Supreme Court No. 100430-3
Court of Appeals No. 82539-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS WAYNE DUNN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Douglas Wayne Dunn requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Dunn, No. 82539-9-I, filed on October 4, 2021. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The Sixth Amendment right to present a full defense includes the right to present evidence relevant to the defense. Here, the trial court excluded evidence that previously Robin Steeley had complained to the police that her neighbor threatened to kill her. This evidence was relevant to Dunn's defense that Robin overreacted and any fear she experienced was unreasonable. The court erred in excluding the evidence.

2. To convict a person of felony harassment, the State must prove beyond a reasonable doubt the person uttered a "true threat" to kill. A "true threat" is a serious threat, not one said in jest, idle talk, or hyperbole. The State did not prove

beyond a reasonable doubt that Dunn uttered a "true threat" to kill.

3. The court instructed the jury that a "true threat" is a statement that a reasonable person would foresee would cause fear of harm. Several courts have held that United States Supreme Court precedent requires proof of a higher *mens rea* in order to comport with the First Amendment. The "true threat" jury instruction impermissibly lowered the burden of proof required by the Constitution.

4. Evidence of Robin Steeley's prior inconsistent statements were relevant and admissible for impeachment purposes.

5. The State did not prove beyond a reasonable doubt that three statements uttered by Dunn were actual threats to kill.

6. The State did not prove beyond a reasonable doubt the essential element that Dunn, by words or conduct, placed Robin in reasonable fear that any threat to kill would be carried out.

C. STATEMENT OF THE CASE

One day in June 2018, Douglas Dunn invited Melody Steeley and her friend "Nicole" over to his house in Vancouver to do drugs. RP 254. Dunn had known Nicole for a few months but this was the first time he met Melody.[1] RP 254. Unfortunately, none of them had any drugs or money. RP 254. Dunn decided to take his guitar to a pawn shop to pawn it. RP 254.

Melody drove the three of them to the pawn shop where Dunn pawned his guitar for $50 or $60. RP 255. Melody proposed that they take the money and buy some drugs from her dealer down the street. But Dunn could not accompany them because her dealer allowed only people he knew to come to his house. RP 255. Dunn gave Melody the money and she

[1] For the sake of clarity, Melody and Robin Steeley will be referred to by their first names. The record does not reveal Nicole's last name.

dropped him off at the McDonald's next to the pawn shop. She said they would return shortly with the drugs. RP 255.

Dunn waited for one or two hours at the McDonald's but Melody and Nicole never returned. RP 255. He called the girls separately and each blamed the other for stealing his money. RP 256-58. Finally, he called his mother who came to pick him up. RP 261.

Dunn sent Melody a text message accusing her of "burning" him. Exhibit 3. He told her to get in touch with him or "I'm coming after you and [Nicole]. I'm serious." Exhibit 3. Dunn then spoke to Melody via Facebook video chat. RP 257. During the chat, Dunn observed a drill in the background that he believed looked similar to a drill that Melody had admired at his house earlier. RP 258. Dunn accused Melody of stealing the drill, his money, and his phone charger that he had left in her car. RP 258-60. He told her he was coming to get his stuff. RP 260. She responded, "Good luck. You won't make it two feet" and, "My family's got guns." RP 260. He said, "What are you

going to shoot me?" RP 260. She responded, "Well, whatever it takes." RP 260. Then she hung up. RP 260.

Dunn was angry and upset and immediately sent Melody another text message. RP 261. In the message, he said,

> If you think I am playing or just talking shit or anything less than completely serious about the lengths I will go to to see that a lesson is taught to both of you then I am sorry for the rude awakening you are about to endure. Nothing is off limits to me. If I can't get at you then I will go after your family and friends.

Exhibit 3.

Dunn then looked at Melody's Facebook page. RP 262. He planned to contact her friends and family to find out where she was and how to get his stuff back. RP 262. He sent a voicemail message to "Robin Steeley" on Facebook Messenger. RP 262-63. He chose Robin because she has the same last name as Melody. RP 262. He did not know that Robin is Melody's mother. RP 156, 262.

In the voicemail message to Robin, Dunn stated, "Melody came to my house and stole from me. Because of that,

her life is in danger." Exhibit 4. He said, "I was hoping that you would have a talk with her and have her make things right before something bad happens to her." Exhibit 4. And he added, "Because you're a friend of hers, or family, you will be also subject to any repercussions that may come her way if she decides to hide or in any way avoid facing her consequences. You guys will pay the price as well." Exhibit 4.

After listening to the voicemail, Robin immediately sent Dunn an angry text message claiming he had threatened her daughter's life. RP 164; Exhibit 2. Dunn responded, clarifying he "did not threaten the life of your child." RP 165; Exhibit 2. He explained he was talking about the "legal consequences that you have to face for stealing from me." Exhibit 2. He added, "if you missed construed [sic] those threats than [sic] I apologize but she did she came in my house and she stole she has a meth

habit that I am I'm not sure you're aware about but that's why she did it."[2] Exhibit 2.

Dunn and Robin continued to exchange several angry text messages over a short period of time that day. RP 335; Exhibit 2. But none of Dunn's text messages contained a threat to kill. Instead, he made vague threats such as, "if something bad were to happen to your daughter because you were too busy reporting something to Facebook instead of dealing with her then you might have a Heavy burden to bear." Exhibit 2. Dunn told Robin he was "a bad dude," and sent her a 20-year-old newspaper clipping from the Oregonian reporting several crimes he had committed. Exhibit 1, 2; RP 272. In a text message, he said, "I just got done doing 20 years in prison I don't want your daughter to go down my path but she chose of life [sic] that sent her down that path so make a right [sic] I

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[2] In composing the text messages, Dunn used Facebook's "voice-to-text" feature, which explains in the numerous misspellings and typos. RP 268.

don't care who makes a right make a right. Make it right. I am not the problem. Your daughter is." Exhibit 2. Robin responded, "trust that I will use my legal Amendment rights and I'm armed and that anyone that enters my home or threatens my family will be treated accordingly." Id. In Dunn's last text message he replied, "I'm doing nothing more than you are protecting my home with up to and including deadly force if necessary." Id.

Robin contacted the police. RP 174. At trial, she testified she believed Dunn was threatening to kill her and Melody and was afraid he might act on that threat. RP 159, 174-76.

But undermining Robin's claim that she was afraid, sometime after the incident she sent a text message to a friend stating, "My quiet life blew up crazy shit that makes the last few days look like vanilla LOL so wish me luck. Some guy thinks my kid stole from him." RP 190-91; Exhibit 11.

Dunn was charged with one count of felony harassment and one count of misdemeanor harassment in regard to Robin,

and one charge of misdemeanor harassment in regard to Melody. CP 14.

At trial, Dunn testified he did not intend to threaten Melody or Robin but "wanted just to get [his] stuff and be done with it." RP 264, 270. In exchanging text messages with Robin, he tried to make clear to her he was not threatening Melody's life but was "just saying, hey, she's making choices that are putting her life in danger." RP 267. He was trying to appeal to Robin's "maternal instincts." RP 267. In sending her the newspaper article about himself, he intended to say, "'I just got done doing 20 years in prison. I don't want your daughter to go down my path, and she chose a life that set her down that path." RP 272.

In cross-examination of Robin, defense counsel asked if anyone had ever threatened her before. RP 194. Robin said yes. RP 194. The State objected on the basis of relevance. RP 194. After the jury stepped out, defense counsel explained that in 2015, Robin had been a named victim in another harassment

death threat case. RP 194-95. A neighbor woman had supposedly threatened to kill her. RP 196. The evidence was relevant to show that Robin "may be overly vigilant in her reactions to perceived threats; that she may have some past trauma from that incident such that she overreacts in this situation." RP 194-95. The court sustained the State's objection, ruling the evidence was not relevant because the facts of the prior case were different from the present case. RP 196-98.

The jury found Dunn guilty of all three harassment counts as charged. CP 40-42. On appeal, the Court of Appeals agreed with Dunn that the two counts of felony and misdemeanor harassment against Robin Steeley violated the Double Jeopardy Clause. The court therefore vacated the misdemeanor conviction in regard to Robin. The court also remanded to the trial court to strike the community supervision fees. The court otherwise affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The court erred and violated Dunn's constitutional right to present a full defense by excluding evidence relevant to the defense.

The trial court erred by excluding evidence that Robin had previously accused her neighbor of threatening to kill her. RP 194-98. This evidence was relevant to the defense because it tended to show that Robin was overly vigilant or sensitive in her perceptions and reactions to perceived threats. Had the jury heard the evidence, it would more likely have concluded that Robin's fear that Dunn would carry out his alleged threats was not reasonable.

An accused in a criminal case has a Sixth Amendment right to present evidence relevant to the defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. VI. If the evidence is relevant to the defense, "the burden shifts to the State to show that the relevant evidence 'is so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" State v. Horn, 3 Wn. App. 2d 302, 310, 415 P.3d 1225 (2018)

(quoting Jones, 168 Wn.2d at 720). The State's interest in excluding prejudicial evidence must also be balanced against the defendant's need for the information sought, and relevant information may be withheld only if the State's interest outweighs the defendant's need. Horn, 3 Wn. App. 2d at 310 (citing Jones, 168 Wn.2d at 720).

The Court reviews *de novo* whether the Sixth Amendment right to present a defense was violated. Jones, 168 Wn.2d at 719.

Here, to prove the harassment charges involving Robin, the State was required to prove Dunn knowingly threatened bodily injury, Robin was placed in reasonable fear that the threat would be carried out, and, for Count I, the threat consisted of a threat to kill. RCW 9A.46.020(1)(a)(i), (1)(b)(ii); State v. Kilburn, 151 Wn.2d 36, 58, 84 P.3d 1215 (2004); CP 29, 31 (to-convict jury instructions). For the felony harassment charge, the State was required to prove Robin reasonably feared that the threat to kill would be carried out, not just bodily

injury. State v. C.G., 150 Wn.2d 604, 608, 80 P.3d 594 (2003); CP 29.

Thus, the State was required to prove not only that Robin subjectively feared Dunn would carry out his threats, but also that her fear was reasonable, using an objective standard. State v. E.J.Y., 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

Evidence that Robin had previously accused someone else of threatening to kill her was relevant to whether she reasonably feared Dunn would kill her or her family members on this occasion. Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

As defense counsel argued, the fact that Robin had previously accused her neighbor of threatening to kill her raised

the possibility that she was overly sensitive or prone to overreact to perceived threats. RP 194-95. Dunn did not directly threaten to kill anyone. See Exhibit 2, 4. Yet Robin perceived Dunn's messages as threats to kill both her and Melody. RP 159, 174-76. She said she was afraid he would carry out these supposed threats to kill. RP 159, 174-75. Whether or not she had accused anyone in the past of threatening to kill her was relevant to whether her reactions to Dunn's perceived threats were reasonable. The court erred in excluding this relevant evidence. Jones, 168 Wn.2d at 720.

2. The State failed to prove beyond a reasonable doubt that Dunn uttered a "true threat" to kill.

The due process clauses of the federal and state constitutions require that the government prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. Const. amend. XIV; Const. art. I, § 3. "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether

the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. at 319.

Where a threat to commit bodily harm is an element of a crime, the State must prove the alleged threat was a "true threat." Kilburn, 151 Wn.2d at 54. This is because of the danger that the criminal statute will be used to criminalize pure speech and impinge on First Amendment rights. True threats are not protected speech because of the "fear of harm aroused in the person threatened and the disruption that may occur as a result of that fear." Id. at 46.

The test for determining a "true threat" is objective and focuses on the speaker. Id. at 54. The question is whether a reasonable person in the speaker's position would foresee that

the threat would be interpreted as a serious expression of intention to inflict the harm threatened. State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013); accord Kilburn, 151 Wn.2d at 46.

A true threat is a serious threat, not one said in jest, idle talk, or political argument. Kilburn, 151 Wn.2d at 43. Stated another way, communications that "bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole" are not true threats. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). The nature of a threat "depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." C.G., 150 Wn.2d at 611.

Moreover, the First Amendment demands more than application of the usual standard of review for sufficiency of the evidence. Kilburn, 151 Wn.2d at 48-49. The Court must independently examine the whole record to ensure that the

judgment does not constitute a forbidden intrusion into the field of free expression. Id. at 50.

Applying the foregoing principles to the facts here, the question is whether a reasonable person in Dunn's position would have foreseen that his communications would be interpreted as a serious expression of an intent to kill Robin and/or Melody. When the language of the utterances is viewed in the context of all of the facts and circumstances, it is apparent that a reasonable person in Dunn's position would not have drawn that conclusion. The only utterance that could reasonably be interpreted as a threat to kill was Dunn's initial voicemail message to Robin stating, "Melody came to my house and stole from me. Because of that, her life is in danger." Exhibit 4. Yet when Robin immediately confronted Dunn about this message, Dunn clarified that he did not intend to "threaten the life of your child." RP 165; Exhibit 2. To the contrary, he explained, he was actually talking about the "legal consequences that you have to face for stealing from me."

Exhibit 2. He apologized to Robin and made clear that, if she believed he was threatening Melody's life, she had misunderstood him. Exhibit 2. Instead, Dunn was angry that Melody had stolen from him and wanted Robin to help "[m]ake it right." Exhibit 2. As Dunn testified at trial, he was not threatening Robin's or Melody's lives but simply "wanted to get [his] stuff and be done with it." RP 264, 270.

In sum, the State did not prove beyond a reasonable doubt that Dunn uttered a true threat to kill as required for count I, the felony harassment charge.

Reversal for insufficient evidence is equivalent to an acquittal and bars retrial for the same offense. State v. Hummel, 196 Wn. App. 329, 359, 383 P.3d 592 (2016). "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Id. (quoting Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141,

57 L. Ed. 2d 1 (1978)). The conviction for count I must be reversed and the charge dismissed.

3. The harassment convictions should be reversed because the "true threat" definition given to the jury was improper under the First Amendment.

The subsection of the harassment statute under which Dunn was convicted criminalizes pure speech, and therefore "must be interpreted with the commands of the First Amendment clearly in mind." Kilburn, 151 Wn.2d at 41; see U.S. Const. amend. I (government may not abridge freedom of speech. Because the right to free speech is "vital," only a few narrow categories of speech may be proscribed). Kilburn, 151 Wn.2d at 42. 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." Id. at 43.

The jury must be instructed on the definition of "true threat," and the failure to provide a proper true threat instruction to the jury is an issue of constitutional magnitude

that may be raised for the first time on appeal under RAP 2.5(a)(3). Schaler, 169 Wn.2d at 287.

Here, the court instructed the jury as follows, with the second paragraph representing the "true threat" definition:

> 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.

CP 34 (Instruction 13). Our supreme court endorsed this standard in State v. Trey M., 186 Wn. 2d 884, 893, 383 P.3d 474 (2016).

But unlike Washington courts, several other courts have held that the First Amendment requires proof of a higher mental state than the reasonable person standard in order to criminalize speech as a true threat. Based on their reading of Virginia v.

Black,[3] those courts hold the government must prove the defendant subjectively intended to induce fear of serious harm or death. See, e.g., United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011); United States v. Heineman, 767 F.3d 970, 976 (10th Cir. 2014); Brewington v. State, 7 N.E.3d 946, 964-65 (Ind. 2014); State v. Boettger, 310 Kan. 800, 814-15, 450 P.3d 805 (2019); O'Brien v. Borowski, 961 N.E.2d 547, 556 (Mass. 2012).

In such circumstances, the error could not be found harmless beyond a reasonable doubt in this case. See Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (constitutional errors require reversal unless it is shown beyond a reasonable doubt the outcome would have been the same absent the error).

The State did not present sufficient evidence to convince a reasonable jury that Dunn subjectively intended to induce fear

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[3] 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

of death. As stated, Dunn told Robin he did *not* intend to threaten Melody's life. RP 165; Exhibit 2. He testified at trial he did not intend to threaten anyone's life but simply "wanted to get [his] stuff and be done with it." RP 264, 270. But given the low burden of proof of the "reasonable person" standard, some jurors may have convicted based only on a superficial reading of the content of Dunn's messages. Thus, if the law is clarified to require a different standard than the one used in this case, the conviction on count I should be reversed and the case remanded for a new trial.

4. The trial court abused its discretion in excluding Robin Steeley's prior inconsistent statements because they were relevant for impeachment purposes.

On direct examination, Robin Steeley stated:

> Like it was—**I've never**—that's terrifying to have someone say the things he was saying.

RP 174-75.

On cross-examination, defense counsel asked Robin:

> Q. Okay. So in response to the State's questioning, you indicated something to the effect

that you've never had something like this happen to you before?

A. **This particular situation? No.**

Q. So –

A. Have I ever had someone threaten me in the past? Yes.

RP 194.

These statements by Robin were inconsistent with defense Exhibit 12, which showed that Robin had previously been involved in a harassment death threat case. Therefore, the evidence was relevant and admissible for impeachment purposes.

Evidence is admissible on cross-examination to impeach a witness's credibility based on evidence of the witness's bias, interest, and prior inconsistent statements. This right is guaranteed by the Confrontation Clause of the Sixth Amendment.

In Davis v. Alaska, the United States Supreme Court held, "Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination." Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct.

1105, 39 L. Ed. 2d 347 (1974) (internal quotation marks and citation omitted). The Davis Court continued, "[D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences to the reliability of the witness." Id. at 318.

The exclusion of Robin's inconsistent statements, which would have facilitated Dunn's cross-examination and impeachment of a key State witness, deprived him of his constitutional right to confront the witnesses against him.

5. The State did not prove beyond a reasonable doubt that three statements uttered by Dunn were actual threats to kill.

The State alleged three statements by Dunn were threats to kill. First, in a voicemail message to Robin, Dunn stated that: [Melody Steeley's] life was in danger." Exhibit 4; RP 344. Second, Dunn stated in a text message to Robin, "If it's life in prison that I'm facing then I will make sure it's a life in prison offense." Exhibit 2, RP 344. Third, Dunn stated in a text

message to Robin, “I am doing nothing more than you are; protecting my home with up to and including deadly force if necessary.” Exhibit 2; RP 344.

None of these statements are actual threats to kill. The law required the State to prove Dunn uttered “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 . . . take the life of another person.” Kilburn, 151 Wn.2d at 42-43.

When viewed in context, it is clear that none of the three statements were actual, true threats to kill.

6. The State did not prove beyond a reasonable doubt the essential element that Dunn, by words or conduct, placed Robin in reasonable fear that any threat to kill would be carried out.

“In order to convict an individual of felony harassment based upon a threat to kill, RCW 9A.46.020 requires that the State prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out as an element of the offense.” C.G., 150 Wn.2d at 612.

Robin Steeley perceived Dunn's statement that her daughter's "life was in danger," Exhibit 4, as a threat to kill. But regardless of whether or not this was a true threat, Dunn's words or conduct did not place Robin in *reasonable* fear that this alleged threat would be carried out. Therefore, the State failed to prove an element of the crime, in violation of due process. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 3rd day of November, 2021. I certify this petition complies with RAP 18.17 and contains 4,396 words.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DOUGLAS WAYNE DUNN, Appellant.	)	No. 82539-9-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Douglas Dunn appeals his judgment and sentence for one count of felony harassment and two counts of gross misdemeanor harassment. Dunn argues that: (1) the two harassment convictions against Robin Steeley violate the double jeopardy clause; (2) the trial court erred in excluding relevant evidence; (3) the State failed to prove all the essential elements of the crime; (4) the trial court erred by improperly instructing the jury on the definition of "true threat"; and (5) the trial court erred in ordering community custody supervision fees. The State concedes, and we agree, that the two counts of felony and misdemeanor harassment against Robin Steeley violate double jeopardy, and that the court improperly imposed community supervision fees due to Dunn's indigence. We vacate the one count of misdemeanor

harassment of Robin and remand to strike the cost of community supervision fees. We otherwise affirm.

FACTS

On June 8, 2018, Dunn invited Nicole[1] and her friend, Melody Steeley,[2] to his house in Vancouver to smoke methamphetamine. This was Dunn's first time meeting Melody. Not having any drugs or money, Melody drove the three to a pawn shop so that Dunn could pawn his guitar for $50 or $60. Melody offered to take Dunn's money to her dealer nearby. The dealer only allowed people he knew in his house. Dunn gave Melody and Nicole the money and waited at the closest McDonald's for one to two hours, but the pair never returned. Dunn called both Melody and Nicole separately; each blamed the other for the theft.

Dunn sent Melody an angry message accusing her of "burning" him and asking her to get in touch with him or "I'm coming after you." Dunn then spoke to Melody over Facebook video chat. Dunn noticed a drill in the background that he believed was his and accused Melody of stealing his drill, his money, and his phone charger that he left in her car. Dunn stated that he was going to get his stuff and Melody responded, "Good luck. You won't make it two feet" and, "My family's got guns." Dunn said, "What are you going to shoot me?" She responded, "Well, whatever it takes" and then hung up.

Dunn sent Melody a follow up message stating:

> If you think I am playing or just talking shit or anything less than completely serious about the lengths I will go to to [sic] see that a lesson is taught to both of you then I am sorry for the rude awakening you are about to endure. Nothing is off limits to me. If I can't get at you then I will go after your family and friends.

[1] The record does not disclose Nicole's last name.

[2] For clarity, this opinion refers to Melody Steeley and Robin Steeley by their first names. We intend no disrespect.

Dunn then examined Melody's Facebook page for close friends and family. Unaware that she was Melody's mother, Dunn sent a voicemail message on Facebook Messenger to Robin. Dunn said, "Melody came into my house and stole from me. Because of that, her life is in danger." He continued,

> I was hoping that you would have a talk with her and have her make things right before something bad happens to her. Something bad is going to happen to her anyway, the severity of it depends on how she proceeds from this point forward. Because you're a friend of hers, or family, you will be also subject to any repercussions that may come her way if she decides to hide or in any way avoid facing her consequences. You guys will pay the price as well.

Robin immediately sent Dunn angry text messages, which the two continued to exchange throughout the day. In his last message, Dunn replied, "I'm doing nothing more than you are protecting my home with up to and including deadly force if necessary."

Robin contacted the police and later testified that she believed Dunn was threatening to kill her and Melody. However, Robin later sent a text message to a friend stating, "My quiet life blew up crazy shit that makes the last few days look like vanilla LOL so wish me luck. Some guy thinks my kid stole from him."

The State charged Dunn with one count of felony harassment and one count of misdemeanor harassment in regard to Robin, and one count of misdemeanor harassment in regard to Melody. At trial, Dunn testified he did not intend to threaten Melody or Robin, just that he wanted his stuff back. On December 5, 2019, the jury found Dunn guilty of all three harassment counts as charged. The trial court sentenced Dunn to 51 months.

Dunn appeals.

ANALYSIS

A. Double Jeopardy Clause

Dunn argues that his threatening messages to Robin constitute only a single unit of prosecution, therefore, the conviction for one count of misdemeanor harassment must be vacated. The State concedes and we accept the State's concession.

The double jeopardy clause "protects a defendant from being convicted twice under the same statute for committing just one unit of the crime." State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). The inquiry is "what act or course of conduct has the Legislature defined as the punishable act." Adel, 136 Wn.2d at 34. Harassment constitutes a single unit of the crime when "a perpetrator (1) threatens to cause bodily harm to a single identified person at a particular time and place and (2) places a single victim of the harassment in reasonable fear that the threat will be carried out." State v. Morales, 174 Wn. App. 370, 387, 298 P.3d 791 (2013).

Here, Dunn threatened Robin on June 9, 2019, over a span of a few minutes. Dunn directed his threats to Robin in one place during a short time. Thus, Dunn's threats directed at Robin constitute a single offense of harassment and his combined felony and misdemeanor harassment charges violate double jeopardy. The remedy for a violation of double jeopardy is to vacate the lesser offense. State v. Albarran, 187 Wn.2d 15, 21-22, 383 P.3d 1037 (2016).

B. Exclusion of Evidence

Dunn argues[3] that the court erred and violated his right to present a full defense by excluding relevant evidence that Robin had previously accused her neighbor of threatening to kill her.[4] We disagree.

When a defendant asserts that an evidentiary ruling resulted in a violation of his right to present a defense, the court utilizes a two-step standard of review. State v. Arndt, 194 Wn.2d 784, 797, 453 P.3d 696 (2019). First, this court reviews the evidentiary ruling for an abuse of discretion. Arndt, 194 Wn.2d at 797. A trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). Second, we review de novo whether these evidentiary rulings deprived the defendant of his Sixth Amendment right to present a defense. Arndt, 194 Wn.2d at 797.

To prove felony harassment, the State must establish that Dunn knowingly threatened to cause bodily injury; that Dunn's conduct placed Robin in reasonable fear that the threat would be carried out; and that Dunn threatened to kill Robin. RCW 9A.46.020(1)(a)(i), (1)(b), (2)(b)(ii). Thus, the State was required to show that Robin subjectively feared Dunn would carry out his threats, and that the fear was objectively reasonable. State v. E.J.Y., 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

[3] In his statement of additional grounds, Dunn also argues that this evidence was relevant to rebut a prior inconsistent statement. Respectfully, this argument is extraneous. Dunn's statement does not present which prior statements are now inconsistent for impeachment purposes.

[4] The State argues that Dunn's offer of proof regarding the evidence that Robin was a named victim in a previous harassment death threat case was insufficient. This argument is unpersuasive. Dunn submitted the previous victim statement and argued to the court following the objection the purpose of the evidence, its relevance, and some additional detail. Therefore, it is important only for us to determine whether excluding this evidence was in error.

During cross-examination, Dunn asked, "So in response to the State's questioning, you indicated something to the effect that you've never had something like this happen to you before?" Robin responded, "Have I ever had someone threaten me in the past? Yes." The State objected on relevance grounds. The defense explained to the court that the information regarding Robin's previous listing as a victim of a death threat, and the victim impact statement, was relevant to show that she may be overly vigilant in her reactions to perceived threats and was, essentially, an eggshell plaintiff. The court ruled that:

> The difference between anything that you may refer to previously and what we have here is the fact that we have communications between the defendant and the alleged victims concerning what statements were there. It's right in front of the jury; the jury can weigh the credibility of this particular defendant. We don't need additional information.

Here, the court properly weighed the evidence, and determined that it was irrelevant to the defense because the jury was presented with text messages, statements, and newspaper clippings allowing them, as the trier of fact, to determine whether Robin subjectively felt fear and whether that fear was objectively reasonable. The court did not abuse its discretion in excluding the evidence.

Because the trial court did not abuse its discretion by excluding the evidence, we next determine if the exclusion violated Dunn's right to present a defense. The right to present a defense is not absolute; defendants do not have a "constitutional right to present irrelevant evidence." State v. Burnam, 4 Wn. App. 2d 368, 377, 421 P.3d 977 (2018). A defendant's right to present a defense is still "subject to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" State v. Blair, 3 Wn. App. 2d 343, 350, 415 P.3d

1232 (2018) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). A court may properly limit evidence without violating a defendant's right to present a defense when the defendant was still able to present evidence relevant to the central defense theory. Arndt, 194 Wn.2d at 814. Thus, the defendant's right to present a defense is examined in context of the entire record. State v. Duarte Vela, 200 Wn. App. 306, 326, 402 P.3d 281 (2017).

Here, the court properly concluded that Robin's status as a victim in a prior harassment case involving a death threat was irrelevant in light of the record and abundance of relevant evidence to assist the trier of fact. Additionally, Dunn had the opportunity to establish Robin's objective and subjective fear through her text messages, cross-examination, and his own testimony. The fact that Robin was a prior harassment victim was irrelevant, the exclusion of which did not deprive Dunn of his right to present a defense.

C. Proof Beyond a Reasonable Doubt

Dunn argues that the State failed to provide sufficient evidence that he made a true threat to kill.[5] We disagree.

"The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The question is, whether,

[5] In Dunn's statement of additional grounds, he argues that the State failed to prove, beyond a reasonable doubt, that the defendant "by words or conduct place[d] the person threatened in reasonable fear that the threat [to kill] would be carried out." RCW 9A.46.020(1)(a)(i), (1)(b), (2)(b)(ii). We will reverse a conviction "only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt." State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). Here, the State presented evidence of audio messages, text messages, and Facebook messages to prove that Robin's fear of Dunn's threat to kill was reasonable.

after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson, 443 U.S. at 319; State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). On review, the court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The appellate court does not "reweigh the evidence and substitute [its] judgment for that of" the fact finder. State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012). In harassment cases, the reviewing court also applies "the rule of independent review" to determine what constitutes a true threat. State v. Kilburn, 151 Wn.2d 36, 52 P.3d 1215 (2004). The purpose of independent review is to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." Kilburn, 151 Wn.2d at 50. Independent review is "limited to review of those crucial facts that necessarily involve the legal determination" of whether there was a true threat and "does not extend to factual determinations such as witness credibility." Kilburn, 151 Wn.2d at 52; State v. Locke, 175 Wn. App. 779, 791, 307 P.3d 771 (2013).

Under RCW 9A.46.020, a person is guilty of harassment if the person knowingly threatens to cause bodily injury and, by words or conduct, this places the threatened person in reasonable fear that the threat will be carried out. Harassment is a felony charge when the threat is to kill the person threatened. RCW 9A.46.020(2)(b)(ii). "Under the First Amendment only a true threat suffices for a conviction under RCW 9A.46.020." Kilburn, 151 Wn.2d at 41. 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 person." State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). The test for determining a true threat is objective and focuses on the speaker. Kilburn, 151 Wn.2d at 54. A true threat is a serious threat, not one said in jest, idle talk, hyperbole, or political argument. Kilburn, 151 Wn.2d at 43. The nature of the threat, "depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003).

There is substantial evidence that Dunn's statements to Robin, in light of all facts and circumstances, constituted a true threat to kill. In his voice message to Robin, Dunn stated that because Melody stole from him that "her life is in danger" and that "because you are a friend of hers, or family, you will be also subject to any repercussions that may come her way." He continued to say "I promise you that, this is not a threat this is just something that's going to happen, this is how I operate." Using the phrase, "life is in danger" and extending that threat to Robin is explicit language of a threat to kill. In addition to these words, Robin and Dunn exchanged angry text messages. Robin stated, "if you touch one hair on her I will make sure you spend the rest of your life in prison." Dunn responded, "if it's life in prison that I'm facing then I will make sure it's a life in prison offense." The context of the conversation additionally supports the notion that Dunn was making a true threat to kill. Dunn made it clear that he wanted his possessions back and went to great lengths to retrieve them.[6] In sum,

[6] In Dunn's statement of additional grounds, he analyzes whether three of the statements are true threats to kill separately. The appropriate inquiry, however, is to view these statements as a whole including the context.

viewed in a light most favorable to the State, there is sufficient evidence for the trier of fact to support a finding that Dunn made a true threat to kill.

D. Jury Instruction Definition of "True Threat"

Dunn argues that the jury instruction defining a true threat was improper under the First Amendment. Dunn argues we should abandon Washington precedent and adopt a subjective standard for what constitutes a true threat under the First Amendment. We disagree.

In State v. Trey M., 186 Wn.2d 884, 892, 383 P.3d 474 (2016), the Washington Supreme Court declined to adopt a subjective test, and held that Washington courts must apply an objective test for what constitutes a true threat under the First Amendment. Washington courts consistently relied on the objective (reasonable person) test since its adoption in State v. Williams, 144 Wn.2d 197, 208, 26 P.3d 890 (2001). We decline to stray from this clear precedent.

E. Community Supervision Fees

Dunn argues that the trial court erred in applying community supervision fees due to his indigency. The State concedes and we accept the State's concession.

The community supervision fee is a discretionary legal financial obligation. RCW 9.94A.703(2)(d); State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), review denied, 193 Wn.2d 1007 (2019). A person who is determined indigent is not required to pay community custody supervision fees. State v. Dillion, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022 (2020). Because the trial court found Dunn indigent, and because it intended to strike community custody supervision fees, we remand to strike the fees.

We vacate the one count of misdemeanor harassment of Robin and remand to strike the cost of community supervision fees. We otherwise affirm.

Mann, C.J.

WE CONCUR:

Chun, J.

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 82539-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Paralegal Date: November 3, 2021
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