Supreme Court No. _____
(COA No. 85701-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHAN PETERS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Nathan Peters asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Peters appealed his conviction for felony harassment. The Court of Appeals affirmed. *State v. Peters*, No. 85701-1-I, 2024 WL 4223694 (Wash. Ct. App. Sept. 16, 2024).

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires the State to prove every element of the offense beyond a reasonable doubt. And before it can punish a person for their speech, the State must prove the person issued a "true threat" under the First Amendment. Under *Counterman v. Colorado*,[1] a "true threat" requires at least recklessness, meaning the person subjectively knew of and consciously disregarded a substantial risk that the other person would view their communications as threatening violence.

[1] 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023).

Here, the State failed to prove Mr. Peters issued a "true threat" because it presented no evidence that Mr. Peters had this subjective mental state. Because the Court of Appeals decision affirming Mr. Peters's conviction conflicts with precedent and violates his First Amendment rights, this Court should accept review. RAP 13.4(b).

2. The First Amendment protects freedom of expression. One category of unprotected speech is a "true threat" of violence, which requires a subjective standard of at least recklessness. Because Washington's harassment statute criminalizes threats using a lower, objective standard of negligence, it is unconstitutional. The Court of Appeals decision reinterpreting the statute conflicts with this Court's holding and is an important constitutional question of broad import. This Court should accept review.[2] RAP 13.4(b).

[2] The constitutionality of Washington's harassment statute has been raised in at least one other petition currently pending before this Court: Petition for Review, *State v.*

D. STATEMENT OF THE CASE

After over five years of living together and raising two young children, Mr. Peters and Ms. Jefferson-Ayosa broke up. RP[3] 412-15. They had a good relationship for many years and tried to make things work, but they struggled with communication. RP 256, 415. After they broke up, they continued to live together and raise their children together while Mr. Peters looked for another place to live. RP 257.

Because of their separation, Mr. Peters and Ms. Jefferson-Ayosa discussed getting separate phone plans and ending their family plan. RP 430. Mr. Peters took Ms. Jefferson-Ayosa off their streaming services. RP 258, 430.

One day, Ms. Jefferson-Ayosa went out and bought a new phone with a new phone number and a separate plan. RP

Calloway, No. 103374-5 (Wash. Aug. 15, 2024). That petition is scheduled for the December 3, 2024 Department calendar.

[3] The transcripts in this case were prepared by three different court reporters. This brief cites to the consecutively paginated, three volume transcripts filed by Laura Parker, totaling 584 pages.

259. When she returned home, Mr. Peters asked why she did not keep her prior phone number. RP 418. She told him, "I don't need to explain to you where I purchased my phone." RP 260. She accused him of living in her house for free. RP 421. Mr. Peters pointed out he paid for their utilities and he was only living there until he found another place to live. RP 421.

While Ms. Jefferson-Ayosa went into the bathroom to prepare for a bath, Mr. Peters began to organize the children's laundry and went downstairs to give them something to eat. RP 262, 418-19. He came back upstairs to change into warm clothes and put on his shoes to go for a walk. RP 268, 419-20. He wanted to give Ms. Jefferson-Ayosa some "space." RP 474. He planned for a short walk so he could be home to put the children to bed. RP 420.

The area they lived in was dangerous. RP 474-75. A cougar had been spotted just days before, and there were known drug houses nearby. RP 287, 389, 445. It was also dark outside,

and the surrounding area was heavily wooded. RP 474-75. Mr. Peters grabbed his gun to protect himself on his walk. RP 423.

As Mr. Peters was preparing to go downstairs and leave for his walk, Ms. Jefferson-Ayosa came out of the bathroom to confront him again. RP 266, 269. He was walking down the hallway with his back to her, but she saw he had changed into warm clothes and shoes. RP 268-69, 422. She could not see what was in his hands, and she walked behind him while repeatedly asking what he was holding. RP 269-70, 422.

Mr. Peters wanted to be prepared in case he encountered something dangerous on his walk, so he cocked the gun to load the chamber. RP 423-24. He then put the gun in his pants and started to go downstairs to leave for his walk. RP 424.

Mr. Peters testified he did not say anything or turn towards Ms. Jefferson-Ayosa, who was standing behind him in the hallway. RP 423-24, 450. But Ms. Jefferson-Ayosa testified that, after she asked Mr. Peters multiple times if he was holding his gun, he turned partway so his side was to her, cocked the

gun, and said, "so what if it is." RP 270. Both parties testified Mr. Peters never turned to face Ms. Jefferson-Ayosa and he never pointed the gun at her. RP 296, 423-24.

Mr. Peters heard Ms. Jefferson-Ayosa go downstairs. RP 424. He stated he was going for a walk. RP 424, 468. He began to leave and saw Ms. Jefferson-Ayosa leave the house first. RP 424, 468. Ms. Jefferson-Ayosa did not recall hearing Mr. Peters say anything after she went down the stairs, but she got the children, left the house, and called the police. RP 274-75.

The State charged Mr. Peters with felony harassment, and a jury found him guilty. CP 54. The Court of Appeals affirmed the conviction. App. at 1.

E. ARGUMENT

1. To constitutionally punish a threat, it must be a "true threat" of violence, which requires a subjective mental state of at least recklessness.

The state and federal constitutions protect the freedom of expression. U.S. Const. amends. I, XIV; Const. art. I, § 5. In general, the govermnent has no power to restrict or punish

expression because of its message, ideas, subject matter, or 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 can the govermnent punish speech. *United States v. Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

One category of unprotected communication 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 subjective mental state of at least 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 (cleaned up).[4] "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 is different from a purely objective "reasonable person" standard, which is a negligence standard based on whether a reasonable person should be aware of the requisite risk. *Id.* at 79 n.5.[5]

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[4] *Cf.* RCW 9A.08.010(1)(c) ("A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.").

[5] *Cf.* RCW 9A.08.010(1)(d) ("A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk

The Court rejected an objective standard because it would not guard against the "chilling effect" that imposing liability for threatening speech has on protected speech. *Id*. at 75. An "objective standard" for "true-threats prosecutions" would "chill too much protected, non-threatening expression." *Id*. at 78. Therefore, the Court held that "an important tool . . . to stop people from steering wide of the unlawful zone—is to condition liability on the State's showing of a culpable mental state." *Id*. at 75 (cleaned up). Accordingly, the Court concluded a subjective standard of recklessness "offers enough breathing space" for protected expression. *Id*. at 82 (citations omitted).

2. This Court should grant review because the Court of Appeals decision affirming Mr. Peters's conviction violates his First Amendment rights and conflicts with binding precedent.

The crime of harassment requires the person to have issued a "true threat," which requires the State to prove the person acted recklessly. *Counterman*, 600 U.S. at 69; *see supra*,

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constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.").

Section E.1. In this case, the State failed to prove that Mr. Peters subjectively understood Ms. Jefferson-Ayosa would interpret his communication as a true threat of violence. The Court of Appeals decision affirming his conviction fails the constitutional mandate announced in *Counterman* and requires this Court's review.

a. The crime of harassment implicates the First Amendment, and this Court's de novo review requires an independent examination.

The State bears the burden to prove every element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A conviction based on anything less violates due process. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 628, 61 L. Ed. 2d 560 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

This Court reviews de novo whether sufficient evidence supports the conviction. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014). This Court will affirm a conviction only if, "after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318; *State v. Vasquez*, 178 Wn. 2d 1, 6, 309 P.3d 318 (2013).

And because the crime of harassment implicates the First Amendment, this Court must examine the record "with the commands of the First Amendment clearly in mind." *State v. Williams*, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001). "The First Amendment demands more" than the usual review of the record on appeal. *State v. Kilburn*, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004). Therefore, this Court conducts an "independent examination of the whole record" in a First Amendment case "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 50 (citations omitted); *see also State v. E.J.J.*, 183 Wn.2d 497, 501, 354 P.3d 815 (2015).

b. The State failed to prove Mr. Peters subjectively understood Ms. Jefferson-Ayosa would perceive his communication as a threat.

To convict Mr. Peters of harassment, the State had to prove he issued a "true threat," which requires proof beyond a reasonable doubt that Mr. Peters acted recklessly. *See Counterman*, 600 U.S. at 69. Recklessness requires evidence that Mr. Peters subjectively knew of and consciously disregarded a substantial risk that Ms. Jefferson-Ayosa would interpret his communication to be a true threat. *Id.* at 79.

The State failed to prove Mr. Peters was subjectively reckless. What happened that night was mostly undisputed. Ms. Jefferson-Ayosa and Mr. Peters had a tense conversation in the upstairs hallway about dividing their expenses. Then, Ms. Jefferson-Ayosa went into the bathroom to tweeze her eyebrows, and Mr. Peters went downstairs to give the kids a snack. Next, Mr. Peters came back upstairs, changed into warm clothes, and put his shoes on to go for a walk. He had his gun

and he loaded the chamber before leaving. He never pointed the gun at her or even faced her with it.

Even assuming Mr. Peters said, "so what if it is," in response to Ms. Jefferson-Ayosa repeatedly asking, "is that your gun," this statement is a not a true threat of violence. RP 271, 422. Rather, this was an annoyed retort to Ms. Jefferson-Ayosa's repeated questions and what he felt was her unnecessary "attitude" in response to "a simple question." RP 266, 420. Indeed, he was walking down the hallway *away* from her when she stepped out of the bathroom to follow him and repeatedly ask him what he was holding. RP 270-71, 421-22. But even "disrespectful, discourteous, and annoying" words "are nonetheless constitutionally protected." *E.J.J.*, 183 Wn.2d at 501. This was not a true threat. *See State v. D.R.C.*, 13 Wn. App. 2d 818, 825, 467 P.3d 994 (2020) (a true threat is "not an idle statement . . . or even a 'hyperbolic expression[] of frustration'") (quoting *State v. Kohonen*, 192 Wn. App. 567, 583, 370 P.3d 16 (2016)).

Nor did cocking the gun make it a threat of violence. Whether a person's words or conduct constitutes a true threat "is determined in light of the entire context." *Kilburn*, 151 Wn.2d at 46. In *Kilburn*, the defendant told a classmate, "I'm going to bring a gun to school tomorrow and shoot everyone and start with you." *Id.* at 39. But the defendant had always been nice to this classmate, they had known each other for years, and he appeared to be joking. *Id.* at 52-53. Even though the statement was serious and the classmate was scared, this Court reversed, concluding under the context it was not a true threat. *Id.* at 53.[6]

Likewise, the context here does not demonstrate Mr. Peters's communication was a "true threat." Mr. Peters and Ms. Jefferson-Ayosa had a good relationship for many years, with no history of any violence. RP 256. Even though they were

[6] This Court concluded this was not a true threat under the objective standard of negligence. *Kilburn*, 151 Wn.2d at 53. It certainly would not satisfy *Counterman*'s higher subjective standard of recklessness.

bickering about finances that night, Mr. Peters was calm. RP 432. He was walking around the house taking care of the children. RP 418. He was not yelling, gesturing, or aggressively approaching Ms. Jefferson-Ayosa. Even if he loudly closed a door or stormed up the stairs, this was reflective of his annoyed exasperation. RP 265.

Mr. Peters's statement did not constitute a "true threat," nor did his actions make his inconsequential statement a "true threat." *Cf. Kilburn*, 151 Wn.2d at 53 (despite the seriously threatening implications of saying he would bring a gun to school and shoot everyone, the context did not demonstrate this was a true threat). Mr. Peters did not say he was going to kill or hurt Ms. Jefferson-Ayosa. He did not chase her or follow her out of the house. RP 276, 424. He never pointed the gun at her. RP 296, 423-24. In fact, he never even turned to face her. RP 423-24, 270. It was only after Ms. Jefferson-Ayosa followed him down the hallway, peppering him with questions as he was trying to leave, did he react and make an annoyed retort.

The Court of Appeals acknowledged the evidence was largely uncontroverted. App. at 15-23. It acknowledged their relationship lasted over five years and was "good." App. at 15. It also noted their children were home that night, and their bickering was interrupted by Mr. Peters taking care of the children. App. at 17.

Noting Ms. Jefferson-Ayosa said it was "unusual" for Mr. Peters to carry his gun, the Court of Appeals concluded this was enough to make his communications a "true threat" of violence. App. at 23-24. In doing so, the Court of Appeals ignored the context of their years-long relationship and effectively applied an objective standard, which fails the constitutional, subjective standard announced in *Counterman*. The Court of Appeals also ignored this Court's decision in *Kilburn* where, even under the prior negligence standard, the context of the relationship was critical to determine whether the statements were a true threat. In Ms. Jefferson-Ayosa's own

words, because she knew Mr. Peters was not a violent person, she thought, "he wouldn't do that." RP 265.

Context is everything. It is what makes something a "true threat" in one situation but not another. While the facts in this case may constitute a "true threat" in a different context with different people, that is not the case for Mr. Peters and Ms. Jefferson-Ayosa.

The State did not prove Mr. Peters issued a true threat. The Court of Appeals decision affirming the conviction for harassment conflicts with precedent and violates Mr. Peters's First Amendment rights. This Court should grant review. RAP 13.4(b)(1), (3).

3. This Court should also grant review to determine the constitutionality of Washington's harassment statute.

"To avoid unconstitutional infringement of protected speech, [the harassment statute] must be read as clearly prohibiting only 'true threats.'" *Kilburn*, 151 Wn.2d at 43 (quoting Williams, 144 Wn.2d at 208). A "true threat" requires

at least a recklessness standard. *Counterman*, 600 U.S. at 69. But the Washington harassment statute criminalizes a threat using a lower standard of negligence. *State v. Trey M.*, 186 Wn.2d 884, 907, 383 P.3d 474 (2016). This Court should grant review to determine the constitutionality of the statute.

a. The harassment statute is unconstitutional because it criminalizes threats based on a negligence standard, which is lower than the required recklessness 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." *Williams*, 144 Wn.2d at 206. 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. *Trey M.*, 186 Wn.2d at 895; *Kilburn*, 151 Wn.2d at 48; *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).").

Consequently, the statute does not require any knowledge by the 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 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, this 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 at 907 (adhering to "Washington's objective (reasonable person) test" and its interpretation of the harassment statute).[7]

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 listener's fear. *Counterman*, 600 U.S. at 78-79 & n.5. An unconstitutional negligence standard hinges criminal liability based on what a reasonable person would think is a threat, not on what the specific defendant subjectively thinks. *Id*. at 79 n.5; *see also Elonis*, 575 U.S. at 739 (reasoning that a "negligence standard" is one that permits a person to be convicted "if he

[7] 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 at 899. 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*, 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 this Court in *Trey M*. adhered to.

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."). This standard is unconstitutional.

b. The Court of Appeals substituted its judgment for this Court's, and its conclusion conflicts with this Court's decisions interpreting the harassment statute.

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 reinterpreted the harassment statute to comply with the recklessness standard articulated in *Counterman*. App. at 10. In reaching its conclusion, the Court of Appeals relied on numerous pre-*Counterman* decisions, which all applied the negligence standard, even though it acknowledged those cases are no longer good law post-*Counterman*. App. at 9 (citing *Schaler*, *Kilburn*, *Williams*, and *Trey M.*), 10 n.2 (noting *Counterman* abrogates this Court's numerous decisions

criminalizing a "true threat" under the negligence standard). In doing so, the Court of Appeals substituted its own conclusion for this Court's.

In addition, the statutory meaning of "threat" in the harassment statute does not change any time a court reinterprets the "true threats" exception to the First Amendment. Because this Court has clearly and repeatedly held the harassment statute only requires negligence, 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). The Court of Appeals decision conflicts with this Court's rulings. RAP 13.4(b)(1). And given the many prosecutions and convictions for harassment, review is warranted as matter of public interest. RAP 13.4(b)(4).

F. CONCLUSION

Based on the preceding, Mr. Peters respectfully requests that review be granted pursuant to RAP 13.4(b).

This brief is in 14-point Times New Roman, contains 4,331 words, and complies with RAP 18.17.

Respectfully submitted this 15th day of October 2024.

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APPENDIX

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NATHAN PETERS, Appellant.	DIVISION ONE No. 85701-1-I UNPUBLISHED OPINION

DWYER, J. — Nathan Peters appeals from the judgment entered on a jury's verdict convicting him of one count of felony harassment. Peters asserts that the harassment statute under which he was convicted is unconstitutional. Peters also asserts that the jury was not presented with sufficient evidence to find that his words and conduct toward Tabitha Jefferson-Ayosa constituted a "true threat" as that term was clarified by the United States Supreme Court in Counterman v. Colorado, 600 U.S. 66, 72-83, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023). Because Peters fails to establish manifest error as to the constitutionality of the harassment statute, both facially and as applied to him, and because the record contains ample evidence to support that he knew of and disregarded a substantial risk that his actions in this matter would be interpreted as a serious expression of an intention to carry out a threat to kill Jefferson-Ayosa, Peters' assertions fail. Accordingly, we affirm.

I

In March 2023, an affidavit of probable cause submitted by a police officer from the Lummi Nation Police Department stated, in pertinent part, as follows:

> On 03/25/2023 at about 2049 hours, I was dispatched to a brandishing of a handgun at [an address in Smokehouse Road in Bellingham, WA]. It was dispatched [that] Tabitha Jefferson-Ayosa and Nathan Peters got into a verbal altercation and [that] Nathan pulled out a handgun during the argument. It was dispatched [that] Tabitha fled the residence with their two children en route to her mother's residence. I proceeded there and contacted Tabitha.
>
> Tabitha stated she lives with Nathan Peters, they are breaking up from a dating relationship, and they share a child in common[.] Tabitha said she recently got a new phone line since Nathan had been bothering her by threatening to cut her off from the data plans they currently have together. Tabitha said the argument continued with Nathan and he slammed a door a couple times. Tabitha said she heard Nathan digging around by their safe and then was pacing back and forth around the hallway, outside the bathroom door. Tabitha said the verbal argument picked up again before Nathan sighed and turned around, walking towards the bedroom. She said she saw something in his hands, behind his back. Tabitha said she asked him several times verbally "is that your fucking gun?" before Nathan replied something to the extent of: so what if it is. Tabitha said she heard the gun "click", as if Nathan was loading a bullet into the chamber. She said he turned around with a black handgun in his left hand. Tabitha said Nathan is left-handed and the gun was in his left hand. Tabitha motioned to indicate the gun was pointed at the ground in front of Nathan. Tabitha said she immediately felt like she was in danger of being shot since the argument was heated and Nathan doesn't usually pull the gun out. Tabitha said she ran down the stairs as fast as she could, gathered her children hastily and left in her vehicle before calling her mother/911. Tabitha said she turned and ran so fast when she saw the gun that she didn't see if he pointed it at her as she was fleeing. She felt his actions were so strange that she was in immediate danger of being shot.

In July 2023, the State, by amended information, charged Peters with one count of harassment by threatening, through words or conduct, to kill an intimate partner, Jefferson-Ayosa, a class C felony.[1]

A two-day jury trial resulted. The State's theory of the case was that Peters' words and conduct on the night in question, in the context of his relationship with Jefferson-Ayosa, reflected that he knew of and disregarded a substantial risk that she would interpret his actions as a serious expression of an intention to carry out a threat to kill her. For his part, Peters' defense theory was that he did not say any menacing words to her and that he had only retrieved his firearm so that he could safely go on a walk in their dangerous neighborhood in order to take a break from Jefferson-Ayosa arguing with him.

In its case in chief, the State called to testify both Jefferson-Ayosa and two police officers who were dispatched in response to her 911 call, presented the audio of the 911 call to the jury, and provided the jury with photographs of the firearm in question. Peters testified in his own defense.

After the parties rested their cases, the trial court provided, in pertinent part, the following instructions to the jury:

INSTRUCTION NO. 5

> To convict the defendant of the crime of felony harassment as charged in count one, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about March 25, 2023, the defendant knowingly threatened to kill Tabitha Jefferson-Ayosa immediately or in the future;

[1] RCW 9A.46.020(1); .020(2)(b)(ii).

(2) That the words or conduct of the defendant placed Tabitha Jefferson-Ayosa 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.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 6

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, idle talk, or political argument. *In addition, the speaker must know of and disregard a substantial risk that the statement or act would be interpreted in that way.*

(Emphasis added.)

Thereafter, the parties presented their closing arguments and the jury was excused to deliberate.

The jury returned its verdict the following day, finding Peters guilty of one count of felony harassment. Thereafter, the superior court entered judgment on the jury's verdict.

Peters now appeals.

II

Peters asserts that the harassment statute under which he was convicted is unconstitutional under the First Amendment to the federal constitution. In so

doing, however, Peters does not specify whether he is asserting a facial challenge or an as-applied challenge to the constitutionality of that statute. Additionally, Peters did not present the issue of the constitutionality of the harassment statute to the trial court and is therefore presenting this issue for the first time on appeal. Because he has not demonstrated that his claim of constitutional error meets the requirement of being a manifest error, we decline to review the merits of the claim. RAP 2.5(a)(3).

A

We may "refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). However, a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). Our Supreme Court has explained the analytical process called for in such a situation.

> It has long been the law in Washington that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); State v. Lyskoski, 47 Wn.2d 102, 108, 287 P.2d 114 (1955). The underlying policy of the rule is to "encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter. See City of Seattle v. Harclaon, 56 Wn.2d 596, 597, 354 P.2d 928 (1960).
>
> The general rule that an assignment of error be preserved includes an exception when the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a). This exception encompasses developing case law while ensuring only certain constitutional questions can be raised for the first time on review. RAP 2.5 cmt. (a) at 86 Wn.2d 1152 (1976).
>
> To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest,

and (2) the error is truly of constitutional dimension. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); Scott, 110 Wn.2d at 688). Stated another way, the appellant must "identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial." Id. at 926-27. If a court determines the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

In analyzing the asserted constitutional interest, we do not assume the alleged error is of constitutional magnitude. Scott, 110 Wn.2d at 687. We look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error. See id. at 689-91. In instances where the allegation is that the defendant's due process rights were violated because he or she was denied a fair trial, the court will look at the defendant's allegation of a constitutional violation, and the facts alleged by the defendant, to determine whether, if true, the defendant's constitutional right to a fair trial has been violated. See id. (holding because nothing in the constitution requires the meaning of particular terms in a jury instruction to be specifically defined, the defendant's unpreserved claim regarding the jury instructions did not constitute constitutional error and, thus, was not properly preserved for appellate review).

After determining the error is of constitutional magnitude, the appellate court must determine whether the error was manifest. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." Kirkman, 159 Wn.2d at 935 (citing State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); McFarland, 127 Wn.2d at 333-34). To demonstrate actual prejudice, there must be a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" Kirkman, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting WWJ Corp., 138 Wn.2d at 603). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. Id. at 935 (citing WWJ Corp., 138 Wn.2d at 602; McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993))). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." Id.

State v. O'Hara, 167 Wn.2d 91, 97-99, 217 P.3d 756 (2009).

With regard to a challenge to the constitutionality of a statute, we have explained that,

> [a] constitutional challenge to a statute presents a question of law that this court . . . reviews de novo. City of Bothell v. Barnhart, 172 Wn.2d 223, 229, 257 P.3d 648 (2011). A reviewing court presumes that a statute is constitutional, and the party challenging it bears the burden of proving otherwise beyond a reasonable doubt. Morrison v. Dep't of Labor & Indus., 168 Wn. App. 269, 272, 277 P.3d 675 (2012) (citing State v. Shultz, 138 Wn.2d 638, 642, 980 P.2d 1265 (1999)). A party may bring a facial or an as-applied challenge. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). To prevail in a facial challenge, a party must show that "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." Moore, 151 Wn.2d at 669. By contrast, a party succeeds in an as-applied challenge by proving that an otherwise valid statute is unconstitutional as applied to that party. Moore, 151 Wn.2d at 668-69.

Didlake v. State, 186 Wn. App. 417, 422-23, 345 P.3d 43 (2015). Therefore, in order to establish manifest error in this matter, Peters must show that the harassment statute underlying his conviction is unconstitutional either facially or as applied to his case. As discussed, infra, Peters fails to establish manifest error under either theory.

B

If Peters is asserting a challenge to the harassment statute under which he was convicted in reliance on a theory that the statute is facially unconstitutional under the First Amendment, he fails to establish manifest error.

Peters was convicted under RCW 9A.46.020. It reads, in pertinent part,

> (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 . . . [and]
> . . . .

> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .
>
> (2) . . . (b) A person who harasses another is guilty of a class C felony if . . .
>
> (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened.

RCW 9A.46.020.

Our State Supreme Court has recognized that, because the foregoing harassment statute criminalizes a form of pure speech—threats—it must be "'interpreted with the commands of the First Amendment clearly in mind.'" State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001) (quoting Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). Additionally, it is well-established that "true threats" constitute a form of speech that is not protected by the First Amendment. See, e.g., Watts, 394 U.S. at 708; Williams, 144 Wn.2d at 207-08.

> "A true threat is a serious threat, not one said in jest, idle talk, or political argument. [State v.]Kilburn, 151 Wn.2d [36,]43[, 84 P.3d 1215 (2004)] (citing United States v. Howell, 719 F.2d 1258, 1260 (5th Cir.1983)). Stated another way, communications that 'bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole' are not true threats. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). The nature of a threat 'depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken.' State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003). Statements may 'connote something they do not literally say . . . .' Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1085 (9th Cir. 2002)."

State v. Kohonen, 192 Wn. App. 567, 576-77, 370 P.3d 16 (2016) (alteration in original) (quoting State v. Locke, 175 Wn. App. 779, 790, 307 P.3d 771 (2013)).

Accordingly, in order for Peters to demonstrate manifest error in pressing a facial challenge to the harassment statute in question, he must show that,

under the First Amendment, "'no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.'" Didlake, 186 Wn. App. at 423 (quoting Moore, 151 Wn.2d at 669).

Peters fails to establish a manifest error arising from his conviction under the harassment statute. Our Supreme Court has instructed that a "true threat" is not an essential element of that statute but, rather, is a definitional component thereof. State v. France, 180 Wn.2d 809, 818, 329 P.3d 864 (2014) ("'true threat' is not an element of felony harassment," rather, "'true threat' defines and limits the scope of criminal statutes, such as felony harassment, that potentially encroach on protected speech" (citing State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013))).

Indeed, our Supreme Court has repeatedly confirmed that the word "threat" in the challenged statute can be defined as only applying to "true threats." See, e.g., Schaler, 169 Wn.2d at 283-84 (construing "the threats-to-kill provision of RCW 9A.46.020" "to reach only 'true threats'"); Kilburn, 151 Wn.2d at 41 ("Under the First Amendment only a true threat suffices for a conviction under RCW 9A.46.020."); Williams, 144 Wn.2d at 208 ("Washington's criminal harassment statute clearly prohibits true threats."); see also State v. Trey M., 186 Wn.2d 884, 908, 383 P.3d 474 (2016).

Furthermore, although the United States Supreme Court recently clarified that a criminal conviction in a "true threat" case requires proof of a mental state of at least recklessness in order to avoid the criminalization of speech protected by the First Amendment, Counterman, 600 U.S. at 72-83, the Court's clarification as

to the definition of "true threat" does not affect a court's capacity to construe the harassment statute as only proscribing "true threats."[2]

Thus, the harassment statute can be constitutionally applied as only criminalizing "true threats." Accordingly, if Peters is asserting that the harassment statute under which he was convicted is facially invalid, he does not establish manifest error.

C

In the alternative, Peters may be asserting an as-applied challenge to the constitutionality of the harassment statute on the basis that, in convicting him of felony harassment, the jury unconstitutionally applied the harassment statute to him. Because he again fails to show manifest error with regard to this challenge, this assertion fails as well.

To be clear, "a party succeeds in an as-applied challenge by proving that an otherwise valid statute is unconstitutional as applied to that party." Didlake, 186 Wn. App. at 423 (citing Moore, 151 Wn.2d at 668-69). Additionally, as set forth above, a criminal prosecution of a "true threat" case requires proof of a mental state of at least recklessness in the making of the threat in order to avoid the First Amendment's bar against criminalizing protected speech. Counterman,

[2] Because "[t]he United States Supreme Court is the paramount authority on the federal constitution," State v. Tyler, 195 Wn. App. 385, 389, 382 P.3d 699 (2016), aff'd on other grounds, 191 Wn.2d 205, 422 P.3d 436 (2018), the Court's holding in Counterman abrogates certain of our Supreme Court's prior decisions to the extent that they held, in a "true threat" criminal prosecution, that the State must only prove a criminal defendant's negligence in order to not criminalize speech protected by the First Amendment. See, e.g., Schaler, 169 Wn.2d at 287.

Indeed, as Division Two of this court recently stated, although the United States Supreme Court's recklessness standard "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." State v. Calloway, ___ Wn. App. 2d __, 550 P.3d 77, 86 (2024).

600 U.S. at 72-83. Therefore, in order to succeed in an as-applied challenge, Peters must establish that the jury convicted him based on evidence of words or conduct that did not constitute a true threat. "In normal usage, 'manifest' means unmistakable, evident or indisputable" and "'[a]ffecting' means having an impact or impinging on." Lynn, 67 Wn. App. at 345 (citing State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)).

Here, Peters was charged with one count of harassment pursuant to RCW 9A.46.020. As set forth above, the jury in this matter was instructed as follows:

INSTRUCTION NO. 6

> 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, idle talk, or political argument. *In addition, the speaker must know of and disregard a substantial risk that the statement or act would be interpreted in that way.*

(Emphasis added.) The jury convicted Peters as charged.

Peters fails to establish manifest error. He—correctly—does not challenge on appeal whether the foregoing instruction aligned with the Supreme Court's guidance in Counterman.[3] It plainly does. He also does not present

[3] Indeed, the instructions given in Peters' case are nearly identical to those recently approved by the Washington Pattern Instruction Committee:

> 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] [jest, idle talk, or political argument]. In addition, the speaker must know of and disregard a substantial risk that the statement or act would be interpreted in that manner.

evidence that the jurors, in convicting him of the harassment charge, did not follow the court's instructions. Absent any such evidence to the contrary, we presume that the jury did follow its instructions. State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008) (citing Kirkman, 159 Wn.2d at 928). Therefore, Peters fails to make "'a plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.'" Kirkman, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting WWJ Corp., 138 Wn.2d at 603).

Thus, if Peters is asserting that the harassment statute is unconstitutional as applied to him, he does not establish manifest error in support of this assertion. Accordingly, under either potential theory, Peters has failed to preserve his challenge to the constitutionality of the harassment statute for appeal. We need not further review his claim.

III

Peters next asserts that the State failed to present a constitutionally sufficient quantum of evidence that his words or conduct constituted a "true threat." This is so, Peters contends, because the record does not contain sufficient evidence for the jury to find that he knew of and disregarded a substantial risk that his statements and actions toward Jefferson-Ayosa would be interpreted as a serious expression of an intention to carry out a threat to kill her. Peters' assertion fails.

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11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.24, at 4 (5th ed. Supp. 2024).

A

"A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from that evidence." State v. Boyle, 183 Wn. App. 1, 6-7, 335 P.3d 954 (2014) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). "We defer to the trier of fact on issues of credibility or persuasiveness of the evidence." Boyle, 183 Wn. App. at 7 (citing State v. Johnston, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006)).

In addition to generally applicable sufficiency principles, because of the constitutional implications inherent in our review of a "true threat," we conduct a limited independent review of the facts crucial to the true threat inquiry. Kohonen, 192 Wn. App. at 577.

> "[T]he First Amendment demands more than application of our usual standard of review for sufficiency of the evidence. Kilburn, 151 Wn.2d at 48-49. Instead, we must independently examine the whole record to ensure that the judgment does not constitute a forbidden intrusion into the field of free expression. Kilburn, 151 Wn.2d at 50. We are required to independently review only crucial facts, that is, those facts so intermingled with the legal question that it is necessary to analyze them in order to pass on the constitutional question. Kilburn, 151 Wn.2d at 50-51. In doing so, we may review evidence in the record not considered by the lower court in deciding the constitutional question. Kilburn, 151 Wn.2d at 51. However, our review does not extend to factual determinations such as witness credibility. State v. Johnston, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006)."

Kohonen, 192 Wn. App. at 577 (alteration in original) (quoting Locke, 175 Wn. App. at 790-91).

To support a conviction for harassment under RCW 9A.46.020, the State must establish that a threat to commit bodily harm was made. Because, in so

requiring, the statute criminalizes pure speech, the State must further prove that the alleged threat was a "true threat" in order to satisfy the protections of the First Amendment. Kohonen, 192 Wn. App. at 575 (citing Kilburn, 151 Wn.2d at 54).

Again, we have described a "true threat" in general terms as follows:

> "A true threat is a serious threat, not one said in jest, idle talk, or political argument. Kilburn, 151 Wn.2d at 43 (citing United States v. Howell, 719 F.2d 1258, 1260 (5th Cir.1983)). Stated another way, communications that 'bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole' are not true threats. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). The nature of a threat 'depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken.' State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003). Statements may 'connote something they do not literally say . . . .' Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1085 (9th Cir. 2002)."

Kohonen, 192 Wn. App. at 576-77 (alteration in original) (quoting Locke, 175 Wn. App. at 790).

In light of the United States Supreme Court's decision in Counterman, "the State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character." 600 U.S. at 72-73. The Court instructed that proof of "recklessness . . . is enough" to satisfy the protections of the First Amendment. Counterman, 600 U.S. at 72-73. The court defined recklessness "[i]n the threats context" as meaning "that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" Counterman, 600 U.S. at 79 (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)).

B

Here, Peters only challenges whether a constitutionally sufficient quantum of evidence was presented to the jury with regard to the subjective test announced in Counterman. Thus, the question before us is whether sufficient evidence supports the conclusion that Peters knew of and disregarded a substantial risk that his words and conduct toward Jefferson-Ayosa would be interpreted as a serious expression of intention to carry out a threat to kill her. A sufficient quantum of such evidence was adduced.

1

Here, at trial, both Jefferson-Ayosa and Peters testified that, five years prior to the time in question, they began a romantic relationship with one another. About one year later, they moved into the same household, had a child of their own, and also raised a child from a prior relationship of Peters'. They had a good relationship in the beginning, with Jefferson-Ayosa testifying that Peters was not "always the best at communicating" his frustrations during their relationship.

They also testified that, sometime between the end of 2022 and the beginning of 2023, they ended their committed relationship.[4] They continued to live with one another and share resources. Jefferson-Ayosa paid the rent for the apartment while Peters paid for other shared amenities, including their cell phone service plan.

[4] Jefferson-Ayosa testified that their relationship ended because of Peters' poor communication issues.

They each testified that, sometime in March 2023, they unsuccessfully attempted to reconcile. Peters testified that they ended their relationship again on March 24 while Jefferson-Ayosa testified that she did not remember exactly when they did so. Peters testified that he ended their relationship because he thought that she was acting in a "suspicious" manner in response to him searching through her cell phone and finding messages between Jefferson-Ayosa and one of her former partners, timestamped from when Peters and Jefferson-Ayosa had previously ended their relationship a few months prior, including a photograph of a pregnancy test. Peters testified that he did not feel jealous when he saw either those messages or that photograph.

They also testified that, on March 24, Peters removed Jefferson-Ayosa as a member of his cell service phone plan without notifying her.

Jefferson-Ayosa testified that, the next day, on March 25, she purchased her own cell phone and a service plan for that phone with a new phone number. Peters testified that, on that day, he received a text message from Jefferson-Ayosa from a phone number different than the one she had been previously assigned under their shared plan.

They both testified that, on the evening of March 25, Peters was already upstairs in their shared apartment at the time that Jefferson-Ayosa arrived with the children. Jefferson-Ayosa left the children downstairs and approached Peters who was upstairs in the bedroom. With regard to the layout of the apartment in question, its first floor had a living room with a staircase leading up

to the second floor and, near the top of the stairs on its second floor, was a bedroom and an adjoining bathroom.

They both testified that, as Jefferson-Ayosa walked up the staircase towards Peters, he asked her about her new cell phone number. Jefferson-Ayosa testified that she did not appreciate such questioning and told him that it was none of his business. Jefferson-Ayosa testified that the questioning escalated into an argument between the two of them, with Peters raising his voice and calling her "dumb." Peters, for his part, testified that he asked her about her new cell phone number "[c]almly," that she had an "attitude" in response to his "simple question," but that the manner in which she responded to him did not cause him to feel frustrated.

They both testified that they then walked away from one another, with Jefferson-Ayosa going into the bathroom and Peters going into the bedroom. Jefferson-Ayosa asked Peters to get the children a snack. He then went downstairs and, sometime thereafter, came back upstairs.

Jefferson-Ayosa testified that, when Peters came upstairs, she heard him slamming doors and rustling around in the bedroom closet where they kept, among other things, a lockbox containing a handgun and ammunition. She testified that she was worried that he was retrieving the handgun that he had stored in the lockbox but, she thought, "no, he wouldn't do that."

Peters testified that, when he came back upstairs, he went into the bedroom closet to retrieve his handgun from the lockbox. He testified that he was calm and collected after their exchange. He denied slamming doors but

testified that he did shut certain doors with heavy mirrors mounted on them that, when closed, made a slamming sound. He testified that, once he was in the bedroom, he changed into sweatpants and a long sleeve t-shirt and opened his firearm lockbox in the bedroom closet. He retrieved from inside the lockbox his pistol and a magazine containing twelve bullets, inserted the magazine into the pistol, and secured the firearm by his lower back by tucking it into the elastic band of his sweatpants.

Peters testified that he changed clothes and retrieved his firearm because he "wanted to go out for a walk." He testified that, "at that point, I felt like I needed to process everything from the week before when I went through her phone and went with the attitude that she shared with me after asking a simple question."[5]

They both testified that Peters then approached the doorway to the bathroom where Jefferson-Ayosa was located. Jefferson-Ayosa testified that, as Peters approached, they began to argue again, with Peters telling her that she had an attitude and Jefferson-Ayosa telling him that he was the one who started the argument by asking her about the cell phone. Peters, for his part, testified that he approached her and asked her to return the cell phone that he had previously purchased for her and that, in response to his request, she began to argue with him.

[5] The following exchange also occurred during Peters' cross-examination: "[Prosecutor]: You were so calm and collected though that you needed to go take a walk and get some space; is that accurate? [Peters]: Yes."

Both parties testified that, as he approached the bathroom, Peters was concealing from Jefferson-Ayosa what was behind his back. Jefferson-Ayosa testified that, when she turned to face Peters, he appeared frustrated, his hands were behind his back, and that she could not see what was behind his back. She testified that, in the conversations earlier that night, his hands had not been behind his back. She also testified that she observed that Peters had changed his clothing and was wearing jeans, rather than sweatpants, with a sweatshirt and shoes.

Both parties testified that, at that time and during the following exchange, Peters did not tell Jefferson-Ayosa that he was planning on going somewhere or leaving the apartment.

Both parties testified that Peters then turned away from Jefferson-Ayosa and began to walk to the bedroom. Jefferson-Ayosa testified that, when Peters turned away from the bathroom and began walking toward the bedroom, he walked with his body turned to the side, rather than walking with his back to her. She testified that she saw something behind his back that did not look like his wallet or his phone and she became worried and afraid that it was his handgun. Peters, for his part, testified that his back was facing her as he walked away.

Both parties testified that Jefferson-Ayosa asked Peters if he was carrying his pistol. Peters did not respond to her question and remained silent. Peters testified that "I didn't respond because I thought that it might escalate the situation more than I wanted it to escalate to." Peters also acknowledged that he

knew that, at the time, Jefferson-Ayosa was unarmed and had no way to defend herself.

They both testified that Jefferson-Ayosa repeated the question twice more. Peters again did not respond to her questions and instead withdrew to the bedroom entryway near the staircase landing, keeping his back facing away from her. Jefferson-Ayosa followed him down the hallway toward both the bedroom entrance and the staircase down to the first floor of the apartment.

They both testified that, when Jefferson-Ayosa was within reaching distance of Peters, Jefferson-Ayosa again urged Peters to tell her if he had his firearm behind his back, saying, "Is that your fucking gun?" Peters then turned his body to the side away from Jefferson-Ayosa, took his handgun out from the waistband of his pants, and held the gun in one hand to the side of his body away from her. She heard him "cocking the gun" as he pulled back on the slide on the top of the firearm, loading a bullet into the gun's chamber with an audible click.

Jefferson-Ayosa testified that, in response to her fourth time urging him to tell her whether he had his firearm behind his back, Peters turned toward her, "cocked" the firearm not once, but twice, and said, "so what if it is?" Jefferson-Ayosa testified that, at the moment, she was terrified that Peters was going to shoot and kill her or the children.

Peters, for his part, testified that, after she had repeated her question for the fourth time, she observed the firearm in his hand, that he only "cocked" it

once, and that he said nothing to her, including no words of reassurance.[6] He testified that he loaded a bullet into the chamber of his pistol in the entryway to the upstairs bedroom "[t]o prepare myself for the walk so I didn't have to do it when I was outside walking and came across something threatening" like "[a]n animal or somebody else walking."[7] He testified that, when he loaded the firearm, he was not planning to kill Jefferson-Ayosa, he was not planning to shoot her, and he was not intending to scare her.

They each testified that, immediately after Peters loaded a bullet into the chamber of the firearm, Jefferson-Ayosa ran down the stairs to their children, leaving her keys and cell phone upstairs, told the children to get outside, grabbed a set of spare keys, and quickly escorted them out of the apartment with her. Jefferson-Ayosa testified that she did not recall if Peters said anything to her as she ran down the stairs and screamed at the children to get out of the house. She testified that, after fleeing the apartment with the children, she called 911 through the cell service on her digital smart watch and drove to her mother's house. The audio of her 911 call was played for the jury. Jefferson-Ayosa testified that she was afraid and was physically shaking while making the call.

Peters, for his part, testified that, after loading the firearm, he "heard her panicking. I heard her going down the stairs, then I placed the firearm back in the back of my pants again and I went downstairs to the top where she could see me and I stated that I was going to leave."

[6] Jefferson-Ayosa testified that she heard him attempt to load the gun twice, the first time unsuccessfully loading a bullet into the chamber and the second time successfully doing so.

[7] Both parties testified that Peters did not point the gun at Jefferson-Ayosa.

Additionally, during Peters' cross-examination, the following exchange occurred:

> Q: [D]o you agree with this statement, a gun can kill?
> A: Yes.
> Q: Okay. And you are inside your house and you ready your gun; is that accurate?
> A. Yes.
> Q. And this is during an argument with Ms. Jefferson-Ayosa; isn't that right?
> A: Yes, because I thought the argument wasn't going anywhere, so, I thought I would leave the argument.
> Q: So you would agree there was an argument?
> A: There was a conversation.
> Q: Okay. So now it's a conversation. It's not an argument? You remember talking to law enforcement, right?
> A: Yes.
> Q: You told them there was an argument; isn't that right?
> A: I even said that an argument, even if I called it an argument. I recall saying that.

When asked about his desire to take a walk, Peters testified that, despite testifying that he lives on a dangerous street with wild animals, he wanted to go on a walk. He did not want to find some space in his car. He testified that he wanted to, for the first time, take his gun on that walk. He testified that there could be a cougar in the area and that he would have attempted to shoot it and scare it away. He testified that the fear of a cougar and the danger of his street was the reason why he loaded a bullet into the chamber of his gun while inside of the apartment. Jefferson-Ayosa, for her part, testified that, in the past, they would walk around the neighborhood with their children and she would sometimes jog in the neighborhood as well.

Both parties testified that Peters did not usually use his firearm, that he would not carry it with him when they went out for a walk in the neighborhood or

out in public, and that he would not take it with him when he went out for a walk by himself. In response to the question "have you ever felt the need to use your gun for protection before this March 25th incident," Peters responded, "No."

2

Admitting the truth of the State's evidence, viewing all reasonable inferences from that evidence in favor of the verdict, and deferring to the jury on the matter of witness credibility, the record contains sufficient evidence to support that Peters knew of and disregarded a substantial risk that his actions would be interpreted as a serious expression of his intention to carry out a threat to kill Jefferson-Ayosa.[8]

The record reflects that, during the five and a half years that they had lived with one another in a committed relationship, Peters had rarely, if ever, used his firearm or carried it with him indoors or outdoors. The record further reflects that, sometime after they were no longer in a committed relationship with one another and, shortly after getting into an argument with Jefferson-Ayosa inside their previously shared home, Peters intentionally took the unusual step of retrieving his handgun from a lockbox in their bedroom closet, placing a 12-bullet magazine inside of the handgun, and carrying the handgun with him out of the bedroom.

The record also reflects that, around this time, he knew that he was shutting doors with heavy mirrors mounted on them that, to a nearby listener, could sound as if a door is being slammed and that Jefferson-Ayosa was in the

[8] We reach the same conclusion after engaging in the required limited independent review of facts pursuant to the true threat inquiry.

nearby bathroom, and he, regardless, proceeded to shut the doors in the manner described.

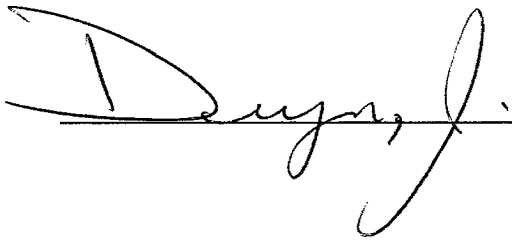
The record further reflects that Peters, after retrieving the handgun, intentionally placed it behind his back, approached the bathroom where Jefferson-Ayosa was located, and re-initiated their earlier argument. Additionally, the record reflects that he was aware that he was concealing the firearm from Jefferson-Ayosa, that he heard her repeatedly urging him to tell her whether he was concealing his handgun behind his back, and that he was aware that a gun is, as a general matter, capable of causing death. Despite all of this, he did not answer her, nor reassure her, nor communicate his supposed intention to leave the apartment to her, any of which might have decreased the risk that his conduct would be interpreted by her as a serious threat to her life.

The record additionally reflects that, despite all of this, and while indoors on the second floor of their apartment within no more than five feet of Jefferson-Ayosa, Peters then grabbed his handgun from behind his back, held the gun down to his side, slid the rack on the top of the gun back—loading a bullet into its chamber with an audible click—and said to her "so what if it is?"

Given all of this, the record amply supports a finding that Peters knew of and disregarded a substantial risk that Jefferson-Ayosa would interpret his conduct and statement as a serious expression of a threat to kill her. Therefore, Peters' assertion that the jury was not presented with sufficient evidence to find that his conduct in this matter constituted a "true threat" fails.

Peters does not prevail on either of his claims on appeal. Accordingly, Peters has not established an entitlement to appellate relief.

Affirmed.



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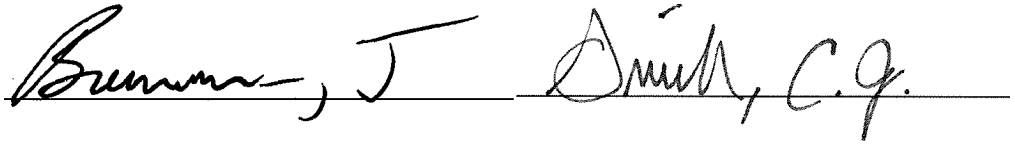

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 85701-1-I**, 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 or residence address as listed on ACORDS:

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