

No. 68568-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JONATHAN W. BRADFORD,

Appellant.

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

The Honorable Mariane C. Spearman

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The harassment provision of the stalking statute is facially overbroad, in violation of the constitutional right to free speech.

2. The harassment provision of the stalking statute is facially void for vagueness, in violation of the constitutional right to due process.

3. The trial court erred in admitting cellular telephone text messages in the absence of authentication of the electronic device or identification of the person who sent the messages, in violation of ER 901.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A statute is unconstitutionally overbroad if it proscribes protected speech. Is the harassment provision of the stalking statute unconstitutionally overbroad when it is not limited to unprotected speech?

(Assignment of Error 1)

2. A criminal statute is unconstitutionally void for vagueness when it does not adequately define proscribed conduct or provide ascertainable standards to protect against arbitrary prosecution. Is the harassment provision of the stalking statute unconstitutionally void for vagueness insofar as it purports to exempt “constitutionally protected activity”? (Assignment of Error 2)

3. ER 901(a) provides that evidence is inadmissible unless it is authenticated or identified by additional evidence sufficient to support a

finding that the evidence is what the proponent claims it to be. Did the trial court err in admitting cellular telephone text messages, in the absence of sufficient evidence to authenticate the accuracy of the electronic devices or to identify the person who sent the messages? (Assignment of Error 3)

C. STATEMENT OF THE CASE

In 2007, Jonathan Bradford met Vanida Vilayphone through a mutual friend, Rose Smith, and they became romantically involved, even though Ms. Vilayphone was married to Ronald Mason. 2/16/12 RP 91-92; 2/21/12 RP 73-74. In 2009, Ms. Vilayphone told her husband about the affair and told Mr. Bradford that their relationship was over. 2/21/12 RP 77, 79. Mr. Bradford continued to call Ms. Vilayphone on her cellular telephone until she changed her number. 2/21/12 RP 80-81.

Throughout 2010, Rose Smith received numerous text messages that she believed were sent by Mr. Bradford, urging her to ask Ms. Vilayphone to contact the text messenger. 2/16/12 RP 105-07. Ms. Smith forwarded many of the text messages to Ms. Vilayphone who also believed the messages were from Mr. Bradford. 2/16/12 RP 105, 110; 2/21/12 RP 88. According to Ms. Vilayphone, several messages threatened to distribute a video or indicated “someone” would be hurt if

she did not call, and she was seriously alarmed that Mr. Bradford would follow through on these messages. 2/21/12 RP 88.

In December 2010, a neighbor called the police after he found a large envelope on his car windshield, on which was written "Happy Holidays." 2/23/12 RP 108. The envelope contained a note with Ms. Vilayphone's name and address and copy of a sex video of Mr. Bradford and Ms. Vilayphone. 2/23/12 RP 106, 108. Responding Officer Cory Simmons collected similar envelopes from other cars parked on the street. 2/22/12 RP 139-40; 2/23/12 RP 109-110. Ms. Vilayphone was shocked and frightened, and she obtained an anti-harassment order. 2/21/12 RP 102, 110; 2/22/12 RP 144.

In January 2011, Officer Vasilios Sideris responded to several 911 calls from Ms. Vilayphone reporting Mr. Bradford was contacting her through text messages sent to Ms. Smith, in violation of the anti-harassment order. 2/28/12 RP 129-30. He recorded verbatim several text messages that Ms. Vilayphone thought were written by Mr. Bradford, including "I said it was life or death. Well, boooooommmmmmm!!!!." 2/28/12 RP 142-43.<sup>1</sup> Several days later, Ms. Vilayphone received a

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<sup>1</sup>The other messages recorded by Office Sideris were: "Have Vanida call me;" "I know she's with you, and all I'm asking for her is to call me, I need to tell her a few things before it's all over;" "Would you please have Vanida call me. I really need to talk to her before it's tooooooo late;" "By the way, the video is getting distributed to neighbors;" "Have Vanida check her Yahoo account;" "Have Vanida give me a call,

package with Mr. Bradford's return address and she was afraid the package contained a bomb. 2/21/12 RP 109-10. She called the police who determined the package contained a compact disc, two bottles of wine, and letters from Mr. Bradford to Ms. Vilayphone. 2/28/12 RP 145, 147-48. Shortly thereafter, Mr. Bradford was arrested and, in April 2011, he pleaded guilty to one count of stalking Ms. Vilayphone and to two counts of misdemeanor violation of the anti-harassment order for contacting Ms. Vilayphone through Ms. Smith. 2/23/12 RP 26-27; 2/28/12 RP 156-57; Ex. 60. At sentencing, the court issued a no-contact order protecting Ms. Vilayphone and an anti-harassment order protecting Ms. Smith. Ex. 4, 5.

In June 2011, Ms. Vilayphone and Ms. Smith were at a bar when Mr. Bradford came in, walked up to Ms. Vilayphone, and said he still loved her. 2/21/12 RP 112, 114; 2/23/12 RP 19. He left when Ms. Vilayphone threatened to call the police. 2/12/12 RP 112,114. After that meeting, Ms. Smith again started receiving numerous text messages requesting Ms. Vilayphone to call. 2/16/12 RP 126; 2/21/12 RP 115-16.

In July 2011, Ms. Vilayphone contacted the police several times to report Mr. Bradford was violating the no-contact order either by sending text messages to Ms. Smith or by driving by her house. 2/22/12 RP 6-7,

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please. It is a life or death emergency. I know you have been passing my messages to her, so you can pass this." 2/28/12 RP 135, 142-43.

99, 113; 2/23/12 RP 97; 2/28/12 RP 14-15. Detective Nicolas Carter investigated the reports and he obtained Ms. Smith's cellular telephone for a "phone dump," where her telephone was inserted into device that produced a printed report that purported to list all text messages sent and received by the telephone that had not been deleted. 2/14/12 RP 181; 2/16/12 RP 10, 61, 64, 66, 72.<sup>2</sup> Detective Carter showed the printed report to Ms. Smith who identified several messages she believed were sent by Mr. Bradford. 2/16/12 RP 137; Ex. 8. Detective Carter did not check Mr. Bradford's telephone, computer, or other electronic records to corroborate Ms. Smith's identification. 2/16/12 RP 29.

In the early morning hours of July 23, 2011, Mr. Mason saw Mr. Bradford's car outside his house. 2/23/12 RP 34. He called 911 and got in his truck to prevent Mr. Bradford from leaving before the police arrived. 2/23/12 RP 38, 50. According to Mr. Mason, Mr. Bradford hit his truck twice in an attempt to drive around it. 2/23/12 RP 50, 52. Mr. Bradford then drove in reverse away from Mr. Mason's truck and hit at least two parked cars before he backed around a corner and drove away. 2/23/12 RP 52-53.

Seattle Police Officers Richard Bonesteel, Dorian Oreiro, and Mark James responded separately to Mr. Mason's 911 call. 2/22/12 RP

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<sup>2</sup>The "phone dump" was conducted by Detective Scotty Bach.

19, 62; 2/28/12 RP 56-57. Officer Bonesteel was the lead car, followed closely by Officer Oreiro and Officer James. 2/22/12 RP 62. As Officer Bonesteel turned a corner near Mr. Mason's address, Mr. Bradford hit his patrol car on the passenger side. 2/22/12 RP 66. Officer Oreiro and Officer James arrived at the scene of the collision within seconds. Officer Bonesteel removed Mr. Bradford from his car, placed him under arrest for violation of a court order, and noted that Mr. Bradford had a cut on his forehead and a strong odor of alcohol. 2/22/12 RP 70-71. Mr. Bradford was transported to a hospital where a blood draw was conducted. 2/22/12 RP 72; 2/28/12 RP 43, 173. A subsequent test determined Mr. Bradford had a blood alcohol level of 0.20. 2/28/12 RP 38; 2/29/12 RP 49.

Mr. Bradford was charged with felony stalking of Ms. Vilayphone, in violation of RCW 9A.46.110, felony stalking of Ms. Smith, also in violation of RCW 9A.110, two counts of domestic violence misdemeanor violation of a court order protecting Ms. Vilayphone, in violation of RCW 26.50.110, violation of an anti-harassment order protecting Ms. Smith, in violation of RCW 10.14.120, driving under the influence, in violation of RCW 46.61.502 and 46.61.506, hit and run (unattended), in violation of RCW 46.52.010, and reckless endangerment, in violation of RCW 9A.36.050.

At trial, over defense objection regarding authentication and identification, Ms. Smith and Ms. Vilayphone were allowed to testify that the text messages were written and sent by Mr. Bradford. 2/14/12 RP 140; 2/21/12 RP 152-53; CP 113. Also over defense objection, Detective Carter was allowed to read his allegedly verbatim record of text messages Ms. Smith said were from Mr. Bradford. 2/28/12 RP 105-07, 113-21.

Mr. Bradford was convicted of all counts except one count of violation of a court order. CP 45-54.

D. ARGUMENT

**1. The harassment provision of the stalking statute is facially overbroad, in violation of the constitutional protection of freedom of expression.**

a. A criminal statute that prohibits constitutionally protected speech is overbroad.

In closing argument, the prosecutor argued that Mr. Bradford violated the harassment provision of the stalking statute by sending text messages both to Vanida Vilayphone and to Rose Smith. 9RP 24-25, 28. Text messages, as a form of electronic communication, are speech subject to constitutional protections.

The United States Constitution and the Washington Constitution guarantee freedom of speech. U.S. Const. amend. I; Wash. Const. art. 1, § 5; R.A.V. v. St. Paul, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L.Ed.2d

305 (1992); City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). A statute that criminalizes pure speech is unconstitutionally overbroad unless it reaches only unprotected speech, such as “true threats,” “fighting words,” or words that produce a “clear and present danger.” Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L.Ed.2d 1031 (1942); Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L.Ed.2d 470 (1919); State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001). When analyzing a statute for overbreadth, the reviewing court must determine “whether the statute not only prohibits unprotected behavior, but also prohibits constitutionally protected activity as well.” State v. Carter, 89 Wn.2d 236, 240, 570 P.2d 1218 (1977); accord Huff, 111 Wn.2d at 925.

Due to the importance of the rights protected by the First Amendment, “the overbreadth doctrine allows a litigant to challenge a statute on its face, rather than as applied to his own facts, and have a statute invalidated for overbreadth where it would be unconstitutional as applied to others even if not as applied to him.” State v. Motherwell, 114 Wn.2d 353, 370-71, 788 P.2d 1066 (1990); accord State v. Immelt, 173 Wn.2d 1, 7, 267 P.3d 305 (2011).

- b. The harassment provision of the stalking statute that criminalizes protected speech is unconstitutionally overbroad.

The harassment provision of the stalking statute provides:

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses ... another person;

...

(6) As used in this section:

...

(c) “Harasses” means unlawful harassment as defined in RCW 10.14.020.

RCW 9A.46.110.

“Unlawful harassment” is defined as:

[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. 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, or when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

RCW 10.14.020(2).

Chapter 10.14 RCW, which includes the definition of “unlawful harassment,” sets out the procedure for obtaining a civil anti-harassment order. RCW 10.14.020 provides two definitions that “apply throughout this chapter”: section (1) defines “course of conduct” and section (2)

defines “unlawful harassment.” Even though the stalking statute does not refer to the definition of “course of conduct,”<sup>3</sup> in State v. Becklin, the Court nonetheless relied on both the definition of “unlawful harassment” and the definition of “course of conduct,” and ruled the stalking statute included within its proscriptions conduct by third parties acting at the defendant’s direction. 163 Wn.2d 519, 524-25, 527, 182 P.3d 944 (2008). Two years later, in State v. Kintz, the Court ruled the term “separate occasions,” as used in the stalking statute, was unambiguous and meant distinct, non-continuous incidents. 169 Wn.2d 537, 548, 238 P.3d 470 (2010). As in Becklin, the Court incorporated both the definition of “unlawful harassment” and the definition of “course of conduct” into the definition of “harassment.” 169 Wn.2d at 546.

The rulings in Becklin and Kintz are not controlling here. First, the issue raised in the instant case, whether the harassment provision of the stalking statute is unconstitutionally overbroad, was not before the Court in Becklin or Kintz. Second, well-settled principles of statutory interpretation prohibit a court from adding words to a statute that the

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<sup>3</sup>RCW 10.14.020(1) provides:

“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. “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.”

Legislature has chosen not to include. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The stalking statute refers to the definition of “unlawful harassment” only, and not to the definition of “course of conduct.” Accordingly, the rules of statutory construction preclude a court from adding the definition of “course of conduct” to the definition of “unlawful harassment.”

- c. The harassment provision of the stalking statute is not narrowly tailored to promote a compelling State interest.

A statute that implicates free speech, such as the stalking statute, is subject to strict scrutiny. Under this highest level of scrutiny, “the burden is on the government to establish that an impairment of a constitutionally protected right is necessary to serve a compelling state interest.” City of Bellevue v. Lorang, 140 Wn.2d 19, 29-30, 992 P.2d 496 (2000). The Legislature cannot criminalize speech and conduct simply because “society at large views [it] as vile, politically incorrect, or borne of hate.” Williams, 144 Wn.2d at 209 and cases cited therein.

Here, the State’s interest in protecting citizens from “unlawful harassment” is not sufficiently compelling to criminalize constitutionally protected speech and conduct. Undoubtedly, “the State has a legitimate interest in restraining harmful conduct.” State v. Lee, 135 Wn.2d 369,

391, 957 P.2d 741 (1998). However, a carefully crafted statute that does not implicate free speech can satisfy any compelling State interest.

- d. The proper remedy is to strike the harassment provision of the stalking statute and to reversal of Mr. Bradford's convictions for stalking.

In closing argument, the prosecutor specifically elected to rely on both alternative means of “harasses” or “follows” for a conviction of stalking Ms. Vilayphone. 3/1/12 RP 24-25. He also specifically elected to rely only on “harasses” for a conviction of stalking of Ms. Smith. 3/1/12 RP 28. These elections were reflected in the jury instructions. CP 68-71. Because the jury was specifically directed to base a verdict on the unconstitutional harassment provision, Mr. Bradford's convictions for stalking must be reversed. See Immelt, 173 Wn.2d at 4.

**2. The harassment provision of the stalking statute is facially void for vagueness, in violation of the constitutional right to due process.**

- a. A criminal statute is unconstitutionally vague where it does not define the offense with sufficient definiteness or it does not provide ascertainable standards for enforcement.

The “void for vagueness” doctrine, based on the due process provisions of the federal and state constitutions, requires criminal statutes to adequately define proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine serves two purposes: “first, to

provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement.” State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993); accord Williams, 144 Wn.2d at 204-05. A facial challenge pursuant to the void for vagueness doctrine, like the overbreadth doctrine, is permissible where, as here, the challenged statute implicates the First Amendment. City of Tacoma v. Luvene, 118 Wn.2d 826, 845, 877 P.2d 1374 (1992) (citing Kolender v. Lawson, 461 U.S. 352, 358 n.8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)).

A statute is void for vagueness if either (1) the statute “does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed” or (2) the statute “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990); accord Lorang, 140 Wn.2d at 30; Halstien, 122 Wn.2d at 117. A statute is unconstitutionally vague if either criterion is not satisfied. Halstien, 122 Wn.2d at 117-18.

A statute does not provide sufficient definiteness if persons ““of common intelligence must necessarily guess at its meaning and differ as to its application,”” if it “invites an inordinate amount of police discretion,” or if it contains “inherently subjective terms.” Haley v. Med. Disciplinary

Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)); Douglass, 115 Wn.2d at 180-81. Courts consider the context to determine whether the statute provides adequate standards for enforcement. Id. at 181.

- b. The definition of harassment that provides that a “course of conduct” “does not include constitutionally protected free speech” or “constitutionally protected activity” is facially void for vagueness.

The definition of “course of conduct” includes the phrases “constitutionally protected free speech” and “constitutionally protected activity.” RCW 10.14.020(1). Assuming, arguendo, the definition of “unlawful harassment” includes the definition of “course of conduct,” the phrases “constitutionally protected free speech” and “constitutionally protected activity” are unconstitutionally vague, for failure to provide citizens with fair warning of proscribed conduct and for failure to protect from arbitrary enforcement. Whether words or activities are protected by the First Amendment requires a legal conclusion that has been the subject of considerable litigation and scholarly debate since its ratification. See, e.g., R.A.V., 505 U.S. at 382-83 and cases cited therein.

Tellingly, the Legislature provided guidelines to the courts for determining whether a “course of conduct” served a legitimate purpose.

In determining whether the course of conduct serves any legitimate or lawful purpose, the court should consider whether:

- (1) Any current contact between the parties was initiated by the respondent only or was initiated by both parties;
- (2) The respondent has been given clear notice that all further contact with the petitioner is unwanted;
- (3) The respondent's course of conduct appears designed to alarm, annoy, or harass the petitioner;
- (4) The respondent is acting pursuant to any statutory authority, including but not limited to acts which are reasonably necessary to:
  - (a) Protect property or liberty interests;
  - (b) Enforce the law; or
  - (c) Meet specific statutory duties or requirements;
- (5) The respondent's course of conduct has the purpose or effect of unreasonably interfering with the petitioner's privacy or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner;
- (6) Contact by the respondent with the petitioner or the petitioner's family has been limited in any manner by any previous court order.

RCW 10.14.030.

Given the Legislature recognized the need to provide very specific guidelines to the courts in determining whether a "course of conduct" serves a legitimate purpose, certainly ordinary citizens must guess at its meaning and will differ as to its application.

Lee, supra, is not controlling. In Lee, the Washington Supreme Court ruled an earlier version of the stalking statute, former RCW 9A.46.110, was not void for vagueness, but that version of the statute did not include the term "harasses" at issue here. 135 Wn.2d at 373 n.1.

Rather, the defendants in Lee challenged the phrase “repeatedly follows” that the Court analyzed in light of the freedom to travel and the general right to movement. Id. at 388-89. Moreover, the Court did not apply strict scrutiny review. Id. at 388-92. Thus, the analysis in Lee is not applicable to the issue sub judice.

- c. The proper remedy is to strike the harassment provision of the stalking statute and to reverse Mr. Bradford’s convictions for stalking.

The harassment provision of the stalking statute must be stricken. Where a statute is unconstitutionally vague, the reviewing court should strike only the unconstitutional provisions, if possible, and leave the remainder of the statute in place. Williams, 144 Wn.2d at 212-13. In fact, Chapter 9A.46 RCW includes a severability clause: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." RCW 9A.46.910.

Because the harassment provision of the stalking statute must be stricken as unconstitutionally overbroad and vague, Mr. Bradford’s convictions for stalking by harassment must be reversed.

**3. The trial court erroneously admitted text messages in the absence of evidence authenticating and identifying the author of the messages.**

- a. Evidence that is not authenticated or identified is inadmissible.

The proponent of tangible evidence, such as a writing or a recording, must authenticate or identify the evidence. State v. Jackson, 113 Wn. App. 762, 765-66, 54 P.3d 739 (2002). “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). The party offering the evidence must produce sufficient evidence of both authentication and identification. State v. Williams, 136 Wn. App. 486, 500-01, 150 P.3d 111 (2007). “The State satisfies ER 901, which requires that documents be authenticated or identified, if it introduces sufficient proof to permit a reasonable juror to find in favor of authenticity or identification.” State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003).

- b. The trial court erroneously admitted evidence of text messages that were not properly authenticated or identified.

The text messages purportedly written and sent by Mr. Bradford were neither properly authenticated nor identified. Text messages are a new technology and scant case law addresses criteria for admission of the

messages. Tegland suggests that text messages be authenticated pursuant to ER 901(b)(9), that is, “evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.” 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 901.23, at 19-20 (5<sup>th</sup> ed. Supp. 2011). “The rule authorizes the admission, at least as far as authentication is concerned, of evidence based upon a wide range of processes and systems which are known to be, or can be shown to be, accurate.” *Id.* at § 901.18, at 313 (5<sup>th</sup> ed. 2007). For example, in State v. Bashaw, the Court ruled the State failed to authenticate the results of a rolling wheel measuring device, when the officer testified how the device operated, but there was no evidence that the device was accurate. 169 Wn.2d 133, 141-43, 234 P.3d 195 (2010). The Court stated, “a showing that the device is functioning properly and producing accurate results is, under ER 901(a), a prerequisite to admission of the results.” 169 Wn.2d at 142. Similarly, here, there was evidence of how Ms. Smith forwarded the text messages and how the detective operated the “phone dump” device, but there was no evidence that either the cellular telephone or the “phone dump” device were in proper working order.

In addition, there was insufficient evidence of identification of the person who sent the text messages received by Ms. Smith in January 2011.

Officer Sideris testified that he copied several text messages verbatim into his report, which Ms. Vilayphone said were sent by Mr. Bradford and forwarded to her by Ms. Smith. 2/28/12 RP 112-13. However, although Officer Sideris stated he wrote everything that was on the cellular telephone screen, he did not remember whether the screen indicated whether the messages were forwarded or otherwise indicated the source of the messages. 2/28/12 RP 112-13.

The trial court admitted messages that referred to “Vanida,” or “video,” on the grounds those references sufficiently related the messages to Mr. Bradford. 2/28/12 RP 114-21. This was in error. In the context of identification of the author of a document that is not handwritten, courts may look to content only if it is “distinctive,” in conjunction with circumstances. Rice v. Offshore Systems, Inc., 167 Wn. App. 77, 86, 272 P.3d 865 (2012); ER 901(b)(4). The content of the text messages here was not distinctive. As Ms. Smith acknowledged, she occasionally received text messages from Mr. Mason asking about “Vanida.” 2/16/12 RP 144.

c. The erroneous admission of test messages was not harmless.

Improperly admitted evidence is not harmless when “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Bashaw, 169 Wn.2d at 143

(quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Here, the State's evidence to establish the charges of stalking, violation of a court order, and violation of an anti-harassment order rested extensively on allegations that Mr. Bradford sent text messages to Ms. Vilayphone through Ms. Smith. As the prosecutor stated in closing argument, "This case is largely about the text messages." 3/1/12 RP 21. Because the error was not harmless, Mr. Bradford's convictions for stalking, violation of a court order, and violation of an anti-harassment order, Counts I, II, IV, and V, must be vacated. See Bashaw, 169 Wn.2d at 144.

E. CONCLUSION

The harassment provision of the stalking statute is overbroad and void for vagueness. The trial court erroneously admitted evidence of text messages in the absence of evidence to authenticate the messages. For the foregoing reasons, Mr. Bradford respectfully requests this Court reverse his convictions for stalking, violation of a court order, and violation of an anti-harassment order.

DATED this 6<sup>th</sup> day of December 2012.

Respectfully submitted,

  
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Washington Appellate Project (91052)  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68568-6-I
v.	)	
	)	
JONATHAN BRADFORD,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> JONATHAN BRADFORD 23429 - 55TH AVE S KENT, WA 98032	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF DECEMBER, 2012.

X \_\_\_\_\_ *for*

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