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STATE OF WASHINGTON

NO. 83172-6

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDRE TOI MENESES,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Meneses was convicted of eight counts of telephone harassment. Did the jury instructions accurately inform the jury that it was required to find a temporal element, i.e., that Meneses had the intent to harass at the time that he initiated each call?

2. Meneses was convicted of two counts of intimidating a witness. Did the trial court properly decline to instruct the jury on lesser included offenses?

3. Do convictions for intimidating a witness and telephone harassment violate double jeopardy?

B. STATEMENT OF THE CASE

A jury convicted Meneses of two counts of intimidating a witness (counts II and VII), two counts of felony telephone harassment (counts I and X), and six counts of gross misdemeanor telephone harassment (counts III, IV, V, VI, VIII and IX). CP 117-28. All of the charges arose out of a series of telephone calls made by Meneses to his ex-girlfriend, Jamila Willis, between May 4 and May 18, 2007. CP 30-34. The calls were recorded and played for the jury. See Trial Exhibit 3.

The messages contained racial slurs, vulgarities, and threats to kill Willis and her boyfriend, Andre Prim, if Willis called the police. To the extent that the content of the messages is relevant here, those facts will be

included in the sections to which they apply. Otherwise, the State relies on the Statement of Facts as provided in the Brief of Respondent before the Court of Appeals, and Trial Exhibit 3, previously designated to the Court. Meneses did not testify at trial.

Meneses faced a standard range of 46 to 61 months. CP 152. Based on the multiple offense policy of RCW 9.94A.589, the court imposed a mitigated exceptional sentence of 30 months. CP 53, 55, 147-48.

C. **ARGUMENT**

1. **THE "TO CONVICT" TELEPHONE HARASSMENT JURY INSTRUCTIONS ACCURATELY CONVEY ALL THE ELEMENTS OF THE CRIME.**

Meneses contends that the "to convict" jury instructions for each count of telephone harassment (felony and misdemeanor) were fatally flawed; he argues that the instructions did not require the State to prove he intended to harass his victim at the time he initiated each call. This argument should be rejected. The language used in the "to convict" instructions accurately, succinctly and directly encompasses the temporal element as articulated by this Court in State v. Lilyblad, 163 Wn.2d 1, 177 P.3d 686 (2008).

a. The Standard Of Review.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole, properly inform the jury of the applicable law. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Generally, the "to convict" instruction must contain all elements essential to the conviction. Mills, 154 Wn.2d at 7. This Court reviews the adequacy of a challenged "to convict" instruction *de novo*. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Still, in determining whether a "to convict" instruction contains all of the essential elements, appellate courts are mindful that there are no "magic words" that must be used. Rather, trial courts are given discretion to determine the specific language to include in the instructions. See e.g., State v. Coe, 101 Wn.2d 772, 787, 684 P.2d 668 (1984). This Court must "review the instruction in the same manner as a reasonable juror." State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994); Mills, 154 Wn.2d at 7.

b. The Telephone Harassment Statute.

The telephone harassment statute reads 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.

RCW 9.61.230(1).

Generally, a conviction for telephone harassment is a gross misdemeanor (counts III-VI, VIII and IX). RCW 9.61.230(1)(c).

Telephone harassment becomes a class C felony if the person harasses his victim "by threatening to kill the person threatened or any other person" (counts I and X). RCW 9.61.230(2)(b). There is no difference between the intent required for gross misdemeanor telephone harassment and felony telephone harassment.

c. The Lilyblad Decision.

In Lilyblad, this Court was asked to determine at what point in time a defendant must form the intent to harass to be convicted under the telephone harassment statute. Specifically, this Court was asked to determine whether a defendant had to form the intent to harass at the time he or she initially placed a call to a victim, or whether the intent to harass

could be formed after the call had already commenced. Lilyblad,
163 Wn.2d at 3-4.

The issue arose because of a decision in Redmond v. Burkhart, wherein the Court of Appeals opined that it was "illogical" for the legislature to have limited the scope of the telephone harassment statute to cover only those persons who had formed the intent to harass at the time the call was initially made. 99 Wn. App. 21, 25, 991 P.2d 717 (2000). The trial court in Lilyblad instructed the jury in accord with the Burkhart decision. The court provided a "to convict" instruction that read as follows:

- (1) That on or about December 24, 2004, the defendant made a telephone call to Lori[e] Haley;
- (2) That the defendant threatened to kill Lori[e] Haley;
- (3) That the defendant acted with intent to harass or intimidate Lori[e] Haley; and
- (4) The acts occurred in the State of Washington.

Lilyblad, 163 Wn.2d at 5. The court provided another instruction further defining the crime. The instruction provided that "'Make a telephone call' refers to the entire call rather than the initiation of the call." Id.

This Court first rejected the Court of Appeals' interpretation of the statute in Burkhart, finding that the meaning of the plain language of the statute was clear--the intent to harass "must form at the time the call is

'made' to the intended victim." Lilyblad, at 9. Second, this Court found that the instructions provided in Lilyblad's case, instructions that followed the dictates of the Burkhart decision, were fatally flawed because they did not properly instruct on the temporal element. Lilyblad, at 13.

The instructions provided here did not follow the dictates of the Burkhart case. Instead, the instructions are entirely consistent with this Court's opinion in Lilyblad.

d. The "To Convict" Jury Instructions.

The trial court gave the following "to convict" instruction for felony telephone harassment as charged in count I:

To convict the defendant of the crime of Telephone Harassment. . .each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about May 4th, 2007 the defendant placed a telephone call to Jamila Willis;
- 2) *That the telephone call was made with the intent to harass or intimidate Jamila Willis*
- 3) That the defendant threatened to kill Jamila Willis and
- 4) That the acts occurred in the State of Washington.

CP 74 (emphasis added).¹

¹ The "to convict" instructions for the other counts of telephone harassment mirror this instruction in all respects relevant here, differing only in date of offense and type of threat made. See CP 75-81.

e. **The “To Convict” Instructions Properly Informed The Jury That Meneses Had To Possess The Intent To Harass At The Time He Initiated Each Call.**

The jury was required to find "[t]hat the telephone call was made with the intent to harass or intimidate Jamila Willis." CP 74. This language is consistent with the statute and this Court's interpretation of the statutory language in Lilyblad.

Meneses' argument to the contrary seems to be premised on the fact that, prior to this Court's decision in Lilyblad, there was a split of authority about when a defendant needed to form the intent to harass.² It follows, Meneses wants this Court to assume, that this somehow makes the meaning of the instructions given here ambiguous. This argument lacks merit for three reasons.

First, statutory interpretation and discerning the meaning of the words used in jury instructions are not one and the same. In attempting to interpret a statute, a reviewing court is "required to give effect to the legislature's intent and purpose." State v. Alphonse, 142 Wn. App. 417, 425, 174 P.3d 684, rev. granted, remanded by, 164 Wn.2d 1021 (2008). This is exactly what the Court of Appeals was attempting to do in

² In the Court of Appeals opinion in Lilyblad, Division Two rejected Division One's interpretation of the statute as articulated in Burkhart. See State v. Lilyblad, 134 Wn. App. 462, 140 P.3d 614 (2006).

Burkhart, opining that, to *interpret the statute* to apply only to situations where a defendant had the intent to harass at the point of initiating the call, "artificially narrows the scope of the statute" and "draws an illogical distinction between threats made by a caller who initiates the call with the intent to intimidate and those made by a caller who formulates the intent to intimidate mid-conversation." Burkhart, at 467. The Court believed that its interpretation best effectuated the legislative intent behind the statute. Id.

However, in discerning the sufficiency of jury instructions, a reviewing court simply reviews the instructions as a reasonable juror would and determines if, read as a whole, the jury was properly informed of the applicable law. Hanna, 123 Wn.2d at 719; Mills, 154 Wn.2d at 7. The focus is on how a reasonable juror would interpret the language, not on trying to discern how best to interpret the language to effectuate perceived legislative intent.

Second, in Lilyblad, this Court rejected the argument that the language of the telephone harassment statute was ambiguous. It was only by "taking out of context," this Court said, the common word "make" that the statute was subject to multiple interpretations. Lilyblad, 163 Wn.2d at 9. Reading the language as a whole, this Court found that the plain language of the statute "clarifies the temporal scope of the act described in

the statute." Lilyblad, at 10. Therefore, instructions that mirror the statutory language would necessarily accurately inform the jury of the law.

Here, the trial court went even further, the third reason the defense argument fails. The language of the "to convict" instruction here, unlike the instruction in Lilyblad, clearly provided the nexus between the temporal element and the intent to harass. The requirement that the jury find the "defendant placed a telephone call to Jamila Willis" and that "the telephone call was made with the intent to harass or intimidate Jamila Willis," can be interpreted in only one reasonable way--that the defendant formed the intent to call when he initiated the call.

2. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON LESSER CHARGES.

Meneses argues that his two convictions for intimidating a witness must be reversed because the trial court failed to instruct the jury on the lesser included offenses of witness tampering and attempted intimidating a witness. This argument fails. The later proposed lesser crime does not exist, and neither instruction is supported by the facts.

a. The Relevant Charges.

The State charged Meneses with two counts of intimidating a witness (counts II and VII) under RCW 9A.72.110(1)(d) for knowingly attempting to induce Jamila Willis, a current or prospective witness, by

use of a threat, not to report information relevant to a criminal investigation. CP 30-34, 87-90. Meneses asked the trial court to instruct the jury on lesser included offenses of witness tampering and attempted intimidating a witness. CP 103-05; 4RP 99-100.³ The court rejected Meneses' request on the grounds that there was no factual basis to instruct on the lesser offenses. 4RP 100; 5RP 4.

b. The Facts Supporting Each Charge.

On May 4, 2007, Meneses called Willis and left an angry voicemail threatening to kill Willis and steal her "piece of shit" baby. 4RP 28-29; Ex 3 (the first message on the tape). Meneses called Willis and Prim "niggers," and told Willis, "bitch you wanna fucking press charges bitch, ... press mother-fucking charges bitch and see what happens to your ass, see how long you're fucking left living." Ex 3. Meneses boasted, "I'm a gangsta," and threatened to "smoke" her "corny-ass family." Ex 3. This message provided the facts supporting count II. CP 30-31; 3RP 9-11.

On May 10, 2007, Meneses left a message wherein he called Willis a "stupid fat black bitch," Prim a "dead man" and a "pathetic black

³ As to the witness tampering charge, Meneses sought an instruction based on RCW 9A.72.120(1)(c), which reads in relevant part:

A person is guilty of tampering with a witness if he or she attempts to induce . . . a person whom he or she has reason to believe may have information relevant to a criminal investigation . . . to

(c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation . . .

nigger," and mentioned the "Filipino Mafia." Ex. 3 (the sixth message on the tape). Meneses then yelled:

Go ahead call the police bitch, see what happens you stupid fucking fat black whore, ... this is fucking international bitch, you know what bitch, if you want to call police you're fucking, we got fucking Filipino gangstas coming from the Philippines to kill your fucking boyfriend who's the father of your piece of shit nigger child right now bitch, okay, that's my son in your house bitch, you want fucking gangstas at your house bitch, do something you stupid fucking whore.

Ex. 3. This message provided the facts supporting count VII. CP 32-33; 3RP 12-13.

c. The Facts Do Not Support The Giving Of Lesser Included Instructions.

A defendant is entitled to an instruction on a lesser included offense when the following two-part test is met: (1) each of the elements of the lesser offense is a necessary element of the offense charged (the legal prong), and (2) the evidence in the case supports an inference that only the lesser crime was committed to the exclusion of the charged offense (the factual prong). State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997).

The State agrees that each element of the witness tampering (RCW 9A.72.120(1)(c)) is a necessary element of intimidating a witness as charged here--thus it is a legal lesser. The State does not agree that

attempted intimidating a witness is a viable legal charge. Intimidating a witness is already an attempt crime and "[t]here can be no such thing as an attempt to attempt to commit a crime." State v. Awde, 154 Wash. 463, 467, 282 P. 980 (1929); see also State v. Music, 40 Wn. App. 423, 432, 698 P.2d 1087 (1985) (there is no such crime as "attempted assault" because assault is already defined as an "attempt to commit a battery").⁴

The remaining issue is whether the facts support the giving of the legal lesser of witness tampering. Specifically, the question is whether the facts show Meneses committed tampering to the exclusion of intimidating. In this case, the court correctly found that the facts did not support the giving of a lesser included instruction.

No jury could find that Meneses committed witness tampering instead of intimidating a witness. Stated in the alternative, no jury could find that Meneses had the intent to induce Willis to not call the police without the use of a threat. In the first call, Meneses threatened Willis:

⁴ Even were there such a crime as attempted intimidating a witness, the facts would not support the giving of an instruction here. Intimidating a witness does not require that the witness actually be intimidated, hear the threat or be induced to not report information. State v. Williamson, 131 Wn. App. 1, 86 P.3d 1121 (2004), rev. granted, cause remanded by, 154 Wn.2d 1031 (2005). The crime is complete when the attempt to induce is made. Here, Meneses left a message with Willis threatening her if she reported the crime. Thus, the crime was complete. There is no evidence that only an attempt crime occurred, such as trying to make the call but failing.

"press mother fucking charges bitch and see what happens to your ass, see how long you're fucking left living." Ex. 3. In the sixth message, Meneses told Willis that his "Filipino gangsta" friends would "kill [her] fucking boyfriend" if she went to the police. Ex. 3.

Meneses contends he was entitled to a tampering instruction because the jury could have found that he did not utter a "true threat." This argument fails for a number of reasons.

Theoretically, the jury could have disbelieved the State's proof as to any one of the elements of the greater crime; but the mere possibility that the jury could disbelieve the State's evidence is insufficient to warrant the giving of a lesser. State v. Speece, 115 Wn.2d 360, 363, 798 P.2d 294 (1990). To be entitled to a lesser included offense, the evidence must affirmatively indicate that *only* the lesser offense was committed. State v. Porter, 150 Wn.2d 732, 736-37, 82 P.3d 234 (2004). In other words, the evidence must rebut the inference that the defendant is guilty of the greater offense. State v. Gallegos, 73 Wn. App. 644, 652, 871 P.2d 621 (1994). Meneses cannot meet this standard.

In addition, a "true threat" is merely a term of art used to delineate the permissible scope of certain threat statutes for First Amendment purposes. State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007).⁵ But the intimidating a witness statute is not a statute that regulates pure speech; rather, the statute regulates conduct implicating speech (just like tampering that requires no threat at all). See State v. Talley, 122 Wn.2d 192, 210, 858 P.2d 217 (1993) ("hate crimes statute" regulates conduct, not pure speech); State v. Dyson, 74 Wn. App. 237, 243, 872 P.2d 1115 (telephone harassment has a speech component, but the statute is directed against specific conduct), rev. denied, 125 Wn.2d 1005 (1994).

What protects from violations of the First Amendment is the requirement of an improper purpose. See Talley, 122 Wn.2d at 211 (absent criminal conduct or intent, bigoted speech is protected--upholding hate crimes statute because of the nexus between the speech and the criminal conduct); Dyson, 74 Wn. App. at 243 (the intent to harass

⁵ 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 to take the life of another person." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

establishes the criminality under the telephone harassment statute, protecting the statute from First Amendment challenge).⁶

Both witness tampering and interfering with a witness require that the defendant act with the intent to induce the witness to do an act to obstruct justice. If the jury were to find that Meneses did not possess this intent, then they could not convict Meneses of either charge. Under such a situation, Meneses is not entitled to a lesser included offense. If the State's evidence indicates that the defendant is guilty as charged, and the defendant's evidence indicates that no crime was committed, there is no basis for instructing the jury on a lesser offense. State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990).

The same is true even if the jury had to find that Meneses' threat was a true threat. There is no evidence supporting a verdict that Meneses actually intended to induce Willis not to report the crime but did so by use of a joke. In other words, there would have to be affirmative evidence for the jury to find that Meneses made a threat, intended it as a threat,

⁶ See also United States v. Thompson, 76 F.3d 442, 452 (2nd Cir. 1996) (requirement of statute prohibiting "corrupt persuasion" of a witness that the persuasion be done with the purpose of obstructing justice assures that the statute does not impinge on the First Amendment); United States v. Jeter, 775 F.2d 670, 679 (6th Cir. 1985) (acts done with intent of "illicit activity" are not constitutionally protected), cert. denied, 475 U.S. 1142 (1986); United States v. Kelly, 91 F.Supp.2d 580, 583 (S.C.N.Y. 2000) (requirement that person threaten witness with intent to cause him to withhold testimony does not make criminal "innocent remarks").

intended to induce Willis by use of the threat, but that no reasonable person would have considered the words as a "true threat."⁷

Under no reasonable reading of the facts would it be possible for Meneses to have committed only the crime of witness tampering. Thus, the court properly rejected that lesser included instruction.

**3. CONVICTIONS OF INTIMIDATING A WITNESS
AND TELEPHONE HARASSMENT DO NOT
VIOLATE DOUBLE JEOPARDY.**

Meneses argues that principles of double jeopardy prohibit separate punishments for his convictions for felony intimidating a witness (count II) and gross misdemeanor telephone harassment (count III). This is incorrect. Double jeopardy is not violated because the statutes fail the "same evidence" double jeopardy test, and the statutes do not otherwise demonstrate a legislative intent that only one punishment be imposed when someone commits acts violating both statutes.

Subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In many cases, a defendant's conduct--even a single act--may violate more than one

⁷ There is no requirement in the statute or the "true threat" doctrine that anyone actually fear the threat. The only requirement under the "true threat" doctrine is that a reasonable person in the speaker's position would believe that others would perceive the words as a threat. See Kilburn, 151 Wn.2d at 44-46.

criminal statute. In such a situation, a defendant can permissibly receive multiple punishments for a single criminal act that violates more than one criminal statute depending on the intent of the legislature. Calle, 125 Wn.2d at 858-60 (finding no double jeopardy violation where a single act of intercourse violated both the rape statute and the incest statute). Double jeopardy is only implicated when the court exceeds the authority granted by the legislature and imposes multiple punishments where multiple punishments are not authorized. Id. at 776.

This Court has set forth a three-part test for determining whether multiple punishments were intended by the legislature. The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Calle, at 776. Should this step not result in a definitive answer, the court turns to step two to determine legislative intent, the two-part "same evidence" or "Blockburger" test.⁸ This test asks whether the offenses are the same "in law" and "in fact." Id. at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Id. at 778-80.

⁸ United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

This search for "clear evidence" of contrary legislative intent is the third step of a double jeopardy analysis.

Meneses contends that his convictions for intimidating a witness and telephone harassment are the same "in law" and "in fact," and thus under the second step of the Calle test, his convictions violate the prohibition against double jeopardy. This is incorrect.⁹ Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. In other words, the court must determine "whether each provision *requires* proof of a fact which the other does not." In re Orange, 152 Wn.2d 795, 817-18, 100 P.3d 291 (2004) (emphasis added). If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle, at 777.

The elements of each statute, and the facts required to prove each element, are far from the same. As charged and proven here, to convict Meneses of intimidating a witness, the State was required to prove elements, and provide facts, showing (1) that there was a criminal investigation, (2) that there was a current or prospective witness to that criminal investigation, (3) that Meneses made a threat, and (4) that he used

⁹ With respect to step one, the intimidating a witness and telephone harassment statutes neither expressly allow nor expressly disallow multiple punishments for a single act. See RCW 9.61, RCW 9A.72.

the threat for the purpose of attempting to induce the witness not to report relevant information. RCW 9A.72.110(1)(d); CP 30-31, 89. There is no requirement that a witness actually hear or learn of the threat or that the intimidation be successful, only that the defendant attempt to do so.

Further, a defendant need not possess the intent to harass; rather, he must have the intent to induce the witness to cooperate with his wishes. And finally, there is no requirement that a phone call occur, that the call be placed by the defendant, or that the threat be communicated over the phone.

In contrast, to convict Meneses of telephone harassment, the State was required to prove elements, and provide facts, showing that (1) Meneses placed a telephone call, (2) he placed the call to a specific person, (3) in placing the call he had the specific intent to harass the person called, and (4) he threatened to cause injury to the person called (Willis) or a member of Willis' household or family (in this case, Elijah Prim or the children). RCW 9.61.230(1)(c); CP 31, 75. There is no requirement that a threat be made, that there was a criminal investigation, that the victim be a witness to the investigation, or that there was an intent to induce a person to not report relevant information to the police.

The only shared element between the two statutes (besides jurisdiction) is that there must be a threat made. Otherwise, the facts

necessary to prove each charge are markedly different, one involving prospective witnesses, an attempt crime, a criminal investigation, and an intent to induce the withholding of evidence; the other involving a completed crime, intent to harass, and a phone call to a specific person. With each offense containing at least one element--in this case multiple elements--that the other does not, the two offenses are not the same "in law" and thus fail the "same evidence" test. "[E]ach provision requires proof of a fact which the other does not." In re Orange, 152 Wn.2d at 817-18.

The "same evidence" test creates a "strong presumption" in favor of multiple punishments, a presumption that can only be overcome by "clear evidence" of a contrary legislative intent. Calle, at 778-80. Neither below, nor in his petition to this Court, has Meneses presented any legislative history that could overcome this presumption.¹⁰

¹⁰ An examination of the statutes actually supports the conclusion that the legislature intended to punish intimidating a witness and telephone harassment separately. First, the statutes are located in different chapters of the criminal code. See Calle, at 780. Intimidating a witness is included in RCW 9A.72, Perjury and Interference with Official Proceedings, while telephone harassment is contained within its own chapter, RCW 9.61, dealing with a different subject, malicious mischief. Second, the offenses serve different purposes. The purpose of the intimidating a witness statute is to preserve the State's ability to effectively investigate and prosecute criminal offenses. Laws of 2004, ch. 271. In contrast, the primary purpose of the telephone harassment statute is to control and punish "unwanted communication upon one who is unable to ignore it." Lilyblad, 163 Wn.2d at 12. The primary victim of one crime is the justice system; the primary victim of the other, the receiver of the threat.

Still, Meneses argues that because the act he committed (the phone call) was used to prove both crimes, the "same evidence" test is satisfied. This is not the test for double jeopardy. This is merely the factual prong of the "same evidence" test, and Meneses' argument is an attempt to conflate the two prongs of the test into one indistinguishable fact-based test. It is not whether the facts of a given case may have been used to obtain convictions on more than one offense, it is whether one statute "requires proof of a fact which the other does not." In re Orange, at 817-18.

In making this argument, Meneses also fails to articulate how an examination of the facts of a particular case provides a method of divining legislative intent as to whether violations of two separate statutes should be punished separately or as one crime. A factual analysis simply provides the stepping stone to the possibility of a double jeopardy violation; it doesn't create one. For example, a robbery and assault may violate double jeopardy,¹¹ but only if the two crimes arise from the same conduct. If the crimes occur on separate days, there is no double jeopardy violation.

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

It is the examination of the statutes--as charged and proven--that allows the court to determine whether the legislature intended to punish crimes separately, or as one offense, when the crimes arise from the same act. As this Court has stated, it is "the legislative branch [that] has the power to define criminal conduct and assign punishment." State v. Louis, 155 Wn.2d 563, 568, 120 P.3d 936 (2005). Court review is limited to determining whether the legislature intended multiple punishments and whether a sentencing court exceeded the authority authorized by the legislature. Louis, 155 Wn.2d at 569. To base a double jeopardy analysis solely upon a determination of the facts would seem to be a violation of the separation of powers doctrine. See Whalen v. United States, 445 U.S. 684, 689, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980) (a court exceeding its own authority by imposing punishment not authorized by Congress violates the separation of powers doctrine).

Meneses also argues that this Court's test for double jeopardy, as articulated in Calle, "conflicts with the test set out in both Blockburger and United States v. Dixon."¹² Def. pet. at 12. Meneses is incorrect. The Court in Dixon affirmed the continued validity of the Blockburger test,

¹² 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

and rejected the "same conduct" or fact-based test Meneses seems to apply here.

In Dixon, the defendant was out on bail pending trial on a murder charge when he committed a drug offense, possession with intent to deliver. A condition of Dixon's release pending trial on the murder charge was that he was not to commit any criminal offense. Dixon, 509 U.S. at 691. Dixon was then prosecuted and convicted of criminal contempt based on proof that he committed a drug offense while under court order. When the government tried to prosecute Dixon separately for the drug offense, Dixon moved to dismiss the indictment on double jeopardy grounds.

In deciding the case, the Supreme Court reaffirmed that the Blockburger test is the sole test to determine whether a double jeopardy violation has occurred. The Court reiterated the Blockburger test, stating that a court "inquires whether *each* offense contains an element not contained in the other." Dixon, at 696 (emphasis added).

Without citation to authority, Meneses asserts that in Dixon, "[t]he crimes of criminal contempt and drug possession clearly have completely different statutory elements." Def. pet. at 13. Meneses makes this argument because the Supreme Court in Dixon found a double jeopardy violation under the Blockburger test and Meneses seeks to claim his

crimes violate double jeopardy too, despite the fact that his crimes require proof of different elements. Meneses' argument and reading of Dixon are incorrect.

In finding a double jeopardy violation, the Court stated that Dixon's "drug offense did not include any element not contained in his previous contempt offense." Dixon, at 700. This is true. In proving contempt, the government was required to prove all the elements of the drug offense. But what Meneses overlooks is that, to meet the Blockburger test, "each offense" must contain an element not contained in the other, not just that one offense contains an additional element as it did in Dixon. Dixon, at 696. Here, each offense Meneses was convicted of contains at least one element not contained in the other.

This result is demonstrated by the companion case in Dixon. Michael Foster, like Dixon, was found guilty of criminal contempt for committing a criminal offense (assault) while out on bail pending trial. In Foster's case, the Supreme Court rejected a double jeopardy claim. At Foster's contempt trial, the Court noted, the government was required to prove a simple assault that did not have a specific intent, and that Foster had knowledge that his assault violated a protection order. Dixon, at 700-01. On the other hand, in the criminal trial, Foster was charged with assault with intent to kill, and as the Court noted, the government was

required to prove that Foster had a specific intent to kill. Dixon, at 701. Just like here, each crime contained an additional element. As the Court said in regard to Foster's crimes, "the result is clear: These crimes were different offenses." Dixon, at 701.

In addition to clarifying the scope and continued propriety of the Blockburger test, the same test this Court has used countless times,¹³ the Dixon Court explicitly rejected the "same conduct" test Meneses seeks to apply here. In 1990, the United States Supreme Court added an additional layer, or second step, to the Blockburger double jeopardy test--the "same conduct" test. Dixon, at 697 (referring to Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990)). The "same conduct" test provided that if in proving the essential elements of one offense, the government proved conduct that constituted another offense, double jeopardy bars conviction for the other offense. Dixon, at 697 (citing Grady, 495 U.S. at 510). The Court in Grady instructed that one first conduct a Blockburger analysis, and if the result of that test does not bar multiple punishments, a "same conduct" analysis must then be conducted. Dixon, at 697 (citing Grady, at 516).

¹³ See e.g., State v. Hughes, 166 Wn.2d 675, 212 P.3d 558 (2009); State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008); In re Borrero, 161 Wn.2d 532, 167 P.3d 1106 (2007); Freeman, *supra*; Louis, *supra*; In re Orange, *supra*.

The "same conduct" test could bar separate punishments even where the Blockburger test did not. However, the Dixon Court analyzed the origins of their adoption of the "same conduct" test, found it "wholly inconsistent with earlier Supreme Court precedent," and held "that Grady must be overruled."¹⁴ Dixon, at 704. Thus, in 1993, the United States Supreme Court in Dixon wholly and unequivocally rejected the factual-type analysis that Meneses espouses here. Two years later, this Court did the same, recognizing that a fact-based test had been rejected by the United States Supreme Court and that the State double jeopardy clause does not provide broader protection than its federal counterpart. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995).

Finally, Meneses cites to Whalen, *supra*, and asserts that the rule of lenity applies. Whalen does not stand for this proposition.

Whalen was convicted of rape and felony-murder based on rape. The trial court imposed consecutive sentences even though neither statute

¹⁴ The Court added that the "same conduct" test "was not only wrong in principle; it has already proved unstable in application." Dixon, at 709. In addition, the Court noted that another test, the "same transaction" double jeopardy test, which required the government to try together all offenses based on one event, had long ago and repeatedly been rejected. Dixon, at 709, n.14.

expressly provided for such a result. Instead, a wholly different sentencing statute enacted by Congress provided the circumstances wherein a trial court could impose consecutive sentences.¹⁵ In interpreting this statute, whose wording the Court found "less than felicitous," the Court opined that Congress intended that consecutive sentences could be imposed only where the underlying crimes were separate offenses under the Blockburger test. Whalen, at 691-92.

The Court then applied the Blockburger test and appropriately found that while felony-murder based on commission of a rape requires the additional element of a death, rape does not require an additional element, and therefore the sentencing court did not have the authority to impose consecutive punishments. Whalen, at 693-94. The rule of lenity came into play in interpreting the sentencing statute, not in the context of the Blockburger test. See Whalen, at 694.

¹⁵ See Whalen, 445 U.S. 684, 691 (citing D.C.Code § 23-112 (1973)).

A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

In sum, Meneses' attempt to show that the legislature intended only one punishment when a person commits both intimidating a witness and telephone harassment is without merit.¹⁶

D. CONCLUSION

For the reasons cited above, this Court should affirm Meneses' convictions.

DATED this 18 day of December, 2009.

Respectfully submitted,

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¹⁶ Meneses also asserts that the proper remedy for a double jeopardy violation is vacation of the gross misdemeanor telephone harassment conviction. But double jeopardy is a question of legislative intent. It would be an absurd result to find that the legislature intended to punish less severely a person who commits both a felony offense and a gross misdemeanor offense than a defendant who commits just the felony offense. The proper remedy would be vacation of the "lesser conviction." State v. Jones, 117 Wn. App. 721, 727 n.11, 72 P.3d 1110 (2003), rev. denied, 151 Wn.2d 1006 (2004).

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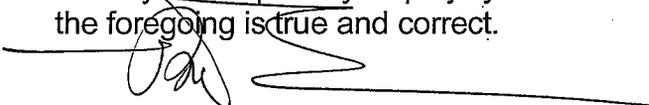
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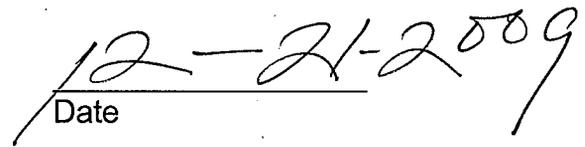
BY RONALD R. CARPENTER

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elizabeth Albertson, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. MENESES, Cause No. 83172-6, in the Supreme Court, for the State of Washington.

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



Name
Done in Seattle, Washington



Date