Supreme Court No. _____
Court of Appeals No. 57226-5-II

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

TURNER CALLOWAY,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Turner Calloway, the petitioner, requests this Court to grant review of the Court of Appeals' decision terminating review. The Court of Appeals issued a published opinion holding that Washington's harassment statute does not violate the constitutional guarantee of freedom of speech even though it punishes "true threats" using a negligence standard rather than the constitutionally mandated recklessness standard under *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023).

The Court of Appeals further held the jury instructions unconstitutionally relieved the prosecution of its burden to prove that Mr. Calloway acted with the subjective mental state of recklessness in making any threat, but that this error was harmless beyond a reasonable doubt.

Mr. Calloway seeks review of both of these holdings.[1]

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. To prove that a speaker made an unprotected "true threat" under the First Amendment, the State must prove recklessness, meaning that *the speaker consciously* disregarded a substantial risk that the speaker's communications would be viewed as threatening violence. Washington's harassment statute criminalizes threats using a negligence standard, meaning that the State must prove that *a reasonable person in the speaker's position* would foresee that a listener would interpret the threat as serious. Is the harassment statute unconstitutional?

2. The Court of Appeals agreed the "true threat" jury instruction relieved the prosecution of its burden to prove guilt beyond a reasonable doubt because it did not require the jury to

[1] The Court of Appeals' opinion and its order denying Mr. Calloway's motion to reconsider are attached in the appendix.

find that Mr. Calloway consciously disregarded a substantial risk that his communications would be viewed as threatening violence. Constitutional error is presumed prejudicial and the State has the burden to prove the error harmless beyond a reasonable doubt, meaning that the error did not contribute to the verdict. When a jury instruction omits an essential fact that the prosecution must prove, the error is not harmless if there is controverted evidence on this fact. The Court of Appeals acknowledged that the evidence on Mr. Calloway's state mind was not uncontroverted and that the jury could have inferred that Mr. Calloway's "threat" was "hyperbolic." Was the error prejudicial under the constitutional harmless error test?

C. STATEMENT OF THE CASE

Turner Calloway and Aljorie Davis were close friends for about a decade. RP 107-08, 189. Residents of the Tacoma area, they were both originally from Mississippi. RP 105-07, 189, 209.

As friends, they hung out and would go out to eat. RP 108. Ms. Davis called Mr. Calloway on the phone frequently. RP 191. Mr. Calloway also helped Ms. Davis, who did not have a car, by giving her rides and by doing yard work for her. RP 129, 191.

Although Mr. Calloway was initially interested in a romantic relationship with Ms. Davis, they never dated. RP 109, 190, 192. Mr. Calloway moved on and dated Linda Thompson, who became his fiancée. RP 192.

The friendship between Mr. Calloway and Ms. Davis waned and they did not speak to each other for about a year, but they reconnected in the fall of 2021. RP 109, 203. They hung out a couple of times in October 2021, going to several bars, one time to watch a football game. RP 131-32, 193, 205-06.

As Mr. Calloway would testify, Mr. Calloway received a call from Ms. Davis on Halloween morning. RP 194-95. Mr. Calloway had lost his glasses the last time he had gone out with Ms. Davis, and he thought she might have them. RP 195. He

had sent her text messages about this, but Ms. Davis had not texted him back. RP 194.

Ms. Davis was jealous of Mr. Calloway's relationship with Ms. Thompson, and was mad at him. RP 177. In the call, she swore at Mr. Calloway and called him names, including the "N word." RP 195. The two exchanged many phone calls throughout the day. RP 195. Ms. Davis continued to be disrespectful. RP 196.

At one point, Ms. Davis left a voicemail on Mr. Calloway's phone. Ex. 4. She swore at him, asked where his "bitch ass" was, asserted that Mr. Calloway was jealous of her being with another man, mocked Mr. Calloway for seeing the same "raggedy ass bitch" "for nine years" because he could not have her, laughed at him, and said she was not scared of him because Mr. Calloway was a "motherfucking coward." Ex. 4.

Later that afternoon or evening, a man joined in on one of the phone calls. RP 196. The man threatened to kill Mr. Calloway. RP 196. Mr. Calloway told the man he was at a pub.

RP 196. Mr. Calloway, who was with Ms. Thompson at this pub, was not scared because there was security. RP 196. Mr. Calloway did not call the police because he had a previous bad experience with the police pointing a gun at him and detaining him after he had sought their help. RP 197.

That evening, Mr. Calloway left the pub and drove Ms. Thompson to her parent's house. RP 197. After dropping her off, he began to drive home. RP 197, 2019. Mr. Calloway decided to stop at Ms. Davis' house on the way to find out why the man had threatened him. RP 197, 209. He wanted to see if they could make peace. RP 210.

Mr. Calloway spoke to Ms. Davis on the phone again. RP 197-98. When he heard a male voice, he thought it was the same man who had threatened him. RP 198. He swore at them and asked why they wanted to kill him, but he did not threaten them. RP 198. Frustrated, he hung up. RP 198. This happened as he was near Ms. Davis' house; he drove by and continued on his way home. RP 199.

Shortly thereafter, Mr. Calloway was pulled over by police. RP 199. He told the police that Ms. Davis had been harassing him all day. RP 213.

Deputy Riley Jorgensen testified that Mr. Calloway told him he had been "drinking with his friends." RP 177. He informed Mr. Calloway he was under arrest for harassment. RP 176. He testified that Mr. Calloway was compliant, respectful, and very cordial. RP 176, 181. Mr. Calloway did not threaten the deputy in anyway. RP 181.

Mr. Calloway was not armed. RP 183. Police found a couple of hunting or fishing knives in his truck. RP 179, 194. Ms. Davis claimed that law enforcement told her Mr. Calloway "had all kinds weapons," including "a machete, ropes, [and] tape." RP 125. Deputy Jorgensen did not recall seeing any machete, rope, or tape in Mr. Calloway's vehicle. RP 184.

Alleging Mr. Calloway made death threats and had "harassed" Ms. Davis, the prosecution charged Mr. Calloway with harassment and stalking. CP 4-5. The harassment charge

alleged Mr. Calloway threatened to kill Ms. Davis. CP 5. The stalking charge alleged that Mr. Calloway "repeatedly harassed" Ms. Davis. CP 4-5, 28 (instruction no. 15).

At trial, Ms. Davis' story differed from Mr. Calloway's. Ms. Davis claimed that Mr. Calloway became threatening after she declined an invitation to go to Seattle with him. RP 112. She testified when she woke up on Halloween morning, she received nonstop threatening phone calls, voicemails, and text messages from Mr. Calloway. RP 113, 137. No phone records, voicemails, or text messages from Ms. Davis' cellphone were admitted at trial.

Ms. Davis testified that her friend, "James Williams," who was not her boyfriend, joined a phone call in an attempt to scare Mr. Calloway away. RP 133-35. She denied that this man threatened Mr. Calloway. RP 134. She claimed to have never had a boyfriend in her life. RP 130. James Williams did not testify.

Ms. Davis called 911 that evening. RP 135. She claimed that Mr. Calloway "was even on the 911 call threatening the 911 people." RP 137. No 911 call was admitted at trial.

Deputy Brent Johnson responded to Ms. Davis' house around 8:00 p.m. RP 151. He recalled Ms. Davis telling him that Mr. Calloway kept calling her. RP 154-55. He witnessed Ms. Davis speaking to Mr. Calloway on speakerphone while he was there, but he did not understand exactly what they were saying to each other. RP 155. At one point, Ms. Davis handed him the phone and he identified himself as a Pierce County Sheriff's Deputy. RP 156. Deputy Johnson testified that Mr. Calloway said "fuck off," and also purportedly said he was going to kill Ms. Davis. RP 157. But Deputy Johnson could not "exactly remember the words [Mr. Calloway] used" in making the purported death threat. RP 163.

Ms. Davis also testified, without objection, about an incident around two weeks earlier where she went to a bar with

Mr. Calloway, and that once Mr. Calloway "started drinking beer, that's when he changed to somebody else." RP 111.

The jury found Mr. Calloway not guilty of the stalking charge, but found him guilty of the harassment charge. CP 29-30.

At sentencing, the court remarked to Mr. Calloway, "I think alcohol played a role in whatever happened," and "I don't know that you necessarily intended to alarm her the way you did . . . ." RP 254.

On appeal, Mr. Calloway argued the harassment statute he was convicted of violating is facially unconstitutional in violation of the First Amendment as interpreted by the United States Supreme Court in *Counterman*. The Court of Appeals acknowledged that *Counterman* conflicted with Washington Supreme Court precedent interpreting the harassment statute and "true threats." Still, rather than declare the statute unconstitutional, the Court interpreted the statute to comply with *Counterman*.

Mr. Calloway argued, in the alternative, that he was entitled to a new trial because the jury instructions relieved the prosecution of its burden to prove a "true threat." The Court of Appeals agreed with Mr. Calloway that the jury instructions were constitutionally inadequate, but held the error harmless.

This Court should review these two determinations.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court should grant review to decide whether Washington's harassment statute is unconstitutional.

The state and federal constitutions protect speech. U.S. Const. amends. I, XIV; Const. art. I, § 5. In general, the government has no power to restrict or punish expression because of its message, its ideas, its subject matter, or its content. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011). Only in a limited number of categories is this permissible. *United States v. Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

One category of unprotected speech is "true threats" of violence. *Counterman v. Colorado*, 600 U.S. 66, 74, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023). "True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Id.* (quoting *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)). Consequently, jests and hyperbole do not qualify even where the speech is literally threatening. *Id.*

The United States Supreme Court determined that a speaker's subjective intent is critical in determining whether speech constitutes a true threat. *Id.* at 69. In order for the State to punish speech as a "true threat," "[t]he State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.*

This is a mental state of recklessness. *Id.* "A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another." *Id.* at 79. "In the threats context, it means that a speaker *is*

aware that others could regard his statements as threatening violence and delivers them anyway." *Id.* (cleaned up) (emphasis added). It not a purely objective "reasonable person" standard, i.e., negligence standard, which inquires whether a reasonable person should be aware of the requisite risk. *Id.* at 79 n.5.

The Court rejected a purely objective approach because this would be inefficient to guard against the "chilling effect" that imposing liability for threatening speech has on protected speech. *Id.* at *4. "The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats." *Id.* at *6. An "objective standard" for "true-threats prosecutions" would "chill too much protected, non-threatening expression." *Id.* A recklessness standard avoids this because it "offers 'enough breathing space' for protected speech." *Id.* at *8.

a. The harassment statute is unconstitutional because it criminalizes threats based on a negligence standard.

Washington's harassment statute criminalizes threats of violence. The first section of the statute reads:

> (1) A person is guilty of harassment if:
> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
> (ii) To cause physical damage to the property of a person other than the actor; or
> (iii) To subject the person threatened or any other person to physical confinement or restraint; or
> (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

RCW 9A.46.020(1). The second section makes some acts of "harassment" a felony. RCW 9A.46.020(2)(b). This includes threats to kill. RCW 9A.46.020(2)(b)(ii).

"On its face this statute criminalizes a form of pure speech: threats." *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). Consequently, the statute implicates the constitutional guarantee of freedom of speech.

Since its enactment, the statute has required proof that "the person knowingly threatens." RCW 9A.46.020(1)(a); Laws of 1985, ch. 288, § 2. But this Court has narrowly interpreted this statutory language to merely require proof that the speaker is aware that they are communicating a threat, as opposed to awareness of the communication's threatening nature. *State v. Trey M.*, 186 Wn.2d 884, 895, 383 P.3d 474 (2016*); State v. Kilburn*, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004); *see Counterman*, 600 U.S. at 74 n.3 (clarifying "difference between awareness of a communication's contents and *awareness of its threatening nature*") (emphasis added). This is despite the fact that "'the crucial element separating legal innocence from wrongful conduct' is the threatening nature of the communication." *Elonis v. United States*, 575 U.S. 723, 737,

135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)).

Additionally, this Court has refused to read the knowledge mental element in subsection (1)(a) as extending to subsection (1)(b), which concerns the result of the speech:

> RCW 9A.46.020(1), indicates the "knowingly" requirement applies to only subsection (1)(a), identifying threats within the statute's purview, and does not apply to subsection (1)(b), setting forth the requirement that the defendant's words or conduct places the person threatened in reasonable fear, since "knowingly" appears in the first section, but not in the second.

State v. J.M., 144 Wn.2d 472, 484, 28 P.3d 720 (2001); *accord State v. Schaler*, 169 Wn.2d 274, 286, 236 P.3d 858 (2010) ("the statute uses the term 'knowingly threaten [ ]' in subsection (1)(a) but includes no mens rea term in the separate subsection listing the result requirement, (1)(b)."); *cf. Elonis*, 575 U.S. at (rejecting Government's argument that because neighboring provision in statute contained express mental state

requirement, this meant that the statute's silence on the mental state precluded reading it to be implied).

Consequently, the statute does not require *any* knowledge by that speaker that their communication would be understood by the listener or receiver as a threat. *Trey M.*, 186 Wn.2d at 898. This Court has refused to read in any subjective knowledge requirement into the statute on this point. *Id.* at 902-04; *cf. Counterman*, 600 U.S. at 79 (recounting that a knowledge requirement, *i.e.*, awareness that result is practically certain to follow, for a true threat would require that the defendant "knows to a practical certainty that others will take his words as threats."). Instead, the Court has held the statute requires "the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." *Schaler*, 169 Wn.2d at 287. "[T]he 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; *Trey M.*, 186 Wn.2d 884, 907, 383 P.3d 474 (2016) (adhering to

"Washington's objective (reasonable person) test" and its interpretation of the harassment statute).[2]

The result of these decisions interpreting the harassment statute is that the statute is plainly unconstitutional under the First Amendment, which requires at least recklessness as to the result of the listener's fear. *Counterman*, 600 U.S. at 78-79 & n.5. An unconstitutional negligence standard "makes liability depend not on what the speaker thinks, but instead on what a reasonable person would think about whether his statements are threatening in nature." *Id.* at n.5; *see also Elonis*, 575 U.S. at (reasoning that a "negligence standard" is one that permits a

[2] This Court asserted that the mental element of "knowingly threaten[ed]" was equivalent to the "mental state acknowledged in *Elonis* as sufficient." *Trey M.*, 186 Wn.2d 884, 899, 383 P.3d 474 (2016). This is incorrect. If the "knowingly threaten[ed]" element in RCW 9A.46.020(1)(a) actually required proof that the defendant had "'knowledge that the communication will be viewed as a threat,'" *id.* at 899 (quoting *Elonis*, at 575 U.S. at 740), then the test for a "threat" in harassment cases would be a subjective knowledge test, not an objective reasonable person test that the Court in *Trey M.* adhered to.

person to be convicted "if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats.").

b. Contravening this Court's precedent and substituting its judgment for this Court, the Court of Appeals reinterpreted the harassment statute so that it is constitutional. Review should be granted on this critical issue.

The Court of Appeals is bound to follow this Court's interpretation of the statute. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984); *State v. Winborne*, 4 Wn. App. 2d 147, 175, 420 P.3d 707 (2018).

Here, the relevant statutory language was enacted nearly four decades ago. Laws of 1985, ch. 288, § 2. This Court has repeatedly interpreted this language to adopt a negligence standard. *Trey M.*, 186 Wn.2d at 906-08; *Schaler*, 169 Wn.2d at 286; *J.M.*, 144 Wn.2d at 484. It adhered to this "settled precedent" over a dissent forewarning the Court that this was unconstitutional. *Trey M.*, 186 Wn.2d at 908; *Trey M.*, 186 Wn.2d 918-20 (Gordon McCloud, J., dissenting).

When this Court construes a statute, it determines what the statute has meant since its enactment. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 860 & n.2, 100 P.3d 801 (2004). The legislature has not amended the statute to reject the negligence standard. This is despite several amendments to the statute, including as recently as 2011. Laws of 2011, ch. 64, § 1. Given this history of legislative acquiescence, the statute cannot now be reinterpreted to avoid the constitutional problem. *State v. Blake*, 197 Wn.2d 170, 192, 195, 481 P.3d 521 (2021).

Notwithstanding this precedent and history, the Court of Appeals interpreted the harassment statute to comply with recklessness true threats standard in *Counterman*. Slip op. at 7-14. The Court acknowledged "*Counterman* contradicts the true threat limitation the Washington Supreme Court has placed on the statute," but reasoned "this incompatibility" did not make the statute unconstitutional. *Id.* at 12. Rather, it just required the Court to hold that the State must now prove the *Counterman* standard in threats cases. *Id.* at 12-13

This does not make sense. The statutory meaning of "threat" in the harassment statute does not change whenever a court interprets the "true threats" exception to the First Amendment. Under this Court's precedents, the harassment statute uses a negligence standard rather than a recklessness standard. Unless *this Court* holds the statute requires at least the recklessness standard, the statute is plainly unconstitutional. *See Blake*, 197 Wn.2d at 188-92.

The constitutionality of the harassment statute is a significant constitutional question meriting review. RAP 13.4(b)(3). Given the many prosecutions and convictions for harassment, review is warranted as matter of public interest. RAP 13.4(b)(4). The Court of Appeals refusal to follow precedent also calls out for review. RAP 13.4(b)(1), (2).

2. Notwithstanding controverted evidence about whether Mr. Calloway acted recklessly in making any threat and the jury's acquittal on the stalking charge, the Court of Appeals held the constitutionally deficient "true threat" instruction harmless beyond a reasonable doubt. This Court should grant review to decide whether the *Counterman* error in the jury instructions requires a new trial.

The "to-convict" instruction on felony harassment did not contain a "true threat" element. CP 22. It required the prosecution to prove beyond a reasonable doubt:

> (1) That on or about October 31, 2021, the defendant knowingly threatened to kill Aljorie Davis immediately or in the future;
> (2) That the words or conduct of the defendant placed Aljorie Davis in reasonable fear that the threat to kill would be carried out;
> (3) That the defendant acted without lawful authority; and
> (4) That the threat was made or received in the State of Washington.

CP 22 (instruction 9).

The term "threat" was defined for the jury, but it used the "reasonable person" standard:

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the

> future to the person threatened or any other person"
>
> To be a threat, a statement or act must occur in the 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 20 (instruction 7) (emphasis added).

These instructions did not require the jury to find that any threat by Mr. Calloway met the constitutional true threat recklessness standard. The instructions use a negligence standard. Consequently, the instructions did not require the jury to find any subjective knowledge *by Mr. Calloway* that his words would reasonably be understood as threatening death.

The Court of Appeals correctly held that the jury instructions were constitutionally deficient and that Mr. Calloway was entitled to raise this issue as a matter of right because it is manifest error affecting a constitutional right. Slip op. at 16. The Court, however, ruled the error harmless beyond a reasonable doubt.

The Court erred. Constitutional error requires reversal unless proved harmless beyond a reasonable doubt. *State v. A.M.*, 194 Wn.2d 33, 41-42, 448 P.3d 35 (2019). The prosecution must prove that the error did not contribute to the verdict. *Id.* at 41.

Error in instructing the jury on a true threat may be harmless if it is established "by uncontroverted evidence." *Schaler*, 169 Wn.2d at 288. But "error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds." *Id.*

Here, based on the defective jury instruction, it is likely the jury convicted *without* finding that *Mr. Calloway* consciously disregarded a substantial and unjustifiable risk that his communication would be viewed as threatening actual death. In other words, it is likely the jury convicted based on the unconstitutional negligence standard.

"Harmless error review requires close scrutiny of all the evidence." *State v. Romero-Ochoa*, 193 Wn.2d 341, 349, 440

P.3d 994 (2019). Here, Mr. Calloway and the Ms. Davis, the purported victim, were friends. They exchanged many messages and phone calls earlier that day. At least once, Ms. Davis swore at Mr. Calloway, mocked him, and called him names. Ex. 4. The law enforcement officer who testified to hearing Mr. Calloway supposedly threaten death over the phone testified he could not "exactly remember the words [Mr. Calloway] used." RP 163.

Under these circumstances, a rational jury could find any death threat by Mr. Calloway was not literal and that he was subjectively unaware that the listener would consider the statements to be actually threatening death. *See State v. Beal*, No. 39022-5-III, 2023 WL 6160381 at *6 (Wash. Ct. App. Sept. 21, 2023) (unpublished) (holding instructional error under *Counterman* was not harmless beyond a reasonable doubt). At the least, *a* rational trier of fact could have a reasonable doubt on whether the State proved recklessness.

Moreover, here the jury acquitted Mr. Calloway of stalking, which was premised on the same facts making up the harassment charge. Evidently the jury did not find Ms. Davis to be credible or that the evidence was lacking.

To reiterate, where there is *controverted* evidence on an omitted element in the jury instructions, a court should not hold the error harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 18-19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). In *Neder*, the omission of a "materiality" element in the jury instructions on a tax offense was harmless because the defendant "did not, and apparently could not, bring forth facts contesting the omitting element." *Id.* at 19. The court explained, "The evidence supporting materiality was so overwhelming . . . that Neder did not argue to the jury—*and does not argue here*—that his false statements of income *could* be found immaterial." *Id.* at 16 (emphases added).

Here, the Court of Appeals candidly "acknowledge[s] that the evidence of [Mr.] Calloway's state of mind is not

entirely uncontroverted" and that "[t]he jury could have drawn an inference form his day-long argument with [Ms.] Davis that he was being hyperbolic." Slip op. at 17.

Consequently, because the evidence on recklessness was controverted, the error is not harmless beyond a reasonable doubt. *See State v. Hayward*, 152 Wn. App. 632, 648, 217 P.3d 354 (2009) (where instructional error in assault prosecution relived prosecution of its burden to prove the defendant inflicted injuries recklessly, uncontroverted evidence that the victim suffered substantial injuries did not prove error harmless beyond a reasonable doubt).

In concluding otherwise, the Court of Appeals relied on testimony from Ms. Davis about the death threat, and quotes verbatim from her screed on what Mr. Calloway purportedly said to her. Slip op. at 18. But it is not clear that any jury would have found Ms. Davis credible, particularly given that the actual jury *acquitted* Mr. Calloway of the stalking charge, which was premised on Ms. Davis's testimony *that Mr.*

Calloway repeatedly called and threated her during the entire day. In other words, *the actual jury* found reasonable doubt about the nature of the contacts Mr. Calloway had with Ms. Davis that day. Viewing the evidence in a contrary manner, i.e., in the light most favorable to the State, is not appropriate in a constitutional harmless error analysis. *See In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012) (deciding whether reversal is required for prosecutorial misconduct "is not a matter of whether there is sufficient evidence to justify upholding the verdicts").

Reasonably viewed, it appears the jury found credible the police officer's testimony that he heard Mr. Calloway make a death threat over the phone to Ms. Davis. But critically this officer testified he could not "exactly remember the words [Mr. Calloway] used." RP 163.

In holding the error harmless, the court also recounted a lack of evidence showing "that intoxication or symptoms of mental illness affected [Mr.] Calloway's state of mind on the

day of the incident." Slip op. at 18. But Mr. Calloway testified about being at a bar that day and drinking. RP 208. Officer Jorgensen testified that Mr. Calloway told him he had been "drinking with his friends." RP 177. And Ms. Davis testified, without objection, about an incident around two weeks earlier where she went to a bar with Mr. Calloway, and that once Mr. Calloway "started drinking beer, that's when he changed to somebody else." RP 111.

Consistent with this evidence, the sentencing court remarked to Mr. Calloway, "I think alcohol played a role in whatever happened." RP 254. The court further remarked, "I don't know that you necessarily intended to alarm her the way you did . . . ." RP 254. In other words, the trial court believed Mr. Calloway may not have been aware that his communications with Ms. Davis would be interpreted as actually threatening death given the circumstances. The error is not harmless. *See State v. Dagnon*, No. 58638-0-II, 2024 WL 3043271, at *5 (Wash. Ct. App. June 18, 2024) (unpublished)

(*Counterman* instructional error to not be harmless where there was evidence the defendant was intoxicated).

This Court should grant review of whether this constitutional error is harmless because the Court of Appeals' analysis conflicts with precedent. RAP 13.4(b)(1), (2); *see Romero-Ochoa*, 193 Wn.2d at 344 (granting request for review solely on issue of whether State proved a constitutional error harmless). And what constitutes the proper constitutional harmless error analysis in this context is a significant constitutional issue and matter of substantial public interest that should be decided by this Court. RAP 13.4(b)(3), (4).

E. CONCLUSION

Mr. Calloway requests this Court grant his petition for review on the related issues of whether the harassment statute is constitutional, and if not, whether the constitutional error in the jury instructions requires a new trial.

This document contains 4,996 words and complies with RAP 18.17.

Respectfully submitted this 15th day of August, 2024.

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Appendix

Filed
Washington State
Court of Appeals
Division Two

July 22, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TURNER LEE CALLOWAY, Appellant.	No. 57226-5-II ORDER DENYING MOTION FOR RECONSIDERATION

The published opinion in this matter was filed on June 11, 2024. On June 28, 2024, appellant moved for reconsideration. After consideration, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

PANEL: Jj. Maxa, Glasgow, Veljacic

FOR THE COURT

Glasgow, J.

Filed
Washington State
Court of Appeals
Division Two

June 11, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TURNER LEE CALLOWAY, Appellant.	No. 57226-5-II PUBLISHED OPINION

GLASGOW, J.—Turner Calloway was convicted of felony harassment for threatening to kill Aljorie Davis. After Calloway appealed his judgment and sentence, the United States Supreme Court decided *Counterman v. Colorado*,[1] which refined the true threat standard for determining whether a threatening statement lacks the protection of the First Amendment to the United States Constitution.

Calloway argues that *Counterman* rendered Washington's harassment statute facially unconstitutional, that *Counterman* rendered the jury instructions erroneous and the error was not harmless, and that the $500 crime victim penalty assessment should be stricken from his judgment and sentence. Calloway also challenges his sentence in a statement of additional grounds for review (SAG).

[1] ___ U.S. ___, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023).

We hold that the harassment statute, RCW 9A.46.020,[2] is not facially unconstitutional. *Counterman* requires a departure from prior case law that placed a First Amendment limitation on the statute, but it does not require us to declare the harassment statute unconstitutional. We further hold that the jury instructions in this case were erroneous because they allowed the jury to convict Calloway without finding that he acted recklessly, as *Counterman* requires. But this error was harmless beyond a reasonable doubt in light of the threatening statements Calloway made and the circumstances under which he made them. We reject Calloway's SAG argument. We affirm Calloway's conviction and sentence, but we remand to the trial court to strike the $500 crime victim penalty assessment.

FACTS

I. BACKGROUND

Calloway and Davis became friends in 2013. In the friendship's earlier years, Calloway and Davis met up often, and Calloway regularly gave Davis rides and took care of her lawn. But in later years, Calloway made insulting statements to Davis, and his behavior strained the friendship.

On October 31, 2021, Calloway called and texted Davis "nonstop." Verbatim Rep. of Proc. (VRP) (July 5, 2022) at 114. After Calloway repeatedly threatened to kill Davis, she called 911. Law enforcement arrested Calloway when he drove by Davis's house. The State charged Calloway with felony harassment. The State also charged Calloway with stalking, but the jury acquitted him of that charge.

[2] Although Calloway was convicted of violating an older version of the statute, we cite the current version throughout this opinion because the relevant language has not changed.

II. TRIAL

A. State Witnesses

Davis testified about the events leading up to Calloway's arrest. She said that in mid-October 2021, she and Calloway met up at a bar, and he began behaving strangely: "He started yelling in the bar, saying things about me, and then he just started telling people we were together." VRP (July 5, 2022) at 111. Davis denied that they were in a relationship and asked Calloway to take her home.

After Calloway drove Davis home, Davis stopped contacting Calloway, but Calloway "just started calling out of the blue." *Id.* A couple of days later, Calloway asked Davis if she wanted to drive to Seattle and see the city lights. Davis said she did not want to do that because it was an activity for couples. Davis testified that Calloway then "snapped:" "He went into calling me names, and he . . . just started threatening[] and started talking crazy." VRP (July 5, 2022) at 112. Calloway repeatedly called and texted Davis, and Davis called back to ask him to stop.

On October 31, Calloway made "nonstop, back-to-back phone calls" starting at 6:51 a.m. VRP (July 5, 2022) at 114. Calloway threatened to harm Davis and called her derogatory names. Davis responded by calling him back, and at one point, she left a message on his phone that included profanity and accused Calloway of being jealous. She said, "You don't scare me and you don't worry me not one bit. Your bitch ass ain't gonna never step up to me." Ex. 4. She also referred to things Calloway had been "saying for nine years" because he couldn't have her. *Id.* Davis testified that she left the message because she was angry and wanted to scare Calloway off.

Calloway began threatening to kill Davis around 5:00 p.m. on October 31. Davis listed the following statements that Calloway made:

> Bitch, you going to die today; bitch[,] you ain't shit; bitch[,] you going [to] the devil the day that you die; you going to hell today, bitch; today is your day; you're going to die today, bitch[,] and hang up, call back; I'm on my way to kill you, bitch; you're going to die today, bitch.

VRP (July 5, 2022) at 120. Later in the evening, Davis had a friend pretend to be her boyfriend over the phone. Davis said she thought a "deep voice" would make Calloway "back off." VRP (July 5, 2022) at 115. In a three-way call with Calloway, the friend told Calloway to leave Davis alone, and Calloway started threatening the friend. Calloway then said he was preparing to come to Davis's house and kill her. Davis hung up and called 911 because she felt that the situation was "getting serious." VRP (July 5, 2022) at 116.

When Brent Johnson, a deputy sheriff, arrived at Davis's house, Davis's cellphone rang repeatedly and she answered it a couple of times. Eventually, Davis handed Johnson the phone, and Johnson identified himself as law enforcement. Davis testified that Calloway told Johnson he was going to "come shoot" and that everyone at her house was going to die. VRP (July 5, 2022) at 121. Johnson testified that Calloway told him he was outside and "was going to kill" Davis. VRP (July 6, 2022) at 157. Johnson called for backup.

Riley Jorgensen, a second deputy sheriff, then arrived at Davis's home. Shortly afterward, Calloway drove past Davis's house. Calloway did not stop, but Davis recognized him and told the officers. A third deputy sheriff stopped Calloway about a mile from the house.

Jorgensen testified about his conversation with Calloway after they stopped him. According to Jorgensen, Calloway said Davis started harassing him after she found out he was in a relationship with someone else. Calloway said he had been drinking at a bar with friends when he "got into [it]" with Davis over the phone that day and drove to Davis's house so he could fight her boyfriend. VRP (July 6, 2022) at 177.

B. Defense Witnesses

Calloway also testified about the events leading up to his arrest. He testified that he never asked Davis to see the Seattle city lights with him. He said that about a week before the incident, he and Davis went to a couple of bars, and he lost his glasses. On the morning of October 31, he texted Davis to ask about the glasses, and Davis called back and called him derogatory names. Calloway and Davis then called each other throughout the day. Calloway said he was "responding," so he "had to have [made] half of those calls." VRP (July 6, 2022) at 196. He said he did not make any threats that day.

Calloway testified that during one of his calls with Davis, while he was at a bar with his wife, a man threatened to kill him. He said he did not call 911 because of a prior negative experience with law enforcement. After the call, Calloway's wife was afraid, so Calloway took her to her parents' house. Calloway then drove to Davis's house because he wanted to know why Davis's boyfriend wanted to kill him. He said he wanted to see if they "could just make peace" because he had not done anything wrong. VRP (July 6, 2022) at 210.

Calloway said that when he spoke with Johnson on the phone, Johnson "didn't have a chance to identify himself." VRP (July 6, 2022) at 198. Calloway thought he was speaking with Davis's boyfriend, so he immediately "went into [his] rant." *Id.* Calloway denied making any threats.

In describing his arrest, Calloway said he initially told Jorgensen that Davis was harassing him. He said Jorgensen asked him if he drove to Davis's house to fight her boyfriend, and he told Jorgensen "what he wanted to hear" because he was "intimidated." VRP (July 6, 2022) at 200.

C. Closing Arguments and Jury Instructions

During closing arguments, the State argued, "It's not a jest or idle talk to say, bitch, you're going to die. You're done." VRP (July 6, 2022) at 224. The State added that a reasonable person in Calloway's position would have understood "what those words meant[] and the impact they would have on Ms. Davis." *Id.*

The defense argued that the State did not prove beyond a reasonable doubt that Calloway made any threats at all, pointing out that the only recording from the incident showed Davis insulting Calloway. The defense did not argue that Calloway's capacity was diminished by alcohol or mental illness or that Calloway's threats were merely hyperbolic.

The trial court instructed jurors that, to convict Calloway, they had to find that Calloway "knowingly threatened to kill . . . Davis immediately or in the future." Clerk's Papers (CP) at 22. They also had to find that Calloway's words or conduct placed Davis "in reasonable fear that the threat to kill would be carried out." *Id.* The trial court further instructed jurors that, to be a true threat, a statement must occur under "circumstances where a reasonable person, in the position of the speaker, would foresee that the statement . . . 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 at 20.

The jury found Calloway guilty of felony harassment. The jury acquitted Calloway of stalking.

III. SENTENCING

The trial court sentenced Calloway to 10 months in jail. The trial court found that Calloway was indigent under RCW 10.101.010(3)(a)-(d) but imposed a $500 crime victim penalty

assessment. In calculating Calloway's offender score, the trial court counted Calloway's prior Mississippi convictions of burglary and child molestation.

Calloway appeals his judgment and sentence.

ANALYSIS

I. HARASSMENT STATUTE

Calloway argues that we must vacate his conviction because under *Counterman*, the harassment statute violates the First Amendment to the United States Constitution by punishing threats "using a negligence standard." Br. of Appellant at 11 (boldface omitted). He contends that the Washington Supreme Court has interpreted the statute to require a showing that the defendant knowingly threatened to cause bodily injury but only negligently placed the threatened person in reasonable fear that the threat would be carried out. Calloway notes that "the relevant statutory language was enacted nearly four decades ago" and the legislature has not amended the statute in response to the Washington Supreme Court's interpretation. Br. of Appellant at 21. Citing *State v. Blake*,[3] Calloway contends that because of "this history of legislative acquiescence, it would be improper to now reinterpret the statute to avoid the constitutional problem." Br. of Appellant at 22. We disagree.

A. Statutory Application in Light of Recent United States Supreme Court Decisions

"Our purpose in interpreting a statute is to determine and carry out the intent of the legislature." *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). "We must construe statutes consistent with their underlying purposes while avoiding constitutional deficiencies." *Id.* We presume "a statute is constitutional, and the party challenging it bears the burden of proving

[3] 197 Wn.2d 170, 481 P.3d 521 (2021).

otherwise beyond a reasonable doubt." *Didlake v. State*, 186 Wn. App. 417, 422-23, 345 P.3d 43 (2015).

Where a party contends a statute is unconstitutional on its face, that party will prevail only if there is no set of circumstances in which a constitutional application of the statute is possible. *State v. Fraser*, 199 Wn.2d 465, 486, 509 P.3d 282 (2022). "The remedy for facial unconstitutionality 'is to render the statute totally inoperative.'" *Id.* (quoting *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004)).

In general, we are bound to follow Washington Supreme Court precedent. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006). Still, the "United States Supreme Court is the final authority on the federal constitution." *State v. Radcliffe*, 139 Wn. App. 214, 224, 159 P.3d 486 (2007), *aff'd*, 164 Wn.2d 900, 194 P.3d 250 (2008). In a matter of federal constitutional law, a clear directive from the United States Supreme Court controls where the Washington Supreme Court has not yet addressed that recent directive's effect. *See id.* at 223-24. And if Washington Supreme Court case law is plainly at odds with a more recent United States Supreme Court interpretation of the federal constitution, we do not presume that the Washington Supreme Court will reject that recent interpretation in favor of its own prior interpretation. *See id.* at 224.

B. *Counterman*'s Requirements for Prosecutions Based on Threats

The First Amendment does not protect true threats of violence. *Counterman*, 143 S. Ct. at 2113. "True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Id.* at 2114 (alteration in original) (quoting *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)).

Whether a statement is a true threat depends in part on what the statement conveys to the listener rather than on the speaker's mental state. *Id.* In *Counterman*, the United States Supreme Court held that the First Amendment also demands "a subjective mental-state requirement." *Id.* The Court held that where the State prosecutes a defendant for making a threat, it must prove the defendant made the threat at least recklessly: "The State must show that the defendant consciously disregarded a substantial risk that [the] communications would be viewed as threatening violence." *Id.* at 2111-12. In other words, the State must demonstrate that the defendant was "aware 'that others could regard [the] statements as' threatening violence and '[delivered] them anyway.'" *Id.* at 2117 (quoting *Elonis v. United States*, 575 U.S. 723, 746, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) (Alito, J., concurring in part and dissenting in part)).

In announcing the recklessness requirement, the Supreme Court noted that reckless conduct is less morally culpable than knowing conduct, explaining that a person knowingly threatens when they know "to a practical certainty that others will take [their] words as threats." *Id.* The Court also explained that reckless conduct is more morally culpable than negligent conduct. *Id.* at 2117 n.5.

C. Washington's Harassment Statute

Under RCW 9A.46.020(1), a person is guilty of harassment if, without "lawful authority," they knowingly threaten to "cause bodily injury immediately or in the future to the person threatened or to any other person," and they place "the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(a)(i), (b). Harassment becomes a class C felony if it involves "threatening to kill the person threatened or any other person." RCW 9A.46.020(2)(b)(ii).

The statute's plain language delineates a knowledge element: "'the defendant must subjectively know'" that they are communicating a threat and know that the communication "'is a threat of intent to cause bodily injury to the person threatened or to another person.'" *State v. Trey M.*, 186 Wn.2d 884, 895, 383 P.3d 474 (2016) (internal quotation marks omitted) (quoting *State v. Kilburn*, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004)). Thus, for example, a person who writes a threat in a journal unaware that it will ever be read or heard by another does not knowingly threaten. *Id.*

The Washington Supreme Court has imposed a constitutional limitation, explaining that a person may only be convicted of violating RCW 9A.46.020 if they made a true threat. *Kilburn*, 151 Wn.2d at 41. The court has defined a true threat as "'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of'" another person. *Trey M.*, 186 Wn.2d at 894 (alteration in original) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001)).

A "'true threat is a serious threat, not one said in jest, idle talk, or political argument.'" *Id.* (quoting *Kilburn*, 151 Wn.2d at 43). Whether "'a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke.'" *Id.* (quoting *Kilburn*, 151 Wn.2d at 46). This definition of a true threat "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." *State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010).

As described in *Schaler*, the mental state of simple negligence requires objective consideration of the reasonable person. *Id. Counterman* defines negligence as an "objective

standard" at the bottom of the "*mens rea* hierarchy:" "A person acts negligently if [they are] not but should be aware of a substantial risk . . . that others will understand [their] words as threats." *Counterman*, 143 S. Ct. at 2117 n.5. This definition is somewhat similar to Washington's definition of criminal negligence, the lowest level of culpability in the statute designating the hierarchy of mental states. RCW 9A.08.010(1)(d). A defendant acts with criminal negligence when they fail "to be aware of a substantial risk that a wrongful act may occur and [their] failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." *Id.* All these forms of negligence involve less culpability than the recklessness that *Counterman* now requires. After *Counterman*, the defendant must have *subjective* awareness of the "substantial risk that [the] communications would be viewed as threatening violence." 143 S. Ct. at 2112.

D. Constitutionality of Washington's Harassment Statute under *Counterman*

We hold that RCW 9A.46.020 remains constitutional on its face because we can recognize that Washington must now comply with *Counterman*'s articulation of what amounts to a true threat without undermining the statute.

RCW 9A.46.020(1)(a)(i) requires the State to prove that the defendant subjectively knew they were communicating a threat to cause bodily injury. The knowledge element goes to whether the defendant knew they were *conveying* a threat, as opposed to keeping their words private, and whether they knew the communication they were imparting was a threat to harm or kill the person threatened or another person. *Trey M.*, 186 Wn.2d at 895. Thus, if a person mutters a threat without awareness that someone heard it, their conduct does not satisfy the statutory knowledge

requirement. *Id.* This statutory knowledge requirement is different from the additional mens rea analysis the true threat case law requires.

Counterman contradicts the true threat limitation the Washington Supreme Court has placed on the statute, but this incompatibility does not require us to declare the statute unconstitutional. Calloway cites *Schaler* for the proposition that RCW 9A.46.020 only requires a showing that the defendant negligently placed the victim in reasonable fear that the threat would be carried out. But the portion of the *Schaler* opinion discussing negligence addresses the definition of a true threat under relevant case law, not the language of RCW 9A.46.020. *Schaler*, 169 Wn.2d at 287. And in holding that RCW 9A.46.020 criminalized only true threats, the court was ensuring compliance with the First Amendment, following the principle that courts apply statutes in ways that preserve their constitutionality whenever possible. *Id.* at 283-84.

Counterman constitutes a clear directive from the United States Supreme Court on a matter of federal constitutional law, and the Washington Supreme Court has not yet addressed *Counterman*'s effect. Washington's pre-*Counterman* true threat limitation on RCW 9A.46.020 contravenes the First Amendment because it does not go far enough. *Counterman* now requires proof "that the *defendant*"—not just a reasonable person in their position—"consciously disregarded a substantial risk that [the] communications would be viewed as threatening violence." 143 S. Ct. at 2112 (emphasis added).

Given that there is no direct conflict between the statutory language and the *Counterman* articulation of what amounts to a true threat, we need not declare the harassment statute unconstitutional. We need only hold, consistent with *Counterman*, that the State must prove the defendant was at least "aware 'that others could regard [the] statements as' threatening violence

and '[delivered] them anyway.'" *Id.* at 2117 (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)).

Although this holding contradicts the Washington Supreme Court's pre-*Counterman* cases, we do not presume the Washington Supreme Court will now reject a United States Supreme Court holding on the federal constitution. *See Radcliffe*, 139 Wn. App. at 223-24. We are permitted to apply the recently adopted United States Supreme Court rule.

Calloway relies on *Blake* to argue that legislative acquiescence to the Washington Supreme Court's limitation on the statute forecloses our application of *Counterman*, but *Blake* is distinguishable. Noting that courts ordinarily construe statutes to avoid unconstitutionality, the *Blake* court declined to apply this principle and held that a statute violated due process because it made drug possession a strict liability crime. *Blake*, 197 Wn.2d at 188, 195. The *Blake* court reasoned that it had previously declined to read a mental state element into the statute and the legislature had not added such an element in response: "Because of the clarity of our prior decisions . . . and the legislature's lengthy acquiescence, it is impossible to avoid the constitutional problem now." *Id.* at 192.

But here, we do not read a new element into RCW 9A.46.020. Rather, we apply the most recent binding articulation of a court-imposed limitation on the statute—one the legislature has not undone. In 2001, the Washington Supreme Court first limited the statute's proscription on speech to true threats. *Williams*, 144 Wn.2d at 209. The legislature then amended the statute in 2003 and 2011, and neither amendment suggested legislative intent to change or get rid of the true threat

limitation. *See* LAWS OF 2003, ch. 53, § 69; LAWS OF 2011, ch. 64, § 1.[4] The United States Supreme Court recently announced a binding definition of true threat that Washington courts must follow.

In sum, we presume statutes are constitutional, and RCW 9A.46.020's plain language allows us to apply it in a way that complies with the First Amendment. Because the United States Supreme Court has intervened, we are permitted to depart from prior Washington Supreme Court holdings and import the United States Supreme Court's definition of a true threat. Therefore, Calloway has not met his burden of proving that the statute is facially unconstitutional as a result of *Counterman*.

II. JURY INSTRUCTIONS

The trial court instructed the jury that to be a true threat, a statement "must occur in a context or under such circumstances where *a reasonable person, in the position of the speaker*, would foresee that the statement . . . would be interpreted as a serious expression of intention to carry out the threat." CP at 20 (emphasis added). But *Counterman* requires proof "that the defendant"—not just a reasonable person in their position—"consciously disregarded a substantial risk that [the] communications would be viewed as threatening violence." 143 S. Ct. at 2112. In other words, *Counterman* requires proof that the defendant was actually "aware 'that others could regard [the] statements as' threatening violence and '[delivered] them anyway.'" *Id.* at 2117 (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)). The State

[4] We note that none of the amendments the legislature has made since Calloway's crime in 2021 suggest legislative intent to change or get rid of the true threat limitation. *See* LAWS OF 2023, ch. 102, § 16; LAWS OF 2024, ch. 292, § 1.

appears to concede that the true threat jury instruction in this case was therefore erroneous in light of *Counterman*.[5]

Calloway argues that we must reverse his harassment conviction because neither the to convict instruction nor the instruction defining a true threat required "the jury to find that any threat by [him] met the constitutional true threat recklessness standard." Br. of Appellant at 24. Calloway further argues that this error was not harmless beyond a reasonable doubt because evidence of a true threat was not uncontroverted and the State emphasized the negligence standard during closing argument.

The State responds that Calloway failed to challenge the relevant jury instruction below, so "Calloway's instructional challenges are barred by RAP 2.5(a)(3)." Br. of Resp't at 1. The State focuses its RAP 2.5 argument on lack of actual prejudice. The State also contends that any instructional error was harmless because Calloway denied that he made any threats, rather than arguing he made them "under circumstances in which they should not have been taken seriously." *Id.* at 40.

We hold that RAP 2.5(a) does not prevent us from reaching Calloway's claim. While the jury instructions in his case were erroneous, the error was harmless beyond a reasonable doubt.

[5] This instruction was based on a Washington pattern jury instruction that has since been revised to incorporate the rule *Counterman* announced. In defining a true "threat," the revised instruction states that "the speaker must know of and disregard a substantial risk that the statement or act would be interpreted" as "a serious expression of intention to carry out the threat." WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.24 (updated Jan. 2024), https://govt.westlaw.com/wcrji/Document/Ief9980dde10d11daade1ae871d9b2cbe?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default).

A. Review for the First Time on Appeal

"The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right'" under RAP 2.5(a)(3). *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (internal quotation marks omitted) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). The purpose of this rule is to ensure "the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *Id.* at 304-05. But "in a narrow class of cases," such as cases involving intervening pronouncements from the United States Supreme Court, "insistence on issue preservation would be counterproductive to the goal of judicial efficiency," as it would "reward the criminal defendant bringing a meritless motion" but punish "the criminal defendant who, in reliance on . . . binding precedent, declined to bring the meritless motion." *Id.* at 305.

Accordingly, RAP 2.5(a) does not preclude review of an issue not raised in the trial court when "(1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation." *Id.*

Here, the first two requirements are discussed in depth above. *Counterman* applies to Calloway because his appeal is not yet final. *See State v. Harris*, 154 Wn. App. 87, 92, 224 P.3d 830 (2010). And Calloway's trial ended before *Counterman* was decided. We therefore reach the merits of Calloway's claim that the jury instructions in his case were erroneous.

B. Constitutional Harmless Error

Counterman requires proof that the defendant was actually "aware 'that others could regard [the] statements as' threatening violence and '[delivered] them anyway.'" 143 S. Ct. at 2117 (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)). The omission of the constitutionally required mens rea from the jury instructions in the true threat context is analogous to the omission of an element of the crime from the instructions. *Schaler*, 169 Wn.2d at 288. Such an omission is thus subject to constitutional harmless error review. *Id.* Prejudice is presumed, and the State must prove that the error was harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). "An error is harmless . . . if the appellate court is assured beyond a reasonable doubt that the jury would have reached the same verdict without the error." *State v. Romero-Ochoa*, 193 Wn.2d 341, 347, 440 P.3d 994 (2019).

An omission of the required mens rea from the jury instructions "may be harmless when it is clear that the omission did not contribute to the verdict," for example, when "uncontroverted evidence" supports the omitted element. *Schaler*, 169 Wn.2d at 288. Conversely, an "error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds." *Id.*

We acknowledge that the evidence of Calloway's state of mind is not entirely uncontroverted. The jury could have drawn an inference from his day-long argument with Davis that he was being hyperbolic. And during closing, the State emphasized the objective standard, arguing that a reasonable person in Calloway's position would have understood the impact their words would have on Davis.

Nonetheless, given the severity of Calloway's threats to both Davis and law enforcement and the jury's clear disbelief of Calloway's denial that he made any threats at all, we hold that the error was harmless beyond a reasonable doubt. Davis testified that Calloway threatened her for an entire day and that the threats escalated in seriousness. When Calloway told Davis he would kill her, his words were anything but equivocal:

> Bitch, you going to die today; bitch[,] you ain't shit; bitch[,] you going [to] the devil the day that you die; you going to hell today, bitch; today is your day; you're going to die today, bitch[,] and hang up, call back; I'm on my way to kill you, bitch; you're going to die today, bitch.

VRP (July 5, 2022) at 120. Neither Calloway nor any other witness testified that these statements were hyperbolic, that Calloway had a longstanding pattern of saying similar things without meaning them, or that intoxication or symptoms of a mental illness affected Calloway's state of mind on the day of the incident. In fact, Calloway testified that he made no threats, an assertion the jury did not find credible.

Moreover, Davis testified that after Calloway found out she had called the police in response to his threatening phone calls, Calloway threatened to kill both her and Johnson, and then Calloway drove to her house. Johnson testified that during the call, Calloway said he was going to kill Davis. Davis's and Johnson's testimony strongly supports the inference that Calloway knew Davis took his homicide threats seriously enough to call 911 and continued making the threats anyway.

Given the words Calloway repeatedly used and the circumstances under which he used them, no reasonable jury would find that Calloway did not at least consciously disregard a substantial risk that his communications would be viewed as threatening violence. The instructional error was thus harmless beyond a reasonable doubt.

III. CRIME VICTIM PENALTY ASSESSMENT

Calloway argues that we should remand for the trial court to strike the $500 crime victim penalty assessment. The State does not respond. We agree with Calloway.

Trial courts may no longer impose the crime victim penalty assessment on indigent defendants. RCW 7.68.035(4). The trial court found Calloway to be indigent under RCW 10.101.010(3) and the State does not contest that finding. We have concluded that the new statute regarding the crime victim penalty assessment applies in all cases that were not yet final when the new statute was adopted. *State v. Eyer*, No. 58055-1-II, slip op. at 7 (Wash. Ct. App. Mar. 26, 2024).[6] Therefore, we remand for the trial court to strike the crime victim penalty assessment.

IV. STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Calloway argues for the first time on appeal that the trial court erred when it used his prior convictions from Mississippi to calculate his offender score because the convictions were not validated or certified. We disagree.

"The use of a prior conviction as a basis for sentencing under the Sentencing Reform Act . . . is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence." *State v. Winings*, 126 Wn. App. 75, 91-92, 107 P.3d 141 (2005). While "the best evidence of a prior conviction is a certified copy of the judgment, the State 'may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history.'" *Id.* at 92-93 (emphasis omitted) (quoting *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)).

[6] https://www.courts.wa.gov/opinions/pdf/D2%2058055-1-II%20Unpublished%20Opinion.pdf.

Here, to prove that Calloway was convicted of burglary and child molestation in Mississippi, the State provided the Mississippi indictment charging him with these offenses, minutes from the Mississippi proceeding where Calloway pleaded guilty to the offenses, and a certified Washington judgment and sentence listing the offenses in Calloway's conviction history. In addition, our record includes Calloway's signed and certified stipulations that his criminal history, including the Mississippi convictions, is correct. In combination, these documents reliably establish Calloway's foreign conviction history.

The trial court did not err when it calculated Calloway's offender score using his Mississippi convictions for burglary and child molestation.

CONCLUSION

We affirm Calloway's judgment and sentence but we remand to the trial court to strike the $500 crime victim penalty assessment.

GLASGOW, J.

We concur:

MAXA, J.

VELJACIC, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 57226-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Washington Appellate Project

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August 15, 2024 - 4:08 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57226-5
Appellate Court Case Title:	State of Washington, Respondent v. Turner Lee Calloway, Appellant
Superior Court Case Number:	21-1-03422-3

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