

original

NO. 35235-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL NORMAN MACKEY,

Appellant.

FILED  
COURT OF APPEALS  
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STATE OF WASHINGTON  
BY *MM*  
DEPUTY

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BRIEF OF APPELLANT

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court's use of a "to convict" instruction that failed to set out all of the elements of the alleged offense denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

2. The trial court's refusal to allow the defense to call a witness with relevant information denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

3. The prosecutor committed misconduct and denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Sixth Amendment when he argued guilt from the defendant's failure to call a witness that the prosecutor had successfully moved the court to exclude.

*Issues Pertaining to Assignment of Error*

1. Does a trial court's use of a "to convict" instruction that fails to set out all of the elements of the alleged offense deny a defendant the right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment?

2. Does a trial court's refusal to allow the defense to call a witness with information relevant to issues before the jury deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment?

3. Does a prosecutor commit misconduct and deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Sixth Amendment when he argues unfavorably from a defendant's failure to call a witness that the prosecutor had successfully moved the court to exclude?

## STATEMENT OF THE CASE

### *Factual History*

Sometime during 2005 the defendant Michael Mackey went to a local sign maker named Don Haines and ordered a large sign to place outside his Longview business. RP II 22<sup>1</sup>. For some reason Mr. Haines was unable to finish the order so after about six months the defendant went to Mr. Haines to retrieve the graphics and other materials to take to another sign maker. RP II 22-23. The exchange between the defendant and Mr. Haines was cordial. RP II 4-10. At the suggestion of Sara Breeden, the defendant's girlfriend, the defendant and Ms. Breeden took all of the materials over to a sign shop in Kelso called Advantage Screen Printing to get it made. RP II 22-23. An employee named Randy Maxwell took the order. RP I 110-113. According to Mr. Maxwell, the defendant was very upset and acted in a rude manner generally while making this order and particularly in his interaction with Ms. Breeden. RP I 113-116. A person by the name of Rick Huckaby owns the business. RP 29-30. At the time Mr. Huckaby had another employee by the name of William Cloniger. RP I 177.

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<sup>1</sup>The record in this case includes four volumes of verbatim reports. The first two continuously numbered volumes report the first day of trial and are referred to herein as "RP I". The second two continuously numbered volumes which restart at page one report the second day of trial and are referred to herein as "RP II".

According to Mr. Maxwell, in March of 2006 a number of weeks after placing the order the defendant came into the shop and very rudely complained about the time they were taking to make the sign. RP I 120-121. Upon hearing about this encounter Mr. Huckaby told Mr. Maxwell that they would not fill the order. RP I 36-37, 123. However, neither of them called the defendant to tell him of this fact. RP I 35-38; RP II 24-27. Finally, on April 18, 2006, Mr. Breeden again stopped by Mr. Huckaby's shop to enquire about the sign. RP II 27. At this point Mr. Huckaby gave Ms. Breeden the file back on the sign and told her that they would not fill the order because the defendant had been rude to Mr. Maxwell. RP II 27-28. Mr. Breeden then took all of the material back to the defendant's shop and told him what Mr. Huckaby had said. RP II 31-33.

At this point the defendant made a number of phone calls to Mr. Huckaby to find out why he would not make the sign. RP II 64-65. Just what the defendant and Mr. Huckaby said during these calls was hotly contested. RP I 29-95; RP II 57-80. According to Mr. Huckaby the defendant initially ordered him to finish the sign with loud, abusive and profane language. RP I 42. When Mr. Huckaby refused and told the defendant to stop calling, the defendant initially threatened to drag him out of the shop and beat him, and the defendant then later threatened to kill Mr. Huckaby, telling him to stay away from any windows because he would shoot him. RP I 42-64. Mr.

Huckaby's version of the conversation was corroborated by his two employees and a customer. They all heard Mr. Huckaby's side of the conversations, as well as part of the defendant's side of the conversations when Mr. Huckaby put the calls on speaker phone. RP I 95-109, 133-145, 195-204. According to Mr. Huckaby and these witnesses, Mr. Huckaby did not use any abusive language and did not threaten the defendant in any way. *Id.*

By contrast, according to the defendant, Mr. Huckaby hung up on the first three calls, and the defendant's only purpose in repeating the calls was to find out why Mr. Huckaby would not finish the project and to make arrangements to pick up part of the sign order that Mrs. Breeden had not been able to fit in her car. RP II 57-80. The defendant denied threatening to harm or kill Mr. Huckaby and stated that he only used profane language in response to Mr. Huckaby's repeated loud, profane, and threatening statements to him during the conversations. RP II 66-69. The defendant's version of the conversations was corroborated by Sara Breeden and one of the defendant's employees named Justin Pellham were present with the defendant during each of these calls. RP II 28-33, 48-52. According Ms. Breeden, and Mr. Pellham, they heard all of the defendant's side of the conversations. *Id.* During the last few telephone calls they could also hear Mr. Huckaby's loud, profane, and threatening remarks when the defendant tipped the telephone

away from his ear to allow them to hear what was said. *Id.* According to Ms. Breeden and Mr. Pellham the defendant never threatened Mr. Huckaby in any manner and only raised his voice in response to Mr. Huckaby loud, profane, and abuse statements. *Id.* Later that day Mr. Pellham went over to Mr. Huckaby's shop and retrieved the remainder of the sign order without incident. RP 52.

### ***Procedural History***

By information filed April 21, 2006, the Cowlitz County Prosecutor charged the defendant Michael Norman Mackey with one count of telephone harassment. CP 1-2. The case later came on for trial before a jury with the state calling five witnesses: Rick Huckaby, William Baker, Randy Maxwell, William Cloniger, and Deputy Tory Shelton. RP I 29, 95, 110, 176, 195. These witnesses testified to the facts mentioned in the preceding *Factual History*. RP I 29-223.

After the state closed its case, the defense proposed to call Mr. Don Haines to testify that he originally took the sign order from Mr. Mackey, that after six months he was unable to finish the sign, and that when the defendant came to pick up the sign materials to take them to Mr. Huckaby the defendant acted perfectly civil about his inability to finish the project. RP II 4-10. The state objected to this evidence and the court refused to allow the defense to call Mr. Haines as a witness. RP II 10. The defense then called three

witnesses: Sara Breedon, Justin Pellham, and the defendant. RP II 21-80. These witnesses testified to the defendant's version of events as set out in the preceding *Factual History*. *Id.*

After the defense closed its case the court instructed the jury on the law with the defense objecting to the court's "to convict" instruction, which read as follows:

**INSTRUCTION NO. 10**

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 April 18, 2006, the defendant made a telephone call to Rick Huckaby;
- (2) That the defendant threatened to injury [sic] Rick Huckaby;
- (3) That the defendant acted with intent to harass, intimidate, or torment Rick Huckaby; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 39.

The defense also took exception to the court's refusal to give the

following proposed instruction defining "make a telephone call":

Defendant Proposed Instruction No. 2

The State must prove beyond a reasonable doubt that the Defendant formed the intent to harass, intimidate, torment, embarrass or threaten to kill before or at the time the call was initiated.

CP 23.

Finally, the defense took exception to the court's refusal to give the following "to convict" instruction proposed by the defense.

Defendant's Proposed Instruction No. 1

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 4-18-06, the defendant made a telephone call to Rick Huckaby;
  - (2) That the defendant threatened to kill Rick Huckaby;
  - (3) That the defendnat acted with intent to harass or intimidate Rick Huckaby at the time the call was initiated; and
- (1) The acts occurred in the State of Washington.

If you find from the evidence that each of the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 22.

During closing the state specifically argued that “[w]hat defines telephone harassment is the content,” not the intent at the initiation of the call. RP II 133. In addition, in spite of the fact that the state successfully objected to the defendant’s attempts to call Donald Haines as a witness, the state argued in rebuttal that the jury could infer guilt from the defendant’s failure to call Mr. Haines as a witness. RP II 127. The prosecutor stated:

One other thing you have to remember, ladies and gentlemen, what comes out of this man’s voice is not evidence. The only thing that’s evidence is what comes out of the stand. He talked about, well, why didn’t you subpoena the guy who did the job before? Who brought that up, ladies and gentlemen? It was Mr. Crandall. He brought that up in his opening, yet he didn’t call the witness. And he wants the State to call a witness, when it’s the Defense that –

RP II 127.

When the defense objected to this argument, the court gave the following curative instruction at the request of the state:

There have been arguments made, and inferences raised, about the ability of a potential witness to testify in this matter that is the person to who the sign job was originally given.

This matter was discussed outside your presence, and as a matter of law I ruled that those conversation were not relevant to this issue. so, going back to my instructions, you’re to disregard any remark that’s made by any lawyer that’s not supported by the evidence that’s been admitted in this case.

RP II 131

After deliberation the jury returned a verdict of guilty and a special verdict that in committing the offense the defendant had made a threat to kill.

CP 44, 45. The court later sentenced the defendant within the standard range and the defendant thereafter filed timely notice of appeal. CP 46.

## ARGUMENT

### I. THE TRIAL COURT'S USE OF A "TO CONVICT" INSTRUCTION THAT FAILED TO SET OUT ALL OF THE ELEMENTS OF THE ALLEGED OFFENSE DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Under this rule, the court must correctly instruct the jury on all of the elements of the offense charged. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988). The failure to so instruct the jury constitutes constitutional error that may be raised for the first time on appeal. Id.

For example, in *State v. Salas*, 74 Wn.App. 400, 873 P.2d 578 (1994), the defendant was charged with vehicular homicide under an information alleging all three possible alternatives for committing that offense. At the end of the trial, the court, without objection from the defense, instructed the jury that to convict, the state had to prove that (1) the defendant drove while intoxicated, and (2) that the defendant's driving caused the death of another person. The court's instruction did not include the judicially created element

that intoxication be a proximate cause of accident that caused the death.

Following deliberation, the jury returned a verdict of guilty, and the defendant appealed, arguing that the court's instructions to the jury violated his right to due process because it did not require that the state prove all the elements of the offense charged. The state replied that the defendant's failure to object to the erroneous instruction precluded the argument on appeal. However, the Court of Appeals rejected the state's argument, holding that (1) the court had failed to instruct on the judicially created causation element, and (2) the defense could raise the objection for the first time on appeal because it was an error of constitutional magnitude. Thus, the court reversed the conviction and remanded for a new trial.

In the case at bar, the state charged the defendant with telephone harassment under RCW 9.61.230. This statute states:

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

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

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

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

RCW 9.61.230(1).

As the unambiguous language of this sections states, there are three alternative methods of committing this crime. Under subsection (2)(b), the third alternative under (1)(c) changes from a misdemeanor to a felony if the defendant threatens to kill the victim as opposed to injuring. This subsection states:

(2) The person is guilty of a class C felony punishable according to chapter 9A.20 RCW if either of the following applies:

. . .

(b) That person harasses another person under subsection (1)(c) of this section by threatening to kill the person threatened or any other person.

RCW 9.61.230(2)(b).

In this statute it is apparent that part (1) sets out the *mens rea* of the crime, while sub-parts (a), (b), (c), and (2)(b) set out the *actus reus* in four alternatives. The *mens rea* of the offense is to “make a telephone call” with the intent to harass, intimidate, torment or embarrass” and the *actus reus* is to then perform one of the four alternative acts. As with all crimes that include an element of intent, the crime is not complete until there is a joining of the *mens rea* with and *actus reus*. As LaFave and Scott state in their treatise on Criminal Law, “while a defendant can be convicted when he both has the mens rea and commits the actus rea required for a given offense, he

cannot be convicted if the mens rea relates to one crime and the actus rea to another.” Wayne R. Lafave & Austin W. Scott, *Criminal Law* § 34, at 243 (1972).

In this case the court attempted to set out all of these elements in the following “to convict” instruction.

#### **INSTRUCTION NO. 10**

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 April 18, 2006, the defendant made a telephone call to Rick Huckaby;
- (2) That the defendant threatened to injury [sic] Rick Huckaby;
- (3) That the defendant acted with intent to harass, intimidate, or torment Rick Huckaby; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 39.

In *State v. Lilyblad*, 134 Wn.App. 462, 140 P.3d 614 (2006), this court ruled that an identical instruction failed to properly set out all of the

elements of telephone harassment. In this case the defendant called her children who were residing with their paternal grandmother. During the call the grandmother got on the line and the defendant then threatened to kill her. Following trial on a charge of telephone harassment, the court gave the following “to convict” instruction.

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 December 24, 2004, the defendant made a telephone call to Lori [sic] Haley;

(2) That the defendant threatened to kill Lori [sic] Haley;

(3) That the defendant acted with intent to harass or intimidate Lori [sic] Haley; and

(4) The acts occurred in the State of Washington.

*State v. Lilyblad*, 134 Wn.App. at 467.

The court also gave a definitional instruction explaining that “make a telephone call” refers to the entire call rather than the initiation of the call. Following conviction the defendant appealed, arguing that under the decision in under the rationale in *State v. Wilcox*, 160 Vt. 271, 628 A.2d 924 (1993), which interpreted a similar statute, the jury instructions were defective because they failed to require the jury to find that the defendant initiated the telephone call with the intent to harass, intimidate, or torment another person. The state responded that under the Division I decision in *City of*

*Redmond v. Burkhart*, 99 Wn.App. 21, 991 P.2d 717 (2000), the instructions were correct because the statute only required that the intent to harass be formed at any time during the call, not at its initiation. In addressing these arguments the court noted the following lone piece of legislative history from the senate debate on the telephone harassment statute:

The original purpose of Senate Bill No. 77 was to cover those telephone calls which were mala in se, so to speak, and actually where the intent was one of a criminal act, where they intend to actually endanger the recipient of the phone call by obscene language or by harassment or by doing things in which the premeditation is there. The intent which the person has before he picks up the phone is a criminal intent to actually endanger the recipient in some manner. Now that was the original scope and object of Senate Bill No. 77.

SENATE JOURNAL, 40th Leg., Reg. Sess., at 195 (Wash.1967).

*State v. Lilyblad*, 134 Wn.App. at 470 n. 3.

In spite of this legislative history the court still found the language of the statute ambiguous. However, the court also found that both proposed interpretations were reasonable and that under the rule of lenity the court would adopt that version that favored the defendant. The court held:

Thus, under the rule of lenity, we must interpret the statute in favor of Paris; this interpretation requires the State to prove that Paris had the intent to harass, intimidate, torment, or embarrass when she initiated the telephone call.

Because the jury was not required to find that Paris had the intent to harass, intimidate, torment, or embarrass at the initiation of the telephone call, the jury was not instructed on every element of the crime, as article I, section 3 of the Washington Constitution and the Fourteenth Amendment of the United States Constitution require.

The cases of *State v. Smith*, 131 Wash.2d at 265, 930 P.2d 917 (“failure to instruct on an element of an offense is automatic reversible error”); *State v. Salas*, 74 Wash.App. 400, 407, 873 P.2d 578 (1994), *rev'd on other grounds*, 127 Wash.2d 173, 897 P.2d 1246 (1995); and *State v. Haberman*, 105 Wash.App. 926, 937, 22 P.3d 264 (2001), do not permit the conviction to stand when the instruction fails to state the law correctly.

*State v. Lilyblad*, 134 Wn.App. at 469.

In the case at bar the court used a “to convict” instruction identical to the erroneous “to convict” from *Lilyblad*. In addition, while the court in the case at bar did not give an instruction defining “make a telephone call,” it did refuse to give the following definitional instruction proposed by the defense:

Defendant Proposed Instruction No. 2

The State must prove beyond a reasonable doubt that the Defendant formed the intent to harass, intimidate, torment, embarrass or threaten to kill before or at the time the call was initiated.

CP 23.

The court also refused to give the following “to convict” instruction proposed by the defense.

Defendant’s Proposed Instruction No. 1

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 4-18-06, the defendant made a telephone call to Rick Huckaby;
- (2) That the defendant threatened to kill Rick Huckaby;

(3) That the defendant acted with intent to harass or intimidate Rick Huckaby at the time the call was initiated; and

(1) The acts occurred in the State of Washington.

If you find from the evidence that each of the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 22.

The defendant's two proposed instructions correctly set out the law and the elements as explained in *Lilyblad*, whereas the "to convict" instruction failed to include all of the elements of the offense for the same reason that the identical "to convict" instruction did in *Lilyblad*. Thus, in the same manner that the defendant in *Lilyblad* was entitled to a new trial so the defendant in the case at bar is entitled to a new trial.

**II. THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO CALL A WITNESS WITH RELEVANT INFORMATION DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this

right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus,

by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments to present a defense.

In the case at bar the state's theory of the case was that the defendant had wanted a sign made to put in front of his business, that he had taken the project to one person who had it for six months without completing the sign, that out of rage and frustration the defendant had taken the project to Mr. Huckaby, that the defendant was mad and upset at the point he retrieved the sign project from the first person and took it to Mr. Huckaby, and that the defendant eventually made the threatening and illegal calls after Mr. Huckaby was unable to finish the project in a timely manner. In order to prove this theory of the case the state itself elicited evidence from Mr. Maxwell on direct and Ms. Breeden on cross-examination that at the time the defendant retrieved the project from the first sign maker and it to Mr. Huckaby he was already very upset and abusive. RP I 113-116. In fact the state specifically outlined this theory of the case to the jury during the beginning of its final argument. RP II 94-96.

Under this theory of the case what happened at the time the defendant retrieved the sign from the first sign maker and took it to Mr. Huckaby's was all part of the *res gestae* of the crime charged. Given the state's claim that

the defendant grossly over-reacted to Mr. Huckaby's inability to complete the sign project, the whole progression of the defendant's attempts to get the sign completed was relevant to show why he reacted as the state claimed he did on the date in question. Recognizing the relevance of this evidence, the defense realized the necessity of finding the best evidence possible to rebut the state's claim that the defendant's frustrations had boiled over into illegal conduct. Part of this evidence was the testimony of Mr. Haines that the defendant was perfectly civil when he retrieved the sign from his shop and then took it to Mr. Huckaby's shop. This evidence would have directly rebutted Mr. Maxwell's claims of the defendant's demeanor on the date they first met. Consequently, it was highly relevant and the court's refusal to allow the defense to call this witness prevented the defense from calling the best witness available to rebut the state's claims.

It is true that the defendant, his girlfriend, and his employee all testified in rebuttal of the state's claims. However, the credibility of each of these witnesses was suspect in the eyes of the jury. By contrast, Mr. Haines' credibility as a disinterested witness would have been unquestioned by the jury. Thus, in refusing to allow the defense to call a relevant, important witness, the court denied the defendant his right to a fair trial under the state and federal constitutions.

**III. THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN HE ARGUED GUILT FROM THE DEFENDANT'S FAILURE TO CALL A WITNESS THAT THE PROSECUTOR HAD SUCCESSFULLY MOVED THE COURT TO EXCLUDE.**

As was previously stated, due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial, untainted from prejudicial evidence. *State v. Swenson, supra; Bruton v. United States, supra*. This right to a fair trial includes the right to have the court correctly define the law, and to have the state refrain from committing misconduct by inviting the jury to ignore the court's rulings on the facts and instructions on the law. *State v. Cantabrana*, 83 Wn.App. 204, 921 P.2d 572 (1996); *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

In the case at bar the prosecutor sought and obtained an order by the court prohibiting the defense from calling Mr. Haines as a witness. As part of the argument on this motion the defense presented an offer of proof

concerning this testimony. In spite of the fact that the state had itself obtained the exclusion of this witness, it none the less argued to the jury that it should disregard the defendant's arguments because the defendant had said it would call Mr. Haines and had failed to do so. Thus the state invited the jury to infer guilty from the defendant's failure to call a witness that it said it would and that under the evidence would have been logical for the defense to call. In so doing the prosecutor argued a falsehood to the jury: that the defense had the capacity to call this witness. In so doing the prosecutor committed misconduct.

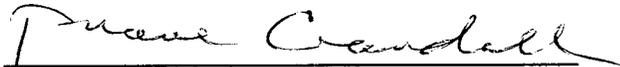
In addition, as was explained in the preceding argument, Mr. Haines was the one disinterested witness who would have rebutted the state's claims on the defendant's state of mind and corroborated the defendant's claims on this critical subject. Thus, but for this evidence there is a substantial likelihood that the result of the trial would have been an acquittal. As a result, the prosecutor's misconduct denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment and he is entitled to a new trial.

## CONCLUSION

The defendant is entitled to a new trial based upon the court's failure to instruct the jury on all of the elements of the crime charged, based upon the court's failure to allow the defense to call a relevant witness, and based upon prosecutorial misconduct.

DATED this 29 day of December, 2006.

Respectfully submitted,



Duane C. Crandall, WSB #10751  
Crandall, O'Neill & McReary. P.S.  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

### INSTRUCTION NO. 10

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 April 18, 2006, the defendant made a telephone call to Rick Huckaby;
- (2) That the defendant threatened to injury [sic] Rick Huckaby;
- (3) That the defendant acted with intent to harass, intimidate, or torment Rick Huckaby; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

### **Defendant's Proposed Instruction No. 1**

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 4-18-06, the defendant made a telephone call to Rick Huckaby;
- (2) That the defendant threatened to kill Rick Huckaby;
- (3) That the defendant acted with intent to harass or intimidate Rick Huckaby at the time the call was initiated; and
- (4) The acts occurred in the State of Washington.

If you find from the evidence that each of the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

### **Defendant Proposed Instruction No. 2**

The State must prove beyond a reasonable doubt that the Defendant formed the intent to harass, intimidate, torment, embarrass or threaten to kill before or at the time the call was initiated.

**RCW 9.61.230**  
**Telephone Harassment**

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

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

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

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

(2) The person is guilty of a class C felony punishable according to chapter 9A.20 RCW if either of the following applies:

(a) That person has previously been convicted of any crime of harassment, as defined in RCW 9A.46.060, with the same victim or member of the victim's family or household or any person specifically named in a no-contact or no-harassment order in this or any other state; or

(b) That person harasses another person under subsection (1)(c) of this section by threatening to kill the person threatened or any other person.

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STATE OF WASHINGTON

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

STATE OF WASHINGTON )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 MICHAEL N. MACKEY, )  
 )  
 Appellant. )  
 )  
 STATE OF WASHINGTON )  
 ) : ss.  
 County of Cowlitz )

NO. 06 1 00493 8  
 COURT OF APPEALS NO.  
 35235-4-II  
 AFFIDAVIT OF MAILING

Sylvia Archibald, being duly sworn on oath, states that on the 29th day of December, 2006, affiant deposited into the mails of the United States of America, properly stamped envelopes directed to:

SUSAN I. BAUR  
Cowlitz County Prosecuting Attorney  
312 SW 1st  
Kelso, WA 98626

MICHAEL N. MACKEY  
1649 Holcomb Acres  
Longview, WA 98632

and that said envelopes contained the following:

1. Brief of Appellant
2. Affidavit of Mailing

DATED this 29<sup>th</sup> day of December, 2006.

Sylvia Archibald  
SYLVIA ARCHIBALD

SUBSCRIBED AND SWORN to before me this 29 day of December, 2006.

BARBARA F. REYNOLDS  
 STATE OF WASHINGTON  
 NOTARY — • — PUBLIC  
 MY COMMISSION EXPIRES 02-04-09

Barbara Reynolds  
Notary Public in and for the  
State of Washington, residing  
at: Kelso. Commission  
expires 2-4-2009.