Supreme Court No. 100714-1
(COA No. 37476-9-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,
v.
JARED WINTERER,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington Court of Appeals Cases

Decisions of Other Jurisdictions

Constitutional Provisions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

Jared Winterer asks this Court to review the opinion of the Court of Appeals in *State v. Jared Winterer*, 37476-9-III (issued on January 25, 2022). A copy of the opinion is attached in the Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether convictions for stalking may be predicated on Mr. Winterer's protected speech.

2. Whether a mistrial was required when the trial court admitted evidence of Mr. Winterer's overturned conviction to show the complainant's reasonable fear, even though the conviction post-dated the events of the case at bar?

3. Whether Mr. Winterer received ineffective assistance of counsel when his attorney failed to object to exhibits he had never seen or received?

C. STATEMENT OF THE CASE

Mr. Winterer suffered a traumatic brain injury many years ago. RP 301-02. Since then, he has had significant difficulties. The record is replete with examples of his struggle to control his behavior, his nonsensical and tangential speech, and his delusional thinking. *Passim*. He also described his inability to socialize and his desire to find love with a romantic partner. RP 302-03.

Mr. Winterer met Ms. Massey, a friend of his cousin, over ten years ago and would see her around town occasionally. RP 146-47. From their first interaction, Mr. Winterer was inappropriate, but he acted this way with all women, seemingly a symptom of his brain injury. RP 147-48. He asked for Ms. Massey's number and contacted her on social media.

Id. She blocked him and asked him to stop contacting her. RP 149-50.

Years later, in 2010, Ms. Massey began working at the Kittitas County Corrections Center. RP 146. At the time, Mr. Winterer was periodically incarcerated there. CP 8; RP 149. When he learned Ms. Massey worked there, he sent her kites and used his emergency call button to speak with her. RP 159. He told her he loved her and asked for sexual favors. RP 165, 196. He became possessive of Ms. Massey and thought guards were in relationships with her. RP 155.

Ms. Massey eventually obtained a no-contact order against Mr. Winterer. RP 198-99. He violated the order several times. RP 170. In 2015, he transferred to Washington State Penitentiary in Walla Walla and stopped contacting Ms. Massey. RP 171. He did, however, send letters to the judge who issued Ms.

Massey's no-contact order and to the Kittitas County jail. Ex. 3, 18. The letters were dated March 14, 2016 and February 8, 2016, respectively, and did were not addressed or directed to Ms. Massey. *Id.* Unbeknownst to Mr. Winterer, Ms. Massey opened the letter to the jail and read it. Ms. Massey did receive a letter from Mr. Winterer on March 7, 2016 in which he communicated his love for her, his desire to marry her, and other similar sentiments. Ex. 22. It did not contain threats of harm. *Id.*

Ms. Massey reported the letters to the Ellensburg Police Department. RP 196. A deputy interviewed Mr. Winterer in prison. Ex. 102. Mr. Winterer denied any intent to frighten or harass Ms. Massey. *Id.* He stated he did not send the letters contained in exhibits 3 and 18 to Ms. Massey, and that he knew it was unlawful to

do so. *Id*. He expressed surprise she had read the letter he addressed to the jail. *Id*.

Shortly after, Mr. Winterer returned to the Kittitas County jail. RP 217. While there, he began contacting Ms. Massey again. Ms. Massey collected letters and kites Mr. Winterer sent her and turned them over to the police. RP 196.

The State charged Mr. Winterer with stalking Ms. Massey. CP 12. He was convicted in a trial in 2018 after representing himself, but the conviction was reversed on appeal because his waiver of counsel was invalid. CP 25-34. Upon remand, Mr. Winterer received new counsel.

At the retrial, Ms. Massey testified to numerous contacts from Mr. Winterer over the years she had known him, but she could not recall any dates of the alleged communications. RP 199. Other than the dated

letters and kites, she did not know when any other "harassing" conduct happened. RP 199.

Defense counsel tried to clarify when various events occurred and asked Ms. Massey when she believed Mr. Winterer had been convicted of a no-contact order violation, but Ms. Massey instead responded that Mr. Winterer had been convicted of stalking. RP 214-15. Ms. Massey was referring to the overturned conviction.

Counsel asked for a recess and moved for a mistrial, citing the highly prejudicial nature of Ms. Massey's answer and the danger inherent in informing the jury Mr. Winterer had previously been convicted of the very offense for which he was currently on trial. RP 215-22. Counsel argued the court could not "un-ring the bell" and the jury had been left with the impression

Mr. Winterer had a separate stalking conviction when in fact he did not. RP 219.

The court denied the mistrial motion, reasoning that even if Ms. Massey was wrong about the existence of a conviction, her understanding of Mr. Winterer's criminal history was relevant to show the reasonableness of her fear. RP 219-21. The court did not explain how Mr. Winterer's reversed conviction, which occurred in 2018, would be relevant to show Ms. Massey's state of mind in 2016, when the offense allegedly occurred.

At the State's request, the court admitted exhibit 27, an envelope containing multiple additional letters purportedly sent from Mr. Winterer to Ms. Massey during the charged timeframe. RP 229. Despite having never received or viewed the exhibit, counsel failed to object to the discovery violation. RP 250-54. Counsel

acknowledged this failure but believed he could not do anything to remedy the situation because the exhibit had already been admitted. *Id*. The prosecutor claimed she had told a previous attorney the exhibit was available at the police department, but she did not remember who she told and made no other effort to provide the missing exhibit to Mr. Winterer. RP 251-52. The court did not provide the jury a limiting or curative instruction. The jury convicted Mr. Winterer as charged. CP 65.

On review, the Court of Appeals found Mr. Winterer's stalking conviction was based on his repeated contact with Ms. Massey rather than the content of his speech, even though the contacts were made in the form of speech. Slip Op. at 8-9. The court further found the trial court did not abuse its discretion by declining to order a mistrial, and that Mr.

Winterer's attorney was not ineffective for failing to object to an exhibit he had never received or reviewed. Slip Op. at 11-17.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Whether a stalking conviction may be predicated on constitutionally protected speech presents a significant constitutional question.

a. A stalking conviction predicated on harassment by speech requires proof that speech is unprotected by First Amendment.

Mr. Winterer's stalking conviction is based on allegations he harassed her by sending letters and calling her. RCW 9A.46.110(1).

For purposes of the stalking statute, "'Harasses' means unlawful harassment as defined in RCW 10.14.020." RCW 9A.46.110(6)(c). "Unlawful harassment" requires "a knowing and willful course of conduct directed at a specific person," RCW

10.14.020(2), but the course of conduct explicitly excludes "constitutionally protected free speech" and "constitutionally protected activity." RCW 10.14.020(1).

Under these provisions, stalking by means of harassment may be committed through speech, but *only* if that speech is not constitutionally protected. U.S. Const. amend. I; Const. art. I, § 5. In limited circumstances, the government may regulate speech. *United States v. Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010). This includes words intended to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and speech presenting a grave and imminent threat that the government has the power to prevent. *United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) (plurality).

The list of exceptions to First Amendment protections may not be expanded even where the speech at issue is claimed to be of minimal value. *Stevens*, 559 U.S. 469-72 (rejecting argument that depictions of animal cruelty could be added to list); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 788, 791-94, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) (violent video games entitled to First Amendment protection). Laws restricting or punishing speech based on its content are presumptively unconstitutional and subject to strict scrutiny. *Brown*, 564 U.S. at 799. "Harassment" is not a category exempted from First Amendment protections. Therefore, speech that "harasses" another is entitled to constitutional protection. Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 Nw. U.L. Rev. 731, 788-89 (2013);

DeJohn v. Temple Univ., 537 F.3d 301, 316 (3d Cir. 2008).

RCW 10.14.020(1) excludes "constitutionally protected free speech" and "constitutionally protected activity" from the scope of the stalking statute. By its plain terms, constitutionally protected speech is therefore not "unlawful harassment."[1] In other words, only speech that fits within an existing First Amendment exception can qualify as "unlawful harassment."

b. This Court should accept review because the Court of Appeals incorrectly reaffirmed the holding in State v. Nguyen.

Division III reaffirmed the holding in *State v. Nguyen*, 10 Wn. App. 2d 797, 450 P.3d 620 (2019). In

[1] Interpretation of a statute is an issue of law reviewed de novo. *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003). The court applies the plain meaning of the statute. *Id.* at 450.

Nguyen, Division I carved out a new exception to the First Amendment, holding that "an intentional course of conduct that seriously alarms, annoys, harasses, or is detrimental to" a person is unprotected by the First Amendment because of the intent element. *Id*. at 811. Relying on this case law, the Court of Appeals here, found Mr. Winterer's "course of conduct" that constituted harassment was his contact with Ms. Massey, not the content of his speech. Slip Op. at 9.

The conclusion in *Nguyen* is contrary to existing case law, and this Court is not obliged to follow it. "[N]ew categories of unprotected speech may not be added to the list [of exceptions] by a legislature" just because it finds "certain speech is too harmful to be tolerated." *Brown*, 564 U.S. at 791. But this is precisely what the Courts of Appeal have done in both *Nguyen* and this case: added a new exception to protected

speech when that speech "seriously alarms, annoys, harasses, or is detrimental to" a person. *Nguyen*, 10 Wn. App. 2d at 811; Slip Op. at 9.

To merely relabel Mr. Winterer's "speech" as "conduct" is semantic and neglects the fact that it was the very content of Mr. Winterer's letters and calls that caused Ms. Massey to feel harassed. Indeed, the prosecution specifically argued it was the *content* of Mr. Winterer's contacts with Ms. Massey that alarmed her:

> …if you—you feel sorry for Mr. Winterer a little bit, spend a little time and ***look at [the] things that he does say to her. Some of the words and language that he uses…It's alarming.***

RP 346 (emphasis added).

Contrary to the Court of Appeals' conclusion, it is in fact Mr. Winterer's speech, not simply his conduct in sending mail or making calls, which was criminalized

in this case. This Court should accept review to determine whether the Courts of Appeal have improperly carved out a new exception to the protections of the First Amendment. RAP 13.4(b)(3), (4).

c. This Court should accept review because Mr. Winterer's speech was protected by the First Amendment.

Absent the new "exception" carved out by *Nguyen*, no valid exception to protections of the First Amendment apply to Mr. Winterer's communications.

The prosecution bore the burden to prove Mr. Winterer intentionally and repeatedly harassed Ms. Massey between February 8 and December 2, 2016. CP 12, 55 (Instruction 7). The content of Mr. Winterer's letters does not constitute unprotected speech.

The consistent theme of Mr. Winterer's notes to Ms. Massey is his affection for her. For example, the

March 7 letter contains no threats or other abusive speech. Instead, it consists of Mr. Winterer's expressions of admiration, compliments about her hair, and his wish to marry her. Ex. 22. He states she was not supposed to receive or read the letter he addressed to the jail, and tells her she is "the special gal [he wants]." *Id*. The letters and kites contained in exhibit 27 repeatedly state that he wants to marry Ms. Massey, wants her to take his last name, and thinks she is attractive. Ex. 27.

Although his sentiments were ill-received and unrequited, the *content* of the letters does not fall within an exception to the First Amendment. *See Alvarez*, 567 U.S. 717 (listing all available exceptions). Mr. Winterer did nothing more than express his feelings for Ms. Massey. The content of this

communication qualified for protection under the First Amendment.

Nevertheless, the State relied not only on the fact of Mr. Winterer's unwanted contact, but on the content of his communications, to prove he had "stalked" Ms. Massey. RP 346 (arguing "the things [Mr. Winterer] does say to [Ms. Massey]" as alarming). The content of these communications does not fall under an exception to the First Amendment. Accordingly, the State failed to prove Mr. Winterer "harassed" Ms. Massey within the meaning of RCW 10.14.020, and thus did not prove he engaged in stalking. This Court should accept review to determine whether Mr. Winterer's stalking conviction rests on his constitutionally-protected speech. RAP 13.4(b)(3), (4).

2. This Court should accept review because the Court of Appeals misapplied the *Hopson* factors in finding the trial court did not abuse its discretion by not granting a mistrial.

This Court should accept review because the trial court erred when it refused to grant a mistrial and instead allowed the complainant to testify about Mr. Winterer's overturned stalking conviction.

A court's ruling on a mistrial motion is reviewed for abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). An unreasonable denial of a mistrial motion must be overturned if there is a substantial likelihood the error affected the jury's verdict. *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3d 422 (2013) (citing *State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002)).

A reviewing court considers three factors when determining whether an irregularity warrants a mistrial: "(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *Emery*, 174 Wn.2d at 765 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

There is no doubt that incorrectly telling the jury Mr. Winterer had prior stalking conviction was "serious enough to materially affect the outcome of the trial." *Hopson*, 113 Wn.2d at 286. Informing the jury Mr. Winterer had previously been convicted of the same charge currently pending was "a serious irregularity that is inherently prejudicial" because that conviction and the current charge were one and the same. *State v. Young*, 129 Wn. App. 468, 476, 119 P.3d 870 (2005).

The parties agreed pretrial that only Mr. Winterer's convictions for violation of a no-contact order were admissible because the State had to prove *felony* stalking. RP 28-33. Mr. Winterer's prior conviction in this case, which was vacated after he succeeded on appeal, was not admissible. *Id*. Yet, when counsel asked Ms. Massey when she believed Mr. Winterer was convicted of a no-contact order violation, she instead responded "He was convicted of - - stalking." RP 214-15.

Mr. Winterer moved for a mistrial, which the court denied. *Id*. The court reasoned the parties would not "want to get into" the reversed conviction and retrial, and that even if Ms. Massey was wrong, her testimony was relevant because "it goes to whether her fear is reasonable, which is one of the elements the state has to prove." RP 220. The court did not explain

how Ms. Massey's understanding of Mr. Winterer's stalking conviction could have shown the reasonableness of her fear at the time of the offense when the first trial and conviction occurred in 2018, but the offense was alleged to have occurred in 2016. CP 4; RP 220.

This error was egregious for several reasons. First, ER 404(b) prohibits the use of a person's prior convictions unless offered for a legitimate purpose, such as to show lack of mistake or common scheme or plan. Here, no such purpose existed for admitting evidence of the prior conviction.

Second, and more importantly, Mr. Winterer had no such conviction and Ms. Massey's testimony was simply incorrect. While procedurally, Mr. Winterer had been convicted of the very charge at issue here, that conviction was overturned on appeal. As counsel

rightly pointed out, Ms. Massey's testimony left the jurors with the impression Mr. Winterer already had a separate stalking conviction against Ms. Massey. RP 219. Thus, it is likely the jury's verdict was affected by this inaccurate testimony.

The Court of Appeals excused this error, finding Ms. Massey was confused about Mr. Winterer's criminal history and that it was cumulative. Slip Op. at 14. But Ms. Massey's confusion and the fact that other evidence of Mr. Winterer's criminal history was admissible are irrelevant to the question of whether the jury's verdict was impacted by inadmissible and prejudicial evidence.

Because the testimony was inherently prejudicial, and because it was inadmissible even for the limited purpose which the court claimed it could be

used, the first factor weighs in favor of finding a mistrial was appropriate.

The second *Hopson* factor asks whether the evidence was cumulative. If the evidence was cumulative, a mistrial may not be necessary. *Hopson*, 113 Wn.2d at 284.

Contrary to the Court of Appeals' opinion, evidence of Mr. Winterer's "prior" stalking conviction was not cumulative of the fact that he had other criminal history, because evidence of that other history was factually correct and required as part of the State's case and the jury was so instructed. This is fundamentally different from incorrectly informing the jury of criminal history that does not exist.

This factor likewise supports a finding a mistrial was appropriate because there was no other evidence

Mr. Winterer had previously been convicted of stalking other than Ms. Massey's problematic testimony.

The final factor, whether the trial court properly instructed the jury to disregard the irregularity, also supports a finding that a mistrial should have been granted. *Hopson*, 113 Wn.2d at 284. Here, the court indicated it had limited the use of this testimony to show Ms. Massey's state of mind only, but in fact no limiting instruction was ever given. RP 220-22.

The absence of a curative instruction was significant in *Young*. In that case, the court failed to address the unintentional disclosure of Young's prior assault conviction with the jury and never told the jury to disregard the disclosure. *Young*, 129 Wn. App. at 476. Instead, the trial court gave a standard instruction telling the jury not to consider the contents

of the information as proof of the crimes charged. *Id.* at 476-77.

The Court of Appeals found this was insufficient because the court's general instructions did not expressly tell the jury to disregard the prejudicial evidence and "cannot logically be said to remove the prejudicial impression created by revelation of *identical other acts*." *Id.* at 477 (emphasis added).

The same is true here, where the court did not provide a curative instruction and did not expressly tell the jury to disregard the testimony about the prior stalking conviction. Indeed, the court believed the testimony *was* admissible for the purpose of showing Ms. Massey's state of mind, even though the reversed conviction occurred two years after the offense allegedly occurred. RP 220. The court's failure to

provide a limiting instruction was wholly improper in light of *Hopson* and *Young*.

The *Hopson* factors are designed to help court determine whether there is a substantial likelihood an error affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269-70. All three factors weigh in favor of finding Ms. Massey's damaging testimony—incorrectly stating Mr. Winterer had a prior conviction for stalking—had a substantial likelihood of affecting the jury's verdict.

As noted in *Hopson*, "in certain situations, curative instructions cannot remove the prejudicial effect of evidence of other crimes." 113 Wn.2d at 284. No curative instruction here could remove the prejudicial effect of Ms. Massey's inaccurate testimony, which was not admissible even for the limited purpose for which the court believed it could be used.

This Court should accept review. The Court of Appeals incorrectly applied the *Hopson* factors to find the trial court did not abuse its discretion by denying Mr. Winterer's motion for a mistrial. RAP 13.4(b)(1), (4).

3. This Court should accept review because Mr. Winterer's attorney was ineffective for failing to object to exhibits he had never received or reviewed.

The Sixth Amendment and article I, § 22 guarantee an accused the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d (1984). To sustain a claim of ineffective assistance, a defendant must show counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defendant. *Id.* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Counsel's performance is deficient if there is no legitimate strategic or tactical purpose supporting the challenged conduct or omission. *Id*. at 336. A defendant is prejudiced by his attorney's deficient performance if there is a reasonable probability that the result of the proceeding would have been different absent the deficiency. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Defense counsel was ineffective for failing to object properly to exhibit 27, an envelope containing various letters and kites purportedly sent from Mr. Winterer to Ms. Massey. Counsel objected to "foundation" for this exhibit, but he failed to object under CrR 4.7 and CrR 8.3(b). RP 228-29. No legitimate tactical reasons exist for this failure.

First, counsel admitted on the record he had not received exhibit 27 or its contents from the State. RP

250-51. The State agreed it did not provide the exhibit to Mr. Winterer because the evidence was sealed at the police department. RP 251. The State indicated it had informed "an attorney" that the evidence was available to view or copy, but could not remember who the attorney was, even though Mr. Winterer had had a series of attorneys and had represented himself at one point. RP 251-52.

CrR 4.7 requires that "Except as otherwise provided by protective orders or as to matters not subject to disclosure," the prosecutor "shall disclose to defendant" any written or recorded statements and the substances of any oral statements made by the defendant" that are "within the prosecuting attorney's possession or control no later than the omnibus hearing." CrR 4.7(a)(1)(ii).

Additionally, "[u]pon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant." CrR 4.7(d).

Despite the clear discovery violation, counsel failed to make a timely objection under CrR 4.7 and did not even realize he did not have the exhibit until the court had already admitted it. Moreover, counsel failed to move to exclude the evidence or dismiss under CrR 8.3(b) in light of the State's violation of its discovery obligation. *See State v. Salgado-Mendoza*, 189 Wn.2d 420, 403 P.3d 45 (2017) (holding failure to comply with discovery obligations constitutes mismanagement for

purposes of CrR 8.3(b) and may be grounds for suppression or dismissal). Given counsel's representations that he was not aware of exhibit 27's existence, counsel's failure to object to the discovery violation cannot be said to be strategic.

The Court of Appeals found Mr. Winterer could not show he was prejudiced by his attorney's deficient performance. Slip Op. at 17. This is incorrect. Mr. Winterer was prejudiced by his attorney's failure to object to exhibit 27. The State was required to prove Mr. Winterer "repeatedly" harassed Ms. Massey during the period between February 8 and December 2, 2016. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 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); CP 70 (Instruction 7).

The "harassing" act must have been directed at Ms. Massey. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470, 477 (2010). "Repeatedly" is defined as meaning "on two or more separate occasions." RCW 9A.46.110(6)(e). A stalking conviction thus requires evidence of "two or more distinct, individual, noncontinuous occurrences of following or harassment, and no minimum amount of time must elapse between the occurrences, provided they are somehow separable" directed at the alleged victim. *Kintz*, 169 Wn.2d at 551.

Other than exhibit 27, however, the State presented only one letter, exhibit 22, directed at Ms. Massey from Mr. Winterer during the charging period. Without dated letters and kites, Ms. Massey could not remember when anything in this case happened.

She testified Mr. Winterer sent her number letters and kites, used his emergency call button to

speak to her, and even called her cell phone twice, but she could not say when these incidents occurred. She testified Mr. Winterer stopped contacting her when he went to prison and resumed when he returned to the jail, but she could not even say what year this took place. She began collecting letters from Mr. Winterer and turning them over to police, but she, again, did not know when the letters were sent or when she gave them to police. RP 199.

Without exhibit 27, which contained letters and kites sent during the charged timeframe, the State could not have met its burden to prove Mr. Winterer stalked Ms. Massey by harassing her on at least two occasions between February 8 and December 2, 2016.

Counsel's failure to object and move to exclude exhibit thus contributed directly to the State's ability to prove its case and resulted in prejudice to Mr.

Winterer. This Court should accept review. RAP 13.4(b)(3), (4).

E. CONCLUSION

Based on the foregoing, Mr. Winterer respectfully requests that review be granted. RAP 13.4(b).

This petition for review complies with RAP 18.17 and contains approximately 4402 words (word count by Microsoft Word).

DATED this 8th day of March, 2022.

Respectfully submitted,

/s Tiffinie B. Ma

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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. JARED ANTHONY WINTERER, Appellant.	)))))))))	No. 37476-9-III UNPUBLISHED OPINION

STAAB, J. — For over ten years, Jared Winterer investigated, called, texted, and sent kites, letters and social media posts to Rachel Massey who worked for the Kittitas County Corrections Center. The communications were of a sexual and threatening nature insisting on an unwelcome intimate relationship with her. Terrified, Ms. Massey obtained a protection order that Mr. Winterer violated exhaustively resulting in the felony stalking conviction before this court. Mr. Winterer timely appeals his stalking conviction for the second time, raising several issues. First, he argues that the evidence is insufficient to support his conviction because all of his communications with the victim are protected speech under the First Amendment to the United States Constitution. Second, he asserts that the trial court improperly denied his motion for mistrial after a witness commented on his prior conviction. Third, he asserts that defense counsel was

ineffective for failing to object to the admission of an exhibit that was not provided in discovery. Finally, he argues that the trial court's exceptional sentence exceeded its authority. The State concedes sentencing issues. We affirm Mr. Winterer's conviction and remand for resentencing.

BACKGROUND

The State charged Jared Winterer, by amended information, with stalking. Following a jury's verdict, Mr. Winterer appealed and we reversed, finding that his waiver of counsel was invalid. *See State v. Winterer*, No. 35854-2-III (Wash. Ct. App. May 30, 2019) (unpublished), https://courts.wa.gov/opinions/pdf/358542_unp.pdf. On remand, the State amended the charging information to include one count of stalking "on or between February 8, 2016 and December 2, 2016."

At the second trial, the State's primary witness was Ms. Massey, an employee of the Kittitas County Corrections Center. Ms. Massey testified that she originally met Mr. Winterer in high school. She indicated that they were not friends, but rather acquaintances, occasionally seeing each other in town.

Since she has known him, Mr. Winterer has always exhibited inappropriate behavior. He was very persistent, asking for her phone number and then saying "raunchy" things. Although the comments made her feel uncomfortable, Ms. Massey did not take them personally because Mr. Winterer was inappropriate with all women. During this time, Mr. Winterer would contact Ms. Massey on social media and make

crude comments. She would block him and then he would create a new profile and make contact again.

At some point, Ms. Massey began working in the control room at the Kittitas County Corrections Center. Her responsibilities included logging inmate movement and answering the inmate emergency buttons. As an inmate in the jail, Mr. Winterer would use his call button "excessively." Mr. Winterer's comments to Ms. Massey were crude, while simultaneously expressing his love for her. Every time he misused the emergency button, Ms. Massey would tell Mr. Winterer that he could only use the button for emergency calls. Nevertheless, Mr. Winterer continued to misuse the button and was written up numerous times. Ms. Massey testified that at first his comments were annoying, but as they increased in frequency and intensity, they became alarming.

On several occasions, Ms. Massey observed Mr. Winterer become violent with corrections officers. One time Ms. Massey observed Mr. Winterer grabbing an officer by the throat.

Alarmed that Mr. Winterer was becoming obsessed with her, Ms. Massey obtained an anti-harassment order against Mr. Winterer in 2014. According to Ms. Massey, the order did not change anything. Mr. Winterer continued to direct kites to Ms. Massey at work. Ms. Massey became increasingly afraid of Mr. Winterer. In an effort to prevent this contact, Ms. Massey was moved out of the jail control room.

The contacts subsided when Mr. Winterer was sent to prison. Eight months later, in February 2016, Mr. Winterer sent a "Dear jail" letter to the corrections center. At the time, Ms. Massey's duties at the corrections center included opening mail and she testified that she immediately recognized Mr. Winterer's handwriting. While not addressed to her personally, the letter indicated that he would be "homicidal" if Ms. Massey was "with any other man" because his "mind has been consumed by Rachel." The letter appalled and disturbed Ms. Massey.

A second letter from Mr. Winterer was addressed to the "classification clerk" at the Kittitas County Corrections Center. Ms. Massey testified that was her position at the time. The letter referenced a February 2016 hearing on the anti-harassment order, saying that he loved her, and that he was attempting to reassure Ms. Massey that he was not a threat to her. At the same time he suggested that her coworkers would need such an order if they did not stay away from her. The letter worried Ms. Massey because she knew he would be getting out of prison soon and he appeared delusional and obsessed with her. Ms. Massey gave the letter to her supervisor at work.

At some point, Mr. Winterer was returned to the Kittitas County Correction Center from prison. When Mr. Winterer returned to the jail, he began sending daily communications to Ms. Massey. These included kites, letters, using the emergency button, and sending messages through other officers. At one point, Mr. Winterer called Ms. Massey twice on her cell phone from the jail. Ms. Massey recognized his voice on

the phone. Ms. Massey's father took the phone and told Mr. Winterer not to call again. This caused Ms. Massey stress. She did not know how he obtained her cell phone number and she was concerned that he would seek her out when he was released from jail.

The persistent communications from Mr. Winterer caused Ms. Massey to fear for her safety. She testified that she was scared that he would come to her house to "get her." She was afraid that "if I was caught alone I would be overpowered." Report of Proceedings (RP) at 187. When he says that he wants to be her boyfriend, "that's disturbing too because they would go from obsessively sweet to very, very angry." RP at 187. Telling him "stop" or "no" is not enough for him because he does not care about the law or what she says, only his desires matter. She is also afraid for other people close to her, her family. RP at 188. He has demonstrated that he can obtain information about her. This makes her scared.

In an interview, Mr. Winterer admitted that he had been "sluthin" Ms. Massey for a long time. He also admitted threatening to kill anybody who interfered with his contact with Rachel.

Mr. Winterer testified in his own defense. He explained that he sustained a traumatic brain injury as a teenager. Mr. Winterer admitted sending communications to Ms. Massey, but denied any intent to cause her alarm or fear. He admitted on direct and

cross-examination that he did not care about the court, the jail, or the law, and would continue to contact Ms. Massey even if he was told not to by a judge.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Mr. Winterer argues that his harassment conviction was based entirely on constitutionally protected speech and since protected speech cannot form the basis for harassment, the evidence is insufficient to support his conviction. We decline Mr. Winterer's invitation to reject the holding in *State v. Nguyen*, and instead reaffirm its conclusion: "a violation of the stalking statute is not based on the content of pure speech. Instead, the statute contains an important mens rea element: the statute is violated only based on an "'intent to harass' with a course of conduct that seriously alarms, annoys, harasses, or is detrimental to the victim." 10 Wn. App. 2d 797, 807, 450 P.3d 630 (2019).

Due process requires the State to prove beyond a reasonable doubt every element of a crime. *State v. Rodriquez*, 187 Wn. App. 922, 930, 352 P.3d 200 (2015). An insufficient evidence claim "admits the truth of the State's evidence and all reasonable inferences from that evidence." *Id.* The critical inquiry is "'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" *Id.* (*quoting Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The reviewing court views the evidence in the light most favorable to the prosecution and

determines whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Garcia*, 179 Wn.2d 828, 836, 318 P.3d 266 (2014). The rule of independent review also applies where the sufficiency of the evidence question raised involves the First Amendment question of whether a defendant's statements constitute a true threat or other form of unprotected speech. *State v. Kilburn*, 151 Wn.2d 36, 52-54, 84 P.3d 1215 (2004) (statement by student that he intended to bring a gun to school deemed not a true threat where the intended audience considered it a jest resulting in reversal of harassment conviction for insufficient evidence).

Under the relevant portions of RCW 9A.46.110(1), a person commits stalking if:

> (a) He . . . intentionally and repeatedly harasses or repeatedly follows another person; and
>
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
>
> (c) The stalker either:
>
> (i) Intends to frighten, intimidate, or harass the person; or
>
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

"'Unlawful harassment' means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such

person, and which serves no legitimate or lawful purpose." RCW 10.14.020(2). The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner. *Id.* "'Course of conduct' means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." RCW 10.14.020(1). "'Course of conduct' includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication, but does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of 'course of conduct.'" RCW 10.14.020(1).

Mr. Winterer argues that since "course of conduct" does not include constitutionally protected speech, and since most speech is protected, "only speech that fits within an existing First Amendment exception can qualify as 'unlawful harassment.'" This argument is a syllogistic fallacy: affirming a conclusion from a negative premise. While it is true that course of conduct does not include constitutionally protected speech, course of conduct does include conduct beyond the content of speech. Mr. Winterer's argument presumes that the course of conduct in his case was based entirely on the content of his speech. It was not.

In *Nguyen*, the defendant continued to contact the victim despite a no-contact order. Over the course of several weeks, the defendant sent dozens of text messages to the protected person. The messages vacillated between pleadings and threats. On appeal,

the court rejected a constitutional challenge to the statute and found the evidence sufficient. "Nguyen's course of conduct included repeated and unwanted calls and text messages, and visits to her house. These actions, not the words contained in the text messages, formed the basis for the felony stalking conviction. Based on [the protected person's] past experiences with Nguyen, her fear was objectively reasonable. There is sufficient evidence to support Nguyen's conviction for felony stalking." *Nguyen*, 10 Wn. App. at 814.

Likewise, in this case, Mr. Winterer's course of conduct was his unrepentant and incessant contact with Ms. Massey despite being told that it caused her fear and after being ordered to stop. The content of his speech was relevant for purposes of proving his intent, and the victim's fear, not for proving course of conduct. The course of conduct was sufficient to show harassment and evidence was sufficient to support the conviction for stalking.

B. MOTION FOR MISTRIAL

Mr. Winterer argues that the trial court abused its discretion by denying his motion for a mistrial after a witness testified that Mr. Winterer had previously been convicted of stalking.

In order to understand the comment, it is necessary to provide context. Mr. Winterer was accused of stalking for making multiple and repeated contacts with Ms. Massey while she was working at the Kittitas County Jail. Many of Mr. Winterer's

contacts were made while he was either an inmate or a prisoner. Mr. Winterer's first conviction for stalking was reversed on appeal and remanded for a new trial. At his second trial, evidence was presented that Mr. Winterer was transferred from prison to the jail in order to address allegations that he had violated the terms of his misdemeanor probation on his conviction for violating the no-contact order. At a show cause hearing in district court, Mr. Winterer was found to have violated his probation by sending letters to Ms. Massey, and the balance of his sentence was imposed. He served this sentence in the Kittitas County Jail.

During the trial on the stalking charge, the superior court found that evidence of Mr. Winterer's prior conviction for violating the no-contact order was relevant to Ms. Massey's fear. In attempting to determine the time frame of jail calls, defense counsel cross-examined Ms. Massey:

> [DEFENSE COUNSEL:]
>
> Q: (off mic')—Massey, you just said you don't recall (inaudible) when he got back from prison—and what was what, (inaudible)?
>
> A: [Massey] I believe so. The time line is—is very messed up in my head as well.
>
> Q: Okay. All right. But the jail calls—were they the same or different as the no-contact order (inaudible).
>
> A: They were—additional—
>
> Q: Those were not the subject of the no-contact order (inaudible), correct?

A: I don't believe so. I don't believe—the original ones, no.

Q: Okay. And when you say the original ones, you're talking about 2014?

A: No—

Q: —later.

A: Later.

Q: Okay. (Inaudible) talking about (inaudible).

A: I think the—I believe the first two were the letters from prison, were the first two—

Q: (Inaudible)—

A: —violations—Yes. So the phone calls would have been after—after prison.

Q: Okay.

A: Yes.

Q: And so the—the letters were the first two and then you testified that when he got back he was convicted of the no-contact order (inaudible)?

A: He was being held on—on the pretrial no-contact order violation, so I don't know if they ever went to court in lower district court. I think they might have—have all been filed under superior court charges. That's—

Q: Okay.—

A: Yeah.

Q: —when you said that when he got back he was convicted of a no-contact—

A: (by Ms. Massey) Uh-huh.

> Q: —violation, do you know whether he was convicted of a no-contact order violation?
>
> A: He was convicted of—of stalking.
>
> Q: (Inaudible). Earlier you testified that he was convicted of a no-contact order violation. Is it your testimony that he was or was not convicted of a no-contact order violation when he came back in (inaudible).
>
> A: I—I don't know. I—I don't know the answer. I'm sorry. I thought he was, but thinking back he might have—it may have all been rolled into the stalking charge. So I don't know for certain if he had a—
>
> Q: (Inaudible).
>
> A: —conviction.
>
> Q: (lnaudible)—
>
> [DEFENSE COUNSEL:] I think we need a recess.
>
> THE COURT. Okay.

RP at 213-15.

At the subsequent recess, Mr. Winterer moved for a mistrial. The prosecutor explained that when Mr. Winterer was returned from prison, he was found to have violated his misdemeanor probation by sending additional letters to Ms. Massey. Ms. Massey knew that Mr. Winterer spent more time in jail for violating the no-contact order but did not appreciate that the jail time was imposed for a probation violation, not a new charge. The trial court denied the motion, noting that the witness expressed confusion and there was already evidence that Mr. Winterer had been convicted of violating the no-contact order and that he had spent significant time in jail and prison. The court offered

to give a limiting instruction about prior convictions and time spent in prison and jail but defense counsel did not request such an instruction and only requested to clarify a few things with the witness.

We review a trial court's decision on a motion for mistrial for abuse of discretion. *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967). "The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried." *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). On the other hand, "denial of a motion for mistrial should be overturned only when there is a substantial likelihood that the prejudice affected the verdict." *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010).

Initially, we reject the State's argument that any error was invited. The invited error doctrine prevents a defendant from appealing an action of the trial court that the defendant himself procured. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Lewis*, 15 Wn. App. 172, 176-77, 548 P.2d 587 (1976). This prevents counsel from "setting up" the trial court by seeking a specific action of the court and then seeking reversal on the basis of that same action. *State v. Meggyesy*, 90 Wn. App. 693, 707, 958 P.2d 319 (1998) (finding no invited error where the defendant did not invite the particular error he raised on appeal). In this case, defense counsel was not asking the witness to comment on the prior stalking conviction.

While we find that the irregularity was not invited, we also conclude that the trial court did not abuse its discretion by denying Mr. Winterer's motion for a mistrial. In determining whether a trial irregularity warrants a mistrial, we consider the three "*Hopson* factors." *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3d 422 (2013). The seriousness of the irregularity, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). The trial court is in the best position to discern prejudice. *Id*.

Erroneously mentioning a prior conviction can be serious, but in this case it was not serious enough to materially affect the outcome of the trial. Immediately after suggesting that Mr. Winterer had been convicted of stalking, the witness equivocated, and indicated that she did not know if he had been convicted of violating the no-contact order after returning from prison and it may have been rolled into the stalking charge. While she used the term stalking twice, the second time she indicated that the violation may have been rolled into the stalking charge. Since Mr. Winterer was on trial for the stalking charge, it was not an irregularity for the witness to make this comment. The witness was clearly confused about new charges, violations, and convictions.

Moreover, any error was cumulative because the jury was already aware that Mr. Winterer had a relevant criminal history and had spent time in jail and prison. Defense counsel's tactical decision to decline a liming instruction suggests that the comment was not overly prejudicial. Finally, the evidence in this case was overwhelming. Mr.

Winterer did not deny making the communications. He only denied any intent to frighten, intimidate or harass Ms. Massey. RP at 356. In the context of the evidence presented at trial, the comment did not deprive Mr. Winterer of a fair trial.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Winterer also argues that his attorney was constitutionally ineffective for failing to object to the admission of Exhibit 27 or assert a discovery violation. Exhibit 27 contained a collection of kites sent by Mr. Winterer to Ms. Massey while Mr. Winterer was an inmate at the jail. When the State moved to admit Exhibit 27, Defense counsel's foundation objection was overruled. At a later point in the trial, counsel notified the court that in reviewing his file, he realized that he had never actually received copies of Exhibit 27 from the State.

The prosecutor indicated that the exhibit was held in the evidence room at the police department. While acknowledging that copies of Exhibit 27 had not been sent to defense counsel, the prosecutor indicated that prior to the first trial, she had provided "an attorney" with a copy of the evidence log with instructions that counsel could view the exhibit at the police station. The same exhibit was admitted at Mr. Winterer's first trial. On appeal, the State points out that Mr. Winterer's attorney at his second trial was stand-by counsel during his first trial.

Mr. Winterer's counsel responded "I'm just laying a record. Like I said, it's already been—admitted. I should have asked for a recess to review them better, or done something else." RP at 254.

Both the United States and Washington Constitutions guarantee a criminal defendant the right to effective assistance of counsel. *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018); *see also* U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. Courts indulge a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*.; s*ee also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The defendant has the burden to show that defense counsel's performance was deficient based on the trial court record. *McFarland*, 127 Wn.2d at 335. Specifically, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *Id*. at 336. Claims of ineffective

assistance of counsel present mixed questions of law and fact, and are reviewed de novo. *Lopez,* 190 Wn.2d at 116-17.

In this case, even if Mr. Winterer could show deficient performance, he fails to establish prejudice. Mr. Winterer claims that exhibit 27 was necessary to show repeated contacts. This argument fails to acknowledge exhibit 26, which counsel did have, and which also contained three separately written items sent to Ms. Massey in violation of the anti-harassment order. Thus, exhibit 27 was cumulative. Even if counsel had been successful in suppressing the exhibit for discovery violations, the result of the proceedings would not have been different.

D. EXCEPTIONAL SENTENCE

Mr. Winterer argues that the trial court exceeded its authority by imposing an exceptional sentence of 120 months without a supporting jury verdict. The State concedes error. The "clearly too lenient" provision of RCW 9.94A.535(2)(b) must be found by a jury. *State v. Borg*, 145 Wn.2d 329, 336-38, 36 P.3d 546 (2001). In this case, the jury did not make this finding. The exceptional sentence exceeded the court's authority.

Upon remand for correction of the exceptional sentence, the trial court will also correct any aggregate term of confinement and community custody to avoid exceeding the statutory maximum. Even though the State disputes the characterization of RCW 9.94A.703(2)(d) discretionary community supervision fees as "costs" under RCW

10.01.160(2), it concedes that the trial court may reconsider the issue on remand for the sentence issue.

We affirm Mr. Winterer's conviction for stalking and remand for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT, v. JARED WINTERER, PETITIONER.	)))))))))	COA NO. 37476-9-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF MARCH, 2022, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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