

66763-7

66763-7

NO. 66763-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEMETRI MANNING,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE DOUGLASS NORTH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The Supreme Court has stated that it is understood that an "assault" is an intentional act. Thus, should this Court reject the defendant's claim that the "to convict" jury instruction must state that the defendant "intentionally assaulted" the victim, or is it sufficient to state that the defendant "assaulted" the victim?

2. Appellate courts have held that in domestic violence and child abuse situations, where a patient is seeking medical treatment, the patient's identification of their abuser is relevant to medical treatment and diagnosis. Did the trial court properly allow such testimony under ER 803(a)(4)?

3. At a pretrial hearing, the trial court ruled admissible the victim's 911 call as an "excited utterance" and a "present sense impression." Later at trial, the victim recanted. Can the defendant claim the trial court's ruling was in error based on the later recantation when he never asked the court to reconsider its decision?

4. One of the defendant's convictions was for cyberstalking. Should this Court reject the defendant's argument (1) that the cyberstalking statute requires proof of a "true threat," and (2) that

the words defining what constitutes a "true threat" must be included in the charging document and "to convict" jury instruction?

5. Should this Court reject the defendant's claim that no reasonable jury could have found his message to the victim, stating "I'm going to fuck you up so bad when I see you," was a "true threat?"

6. Should this Court agree that the defendant's failure to prove multiple trial court errors and substantial prejudice bars him from prevailing in a claim under the "cumulative error" doctrine?

7. The judgment and sentence contains a scrivener's error. In its oral ruling, the trial court properly ordered the defendant to undergo a "controlled substance evaluation" as part of his sentence for possessing cocaine, but the judgment and sentence mistakenly says "alcohol evaluation." This error should be corrected.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with assault in the second degree (count I), felony cyberstalking (count II), and possession of cocaine (count III). CP 7-8. He pled guilty to the possession of cocaine charge and proceeded to trial on the other two charges.

CP 91-102. A jury found the defendant guilty of assault in the second degree and misdemeanor cyberstalking. CP 53-54, 76. He received a standard range sentence of six months on the felony convictions, concurrent to a credit for time served sentence on the misdemeanor cyberstalking conviction. CP 115-21; CP ____, sub # 69.

2. SUBSTANTIVE FACTS

On August 16, 2010, Kea King called 911 three times. 3RP¹ 44, 46, 52. The first call came in at 1:30 in the afternoon from the Greenwood Market in Seattle, with officers responding within ten minutes. 2RP 58, 60; 3RP 60, 65-67. King reported to 911 that her "boyfriend just punched me in my face." Exhibit 4. King told the 911 operator that she could see the defendant exiting her house and driving away. Id. When officers arrived, they found King, bloodied and afraid. 3RP 68-70; Exhibits 1, 2, 3, 16 and 17. King suffered a cut lip, chipped tooth, and a broken nose. 3RP 19-20, 68, 70.

¹ The four volume verbatim report of proceedings is cited as follows: 1RP--1/12/11, 1/14/11, 1/28/11, 2/3/11, 2/7/11 & 2/8/11; 2RP--2/9/11; 3RP--2/10/11; 4RP--2/14/11 & 2/25/11.

After the police took a report and left the scene, King called the police twice more, once at 7:36 that evening, and again at 7:43. Officers responded to a "threats in progress" and found a "very scared" King. 1RP 168-69, 173. King showed responding officers a text message. 1RP 173. In a protection order petition written the next day, King stated that the defendant had been sending her multiple threatening messages. Exhibit 18. Phone records showed that from 12:36 that afternoon until 10:21 that evening, the defendant placed 30 plus calls and 25 plus text messages to King's phone. 3RP 44-52. One of the messages was received while King was talking with responding officers. 3RP 71-72. King showed officers the text, which read, "see, you knew you was in the wrong. You know you ain't called the police. I'm going to fuck you up so bad when I see you at the (indiscernible)." 3RP 72.

King appeared for trial only after the prosecutor threatened to obtain a material witness warrant and after notifying the court that it appeared the defendant's father may have been involved in witness tampering. 1RP 95-99, 188-89; 2RP 16-17. King testified and recanted. She claimed that she got mad at the defendant for not bringing her some diapers so she hit him. 2RP 57. She claimed not to remember how she got injured or if she had been

punched. 2RP 58. She also testified that when she called 911, she lied about what happened. 2RP 58.

King claimed not to know the defendant's phone number and claimed that he had not texted her. 2RP 67-68. She claimed the police never looked at her phone to see if there were any text messages. 2RP 66. In fact, despite the phone records introduced at trial, the recording of her 911 calls, the testimony of responding police officers and the 911 communications dispatcher, King claimed she had not called the police again that evening and had not seen them later in the evening because she wasn't there. 2RP 74, 80. King's testimony was substantially impeached by evidence admitted for substantive purposes and by evidence admitted for impeachment purposes.

Upon questioning, King admitted that she was in love with the defendant and that he was still her boyfriend. 2RP 58. She also admitted that despite talking multiple times with police officers, a detective, her treating physician, a judge at the defendant's arraignment, the prosecutor, an advocate and defense counsel, prior to trial she had never before claimed that the fight was mutual and that she was the aggressor. 2RP 93-94. She admitted, and other witnesses confirmed, that she told the 911 operator,

responding police officers, the detective, and treating medical personnel, that the defendant had punched her in the face, knocked her to the ground, and later threatened her. 2RP 64, 66, 71, 76, 79, 83, 86-87; 3RP 15, 18, 32, 69, 80-81, 83; Exhibit 18.

The defendant did not testify at trial or call any witnesses. Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE JURY INSTRUCTIONS PROPERLY INFORMED THE JURY OF THE APPLICABLE LAW.

The defendant contends that the jury instructions were fatally flawed. Specifically, he claims that the "to convict" instruction was required to say he "intentionally assaulted" the victim, as opposed to simply that he "assaulted" the victim, and the failure to use the word "intentionally" means his conviction must be reversed. This argument is contrary to existing case law and must be rejected. The issue has also not been preserved for appeal.

a. The Standard Of Review.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the

case, and when read as a whole, properly inform the jury of the applicable law. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Generally, the "to convict" instruction must contain all the elements essential of the crime charged. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 916 (1997), but see, Mills, supra, (court approved "threat to kill" element of felony harassment being contained in a separate instruction) and State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002) (court approved "prior conviction" element of felony violation of a no-contact order statute being contained in a separate instruction). This Court reviews the adequacy of a challenged "to convict" instruction *de novo*. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

In determining whether a "to convict" instruction contains all of the essential elements, appellate courts are mindful that there are no "magic words" that must be used. Rather, trial courts are given discretion to determine the specific language to include in the instructions. State v. Coe, 101 Wn.2d 772, 787, 684 P.2d 668 (1984). This Court must "review the instruction in the same manner as a reasonable juror." State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994); Mills, 154 Wn.2d at 7.

b. The Jury Instructions.

In pertinent part, the trial court gave the following "to convict" instruction:

To convict the defendant of the crime of assault in the second degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 16, 2010, the defendant assaulted Kea King;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on Kea King; and
- (3) That the act occurred in the State of Washington.

CP 65. With the exception that the defendant wanted language pertaining to self-defense included in this instruction--not an issue here, the defendant agreed to the giving of this instruction. 3RP 97-98.

In defining the crime, the jury was instructed as follows:

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

CP 64.

The jury was further instructed that:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or

offensive regardless of whether any physical injury is done to the person.

CP 66.

c. The Statute.

In pertinent part, the second-degree assault statute reads in pertinent part:

A person is guilty of assault in the second degree if he or she ... [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.

RCW 9A.36.021.

d. The Issue Has Not Been Preserved.

The defendant not only failed to object to the instructions given in this case, he affirmatively agreed to them. The defendant is thus barred from raising this issue under the doctrine of invited error. State v. Alphonse, 147 Wn. App. 891, 899, 197 P.3d 1211 (2008), rev. denied, 166 Wn.2d 1011 (2009); State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000).

In addition, simply the failure to object below bars review. See State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). In O'Hara, the Supreme Court held that a claim of error in a

self-defense instruction cannot be raised for the first time on appeal if the error alleged is not of constitutional dimension and is not "manifest" under RAP 2.5. An error is "manifest" for these purposes only if there has been actual prejudice, meaning that the defendant has made a plausible showing that the alleged error "had practical and identifiable consequences in the trial of the case." O'Hara, 167 Wn.2d at 108 (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

Here, where the definition of the crime given to the jury included the exact language the defendant believes must be included in the "to convict," and where the State was not relieved of its burden of proving all the elements of the crime, the defendant cannot show that the alleged error is a "manifest" constitutional error that resulted in practical and identifiable consequences. Therefore, under O'Hara, the defendant's claim cannot be reviewed for the first time on appeal.

e. The "To Convict" Instruction Properly Informed The Jury On All The Elements Of The Crime.

An assault is an intentional act. To use the term "intentional" or "intentionally" to define the word assault is redundant. See State v. Davis, 119 Wn.2d 657, 835 P.2d 1039 (1993).

In Davis, the charging document alleged that Davis "did assault Darlynn Ferguson." Davis, 119 Wn.2d at 662. The Supreme Court rejected Davis' claim that the charging document needed to state that he intentionally assaulted the victim. "Assault," the Court said, "is not commonly understood as referring to an unknowing or accidental act." Davis, at 663. The term "assault," the Court held, "adequately conveys the notion of intent," it "includes the element of intent." Davis, at 663 (citing State v. Hopper, 118 Wn.2d 151, 158-59, 822 P.2d 775 (1992)).

The defendant rejects these cases for two reasons--both faulty. First, he claims that Davis and Hopper were cases in which the court "liberally construed" the charging documents because no objection was raised prior to the verdict in each case. He asserts that under a strict construction, the term assault does not mean an intentional act. Def. br. at 15-16. However, the defendant fails to

cite State v. Taylor, 140 Wn.2d 229, 996 P.2d 571 (2000), in which the Supreme Court rejected this very same argument.

Application of a strict standard of review does not alter the plain meaning of "assault." This Court has held that the word "assault" conveys an intentional or knowing act. Applying the different standards of construction requires the court to judge the sufficiency of the charging documents as a whole with different levels of scrutiny, but the standards do not require the court to give words different meanings depending upon the standard of construction applied. Concluding that an allegation of assault is constitutionally sufficient under the strict standard of construction is consistent with other cases construing the sufficiency of charging documents.

Taylor, 140 Wn.2d at 242-43. In short, the Supreme Court has held that the plain meaning of the term "assault" necessarily conveys that an act of assault is an intentional act.

Second, the defendant contends that a "to convict instruction is not reviewed liberally." Def. br. at 16. It is unclear the purpose the defendant attempts to make by this statement. The Supreme Court has held that a court will review jury instructions "in the same manner as a reasonable juror." Hanna, 123 Wn.2d at 719. With the Supreme Court holding that even under a strict construction, an assault is commonly understood as being an intentional act, it defies logic to assume that a reasonable juror would assume that assault is not an intentional act.

The State's position and the Supreme Court's understanding that the meaning of the term "assault," is consistent with the other assault statutes and the WPIC "to convict" jury instructions. For example, first-degree assault requires an intent to inflict great bodily harm but neither the statute nor the "to convict" instruction uses or requires the phrase "intentionally assaults." See RCW 9A.36.011(a) and (b); WPIC 35.02, 35.04; see also RCW 9A.36.021(a) (third-degree assault); WPIC 35.21; RCW 9A.36.031 (fourth-degree assault); WPIC 35.26.

Here, in subsection (1)(a), of the second-degree assault statute, the statute does use the phrase "intentionally assaults another" but the inclusion of the word "intentionally" is clearly intended to make apparent the different *mens rea* included in the statute, the intent required in committing the assaultive act versus the *mens rea* required as to the harm inflicted, i.e., that the defendant "recklessly inflicts substantial bodily harm." RCW 9A.36.011; see also State v. Holzkecht, 157 Wn. App. 754, 238 P.3d 1233 (2010), rev. denied, 170 Wn.2d 1029 (2011).

No "magic words" are required in jury instructions. State v. Meneses, 169 Wn.2d 586, 592 n.2, 238 P.3d 495 (2010). The issue is whether the essential elements are contained in the "to convict" instruction. An assault is an intentional act. The jury was instructed that they had to find beyond a reasonable doubt that "the defendant assaulted Kea King." The jury here was properly informed of the applicable law and the inclusion of the word "intentional" or "intentionally" would have been redundant.

f. Any Error Was Harmless.

Even if it were required that the "to convict" instruction here include the term "intent" or "intentionally," the failure to do so is harmless. Under a harmless error analysis, an instructional error is presumed to be prejudicial unless it affirmatively appears that it was harmless. Smith, 131 Wn.2d at 263-64 (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). As held by the Supreme Court, "[i]n order to hold the error harmless, we must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." State v. Brown, 147 Wn.2d 330, 341,

58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).²

Here, the jury was specifically instructed that "[a] person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm." CP 64. The jury was further instructed that "[a]n assault is an intentional touching or striking of another person." CP 66. The jury was instructed that the State had to prove each element beyond a reasonable doubt. There could not have been confusion here--the jury was informed of all that the State was required to prove and any error in the instructions was harmless.

² The defendant asserts that there is no harmless error analysis allowed under the state constitution. However, in Brown, *supra*, the Washington Supreme Court adopted the Neder standard from the United States Supreme Court. Further, where a defendant seeks to argue that the Washington Constitution provides greater protections than the United States Constitution, he must conduct a "Gunwall" analysis. State v. Olivas, 122 Wn.2d 73, 81-82, 856 P.2d 1076 (1993) (referring to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)). A court will not conduct a review under independent state constitutional grounds in the absence of this analysis. Id.

2. KEA KING'S STATEMENTS TO MEDICAL PERSONNEL WERE PROPERLY ADMITTED UNDER ER 803(a)(4).

The defendant contends that statements made by Kea King to a nurse and emergency room physician were hearsay and thus the statements were not admissible. This claim is without merit. The trial court did not abuse its discretion in finding that the requirements of ER 803(a)(4) had been met and thus the statements were admissible as an exception to the general rule barring hearsay evidence.

a. Evidence Rule 803(a)(4).

As an exception to the general rule barring hearsay evidence, ER 803(a)(4) allows for the admissibility of statements made for the purpose of medical diagnosis or treatment. The rule provides that statements are admissible if "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." ER 803(a)(4).

As a legal proposition, it has long been accepted that attributing fault to a particular abuser is relevant for medical

diagnosis and treatment purposes in certain situations, specifically, in instances of child abuse and domestic violence. See, e.g., State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (two-year-old's statement to nurse identifying mother's boyfriend as his physical abuser admissible under ER 803(a)(4)), rev. denied, 112 Wn.2d 1014 (1989); In re Dependency of S.S., 61 Wn. App. 488, 503, 814 P.2d 204, (statements made to social worker by five-year-old admissible under ER 803(a)(4)), rev. denied, 117 Wn.2d 1011 (1991); United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993) (emotional and psychological harm caused by domestic abuse makes identity of abuser pertinent for medical treatment purposes), cert. denied, 510 U.S. 1184 (1994); State v. Sims, 77 Wn. App. 236, 239-40, 890 P.2d 521 (1995) (victim's statements to ER doctor and social worker were admissible where victim identified her boyfriend as the person who broke her jaw); United States v. Renville, 779 F.2d 430, 437 (8th Cir. 1985) (the prevention of future harm provides another reason why the identity of the perpetrator is relevant for medical treatment and diagnosis in domestic violence cases).

b. Facts Relating To Defendant's Claim.

Prior to trial, the court heard argument on the admissibility of statements made by Kea King to medical personnel who treated

her for her injuries on the night she was assaulted. 1RP 123-33.

The statements consisted of King stating that she got punched in the face by her boyfriend. 3RP 15, 18.³

The defendant argued that King's statements to medical personnel identifying her boyfriend as her abuser should not be admitted. 1RP 131. The court pointed out the case law that held contrary of the defense position (see for example the above listed cases). Defense counsel responded that she was fully aware of the case law cited by the court regarding the importance of naming the perpetrator in domestic violence cases, but she claimed--without providing any supporting evidence--that "nobody apparently believed that her [King's] concerns merited that kind of intervention or counseling." 1RP 133. Defense counsel requested that she be allowed to later *voir dire* the witnesses on this issue. 1RP 133. Defense counsel never raised the issue again.

At trial, Registered Nurse Mary Pham of Swedish Hospital testified that she worked in the ER triaging patients. 3RP 9. She testified that it was her job to get a full history from a patient as to what happened to them. 3RP 9-10. Then, working closely with the

³ King did not actually provide the name of her abuser to medical personnel. See 1RP 124-25; 3RP 15-18.

treating physician and social workers, the team would create a plan for the patient "as far as what resources that person -- that patient will need." 3RP 9-10. During this process, Pham testified, the team engages in a full "assessment meeting." 3RP 10.

c. Standard Of Review And Argument.

The admission of evidence lies largely within the sound discretion of the trial court. State v. Brown, 132 Wn.2d 529, 570, 940 P.2d 546, cert. denied, 523 U.S. 1007 (1997). A decision of the trial court will not be disturbed absent an abuse of discretion, a standard met only upon a showing that no reasonable person would have taken the position adopted by the trial court. Brown, 132 Wn.2d at 570; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

The law is well settled about the admissibility of the statements made for the purposes of medical diagnosis and treatment, as well as the naming of the abuser in a domestic violence case. The defendant seems to argue two things. First, he seems to argue that because King did not receive any counseling regarding domestic violence after making her statements to medical personnel, that this defeats admissibility of the statements under

the rule. There is no support for this proposition under the law, and it is not supported by the facts.

The defendant did not present any evidence that medical personnel did not counsel King in some manner, or provide resources to her, regarding domestic violence in general or the specific situation she was in. Additionally, the defendant's theory of admissibility would turn the rule on its head, making the admissibility of statements dependent on the ultimate diagnosis and subsequent treatment instead of on the declarant's purpose in making the statement. In other words, if a person sought hospitalization believing their arm was broken, but the physician found no break or treatable injury, then the person's statements would be inadmissible. But the rational underpinning of the rule is that a patient will convey trustworthy accurate information because they believe they have suffered injury and are seeking appropriate medical care. Butler, 53 Wn. App. at 220 (citing Renville, 779 F.2d at 436-37)). In other words, the trustworthiness of the statement comes from the patient's belief that they have been harmed, not on the later diagnosis or treatment of the physician.

The defendant also seems to argue that there was an insufficient foundation in his case to admit statements attributing

fault to the abuser. He cites to State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003) and State v. Huynh, 107 Wn. App. 68, 26 P.3d 290 (2001) to support his claim. However, Redmond involved the defendant and an unrelated individual fighting in a school parking lot. It was not a domestic violence case and there was no evidence the victim and defendant would ever see each other again. Similarly, Huynh involved a claim that the patient was assaulted by a police officer. The cases are simply inapposite.

Pham testified that a full assessment of the patient's needs is done in conjunction with treating physician, triage nurse and social worker. That would include, as the parties discussed and the case law states, attribution of fault in a domestic violence case. The defendant's case is not an exception to the norm--that attribution of fault in a domestic violence case is "reasonably pertinent" to diagnosis and treatment. See Butler, 53 Wn. App. at 217.

d. Any Error Was Harmless.

Even if the testimony was improperly admitted, any error was harmless. An evidentiary error is deemed harmless unless a defendant can demonstrate that there is a reasonable probability

that the erroneous admission of the evidence materially affected the outcome of trial. State v. Greiff, 141 Wn.2d 910, 927-28, 10 P.3d 390 (2000). Here, the admission of the evidence, even if error, did not affect the outcome of the case.

This was not a "who done it" case. King's excited utterance statements, King's statements in her protection order petition, and King's testimony, all provided substantive evidence that the defendant assaulted her. The issue was whether or not this was a mutual fight with the defendant acting in self-defense. Thus, the defendant cannot prove that admission of the one statement attributing fault materially affected the outcome of trial.

3. THE DEFENDANT'S EXCITED UTTERANCE CLAIM HAS BEEN WAIVED.

The defendant contends that because Kea King recanted at trial, the trial court erred in allowing the admission of her 911 call, admitted as an "excited utterance" and "present sense impression." This issue is not properly before the Court. King's recantation occurred at trial. The trial court's ruling was made pretrial. The

defendant never asked the court to reconsider its decision based on King's recantation. Thus, this issue has been waived. See Sims, 77 Wn. App. at 238.

a. The Call To 911.

On February 7, 2011, the court was notified that it was expected that Kea King would not be present for trial. 1RP 95-98. While the prosecutor had been in contact with King, she had "in no uncertain words told [the prosecutor] that she would not appear." 1RP 99.

During pretrial hearings, the prosecutor notified the court that on the date of the incident King made a number of phone calls to 911. 1RP 106. The prosecutor indicated that it would seek to introduce the first call as an excited utterance under ER 803(a)(2).⁴ 1RP 106. A CD of the call was played for the court. 1RP 107. After hearing argument, the court ruled that the call was admissible

⁴ A statement is not excluded as hearsay if it is an "excited utterance" "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2).

as both an excited utterance, and portions of the call as a "present sense impression."⁵ 1RP 121-22.

On February 9, 2011, after opening statements and multiple witnesses had testified, the prosecutor informed the court that King had indicated that she would appear for court. 2RP 5. When King did appear, a recess was taken so that the prosecutor and defense counsel could talk to her. 2RP 18, 21. Defense counsel informed the court that King was now claiming that she started the fight between the defendant and herself, and that the two had hit each other. 2RP 24.

King then testified and stated that she and the defendant had both been "fighting." 2RP 57. She claimed that she hit the defendant first. 2RP 57. She admitted calling 911 but asserted that she had lied about some of the things she said during the call. 2RP 58-59. She also claimed that she made the call five to ten minutes after the fight with the defendant had concluded. 2RP 60. The CD (exhibit 4) was then admitted and played for the jury without further objection from the defendant. 2RP 60.

⁵ A statement is not excluded as hearsay if it is a "present sense impression," "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1).

b. The Defendant Never Asked The Court To Reconsider Its Ruling.

In State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995), the declarant called 911 to report that she had been abducted, forced into Brown's apartment, and raped by four men. At a pretrial hearing, the trial court ruled that the 911 call was admissible as an excited utterance. Brown, 127 Wn.2d at 751-52. At trial, the declarant testified that she went willingly into Brown's apartment and admitted that she called 911 only after talking with her boyfriend and making the conscious decision to lie about the abduction portion of her story. Id. When it came time to admit the 911 call, Brown "renewed" his objection based on the declarant's trial recantation. Brown, at 753. The trial court overruled the objection. Id. The Supreme Court ruled that the trial court had abused its discretion because it was undisputed that the declarant had the opportunity to, and did in fact, fabricate part of her story. State v. Young, 160 Wn.2d 799, 807, 161 P.3d 967 (2007) (citing Brown, at 758-59)). Thus, she was not under the influence of an exciting event incapable of lying at the time she made the call to 911. Id.

In Young, the eleven-year-old declarant ran next door crying hysterically and told a friend that Young had put his hand "underneath her panties and gabbed her butt." Young, 160 Wn.2d at 802. The same month Young was charged with molesting the declarant, Young and the declarant's mother were married.⁶ Prior to trial, with her mother present, the declarant wrote a letter recanting her claim that Young molested her. Young, 123 Wn.2d at 804.

At a pretrial hearing, the court heard evidence regarding the circumstances of the purported excited utterance statements made by the declarant. Id. The declarant testified and recanted. Id. The trial court ruled that the declarant's statements were admissible as an excited utterance, making a finding that the declarant's recantation was not credible. Young, at 808. The Supreme Court held that the trial court did not abuse its discretion. The Court held that the trial court acted within its power to weigh the declarant's recantation against the facts supporting admission of the statements as an excited utterance. Id.

⁶ This fact is from the court of appeals decision. See State v. Young, 123 Wn. App. 854, 856, 99 P.3d 1244 (2004). While the Supreme Court decision indicates the mother and Young were involved in a romantic relationship, it leaves out the fact that they married after the declarant's allegation of abuse.

These cases, relied upon by the defendant, provide guidance to trial court when faced with recanting victims and excited utterances. The problem faced by the defendant here was that the victim's recantation was not presented to the trial court when it ruled on the admissibility of her prior statements. Thus, the issue has not been preserved for appeal.

In Sims, supra, this same situation arose, with this Court stating the following:

Sims argues that Bellinger's statement to the officer [the excited utterance admitted] must have been the result of fabrication because she later allegedly made an inconsistent statement to his grandmother. He did not present this argument to the trial court as a reason for excluding the excited utterance. Therefore, he did not preserve the objection and we will not consider it.

Sims, 77 Wn. App. at 238; see also State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985) (a party may only assign error in the appellate court on the specific ground of the evidence objection made at trial), cert. denied, 475 U.S. 1020 (1986); State v. Meckelson, 133 Wn. App. 431, 438, 135 P.3d 991 (2006) (a suppression ruling stands and falls on its own merits, based upon the evidence before the suppression judge, not what is later developed at trial), rev. denied, 159 Wn.2d 1013 (2007); State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002) (the scope of review is limited to the trial

court's exercise of its discretion in deciding the issues that were raised by the motion).

Here, the defendant never asked the court to reconsider its decision based on new evidence--King's recantation at trial. If he had asked the court to reconsider its decision, under Brown and Young, the trial court would have had to make a determination as to whether King's recantation was credible or not--but the court was never asked to do so. See State v. Sullivan, 69 Wn. App. 167, 172, 847 P.2d 953 (the trial court has no duty to raise the issue *sua sponte*), rev. denied, 122 Wn.2d 1002 (1993). The trial court cannot be said to have abused its discretion based on evidence that was not present to the court at the time the decision was made. Thus, the defendant's claim that the trial court erred in admitting King's prior statements as an excited utterance and present sense impression because she later recanted has not been preserved.⁷

⁷ It is likely counsel did not ask the court to reconsider its decision because of the nature of King's testimony. King's recantation was substantially at odds with the evidence presented and testimony of other witnesses. It is highly unlikely that the court would have found her testimony so credible as to exclude her prior statements.

4. THE TERM "TRUE THREAT" IS NOTHING MORE THAN A TERM OF ART USED TO DESCRIBE THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF ANY CRIME.

The defendant contends that it is error not to include the following language in every charging document and "to convict" jury instruction involving a verbal threat:

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 carry out the threat.

More specifically, the defendant contends that this language is not definitional--as multiple courts have held; rather, he asserts that the language constitutes an actual element of every criminal statute involving a threat. This is incorrect and inconsistent with existing case law. See, e.g., State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006); State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007); State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010). The term "true threat" is a term of art used to describe the permissible scope of threat statutes for first amendment purposes. The language describing what constitutes a true threat is definitional only, no different than the language used to define "intent," "recklessness" or "great bodily harm." Thus, the language does not need to be

included in the "to convict" jury instruction or the charging document.

a. The Charging Document And Jury Instructions.

By Information the defendant was charged as follows:

That the defendant DEMETRI MANNING in King County, Washington, on or about August 16, 2010, with intent to harass, intimidate, torment or embarrass any other person, and under circumstances not constituting telephone harassment, make an electronic communication to such other person threatening to inflict injury on the person or property of the person contacted and the threat was a threat to kill the person contacted.

CP 8; RCW 9.61.260(1)(c) and (3)(b).

The court gave the jury a "to convict" instruction that read in pertinent part:

To convict the defendant of the crime of cyberstalking as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 16, 2010, the defendant made an electronic communication to Kea King;
- (2) With intent to harass, intimidate, torment, or embarrass Kea King;

(3) The electronic communication threatened to inflict injury on the person or property of Kea King; and

(4) That the act occurred in the State of Washington.

CP 76.⁸

The court also gave the following definitional instruction:

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

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

CP 78 (emphasis added); see also WPIC 2.24. The defendant was in complete agreement with the giving of these instructions. 3RP 93-98.

⁸ The defendant was charged with felony cyberstalking based on a threat to kill. The case proceeded to the jury on the lesser offense of misdemeanor cyberstalking based on a threat to inflict injury. 3RP 87-88, 94.

b. The Elements Of The Crime Of Cyberstalking.

A charging document is sufficient if it sets forth all the elements necessary to constitute the offense. State v. Kiorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). In regard to the jury instructions, due process is satisfied if the jury is "informed of all the elements of the offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted." State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). While a "to convict" instruction should contain all the essential elements of the crime, it "need not contain all pertinent law such as **definitions of terms**." State v. Fisher, 165 Wn.2d 727, 754-55, 202 P.3d 937 (2009) (emphasis added).

As charged and convicted here, a person commits the crime of cyberstalking if, with intent to harass, intimidate, torment or embarrass any other person, he or she makes an electronic communication to the victim threatening to inflict injury to that person. RCW 9.61.260(1)(c). The statute sets out all the elements of the crime. The defendant's argument that the statute can only proscribe "true threats," and that "true threats" are an element of the crime, fails for two reasons.

c. The Intent To Harass.

First, in defining the constitutional limits of the general harassment statute (RCW 9A.46.020)--a statute that "criminalizes pure speech," the Supreme Court has stated that to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only what are termed "true threats." State v. Kilburn, 151 Wn.2d 36, 41, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001). However, unlike the harassment statute that contains no intent element, cyberstalking requires that the defendant act with the actual "intent to harass, intimidate, torment or embarrass." This intent requirement of the statute resolves the First Amendment issue without the need to look at the nature of the threat itself. See Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

In Virginia v. Black, the United States Supreme Court was asked to rule on the constitutionality of Virginia's cross-burning statute. The Court held that the State of Virginia could proscribe cross-burning done "with the intent to intimidate," as the statute

required.⁹ Black, 538 U.S. at 362. In other words, because of the required intent element, the Court did not need to rule on the limitations of the speech itself. Such is the case here. Under Black, because cyberstalking requires the State prove the defendant intended to harass, the statute satisfies First Amendment analysis.

The defendant does not address this point, the intent to harass and the differences in the harassment and cyberstalking statutes. Instead, he proceeds directly to his claim that the court must look solely at the nature of the words spoken to satisfy First Amendment concerns. In any event, under a "true threats" analysis, the defendant's argument fails.

d. "True Threat" Is A Term Of Art.

A "true threat," the Supreme Court has said, 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

⁹ The statute was ultimately struck down because of a legal presumption contained in another section of the statute. A provision of the statute created a presumption that the jury could find that any cross-burning was done with the intent to intimidate--even if the cross-burning was done for political or ideological reasons. Black, at 363-64.

harm upon or to take the life of another person." Kilburn, 151 Wn.2d at 43. Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, at 44. The relevant question is whether a reasonable person in the defendant's position would foresee that taken in context, a listener would interpret the statement as a serious threat. Kilburn, at 46.

Here, the court gave an instruction properly incorporating the definition of what constitutes a "true threat." Because the court provided proper instructions that included all the elements in the "to convict" instruction, and proper definitional instructions encompassing the first amendment concerns expressed in Kilburn, J.M., and Williams, the defendant's argument fails.

This is consistent with Tellez, supra, and Atkins, supra, wherein this Court rejected these very same arguments. See also State v. Sloan, 149 Wn. App. 736, 205 P.3d 172, rev. denied, 220 P.3d 783 (2009); State v. Schaler, 145 Wn. App. 628, 186 P.3d 1170 (2008), rev. on other grounds, 169 Wn.2d 274 (2010). It is also consistent with the Supreme Court's decision in Johnston, 156 Wn.2d 355.

Johnston was charged with threats to bomb under RCW 9.61.160(1). At trial, Johnston proposed a definition of threat that

included "true threat" language. The trial court refused to give the instruction. On appeal, Johnston claimed it was error not to have provided the jury with a definition of "true threat." Johnston, at 358, 364. Before the Supreme Court, Johnston and the State were in agreement that for First Amendment purposes, the threats to bomb statute must be construed to limit its application to "true threats." Johnston, at 359, 363. The parties were in further agreement, and the Supreme Court concurred, that the jury instructions "were erroneous because they did not *define* 'true threat.'" Johnston, at 364, 366 (emphasis added). Because the trial court had not provided the jury with a definition of "true threat," the Court remanded the case, requiring that the jury be "***instructed on the meaning*** of a true threat" on retrial. Johnston, at 366 (emphasis added).

Here, as charged, and with the instructions given, the jury was required to find beyond a reasonable doubt that the defendant intended to harass, intimidate, torment or embarrass Kea King with an electronically communicated threat that occurred "in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intent to carry out

the threat." To date, the defendant has cited no case, and the State has found no case, that has ever held that the language that describes what constitutes a "true threat" is an actual separate element that must be included in the charging document and the "to convict" jury instruction for any crime involving a threat.

5. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO DETERMINE THE DEFENDANT MADE A TRUE THREAT.

The defendant contends that his conviction for cyberstalking must be reversed because no reasonable jury could have found that his threat to "fuck you up," was a "true threat," i.e., that a reasonable person in the defendant's position would foresee that the statement would be interpreted as a serious expression of intention to cause harm. This claim lacks any merit and the defendant's argument ignores the standard of review on appeal.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most

strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where it is plainly indicated as a matter of logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. Salinas, at 201.

The defendant and Kea King had just been in a fight, with the defendant assaulting King and punching her in the face, King calling 911, and the defendant fleeing the scene. The defendant then repeatedly called and texted King, with one of the text messages reading, "you knew you was in the wrong. You know you ain't called the police. I'm going to fuck you up so bad when I see you at the (indiscernible)." 3RP 71-72. With no explanation, the defendant claims there was "[n]o evidence" that a reasonable person would foresee his threat as a serious intent to inflict harm. Def. br. at 46. This defies reason. The defendant had just assaulted King in anger and then threatened to do so again. Viewed in the light most favorable to the State, there can be no question that a reasonable person in the defendant's position would

foresee exactly what the defendant wanted King to foresee--a serious threat to cause her harm.

6. THE DEFENDANT'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.

The defendant contends that the cumulative effect of the errors alleged warrants a new trial, even if they do not justify a reversal individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Reversals due to cumulative error are justified only in rather extraordinary circumstances.¹⁰ Here, as explained in the sections above, no

¹⁰ See, e.g., State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426 (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a new trial), rev denied, 133 Wn.2d 1019 (1997); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

error occurred that warrants a new trial, either individually or cumulatively.

7. THE JUDGMENT AND SENTENCE CONTAINS A SCRIVENER'S ERROR.

At sentencing, pursuant to RCW 9.94A.505(8), the trial court ordered that as a condition of community custody, the defendant "obtain a substance abuse evaluation and follow all treatment recommendations." 4RP 30-31. This is a perfectly acceptable crime-related condition of sentence as one of the charges the defendant was convicted was possession of a controlled substance. However, in the judgment and sentence, it is mistakenly written that the defendant obtain an "alcohol evaluation." CP 121. This is clearly a scrivener's error that was not caught by the parties or the trial court. The case should be remanded to correct the judgment and sentence to accurately reflect the trial court's ruling.

D. CONCLUSION

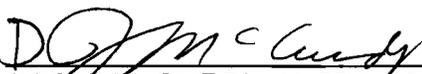
For the reasons cited above this Court should affirm the defendant's conviction. This Court should remand the case to

correct the scrivener's error related to the defendant's conditions of sentence.

DATED this 20 day of December, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MANNING, Cause No. 66763-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

12/20/11

Date