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Court of Appeals No. 61118-6-I

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ANDRE MENESES,

Petitioner.

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER / COURT OF APPEALS DECISION

Andre Meneses, defendant and appellant below, seeks review of the Court of Appeals published decision affirming his convictions on two counts of felony telephone harassment, six counts of gross misdemeanor telephone harassment, and two counts of intimidating a witness. State v. Meneses, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 1058086 (No. 611186-I, April 13, 2009). A copy of the Court of Appeals decision is attached as an appendix to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. In a telephone harassment charge, does State v. Lilyblad require the jury be instructed that the requisite intent to harass or intimidate must be formed at the initiation of the telephone call?

2. Was Mr. Meneses entitled to have the jury instructed regarding lesser offenses for the witness intimidation charges?

3. Do the convictions in Counts II and III violate the prohibition against double jeopardy?

4. Where the gross misdemeanor telephone harassment statute prohibits only threats to injure persons or property, was the jury improperly instructed on the definition of "threat"?

5. Are the "to convict" instructions defective because they do not list "true threats" as an element necessary for conviction?

6. Are the convictions supported by sufficient evidence?

C. STATEMENT OF THE CASE

Andre Meneses has a son, Jacoby (age seven), with Jamilla Willis. 9/26/07RP 19. Mr. Meneses and Ms. Willis split up several years ago, and Ms. Willis currently lives with her boyfriend, Andre Prim, their five-month-old baby, Elijah, and Jacoby. 9/26/07RP 19-20. From March until May of 2007, Mr. Meneses and Ms. Willis were involved in a dispute over whether Mr. Meneses could have visitation with Jacoby. 9/26/07RP 37.

In the course of a different investigation, Jamila Willis informed police that Mr. Meneses made numerous telephone calls to her, leaving what she described as threatening messages on her phone. 9/26/07RP 12, 22-23. Ms. Willis gave police access to these messages, and from them a police detective made a tape of ten recorded phone messages. 9/26/07RP 23-24; Ex. 3. In the various phone messages, Mr. Meneses expressed his frustration and anger over Ms. Willis's unwillingness to let him see his son. Ex. 3. He used profanity and racial slurs, and made various so-called threats, although he disputed at trial that they constituted "true threats." Ex. 3.

Mr. Meneses was originally charged with one count of felony telephone harassment. CP 1. Before trial, the charges were amended to add three additional counts of felony telephone harassment, four counts of

(gross misdemeanor) telephone harassment, and two counts of intimidating a witness. CP 30-34. All ten charges were based on the messages left by Mr. Meneses and placed on the single tape recording made by the police detective.

The jury ultimately found Mr. Meneses guilty on all ten counts, although on counts IV and VIII he was found not guilty of felony telephone harassment and guilty of gross misdemeanor telephone harassment. CP 117-19, 125. The trial court sentenced Mr. Meneses to thirty months incarceration, which constituted an exceptional sentence of less than the standard sentence range.

On appeal, Mr. Meneses argued that 1) the jury was not instructed that the intent to harass, intimidate, or torment must be formed at the initiation of the telephone calls; 2) the “to convict” instructions did not include the essential element that the threats be “true threats”; 3) there was insufficient evidence to prove “true threats”; 4) there was insufficient evidence to prove Mr. Meneses acted with the intent to harass, intimidate, or torment at the time the phone calls were initiated; 5) the trial court erred in refusing to instruct the jury on lesser included offenses for the witness intimidation charges; 6) the jury instruction defining “threat” did not comport with the statutory definition of telephone harassment; and 7) the

convictions in Counts II and III, based on the same telephone call, violated the prohibition against double jeopardy.

The Court of Appeals concluded that the instructions provided to the jury were proper, the evidence was sufficient to support the convictions, and there was no double jeopardy violation. Slip Op. at 3-7. All of the convictions against Mr. Meneses were affirmed by the Court of Appeals. Mr. Meneses now seeks review in this Court.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF STATE V. LILYBLAD REQUIRES THE STATUTORY PHRASE “MAKES A TELEPHONE CALL” BE DEFINED FOR THE JURY.

The jury must be informed of all elements necessary for conviction.<sup>1</sup> Here, the jury instructions failed to inform the jury that the defendant’s intent to harass, intimidate, or torment must be formed at the initiation of the telephone call. The Court of Appeals held that instructing the jury in accordance with the language of RCW 9.61.230, the telephone harassment statute, (“a person commits the crime of telephone harassment when he or she, with intent to harass or intimidate any other person, makes

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<sup>1</sup> The burden is always upon the State to establish every element of the crime charged by proof beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const, amend. 14; Wash. Const. art. 1, §3. Accordingly, the trial court must instruct the jury on every element of the crime. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984).

a telephone call ...”) was sufficient to inform the jury that the intent needed to be formed at the initiation of the call. Slip Op. at 3-4. This Court should accept review because the decision of the Court of Appeals conflicts with a decision of this Court, and also because the decision raises an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1) and (4).

In State v. Lilyblad, 163 Wn.2d 1, 13, 177 P.3d 686 (2008), this Court determined that the crime of telephone harassment includes as an element the intent to harass or intimidate at the time the phone call is initiated. In Lilyblad, the jury had been given a separate instruction that “make a telephone call” referred to the entire call rather than the initiation of the call. In the instant case, the jury did not receive a separate instruction about the meaning of “make a telephone call.” However, as in Lilyblad, neither the definition of telephone harassment nor the to-convict instructions included the element that Mr. Meneses must have formed the intent to harass or intimidate at the time he initiated the calls. CP 71, 74-81.<sup>2</sup> Nowhere in any of the instructions was the jury informed that one

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<sup>2</sup> The defense offered a jury instruction which stated in part:

You may find the defendant guilty of the greater charge of harassment, with a threat to kill, only if you find beyond a reasonable doubt that the defendant made a true threat, and that the telephone call must be initiated with the intent to harass, intimidate, torment, or embarrass another person.

element of the crime of telephone harassment was the intent to harass, intimidate, or torment at the initiation of the phone call. CP 62-92. Rather, the jury was left to believe the necessary intent could be formed at any time during the call.

The Court of Appeals held that the word “makes” implies “to begin or initiate,” and that a reasonable jury would understand that the requisite intent needed to be formed at the time the call was initiated. Slip Op. at 4. However, prior to this Court’s decision in Lilyblad, there was a split among the divisions in the Court of Appeals as to the meaning of the phrase “make a telephone call.” Division I held that the telephone harassment statute applied to a caller who formed the intent to harass or intimidate “at any point” in a telephone conversation. City of Redmond v. Burkhardt, 99 Wn.App. 21, 991 P.2d 717 (2000). Division II maintained that the intent to harass must be formed at the time the defendant initiated the call. State v. Lilyblad, 134 Wn.App. 462, 140 P.3d 614 (2006), aff’d, 163 Wn.2d 1 (2008). This Court ultimately interpreted the statute to require the intent be formed at the initiation of the call. Given the disagreement among the divisions of the Court of Appeals, the jury in the case at hand could hardly be expected to properly interpret the phrase without instructional assistance. Parties are entitled to jury instructions

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CP 111 (emphasis added). The court declined to give the requested instruction.

which properly inform the jury of the applicable law. State v. Cyrus, 66 Wn. App. 502, 508, 832 P.2d 142 (1992), rev. denied, 120 Wn.2d 1031 (1993).

The jury instructions relieved the State from proving beyond a reasonable doubt that Mr. Meneses had the specific intent to harass or intimidate when he initiated the calls. This Court should accept review because the decision of the Court of Appeals conflicts with this Court's decision in Lilyblad. RAP 13.4(b)(1). In the alternative, this Court should accept review to clarify whether Lilyblad requires that the phrase "make a telephone call" be further defined for the jury to specify that the requisite intent must be formed at the initiation of the call. This case raises an issue of substantial public interest under RAP 13.4(b)(4) that needs to be resolved by this Court.

2. THIS COURT SHOULD ACCEPT REVIEW TO  
DETERMINE IF THE TRIAL COURT ERRED IN  
REFUSING TO INSTRUCT THE JURY ON THE  
LESSER OFFENSES OF ATTEMPTED  
INTIMIDATION OF A WITNESS AND TAMPERING  
WITH A WITNESS.

With regard to the two charges of intimidating a witness, defense counsel offered instructions that would allow the jury to consider the lesser included offenses of attempted intimidating a witness, and witness tampering. CP 103-05; 9/26/07RP 99-100. The Court of Appeals upheld

the trial court's refusal to instruct the jury as to these lesser offenses. This Court should accept review under RAP 13.4(b)(1) because the decision of the Court of Appeals conflicts with several decisions of this Court.

A party is entitled to an instruction on a lesser included offense where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong). State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Although affirmative evidence must support the issuance of the instruction, such evidence need not be produced by the defendant. Rather, the trial court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). Finally, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. Id. at 455-56.

The Court of Appeals held that under the facts of this case, the jury was not entitled to be instructed on either attempted witness intimidation or witness tampering. The court found that an instruction on attempted witness intimidation was not warranted since Mr. Meneses completed the act of sending the voicemail message. Slip Op. at 5. The charge of

witness tampering (9A.72.120) differs from witness intimidating in that it does not require the use of a threat. The court found that the messages left by Mr. Meneses were threats, and that the requested instruction for witness tampering was properly denied. Slip Op. at 5.

The court's opinion disregards the defense presented by Mr. Meneses: that the so-called threats were mere puffery and did not constitute "true threats." Mr. Prim told the police detective that neither he nor Ms. Willis took Mr. Meneses's statements seriously, and that Mr. Meneses never followed through on his so-called threats. 9/26/07RP 56-57, 67. Ms. Willis testified that she did not take Mr. Meneses's comments regarding being involved in the mafia seriously. 9/26/07RP 30.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case if there is evidence to support that theory. Fernandez-Medina, 141 Wn.2d at 461-62; State v. Redmond, 150 Wn.2d 489, 495, 78 P.2d 1001 (2003). If the jury was not convinced beyond a reasonable doubt that the so-called threats uttered by Mr. Meneses were "true threats," it would be appropriate for them to then consider the lesser charges of attempted witness intimidation or of witness tampering. Viewed in the light most favorable to Mr. Meneses, the evidence supported the inference that he was guilty of only a lesser charge and not witness intimidation. This Court should accept review under RAP

13.4(b)(1), because the decision of the Court of Appeals conflicts with the decisions of this Court in Fernandez-Medina, Berlin, and Workman.

3. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF THE CONVICTIONS IN COUNTS II AND III VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY.

The Court of Appeals acknowledged that the “exact same evidence, here a single voicemail message,” supports the convictions in both Counts II and III. Slip Op. at 6. As charged and prosecuted, proof of the telephone harassment charge in Count III also proved the charge of intimidating a witness in Count II. This Court should accept review under RAP 13.4(b)(3) because this case raises a significant question of law under the United States and Washington Constitutions.

The double jeopardy clauses of the Fifth Amendment to the United States Constitution<sup>3</sup> and Article I, section 9 of the Washington Constitution protect a criminal defendant from multiple convictions and punishments for the same offense. Ball v. United States, 470 U.S. 856, 861, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); State v. Bobic, 140 Wn.2d 250, 260, 996, P.2d 610 (2000). The Washington State double jeopardy clause provides the same scope of protection as does the federal double jeopardy clause. Bobic, 140 Wn.2d at 260.

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<sup>3</sup> The Fifth Amendment double jeopardy clause applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969).

Where a defendant is charged with violating two separate statutory provisions for a single act, courts must determine whether, in light of legislative intent, the charged crimes constitute the same offense. To answer this question, they look to “whether each provision requires proof of a fact which the other does not.” Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932); In re Pers. Restraint of Orange, 152 Wn.2d 795, 817, 100 P.3d 291 (2004).

In determining whether proof of one offense also establishes another charged offense, the inquiry must focus on the offenses as they were charged and prosecuted in a given case, rather than a mere abstract comparison of statutory elements. Whalen v. United States, 445 U.S. 684, 694, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Orange, 152 Wn.2d at 818-19. If there is doubt as to the legislative intent, the rule of lenity requires the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694.

The telephone harassment charge in count III alleged that Mr. Meneses, “on or about May 4, 2007, with intent to harass, intimidate, or torment another person, did make a telephone call to Jamila Willis, threatening to inflict injury on the person or property of Jamila Willis, or to any member of her family or household.” CP 31. In Count II, Mr. Meneses was charged with intimidating a witness. The amended

information alleged that Mr. Meneses, “on or about May 4, 2007, by use of a threat against Jamila Willis, a current or prospective witness, did knowingly attempt to induce that person not to report information which was relevant to a criminal investigation.” CP 31. The evidence offered by the State to prove the telephone harassment charge consisted of the phone messages Mr. Meneses left on Ms. Willis’s phone. The same evidence was used to establish the charge of intimidating a witness in Count II. Counts II and III not only arose from the same incident date, they were both based on the same phone call (call number one) according to the deputy prosecuting attorney. 9/25/07RP 9; 9/27/07RP 24, 29. Both charges required the same intent and both alleged threats to the same person.

The Court of Appeals held that the two convictions do not violate the prohibition against double jeopardy because the threats regarding each charge served different purposes, and therefore the convictions were not the same in fact and law as required by State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). Slip Op. at 6-7. This is not the appropriate inquiry. In addition, Calle conflicts with the test set out in both Blockburger and United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). This Court cannot authorize that which is prohibited by the United States Constitution.

While it is true that the two crimes in question contain different statutory elements, any two given statutes will always have different elements. This is not a bar to finding that Mr. Meneses's act constitutes the same offense. In Dixon, the defendant was originally charged with second-degree murder. 509 U.S. at 691. He was released on bond with a condition that he not commit any criminal offense. Id. While awaiting trial, Dixon was arrested on a drug charge (possessing cocaine with the intent to distribute). Id. He was then found guilty of criminal contempt for violating the court's order. Id. at 691-92. The Court held that the subsequent prosecution for the drug offense was barred by double jeopardy. Id. at 712. The crimes of criminal contempt and drug possession clearly have completely different statutory elements. Nevertheless, since proof of the contempt charge also proved the drug charge, the offenses were the same. Id. at 699-700. "Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution violates the Double Jeopardy clause." Id. at 700.

Here, proof of the telephone harassment charge also proved the charge of intimidating a witness. It is irrelevant whether telephone harassment could be established without also proving witness intimidation in another scenario. Whalen, 445 U.S. at 694. The two offenses, as

charged and prosecuted, constituted the same offense and Mr. Meneses's convictions on both Counts II and III violate the prohibition against double jeopardy. See Orange, 152 Wn.2d at 820 ("The two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault"). This Court should accept review under RAP 13.4(b)(3).

4. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF THE JURY INSTRUCTION DEFINING THREAT WAS DEFECTIVE.

As charged against Mr. Meneses, the gross misdemeanor telephone harassment charges required proof that he threatened "to inflict injury" to persons or property. CP 30-34; RCW 9.61.230(1)(c). However, the court instructed the jury regarding a definition of "threat" that allowed them to convict based on threats beyond threats to injure persons or property. This Court should accept review under RAP 13.4(b)(3) because a significant question of constitutional law is involved.

The State must prove all elements of the charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art 1, §§ 3, 21, 22. Court's Instruction No. 8 was the only definition of threat that the

jury received. CP 62-92.<sup>4</sup> This definition is much broader than the definition of threat in the gross misdemeanor telephone harassment statute, which is limited to threats to inflict injury to persons or property. RCW 9.61.230. The instruction was not only inaccurate as to the telephone harassment charges, but given its broad definition of “threat,” the instruction made it easier for the State to prove the charges. In this way, the use of Court’s Instruction No. 8 relieved the State of its burden to prove an essential element of the charge.<sup>5</sup>

Where a statute is subject to differing interpretations, the rule of lenity applies. State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). Under the rule of lenity, the court must adopt the interpretation most favorable to the defendant. Id. Threats to steal Ms. Willis’s baby (count

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<sup>4</sup> Court’s Instruction No. 8 reads as follows:

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; or

To subject the person threatened or any other person to physical confinement or restraint; or

To do any other act which is intended to harm substantially the person threatened or another with respect to that person’s health, safety, business, financial condition or personal relationships.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

CP 72.

<sup>5</sup> The prosecutor argued to the jury that Mr. Meneses was guilty in Count III because the definition of “threat” included threats of physical confinement or restraint. 9/27/07RP 25.

III), a threat by Mr. Meneses to take matters into his own hands (count VI), and a threat to take Ms. Willis's family (count IX) fall outside those threats prohibited under the telephone harassment statute. Because the jury instruction relieved the State of its burden to prove an essential element of the charge, a significant question of law under the federal and state constitutions is involved, and this Court should accept review under RAP 13.4(b)(c).

5. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF THE "TO CONVICT" INSTRUCTIONS WERE DEFECTIVE BECAUSE THEY FAILED TO INCLUDE THE ESSENTIAL ELEMENT THAT THE THREATS BE "TRUE THREATS."

"To convict" instructions must include all essential elements of the offense. Without citing to any authority, the Court of Appeals held that the failure of the "to convict" instructions to include the requirement that the threats be "true threats" was not error because "[t]he existence of a true threat, however, is not an essential element" of the crimes. Slip Op. at 4. This Court should accept review under RAP 13.4(b)(1) and (3).

The due process clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every element of the crime charged. State v. McCullum, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983). An essential element of a crime is one that must be proven to "establish

the very illegality of the behavior.” State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). An element need not be listed in the statute defining the crime to be considered essential. Id.

Also required by principles of due process, the “to convict” instruction must include all essential elements of the crime. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953). The United States Constitution, First Amendment states in pertinent part: “Congress shall make no law... abridging the freedom of speech.” What constitutes a “threat” must be distinguished from what is constitutionally protected speech. Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). Where a statute criminalizes pure speech, a prohibition against threats must be narrowly read as prohibiting only “true threats” in order to pass constitutional muster. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). A true threat “must be a serious threat, and not just idle talk, joking or puffery.” Id. at 46. 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 take the life of” another person. State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001) (quoting United States v. Khorrami, 895 F.2d 1186 (7<sup>th</sup> Cir. 1990)).

The basis for all ten charges against Mr. Meneses was the series of messages he left on Ms. Willis's phone - - in other words, pure speech. As charged, all ten Counts required that the State prove a "threat." CP 30-34. To prove any of the charges against Mr. Meneses, the State was required to prove both the statutory elements of the offense and that Mr. Meneses's statements were "true threats." Kilburn, 151 Wn.2d at 54. Since the State had to establish that Mr. Meneses made "true threats" in order to establish that his conduct was illegal, proof of a "true threat" was an element of all charges against Mr. Meneses. Johnson, 119 Wn.2d at 147.

None of the "to convict" instructions limited "threat" to only "true threats." CP 74-81, 89-90. The to-convict instructions were defective because they failed to include the essential element of "true threats" as an element that the State must prove beyond a reasonable doubt. The decision of the Court of Appeals conflicts with this Court's decision in Johnson. In addition, the decision raises significant questions of constitutional law, since due process requires that every element of a crime be proved beyond a reasonable doubt, and also requires that "to convict" instructions include all essential elements of the crime. This Court should accept review under RAP 13.4(b)(1) and (3).

6. THIS COURT SHOULD ACCEPT REVIEW TO  
DETERMINE IF SUFFICIENT EVIDENCE  
SUPPORTS THE CONVICTIONS.

The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. at 364; U.S. Const. amends. 6, 14; Wash. Const. art 1, §§ 3, 21, 22. The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Under Kilburn, 151 Wn.2d at 48, a “true threat” requires “sufficient evidence that a reasonable person in [the defendant’s] position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death.” A true threat “must be a serious threat, and not just idle talk, joking or puffery.” Id. at 46. The Court of Appeals held that the test for “true threats” was met without addressing Mr. Meneses’s defense that his words were mere “puffery.” Slip Op. at 5. The State presented insufficient evidence to

prove beyond a reasonable doubt that Mr. Meneses made “true threats,” a necessary element for all charges.

In a footnote, the Court of Appeals rejected another sufficiency argument made by Mr. Meneses regarding the telephone harassment charges. Slip Op. at 5 (footnote 5). However, the State failed to prove beyond a reasonable doubt that Mr. Meneses acted with the intent to harass, intimidate, or torment; or that such intent was formed at the time the phone calls were initiated, as required by RCW 9.61.230 and Lilyblad, 163 Wn.2d at 13.

The decision of the Court of Appeals conflicts with the decisions in Kilburn and Lilyblad. In addition, this case involves a significant question of law under the United States and Washington Constitutions. This Court should accept review under RAP 13.4(b)(1) and (3).

E. CONCLUSION

Mr. Meneses’s case raises numerous important issues. This Court should accept review under RAP 13.4(b)(1), (3), and (4).

Respectfully submitted this 13<sup>th</sup> day of May, 2009.

*Elizabeth Albertson*  
Elizabeth Albertson – WSBA #17071  
Washington Appellate Project 91052  
Attorneys for Petitioner

# Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 61118-6-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	PUBLISHED OPINION
	)	
ANDRE TOI MENESES,	)	
	)	FILED: April 13, 2009
Appellant.	)	

Grosse, J. — To ensure that the State is held to its burden of proving a defendant's guilt beyond a reasonable doubt, jury instructions must include every essential element of the charged crime(s). Telephone harassment requires that the defendant possess, at the time of initiating the telephone call, the intent to harass or threaten. Here, the jury instructions properly conveyed that temporal element. Meneses raises numerous other issues on appeal, including sufficiency of the evidence, double jeopardy, and erroneous jury instructions — none of which are meritorious. We affirm.

FACTS

Andre Toi Meneses repeatedly called Jamila Willis, his former girlfriend and the primary custodial parent of their 7-year-old son, in the spring of 2007. Meneses and Willis were in an ongoing dispute over Meneses' right to see his son. Meneses left numerous messages on Willis' cellular telephone voicemail account in which he used incredibly vile language, including racial slurs and descriptive obscenities. In these

messages, Meneses repeatedly threatens to kill Willis, her current live-in boyfriend, Prim, and the couple's 5-month-old baby. Meneses boasts and implies in several of the messages that he and his family are associated with the local Filipino Mafia and that they would take pleasure in employing violence against Willis and her family. In one voicemail message, Meneses declares that he has Willis' place of employment surrounded by persons so affiliated and implies that they are waiting for her to leave to attack her. And, in two of the calls, Meneses warns Willis not to go to the police.

When a King County sheriff was investigating the vandalism of Willis' and Prim's vehicles in May 2007, Willis first reported the threatening telephone calls from Meneses. A police detective made a recording consisting of ten of these voicemail messages. Based on this recorded compilation, Meneses was charged with multiple counts of telephone harassment (four counts felony and four counts misdemeanor) and two counts of intimidating a witness.

Meneses defended that Willis and Prim knew that he was only speaking out of anger because of the situation with his son and that they would not have actually taken his words seriously and felt threatened by the calls. The jury found Meneses guilty on all ten counts as charged, each count carrying a domestic violence designation. The trial court sentenced him to 30 months' imprisonment, an exceptional sentence below the applicable standard range.

Meneses appeals.

#### ANALYSIS

#### Jury Instructions – Telephone Harassment and Mens Rea

Meneses contends the jury instructions for the eight counts of telephone harassment were flawed because they did not include every essential element of the crime, thus alleviating the State of its duty to prove every element beyond a reasonable doubt.<sup>1</sup> More specifically, Meneses contends the jury instructions were deficient as to the requisite mens rea. RCW 9.61.230 proscribes telephone harassment and provides in pertinent part:

(1) Every person who, *with intent* to harass, intimidate, torment or embarrass any other person, *shall make a telephone call* to such other person:

(a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or

(b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or

(c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household; is guilty of a gross misdemeanor, except as provided in subsection (2) of this section.<sup>[2]</sup>

In State v. Lilyblad, the Supreme Court directly addressed the issue of timing and intent for telephone harassment.<sup>3</sup> Prior to the 2008 Lilyblad decision, there was a split among the Court of Appeals' divisions as to when the defendant must have formed the requisite mens rea under the telephone harassment statute.<sup>4</sup> The Supreme Court clarified in Lilyblad that a defendant must have already formed the intent to harass or threaten the call's recipient at the time the defendant initiates the telephone call.

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<sup>1</sup> See State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984).

<sup>2</sup> (Emphasis added.)

<sup>3</sup> 163 Wn.2d 1, 177 P.3d 686 (2008).

<sup>4</sup> RCW 9.61.230; see State v. Alexander, 76 Wn. App. 830, 837, 888 P.2d 175 (1995); State v. Lilyblad, 134 Wn. App. 462, 465-66, 140 P.3d 614 (2006); see also City of Redmond v. Burkhart, 99 Wn. App. 21, 26-27, 991 P.2d 717 (2000), abrogated by Lilyblad, 163 Wn.2d 1 (2008).

Jury instruction 7 in this case states:

A person commits the crime of Telephone Harassment when he or she, with intent to harass or intimidate any other person, *makes* a telephone call to such other person threatening to inflict injury on the person called or any member of the family or household of the person called.

A person also commits the crime of Telephone Harassment when he or she, with the intent to harass or intimidate any person, *makes* a telephone call to such other person threatening to kill that person or any other person.

To be a threat, a statement must occur in a 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.<sup>5</sup>

The word "makes" is critical. It implies to begin or initiate the telephone call in this context. A reasonable juror would understand that the requisite mens rea or intent needed to be formed by the time the defendant initiated the call underlying the telephone harassment charges. Jury instruction 7 is in accord with Lilyblad and its interpretation of the telephone harassment statute.

#### Jury Instructions - True Threat

Meneses contends the "[t]o convict" telephone harassment jury instructions were deficient because they did not address an essential element: that the defendant caller made a "true threat" or at least would have reasonably been perceived to have done so. The existence of a true threat, however, is not an essential element of the crime. Moreover, the jury instructions properly informed the jury of the applicable law. The last portion of jury instruction 7 provides:

To be a threat, a statement must occur in a context or under such circumstances where *a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to*

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<sup>5</sup> (Emphasis added.)

*carry out the threat.*<sup>6</sup>

Here, the reasonable person standard is easily satisfied.<sup>7</sup> The test is an objective one. In fact, it is difficult to imagine a context in which a reasonable person would not consider the recorded statements to be “a serious expression of intention to carry out the threat[s].” In the messages, Meneses utters multiple derogatory statements, including bigoted racial slurs about Willis, her boyfriend, and their child as well as repeated and varied threats of violence. We think it fair to say that “a reasonable person would foresee that [these statements] would be interpreted as a serious expression of intention” by Meneses to act on his words.

Denial of Requested Jury Instructions - Attempting to Intimidate a Witness and Jury Tampering

Meneses contends the trial court erred when it refused to instruct the jury on the allegedly lesser included offenses of attempting to intimidate a witness and witness tampering. For a trial court to issue a lesser included offense instruction, there must be evidence presented regarding that offense.<sup>8</sup> No such evidence exists here.

Meneses cannot be found to have attempted to intimidate by leaving a voicemail as the act was complete when he ended his message. He did not record a message and then fail to send it. The attempt, in other words, was successful. And, there is no evidence that Meneses ever attempted to induce Willis to do or refrain from doing anything. The two voicemail messages supporting the witness tampering convictions are simply threats, not inducements to not call the police. The trial court properly

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<sup>6</sup> (Emphasis added.)

<sup>7</sup> It follows that Meneses’ argument that there was insufficient evidence to prove that he had made the calls with the intent to harass or intimidate is without merit.

<sup>8</sup> See State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

declined Meneses' requested jury instructions.

### Double Jeopardy

Meneses contends his convictions for intimidating a witness and felony harassment that are based on the same telephone call violate double jeopardy principles. Double jeopardy prohibits multiple punishments for the same crime.<sup>9</sup> A single course of conduct may give rise to liability under several criminal statutes. To not violate double jeopardy, the crimes must be different both in fact and in law.<sup>10</sup> That inquiry is necessarily fact specific. The exact same evidence, here a single voicemail message, supports the two convictions. The legislature, however, has the authority to 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.<sup>11</sup> In other words, the offenses must be legally different. Here, even though the same evidence supports both convictions, they are not the same offense as charged and tried.

Intimidating a witness as charged and proven here required that Meneses attempt to influence Willis to not report information relevant to a current police investigation by means of a threat.<sup>12</sup> Felony telephone harassment as charged and proven here required Meneses to have called with the intent to harass or intimidate

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<sup>9</sup> U.S. Const. amend. V; WA Const. art. I § 9; State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).

<sup>10</sup> State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

<sup>11</sup> See Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932); In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); Calle, 125 Wn.2d at 777; United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

<sup>12</sup> See RCW 9A.72.110.

Willis and threaten to injure either her or her family.<sup>13</sup> While both required threats, each served different purposes. For intimidating a witness, the threat's purpose was to interfere with the reporting of information to the police whereas the purpose of the other is to harass or intimidate the call's recipient for any reason. These convictions are not the same both in fact and in law and thus do not violate double jeopardy principles.

Statement of Additional Grounds (SAG)

In his SAG, Meneses addresses arguments already raised by defense counsel on appeal (i.e., double jeopardy, sufficiency of the evidence) in addition to many others, such as jurisdictional and time for trial issues. We do not need to reconsider those issues already raised and well argued by defense counsel on appeal.<sup>14</sup> Further, even though Meneses is not required to cite to the record or authority in his SAG, he must still "inform the court of the nature and occurrence of [the] alleged errors," and this court is not required to search the record to find support for the defendant's claims.<sup>15</sup> Several of Meneses' grounds are not sufficiently developed to allow review, and we do not reach them. Ultimately, none of the arguments Meneses presents in his SAG are meritorious.

For the above reasons, we affirm.

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<sup>13</sup> See RCW 9.61.230.

<sup>14</sup> State v. Meridieth, 144 Wn. App. 47, 180 P.3d 867 (2008).

<sup>15</sup> RAP 10.10(c).

Grosse, J

WE CONCUR:

Jau, J.

Leach, J.

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2009 MAY 13 PM 4:42

**DECLARATION OF FILING & MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 61118-6-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for  **respondent: Erin Norgaard - King County Prosecuting Attorney-Appellate Unit**,  **appellant** and/or  **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.



MARIA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: May 13, 2009

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	No. 61118-6-I
Respondent,	)	
	)	ORDER GRANTING MOTION
v.	)	TO AMEND OPINION
	)	
ANDRE TOI MENESES,	)	
	)	
Appellant.	)	

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The respondent, State of Washington, has filed a motion to correct typographical errors in the published opinion filed on April 13, 2009. The court has taken the matter under consideration and has determined that the motion should be granted.

Now, therefore, it is hereby

ORDERED that the opinion of the court in the above-entitled cause filed April 13, 2009, be amended to read as follows:

DELETE the first sentence in the first full paragraph on page 6, which reads:

Meneses contends his convictions for intimidating a witness and felony harassment that are based on the same telephone call violate double jeopardy principles.

REPLACE that sentence with the following:

Meneses contends his convictions for intimidating a witness and gross misdemeanor telephone harassment that are based on the same telephone call violate double jeopardy principles.

DELETE the second sentence in the second paragraph on page 6, which reads:

Felony telephone harassment as charged and proven here required Meneses to have called with the intent to harass or intimidate Willis and threaten to injure either her or her family.

REPLACE that sentence with the following:

Gross misdemeanor telephone harassment as charged and proven here required Meneses to have called with the intent to harass or intimidate Willis and threaten to injure either her or her family.

Done this 14<sup>th</sup> day of May 2009.

Grosse, J

Jay, J.

Leach, J

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STATE OF WASHINGTON  
2009 MAY 14 AM 9:56