

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SLOAN PATRICK STANLEY,

Appellant.

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Court of Appeals
Division I
State of Washington

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred and violated the First and Fourteenth Amendments by denying Mr. Stanley's motion to instruct the jury that the State must prove he intended his statements to be taken as true threats or knew that his statements would be taken as true threats. CP 145, 158; RP (7/21/15) 179-80, 207-16; RP (7/30/15) 1124.

2. Even under the negligence (reasonable person) standard, the State presented insufficient evidence to prove a true threat to kill on counts six and nine.

3. RCW 9.61.260 is overbroad and vague in violation of the First and Fourteenth Amendments.

4. The prosecutor committed misconduct in closing argument by misstating the law and the facts.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The First and Fourteenth Amendments prohibit criminalizing speech alleged to be a threat unless the statement at issue is a "true threat." In *Virginia v. Black*, the Supreme Court said, "'True threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (emphasis added). In *Elonis v. United*

States, the Court construed the federal “communicating a threat” statute to require a mens rea higher than negligence because “a ‘reasonable person’ standard is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct – awareness of some wrongdoing.” *Elonis*, ___ U.S. ___, 135 S.Ct. 2001, 2011, 192 L.Ed.2d 1 (2015).

In light of these cases and others, Mr. Stanley requested a jury instruction stating that “speech may be deemed a real threat unprotected by the First Amendment only upon proof the speaker subjectively intended speech as a threat or knew that communications would be viewed as threats.” CP 145. The trial court instead instructed the jury that a threat is a statement made “in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat ...”

In refusing to give Mr. Stanley’s proposed instructions, did the trial court err and violate Mr. Stanley’s First and Fourteenth Amendment rights?¹

¹ The issue of whether the “reasonable person” standard for true threats is constitutionally insufficient is pending in our state supreme court in *State v. Trey M.*, no. 92593-3.

2. Even under the negligence (reasonable person) standard, did the State present insufficient evidence to prove a true threat to kill on counts six and nine, where Mr. Stanley made vague and passive pronouncements about his wishes and desires but did not express an intent to kill?

3. Is RCW 9.61.260 overbroad and vague in violation of the First and Fourteenth Amendments, where it criminalizes communications made with intent to “harass” or “embarrass” another person using “any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act”?

4. Did the prosecutor commit misconduct in closing argument when he repeatedly claimed the only things he had to prove beyond a reasonable doubt were the elements in the “to convict” instructions (but the “true threat” instruction is a separate instruction) and where he wrongly claimed alleged victim Miriam Much received messages from Mr. Stanley after she returned from Spain?

C. STATEMENT OF THE CASE

Sloan Stanley endured what the prosecutor in this case called a “horrific childhood,” during which he was abandoned by his mother and tormented by his alcoholic father. RP (10/14/15) 313; ex. 8 at 12, 16, 44, 50, 67, 73, 77, 80. But he persevered, graduated from college, became an engineer, and moved to Seattle. RP (7/27/15) 803; ex. 18.

Mr. Stanley frequently went out to the neighborhood bars after work and on weekends. One of his standard destinations was the Atlantic Crossing. He became acquainted with some of the other regular customers, including Alyson Gray, Miriam (or “Mia”) Much, and Leah Mesford. He also got to know the bartenders, including Dionna Couch and Elizabeth (“Liz”) Williams. RP (7/23/15) 519-20, 578-81; RP (7/27/15) 646-48.

Mr. Stanley remembers staying at the Atlantic Crossing well past closing on June 10-11, 2010. He has a memory of being there with Ms. Gray, Ms. Much, and Ms. Williams. He remembers all three expressing an interest in him sexually, after which he fondled and/or kissed each of them briefly. He also remembers telling them stories that were essentially predictions of future events that ultimately occurred. He woke up at around 5:30 a.m., and realized he and the others had fallen asleep at the bar. He went home and slept for a while, then went to work. Ex. 18.

Mr. Stanley only saw the women a few more times that summer, and they did not acknowledge the events of June 10. Ex. 18. Mr. Stanley’s work took him to England in the fall of 2010. While there, he was beaten and robbed one night while waiting for a cab. He briefly lost consciousness, and the cab driver took him to the hospital. Ex. 19.

Although he was released in short order, the hit to the head caused lingering problems with his sense of smell, headaches, and memory. Ex. 4

at 6; ex. 20 at 4, 10. Mr. Stanley reflected on the night of June 10, and wondered what really happened. He was concerned because he was romantically interested in Ms. Gray but remembered fondling her friends. He was also worried about whether the head injury had caused him to make up memories. RP (7/29/15) 957-59.

In an effort to gain understanding, Mr. Stanley obtained the contact information for Ms. Gray and exchanged e-mail messages with her starting in December of 2010. Ex. 4 at 1. They discussed work, school, and other activities. Ex. 4 at 3-5. Mr. Stanley told Ms. Gray about the head injury he had sustained while he was in England. He asked Ms. Gray out, but she told him she was seeing someone. Ex. 4 at 6-9. Mr. Stanley also asked Ms. Gray about the events of June 10, 2010, but Ms. Gray said she did not remember anything about that night. Ex. 4 at 5, 11. Mr. Stanley became very frustrated. He asked Ms. Gray to help him “clear up these memories” because “it might help me clear the fog on the events of the night my head got hit.” Ex. 4 at 14.

Ms. Gray stopped responding to Mr. Stanley’s messages, and Mr. Stanley became irate. He said, “This is not a [expletive] game. This has been eating away at me for some time and now more than ever. I don’t know what your [expletive] problem is and why you are lying about this night but I assure [you] I will not [expletive] let this go.” Ex. 4 at 15.

Ms. Gray eventually asked Mr. Stanley to stop contacting him. Ex. 10 at 20. This upset Mr. Stanley because he wanted to know what happened the night of June 10, 2010. He swore at Ms. Gray and called her names. Ex. 4 at 21. She responded by saying she had “no recollection” of the night he described, and again asked him to stop contacting her. Ex. 4 at 22. Mr. Stanley insisted that he only wanted to know what happened:

Please I’m begging you, just level with me. I don’t understand what the big deal is. I’ll do anything in return if you just level with me. Please, I just want to put these memories to rest. There is [no] way I could [have] dreamed it up and I’m not making it up.

Ex. 4 at 24. He sent a few more messages, but Ms. Gray did not respond.

Mr. Stanley hoped one of the other women would be able to help him clear up his memories. He e-mailed Ms. Much and explained, “All I want is someone to help me with memories of that Thursday night you know which one I’m talking about, we were there til 5:30 in the morning Alyson makes it sound like I’m making it up.” Ex. 20 at 2. Ms. Much did not respond, but Mr. Stanley kept e-mailing her and asking her what happened on the night in question. Ex. 20 at 3, 7. When he did not receive any response, he called her names. Ex. 20 at 8, 12.

In the meantime, Mr. Stanley continued to e-mail Ms. Gray. He told her she and her friends were being “cruel” by ignoring his requests for help, and he repeatedly begged her to reveal what happened. Ex. 4 at 28,

29. When she didn't answer, he called her names. Ex. 4 at 30. He also became despondent, and talked about killing himself. Ex. 4 at 42. He said, "Oh, how I wish you could just explain to me what is going on." *Id.* On July 7, 2011, Ms. Gray again asked Mr. Stanley not to contact her, and advised him to seek professional help. Ex. 10 at 43.

In August, Mr. Stanley again asked Ms. Much to tell him what happened that night over a year earlier. He said, "Can't you see I just want help with my memories. I'm not going to cause any trouble I just want to know what memories are real or not." Ex. 20 at 10. He became more and more despondent, and in September wrote that the ordeal was making him "physically sick." Ex. 20 at 11. He called Ms. Much names, and used expletives liberally. Ex. 20 at 12. But he also begged for help and said he was suicidal: "You[re] killing me. Is that what you want you want me to kill myself? I can't function anymore. This is to[o] much. Please make it stop. Please, I'm begging. My head can't handle this." Ex. 20 at 12. He continued to send messages to Ms. Much asking her to tell him what happened on June 10 of 2010, and saying that not knowing what happened gave him terrible headaches and made him feel crazy. Ex. 20 at 13. He repeatedly lamented that he was in emotional pain and felt like committing suicide. Ex. 20 at 14.

Ms. Gray and Ms. Much called the police in January of 2012. RP (7/23/15) 589. The responding officer observed that Mr. Stanley appeared to use these communications as an “outlet,” but told the women they could obtain restraining orders. RP (7/27/15) 828. Ms. Gray and Ms. Much decided not to take that step, and instead deleted or stopped using the accounts at which they had received messages from Mr. Stanley. RP (7/23/15) 589-90.

In the meantime, Mr. Stanley also sent messages to Leah Mesford on Facebook. RP (7/27/15) 701. Because they were not Facebook “friends,” the messages went into a different folder than that containing messages from Ms. Mesford’s designated contacts. *Id.* As he had done with the other women, Mr. Stanley asked Ms. Mesford about the particular night in question, and explained he wanted to “clear things up.” RP (7/27/15) 702. Ms. Mesford only looked at the messages every couple of weeks, and never responded to them. Eventually, she stopped checking them altogether. *Id.*

At some point Mr. Stanley created a Facebook account under the name “Erwin Jenkins” specifically for messaging the women. RP (7/28/15) 866, RP (7/30/15) 1096. Because Ms. Mesford never responded and never blocked him, Mr. Stanley essentially started using his messages to her as a diary or journal. *See* ex. 8 at 1-80. He sent messages to her

regularly from August, 2012 to June, 2014. *Id.* He begged her to tell him what happened on the night in question. When she failed to respond, he got angry, called her names and even said he would kill her. He also said he wanted to kill himself, and repeatedly pleaded for her to help him. Ex. 8.

Mr. Stanley sent messages to Ms. Much from the “Erwin Jenkins” account between August of 2012 and May of 2014. Ex. 10 at 5-35. He swore and said, “Why can’t you say what happened that night.” Ex. 10 at 5. He said, “I have basically begged you to tell me what happened for my own sanity you [expletive].” Ex. 10 at 6. Over the months, the communications included messages that were like journal entries, chronicling Mr. Stanley’s life and work events. Ex. 10; RP (7/27/15) 782. They included repeated pleas for help and suicidal ideations. Ex. 10. They also included swearing, name-calling, and threats of harm. Ex. 10. Mr. Stanley’s final messages to Ms. Much were sent at the beginning of May, 2014. He talked about his new job and congratulated her on her admission to culinary school. Ex. 10 at 34. He said, “I have to write you it is the only thing that is calming me right now.” *Id.* He went on:

I am very depressed and have been for along time. This all has been a nightmare and I feel like the worlds biggest reject loser. I have to quit doing that. I am just making myself more down. I have to remember the good things about me. Its hard though because of this. It hurts so much.

Ex. 10 at 34. Mr. Stanley wrote, “I don’t care if you don’t answer me. I just like to write to you girls. Its weird isn’t it.” Ex. 10 at 35. The last message to her was on May 5² and said simply, “2 sweet beautiful girls. It’s nice to see pictures of Alyson. Happy cinco de mayo.” Ex. 10 at 35.

Mr. Stanley reconnected with Alyson Gray in June of 2014 after a three-year hiatus. Ex. 4 at 43-44. He saw her picture on Ms. Mesford’s Facebook page, and believed it was a sign that she welcomed contact. Ex. 8 at 40-42. He sent messages to her business account from his “Erwin Jenkins” account. Ex. 4 at 44-64. On June 10, 2014 he wrote:

4 years tonight. Will you please just talk to me? Talk to me and explain to me what happened that night and I will leave you alone forever. It’s not fair to tell me my memories are fantasy and then not explain to me what did really happen.

Ex. 4 at 44. He professed his love for Ms. Gray, and updated her on his life, work, and daily activities. Ex. 4 at 46-47. He expected her to respond to him on June 23, and when she did not, he said, “how much pain do you want to cause me[?]” Ex. 4 at 48. He went on, “my life is hell and I want

² The header says May 6 at 5:17 a.m. but that is UTC (Coordinated Universal Time), not local time. Ex. 10 at 35.

out.” *Id.* In a later message the same day, he became angry, swore at her, and called her names. *Id.*

Mr. Stanley continued sending Ms. Gray messages through August 8, 2014. Ex. 4 at 62. Many were like diary entries, talking about his parents, his past, and his problems. Ex. 4. Many repeated the request to talk to him about what happened in June of 2010. *Id.* When he received no response, he repeatedly became angry and called Ms. Gray names. *Id.* In a few messages, Mr. Stanley became so angry that he threatened Ms. Gray’s life. *Id.* His final message read:

Please will [you] do something. Don’t make me think I have to go to extremes to get you to do something. I really don’t know what is going on. I just want this to end. It is so [expletive] up. I am really hanging on to life by a thread. I don’t [know] what to do anymore. Please listen and help. Please.

Ex. 4 at 62.

In the meantime, Mr. Stanley started sending messages to Elizabeth Williams from his “Erwin Jenkins” account in 2013. Ex. 5. As with the others, he asked her “what happened that night.” Ex. 5 at 1. He said, “please just tell me what happened. I really im in a lot of pain because of this. Please.” Ex. 5 at 2. Mr. Stanley explained:

I am not going to call you bad names I will try my hardest. I get so mad and call Leah and Mia bad names and I always feel bad about [it]. but when I’m saying it I am so mad but then I always feel bad about it. I write so many messages

and just get ignored. Can you imagine what it is like for me to just be ignored. Its crazy. I write and write to like thin air. I have a conversation that isn't one. I'm talking to myself going crazier and crazier. I hate my dreams because some of them seem so real and I don't know how they get into reality. This alone because of what happened has really caused me a lot of distress. The memories from that night are causing me a lot of stress and to be told they were fantasy to think I made up all the crazy stuff. Well then something is very wrong with me and I don't know what to do. All I really have in life is myself and if I can't trust myself I feel I have very little hope. I have very little hope right now. This has been a very bad last 3 years for me, over 3 years.

...

I bottle all these feelings and I am so hurt. I am in so much pain I don't know how much longer I can take [it]. I need a new life. I just want closure to this all. I want to know what did happen. Please what did happen then. Did I make it all up. Please if I did then please help me to figure out why and tell me what did happen. I am scarred that I made all that up. It is such an uneasy feeling. Please talk to me liz. Please liz.

Ex. 5 at 2.

As with the other women, when Ms. Williams failed to respond Mr. Stanley became frustrated and swore and called her names, but he never threatened to harm her. Ex. 5. Most of his messages to Ms. Williams were cries for help, discussions of his suicidal thoughts, and diaries of his daily life activities. Ex. 5.

Mr. Stanley continued writing to Ms. Mesford and Ms. Williams through September 24, 2014. The last few messages to both women were

desperate and hopeless. Ex. 5 at 27-28; Ex. 8 at 76-77. On September 23

he wrote to Ms. Williams:

You just want me to kill myself. I am very close to it. less than a month. I am planning on going home and that is when I will do it. how many times have I wanted to do it, but more I wanted to live. I wanted a chance to have my own family. A chance to have someone to care about that cared about me. A chance for real happiness. Why won't you people just care. Allow me a chance to have a life. I am so down right now....

Ex. 5 at 27. On September 24, 2014, he wrote to Ms. Mesford:

Why couldn't I have just died 4 years ago when I was hit in the head. That night I was drunk and just walking around the town because it was a nice night and no one was out it was peaceful and a full moon so it wasn't real dark. I was walking around and I was sad and pissed because of what happened with you girls and how much I liked alyson. I got hit hard. [expletive] its time for my life to be over. I don't want to suffer anymore. That is all my life has been. Hurt and suffering. How is that fair. I don't want anything to do with this world.

Ex. 5 at 77.

In the summer of 2014, Ms. Gray contacted the police and showed them the messages Mr. Stanley had sent her. RP (7/23/15) 509, 614-16. Detective Rande Christiansen called Mr. Stanley on September 24, 2014. RP (7/28/15) 853-55. Mr. Stanley was surprised that the women had contacted the police. He said, "I mean I haven't ever done anything except left messages." Ex. 19. Mr. Stanley explained that all he wanted was for the women to talk to him and tell him what happened on June 10, 2010. *Id.*

He thought it was “crazy cruel” of them to ignore him. *Id.* Mr. Stanley acknowledged having said he would kill them, but assured the detective that he was “not going to hurt anybody.” Ex. 19. He pointed out that he had been writing the women for four years and had not done anything physical. *Id.*

Mr. Stanley then met with Detective Christiansen in person, and provided him with copies of the messages. RP (7/28/15) 858, 864, 868-69. The detective immediately told Mr. Stanley he was going to arrest him, and Mr. Stanley was shocked. Ex. 18. Mr. Stanley explained the timeline of events to the detective, and repeatedly lamented that no one would tell him what really happened in June of 2010. *Id.* He again acknowledged that some of his statements were facially threats to kill, but emphasized that he would never harm anyone and was only trying to get the recipients to talk to him. He also said if he was going to hurt anyone, it would be himself. Ex. 18.

Mr. Stanley was ultimately charged with nine counts of felony cyberstalking: three with Ms. Gray as the alleged victim, three with Ms. Much as the alleged victim, two with Ms. Mesford as the alleged victim, and one with Ms. Williams as the alleged victim. CP 48-51. Mr. Stanley was dissatisfied with his appointed counsel, so he made a successful motion to proceed pro se. RP (3/27/15) 120-27; RP (4/1/15) 131-35.

Mr. Stanley told the jury that he did not want to threaten anyone but just wanted to know what happened that night in June of 2010. RP (7/29/15) 957. The women testified that Mr. Stanley's messages scared them, but also acknowledged that many messages were cries for help. RP (7/23/15) 587-88, 592; RP (7/27/15) 654, 704, 721-22, 777-82.

Citing *Elonis*, *Black*, and other cases, Mr. Stanley asked the court to instruct the jury that the State must prove he intended his statements to be taken as true threats or knew that they would be taken as true threats. RP (7/21/15) 179-85; 203-16; RP (7/30/15) 1124; CP 145. The court rejected his proposed instructions, and instead instructed the jury using the negligence standard for true threats. CP 158; RP (7/30/15) 1118, 1124. Mr. Stanley was convicted of all nine counts as charged. CP 175-83.

D. ARGUMENT

1. The trial court erred in refusing to instruct the jury that the mens rea for a true threat is intent or knowledge rather than mere negligence.

- a. Mr. Stanley proposed instructions requiring proof of intent or knowledge and cited multiple cases in support of his proposed instructions.

Mr. Stanley alerted the court early on that First Amendment issues would be paramount in his trial. He informed the judge and the prosecutor about multiple cases forbidding criminal convictions for alleged threats unless the speaker *intended* his statements to be threats or *knew* they

would be received as such. He wanted the jury instructions to include these requirements. *See* RP (7/21/15) 179-80; 207-16; RP (7/30/15) 1124; CP 145.

The prosecutor wrongly believed that whether a statement is a true threat was not a question for the jury but was one for the court. RP (7/21/15) 179. Mr. Stanley responded:

What are you talking about? I have read case law and case law [says] that is what the jury does, is decides whether the threats are true threats or not.

Furthermore, it is not the objective [standard]. It is the subjective intent that has to be ... [Elonis]³ decided on June 1st, says that you have to have subjective intent, as well as the objective intent.

RP (7/21/15) 179.

The court at first endorsed the prosecutor's position that the jury does not decide whether alleged threats are true threats and that the question is instead "a judicial call." RP (7/21/15) 181. Mr. Stanley was understandably confused:

³ The court reporter for this case committed numerous typos throughout the transcripts. One example is her use of the word "Lonenews" when Mr. Stanley is clearly discussing *Elonis*.

MR. STANLEY: Who decides if it is a true threat or not?

THE COURT: Me.

MR. STANLEY: What is the jury doing?

RP (7/21/15) 183. The court claimed the jury decided only whether the State had proved the elements in the “to convict” instruction beyond a reasonable doubt, but not whether the State had proved a true threat. RP (7/21/15) 183.

Mr. Stanley again asked the judge if he was aware of *Elonis*, and noted the similarities between that case and his own. RP (7/21/15) 184. The trial judge had not heard of the case and did not realize it was a U.S. Supreme Court decision. *Id.* Mr. Stanley explained that the Court had decided *Elonis* about seven weeks prior and that it held the mens rea for threats “has to be more than just negligence.” *Id.* The prosecutor found the opinion, and the court deferred discussion of the issue. RP (7/21/15) 184-85.

After a lunch break, the prosecutor acknowledged that Mr. Stanley was right about the “true threat” question being one for the jury. RP (7/21/15) 197. Mr. Stanley discussed additional First Amendment cases addressing the proof required to designate an alleged threat a “true threat” falling outside constitutional protection. RP (7/21/15) 203-09 (citing *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969));

State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004)). Mr. Stanley proposed jury instructions consistent with the cases he cited from the U.S. Supreme Court and the Ninth Circuit. RP (7/21/15) 180, 203-09. His proposed instruction provided:

Objective Test / Subjective Test Instruction

Along with the “Real” Threat definition set forth in WPIC 2.24 a “Real” threat is distinguished from hyperbole, careless talk, no matter how vehement caustic, vituperative, abusive or inexact. It is also distinguished from outbursts of transitory anger.

The above mentioned along with WPIC 2.24 constitute the objective test standard that focuses on the speaker.

The subjective test standard indicates speech may be deemed “Real” threat unprotected by the First Amendment only upon proof the speaker subjectively intended speech as threat or knew that communications would be viewed as threats.

Both the subjective test standard and the objective test standard must be satisfied to rule a threat a “Real” threat unprotected by the First Amendment.

CP 145. Mr. Stanley acknowledged that the true threat definition need not be in the “to convict” instruction, but said, “I would like to have it in the to convict, just so that it is clarified.” RP (7/21/15) 209.

The court and prosecutor protested that WPIC 2.24 set forth only a “reasonable person” (objective) standard, but Mr. Stanley emphasized his proposed instruction requiring proof of subjective intent to threaten was

“in case law after case law.” RP (7/21/15) 210-13 (citing *Elonis* and *Black*). The court nevertheless declined to give the defense-proposed instructions and instead instructed the jury only on the objective standard for true threats. CP 158; RP (7/30/15) 1118, 1124; *see* WPIC 2.24. The instruction provided:

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.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk, or political argument.

CP 158.

- b. Washington adopted a negligence standard before the U.S. Supreme Court decided *Virginia v. Black* and *Elonis v. United States*.

Because the right to free speech is “vital,” only a few narrow categories of communication may be proscribed. *Kilburn*, 151 Wn.2d at 42; U.S. Const. amend. I. Although a “threat” is one of those categories, the only type of threat which may be criminalized without running afoul of the First Amendment is a “true threat.” *Watts*, 394 U.S. at 708; *Kilburn*, 151 Wn.2d at 43.

In *Watts*, the U.S. Supreme Court reversed the conviction of a man who objected to the draft and said, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” *Watts*, 394 U.S. at 706. The Court noted that the statute at issue criminalized pure speech, and emphasized that such statutes “must be interpreted with the commands of the First Amendment clearly in mind.” *Id.* at 707. The statute required “the Government to prove a true ‘threat,’” *id.* at 708, and “[w]hat is a threat must be distinguished from what is constitutionally protected speech.” *Id.* at 707. Although it held the defendant’s statements were protected speech and not a true threat, the Court did not set forth a standard for determining the difference in future cases. *See id.* at 707-08.

In the wake of *Watts*, most courts adopted an objective test for evaluating whether a statement is a true threat or constitutionally protected speech. The Washington Supreme Court adopted such a standard in *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001). In so doing, the Court relied on the judgment of the Seventh Circuit. *See id.* (citing *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990)); *State v. J.M.*, 144 Wn.2d 472, 479 n.4, 28 P.3d 720 (2001) (citing *Khorrami*). The Court stated:

A ‘true threat’ is a statement 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].

Williams, 144 Wn.2d at 207-08 (internal quotations omitted). In other words, the Court adopted a civil negligence standard for determining whether a criminal defendant has uttered a true threat instead of constitutionally protected speech. *See State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010).

Although *Williams* endorsed the above standard, it was immaterial to the outcome. The Court reversed the defendant's conviction for felony harassment on two independent grounds unrelated to the definition of "true threat." It held that a prior version of the harassment statute was both vague and overbroad insofar as it criminalized threats to "mental health." *Williams*, 144 Wn.2d at 212. Thus, the Court had no need to analyze the "true threat" definition in depth, and did not do so. *See id.* at 207-08.

Two years after *Williams*, the U.S. Supreme Court decided *Black*, 538 U.S. 343. As will be discussed below, *Black* called into question the constitutionality of the objective (negligence) standard for assessing true threats. Following *Black*, several courts replaced the objective negligence standard with a subjective intent standard, holding that the First Amendment requires prosecutors to prove the speaker *intended* to place the victim in fear of bodily harm or death. *See United States v. Heineman*,

767 F.3d 970, 976 (10th Cir. 2014); *Brewington v. State*, 7 N.E.3d 946, 964-65 (Ind. 2014); *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011); *see also United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (not reaching issue because jury was instructed it had to find intent, but opining that negligence standard is unconstitutional under *Black*).

Unlike these courts, Washington courts have not yet had occasion to address the impact of *Black* on the negligence standard.⁴ Washington should once again follow the Seventh Circuit, and should recognize that “an entirely objective definition is no longer tenable” under the First Amendment. *Parr*, 545 F.3d at 500.

The Supreme Court’s even more recent decision in *Elonis* also provides persuasive authority for the proposition that a negligence standard is insufficient. *See Elonis*, 135 S.Ct. 2001. The Court did not reach the First Amendment question in *Elonis*, but rejected a negligence standard for threats on statutory construction grounds. *See id.* at 2012. The Court’s holding relied heavily on due process considerations which are equally applicable in Washington. *See id.* at 2009-11.

In sum, this Court should reject the negligence standard in light of *Black* and *Elonis*. It should hold that a person may not be convicted of issuing a “true threat” unless the State proves the speaker subjectively

⁴ As noted, the issue is pending in *State v. Trey M.*, no. 92593-3.

intended to place the victim in fear of bodily harm or death or knew that he was placing the victim in fear of bodily harm or death. The trial court erred in rejecting Mr. Stanley's proposed instructions on this issue.

c. A mens rea of negligence is insufficient under the First Amendment and *Virginia v. Black*.

Virginia v. Black involved consolidated cases in which three defendants were convicted of the crime of cross-burning with the intent to intimidate. *Black*, 538 U.S. at 347-48. Although the Virginia statute at issue required the prosecution to prove subjective intent to cause fear, it also provided that "burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Id.* at 348.

This presumption made sense in light of the history of cross-burning in this country. "Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan[,] a group that "imposed a veritable reign of terror throughout the South." *Id.* at 352-53 (internal quotations omitted). "Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence." *Id.* at 354. The victims in *Black* felt "terrible" and "very nervous," because "a cross burned in your yard ... tells you that it's just the first round." *Id.* at 349-50.

In addressing the constitutionality of the statute, the Court reiterated that because the First Amendment protects freedom of speech, only true threats may be criminalized. The Court stated, “‘True threats’ encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Black*, 538 U.S. at 359 (emphasis added). The Court held that Virginia could ban “cross burning with intent to intimidate,” because “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear* of bodily harm or death.” *Id.* at 360 (emphasis added).

But the Court struck down the subsection creating a rebuttable presumption that any cross-burning was done with intent to intimidate. *Id.* at 364 (Four-justice lead opinion); *id.* at 380-81 (Three justices would have invalidated the statute in its entirety under the First Amendment). The plurality explained, “The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.” *Id.* at 367. Although he would have applied a different remedy, Justice Scalia endorsed the plurality’s view that “‘a burning cross is not always intended to intimidate,’ and

nonintimidating cross burning cannot be prohibited.” *Id.* at 372 (Scalia, J., concurring in part).

The convictions in *Black* were reversed even though (1) all of the defendants intentionally burned crosses; (2) the burning crosses caused people to fear harm; and (3) this fear was reasonable in light of the context and history of cross-burning. *See id.* at 348-50. The Court concluded that because of the vital values protected by the First Amendment, even making statements that cause fear of violence is protected unless the statements were made with a *purpose* of causing that fear. *Id.* at 360. This Court should impose a similar requirement in Washington in order to comport with the First Amendment and *Black*.

d. Other courts have abandoned the negligence standard in light of *Black*.

Other courts have had the opportunity to reassess the true-threat standard in light of *Black*, and have renounced the objective (negligence) standard previously used in favor of a subjective (intent) requirement.

The Tenth Circuit engaged in a particularly thorough analysis in *United States v. Heineman*, 767 F.3d 970 (10th Cir. 2014). There, the defendant was charged with the crime of “sending an interstate threat” after he e-mailed a frightening message to a professor. *Id.* at 971-72. The defendant requested a jury instruction that “the government must prove

that the defendant intended the communication to be received as a threat.” *Id.* at 972. After the trial court rejected the request, the defendant moved to dismiss, arguing the statute violated the First Amendment if it did not require proof that “the defendant intended to place the hearer in fear of bodily harm or death.” *Id.*

Although the district court denied the defendant’s motions, the circuit court agreed with his position and reversed. *Heineman*, 767 F.3d at 971. The court rejected the government’s reliance on prior Tenth Circuit opinions, because those decisions either pre-dated *Black* or did not raise the issue of whether a new true-threat standard was required in light of *Black*. *Id.* at 973-74. The court explained, “we are facing a question of first impression in this circuit: Does the First Amendment, as construed in *Black*, require the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened? We conclude that it does.” *Id.* at 975.

The court acknowledged the complexity of *Black*, but found, “a careful review of the opinions of the Justices makes clear that a true threat must be made with the intent to instill fear.” *Heineman*, 767 F.3d at 976. It noted that a majority of the Court described true threats as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence” and that the majority also said,

“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* (quoting *Black*, 538 U.S. at 359-60).

The Tenth Circuit recognized that only four justices held the prima facie provision of the statute was “overbroad,” but noted that Justice Scalia also endorsed the view that proof of intent to threaten was constitutionally required. *Heineman*, 767 F.3d at 978. The court explained that another circuit’s rejection of *Black* made no sense: the Sixth Circuit “said that *Black* had no need to impose a subjective-intent requirement because the Virginia statute already required that intent.” *Id.* at 979. But “[i]f the First Amendment does not require subjective intent, how could [the U.S. Supreme Court] invalidate the [Virginia] statute for allowing a jury to find subjective intent on improper or inadequate grounds?” *Id.* at 980. After also rejecting the Sixth Circuit’s illogical grammatical deconstruction of *Black*, the Tenth Circuit held:

In short, despite arguments to the contrary, we adhere to the view that *Black* required the district court in this case to find that defendant *intended to instill fear* before it could convict him of violating 18 U.S.C. § 875(c).

Heineman, 767 F.3d at 982 (emphasis added).

The Indiana Supreme Court has also read *Black* to require a subjective standard. *Brewington v. State*, 7 N.E.3d 946, 963 (Ind. 2014). In other words, the State must prove the speaker intended to place the victim in fear of bodily harm or death. *Id.* Because of its “strong commitment to protecting the freedom of speech,” the Court imposed a two-pronged approach for future cases:

We therefore hold that “true threat” under Indiana law depends on two necessary elements: that the speaker intend his communications to put his targets in fear for their safety, and that the communications were likely to actually cause such fear in a reasonable person similarly situated to the target.

Id.

The Ninth Circuit has similarly held that, following *Black*, proof of subjective intent to threaten is required under the First Amendment. *United States v. Bagdasarian*, 652 F.3d 1113, 1116-18 & 1122 (9th Cir. 2011). The court noted that oftentimes an objective element must *also* be satisfied under the relevant statutes, but in all cases the subjective intent standard must be satisfied as a matter of constitutional law. *Id.* at 1117-19.

Finally, as mentioned earlier, the Seventh Circuit has construed *Black* as requiring proof of subjective intent to cause fear. *Parr*, 545 F.3d at 500. The court did not have to resolve the issue in *Parr* because the district court had granted the defendant’s request to instruct the jury that it

could convict only if Parr “intended his statement to be understood” as a threat. *Id.* The court acknowledged that *Black* was somewhat cryptic and “[i]t is possible that the Court was not attempting a comprehensive redefinition of true threats....” *Id.* “It is more likely, however, that *an entirely objective definition is no longer tenable.*” *Id.* (emphasis added).

The only question the court believed to be open was whether the subjective intent standard should be combined with a requirement of proving the listener’s reasonable fear:

[A] standard that combines objective and subjective inquiries might satisfy the constitutional concern: the factfinder might be asked first to determine whether a reasonable person, under the circumstances, would interpret the speaker’s statement as a threat, and second, whether the speaker intended it as a threat. In other words, the statement at issue must objectively *be* a threat and subjectively be *intended* as such.

Parr, 545 F.3d at 500. Mr. Stanley proposed instructions consistent with the above, requiring the jury to find both that the statements at issue were objectively threats and that he subjectively intended them to be threats. CP 145.

Washington followed the Seventh Circuit when it initially adopted the objective standard in *Williams*, 144 Wn.2d at 207-08. *See also J.M.*, 144 Wn.2d at 479 n.4. Washington should again follow that court’s lead in

recognizing that “an entirely objective definition is no longer tenable.”

Parr, 545 F.3d at 500.

- e. A mens rea of negligence is insufficient in light of due process principles as explained in *Elonis*.

Although *Black* is binding authority on the First Amendment question and compels a subjective-intent standard, it is also worth noting that due process concerns support such a standard. The U.S. Supreme Court construed a federal threat statute in light of due process principles and rejected the negligence standard in *Elonis*, 135 S.Ct. at 2011.

Anthony *Elonis* was charged with multiple counts of the federal crime of communicating a threat, after he posted frightening Facebook messages about how he would kill his ex-wife and others. *Id.* at 2004-07. *Elonis* explained that he posted the messages for “therapeutic” reasons, to help him “deal with the pain” of divorce. *Id.* at 2005. Over *Elonis*’s objection, the trial court gave a jury instruction on “true threat” that applied the same reasonable-speaker (negligence) standard that was applied in Mr. Stanley’s case. *Elonis*, 135 S.Ct. at 2006. *Elonis* was convicted of most of the charges, and he appealed on statutory and First Amendment grounds. *See id.*

The Supreme Court did not reach the First Amendment question, but reversed the convictions after holding that due process did not permit a

construction of the statute which allowed conviction based on a mens rea of mere negligence. *Id.* at 2009-12. The Court explained:

Such a “reasonable person” standard is a familiar feature of civil liability in tort law, but is inconsistent with “the conventional requirement for criminal conduct – *awareness* of some wrongdoing. Having liability turn on whether a “reasonable person” regards the communication as a threat – regardless of what the defendant thinks – “reduces culpability on the all-important element of the crime to negligence, and we “have long been reluctant to infer that a negligence standard was intended in criminal statutes.”

Elonis, 135 S.Ct. at 2011 (internal citations omitted); *Cf. State v. Bauer*, 180 Wn.2d 929, 936-37, 329 P.3d 67 (2014) (declining to import causation standard from tort law because “criminal law and tort law serve different purposes” and “the consequences of a determination of guilt [in criminal cases] are more drastic”).

The Sixth Circuit further explained the due-process problems with the negligence standard in *United States v. Houston*, 792 F.3d 663, 667-68 (6th Cir. 2015). There, the defendant was upset about the fact that his defense attorney foreclosed on part of his property after he failed to pay for the lawyer’s services. *Id.* 665. A jail guard overheard the defendant say, “When me and my brother get out, we’re going to go to that law firm and kill every last one of them.” *Id.* The next day, the defendant called his girlfriend. He told her, “I’ll kill that [expletive] when I get out. Hey, I ain’t kidding! ... When I get out of this, ... he’s dead!” *Id.* He continued to rant

about his plan to kill the lawyer, and urged his girlfriend to tell his family members they had his “permission” to kill him. *Id.* at 665-66. The girlfriend responded that no one was going to kill anybody. *Id.* at 666.

The telephone call had been recorded, and the defendant was charged with crimes for these statements. *Id.* The trial court instructed the jury on the definition of “true threat” using the objective standard. *Id.*

Following *Elonis*, the Court of Appeals reversed. *Houston*, 792 F.3d at 666-68. The court reiterated the principle that “[i]nstead of permitting liability to turn on mere negligence – how acts ‘would be understood by a reasonable person’ – criminal statutes presumptively require ‘awareness of some wrongdoing.’” *Id.* at 666 (quoting *Elonis*, 135 S.Ct. at 2011) (emphasis in original). After citing additional sections of *Elonis*, the court contributed its own analysis to the issue:

And having liability turn on a “reasonable person” standard, we would add, permits criminal convictions premised on mistakes – mistaken assessments by a speaker about how others will react to his words. If a legislature wishes to criminalize negligent acts – and especially negligent utterances – it should say so explicitly; the criminalization of “threats” in “interstate commerce” does nothing of the sort.

Houston, 792 F.3d at 667.

Although the issue had been raised for the first time on appeal, the court reversed in light of “the importance of state-of-mind instructions in

‘threat’ cases” as well as “the oddity of permitting a criminal conviction to stand based on a reasonable-person – which is to say, negligence – standard.” *Id.* at 668. And as to Houston’s case specifically, the reduced burden on the mens rea was not harmless: “Recognizing that Houston was speaking with his girlfriend, a jury could reason that he was venting his frustration to a trusted confidante rather than issuing a public death threat to another.” *Id.* at 667-68.

The due process principles relied on in *Elonis* are equally applicable in Washington. *See, e.g., State v. Anderson*, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). Furthermore, the First Amendment provides special protection against the criminalization of speech. *See Black*, 538 U.S. at 358. In light of these twin constitutional concerns, this Court should hold that a person may not be convicted of issuing a “true threat” unless the State proves the speaker subjectively intended to place the victim in fear of bodily harm or death, or knowingly placed the victim in such fear. The trial court erred in rejecting Mr. Stanley’s proposed instructions outlining these requirements.

- f. A new trial is required because the State cannot prove beyond a reasonable doubt that the failure to instruct on the proper mens rea was harmless.

Because the instructional error is of constitutional magnitude, a new trial is required unless the State proves beyond a reasonable doubt

that the result would have been the same absent the error. *State v. Mills*, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005) (citing *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The State cannot meet that heavy burden here; the jury may well have acquitted on some or all counts had it been properly instructed on the mental element. This is especially so in light of the fact that in closing argument, the prosecutor told the jury to ignore Mr. Stanley's assertion that the State had to prove intent to threaten – and even implied that the State did not have to prove any definition of “true threat” beyond a reasonable doubt. *See* RP (7/30/15) 1136-37, 1164-67, 1175; *see also* argument (4) below.

In determining whether a defendant intended his statements to be taken as true threats, all of the context must be considered. *Black*, 538 U.S. at 367; *see Houston*, 792 F.3d at 667-68. The context here was that of a despondent man who just wanted to know what happened on a particular night in 2010. This theme ran through most of the over 200 messages Mr. Stanley sent. *See* exs. 4, 5, 8, 10, 20; RP (7/23/15) 586, 604, 633-34; RP (7/27/15) 657, 690, 702, 710, 723, 774, 783, 798-99; RP (7/29/15) 957, 968.

There were also many messages in which Mr. Stanley called the women terrible names, but did not threaten them. *See, e.g.*, ex. 4 at 15, 21, 28, 53, 60; ex. 5 at 8; ex. 8 at 1, 13, 26, 33, 36, 47, 54, 58, 64; ex. 10 at 4, 25, 26, 29, 30, 32. A handful of messages contained explicit threats to kill. *See, e.g.*, ex. 4 at 49-50, 58; ex. 8 at 16, 57, 67; ex. 10 at 11. But these statements were followed by apologies and assurances that Mr. Stanley would never harm others. RP (7/23/15) 611; ex. 4 at 46 (“You know I am harmless. I would never do anything to hurt you emotionally or physically. Why? Because I am not like that. I have a lot of bark and no bite.”); RP (7/27/15) 722 (“I just want it to end, Leah. I don't want to see any of you girls hurt.”); Ex. 4 at 58 (“I'm sorry. I didn't mean the mean things I said. I am just so upset that you won't tell me what happened.”); Ex. 5 at 8; Ex. 8 at 10 (“I don't want to hurt anyone. That's the last thing I want to do.”), 25. Mr. Stanley's assurances were substantiated; he never attempted violence against any of the women during the four years he sent messages.

Furthermore, the mean messages were surrounded by a tremendous number of cries for help. RP (7/27/15) 674-75, 704, 722; ex. 4 at 16, 17 (“Please can you find it in your heart to help me resolve this?”), 24 (Please, I just want to put these memories to rest), 42, 44, 51, 52 (“please help me”), 53 (“please help me. I don't [know] what to do. I can't go on

anymore.”), 54, 55 (“I am scared. Please help me. Please.”), 58 (“I want to be free of this. Please.”), 62 (“I am really hanging on to life by a thread. I don’t [know] what to do anymore. Please listen and help. Please.”); ex. 5 at 2 (“please just tell me what happened. I really im in a lot of pain because of this. Please.”), 5 (“you could help to give me my life back.”), 7 (“please help me. Please. ... please the pain is to much.”), 8 (“oh please do something. Please.”), 9 (“oh Liz, please don’t hate me. Please care about me. I just am really having a hard time.”), 11, 12, 13, 14 (“I’m begging.”), 15, 17 (“please Liz, please put away your hatred for me and just help me with these memories. Please do something Liz, please.”), 18, 19 (“help me.”), 24 (“please. Oh please just end this.”), 28 (“just help me liz. Please.”), ex. 8 at 12 (“please I’m begging you just talk to me”), 13 (“Please Leah”), 14 (“please make this end. I feel sick. ... I need your help with this. Please.”), 19 (I wanna ... die. Please help me.”), 20, 22 (“please just help me, please. ... I am in so much pain. ... please help me. Please I beg you.”), 25, 39 (“please give me some hope ... Please Leah! Please Leah!”), 40, 42 (“please care. Do something please. ... I am hurting more than ever. Please help me.”), 52, 53, 56, 58, 72, , 75, 76; ex. 10 at 12 (“please help I can’t take it anymore. Please.”), 13 (“please just help me. ... I am really hurtin from all this.”), 14, 18, 22, 23, 25, 31, 32 (“please

help me. Please help me. I can't deal with life anymore. Please mia help me.”), 34.

Mr. Stanley was in so much pain that he contemplated suicide and discussed this possibility frequently in his messages. *See* RP (7/27/15) 809-10; ex. 4 at 48, 52, 59; ex. 5 at 2 (“do you know how many times a week I think about putting my pistol to my head and blowing my ... brains out”), 3 (“I sit and think about blowing off my head and don't do it. I can't get the nerve to do it. not yet.”), 7 (“I want to die.”), 8 (“today I sat for awhile and imagined putting my gun to my head and doing it.”), 22 (“I try to give myself a reason to live when most of the time I want to put a bullet in my head”), 23, 27, 28 (“I am going back home and I plan to write a check of all my money to my mom and then go to my back yard and put a bullet in my head.”); ex. 8 at 1 (“Another day of wanting to put a bullet in my head.”), 14, 17, 19, 22 (“every week I want to kill myself”), 42 (“I don't want to live anymore”), 47 (“I would like to drive to the mountains and find a pretty creek to sit by and put a bullet in my head.”), 50, 58, 64, 76, 78; ex. 10 at 6 (“I am physically sick. I want to put a bullet in my head.”), 11 (“I come closer and closer to blowing my ... head off.”), 12 (“I am very close to killing myself”), 13, 18, 23, 25, 33.

Indeed, as the women acknowledged, Mr. Stanley treated his messages to them – which went mostly unanswered – as a therapeutic

diary or journal. RP (7/23/15) 565-66; RP (7/27/15) 654, 782. He not only worked through the difficult feelings described above, but also wrote about his traumatic upbringing and current life events. *E.g.* ex. 4 at 42, 47; ex. 5 at 3, 4, 8, 9, 10, 11, 12, 15, 16, 20, 21; ex. 8 at 5, 14, 17, 30, 31, 33, 39, 43, 44, 45, 59; ex. 10 at 7, 8, 15, 18, 19, 34. Ms. Much explained:

[T]here were times over the course of the last few years that I didn't block him hoping that maybe he would just needed to ramble. Like I felt so much like he was almost journaling to me in a way. Maybe if he just needed to journal, like, I skimmed for content. I just feel that I -- I don't know. Sometimes I just would let them come and just not read them.

RP (7/27/15) 782. Ms. Williams agreed. When the prosecutor asked, “what was the context of the messages?” she said, “It was a lot of varying different kinds of contexts. Some of it would be a diary entry where he is going through some mental anguish and not understanding why.” RP (7/27/15) 654. Mr. Stanley’s own messages confirmed their therapeutic purpose:

[I’m] feeling a bit better. I had to write you girls a lot. It makes me feel better to write you girls. It’s weird but it does. The worse I feel the more I write and I did some writing the last couple days. I don’t write you as much. Leah is my goto because she has always been there for me to write. I have to find a new place to live by the end of the month. ...

Ex. 5 at 20. *See also* ex. 8 at 33 (“dear journal. First day went good.

Almost fell asleep at my desk. Had to go thru employee handbook and

look at some standards, made me sleepy.”); ex. 10 at 27 (“You know it’s really kinda weird that I just write to like nothing. I don’t know if you ever read any of this.”).

In light of this entire context, the State cannot prove beyond a reasonable doubt that the outcome would have been the same had the jury been properly instructed. In *Houston*, the court held a new trial was required following the same error even though (1) the issue had been raised for the first time on appeal, and (2) the defendant had repeatedly threatened to kill his former lawyer and insisted, “I ain’t kidding!” *Houston*, 792 F.3d at 665. The court ruled that in light of the entire context, a properly instructed jury may have found that the defendant was simply venting his frustrations rather than issuing a true threat. *Id.* at 667-68.

The same is true here. As in *Houston*, Mr. Stanley made statements that were facially threatening, but which in context could be viewed as a means of venting his frustration. His messages were often more like diary entries than communications, and his communications were mostly cries for help. Under these circumstances, the instructional error was not harmless, and a new trial should be granted. *See Houston*, 792 F.3d at 667-68; *see also Schaler*, 169 Wn.2d at 289 (remanding for new trial where court omitted true threat instruction, because even though defendant said

he wanted to kill his neighbor with his bare hands, a jury could find his statements “were a cry for help from a mentally troubled man”).

2. Even under the negligence (reasonable person) standard, the State presented insufficient evidence to prove a true threat to kill on counts six and nine.

- a. This Court independently reviews the evidence to determine the validity of convictions based on speech.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant’s fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“The purpose of this standard of review is to ensure that the trial court fact finder rationally applied the constitutional standard required by

the due process clause of the Fourteenth Amendment, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt.” *State v. Kohonen*, 192 Wn. App. 567, 574, 370 P.3d 16 (2016) (internal quotations omitted). “This standard of review is also designed to ensure that the fact finder at trial reached the ‘subjective state of near certitude of the guilt of the accused,’ as required by the Fourteenth Amendment’s proof beyond a reasonable doubt standard.” *Id.* (quoting *Jackson*, 443 U.S. at 315).

When considering sufficiency-of-the-evidence claims in cases implicating pure speech, an appellate court affords less deference to the fact finder than in other cases, and instead applies “the rule of independent review.” *Kilburn*, 151 Wn.2d at 52. As explained in *Kilburn*:

[T]he sufficiency of the evidence question raised involves the essential First Amendment question – whether [the defendant’s] statements constituted a “true threat” and therefore unprotected speech. We must independently review the crucial facts in the record, i.e., those which bear on the constitutional question.

Id. Accord State v. E.J.J., 183 Wn.2d 497, 354 P.3d 815, 818 (2015)

(“Given the important First Amendment rights at stake, we are required to engage in a careful review of the record ...”); *see also id.* at 819 n.8 (“the constitutional standard of review ... requires scrutiny of not only the trial court’s findings, but of the entire record ...”).

An appellate court must be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech. It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings. The First Amendment demands more.

Kilburn, 151 Wn.2d at 49.⁵

- b. The evidence is insufficient to support the convictions on counts six and nine, because the alleged threats were statements expressing passive desires rather than intentions.

After independently reviewing the evidence as described above, this Court should hold that insufficient evidence supports the convictions on counts six and nine. As to those counts, the State failed to prove true threats to kill even under the “reasonable person” standard.

In count nine the State alleged that Mr. Stanley threatened to kill Elizabeth Williams. CP 50, 172. But none of the messages Mr. Stanley sent to Ms. Williams constitute true threats to kill. *See ex. 5*. In closing argument, the State suggested a couple of messages the jury could rely on to convict Mr. Stanley on this count. RP (7/30/15) 1143-44. The first was:

⁵ *Kilburn, E.J.J.*, and *Kohonen* reference “the trial court’s findings” because the cases were juvenile bench trials. In adult trials, the default fact finder is of course a jury, not the trial court. The rule of independent review applies regardless. *See, e.g., State v. Johnston*, 156 Wn. 2d 355, 365–66, 127 P.3d 707 (2006).

I want to [expletive] watch you [expletive] die you
[expletive expletive]. [Expletive] die [expletive], die
[expletive], you [expletive expletive]. That is all you are.
You deserve to [expletive] die, you [expletive expletive].

Ex. 5 at 14; RP (7/30/15) 1143-44. The second was:

I want to kill you [expletive] for what you have done to me.
I can't help the thoughts.

Ex. 5 at 25; RP (7/30/15) 1144.

On their face, these statements are expressions of desire but are not threats to kill. Indeed, the first statement is entirely passive, and the second is a description of thoughts and wishes.

The context only reinforces the fact that the messages were not true threats to kill. As discussed in section (1)(f) above, the vast majority of the statements Mr. Stanley made were pleas for help. This is certainly true of the messages to Ms. Williams, including those immediately preceding and immediately following the alleged threats. For instance, a little over an hour after he wrote the second message above, Mr. Stanley said:

[A]ll you have to do is write a few sentences and be nice and you could change my life. It's crazy you could re[a]lly change my life by just talking to me. You could make my life so much better than what it is by being nice to me, talk to me. Please acknowledge me.

Ex. 5 at 25. And within half an hour of writing the first message above, Mr. Stanley send Ms. Williams another message stating, "just talk to me

please. I can't take it anymore. Please. Why won't you listen." Ex. 5 at 14. Thus, both the plain language and the context of these messages demonstrates that they are not true threats to kill in light of the "difficult standard" the State must satisfy in cases criminalizing speech. *Kilburn*, 151 Wn.2d at 53.

This Court's decision in *Kohonen* is instructive. There, as here, the defendant was upset about some sort of past slight. *Kohonen*, 192 Wn. App. at 570-71. She took to Twitter to express her displeasure with the other person's actions. One tweet read, "TBH I still want to punch you in the throat even tho it was 2 years ago." *Id.* at 571. The second read, "[S.G.]mustdie." *Id.* The defendant was convicted of cyberstalking, and on appeal she argued that there was insufficient evidence of a true threat. *Id.* at 573.

This Court agreed. *Id.* The Court noted that the language of the former tweet "expressed a *desire* to harm S.G., not an *intention* to do so." *Id.* at 579. And the language of the latter was passive and therefore insufficient to constitute a true threat. *Id.* at 578-79 (citing *State v. Locke*, 175 Wn. App. 779, 307 P.3d 771 (2013)). The context reinforced this conclusion, in part because the defendant used Twitter as a vehicle for expressing her thoughts and feelings. *Kohonen*, 192 Wn. App. at 580.

As in *Kohonen*, Mr. Stanley’s messages to Ms. Williams were passive and “expressed a *desire* to harm [the alleged victim], not an *intention* to do so.” *Id.* at 579; compare ex. 5 at 14 & 25 with *Kohonen*, 192 Wn. App. at 571. And as in *Kohonen*, the context here reinforces the conclusion that these messages were not true threats to kill. Most of the surrounding messages were pleas for help, expressions of despair, and diary entries. Ex. 5 at 1-32. Thus, insufficient evidence supports the conviction on count nine in light of the strict standard of review applicable in “true threat” cases.

The same is true for count six, which is one of three counts naming Miriam Much as the alleged victim. *See* CP 49-50, 165-69. Mr. Stanley acknowledges that in light of the following statements, sufficient evidence supports convictions on two counts under the “reasonable person” standard: (1) “I am warning you that at least one of you will be dead because I am not going out alone[,]” ex. 10 at 11; and (2) “I am going to send you back to hell where you ... belong[,]” ex. 10 at 20. *See also* RP (7/30/15) 1143 (prosecutor relies on these statements). But insufficient evidence supports a third conviction. The prosecutor suggested that the jury rely on one of the following statements:

- “You [expletives] need to die. I can’t take it anymore. I want to [expletive] kill each one of you [expletives].
- “I want to kill you people. I want to strangle you with my bare hands.”

RP 1143; *see ex. 10* at 10, 21. These statements are not “true threats” for the same reason the messages to Elizabeth Williams were not true threats – they express “a *desire* to harm [Ms. Much], not an *intention* to do so.” *Kohonen*, 192 Wn. App. at 579. And as with count nine, the context surrounding the alleged threat on count six is that of a despondent young man pleading for help. *See ex. 10* at 1-35. Accordingly, this Court should hold that insufficient evidence supports the conviction on count six.

- c. The remedy is reversal of the convictions on counts six and nine and dismissal of the charges with prejudice.

Double Jeopardy prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). Accordingly, the remedy for insufficient proof of a true threat is reversal and remand for dismissal of the charges with prejudice. *Kilburn*, 151 Wn.2d at 54; *Kohonen*, 192 Wn. App. at 583.

Even if the State identifies a true threat to *harm* that does not amount to a true threat to *kill*, the remedy remains dismissal with prejudice. The State may not request remand for entry of a conviction on the lesser offense of misdemeanor cyberstalking, because the jury was not instructed on that offense. *See In re the Personal Restraint of Heidari*, 174 Wn. 2d 288, 292, 274 P.3d 366 (2012). In sum, Mr. Stanley asks this Court to reverse the convictions on counts six and nine, and remand with instructions to dismiss the charges with prejudice.

3. The cyberstalking statute is unconstitutionally overbroad and vague.

- a. The statute includes prohibitions on “lewd, lascivious, indecent, or obscene” communications made with intent to “harass” or “embarrass”.

The cyberstalking statute provides:

(1) A person is guilty of cyberstalking if he or she, with intent to *harass*, intimidate, torment, or *embarrass* any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:

(a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;

(b) Anonymously or repeatedly whether or not conversation occurs; or

(c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.

(2) Cyberstalking is a gross misdemeanor, except as provided in subsection (3) of this section.

(3) Cyberstalking is a class C felony if either of the following applies:

(a) The perpetrator has previously been convicted of the crime of harassment, as defined in RCW 9A.46.060, with the same victim or a member of the victim's family or household or any person specifically named in a no-contact order or no-harassment order in this or any other state; or

(b) The perpetrator engages in the behavior prohibited under subsection (1)(c) of this section by threatening to kill the person threatened or any other person.

(4) Any offense committed under this section may be deemed to have been committed either at the place from which the communication was made or at the place where the communication was received.

(5) For purposes of this section, “electronic communication” means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. “Electronic communication” includes, but is not limited to, electronic mail, internet-based communications, pager service, and electronic text messaging.

RCW 9.61.260 (emphases added).

As explained below, the statute is unconstitutionally overbroad and vague to the extent that it criminalizes communications made with intent to “harass” or “embarrass,” and to the extent it prohibits communications “[u]sing any lewd, lascivious, indecent, or obscene words, images, or

language, or suggesting the commission of any lewd or lascivious act.”

See id.

- b. The statute is unconstitutionally overbroad because it makes unlawful a substantial amount of protected speech, and is unconstitutionally vague because it is unclear and subject to arbitrary enforcement.

“A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities.” *Williams*, 144 Wn.2d at 206 (quoting *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000)).

Criminal statutes require particular scrutiny and may be facially invalid if they make unlawful a substantial amount of constitutionally protected conduct.... This standard is very high and speech will be protected ... unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Id. (citing *Lorang*, 140 Wn.2d at 26-27) (internal quotations omitted).

A law is unconstitutionally vague if it either: (1) fails to define the offense with sufficient definiteness that ordinary people can understand what is proscribed, or (2) fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *Williams*, 144 Wn.2d at 203 (citing *Lorang*, 140 Wn.2d at 30). Although vagueness is a violation of the due process clause of the Fourteenth Amendment, courts “are especially cautious in the interpretation of vague statutes when First Amendment

interests are implicated.” *Williams*, 144 Wn.2d at 204 (quoting *Lorang*, 140 Wn.2d at 31).

In *Williams*, the Supreme Court held that the harassment statute was both unconstitutionally overbroad and unconstitutionally vague to the extent it criminalized threats to perform acts intended to substantially harm a person’s “mental health.” *Williams*, 144 Wn.2d at 201 (citing RCW 9A.46.020(1)(a)(iv) (1992)). The term “mental health” was impermissibly vague because it was not clear whether it referred to “mere irritation or emotional discomfort” or instead meant a diagnosed psychological condition. *Id.* at 204-05. And it was unconstitutionally overbroad because it was not limited to “true threats,” which by definition require an expression of intent to cause *physical* harm. *Id.* at 207-08.

Similarly here, the cyberstalking statute is both overbroad and vague. It is overbroad because, like the harassment statute, the cyberstalking statute prohibits not only true threats but also a substantial amount of constitutionally protected speech. For example, it criminalizes the sending of an electronic communication using “indecent” language with intent to “embarrass” the recipient. RCW 9.61.260(1)(a). Such a content-based restriction runs afoul of the First Amendment because this type of speech is not “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience,

annoyance, or unrest.” *Williams*, 144 Wn.2d at 206. Indeed, such speech could be used for political purposes: one can imagine a communication sent as part of the transgender bathroom debate being swept up under this statute in light of the overbroad language prohibiting “indecent”⁶ words or images sent with intent to “embarrass.”

The term “harass” is also overbroad. “Harass” means “to annoy or bother (someone) in a constant or repeated way.”⁷ An electronic communication using indecent language or images sent with intent to annoy or bother someone falls within the protection of the First Amendment, and cannot be criminalized. As this Court explained when invalidating an anti-harassment ordinance, “[a] discussion of any political, social, economic, philosophic or religious topic might well vex, irritate or bother the listener.” *City of Everett v. Moore*, 37 Wn. App. 862, 864, 683 P.2d 617 (1984). This Court noted that the mailing of anti-abortion brochures had been improperly criminalized under a similar Colorado law. *Id.* at 865 (citing *Bolles v. People*, 189 Colo. 394, 541 P.2d 80, 83 (1975)).

⁶ One definition of “indecent” is “using language that offends people : including behavior or ideas that people find offensive.” <http://www.merriam-webster.com/dictionary/indecent>. Communicating ideas that others find offensive is conduct lying at the core of First Amendment protection. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). There can be no doubt that a prohibition on this type of language criminalizes a substantial amount of constitutionally protected speech.

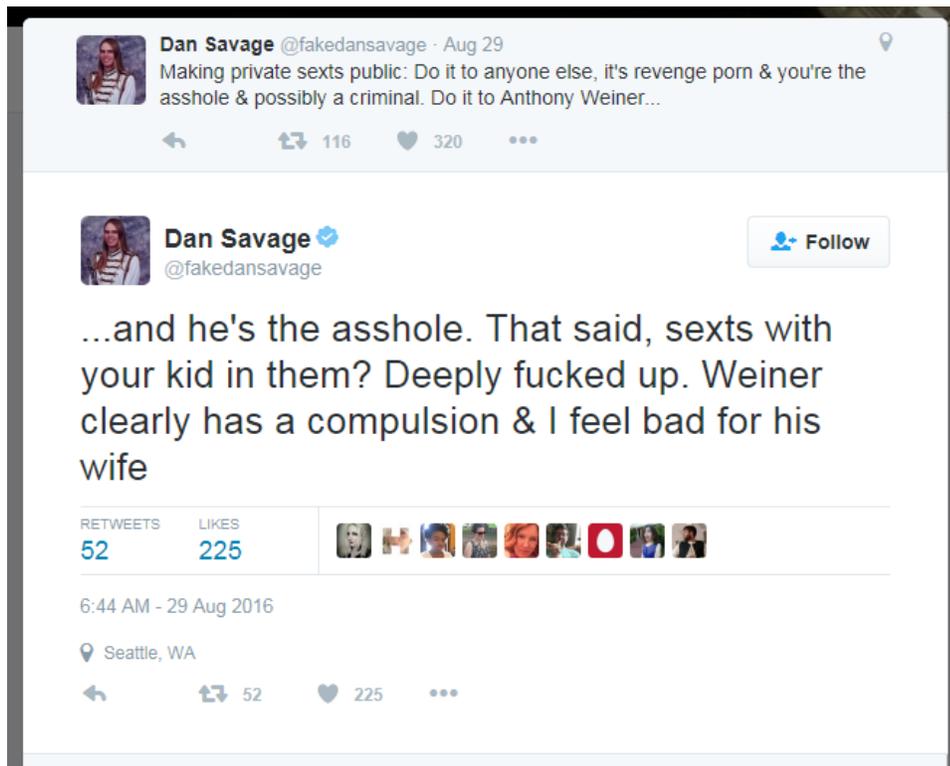
⁷ <http://www.merriam-webster.com/dictionary/harass>.

Indeed, countless political tweets could be considered cyberstalking in light of the overbroad language prohibiting “lewd, lascivious, indecent, or obscene” electronic communications made with intent to “harass” or “embarrass.” The following are some examples:





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While many (perhaps most) would be offended by the above missives, it is “often true that one man's vulgarity is another's lyric.” *Cohen v. California*, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). The First Amendment protects the principle that “debate on public

⁸ Rob Morrow is the chairman of the Republican Party of Travis County, Texas.

issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks” against those with whom the speaker disagrees. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Because the cyberstalking statute sweeps this exchange of ideas within its prohibitions, it is unconstitutionally overbroad.⁹

In addition to being overbroad, the statute is vague. For example, does the word “embarrass” mean “to make uncomfortable” or is it limited to a graver form of emotional distress? The latter reading might cure the overbreadth problem but the former is consistent with the dictionary definition. Similarly, does the overbroad dictionary definition of “harass” discussed above apply, or is it a legal term of art with a narrower meaning? Does “indecent” mean “using language that offends people : including behavior or ideas that people find offensive”¹⁰ – which is clearly overbroad – or does it mean “sexually offensive or shocking”¹¹ – which

⁹ In contrast to communications made with intent to “harass” or “embarrass,” communicating with intent to “intimidate” (or “torment”) likely falls outside the scope of First Amendment protection. *See Black*, 538 U.S. at 360 (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”). The problem is that the cyberstalking statute is not limited to intimidation. *See* RCW 9.61.260.

¹⁰ *See* <http://www.merriam-webster.com/dictionary/indecent>.

¹¹ *See id.*

might not be? These ambiguities render the statute unclear and subject to arbitrary enforcement. It is therefore void for vagueness under the Fourteenth Amendment. *See Williams*, 144 Wn.2d at 203-06.

c. The remedy is reversal of the convictions and remand for a new trial.

Although the statute may be rendered constitutional by severing the offending terms, “[a]n appellate court must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written.” *Id.* at 213 (internal quotations omitted). Because Mr. Stanley was convicted under an unconstitutional statute, a new trial is required unless the State proves beyond a reasonable doubt that he has not been prejudiced by the unconstitutional provisions. *Id.*

The State cannot meet this burden. Although the jury was not instructed on the clause prohibiting “any lewd, lascivious, indecent, or obscene words, images, or language,” it *was* instructed that cyberstalking includes communicating with intent to “embarrass” or “harass.” *See CP 155, 160-72.* In light of the plethora of evidence that Mr. Stanley’s messages were either cries for help or journal entries, the State cannot show an absence of prejudice. *See Section (1)(f) above.* Accordingly, Mr. Stanley asks this Court to reverse his convictions, and remand for a new trial. *Williams*, 144 Wn.2d at 213.

4. The prosecutor committed misconduct in closing argument.

“The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution.” *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Every prosecutor is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); *see Berger v. United States*, 295 U.S. 78, 84-85, 55 S.Ct. 629, 79 L.Ed.1314 (1935). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *Glasmann*, 175 Wn.2d at 703-04.

A new trial should be granted where a prosecutor’s conduct was both improper and prejudicial. *Id.* at 704. Prejudice is established if there is a substantial likelihood that the misconduct affected the verdict. *Id.* Even where a defendant does not object to improper argument, this Court will reverse if the misconduct was flagrant and ill-intentioned and incurable by an instruction. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

Here, the prosecutor committed prejudicial misconduct by presenting facts not in evidence, misstating the law, and lowering his burden of proof.

The prosecutor presented facts not in evidence when he said, “Miriam went to Spain but said she received messages before she left and after she got back.” RP (7/30/15) 1138. This statement was false, as Ms. Much received no messages from Mr. Stanley after she left for Spain – let alone after she returned. RP (7/27/15) 781-82 (Ms. Much testifies that she left for Spain in June of 2014 and blocked Mr. Stanley before she left); ex. 10 at 35 (showing last message to Ms. Much was sent May 6, 2014). Mr. Stanley immediately objected, but the court improperly overruled the objection and undermined Mr. Stanley’s credibility in front of the jury:

[PROSCUTOR]: Miriam went to Spain but said she received messages before she left and after she got back.

MR. STANLEY: Objection, she never said that.

THE COURT: Grounds? Again, this is the opportunity for counsel to make argument.

MR. STANLEY: I can object during the closing statement if the facts aren’t correct. That fact is not correct.

THE COURT: Whether or not the facts are correct is something that the jury will decide.

MR. STANLEY: I thought that I was allowed to have some objections during closing.

THE COURT: That is not a recognizable one in closing argument, sir. The objection is overruled. Go ahead, Mr. Brenner.

RP (7/30/15) 1138-39.

The court was wrong. Numerous cases have held that it is misconduct for the prosecutor to argue facts not in evidence. *E.g. State v. Pierce*, 169 Wn. App. 533, 537, 280 P.3d 1158 (2012); *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008); *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). It is the court's role to sustain proper objections to prosecutorial misconduct, and the trial judge erred in abdicating his responsibility. In overruling Mr. Stanley's objection, the court lent "an aura of legitimacy to what was otherwise improper argument." *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268, 275 (2015). In addition to improperly bolstering the prosecutor's claims, the court denigrated Mr. Stanley in the eyes of the jury, rendering the jurors less likely to trust him when it was his turn to present argument.

The prosecutor did not just misstate the facts; he also misstated the law and lowered his burden of proof. *See Allen*, 182 Wn.2d at 373 ("A prosecutor commits misconduct by misstating the law."); *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) (A prosecutor commits misconduct by misstating the burden of proof). The prosecutor said:

Another thing that I want you to understand is that reasonable doubt, or my burden to prove elements beyond a reasonable doubt *only applies to the elements, only applies to your to convict instructions.*

RP (7/30/15) 1136 (emphasis added). He repeated the error when stepping through the instructions themselves:

The next instruction – actually, there is several instructions. This is instructions 11 through 19. These are the elements that I have been talking about. What I have to prove beyond a reasonable doubt for Mr. Stanley to be found guilty.

RP (7/30/15) 1137. Later, the prosecutor referenced instruction number nine, which includes the “true threat” definition, but did *not* say he had to prove the statements were true threats beyond a reasonable doubt. RP (7/30/15) 1140 (“You have a jury instruction that will help you decide whether or not Mr. Stanley’s messages are threats. That is instruction number nine, that I have also included here.”).

The statements above misstate the law because the prosecutor bears the burden of proving beyond a reasonable doubt that a statement is a true threat unprotected by the First Amendment. *Kilburn*, 151 Wn.2d at 54 (State must prove *both* a true threat *and* the statutory elements).

Although Mr. Stanley did not object to these misstatements during closing argument, he had already preserved the issue when the parties and the court discussed jury instructions. The court and prosecutor had wrongly told Mr. Stanley that the jury decides only the elements in the “to convict”

instruction, and the court rejected Mr. Stanley's proposal to include the "true threat" definition in the "to convict" instruction. RP (7/21/15) 179-83, 209-13; CP 141, 158, 160-72. Although courts have held that the "true threat" definition need not be in the "to convict" instruction,¹² it is particularly egregious that the prosecutor took advantage of this situation by proposing a separate instruction and then telling the jury that his burden to present proof beyond a reasonable doubt applied only to the elements in the "to convict" instructions.

There is a substantial likelihood that this misconduct affected the verdict. The core dispute in the case was whether Mr. Stanley's statements were true threats, and the result may have been different if the prosecutor had not misrepresented the law on this issue. (*See* Section (1)(f) above describing context tending to show statements were not true threats). For this reason, too, this Court should reverse the convictions and remand for a new trial.

¹² *State v. Allen*, 176 Wn. 2d 611, 630, 294 P.3d 679 (2013).

E. CONCLUSION

For the reasons set forth above Mr. Stanley asks this Court to reverse his convictions, order dismissal of the charges on counts six and nine, and remand for a new trial on the remaining counts.

DATED this 1st day of September, 2016.

Respectfully submitted,

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74204-3-I
v.)	
)	
SLOAN STANLEY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **OPENING 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:

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APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] SLOAN STANLEY	(X)	U.S. MAIL
386799	()	HAND DELIVERY
WASHINGTON CORRECTIONS CENTER	()	_____
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SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF SEPTEMBER, 2016.



X _____

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