mail threats that started in 2010, which resulted in his

2015 convictions. CP 75; 80-87; RP 42-43, 163. The prosecutor alleged the prior conduct was relevant to the element of “reasonable fear.” CP 77.

Mr. Stanley offered to stipulate to this element. He argued this evidence would result in a retrial of his previous case, and that the prejudice of this evidence would influence the jury as to the only disputed element at trial—whether the threats were made. RP 44-46, 165-67; CP 88-89. The court denied Mr. Stanley’s request and admitted the State’s proffered evidence without limit. RP 169; CP 94-96.

At trial, the undisputed element of “reasonable fear” was explored at length through the witnesses’ extended testimony about the prior threats and the fear they caused each witness. The prosecutor used the specifics of the threats to compare the current alleged threats, bolstering the weak evidence of whether the threats were even made.

*i. The prosecutor elicited comparisons between the 2015 threats and the alleged threats here as propensity evidence.*

The prosecutor asked Mr. Brenner, over defense objection, to compare the threats Mr. Burluson claimed to hear with the prior threats:

Q: Was there anything about the threats that were conveyed to you that -- alleged threats that were conveyed to you that didn’t sound concerning or accurate?

A: No. It -- it sounded -- it sounded believable because it was similar things that he had said before in the past.

RP 306 (emphasis added).

Then, in questioning Judge Ramsdell the prosecutor brazenly elicited propensity evidence over defense objection:

Q: Based on the evidence you saw, the emails you described --

A: Yes.

Q: -- was there anything in that evidence that made you believe that Stanley would continue his behavior even after the conviction?[...]

A: ...since he never seemed to fully appreciate why it was such a big deal, that I could only assume that if he doesn't understand what's wrong, he's probably not going to change that behavior.

RP 395-96 (emphasis added).

The State was then allowed, over defense objection, to use this evidence to refer to the alleged threats as if they were established fact:

Q: Just to follow up on that. Did that make his threats more real, more concerning, more fearful to you?

MS. CARLSON STRAUBE: And objection, your Honor. The State is again asking questions that suggests an answer.

THE COURT: Overruled.

A: Yes, in short.

RP 396.

The prosecutor also elicited propensity evidence that was not objected to, but which violated the court's ruling on the permissible scope of the evidence of prior threats. RP 44-46, 165; CP 94. In questioning Ms. Gray, the prosecutor directly elicited propensity evidence, asking:

Q: When you first got that [call about 2016 allegations], what was your reaction?

A: I was scared, but I wasn't surprised. I mean, that was always my worst fear that he would get released from prison in some sort of angry mental state and try to find us and kill us. Those were the messages

that he engrained in my memory over years and years and years and that was the same language that I had come to expect from him.

RP 270.

Q: Did you hear the -- some of the language that he used?

A: Yes.

Q: Is there anything that struck you about the language?

A: The fact that he said he had hidden a gun and that he was planning to find us and kill us. I mean, it was along the same lines of what he had sent me before and -- Yes, I was familiar with the kind of language that he used in the past and it sounded along those same lines.

Q: From your experience it sounded like the words Mr. Stanley would use?

A: Yes.

RP 272 (emphasis added). She then testified that they were believable because they were so similar to previous threats he had made:

Q: Do you believe those words?

A: ... Sadly, that is the kind of language that I expect from him. Those are the same kinds of threats he would use towards me repeatedly.

RP 272 (emphasis added).

Ms. Williams was asked to offer an opinion about the similarity between the current alleged threat and Mr. Stanley's past threats:

Q: Is that similar to things he said to you in the messages?

A: Very, but years later.

RP 509.

The prosecutor relied heavily on this propensity evidence in place of the lack of evidence a threat was made over defense objection. The prosecutor argued in closing:

...So let's look at the other five percent and think about what the women said about it. When they heard the threats, why were they afraid? Because the words sounded like Mr. Stanley. They sounded like things --

MS. CARLSON STRAUBE: And, your Honor --

MR. ERNSDORFF: -- they heard before.

MS. CARLSON STRAUBE: -- I'm going to object here...the State is moving to essentially not follow the law in this portion of the statement [...]

MR. ERNSDORFF: Part of their reasonable fear, they told you their reasonable fear was based on the consistency of the language in the current threats. They heard in those threats many of the things they heard before and it made them afraid. Every one of them came in and told you about how those threats rang true to them and made them -- gave them that reasonable fear. Mr. Burleson, if he was making up threats, could have said a lot of things, but what he said, made them reasonably afraid. You can put your confidence, when you do the analysis of Randy Burleson's credibility, like we talked about, when you look at what he said and how it was corroborated by the other witnesses...you will know you can trust a hundred percent, not just the ninety-five.

RP 676-77.

The prosecutor was permitted to spend days questioning the witnesses about the past acts, purportedly to prove the undisputed element of reasonable fear. It was a plain violation of ER 404(b) and ER 403 for the court to allow the prosecutor to also use this evidence of Mr. Stanley's prior threats and conduct to show it was more likely he made the disputed threats in the instant case. *See Gunderson*, 181 Wn.2d at 922.

*ii. The e-mails from Mr. Stanley's 2015 convictions were admitted as substantive evidence in this case.*

A danger of unfair prejudice exists when evidence is more likely to stimulate an emotional response than a rational decision. *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011). Here, the trial court admitted Mr. Stanley's prior e-mails to the alleged victims as substantive evidence in violation of ER 403.

Mr. Stanley sought to limit admission of the e-mails that resulted in his cyberstalking convictions. 8/28/18 RP 45. At trial, Mr. Stanley argued the e-mails should only be permitted to refresh the witness' recollections. RP 259. The court overruled Ms. Stanley's objections, and the witnesses not only read the most offensive and threatening of the e-mails out loud, but the court also admitted them into evidence. *See e.g.* Ex. 2-9; RP 260-65; 435-41; 497-502; 538-39.

Having the witnesses read the e-mails that resulted in Mr. Stanley's conviction at a prior trial far exceeded any probative value, where the witness's testimony plainly established reasonable fear, and the cumulative nature of this evidence served no purpose other than to create an emotional response in the jury, in violation of ER 403.

*iii. Mr. Burlison was improperly permitted to testify that Mr. Stanley was scarier than Gary Ridgeway.*

The prosecutor elicited testimony from Mr. Burlison that Mr. Stanley far surpassed other inmates he has known in dangerousness:

Q: Have you been locked up with folks that have been convicted of murder?

A: Yeah, 50 and more murderers I have been locked up with. People that's done 50 -- more than 50 murders, that one person.

Q: Who is that?

A: Gary Ridgway, Green River killer.

Q: How did you feel celling with him?

A: I wasn't celled with him, but I walked the yard.

MS. CARLSON STRAUBE: Objection, your Honor, relevancy.

A: It was --

THE COURT: Overruled.

Q: Go ahead.

A: I was a little nervous at first, just talking to the man knowing what he did. But I knew of him prior to that because of my brother knew the family. But it wasn't -- I didn't have any feeling around him like I did with him [Stanley].

RP 227-28. Mr. Burleson's opinion on how a serial killer made him feel in comparison to Mr. Stanley was not relevant to any element of the offense, and had the sole purpose of inflaming the jury, in violation of ER 403.

- c. The court's refusal to recuse the King County Prosecutor's Office impermissibly allowed Mr. Brenner to testify as a witness-advocate.

The trial court's refusal to recuse the King County Prosecutor's Office impermissibly made Deputy Prosecutor Brenner a witness-advocate for the State, undermining Mr. Stanley's right to a fair trial.

A prosecutor is a quasi-judicial officer who is required to act impartially. *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). "If a prosecutor's interest in a criminal defendant or in the subject matter of the defendant's case materially limits his or her ability to prosecute a matter

impartially, then the prosecutor is disqualified from litigating the matter, and the prosecutor's staff may be disqualified as well." *State v.*

*Ladenburg*, 67 Wn. App. 749, 751, 840 P.2d 228 (1992), *abrogated on other grounds*, *State v. Finch*, 137 Wn.2d 792, 808, 975 P.2d 967 (1999).

Courts generally disfavor allowing a participating prosecutor to testify at a criminal trial. *United States v. Prantil*, 764 F.2d 548, 554 (9th Cir. 1985).

When considering a defendant's motion to recuse a prosecutor's office who calls one of its own attorneys at trial, courts must 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."<sup>3</sup> *State v. Bland*, 90 Wn. App. 677, 680, 953 P.2d 126 (1998); *United States v. Johnston*, 690 F.2d 638, 642-43 (7th Cir. 1982) (citing *United States v. Birdman*, 602 F.2d 547, 553-55 (3d Cir. 1979)).

RPC 3.7 prohibits a lawyer from acting as an advocate in a trial in which another lawyer from the same firm is likely to testify because there

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<sup>3</sup>Soon after *Bland*, the Supreme Court determined that the "appearance of fairness doctrine" was limited to "judicial and quasi-judicial decision makers" and would not apply to motions to recuse a prosecutor's office. *Finch*, 137 Wn.2d at 808-09 (emphasis in original). *Finch* did not involve a prosecutor/witness as in *Bland* and Mr. Stanley's case, and thus did not involve analysis of whether the dual role of the witness-prosecutor can be objective, artificially bolsters the witness's credibility, or violates the advocate-witness rule at issue in *Bland*. 90 Wn. App. at 680.

are difficulties in cross-examining or impeaching an interested witness and the roles of advocate and witness are inherently inconsistent. RPC 3.7's historical antecedent is the common law principle known as the "advocate witness rule." *State v. Sakawe*, 191 Wn. App. 1029, 2015 WL 7721826, at \*6 (Wash. Ct. of App. 2015).<sup>4</sup> This rule applies to public law offices such as the prosecutor's office. *Bland*, 90 Wn. App. at 679-80.

The advocate witness rule is "a matter of institutional concern implicating the basic foundations of our system of justice." *Prantil*, 764 F.2d at 553. The "professional impropriety of assuming the dual role of advocate and witness in a single proceeding" has "deep roots in American law." *Johnston*, 690 F.2d at 642. The advocate-witness rule in a criminal case reflects the concern that jurors will be "unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors." *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998).

If the deputy prosecutor is personally involved in prosecuting the case or has another personal interest which would raise a conflict of interest, the prosecutor's office should be disqualified and a special prosecutor appointed. *Bland*. 90 Wn. App at 681.

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<sup>4</sup> Unpublished, GR 14.1, cited as persuasive, nonbinding authority.

In *Bland*, the defendant moved to disqualify the King County Prosecutor's office because the social worker/prosecutor testified as a State witness. *Bland*, 90 Wn. App. at 679. *Bland* determined the prosecutor's office need not be disqualified where the deputy prosecutor testified as a social worker, not a prosecutor. *Id.* at 681. The court determined she had no special personal interest stemming from her work with the prosecutor's office. *Id.* at 681.

By contrast, Wes Brenner prosecuted Mr. Stanley for the same agency currently prosecuting Mr. Stanley. Mr. Stanley sought to recuse the King County Prosecutor from prosecuting a case in which its own attorney was an alleged victim and witness. CP 47; 8/28/18 RP 36-42. The trial court denied this request. *Id.* at 42. The prosecutor's testimony that followed emphasized his previous prosecution of Mr. Stanley, impermissibly making him a witness and an advocate for the government. *Prantil*, 764 F.2d at 553.

The trial prosecutor began his questioning of Mr. Brenner by crediting the strength and rationale of their office's prosecution of Mr. Stanley's 2015 offenses. Mr. Brenner established his office's handling of serious offenses: "when the seriousness of the offense was determined, [...] it moved to my office, the King County Prosecutor's Office and then eventually to me." RP 298. The prosecutor then had Mr. Brenner detail his

charging decisions, crediting his ability to assess the merit of criminal charges in relation to Mr. Stanley's conduct:

Q: And when it came to you, how was the case charged?

A: It was charged, I believe, with one count of felony cyberstalking.

Q: And did that change over time?

A: Yes, it did. During the process of working on this case we added additional counts of cyberstalking. I think it was nine -- I think we ended with nine counts -- or we went to trial on nine counts of cyberstalking.

RP 299. The prosecutor asked Mr. Brenner about prosecuting Mr. Stanley, establishing him as an authority on Mr. Stanley's criminality:

...I think I was probably the first attorney to realize the scope of what had been done in terms of seeing all the messages that had been sent...I was probably the first person to go through them one at a time.

RP 299-300.

Mr. Brenner used his experience as a King County Prosecutor to credit the current alleged threats, impermissibly using the "prestige or prominence of a government prosecutor's office" to artificially enhance the credibility of the new alleged threats. *Johnston*, 690 F.2d at 642.

Q: Okay. Is hearing about what Mr. Stanley is alleged to have said in prison different in your mind from the other threats that you have received or heard throughout your career?

A: Absolutely.

Q: Why?

A: For two reasons. One was that it was more than just-From what I- The way it was described to me, it was more than just an outburst. It sounded like it was an actual -- some actual planning had gone in to what Mr. Stanley was planning to do to me, to the judge involved. [...] But I think the biggest reason was just because of the previous interactions I had with Mr. Stanley. The rage that I had seen him show

toward the victims, towards the judge, towards myself. The obsessive behavior that I had seen him exhibit over four years of constant emails and Facebook messages to the women involved. And, yeah, just the ideation of violence and suicidal behavior that he described in in his -- in his -- in those messages.

RP 303-04 (emphasis added).

Mr. Brenner used his personal knowledge to bolster Mr. Burleson's vague descriptions. For instance, Mr. Brenner credited and confirmed Mr. Burleson's vague testimony about Mr. Stanley knowing the location of the unnamed "witnesses" based on his personal knowledge:

Q: And so from what you knew, had two of the women moved out of state?

A: They had.

Q: Was it concerning to you that -- that this witness from prison had relayed information back that was accurate?

A: Absolutely. I--I don't know how -- It was troubling to learn that he knew these women had moved out of state, when I was under the belief they had moved out of state to have some distance from this. And so it didn't -- I wouldn't have thought it was something they would have been broadcasting, certainly not to Mr. Stanley. And so that he was able to obtain -- to take steps to obtain that information that -- information that I -- at least, I believed to be true, as far as my knowledge that they did move out of state for that reason, that was troubling that he had taken those steps.

RP 305-06.

Mr. Brenner's assertion of personal knowledge encouraged the jury to rely on "the integrity or credibility" of Mr. Brenner's and his agency's assessment of Mr. Burleson's allegations, directly implicating the witness-advocate rule. *Prantil*, 764 F.2d at 553.

The prosecutor characterized the alleged threats at issue in this trial as “believable because it was similar things that he had said before in the past.” RP 306 (also discussed *supra*, in argument 3(b)(1)).

Mr. Brenner also relied on his own personal knowledge derived from his prior prosecution of Stanley to bolster Mr. Burluson’s testimony that Mr. Stanley talked about a gun and going to Idaho, and that he knew from his prior case that he had access to guns. RP 219, 221, 307-08.

Mr. Brenner used his status to inform the jury that Mr. Stanley was a threat because he was the only person whose status he monitored after the end of his case. RP 315. Mr. Brenner opined that in his 2015 trial, Mr. Stanley had to be restrained for the protection of others. RP 325.

In sum, Mr. Brenner spoke as a witness and advocate for the State’s current charges against Mr. Stanley:

So I knew -- or it was my opinion that his behavior had been getting progressively worse and so that he was -- So when I heard these threats, it sounded like there was a good chance he was going to take these steps to come after me and the other victims.

RP 308.

Mr. Brenner’s testimony placed the “prestige and prominence of the prosecutor’s office” behind the current allegations, impermissibly leading jurors to “base their credibility determinations on improper factors.” *Edwards*, 154 F.3d at 921. Mr. Brenner’s testimony directly

implicates each of the policy concerns behind the advocate witness rule. The court erred in refusing to disqualify the King County Prosecutor's Office. *See Johnston*, 690 F.2d at 642-43.

- d. The trial court allowed the prosecutor to impermissibly bolster Randy Burleson's testimony.

Before Mr. Stanley had attacked Mr. Burleson's credibility, the prosecutor impermissibly bolstered Mr. Burleson's credibility, in excess of any anticipated credibility impeachment on cross-examination.

Unless attacked, the State may not bolster a witness's testimony in direct examination. *Bourgeois*, 133 Wn.2d at 400-01. Even when the witness's credibility is attacked, corroboration may only concern "the facet of the witness' character or testimony which has been challenged." *State v. Froehlich*, 96 Wn.2d 301, 305, 635 P.2d 127 (1981). Evidence of truthful testimony is generally irrelevant, self-serving, and should not be admitted in the State's case. *State v. Ish*, 170 Wn.2d 189, 198, 241 P.3d 389 (2010). This longstanding rule is rooted in the common law and evidence rules. *Bourgeois*, 133 Wn.2d at 400-01.

In *Bourgeois*, the prosecutor asked its witness if he wanted to "be here today?" 133 Wn.2d at 393. The witness answered he did not want to be in court and was there because of his arrest as a material witness. *Id.* at 394. Two other witnesses were asked similar questions indicating they

were not voluntarily testifying or were scared to testify. *Id.* at 394-95. The Court determined that a logical effect of this testimony was that the witnesses overcame their fear to testify at trial, which bolstered their credibility. *Id.* at 401-02. Consequently, the trial court erred in allowing this questioning. *Id.* at 402.

Likewise in *Ish*, where the credibility of the witness had not been attacked, referencing the witness's promise to testify truthfully was irrelevant and had the potential to prejudice the defendant by placing the prestige of the State behind the witness. *Ish*, 170 Wn.2d at 199.

Mr. Stanley had not attacked Mr. Burleson's credibility prior to his testimony. His counsel reserved opening argument and Mr. Burleson was the first witness. RP 472, 201.

Still, the court allowed the State to bolster Mr. Burleson's credibility on direct. The prosecution began by questioning him about his previous offenses with the goal of establishing his credibility:

Q: What about all the other times you have been charged, have you taken those to court?

A: No. I took it upon myself to admit my guilt and took a plea.

Q: Why admit your guilt?

MS. CARLSON STRAUBE: Objection, your Honor, relevancy, again.<sup>5</sup>

MR. ERNSDORFF: That goes to his background and his credibility.

THE COURT: Overruled.

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<sup>5</sup> The court sustained Mr. Stanley's relevance objection to the prosecutor's previous question about his criminal history. RP 200.

RP 201-02. The prosecutor then elicited from Mr. Burleson that he was risking “life or death” by testifying in violation of the “convict code.” RP 202-03.<sup>6</sup>

The prosecutor also preemptively elicited from Mr. Burleson that he received no benefit from testifying, and he did not ask “Detective Christiansen or me or anybody else” to “put in a good word” for him when he was sanctioned for violating his probation. RP 205. The prosecutor then impermissibly asked Mr. Burleson why he was testifying:

Q: What are you here for?

A: I’m here to try to prevent something that I feel within myself --

MS. CARLSON STRAUBE: Objection, your Honor. This is going into conjecture. We are not hearing what the actual allegation is...

THE COURT: The defendant can answer the question.

MS. CARLSON STRAUBE: Okay.

Q: You can answer.

[...]

A: I’m here so that I can try to protect these people that this man’s threatened to kill on numerous occasions.

Q: So you are not getting anything; right?

A: No.

RP 205-06. This goes far beyond the prosecutor’s questioning about whether the witnesses wanted to “be here today?” deemed improper in *Bourgeois*. 133 Wn.2d at 393, 401-02.

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<sup>6</sup> Mr. Stanley contends that his first objection on relevancy grounds preserves the series of questions that followed the court’s ruling. RP 202. If this Court disagrees, at a minimum the expansive questioning provides necessary context for the objected to portions of the questioning that will be noted herein.

Even where credibility may be an “inevitable, central issue,” at least a “slight” attack on credibility is required before credibility may be fortified. *Bourgeois*, 133 Wn.2d at 40. And even if the issue of credibility was inevitable, bolstering must be in response to a reasonably anticipated attack. *Bourgeois*, 133 Wn.2d at 402. Even if aspects of Mr. Burleson’s credibility such as prior convictions could have been anticipated, the questions about Mr. Burleson’s motivations were not. *Bourgeois*, 133 Wn.2d at 401. The *absence* of any benefit from the State or Mr. Burleson’s claimed altruism would certainly not be anticipated attacks because they are not impeaching.

The prosecutor’s effort to establish Mr. Burleson was selflessly risking his life to protect the lives of others far surpasses what *Bourgeois* deemed to be impermissible questioning about witnesses’ fear or reluctance to testify. 133 Wn.2d at 401. The court erred in allowing this extreme form of crediting its own witness. *Id.* at 402.

- e. The trial court’s violation of well-established evidentiary and common law rules intended to ensure a fair trial requires reversal.

Reversal for evidentiary error is required when “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Bourgeois*, 133 Wn.2d at 403.

The State's decision to premise its case on the uncorroborated testimony of a jail informant whose credibility the State questioned explains the prosecutor's efforts to impermissibly support its weak evidence. It leaves no doubt the improper admission of prejudicial evidence affected the trial outcome. *See Wright v. Gramley*, 125 F.3d 1038, 1043 (7th Cir. 1997) ("The outcome of a weak prosecution case is more likely to be affected by errors than a strong one."); *see also Branch v. Sweeney*, 758 F.3d 226, 238 (3d Cir. 2014) ("a verdict ...only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

An experienced prosecutor would not risk reversal of a conviction for improperly admitted evidence unless that prosecutor believed the risk was required. Asking the witnesses to compare the current charges with past conduct was clearly eliciting propensity evidence to support the weak evidence that Mr. Stanley made a threat. RP 676.

The State distracted the jury from the weak evidence that any threat was made through prejudicial, irrelevant comparison of Mr. Stanley to a serial killer. The evidence of alarming and threatening e-mails that resulted in Mr. Stanley's 2015 conviction would certainly make a jury more likely to convict Mr. Stanley based on fear and prejudice, rather than the strength of the State's evidence that Mr. Stanley in fact, made the

alleged threats. The prosecutor emphasized this irrelevant, prejudicial evidence in closing:

And Randy told you how he gets thousands of people. The worst of the worst people and on down. And Sloan Stanley is just one of them, just one of the guys in prison. He met the worst of the worst. He told you walking the yard. Gary Ridgway, with other folks that were in for life that had murdered people, that had done some pretty horrific things to want to put them in prison. And he talked to you about one... One guy was scary. One guy made him believe that he would make good on the idle threats that you hear in prison, one guy, Sloan Stanley.

RP 671.

The court's refusal to recuse the King County Prosecutor allowed the prosecutor to substantiate Mr. Burluson's claims by having one of its own prosecutors use his expertise to credit this evidence. Given the prestige of the prosecutor, this would very likely influence the jury. *Edwards*, 154 F.3d at 921; *see e.g. In re Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012).

A jury would also be far more willing to credit Mr. Burluson's testimony about the alleged threat if they believed he risked his life by testifying. Understanding this, the prosecutor emphasized this artificially created credibility, arguing Mr. Burluson's life "will not be easy" and "could be dangerous," but "Mr. Burluson thought it was worth it." RP 672.

And what did Mr. Burluson ask for? Nothing. And what did he get, what did he get for coming in and testifying here this week? Nothing. It is not quite true. He's now a snitch. What he got is the label, the snitch. So not only did he not ask for or get a benefit, he

came in here at his own personal peril. And all he's gotten out of this case is his personal peril... So he not only did not get a benefit, but he's getting a detriment. That's it.

RP 673.

The impermissible crediting of witnesses and irrelevant, prejudicial evidence was the heart of the State's case, as the prosecutor's closing argument makes clear. The court's evidentiary rulings and the prosecutor's use of this evidence profoundly eroded the presumption of innocence. *See Williams*, 425 U.S. at 503. Where this prejudicial evidence and impermissible bolstering of the State's witnesses affected the trial outcome, reversal and remand for a new trial is required.

Even if the Court finds any of the above constitutional and evidentiary errors were harmless in isolation, it should nonetheless reverse because the errors are prejudicial in the aggregate. "The combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial." *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (reversing and remanding for new trial on combined basis of three errors); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992) (cumulative error denied the defendant a fair trial even where some errors were not properly preserved for appeal); U.S. Const. amend. XIV; Const. art. I, § 3.

Here, the constitutional and evidentiary errors resulted in the State presenting highly prejudicial evidence while denying Mr. Stanley his constitutional right to present his own evidence. These errors deprived Mr. Stanley of a fair trial, requiring reversal.

**4. The court’s exceptional sentence elevated the 51-102 month standard range sentence to a de facto life sentence based on facts that inhered in the recidivist offense of harassment.**

The Sentencing Reform Act (“SRA”) creates a standard sentencing range based on the seriousness level of the crime and the defendant’s offender score. RCW 9.94A.505; RCW 9.94A.525; *Matter of Canha*, 189 Wn.2d 359, 367, 402 P.3d 266 (2017). Before the sentencing court may depart from the range, it must find “substantial and compelling reasons justifying an exceptional sentence,” other than the fact of a prior conviction. RCW 9.94A.535. The State must prove facts supporting an aggravated sentence beyond a reasonable doubt. RCW 9.94A.537(3).

On appeal, “the meaning and applicability of a statutory aggravating factor” is reviewed as a matter of law. *State v. Davis*, 182 Wn.2d 222, 229, 340 P.3d 820 (2014). A trial court’s exceptional sentence must be reversed if the record does not support the sentencing court’s articulated reason, if the articulated reasons do not justify a sentence outside the standard range, or when the length of the exceptional sentence was clearly excessive. RCW 9.94A.585(4); *State v. Tili*, 148 Wn.2d 350,

358, 60 P.3d 1192 (2003). This Court reviews a court's justification for the exceptional sentence as a matter of law. *Tili*, 148 Wn.2d at 358.

The jury in Mr. Stanley's case found the statutory aggravating factor the "egregious lack of remorse." RCW 9.94A.535(3)(q); CP 155-58. The trial court cited this finding as a basis to depart from the presumption that Mr. Stanley should receive a standard range sentence. CP 307.

Critically, exceptional sentences allow punishment beyond the standard range "where the particular offense at issue causes more damage than that contemplated by the statute defining the offense." *Davis*, 182 Wn.2d at 229; RCW 9.94A.535. An exceptional sentence may not be "based on factors inherent to the offense for which a defendant is convicted." *State v. Thomas*, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999). Criminal history is already considered in computing the offender score and may not be considered in imposing a sentence outside the presumptive range. *State v. Bartlett*, 128 Wn.2d 323, 331, 907 P.2d 1196 (1995).

The offense of harassment is elevated to a felony where the defendant was previously convicted of harassment against the same victim or made threats to kill. RCW 9.94A.46.020((1), (2)(b)); CP 64-65. In addition, these prior offenses are included in the offender score. Thus, the defendant's prior convictions and conduct underlying those convictions are accounted for in this felony offense.

No statute or case law defines the phrase “egregious lack of remorse.” 11A Wash. Prac., Pattern Jury Instr. Crim., WPIC 300.26 comment. The WPIC Committee created a definition based on rules taken from case law to arrive at the following definition:

An egregious lack of remorse means that the defendant’s words or conduct demonstrated extreme indifference to harm resulting from the crime. In determining whether the defendant displayed an egregious lack of remorse, you may consider whether the defendant’s words or conduct (a) increased the suffering of others beyond that caused by the crime itself; (b) were of a belittling nature with respect to the harm suffered by the victim; or (c) reflected an ongoing indifference to such harm. A defendant does not demonstrate an egregious lack of remorse by denying guilt, remaining silent, asserting a defense to the charged crime or failing to accept responsibility for the crime.

CP 137; WPIC 300.26.

The prosecutor argued the egregious lack of remorse aggravator applied to Mr. Stanley because he allegedly committed this offense against the same victims he was convicted of cyberstalking in 2015:

Clearly, the threats that Mr. Stanley made from Shelton, Washington in the prison cell reflected an indifference to the harm that these women have gone through, not for a day, not for a week, not for a year, but for eight years now. Six years at the time the threats were made in Shelton. So clearly he reflected an indifference to the harm to the victims.

RP 668.

Likewise, the State’s argument at sentencing hinged on Mr. Stanley’s convicted conduct. CP 285. Emphasizing the impact of the prior

proceedings, the prosecutor asked for the maximum sentence allowed. CP 286-87. The State's sentencing memo also highlighted the fact Mr. Stanley exercised his right to represent himself in the prior proceedings as "another layer of victimization by some of the women." CP 285.

Mr. Stanley's prior convictions and conduct towards the prior victims was introduced at length to establish "reasonable fear" as required by RCW 9A.46.020(2)(b). Mr. Stanley's prior convictions were also included in calculation of his standard range sentence. RP 163-69; CP 298. Thus, Mr. Stanley's prior conduct was fully accounted for in his standard range. And the fact that the jury found Mr. Stanley again harassed the same victims is contemplated in the convictions for felony harassment and cannot be a basis for the court to impose an exceptional sentence. RCW 9A.46.020(1)(a)(i); CP 111, 116, 120, 124. Nor can Mr. Stanley's exercise of his constitutional right to trial and self-representation be a basis, as argued by the prosecutor. *See e.g. State v. Burke*, 163 Wn.2d 204, 221, 181 P.3d 1 (2008) ("Courts are appropriately reluctant to penalize anyone for the exercise of any constitutional right").

Because the conduct supporting the aggravators in counts 1-4 was accounted for in the offense and the standard range, it was impermissible to impose an aggravator based on this conduct. The sentence should be reversed and remanded for resentencing within the standard range.

**5. The trial court improperly relied on an unconstitutionally vague and overbroad statutory aggravator.**

a. The void for vagueness doctrine applies to aggravating factors

The state and federal constitutions prohibit the deprivation of life, liberty, or property without due process. Const. art. I, § 3; U.S. Const. amend. XIV. The State violates this guarantee by taking away “someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, \_\_\_U.S. \_\_\_, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015).

These principles apply not only to statutes defining elements of crimes but also to sentencing statutes. *Id.* at 2557. In *Johnson*, the U.S. Supreme Court invalidated a sentencing statute that allowed a court to increase a sentence to a minimum of 15 years violated the prohibition against vague laws. *Id.* at 2555, 2551.

Then in *Beckles v. United States*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017), the Court rejected a due process vagueness challenge to the federal guidelines, which are advisory and did “not fix the permissible range of sentences” in a purely discretionary sentence scheme. *Beckles*, 137 S. Ct. at 894, 999. Contrary to the statute in *Johnson*, which “fixed—in an impermissibly vague way—a higher range of sentences for

certain defendants,” in *Beckles*, the guidelines “merely guide the exercise of a court’s discretion in choosing an appropriate sentence within the statutory range.” *Beckles*, 137 S. Ct. at 892. *Beckles* reiterated that “void for vagueness” applies to “laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses.” *Id.*

Washington’s mandatory sentencing scheme is designed to respect the constitutional rights of defendants and comply with *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and *Apprendi*, 530 U.S. at 490. Laws of 2005, ch. 68, § 1; *State v. Stubbs*, 170 Wn.2d 117, 130, 240 P.3d 143 (2010). The “‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 542 U.S. at 303 (emphasis in original).

*Apprendi* and *Blakely* are premised on the rule that facts which increase the punishment for an offense are equivalent to essential elements. *State v. Allen*, 192 Wn.2d 526, 534-35, 431 P.3d 117 (2018).

Unlike the provision in *Beckles*, which if satisfied resulted in an advisory sentence, the existence of an aggravator in Washington’s mandatory sentencing scheme is necessary to impose a sentence outside the standard range and must be found by a jury. *Beckles*, 137 S. Ct. at 892; RCW 9.94A.537. They are the functional equivalent to elements of a

criminal offense. *Allen*, 192 Wn.2d at 535; *see also Beckles*, 137 S. Ct. at 899 (Sotomayor, J., concurring).

In *State v. Baldwin*, the Court reached the opposite conclusion, determining the void-for-vagueness doctrine did not apply to aggravating factors. 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). However, *Baldwin* is contrary to the Court's evolving interpretation of aggravating factors in Washington's mandatory sentence scheme since *Blakely*, as are this Court's recent decisions that rely on *Baldwin* and *Beckles* to deny vagueness challenges to statutory aggravating factors. *State v. DeVore*, 2 Wn. App. 2d 651, 665, 413 P.3d 58 (2018); *State v. Brush*, 5 Wn. App. 2d 40, 59 425 P.3d 545 (2019). Both decisions incorrectly reason that the jury's finding of an aggravator does not alter the range of punishment because the court must still sentence the defendant within the statutory maximum. *DeVore*, 2 Wn. App. 2d at 665; *Brush*, 2 Wn. App. 2d 61-63.

Here, though the aggravating factor does not mandate a minimum penalty, it alters the range of punishment. Consistent with U.S. Supreme Court precedent and our Supreme Court's recent decision in *Allen*, this Court should conclude that the statutory aggravators set out in RCW 9.94A.535(3) are subject to void for vagueness challenges.

b. The statutory aggravator, “egregious lack of remorse” is vague as applied to Mr. Stanley.

A statute is vague if it “fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or if it does not provide standards sufficiently specific to prevent arbitrary enforcement.” *State v. Duncalf*, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013) (internal citations and quotation marks omitted). If a person of reasonable understanding is unable to guess at the meaning of the statute and whether their conduct is at risk, the statute is vague. *Id.* at 297; *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). A vagueness challenge to a statute not involving First Amendment rights is evaluated as applied, using the facts of the particular case. *State v. Russell*, 69 Wn. App. 237, 245, 848 P.2d 743 (1993).

Here, a reasonable person could not know that making threats to a person unrelated to the intended victims without ever making contact with the alleged victims would be sufficient to establish “egregious lack of remorse.” The guidelines provided by the WPIC committee provide no guidance because this offense as committed by Mr. Stanley *only* affected the claimed victims through the conduct of a third party—here, Mr. Burleson, and then the detective, who relayed the alleged threats to the prior victims, albeit in inaccurate terms. CP 1-2; RP 342. The effect of Mr.

Stanley’s alleged words on the alleged victims for the offense of felony harassment was through a series of events over which he had no control. Under no circumstances would he have been able to guess that his conduct, which did not include any contact with the alleged victims, could be a particularly “egregious” form of committing felony harassment.

c. The “egregious lack of remorse” aggravator is overbroad because it reaches protected speech and conduct.

The “egregious lack of remorse” aggravating factor for the offense of harassment is unconstitutionally overbroad because it criminalizes protected speech and conduct, including words that “demonstrate an extreme indifference to harm.” CP 137.

The First Amendment’s protections are not limited to words—conduct may be “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.” *State v. Immelt*, 173 Wn.2d 1, 17, 267 P.3d 305 (2011) (citing *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)).

A statute that legitimately prohibits certain unlawful conduct and unprotected speech violates the First Amendment when it also prohibits constitutionally protected speech. *Brush*, 5 Wn. App.2d at 50. *Brush* analyzed whether the aggravating factor, “domestic violence/ongoing pattern of psychological abuse” in RCW 9.94A.535(3)(h) was facially

overbroad under the First Amendment. *Id.* at 50-57. *Brush* emphasized that a law is unconstitutionally overbroad if it prohibits a *substantial* amount of constitutionally protected speech. *Id.* at 51-52 (citing *State v. Homan*, 191 Wn. App. 759, 766-67, 364 P.3d 839 (2015)). *Brush* applied Washington’s four part test to determine whether the aggravating factor was facially overbroad under the First Amendment. *Id.* at 52. The State has the burden to show a statute restricting speech does not violate the constitution. *Id.* at 51.

The first question is whether the statute allows enhanced punishment for speech. *Id.* at 52. The *Brush* court determined the aggravator “psychological abuse,” which includes injuring a person’s mental and emotional condition, could include speech and expressive conduct. *Id.* at 52-53. The same must be true of the “egregious lack of remorse” aggravator, which allows for an enhanced penalty where a “defendant’s words or conduct” establish extreme indifference. CP 137.

The second inquiry is whether the aggravator could legitimately allow enhanced punishment for certain types of unprotected speech. *Id.* Like in *Brush*, here, “egregious lack of remorse” could enhance punishment for unprotected speech such as “true threats,” “libelous speech,” or other unprotected speech, which means it “*legitimately* allows enhanced punishment.” *Id.* at 53-54 (emphasis in original).

The third step is to consider whether the aggravating factor also applies to constitutionally protected speech. *Id.* Here, as in *Brush*, the aggravating factor “egregious lack of remorse” penalizes protected speech, because it could impose greater punishment for offensive, mocking comments, making jokes, embarrassing a person, or lodging vulgar insults, all protected speech, so long as such words or conduct increased the person’s suffering, belittled the harm suffered by the victim, or reflected indifference to the harm. *Id.* at 54-55; CP 137.

Finally, a court’s overbreadth analysis must determine if the aggravator applies to a substantial amount of protected speech by weighing “the amount of conduct and unprotected speech that the statute legitimately penalizes against the amount of protected speech that also would be penalized.” *Id.* at 55. Critical to *Brush*’s analysis of the domestic violence aggravator was that it applied only “after the defendant has committed an offense that involves domestic violence or stalking, which generally involves conduct rather than speech.” *Id.* at 56. Nor did the statute apply to verbal or psychological abuse that is “short in duration.” *Id.* By contrast, when applied to the offense of harassment, “egregious lack of remorse” increases punishment based on words and feeling alone in the commission of the offense in relation to previous conduct based on words alone (cyberstalking in Mr. Stanley’s case), thus directly

implicating a range of behavior and words protected by the First Amendment. *Id.* at 56. This fails under the First Amendment.

d. The exceptional sentence must be reversed.

Because the court may not impose an exceptional sentence based on an aggravator that punishes a defendant's prior conduct included in the offense and standard range, and because it fails to satisfy the requirements of the First and Fourteenth Amendments, the "egregious lack of remorse" aggravator imposed for counts 1-4 is invalid, and this Court should remand for a standard range sentence. *State v. Ferguson*, 142 Wn.2d 631, 653, 15 P.3d 1271 (2001).

F. CONCLUSION

A jury convicted Mr. Stanley based on uncorroborated allegations of a jail informant, who claimed Mr. Stanley made threats from the confines of their prison cell, absent sufficient evidence the alleged threats were made against the specific people identified by the State, and without requiring a *mens rea* for intimidating a judge. After a trial plagued by errors that allowed the prosecutor to bolster its case in violation of rules designed to ensure a fair trial, while depriving Mr. Stanley of the right to present his defense, the trial court sentenced him to a de facto life sentence of 33.5 years based on invalid and unconstitutional aggravating factor. Reversal of Mr. Stanley's conviction and sentence is required.

DATED this 2nd day of December 2019.

Respectfully submitted,

/s Kate Benward

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

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

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# WASHINGTON APPELLATE PROJECT

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