

ORIGINAL

Supreme Court No. 83172-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDRE MENESES,

Petitioner.

CLERK

BY RONALD R. CARPENTER

09 DEC 18 PM 3:58

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

ELIZABETH ALBERTSON
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

A. INTRODUCTION.....1

B. ISSUES PRESENTED.....1

C. SUMMARY OF THE CASE.....2

D. ARGUMENT.....4

 1. THE CONVICTIONS IN COUNTS II AND III FOR TELEPHONE HARASSMENT AND INTIMIDATING A WITNESS VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY.....4

 a. The prohibition against double jeopardy prohibits multiple convictions for the same offense.....4

 b. As charged and prosecuted, two convictions violate the prohibition against double jeopardy where the evidence required to support a conviction upon one of them is sufficient to warrant a conviction on the other.....5

 c. Mr. Meneses' convictions for intimidating a witness and telephone harassment, as charged and prosecuted, are the same in law and fact and violate double jeopardy.....9

 d. The proper remedy is vacation of the conviction for intimidating a witness.....11

 2. LILYBLAD REQUIRES THAT THE STATUTORY PHRASE "MAKES A TELEPHONE CALL" BE DEFINED FOR THE JURY.....11

 a. The jury must be informed of all necessary elements for conviction.....11

b. <u>That the phone call be initiated with the intent to harass or intimidate is an element of the crime of telephone harassment.</u>	12
c. <u>The jury was not instructed as to this necessary element of the crime of telephone harassment.</u>	13
d. <u>The failure to so instruct the jury requires reversal of all convictions for telephone harassment.</u>	15
3. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LESSER OFFENSE OF WITNESS TAMPERING.....	16
a. <u>Witness tampering is a lesser offense of witness intimidation.</u>	16
b. <u>Taken in the light most favorable to Mr. Meneses, the evidence at trial supported the inference that he only committed the lesser crime of witness tampering.</u>	18
c. <u>Failure to instruct the jury on witness tampering prejudiced Mr. Meneses and requires reversal of his convictions for intimidating a witness.</u>	19
E. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Washington Supreme Court

In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291
(2004).....5, 6, 7, 8, 11

State v. Allen, 101 Wn.2d 355, 678 P.2d 798 (1984).....12

State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997).....16

State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000).....5

State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995).....8, 9

State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003).....12

State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953).....12.

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150
(2000).....16, 19, 20

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).....8, 9, 11

State v. Hughes, 166 Wn.2d 675, 212 P.3d 558 (2009).....5, 8

State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001).....18

State v. Johnson, 119 Wn.2d 143, 829 P.2d 1078 (1992).....12

State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004).....18

State v. Lilyblad, 163 Wn.2d 1, 177 P.3d 686 (2008).....12, 13, 15

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983).....12

State v. Mills, 154 Wn.2d 1,109 P.3d 415 (2005).....12

State v. Radcliffe, 164 Wn.2d 900, 194 P.3d 250 (2008).....6

<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.2d 1001 (2003).....	19-20
<u>State v. Reiff</u> , 14 Wash. 664, 45 P. 318 (1896).	6
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	12
<u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	14
<u>State v. Vladovic</u> , 99 Wn.2d 413, 423-24, 662 P.2d 853 (1983).....	8
<u>State v. Williams</u> , 132 Wn.2d 248, 937 P.2d 1052 (1997).....	20
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	16

Washington Court of Appeals

<u>City of Redmond v. Burkhart</u> , 99 Wn. App. 21, 991 P.2d 717 (2000), <u>abrogated by State v. Lilyblad</u> , 163 Wn.2d 1 (2008).....	4, 14
<u>State v. Lilyblad</u> , 134 Wn. App. 462, 140 P.3d 614 (2006), <u>aff'd</u> , 163 Wn.2d 1 (2008).....	14
<u>State v. Meneses</u> , 149 Wn. App. 707, 205 P.3d 916 (2009).....	3, 10, 13, 14, 17-18
<u>State v. Read</u> , 100 Wn. App. 776, 998 P.2d 897 (2000), <u>aff'd on other grounds</u> , 147 Wn.2d 238 (2002).....	11

United States Supreme Court

<u>Baker v. Carr</u> , 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).....	6
<u>Ball v. United States</u> , 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 70 (1985).....	5
<u>Benton v. Maryland</u> , 395 U.S. 784, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969).....	5
<u>Blockburger v. United States</u> , 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932).....	5, 6

<u>Brown v. Ohio</u> , 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).....	7
<u>Harris v. Oklahoma</u> , 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).....	7
<u>Illinois v. Vitale</u> , 447 U.S. 410, 100 S.Ct. 2267, 65 L.Ed.2d 228 (1980).....	7
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	12
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	15
<u>Pruneyard Shopping Ctr. v. Robins</u> , 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).....	9
<u>United States v. Dixon</u> , 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).....	7
<u>Watts v. United States</u> , 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).....	18
<u>Whalen v. United States</u> , 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).....	6, 7, 8

Constitutional Provisions

United States Constitution, Fifth Amendment.....	5
United States Constitution, Fourteenth Amendment.....	5, 11
Washington State Constitution, Article I, section 9.....	5

Statutes

RCW 9.61.230.....	13
RCW 9A.72.110.....	16, 18
RCW 9A.72.120.....	17, 18

Other Jurisdictions

United States v. Cina, 669 F.2d 853 (7th Cir.), cert. denied, 464
U.S. 991 (1983).....12

United States v. Khorrami, 895 F.2d 1186 (7th Cir. 1990).....18

A. INTRODUCTION

Mr. Meneses was convicted of witness intimidation and telephone harassment based upon a single telephone call to a single person. Because they are the same in fact and in law, the two convictions violate the prohibition against double jeopardy. The trial court also deprived Mr. Meneses of Due Process by failing to instruct the jury on a necessary element of telephone harassment – that the requisite intent to harass or intimidate be formed at the initiation of the call. Finally, regarding the charges of intimidating a witness, the trial court erred in refusing to instruct the jury on the lesser offense of tampering with a witness. Collectively, these errors require reversal of all convictions.

B. ISSUES PRESENTED

1. Mr. Meneses' convictions for intimidating a witness and telephone harassment in Counts II and III arose from the very same telephone call and required the same intent to intimidate. As charged and prosecuted, proof of the telephone harassment charge necessarily proved the charge of intimidating a witness. Are the offenses the same such that a conviction for both violates the prohibition against double jeopardy?

2. The jury must be informed of all elements necessary for conviction. Here, the jury instructions failed to inform the jury that Mr. Meneses' intent to harass or intimidate must be formed at the initiation of

the telephone call. Does the failure to instruct the jury on this required element necessitate reversal of the convictions for telephone harassment?

3. Regarding the two charges of intimidating a witness, defense counsel offered instructions that would allow the jury to consider the lesser offense of tampering with a witness.¹ Did the trial court err in refusing to instruct the jury on the lesser offense?

C. SUMMARY OF THE CASE

From March until May of 2007, Mr. Meneses and Jamila Willis were involved in a dispute over whether Mr. Meneses could have visitation with their son, Jacoby. 9/26/07RP 37. In the course of a different investigation, Ms. 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. A police detective made a tape of the recorded telephone messages. 9/26/07RP 23-24; Ex. 3. In the messages, Mr. Meneses expressed his frustration and anger over Ms. Willis' unwillingness to let him see his son. Ex. 3. He used profanity and

¹ At trial, the defense offered lesser instructions for both witness tampering and attempted intimidation of a witness. Mr. Meneses is only asking this Court to rule on the failure of the trial court to instruct the jury regarding the lesser offense of witness tampering.

racial slurs, and made various threats, although he disputed at trial that they constituted "true threats." Ex. 3.

Based on the tape recording made by the police detective, Mr. Meneses was charged with four counts of felony telephone harassment, four counts of (gross misdemeanor) telephone harassment, and two counts of intimidating a witness. CP 30-34. Mr. Meneses was found guilty of all ten charges, although in two counts he was found not guilty of felony telephone harassment and guilty of gross misdemeanor telephone harassment. CP 117-19, CP 125.

On appeal, Mr. Meneses argued that 1) the jury was not instructed that the intent to harass or intimidate must be formed at the initiation of the telephone calls; 2) the trial court erred in refusing to instruct the jury on lesser offenses for the witness intimidation charges; and 3) the convictions for witness intimidation and telephone harassment, based on the same telephone call, violated the prohibition against double jeopardy.

In a published opinion, the Court of Appeals affirmed all of the convictions. State v. Meneses, 149 Wn. App. 707, 205 P.3d 916 (2009). Regarding the telephone harassment charges, the court ruled that the language "makes a telephone call" in the instructions was sufficient to inform the jury that the intent to harass or intimidate must be formed at the initiation of the telephone call, despite its own earlier interpretation of the

phrase to mean that the formation of intent could be formed at any point during the call. Id. at 713.² For the charges of intimidating a witness, the court held that the facts of the case did not support the inference that only the lesser crime of witness tampering had been committed, even though the two crimes differ only with regard to the presence of a threat, and Mr. Meneses' defense at trial was that his threats did not constitute "true threats." Id. at 714. Finally, even though the crimes of telephone harassment and witness intimidation were based on precisely the same act and proof of one necessarily proved the other, the court ruled that the two crimes were not the same in law and that there was no double jeopardy violation. Id. at 715.

D. ARGUMENT

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

a. The prohibition against double jeopardy prohibits

multiple convictions for the same offense. The double jeopardy clauses of the Fifth Amendment to the United States Constitution and Article I,

² City of Redmond v. Burkhart, 99 Wn. App. 21, 991 P.2d 717 (2000), abrogated by Lilyblad, 163 Wn.2d at 13.

section 9 of the Washington Constitution protect a criminal defendant from multiple convictions and punishments for the same offense.³ 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). A double jeopardy violation is reviewed de novo. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

b. As charged and prosecuted, two convictions violate the prohibition against double jeopardy where the evidence required to support a conviction upon one of them is sufficient to warrant a conviction on the other. Where a defendant is charged with violating two separate statutory provisions for a single act, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. 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, 815, 100 P.3d 291 (2004). Where the relevant statutes do not expressly disclose legislative intent, courts

³ The Fifth Amendment double jeopardy clause of the U.S. Constitution provides: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” This 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). Similarly, article 1, section 9 of the Washington Constitution states that “no person shall be ... twice put in jeopardy for the same offense.”

apply the test variously known as the Blockburger test, the “same elements” test, or the “same evidence” test. Orange, 152 Wn.2d at 816. Under this test, courts must determine “whether each provision requires proof of a fact which the other does not.” Blockburger, 284 U.S. at 304. This test cannot be applied by a mere abstract comparison of the statutory elements, but must focus on the offenses as they were charged and prosecuted in the particular case. 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.

Expressed in a slightly different way, two convictions violate the prohibition against double jeopardy, absent clear legislative intent to the contrary, if they are “identical both in fact and in law.” Orange, 152 Wn.2d at 816 (quoting State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)). Under Reiff, offenses are the same in fact and in law if “the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.” Id. Orange noted that the test employed in Reiff is “indistinguishable from the Blockburger test.” 152 Wn.2d at 816.

The U.S. Supreme Court is the “ultimate interpreter” of the U.S. Constitution. Baker v. Carr, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008).

Their interpretation of the Fifth Amendment's prohibition against double jeopardy makes clear that it is irrelevant whether telephone harassment could be established without also proving witness intimidation in another scenario. Whalen, 445 U.S. at 694; Harris v. Oklahoma, 433 U.S. 682, 682-83, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (convictions for felony murder with the predicate crime of robbery and for robbery violated the Double Jeopardy Clause even though the felony murder statute on its face did not require proof of robbery).

Similarly, it is also irrelevant that the two crimes in question have different statutory elements. United States v. Dixon, 509 U.S. 688, 712, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (a conviction for criminal contempt barred a subsequent prosecution for a drug offense); Illinois v. Vitale, 447 U.S. 410, 420-21, 100 S.Ct. 2267, 65 L.Ed.2d 228 (1980); Brown v. Ohio, 432 U.S. 161, 164, 97 S.Ct. 2221, 53 L.Ed.2d 187(1977) (“separate statutory crimes need not be identical either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition”).

Following federal interpretation of the Fifth Amendment, this Court determined in Orange that courts must “look at the facts used to prove the statutory elements” rather than limit the analysis to a comparison of generic statutory language. 152 Wn.2d at 819. In Orange,

since “the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault,” conviction for both offenses was prohibited. Id. at 820. Similarly, in Hughes, convictions for rape and child rape based on the same act of intercourse violated the prohibition against double jeopardy, even though “the elements of the crimes facially differ.” 166 Wn.2d at 682-84.

Unfortunately, some Washington decisions have failed to conduct a double jeopardy analysis by focusing on the offenses as they were charged and prosecuted. Other Washington decisions have misstated the test articulated by the U.S. Supreme Court. See State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) and State v. Vladovic, 99 Wn.2d 413, 423-24, 662 P.2d 853 (1983) (concluding a double jeopardy violation does not occur if there is an element in each offense not included in the other and proof of one does not necessarily prove the other); State v. Freeman, 153 Wn.2d 765, 773-79, 108 P.3d 753 (2005) (utilizing a four-part test to determine whether two crimes violate double jeopardy violations).

Under the U.S. Constitution, a determination that the legislature intended to allow for separate convictions and punishments must be based on an express statement of legislative intent. Whalen, 445 U.S. at 691-92. If there is doubt as to the legislative intent, the rule of lenity requires the interpretation most favorable to the defendant. Id. at 694. Individual

states may afford more, but not less, protection than the U.S. Constitution. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). Washington cases which allow courts to make assumptions about legislative intent in the absence of the legislature's express statement of intent are in direct conflict with U.S. Supreme Court law. See Freeman, 153 Wn.2d at 771-780; Calle, 125 Wn.2d at 777-82.

c. Mr. Meneses' convictions for intimidating a witness and telephone harassment, as charged and prosecuted, are the same in law and fact and violate double jeopardy. Here, the two offenses are the same "in fact."⁴ The evidence offered by the State to prove the telephone harassment charge consisted of the phone messages Mr. Meneses left on Ms. Willis' phone. The same evidence was used to establish the charge of intimidating a witness. Counts II and III not only arose from the same incident date, they were both based on the very same telephone call (call number one). 9/25/07RP 9; 9/27/07RP 24, 29. The Court of Appeals

⁴ The telephone harassment charge 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. The charge of witness intimidation 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.

acknowledged that the “exact same evidence, here a single voicemail message,” supports the two convictions. Meneses, 149 Wn. App. at 715.

Nevertheless, the court held that the two convictions were not the same in law because the purpose of the threat for the witness intimidation charge was to interfere with the reporting of information to police, whereas the purpose of the threat for the telephone harassment charge was to harass or intimidate the person called “for any reason.” Meneses, 149 Wn. App. at 715. Whether the two crimes are the same must be determined in light of the particular facts of the case. Mr. Meneses did not call Ms. Willis “for any reason.” He called to vent his frustration over not being able to see his son, and the intent of threatening Ms. Willis was to convince her to let him see his son.⁵ Similarly, the intent of the threat regarding pressing charges was to convince Ms. Willis not to interfere in his desire to see his son.⁶

The appropriate inquiry focuses on whether the evidence to prove telephone harassment, as charged and prosecuted, also proved the crime of

⁵ See Ex. 3, call one (“don’t f**k with me okay, I want to see my son that’s it”); call three (“if that’s my son then let me be a father to my son”); call five (“All I want to do is see my son ... I just wanna see my son ... I wanna see my son this weekend”); call six (“I wanna see my son, I wanna see him right now okay”); call eight (“you better let me see my son right now bitch”).

⁶ See Ex. 3, call one (“bitch you wanna f**kin’ press charges ... press mother f**kin’ charges bitch and see what happens to your ass”).

intimidating a witness, as charged and prosecuted. Orange, 152 Wn.2d at 818. Both charges required the same intent and both alleged threats to the same person. Since proof of the telephone harassment charge also proved the witness intimidation charge, the offenses are the same “in law” and Mr. Meneses’ convictions violate the prohibition against double jeopardy. Orange, 152 Wn.2d at 820.

d. The proper remedy is vacation of the conviction for intimidating a witness. Mr. Meneses’ convictions, as charged and prosecuted, violated the prohibition against double jeopardy. Where two convictions violate the prohibition against double jeopardy, the remedy is to vacate the conviction for the offense that formed part of the proof of the other offense. Freeman, 153 Wn.2d at 777; State v. Read, 100 Wn. App. 776, 792-93, 998 P.2d 897 (2000), aff’d. on other grounds, 147 Wn.2d 238, 53 P.3d 26 (2002). Accordingly, the conviction in Count II for Intimidating a Witness (which formed part of the proof of Telephone Harassment) must be vacated.

2. LILYBLAD REQUIRES THAT THE STATUTORY PHRASE “MAKES A TELEPHONE CALL” BE DEFINED FOR THE JURY.

a. The jury must be informed of all necessary elements for conviction. The due process clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every element of the

crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); 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) (citing United States v. Cina, 669 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991 (1983)). An element need not be listed in the statute defining the crime to be considered essential. Id. 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).^{7, 8} Here, the jury instructions failed to inform the jury of an essential element of the crime of telephone harassment: that the defendant’s intent to harass or intimidate must be formed at the initiation of the telephone call.

b. That the phone call be initiated with the intent to harass or intimidate is an element of the crime of telephone harassment. In State v. Lilyblad, 163 Wn.2d 1, 13, 177 P.3d 686 (2008), this Court

⁷ See also State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953) (due process requires that the “to convict” instruction include all essential elements of the crime).

⁸ The adequacy of a challenged jury instruction is reviewed de novo. State v. DeRyke, 149 Wn.2d 906, 1002, 73 P.3d 1000 (2003).

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.⁹ In the case at hand, the jury was not instructed that the requisite intent must be formed at the initiation of the call, despite the fact that such an instruction was offered by the defense. CP 111.¹⁰ Rather, they were merely instructed in accordance with the language of RCW 9.61.230, the telephone harassment statute, that “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...” CP 71, CP 74-81.

c. The jury was not instructed as to this necessary element of the crime of telephone harassment. In affirming the convictions, Division I of the Court of Appeals held that the word “makes” implies “to begin or initiate.” Meneses, 149 Wn. App. at 713. The court then concluded that the jury instructions were sufficient to inform the jury that the intent needed to be formed at the initiation of the call:

⁹ As this Court noted, such an interpretation comports with the First Amendment by prohibiting conduct (initiating the telephone call) as opposed to merely prohibiting speech. Id. at 12-13.

¹⁰ Regardless, under Lilyblad, the failure to instruct on an element of the crime is a constitutional error of constitutional magnitude that can be raised for the first time on appeal. Lilyblad, 163 Wn.2d at 5.

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.

Id. at 713. This is an odd assertion, given that prior to this Court's decision in Lilyblad, Division I interpreted "make a telephone call" to mean that the intent to harass or intimidate could be formed "at any point" during the telephone conversation. City of Redmond v. Burkhardt, 99 Wn. App. 21, 991 P.2d 717 (2000), abrogated by Lilyblad, 163 Wn.2d at 13. This Court's ruling in Lilyblad ultimately resolved the conflict that existed between Divisions I and II concerning the interpretation of the phrase "make a telephone call."¹¹ However, the differing interpretations in the divisions of the Court of Appeals demonstrates the difficulty that a jury would have interpreting the phrase without instructional assistance.

Parties are entitled to jury instructions which properly inform the jury of the applicable law and allow them to argue their theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Under Lilyblad, the State is required to prove beyond a reasonable doubt that the requisite

¹¹ 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).

intent existed at the initiation of the telephone call. If the jury is not informed of this requirement, the Lilyblad decision is meaningless.

In the case at hand, 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, CP 74-81. Nowhere in the instructions was the jury informed that one 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.

d. The failure to so instruct the jury requires reversal of all convictions for telephone harassment. 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 determine if Mr. Meneses had formed the requisite intent to harass or intimidate at the time the telephone calls were initiated. Because the jury instructions relieved the State from proving a necessary element of the crime, all of the telephone harassment convictions must be reversed. Neder v. United States, 527 U.S. 1, 18-19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (failure to instruct on every element is harmless only if supported by uncontroverted evidence); Lilyblad, 163 Wn.2d at 13.

3. THE TRIAL COURT ERRED IN REFUSING TO
INSTRUCT THE JURY ON THE LESSER
OFFENSE OF WITNESS TAMPERING.

a. Witness tampering is a lesser offense of witness intimidation. 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.

Mr. Meneses was charged with two counts of intimidating a witness under RCW 9A.72.110. CP 30-34. The State alleged that Mr. Meneses, “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 30-34.

At trial, the defense offered lesser included instructions for witness tampering. CP 103-05; 9/26/07RP 99-100. The charge of witness tampering differs from witness intimidation in that it does not require the use of a threat. RCW 9A.72.120.

The trial court refused to instruct the jury regarding witness tampering, ruling that there was no factual basis to find that only the proposed lesser offense took place. 9/26/07RP 100; 9/27/07RP 3-4. The court reasoned that the only basis for the witness intimidation charges was a threat, and that the “jury is either going to find there was a threat to induce or no conduct.” 9/26/07RP 100.

The Court of Appeals upheld the trial court’s decision. The court did not dispute that witness tampering meets the legal prong of the Workman test, but held there was no evidence presented that only the lesser crime was committed:

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 [intimidating] convictions are simply threats, not inducements to not call the police.¹²

¹² The opinion mistakenly refers to the convictions as witness tampering convictions.

Meneses, 149 Wn. App. at 714. The court's reasoning is flawed, since both witness intimidation and witness tampering require an "attempt to induce," and the crimes differ only in the use of a threat. RCW 9A.72.110; RCW 9A.72.120.

b. Taken in the light most favorable to Mr. Meneses, the evidence at trial supported the inference that he only committed the lesser crime of witness tampering. 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 (7th Cir. 1990)).

Mr. Meneses' defense at trial was that the State only proved mere "puffery," not "true threats," and that a reasonable person in Mr. Meneses'

shoes would not foresee that Ms. Willis would take his threats seriously, given that he was prone to exaggeration and had not been taken seriously in the past. 9/27/07RP 36-37, 41-42, 44-46. Ms. Willis testified that she did not take Mr. Meneses' comments regarding being involved in the mafia seriously. 9/26/07RP 30. Mr. Prim told the police that neither he nor Ms. Willis took the statements seriously because Mr. Meneses never followed through on his so-called threats. 9/26/07RP 56-57, 67. Mr. Meneses began his first telephone call with "you might laugh," suggesting he did not expect his comments to be taken seriously. Ex. 3.

If the jury was not convinced beyond a reasonable doubt that the threats were "true threats," it would be appropriate for them to consider the lesser charge of witness tampering. Viewed in the light most favorable to Mr. Meneses, the evidence supported the inference that he was guilty of only witness tampering. The jury, as fact-finder, should have been allowed to decide whether Mr. Meneses was guilty of witness intimidation, or whether he was only guilty of witness tampering.

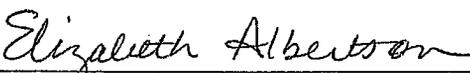
c. Failure to instruct the jury on witness tampering prejudiced Mr. Meneses and requires reversal of his convictions for intimidating a witness. A criminal defendant is entitled to have the jury fully instructed on the defense theory of the case if there is evidence to support that theory. Fernandez-Medina, 141 Wn.2d at 461-62; State v.

Redmond, 150 Wn.2d 489, 495, 78 P.2d 1001 (2003). Since there was substantial evidence in the record which affirmatively raised the inference that Mr. Meneses was guilty of only witness tampering, the requested instructions should have been given. Fernandez-Medina, 141 Wn.2d at 461-62. The failure of the trial court to do so constitutes prejudicial error and requires reversal of the two convictions for intimidating a witness. Id. at 462; Redmond, 150 Wn.2d at 495; State v. Williams, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997).

E. CONCLUSION

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

Respectfully submitted this 18th day of December, 2009.


ELIZABETH ALBERTSON (WSBA 17071)
Washington Appellate Project - 91052
Attorneys for Petitioner