**FILED**
**OCTOBER 8, 2026**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>B.E.H.,<br><br>Appellant. | ) | No. 40484-6-III<br><br><br><br><br><br>UNPUBLISHED OPINION |

COONEY, J. — B.E.H. was convicted of harassment following a juvenile adjudicatory hearing. He appeals, arguing (1) the trial court erred in denying his motion to suppress statements he made to law enforcement, (2) Washington's harassment statute is facially unconstitutional, and (3) the conviction must be reversed because the court did not find B.E.H. acted recklessly when making the threatening statements. We disagree with his arguments and affirm.

## BACKGROUND

In 2024, B.E.H., then 14 years old, lived with his grandfather and Sarah Shirley, his grandfather's girlfriend. On March 26, 2024, B.E.H. and Ms. Shirley quarreled over whether B.E.H.'s grandfather had given him permission to have a friend visit the residence. Jerred Ogden, a friend of Ms. Shirley's son, was also present. Ms. Shirley

called the Clarkston Police Department and reported that an argument with B.E.H. had culminated in B.E.H. threatening to get a gun and return to kill her. Officer Colby Martin responded and observed three juveniles walking along the road near Ms. Shirley's residence.

Officer Martin contacted the juveniles and had B.E.H. "step away from the group so [he] could speak with him." Clerk's Papers (CP) at 2. B.E.H. told Officer Martin that he "began to swear and be disrespectful to" Ms. Shirley and that the two had yelled at each other. CP at 2. Officer Martin continued questioning B.E.H. while Sergeant Boyd[1] obtained statements from Ms. Shirley and Mr. Ogden at the residence. Officer Martin arrested B.E.H. after he had questioned B.E.H. and Sergeant Boyd relayed Ms. Shirley's and Mr. Ogden's statements to him. The State charged B.E.H. with one count of harassment.

B.E.H. filed pretrial motions to suppress the statements he made to Officer Martin under RCW 13.40.740 and to dismiss the charge, arguing that Officer Martin's misconduct materially prejudiced his rights. The State responded that RCW 13.40.740 did not apply because (1) the questioning occurred during a *Terry*[2] stop, which does not amount to a custodial interrogation, and (2) Officer Martin did not have probable cause

[1] Sergeant Boyd's full name is not stated in the record.

[2] *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

that B.E.H. was involved in criminal activity. The trial court denied both motions and found, among other things:

> 3. During the detention, Officer Martin (the only officer on scene) was able to identify both juveniles and asked if they had been involved in an incident with the reporting party. The juveniles admitted to being at the location of the alleged incident but denied any wrongdoing. The interaction with the juveniles did not appear to be coercive in the type of questions asked, in the location of the interaction (outdoors in public), or in the number of officers involved.
>
> 4. At no time did Officer Martin provide Miranda warnings or offer the juvenile access to an attorney. Officer Martin did not request the juvenile to waive any rights or ask the juvenile to consent to a search.
>
> 5. A short time after making contact, Sergeant Boyd arrived at Officer Martin's location and confirmed the allegations of the reporting party as credible. Based on Sergeant Boyd's information, Officer Martin developed probable cause to arrest [B.E.H.], the Respondent.
>
> 5. Prior to formal arrest, [B.E.H.] was not in custody, as there was no evidence that he had his movement curtailed to a degree associated with formal arrest. Additionally, the questioning by Officer Martin prior to arrest, did not appear to be designed to be of the kind to likely to illicit incriminating responses.

CP at 62.

The court concluded that "Officer Martin had reasonable suspicion to briefly detain the juveniles," that the interaction was not "coercive," and that B.E.H.'s statements were "voluntary." CP at 62. The court further concluded:

> 3. Officer Martin did not curtail the juvenile's freedom in a way associated with arrest until after Sgt. Boyd arrived on scene to provide additional information on the investigation. Upon receiving Sgt. Boyd's information, the officers developed probable cause. At the point of developing probable cause for arrest, the juvenile would have been entitled to Miranda warnings

> and access to an attorney before questioning. Officer Martin, and the State, do not intend to offer any statements made by the juvenile subsequent to the determination of probable cause.

CP at 62.

On May 29, 2024, Ms. Shirley, Mr. Ogden, and Officer Martin testified during the juvenile adjudicatory hearing. Ms. Shirley testified that she and B.E.H. engaged in a "yelling match" on March 26, 2024, over whether B.E.H.'s grandfather had given him permission to have friends visit the residence. Verbatim Rep. of Proc. (VRP) at 51. She testified, "I had to ask [B.E.H.] to ah, please have his friends leave and he kept saying no, and so, they stepped outside, I asked them 'Please, leave [B.E.H.]' and that's when he proceeded to tell me that 'F-off, I'm going to find a gun and I'm going to come back and kill all of you.'" VRP at 49. Ms. Shirley further testified that she locked herself in the house and "proceeded to call the cops because [B.E.H.] refused to leave." VRP at 52.

Ms. Shirley testified that she was afraid of B.E.H. because she had seen him "get violent before." VRP at 54. She stated that she "didn't want [B.E.H.] to hurt [her]" because she had seen him become "physical" before and "punch his grandpa." VRP at 54, 62. Ms. Shirley stated, "I was shaking so bad I was scared." VRP at 54. When asked whether she believed B.E.H. would kill her, Ms. Shirley responded, "I don't know. I mean, I—I was just really scared and upset and that's why I was on the phone with the police because I—I just felt threatened, yes." VRP at 56. Ms. Shirley later clarified that she did not know if she felt threatened or when B.E.H. was going to carry out his threat.

Mr. Ogden testified that B.E.H. brought a friend to Ms. Shirley's residence without permission on March 26. He stated he heard B.E.H. and Ms. Shirley—who appeared "[d]isappointed and upset"—raise their voices and that "[B.E.H.] started getting a little more angry" and visibly upset. VRP at 74-75. Mr. Ogden testified that he heard B.E.H. say "he would take a gun and kill us all." VRP at 76. Mr. Ogden further testified that he intervened and "started pushing [B.E.H.] towards the driveway." VRP at 77. According to Mr. Ogden, B.E.H. had "thrown [him] to the ground a little bit," "was very extremely agitated," and attempted to punch him. VRP at 77.

Officer Martin testified that he contacted B.E.H. and two of his friends "[a]pproximately half a [city] block" from Ms. Shirley's residence. VRP at 93. He described B.E.H. as "compliant" and "energetic." VRP at 94. Officer Martin testified that B.E.H. admitted he had a verbal dispute with Ms. Shirley. Officer Martin stated that he did not have probable cause to arrest B.E.H. at that point. He testified that he did not provide B.E.H. access to an attorney nor advise him of his *Miranda*[3] rights at that time. Officer Martin also testified that B.E.H. admitted to having an altercation with Ms. Shirley, using "profanities," and engaging in a "pushing match" with Mr. Ogden. VRP at 101-02. Officer Martin testified that he arrested B.E.H. after receiving additional information from Sergeant Boyd.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

In its oral ruling at the close of the juvenile adjudicatory hearing, the court referenced a pattern jury instruction provided by defense counsel, stating, "'A true threat is a statement in a context or under such circumstances where a reasonable person would foresee the statement would be interpreted as a serious expression of intention to inflict bodily harm.'" VRP at 115 (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 36.07, at 652-53 (5d ed. 2024) (WPIC) (quoting *State v. Williams*, 142 Wn.2d 197, 207-08, 26 P.3d 890 (2001)). The court stated, "I believe that's how [Ms. Shirley] felt." VRP at 116. The court further found:

> 3. On [March 26, 2024], [B.E.H.] arrived at the residence with a friend or friends. Ms. Shirley and a Jerred Ogden were at the home. Ms. Shirley told [B.E.H.] that his friends were not allowed over at that time and an argument ensued.
> 4. During the course of the argument, [B.E.H.] disagreed that his friend(s) were not allowed to be at the home and he refused to make them leave. Voices were raised by [B.E.H.] and Sarah Shirley. [B.E.H.] was disrespectful, agitated and was using profane language.
> 5. At one point in the altercation [B.E.H.] stated to [Mr. Ogden] and [Ms. Shirley], that he would obtain a gun and return to "kill you all" or words to that effect.
> 6. After making the threat, Jerred Ogden attempted to escort [B.E.H.] away from the residence and a short scuffle occurred between the two. Sarah Shirley called 911, began to shake, and locked herself in the home.
> 7. Sarah Shirley was fearful of the threat made by [B.E.H.], not necessarily that he would kill her, but that he would immediately or sometime in the future cause her harm.
> 8. The evidence showed that Ms. Shirley became visibly shaken after the words were stated, she had called the police, and had locked

herself in her home. [Ms. Shirley] appeared emotionally upset when testifying.

9. Ms. Shirley had witnessed [B.E.H.] upset in the past, including an incident weeks prior in which he became physical with his grandfather.
10. Jerred Ogden witnessed the elevated interaction between [B.E.H.] and Sarah Shiley [sic]. Jerred Ogden heard [B.E.H.'s] words that he would obtain a gun and kill. Jerred Ogden intervened after the threat in order to remove [B.E.H.] from the scene and protect Sarah Shirley who he did not believe would be able to handle a physical altercation with [B.E.H.]
11. Within minutes of the 911 call, Officer Colby Martin located [B.E.H.] and at least one acquaintance, within a block of the scene of the incident. [B.E.H.] appeared excited, admitted to being at the scene of the argument.

CP at 72-73.

The trial court concluded:

1. On May 26, 2024, in Asotin County, WA, [B.E.H.] did threaten Sarah Shirley;
2. [B.E.H.'s] threat was a true threat, in that a reasonable person would fear the threat would be carried out immediately or in the future;
3. [B.E.H.] did not act with lawful authority; and therefore
4. [B.E.H.] is guilty as charged of the offense(s) of: Count I – Harassment (GM).

CP at 73-74.

B.E.H. timely appeals. This court stayed B.E.H.'s appeal pending the Supreme Court's decision in *State v. Calloway*, 6 Wn.3d 257, 585 P.3d 1270 (2026). On April 30, 2026, after the *Calloway* decision was issued, we requested supplemental briefing from the parties to address a single question:

> How does the Washington Supreme court's recent decision in *State v. Calloway*, No. 103374-5, impact B.E.H.'s arguments relative to RCW 9A.46.020?

Clerk's Letter (Apr. 30, 2026) (emphasis omitted).

Supplemental briefing was due on May 20, 2026. B.E.H. timely filed his supplemental brief, and the State moved for an extension of time. The clerk granted the State's motion, extended the State's deadline to June 1, and provided that a "reply brief, if any, [was] due 30 days after service of Respondent's brief." Clerk's Ruling (May 21, 2026). On June 9, B.E.H. filed a supplemental reply brief and a statement of additional authorities under RAP 10.8. The State then filed a "Motion to Strike [B.E.H.'s] Supplemental Reply Brief and Statement of Additional Authorities" on June 12 (some capitalization omitted). A commissioner of this court ruled that the State's motion to strike would be treated as a motion to modify the clerk's May 21 ruling that permitted B.E.H. to file a reply brief and referred the motion to a panel for consideration. Comm'r's Letter Ruling (June 15, 2026).

## ANALYSIS

### MOTIONS

#### *Motion to Strike Section Two of B.E.H.'s Supplemental Brief*

The State moves to strike section two of B.E.H.'s supplemental brief because it revisits issues related to RCW 13.40.740 rather than addressing the court's request for

additional briefing on RCW 9A.46.020. We agree and strike potions of section two of B.E.H.'s supplemental brief.

RAP 10.1(b) provides that, in any review, the parties may file (1) an appellant's brief, (2) a respondent's brief, and (3) an appellant's reply brief. RAP 10.1(h) further provides that the court may, on its own motion or on motion of a party, authorize or direct the filing of additional briefs beyond those listed in RAP 10.1(b).

Here, we stayed this appeal pending the Supreme Court's decision in *Calloway*. After the Supreme Court issued its decision, we directed the parties to file supplemental briefing addressing a single question concerning RCW 9A.46.020. Section two of B.E.H.'s supplemental brief instead argues harmless error arising from an alleged violation of RCW 13.40.740—an issue outside the scope of this court's request and unrelated to RCW 9A.46.020. Accordingly, we strike the portion of section two of B.E.H.'s supplemental brief that addresses RCW 13.40.740.[4]

*Motion to Modify the Clerk's Ruling and Strike B.E.H.'s Supplemental Reply Brief*

The State next moves to modify the clerk's May 21 ruling permitting B.E.H. to file a supplemental reply brief. We deny the motion.

[4] B.E.H.'s discussion of *State v. Magaña-Arévalo*, 5 Wn.3d 781, 582 P.3d 330 (2026), as it relates to the *Calloway* court's application of *Magaña-Arévalo* in the context of RCW 9A.46.020, does not exceed the scope of our request for supplemental briefing. Thus, we only strike the portion of section two related to RCW 13.40.740.

We review de novo a motion to modify a commissioner's ruling under RAP 17.7. *In re the Vulnerable Adult Pet. of Winter*, 12 Wn. App. 2d 815, 843, 460 P.3d 667 (2020). The same de novo standard applies to a motion to modify a clerk's ruling under RAP 17.7. *Id.*

This court has authority "to perform all acts necessary or appropriate to secure the fair and orderly review of a case." RAP 7.3. "The appellate court may in a particular case, on its own motion or on motion of a party, authorize or direct the filing of briefs on the merits other than those listed in this rule." RAP 10.1(h). Accordingly, a supplemental reply brief may be filed only with leave of the court. *See* RAP 10.1(h).

Here, the supplemental briefing was due on May 20. B.E.H. timely filed his supplemental brief while the State moved for an extension of time. The clerk extended the State's deadline and authorized B.E.H. to file a supplemental reply brief. The State filed its supplemental brief several days after B.E.H.'s supplemental brief was filed. The State's supplemental brief included a motion to strike portions of B.E.H.'s supplemental brief and responded in part to arguments raised in his supplemental brief. Under these circumstances, permitting B.E.H. to file a supplemental reply was necessary to ensure the fair and orderly review of the case. We therefore deny the State's motion to modify the clerk's May 21 ruling.

*Motion to Strike Statement of Additional Authorities*

Lastly, the State moves to strike B.E.H.'s statement of additional authorities. We grant the motion.

RAP 10.8(a) permits a party to file a statement of additional authorities, but the authorities must relate to a point made in the briefing or at oral argument. RAP 10.8(b) requires the statement to include argument explaining the relevance of the additional authorities and to provide a pinpoint citation to the portion of the brief to which the authority relates. RAP 10.8(b).

The State argues that B.E.H.'s filing exceeds RAP 10.8 because it functions as additional substantive briefing. Specifically, the State contends the statement of additional authorities consists entirely of argument regarding the application of *State v. Magaña-Arévalo*, 5 Wn.3d 781, 582 P.3d 330 (2026), which B.E.H. had already addressed.

In his statement, B.E.H. cites *Magaña-Arévalo* as additional authority supporting his claim that the trial court erred by admitting his statements to Officer Martin. However, B.E.H. already presented analysis and argument regarding *Magaña-Arévalo* in his supplemental brief.

B.E.H.'s statement of additional authorities exceeds the limited purpose of RAP 10.8 because it advances argument B.E.H. already made in his supplemental brief, and

*Magaña-Arévalo* had already been cited by both parties. Accordingly, we grant the State's motion and strike B.E.H.'s statement of additional authorities.

ADMISSION OF B.E.H.'S STATEMENTS UNDER RCW 13.40.740

B.E.H. contends the trial court erred by denying his motion to suppress statements he made to Officer Martin. The State responds that the court properly denied the motion and, alternatively, that any error was harmless beyond a reasonable doubt. We hold that the trial court properly denied the motion to suppress.

When reviewing a trial court's denial of a motion to suppress, we determine whether substantial evidence supports the challenged findings of fact and whether the findings of fact support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Substantial evidence exists where there is a sufficient quantity of evidence . . . to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings of fact are verities on appeal. *Id*. We review de novo whether a trial court's conclusions of law are properly derived from the findings of fact. *State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158 (2012).

RCW 13.40.740(1)(a)-(c) requires law enforcement to provide a juvenile access to an attorney for consultation before the juvenile waives any constitutional rights when law enforcement (1) "[q]uestions [the] juvenile during a custodial interrogation," (2) "[d]etains [the] juvenile based on probable cause of involvement in criminal activity,"

or (3) "[r]equests that the juvenile provide consent to an evidentiary search of the juvenile or the juvenile's property, dwellings, or vehicles under the juvenile's control." Statements obtained under any of these circumstances without access to an attorney for consultation and a knowing, intelligent, and voluntary express waiver are inadmissible. RCW 13.40.740(3)(a).

"Custodial interrogation" is defined as "express questioning or other actions or words by a law enforcement officer which are reasonably likely to elicit an incriminating response from an individual and occurs when reasonable individuals in the same circumstances would consider themselves in custody." RCW 13.40.020(10). "Custody" is not defined under chapter 13.40 RCW. However, the definition of "custody" for purposes of *Miranda* rights is instructive.

In *Miranda v. Arizona*, the United States Supreme Court defined "custody" for purposes of a custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Custody consists of circumstances where "a suspect's freedom of action is curtailed to a 'degree associated with a formal arrest.'" *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)).

Our courts employ an objective totality of the circumstances test to determine whether a reasonable person in the suspect's position would have felt restricted to the same degree as a formal arrest. *State v. Escalante*, 195 Wn.2d 526, 533-34, 461 P.3d 1183 (2020). "Relevant circumstances may include the nature of the surroundings, the extent of police control over the surroundings, the degree of physical restraint placed on the suspect, and the duration and character of the questioning." *Id.* at 534. Age is also a relevant factor in determining whether a minor is in custody. *J.D.B. v. N. Carolina*, 564 U.S. 261, 265, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).

B.E.H. contends the trial court erred by denying his motion to suppress statements he made to Officer Martin because Officer Martin conducted a custodial interrogation without first providing access to an attorney for consultation, as required by RCW 13.40.740. The State responds that B.E.H. was not subjected to custodial interrogation and that Officer Martin's contact with him was akin to a *Terry* stop. We agree with the State.

"As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution." *Garvin*, 166 Wn.2d at 249. The State bears the burden of showing a warrantless search or seizure "falls within one of the carefully drawn exceptions to the warrant requirement." *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015). One exception to the warrant requirement is a *Terry* investigative stop.

*Garvin*, 166 Wn.2d at 249. During a *Terry* stop, law enforcement may briefly stop and detain an individual without a warrant, so long as the officer has reasonable suspicion that the individual is engaged or is about to be engaged in criminal activity. *Id.* at 250. Furthermore, "[a]n officer making a *Terry* stop may ask a moderate number of questions to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for the purposes of *Miranda*." *State v. Heritage*, 152 Wn.2d 210, 219, 95 P.3d 345 (2004) (citing *Berkemer*, 468 U.S. at 439-40).

Both the State and B.E.H. cite *State v. Heritage* as being instructive in determining whether B.E.H. was subjected to a custodial interrogation. In *Heritage*, our Supreme Court held that the juvenile, Ms. Heritage, was not in custody, for purposes of *Miranda*, where park security guards approached her and her friends while wearing duty belts with handcuffs and t-shirts that identified them as park security. *Id.* at 218-19. The security guards did not detain or search the individuals, and they made it apparent to the group they did not have the authority to arrest. *Id.* at 219. The questioning was brief; the security guards asked the group who a "marijuana pipe" belonged to, and Ms. Heritage claimed ownership. *Id.* The court determined that the officers asked a moderate number of questions related to their suspicions that the group was engaged in smoking marijuana, and a reasonable person in the position of the defendant would not have believed their freedom was restricted to the degree of a formal arrest. *Id.* The court further determined

that Ms. Heritage's age did not render the encounter custodial because (1) the questioning was done in public, (2) Ms. Heritage was not isolated, (3) the security guards assured Ms. Heritage that they could not arrest her, and (4) Ms. Heritage admitted the pipe was hers after brief questioning. *Id.*

Contrastingly, in *State v. France*, 129 Wn. App. 907, 910-11, 120 P.3d 654 (2005), which B.E.H argues is more illustrative of the facts in this case, this court determined that Mr. France was in custody because (1) he was expressly told that he was not allowed to leave until the matter was "cleared up," (2) the duration of questioning by law enforcement was uncertain, (3) Mr. France's freedom was curtailed indefinitely, and (4) police had probable cause to arrest Mr. France but delayed doing so to avoid giving Mr. France a *Miranda* warning. Moreover, the *France* court specifically noted that the questions asked by law enforcement were not open-ended or general questions but were rather "'designed to obtain an admission'" related to an element of the crime charged. *Id.* at 909 (quoting *State v. France*, 121 Wn. App. 394, 399-400, 88 P.3d 1003 (2004)).

Here, Officer Martin contacted B.E.H. and his friends within minutes of receiving the call regarding Ms. Shirley's residence. B.E.H. and the other juveniles were walking on a public sidewalk near the residence and matched the description Officer Martin had been given. Officer Martin asked, "Who's [B.E.H.]?" and B.E.H. identified himself. VRP at 99. Officer Martin then "had [B.E.H.] step away from the group so [he] could speak with him" and asked him "what the call was about." CP at 2; VRP at 99. The

encounter lasted only minutes, and Officer Martin did not arrest B.E.H. until Sergeant Boyd gave him more information from his contact with Ms. Shirley and Mr. Ogden.

Officer Martin's contact with the juveniles was brief, occurred in a public setting, and involved only one officer. Officer Martin did not physically restrain B.E.H. and did not tell him he was under arrest or otherwise not free to leave. Officer Martin did not develop probable cause to arrest B.E.H. until Sergeant Boyd provided additional information.

This brief encounter does not show that a reasonable person in B.E.H.'s position—accounting for age—would have understood his freedom of movement to be restrained to the degree associated with formal arrest. Unlike in *France*, Officer Martin did not ask questions calculated to elicit an admission and did not tell B.E.H. that he was not free to leave. At most, the encounter amounted to an investigatory detention under *Terry*. Accordingly, B.E.H. was not subjected to custodial interrogation, RCW 13.40.740 was not triggered, and Officer Martin was not required to provide B.E.H. access to counsel.

Substantial evidence supports the challenged trial court findings, which in turn support the trial court's conclusion that B.E.H.'s freedom was not curtailed in a manner associated with a formal arrest when he made statements to Officer Martin. The trial court did not err in denying B.E.H.'s motion to suppress the statements he made to Officer Martin.

HARASSMENT STATUTE

B.E.H. contends Washington's harassment statute, RCW 9A.46.020, is facially unconstitutional. While this appeal was pending, however, our Supreme Court rejected that claim in *State v. Calloway*, 6 Wn.3d 257, 585 P.3d 1270 (2026). We follow *Calloway* and hold that RCW 9A.46.020 is constitutional.

B.E.H. also argues the trial court applied an improper mens rea by using a negligence standard rather than finding he acted recklessly in making the threatening statements. The State concedes the court applied the wrong mens rea but argues the error was harmless beyond a reasonable doubt. We agree with the State.

Here, the trial court did not apply the subjective standard requiring proof that B.E.H. "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Counterman v. Colorado*, 600 U.S. 66, 69, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023). Instead, in finding B.E.H. guilty of harassment, the court relied on the pre-*Counterman* objective "true threat" formulation. The court referenced WPIC 36.07 and recited the comment stating, "'A true threat is a statement in a context or under such circumstances where a reasonable person would foresee the statement would be interpreted as a serious expression of intention to inflict bodily harm.'" VRP at 115 (quoting WPIC 36.07 at 652-53 (quoting *Williams*, 144 Wn.2d at 207-08)). The court then stated, "I believe that's how [Ms. Shirley] felt." VRP at 116. Consistent with that approach, the court's written findings stated, "[B.E.H.'s] threat was a

true threat, in that a reasonable person would fear the threat would be carried out immediately or in the future." CP at 73. The court employed the incorrect mens rea by applying an objective reasonable person standard rather than the required recklessness standard, which was error.

Constitutional error, however, remains subject to harmless error review. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Under the constitutional harmless error analysis, the State bears the burden of proving beyond a reasonable doubt that the constitutional error did not contribute to the verdict. *State v. Delbosque*, 195 Wn.2d 106, 124, 456 P.3d 806 (2020). In assessing constitutional harmless error, we consider "*both the strength of the properly admitted evidence of guilt* as well as the prejudicial impact of the erroneously admitted evidence on even the properly admitted evidence" and then determine whether the State has proved the error harmless beyond a reasonable doubt. *Magaña-Arévalo*, 5 Wn.3d at 810 (emphasis added). The record before us must affirmatively demonstrate harmlessness. *State v. Burri*, 87 Wn.2d 175, 182, 550 P.2d 507 (1976).

Here, the evidence shows that B.E.H. consciously disregarded a substantial risk that his statements would be understood as threats of violence and made them anyway. Both Ms. Shirley and Mr. Ogden testified that B.E.H. said he would get a gun and come back to kill them. Mr. Ogden testified that B.E.H. was visibly upset, angry, "extremely agitated," and that he felt compelled to physically intervene. VRP at 77. Ms. Shirley

testified that she became afraid, was "shaking," locked herself inside of her home, and called law enforcement after B.E.H. made the statement. VRP at 54.

The properly admitted evidence establishes beyond a reasonable doubt that the trial court's use of an objective reasonable person standard did not affect the verdict. The same evidence supporting the court's "true threat" finding also prove that B.E.H. acted recklessly—that he consciously disregarded a substantial risk his statements would be understood as threats of violence. Accordingly, any error was minimal and did not contribute to the verdict. The State has shown that the error was harmless beyond a reasonable doubt.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Staab, C.J.

Murphy, J.