

38759-0-II

No. 38659-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TROY GATES, III
Appellant.

STATE OF WASHINGTON
BY [Signature]
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COURT OF APPEALS
DIVISION II

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

The Honorable Christine A. Pomeroy, Judge
Cause No. 08-1-00917-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the State produce sufficient evidence from which a rational trier of fact could have found all of the essential elements of the crimes charged beyond a reasonable doubt?
2. As to the crime of Intimidating a Witness, was the court required to instruct the jury as to the requirement that the threat alleged be a "true threat" and as to the definition of "true threat."?
3. Did the Defendant receive ineffective assistance of counsel when his counsel failed to propose any jury instructions as to "true threat" and/or Possession of Stolen Property?
4. With regard to the charges of Intimidating a Witness and Tampering with a Witness, do the doctrines of double jeopardy/merger and/or same criminal conduct operate so as to result in the dismissal of one of the charges or a reduction in the offender score?
5. Was there a factual or legal basis for the Court to order the defendant to pay "costs of incarceration" for the respective convictions?

B. STATEMENT OF THE CASE

The State accepts the appellant's statement of the case, while noting the following clarifications and corrections:

1. Procedure.

Upon conclusion of the State's case and defense counsel's consultation with his client, Mr. Gates, the defense also rested, choosing not to present any additional evidence. [12-11-08 RP 71]

Neither side excepted to the court's giving of the instructions. [12-11-08 RP 72]

2. Facts.

During the questioning of Detective Rebecca Fayette of the Olympia Police Department, she indicated that during the course of her investigation she attempted to reach Gates several times, but he never returned her calls or offered to cooperate until after she turned in her report to the Thurston County Prosecutor's office on May 6, 2008. [12-10-08 RP 23]. Some time after May 6, Gates' mother contacted Fayette's sergeant and turned in to him one single computer in June. [12-10-08 RP 23-24]. Gates never contacted Fayette after the initial call following her report and request for Gates to be charged. [12-10-08 RP 23-25].

Tyson Embry indicated that he sold some, which the record later indicates is at least six, of the stolen computers to Gates for a total of \$1,000, meeting with him on two separate occasions to complete the transaction. [12-10-08 RP 11-18, 29-30].

Robert Badillo testified that Gates contacted him at about seven-thirty in the morning on April 23, 2008. [12-10-08 RP 42]. Badillo stated that he was eating breakfast at Cattin's in Tumwater and he knew it was Gates because he had known the man for 10

years and recognized Gates' phone number coming in on his cell phone. [12-10-08 RP 42]. Badillo testified that Gates wanted Badillo to move a car for him, so Gates met him at Cattin's. [12-10-08 RP 42-43]. Gates then took Badillo's bike (on which he'd ridden to breakfast) and Badillo, along with a second driver, took Gates' car over to the location of the car which Gates wanted moved. [12-10-08 RP 43]. After attempting to get the car started with the key the men received failed, Badillo called Gates back, but was only able to reach Gates' mother. [12-10-08 RP 43]. Someone brought the men another key, which again failed, and so they called Gates back for a second time, and this time were able to get in touch with his sister, asking for another key. [12-10-08 RP 43]. The third key finally went into the ignition, but since the car would not start, the men contacted Gates for a third time, and this time they were told by him "to get the merchandise out of the back of the trunk . . . [which was] three boxes total." [12-10-08 RP 43]. After loading them, at Gates' instructions, into the car Gates had loaned them to complete the favor they were doing him, they drove back to Badillo's residence where they were met by Gates, along with three other individuals. [12-10-08 RP 44].

On cross-examination, Badillo described his conversation with Gates later on that same day, saying at RP 55:

DEFENSE: Okay. And in the taped statement that you provided at that time you indicated that Mr. Gates told you that the stuff in the boxes might be stolen. He was trying to figure that out himself, correct?

BADILLO: No.

DEFENSE: Okay. He told you to hold on to it until they figured out what was going on, right?

BADILLO: No. It was stolen property. He knew it was stolen property.

C. ARGUMENT.

1. The trial court did not err in determining that sufficient evidence existed to support a finding of guilt beyond a reasonable doubt for the crimes charged.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The Salinas court held that not only must “all reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant,” but “a claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn

therefrom.” Id.; see also State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980). As the Court stated during jury instructions, “reasonable doubt . . . is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If from such consideration you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” [12-11-08 RP 78]. As the Court further noted, circumstantial evidence, while different from direct evidence, is no less reliable. [12-11-08 RP 78]. “Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience.” [12-11-08 RP 78]. A reviewing court’s role is not to re-weigh the evidence to determine if it believes guilt exists beyond a reasonable doubt—that is the purview of the jury. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A jury acts as the sole judge of the admitted evidence, “the sole judge[] of the credibility of each witness,” and “the sole judge[] of the value or weight” of the “testimony of each witness.” [12-11-08 RP 74]. In the end, it appropriately comes down to whom the jury finds more credible based on the evidence.

a. Sufficient evidence exists to support a guilty finding, beyond a reasonable doubt, of Trafficking in Stolen Property in the First Degree.

Trafficking in Stolen Property is prohibited by Revised Code of Washington (RCW) 9A.82.050 (1):

A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

The RCW defines “trafficking” to mean:

to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

[RCW 9A.82.010 (19)]. Knowingly is defined in the RCW to mean

that a person “acts knowingly or with knowledge when:

. . . he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

[RCW 9A.08.010 (1)(b)].

First, based on the RCW, the evidence stated in the record, and the admission of the State’s evidence as true (as well as all reasonable inferences), the evidence is sufficient to support a finding that Gates trafficked in stolen property. A reasonable trier of

fact could find that stolen property was either transferred or otherwise disposed of by Gates to Badillo, and/or that Gates bought, received, possessed, or obtained control of stolen property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person. It is inarguable that numerous computers and other electronic equipment, totaling more than \$6,000 in value, was stolen from Garfield Elementary School. The same equipment was bought from a "young kid" [12-11-08 RP 98], as defense counsel described him, and paid for in two separate installments by Gates for less than one-sixth of the actual value. It is further inarguable that Gates asked someone he had known for 10 years, and the evidence demonstrates he felt he had a close personal relationship with, to retrieve, transport, and store the equipment for him. This evidence is readily sufficient to support a determination of trafficking of stolen property by Gates. Gates argues, however, that the State did not and cannot prove that he did so knowingly, as required by the RCW. The State disagrees.

Gates relies primarily on the testimony of one witness, Embry, to demonstrate Gates' lack of knowledge. He points to Embry's testimony that Embry stole the equipment from the school and Embry removed the identifying stickers from the computers,

and Embry did not tell Gates the equipment was stolen. What Gates fails to address however, is that this was Embry's second version of what occurred, and only after the court took a recess and Embry conferred with his counsel, which the jury witnessed. [12-10-08 RP 26-28]. The testimony from Embry clearly indicates that a) he was initially trying to avoid even acknowledging Gates' had any involvement, which was obviously not true, and b) it took a court recess and a conference with counsel for him to admit he sold the equipment to Gates. It was absolutely reasonable for a trier of fact listening to this testimony to determine that, in general, Embry was not a credible witness and specifically, that he was going out of his way to minimize Gates' role in the trafficking. Embry only testified that he did not expressly tell Gates the equipment was stolen, not that Gates did not know it was stolen. Embry's testimony does not inherently, or even likely, equate to a lack of knowledge by Gates based on the surrounding circumstances of the sale and a trier of fact was within reason to make that inference from the witness's testimony and demeanor.

In contrast to Embry's testimony, Badillo expressly testified he did not believe Gates was unaware the property was stolen. On cross-examination and in clear response to questioning by defense

counsel, Badillo stated, "He knew it was stolen property." [12-10-08 RP 55]. A reasonable trier of fact could easily infer from Badillo's interview with Fayette and defense counsel's cross-examination of the same that there was some confusion on Badillo's part during the interview as to who he was being asked knew what and when and who had asked him to store what Gates referred to as "the merchandise." At one point it appeared Badillo thought defense counsel was asking him what Det. Fayette requested he do with the property, when it appears counsel was actually attempting to ask him what Gates had asked him to do with the property. [12-10-08 RP 55]. While the exchange is moderately confusing, what is not confusing is Badillo's clarification at the end of the exchange. Badillo was absolutely clear in stating that when Gates gave the equipment to him to hold he knew it was stolen. [12-10-08 RP 55].

When Gates returned later in the day "devastated," as Badillo described, Gates claims that the only conclusion a reasonable person could infer was that Gates had just learned the equipment was stolen. Not surprisingly, the State disagrees. A reasonable person could also infer, as it appears the jury did, that Gates, someone with no previous criminal history but who knew he bought and was holding stolen equipment, had found out that the

young kids he bought it from were arrested and “snitching.” For someone who had never been arrested before, this would likely be a significant emotional event. A reasonable person might also infer from Gates’ demeanor that because he knew the equipment was stolen when he bought it, he was keeping tabs on the people he bought it from, knew what they were likely arrested for, and described his sellers’ actions to Badillo as “snitching” because he knew he was guilty, too. A juror could determine this is not behavior typical of an innocent person who believes he has purchased legitimate goods, but is for someone who has knowledge otherwise.

Thus, a rational trier of fact could determine based on the the credibility of the witnesses, that Gates knew the equipment was stolen when he bought and transferred it to Badillo and not afterwards. Even for a person buying used equipment, the jury could have concluded that a reasonable man, in the same circumstances, buying Apple computers and accessories in the same shape, unpackaged and loose, for less than one-sixth the actual value, from a young kid, and out of a car, would have known the equipment was stolen. As a result, the State satisfied the knowledge element of the crime and sufficient evidence exists to support the conviction for trafficking.

b. Sufficient evidence exists to support a guilty finding, beyond a reasonable doubt, of Intimidating a Witness.

RCW 9A.72.110(a) provides that “a person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to: influence the testimony of that person.” “Threat” is defined under this statute to mean either: a) “to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or b) as defined in RCW 9A.04.110 (25)”—which was recodified in 2007 to subsection (27). Ten possible meanings of the word exist under 9A.04.110 (27), including the definitions in (a), which states that a “[t]hreat’ means to communicate, directly or indirectly the intent to cause bodily injury in the future to the person threatened or to any other person, and (j), which states that a “[t]hreat’ means to communicate, directly or indirectly the intent to do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.” [RCW 9A.04.110(27)(a), (j)].

Gates argues, in fact expressly states in his brief, that the State of Washington has long recognized statutes “such [as] RCW

9A.72.110 criminalize pure speech, and, as such, ‘must be interpreted with the commands of the First Amendment clearly in mind.’” [Appellant’s brief, 8], quoting State v. Williams, 144 Wn. 2d 197, 206-07, 26 P. 3d 890 (2001). Gates then argues that in order to prove the existence of a threat, the State must actually prove the existence of a “true threat” under First Amendment standards. Gates is incorrect.

Washington law is clear: the true threat standard, while applicable to other speech statutes, does not apply to RCW 9A.72.110, specifically. “No Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document or “to convict” instruction.” State v. Tellez, 141 Wn. App. 479, 483-84, 170 P.3d 75 (2007) (finding that even for felony telephone harassment, “true threat” is not an essential element the State must prove); see also State v. King, 135 Wn. App. 662, 668; 145 P.3d 1224 (2006) (“He relies on decisions in prosecutions for felony harassment (RCW 9A.46.020), see, e.g., State v. Kilburn, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004), and therein lies the problem. He notes, correctly, that the felony harassment statute covers both

protected and unprotected speech under a broad range of circumstances. He contends this means the State must prove a 'true threat' to convict him for witness intimidation." The Court disagreed.), *review denied State v. King*, 161 Wn.2d 1017, 171 P.3d 1056 (2007). In King, the court expressly held that conviction for witness intimidation using the statutory definition in 9A.72.110(3)(a)(ii) did not violate the First Amendment and did not require showing proof of a "true threat" outside of the statutory definitions and elements expressly provided in RCW 9A.72.110. King, 135 Wn. App. at 666.

Gates cites to State v. Brown, 137 Wn. App. 587, 154 P.3d 302 (2007), as case law demonstrating the requirement for the evidence to support a true threat and the State's inability to do so. This reliance, however, is misplaced. In Brown, in addition to the crime and related elements being different from those involved in the instant case, the facts were different. In Brown, the threats were determined to be statements of past thoughts, not current or future intentions and made to a third party, not the judge or his family. State v. Brown, 137 Wn. App. at 591-592. Here, the text messages were sent directly to Badillo and relayed Gates' current thoughts and future intentions, not his past thoughts. A jury could reasonably

find Gates intended the messages to influence Badillo's testimony whereas the same is not true in Brown.

Moreover, Washington law is very clear that threats against witnesses are treated very differently from threats against other members of the legal profession and the public as a whole. For example,

[T]he crime of felony harassment and the crime of witness intimidation are different. The statute prohibiting harassment covers a virtually limitless range of utterances and contexts, any of which might be protected. Both the speech and context of witness intimidation, by contrast, are limited by the language of the statute. The statute requires the State to prove that the defendant communicated an intent to harm a person who has appeared, presumably against him, in a legal proceeding. . . . There is, then, no constitutionally protected speech prohibited by a statute that outlaws solely threats to witnesses.

King, 135 Wn. App. at 669-70. As the King court then noted, this is because the laws protecting witnesses "focus on fear and 'the disruption that fear engenders,' as well as the possibility that the threatened violence will occur." King, 135 Wn. App. at 670 (quoting State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001)).

While Gates may describe the text messages as purely name calling and thus not threatening in the common context to any reasonable person, in the case of a witness, especially a

current or prospective witness, the same contact can take on an entirely different characterization. A jury could very reasonably determine that the message content along with the sheer volume of messages, eight in total, was enough to satisfy the statutory elements of the charge and the definition of “threat.” Gates’ messages went so far as to say, “karma will get you,” “you are a bitch,” “I hope you die in pain bitch,” and “If I go to jail, I’m going to kill myself or try.” [12-10-08 RP 63-64]. Even while uncertain of the exact definition of the word “karma,” Badillo reasonably interpreted from the context of the rest of the text messages that Gates intended to “get-back” or “get even” with him in some way. [12-10-08 RP 54-55, 63].

Further, the messages were apparently frightening and serious enough to Badillo that he felt compelled to report them to detectives. In his testimony, he expressly characterized the messages as “threatening,” [12-10-08 RP 48], and described the messages as “very frightening” to him and also to his family. [12-10-08 RP 53]. He testified that he interpreted Gates’ messages to mean that Gates’ thought “[he was] a punk,” and Gates “was going to kill [him].” [12-10-08 RP 54]. A reasonable person would very likely have a similar response.

As the King court pointedly noted, “Even vague hints of future harm are intrinsically frightening. Arguably, a veiled threat is scarier than a specific one.” King, 135 Wn. App. at 671. The RCW recognizes and criminalizes threats of bodily harm to *any person* in 9A.72.110, because the point is that the threat is made to influence a witnesses’ testimony. Where a defendant and a witness have a long-term relationship and the defendant either makes direct or veiled threats against the witness, and/or directly threatens to do imminent harm to himself, a reasonable person would likely be frightened. It is, essentially, emotional blackmail. The defendant is letting the witness know that if the witness testifies as the defendant believes he intends to, then not only will the witness be hurt, but he will also be responsible for the physical harm that comes to anyone else, including the defendant. The threats of bodily harm are directly related to the defendant’s intention to intimidate the witness and influence the witness’s testimony, which is why the statute criminalizes it and treats it differently. Unlike in other statutes, felony harassment for example, “proof of the minimum facts required to show witness intimidation, then, establishes a context that is inherently threatening.” Id.

Gates cites to another case with the same name, State v. Brown, where the court found the State did not meet its burden of proof, claiming the facts there were worse than those in the instant case and since the analysis is the same, the court should make the same finding. State v. Brown, 162 Wn.2d 422, 173 P. 3d 245 (2007); [Appellant's brief, 12]. A closer look at this Brown case, however, demonstrates that that case is distinctly different from Gates'. The Brown court found the evidence insufficient to support the charge of intimidating a witness because Hill had not yet reported anything to the police at the time she was threatened. Id. at 430. Upon realizing Hill had overheard her cousin and Brown talking about the burglary, Brown told her "she would pay if she spoke to police." Id. at 426. At the time of the threat, she had had no contact with police or anyone else besides Brown and her cousin regarding the incident. She had not even reported the event to the police, let alone was scheduled to give her account in court. There was no "testimony" for Brown to influence. "[T]he evidence presented . . . shows that Brown threatened Hill in an attempt to prevent her from providing any information to the police . . . Thus, the evidence was insufficient to support the crime that the State did charge." Id., at 430.

The Brown court held that the State had not met the statutory elements of the crime as to Hill's knowledge as "testimony," whereas no such claim is made by the defense here as to Badillo's status, nor could they. At the time Gates threatened Badillo, Badillo had already contacted and given a report to police regarding the stolen property. He was actively involved in the investigation and prepared to testify against Gates when Gates threatened him. Gates threatened him because of Brown's intention to testify. While the text messages never explicitly said "testify" or "trial" Gates was obviously aware Badillo had already given his statement to police and was in contact with him. A reasonable trier of fact could infer without significant effort that Gates' intent was to influence Brown's future testimony on the matter. If avoiding a charge of witness intimidation were simply a matter of avoiding court-specific words, then it would seem unlikely such a charge would ever be successful. Luckily, the intent is readily inferred from the language, the parties, and context of the circumstances. Thus, Gates' reliance on the reversal in Brown is misplaced.

The case law is clear that in cases of witness intimidation, the State must only show proof that satisfies the statutory elements and definitions as set forth in RCW 9A.72.110. The courts and

legislature have already accounted for First Amendment concerns and tailored the language of the statute to meet those concerns. As long as a reasonable trier of fact could infer that 1) Gates sent the messages threatening to harm Badillo, a current or prospective witness, in the future and/or also himself if Badillo testified, and 2) those messages caused reasonable fear in Badillo, such that it might reasonably have had the effect of influencing Badillo's testimony, then the State satisfied the statutory requirements and met its burden. All of those things occurred in this case and thus the evidence was sufficient to support a guilty finding, beyond a reasonable doubt, of witness intimidation.

c. Sufficient evidence exists to support a guilty finding, beyond a reasonable doubt, of Tampering with a Witness.

As Gates properly indicates, the same analysis from above applies to this claim as well. RCW 9A.72.120(1)(a) makes it a crime for Gates to attempt to "induce a witness . . . to testify falsely or, without right or privilege to do so, to withhold any testimony." Again, a rational trier of fact could easily infer the point of the text messages sent by Gates was not just to induce Badillo to change his story, but more specifically, to get him to not testify at all. The series of messages progresses from an initial, "answer you (sic)

phone,” to, “why you got (sic) to be a snitch?”, to what Gates says will happen if he goes to jail (which would occur after a trial). Gates was contacting Badillo under the belief Badillo would testify. [12-10-08 RP 64]. Contrary then to Gates’ proposition, the text messages can easily be construed, and in fact were by the jury, to indicate that Gates’ intent in texting Badillo was to get him to change or withhold future statements about the stolen property, which would include the testimony Gates believed could send him to jail, as referenced in his message. While some of the messages rise to the level of a threat, not all of them did and thus, the evidence was sufficient to show those messages would qualify as tampering instead.

2. The trial court was not required to define “true threat” for the jury nor include it as a requirement in the jury instruction.

Washington law is clear that for cases of witness intimidation, the trial court is not required to either define “true threat” for the jury or include it in the jury instruction because it has been inherently included in the statutory definition. Tellez, 141 Wn. App. at 483. Gates contends that the jury was neither properly instructed on the requirements of a true threat nor was the term defined for it. He does so based on the mistaken assumption that

the State had to show a "true threat," which the State has previously demonstrated is not true. To support his position, Gates cites to both State v. Schaler, 145 Wn. App. 628, 186 P. 3d 1170 (2008), a felony harassment case, and State v. Johnston, 156 Wn.2d 355, 127 P. 3d 707 (2006), a prosecution for Threats to Bomb or Injure Property, but fails to note cases previously referenced in this brief which hold that the analysis for those crimes is not the same as the instant case. In short, neither Schaler nor Johnston apply.

In Schaler, the court held that in a felony harassment prosecution, the jury must be instructed on the concept of a true threat. State v. Schaler, 145 Wn. App. 628, 640, 186 P.3d 1170 (2008). However, the court held in King that Washington's witness intimidation statute does not violate constitutionally protected speech because it prohibits no speech other than true threats. King, 135 Wn. App. at 666. As previously discussed, this is because felony harassment and witness intimidation are very different crimes, as is prosecution for threats to bomb or injure property (as occurred in Johnston). While felony harassment "covers a virtually limitless range of utterances and contexts, any of which might be protected," Id., at 669, the witness intimidation statute is confined to

threats against witnesses—a context that is inherently threatening.
Id. at 671.

The King court concluded that an instruction defining a threat in the context of witness intimidation is sufficient if it meets the statutory definition of RCW 9A.72.110. Id. at 671. In instruction No. 15, the court instructed the jury that “[a] person commits the crime of intimidating a witness when he or she, by use of a threat against a current or prospective witness, attempts to influence the testimony of that person,” which is RCW 9A.72.110(a) verbatim. [12-11-08 RP 81]. In instruction No. 17, the court correctly defined “threat” to the jury as the

means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person or to do any other act that is intended to harm substantially the person threatened or another with respect to that person’s health, safety, business, financial condition or personal relationships.

[12-11-08 RP 81]. This, again, is the statutory definition of “threat” as contained in RCW 9A.72.110 (incorporating RCW 9A.04.110(27)), which the court has already explicitly determined satisfies the “First Amendment concerns inherent in the broader harassment statutes.” King, 135 Wn. App. at 671-72. Gates’ premise is simply wrong. Gates fails to cite any witness intimidation

cases demonstrating a requirement for the inclusion of a true threat inclusion instruction or definition. Moreover, he ignores cases that specifically counter his proposition. Again, Washington law is clear. Unlike in the broader harassment cases, in a witness intimidation case the court is not required to give a jury instruction defining the requirement for a true threat nor is it required define the term “true threat” for the jury. The statutory elements and definitions account for precisely the first amendment concerns Gates proposes. As a result, the court properly instructed the jury and any discussion of harmless error or the defense’s theory of the case is irrelevant because it follows from Gates’ mistaken assumption of on nonexistent requirements.

3. Gates’ counsel was not ineffective because the jury instructions were proper as given.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Deficient performance occurs when counsel’s performance “[falls] below an objective standard of reasonableness.” State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*,

523 U.S. 1008 (1998). As the Supreme Court noted, “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. “When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.” Id. at 688. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, “judicial scrutiny of counsel's performance must be highly deferential.” Strickland, 466 U.S. at 689; *see also* State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). As the Court noted,

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.”

Strickland, 466 U.S. at 694-95. Prejudice occurs when but for the deficient performance, the outcome would have been different; in other words, a “showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland, at 466 U.S. at 687; see *a/so* In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). “If either part of the test is not satisfied [by the defendant], the inquiry need go no further.” Hendrickson, 129 Wn.2d at 78; State v. Fredrick, 45 Wn. App. 916, 729 P.2d 56 (1986).

a. Defense counsel was not ineffective for failing to propose a true threat instruction and definition.

Following from the previous argument, Gates fails to satisfy the first prong of the Strickland test because his defense counsel’s failure to propose an inapplicable jury instruction was not an error and therefore, did not fall below an objective standard of reasonableness. Even without applying the presumption of effectiveness, Gates’ counsel could not be deemed to have made any error where counsel acceded to the applicable rule of law. Because a court is not required to instruct a jury on either a nonexistent true threat requirement in a witness intimidation case, nor the definition of “true threat” for the same, no error existed, let

alone an “error[] so serious that [he] was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. The lack of error, combined with the effectiveness presumption results in a deficient showing on the first prong by Gates.

Additionally, Gates fails to demonstrate any actual prejudice suffered. Again, the King Court explicitly noted that the statutory definition of “threat,” as contained in RCW 9A.72.110 (incorporating RCW 9A.04.110(27)), satisfies the “First Amendment concerns inherent in the broader harassment statutes.” King, 135 Wn. App. at 671-72. Gates’ argument, once again, is based on the false premise that the court was required to give a true threat instruction and definition. Not only does he fail to demonstrate the error, but his showing of actual prejudice is the single, generalized, and conclusory statement that had the jury been instructed on a “true threat,” Gates does not believe he would have been convicted. The reality, however, is that the jury was given the statutory definition of “threat,” which Washington Courts have consistently held inherently satisfies the First Amendment concerns of a “true threat.” As a result, the jury received both instructions and a definition that took into account the same concerns a “true threat” instruction would

have and convicted Gates based thereon. The level of “threat” inherent in Gates’ text messages to Badillo was one for the trier of fact to evaluate and the simple fact that the jury did not evaluate them the way Gates’ would have liked, does not demonstrate prejudice. Gates is guaranteed a fair trial by the Sixth Amendment, not a successful defense. His subjective belief that a different verdict was possible, and should have occurred, based on an inapplicable rule of law is not a legitimate showing of actual prejudice.

As a result, Gates fails on both prongs of Strickland. Not only does Gates not overcome the presumption that his counsel acted reasonably, but he fails to show any clear evidence that the outcome of the case would be different had actual error occurred. Instead, he makes the unsupported and illogical conclusion that a different vernacular, which would include the same concerns as the statutory definition, would produce a different result. There is no evidence to support this.

b. Defense counsel was not ineffective for failing to propose jury instructions concerning Possession of Stolen Property.

As previously argued, based on the testimony of the witnesses and the evidence as presented, a jury could both

reasonably and easily determine that Gates knew the equipment was stolen when he transferred it to Badillo. In addition to the general presumption that counsel was effective, there are any number of strategic reasons counsel may have relied solely on the jury instruction for Trafficking in Stolen Property as given.

For example, counsel's theory of the defense was that Gates did not know the property was stolen when he gave it to Badillo. [12-11-08 RP 100 - 01]. Without proving beyond a reasonable doubt that Gates knew the equipment was stolen when he obtained it, a fact that likely came down to the credibility of the witnesses and was within the purview of the jury to weigh, the State would have failed to meet its burden. In such an event, no other jury instructions were proposed by either side. If defense counsel was successful in arguing his theory of the case (which he was able to do consistent with the given instructions), his client would be clear of the stolen property charge entirely.

The State did not charge Gates, in the alternative, with the lesser included crimes of Possession of Stolen Property in the first or third degree. A legitimate trial strategy, then, could have been to not make an additional instruction available on a lesser included offense for which the jury could almost certainly convict but which

the State did not charge. This is especially true if the defense believed in the strength of its theory as it appears it did. “If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel.” State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Here, when taken in light of the totality of the record, at least one legitimate trial strategy existed, if not more, to explain defense counsel's reliance on the Trafficking charge. Moreover, Gates bears the burden of overcoming the presumption of effectiveness, which he fails to do. Thus, no manifest error occurred on the part of counsel to support a claim of ineffective assistance of counsel in violation of the Sixth Amendment.

Additionally, Gates fails to demonstrate any actual prejudice occurred. Even if defense counsel requested instruction on the lesser included offenses, there is a) no likelihood they would have been granted, and b) there is no likelihood the jury would have found Gates “not guilty” on the Trafficking charge. The key element in the Trafficking case was whether the State proved to the jury, beyond a reasonable doubt—based on witness testimony and the evidence--that Gates knew the equipment was stolen when he

transferred it. The State neither charged nor proposed an alternative instruction of Possession of Stolen Property. The State put all its eggs in the “trafficking basket,” so to speak. If the State met its burden, then Gates would be found guilty. If the State failed, then Gates would be free of that charge entirely, not found guilty of a lesser charge. One might argue then, that proposal of the lesser charge of Possession in either the first or third degree by defense counsel would have actually prejudiced Gates, whereas counsel’s actions at the time did not. Moreover, even had the lesser charge been proposed by defense counsel, Gates fails to demonstrate how it would have ensured the success of his argument on the element of knowledge, which was the key to his theory of the case. The fact that he was unsuccessful in arguing this point is not grounds for ineffective assistance of counsel. No actual prejudice exists. While the State need only show Gates’ failure to satisfy one prong of Strickland, it contends that he fails on both.

4. The trial court did not err in convicting and sentencing Gates on both Intimidating a Witness and Tampering with a Witness, or in not finding that the two offenses constituted the “same criminal conduct” for sentencing purpose.

- a. Neither the theories of double jeopardy nor merger apply to convictions for the crimes of Intimidating a Witness and Tampering with a Witness.

Article I, section 9 of the Washington Constitution states “[n]o person shall be ... twice put in jeopardy for the same offense.” A single course of conduct, however, “may give rise to liability under several criminal statutes.” State v. Meneses, 149 Wn. App. 707, 715, 205 P.3d 916 (2009). In order to avoid double jeopardy, there must be a difference in both fact and law of the crimes charged. Id. Washington follows the “same evidence” rule which this court adopted in 1896. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). “Washington’s ‘same evidence’ test is very similar to the rule set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).” Id. The same evidence rule controls “unless there is a clear indication that the legislature did not intend to impose multiple punishment.” State v. Gohl, 109 Wn. App. 817, 821, 37 P.3d 293 (2001). The legislature may “impose multiple punishments for a single act or course of conduct as long as the crimes have separate elements that require proof that the other does not.” Meneses, 149 Wn. App. at 715. Thus, “the Blockburger presumption may be rebutted by other evidence of legislative intent.” Calle, 125 Wn.2d at 778.

The resulting analysis then occurs in four parts: 1) whether there exists any legislative intent, express or implied; 2) whether the crimes include the same elements and same evidence, meaning they are the same in fact and law; 3) whether the merger doctrine applies; and 4) if the merger doctrine does appear to apply, whether there is any independent purpose or effect which would support separate punishments for each crime. State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005).

First, while there is no statutory language expressly authorizing separate punishments for the crimes of Witness Tampering and Intimidating a Witness, the findings in the notes following both RCW 9A.72.110 and 9A.72.120, incorporate the comments following RCW 9A.72.090 which clearly indicate the legislature's intent that the crimes may be separately and simultaneously charged due to their inherent danger to public safety. The legislature finds

. . . that witness intimidation and witness tampering serve to thwart [] the effective prosecution of criminal conduct in the state of Washington []. . . Further, the legislature finds that intimidating persons who have information pertaining to a future proceeding serves to prevent both the bringing of a charge and prosecution of such future proceeding. . . The legislature finds, therefore, that tampering with *and/or* intimidating witnesses or other persons with information relevant to

a present or future criminal . . . are grave offenses which adversely impact the state's ability to promote public safety and prosecute criminal behavior.

[RCW 1994 c 271 § 201, emphasis added]. Taking the statutory comments on their face, it seems apparent that while the legislature did not explicitly state, "These crimes may be charged and punished separately," that was precisely the legislative intent where applicable through the use of the inclusive "and."

Second and third, Gates argues that the crimes are the same in fact and law, that proof of Intimidating a Witness as charged here necessarily encompasses the proof required for Tampering with a Witness. The State once again disagrees with Gates' characterization of the evidence in this case. Eight separate text messages exist. As the prosecutor indicated in his closing statement, those text messages had a variety of themes, some of which supported the charge of tampering and some of which supported the charge of intimidation. For example, some of the messages appeared aimed at making Badillo feel bad or guilty for talking to the police and becoming a witness: "please, I got you out of jail," "I always help you and you do me like that even after you cry to me and you knew I was going through a hard time with family," "you know I'm really sick and can't do nothing," "you hurt

my feeling badly,” “you turn those in and made me move and not see my doctor.” [12-10-08 RP 63-64]. Others, however, were threats aimed at frightening the witness, which Badillo testified, in fact, that they did: “karma will get you,” “you are a punk,” “I hope you die in pain bitch,” “if I go to jail, I’m going to kill myself or try.” [12-10-08 RP 63-64].

Gates generalizes both the evidence and the statutes in order to support his claim of merger and double jeopardy. He points to Freeman, a robbery and assault case to illustrate his point, but his focus is misplaced. [Appellant’s brief, 21; Freeman, 153 Wn.2d 765, 778, 108 P. 3d 753 (2005)]. The statutory requirements to satisfy First Degree Robbery under RCW 9A.56.200 include when a person inflicts bodily injury, which is, by necessity, Second Degree Assault. The State in that case could not prove Robbery in the First Degree without proving the second degree assault charge – the same single punch constituted the evidence for both charges. To use an old metaphor, both in fact and law, the First Degree Robbery circle entirely encompasses the Second Degree Assault circle.

Here, though, the crimes are distinctly different, even as charged. The State can and did prove to the trier of fact that some

of the text messages constituted threats, a requirement of proof different for intimidation than tampering. Tampering does not require a “threat,” and thus, the evidence required to support it, was separate and distinct. To accept the interpretation of the statute as Gates proposes, that “intimidation” inherently encompasses “tampering,” would require the Court to ignore the legislature’s clear intent that the two can be simultaneously charged. While the “circles” of tampering and intimidation may overlap, the one is not wholly encompassed by the other. Further, there is no requirement that the State indicate or that the jury distinguish which text messages they found to constitute proof to support which charge. Thus, neither the merger doctrine nor double jeopardy applies to this case, as charged.

Lastly, the fact that the two statutes appear in the same section of the RCW does not a) negate the legislative intent previously noted, or b) in any way indicate the two are not mutually exclusive. The same effect and purpose test proscribed in Freeman and discussed in Fuentes, specifically begins with the presumption that “these offenses were intended to be punished separately ‘unless there is a clear indication that the legislature did not intend to impose multiple punishment.’” State v. Fuentes, 150 Wn. App.

444, 454, 208 P.3d 1196 (2009). Gates' observation of the Court's finding in Fuentes is not instructive, primarily because in that case, there was no legislative intent noted for the Court to refer to so it had to look elsewhere. In this case, the opposite is true. The legislature clearly anticipated the likely event that the two crimes would be simultaneously charged through the use of the inclusive language previously mentioned. Absent any clear evidence to the contrary, the location of the statutes does not overcome the presumption (and evidence to that effect) that the legislature intended multiple punishments.

Moreover, while the two may share a similar broad purpose, they have different effects, as charged. The prohibition against tampering with a witness specifically serves to prevent the inducement of a witness to either testify falsely or withhold testimony relevant to a criminal investigation, through even non-threatening means—a class C felony offense. Intimidating a witness, on the other hand, specifically prohibits the intimidation of a current or prospective witness's testimony through the use of threats which is a class B felony. If the legislature intended for the statutes to have the same purpose and effect, then by Gates' logic, the legislature could have classified tampering as a class B felony

offense and deleted intimidation altogether in order to achieve the same effect. That was clearly not its intention, however. Like many other statutes which share geographical proximity to each other in the RCW, the purpose and effects of the RCW 9A.72.110 and 9A.72.120 are different and again, do not merge or implicate double jeopardy. *E.g.* Bribe receiving by a witness and Tampering with a witness—RCW 9A.72.100, .120; Rape of a child in the first degree and child molestation in the first degree—RCW 9A.44.073, .083; reckless endangerment and promoting a suicide attempt—RCW 9A.36.050-.060.

b. The court did not miscalculate Gates' offender score based on the criminal convictions.

The question of whether a court includes all current convictions as separate criminal acts in calculating an offender score is addressed in RCW 9.94A.589. The general rule is found in RCW 9.94A.589(1)(a):

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That *if the court enters a finding that some or all of the current offenses encompass the same criminal conduct* then those current offenses shall be counted as one crime. . . . "Same criminal conduct," as used in

this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. . .

(Emphasis added.)

The statutory language above states that two or more offenses are to be counted as one point *if* the court enters a finding that they encompass the same criminal conduct. As Gates' brief notes, the court did not make the required finding, nor did Gates' counsel object to the lack of such a finding at the time. Gates' failure to object at the time of calculation and sentencing effectively waives his right to raise the issue for the first time on appeal. See RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."); see *also* State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) ("As a general rule, appellate courts will not consider issues raised for the first time on appeal.").

Further, even in the event the Court deems the issue not waived on appeal, the Supreme Court of Washington noted in State v. Haddock:

[A]n appellate court, when reviewing a sentence under the Sentencing Reform Act of 1981, will generally defer to the discretion of the sentencing court, and will reverse a sentencing court's determination of "same criminal conduct" only on a

“clear abuse of discretion or misapplication of the law.”

State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000), citing to State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990); *see also* State v. Hernandez, 95 Wn. App. 480, 483, 976 P.2d 165 (1999). On numerous occasions both the Courts of Appeal and the Supreme Court of Washington have held that review of issues raised for the first time on appeal should be allowed sparingly. See State v. Lynn, 67 Wn. App. 339, 344, 835 P.2d 251 (1992) (“A judicious application of the ‘manifest’ standard permits a reasonable method of balancing these competing values. Thus, it is important that ‘manifest’ be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals.”); State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting comment (a), RAP 2.5) (“The exception actually is a narrow one, affording review only of ‘certain constitutional questions.’”).

Even where a determination of “same criminal conduct” exists, sentencing courts should be granted a high level of deference unless a clear abuse of discretion exists. That is not the case here. There is no evidence the trial court clearly abused its

discretion or misapplied the law. Gates bases his argument on this point on the same flawed argument he has throughout that a) the charges for tampering and intimidating, as charged herein, are in essence the same, and b) that the same act provided the proof, in whole, for both charges. Once again, however, this mischaracterizes the evidence.

RCW 9.94A.589 defines "same criminal conduct" as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Setting aside the fact that Gates waived the issue as previously discussed, the facts still fail to meet the above definition. While Gates is correct that the victim is the same throughout, the same intent and time frame are not. Eight different text messages exist. Each message was sent at a different time, over the course of several weeks, with different intents. [12-10-08 RP 62-64]. As previously discussed, some were intended to threaten and scare Badillo out of testifying against him while some appear intended to make him feel bad or guilty for cooperating with the criminal investigation. As a result, even if the Court were to entertain the argument for the first time on appeal, which it is historically cautious to do, Gates' argument fails

to meet all of the elements required for “same criminal conduct” as defined by RCW 9.94A.589.

5. The imposition of “costs of incarceration” on Gates was valid and legal.

First, and as previously noted, issues raised for the first time on appeal which do not constitute “an error of constitutional magnitude” are generally deemed waived. State v. Phillips, 65 Wn. App. 239, 242-43, 828 P.2d 42 (1992); see also State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990); RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). In Phillips, Phillips’ co-defendant, Scott, challenged the trial court’s ability to impose financial obligations on Scott without “enter[ing] findings regarding [Scott’s] ability to pay.” Phillips, 65 Wn. App. at 242. The Court agreed with the State’s position that the error was statutory in nature and not constitutional, thus it was improper to raise it for the first time on appeal. Id. at 243. The Court expressly noted that “a trial court’s failure to enter formal findings regarding a defendant’s financial circumstances before imposing costs pursuant to RCW 10.01.160 is not a constitutional error that requires resentencing.” Id., citing State v. Curry, 62 Wn. App. 676, 680-81, 814 P.2d 1252 (1991)(This is the controlling Supreme Court of Washington case

decided after State v. Williams, upon which Gates' bases his argument, and which specifically holds that no formal findings must occur.); State v. Eisenman, 62 Wn. App. 640, 810 P.2d 55, 817 P.2d 867 (1991). The Court further noted that constitutional issues are only implicated "if the government seeks to enforce collection of the assessments 'at a time when [the defendant is] unable, through no fault of his own, to comply.'" Phillips, 65 Wn. App. at 243-44 citing U.S. v. Hutchings, 757 F.2d 11, 14-15 (2d Cir.), *cert. denied*, 105 S.Ct. 3511, 87 L.Ed.2d 640 (1985) (citations omitted). Although the "costs" in that case were court costs and not incarceration costs, the holding is no less applicable:

Scott's failure to object when the trial court imposed court costs under RCW 10.01.160 amounted to a waiver of the statutory (not constitutional) right to have formal findings entered as to his financial circumstances. In addition, pursuant to Curry and Pagan, any constitutional issues that might be raised with regard to the other penalties imposed are not presently ripe for review. It is only when the State attempts to collect Scott's \$50 monthly payment ordered by the trial court that such issues might arise.

Curry, 62 Wn. App. at 682; U.S. v. Pagan, 785 F.2d 378, 381-82 (2d Cir), *cert. denied*, 479 U.S. 1017, 93 L. Ed. 2d 719, 107 S. Ct. 667 (1986).

As in Phillips and Curry, Gates made no objection at the time of sentencing to the imposed incarceration costs. Presumably, Gates' arguments would imply that he did not object because he did not and could not reasonably have had knowledge of the court's actions. Notably, however, he never claims he was not aware of the incarceration costs, just that the Court never discussed them. He states that, "[o]n the most elementary level, there simply was no order by the Court which imposed 'costs of incarceration' in this case." [Appellant's brief, 23]. This is simply untrue. The Felony Judgment and Sentence form clearly notes the Court's imposition of incarceration costs on the bottom of the page. [No. 08-1-01583-5 CP 12, No. 08-1-00917-7 CP 56]. Even at the most elementary level of legal understanding, the Judgment and Sentence is a court order.

Gates next makes note of the lack of any express mention of the incarceration costs on the record during the sentencing hearing. The State first responds by saying the court is not required to read the sentencing form, verbatim, and in its entirety, to the defendant. Both the State and defense counsel receive a copy of the form. The defendant is then provided an opportunity to review the form, in its entirety, with his counsel. Upon full review of the forms, the Court

will then conduct its own review and address any issues with the defendant and the State. While the Court will often read all of the orders included in the form, it is not required to.

Further, it is highly unlikely that Gates was not aware of the costs. There was a significant amount of discussion on costs associated with this case in general, Gates' indigency, and for what the Court intended to hold Mr. Gates responsible. [01-06-09 RP 11-14]. This included \$500.00 for the victim's assessment fee as well as \$200.00 for court costs, equaling a total amount of \$700.00 (for tampering and intimidation). Gates makes no claim that he was not aware of these numbers (presumably because the Court discussed them in open court), yet the imposition of incarceration costs is clearly marked on the same page of the form that memorializes the same discussion. [No. 08-1-01583-5 CP 12, No. 08-1-00917-7 CP 56].

Additionally, the defendant was aware of the existence other imposed duties which the sentencing judge, himself, did not initially address. For example, defense counsel was able to identify the boxes checked which imposed duties and restrictions relating to the witness and drug evaluation. [1-6-09 RP15, No. 08-1-01583-5 CP 15]. Even where both the State and defense noted the drug

imposition was uncommon for this type of case, the defendant apparently read the document carefully and thoroughly enough to note the checked box (identical to every other box in the form) and argue against it on the record. Yet, he would have the Court believe that he could not be expected to do the same for the incarceration costs, a fairly common imposition, without the Court explicitly directing his attention to it. Not only is this argument unreasonable, but again, the Court was not required to do so.

Gates had ample time and opportunity to look through the sentencing form with counsel, the record evidences he did so, he argued against objectionable elements of the sentence, and then, without further objection from Gates, the Court signed the form in the defendant's presence. The State maintains Gates was aware of all of the costs, he does not claim he was expressly unaware of them, and most importantly, he never objected to them, thus, the incarceration costs are valid and Gates cannot raise the issue for the first time on appeal.

Lastly, there is evidence the Court took into account Gates' financial resources by signing off on his indigency form; his status as such does not invalidate the imposition of costs. While the historical background to RCW 10.01.160 is interesting, controlling

law in this case is unambiguous. Even if a violation of the statute occurred, which the State maintains is not the case, a verbal omission by the court in the record does not invalidate the court's order in the sentencing form. CrR 7.8(a); See also State v. Klump, 80 Wn. App. 391, 397, 909 P.2d 317 (1996), State v. Snapp, 119 Wn. App. 614, 626-27, 82 P.3d 252 (2004). As noted and conceded by Gates, "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). The trial court has the discretion to impose fines and "ample protection is provided from an abuse of that discretion." Id. "[A] mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified. Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system." Id.; See also State v. Phillips, 65 Wn. App. 239; 828 P.2d 42 (1992).

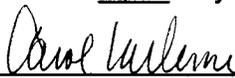
In sum, the incarceration costs were valid as entered. The imposition of costs is within the court's discretion, there is evidence the court considered Gates' financial resources at the time, and there is evidence Gates was or should have been aware of the

incarceration costs. Gates did not object to the costs at the time of sentencing and no constitutional violation exists to warrant a first look of the issue on appeal. While the State maintains that no statutory violation occurred, even if the Court construes it did, various statutory safeguards exist in Washington to allow Gates to petition for remission of costs if it "will impose manifest hardship on the defendant or [his] immediate family." State v. Blank, 131 Wn.2d 230, 234-35, 930 P.2d 1213 (1997); RCW 10.01.160(4). The current forum is inappropriate for this complaint and thus, the Court should deny it.

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm this conviction

Respectfully submitted this 9th day of October, 2009.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

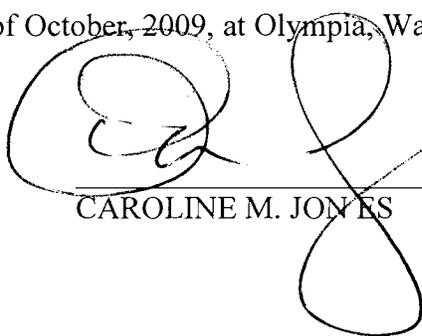
- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: ROBERT M. QUILLIAN
ATTORNEY AT LAW
2633-A PARKMONT LN SW
OLYMPIA, WA 98502

09 OCT 12 AM 10:45
STATE OF WASHINGTON
BY _____
DEPUTY
COURT OF APPEALS
DIVISION II

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9 day of October, 2009, at Olympia, Washington.



CAROLINE M. JONES