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**OPINION, SUPREME COURT OF THE
STATE OF WASHINGTON
(MARCH 19, 2026)**

THIS OPINION WAS FILED FOR RECORD
AT 8 A.M. ON MARCH 19, 2026

/s/ Sarah R. Pendleton
Supreme Court Clerk

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TURNER LEE CALLOWAY,

Petitioner.

No. 103374-5

En Banc

Filed: March 19, 2026

Before: Debra L. STEPHENS, C.J.,
Barbara A. MADSEN, Raquel MONTOYA-LEWIS,
Charles W. JOHNSON, G. Helen WHITENER,
Steven C. GONZÁLEZ, Salvador “Sal” MUNGIA, JJ.,
Mary I. YU, J.P.T.

MADSEN, J.—

The First Amendment was designed to protect essential pillars of a democratic society—most notably freedom of speech. U.S. CONST. amend. I. Still, this freedom is not without limits. This case asks us to determine whether Washington’s harassment statute, RCW 9A.46.020, is facially unconstitutional in violation of the First Amendment. This court previously held that in order to be convicted of felony harassment, the State must prove that a “true threat” was made, and that the defendant was negligent as to whether their words would be understood as a threat.

Turner Lee Calloway was convicted of one count of felony harassment. While his appeal was pending, the United States Supreme Court released its decision in *Counterman v. Colorado*, 600 U.S. 66, 82, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), which held that recklessness is the appropriate mens rea to support a criminal conviction for communications constituting a “true threat.”¹ Based on *Counterman*, Calloway argued that Washington’s harassment statute is unconstitutional because it criminalizes threats based on a negligence standard. He further argued that as a result, the jury instructions used in his case were erroneous and that the State cannot prove that the error was harmless beyond a reasonable doubt due to the controverted evidence in this case. The Court of Appeals affirmed his conviction and held that *Counterman* did not render the harassment statute unconstitutional on its face. Calloway sought review here.

¹ Both parties agree that *Counterman* applies since Calloway’s appeal was pending when *Counterman* was released.

We hold that the harassment statute is constitutional. *Counterman* requires a mens rea standard of at least “recklessness.” As written, our felony harassment statute does not prevent the State from proving a true threat based on recklessness. However, the jury instruction defining a “true threat” informed the jury that the mens rea required to convict Calloway of making a true threat under the statute was negligence, while *Counterman* held the mens rea must be at least recklessness. Therefore, the remaining issue is whether the instructional error was harmless. This court recently clarified the test for constitutional harmless error in *State v. Magaña-Arévalo*, No. 103586-1, slip op. at 4 (Wash. Jan. 15, 2026). Accordingly, we affirm the Court of Appeals in part, reverse in part, and remand for the court to determine whether the error in the “true threat” instruction was harmless beyond a reasonable doubt as explained in *Magaña-Arévalo*.

BACKGROUND

Turner Calloway and A.D. were close friends for about a decade. Calloway initially had a romantic interest in A.D.; however, they never dated and they maintained a platonic friendship. Calloway and A.D.’s friendship ebbed and flowed, particularly in 2020, since a miscommunication resulted in the pair not speaking for about a year. In October 2021, they both apologized and reconciled. The reconciliation was short-lived; A.D. testified that Calloway began acting strange after drinking some beers when they were together at a bar watching a football game. He then got angry with her when she did not want to go see the city lights in Seattle with him. Shortly thereafter, things took a turn.

In the morning on the last day of October, Calloway testified that he received a call from A.D. after he had only texted, not called, about whether she had seen his missing glasses. However, A.D. testified that Calloway was calling her nonstop that same morning with the calls starting as early as 6:51 a.m. A.D. testified that the calls were brief since Calloway would say something and then hang up and call again, and if she did not answer, he would leave threatening and degrading voicemails. A.D. initiated some of the calls to Calloway and left a voice message, which the jury heard, where she used profanity, mocked Calloway, and told him she was not scared of him; although she later testified that she was “very terrified” and was attempting to “[s]care him off.” Verbatim Rep. of Proc. (VRP) (July 5, 2022) at 118-19.

As the day went on, A.D. testified that the threats escalated. In the afternoon when the calls persisted, A.D. had an acquaintance of hers join in a three-way call and pose as her boyfriend. She testified that Calloway threatened to kill them both. A.D. further stated that “he threatened everything; kidnap me, what he was going to do to me.” *Id.* at 116. However, Calloway testified that the acquaintance had threatened to kill him, which concerned his girlfriend, leading him to take her to her parent’s home for the night.

When questioned about the exact words Calloway used to threaten her, A.D. testified that he told her:

Bitch, you going to die today; bitch you ain’t shit; bitch you going [to] the devil the day that you die; you going to hell today, bitch; today is your day; you’re going to die today, bitch

and hang up, call back; I'm on my way to kill you, bitch; you're going to die today, bitch.

Id. at 120.² These threats prompted A.D. to call the police later in the evening.

Deputy Brent Johnson responded to the call and testified that upon arriving he found A.D. crying and shaking, and that she had told him she was being harassed and was going to leave for the night for fear of her safety. He further testified that while he was speaking with A.D. for about half an hour, “[h]er cell phone kept ringing over and over.” VRP (July 6, 2022) at 153. A.D. informed the deputy that Calloway kept calling her and she proceeded to answer some of the calls on speakerphone, but the deputy was unable to understand what was being said. Eventually she handed the phone to Deputy Johnson, who identified himself as a Pierce County Sheriff’s deputy and asked Calloway why he kept calling A.D. Calloway angrily told the deputy to “fuck off.” *Id.* at 156. He then stated he was outside A.D.’s house and was going to kill A.D.

At this point, Deputy Johnson called for another police unit to come to their location for both his and A.D.’s safety in case Calloway did show up. Shortly after, Deputy Riley Jorgensen arrived and they were all standing on A.D.’s porch when they saw a white Chevy truck drive by, which A.D. identified as Calloway’s vehicle.

² A.D. testified that Calloway threatened her during phone calls, through text messages, and by leaving voicemails. However, none of these were entered into evidence as A.D. testified that she had a government phone with limited data. VRP (July 5, 2022) at 137.

Calloway's vehicle was stopped by another deputy about 30 blocks from A.D.'s home. Deputy Jorgensen testified that Calloway had told him that he had been drinking with his friends and had driven by to fight A.D.'s "boyfriend" who had threatened him earlier in the day. He further stated he had no intention of fighting A.D. Calloway later testified that he went to see why her "boyfriend" wanted to kill him.

Calloway was placed under arrest and charged with one count of felony harassment and one count of stalking. Calloway later testified that he made no threats to A.D., Deputy Johnson, or A.D.'s acquaintance.

At the time of trial, this court held that "[a] 'true threat' is 'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life' of another person." *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (second alteration in original) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001)). The jury received the following instruction:

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

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious

expression of intention to carry out the threat rather than as something said in jest or idle talk.

Clerk's Papers (CP) at 20 (jury instruction 7).

In its closing argument, the State argued:

It's not a jest or idle talk to say, bitch, you're going to die. You're done. I'm outside your—I'm outside, I'm around the corner, I'm coming to kill you, as you heard Deputy Johnson testify that he heard the defendant himself say over the phone. These were threats that were not done in jest; they were not done as a joke. These are threats the defendant—that a reasonable person in the defendant, the speaker's shoes, what the intention behind those were and what those words meant, and the impact they would have on Ms. [A.D.].

So putting that all together, on October 31st, 2021, the defendant knowingly threatened to kill [A.D.] immediately or in the future.

VRP (July 6, 2022) at 224. The defense argued that the State did not prove beyond a reasonable doubt that Calloway made any threats at all given the lack of voicemails or text messages produced at trial to show that Calloway made the threats that A.D. and Deputy Johnson testified to hearing.

The jury found Calloway not guilty of the stalking charge but guilty of the harassment charge. Calloway appealed.

After he appealed his judgment and sentence, the United States Supreme Court released its decision in

Counterman. Based on *Counterman*, Calloway asserted a First Amendment facial challenge to Washington’s harassment statute, RCW 9A.46.020 (1),³ and argued further that *Counterman* rendered the true threat jury instruction used in his case erroneous since it misinformed the jury of the requisite mens rea and that the error was not harmless.

The Court of Appeals held, among other things, that RCW 9A.46.020 is not facially unconstitutional. It further held that “the jury instructions in this case were erroneous because they allowed the jury to convict Calloway without finding that he acted recklessly, as *Counterman* requires. But this error was harmless beyond a reasonable doubt in light of the threatening statements Calloway made and the circumstances under which he made them.” *State v. Calloway*, 31 Wn. App. 2d 405, 409-10, 550 P.3d 77, review granted, 3 Wn.3d 1031 (2024). Therefore, Calloway’s judgment and sentence was affirmed, but the case was remanded for the trial court to strike the \$500 crime victim penalty assessment. *Id.* at 427. Calloway sought discretionary review here. We granted review.

ANALYSIS

1. Standard of Review

The constitutionality of a statute is reviewed de novo. *State v. Reynolds*, 2 Wn.3d 195, 201, 535 P.3d 427 (2023). “We interpret statutes as constitutional if we can.” *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm’n*, 173 Wn.2d 608, 619, 268 P.3d 929

³ Calloway was convicted of violating an older version of the harassment statute; however, we cite the current version as the amendment does not impact our analysis.

(2012); *Utter ex rel. State v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015) (“We construe statutes to avoid constitutional doubt”).

2. RCW 9A.46.020 Is Facially Constitutional

A statute is presumed constitutional, and the burden falls on the challenging party to demonstrate unconstitutionality beyond a reasonable doubt. *Gerberding v. Munro*, 134 Wn.2d 188, 196, 949 P.2d 1366 (1998). A statute is facially unconstitutional if “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *State v. Hunley*, 175 Wn.2d 901, 916, 287 P.3d 584 (2012) (quoting *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004)). Essentially, the statute is “rendered totally inoperative.” *Id.* Statutes that criminalize protected speech will be invalidated only if a limiting instruction cannot save them. *See State v. Johnston*, 156 Wn.2d 355, 363, 127 P.3d 707 (2006).

Both the federal and state constitutions protect freedom of speech. U.S. CONST. amends. I, XIV; WASH. CONST. art. I, § 5. The government cannot punish or restrict speech based on its message, ideas, subject matter, or content. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). However, the government may do so in limited instances, such as communications involving “true threats.” This is because we recognize the government’s overriding interest in protecting “‘individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.’” *Kilburn*, 151 Wn.2d at 43 (internal quotation marks omitted) (quoting *State v. J.M.*, 144 Wn.2d 472, 478, 28 P.3d 720 (2001)).

State courts were divided on whether the First Amendment requires proof of a defendant's subjective mental state in true threat cases or whether an objective reasonable person standard suffices. Washington courts have historically applied an objective standard to determine whether a statement constitutes a true threat. We stated that a "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person." *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting *Kilburn*, 151 Wn.2d at 43). However, "we have never held the true threat requirement to be an essential element of a harassment statute." *State v. Allen*, 176 Wn.2d 611, 628, 294 P.3d 679 (2013) (plurality opinion).

In *Schaler*, we interpreted the threats-to-kill provision of RCW 9A.46.020, which is the same provision at issue here, to require only that a defendant be at least negligent as to their threats' effect on listeners. Therefore, we analyzed whether "a reasonable speaker would foresee that the threat would be considered serious." *Schaler*, 169 Wn.2d at 283; see *State v. Trey M.*, 186 Wn.2d 884, 892-93, 902-04, 383 P.3d 474 (2016) (applying an objective reasonable person standard, rather than a subjective intent to threaten, to determine whether a statement is a "true threat"); *Williams*, 144 Wn.2d at 207-08.

Calloway argues that based on *Counterman*, our felony harassment statute is facially unconstitutional and cannot be constitutionally applied because the legislature has acquiesced to our use of the negligence-based standard to determine whether a statement is

a “true threat.”⁴ See *O’Day v. King County*, 109 Wn.2d 796, 807, 749 P.2d 142 (1988) (once this court construes a statute, that construction becomes a part of the legislation as if it were written into it).

Counterman rejected an objective reasonableness standard in favor of a subjective mental state requirement in true threat prosecutions; thus, the State has the burden to prove at least “recklessness.” This standard requires that a defendant “consciously disregarded a substantial risk that his communications

⁴ Calloway cites a Michigan case, *People v. Kvasnicka*, No. 371542, 2025 WL 492469, at *1 (Mich. Ct. App. Feb. 13, 2025), to support his argument that our felony harassment statute is unconstitutional under *Counterman* and the First Amendment. The Michigan Court of Appeals held that their statute proscribing the making of a terrorist threat was facially unconstitutional because it did not provide a proper mens rea standard as applied to the defendant. *Id.* at 4. The *Kvasnicka* case was vacated by the Michigan Supreme Court and remanded to the Court of Appeals, which, on remand, held that the statute at issue was not facially unconstitutional. *People v. Kvasnicka*, No. 371542, 2025 WL 2045006, at *6 (Mich. Ct. App. July 21, 2025). The Michigan Supreme Court has now granted review of three issues: “(1) whether the plain language of MCL 750.543m(1)(a) includes a scienter requirement that is consistent with *Counterman* . . . (2) whether the constitutional-doubt canon permits a court to deviate from ordinary principles of statutory interpretation when assessing ‘whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided[.]’ . . . and (3) whether it is appropriate to adopt a limiting construction of MCL 750.543m(1)(a) to remedy any remaining constitutional deficiency.” *People v. Kvasnicka*, 28 N.W.3d 710, 710 (Mich. Dec. 29, 2025) (order granting review) (second and third alterations in original). The case has yet to be decided and thus has limited persuasive value. As discussed below, we will hold a statute to be facially unconstitutional only if it cannot be constitutionally applied. Here, we hold that a limiting instruction remedies any constitutional deficiency in the statute.

would be viewed as threatening violence.” *Counterman*, 600 U.S. at 69.

In *Counterman*, the defendant was charged with violating Colorado’s stalking statute, COLO. REV. STAT. 18-3-602(1)(c).⁵ *Id.* at 70. The defendant argued that his messages were not “true threats” and moved to dismiss the charge on First Amendment grounds. *Id.* at 71. The trial court denied the motion after finding that an objective, reasonable person would view the messages as threatening. *Id.* The appellate court affirmed. *Id.* However, the United States Supreme Court ultimately determined that the First Amendment requires the State to prove that the defendant was at least reckless even though that standard would shield some true threats from liability. *Id.* at 75. It held that in true threat cases, a subjective mental state of “recklessness” is constitutionally required to avoid chilling protected speech.

⁵ The statute stated:

- (1) A person commits stalking if directly, or indirectly through another person, the person knowingly:
 - (a) Makes a credible threat to another person, and in connection with the threat, repeatedly follows, approaches, contacts, or places under surveillance that person. . . . or
 - (b) Makes a credible threat to another person and, in connection with the threat, repeatedly makes any form of communication with that person. . . . or
 - (c) Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person . . . that would cause a reasonable person to suffer serious emotional distress. . . .

“Recklessness” in the context of true threats “means that a speaker is aware ‘that others could regard his statements as’ threatening violence and ‘delivers them anyway.’” *Id.* at 79 (quoting *Elonis v. United States*, 575 U.S. 723, 746, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) (Alito, J., concurring in part and dissenting in part)).

However, as discussed above, a statute is facially unconstitutional only if there are no circumstances in which the statute, as currently written, can be constitutionally applied. That is not the case here.

Our felony harassment statute provides that

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . [and]
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. “Words or conduct” includes, in addition to any other form of communication or conduct, the sending of an electronic communication.
- (2)
 - (a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.
 - (b) A person who harasses another is guilty of a class C felony if any of the following apply: . . . (ii) the person harasses

another person under subsection (1) (a) (i) of this section by threatening to kill the person threatened or any other person. . . .

RCW 9A.46.020. The statute requires the State to prove that a defendant knowingly threatened another person. Yet nothing in the statute prevents it from being applied in a constitutionally permissible manner post-*Counterman*. It neither requires the State to prove a true threat based on negligence nor prevents the State from proving a true threat based on recklessness. Since *Counterman* does not change any of the elements of our felony harassment statute, it is sufficient to give the jury an instruction defining true threat and explaining the requisite mens rea required to convict in true threat prosecutions as was done here. We have commonly held that such an instruction is sufficient to protect a defendant's First Amendment rights. See *Allen*, 176 Wn.2d at 630; *Johnston*, 156 Wn.2d at 363-64; *State v. Tellez*, 141 Wn. App. 479, 483-84, 170 P.3d 75 (2007).

3. Harmless Error

Here a "to convict" jury instruction was given, separate from the "true threat" instruction, requiring the jury to find that Calloway *knowingly* threatened to kill A.D. immediately or in the future. The issue is that pre-*Counterman*, true threat jury instructions used an objective "reasonable person" standard regarding a defendant's understanding that the content of their communication would be understood by the listener as a threat. In other words, the true threat instruction did not ensure that the jury understood it must find, at a minimum, that Calloway was "aware

‘that others could regard [the] statements as’ threatening violence,” but that he “‘deliver[ed] them anyway.’” *Counterman*, 600 U.S. at 79 (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)).

Given the error, it is the State’s burden to prove harmlessness beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). Not every erroneous jury instruction requires a conviction to be set aside. *See Neder v. United States*, 527 U.S. 1, 15-16, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)) (“[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.”). This requires a reviewing court to consider both the strength of the evidence of guilt as well as the prejudicial impact of the erroneous jury instruction. *See Magaña-Arévalo*, No. 103586-1, slip op. at 4; *State v. Brown*, 147 Wn.2d 330, 338, 58 P.3d 889 (2002).

The harmless error analysis “serve[s] a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.” *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). An error is not harmless “when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.” *Schaler*, 169 Wn.2d at 288. Alternatively, a misstatement of the law in a jury instruction or even an omission of an essential element is harmless if that element is supported by uncontroverted evidence. *Brown*, 147 Wn.2d at 341.

Since it is rare that the State's key evidence in criminal trials will not be controverted in some way, the reviewing court may find harmless error when after a thorough examination of the record, it concludes beyond a reasonable doubt that the jury verdict would have been the same. *State v. Berube*, 150 Wn.2d 498, 505 n.2; 79 P.3d 1144 (2003). We remand to the Court of Appeals to determine whether the State can prove that the erroneous jury instruction here was harmless beyond a reasonable doubt as clarified in *Magaña-Arévalo*.

CONCLUSION

We hold that our felony harassment statute is facially constitutional and that the true threat jury instruction in this case did not properly inform the jury of the requisite mens rea to be convicted under our felony harassment statute. We affirm in part, reverse in part, and remand for the Court of Appeals to determine whether the State has established beyond a reasonable doubt that the instructional error was harmless.

/s/ Madsen

Madsen, J.

WE CONCUR:

/s/ Stephens

Stephens, C.J.

/s/ Johnson

Johnson, J.

/s/ González

González, J.

/s/ Montoya-Lewis
Montoya-Lewis, J.

/s/ Whitener
Whitener, J.

/s/ Mungia
Mungia, J.

/s/ Yu
Yu, J.P.T.

**CONCURRING OPINION OF
JUSTICE GORDON MCCLOUD**

GORDON McCLOUD, J. (concurring)—I agree with the majority that the United States Supreme Court’s decision in *Counterman v. Colorado*¹ changed Washington law as it relates to our felony harassment statute, RCW 9A.46.020. But I disagree about exactly how it changed Washington law.

The majority acknowledges that “the true threat instruction [in this felony harassment case] did not ensure that the jury understood it must find, at a minimum, that [Turner Lee] Calloway was ‘aware that others could regard [the] statements as threatening violence,’ but that he ‘deliver[ed] them anyway.’” Majority at 13 (third and fourth alteration in original) (quoting *Counterman*, 600 U.S. at 79). The majority nevertheless concludes that “*Counterman* does not change any of the elements our felony harassment statute.” *Id.* at 13.

The majority does not reach this conclusion because our felony harassment statute already used the mental state, or “mens rea,” of “recklessness,” as *Counterman* requires. The majority could not do that because RCW 9A.46.020 does not use that word, and our prior controlling precedent interpreting that statute requires the State to prove only negligence, not recklessness. *See, e.g., State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010). Instead, the majority reaches that conclusion because the statute does not bar trial

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

courts from telling the jury the correct mens rea (*i.e.*, recklessness) if they choose to do so. *Id.* at 12-13.

This analysis is strained. I would candidly acknowledge that our felony harassment statute does not clearly say that the State must prove at least recklessness to obtain a conviction. *See* RCW 9A.46.020. I would further acknowledge that our controlling precedent has interpreted that statute to mean that the State must prove only negligence, not recklessness, knowledge, or intent, to prove a violation of that statute. *E.g.*, *Schaler*, 169 Wn.2d at 287. I would continue that those prior controlling precedential interpretations do concern an element of the crime—the element of intent, or mens rea, or scienter. And I would explain that that interpretation was incorrect, based on *Counterman*. Finally, I would adopt a different interpretation of the statute—based on its plain language and controlling rules concerning interpretation of statutes to protect First Amendment rights—by concluding that RCW 9A.46.020 requires the State, in order to gain a conviction, must prove that the defendant knowingly threatened the victim. U.S. CONST. amend. I.

I therefore concur in the outcome, but offer a different analysis.

I. *Counterman* Overrules Our Prior Precedent About an Element of Felony Harassment. It Holds That the State Must Prove a Mental Element of at Least Recklessness, Rather Than Just Negligence

As explained above, our prior controlling precedent held that the mens rea for a conviction of felony

harassment is negligence. *E.g.*, *Schaler*, 169 Wn.2d at 287.

Counterman overrules that line of cases. *Counterman* ruled that “[t]rue threats of violence are outside the bounds of First Amendment protection and punishable as crimes” and that “a statement can count as such a threat based solely on its objective content.” 600 U.S. at 69, 72. To be clear about that point, the Supreme Court said it again in different words: “Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat . . .” *id.* at 74 (citing *Elonis v. United States*, 575 U.S. 723, 733, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015)), and again: “The existence of a threat depends not on ‘the mental state of the author,’ but on ‘what the statement conveys’ to the person on the other end.” *Id.* (quoting *Elonis*, 575 U.S. at 733). So, words constitute a true threat if they are sufficiently harassing, threatening, or terrorizing—regardless of the speaker’s mental state.

Counterman continued, however, that such true threats cannot be criminalized unless the government proves something more: that the defendant made that true threat with a culpable state of mind, that is, a mental state of at least recklessness. That’s clear from *Counterman*’s introductory remarks, framing the question that court was addressing: “True threats of violence, everyone agrees, lie outside the bounds of the First Amendment’s protection. *And a statement can count as such a threat based solely on its objective content.* The first dispute here is about *whether the First Amendment nonetheless demands* that the State in a true-threats case prove that the defendant was

aware in some way of the threatening nature of his communications.” *Id.* at 72 (emphasis added).

The *Counterman* majority ruled that the answer is yes—a statute that criminalizes true threats requires the State to prove a culpable mental state as an element of the crime for the statute to comply with the First Amendment. To be sure, *Counterman* reiterates that “[t]rue threats’ of violence is [a] historically unprotected category of communications.” *Id.* at 74 (citing *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); *United States v. Alvarez*, 567 U.S. 709, 717-18, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) (plurality opinion)). But *Counterman* continues that those unprotected true threats still can’t be criminalized without proof of one additional element—the element of a culpable mental state of at least recklessness: “Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. . . . [A]n important tool to prevent that [chilling effect] outcome—to stop people from steering ‘wide[] of the unlawful zone’—is to condition liability on the State’s showing of a culpable mental state.” *Id.* at 75 (fourth alteration in original).

Thus, the Supreme Court ruled that the government must prove a specific intent element—the element that the defendant had a culpable mental state when uttering a “true threat” that was objectively threatening—in order to convict one of a crime. The mental state element that the Supreme Court chose—after considering the risks and benefits of different mental states—was at least “recklessness.” *Id.* at 79-83.

Notably, the Supreme Court called this recklessness mental state a necessary “element” of the crime in a case like *Counterman*’s: “The same reasoning counsels in favor of requiring *a subjective element* in a true-threats case.” *Id.* at 77 (emphasis added).

I don’t think the Supreme Court was being sloppy when they called this mental state an “element.” I think they meant it. The majority used the same description “element” again just one paragraph later in explaining how it came to its conclusion.² And the majority analogized to prior Supreme Court decisions requiring proof of “actual malice” in defamation and libel cases and proof of scienter in obscenity cases³—all elements of those claims.

I therefore disagree with the majority’s assertion that *Counterman* did not change any element of Washington’s felony harassment crime. It changed the required mental state element that we had previously read into that statute from negligence to at least recklessness.

² “The reasoning—and indeed some of the words—came straight from this Court’s decisions insisting on a subjective element in other unprotected-speech cases, whether involving defamation, incitement, or obscenity.” *Id.* at 78.

³ *Id.* at 76 (“False and defamatory statements of fact, we have held, have ‘no constitutional value.’ Yet a public figure cannot recover for the injury such a statement causes unless the speaker acted with ‘knowledge that it was false or with reckless disregard of whether it was false or not.’ *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). . . .” (citations omitted) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974))); see also *id.* at 80-81.

II. We Should Now Interpret the Felony Harassment Statute’s Mental Element of Knowledge to Apply to All Parts of the Statute—including the “True Threats” Part—to Render It Constitutional

RCW 9A.46.020 lacks that required mental state element in its subsection prohibiting “true threat[s].” Does that mean that Washington’s harassment statute is unconstitutional on its face? I answer no for two reasons.⁴

First, that’s not what the *Counterman* Court ruled. It ruled that Colorado’s harassment statute was unconstitutional as applied in that particular case, but not unconstitutional on its face.

Second, Washington’s felony harassment statute *does* contain a mens rea, even though it’s not in the subsection defining “true threat.” It states in relevant

⁴ I disagree with the majority’s statement about what Calloway must show to win on this point in this case. The majority asserts, without qualification, “A statute is presumed constitutional, and the burden falls on the challenging party [Calloway] to demonstrate unconstitutionality beyond a reasonable doubt.” Majority at 8 (citing *Gerberding v. Munro*, 134 Wn.2d 188, 196, 949 P.2d 1366 (1998)). But we have qualified that traditionally cited standard quite a bit: “As used in this context, “beyond a reasonable doubt” is not an evidentiary standard but a reflection of “respect for the legislature.” *Sch. Dists.’ All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 606, 244 P.3d 1 (2010). It signifies that we will not invalidate a statute unless the challenger, ‘by argument and research, convince[s] the court that there is no reasonable doubt that the statute violates the constitution.’ *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).” *Quinn v. State*, 1 Wn.3d 453, 471 n.9, 526 P.3d 1 (2023) (alteration in original).

part (and I'm highlighting the mens rea of "knowledge" here):

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person *knowingly* threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; [and]
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.
- (2)
 - (a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.
 - (b) A person who harasses another is guilty of a class C felony if any of the following apply: . . . (ii) the person harasses another person under subsection (1) (a) (i) of this section by threatening to kill the person threatened or any other person. . . .

RCW 9A.46.020 (emphasis added). As noted by the majority, the to-convict jury instruction in this case used basically the same language and structure, including the "knowingly" mental element in the first part but not in the second part, concerning true threats. Majority at 13. I agree with the majority that that was a problem in this case.

And I also agree with the majority that it doesn't have to be a problem in future cases. But not just because we can reword jury instructions to say what the statute doesn't. It's because we can interpret the statute itself to require that its listed mens rea of "knowingly" applies to all portions of the statute. And proof of "knowledge," of course, suffices to prove "recklessness" because knowledge is a higher—more culpable—mental state than recklessness. RCW 9A.08.010(1)(b), (c).

I would interpret the mens rea of "knowingly," which appears in the introductory portion of the RCW 9A.46.020's subsection (1)(a), to modify both elements listed in subsection (1), that is, both (1)(a)(i)'s element of the type of threat ("[t]o cause bodily injury immediately or in the future to the person threatened or to any other person") and (1)(b)'s element concerning the impact of the threat ("[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out").

I understand that the introductory clause in subsection (1)(a) would not necessarily, grammatically, be read to apply to subsection (1)(b). But it can be read that way if necessary to save the statute from constitutional infirmity. That's exactly what the United States Supreme Court said in *United States v. X-Citement Video, Inc.* when interpreting another statute that would have violated the First Amendment if a limiting mens rea from one subsection were not read to also cover an act described in a later subsection. 513 U.S. 64, 70-71, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) (imposing scienter requirement on every element of a federal statute that prohibited shipping and transporting child pornography, including the child's

age, even though that was not necessarily the best grammatical read of the elements to which the listed scienter applied).

The *X-Citement Video* decision did not come to that analysis out of the blue. It relied on prior Supreme Court decisions in which it had done basically the same thing—read the element of “knowledge” in one part of a criminal statute to apply to other parts of that criminal statute to save the statute from constitutional infirmity, even though that was not the most grammatical reading of the statute.⁵ The Supreme Court ruled that it was the best constitutional reading of those statutes, and that’s what counted.

CONCLUSION

⁵ For example, the Court in *X-Citement Video* relied on *Morissette v. United States*, 342 U.S. 246, 271, 72 S. Ct. 240, 96 L. Ed. 2d 288 (1952), which took the “knowingly” mens rea in the federal embezzlement statute and applied it to all the prohibited acts listed in that statute even though, grammatically, it really modified only one of those verbs (“converts”). 513 U.S. at 70. As another example, the Court in *X-Citement Video* relied on *Liparota v. United States*, 471 U.S. 419, 424 n.6, 426, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985), which considered “a challenge to a federal statute prohibiting certain actions with respect to food stamps. The statute’s use of ‘knowingly’ could be read only to modify ‘uses, transfers, acquires, alters, or possesses’ or it could be read also to modify ‘in any manner not authorized by [the statute].’ Noting that neither interpretation posed constitutional problems, the Court held the scienter requirement applied to both elements by invoking the background principle set forth in *Morissette*. In addition, the Court was concerned with the broader reading which would ‘criminalize a broad range of apparently innocent conduct.’” *Id.* at 70-71 (alteration in original) (citation omitted) (quoting *Liparota*, 471 U.S. at 426).

The problem in this case—as the majority correctly notes—is that the instructions did not ensure that the jury applied the statutory mens rea of knowledge to the defendant’s own understanding of his threatening words. But we do not need to rewrite the statute to fix that—we can reinterpret the mental state element of “knowingly” already present in the statute to apply to the “true threat” act and then instruct trial courts to ensure that the jury instructions reflect this interpretation of the statute. That is the best constitutional reading of this statute, and that’s what counts.

I therefore agree with the majority’s conclusion that we must reverse due to the erroneous jury instructions in this case, which failed to ensure that the State proved that the defendant acted with at least recklessness before convicting him of harassment based on his true threats. But I disagree with the majority’s reasoning, because it seems to interpret both *Counterman* and RCW 9A.46.020 incorrectly.

I respectfully concur.

/s/ Gordon McCloud
Gordon McCloud, J.

**POST-REMAND UNPUBLISHED OPINION
ON HARMLESS ERROR,
WASHINGTON COURT OF APPEALS,
DIVISION TWO
(SEPTEMBER 9, 2026)**

FILED
WASHINGTON STATE
COURT OF APPEALS
DIVISION TWO
SEPTEMBER 9, 2026

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON – DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TURNER LEE CALLOWAY,

Appellant.

No. 57226-5-II

Before: VELJACIC, C.J., GLASGOW, MAXA, JJ.

UNPUBLISHED OPINION

GLASGOW, J.

Turner Lee Calloway was in an all-day argument that culminated in a threat he made to Aljorie Davis

and a responding law enforcement officer. Calloway told both that he was going to come to Davis' house and kill her.

A jury convicted Calloway of felony harassment, but the jury was given an outdated instruction about the true threat requirement under the First Amendment to the United States Constitution. The trial court instructed the jury that to be a true threat, a statement must occur under "circumstances where a reasonable person, in the position of the speaker, would foresee that the statement . . . would be interpreted as a serious expression of intention to carry out the threat." Clerk's Papers (CP) at 20. This was erroneous because the United States Supreme Court later determined that a true threat requires proof that the defendant was actually "aware 'that others could regard [the] statements as' threatening violence and 'deliver[ed] them anyway.'" *Counterman v. Colorado*, 600 U.S. 66, 79, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023) (quoting *Elonis v. United States*, 575 U.S. 723, 746, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) (Alito, J., concurring in part and dissenting in part)).

After agreeing with this court that the true threat jury instruction in Calloway's case was erroneous under the new *Counterman* test, the Washington Supreme Court remanded to this court to determine whether the error in the true threat jury instruction was harmless beyond a reasonable doubt by applying the test recently clarified in *State v. Magaña-Arévalo*, 5 Wn.3d 781, 582 P.3d 330 (2026). We hold that the error was harmless and affirm.

FACTS

I. Background

Calloway and Davis became friends in 2013. In the friendship's early years, they met up often, and Calloway occasionally took care of Davis' lawn. But in later years, Calloway made insulting statements to Davis, and his behavior strained the friendship. There was at least one period of time when they had no contact with each other.

In mid-October 2021, Davis and Calloway met up at a bar, and Calloway's behavior changed when he started drinking: "He started yelling in the bar, saying things about [Davis], and then he just started telling people [they] were together." Verbatim Rep. of Proc. (VRP) (July 5, 2022) at 111. Davis denied that they were in a relationship and asked Calloway to take her home.

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

On October 31, 2021, Calloway made "nonstop, back-to-back phone calls" to Davis starting at 6:51 a.m. VRP (July 5, 2022) at 114. Calloway threatened to harm Davis and called her derogatory names. Davis

responded by calling him back multiple times, and at one point, she left a message on his phone that included profanity and accused Calloway of being jealous. She said, “You don’t scare me and you don’t worry me not one bit. Your [b**ch] [a**] ain’t gonna never step up to me.” Ex. 4. She also referred to things Calloway had been “saying for nine years” because he could not date her. *Id.* Davis left the message because she was angry and wanted to scare Calloway off.

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

[B**ch], you going to die today; [b**ch][,] you ain’t [s**t]; [b**ch][,] you going [to] the devil the day that you die; you going to hell today, [b**ch]; today is your day; you’re going to die today, [b**ch][,] and hang up, call back; I’m on my way to kill you, [b**ch]; you’re going to die today, [b**ch].

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

When Brent Johnson, a deputy sheriff, arrived at Davis’ house, Davis’ cell phone rang repeatedly and she answered it a couple of times. Eventually,

Davis handed Johnson the phone, and Johnson identified himself as law enforcement. Davis testified that Calloway told Johnson he was going to “come shoot” and that everyone at her house was going to die. VRP (July 5, 2022) at 121. After refreshing his recollection with his written report, Johnson testified that Calloway told him that “he was outside” and “was going to kill” Davis. VRP (July 6, 2022) at 157. Johnson immediately called for backup. VRP (July 6, 2022) at 157.

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

Jorgensen went to the location of the stop and arrested Calloway. Calloway then told Jorgensen that Davis started harassing him after she found out he was in a relationship with someone else. Jorgensen testified that Calloway reported having “a couple of drinks” at a bar when he “got into [it]” with Davis over the phone that day and drove to Davis’ house so he could fight her boyfriend. VRP (July 6, 2022) at 177. Calloway “was being respectful [to Jorgensen], . . . he wasn’t acting belligerent, nothing of those sorts.” VRP (July 6, 2022) at 181. There is no indication in Jorgensen’s testimony that he thought Calloway might be intoxicated; Jorgensen did not report any signs that Calloway was intoxicated, nor did he report taking any steps to evaluate whether Calloway was driving under the influence.

The State charged Calloway with felony harassment and stalking.

II. Trial

A. Witness Testimony

Davis, Johnson, and Jorgensen testified consistently with the facts described above.

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

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

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

In describing his arrest, Calloway said he initially told Jorgensen that Davis was harassing him. He said Jorgensen asked him if he drove to Davis' house to fight her boyfriend, and he told Jorgensen "what he wanted to hear" because he was "intimidated." VRP (July 6, 2022) at 200. During cross-examination, the State's attorney asked Calloway whether he told Jorgensen that he had a few beers that day, and Calloway replied, "No, I said I had a couple [of beers]." VRP (July 6, 2022) at 208.

B. Jury Instructions and Closing Arguments

The trial court instructed the jurors that, to convict Calloway of felony harassment, they had to find that Calloway "knowingly threatened to kill . . . Davis immediately or in the future." CP at 22. They also had to find that Calloway's words or conduct placed Davis "in reasonable fear that the threat to kill would be carried out." *Id.* The trial court further instructed jurors that, to be a true threat, a statement must occur under "circumstances where a reasonable person, in the position of the speaker, would foresee that the statement . . . would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk." CP at 20.

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

The defense argued that the State did not prove beyond a reasonable doubt that Calloway made any threats at all, pointing out that the only recording

from the incident showed Davis insulting Calloway. The defense relied on the fact that Johnson could not independently recall the exact words Calloway used when he told Davis he was coming to Davis' house to kill her. VRP (July 6, 2022) at 232-33. The defense did not argue that Calloway's capacity was diminished by alcohol or mental illness. The defense also did not argue that Calloway's threats were merely hyperbolic, even though the jury instructions included the concept that jest or idle talk would not be sufficient to amount to a true threat. Instead, defense counsel's argument focused on the lack of recordings and the State's reliance on Davis' testimony, which defense counsel argued did not make any sense.

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

The trial court sentenced Calloway to 10 months in jail. At sentencing, the trial court said:

What I will tell you is that I think alcohol played a role in whatever happened. I don't know that you necessarily intended to alarm her the way you did, but it was pretty clear that she had some feelings about how that interaction went that day, and it was somewhat unequivocal about what the officers heard you say.

VRP (August 16, 2022) at 254.

III. Appeal

Calloway appealed his judgement and sentence. Calloway argued, among other things, that *Counterman* rendered Washington's harassment statute, RCW 9A.46.020, facially unconstitutional. *See* 600 U.S. at

69; Br. of Appellant at 1-2. Calloway also argued that *Counterman* rendered the jury instructions in this case erroneous and the error was not harmless.

We held that Washington’s harassment statute is not facially unconstitutional. *State v. Calloway*, 31 Wn. App. 2d 405, 409, 550 P.3d 77 (2024), *remanded*, 6 Wn.3d 257, 585 P.3d 1270 (2026). We also held that the jury instructions were erroneous because they allowed the jury to convict Calloway without finding he acted recklessly, as *Counterman* requires. *Id.* But we found this error was harmless beyond a reasonable doubt in light of the threatening statements Calloway made and the circumstances under which he made them. *Id.* at 409-10. We affirmed Calloway’s judgment and sentence but remanded to the trial court to strike the \$500 crime victim penalty assessment. *Id.* at 410.

Calloway sought discretionary review from the Washington Supreme Court, which the Supreme Court granted. In the meantime, the Supreme Court decided *State v. Magaña-Arévalo*, 5 Wn.3d 781, 582 P.3d 330 (2026), which clarified the test for determining when a constitutional error is harmless beyond a reasonable doubt.

The Supreme Court held that the felony harassment statute is facially constitutional and that the true threat jury instruction did not properly inform the jury of the requisite mens rea to be convicted under the harassment statute. *State v. Calloway*, 6 Wn.3d 257, 261, 271, 585 P.3d 1270 (2026). The Supreme Court affirmed in part, reversed in part, and remanded to this court to determine whether the State has established that the error in the true threat jury instruction was harmless beyond a reasonable doubt as clarified by *Magaña-Arévalo*. *Id.* at 271-72.

ANALYSIS

I. Harmless Error

A. Effect of *Counterman*

Before *Counterman*, the Washington Supreme Court defined a true threat as “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)). Accordingly, true threat jury instructions used an objective “reasonable person” standard to determine whether the content of the communication would be understood by the listener as a true threat. *Calloway*, 6 Wn.3d at 270. In this case, the trial court instructed the jury that to be a true threat, a statement “must occur in a context or under such circumstances where *a reasonable person, in the position of the speaker*, would foresee that the statement . . . would be interpreted as a serious expression of intention to carry out the threat.” CP at 20 (emphasis added). The defendant’s subjective state of mind was irrelevant.

After *Calloway*’s trial, while his case was on appeal to this court, the United States Supreme Court decided *Counterman*. *Calloway*, 6 Wn.3d at 265. *Counterman* required proof that the defendant was actually “aware ‘that others could regard [the] statements as’ threatening violence and ‘deliver[ed] them anyway.’” 600 U.S. at 79 (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)). Post-*Counterman*, the parties agree the jury instruction

should have said: to constitute a threat, “the speaker must know of and disregard a substantial risk that the statement or act would be interpreted” as “a serious expression of intention to carry out the threat.” 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.24 (5th ed. Supp. 2024). The true threat jury instruction in this case informed the jury that the requisite mens rea to convict was negligence, while *Counterman* held that the mens rea must be at least recklessness. *Calloway*, 6 Wn.3d at 261.

“The omission of the constitutionally required mens rea from the jury instructions in the true threat context is analogous to the omission of an element of the crime from the instructions.” *Calloway*, 31 Wn. App. 2d at 423-24 (citing *Schaler*, 169 Wn.2d at 288). “Such an omission is thus subject to constitutional harmless error review.” *Id.* at 424. The parties agree that the jury instruction given at trial amounted to constitutional error and the State must show that the instructional error was harmless beyond a reasonable doubt.

B. Magaña-Arévalo Constitutional Harmless Error Test

Calloway argues that the error in the true threat jury instruction was not harmless beyond a reasonable doubt. He contends that the evidence relevant to the omitted mens rea requirement must be uncontroverted for the error to be harmless, and because the evidence on whether Calloway acted recklessly was controverted, the error is not harmless. Calloway also argues that the error in the jury instructions prejudiced him at trial because had the post-*Counterman* instruction on recklessness been

available, he would have developed and presented more or different evidence on his state of mind. We disagree.

The State bears the burden of proving a constitutional error was harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). “An error is harmless . . . if the appellate court is assured beyond a reasonable doubt that the jury would have reached the same verdict without the error.” *State v. Romero-Ochoa*, 193 Wn.2d 341, 347, 440 P.3d 994 (2019). An error is not harmless “when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.” *Schaler*, 169 Wn.2d at 288-89 (holding that the omission of a “true threat” jury instruction was not harmless because the defendant’s erratic and contradictory behavior could have led the jury to conclude the statements he made while experiencing a mental health crisis would not be understood as serious threats).

In *Magaña-Arévalo*, the Washington Supreme Court clarified the proper test for conducting constitutional harmless error review. 5 Wn.3d at 810. As applied to improperly admitted evidence, “the reviewing court must ask whether the State has proved the error harmless beyond a reasonable doubt, considering *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.” *Id.*

Here, the Washington Supreme Court remanded to this court to apply the clarified *Magaña-Arévalo* test to an erroneous jury instruction. Thus, in this case, we must consider both the strength of the

properly admitted evidence of guilt as well as the prejudicial impact of the erroneous jury instruction. *See id.* at 811; *see also Neder v. United States*, 527 U.S. 1, 15-20, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (concluding that the erroneous jury instruction was harmless after considering both the strength of the properly admitted evidence against the defendants as well as the prejudicial impact of the error).

Although Calloway argues otherwise, the Washington Supreme Court has not held that evidence must be uncontroverted for an error to be harmless under the *Magaña-Arévalo* constitutional harmless error test. If uncontroverted evidence were a requirement in every case, the *Magaña-Arévalo* court would have said so, but it did not. 5 Wn.3d at 808-16. In a prior harmless error case, the Washington Supreme Court considered the uncontroverted nature of the evidence to be relevant, but it did not *require* uncontroverted evidence for an error to be harmless. *Schaler*, 169 Wn.2d at 288 (explaining “for example” an omitted element in a jury instruction is harmless when the evidence supporting the missing element was uncontroverted). The *Magaña-Arévalo* court did not overrule this reasoning in *Schaler* and Calloway has not shown that the Supreme Court intended to abandon this reasoning.

Furthermore, in *Neder*, a case about an erroneous jury instruction, the United States Supreme Court acknowledged:

A reviewing court making this harmless-error inquiry does not, as Justice Traynor put it, “become in effect a second jury to determine whether the defendant is guilty.” Traynor, *supra*, at 21. Rather a court, in

typical appellate court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is “no,” holding the error harmless does not “reflec[t] a denigration of the constitutional rights involved.” *Rose*, 478 U.S., at 577. On the contrary, it “serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.” *Chapman*, 386 U.S., at 22.

527 U.S. at 19 (alterations in original). *Neder* did not require uncontroverted evidence. And finally, in this case, the Washington Supreme Court expressly acknowledged, “Since it is rare that the State’s key evidence in criminal trials will not be controverted in some way, the reviewing court *may* find harmless error when after a thorough examination of the record, it concludes beyond a reasonable doubt that the jury verdict would have been the same.” *Calloway*, 6 Wn.3d at 271 (emphasis added) (citing *State v. Berube*, 150 Wn.2d 498, 505 n.2, 79 P.3d 1144 (2003)). Thus, neither the United States Supreme Court nor the Washington Supreme Court has required uncontroverted evidence as a prerequisite to a finding that constitutional error was harmless.¹

¹ Although *Calloway* relies on *State v. Hayward*, 152 Wn. App. 632, 217 P.3d 354 (2009), to argue that we must consider only uncontroverted evidence, that was a Court of Appeals case decided in 2009, before *Schaler* and well before the Supreme Court’s decisions in *Magaña-Arévalo* and in this case.

1. Strength of admitted evidence of guilt

Although Calloway argues that the error here was not harmless because the evidence on his state of mind is not uncontroverted, evidence does not need to be uncontroverted under the *Magaña-Arévalo* constitutional harmless error test. Here, although not entirely uncontroverted, the evidence of guilt is quite compelling.

At trial, Calloway testified. He did not claim that the things he said that day were hyperbolic, even though that would have been relevant under the true threat jury instruction given to the jury. Instead, he denied making any threats at all. But the jury's verdict of guilt for felony harassment indicates that the jury did not find his denial credible. Had the jury believed Calloway's version of events, it would not have found him guilty of felony harassment.

Calloway's behavior intensified over the course of a day, and his threats escalated in seriousness. Calloway's threats to kill Davis were clear and unambiguous:

[B**ch], you going to die today; [b**ch][,] you ain't [s**t]; [b**ch][,] you going [to] the devil the day that you die; you going to hell today, [b**ch]; today is your day; you're going to die today, [b**ch][,] and hang up, call back; I'm on my way to kill you, [b**ch]; you're going to die today, [b**ch].

VRP (July 5, 2022) at 120. Additionally, Johnson heard Calloway threaten Davis over speakerphone. Johnson testified that he identified himself to Calloway as a law enforcement officer. Even after Johnson did so, Calloway threatened that "he was outside" and

“was going to kill” Davis. VRP (July 6, 2022) at 157. After hearing this, Johnson was concerned enough to call for backup.

Under the proper jury instruction, the jury would have had to decide whether Calloway was subjectively aware that Davis and Johnson could regard his statements as threatening violence and delivered them anyway. At the very least, the State presented strong evidence that when Calloway reiterated a threat to kill Davis to a law enforcement officer and then partially followed through by driving past her house, he would have known his words and actions would be taken as a true threat to kill but he said the words and drove by her house anyway. Thus, the strength of the State’s evidence weighs strongly in favor of harmlessness.

2. Prejudicial impact of erroneous jury instruction

Even considering that Calloway asserts he would have made a different argument and presented different evidence about his state of mind had the post-*Counterman* instruction been given at his trial, the prejudicial impact of the error in the jury instruction was minimal.

Calloway suggests that he would have more fully developed possible evidence of intoxication or other evidence about his mental state. But the jury heard significant evidence about his mental state, including Calloway’s own testimony. Johnson testified he heard Calloway threaten to kill Davis over speakerphone, and Calloway drove to Davis’ house. Jorgensen testified that when Calloway was arrested, “[Calloway] was being respectful . . . he wasn’t acting belligerent,

nothing of those sorts.” VRP (July 6, 2022) at 181. Additionally, Calloway testified that he told Jorgensen, “I had a couple [of beers]” that day, and not a few beers. VRP (July 6, 2022) at 208. Moreover, although the sentencing judge mentioned alcohol as a possible factor, the only conclusion we can draw from the testimony is that by the time Calloway spoke to Johnson and drove by Davis’ house, he was not showing signs of intoxication. Jorgensen did not report he suspected Calloway was driving under the influence.

This record shows that Calloway was not so intoxicated that he was unaware of the impact his threats would have on Davis, nor did his interaction with Jorgensen indicate he was suffering from mental illness or any other condition that caused an inability to regulate his emotions or behavior. No argument was raised during trial or in supplemental briefing to this court that Calloway experienced symptoms of a mental illness affecting Calloway’s state of mind on the day of the incident.

Although Calloway seems to suggest he would have introduced evidence about his state of mind, the evidence about his state of mind just after Calloway talked to Johnson *was* presented through Jorgensen’s testimony, and the evidence does not support an inability to recognize that his words would be taken as threats.

In sum, the dire nature of Calloway’s threats, along with testimony relevant to his state of mind on the day of the incident, are overwhelming enough that the instructional error did not prejudice Calloway and any reasonable jury would find he met the recklessness standard.

C. Other Arguments

1. Hyperbole

Calloway argues that the jury, if given the correct instruction, could have inferred that any threatening statement he made was hyperbolic and therefore not made with an understanding of a substantial risk that Davis would interpret it as a true threat. However, during trial, neither Calloway nor any other witness testified that his statements were hyperbolic or that Calloway had a pattern of saying similar things without meaning them. Additionally, the jury instructions provided at trial addressed jest and idle talk, and during closing arguments the State argued, “It’s not a jest or idle talk to say, [b**ch], you’re going to die. You’re done.” VRP (July 6, 2022) at 224. Calloway could have argued he was joking, being hyperbolic, or engaging in idle talk under the jury instructions that were given, yet his testimony instead was that he did not utter the threats that Davis and Johnson alleged he did. An argument that Calloway uttered the threats but he was being hyperbolic does not align with the version of events he has already testified to.

2. Acquittal of stalking charge

Calloway also argues the jury likely found Davis not credible because they acquitted Calloway of stalking, which was based solely on Davis’ testimony, but found Johnson, the officer who overheard the threat, credible because they found Calloway guilty of harassment. Calloway argues that because the State cannot disprove this, the instructional error cannot be deemed harmless. We disagree.

Regardless of whether the jury found Davis’ testimony entirely credible, Johnson testified that he

heard Calloway threaten to kill Davis, and this testimony from Johnson amounts to overwhelming evidence. Additionally, stalking contains some elements distinct from felony harassment, in particular a different mens rea, even post-*Counterman*. Under the jury instructions for stalking, “[t]o harass” means the defendant acted knowingly and willfully. CP at 25. This is a different state of mind than recklessness, which is required to find a true threat post-*Counterman*. Calloway could have lacked the higher mens rea of acting knowingly and willfully necessary for the stalking charge, but still have acted with recklessness for purposes of the true threat analysis. Thus, a finding of harmless error is not inconsistent with the jury’s acquittal for stalking.

CONCLUSION

We affirm.

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.

/s/ Glasgow

J.

We concur:

/s/ Veljacic

C.J.

/s/ Maxa

J.

**PUBLISHED OPINION ON
CONSTITUTIONALITY,
WASHINGTON COURT OF APPEALS,
DIVISION TWO
(JUNE 11, 2024)**

FILED
WASHINGTON STATE
COURT OF APPEALS
DIVISION TWO
JUNE 11, 2024

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON – DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TURNER LEE CALLOWAY,

Appellant.

No. 57226-5-II

Before: VELJACIC, A.C.J., GLASGOW, MAXA, JJ.

PUBLISHED OPINION

GLASGOW, J.

Turner Calloway was convicted of felony harassment for threatening to kill Aljorie Davis. After

Calloway appealed his judgment and sentence, the United States Supreme Court decided *Counterman v. Colorado*,¹ which refined the true threat standard for determining whether a threatening statement lacks the protection of the First Amendment to the United States Constitution.

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

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

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

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

viction and sentence, but we remand to the trial court to strike the \$500 crime victim penalty assessment.

FACTS

I. Background

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

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

II. Trial

A. State Witnesses

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

After Calloway drove Davis home, Davis stopped contacting Calloway, but Calloway "just started calling

out of the blue.” *Id.* A couple of days later, Calloway asked Davis if she wanted to drive to Seattle and see the city lights. Davis said she did not want to do that because it was an activity for couples. Davis testified that Calloway then “snapped:” “He went into calling me names, and he . . . just started threatening[] and started talking crazy.” VRP (July 5, 2022) at 112. Calloway repeatedly called and texted Davis, and Davis called back to ask him to stop. On October 31, Calloway made “nonstop, back-to-back phone calls” starting at 6:51 a.m. VRP (July 5, 2022) at 114. Calloway threatened to harm Davis and called her derogatory names. Davis responded by calling him back, and at one point, she left a message on his phone that included profanity and accused Calloway of being jealous. She said, “You don’t scare me and you don’t worry me not one bit. Your bitch ass ain’t gonna never step up to me.” Ex. 4. She also referred to things Calloway had been “saying for nine years” because he couldn’t have her. *Id.* Davis testified that she left the message because she was angry and wanted to scare Calloway off.

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

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

VRP (July 5, 2022) at 120. Later in the evening, Davis had a friend pretend to be her boyfriend over

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

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

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

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

B. Defense Witnesses

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

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

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

In describing his arrest, Calloway said he initially told Jorgensen that Davis was harassing him. He said Jorgensen asked him if he drove to Davis’s house to

fight her boyfriend, and he told Jorgensen “what he wanted to hear” because he was “intimidated.” VRP (July 6, 2022) at 200.

C. Closing Arguments and Jury Instructions

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

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

The trial court instructed jurors that, to convict Calloway, they had to find that Calloway “knowingly threatened to kill . . . Davis immediately or in the future.” Clerk’s Papers (CP) at 22. They also had to find that Calloway’s words or conduct placed Davis “in reasonable fear that the threat to kill would be carried out.” *Id.* The trial court further instructed jurors that, to be a true threat, a statement must occur under “circumstances where a reasonable person, in the position of the speaker, would foresee that the statement . . . would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.” CP at 20.

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

III. Sentencing

The trial court sentenced Calloway to 10 months in jail. The trial court found that Calloway was indigent under RCW 10.101.010(3)(a)-(d) but imposed a \$500 crime victim penalty assessment. In calculating Calloway's offender score, the trial court counted Calloway's prior Mississippi convictions of burglary and child molestation.

Calloway appeals his judgment and sentence.

ANALYSIS

I. Harassment Statute

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

³ 197 Wn.2d 170, 481 P.3d 521 (2021).

the statute to avoid the constitutional problem.” Br. of Appellant at 22. We disagree.

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

“Our purpose in interpreting a statute is to determine and carry out the intent of the legislature.” *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). “We must construe statutes consistent with their underlying purposes while avoiding constitutional deficiencies.” *Id.* We presume “a statute is constitutional, and the party challenging it bears the burden of proving otherwise beyond a reasonable doubt.” *Didlake v. State*, 186 Wn. App. 417, 422-23, 345 P.3d 43 (2015).

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

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

Washington Supreme Court case law is plainly at odds with a more recent United States Supreme Court interpretation of the federal constitution, we do not presume that the Washington Supreme Court will reject that recent interpretation in favor of its own prior interpretation. *See id.* at 224.

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

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

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

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

C. Washington’s Harassment Statute

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

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

The Washington Supreme Court has imposed a constitutional limitation, explaining that a person may only be convicted of violating RCW 9A.46.020 if

they made a true threat. *Kilburn*, 151 Wn.2d at 41. The court has defined a true threat as “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of” another person. *Trey M.*, 186 Wn.2d at 894 (alteration in original) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001)).

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

As described in *Schaler*, the mental state of simple negligence requires objective consideration of the reasonable person. *Id.* *Counterman* defines negligence as an “objective standard” at the bottom of the “mens rea hierarchy:” “A person acts negligently if [they are] not but should be aware of a substantial risk . . . that others will understand [their] words as threats.” *Counterman*, 143 S. Ct. at 2117 n.5. This definition is somewhat similar to Washington’s definition of criminal negligence, the lowest level of culpability in the statute designating the hierarchy of

mental states. RCW 9A.08.010(1)(d). A defendant acts with criminal negligence when they fail “to be aware of a substantial risk that a wrongful act may occur and [their] failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.” *Id.* All these forms of negligence involve less culpability than the recklessness that *Counterman* now requires. After *Counterman*, the defendant must have *subjective* awareness of the “substantial risk that [the] communications would be viewed as threatening violence.” 143 S. Ct. at 2112.

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

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

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

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

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

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

others could regard [the] statements as' threatening violence and '[delivered] them anyway.'" *Id.* at 2117 (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)).

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

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

But here, we do not read a new element into RCW 9A.46.020. Rather, we apply the most recent binding articulation of a court-imposed limitation on the statute—one the legislature has not undone. In 2001, the Washington Supreme Court first limited the statute's proscription on speech to true threats. *Williams*, 144 Wn.2d at 209. The legislature then

amended the statute in 2003 and 2011, and neither amendment suggested legislative intent to change or get rid of the true threat limitation. *See* LAWS OF 2003, ch. 53, § 69; LAWS OF 2011, ch. 64, § 1.⁴ The United States Supreme Court recently announced a binding definition of true threat that Washington courts must follow.

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

II. Jury Instructions

The trial court instructed the jury that to be a true threat, a statement “must occur in a context or under such circumstances where *a reasonable person, in the position of the speaker*, would foresee that the statement . . . would be interpreted as a serious expression of intention to carry out the threat.” CP at 20 (emphasis added). But *Counterman* requires proof “that the defendant”—not just a reasonable person in their position—“consciously disregarded a substantial risk that [the] communications would be viewed as

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

threatening violence.” 143 S. Ct. at 2112. In other words, *Counterman* requires proof that the defendant was actually “aware ‘that others could regard [the] statements as’ threatening violence and ‘[delivered] them anyway.’” *Id.* at 2117 (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)). The State appears to concede that the true threat jury instruction in this case was therefore erroneous in light of *Counterman*.⁵

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

The State responds that Calloway failed to challenge the relevant jury instruction below, so “Calloway’s instructional challenges are barred by RAP 2.5(a)(3).” Br. of Resp’t at 1. The State focuses its

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

RAP 2.5 argument on lack of actual prejudice. The State also contends that any instructional error was harmless because Calloway denied that he made any threats, rather than arguing he made them “under circumstances in which they should not have been taken seriously.” *Id.* at 40.

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

A. Review for the First Time on Appeal

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

Accordingly, RAP 2.5(a) does not preclude review of an issue not raised in the trial court when “(1) a court issues a new controlling constitutional

interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation." *Id.*

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

B. Constitutional Harmless Error

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

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

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

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

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

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

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

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

III. Crime Victim Penalty Assessment

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

Trial courts may no longer impose the crime victim penalty assessment on indigent defendants.

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

IV. Statement of Additional Grounds

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

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

Here, to prove that Calloway was convicted of burglary and child molestation in Mississippi, the State provided the Mississippi indictment charging

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

him with these offenses, minutes from the Mississippi proceeding where Calloway pleaded guilty to the offenses, and a certified Washington judgment and sentence listing the offenses in Calloway's conviction history. In addition, our record includes Calloway's signed and certified stipulations that his criminal history, including the Mississippi convictions, is correct. In combination, these documents reliably establish Calloway's foreign conviction history.

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

CONCLUSION

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

/s/ Glasgow
J.

We concur:

/s/ Maxa
J.

/s/ Veljacic
A.C.J.

**WARRANT OF COMMITMENT
AND JUDGMENT, SUPERIOR COURT OF
WASHINGTON FOR PIERCE COUNTY
(AUGUST 16, 2022)**

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

TURNER LEE CALLOWAY,

Defendant.

Cause No. 21-1-03422-3

Before: Joseph A. EVANS, Judge.

WARRANT OF COMMITMENT

☒ County Jail

THE STATE OF WASHINGTON TO THE DIRECTOR
OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced
against the defendant in the Superior Court of the
State of Washington for the County of Pierce, that the
defendant be punished as specified in the Judgment and
Sentence/Order Modifying/Revoking Probation/

App.71a

Community Supervision, a full and correct copy of which is attached hereto.

- ☒ 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

Date: 8/16/22

By direction of the Honorable

/s/ Joseph A. Evans

Judge

Constance R. White

Clerk

By: /s/ Linda Taylor

Deputy Clerk

**JUDGMENT AND SENTENCE
(AUGUST 16, 2022)**

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

TURNER LEE CALLOWAY

Defendant.

SID: WA17889393

DOB: 06/07/1964

PCN: WA2700000103912899

Cause No. 21-1-03422-3

Before: Joseph A. EVANS, Judge.

JUDGMENT AND SENTENCE (FJS)

☒ Jail One Year or Less

I. HEARING

- 1.1 The Court conducted a sentencing hearing this date; the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 **CURRENT OFFENSE(S):** The defendant was found guilty on: 7/6/2022 based upon [X] jury-verdict

COUNT: 1

CRIME: FELONY HARASSMENT (KK32A)

CLASS: FC

RCW (with Subsections):

9A.46.020(2)(b)

9A.46.020(1)(a)(i)(b), (2)(b)(ii)

DATE OF CRIME: 10/31/2021

INCIDENT NO.: PCSD 2130401639

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
--

[. . .]

2.2 **CRIMINAL HISTORY (RCW 9.94A.525):**

Count No.: 1

Crime: Assault 4th / UNLWFL Imprisonment

Date of Sentence: 06-11-1998

Sentencing Court: Whatcom Superior Court

Date of Crime: 01-07-1998

A or J Adult or Juv: A

Count No.: 2

Crime: DWLS | Date of Sentence:

Sentencing Court: Tacoma Municipal Court

Date of Crime: 04-30-1998

A or J Adult or Juv: A

Type of Crime: Misd

Count No.: 3

Crime: DWLS 3

Date of Sentence: 07-02-1998

Sentencing Court: Tacoma Municipal Court

Date of Crime: 04-30-1998 |

A or J Adult or Juv: A

Type of Crime: Misd

Count No.: 4

Crime: DWLS 3

Date of Sentence: 04-06-2004

Sentencing Court: Tacoma Municipal Court

Date of Crime: 03-15-2004

A or J Adult or Juv: A

Type of Crime: Misd

Count No.: 5

Crime: DWLS 3

Date of Sentence: 06-04-2004

Sentencing Court: District Court 1 (Tacoma)

Date of Crime: 04-10-2004

A or J Adult or Juv: A

Type of Crime: Misd

Count No.: 6

Crime: DV ASLT

Date of Sentence: 02-16-2005

Sentencing Court: Tacoma Municipal Court

Date of Crime: 02-01-2005

A or J Adult or Juv: A

Type of Crime: Misd

Count No.: 7

Crime: Assault - DV

Date of Sentence: 01-05-2006

Sentencing Court: Tacoma Municipal Court

Date of Crime: 02-23-2005

A or J Adult or Juv: A
Type of Crime: Misd
DV* Yes: Yes

Count No.: 8

Crime: ATT FTRSO
Date of Sentence: 05-07-2009
Sentencing Court: Superior Ct - Pierce Cty
Date of Crime: 02-17-2009
A or J Adult or Juv: A
Type of Crime: Misd

Count No.: 9

Crime: Aslt 4
Date of Sentence: 05-07-2009
Sentencing Court: Superior Ct - Pierce Cty
Date of Crime: 02-17-2009
A or J Adult or Juv: A
Type of Crime: Misd

Count No.: 10

Crime: Obstruct Law Enforcement Officer
Date of Sentence: 05-07-2009
Sentencing Court: Superior Ct - Pierce Cty
Date of Crime: 02-17-2009
A or J Adult or Juv: A
Type of Crime: Misd

Count No.: 11

Crime: Criminal Trespass - 2nd Degree
Date of Sentence: 07-07-2009
Sentencing Court: Tacoma Municipal Court
Date of Crime: 07-03-2009
A or J Adult or Juv: A

Count No.: 12

Crime: Marihuana Poss Less/Equal 40 Grams
Date of Sentence: 03-03-2010

Sentencing Court: District Ct - Pierce County
Date of Crime: 07-10-2009
A or J Adult or Juv: A

Count No.: 13

Crime: Crim Tresp 2
Date of Sentence: 09-24-2009
Sentencing Court: Tacoma Municipal Court
Date of Crime: 09-20-2009
A or J Adult or Juv: A

Count No.: 14

Crime: DWLS 3
Date of Sentence: 02-29-2012
Sentencing Court: Tacoma Municipal Court
Date of Crime: 05-13-2010
A or J Adult or Juv: A

Count No.: 15

Crime: Obstructing-Hinder Public Servant
Date of Sentence: 06-27-2011
Sentencing Court: Tacoma Municipal Court
Date of Crime: 03-08-2011
A or J Adult or Juv: A

Count No.: 16

Crime: DWLS 3
Date of Sentence: 08-26-2011
Sentencing Court: Fife Municipal Court
Date of Crime: 08-13-2011
A or J Adult or Juv: A

Count No.: 17

Crime: Marihuana Poss Less/Equal 40 Grams
Date of Sentence: 08-26-2011
Sentencing Court: Fife Municipal Court
Date of Crime: 08-13-2011
A or J Adult or Juv: A

Count No.: 18

Crime: Unlawful Transit Conduct
Date of Sentence: 03-03-2015
Sentencing Court: Lakewood Muni Court
Date of Crime: 10-22-2014
A or J Adult or Juv: A

Count No.: 19

Crime: Child Molestation
Date of Sentence: 01-10-1992
Sentencing Court: Jackson Co., MS
Date of Crime: 09-23-1991
A or J Adult or Juv: A

Count No.: 20

Crime: Res Burglary
Date of Sentence: 01-10-1992
Sentencing Court: Jackson Co., MS |
Date of Crime: 09-23-1991
A or J Adult or Juv: A

Count No.: 21

Crime: Assault in the Second Degree
Date of Sentence: 11-15-1999
Sentencing Court: Superior Ct - Pierce Cty
Date of Crime: 05-04-1999
A or J Adult or Juv: A

Count No.: 22

Crime: Comm. Custody Violation
Date of Sentence: 12-02-2002
Sentencing Court: Superior Ct - Pierce Cty
Date of Crime: 11-01-2000
A or J Adult or Juv: A

Count No.: 23

Crime: Assault 3
Date of Sentence: 03-31-2003

Sentencing Court: Superior Ct - Pierce Cty
Date of Crime: 01-02-2001
A or J Adult or Juv: A

Count No.: 24

Crime: DWLS 3
Date of Sentence:
Sentencing Court: Thurston County Dist Ct
Date of Crime: 03-15-2004
A or J Adult or Juv: A

Count No.: 25

Crime: FTRASO
Date of Sentence: 02-09-2006
Sentencing Court: Superior Ct - Pierce Cty
Date of Crime: 02-02-2005
A or J Adult or Juv: A

Count No.: 26

Crime: FTRASO
Date of Sentence: 02-09-2006
Sentencing Court: Superior Ct - Pierce Cty
Date of Crime: 02-22-2005
A or J Adult or Juv: A

*DV: Domestic Violence was pled and proved.

[. . .]

2.3 SENTENCING DATA:

Count No.: 1 |

Offender Score: 3 | Seriousness Level: III |

Standard Range (not including enhancements):

9-12 Months | Total Standard Range (including
enhancements): 9-12 Months |

Maximum Term: 5 Yrs./\$10,000

[. . .]

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court makes the following specific findings:

☒ The defendant is indigent as defined in RCW 10.101.010(3)(a)-(d) because the defendant:

[. . .]

III. JUDGMENT

3.1 The Defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1, and if present, Stipulation on Prior Record and Offender Score filed herein.

[. . .]

IV. SENTENCE AND ORDER

IT IS ORDERED:

- 4.1 **Legal Financial Obligations:** Defendant shall pay to the Clerk of this Court: Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402

JASS CODE

MANDATORY LFOs

RTN/RJN 3801 \$ Per LOC

Restitution to: Per LOC

PCV \$ 500.00 Crime Victim assessment

DNA (unless collected in the past. RCW 43.43.7541) Previously collected

COSTS OF PROSECUTION UNDER RCW 10.01.160 – cannot be imposed on indigent defendants

Court waives all non-mandatory fines & fees.

**OTHER LEGAL FINANCIAL OBLIGATIONS
(specify below)**

\$ 500.00 TOTAL

- ☒ The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
 - ☒ shall be set by the prosecutor.
- ☒ Restitution ordered above shall be paid jointly and severally with:
 - ☒ All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court

specifically sets forth the rate herein: Not less than \$ Per Clerk per month commencing Per Clerk. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[. . .]

- 4.2 ☒ **DNA TESTING.** The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

4.3 **NO CONTACT**

The defendant shall not have contact with Algorie Davis (DOB: 2/18/1980) (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 5 years (not to exceed the maximum statutory sentence).

- ☒ Domestic Violence No-Contact Order, Anti-harassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 **OTHER:** Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days unless forfeited by agreement in which case no claim may be made. After 90 days, if you do not make a claim, property may be disposed of according to law.

Maintain law abiding behavior

[. . .]

4.4b **EXONERATED:** The Court hereby exonerates any bail, bond, and/or personal recognizance conditions.

4.5 **JAIL ONE YEAR OR LESS.** The defendant is sentenced as follows:

- (a) Confinement. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the county jail:

10 months on Count 1

Actual number of months of total confinement ordered is: 10 months

- ☒ CONSECUTIVE/CONCURRENT SENTENCES:
RCW 9.94A.589

[. . .]

- (b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this case number. RCW

9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 42 days CTS

[. . .]

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** If you wish to petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 **LENGTH OF SUPERVISION.** If you committed your offense prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court has authority to collect unpaid legal financial obliga-

tions at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

- 5.3 NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

[. . .]

- 5.5 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.
- 5.6 FIREARMS.** You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or

comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION.
RCW 9A.44.130, 10.01.200.

N/A

[. . .]

DONE IN OPEN COURT and in the presence of
the defendant this date: 8/16/22

Judge: /s/ Joseph A. Evans
Print name: Joseph A. Evans

/s/ Tyler Kennedy
Deputy Prosecuting Attorney
Print name: Tyler Kennedy
WSB #: 52506

/s/ Dana Ryan
Attorney for Defendant
Print name: Dana Ryan
WSB #: 17418

/s/ Turner Lee Calloway
Defendant

VOTING RIGHTS STATEMENT: I acknowledge that
I have lost my right to vote because of this felony con-
viction. If I am registered to vote, my voter registration
will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.060. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: /s/ Turner Lee Calloway

[. . .]

IDENTIFICATION OF DEFENDANT

SID: WA17889393

(If no SID take fingerprint card for State Patrol)

Date of Birth: 06/07/1964

FBI: 219818AA8

Local ID: CHRI#991250016

PCN: WA2700000103912899

Race: ☒ Black/African-American

Ethnicity: ☒ Non-Hispanic

Sex: ☒ Male

FINGERPRINTS

{ Fingerprint images excluded }

Defendant's Signature: /s/ Turner Lee Calloway

**ORDER DENYING
MOTION FOR RECONSIDERATION,
SUPREME COURT OF WASHINGTON
(APRIL 23, 2026)**

FILED
SUPREME COURT
STATE OF WASHINGTON
4/23/2026
By Sarah R. Pendleton
Clerk

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TURNER LEE CALLOWAY,

Petitioner.

No. 103374-5

Before: Debra L. STEPHENS, C.J.,

**ORDER DENYING MOTION FOR
RECONSIDERATION**

The Court considered the Petitioner's "MOTION
FOR RECONSIDERATION."

It is hereby

ORDERED:

That the motion for reconsideration is denied.

DATED at Olympia, Washington this 23rd day of
April, 2026.

/s/ Stephens
Stephens, C.J.

**ORDER DENYING MOTION FOR
RECONSIDERATION, WASHINGTON COURT
OF APPEALS DIVISION TWO
(JULY 22, 2024)**

FILED
WASHINGTON STATE
COURT OF APPEALS
DIVISION TWO
JULY 22, 2024

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON – DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TURNER LEE CALLOWAY,

Appellant.

No. 57226-5-II

Before: GLASGOW, MAXA, VELJACIC, JJ.

**ORDER DENYING MOTION FOR
RECONSIDERATION**

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

ORDERED that appellant's motion for reconsideration is denied.

PANEL: Jj. Maxa, Glasgow, Veljacic
FOR THE COURT

/s/ Glasgow
J.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code § 9A.46.020(1), (2)

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

- (iii) To subject the person threatened or any other person to physical confinement or restraint; or
 - (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical health or safety; and
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.
- (2)
- (a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.
 - (b) A person who harasses another is guilty of a class C felony if any of the following apply: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person; (iii) the person harasses a criminal justice participant or election official who is performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant or election official because of an action taken or decision made

by the criminal justice participant or election official during the performance of his or her official duties. For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant or election official would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant or election official that the person does not have the present and future ability to carry out the threat.

**VERDICT FORM – COUNT 1,
SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY
(JULY 6, 2022)**

FILED
DEPT 16
IN OPEN COURT
JUL 06 2022
PIERCE COUNTY,
CLERK
By Linda Taylor
Deputy

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

TURNER LEE CALLOWAY,

Defendant.

Cause No. 21-1-03422-3

VERDICT FORM – COUNT 1

We, the jury, find the defendant Turner Calloway GUILTY (write in “not guilty” or “guilty”) of the crime of Felony Harassment as charged in Count 1.

/s/ J.T.
Presiding Juror

Date: 7/6/22

**VERDICT FORM – COUNT 2,
SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY
(JULY 6, 2022)**

FILED
DEPT 16
IN OPEN COURT
JUL 06 2022
PIERCE COUNTY,
CLERK
By Linda Taylor
Deputy

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

TURNER LEE CALLOWAY,

Defendant.

Cause No. 21-1-03422-3

VERDICT FORM – COUNT 2

We, the jury, find the defendant Turner Calloway NOT GUILTY (write in “not guilty” or “guilty”) of the crime of Stalking as charged in Count 2.

/s/ J.T.
Presiding Juror

Date: 7/6/22

**CASE INFORMATION,
FILED IN THE SUPERIOR COURT OF
WASHINGTON FOR PIERCE COUNTY
(NOVEMBER 1, 2021)**

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PIERCE COUNTY, WASHINGTON
NOVEMBER 01 2021 9:46 AM
Kevin Stock
County Clerk

**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

STATE OF WASHINGTON,

Plaintiff,

v.

TURNER LEE CALLOWAY,

Defendant.

Cause No. 21-1-03422-3

DOB:	06/07/1964
Sex:	Male
Race:	Black
DOL#:	WA - CALLOTL365LG
SID#:	17889393

INFORMATION (INF)

COUNT 1

I, Mary E. Robnett, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse TURNER LEE CALLOWAY of the crime of FELONY HARASSMENT, committed as follows:

That TURNER LEE CALLOWAY, in the State of Washington, on or about the 31st day of October, 2021, without lawful authority did knowingly threaten to cause A. N. DAVIS bodily injury, immediately or in the future, the threat was communicated to A. N. DAVIS, the defendant's words or conduct put A. N. DAVIS in reasonable fear the threat would be carried out; further, the threat was a threat to kill A. N. DAVIS, thereby invoking the provisions of RCW 9A.46.020(2)(b) and increasing the classification of the crime to a felony., contrary to RCW 9A.46.020(1)(a)(i) (b), (2)(b)(ii), and against the peace and dignity of the State of Washington.

COUNT 2

And I, Mary E. Robnett, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse TURNER LEE CALLOWAY of the crime of STALKING, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That TURNER LEE CALLOWAY, in the State of Washington, on or about the 31st day of October, 2021, without lawful authority and under circumstances not amounting to a felony attempt of another crime: (a) did unlawfully, intentionally and repeatedly harass or follow another person; and (b) the person being harassed or followed was placed in fear that the stalker intended to injure the person, another person, or property of the person or of another person; and the stalker either: (i) intended to frighten, intimidate, or harass the person; or (ii) knew or reasonably should have known that the person was afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person, contrary to RCW 9A.46.110(1)(5), and against the peace and dignity of the State of Washington.

Dated: November 1, 2021
Place: Tacoma, WA
Pierce County Sheriff 2700

Mary E. Robnett
Pierce County Prosecuting Attorney

/s/ Maureen C. Goodman
Maureen C. Goodman, WSB#34012
Deputy Prosecuting Attorney