SUPREME COURT NO. _____
NO. 58784-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY JOHNSON,

Petitioner.

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

The Honorable Jennifer Snider, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Anthony Johnson asks this Court to grant review of the court of appeals' unpublished decision in State v. Johnson, No. 58784-0-II, filed August 5, 2025 (appended).

B. ISSUES PRESENTED FOR REVIEW

1a. Should this Court stay Johnson's petition for review pending a decision in Calloway, where Johnson has challenged the constitutionality of the harassment statute?

1b. Should this Court also stay Johnson's petition pending Calloway, where the court of appeals held the erroneous true threat instruction given in Johnson's case was harmless beyond a reasonable doubt, likewise at issue in Calloway?

2. Should this Court grant review where defense counsel made a major mistake in failing to seek redaction of irrelevant and highly prejudicial judicial findings in multiple exhibits admitted at Johnson's trial?

3. Should this Court grant review to determine whether erroneously admitted ER 404(b) evidence can still be prejudicial even if admitted for another proper purpose?

4. Should this Court grant review where multiple errors found by the court of appeals denied Johnson a fair trial?

C. STATEMENT OF THE CASE

Anthony Johnson and Jadey Kiser dated and have a daughter, A.J., together. RP 497-98. Johnson also has two children from a prior relationship with Cassandra Gill. RP 498. Kiser and Gill are on "cordial" terms. RP 459.

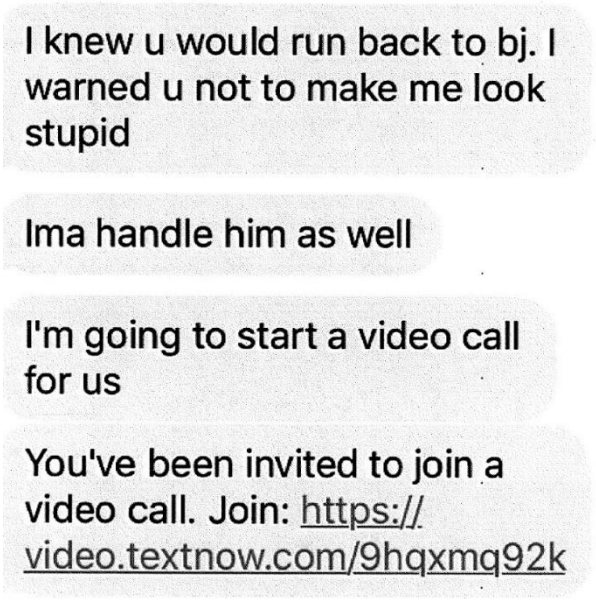
Johnson and Kiser lived together in Oregon until they ended their relationship in the spring of 2021. RP 500. Kiser moved to Vancouver, Washington, and refused to let Johnson see their daughter. RP 315, 500. On April 26, 2021, Johnson asked Kiser to agree to a parenting plan. RP 504.

Kiser instead obtained a temporary protection order on April 30, 2021, prohibiting Johnson from contacting Kiser and A.J. except for court filings. Ex. 1. On May 4, Johnson filed a

petition for visitation and a parenting plan. RP 504. Kiser called 911 to report Johnson's lawful court filing. RP 347, 456.

A one-year order for protection was entered on June 11, 2021, prohibiting Johnson from contacting Kiser or A.J., except pursuant to any subsequent parenting plan. Ex. 5; RP 367. Johnson did not appear at the June 11 hearing and was not served with the protection order until June 21. Exs. 5, 7.

On June 15, Kiser received four calls in the early morning hours from an "Unknown Caller." Ex. 11. Kiser then received three text messages from a number she did not recognize, followed by an invitation to join a video call:



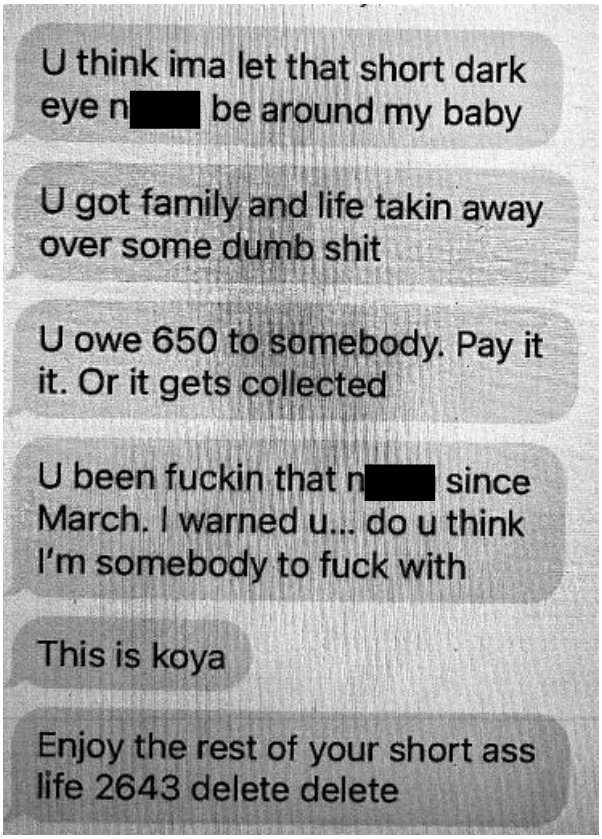
Ex. 10; RP 333. Kiser explained at trial that B.J. was an old friend from high school, whom Johnson knew of but had never met. RP 334.

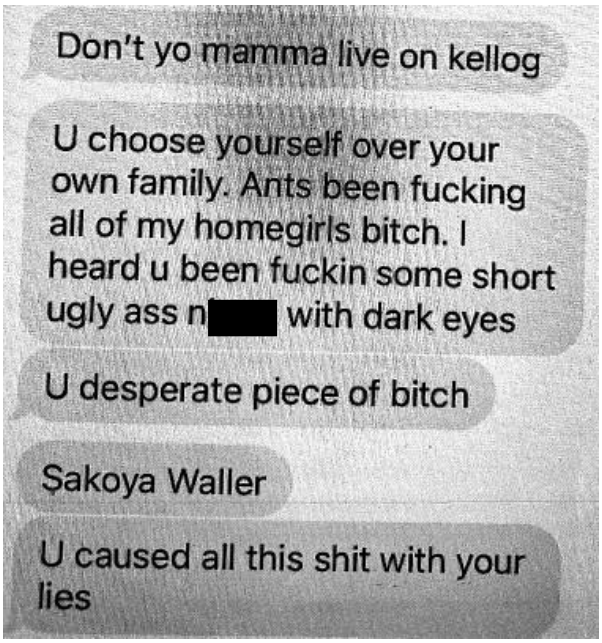
On June 22, Gill said she was on the phone with Johnson, "just having a normal conversation." RP 460. Gill recalled Johnson "got really upset" when Gill told him that Kiser was seeing someone. RP 460. Johnson allegedly told Gill, "I'm going to go kill that fucking bitch right now. I'm going to her house right now. I'm going to fucking kill her." RP 460.

Gill called Kiser to warn her. RP 335. Kiser recalled Gill told her that Johnson said he was going to slit her throat. RP 349. Gill explained she then had a series of calls with Johnson, trying to calm him down, while texting Kiser. RP 461-62. Gill texted Kiser, "Idk what he's on." Ex. 12. Kiser responded, "I'm in my car." Ex. 12. Gill texted back, "Okay!!!! Yea prob best idk wtf he's doing." Ex. 12.

The prosecution initially charged Johnson with one count of felony harassment based on the alleged June 22 threat to kill Kiser (Count 1), one count of gross misdemeanor violation of a court order based on the June 15 text messages (Count 2), and one count of gross misdemeanor harassment also based on the June 15 text messages (Count 3). CP 1-2, 6-8.

On July 5, Kiser received another series of text messages again from a number she did not recognize:


U think ima let that short dark eye n[redacted] be around my baby
U got family and life takin away over some dumb shit
U owe 650 to somebody. Pay it it. Or it gets collected
U been fuckin that n[redacted] since March. I warned u... do u think I'm somebody to fuck with
This is koya
Enjoy the rest of your short ass life 2643 delete delete


Don't yo mamma live on kellog
U choose yourself over your own family. Ants been fucking all of my homegirls bitch. I heard u been fuckin some short ugly ass n[redacted] with dark eyes
U desperate piece of bitch
Sakoya Waller
U caused all this shit with your lies

RP 338; Ex. 13-14 (redacted). Kiser testified $650 was the deposit she and Johnson got back on the rental house they shared. RP 339. Kiser explained 2643 is the passcode she uses for everything. RP 340. And Sakoya or "Koya" is a female friend of both Kiser and Johnson. RP 510.

Based on the July 5 text messages, the prosecution charged Johnson with additional counts of gross misdemeanor harassment (Count 4) and gross misdemeanor violation of a court order (Count 5). CP 13-14.

On the first day of Johnson's two-day jury trial, the prosecution added a charge of witness intimidation against Gill. CP 59; RP 164-67. During a midtrial evidentiary hearing, however, Gill admitted Johnson never threatened her. RP 437. The court allowed the prosecution to proceed on the lesser included offense of witness tampering, which does not require a threat. RP 447-48.

Gill testified at trial that she knew Kiser had reported the alleged June 22 threat to kill to the police. RP 463. Gill did not

want to get involved. RP 463. Around December of 2021, however, Gill said Johnson called her, irate, when he found out he was charged with threatening to kill Kiser. RP 463-64. Gill said Johnson gave her the number of his attorney and a private investigator, telling her "to call them and tell them that Jadey lied about everything, that none of it ever happened." RP 464-65.

On cross-examination, Gill explained she called the defense investigator, but claimed she told the investigator Kiser put words in her mouth only "[a]bout the knife slitting," but "[n]ot about the threat to kill." RP 466. Gill was impeached with her contrary statement to the investigator that Johnson never threatened to kill Kiser at all. RP 468-69.

Over defense objection, the trial court admitted under ER 404(b) prior acts of domestic violence Johnson allegedly committed against Kiser. RP 140-44. The court instructed the jury that it could consider evidence "of prior acts of violence or abusive conduct or words perpetrated upon Jadey Kiser" only for the purpose of "1) whether her fear was reasonable under the

circumstances, and 2) whether she could identify the sender and caller as Anthony Johnson." CP 67.

Kiser testified Johnson subjected her to "[a] lot of mental, emotional, and physical abuse," like shoving her and grabbing her tightly. RP 321-22. Kiser described an incident in January of 2021, where she claimed Johnson spit food on her, shoved her onto the bed, and ripped off her necklace. RP 323-25. Kiser testified Johnson left the room, then came back holding a knife at his side, telling her, "I'm going to kill you, bitch." RP 326.

Kiser initially told police Johnson was holding a bread knife. RP 341-42. But Kiser later told police Johnson never threatened her and she did not actually see a knife in his hand. RP 342. Kiser changed her story again several months later, right after Johnson said he would file for visitation with A.J., claiming again that Johnson threatened her with a knife. RP 346-47. Johnson was acquitted in Oregon on the corresponding weapon charge. RP 124; CP 126.

Johnson testified the last time he contacted Kiser was in late April of 2021, when he told her that he was going to file for parenting time. RP 519-20. Johnson denied calling or texting Kiser on June 15 and July 5. RP 505, 511. Johnson also denied telling Gill he was going to kill Kiser. RP 506. Johnson acknowledged talking to Gill when he discovered much later that Gill told Kiser he threatened to kill her, but denied asking Gill to contact anyone or lie about the allegation. RP 512-15.

In closing, the prosecution elected the threat it wanted the jury to rely on for Count 3, the June 15 text messages, "That second text, 'I'm gonna handle him as well.' That's the basis for our threat." RP 568. For Count 4, the July 5 text messages, the prosecution elected, "You also see, down there at the bottom: Enjoy the rest of your short-ass life. 2643, delete, delete. So, once again, we have a threat." RP 575.

The jury found Johnson guilty as charged on Counts 1-5 and guilty of witness tampering on Count 6. CP 90-95. The trial court sentenced Johnson to 38 months on the felony convictions.

CP 142. The court of appeals reversed Johnson's sentence and remanded for resentencing, but otherwise affirmed Johnson's convictions. Slip op., 24, 26.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **Johnson's three harassment convictions implicate two issues currently pending before this Court is Calloway.**

Johnson was convicted of three counts of harassment under RCW 9A.46.020 for the alleged threats on June 22 (Count 1, felony), June 15 (Count 3, gross misdemeanor), and July 5 (Count 4, gross misdemeanor). CP 138, 154. A person commits gross misdemeanor harassment if they knowingly threaten "[t]o cause bodily injury immediately or in the future to the person threatened or to any other person." RCW 9A.46.020(1)(a)(i). A threat to kill elevates harassment to a class C felony. RCW 9A.46.020(2)(b)(ii).

Because Washington's harassment statute criminalizes pure speech, it requires proof of a true threat to avoid violating the First Amendment. State v. Kilburn, 151 Wn.2d 36, 41-43, 84

P.3d 1215 (2004). "True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" Counterman v. Colorado, 600 U.S. 66, 74 (2023) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)).

Washington courts long held the requisite mental state for uttering a true threat was simple negligence. State v. Schaler, 169 Wn.2d 274, 287, 236 P.3d 858 (2010). That 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." Kilburn, 151 Wn.2d at 46.

On June 27, 2023, however, the United States Supreme Court held in Counterman that the prosecution must prove the threat was made at least recklessly: "The State must show that the defendant consciously disregarded a substantial risk that [the] communications would be viewed as threatening violence." 600 U.S. at 69. Negligence is a lower mental state, with less culpability, than recklessness. RCW 9A.08.010. Consequently, Counterman now requires proof that the defendant, not just a

reasonable person in their position, had subjective awareness the statements would be viewed as serious threats. State v. Calloway, 31 Wn. App. 2d 405, 418-19, 550 P.3d 77, review granted, 3 Wn.3d 1031 (2024).

Johnson's trial took place in September of 2023, several months after the Counterman decision. The jury was nevertheless instructed on simple negligence, rather than the higher mental state of recklessness:

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

CP 69. Defense counsel did not object. RP 534.

a. *Johnson challenged the constitutionality of the harassment statute, which will be controlled by this Court's decision in Calloway.*

Johnson argued on appeal that the harassment statute is unconstitutional because it punishes threats using a negligence standard rather than at least a recklessness standard, requiring

Johnson's three harassment convictions to be vacated. Supp'l Br. of Appellant, 6-10. Johnson asserted it would be improper to reinterpret the harassment statute, because the legislature has repeatedly acquiesced to the negligence standard, "locking in" that interpretation of the statute. Supp'l Br. of Appellant, 8-9.

Consistent with its prior decision in Calloway, the court of appeals held, "instead of declaring the harassment statute unconstitutional, '[w]e need only hold . . . that the State must prove the defendant was at least aware that others could regard [the] statements as threatening violence and deliver[ed] them anyway.'" Slip op., 12 (alteration in original) (quoting Calloway, 31 Wn. App. 2d at 420) (some internal quotation marks omitted). This Court granted review in Calloway (No. 103374-5) on this issue. Oral argument was heard on March 11, 2025, with no decision issued yet. This Court should therefore stay Johnson's petition for review pending a decision in Calloway.

b. *The court of appeals' harmless error analysis on the erroneous true threat instruction also implicates Calloway.*

Johnson also argued the true threat instruction given in his case, which allowed the jury to convict based on simple negligence, was constitutional error requiring reversal. Br. of Appellant, 26-38. The court of appeals agreed "the trial court's instruction regarding what constitutes a true threat failed to comply with Counterman."[1] Slip op., 15. However, the court of appeals held the instructional error to be harmless beyond a reasonable doubt on all three counts. Slip op., 16-18, 20.

Harmlessness of a Counterman error is also at issue in Calloway. In addition to the constitutionality of the harassment statute, Calloway asked this Court to review the court of appeals' harmless error analysis. Calloway Pet. for Review, 22-30. This Court's ruling accepting review broadly stated "granted." Thus, it

[1] The court of appeals also agreed with Johnson that the error was manifest and therefore reviewable for the first time on appeal, consistent with this Court's decision in Schaler. Slip op., 15.

is appropriate to also stay this issue pending Calloway. Once there is a decision in Calloway, this Court should grant review and either decide Johnson's case itself or remand for the court of appeals to reconsider harmlessness in light of Calloway.

The felony harassment charge on Count 1 stemmed from the June 22 phone call Gill said she had with Johnson. Although the threat alleged to have been made during that phone call was unequivocal—"I'm going to go kill that fucking bitch right now"—Johnson never communicated it directly to Kiser. RP 460. Nor was there any indication from the testimony that Johnson knew Gill and Kiser communicated regularly. The second-hand nature of the alleged threat makes it more likely that it was uttered as hyperbole or an expression of frustration to a confidant, rather than a serious expression of intent to kill Kiser. Gill also texted Kiser, "Idk what he's on" and "idk wtf he's doing," indicating Johnson was potentially intoxicated when he made the alleged threat. Ex. 12; RP 319 (Kiser testifying to Johnson's "drinking

habits").[2] Similar to Calloway, the court of appeals dismissed this evidence because "there was no testimony suggesting he was obviously intoxicated or that Johnson did not know what he was saying." Slip op., 17; Calloway, 31 Wn. App. 2d at 425. Contrary to the court of appeals' holding, these factors undermine a confident conclusion that Johnson was aware the threat could be understood as a serious expression of intent to commit violence as to Count 1.

The misdemeanor harassment charge on Count 3 stemmed from the June 15 text messages Kiser believed Johnson sent her. The so-called threat to "handle" B.J. "as well" cannot be characterized as an unequivocal or unambiguous threat to Kiser, as required by the to-convict instruction. Ex. 10; CP 75. It is not even clear what the sender meant by "handl[ing]" B.J., especially when immediately followed by an invitation to join a video call. Such a

[2] The court at sentencing expressed its view that Johnson has "a significant drinking problem," recognizing, "because of your abuse of alcohol, you're not aware of how you're treating people." RP 659.

vague, nonspecific statement is not uncontroverted evidence that the sender was aware it would be interpreted as a serious threat to cause bodily injury to B.J., let alone Kiser. No other context, such as body language, a weapon, or even repetition of the remark, suggests a reckless mental state. But the court of appeals again dismissed these factors because "[n]othing in the record suggests that the texts were sent in jest or as hyperbole, or that Johnson had any sort of incapacity that implicated his state of mind when he sent the messages," essentially shifting the burden to Johnson to show prejudice from the constitutional error. Slip op., 18.

The misdemeanor harassment charge on Count 4, stemming from the July 5 text messages, was based on a similarly vague, nonspecific threat. The sender told Kiser, "Enjoy the rest of your short ass life 2643 delete delete." Ex. 13. However, the threat contained no specifics as to when or how Kiser's life would be short. It did not include any first person language indicating the *sender* would be the one to make Kiser's life short. Such "passive and impersonal phrasing" at best "reach[es] only the margins of a

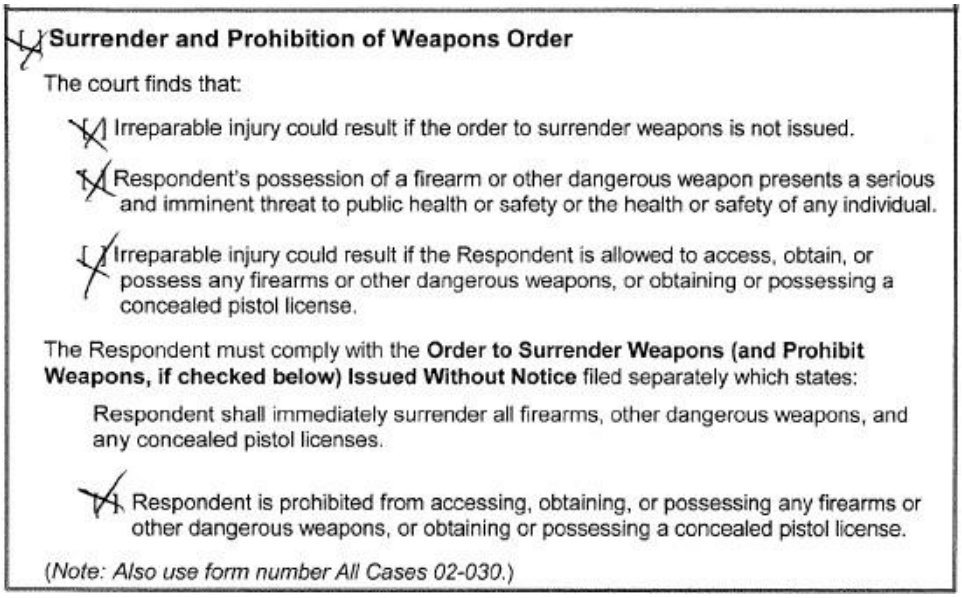
true threat." State v. Locke, 175 Wn. App. 779, 792, 307 P.3d 771 (2013). Expressing the desire to see someone suffer harm is more likely to be hyperbolic than specifically threatening to cause someone harm. Id. at 791-92. The court of appeals yet again required Johnson to demonstrate prejudice, emphasizing "Johnson did not offer an alternative explanation for the texts," despite the oblique, indirect nature of the theat. Slip op., 20.

The court of appeals also failed to acknowledge the prosecutor quoted the simple negligence standard very near the end of his rebuttal argument, making that lower mental state one of the last things the jury heard before deliberations. RP 610-11. All of these factors make the Counterman error in Johnson's case not harmless beyond a reasonable doubt. Review is therefore appropriate under RAP 13.4(b)(3).

2. **Review is warranted to determine whether defense counsel's "major mistake" in failing to seek redaction of judicial findings regarding Johnson's dangerousness in multiple exhibits mattered in a case that boiled down to credibility.**

Johnson argued on appeal that his counsel was constitutionally ineffective for failing to seek redaction of irrelevant, inadmissible, and highly prejudicial judicial findings in multiple exhibits. Br. of Appellant, 44-56.

Specifically, the trial court admitted the unredacted temporary order for protection, which contained multiple judicial findings that Johnson posed a serious risk of violence:



Surrender and Prohibition of Weapons Order

The court finds that:

- Irreparable injury could result if the order to surrender weapons is not issued.
- Respondent's possession of a firearm or other dangerous weapon presents a serious and imminent threat to public health or safety or the health or safety of any individual.
- Irreparable injury could result if the Respondent is allowed to access, obtain, or possess any firearms or other dangerous weapons, or obtaining or possessing a concealed pistol license.

The Respondent must comply with the **Order to Surrender Weapons (and Prohibit Weapons, if checked below) Issued Without Notice** filed separately which states:

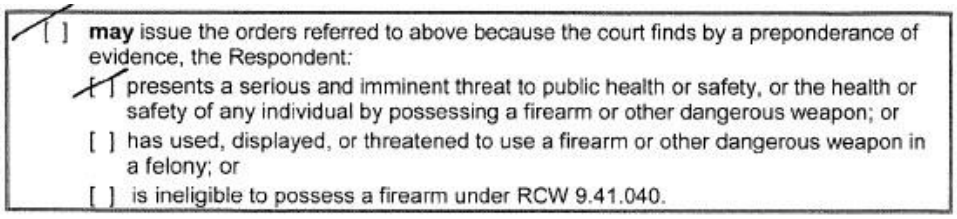
Respondent shall immediately surrender all firearms, other dangerous weapons, and any concealed pistol licenses.

- Respondent is prohibited from accessing, obtaining, or possessing any firearms or other dangerous weapons, or obtaining or possessing a concealed pistol license.

(Note: Also use form number All Cases 02-030.)

Ex. 1, at 3. Exhibits 3 and 4, reissuances of the temporary protection order, extended the above weapons surrender order.

Exhibit 5, the unredacted protection order, included a finding regarding Johnson's dangerousness on the first page: "**Credible Threat**: [x] Respondent presents a credible threat to the physical safety of the protected person/s," Kiser and their daughter A.J. Ex. 5. Page 4 reiterated the finding that Johnson presented a "credible threat" to Kiser and A.J. Ex. 5. Page 5 included yet another finding, made by a preponderance of the evidence, regarding Johnson's violent nature:



[ ] **may** issue the orders referred to above because the court finds by a preponderance of evidence, the Respondent:
[ ] presents a serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon; or
[ ] has used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; or
[ ] is ineligible to possess a firearm under RCW 9.41.040.

Ex. 5. All four exhibits were submitted to the jury to examine during deliberations. CP 234.

The prosecution on appeal conceded that "[t]he admission of this evidence is a major mistake that should not have occurred." Br. of Resp't, 39. The court of appeals agreed "[c]ounsel should

have ensured redaction of the no-contact orders before their admission as exhibits." Slip op., 21. The court of appeals further "acknowledge[d] that the findings would have conveyed to the jury that a judicial officer thought Johnson was a danger to Kiser, and that if he were allowed to possess firearms, he would present imminent danger to the public as well." Slip op., 21.

But the court of appeals ultimately rejected Johnson's ineffective assistance of counsel claim, finding no prejudice. Slip op., 21-22. The court reasoned "the evidence of Johnson's guilt is overwhelming from the text messages themselves, and to the extent he contends he did not send the text messages, the circumstantial evidence that he sent the texts was significant." Slip op., 21-22. The court believed "the judicial findings in boilerplate, pre-printed language would likely not have added much to what the jury already knew given that Kiser had protection orders against Johnson." Slip op., 22.

The court of appeals' holding cannot be squared with the record or a conflicting decision from Division One. Division One

held a very similar error by defense counsel required reversal in State v. Carmichael, noted at 21 Wn. App. 2d 1018, 2022 WL 766223 (Mar. 14, 2022) (unpublished, GR 14.1). There, at Carmichael's trial for second degree assault and second degree escape, defense counsel failed to seek redaction of judicial findings in two exhibits that there was a "substantial danger" Carmichael "will commit a violent crime" if released. Id. at *7. Division One concluded these judicial findings were prejudicial enough to undermine confidence in the outcome of trial. Id. The Carmichael court reasoned, "[e]vidence that two judges had determined Carmichael was likely to commit a violent crime and not return to court would weigh heavily on a jury," particularly given the charges at issue. Id. at *7-*8.

In Johnson's case, the jury needed to evaluate whether Kiser was credible in her testimony that Johnson was the unknown texter on June 15 and July 5. The three June 15 messages had very little identifying information. Ex. 10. Sakoya Waller, not Johnson, claimed to be the sender of the July 5 texts. Ex. 13-14. And, even

if Johnson was the sender, the jury still needed to decide whether he intended the vague, nonspecific comments to be interpreted as serious expressions of intent to cause Kiser bodily harm. RP 590-91. So, too, with the alleged threat to kill Kiser made indirectly to Gill while Johnson was potentially "on" something. Ex. 12; RP 591-93.

Like in Carmichael, the multiple unredacted exhibits showed judges previously determined Johnson presented a "credible threat" to Kiser's as well as A.J.'s physical safety and a "serious and imminent threat" to public safety or the safety of any individual. Ex. 1, at 3; Ex. 5, at 4-5. These findings undermined Johnson's credibility denying the allegations. RP 504-15. This Court can be certain the jury considered the judicial findings, because it was instructed "evidence that you are to consider during your deliberations" includes "the exhibits that I have admitted." CP 61. The Carmichael court found this factor exacerbated the prejudice from counsel's error. 2022 WL 766223, at *8.

Meanwhile, the court of appeals did not address any of the evidence undermining Kiser's and Gill's credibility. Both women told different stories at different times. Kiser claimed Johnson threatened her with a knife in January of 2021, but she previously recanted that same allegation. RP 341-47. Gill, too, told Johnson's defense investigator that he never threatened to kill Kiser. RP 468-69. But Gill changed her tune at trial, claiming she told the investigator only that Johnson never said he would slit Kiser's throat, but he did threaten to kill her. RP 466. The evidence also showed Kiser routinely called 911 to report Johnson's lawful activity, like filing a court petition for visitation, indicating Kiser's bias against Johnson. RP 347, 456.

These discrepancies and biases mattered little considering the judicial findings that Johnson presented a serious threat of violence to Kiser, their daughter, and the public. This constitutional issue warrants review under RAP 13.4(b)(3). Given the conflict with Division One's decision in Carmichael, the spirit of RAP 13.4(b)(2) likewise warrants review.

3. **Review is warranted to determine whether ER 404(b) evidence is harmless when properly admitted for one purpose but improperly admitted for an entirely different purpose that went to a disputed element.**

Johnson also argued on appeal that the trial court erred in admitting the allegations of prior bad acts for his identity as the unknown caller/sender of the text messages. Br. of Appellant, 57-62. The court of appeals recognized "[a] prior act is not admissible to show identity merely because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused." Slip op., 10-11. The prosecution conceded, and the court of appeals agreed, "Johnson's prior bad acts here did not rise to this level of similarity." Slip op., 11.

The "risk of unfair prejudice" from improperly admitted prior bad acts is "very high" in domestic violence cases. State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). The prosecution nevertheless argued, and the court of appeals agreed, that the ER 404(b) error was harmless because "[t]he evidence was admitted for the proper purpose of showing Kiser's reasonable fear

and therefore the evidence was already in the minds of the jurors." Slip op., 11 (citing State v. Ashley, 186 Wn.2d 32, 48, 375 P.3d 673 (2016)); Br. of Resp't, 51-52 (citing State v. Crossguns, 199 Wn.2d 282, 505 P.3d 529 (2022), and State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007)).

Contrary to the court of appeals' conclusion, though, there is no categorical rule that improperly admitted ER 404(b) evidence is harmless if properly admitted for another purpose. Cases that have found harmless error still turned on the specific facts and circumstances of those cases.

For instance, in Crossguns, this Court rejected the label "lustful disposition" as a means to admit uncharged sexual assaults of the same victim, because it perpetuates outdated rape myths. 199 Wn.2d at 291-94. But, the Crossguns court explained, such evidence is admissible for multiple other proper purposes, like intent, motive, opportunity, and res gestae regarding the complainant's delayed disclosure. Id. at 296. Thus, the prior bad

acts were properly admitted in Crossguns for essentially the same purpose, but without the harmful, sexist label. Id.

Similarly, in Foxhoven, the prior bad acts were improperly admitted for common scheme or plan. 161 Wn.2d at 179. The existence of a common scheme or plan is relevant only to the extent it shows the charged crime happened, and there was no dispute the vandalism in question occurred. Id. But the same prior bad acts were properly admitted for modus operandi, where identity was key issue at trial, and so the former error was harmless. Id.

This demonstrates an ER 404(b) error is harmless where the prior bad acts were properly admitted for a very similar purpose (Crossguns) and/or the prior bad acts went to an undisputed element (Foxhoven). See also, e.g., Ashley, 186 Wn.2d at 47-48 (holding ER 404(b) error harmless where prior bad acts were improperly admitted for complainant's credibility but properly admitted for her lack of consent).

None of these circumstances are present in Johnson's case. The prior acts were improperly admitted for a disputed element of Counts 2, 3, 4, and 5—the identity of the unknown caller/texter on June 15 and July 5. RP 505, 511 (Johnson testifying he did not call or text Kiser on June 15 or July 5), 588 (defense counsel arguing in closing that the prosecution failed to prove Johnson sent the June 15 texts), 593-95 (counsel emphasizing reasons to question Kiser's identification of Johnson as the July 5 texter). Meanwhile, the prior acts were properly admitted for an entirely different purpose and different element of the harassment offenses—the reasonableness of Kiser's fear. CP 72, 75-76.

There were very few similarities between the prior acts and the charged crimes. Admitting the evidence for Johnson's "identity" therefore effectively encouraged the jury to rely on it for his general propensity for domestic violence, i.e., his identity as a domestic violence perpetrator. That, in turn, made it more likely Johnson committed the charged crimes against Kiser and Gill, both former intimate partners of Johnson's. The "identity" evidence

bolstered Kiser's and Gill's credibility, while detracting from Johnson's credibility.

Where identity was disputed, and the evidence was not admitted for a similar purpose, the error in admitting it for identity prejudiced Johnson's defense. This case therefore presents a genuine question of whether prior bad acts properly admitted for one purpose can still be prejudicial when improperly admitted for an entirely different purpose. Given the "heightened prejudicial effect" of such evidence in domestic violence cases, this presents an issue of substantial public interest under RAP 13.4(b)(4). Gunderson, 181 Wn.2d at 925.

4. **Finally, review is warranted because Johnson's case is one of the rare instances where numerous errors, as found by the court of appeals, accumulated to deny him a fair trial.**

Johnson argued on appeal, even if the multiple errors did not warrant reversal standing alone, their cumulative effect deprived him of a fair trial. Br. of Appellant, 67; Reply Br., 22-24. The court of appeals agreed several errors occurred at Johnson's two-

day trial: "The trial court erred by giving an incorrect instruction as to the definition of true threat, the protection order exhibits should have been redacted to hide the trial court's findings as to the danger that Johnson presented, and the trial court should not have allowed the jury to consider Johnson's prior instances of domestic violence for purposes of identity." Slip op., 22. The court nevertheless refused to reverse based on cumulative error, reasoning "the evidence of Johnson's guilt on his convictions is overwhelming." Slip op., 22.

Not so. There was reason to question whether the alleged threats were true threats, where they were vague and indirect. The text messages sent on June 15 and July 5 were from an unknown number. Kiser's and Gill's credibility was at issue, where they both had a history of recantation and demonstrated animus against Johnson. RP 342-46, 466-69. Both were in child custody disputes with Johnson, and the evidence showed Kiser routinely called 911 to report lawful behavior by Johnson. RP 347-48, 456, 467.

Against this backdrop, the court's instructions allowed the jury to convict Johnson on less than true threats. The jury also learned judicial officers had previously found Johnson posed a credible threat to Kiser's, their daughter's, and the public's safety. The jury was also allowed to consider Johnson's "identity" as a domestic abuser in assessing whether he was the unknown caller/texter. The jury was tasked with weighing Kiser's and Gill's credibility against Johnson's credibility. The cumulative effect of the errors prevented the jury from fairly doing so. Review of this constitutional issue is warranted. RAP 13.4(b)(3).

E. CONCLUSION

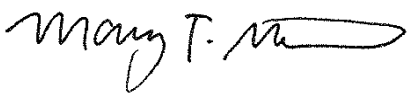
For the reasons discussed above, this Court should stay Johnson's petition for review pending a decision in Calloway, then grant review and reverse the court of appeals.

DATED this 4th day of September, 2025.

I certify this document contains 4,972 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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Appendix

Filed
Washington State
Court of Appeals
Division Two

August 5, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY L. JOHNSON, Appellant.	No. 58784-0-II UNPUBLISHED OPINION

CRUSER, C.J.—Jadey Kiser obtained a domestic violence protection order against Anthony Johnson, with whom she had one daughter. After the order was entered, Kiser received numerous phone calls and threatening text messages from an unknown number. The messages contained information that led her to believe the calls and messages were from Johnson. In addition, a friend, who also had a child with Johnson, contacted Kiser and warned her to flee her home because Johnson was threatening to kill her.

The State charged Johnson with felony harassment domestic violence, witness tampering, two counts of misdemeanor harassment, and two counts of violating a domestic violence court order. A jury convicted him of these charges.

Johnson appeals his convictions and sentence, arguing that the trial court abused its discretion by erroneously admitting ER 404(b) evidence, Washington's harassment statute is unconstitutional, the trial court erred by failing to instruct the jury on the proper mens rea for a

true threat after *Counterman v. Colorado*,[1] and insufficient evidence supported one of his misdemeanor harassment convictions. Johnson also contends that he received ineffective assistance of counsel, and cumulative error denied him a fair trial. Finally, Johnson asserts that at sentencing, the trial court erroneously refused to consider a prison-based drug offender sentencing alternative (DOSA), the trial court miscalculated his offender score for felony harassment, and his misdemeanor judgment and sentence is unclear. The State concedes the miscalculation and that the lack of clarity should be corrected on remand.

We agree that the trial court erroneously refused to consider a prison-based DOSA and miscalculated his offender score for felony harassment, and that clarification of his misdemeanor judgment and sentence is required, but we otherwise affirm his convictions. Accordingly, we remand for reconsideration of a prison-based DOSA, correction of his offender score and resentencing on that count, and clarification of his misdemeanor judgment and sentence.

FACTS

I. BACKGROUND

Soon after Johnson and Kiser began dating in March 2017, Kiser became pregnant with their daughter. In the beginning of their relationship, the couple lived in Portland. During their relationship, Johnson was mentally, emotionally, and physically abusive toward Kiser. Eventually, Kiser and her daughter left the home they rented with Johnson, moved to Vancouver, Washington, and obtained a protection order against Johnson. In spite of the protection order, Kiser received numerous threatening text messages and phone calls from an unknown number. Kiser believed the messages and calls were from Johnson, and Kiser reported the incidents to law enforcement.

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

The State charged Johnson with 1 count of felony harassment including a death threat (count 1), 2 counts of violating a domestic violence court order (count 2, count 5), 2 counts of misdemeanor harassment (count 3, count 4), and witness tampering (count 6).

II. PRETRIAL PROCEEDINGS

Prior to trial, the trial court held a hearing on the admissibility of evidence of Johnson's prior bad acts, including prior domestic violence, substance use, and prison time, under ER 404(b). In particular, the parties argued whether Kiser could testify to her recollection of an incident where Johnson threatened Kiser while holding a knife. The incident resulted in multiple Oregon criminal charges, including the unlawful use of a weapon, 2 counts of menacing—domestic violence, 4 counts of harassment, and tampering with a witness. At the ER 404(b) hearing, Johnson argued that the State had failed to prove the knife incident occurred by a preponderance of the evidence. Johnson pointed out that he was acquitted of the unlawful use of a weapon charge[2] and argued that Kiser had given two different versions of the incident. The trial court responded that Kiser's inconsistent statements would subject her to impeachment, but that was a different issue from admissibility.

The trial court then ruled that Kiser could testify to the knife incident.

> I can make a finding of preponderance based on some of the things that she said.
>
> I've already kind of gone over those. His anger, his sarcastic comments, his threats of violence, drinking, breaking toys, throwing toys, punching holes in walls. That burden has been met.
>
> She can testify with regards to the knife incident. He can impeach her, as you choose appropriate. That goes to the element on the harassment death threats.

[2] The jury found Johnson not guilty of unlawful use of a weapon, harassment based on pushing Kiser into the wall, and tampering with a witness. The jury found Johnson guilty of both counts of menacing but that they did not constitute domestic violence, harassment based on pushing Kiser onto the bed, harassment based on pulling Kiser's necklace, and harassment based on spitting and throwing food.

1 Rep. of Proc. (RP) at 143-44. The trial court stated that it was admitting the evidence for the purpose of showing that Kiser was in reasonable fear of the defendant based on Johnson's words or conduct.

III. TRIAL

The case proceeded to a jury trial. At the beginning of Kiser's testimony at trial, the trial court instructed the jury that the evidence of prior acts of violence or abusive conduct against Kiser could only be considered for the limited purpose of determining whether Kiser's fear was reasonable under the circumstances and whether Kiser could identify the sender of the text messages and the unknown caller as Johnson.

During her testimony, Kiser recalled an incident in January 2021, when Johnson spit food into Kiser's face multiple times and shoved her to their front door. Kiser tried to walk away to get to their daughter, but Johnson repeatedly shoved her into the walls of the hallway. Once Kiser made it into the bedroom with their daughter, Johnson continued to yell and spit food at Kiser. Johnson shoved her onto the bed and ripped her necklace off. Johnson then left the room before returning and shoving Kiser onto the bed again. Johnson said, "I'm going to kill you, bitch," and Kiser saw that he had a knife in his hand by his right hip. 1 RP at 326. At the end of Kiser's testimony, the trial court reminded the jury that it could consider this testimony only for the limited purpose of determining whether Kiser's fear of Johnson was reasonable and whether she could identify the sender and caller as Johnson.

As soon as Johnson left the house that night, Kiser and their daughter left the home and called 911. Kiser then moved to Vancouver, Washington and petitioned for a protection order against Johnson. The trial court admitted the temporary protection order as an exhibit. Later in trial, the trial court admitted multiple orders reissuing the temporary order as well as a final

protection order and an order denying modification or termination of the protection order. The orders were not redacted, nor did either party request redaction. The orders included boilerplate judicial findings that Johnson presented a credible threat to Kiser and that he would present a "serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon." Ex. 5 at 5.

On June 15, 2021, Kiser called the police after she received multiple phone calls and text messages from someone whom she believed to be Johnson based on the content of the messages. The text messages read, "I knew u would run back to bj. I warned u not to make me look stupid," "Ima handle him as well," and "I'm going to start a video call for us," and included a hyperlink to a video call. Ex. 10. BJ was an old friend of Kiser's from high school.

While living in Vancouver, Kiser spent time with Cassandra Gill, who had two children with Johnson. Kiser called the police again on June 22, 2021, after Gill called her and told her to leave the house because Johnson was on his way there to kill her. Kiser recalled that Gill's voice was frantic as she told Kiser to pick up her daughter and leave immediately. Kiser grabbed her daughter, fled the home, and called police. Kiser testified that she felt scared after Gill told her Johnson was coming to kill her. The State admitted text messages between Kiser and Gill from that night, confirming that Gill was warning Kiser and trying to calm Johnson down.

Gill testified that she had been having a normal phone conversation with Johnson when the subject turned to Kiser possibly dating a new person. Gill recalled that Johnson went into a rage. He told Gill, "I'm going to go kill that fucking bitch right now. I'm going to her house right now. I'm going to fucking kill her." 1 RP at 460. Gill tried to calm Johnson down but he hung up. Gill described Johnson as furious and "flipping out the whole time," screaming, yelling, and cussing.

1 RP at 461. Johnson called Gill back and continued to threaten Kiser while Gill tried to calm him down. Johnson hung up on Gill and then called back several times.

Kiser also testified about text messages she received on July 5, 2021. Although there was no contact information related to the phone number sending the messages, Kiser testified that she knew they were from Johnson based on the content of the messages. She interpreted his statement, "U got family and life takin away over some dumb shit" as him threatening to kill her family. Ex. 13. She also explained that one message's reference to owing somebody $650 was a reference to the security deposit on their prior apartment that he believed she kept from him. Kiser explained that "'2643,"' in the text message, "'Enjoy the rest of your short-ass life. 2643 delete delete,"' referred to the passcode she used on her bank accounts, car lot, and "literally everything," which she had only ever shared with Johnson. 1 RP at 339-40. Kiser testified that she felt scared when she received the July 5 messages.

Johnson testified at trial and denied ever calling or messaging Kiser. He claimed the conversation with Gill where he threatened to kill Kiser never happened.

Prior to closing arguments and jury deliberations, the trial court instructed the jury,

> 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.

Clerk's Papers (CP) at 69. The instruction did not require the jury to find that the speaker had any subjective state of mind with regard to whether the words uttered would be perceived as a threat.

As to count 1, felony harassment with death threats, the trial court instructed the jury that to find Johnson guilty it must find beyond a reasonable doubt that on or about June 22, 2021,

Johnson knowingly threatened to kill Kiser immediately or in the future and that Johnson's words or conduct placed Kiser in reasonable fear that the threat to kill would be carried out.

The trial court further instructed the jury,

> A person commits the crime of harassment, as charged in Count 03 and 04, when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person; or to cause physical damage to another person's property; or maliciously to do any act which is intended to substantially harm another person with respect to his or her physical health or safety and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

CP at 74.[3]

As to count 3, misdemeanor harassment, the to-convict instruction stated that to find Johnson guilty, the jury must find beyond a reasonable doubt that on or about June 15, 2021, Johnson knowingly threatened to cause bodily injury immediately or in the future to Kiser, and that Johnson's words or conduct placed Kiser in reasonable fear that the threat would be carried out. During closing argument, the State argued to the jury that the June 15 text, "Ima handle him as well," was the threat at the basis of count 3. Ex. 10; *see also* 1 RP at 568. The State argued that the text reasonably caused Kiser fear based on the years of tension and violence she experienced with Johnson.

As to count 4, misdemeanor harassment, the to-convict instruction stated the same but referenced a threat made on or about July 5, 2021. In closing, the State argued that the message, "Enjoy the rest of your short-ass life. 2643, delete, delete," constituted a threat. 2 RP at 575.

[3] Count 2 charged Johnson with violating a domestic violence court order and is not at issue here.

The trial court also instructed the jury again that it could consider Kiser's testimony about prior instances of domestic violence only for the purpose of determining the reasonableness of her fear with regard to the threats and whether Kiser could identify the sender and caller as Johnson.

The jury found Johnson guilty as charged.

IV. SENTENCING

At sentencing, the trial court found Johnson's offender score to be 7 on both felony harassment and witness tampering with a standard sentencing range of 33-43 months. The State recommended a 38-month sentence. Johnson requested he be screened for a prison-based DOSA. The State opposed a DOSA, arguing that there was no showing of a nexus between the crimes and Johnson's substance use.

The trial court denied Johnson's request to be screened for a DOSA and imposed a mid-range standard sentence of 38 months of confinement. The trial court explained, "I don't believe this is an appropriate case to screen for DOSA. I don't think prison DOSA, crimes involving people, qualify for that." 2 RP at 661.

Johnson appeals his convictions and his sentence.

ANALYSIS

I. ER 404(b) EVIDENCE

Johnson argues that the trial court erred by admitting ER 404(b) evidence to prove his identity and, specifically, by admitting evidence of the knife incident without first finding by a preponderance of the evidence that the incident occurred. We disagree.

We review the trial court's decision to admit or exclude evidence of misconduct under ER 404(b) for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court's error in admitting evidence is reviewed under the standard for nonconstitutional error.

State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). A nonconstitutional error is harmless where there is no reasonable probability that the error materially affected the verdict. *Id*.

Under ER 404(b), evidence of prior misconduct is categorically barred when it is offered "for the purpose of proving the character of a person in order to show that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The same evidence, however, may be admitted for proper purposes that include but are not limited to "'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."' *Id.* (quoting ER 404(b)). "ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

Before admitting evidence of prior misconduct, a trial court must, on the record, "'(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."' *Gresham*, 173 Wn.2d at 421 (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

A. Preponderance Finding

Johnson also argues that the trial court erred by admitting testimony of the knife incident without first finding by a preponderance of the evidence that the incident actually occurred. Essentially, Johnson and the State disagree as to how the trial court's oral ruling should be interpreted and whether the trial court's language shows that it made the required finding. Johnson

contends that the trial court's finding of a preponderance was limited to other bad acts—"'[h]is anger, his sarcastic comments, his threats of violence, drinking, breaking toys, throwing toys, punching holes in walls'"—but did not include the knife incident. Br. of Appellant at 64 (quoting 1 RP 143-44). We disagree.

The record reflects that the trial court understood the requisite analysis in order to admit the ER 404(b) evidence. The trial court specifically identified the factors it must consider in making its ruling and walked through each on the record. The court discussed with the parties the admissibility of the knife incident, in particular, and the fact that Johnson had been acquitted of the charge involving the knife. It is unreasonable to interpret the record to mean that the trial court properly conducted an ER 404(b) analysis as to some bad acts but not the one most at issue. The more reasonable interpretation of the record, and the one we adopt here, is that the trial court noted "[h]is anger, his sarcastic comments, his threats of violence, drinking, breaking toys, throwing toys, punching holes in walls" as being part of the basis for its preponderance finding. 1 RP at 143-44. Although the trial court's finding that the knife incident also occurred may not be as explicit, when the entire discussion is read in context, it is apparent the trial court properly found that the knife incident was supported by a preponderance of the evidence in accordance with ER 404(b).

B. Improper Identity Evidence

Here, the trial court admitted evidence of Johnson's prior bad acts for the purpose of showing the reasonableness of Kiser's fear. But the limiting instruction issued to the jury stated that the evidence could also be considered to determine whether Kiser could identify the sender of the text messages and the unknown caller as Johnson. Johnson argues, and the State concedes, that admitting the evidence to show Johnson's identity was improper. A prior act is not admissible to show identity merely because it is similar, but only if it bears such a high degree of similarity as

to mark it as the handiwork of the accused. *Foxhoven*, 161 Wn.2d at 176. We agree with the parties that Johnson's prior bad acts here did not rise to this level of similarity, and we accept the State's concession.

Because the trial court improperly instructed the jury that evidence of Johnson's prior bad acts could be considered to prove Johnson's identity, we must address whether the court's error was harmless. *State v. Ashley*, 186 Wn.2d 32, 47, 375 P.3d 673 (2016). "Erroneous admission of evidence in violation of ER 404(b) is harmless unless there is a reasonable probability that the verdict would have been materially different but for the error." *Id*. Here, there is no reasonable probability that the admission of Johnson's prior bad acts for consideration of his identity caused the verdict to be materially different.

The evidence was admitted for the proper purpose of showing Kiser's reasonable fear and therefore the evidence was already in the minds of the jurors. *Id*. at 48. Johnson argues that despite the evidence's otherwise proper admission, the error in instructing the jury that it could consider the same evidence for identity is not harmless because Johnson specifically disputed whether he was the person who sent the text messages and made the phone calls. We disagree.

Johnson testified at trial that he never sent the messages or called Kiser. But the jury did not find him credible. Moreover, the evidence that Johnson sent the messages and made the calls was based on Kiser's testimony regarding the content of the messages, not on Johnson's prior bad acts. Kiser testified that she knew the text messages were from Johnson based on the content of the messages themselves, which included details that only Johnson would know such as the amount of their previous security deposit and her passcode. Given that the evidence was otherwise properly before the jury and the State's theory on identification did not hinge on Johnson's prior bad acts, we hold that the trial court's error was harmless.

II. CONSTITUTIONALITY OF HARASSMENT STATUTE

In his supplemental appellate brief, Johnson argues that all of his harassment convictions must be reversed because Washington's harassment statute, RCW 9A.46.020, is unconstitutional. We disagree.

Under RCW 9A.46.020(1)(a)(i)[4], a person is guilty of harassment if they knowingly threaten to cause bodily injury. Harassment involving a death threat is a class C felony. RCW 9A.46.020(2)(b); *State v. Johal*, 33 Wn. App. 2d 408, 413, 561 P.3d 1235 (2025). The knowledge element requires the defendant to know they were conveying a threat and to know that the communication was a threat to harm or kill the threatened person or another person. *State v. Calloway*, 31 Wn. App. 2d 405, 417, 550 P.3d 77 (2024), *review granted*, No. 103374-5 (Wash. Dec. 4, 2024). Following the United States Supreme Court's recent decision in *Counterman*, the First Amendment also requires a showing the defendant acted at least recklessly by "consciously disregard[ing] a substantial risk that [the] communications would be viewed as threatening violence." 600 U.S. at 69.

In *Calloway*, we held that there was "no direct conflict between the statutory language and the *Counterman* articulation of what amounts to a true threat." 31 Wn. App. 2d at 420. And instead of declaring the harassment statute unconstitutional, "[w]e need only hold . . . that the State must prove the defendant was at least "'aware that others could regard [the] statements as threatening violence and deliver[ed] them anyway.'" *Id.* (second and third alteration in original) (internal quotation marks omitted) (quoting *Counterman*, 600 U.S. at 79). Therefore, consistent with *Calloway*, we hold that RCW 9A.46.020 is not unconstitutional.

[4] We cite the current version of RCW 9A.46.020 as the relevant language has not changed.

III. IMPROPER JURY INSTRUCTIONS

Johnson argues that his harassment convictions must be reversed because the harassment jury instructions failed to define a true threat as required under *Counterman*. The State responds that Johnson failed to preserve this issue for appeal and, if we reach the merits, that the jury instructions were erroneous but the error was harmless beyond a reasonable doubt. We hold that Johnson may raise this issue for the first time on appeal, but the error was harmless beyond a reasonable doubt.

A. Preservation of Error

Generally, we will not consider issues raised for the first time on appeal. *State v. Frieday*, 33 Wn. App. 2d 719, 743, 565 P.3d 139 (2025). Under RAP 2.5(a), we may refuse to review any claim of error that was not raised in the trial court. This principle helps avoid unnecessary appeals by ensuring that the trial court has the opportunity to correct any errors. *Frieday*, 33 Wn. App. 2d at 743.

Here, Johnson did not object to the jury instructions at his September 2023 trial, despite the fact that *Counterman* had been decided in June 2023, two months earlier. The State argues, as an initial matter, that when a defendant raises a new argument for the first time on appeal, they must generally address RAP 2.5(a) in their briefing. *Id.* at 744. Otherwise, we consider the issue waived. *Id*.; *see also State v. Lindsey*, 177 Wn. App. 233, 247, 311 P.3d 61 (2013) (declining to address issue raised for the first time on appeal where defendant failed to address any of the RAP 2.5(a)(3) exceptions); *State v. Knight*, 176 Wn. App. 936, 951, 309 P.3d 776 (2013) (declining to address double jeopardy jury instruction challenge where defendant failed to make any showing that the alleged error was manifest).

Johnson contends that the trial court's failure to instruct the jury on the correct mens rea for a true threat is manifest constitutional error reviewable for the first time on appeal. The State responds that Johnson's contention does not amount to sufficient argument as to why the issue is reviewable for the first time under RAP 2.5(a). While Johnson certainly could have made more robust argument, his argument was adequate. In his opening brief, to support his contention that the jury instruction error is reviewable for the first time on appeal, Johnson cited *Sate v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010). There, the Supreme Court held that the failure to give a "true threat" jury instruction was manifest constitutional error warranting review for the first time on appeal. *Id*. This reference to controlling law on the reviewability of the same issue amounts to sufficient argument regarding reviewability under RAP 2.5(a). Accordingly, we turn to whether Johnson shows a manifest constitutional error in this case.

RAP 2.5(a)(3) permits appellate review of manifest errors affecting a constitutional right raised for the first time on appeal. The parties agree that omission of a mens rea element of a crime from the jury instructions is a constitutional error. Thus, our inquiry focuses on whether the constitutional error was manifest.

"'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice requires a plausible showing that the asserted error had practical and identifiable consequences in the case. *Id.*

As the Washington Supreme Court explained in *Schaler*, the RAP 2.5 manifest error analysis "is distinct from deciding whether the error was harmless and therefore does not warrant reversal." 169 Wn.2d at 284. There, the court determined the failure to instruct the jury on the First Amendment's "true threat" requirement was manifest constitutional error warranting review for

the first time on appeal. *Id.* at 288. The *Schaler* court explained that the failure to properly instruct the jury allowed the jury to convict Schaler based on his utterance of protected speech. The *Schaler* court noted that given the clear state of the law at the time that it instructed the jury, the trial court could have corrected the error and thus the constitutional error was manifest. *Id.*

Given the similarities between this case and *Schaler*, we follow the "manifest" analysis articulated in *Schaler*. Like in *Schaler*, here the trial court issued erroneous jury instructions that allowed the jury to convict Johnson without finding that he acted recklessly, as *Counterman* requires. Similarly to *Schaler*, the trial court could have corrected the instructional error given that *Counterman* was decided two months prior to Johnson's trial. We therefore hold that the error was manifest and thus we must address it on appeal.

B. Constitutional Harmless Error

There is no dispute that the trial court's instruction regarding what constitutes a true threat failed to comply with *Counterman.* But "[e]ven manifest constitutional errors may be harmless." *Schaler*, 169 Wn.2d at 283. The "omission of the constitutionally required mens rea from the jury instructions . . . is analogous to" the omission of an element of the crime from the instructions. *Id*. 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 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*.

1. Count 1

Johnson's conviction for felony harassment, as charged in count 1, was based on the statements Johnson made during his phone call with Gill wherein he repeatedly threatened to kill Kiser. He told Gill, "I'm going to go kill that fucking bitch right now. I'm going to her house right now. I'm going to fucking kill her," while he was "flipping out the whole time," screaming, yelling, and cussing. 1 RP at 460-61. Gill repeatedly tried to calm Johnson down but he continued to make threats against Kiser. We hold that the instructional error on this count was harmless beyond a reasonable doubt.

Gill testified Johnson repeatedly told Gill that he was going to kill Kiser. Johnson's remarks were unequivocal; they were made during a rage after learning Kiser may have been dating someone else. Importantly, Johnson knew Gill regarded his statements as threatening violence and delivered them anyway—Gill testified that she continually tried to calm Johnson down while Johnson raged and threatened to kill Kiser. Johnson's only response to this evidence was to say that the conversation with Gill never happened, which the jury did not find credible.

Johnson argues that "[t]he second-hand nature" of the threat makes it more likely that it was uttered as hyperbole or an expression of frustration to a confidant. Br. of Appellant at 33. We disagree. In *State v. J.M.*, 144 Wn.2d 472, 488, 28 P.3d 720 (2001), the Supreme Court held that the perpetrator need not know or intend that the threat will be communicated to the victim. And the person to whom the defendant communicates the threat may be someone other than the person threatened. *Id.*

It would be unreasonable to conclude that Johnson may have thought Gill took his threats as hyperbolic or in jest given the fact that Gill repeatedly tried to calm Johnson down. Johnson was aware that Gill was alarmed by Johnson's statements given her efforts to calm him and

nonetheless continued to repeat his threats to kill Kiser. Put another way, the evidence is clear that Johnson was aware that Gill regarded his statements as threatening violence and delivered them anyway. Moreover, although there are statements in our record indicating that Johnson may have had a drinking problem, there was no testimony suggesting he was obviously intoxicated or that Johnson did not know what he was saying.

Given the unequivocal nature of the statements and the circumstances under which he made them, no reasonable jury would find that Johnson did not at least consciously disregard a substantial risk that his communications would be viewed as threatening violence.

We hold that the jury instruction error is harmless beyond a reasonable doubt as to count 1.

2. Count 3

A person is guilty of misdemeanor 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). Here, the jury was instructed that to convict Johnson as charged in count 3, it had to find that on or about June 15, 2021, Johnson knowingly threatened to cause bodily injury immediately or in the future to Kiser.

a. Harmless error

Johnson's conviction for count 3 was based on June 15 text messages including, "I warned u not to make me look stupid," and "Ima handle him as well." Ex. 10. Johnson argues that the messages were nothing more than a "vague, nonspecific statement," but we disagree. Br. of Appellant at 35.

The content of the message is clear—Johnson warned Kiser not to go back to BJ, she disobeyed him, and now she and BJ would suffer the consequences of Johnson "handling" them. Nothing in the record suggests that the texts were sent in jest or as hyperbole, or that Johnson had any sort of incapacity that implicated his state of mind when he sent the messages. Johnson's only defense was that he did not send the texts, which the jury found not credible.

Given these circumstances, no reasonable jury would find that Johnson did not at least consciously disregard a substantial risk that his communications would be viewed as threatening violence. Accordingly, we hold that the trial court's jury instruction error was harmless beyond a reasonable doubt as to count 3.

b. Sufficient evidence

Johnson also argues that the State provided insufficient evidence to prove that this language threatened Kiser at all. A defendant who contests the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *State v. Trey M.*, 186 Wn.2d 884, 905, 383 P.3d 474 (2016). Circumstantial evidence and direct evidence are equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

When reviewing a claim of insufficient evidence, we do not "reweigh the evidence and substitute our judgment for that of the jury." *State v. McCreven*, 170 Wn. App. 444, 477, 284 P.3d 793 (2012). Rather, because the jury "observed the witnesses testify firsthand, we defer to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given the evidence." *Id*.

In his appellate brief, Johnson argues that the State failed to prove that he threatened to cause Kiser bodily injury, as opposed to BJ. The State emphasizes that the text message threatened to handle BJ "'*as well*,"' arguing that it meant Johnson was threatening harm against both BJ and

Kiser. Br. of Resp't at 25. At oral argument, Johnson appeared to concede that there is a reasonable inference that "as well" meant any threat was also against Kiser. Wash. Ct. of Appeals oral arg., *State v. Johnson*, No. 58784-0-II (June 23, 2025), at 32 min., 9 sec., *audio recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-2-court-of-appeals-2025061025/?eventID=2025061025.

Johnson also argues that insufficient evidence supported a finding that the messages constituted a true threat of bodily injury. The messages clearly referenced a warning not to make Johnson look stupid, and then threatened the consequence of Johnson "handling" Kiser and BJ. While "handling" may not be an explicit threat of bodily injury, threatening language need not be literal to amount to a true threat. *State v. Locke*, 175 Wn. App. 779, 790, 307 P.3d 771 (2013). Rather we review the facts and circumstances surrounding the statements. *Id*. Given Johnson's history with Kiser and his reference to having "warned" her, taking the evidence in the light most favorable to the State, a reasonable juror could infer that the message constituted a true threat. Ex. 10.

Johnson also argues that insufficient evidence supported a finding that Kiser was placed in reasonable fear. Kiser testified that she found the messages threatening. And her fear is evidenced by the fact that she contacted law enforcement after receiving them. Moreover, the jury heard testimony that these threats were made after Kiser experienced violence while living with Johnson, and she and her daughter escaped. Given the context under which the messages were received—despite an active domestic violence no contact order prohibiting Johnson from contacting Kiser due to his violent actions—a reasonable juror could have found that Kiser was placed in reasonable fear that Johnson would carry out his true threat to cause her bodily injury.

Accordingly, we hold that sufficient evidence supported Johnson's conviction in count 3.

3. Count 4

Johnson's conviction for misdemeanor harassment, as charged in count 4, was based on the July 5 text messages sent to Kiser stating, "Enjoy the rest of your short-ass life. 2643, delete, delete." 2 RP at 575-76.

This message threatened Kiser by suggesting that her life would be shortened. The fact that the message was intended to be threatening is underscored by the inclusion of Kiser's confidential information. Kiser testified that "2643" was her passcode for "literally everything" in her life and only Johnson knew it. 1 RP at 340. In context, the message is meant to inform Kiser that her life would be shortened. The emphasis on her passcode—information that only Johnson knew—showed not only that Johnson sent the messages, but also that Johnson had the information to help him gain access to her private information, suggesting his access could facilitate the accomplishment of his threat.

It would be unreasonable to conclude that Johnson was not aware that Kiser would take the message as threatening. Johnson made these statements after he knew Kiser had involved law enforcement over his previous threats. Nothing in the record suggests that these statements were anything other than an intentional threat of violence against Kiser. Johnson did not offer an alternative explanation for the texts—he denied ever sending them, which the jury clearly found not credible.

Given these circumstances, no reasonable jury would find that Johnson did not at least consciously disregard a substantial risk that his communications would be viewed as threatening violence. Accordingly, we hold that the trial court's jury instruction error was harmless beyond a reasonable doubt as to count 4.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Johnson argues that his trial counsel performed deficiently by failing to seek redactions in the no-contact orders admitted as exhibits. The orders included unredacted judicial findings that Johnson presented a credible threat to Kiser and that he would present a "serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon." Ex. 5 at 5. The State concedes that this failure constituted deficient performance but argues that Johnson cannot show that the deficient performance resulted in prejudice. We agree with the State.

The right to counsel includes the right to effective assistance of counsel. *State v. Crawford*, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006). To show ineffective assistance of counsel, a defendant must show that defense counsel's conduct was deficient and that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defense counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Prejudice ensues if the result of the proceeding would have been different had defense counsel not performed deficiently. *Id.*

As the State acknowledges, the failure to redact the judicial findings on the protection order exhibits should not have occurred. Counsel should have ensured redaction of the no-contact orders before their admission as exhibits. Moreover, we acknowledge that the findings would have conveyed to the jury that a judicial officer thought Johnson was a danger to Kiser, and that if he were allowed to possess firearms, he would present imminent danger to the public as well. But as previously discussed, the evidence of Johnson's guilt is overwhelming from the text messages themselves, and to the extent he contends he did not send the text messages, the circumstantial

evidence that he sent the texts was significant. Gill's testimony that he made threats to Kiser was also compelling, and the contemporaneous texts between the women provide confirmation that Gill understood Johnson's statements to be threatening. Moreover, the judicial findings in boilerplate, pre-printed language would likely not have added much to what the jury already knew given that Kiser had protection orders against Johnson. We cannot conclude that but for the erroneous admission of judicial findings in the exhibits, the outcome of the proceedings would have been different. Accordingly, Johnson's ineffective assistance of counsel claim fails.

V. CUMULATIVE ERROR

Johnson argues that cumulative error deprived him of a fair trial. We disagree.

Under the cumulative error doctrine, the court may reverse a defendant's conviction when the combined effect of trial errors effectively denies the defendant their right to a fair trial, even if each error alone would be harmless. *State v. Lazcano*, 188 Wn. App. 338, 370, 354 P.3d 233 (2015). The defendant bears the burden to show multiple trial errors and that the accumulated prejudice from those errors affected the outcome of their trial. *Id*.

The trial court erred by giving an incorrect instruction as to the definition of true threat, the protection order exhibits should have been redacted to hide the trial court's findings as to the danger that Johnson presented, and the trial court should not have allowed the jury to consider Johnson's prior instances of domestic violence for purposes of identity. But as previously discussed, the evidence of Johnson's guilt on his convictions is overwhelming. The threats to kill Kiser that Johnson made in the phone call to Gill were both unequivocal and continued after it was clear that Gill was taking them seriously. Gill's testimony was corroborated by contemporaneous texts and Kiser's similar account of what Gill told her that day. The threats Johnson made by text that were the basis for counts 3 and 4 were also unequivocal, and one contained details only he

would know, contradicting his assertion that he was not the one who made the threats. In the face of this evidence, Johnson fails to show that the accumulated prejudice of multiple trial errors affected the outcome of his trial.

VI. SENTENCING ISSUES

Johnson also makes several arguments regarding sentencing and contends that resentencing on both his felony and misdemeanor sentences is appropriate.

A. Eligibility For Prison-Based DOSA

Johnson argues that the trial court abused its discretion by refusing to consider a prison-based DOSA, asserting the court erroneously believed that Johnson was ineligible. We agree.

Under RCW 9.94A.505(2)(a)(i), a trial court is ordinarily expected to impose a standard range sentence, but under certain circumstances "the court may deviate from the standard range." *State v. Yancey*, 193 Wn.2d 26, 30, 434 P.3d 518 (2019). A DOSA is one alternative to standard range sentencing that "give[s] eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions." *State v. Grayson*, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005); *see* RCW 9.94A.660. Under RCW 9.94A.660(3), a DOSA may be prison-based or residential.

Defendants are not entitled to receive DOSAs, but they may "ask the trial court to consider such a sentence and to have the alternative actually considered." *Grayson*, 154 Wn.2d at 342. If a person is eligible for a DOSA, the trial court decides if the DOSA is appropriate. *State v. Hender*, 180 Wn. App. 895, 900, 324 P.3d 780 (2014). If a judge denies a DOSA and imposes a standard range sentence, that decision is usually unreviewable. *State v. Bramme*, 115 Wn. App. 844, 850, 64 P.3d 60 (2003). But a defendant may appeal a DOSA denial "if the trial court refused to exercise

discretion at all or relied on an impermissible basis in making the decision." *State v. Lemke*, 7 Wn. App. 2d 23, 27, 434 P.3d 551 (2018).

In deciding whether to grant a DOSA, the trial court may properly consider the defendant's criminal history, whether the defendant would benefit from substance abuse treatment, and whether the DOSA would serve both the defendant and the community. *State v. Jones*, 171 Wn. App. 52, 55-56, 286 P.3d 83 (2012). A trial court may "consider the type or circumstances of the crime" at issue. *State v. Van N*oy, 3 Wn. App. 2d 494, 499, 416 P.3d 751 (2018).

Johnson contends that the trial court erroneously refused to consider a prison-based DOSA based on its mistaken belief that he was ineligible because his convictions involved crimes against people. The State responds that the trial court did not mistakenly believe Johnson was ineligible, but rather determined that a DOSA was not appropriate given the facts and circumstances of the case. The State emphasizes that the trial court did not use the word "ineligible," but rather that it did not believe it was "'an appropriate case to screen for DOSA.'" Br. of Resp't at 62 (quoting 2 RP at 661). But this ignores the trial court's next sentence: "I don't think prison DOSA, crimes against people, qualify for that." 2 RP at 661. Because the trial court erroneously stated that Johnson did not qualify, relying in part on an improper basis for declining to impose a prison-based DOSA, we must remand for the trial court to consider a prison-based DOSA sentence.

B. Offender Score

Johnson also argues that resentencing is required because the trial court erroneously calculated his offender score for felony harassment. The State concedes that the offender score was incorrect but argues that the error does not require the trial court to consider a residential DOSA. We agree with the State.

The trial court's calculation of Johnson's offender score for felony harassment erroneously counted his witness tampering offense as two points. RCW 9.94A.525(21)(a-b) specifies which felony domestic violence convictions count as two points for offender score calculation; witness tampering is not one of them. Accordingly, Johnson's offender score for felony harassment should have been 6 and not 7. On remand, the trial court should impose a new sentence for felony harassment within the new standard range.

Johnson argues that because of the lower offender score and corresponding lower standard sentence range, he would now be eligible for a residential DOSA. The State agrees that Johnson's offender score for felony harassment should be a 6 requiring remand for correction of the judgment and sentence, but the State argues that full reconsideration of a residential DOSA is unnecessary because the offender score for witness tampering remains the same and becomes the controlling sentencing term.

Johnson appears to agree in his reply that the higher sentencing range for witness tampering makes Johnson ineligible for a residential DOSA and argues instead that Johnson might be eligible for an exceptional sentence downward. But Johnson did not argue for an exceptional sentence below. On remand, the offender score for the felony harassment conviction should be corrected, and if necessary, Johnson should be sentenced to a term within the standard range for the correct offender score.

C. Clarity of Judgment and Sentence

Johnson also argues that his misdemeanor judgment and sentence is unclear as to whether the trial court ordered 364 days in jail or 12 months of supervised probation. The State concedes, and we accept the State's concession. The sentence for Johnson's misdemeanors should be clarified on remand.

CONCLUSION

In sum, we hold that the trial court did not abuse its discretion by admitting ER 404(b) evidence to show Kiser's reasonable fear, and the trial court's error in admitting that evidence to show identity was harmless. Washington's harassment statute is not unconstitutional. We further hold that the trial court erred by improperly instructing the jury as to the requisite mens rea for harassment but that this error was harmless. There was sufficient evidence to support the conviction on count 3. Johnson's defense counsel performed deficiently by not seeking redaction of judicial findings in exhibits at trial, but Johnson fails to show the deficient performance prejudiced him. Cumulative error did not deprive Johnson of a fair trial.

Accordingly, we affirm Johnson's convictions and remand for reconsideration of a prison-based DOSA, correction of his offender score for the felony harassment conviction, and clarification of the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Cruser, C.J.

CRUSER, C.J.

We concur:

Glasgow, J

GLASGOW, J.

Price, J.

PRICE, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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