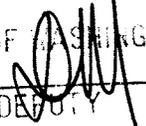


387590-II  
NO. 38659-3-II

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

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY   
DEPUTY

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STATE OF WASHINGTON,

Respondent,

vs.

ROBERT TROY GATES, III,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Christine A. Pomeroy, Judge  
Cause Number 08-1-00917-7

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**REPLY BRIEF OF APPELLANT**

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## INTRODUCTION

For the most part, the Appellant will rely and stand upon the arguments set forth in his Opening Brief, and will not present rebuttal to the arguments set forth in the Brief of Respondent. However, there are two areas where a rebuttal, by way of Reply Brief, is necessary and appropriate.

## TRUE THREAT

The State attempts to use the case of *State v. Tellez*, 141 Wn. App. 479, 170 P. 3d 75 (2007), for the broad proposition that the State does not have to prove that a threat was a “true threat” in cases of this nature. That is a misreading of the *Tellez* case.

The *Tellez* case simply held that a “true threat” is not an “essential element” of the crime, to the extent that it was not necessary that it be alleged in the charging document that the threat had to be a “true threat”, nor that it be stated in the “to convict” instruction that the threat had to be a “true threat”. What the State fails to mention is that one of the jury instructions in the *Tellez* case stated:

A true threat is a statement made in the context or under such circumstances where a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to carry out the threat.

Thus, the Court was clear that the appeal of the Defendant Tellez had no merit because the jury was, in fact, instructed as to the definition of a “true threat”. Indeed, the Court stated at the very beginning of the opinion that “[w]hile **we agree that the threat must be a true threat**, there is no basis on which to hold that his definitional concept must be included in an information or ‘to convict’ instruction.” *Tellez, supra.*, at 479 (Emphasis added). Again, at the very end of the opinion, the Court states that “[w]e hold that the

essential element in the crime of telephone harassment is a threat **which must be defined for the jury as a true threat.**” *Id.*, at 484 (Emphasis added). Thus, it is clear that the definition of a true threat must be communicated to the jury in cases of this nature. That was not done in any way in Mr. Gates’ case.

The State’s reliance on *State v. King*, 135 Wn. App. 662, 145 P. 3d 1224 (2006), is similarly misplaced. That case certainly says that the threat involved must be a true threat, but that in the context of the facts of that case, i.e. where the threat was made to a police witness in the courtroom immediately after that witness had testified, there could be no circumstances where such a threat was not a “true threat”.

The interesting aspect of the *King* case, a Division III case, is that, if it says what the State alleges it says, i.e. that it is not necessary to prove a “true threat” in a witness intimidation case, the case cannot be reconciled with the Division II case of *State v. Brown*, 137 Wn. App. 587, 154 P. 3d 302 (2007), a case decided after the *King* case, and cited in the Appellant’s Opening Brief. While the *Brown* case was admittedly a case involving a charge of Intimidating a Judge, the statutory elements of the crime (RCW 9A.72.160) are, for purposes of this analysis, identical to those for Intimidating a Witness (RCW 9A.72.110).

Yet, the *Brown* Court made it clear that a “true threat” was necessary proof in a prosecution for Intimidating a Judge, though it ultimately found that the remarks in that case did not constitute a “true threat”. The rationale and holding of the *Brown* case, i.e. that the threat in such cases must be a “true threat”, is by far the more reasoned and logical holding, and should be followed by this Court in Mr. Gates’ appeal.

### **COSTS OF INCARCERATION**

None of the cases cited by the State deal with the specific statute which discusses the imposition of costs of incarceration. That statute, RCW 9.954A.760 is quoted in the Brief of Appellant at page 24, and mandates that a determination must be made “**at the time of sentencing**”, of the Defendant’s means to pay those costs. There was no such finding made and, as pointed out in the Brief of Appellant, and supported by the record, there was no mention of costs of incarceration **at all**.

The State alleges that this is not a matter of constitutional magnitude, and that it cannot be raised for the first time on appeal. To the contrary, it is strongly urged that this constitutes a clear due process violation, in that Mr. Gates was supposedly ordered to pay costs of incarceration without there being any mention of those costs by the sentencing judge, or by either counsel during the entire proceeding.

Counsel for the State has injected facts outside the record into her brief, in describing the procedure which was followed at Mr. Gates’ sentencing hearing. She implies that Mr. Gates had full and adequate time to review the Judgment & Sentence, and that his failure to object constitutes a waiver of some sort. This argument might well carry some weight if there was anywhere in the trial record, other than a small box checked on the Judgment & Sentence, which indicates that Mr. Gates was ever informed that the Court was imposing costs of incarceration. The Appellant strenuously objects to the Court’s consideration of the “facts” stated by the counsel for the State in her Brief. If necessary, this court should, at the very least, remand this to the Thurston County

Superior Court for a reference hearing to determine whether (a) Mr. Gates or his counsel were even aware of the imposition of the costs of incarceration and/or (b) whether the sentencing judge intended to impose those costs, or whether that box was checked solely by the Deputy Prosecuting Attorney handling the case.

DATED: November 11, 2009.

Respectfully submitted,



ROBERT M. QUILLIAN,  
Attorney for Defendant  
WSBA #6836

**CERTIFICATE**

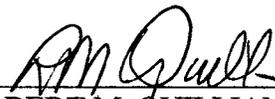
I certify that I mailed a copy of the Reply Brief of Appellant by depositing same in the United States Mail, first class postage prepaid, to the following people at the addresses indicated:

Thurston County Prosecuting Attorney  
2000 Lakeridge Dr. SW  
Olympia, WA 98502

Mr. Robert Troy Gates, III  
#326776  
Airway Heights Corrections Center  
P.O. Box 1899  
Airway Heights, WA 99001-1899

DATED this 11th day of November, 2009.

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STATE OF WASHINGTON  
BY 



ROBERT M. QUILLIAN, WSBA #6836  
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