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NO. 61118-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

ANDRE MENESES,
Appellant.

2009 SEP 26 PM 4: 22

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON

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

The Honorable Paris Kallas

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. STATE V. LILYBLAD REQUIRES REVERSAL OF ALL TELEPHONE HARASSMENT CONVICTIONS BECAUSE THE JURY WAS NOT INSTRUCTED THAT MR. MENESES HAD TO FORM THE SPECIFIC INTENT TO HARASS OR INTIMIDATE AT THE TIME HE INITIATED THE CALL.

The State concedes that one essential element of telephone harassment is the intent to harass or intimidate at the time the phone call is initiated. Brief of Respondent at 19; State v. Lilyblad, 163 Wn.2d 1, 13, 177 P.3d 686 (2008). The State incorrectly argues, however, that the instructions given in this case adequately apprised the jury of that specific element. Brief of Respondent at 22.

First, the State relies on the fact that in Lilyblad, the jury was given an instruction that "make a telephone call" referred to the entire call rather than the initiation of the call, and that there was no such erroneous instruction given in the case at hand. Brief of Respondent at 20-21. While this is true, the State ignores the fact that in this case, nowhere in any of the jury instructions was the jury informed that one element of the crime of telephone harassment is 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.

Second, the State argues that the language in the “to convict” instructions, which required the State to prove “that the telephone call was made with the intent to harass or intimidate” properly informs the jury regarding the Lilyblad decision. Brief of Respondent at 21. It does not. This wording is based on the telephone harassment statute, RCW 9.61.230, which uses the phrase “make a telephone call.” While the Washington Supreme Court interpreted this statute to require the requisite intent at the initiation of the telephone call, it came to that conclusion only after two divisions of the Court of Appeals conflicted regarding how to interpret those very words in the statute.¹ The jury could hardly be expected to come to the same conclusion as the Washington Supreme Court all on their own without instructional assistance.

The failure to instruct the jury that the requisite intent must

¹ Prior to the Washington Supreme Court’s decision in Lilyblad, there was a split among the divisions in the Court of Appeals. Division I held that the statute applied to a caller who formed the intent to harass or intimidate “at any point” in a telephone conversation. City of Redmond v. Burkhart, 99 Wn.App. 21, 991 P.2d 717 (2000). Division II maintained that the requisite intent must be formed at the time the defendant initiated the call. State v. Lilyblad, 134 Wn.App. 462, 140 P.3d 614 (2006).

be formed at the initiation of the phone call relieved the State from proving a necessary element of the charge of telephone harassment. As a result, all of the telephone harassment convictions must be reversed. Lilyblad, 163 Wn.2d at 13.

Finally, the State submits that the defense somehow invited the error. Brief of Respondent at 15-18. The State mistakenly argues that the defense submitted erroneous instructions. The defense has not argued that the instructions given by the court were in error, but rather that they were incomplete and in need of clarification. In fact, the defense did offer a clarifying instruction which stated that the jury could convict only if it found beyond a reasonable doubt that the telephone call was initiated with the intent to harass, intimidate, or torment. CP 111. The State concedes that this instruction is a correct statement of the law under Lilyblad. Brief of Respondent at 22. However, the court did not give this instruction. The defense did not invite the error.

It is the function of the jury to decide whether a criminal defendant is guilty of the crimes charged. As such, it was for the jury to decide if Mr. Meneses had the requisite intent at the time the telephone calls were initiated. Because 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, all of his convictions for telephone harassment must be reversed. Lilyblad, 163 Wn.2d at 13.

2. THE "TO CONVICT" INSTRUCTIONS GIVEN TO THE JURY WERE DEFECTIVE BECAUSE THEY DID NOT INCLUDE THE ESSENTIAL ELEMENT THAT THE THREATS BE "TRUE THREATS."

The State incorrectly argues that "true threats" is not an essential element of either telephone harassment or intimidating a witness. Brief of Respondent at 22, 25. The State is clearly wrong. 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). In the case at hand, all ten charges were based solely on pure speech – the series of messages spoken by Mr. Meneses and recorded on Ms. Willis's phone. As such, all charges required proof of both the statutory elements of the crime and that the threats made were "true threats." Kilburn, 151 Wn.2d at 43, 54.

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. 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. Id.

With regard to the telephone harassment charges, the State relies on State v. Tellez, 141 Wn.App. 479, 170 P.3d (2007). Brief of Respondent at 22. In Tellez, the court held that while the telephone harassment statute must be construed so as to proscribe only “true threats,” a “true threat” was not an element of the charge. Id. at 484. This decision cannot be reconciled with Johnson. To the extent that Tellez holds that “true threat” is not an element of the crime of telephone harassment, Tellez is wrongly decided.

The same is true with regard to the witness intimidation charges. The State relies on State v. King, 135 Wn.App. 662, 669-72, 145 P.3d 1224 (2006), rev. denied, 161 Wn.2d 1017 (2007). Brief of Respondent at 25. In King, the defendant was charged with intimidating a witness for threatening a police officer who had

testified against him. The prong of the statute charged against King required proof of a threat of bodily harm or death, and the jury was instructed that “threat” meant to communicate an intent to cause bodily injury in the future. Id. at 666, 671. The court held that to be unlawful, the threats must be “true threats,” and that “it is the context that makes a threat ‘true’ or serious.” Id. at 669. The court concluded that this requirement was met based on the charging language in the statute, the definition of threat given to the jury, and the inherently threatening context of the words spoken by King. Id. at 669, 671.

In the case at hand, Mr. Meneses was not charged with threatening a former witness, but rather with threatening a current or prospective witness. CP 30-34. The definition of “threat” given to the jury was much broader, including threats of physical confinement, and threats to a person’s health, safety, business, financial condition, or personal relationships. CP 72 (Court’s Instruction No. 8). Additionally, in this case, there was a prior relationship between Mr. Meneses and Ms. Willis. They had known each other for several years, and the seriousness of the words spoken to her by Mr. Meneses had to be taken in the context of their past relationship.

The "to convict" instructions purported to contain all the essential elements of the crimes charged, and the jury had a right to regard them as complete. State v. Emmanuel, 42 Wn.App. 799, 819, 259 P.2d 845 (1953). The State argues that any error is harmless, stating that given the evidence, the jury would have nevertheless concluded that Meneses's threats were "true threats." Brief of Respondent at 29. The error in the to-convict instructions went to the heart of the defense: whether Mr. Meneses made "true threats," or whether his words were mere puffery. The fact that the jury did not convict on two of the felony telephone harassment charges despite Mr. Meneses's recorded words threatening to kill suggests that they were struggling with this very issue. The error was not harmless and requires reversal of all convictions. Id.

Finally, the omission of an element from the "to convict" instruction is a manifest constitutional error that may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

3. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT MR. MENESES MADE "TRUE THREATS," A NECESSARY ELEMENT FOR ALL OF THE CHARGES.

In determining the sufficiency of the evidence regarding "true threats," the relevant question is "whether there is 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." Kilburn, 151 Wn.2d at 48. A true threat "must be a serious threat, and not just idle talk, joking or puffery." Id. at 46. Because core First Amendment rights are involved, an appellate court must independently review the constitutionally critical facts in the record that bear on the question of whether a true threat was made. Id. at 53-54; State v. Johnston, 156 Wn.2d 355, 365, 127 P.3d 707 (2006).

Threats to steal Ms. Willis's baby (count III), a threat by Mr. Meneses to take matters into his own hands (count VI), and threats to "take" Ms. Willis's family (count IX) do not meet the definition of "true threat" because they do not evidence an intent to inflict serious bodily injury or death. Kilburn, 151 Wn.2d at 48. In the remaining charges, although threatening words were spoken, the

threats do not constitute “true threats” because a reasonable person in Mr. Meneses’s shoes would not foresee that Ms. Willis would take his threats seriously, given that he was prone to exaggeration and that he had not been taken seriously in the past. Although Mr. Meneses claimed to be part of the Piru Filipino Mafia, Ms. Willis did not take these statements seriously. 9/26/07RP 21, 30. In fact, Mr. Prim told the detective that Ms. Willis had “never taken him seriously, because he never follows through with things that he’s ever said or done.” 9/26/07RP 57. The State argues that Mr. Prim’s state of mind is irrelevant. Brief of Respondent at 37. However, the trial court properly allowed this testimony into evidence, because it tended to disprove the State’s claim that the context of the words spoken showed they were true threats. Finally, Mr. Meneses’s use of the phrase, “you might laugh,” suggests that he did not expect that his comments would be taken seriously. Ex. 3 (call 1).

The State also points to Ms. Willis’s testimony that she took Mr. Meneses’s comments as threats, and that she delayed reporting the threats out of fear of further retaliation by Mr. Meneses. Brief of Respondent at 35. However, Ms. Willis never testified that she took Mr. Meneses’s comments as a “serious

statement of intent to inflict serious bodily injury or death” as the definition of true threat requires. Rather, she was concerned that Mr. Meneses might slash her car tires or “knock on my door or something.” 9/26/07RP 44-45. A concern on Ms. Willis’s part that Mr. Meneses was going to bother her or damage her personal property does not meet the definition of “true threat.” Because a reasonable person in Mr. Meneses’s position would not foresee that his comments would be taken as more than “puffery,” the threats were not “true threats.”

4. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. MENESES ACTED WITH THE INTENT TO HARASS, INTIMIDATE, OR TORTMENT; OR THAT SUCH INTENT WAS FORMED AT THE TIME THE PHONE CALLS WERE INITIATED.

The State argues that there is “no question” that Mr. Meneses initiated each phone call with the intent to harass or intimidate Ms. Willis. Brief of Respondent at 39. However, the evidence showed that Mr. Meneses’s intent was to get Ms. Willis to

allow him to see their son.² Moreover, even if this Court finds that Mr. Meneses had the requisite intent, the State failed to present evidence as to when the intent was formed. This requires reversal of all telephone harassment convictions.

5. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LESSER OFFENSES OF TAMPERING WITH A WITNESS AND ATTEMPTED INTIMIDATION OF A WITNESS, REQUIRING REVERSAL OF THE CONVICTIONS FOR INTIMIDATING A WITNESS.

The State argues that the facts of the case did not support the giving of the requested lesser included instructions. Brief of Respondent at 41. As to the witness tampering charge, the State argues that no jury could find that Mr. Meneses attempted to induce Ms. Willis not to call the police without the use of threats. Brief of Respondent at 41. This argument ignores the whole issue at trial: whether the words spoken by Mr. Meneses constituted "true threats." The State argues that if Mr. Meneses was only joking, he would not be guilty of any crime. Brief of Respondent at

² Exhibit 3 contains the following statements by Mr. Meneses to Ms. Willis on her phone: "I want to see my son that's it" (call 1); "If that's my son then let me be a father to my son" (call 3); "All I want to do is see my son" (call 5); "I just wanna see my son" (call 5); "I wanna see my son this weekend before I take matters in my own hands" (call 5); "I wanna see my son, I wanna see him right now, okay" (call 6); "you better let me see my son right now bitch" (call 8).

42-43. The defense has never submitted that Mr. Meneses was joking around in his phone calls. However, the defense has maintained that Mr. Meneses's statements were "puffery" and thus not a "true threat." Kilburn, 151 Wn.2d at 46. If the jury was not convinced that the so-called threats were "true threats," it would be appropriate for them to consider the lesser charge of witness tampering. For the same reasons, an instruction on attempted intimidation of a witness was factually warranted. The jury should have been allowed to make this decision. Since there was substantial evidence in the record which affirmatively raised the inference that Mr. Meneses was guilty only of witness tampering or attempted witness intimidation, and not guilty of intimidating a witness, the requested instructions should have been given. State v. Fernandez-Medina, 141 Wn.2d 448, 461-62, 6 P.3d 1150 (2000).

6. THE JURY INSTRUCTION DEFINING "THREAT" WAS DEFECTIVE BECAUSE IT DID NOT COMPORT WITH THE STATUTORY DEFINITION OF TELEPHONE HARASSMENT.

First, the State argues that Mr. Meneses has waived this issue because he did not object below to the jury instruction defining "threat." Brief of Respondent at 31. The instruction

(Court's Instruction No. 8) was offered by the State, not the defense. CP 72, 95-112: A jury instruction which relieves the State of its burden to prove an element of the crime charged is an error of constitutional magnitude and may be raised for the first time on appeal. State v. Stein, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001). The State asserts that the definition of "threat" is not an element of telephone harassment, but is instead strictly definitional. Brief of Respondent at 31. However, only certain types of threats are made unlawful in the telephone harassment statute. Specifically, the gross misdemeanor telephone harassment charges required proof that Mr. Meneses threatened "to inflict injury on the person or property of Jamila Willis, or to any member of her family or household." CP 30-34; RCW 9.61.230(1)(c). The definition given to the jury was much broader than the definition of threat in the telephone harassment statute. The giving of Court's Instruction No. 8 relieved the State of its burden to prove an essential element of the crime charged and may therefore be raised for the first time on appeal.

The State argues that "injury" should be broadly interpreted, and that threats to steal Ms. Willis's baby (count 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) satisfy the telephone harassment statute's requirement of a threat to inflict injury on the person or property of Jamily Willis, or to any member of her family or household. Brief of Respondent at 33. 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. Utilizing the rule of lenity, these types of threats fall outside those prohibited under the telephone harassment statute. The inclusion of these threats in the definition of "threat" given to the jury in Court's Instruction No. 8 relieved the State of its burden to prove all essential elements of the gross misdemeanor charges of telephone harassment. Moreover, as previously discusses, proof of a "true threat" required a threat to kill or inflict bodily harm. Kilburn, 151 Wn.2d at 48.

7. THE CONVICTIONS IN COUNTS II AND III FOR
INTIMIDATING A WITNESS AND TELEPHONE
HARASSMENT VIOLATED THE PROHIBITION
AGAINST DOUBLE JEOPARDY.

The State mistakenly claims that the correct test for determining a double jeopardy violation is contained in State v. Calle, 125 Wn.2d 769, 776-80, 888 P.2d 155 (1995). Brief of

Respondent at 44. Calle conflicts with the test set out in United States v. Blockburger, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). The Washington Supreme Court cannot authorize that which is prohibited by the United States Supreme Court and the U.S. Constitution. Under the Blockburger test, 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, 284 U.S. at 304. The inquiry must focus on the offenses as they were charged and prosecuted in a given case. Whalen v. United States, 445 U.S. 684, 694, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); In re Pers. Restraint of Orange, 152 Wn.2d 795, 818-19, 100 P.3d 291 (2004). Applied to the case at hand, the appropriate question is whether the evidence to prove telephone harassment, as charged and prosecuted, also proved the crime of intimidating a witness, as charged and prosecuted. See Orange, 152 Wn.2d at 818.

The State argues that under Calle, since each of the statutes include elements not included in the other, the offenses do not constitute the same offense. Brief of Respondent at 46-47.

However, any two given statutes will always contain different elements. While the crimes of telephone harassment and intimidating a witness have different statutory elements, this is not a bar to finding that Mr. Meneses's act constitutes the same offense. See Dixon, 509 U.S. at 712 (a conviction for criminal contempt barred a subsequent prosecution for a drug offense). Even though two crimes have different statutory elements, if proof of one charge also proved the other charge, the offenses are the same. Id. at 699-700. In this case, the evidence for both charges was the same message (call number one) left by Mr. Meneses on Ms. Willis's phone. 9/25/07RP 9; 9/27/07RP 24, 29. Both charges required the same intent and both alleged threats to the same person. It is irrelevant whether telephone harassment could be established in another scenario without also proving witness intimidation. Mr. Meneses's convictions in counts II and III, as charged and prosecuted, violated double jeopardy.

B. CONCLUSION.

For the reasons set forth above, reversal of all convictions is required.

DATED this 26th day of September, 2008.

Respectfully submitted,


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

STATE OF WASHINGTON,)	
Respondent)	
)	COA NO. 61118-6
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)	
ANDRE MENESES,)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 26TH DAY OF SEPTEMBER, 2008, A COPY OF *APPELLANT'S REPLY BRIEF* WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

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STATE OF WASHINGTON
2008 SEP 26 PM 4: 22

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF SEPTEMBER, 2008

x Ann Joyce