

66763-7

66763-7

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 26 PM 4:50

NO. 66763-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DEMETRI MANNING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

A. SUMMARY OF REPLY 1

B. ARGUMENT IN REPLY 2

 1. REVERSAL OF THE ASSAULT CONVICTION IS
 REQUIRED BECAUSE THE TO-CONVICT
 INSTRUCTION LACKED THE ESSENTIAL INTENT
 ELEMENT 2

 2. BECAUSE THE STATE PRESENTED NO EVIDENCE
 THAT THE HEARSAY STATEMENTS IDENTIFYING
 MR. MANNING WERE MADE FOR AND PERTINENT
 TO MEDICAL DIAGNOSIS OR TREATMENT, THE
 COURT ERRED IN ADMITTING THE STATEMENTS 9

 3. MR. MANNING DID NOT WAIVE HIS OBJECTION TO
 ADMITTANCE OF THE 911 CALL, WHICH WAS
 INADMISSIBLE HEARSAY THAT SHOULD HAVE BEEN
 EXCLUDED 12

 4. BECAUSE THE ESSENTIAL 'TRUE THREAT' ELEMENT
 WAS NOT PLED IN THE INFORMATION AND
 INCLUDED IN THE 'TO-CONVICT' INSTRUCTION, THE
 CYBERSTALKING CONVICTION SHOULD BE
 REVERSED 14

 5. BECAUSE EVEN VIEWING THE EVIDENCE IN THE
 LIGHT MOST FAVORABLE TO THE STATE,
 INSUFFICIENT EVIDENCE SUPPORTED THE TRUE
 THREAT ELEMENT, THERE WAS INSUFFICIENT
 EVIDENCE TO FIND MR. MANNING COMMITTED
 CYBERSTALKING 18

 6. CUMULATIVE ERROR DENIED MR. MANNING HIS
 CONSTITUTIONAL RIGHT TO A FAIR TRIAL 19

7. THE STATE AGREES THE ALCOHOL EVALUATION
COMMUNITY CUSTODY CONDITION WAS
IMPROPERLY IMPOSED..... 19

C. CONCLUSION.....20

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Pers. Restraint of Call</u> , 144 Wn.2d 315, 28 P.3d 709 (2001).....	3, 4
<u>State v. Bradley</u> , 141 Wn.2d 731, 10 P.3d 358 (2000)	4
<u>State v. Davis</u> , 119 Wn.2d 657, 835 P.2d 1029 (1992)	5
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	5
<u>State v. Emmanuel</u> , 42 Wn.2d 799, 259 P.2d 845 (1953)	8
<u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992).....	5
<u>State v. Johnston</u> , 156 Wn.2d 355, 127 P.3d 707 (2006).....	16, 17
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996)	6, 8
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005)	2
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	2, 3, 6
<u>State v. Schaler</u> , 169 Wn.2d 274, 236 P.3d 858 (2010)	17
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997)	8
<u>State v. Taylor</u> , 140 Wn.2d 229, 996 P.2d 571 (2000)	6
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004)	3
<u>State v. Wakefield</u> , 130 Wn.2d 464, 925 P.2d 183 (1996).....	3, 4
<u>State v. Young</u> , 160 Wn.2d 799, 161 P.3d 967 (2007)	13

Washington Court of Appeals Decisions

<u>In re Dependency of S.S.</u> , 61 Wn. App. 488, 814 P.2d 204 (1991).....	10
<u>State v. Alphonse</u> , 147 Wn. App. 891, 197 P.3d 1211 (2008)	4

<u>State v. Butler</u> , 53 Wn. App. 214, 766 P.2d 505 (1989).....	10
<u>State v. Campbell</u> , 163 Wn. App. 394, 260 P.3d 235 (2011).....	6
<u>State v. Hall</u> , 104 Wn. App. 56, 14 P.3d 884 (2000).....	5
<u>State v. Irons</u> , 101 Wn. App. 544, 4 P.3d 174 (2000).....	6
<u>State v. Sims</u> , 77 Wn. App. 236, 890 P.2d 521 (1995).....	10
<u>State v. Ward</u> , 125 Wn. App. 138, 104 P.3d 61 (2005).....	13

United States Supreme Court Decisions

<u>Taylor v. Kentucky</u> , 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).....	19
<u>Virginia v. Black</u> , 538 U.S. 343, 1232 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).....	15
<u>Williams v. Taylor</u> , 529 U.S. 362, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000).....	19

Other Federal Decisions

<u>United States v. Joe</u> , 8 F.3d 1488 (10th Cir. 1993).....	10
<u>United States v. Renville</u> , 779 F.2d 430 (8th Cir. 1985).....	10

Constitutional Provisions

Const. art. I, § 3.....	19
U.S. Const. amend. XIV.....	19

Statutes

RCW 9A.36.011.....	7
--------------------	---

Other

WPIC 35.13.....	7
-----------------	---

A. SUMMARY OF REPLY

The State's arguments in response to appellant's opening brief fail to overcome the six independent bases for reversing Mr. Manning's convictions: (1) the to-convict jury instruction on assault lacked the intent element; (2) Ms. King's out-of-court statements identifying the perpetrator should not have been admitted under the medical diagnosis and treatment exception to the hearsay rule, (3) the trial court erred in admitting Ms. King's 911 call because it did not come within the excited utterance exception to the hearsay rule; (4) the jury instructions and charging document lacked the "true threat" element for cyberstalking, (5) insufficient evidence supported the "true threat" element; and (6) cumulative error denied Mr. Manning a fair trial.

In the alternative, as the State concedes, the community custody provision requiring an alcohol evaluation was imposed improperly.

B. ARGUMENT IN REPLY

1. REVERSAL OF THE ASSAULT CONVICTION IS REQUIRED BECAUSE THE TO-CONVICT INSTRUCTION LACKED THE ESSENTIAL INTENT ELEMENT.

The State incorrectly argues that this Court should not review the trial court's failure to include the essential intent element in the second-degree assault to-convict instruction. The State confuses concepts and is legally incorrect that review is barred. First, the failure to instruct the jury on an essential element of the crime charged is a manifest constitutional error. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). The case law relied upon by the State sets forth this same principal. State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009); see Resp. Br. at 9-10 (citing O'Hara, 167 Wn.2d 91). As O'Hara itself makes clear, *manifest* constitutional error is demonstrated where "the error is so obvious on the record that the error warrants appellate review." 167 Wn.2d at 100. Though this determination may be couched in terms of "actual prejudice," because the determination is distinct from harmless error analysis, the inquiry at this stage must be on the foreseeability of the error. Id. Thus, "to determine whether an error is practical and identifiable [i.e. manifest], the appellate court must

place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” Id. Here, the error was obvious from the face of the jury instructions. Therefore, under RAP 2.5(a)(3), the issue can be raised for the first time on appeal.

The State next incorrectly argues that the invited error doctrine bars review because “the defendant agreed to the giving of” the to-convict instruction on assault. See Resp. Br. at 8, 9. The invited error doctrine prevents a litigant from complaining of a trial error that he or she affirmatively proposed. In re Pers. Restraint of Call, 144 Wn.2d 315, 328-29, 28 P.3d 709 (2001).¹ It applies only against a litigant who took affirmative steps to set up the error. Id. The doctrine is thus inapplicable where a litigant simply fails to object. See id.; State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996) (invited error doctrine inapplicable where court took initiative beyond defendant’s request and defendant did not object).

Here, Mr. Manning did not propose the instruction provided by the court. Mr. Manning simply did not object to that part of the instruction that lacked the essential element of intent, and the court

¹ The State bears the burden of proving invited error. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

gave an instruction on assault in the second degree that lacked the intent element. 3RP 97-98; CP 65. The State is factually incorrect that Mr. Manning affirmatively agreed to the instruction. Resp. Br. at 8-9 (arguing defendant “affirmatively” agreed with to-convict instruction) with 3RP 97-98 (discussion of self-defense instruction and potential indication by defense counsel that self-defense instruction was proper as given).

The cases cited by the State do not support the its invited error argument. Resp. Br. at 9 (citing State v. Alphonse, 147 Wn. App. 891, 899, 197 P.3d 1211 (2008), which notes courts will not consider errors in jury instructions proposed by defendant himself, and State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000), which affirms Court of Appeals holding that defendant is barred from claiming error on appeal in a jury instruction defendant himself proposed).

Mr. Manning did not propose the defective instruction. Mr. Manning’s failure to object to the erroneous language set forth by the court does not prevent him from raising this manifest constitutional error here. Mr. Manning did not invite the error. See Call, 144 Wn.2d at 328-29; Wakefield, 130 Wn.2d at 475.

The State agrees that the to-convict instruction is reviewed de novo. Resp. Br. at 7 (citing State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003); see Op. Br. at 13. Thus, as argued in Mr. Manning's opening brief, Division Three's opinion in State v. Hall, where the court reviewed for abuse of discretion, does not address the issue raised here. 104 Wn. App. 56, 60, 61, 14 P.3d 884 (2000).

The State mischaracterizes Mr. Manning's argument with regard to the difference between the inclusion of elements in charging documents (and the cases State v. Davis and State v. Hopper) and to-convict instructions. See Resp. Br. at 11. Mr. Manning does not argue that the words used in each document have different meanings depending on the document. Rather, the audience of each document matters when the adequacy of the content is liberally reviewed. In Davis and Hopper, the Supreme Court liberally reviewed the sufficiency of the charging documents that omitted the mens rea. State v. Davis, 119 Wn.2d 657, 662, 835 P.2d 1029 (1992); State v. Hopper, 118 Wn.2d 151, 158, 822 P.2d 775 (1992). Thus, in those cases the court had to determine whether the charging document provided sufficient notice to criminal defendants entitled to representation by counsel. Here,

however, Mr. Manning challenges the lack of mens rea element in the to-convict instruction, which otherwise provided a yardstick by which the lay jury was to determine Mr. Manning's innocence or guilt. Because a jury is made of up of average citizens, jury instructions must be manifestly clear. State v. Campbell, 163 Wn. App. 394, 407-08, 260 P.3d 235 (2011) (citing State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996) overruled on other grounds by O'Hara, 167 Wn.2d 91; State v. Irons, 101 Wn. App. 544, 550, 4 P.3d 174 (2000)). This standard does not apply to charging documents, such as those reviewed in Davis and Hopper.

Moreover, the State misleadingly applies the court's reasoning in State v. Taylor to the case at bar. Resp. Br. at 11-12. The State argues that Taylor stands for the proposition that "assault" includes the concept of intent regardless of when or to whom it is set forth. However, the Taylor case dealt only with the context of a charging document. 140 Wn.2d 229, 242-43, 996 P.2d 571 (2000). In Taylor, the Supreme Court refused to apply different meanings to the same word when used in a charging document based on the standard of review or level of scrutiny applied. Id. at 243 (referring exclusively to charging documents as cases dealing with same). But the Court did not abandon LeFaber's requirement

that jury instructions be held to a unique standard based on the particular lay audience. Nor did the Taylor Court discuss the interpretation of assault in a to-convict instruction. Accordingly, Taylor is no more applicable than Davis and Hopper.

The State conveniently relies on the statutes and WPICs for other degrees of assault to argue that intent is not an essential element of assault in the second degree. Resp. Br. at 13. But the State's argument fails to recognize that the WPIC for assault in the second degree—the offense at issue here—specifically sets forth the element of intent, contrary to the court's instruction below. Compare WPIC 35.13 with CP 65. The State attempts to excuse the lack of the intent element by arguing the intent language is only included in the statute "to make it apparent the different *mens rea* included in the statute, the intent required in committing the assaultive act versus the *mens rea* required as to the harm inflicted, i.e., that the defendant 'recklessly inflicts substantial bodily harm.'" Resp. Br. at 13 (quoting RCW 9A.36.011). But the State fails to explain why such language is necessary to "to make apparent" the *mens rea* in the statute but is not necessary in the to-convict instruction. Jury instructions must be manifestly clear to a

reasonable juror, thus they are not subject to the same rules of interpretation as a statute. LeFaber, 128 Wn.2d at 902.

Notably, the State does not disagree that intent is an essential element of second-degree assault. Because it is an essential element of the crime, it must be included in the jury instruction. This is particularly true where the to-convict instruction presented here purported to provide the jury with a yardstick by which to measure Mr. Manning's innocence or guilt. See State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 817, 819, 259 P.2d 845 (1953); CP 65.

Finally, as argued in the opening brief, the error requires automatic reversal. However, even under the constitutional harmless error standard, which requires the State to prove beyond a reasonable doubt that the result would have been the same absent the error, reversal is required. The alleged assault victim testified she did not know whether Mr. Manning punched her. 2RP 58. If she told the police a different story, it was because she was mad at Mr. Manning and wanted the police to "get him." 2RP 63. Accordingly, the evidence was not clear that Mr. Manning acted intentionally.

2. BECAUSE THE STATE PRESENTED NO EVIDENCE THAT THE HEARSAY STATEMENTS IDENTIFYING MR. MANNING WERE MADE FOR AND PERTINENT TO MEDICAL DIAGNOSIS OR TREATMENT, THE COURT ERRED IN ADMITTING THE STATEMENTS.

The State recognizes that the hearsay exception provided for in ER 803(a)(4) allows for the admissibility of statements only if “made for the purposes of medical diagnosis or treatment and describing [the injury] insofar as reasonably pertinent to diagnosis or treatment.” Resp. Br. at 16. On this basis, Mr. Manning argued that Ms. King’s statements identifying the perpetrator of her alleged injuries were inadmissible because the State proved neither that they were made for the purpose of medical diagnosis or treatment nor that they were reasonably pertinent to diagnosis or treatment. Mr. Manning’s argument recognized that the identity of the perpetrator has been allowed in other cases, but only where the proper foundation demonstrates a nexus between the identity and medical diagnosis or treatment.

The State argues that in *all* instances of alleged child abuse and domestic violence, evidence of identity is allowed under ER 803(a)(4). Even the State’s case law does not support this argument—instead it supports the principle that an evidentiary

foundation must connect the out-of-court statement with the specific instance of medical diagnosis or treatment in which it was made. Resp. Br. at 16-17; State v. Butler, 53 Wn. App. 214, 218-19, 221-23, 766 P.2d 505 (1989) (finding child's statement of identity admissible where physician testified to its importance in his medical determination of whether injuries are accidental or intentionally inflicted, and discussing specific context of child abuse); In re Dependency of S.S., 61 Wn. App. 488, 503, 814 P.2d 204 (1991) (child's statements to social worker admissible because social worker's duty was to evaluate child's psychological harm and provide treatment, which could be thwarted by continued abuse); United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993) (citing testimony by treating physician that identity is "extremely important" to his treatment of patient); State v. Sims, 77 Wn. App. 236, 239-41, 890 P.2d 521 (1995) (citing specific testimony by health care provider and social worker that tied identity to diagnosis or treatment); United States v. Renville, 779 F.2d 430, 437 (8th Cir. 1985) (citing extensive testimony by physician that identity was important to his medical diagnosis and treatment in child abuse case); accord Op. Br. at 23-25 (discussing additional cases).

The evidentiary rules set forth a limited exception under ER 803(a)(4) and neither the Legislature nor the courts have created a per se expansion to include statements made in all cases of alleged domestic violence. This Court should not do so here. The burden was on the State, as the proponent of the hearsay, to demonstrate that Ms. King's statements of identity were reasonably pertinent to medical diagnosis or treatment. The testifying nurse offered no such evidence. Consequently, admission of the identity portions of Ms. King's statements was erroneous.

Nor was the error harmless. Ms. King's statements to medical providers alleging Mr. Manning was the source of her injuries lent credence to the State's case that King's recantation was false. The out-of-court statements were made within days of the incident. Accordingly, they were likely given greater weight than Ms. King's in-court recantation. Further, in Ms. King's trial testimony she could not even say whether Mr. Manning hit her. 2RP 58. The weight of this testimony was greatly diminished by the admission of improper hearsay statements.

3. MR. MANNING DID NOT WAIVE HIS OBJECTION TO ADMITTANCE OF THE 911 CALL, WHICH WAS INADMISSIBLE HEARSAY THAT SHOULD HAVE BEEN EXCLUDED.

The State contends Mr. Manning waived his argument that the trial court abused its discretion by admitting the 911 call under the excited utterance exception. Resp. Br. at 22-23, 28. First, there was insufficient basis to admit the call even prior to Ms. King's in-court recantation. Ms. King was completely calm during her conversation with the 911 operator. Exhibit 4 (Track #1). Her initial statement is contrived, not spontaneous: "I'm reporting a domestic violence." *Id.* at 00:03-06. She then provided the license plate number and a description of her boyfriend's car, even though the operator did not request it. *Id.* at 01:07-1:35. Tellingly, she expressly declined medical aid. *Id.* at 2:07-:30. Finally, when the police arrived to speak with Ms. King, she was not there. 3RP 67. Aside from the content of Ms. King's report to 911, no direct or circumstantial evidence demonstrates Ms. King was under the stress of a startling event.

Moreover, though defense counsel did not renew the objection during Ms. King's testimony, the issue had been subject to extensive argument before the court. And the court had already

determined it would allow the contents of the call to come in, even though it was aware Ms. King was likely to not appear at trial or to recant her statements. Unlike the cases relied on by the State, defense counsel squarely challenged Ms. King's 911 call on the same basis alleged on appeal—it fails to satisfy the excited utterance exception to the hearsay rule. See Resp. Br. at 27; 1RP 111-17. Moreover, in State v. Young, 160 Wn.2d 799, 819, 161 P.3d 967 (2007), our Supreme Court specifically considered events at trial, which occurred after the trial court's evidentiary ruling, in affirming that ruling. Thus, in reviewing the trial court's ruling, this Court may look to events that post-dated that ruling.

For the reasons set forth in the opening brief, the trial court erred in admitting the 911 call under the excited utterance exception. Op. Br. at 30-36. Because the State concedes that, if the admission was error, it was not harmless, this Court should reverse Mr. Manning's assault conviction. See State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (issue conceded where no argument set forth in response); Op. Br. at 36-37 (arguing error requires reversal under harmless error standard).

4. BECAUSE THE ESSENTIAL 'TRUE THREAT' ELEMENT WAS NOT PLED IN THE INFORMATION AND INCLUDED IN THE 'TO-CONVICT' INSTRUCTION, THE CYBERSTALKING CONVICTION SHOULD BE REVERSED.

In his opening brief, Mr. Manning argued that the failure to include the essential element that the threat forming the basis of cyberstalking must have been a “true threat” requires reversal of that conviction. Op. Br. at 37-45. Contrary to the State’s characterization, Mr. Manning does not contend that the entire definition of true threat must be included in the charging document and to-convict instruction. See Resp. Br. at 29. Instead, those documents must simply indicate that the allegedly threatening statements were “true threats.” For example, for the information to have complied with the constitutional requirement, the State need only have charged “. . . and the threat was a [true] threat to kill the person contacted.” CP 8 (information (bracketed language added)). Relying on its mischaracterization, the State further argues that the language describing what constitutes a true threat is definitional only. Resp. Br. at 29-30, 32. While that might true of the full paragraph of definitional language included in the State’s response brief, the element of “true threat” is not definitional and

those words should be included in the charging document and to-convict instruction.

The State contends the “true threat” language need not be included here because the cyberstalking statute requires “the defendant act with the actual ‘intent to harass, intimidate, torment or embarrass.’” Resp. Br. at 33. The State ignores, however, that the State below (as well as the court and Mr. Manning) understood that the offense required a showing of a true threat. See CP 78 (jury instruction 21 defining true threat, though not included in to-convict instruction).

The State further relies on Virginia v. Black to argue for the first time that the intent element of the cyberstalking statute on its face satisfies the First Amendment. 538 U.S. 343, 1232 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); Resp. Br. at 33-34. But the State fails to recognize that Black dealt with the very specific context of cross-burning. After reciting extensively the historical connection between cross burning and the Klu Klux Klan, the Black Court recognized “often the cross burner intends that the recipients of the message fear for their lives.” 538 U.S. at 357. Therefore, “in light of cross burning’s long and pernicious history as a signal of impending violence,” a statute prohibiting cross-burning with intent

to intimidate did not violate the First Amendment. Id. at 363. The Court did not, however, hold that prohibiting any action or words communicated with intent to intimidate per se satisfied the First Amendment.

Fittingly, the State does not argue that the “true threat” requirement should not have been presented to the jury at all nor supported the crime charged in the information. Accordingly, the dispute here appears to be solely as to *how* (or where) the element needs to be presented, i.e. whether it needs to be alleged on the face of the information and included in the to-convict instruction.

Though the State relies heavily upon State v. Johnston, the question presented here was not decided in that case. Resp. Br at 35-36. The Johnston Court held that a conviction under the harassment statute requires a true threat and that the jury must be instructed on the meaning of a true threat. State v. Johnston, 156 Wn.2d 355, 366, 127 P.3d 707 (2006). Though the Court emphasized the centrality of the true threat requirement, the opinion does not squarely hold whether “true threat” is an essential element that must be included in the charging document and to-convict instruction. That Johnston does not reach this issue is made obvious by the Supreme Court’s acceptance of review of the

issue in State v. Allen. No. 86119-6 (oral argument scheduled for Mar. 1, 2012).

In Johnston and State v. Schaler, however, the Supreme Court has strongly suggested that “true threat” is an essential element of offenses that implicate the First Amendment and that element must be included in the to-convict instruction and charging document. Johnston, 156 Wn.2d at 366; State v. Schaler, 169 Wn.2d 274, 288-89 & n.6, 236 P.3d 858 (2010).

In sum, though the issue is not squarely settled in Washington, the Due Process Clause and First Amendment require the “true threat” element be included in the charging document and the to-convict jury instruction. Because the element was neither in the charging document nor to-convict instruction here, Mr. Manning’s conviction should be reversed.

5. BECAUSE EVEN VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, INSUFFICIENT EVIDENCE SUPPORTED THE TRUE THREAT ELEMENT, THERE WAS INSUFFICIENT EVIDENCE TO FIND MR. MANNING COMMITTED CYBERSTALKING.

Contrary to the State's argument in response, Mr. Manning's insufficiency argument does not ignore the applicable standard of review. Rather, even viewing the evidence in the light most favorable to the State, the evidence was insufficient to find Mr. Manning committed cyberstalking. Op. Br. at 46 (setting forth extremely limited evidence of cyberstalking count). None of the evidence showed beyond a reasonable doubt that a reasonable person sending a text message stating "I'm going to fuck you up" would foresee that the statement would be interpreted as a serious intention to inflict harm and not as jest, puffery or idle talk.

The State's brief relies on an exaggeration of the evidence to argue the evidence was sufficient. For example, the evidence did not show that Mr. Manning repeatedly texted Ms. King. And even to the extent more than one text message was allegedly sent, the evidence did not set forth the content of any other messages. The mere fact of more than one text does not constitute a "true threat."

6. CUMULATIVE ERROR DENIED MR. MANNING HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

For the reasons set forth in Mr. Manning's opening brief, even if no single trial error standing alone merits reversal, the combined errors denied Mr. Manning a fair trial. Op. Br. at 47-49; see U.S. Const. amend. XIV; Const. art. I, § 3; Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

7. THE STATE AGREES THE ALCOHOL EVALUATION COMMUNITY CUSTODY CONDITION WAS IMPROPERLY IMPOSED.

The State does not dispute that the trial court improperly entered a special community custody condition requiring Mr. Manning to submit to an alcohol evaluation and comply with recommendations. Accordingly, if the Court does not reverse the conviction on one of the above grounds, this sentencing condition should be vacated. See Op. Br. at 49-52. The State requests that the matter be remanded to the trial court for correction of the error.

If the Court agrees that the error is simply a scrivener's error, then remand for correction is the appropriate remedy.

C. CONCLUSION

Mr. Manning's conviction for assault should be reversed because the to-convict instruction lacked an essential element; the trial court erred in admitting Ms. King's out-of-court statements under the medical diagnosis or treatment exception; and the trial court erred in admitting the 911 call. In addition, Mr. Manning's cyberstalking conviction should be reversed because the to-convict instruction did not include the "true threat" element and insufficient evidence proved that element. Alternatively, both counts should be reversed because cumulative error denied Mr. Manning a fair trial.

If the convictions are not reversed, the Court should strike the non-crime-related community custody provision.

DATED this 26th day of January, 2012.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66763-7-I
v.)	
)	
DEMETRI MANNING,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DENNIS MCCURDY, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] DEMETRI MANNING	(X)	U.S. MAIL
3208 25 TH AVE S	()	HAND DELIVERY
SEATTLE, WA 98144	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF JANUARY, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710