

66763-7

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NO. 66763-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DEMETRI MANNING,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

D. STATEMENT OF THE CASE 5

 1. Ms. King’s reporting of the incident. 5

 2. The charges against Mr. Manning and pretrial motions. 8

 3. Ms. King’s recantation and the trial. 10

E. ARGUMENT 12

 1. THE TO-CONVICT INSTRUCTION ON ASSAULT IN
 THE SECOND DEGREE OMITTED AN ESSENTIAL
 ELEMENT OF THE CRIME 12

 a. A to-convict instruction violates due process if it omits
 an element of the crime charged 12

 b. The to-convict instruction in this case violated Mr.
 Manning’s right to due process because it omitted the
 element of intent..... 13

 c. Reversal is required 17

 2. THE TRIAL COURT ABUSED ITS DISCRETION BY
 ADMITTING HEARSAY STATEMENTS THAT WERE
 NOT FOR PURPOSES OF MEDICAL DIAGNOSIS OR
 TREATMENT 20

 a. An out-of-court statement that is made for purposes of
 medical diagnosis or treatment is admissible at trial 21

b.	The State failed to show Ms. King’s statements identifying the perpetrator were relevant to diagnosis or treatment and the trial court misapplied the burden ..	22
c.	The error requires reversal of Mr. Manning’s assault conviction ..	26
3.	THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING A 911 CALL THAT WAS NOT AN EXCITED UTTERANCE AND THE CONTENT OF WHICH THE CALLER RECANTED ..	27
a.	An excited utterance constitutes a narrow exception to the general rule that hearsay is inadmissible ..	28
b.	The trial court abused its discretion by admitting Ms. King’s statements to 911 under the excited utterance exception ..	30
c.	The error requires reversal of Mr. Manning’s assault conviction ..	36
4.	WHETHER THE THREAT CONSTITUTING CYBERSTALKING WAS A ‘TRUE THREAT’ WAS AN ESSENTIAL ELEMENT THAT HAD TO BE PLED IN THE INFORMATION AND INCLUDED IN THE ‘TO-CONVICT’ INSTRUCTION ..	37
a.	A charging document or to-convict instruction violates due process if it omits an element of the crime charged ..	37
b.	That the cyberstalking threat was a true threat was an essential element that had to be included in the information and to-convict instruction ..	39
c.	Because the essential true threat element was not included in the information or to-convict instruction, reversal is required ..	44
5.	BECAUSE NO EVIDENCE SUPPORTED THE TRUE THREAT ELEMENT, THERE WAS INSUFFICIENT	

EVIDENCE BEFORE THE JURY TO FIND MR. MANNING COMMITTED CYBERSTALKING	45
6. CUMULATIVE ERROR DENIED MR. MANNING HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.....	47
7. THE ALCOHOL EVALUATION COMMUNITY CUSTODY CONDITION MUST BE STRICKEN AS NOT CRIME-RELATED AND UNAUTHORIZED BY THE SRA.....	49
F. CONCLUSION	52

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Beck v. Dye</u> , 200 Wash. 1, 92 P.2d 1113 (1939).....	31
<u>City of Tacoma v. Luvene</u> , 118 Wn.2d 826, 827 P.2d 1374 (1992).....	40
<u>In re Dependency of Penelope B.</u> , 104 Wn.2d 643, 709 P.2d 1185 (1985).....	22
<u>In re Pers. Restraint of Grasso</u> , 151 Wn.2d 1, 84 P.3d 859 (2004).....	22
<u>In re Postsentence Review of Leach</u> , 161 Wn.2d 180, 163 P.3d 782 (2007).....	50
<u>McClaine v. Territory</u> , 1 Wash. 345, 25 P. 453 (1890).....	18
<u>Pasco v. Mace</u> , 98 Wn.2d 87, 653 P.2d 618 (1982).....	18
<u>Sofie v. Fibreboard</u> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	18
<u>State v Williams</u> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	41
<u>State v. Aumick</u> , 126 Wn.2d 422, 894 P.2d 1325 (1995).....	13
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	50, 51
<u>State v. Brown</u> , 127 Wn.2d 749, 903 P.2d 459 (1995).....	29, 30, 33
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	19
<u>State v. Chapin</u> , 118 Wn.2d 681, 826 P.2d 194 (1992).....	29, 30
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	48
<u>State v. Davis</u> , 119 Wn.2d 657, 835 P.2d 1039 (1992).....	15
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003)....	13, 17, 38
<u>State v. Emmanuel</u> , 42 Wn.2d 799, 259 P.2d 845 (1953).....	14, 15, 16, 19

<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	51
<u>State v. Goodman</u> , 150 Wn.2d 774, 83 P.3d 410 (2004).....	38, 39
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	46
<u>State v. Hamlet</u> , 133 Wn.2d 314, 944 P.2d 1026 (1997)	27
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	47
<u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992).....	15
<u>State v. J.M.</u> , 144 Wn.2d 472, 28 P.3d 720 (2001).....	41
<u>State v. Johnston</u> , 156 Wn.2d 355, 127 P.3d 707 (2006).....	41, 42
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004)	41
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	39
<u>State v. Lee</u> , 128 Wn.2d 151, 904 P.2d 1143 (1995)	47
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004)	42
<u>State v. McCorkle</u> , 137 Wn.2d 490, 973 P.2d 461 (1999)	51
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	13, 38
<u>State v. O’Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	13
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	18, 19, 20
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	23, 24
<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998)	52
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	46
<u>State v. Schaler</u> , 169 Wn.2d 274, 236 P.3d 858 (2010)	40, 43, 44
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997)	12, 13, 19
<u>State v. Strauss</u> , 119 Wn.2d 401, 832 P.2d 78 (1992)	29

<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	38, 45
<u>State v. Woods</u> , 143 Wn.2d 561, 23 P.3d 1046 (2001)	22
<u>State v. Young</u> , 160 Wn.2d 799, 161 P.3d 967 (2007).....	passim

Washington Court of Appeals Decisions

<u>City of Seattle v. Abercrombie</u> , 85 Wn. App. 393, 945 P.2d 1132 (1997).....	40
<u>City of Seattle v. Ivan</u> , 71 Wn. App. 145, 856 P.2d 1116 (1993) ...	40
<u>State v. Alexander</u> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	48
<u>State v. Allen</u> , 161 Wn. App. 727, 255 P.3d 784 (2011).....	44
<u>State v. Briscoeray</u> , 95 Wn. App. 167, 974 P.2d 912 (1999).....	29
<u>State v. Butler</u> , 53 Wn. App. 214, 766 P.2d 505 (1989).....	22
<u>State v. Cochrane</u> , 160 Wn. App. 18, 253 P.3d 95 (2011)	45
<u>State v. Courneya</u> , 132 Wn. App. 347, 131 P.3d 343 (2006).....	39, 45
<u>State v. Dixon</u> , 37 Wn. App. 867, 684 P.2d 725 (1984).....	31
<u>State v. Fisher</u> , 130 Wn. App. 1, 108 P.3d 1262 (2005).....	22
<u>State v. Hall</u> , 104 Wn. App. 56, 14 P.3d 884 (2000).....	14, 17
<u>State v. Huynh</u> , 107 Wn. App. 68, 26 P.3d 290 (2001).....	25
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003)	51, 52
<u>State v. Knowles</u> , 91 Wn. App. 367, 957 P.2d 797 (1998).....	41, 46
<u>State v. Pope</u> , 100 Wn. App. 624, 999 P.2d 51 (2000).....	19
<u>State v. Price</u> , 126 Wn. App. 617, 109 P.3d 27 (2005).....	24
<u>State v. Ramires</u> , 109 Wn. App. 749, 37 P.3d 343 (2002).....	30

<u>State v. Sims</u> , 77 Wn. App. 236, 890 P.2d 521 (1995).....	23, 24
<u>State v. Stephenson</u> , 89 Wn. App. 794, 950 P.2d 38 (1998).....	40
<u>State v. Tellez</u> , 141 Wn. App. 479, 170 P.3d 75 (2007)	41, 42
<u>State v. Venegas</u> , 153 Wn. App. 507, 228 P.3d 813 (2010).....	48
<u>State v. Williamson</u> , 100 Wn. App. 248, 996 P.2d 1097 (2000).....	30
<u>Sturgeon v. Celotex Corp.</u> , 52 Wn. App. 609, 762 P.2d 1156 (1988).....	26

United States Supreme Court Decisions

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	38, 45
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	20
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	13, 38, 45
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	46
<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	17, 19
<u>Taylor v. Kentucky</u> , 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).....	48
<u>Virginia v. Black</u> , 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).....	40
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)	20
<u>Watts v. United States</u> , 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).....	41
<u>Williams v. Taylor</u> , 529 U.S. 362, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000).....	48

Other Federal Decisions

United States v. Khorrami, 895 F.2d 1186 (7th Cir. 1990).....41
United States v. Marrowbone, 211 F.3d 452 (8th Cir. 2000) 26
United States v. Weber, 451 F.3d 552 (9th Cir. 2006)..... 51

Constitutional Provisions

Const. art. I, § 3..... 48
Const. art. I, § 21..... 17, 20
Const. art. I, § 22..... 38
U.S. Const. amend. VI..... 38
U.S. Const. amend. XIV 38, 48
U.S. Const. amend XIV 45

Statutes

RCW 9.61.021 13
RCW 9.61.260..... 9, 12, 44, 46
RCW 9.94A.030 51
RCW 9.94A.505 50
RCW 9.94A.703 50
RCW 9A.36.021 9
RCW 9A.46.020 41

Rules

ER 104 30
ER 801 21
ER 802 21

ER 803 passim

Treatises

5A Karl B. Tegland, Washington Practice § 367 (2d ed.1982)22

6 J. Wigmore, Evidence § 1747 (1976)29

Other

Advisory Committee's Note, Fed. R. Evid. 803.....23

WPIC 35.13..... 14

A. SUMMARY OF ARGUMENT

Mr. Manning's convictions merit reversal on several independent bases: (1) the to-convict jury instruction on assault lacked the essential element of intent; (2) the trial court erred in admitting statements identifying the perpetrator that the alleged victim made to a treating nurse and physician because the statements were not made for purposes of medical diagnosis or treatment, (3) the trial court erred in admitting the alleged victim's call to 911 because it did not come within the excited utterance exception to the hearsay rule; (4) the jury instructions and charging document lacked the "true threat" element for cyberstalking, (5) insufficient evidence supported the conviction for cyberstalking; and (6) cumulative error denied Mr. Manning a fair trial.

In the alternative, because there was no evidence that alcohol use contributed to the crimes, the community custody provision requiring an alcohol evaluation must be stricken.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Manning's right to due process by omitting the essential intent element from the to-convict jury instruction on second degree assault.

2. The trial court erred in admitting out-of-court statements identifying Mr. Manning as the perpetrator under the medical diagnosis and treatment exception to the hearsay rule.

3. The trial court erred in allocating the burden to the defense to show that the out-of-court statements identifying the perpetrator were not made for purposes of medical diagnosis or treatment.

4. The trial court erred in admitting out-of-court statements to 911 under the excited utterance exception.

5. The trial court erred in admitting out-of-court statements to 911 under the present sense impression exception.

6. The information charging cyberstalking lacked the essential element of true threat.

7. The cyberstalking to-convict jury instruction lacked the essential element of true threat.

8. There was insufficient evidence to find Mr. Manning guilty of cyberstalking beyond a reasonable doubt.

9. Cumulative error denied Mr. Manning his due process right to a fair trial.

10. The court lacked authority to impose a community custody condition requiring Mr. Manning obtain an alcohol

evaluation and follow all recommended treatment when it was not crime-related.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires all essential elements of a crime be included in a to-convict instruction. Intent is an essential element of assault in the second degree. Where the to-convict instruction for assault contained all elements of the crime except intent, was Mr. Manning denied due process?

2. Out-of-court statements may be admissible if made for the purpose of medical diagnosis or treatment. Generally, a statement identifying the perpetrator of injuries is not admissible absent evidence the identity was necessary for medical treatment or diagnosis. Where a treating nurse testified the declarant identified her perpetrator but the State did not provide any evidence showing identity was relevant to treatment or diagnosis, did the trial court err in admitting the out-of-court statements?

3. An out-of-court statement is generally inadmissible unless it fits within an exception to the hearsay rule. Excited utterances are admissible if the statement relates to a startling event or condition and is made while the declarant was under the stress of excitement caused by the event or condition. The proponent of the

statement must show that the declarant made the statement while under the stress of excitement of the startling event or condition.

Where the declarant later recanted the statements made in her 911 call, appeared completely calm during the call and had time between the event and the call to fabricate her statements, did the trial court err in admitting the 911 call as an excited utterance?

4. Due process requires that all essential elements of a crime be included in the charging document and to-convict jury instruction. To avoid constitutional overbreadth, a statute criminalizing threats must be limited to criminalize only “true threats.” True threat is therefore an essential element of cyberstalking. Where the information and to-convict instruction lacked the element of true threat, was Mr. Manning denied due process?

5. Due process requires the State prove each element of the charged offense beyond a reasonable doubt. A charge of cyberstalking requires the State to prove the statements were a “true threat.” Where the State failed to prove that the text message attributed to Mr. Manning constituted a “true threat,” is Mr. Manning entitled to reversal of the cyberstalking count with instructions to dismiss the charge?

6. Cumulative error may deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. In light of the errors assigned above, should this Court conclude that the cumulative effect of the errors denied Mr. Manning a fundamentally fair trial?

7. A court may impose conditions of community custody that are authorized by statute or are reasonably related to the offense of conviction. Mr. Manning was not accused of abusing alcohol and the court made no finding that using alcohol contributed to the offenses. Did the court abuse its discretion by requiring Mr. Manning to submit to an alcohol evaluation and follow treatment recommendations as a condition of community custody?

D. STATEMENT OF THE CASE

1. Ms. King's reporting of the incident.

Mr. Manning and Kea King have a long-term dating relationship and two children together. 2RP 53-54, 58-59.¹ They

¹ The verbatim reports of proceedings are referred to as follows:

- 1RP refers to verbatim report of proceedings for hearings dated January 12, 14, and 28 as well as February 3, 7, and 8, 2011;
- 2RP refers to verbatim report of proceedings for hearings dated February 9, 2011;
- 3RP refers to verbatim report of proceedings for hearings dated February 10, 2011; and
- 4RP refers to verbatim report of proceedings for hearings dated February 14 and 25, 2011.

do not live together. See 2RP 55. On August 16, 2010 they had a fight. Ms. King told differing accounts of the incident.

First, the police became involved when Ms. King called 911. See Exhibit 4 (Track #1). Ms. King appears calm throughout the call. See id. She told the operator she was reporting “a domestic violence . . . my boyfriend just punched me in my face.” Id. at 00:03-08. She was at the Greenwood Market on 85th Street and Third Avenue in Northwest Seattle. Id. at 00:13-19. Ms. King reported that her boyfriend was in her house or around her house, which was across the street from the Greenwood Market. Id. at 00:25-00:28, 00:46-48. Unprompted, Ms. King then provided the 911 operator with her boyfriend’s license plate and a description of his car “in case he tries to run.” Exhibit 4 at 01:07-1:35. When asked her boyfriend’s name, Ms. King stated, “Demetri Manning” and described him to the operator. Id. at 01:35-02:03. When asked if she needed medical attention, Ms. King declined. Id. at 2:07-:30. A couple minutes into the call, Ms. King reported that Mr. Manning was leaving her house and driving away. Id. at 2:30-:48, 3:00-:20. Ms. King later recanted this version of the fight, as set forth below.

When the police arrived at Greenwood Market to speak with Ms. King, she was not there. 3RP 67. Dispatch called her back at the number she had used to call 911 and she arrived in the parking lot a short time later. 3RP 67. She told the police that Mr. Manning had come into her home and punched her. 2RP 100, 115; 3RP 69, 80. She also told them that Mr. Manning was sending her threatening text messages. 3RP 71-72, 81. The responding police officer had no independent knowledge of who the messages were from or when they were sent. 3RP 73. In a statement that Ms. King signed, the content of a text message was given as, "See, you know you was in the wrong, you ain't called the police, I'm going to fuck you up so bad when I see you and the guy." 2RP 71.

Later that evening, Ms. King went to the emergency room, even though she had passed up medical support offered by 911. 2RP 88, 103; 3RP 11, 13. She presented with a swollen nose and a small chip in her tooth. 3RP 13, 19, 25. She told the treating nurse and physician that her injuries derived from her boyfriend hitting her face. 3RP 15, 18.

Ms. King sought a protective order against Mr. Manning following the incident, but did not follow through on her request. 2RP 102; cf. 2RP 111 (did not want no-contact order as part of

arraignment). In the petition, she reported that she had met Mr. Manning in the Greenwood Market parking lot (not that he had come into her home) and he punched her in the face. 2RP 86, 99-100. The petition also references the text message she reported to police. 2RP 87. Ms. King later testified that she moved for a protection order because she was told she would lose her housing if she did not clear up any domestic violence issues. 2RP 81-83. Ms. King was not concerned that her statement had been given under oath. 2RP 85.

Three days after the incident, Ms. King was contacted by a detective; she told the detective that Mr. Manning had injured her nose and tooth when he punched her. 3RP 38. But Ms. King did not follow up with the detective as planned and the detective was unable to reach her again. 3RP 36-37.

2. The charges against Mr. Manning and pretrial motions.

Mr. Manning was charged with assault in the second degree (RCW 9A.36.021(1)(a)) and felony cyberstalking (RCW 9A.61.260(1)(c) and (3)(b)). CP 1.²

² By amended information, the State added a charge of violation of the uniform controlled substances act (RCW 69.50.4013). CP 7. That count was severed and Mr. Manning pled guilty. CP 91; 1RP 89.

Before trial, the State moved to admit the out-of-court statements in Ms. King's 911 call as an excited utterance. 1RP 105. Mr. Manning objected. 1RP 111. The court recognized the issue was a close call but admitted the statements. 1RP 121. The facts are discussed in additional detail in the argument section below.

The State also moved to admit Ms. King's out-of-court statements to the nurse and physician when she visited the emergency room, including Ms. King's identification of Mr. Manning as the perpetrator. 1RP 123-24. Mr. Manning objected to the admission of this evidence as well. 1RP 125-27, 130-31. The court found that it was the defendant's burden to show that the statements were not made for purposes of medical diagnosis or treatment. 1RP 130-33. It allowed the statements to come in over objection from Mr. Manning. 3RP 15. Thus at trial, the nurse testified (1) Ms. King told her "I got punched in the face by my baby daddy," and (2) the treating physician's notes stated, "[Ms. King] was assaulted this afternoon, struck in her nose by her boyfriend." 3RP 15, 18. The State did not lay any foundation showing the identity of the perpetrator was related to either medical diagnosis or treatment. See 3RP 9-11 (testimony regarding general practices

but not including any information about need for identity of perpetrator).

3. Ms. King's recantation and the trial.

Ms. King appeared at trial and recanted her prior version of events. She told the jury she was injured during a fight she started with Mr. Manning. 2RP 57. Contrary to her statements to 911, Ms. King testified the fight occurred outside at the Greenwood Market when she came to meet Mr. Manning and saw he had not brought diapers and other items she was expecting. 2RP 57-58, 66. She admitted that she fabricated the story when she called 911 and testified she waited for 5 or 10 minutes after the fight so that she could decide what to say. 2RP 58, 60, 73. She called 911 because she was mad at Mr. Manning for cheating on her and wanted him to go to jail. 2RP 60-63. "I told them whatever they wanted to hear" 2RP 63. She "didn't even really care too much about that [he punched her in the face]." In fact, she testified she was not sure what he actually did to her during the fight, but she told the police he punched her in the face. 2RP 64. She further testified that she was motivated to "blame everything on [Mr. Manning]" because she did not want to implicate herself in fighting. 2RP 71-72.

With regard to her injuries, she told the jury her chipped tooth had occurred previously when she was out drinking with a friend and fell on her face. 2RP 96-97, 106-07. She lied about the injury because she hoped the police would come faster and that insurance would fix her tooth if it was the result of a domestic violence incident rather than merely a cosmetic repair. 2RP 97.

Ms. King also denied that Mr. Manning had sent her any threatening text messages that day. 2RP 66-69. She admitted in her testimony that she had lied to the police, the court when she sought a protective order, and the prosecutor during pretrial investigation. 2RP 105, 115. She was unsure what she had told others about the incident since it occurred. 2RP 94-96.

An exhibit of cellular phone records from the number Ms. King indicated was hers showed text messages and telephone calls from the telephone number 206-388-9779 on the day of the incident. 3RP 45-52; 2RP 54. There was no evidence as to whom the 206-388-9779 number belonged, and the exhibit did not show the content of any of the messages. See 2RP 54 (Ms. King could not testify as to Mr. Manning's telephone number); 3RP 52-53 (no indication of content of messages or telephone calls).

Despite Ms. King's recantation, Mr. Manning was convicted of both counts. CP 53-54 (verdict forms).³

E. ARGUMENT

1. THE TO-CONVICT INSTRUCTION ON ASSAULT IN THE SECOND DEGREE OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.
 - a. A to-convict instruction violates due process if it omits an element of the crime charged.

The "to convict" instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. Smith, 131 Wn.2d at 262-63. "It cannot be said

³ The State ultimately did not seek conviction under RCW 9.61.260(3)(c), which elevates cyberstalking to a felony if a threat to kill is involved. See CP 76. Mr. Manning was convicted of the misdemeanor crime of cyberstalking (RCW 9.61.260(1)(c)).

that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” Id. at 263.

Because the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, it may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Omission of an element from the to-convict instruction “obviously affect[s] a defendant’s constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict.” State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). This Court reviews a challenged jury instruction de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

- b. The to-convict instruction in this case violated Mr. Manning’s right to due process because it omitted the element of intent.

Intent is an essential element of second degree assault. RCW 9.61.021(1)(a). As charged here, assault by battery requires intent to commit the physical act that constitutes the assault. State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000), review denied 143 Wn.2d 1023, 25 P.3d 1020 (2001). The jury in this case convicted Mr. Manning of assault in the second degree. CP 53.

But the jury was not instructed that intent is an element of the crime. The to-convict instruction allowed the jury to find Mr. Manning guilty even if it found that he did not act intentionally. See CP 65.

The to-convict instruction, instruction number 8, provided the jury a yardstick by which it could measure the evidence in determining Mr. Manning's guilt or innocence. State v. Emmanuel, 42 Wn.2d 799, 817, 819, 259 P.2d 845 (1953); CP 65. However, the to-convict instruction does not include the element of intent. CP 65 ("To convict the defendant of the crime of assault in the second degree, . . . each of the following elements of the crime must be proved beyond a reasonable doubt: (1) . . . the defendant assaulted Kea King"). The instruction is contrary to the Washington Pattern Jury Instructions, which includes the element of intent. WPIC 35.13 ("To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about _____, the defendant intentionally assaulted _____;").

It is not sufficient that a subsequent definitional instruction refers to intent. See CP 66. Here, the assault to-convict instruction "purport[s] to include all the essential elements of the crime."

Emmanuel, 42 Wn.2d at 817. Where the court “[i]n effect . . . furnished a yardstick by which the jury were to measure the evidence in determining appellant’s guilt or innocence of the crime charged,” it is “not a sufficient answer [to the assignment of error that an element is missing from the to-convict] to say that the jury could have supplied the omission of this element . . . by reference to the other instructions.” Id. at 819. Like in Emmanuel, the to-convict instruction purported to contain all essential elements. The jury thus had a right to “regard [it] as being a complete statement of the elements of the crime charged.” Id.

In State v. Hopper, 118 Wn.2d 151, 822 P.2d 775 (1992) and State v. Davis, 119 Wn.2d 657, 835 P.2d 1039 (1992), the Supreme Court upheld the sufficiency of charging documents that omitted the appropriate mens rea. In both cases, the court found that the charging documents were sufficient even absent the missing element. Davis, 119 Wn.2d at 662; Hopper, 118 Wn.2d at 158. These cases, however, are not on point for two reasons. First, in each case the court considered the sufficiency of the charging document, which provides notice to the defendant of the crimes charged. Here, Mr. Manning assigns error to the sufficiency of the to-convict instruction. Unlike the charging document, a to-

convict instruction is intended to inform a lay jury of all essential elements of the crime. Second, in Davis and Hopper, the appellants raised error in the information for the first time on appeal; therefore, the court “liberally construed” the charging document. 119 Wn.2d at 661; 118 Wn.2d at 155-56, 158 (“When construed liberally, the term ‘assault’ contains within it the concept of knowing conduct.”). Here, however, the to-convict instruction is not reviewed liberally.

The to-convict instruction here is not similar to that evaluated by Division Three in Hall. Here, as discussed, the to-convict instruction purports to provide a full accounting of the essential elements. See CP 65. It acts as a yardstick by which the jury could measure Mr. Manning’s guilt or innocence. See Emmanuel, 42 Wn.2d at 817, 819. The jury would not have logically inferred that it needed to refer to other instructions to find additional elements of the crime. In Hall, on the other hand, Division Three apparently did not view the to-convict instruction as an intended yardstick. 104 Wn. App. at 62.⁴ Moreover, in Hall the court only reviewed the instruction under an abuse of discretion standard. Id. at 60, 61 (alleged error was trial court’s refusal to include intent as

⁴ The opinion does not set forth the full language of the instruction at issue.

specific element of to-convict instruction). The instructional error alleged here is subject to de novo review. DeRyke, 149 Wn.2d at 910. Thus, Hall does not control the outcome here.

In sum, the to-convict instruction for assault in the second degree was insufficient because it omitted the essential element of intent.

c. Reversal is required.

The United States Supreme Court has held that under the federal constitution, harmless error analysis applies where the trial court omits an element from the to-convict instruction. Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). But our state constitutional right to a jury trial is stronger, requiring automatic reversal where the court omits an element from the to-convict instruction.

Article I, Section 21 provides that “[t]he right of trial by jury shall remain inviolate.” Const. art. I, § 21. There is no equivalent federal provision, and therefore our Supreme Court has repeatedly held that the state constitution provides a stronger right to a jury trial than the United States Constitution. E.g. State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); Sofie v. Fibreboard,

112 Wn.2d 636, 644-50, 771 P.2d 711 (1989); Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982).

Furthermore, in looking to the law regarding the specific issue raised here, our state courts have required automatic reversal for this type of error for over 100 years. In 1890, during our first year of statehood, the Supreme Court held in McClaine v. Territory, 1 Wash. 345, 25 P. 453 (1890), that the omission of an element from what we would now call the to-convict instruction required reversal. The court noted that a problem with a definitional instruction could possibly be considered harmless in light of other instructions, but that the omission of an element from the “to-convict” instruction required reversal, without any reference to how much evidence was presented on that element or whether the outcome would have been the same with the proper instruction. Id. at 354-55.

Many cases over the next century reaffirmed the rule that automatic reversal is required where the to-convict instruction omits an element. The Supreme Court so held in the 1953 case of State v. Emmanuel, 42 Wn.2d 799, as well as much later cases like Smith, 131 Wn.2d at 265 (“Failure to instruct on an element of an offense is automatic reversible error”). And this Court as recently

as the year 2000 stated, “A harmless error analysis is never applicable to the omission of an essential element of the crime in the ‘to convict’ instruction. Reversal is required.” State v. Pope, 100 Wn. App. 624, 630, 999 P.2d 51 (2000).

Although our Supreme Court has acknowledged Neder as the federal standard, its decisions in Brown and Recuenco indicate that it will not follow that standard under the Washington Constitution. In 2002, the Brown court recognized Neder and applied it in that case, but it did not perform an independent state constitutional analysis and it continued to cite prior Washington cases for the proposition that “[a]n instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

More recently in the Recuenco series of cases, the United States Supreme Court held that a Neder harmless error standard must be applied to Blakely⁵ errors because the failure to instruct on an element is indistinguishable from a failure to instruct on a sentence enhancement. Washington v. Recuenco, 548 U.S. 212, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). But on remand,

⁵ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

our Supreme Court held that automatic reversal was required under Washington law, because the sentence imposed was not supported by the jury's actual verdict, notwithstanding what a jury might have found if properly instructed. *Recuenco*, 163 Wn.2d at 441-42. The Court cited Article I, Section 21 of our state constitution, reiterated that it provides stronger protection than the federal constitution, and stated "our right to a jury trial is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Id.* at 435. Accordingly, automatic reversal was required.

Similarly here, this Court should hold that automatic reversal is required because the to-convict instruction omitted an essential element of the crime.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING HEARSAY STATEMENTS THAT WERE NOT FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.

The trial court abused its discretion when it admitted Ms. King's out-of-court statements to a nurse and emergency room physician without foundation that the statements were necessary for medical diagnosis or treatment.

- a. An out-of-court statement that is made for purposes of medical diagnosis or treatment is admissible at trial.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Subject to narrow exceptions, hearsay is presumptively inadmissible. ER 802.

Hearsay is admissible at trial if it is a statement “made for purposes of medical diagnosis or treatment.” ER 803(4). ER 803(4) provides in full:

Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

“The medical treatment exception applies to statements reasonably pertinent to diagnosis or treatment.” State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001). Generally, to determine whether a statement was made for purposes of medical diagnosis or treatment, courts look to whether (1) the declarant’s motive was to promote treatment, and (2) the medical professional reasonably relied on the statement for treatment purposes. In re Pers. Restraint of Grasso, 151 Wn.2d 1, 20, 84 P.3d 859 (2004) (citing

State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505 (1989)). For the statement to be admissible, the declarant's apparent motive must be consistent with receiving treatment and the statements must be information on which the medical provider reasonably relies to make a diagnosis. State v. Fisher, 130 Wn. App. 1, 14, 108 P.3d 1262 (2005).

Pursuant to this rule, "statements as to causation ("I was hit by a car") would normally be allowed, but statements as to fault ("... which ran a red light") would not." In re Dependency of Penelope B., 104 Wn.2d 643, 656, 709 P.2d 1185 (1985) (quoting 5A Karl B. Tegland, Washington Practice § 367, at 224 (2d ed.1982)).

This Court reviews the trial court's admission of a statement under ER 803(4) for abuse of discretion. Woods, 143 Wn.2d at 602.

- b. The State failed to show Ms. King's statements identifying the perpetrator were relevant to diagnosis or treatment and the trial court misapplied the burden.

As a general rule, statements identifying the perpetrator are not relevant to diagnosis or treatment. State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003); State v. Sims, 77 Wn. App. 236, 890 P.2d 521 (1995); accord Advisory Committee's Note, Fed. R. Evid. 803(4).

In some circumstances, the identity of the perpetrator may be relevant to treatment and thus admissible under ER 803(4). For example, in Sims, the complainant was assaulted by a former boyfriend. 77 Wn. App. at 238-39. A surgeon testified the perpetrator's identity was important in assessing the patient's pain management; an emergency room doctor said he considered it part of his practice to refer patients to social workers when assessing assault victim's needs; and a social worker testified that an integral part of her counseling and treatment plan for the complainant was working with her in avoiding threatening situations and improving the relationship dynamic between the complainant and perpetrator. Id. at 240. The Sims Court found that, because testimony "establishes that awareness of the abuse was useful" in their provision of medical care, the medical professionals' testimony identifying the perpetrator was admissible. Id. The Sims Court also found it pertinent that the defendant did not try to "challenge the admissibility of [the] hearsay statements on the ground that [the alleged victim's] motivation was something other than the hospital context would suggest." Id. at 241.

Similarly, in State v. Price, 126 Wn. App. 617, 640-41, 109 P.3d 27 (2005), the court received testimony from the treating

physician that he questioned the alleged victim about the identity of her abuser because the “injuries involved domestic abuse and would require special treatment.” The physician further testified that “he discussed counseling and other resources” with the alleged victim. 126 Wn. App. at 640-41. On these grounds, the reviewing court ruled the admission of the statements was not an abuse of discretion. Id. at 641.

However, where the evidence does not demonstrate that the statement identifying the perpetrator was related to medical diagnosis or treatment, the hearsay exception does not apply. For example, in Redmond, the Supreme Court ruled the trial court erred in admitting portions of the assault victim’s medical records, in which a physician had noted the victim's description of the assault and the identification of the defendant as the assailant. 150 Wn.2d at 496-97. No foundation was laid to show the identification was pertinent to the medical diagnosis or treatment. The court held that the medical records should have been redacted to omit the facts surrounding the assault. Id. at 497.

In State v. Huynh, 107 Wn. App. 68, 26 P.3d 290 (2001), this Court reached a similar result. In that case the defendant sought to admit medical records that included his statements that the police

inflicted injuries upon him. 107 Wn. App. at 73. This Court held that the records were not admissible under ER 803(4) because “statements explaining who caused the injuries in this case and whether that person’s actions constituted an assault are not reasonably pertinent to diagnosis or treatment of [the defendant’s] sprained wrist and sore shoulder.” Id. at 75-76 (footnote omitted). Significantly, the defendant in Huynh did not present evidence indicating the relation between his statement of identification and the injuries.

In the case at bar, no medical personnel testified that the name of the perpetrator was necessary for treatment. Though the nurse described her general duties, she did not testify as to what type of information she uses to treat patients in general. 3RP 9-11 (describing emergency room process, including that she works with doctors and social workers, but without any description as to why, how or in which type of cases). Furthermore, the nurse did not testify that Ms. King’s identification of the perpetrator was related to any medical diagnosis or treatment in this case. See 3RP 7-27. The defense argued Ms. King also was not motivated by the need for medical treatment or diagnosis, at least not in indentifying Mr. Manning, but was motivated by a continuing desire to see Mr.

Manning put in jail or otherwise punished. E.g., 1RP 126-27, 130-31. Nonetheless, over objection from defense, the nurse testified that Ms. King told her, "I got punched in the face by my baby daddy," and the doctor's notes state, "she was assaulted this afternoon, struck in her nose by her boyfriend." 3RP 15, 18.

In refusing to exclude the statements, the trial court allocated the burden to the defendant to show the statements were *not* made for purposes of medical diagnosis or treatment. 1RP 130-33. However, the proponent of the hearsay statement, in this case the State, has the burden of demonstrating a hearsay exception applies. E.g., United States v. Marrowbone, 211 F.3d 452, 455 (8th Cir. 2000); Sturgeon v. Celotex Corp., 52 Wn. App. 609, 618-19, 762 P.2d 1156 (1988). Without this necessary foundation, the court erred in admitting statements Ms. King made to the nurse and physician.

- c. The error requires reversal of Mr. Manning's assault conviction.

Evidentiary errors by the trial court are reviewed under the non-constitutional harmless error standard. State v. Hamlet, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997) (nonconstitutional error in admitting evidence does not require reversal absent reasonable

probability it affected the verdict). Under this standard an error cannot be harmless where, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Id.

The admission of Ms. King's out-of-court statements identifying Mr. Manning as the perpetrator was not harmless. Ms. King's identifications of Mr. Manning to health care providers was additional evidence that contradicted Mr. Manning's defense by implicating him as the perpetrator. The evidence lent credence to the State's theory of the case that Ms. King's recantation was false whereas the statements in her 911 call and to police officers were more accurate. See 3RP 116, 135. Consequently, the error was not harmless and Mr. Manning's assault conviction must be reversed.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING A 911 CALL THAT WAS NOT AN EXCITED UTTERANCE AND THE CONTENT OF WHICH THE CALLER RECANTED.

The trial court admitted Ms. King's 911 call, over Mr. Manning's objection, as an excited utterance. However, Ms. King recanted the statement, indicating it was made five to ten minutes after the startling event and admitting that she fabricated the fact of

the startling event. Because the statements Ms. King made to 911 did not satisfy an exception to the hearsay rule, the trial court abused its discretion in admitting them.

- a. An excited utterance constitutes a narrow exception to the general rule that hearsay is inadmissible.

Another recognized exception to the hearsay rule is an excited utterance. ER 803(2). An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Id. The proponent of hearsay under this exception must satisfy three closely-connected requirements: “that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition.” State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007) (citation omitted).

The underlying rationale behind admitting this hearsay evidence is that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore,

Evidence § 1747, at 195 (1976)). “[T]he key determination is ‘whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.’” State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995) (quoting State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)).

In determining whether a statement is an excited utterance, spontaneity is crucial. State v. Briscoeray, 95 Wn. App. 167, 173, 974 P.2d 912, review denied, 139 Wn.2d 1011(1999). In determining spontaneity, courts look to the amount of time that passed between the startling event and the utterance, as well as any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it. Chapin, 118 Wn.2d at 688. Where the witness had an opportunity to reflect on the event and fabricate a story, the statement is not spontaneous and thus not an excited utterance. State v. Williamson, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000). Where a witness recants her account of an incident, her recantation is relevant to determining whether the statement was made

spontaneously. Young, 160 Wn.2d at 808-09; see Brown, 127 Wn.2d at 757-58.

The decision whether to admit an out-of-court statement as an excited utterance is reviewed for an abuse of discretion. Young, 160 Wn.2d at 806. To admit the evidence, the trial court must find by a preponderance of the evidence that the declarant remained *continuously* under the influence of the event at the time the statement was made. ER 104(a); State v. Ramires, 109 Wn. App. 749, 757, 37 P.3d 343 (2002). ER 803(a)(2) must be interpreted in a restrictive manner, so as to “not lose sight of the basic elements that distinguish excited utterances from other hearsay statements. This is necessary . . . to preserve the purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present.” State v. Dixon, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

- b. The trial court abused its discretion by admitting Ms. King’s statements to 911 under the excited utterance exception.

The State moved pretrial to admit the 911 call made by Ms. King, arguing it falls within the excited utterance exception. 1RP 105-11. Mr. Manning opposed the motion, arguing Ms. King sounded calm in the call and like someone who had time to

fabricate. 1RP 111-15. Mr. Manning further argued Ms. King's purpose was to report Mr. Manning to the police and have him arrested; there was no ongoing emergency. 1RP 115-17.

The court recognized that it was a close case whether the call was admissible as an excited utterance. 1RP 121.

Nonetheless, the court ruled the call admissible, finding Ms. King was under the stress of the startling event that obviously just happened. 1RP 122.⁶

Ms. King recanted her statements to 911 when she testified as a State's witness at trial. She testified that her injuries derived from a fight she started with Mr. Manning; it arose in the parking lot of the Greenwood Market (not in her apartment) because she got mad at him for not bringing diapers and other items. 2RP 57, 66, 93. In response to the prosecutor's question about whether Mr. Manning punched her, Ms. King responded, "We were fighting. I don't know." 2RP 58. She further testified that 5 or 10 minutes

⁶ The court also found that some of the statements, regarding Mr. Manning walking out of the house and driving away, were present sense impressions. 1RP 122. To qualify as a present sense impression, the statement must be a "spontaneous or instinctive utterance of thought," evoked by the occurrence itself, unembellished by premeditation, reflection, or design. Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939); ER 803. Because Ms. King recanted the statements, indicated they were fabricated, and reported the fight occurred in the Greenwood Market parking lot and not in her home, the statements about Mr. Manning leaving her house were not a spontaneous utterance of thought unembellished by premeditation, reflection or design.

after the fight she called 911 and “fabricated some stuff to them.” 2RP 58, 60. She waited for 5 or 10 minutes so she could get her story together and because she was nervous about warrants that were out for her. 2RP 73. She called 911 because she was mad that he was cheating on her and wanted him arrested. 2RP 60-63. Because she had warrants out for her, Ms. King did not tell the police she was fighting with Mr. Manning; instead, she blamed everything on Mr. Manning. 2RP 71-72.

A subsequent recantation, like Ms. King’s here, substantially diminishes the likelihood the original statements were the product of an excited utterance. In State v. Brown, the Supreme Court reviewed the admission of a 911 call as an excited utterance, where the victim testified that she had decided, before making the 911 call, to lie about being abducted when in fact she willingly went to the defendant’s apartment. 127 Wn.2d at 753. Because of the evidence of fabrication, the Supreme Court held it was error to admit the 911 call as an excited utterance as it was not made while still under the stress of the startling event. Id. at 759. Instead, the declarant had the opportunity to and did fabricate at least part of her story. Id. at 758-59. The Supreme Court later clarified that Brown “stands for the proposition that where there is undisputed

evidence that a declarant fabricated her hearsay statements, the second element of an excited utterance—that the statement was made under the influence of a startling event is not satisfied.”

Young, 160 Wn.2d at 806.

The Supreme Court subsequently reviewed a case in which the evidence regarding fabrication was disputed. In Young, the Supreme Court reviewed the admission of hearsay statements made by a visibly upset 11-year-old to friends of hers, the content of which she later recanted. Multiple witnesses consistently described the declarant as visibly upset, “borderline hysterical,” crying and scared as she reported the alleged crime to them. 160 Wn.2d at 802 (K.L. crying when she arrived at friend’s door and throughout description of event; friend described child as appearing “really scared” and “upset”; child refused hug from friend, which she had never done before); Id. at 803 (friend of three to four years testified he had never seen child so upset and she was “crying really hard”; another witness testified child did not stop crying and described her state as “borderline hysterical”). Just a few minutes later, the child confirmed the story again to her friend. Id. at 803 & n.4. A few months later, in a notarized letter to the accused witnessed by her mother, the child recanted her statements that

Young had inappropriately touched her. Id. at 804. The child's testimony at trial was consistent with her recantation. Id.

The Young Court held that the trial court could weigh "the reliability of the alleged excited utterance against the credibility of the recantation in determining admissibility" of the hearsay statements. 160 Wn.2d at 808. Distinguishing the case from Brown, the Court noted the trial court in Young made a specific finding that the recantation was not credible whereas the earlier statements were reliable because of the child's "emotional state at the time, the lack of opportunity for her to fabricate [because the child came from her home, a mere 10 seconds away], and the other witnesses' knowledge of and experience with [her.]" Id. In addition, the Supreme Court found circumstantial evidence corroborated the occurrence of the startling event, satisfying the first element of the excited utterance exception. Id. at 808, 819 (reciting corroborative evidence). Thus, the Young Court did not find the admission of the child's hearsay statements an abuse of the trial court's discretion.

Several factual distinctions between Young and the case at bar compel a different result here. Unlike the 11-year-old declarant in Young, Ms. King is a grown adult more attuned to the art of motivated fabrication. See 106 Wn.2d at 818-19 (reciting trial

court's finding that did "not find it credible that this 11-year-old child was under the circumstances so artful that she created a false impression in the part of all these people"). Though the declarant in Young was described by all as visibly upset, scared and crying, the recording of the 911 call here demonstrates Ms. King was not tearful, startled, shaken or otherwise upset. Exhibit 4 (Track #1). In fact, Ms. King appears completely calm and unhurried. Id. Moreover, in Young the recipients of the hearsay statement knew the declarant well and thus could credibly testify as to her "borderline hysterical" state and actions that were unlike any they had seen her demonstrate previously. In this case, on the other hand, no evidence other than the content of the statements made by Ms. King to the 911 operator (that is, her own statement that her boyfriend had just hit her) indicates that Ms. King was under the stress of a startling event. Finally, though the Young Court agreed with the trial court's finding that the declarant in that case had no time to fabricate her story because her friends were located in a home just across the street (maybe 10 seconds away), Ms. King testified that she waited 5 to 10 minutes before she called 911. Ms. King plainly had sufficient opportunity to fabricate her story. Moreover, when the police arrived at the scene, Ms. King had

already left. This fact indicates Ms. King was neither traumatized nor scared to return to her home across the street (which is where she had reported to 911 that Mr. Manning had been).

Applying the rationale of Brown and Young, Ms. King's 911 call was not made under the stress of excitement of the startling event. Accordingly, Ms. King's call to 911 was not an excited utterance satisfying the hearsay exception. The admission of the 911 call was an abuse of discretion.

c. The error requires reversal of Mr. Manning's assault conviction.

As discussed above, evidentiary errors by the trial court are reviewed under the non-constitutional harmless error standard. Section E.2.c, supra. Admission of the recording of the 911 call was prejudicial. The recording constituted Ms. King's own account of what transpired between her and Mr. Manning. Of the evidence admitted at trial, it was the most contemporaneous to the event. As an audio recording, the 911 call comprised a more personalized account than any other evidence admitted. It thus was a compelling piece of evidence in support of the State's theory that Ms. King lied on the stand. 3RP 135. Furthermore, Mr. Manning's self-defense defense was dependent upon the jury believing Ms.

King's account at trial—that she was the aggressor in a physical fight between them. See CP 74 (lawful use of force instruction). The 911 call constituted a contrary account, simply that Mr. Manning had punched her.

The 911 call, therefore, was the most compelling piece of evidence in support of the State's case. Its absence likely would have materially affected the outcome.

4. WHETHER THE THREAT CONSTITUTING CYBERSTALKING WAS A 'TRUE THREAT' WAS AN ESSENTIAL ELEMENT THAT HAD TO BE PLED IN THE INFORMATION AND INCLUDED IN THE 'TO-CONVICT' INSTRUCTION.

The requirement that the threat made be a "true threat" was not included in the information or the "to-convict" instruction on cyberstalking. CP 7-8, 76. Though a subsequent jury instruction defined "threat" for the jury, the error requires reversal of the cyberstalking conviction.

- a. A charging document or to-convict instruction violates due process if it omits an element of the crime charged.

As discussed above, the "to convict" instruction must contain all of the elements of the crime charged. Section E.1.a, supra. An accused person has the due process right to require the State to prove the essential elements of a charged offense to the jury

beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Winship, 397 U.S. at 364; U.S. Const. amend. XIV. The failure to instruct the jury on an element of a crime charged may be raised for the first time on appeal. Mills, 154 Wn.2d at 6. This Court reviews a challenged jury instruction de novo. DeRyke, 149 Wn.2d at 910.

Due process also requires that the essential elements of a crime be included in the charging document, regardless of whether they are statutory or non-statutory. U.S. Const. amend. VI; Const. art. I, § 22; State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). In Goodman, the Washington Supreme Court relied on Apprendi to hold that all facts essential to punishment must be pled in the information and proved beyond a reasonable doubt. Goodman, 150 Wn.2d at 785-86. The purpose of the rule is to give the accused notice of the nature of the allegations so that a defense may be properly prepared. Id. at 784; State v. Kiorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An information omitting essential elements charges no crime at all. State v. Courneya, 132 Wn. App. 347, 351, 131 P.3d 343, review denied, 149 P.3d 378 (2006).

Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before trial or a guilty verdict. Kjorsvik, 117 Wn.2d at 102. The reviewing court determines whether the necessary facts appear in the information in any form. Goodman, 150 Wn.2d at 787-88; Kjorsvik, 117 Wn.2d at 105-06. “If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice.” Courneya, 132 Wn. App. at 351.

- b. That the cyberstalking threat was a true threat was an essential element that had to be included in the information and to-convict instruction.

“The First Amendment, applicable to the States through the Fourteenth Amendment, provides that ‘Congress shall make no law . . . abridging the freedom of speech.’” State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting Virginia v. Black, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)). “A criminal statute that ‘sweeps constitutionally protected free speech activities within its prohibitions’ may be overbroad and thus violate the First Amendment.” State v. Stephenson, 89 Wn. App. 794, 800, 950 P.2d 38 (1998) (quoting City of Seattle v. Abercrombie, 85 Wn.

App. 393, 397, 945 P.2d 1132, review denied, 133 Wn.2d 1005, 943 P.2d 663 (1997)). “Overbreadth analysis is intended to ensure that legislative enactments do not prohibit constitutionally protected conduct, such as free speech.” City of Seattle v. Ivan, 71 Wn. App. 145, 149, 856 P.2d 1116 (1993) (citing City of Tacoma v. Luvone, 118 Wn.2d 826, 827 P.2d 1374 (1992)).

Though speech is generally protected by the First Amendment, a “true threat” is not protected. A true threat is “a statement made ‘in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual].’” State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998) (quoting United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990)). The communication “must be a serious threat, and not just idle talk, joking or puffery.” State v. Kilburn, 151 Wn.2d 36, 46, 84 P.3d 1215 (2004) (citing State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001)). Whether a true threat occurs “is determined under an objective standard that focuses on the speaker.” Id. at 44.

In Kilburn, the Supreme Court considered a First Amendment challenge to RCW 9A.46.020, the felony harassment

statute. The Court noted that because the statute “criminalizes pure speech,” it “must be interpreted with the commands of the First Amendment clearly in mind.” Id. at 41 (quoting State v Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001) and Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). The Court held that in order to “avoid unconstitutional infringement of protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only ‘true threats.’” Kilburn, 151 Wn.2d at 43; accord State v. Johnston, 156 Wn.2d 355, 363-65, 127 P.3d 707 (2006).

In State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007), this Court considered whether, in the context of a prosecution for telephone harassment, the requirement that the threat was a “true threat” had to be included in the information or the “to convict” instruction. 141 Wn. App. at 482-85. Johnston notwithstanding, the court in Tellez concluded that the “true threat” requirement was a mere definitional component of the harassment statute, and not an essential element, reasoning that the court in Johnston did not expressly rule that “a true threat is an essential element of any threatening-language crime.” Id. at 483.

The decision in Tellez was incorrect. In fact, in Johnston the Court held “the jury must be instructed that a *conviction* under RCW 9.61.160 requires a true threat *and* must be instructed on the meaning of a true threat.” Johnston, 156 Wn.2d at 366 (emphases added). The language of the Court’s holding demonstrates that the Court considered the “true threat” requirement to be an element of any harassment charge.

The conclusion that the Court considered the “true threat” requirement to be an element is consistent, as well, with the Court’s treatment of mere definitional terms. See, e.g., State v. Lorenz, 152 Wn.2d 22, 33-35, 93 P.3d 133 (2004) (observing that the failure to instruct on definitional terms is not an error that requires a conviction be reversed) (citations omitted). By requiring an instruction on the “true threat” requirement, the Court implicitly distinguished “true threats” from definitional terms and signaled its view that whether a threat was a “true threat” is an essential element of a harassment charge.

The Washington Supreme Court recently reiterated the same view. In Schaler, the Court reversed the defendant’s conviction because the trial court did not instruct the jury that it could only convict if it found the defendant issued a true threat. 169

Wn.2d at 278, 292-93. The full definition of “true threat” was neither in the to-convict instruction nor in a standalone instruction. Id. at 284-86. The Court noted that while the jury was instructed on the necessary mens rea as to the speaker’s *conduct*, it was not instructed on the necessary mens rea as to the *result*. Id. at 285-86. “True threat” includes the latter—that a reasonable speaker would foresee that the statement would be interpreted as a serious expression of intention to inflict harm. Id. at 286-87.

The Court went on to explain that “the omission of the constitutionally required mens rea from the jury instructions . . . is analogous to [a situation] in which the jury instructions omit an element of the crime.” Schaler, 169 Wn.2d at 288. And although it declined to reach whether true threat language must appear in the to-convict instruction, it noted, “[i]t suffices to say that, *to convict*, the State must prove that a reasonable person in the defendant’s position would foresee that a listener would interpret the threat as serious.” Id. at 289 n.6 (emphasis added).

Finally, the Washington Supreme Court has taken up the issue left open in Schaler, at least in regards to the felony harassment statute, by accepting review in State v. Allen, 161 Wn. App. 727, 255 P.3d 784 (2011); Supreme Court No. 86119-6. In

Allen, this Court adhered to its own precedent in the face of Schaler. 161 Wn. App. at 753-56. The Court thus held that the lack of “true threat” element in the information and to-convict instruction was not erroneous. Id. at 756.

- c. Because the essential true threat element was not included in the information or to-convict instruction, reversal is required.

The provision of the cyberstalking statute under which Mr. Manning was charged and convicted criminalizes threats. RCW 9.61.260(1)(c). As discussed above, its reach must be limited to true threats to comport with the First Amendment. Thus, a true threat is an essential element of the crime that must be included in the information and to-convict. See Section E.4.b, supra.

Where the information lacks any reference to an element, prejudice is presumed and “reviewing courts reverse without reaching the issue of prejudice.” Courneya, 132 Wn. App. at 351. Vangerpen, 125 Wn.2d at 791-93 (remedy for insufficient information is reversal and dismissal of charge without prejudice); State v. Cochrane, 160 Wn. App. 18, 25-26, 253 P.3d 95 (2011) (following Vangerpen and reversing conviction where information omitted essential element). Here the information bore no language about a true threat. See CP 1, 7.

Similarly, where an essential element is missing from the to-convict reversal of the conviction is the proper remedy. Section E.1.c, supra (reversal is remedy for failure to include essential element in to-convict).

Consequently, Mr. Manning's conviction for cyberstalking must be reversed and the charge dismissed without prejudice.

5. BECAUSE NO EVIDENCE SUPPORTED THE TRUE THREAT ELEMENT, THERE WAS INSUFFICIENT EVIDENCE BEFORE THE JURY TO FIND MR. MANNING COMMITTED CYBERSTALKING.

In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; Apprendi, 530 U.S. at 471; Winship, 397 U.S. at 364; State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). In analyzing a claim of insufficiency of the evidence this Court determines “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Green, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and

all reasonable inferences that can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

As discussed above, the cyberstalking statute under which Mr. Manning was charged must be construed to criminalize only true threats and the State must prove that the statement Mr. Manning made was a true threat. See Section E.4.b, supra; RCW 9.61.260(1)(c). A statement is a true threat if a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another individual. E.g., Knowles, 91 Wn. App. at 373.

The totality of the State's evidence on the cyberstalking count was: (1) testimony of a police officer that Ms. King showed him a message on her telephone that stated "I'm going to fuck you up," 3RP 71-72; (2) Ms. King's police statement written by an officer at the scene reporting the same language, 2RP 71; and (3) telephone records showing calls and texts (but not the content thereof) from a certain, unidentified number on August 16, 2010, 3RP 45-52. No evidence showed that a reasonable person sending such a text message would foresee that the statement would be interpreted as a serious intention to inflict harm.

Where the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Because retrial following reversal for insufficient evidence is “unequivocally prohibited,” the charge must be dismissed with prejudice. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

Here, the State did not prove all the elements of cyberstalking. Therefore, the conviction must be reversed and dismissed.

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

Each of the above errors requires reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Manning a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; e.g., Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel’s errors in determining that defendant was denied a

fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Venegas, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the above errors merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury’s verdict. The admission of the 911 call and Ms. King’s statements identifying Mr. Manning as the perpetrator both heavily favored the State’s theory of the case. The evidence reduced the impact of Ms. King’s in-trial recantation. The omission of an element from the assault to-convict instruction only further compounded the effect of these errors. The removal of the intent element from the to-convict instruction resulted in the jury being unable to weigh Mr. Manning’s defense that any injuries to Ms. King

were sustained as a result of his self-defense. The State's overall evidence on the cyberstalking count was minimal. Two police officers testified Ms. King told them Mr. Manning had been texting her and one saw the content of a text message on her cellular telephone. But no other evidence of Mr. Manning's identity or the content of the text messages came in except for Ms. King's later-recanted words. This Court should conclude the combined effect of the errors materially affected the jury's verdict, in violation of due process. Mr. Manning's convictions accordingly must be reversed.

7. THE ALCOHOL EVALUATION COMMUNITY
CUSTODY CONDITION MUST BE STRICKEN AS
NOT CRIME-RELATED AND UNAUTHORIZED BY
THE SRA.

There was no evidence presented at trial or sentencing that alcohol consumption contributed to Mr. Manning's offenses or that he had an alcohol abuse problem. The trial court nonetheless entered a special condition of community custody requiring Mr. Manning to submit to an alcohol evaluation. CP 121. Specifically, Appendix H to the judgment and sentence orders Mr. Manning to "obtain alcohol evaluation within 30 days of release, and follow all recommended treatment." CP 121. This condition must be vacated

because it is not crime-related and therefore not authorized by the sentencing statutes.

When a person is convicted of a felony, the sentencing court must impose punishment as authorized by the Sentencing Reform Act (SRA). RCW 9.94A.505; In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature).

RCW 9.94A.703(1) sets forth the mandatory standard conditions of community custody, such as reporting to the Department of Corrections (DOC). Special discretionary conditions include having no contact with the crime victim or a class of individuals, participating in crime-related treatment or counseling, not consuming alcohol, or other “crime-related prohibitions.” RCW 9.94A.703(3); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). In addition, RCW 9.94A.505(8) authorizes the sentencing court to impose “crime-related prohibitions and affirmative conditions as provided in this chapter.” A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

The burden is on the State to demonstrate that a condition of community supervision is statutorily authorized. Cf. State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA places burden on State to prove existence and comparability of out-of-state convictions for offender score purposes); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (same); United States v. Weber, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case). A sentencing error may be raised for the first time on appeal. Bahl, 164 Wn.2d at 744-45; Ford, 137 Wn.2d at 477.

As this Court explained in State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003), it is error to mandate alcohol counseling without evidence to indicate the requirement of alcohol counseling was crime-related. Like in Jones, nothing in the evidence at trial or sentencing indicated that alcohol contributed to the offenses, “or that the trial court’s requirement of alcohol counseling was ‘crime-related.’” Jones, 118 Wn. App. at 207.

Where a condition of community custody is not reasonably related to the offense, the remedy is to strike the improper condition. State v. Riles, 135 Wn.2d 326, 353, 957 P.2d 655

(1998). Accordingly, this Court should strike the condition that Mr. Manning obtain an alcohol evaluation and follow all recommended treatment.

F. CONCLUSION

Mr. Manning's convictions should be reversed for the independent grounds set forth above. In the alternative, the Court should strike the non-crime-related community custody provision.

DATED this 11th day of October, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MLZ', is written over a horizontal line.

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

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF OCTOBER, 2011.

X _____ 

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