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NO. 36432-1-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

SLOAN STANLEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR WALLA WALLA COUNTY

THE HONORABLE JUDGE M. SCOTT WOLFRAM

BRIEF OF RESPONDENT

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A. INTRODUCTION AND SUMMARY OF ARGUMENT

In 2015, Sloan Stanley was convicted in King County of multiple counts of cyberstalking for a relentless campaign of terrifying threats and harassment against four women he barely knew. When Stanley's probation was quickly revoked and he was re-imprisoned in July of 2016, Stanley again threatened the women's lives — this time in an expletive-filled two-week tirade to his cellmate, Randy Burleson. Stanley also convincingly told Burleson that he would kill the prosecutor and judge from his cyberstalking trial. Burleson was so disturbed and concerned by Stanley's invective that he reported it to the authorities, in violation of the "convict code" against "snitching" that Burleson lived by, and despite the significant personal danger he would face in prison.

A Walla Walla County jury convicted Stanley and he was sentenced for five counts of felony harassment and one count of intimidating a judge. The jury also determined that Stanley's latest crimes against the four women demonstrated an egregious lack of remorse, and that his threats to kill the prosecutor were committed against a public official in retaliation of the performance of his official duties. The trial court imposed an exceptional sentence by running each of the counts consecutively.

In this appeal, Stanley alleges multiple trial and sentencing errors, all of which this Court should reject. At Stanley's request, the trial court allowed another inmate — housed in the same “pod” as Stanley and Burleson — to testify that while Stanley was upset about his prior cyberstalking trial, he never threatened anyone. Stanley was able to fully present his theory of the case — that Burleson, on whose testimony the State's case relied, was an untrustworthy liar. The trial court did not err or interfere with Stanley's right to present a defense when it excluded irrelevant hearsay evidence that Stanley made no threats when housed with an entirely different inmate a full year after he communicated threats to Burleson.

Additionally, the State presented sufficient evidence to support felony harassment convictions for each of the four women who testified against Stanley in the 2015 cyberstalking trial and sufficient evidence that Stanley made a “true threat” toward the judge who presided over Stanley's King County trial.

Further, the trial court properly admitted ER 404(b) evidence of Stanley's prior threats because the State was required to prove beyond a reasonable doubt that the victims' current fear was reasonable. The extent of Stanley's instability and animosity, as graphically demonstrated by his prior threats, explained the reasonableness of the victims' fear upon

learning that Stanley had threatened their lives to his cellmate in prison. The trial court properly exercised its discretion to find that the probative value of that evidence vastly outweighed the danger of unfair prejudice and provided the jury with an instruction properly limiting its use.

Furthermore, the trial court properly allowed evidence of how seriously Burleson took Stanley's threats and his reasons for reporting them because Burleson's motivation was relevant to his credibility and pivotal to the jury's consideration of the charges.

Next, Stanley moved pretrial to disqualify deputy prosecutor Ernsdorff from trying the case because he was employed by the King County Prosecutor's Office along with victim Brenner. Now on appeal, Stanley changes his argument to a complaint that Brenner, as the prosecutor of Stanley's 2015 cyberstalking trial, impermissibly testified in violation of the advocate-witness rule. But Stanley did not object below to Brenner's testimony as violating the advocate-witness rule nor did he ask that Brenner's testimony be excluded on the basis. Stanley has failed to preserve that claim. But regardless, the trial court correctly declined to remove Ernsdorff, and Brenner's testimony was proper as a charged victim of Stanley's threats.

Lastly, the trial court properly imposed an exceptional sentence in this case. The "egregious lack of remorse" aggravating factor is not

inherent in the felony harassment crimes that Stanley committed and is not accounted for in the standard ranges. Furthermore, Stanley may not bring a vagueness challenge to the aggravator because it does not result in any mandatory punishment. Even so, the aggravator is sufficiently clear. Stanley has also failed to establish that the aggravator is overbroad.

B. ISSUES PRESENTED

1. Did the trial court properly exclude hearsay evidence that Stanley did not make similar threats a year after the charged crimes?

2. When considered in the light most favorable to the State, was there sufficient evidence of four counts of felony harassment for Stanley's threats to kill the women who previously testified against him? Was there sufficient evidence that Stanley made a true threat to support the constitutionality of the jury's verdict for intimidating a judge?

3. Did the trial court properly admit evidence of Stanley's prior threats when the evidence was immensely probative of the reasonableness of the victims' fear?

4. Has Stanley failed to preserve his claim that the State improperly bolstered Burleson's credibility before it was attacked? Was the testimony proper regardless? Was any error harmless?

5. When Burleson’s credibility was central to the case, was his brief reference to Gary Ridgway properly admitted to show that he was not the type of inmate to overreact to idle talk? Was any error harmless?

6. Has Stanley failed to preserve the argument that deputy prosecutor Brenner was an impermissible advocate-witness? Was Brenner’s testimony as a charged victim proper regardless?

7. Has Stanley failed to establish cumulative evidentiary error denied him a fair trial?

8. Stanley’s argument that the “egregious lack of remorse” aggravating factor inheres in the underlying harassment charges is really a sufficiency of the evidence argument. Was there sufficient evidence to support the jury’s finding of an egregious lack of remorse?

9. Is this Court bound by controlling precedent that aggravating factors are not subject to vagueness challenges because exceptional sentences are discretionary? Is the “egregious lack of remorse” aggravator sufficiently clear as applied to Stanley?

10. Has Stanley failed to establish that the “egregious lack of remorse” aggravator is facially overbroad?

C. STATEMENT OF THE CASE

In late June of 2016, Randy Burleson’s Drug Offender Sentencing Alternative (“DOSA”) was revoked and he was briefly incarcerated at the

state prison in Monroe. RP 206-07. He was soon transferred to Washington Corrections Center at Shelton to serve his sentence. RP 207. While being transported from Monroe to Shelton, Burleson met another inmate whose DOSA had recently been revoked — Sloan Stanley. RP 207-08, 607-08. Stanley was angry that his DOSA had been revoked, especially because it was based on his first violation. RP 613-14.

When Burleson and Stanley arrived in Shelton, they were housed together in the same cell for about two weeks. RP 209, 214, 608-09. The two men had formed a “bit of a connection” during the bus ride to Shelton, so they were “excited” to be placed in the same cell. RP 207, 212, 608. Burleson and Stanley were locked in their cell for 21 hours a day, with short periods of time out to eat, bathe and exercise. RP 227, 235, 611.

Right away, Stanley told Burleson he had been convicted of eight or nine counts of “threats to kill over the internet.” RP 214. He was “super angry” about “the witnesses,” and as days went by, he became more agitated. RP 214-15. When Stanley talked about his case to Burleson he would fly into fits of rage, leap down from the top bunk, and threaten to kill the women who had testified against him, the prosecutor, and the judge. RP 214-15, 217, 231-32, 235, 611. Stanley repeated his threats to kill numerous times, day after day. RP 215, 217, 225, 230.

Stanley told Burleson many times that he “wanted to fucking kill them.” RP 217. He explained how his grandfather had been a gunsmith and had made one specific gun that Stanley would like to use to kill his victims. RP 217, 224. Stanley described how when he was released from prison he planned to go back to Idaho and then kill his victims. RP 219.

Stanley described being “pissed off” about the witnesses because he did not understand why they had testified against him. RP 215. He was angry with the prosecutor for objecting to arguments that Stanley, who had acted as his own lawyer, had made during trial. RP 223. On more than one occasion when conveying his anger toward the prosecutor, Stanley would take a shooting stance, gesture that he had a gun, and talk about “shooting the fucker.” RP 223-24. Stanley was similarly angry with the judge because he believed the judge had not followed the law and had improperly ruled against him. RP 223-24.

Stanley’s “anger intensif[ied]” and his “aggression excel[ed]” while making his threats. RP 218. When Stanley “raged” about his case, he would “go from zero to a hundred and then back down,” it was “really everywhere.” RP 226-27. Stanley would instantly go from being very calm to exhibiting extreme anger, shown in a change in his eyes, his facial expression, his demeanor, and his gestures. RP 227. Burleson became increasingly uncomfortable with Stanley’s anger and instability, and with

hearing how Stanley wanted to hurt “these other people.” RP 226-27.

Burleson did not know what Stanley was capable of. RP 227.

Stanley proclaimed to Burleson that “one way or the other he would take care of these people.” RP 229-30. Burleson described Stanley’s obsession as his “destiny,” because Stanley felt that killing the victims was justified for what they had done to him. RP 230.

After the two-week period they were housed together, Stanley and Burleson had no real further interaction. RP 241-42, 609-10. Burleson was soon transferred out of Shelton and Stanley later went to the Washington State Penitentiary in Walla Walla. RP 569.

At trial, Stanley testified in his own defense, and denied making any threats while housed with Burleson, claiming that “whatever is being said is a lie.” RP 601-02, 605-06. But he admitted that he had talked to Burleson about his case, that he felt the prosecutor and judge had committed misconduct, and that he was upset about it. RP 618-21. He also admitted that he was upset with the witnesses who had testified against him. RP 623.

Stanley conceded that he and Burleson got along fine during the two weeks they shared a cell, and that they never got into any arguments, fights, or disagreements. RP 601, 615. Stanley admitted that Burleson had no access to Stanley’s court papers, and that any information Burleson

possessed had come from talking to Stanley. RP 617. Stanley told the jury that when they parted ways, there was no bad blood between he and Burleson, and it was just like “good luck to you.” RP 615.

The four women whom Stanley had cyberstalked and who testified against him in his 2015 trial were told by authorities about Stanley’s new threats from prison, as was the prosecutor, Wesley Brenner, and the judge, Jeffrey Ramsdell. RP 270-72, 305, 390, 432, 491-92, 524-26. The women whose lives Stanley had disrupted for the better part of a decade each described for the jury the terror they felt over their belief that Stanley would make good on his current threats, and the steps they took to protect themselves. RP 269-70, 273-79, 428, 432-35, 492-94, 540-42. The deputy prosecutor and judge also testified about the fear that Stanley struck in their hearts when they learned that he had also threatened their lives from prison. RP 317, 392-93.

A Walla Walla County¹ jury convicted Stanley as charged and he was sentenced for five counts of felony harassment and one count of intimidating a judge. CP 148-54, 297, 302. The jury also determined that Stanley’s crimes against the four women demonstrated an egregious lack of remorse, and that his threats to kill the prosecutor were committed

¹ This case was originally filed in King County Superior Court, but Stanley successfully moved to transfer venue to Walla Walla County. RP 53.

against a public official in retaliation of the official's performance of his duties.² CP 155-59. Based on those aggravating factors, the trial court imposed an exceptional sentence above the standard range by running each of the six counts consecutively, for a total prison sentence of 402 months. CP 298, 300, 306-08. Stanley filed this timely appeal. CP 312.

D. ARGUMENT

1. THE TRIAL COURT PROPERLY EXCLUDED IRRELEVANT HEARSAY EVIDENCE WITHOUT INFRINGING ON STANLEY'S RIGHT TO A DEFENSE.

Stanley first claims that the trial court denied him the constitutional right to present a defense because it excluded out-of-court statements and audio recordings of Stanley's conversations with a different inmate, Billy Temple, in August of 2017, during which Stanley discussed his case but made no threats of harm. To the contrary, the trial court's evidentiary ruling was highly discretionary, and the trial court properly exercised that discretion by excluding Stanley's out-of-court statements, made a full year after his threats to Burleson, as irrelevant hearsay.

² The jury also returned a guilty verdict for felony harassment against Judge Ramsdell, including a finding that Stanley committed the offense with the aggravating factor of retaliation against a public official for the performance of his duties. CP 153, 160. That charge was vacated in favor of the more serious intimidating a judge conviction. CP 296.

Moreover, the trial court allowed Stanley to call another witness, Brian Delano, who was housed in the same “pod” at Shelton as Stanley and Burlson in July of 2016 — at the same time that Burlson alleged Stanley made the threats — to testify that he had also interacted with Stanley and never heard Stanley threaten anyone. Thus, the trial court’s exclusion of evidence that Stanley made no threats in August of 2017 did not affect, let alone foreclose, Stanley’s ability to present a defense regarding the July 2016 threats.

a. Relevant Facts.

After he left Shelton, Burlson alerted several people about Stanley’s threats. RP 238, 361. At first no one would listen, until a full year later when the information made its way to the Seattle police detective who had originally investigated Stanley’s cyberstalking case. CP 2; RP 228, 339-41. After speaking with Burlson, the detective arranged with officials at the penitentiary in Walla Walla to place Stanley in a cell with an inmate informant, Temple, and the State obtained a one-party consent authorization to hide a recording device in Temple’s cell. RP 343-46, 358. 144 hours of audio spanning a six-day period in August of 2017 was recorded, but of the portions listened to by police, Stanley made no threats of bodily harm, but talked about his grandfather’s firearm,

how he was angry with the system, and how he wanted to “handle” the people involved. RP 347-48, 358, 464.

On September 10, 2018, prior to opening statements, Stanley informed the State that he would offer testimony from Temple about Stanley’s out-of-court statements when they were housed together in Walla Walla in August of 2017. RP 174-75, 476. The State told the trial court that it believed this testimony was hearsay,³ and asked for an offer of proof. RP 175. The State informed Stanley that it was considering a motion to exclude the recordings as well. RP 476. The trial court stated it would rule after it heard an offer of proof the next day. RP 177-78.

The following day, after the State’s opening remarks, but before Stanley’s,⁴ Stanley provided an offer of proof regarding his evidence. RP 454. Brian Delano was an inmate who was also incarcerated at Shelton in July of 2016 when Burlison and Stanley were housed together there. RP 454, 457. Stanley told the court that Delano would testify there had been significant interaction between the three men at Shelton, and that although

³ Although the deputy prosecutor referred to the testimony as “self-serving hearsay,” he correctly argued that Stanley could not elicit from Temple his own out-of-court statements to prove their truth. RP 175.

⁴ Stanley gave his opening statement on September 12, 2018, at the beginning of the defense case. RP 560.

Stanley expressed frustration about his case, Delano never heard Stanley have an outburst like those Burleson described. RP 454, 457-58, 466.

Stanley stated that Billy Temple would testify that while he was incarcerated with Stanley in Walla Walla in August of 2017, Stanley expressed frustration about his case but did not make any death threats. RP 459-60. Stanley asserted that his out-of-court statements were admissible under ER 803(a)(3) as statements of then-existing mental, emotional, or physical condition. RP 460. The State argued that the cited hearsay exception was inapt because Stanley's state of mind a full year after the threats to Burleson (which formed the charges) was irrelevant. RP 461, 464-65. The court's initial reaction was that Temple's testimony about statements Stanley made in August of 2017 were hearsay, but that it would research the issue, and it recessed for the day. RP 468-69.

The next morning the trial court granted the State's objection as to Temple's testimony and the recordings, finding them irrelevant hearsay. RP 473, 480, 482-83. Stanley then argued that the State's objection to the defense evidence was "untimely," asserted that he would have approached the case differently had he known sooner of the State's objection and moved for a mistrial. RP 472. The State responded that prior to trial, on August 22, 2018, it had filed a witness list that placed Stanley on notice it did not intend to call Temple as a witness. RP 459, 473. Then, on August

23, 2018, Stanley filed his own witness list naming Temple and Delano as witnesses but did not provide the State with any significant detail of their proposed testimony. RP 455, 473-74. Only after trial had begun and Stanley provided the State with more detailed information about what the witnesses would say, did the State object. RP 473. The prosecutor also told the court that he had informed Stanley prior to opening statements that he was considering a motion to exclude the recordings. RP 476. The court denied Stanley's motion for a mistrial.⁵ RP 480.

Delano ultimately testified, telling the jury that Burleson introduced him to Stanley at Shelton in July of 2016, and that in prison, this introduction meant that Burleson was “vouching” for Stanley — meaning Stanley was not a sex offender or a rat, and was a “solid individual to hang out with.” RP 565, 567. Delano told the jury that he was not housed in a cell with Stanley at Shelton, but that he was in the same pod as both Stanley and Burleson. RP 569-70, 579. Although he saw Stanley upset a “couple of times” about his case, Delano never heard Stanley threaten anyone or act irrational. RP 570-71, 582, 593, 598. Delano and Stanley were eventually both moved to Walla Walla and became close friends. RP 565, 569-70, 576, 585-86. Delano admitted that

⁵ Stanley does not challenge this ruling on appeal.

he lived by the prison “code of conduct” and would never testify on behalf of the State, and more specifically, he would never testify against Stanley. RP 575, 577.

b. The Exclusion Of The Evidence Did Not Foreclose Stanley’s Right To Present A Defense.

This Court employs a two-step process when considering a claim that an evidentiary exclusion violated the defendant’s Sixth Amendment right to a present defense. State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019) (citing State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017)). First, the trial court’s evidentiary ruling is reviewed for an abuse of discretion and will not be overturned unless no reasonable person would adopt the view of the trial court. Clark, 187 Wn.2d at 648. If there is no abuse of discretion, this Court then reviews de novo whether the evidentiary ruling deprived the defendant of his or her Sixth Amendment right to present a defense. Arndt, 194 Wn.2d at 798.

The trial court here properly exercised its discretion and excluded Stanley’s out-of-court statements because they were irrelevant and did not fall within a valid hearsay exception. Through the testimony of Billy Temple and the audio recordings, Stanley attempted to elicit evidence of conversations in which he had *not* made threats while discussing his case. But Stanley’s out-of-court statements offered to prove their truth (that

Stanley merely wanted to “debench” the judge and planned to file a civil lawsuit) were inadmissible hearsay unless offered by the State. See ER 801(c), (d)(2)(i) (an out-of-court statement by a party is not hearsay if offered *against* the party). Under the hearsay rules, Stanley could not discredit Burleson’s testimony that Stanley had threatened to kill the victims by offering — for their truth — other out-of-court statements expressing his desire to sue and remove the judge from office.

Stanley argued that his statements were admissible under the “then-existing state of mind” exception to the hearsay rule. See ER 803(a)(3). But the trial court pointed out that even if Stanley’s statements to Temple indicated what Stanley’s state of mind was when he spoke to Temple, they did not necessarily reflect his state of mind “previously, when he had perhaps a different intent.” RP 463. In other words, the trial court properly concluded that Stanley’s state of mind in August of 2017 was not relevant to whether he made threatening statements to Burleson *a year earlier* in July of 2016. See State v. Sanchez-Guillen, 135 Wn. App. 636, 646, 145 P.3d 406 (2006) (defendant’s statements to the police at the time of arrest not admissible as state-of-mind evidence when defendant’s state of mind at the time of arrest not at issue). See also State v. Stubbsjoen, 48 Wn. App. 139, 146, 738 P.2d 306 (1987) (in kidnapping case, defendant’s out-of-court statements corroborating lack of intent to

abduct baby not admissible when relevant state of mind was when defendant took baby, not hour and a half later when statements made).

Stanley's argument that his statements to Temple were relevant because the State was still investigating him when he made them is not persuasive. The evidence relied on by the State to convict Stanley was his 2016 threats to Burlison at Shelton, made shortly after Stanley's DOSA was revoked, and at a time when Stanley's anger over being reincarcerated was fresh and elevated. RP 461, 464, 669-81. The fact that Stanley did not make similar threatening statements a year later was irrelevant to whether Stanley communicated threats to Burlison, regardless of when the State learned of the threats or whether it was still investigating him.

Stanley further argues that because he was incarcerated, the only harm he could have intended was in the future, and thus his statements to Temple, made shortly before he was scheduled to be released, were highly relevant. That argument is not persuasive because neither felony harassment nor intimidating a judge requires proof that the defendant intended to *carry out* his threats. State v. Kilburn, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004); State v. Kepiro, 61 Wn. App. 116, 121, 810 P.2d 19 (1991). Stanley's state of mind closer to a time when he might have had the actual ability to carry out his earlier threats is thus irrelevant. And although Stanley complains that the State itself elicited some of his out-of-

court statements to Temple, the State was clearly entitled to do so under ER 801(d)(2)(i).

This Court cannot say that no reasonable person would have ruled that Stanley's out-of-court statements were irrelevant hearsay. Thus, the trial court did not abuse its discretion in excluding them.

Regardless, even if the trial court should have admitted Temple's testimony and the recordings, their exclusion did not deny Stanley the constitutional right to present his defense. An evidentiary exclusion does not violate a right to a defense unless the evidence is *highly probative* and is *truly necessary* to the defense — i.e., the defense is foreclosed without the evidence. E.g., State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010). In other words, excluding defense evidence under the established court rules may violate a defendant's right to a defense when the evidence is "highly probative" and thus its exclusion effectively bars the defendant from presenting a defense. Jones, 168 Wn.2d at 720-21.

Stanley's statements to Temple in August of 2017, even if minimally relevant and not hearsay, were not *highly probative* of whether he made the threats to Burleson a full year earlier in July of 2016 and were not *truly necessary* to his defense. Stanley was more than able to present his defense — that Burleson was lying — through Delano's testimony that he had also observed Stanley upset about his case at Shelton in July of

2016, but that he never saw Stanley behaving irrationally or heard Stanley threaten anyone. The exclusion of Stanley's August 2017 statements did not effectively bar Stanley from presenting his defense. There was no constitutional violation.

c. Any Error Was Harmless.

Even a constitutional error can be harmless if it is proved to be harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724. And non-constitutional evidentiary errors are harmless unless this Court determines that the trial outcome would have differed if the error had not occurred. State v. Thach, 126 Wn. App. 297, 790, 106 P.3d 782 (2005).

Here, the jury heard that Stanley's statements to Temple and the recordings of their conversations did not include any threats of bodily harm, even though Stanley spoke to Temple about his case and was upset by it. RP 347-48, 358. Even though the jury did not hear from Temple or hear the recordings of his conversations with Stanley, the salient point of the evidence that Stanley complains was erroneously excluded was actually before the jury — that Stanley did not make threats during the six-day period he was housed with Temple. If there was any error, it was undoubtedly harmless under any standard. This Court should reject Stanley's sweeping claims of a constitutional violation from the trial court's discretionary evidence ruling.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT STANLEY THREATENED EACH OF THE FOUR WOMEN CHARGED AS VICTIMS OF HARASSMENT IN COUNTS ONE THROUGH FOUR.

Stanley argues the evidence was insufficient as to the felony harassment charges in counts one through four. Specifically, he contends that there was insufficient evidence that the threats he made were to the four named victims. Stanley's argument should be rejected based on the evidence and the valid inferences that a rational juror could draw from it.

When there is a claim that evidence is insufficient to support a conviction, the evidence is reviewed in a light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficient evidence claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.⁶ Id.

⁶ Stanley argues that this Court must independently review his claim because it "implicates core First Amendment rights." Brf. of App. at 21. But Stanley does not dispute that there was sufficient evidence that he knowingly made true threats to kill the victims in counts one through four. Rather, he disputes only the sufficiency of the evidence as to the identity of the victims. The heightened standard of review cited by Stanley is limited to review of those crucial facts that necessarily involve the legal determination whether the speech is unprotected, i.e., whether the threats are "true threats." State v. Kilburn, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004).

The trier of fact resolves conflicting testimony and weighs the persuasiveness of the evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989). The jury is the sole arbiter of credibility. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus, the appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Here, with respect to counts one through four, the State was required to prove that Stanley knowingly threatened to kill Alyson Gray, Miriam Much, Leah Mesford, and Elizabeth Williams, and that he placed each of them in reasonable fear that the threat would be carried out. CP 63-65, 111, 116, 120, 124. Stanley told Burleson he had been convicted of multiple counts of threats to kill over the internet, and that Stanley was “pissed off about the witnesses, and he couldn’t understand why they were testifying.” RP 214-15. Stanley said he wanted to kill the women, the judge and the prosecutor from his trial. RP 217. When Stanley talked about his prior case to Burleson, he talked about killing the people involved. RP 233. Regarding the women witnesses, Burleson testified that Stanley thought “they may have moved.” RP 220. Burleson recalled that one of the women was a bartender and that Stanley would drink with the women at the bar. RP 240-41.

Although Burleson did not know the names of the women Stanley was mad at, and did not know the details of the case, when asked if Stanley was “focused on the women that testified against him,” Burleson responded, “Yes. There were *three* women that testified against him.” RP 241 (emphasis added). Indeed, Burleson testified several times that Stanley’s threats were to the *three* women witnesses from the previous trial. RP 215, 218-19, 225, 234, 239. But Stanley himself admitted that he had previously threatened to kill all *four* women in internet messages and that he had just been returned to prison for violating his probation when he met Burleson. RP 606-07, 600-01, 613. Stanley further admitted that although he was upset with each of the women, no one individual of the four was more “central to his case” than the others. RP 623-24.

The four charged victims testified that they had met Stanley at a neighborhood bar where one of them, Williams, worked as a bartender. RP 248-49, 414-15, 487-88, 520-23. Stanley became obsessed with the women and relentlessly harassed and threatened them over the internet. RP 251-67, 415-28, 489, 495-502, 530-38. They each testified in his subsequent cyberstalking trial. RP 267, 427, 495, 520, 547-48. And just as Stanley told Burleson in prison, two of the women indeed had moved after the cyberstalking trial. RP 269, 428. All four women testified that

they were terrified after hearing Stanley's most recent threats from prison. RP 270-75, 279, 432-35, 440, 490-94, 509, 540-42.

From this evidence, a rational juror could conclude beyond a reasonable doubt that Stanley had threatened to kill each of the four charged victims. Burleson was adamant that the women that Stanley threatened had been witnesses at his previous trial. All four charged victims had testified at his cyberstalking trial, and Stanley himself admitted that none of the women were more central to the case than any other. The jury could reasonably infer that Burleson was simply wrong about the number of women who had been witnesses. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against Stanley. Salinas, 119 Wn.2d at 201. In the light most favorable to the State, there was sufficient evidence to support each of the four harassment counts.

Even if this Court concludes that it is not a reasonable inference from the evidence that Stanley threatened all four women witnesses from his first trial, three of the four counts should be affirmed. Burleson testified that Stanley's threats were directed *at the women who testified against him at his prior trial*. Although Stanley contacted a fifth woman related to the bar and had his DOSA revoked as a result, that woman was not a witness at his trial. RP 351-53.

3. THE STATE PRESENTED SUFFICIENT EVIDENCE OF A TRUE THREAT TO SUPPORT STANLEY'S CONVICTION FOR INTIMIDATING A JUDGE.

Stanley argues that there was insufficient evidence to support count seven, intimidating a judge. Specifically, he argues that the State was required to prove that he intended to threaten or knew that his words were threatening. But the State was not required to prove Stanley's subjective mental state, and the jury was properly instructed on what constitutes a "true threat."

In order to convict Stanley of intimidating a judge, the State had to prove that he directed a threat to Judge Ramsdell, and that he made the threat because of a ruling or decision of Judge Ramsdell's in an official proceeding. CP 134-35; RCW 9A.72.160(1). The jury was instructed that a "threat" means "to communicate, directly or indirectly the intent to cause bodily injury in the future to the person threatened or to any other person. CP136; RCW 9A.04.110(26)(a).

The constitution generally prohibits the government from interfering with speech or expressive conduct, but "true threats" are unprotected speech under the First Amendment. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (citing Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)).

In order to constitute a “true threat,” the communication must be “made ‘in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual].’” State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 2d 1041 (1942)). Here, the jury was properly instructed as to this standard. CP 136.

Stanley does not argue that the evidence was insufficient to support the definition of a “true threat” provided to the jury. Rather, he cites Elonis v. United States, 575 U.S. 723, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015), for the proposition that subjective intent is required for a “true threat.” Brf. of App. at 28. Stanley is wrong. Elonis was premised entirely on interpretation of a federal statute. See 135 S. Ct. at 2012 (“Given our disposition, it is not necessary to consider any First Amendment issues.”). Our state supreme court recently refused to abandon Williams’ objective-person standard and rejected the argument — the same one Stanley makes here — that the First Amendment requires a showing of subjective intent. State v. Trey M., 186 Wn.2d 884, 893-904, 383 P.3d 474 (2016). This Court is bound by the decision in Trey M., and Stanley’s argument must be rejected. See State v. Watkins, 136

Wn. App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court).

Although conceding Elonis was a statutory-construction case, Stanley cites it for the proposition that the First Amendment requires this Court to read a *mens rea* into the intimidating a judge statute. But as the Trey M. court noted, “Elonis did not mandate a scienter requirement for all offenses.” 186 Wn.2d at 897. Moreover, like the felony harassment statute at issue in Trey M., a judicially grafted element of conscious wrongdoing is unnecessary here when the statute already requires it.

Intimidating a judge requires that the defendant “direct”— i.e., “communicate,” the intent to cause bodily injury in the future to a judge. State v. Hansen, 122 Wn.2d 712, 718, 862 P.2d 117 (1993). The communication itself must be an intentional act, and the threat must be a “true threat.” State v. Ozuna, 184 Wn.2d 238, 249 n.4, 359 P.3d 739 (2015); State v. Brown, 137 Wn. App. 587, 591, 154 P.3d 302 (2007). Importantly, the threat must be communicated *because of* an official ruling or decision by the judge who is threatened. RCW 9A.72.160. By requiring that a true threat be made *because of* a prior official act, the statute already requires an element of conscious wrongdoing on the part of the speaker. Stanley’s claim should be rejected.

4. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF STANLEY'S PRIOR THREATS TO PROVE THE VICTIMS' REASONABLE FEAR.

Stanley next complains that the trial court erred by admitting propensity evidence in violation of ER 404(b) and ER 403, specifically, evidence of Stanley's previous cyberstalking of the same four victims and his related prosecution. Stanley is wrong because the evidence was not admitted to prove propensity but instead was highly probative of an element of the charged crimes — the victims' reasonable fear that Stanley would carry out his *current* threats. Under the unique facts presented in this case — Stanley's renewed campaign of threats and harassment toward the victims and now criminal justice participants of his recent prosecution — it was impossible to completely divorce Stanley's prior acts from the current charges. The evidence of Stanley's prior threats and how they influenced the victims' current fear was properly admitted.

Evidence of a defendant's prior bad acts is not admissible to show the defendant has a propensity to commit crimes but may be admissible if it serves a legitimate purpose, is relevant to prove an essential ingredient of the crime, and its probative value outweighs its prejudicial effect. ER 404(b); State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008); State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996).

Here, the trial court admitted evidence of Stanley’s prior threats and harassment of Gray, Much, Williams, and Mesford, as well his behavior and interaction with the prosecutor and judge during his ensuing cyberstalking trial. CP 94-96; RP 169. The trial court admitted the evidence because it was highly probative and relevant to prove a necessary element of the felony harassment charges — that the victims reasonably feared Stanley’s current threats.⁷ CP 96.

The decision to admit ER 404(b) evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 569, 940 P.2d 546 (1997). To prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

The trial court properly exercised its discretion to admit evidence of Stanley’s past threats and prosecution to prove the victims’ reasonable fear of Stanley’s current threats.⁸ In State v. Ragin, 94 Wn. App. 407,

⁷ It should be noted that the State moved to admit only *select* email threats from Stanley’s first trial, and after the trial court denied Stanley’s objection to the evidence, Stanley himself asked that the threats be introduced in their *entirety*. CP 82-87; RP 171-74; compare Ex. 3, 5, 7, 9 with Ex. 2, 4, 6, 8.

⁸ Stanley repeatedly asserts that the victims’ reasonable fear was “undisputed.” But in a criminal case, the State must prove every essential element of a crime beyond a reasonable doubt. Magers, 164 Wn.2d at 183. A defendant cannot stipulate or admit his way out of the “full evidentiary force of the case.” State v.

411-12, 972 P.2d 519 (1999), this Court affirmed the admission of past violent acts of the defendant that the victim was aware of, noting, “If the jury were presented with evidence of [the current threats] alone, it may have believed [the victim] was overreacting.” The prior bad acts were thus relevant to the reasonable fear element of felony harassment. Id.

The same can be said of the threats Stanley communicated to his cellmate in prison. In a vacuum, the jury would lack any context that would have showed the victims’ fears were warranted and reasonable.⁹ As the prosecutor pointed out, evidence of Stanley’s past threats and behavior:

paints a picture for the jury of why two years after [Stanley’s] conviction, when a witness or victim learns of a threat made in otherwise would could be described as isolation, he hasn’t seen them in a couple of years and suddenly he’s threatening to kill them, that history becomes critically important for a jury to understand why they are afraid of him now . . . what he would do after he’s released and why the threats that he made in that jail cell resonate so

Taylor, 193 Wn.2d 691, 701, 444 P.3d 1194 (2019) (quoting Old Chief v. United States, 519 U.S. 172, 186-87, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)).

⁹ Specifically, the four women victims testified about some of the steps they took to protect themselves after hearing of Stanley’s most recent threats from prison. Between them, they used a post office box, limited their online presence, researched the process for changing their name, had their employer place additional locks on the doors and develop a “buddy system,” were afraid to advance in a career for fear of publicity, considered not returning to work and purchasing a gun despite a lifelong distaste of firearms, considered moving far away, and revoking a waiver that authorized employer to use their image in its brochure. RP 273, 279, 433-35, 492-94, 541-42.

dramatically and emotionally within each one of those victims.

RP 43-44. Furthermore, victims Brenner and Ramsdell had each been threatened by criminal defendants in the past, and admitted it was “part of the job.” RP 303, 391-93. But Stanley’s threats were different — and the evidence of Stanley’s prior acts was vital to explain *why*.

Nor did the trial court err by concluding that the probative value of the evidence outweighed the danger of unfair prejudice. CP 96. As in Ragin, Stanley’s earlier acts were necessary to put his current threats into context. 94 Wn. App. at 412. “Although the [evidence] may have put Ragin in a bad light before the jury, the evidence was *necessary* to prove an essential element of the charged crime, so its probative value outweighed its prejudicial effect.” Id. (emphasis added). The same is true here. The trial court did not abuse its discretion in admitting the evidence.

Stanley appears to argue that the evidence the State presented exceeded the scope of the trial court’s ER 404(b) ruling.¹⁰ Specifically, Stanley argues that because the victims talked about how similar his past threats were to his present ones, the evidence was used only to show propensity. But the specific testimony and argument that Stanley complains of was entirely in the context of the victims’ past interactions

¹⁰ But Stanley does not allege or argue prosecutorial misconduct.

with Stanley to show their current fear. What made the victims fearful of the new threats was, in part, the *consistent nature* of Stanley's threats over time. That does not turn properly admitted evidence of reasonable fear into impermissible propensity evidence.

Moreover, the jury was instructed that the only purpose for which it could consider the evidence was for whether "the alleged victims could have reasonable fear if the alleged threats were made." CP 108. Jurors are presumed to follow the court's instructions. Diaz v. State, 175 Wn.2d 457, 474, 285 P.3d 873 (2012). There was no error.

5. BURLESON'S TESTIMONY ON DIRECT EXAMINATION ABOUT HIS MOTIVATION FOR REPORTING STANLEY'S THREATS AND THE RAMIFICATIONS OF DOING SO DOES NOT WARRANT REVERSAL.

Next, Stanley argues that the trial court erred by allowing Burlison to testify on direct examination that he risked personal danger to himself in prison by testifying against another inmate, that he received no personal benefit for coming forward, and that his reason for reporting Stanley was to protect the victims. But Stanley did not object to this testimony below, and the two objections that he did lodge were not based upon improper bolstering, the error he now claims. He has thus failed to preserve this argument on appeal.

Even if this Court considers this claim, reversal is unwarranted because the focus of Stanley's defense was that Burleson was lying, and thus his credibility was central to the case. It was reasonable for the State to inquire as to his motivations in anticipation of challenges to such.

a. Relevant Facts.

On direct examination Burleson explained to the jury that he had been to prison seven times and had been incarcerated close to 18 out of his 51 years of life. RP 198, 200-01. Burleson told the jury that he lived by the "convict code," which meant acting respectfully, not talking about other people's business, and not "snitching." RP 203. Burleson explained that testifying against Stanley was a violation of the "no snitching" portion of the code and would put his life in danger if he were ever to return to prison. RP 203-04, 206. He testified that inmates who were known to not follow the "convict code" had to be placed in protective custody unless they were "controlled by" a prison leader. RP 204. When asked "what he was getting out of" testifying in violation of the convict code, Burleson replied, "I'm getting out if it is hopefully to be able to save some people." RP 204. Burleson told the jury that he had neither asked for nor received any benefit for coming forward. RP 205. *Stanley did not object to any of this testimony.*

Later, the prosecutor again asked Burleson, “What are you here for?” RP 205. Burleson answered, “I’m here to try to prevent something that I feel within myself -- ” at which time Stanley objected on the basis of “conjecture,” and “we are not hearing what the actual allegation is.”¹¹ RP 206. When that objection was overruled, Burleson answered, “I’m here so I can try to protect these people that this man’s threatened to kill on numerous occasions.” Id.

b. Stanley Has Failed To Preserve The Right To Challenge Burleson’s Testimony On Appeal.

Generally, a defendant cannot raise an issue for the first time in the appellate courts. RAP 2.5(a). Accordingly, in order to challenge a trial court’s admission of evidence, a party must raise a timely and specific objection at trial. State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006). The reason for this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

¹¹ Up until this, Stanley had objected only twice, each time on relevancy grounds. The first objection was to the State’s question, “What in your life caused you to amass the criminal history you have,” and the second to why Burleson had pled guilty to most of his prior criminal charges. RP 200, 202.

An exception to the general rule is made when the appellant demonstrates that the error complained of constitutes manifest constitutional error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Claimed evidentiary errors are not of constitutional magnitude. State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). Stanley did not object to the testimony he now challenges on appeal. He has waived his claim of error as to Burleson's testimony.¹²

c. Reversal Is Unwarranted Even If Stanley's Unpreserved Claim Is Considered.

This court reviews a trial court's evidentiary rulings for an abuse of discretion. State v. Lormor, 172 Wn.2d 85, 94, 257 P.3d 624 (2011). A decision to allow evidence will not be reversed absent a showing of abuse of discretion, a standard met only when this court concludes that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

¹² Stanley asserts that his two relevancy objections to questions about what led Burleson to commit crimes and why had pled guilty in prior cases preserves his claim. This Court should reject that argument because Stanley did not provide the trial court with an opportunity to address his claim of improper bolstering. A defendant may only assign error on grounds of the specific evidentiary objection made below. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). A relevancy objection is thus insufficient to preserve a claim of improper bolstering. The same is true of Stanley's later objection — as conjecture — to Burleson repeating his earlier testimony about why was testifying. RP 205-06.

Here, Burleson's credibility was central to the case. As an individual with extensive criminal history who was incarcerated with Stanley, the jury would reasonably speculate about whether Burleson was receiving a benefit for testifying and would reasonably be concerned that he was making up the allegations in exchange for special treatment in prison. Burleson's testimony about his adherence to the "convict code" and his motivations for testifying were essential to his credibility and to the jury's consideration of the case. Even if the State should have waited until after his cross-examination to ask the questions, Stanley's clear defense was that Burleson was lying. See RP 601-02, 605-06 (Stanley's testimony that "whatever is being said is a lie."). Because such testimony would have been proper redirect, any error for eliciting it earlier was harmless. See State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (finding improper bolstering evidence not prejudicial because, within reasonable probabilities, it did not affect the outcome of the trial).

6. BURLESON'S BRIEF REFERENCE TO GARY RIDGWAY WAS NOT IMPROPER BECAUSE BURLESON'S CREDIBILITY REGARDING STANLEY'S THREATS WAS CENTRAL TO THE CASE.

Stanley argues that Burleson's brief reference to the Green River Killer, Gary Ridgway, was irrelevant and served only to inflame the jury. But the testimony was elicited from proper questioning by the State to

establish that Burleson was not the type of inmate to become alarmed at the slightest danger or at mere idle talk. The evidence was relevant to Burleson's credibility and its probative value was not substantially outweighed by the danger of unfair prejudice. Furthermore, even if error, the brief reference to Ridgway was harmless.

On direct examination, Burleson told the jury how he had spent many years in and out of prison. RP 199-201. Burleson testified about the prison hierarchy and that it was important to get along with certain types of people that he would not otherwise choose to be around, such as murderers and "lifers." RP 202-03. Burleson told the jury, without objection, that he had been incarcerated with all types of inmates, including notorious murderers, and that he had "talked to Gary Ridgway, the Green River murderer." RP 202.

Later, after describing Stanley's threats, anger, and erratic behavior, and how uncomfortable they made him, Burleson told the jury he had not "felt like that" before. RP 227. He told the jury that he had previously walked the yard with Gary Ridgway, but that he "didn't have any feeling around him like I did with [Stanley]." RP 228. The court overruled Stanley's relevancy objection to this testimony. Id.

The threshold to admit relevant evidence is very low, and even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d

612, 621, 41 P.3d 1198 (2002). Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable. ER 401. However, relevant evidence may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

Here, the trial court did not abuse its discretion in allowing the testimony. The evidence was relevant to show that Burleson had been around inmates who were serving life sentences, who “lived by a whole different element of thinking,” and how he had to learn to get along with them, even though he did not really want to. RP 202-04. The reference to Ridgway was brief and occurred in the context of a larger exchange designed to show that Burleson was not the type of inmate to be alarmed by the slightest danger or overreact to mere idle talk. Given that Burleson’s credibility was central to the case, the court did not err in admitting the evidence.

Even if error, it was harmless because, within reasonable probabilities, the outcome of the trial would not have been materially affected had the error not occurred. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Here, Burleson had no motive to lie — Stanley himself admitted there was no animosity between them and conceded that any information Burleson had about Stanley’s case could only have come

from Stanley. Moreover, Stanley's defense was that he never made any threats at all, not that they were not frightening. There is no danger that the jury based its verdict on Burleson's brief reference to Ridgway. Any error was harmless.

7. THE TRIAL COURT PROPERLY DENIED STANLEY'S MOTION TO DISQUALIFY THE KING COUNTY PROSECUTOR'S OFFICE.

Next, Stanley argues that reversal is required because the trial court's refusal to recuse deputy prosecutor Ernsdorff¹³ from the case "impermissibly allowed Mr. Brenner to testify as a witness-advocate." Brf. of App. at 40. But the trial court's ruling that Ernsdorff's *current prosecution* of Stanley did not amount to an impermissible conflict of interest is irrelevant to Stanley's argument on appeal, which is that Brenner's testimony about his *prior prosecution* of Stanley in 2015 violated the advocate-witness rule. Stanley argued below that Ernsdorff had a conflict of interest because he was employed by the same agency as victim Brenner. Now Stanley argues on appeal that Brenner's testimony about his prosecution of Stanley in 2015 artificially bolstered his

¹³ The Walla Walla County Prosecutor's Office filed and prosecuted this case. CP 7-12; 11/13/17 RP 5-8. King County Deputy Prosecutor Gary Ernsdorff was appointed a Special Deputy Prosecutor for Walla Walla County and tried the case. CP 295, 296, 308; 4/2/18 RP 10. It is unclear whether the jury, who was introduced to Ernsdorff as a "Special Deputy Prosecutor," was aware that Ernsdorff was employed by King County. RP 59.

credibility and unduly influenced the jury — a claim that has nothing to do with who prosecuted Stanley here. Stanley did not argue below that Brenner was an impermissible advocate-witness, nor did he move to exclude Brenner’s testimony. Thus, Stanley has failed to preserve this argument and this Court should not consider it.

Even if this Court reaches the merits of Stanley’s claim, Brenner was the *victim* of Stanley’s death threats *because* he had previously prosecuted Stanley for other charges. Brenner in no way participated as an advocate in Stanley’s instant prosecution. His conflict of interest as a victim of Stanley’s threats to kill him was not imputed to the entire King County Prosecutor’s Office. Stanley misstates the applicable rules and fails to show that Ernsdorff had any conflict or personal interest. Stanley also fails to show that Brenner’s relevant and necessary testimony as a charged victim should have been excluded.

a. Relevant Facts.

Stanley was charged with felony harassment for knowingly threatening to kill Brenner and placing him in reasonable fear that the threat would be carried out. CP 65-66, 128. The State’s theory was that Stanley threatened Brenner due to his belief that Brenner had committed misconduct in Stanley’s cyberstalking case. RP 223, 618-21.

Pretrial, Stanley moved to disqualify Ernsdorff and require a Walla Walla County prosecutor to try the case because Brenner was to be a witness. RP 36-42. Stanley argued that the appearance of unfairness required recusal. RP 38-42. The State replied that prosecutors are not subject to the appearance of fairness doctrine and that Stanley had not shown that the office itself was partial or conflicted. RP 37-42. Ernsdorff offered to give a sworn declaration about his “relationship or lack thereof with Wes Brenner and my impartiality.” RP 41. The trial court did not take Ernsdorff up on that offer and denied Stanley’s motion. RP 42.

Brenner testified generally about his involvement in prosecuting Stanley in the previous case. RP 297-301. This included testimony about observing Stanley’s demeanor and interacting directly with Stanley because Stanley represented himself at trial. RP 301-02. Brenner testified that he had telephone conversations with Stanley in which Stanley would be normal and professional until Brenner disagreed with him, at which time Stanley would erupt with rage as if a “light switch” had been thrown. RP 301-02, 309-11. Brenner also testified that Stanley’s rage erupted in the courtroom and sometimes seemed directed at Brenner himself. RP 310-11. Brenner also testified that he had some knowledge of Stanley’s background, including that Stanley had previously had access to firearms

in the past and owned a house in Idaho, where he might not be prohibited from possessing guns. RP 307-08.

Brenner testified that these “previous interactions” with and knowledge of Stanley was *why* Stanley’s threats seemed different than other kinds of threats he had received in his job as a prosecutor and made him “shocked and ... afraid.” RP 302-04. “It sounded believable because it was similar to [to] things that he had said before in the past,” Brenner testified. RP 306. He had personally observed Stanley’s behavior “getting progressively worse,” so when he learned of the 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. Brenner testified that he decided to change jobs and join the civil division of the prosecutor’s office in part because of Stanley. RP 317.

b. Stanley Has Failed To Preserve A Claim Of Error
As To The Propriety Of Brenner’s Testimony.

As noted above, this Court generally does not consider issues first raised on appeal. RAP 2.5(a); Kirkman, 159 Wn.2d at 926. Stanley argued below that deputy prosecutor Ernsdorff should be disqualified because he had the same employer as Brenner. RP 36-42. On appeal, Stanley does not argue against the trial court’s conclusion that Brenner’s conflict was not imputed to the entire King County Prosecutor’s Office.

Rather, he makes an entirely new argument — that Brenner’s testimony was improper because Brenner testified about his *prior* 2015 prosecution of Stanley. Because Stanley’s argument is not a claim of manifest constitutional error, RAP 2.5(a) bars its consideration.

- c. The Trial Court Properly Declined To Disqualify Ernsdorff Because Deputy Prosecutor Brenner’s Conflict Of Interest Was Not Imputed To The Entire Office.

A prosecutor 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).

However, this presumption of disqualification applies only to *elected* prosecutors. State v. Nickels, ___ Wn.2d ___, 456 P.3d 795, 797-98 (2020). Elected prosecutors are distinguished from *deputy* prosecutors because the entire office is closely interwoven with the elected prosecutor, which is not the case with an individual deputy. Id., citing State v. Stenger, 111 Wn.2d 516, 522, 760 P.2d 357 (1988). In fact, our supreme court has long said, and has now reaffirmed, that office-wide

disqualification is “neither necessary nor wise” when a *deputy* prosecuting attorney was personally disqualified and can be effectively screened. Id. (quoting Stenger, 111 Wn.2d at 523).

The rules of professional conduct were amended in 2006 and “now provide that a government lawyer’s personal conflict of interest is no longer imputed to their entire office.” Nickels, 456 P.3d at 797-98 (citing RPC 1.10(d); RPC 1.11 cmt. 2). Moreover, under RPC 3.7(b), a “lawyer *may* act as an advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or 1.9.” (emphasis added). Rules 1.7 and 1.9 forbid representation if the lawyer-advocate *himself* has a conflict of interest or a former client is involved.

Prosecutors are *not* quasi-judicial decision-makers and are not subject to the appearance of fairness doctrine. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A deputy prosecutor does not represent a “client” in the traditional sense, and should be allowed to testify if the trial court is satisfied that he can be an objective witness and that the dual positions do not artificially bolster the witness’s credibility or make it difficult for the jury to weigh the testimony. State v. Bland, 90 Wn. App. 677, 680, 953 P.2d 126 (1998).

A trial court's decision not to disqualify a prosecutor is reviewed *de novo*. State v. Greco, 57 Wn. App. 196, 200, 787 P.2d 940 (1990) (citing Stenger, 111 Wn.2d at 521-22).

Here, the trial court properly declined to appoint a Walla Walla County prosecutor because Stanley entirely failed to show that the actual trial advocate for the State, Ernsdorff, had any personal or professional conflict of interest or lack of impartiality. Stanley raised nothing to show that Brenner had not been effectively screened from the legal work and decision making in Stanley's case. There was no legal requirement, under the case law or the rules of professional conduct, that forbade Ernsdorff from serving as a special deputy prosecutor for Walla Walla County on the case or that precluded Brenner from being a witness.

In arguing that the entire King County Prosecutor's Office should have been disqualified, Stanley misstates RPC 3.7(b), claiming it says the opposite of what it actually says. Compare Brf. of App. at 41-42 ("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 ...") with RPC 3.7(b) (a "lawyer *may* act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness ..."). This Court should reject any argument that the trial court erred by refusing to disqualify Ernsdorff and appoint a prosecutor from Walla Walla County.

d. Deputy Prosecutor Brenner Properly Testified As A Victim.

At the heart of his argument, Stanley conflates disqualification of the King County Prosecutor's Office — which would mean removing Ernsdorff as the trial advocate — with a claim that Brenner should not have been allowed to testify as a victim under the advocate-witness rule. The advocate-witness rule prohibits an attorney from appearing as both a witness and an advocate in the same litigation. United States v. Prantil, 764 F.2d 548, 552-53 (9th Cir. 1985). In other words, this rule bars testimony by a *participating* prosecutor to “eliminate the risk that a testifying prosecutor will not be a fully objective witness given his position as an advocate for the government.” Id. at 553.

But Brenner was not a *participating* prosecutor. He was a *victim* of a charged count of felony harassment based on the performance of his official duties as a prosecutor. He was thus an absolutely necessary witness and was not performing as an advocate for the State in the trial before the Walla Walla jury. His testimony was necessary to prove the charge in count five. It was not improper and did not implicate the advocate-witness rule. See Prantil, 674 F.2d at 554 (even a participating prosecutor is not absolutely precluded from testifying if there is a “compelling need” for the testimony).

Stanley's insistence that Brenner was performing a "dual role" as an advocate-witness removes his testimony from its proper context. The State was required to prove not only that Stanley threatened Brenner but that the threat was based on Brenner's official duties and that Brenner was placed in reasonable fear of the threat being carried out. CP 128, 159. Stanley quotes or paraphrases multiple excerpts of Brenner's testimony to claim that Brenner was improperly using the "prestige" of his job to bolster the charges. But when placed back in its proper context, the testimony was directly relevant to and focused on proving Brenner's reasonable fear of Stanley.¹⁴ If Stanley's argument were correct, no prosecutor-victim could ever testify about his victimization; anyone could threaten a prosecutor with impunity.

Stanley also relies on an unpublished case, State v. Sakawe, to support his argument that Brenner should have been disqualified from testifying. But that case is easily distinguishable.¹⁵ There, this Court held that a deputy prosecutor had violated the advocate-witness rule by

¹⁴ The length restrictions of this brief and the number of issues Stanley has raised on appeal prevent the State from addressing all of these excerpts individually. For a few examples, consider RP 303-04 (discussing his observations of Stanley to explain why Brenner believed the threats were serious); RP 305-06 (explaining how two victims had moved out of state and that Stanley's knowledge of such fact contributed to his fear); RP 315 (explaining that he monitored Stanley's custody status because he was afraid Stanley would carry out his threats).

¹⁵ No. 70563-6-I, 2015 WL 7721826 (Nov. 30, 2015).

testifying (in the retrial of a defendant whose case she had initially tried) about factual matters regarding crucial surveillance video she had viewed but had since been lost. 2015 WL 7721826 at *3, *6-8. There, the prosecutor’s testimony “presented a risk that the jury accorded undue credit to her testimony concerning her descriptions of the surveillance video content.” Id. at *8. But here, Brenner related his personal experiences with his prior prosecution of Stanley to explain his fear of Stanley’s current threats against him. Sakawe provides no guidance.¹⁶

In short, even if this Court reaches the merits of his claim, Stanley fails to show that Ernsdorff should have been disqualified from his case, or that Brenner, as a charged victim of Stanley’s new threats, should have been disqualified as a witness. This claim should be rejected.

8. STANLEY HAD A FAIR TRIAL.

Stanley also argues that cumulative evidentiary error warrants reversal. The cumulative error doctrine applies where several trial errors, standing alone, may not be sufficient to merit reversal, but when combined may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003). The defendant must establish multiple trial

¹⁶ It is, however, worth noting that the court in Sakawe recognized that the prosecutor’s testimony did not violate RPC 3.7 “because she was not the advocate for the State in the retrial.” 2015 WL 7721826 at *6.

errors and show that accumulated prejudice affected the verdict. The doctrine does not apply where the defendant has failed to establish multiple errors, or where the errors had little or no effect on the outcome. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, Stanley has failed to establish any error, so he cannot obtain reversal based on the cumulative error doctrine.

9. THE TRIAL COURT PROPERLY BASED STANLEY’S EXCEPTIONAL SENTENCE ON THE AGGRAVATING FACTOR OF EGREGIOUS LACK OF REMORSE.

Stanley contends that the “egregious lack of remorse” aggravating factor was not “legally applicable” to him given the facts of his case. He argues that it was based on conduct already accounted for in the calculation of his standard range. But the aggravator was not based on Stanley’s prior acts of cyberstalking or even the fact of his current threats alone. Rather, it was based on his attitude about and indifference toward the victims’ terror, and his persistent belief that they, along with the criminal justice system, were responsible for his incarceration. The State presented sufficient evidence of Stanley’s egregious lack of remorse — an aggravator based on an ongoing mental state rather than a specific act. The trial court properly exercised its discretion to impose an exceptional sentence based on the jury’s findings.

a. Relevant Facts.

Here, the jury was instructed that:

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; RP 651. See WPIC 300.36.

In closing argument, the State reviewed the testimony of the women who had described how Stanley's latest threats had resurrected all the terror they had felt from the previous years of threats. RP 654-56. In discussing the aggravating factor, the State focused on Stanley's ongoing indifference to the harm he caused his victims. RP 668. "Clearly, the threats that Mr. Stanley made from Shelton, Washington, in the prison cell reflected an indifference to the harm that those women have gone through, not for a day, not for a week, not for a year, but for eight years now," the State argued. RP 668.

The jury found that Stanley's crimes against the four women demonstrated an egregious lack of remorse. CP 155-58. The jury also

found the aggravating factor of retaliation against an officer of the court as to count five pertaining to prosecutor Brenner. CP 159-60. At sentencing, the State argued that an exceptional sentence — running each of the standard-range sentences consecutively — was appropriate based on both aggravating factors. CP 287-88. The State noted that the women “have a deep seeded fear that has affected nearly every aspect of their life,” affecting them “every single day for the last eight years whether Mr. Stanley has been in custody or out.” RP 751-52. The State also noted that Stanley’s retaliatory threats against Brenner contributed to his giving up his job as a criminal prosecutor. RP 752-53. The State argued that the present crimes showed that Stanley’s behavior “has only been escalating over the last eight years” despite being convicted and sent to prison. CP 288. The State argued that a standard-range sentence “does not adequately address the impact his threats had on his victims and does not give them the peace and normalcy they deserve.” CP 288.

The trial court agreed, imposing the consecutive time the State requested based on both aggravating factors of egregious lack of remorse and retaliation against a public official providing a substantial and compelling need to depart from the presumption of concurrent sentences. CP 307. Concurrent sentences of 77-102 months does “not adequately

account for [Stanley's] current crimes and lack of remorse," the court concluded. RP 789.

b. Sufficient Evidence Supported The Aggravating Factor Of Egregious Lack Of Remorse.

A trial court "may impose a sentence outside the standard sentence range for an offense if it finds ... that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

Demonstrating or displaying an egregious lack of remorse is one of the aggravating circumstances that can constitute a substantial and compelling reason for an upward departure from the sentencing guidelines. RCW 9.94A.535(3)(q).

A jury's finding of egregious lack of remorse is reviewed under a sufficiency of the evidence standard. State v. Zigan, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012). This Court determines whether, in the light most favorable to the State, any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt. Id. An element of the charged offense may not be used to justify an exceptional sentence. State v. Ferguson, 142 Wn.2d 631, 648, 15 P.3d 1271 (2001). An exceptional sentence may not be imposed on factors inherent to the crime of conviction. State v. Thomas, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999).

Washington courts have historically treated the egregious lack of remorse aggravating factor as a state of mind that may be proved by discrete examples of words and conduct displaying that state of mind. “Whether a sufficient quantity or quality of remorse is present in any case depends on the facts.” State v. Ross, 71 Wn. App. 556, 563, 861 P.2d 473 (1993). In Ross, for example, the court held the egregious lack of remorse factor was supported by showing that Ross continued to blame the justice system for his crimes and that his statement that he was sorry was not credible. Id. at 563-64.

The language of the pattern jury instruction also reflects the courts’ historic treatment of this aggravator as an ongoing mental state that may be proved by multiple displays or demonstrations rather than being a discrete act. See 11A WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 300.26 at 811 (4th ed. 2016) (aggravator may be proved by words or conduct that “reflected *an ongoing indifference* to such harm” (emphasis added)). This is the portion of the instruction that the State highlighted to the jury in Stanley’s case. RP 668.

The overall point is that the lack of remorse aggravator is entirely fact-specific, turning on a determination of the *mental attitude* of the defendant about the commission of the crimes. Unlike some aggravating circumstances, which are based on specific concrete acts, this aggravating

factor is not about the act itself but the perpetrator's attitude about it and indifference toward it, as demonstrated by his words or conduct.

Stanley's argument is essentially that the State did not provide sufficient evidence of lack of remorse separate from the act of threatening the same women anew. He incorrectly frames this as a challenge to the *applicability* of the aggravating factor. For example, Stanley cites to State v. Davis to propose that this issue should be reviewed as a matter of law. 182 Wn.2d 222, 229, 340 P.3d 820 (2014). But there, the supreme court determined as a matter of law that an aggravating factor of destructive impact to persons other than the victims was not applicable to the crime of rendering criminal assistance because the victim of rendering criminal assistance was the entire public in general. Id. at 231-32. That holding was not about the facts but whether the aggravator could ever apply to a particular underlying crime. Here, Stanley is arguing that there were insufficient facts outside the commission of the crime itself to support the aggravator. The argument is incorrectly framed as an applicability challenge. The proper review is for the sufficiency of the evidence.

There was ample evidence for a rational jury to conclude that Stanley demonstrated an egregious lack of remorse when he continued to blame the victims and the system for his incarceration, manifested in his continued threats to the lives of the women he already had spent nearly a

decade terrorizing. After having his probation revoked and being sent back to prison, Stanley spent two weeks ranting to his cellmate about how he was “pissed off about the witnesses,” could not understand why they had testified, and repeatedly said that he wanted to “fucking kill them.” RP 208, 213, 215, 217-18, 224-25. Stanley believed killing them was justified for what they had done to him and stated that one way or the other he was going to “take care” of them. RP 229, 230.

Stanley made the current threats despite having listened to the victims’ previous testimony in the cyberstalking trial about the effect of his relentless and graphic threats to kill them. And the jury here heard how Stanley blamed the victims for his situation and how he would feel justified in killing them. The jury also heard from the women that their terror had significantly increased as a result of Stanley’s most recent threats. This evidence all added up to the fact that Stanley *continued* to blame the victims and the system for his crimes and that he had an absolute indifference to the increased terror he would inflict by making new threats to the women from prison. His indifference and victim-blaming was sufficient to support the aggravator. See Ross, 71 Wn. App. at 563-64.

This evidence is not bound up in the elements of proving the knowing threat itself. One can knowingly threaten someone a second time

without being entirely indifferent and remorseless about it. Knowledge and indifference are two separate mental states. And the evidence here supported both. Based on the jury's proper finding that Stanley's crimes reflected this aggravating factor, the trial court acted well within its discretion to find the factor to be a substantial and compelling reason to impose an exceptional sentence of consecutive terms.

10. STANLEY'S VAGUENESS CHALLENGE FAILS.

Stanley also claims that the egregious lack of remorse aggravating factor violates due process because it is unconstitutionally vague. Stanley is mistaken. Exceptional sentence aggravating factors are not subject to a void-for-vagueness challenge under well-established precedent. Stanley cannot show that State v. Baldwin¹⁷ is incorrect and harmful, particularly given recent United States Supreme Court precedent confirming that discretionary sentencing guidelines are not subject to vagueness review. Even if Stanley could raise a vagueness challenge, his claim would fail because the egregious lack of remorse aggravating factor was not unconstitutionally vague as applied to him.

¹⁷ 150 Wn.2d 448, 78 P.3d 1005 (2003).

a. Baldwin Remains Good Law.

Nearly 25 years ago, this Court unanimously held in Baldwin that the exceptional sentence guidelines are not subject to a vagueness challenge because they do not define conduct, allow for arbitrary arrest and prosecution, or set penalties. 150 Wn.2d at 459. Critically, the court held that the exceptional sentence guidelines do not create a “constitutionally protectable liberty interest” because they “are intended only to structure discretionary decisions affecting sentences,” and do not require that a specific sentence be imposed. Id. at 461.

Since Baldwin, this Court has routinely rejected vagueness challenges to aggravating circumstances — even after Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). E.g., State v. Chanthabouly, 164 Wn. App. 104, 141-42, 262 P.3d 144 (2011); State v. DeVore, 2 Wn. App. 2d 651, 665, 413 P.3d 58 (2018); State v. Brush, 5 Wn. App. 2d 40, 63, 425 P.3d 545 (2018).

Under *stare decisis*, a court must adhere to a prior ruling unless the party seeking to set aside the decision can make “a clear showing” that the rule is “incorrect and harmful.” In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Stanley argues that Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), and Beckles v. United States, ___ U.S. ___, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017) undercut the

holding in Baldwin, but that argument was rejected by this Court in both DeVore and Brush.¹⁸ The aggravating factor of egregious lack of remorse is not subject to vagueness review.

- b. Alternatively, The Egregious Lack of Remorse Aggravating Factor Is Not Unconstitutionally Vague As Applied To Stanley.

Even if the aggravating factor is subject to a vagueness challenge, Stanley's claim fails. A statute is presumed to be constitutional and will be upheld on appeal unless the party challenging it proves that the statute is unconstitutional beyond a reasonable doubt. City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). A statute meets constitutional requirements "[i]f persons of ordinary intelligence can understand what the ordinance proscribes." City of Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). It is not enough to hold a statute vague merely because "a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." Eze, 111 Wn.2d at 27. Vagueness "is not mere uncertainty." State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). The test is whether a person of ordinary intelligence can understand what the statute proscribes or requires,

¹⁸ Stanley also cites to State v. Allen, 192 Wn.2d 526, 431 P.3d 117 (2018), for the proposition that "facts which increase the punishment for an offense are equivalent to essential elements," but he does not adequately explain how that renders the holding in Baldwin incorrect or harmful.

notwithstanding some possible areas of disagreement. Douglass, 115 Wn.2d at 179. Vagueness challenges to a statute that do not involve the First Amendment rights are evaluated as applied to the particular facts of the case. Id. at 182.

Stanley contends the aggravator is vague as applied to him, arguing that he had no control over any harm he caused. Stanley says that harm was only inflicted because of the actions of third parties in relaying the threats to the victims. He claims he could not be expected to know that “an egregious lack of remorse” could be found from threats made to someone other than the victims themselves. This argument is wide of the mark. Whether Stanley could expect that his cellmate would pass along his threats has no bearing on whether he egregiously lacked remorse for making them. Lack of remorse is a mental state aggravator in which the defendant is extremely indifferent to the harm he causes. While there may be “some possible areas of disagreement,” or the “exact point” of defining a violation not completely evident, Stanley has not proven beyond a reasonable doubt that a person of ordinary intelligence would be unable to know what the statute proscribes. Douglass, 115 Wn.2d at 179. His vagueness claim, even if considered, should be rejected.

**11. THE EGREGIOUS LACK OF REMORSE
AGGRAVATING FACTOR IS NOT FACIALLY
OVERBROAD.**

Finally, Stanley argues that the egregious lack of remorse aggravating factor is facially overbroad because it allows enhanced punishment for a substantial amount of constitutionally protected speech. Stanley's claim should be rejected outright because the statute does not reach constitutionally protected speech or expressive conduct.

The constitutionality of a statute is reviewed de novo. State v. Immelt, 173 Wn.2d 1, 6, 267 P.3d 305 (2011). A law is overbroad in violation of the First Amendment if it prohibits a substantial amount of constitutionally protected speech in relation to its plainly legitimate sweep. Eze, 111 Wn.2d at 31; City of Bellevue v. Lorang, 140 Wn.2d 19, 26, 992 P.2d 496, 500 (2000). The first task in an overbreadth analysis is to determine if a statute regulates constitutionally protected speech or expressive conduct. State v. Williams, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). Only then does the court examine whether it prohibits a real and substantial amount of protected free speech activities in relation to its plainly legitimate sweep. State v. Halstien, 122 Wn.2d 109, 122-23, 857 P.2d 270 (1993). If a statute does not implicate First Amendment concerns, it cannot be overbroad and there is no need to examine whether it prohibits a substantial amount of speech or whether a limiting

construction is possible. In re Det. of Danforth, 173 Wn.2d 59, 70, 264 P.3d 783 (2011).

Here, the egregious lack of remorse aggravating factor in RCW 9.94A.535(3)(q) does not punish or regulate speech in any manner. Rather, it allows for enhanced punishment for extreme indifference to the harm resulting from the underlying crime. CP 137. The fact that speech and expressive conduct can be used to *prove* the extreme indifference aggravator is irrelevant. Criminal statutes that merely use speech to establish the elements of a crime or to prove motive or intent do not implicate the First Amendment. Wisconsin v. Mitchell, 508 U.S. 476, 489, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993). There is a difference between making speech the crime and relying on speech to prove a crime. See Halstien, 122 Wn.2d at 124-25 (sexual motivation aggravating factor does not implicate the First Amendment).

Stanley makes no attempt to explain how the aggravator punishes speech or expressive conduct.¹⁹ Instead, he relies solely on Brush, supra. There, this Court considered an overbreadth challenge to RCW 9.94A.535(3)(h)(i), the aggravating factor which requires that the

¹⁹ Indeed, in his earlier argument that the aggravator is unconstitutionally vague, Stanley concedes that the correct standard of review is whether the aggravator is vague as applied to his conduct — the standard for vagueness challenges to statutes that do *not* implicate First Amendment rights. See Brf. of App. at 61.

underlying crime be “part of an ongoing pattern of psychological, physical, or sexual abuse of a victim...” Although Brush concluded that the aggravator was not overbroad, it determined that psychological abuse *could* include speech and expressive conduct, and thus the First Amendment was implicated. 5 Wn. App. at 52-53. But here, the conduct that is punished is the defendant’s extreme indifference to the harm that results from his crime. His words or expressive conduct may be used to prove such indifference, but it is the indifference itself that is punished. The “egregious lack of harm” aggravating factor does not implicate the First Amendment and is not facially overbroad.

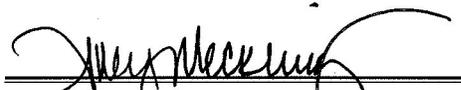
E. CONCLUSION

For all of the above reasons, the State respectfully requests that this Court affirm Stanley’s convictions and sentence.

DATED this 12th day of March, 2020.

Respectfully submitted,

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