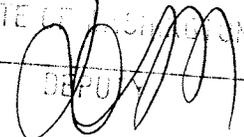


COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

NO. 38759-0-II

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

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STATE OF WASHINGTON,

Respondent,

vs.

ROBERT TROY GATES, III,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Christine A. Pomeroy, Judge  
Cause No. 08-1-00917-7

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**BRIEF OF APPELLANT**

---

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to dismiss the charges against the Defendant due to the failure of the State to produce sufficient evidence from which a rational trier of fact could have found all of the essential elements of the offenses beyond a reasonable doubt.
2. The trial court erred in failing to give jury instructions concerning the requirement for and the definition of “true threat” with regard to the charge of Intimidating a Witness.
3. The trial court erred in failing to find that the Defendant did not receive effective assistance of counsel due to his counsel’s failure to propose jury instructions regarding “true threat” and Possession of Stolen Property.
4. The trial court erred in failing to dismiss one count due to a double jeopardy/merger analysis and/or in sentencing the Defendant on all counts without a finding of same criminal conduct.
5. The trial court erred in imposing the payment of “costs of incarceration” on the Defendant in this case.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the State produce sufficient evidence from which a rational trier of fact could have found all of the essential elements of the crimes charged beyond a reasonable doubt? (Assignment of Error No. 1)
2. As to the crime of Intimidating a Witness, was the court required to instruct the jury as to the requirement that the threat alleged be a “true threat” and as to the definition of “true threat”? (Assignment of Error No. 2)
3. Did the Defendant receive effective assistance of counsel when his counsel failed to propose any jury instructions as to “true threat” and/or Possession of Stolen Property? (Assignment of Error No. 3)

4. With regard to the charges of Intimidating a Witness and Tampering with a Witness, do the doctrines of double jeopardy/merger and/or same criminal conduct operate so as to result in the dismissal of one of the charges or a reduction in the sentencing ranges? (Assignment of Error No. 4)
5. Was there a factual or legal basis for the Court to order the Defendant to pay “costs of incarceration” on the respective sentencing documents? (Assignment of Error No. 5)

**C. STATEMENT OF THE CASE**

By Information filed on May 20, 2008, in Thurston County Superior Court cause number 08-1-00917-7, the Defendant, ROBERT T. GATES, III, was charged with one count of Trafficking in Stolen Property in the First Degree, CP 2. **(NOTE: All clerk’s papers referenced herein are those filed under cause number 08-1-00917-7 unless otherwise noted).** By Information filed on September 3, 2008, in Thurston County Superior Court cause number 08-1-01583-5, the Defendant was charged with Intimidating a Witness (Count I) and Tempering with a Witness (Count II). CP 3 (in case number 08-1-01583-5). The cases were subsequently joined for trial under the first case number. CP 11. The matter came before the court for jury trial on December 10, 2008, the Honorable Judge Christine A. Pomeroy presiding. RP from December 10 and 11, 2008, pp. 1-114 (hereafter denominated as “RP”).

After some preliminary matters and jury selection, the State called Detective Rebecca Fayette of the Olympia Police Department as its first witness. RP 4 et seq. She related that she was the lead investigator regarding a burglary at Garfield Elementary School where a number of computers had been stolen. RP 6. When the perpetrators of the

burglary were identified, they had some, but not all, of the stolen property. RP 7. Through another detective, she was put in contact with Robert Badillo, who stated he thought he might have some of the computers which were taken in the Garfield burglary. RP 7-8. She contacted Badillo and his home, took a statement from him, and recovered the property from him. RP 8. She recovered four desktop computers and one laptop computer from Badillo. RP 21.

Fayette indicated that she had contact with the Defendant Gates during the course of her investigation, and that Gates had attempted to get the computers back to her as well. RP 22. She indicated that Gates' mother had brought one computer back, and that Badillo had actually gotten the computers in his possession from Gates' mother. RP 23.

Tyson Embry, an admitted participant in the Garfield burglary, testified that he sold some of the stolen computers to Gates for \$1,000. RP 29-30. He stated that he had removed from the computers all stickers which indicated that they were the property of the Olympia School District. RP 30. He testified that he did that so that the persons to whom he was selling the computers would not have any indication that the computers were stolen. RP 32. At no time did Embry tell Gates that the items Gates was buying were stolen. RP 32.

Chet Mackaben, the primary evidence officer for the Olympia Police Department, and Ron Morsette, the educational technology director for the Olympia School District, gave testimony to establish the identity of the stolen computers and their value. RP 33-40.

Robert Badillo stated that he had known Gates for a little over ten years. RP 41. Badillo stated that on April 23, he, at Gates' request, transported several boxes from the

trunk of a vehicle back to his (Badillo's) apartment in Tumwater. RP 43-44. Gates arrived at the apartment, and they all sat around talking and watching a football game. RP 44.

The following colloquy then took place at RP 45:

BADILLO: Later on he had come back crying - -I mean real devastated that if I knew that there was a computer stolen in my closet, and I'm just, like, what? And I didn't say nothing to him. So then I contacted Mr. Leischner.

PROSECUTOR: What did he say about the items in the boxes?

BADILLO: That there was some computers had been stolen, that some kids had snitched them off already, that he didn't know what he could try to put them at, you know, put the merchandise at.

...

PROSECUTOR: So he talked to you about what was in the items and that he knew that they were stolen.

BADILLO: Yes.

Badillo stated he then contacted Officer Daryl Leischner and asked about stolen computers, and that he was then put in contact with Detective Fayette. RP 45.

Badillo then described some messages he had received from Gates in August, 2008, and he identified eight exhibits as containing the contents of those messages. RP 48-53. He described the messages as "very frightening." RP 53.

On cross examination, Badillo stated that on April 24, in his statement to Fayette, he indicated that Gates asked Badillo to hold onto the stuff until he could find out if it was stolen, and that Gates came back later in the day and said the stuff was stolen. RP 57.

Detective Fayette was recalled to discuss her contact with Badillo in August, 2008, regarding the messages he had received from Gates. She then read into the record

the entirety of each of the eight messages. RP 62-64. Both parties then rested. RP 65, 71.

After the giving of jury instructions and closing arguments of counsel, the jury convicted the Defendant as charged of all three counts. RP 108. The Defendant was sentenced on January 6, 2009, to a total term of 24 months RP 1/6/09, pp. 3-22. CP 53-63; CP (08-1-01583-5) 9-19. On each Judgment & Sentence, the Defendant was ordered to pay the “costs of incarceration” pursuant to RCW 9.94A.760. CP 57; CP (08-1-01583-5) 12.

Timely Notice of Appeal was filed in the case on January 6, 2009. CP 64; CP (08-1-01583-5) 20.

#### **D. ARGUMENT**

##### **I.**

**The trial court erred in failing to dismiss the charges due to the State’s failure to present sufficient evidence to the jury to prove, beyond a reasonable doubt, that the Defendant was guilty of the crimes charged.**

In deciding whether Gates’ convictions were based upon sufficient **evidence**, a reviewing court must view the **evidence** in the light most favorable to the State. The issue becomes whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P. 2d 1068 (1992). All reasonable inferences from the **evidence** must be drawn in favor of the State and interpreted most strongly against the Defendant. *Salinas, supra.*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P. 2d 774 (1992). Circumstantial **evidence** is no less reliable than direct **evidence**, and criminal intent may be inferred from conduct where

“plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn. 2d 634, 638, 618 P. 2d 99 (1980). A claim of insufficiency admits the truth of the State’s **evidence** and all inferences that reasonably can be drawn therefrom. *Salinas, supra.*, at 201; *Craven, supra.*, at 928.

### **Trafficking in Stolen Property in the First Degree**

This charge can be proven in several ways, each of which is set forth in the body of the Information. CP 2. One can commit this crime by:

- (1) knowingly initiating, organizing, planning, financing, directing, managing, or supervising the theft of property for sale to others;
- (2) knowingly selling, transferring, distributing, dispensing, or otherwise disposing of stolen property to another person; or
- (3) knowingly buying, receiving, possessing, or obtaining control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

Implicit in each of these various ways in which to commit the crime is the requirement that a Defendant, **at the time of the relevant action**, know that the property in question is stolen property. That is, in fact, set forth as a separate element in the “elements” jury instruction. CP 42.

As to method (a) above, there is absolutely no evidence at all from which it could be concluded that Gates was in any way involved in the actual theft of the computers from Garfield School. Thus, there is no evidence that he committed the crime in that manner.

As to methods (2) and (3), there was arguably, given the applicable evidentiary standard, evidence that Gates transferred the computers to Badillo and/or that he

possessed or controlled the computers with the intent to transfer them to Badillo. The issue, though, is whether he committed those acts **with knowledge that the computers had been stolen**, as required by the elements of the crime. The testimony of Embry was that he sold the computers to Gates for \$1,000, and, more importantly, that he removed all identifying stickers so that a purchaser of the computers would not be aware that they were the property of the Olympia School District. Furthermore, Embry testified that he never told Gates that the computers were stolen.

However, the testimony of Badillo is perhaps of the most significance on this issue. Badillo testified that, at Gates' request, he transferred the computers from a car to his (i.e. Badillo's) apartment in Tumwater. Gates came over with a few other people, and they just talked and watched a football game. Badillo indicated that at some point, Gates had **come back**, was crying, and was "real devastated." The only conclusion that can be drawn from this testimony is that Gates had, at some point, left Badillo's apartment, and had, at that time, received information about the fact that the computers **may** be stolen. He then returned to Badillo's apartment and, as described by Badillo, told Badillo to hold onto the computers until he could get more information as to whether the items were stolen or not.

The critical factor in this timeline is that Gates, by Badillo's own testimony, did not have any inkling that the computers might be stolen until **after** he had asked Badillo to take them to his apartment. Thus, there was no transfer or intent to transfer the computers to anyone **after** Gates had received knowledge and information that they might be stolen. While this evidence may have supported a charge of Possession of Stolen Property (as of

the time Gates received information that the computers might be stolen), it does not constitute sufficient evidence of the crime of Trafficking in Stolen Property in the First Degree.

### **Intimidating a Witness**

To convict of this crime, the State must prove (1) a “threat” to a current or prospective witness and (2) an attempt to influence the testimony of that person. Neither of these elements were sufficient proven in the instant case. The **only** evidence to support the charge of Intimidating a Witness were the eight text messages sent by Gates to Badillo in August, 2008. An examination of those messages clearly shows that they cannot legally establish the elements of that crime.

### **True Threat**

It has long been recognized in the State of Washington and elsewhere that statutes such RCW 9A.72.110 criminalize pure speech, and, as such, “must be interpreted with the commands of the First Amendment clearly in mind.” *State v. Williams*, 144 Wn. 2d 197, 206-07, 26 P. 3d 890 (2001) (quoting *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). “The First Amendment presupposes that the freedom to speak one’s mind is not only an aspect of individual liberty - and thus a good unto itself - but also is essential to the common quest for the truth and the vitality of society as a whole. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). The *Bose* court went on to state at page 504 as follows:

In order to preserve the vital right to free speech, it is imperative that a court carefully assess statements at

issue to determine whether they fall within or without the protection of the First Amendment. It is, at this point, settled that certain kinds of speech are unprotected. The Court has noted that there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they ‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

One of those categories is “true threats”, which have been held not to be protected under the “majestic protection” of the First Amendment. *Watts, supra.*, at 707; *Williams, supra.*, at 207; *State v. J.M.*, 144 Wn. 2d 472, 477, 28 P. 3d 720 (2001). 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. *Williams, supra.*, at 208-09 (quoting *State v. Knowles*, 91 Wn. App. 367, 373, 957 P. 2d 797 (1998) (quoting *United States v. Khorrami*, 895 F. 2d 1186, 1192 (7<sup>th</sup> Cir. 1990))); accord, *State v. J.M.*, *supra.*, at 477-78. “Idle talk, joking, or puffery does not {evince} a knowing communication of an actual intent to cause bodily injury.” *State v. J.M.*, *supra.*, at 482.

The eight text messages which form the basis for the State’s charge in the instant case can in no way be said to constitute a “true threat”. They are perhaps rightfully characterized as angry words with a good deal of name calling, but the only person to whom harm is even threatened is the speaker, Gates himself, when he speaks of killing himself if he goes to jail. In no way do these messages rise to the level of a “true threat” as that term has been defined.

Instructive in this regard is the 2007 case of *State v. Brown*, 137 Wn. App. 587,

154 P. 3d 302 (2007). In that case, the Defendant Brown had been sentenced by a municipal court judge on a DUI case. Brown ultimately called a collection agency to discuss paying off his outstanding fines in order to get his driver's license reinstated. He blamed the judge for his difficulties, and told the collections officer that he had unsuccessfully tried to shoot himself, and that he had then fired four bullets into the wall. He went on to say that he could "see [the sentencing judges] door from his front porch and that the judge could see his door, and that he had seen not only the judge but also his wife and his kids out in the front lawn, and had thought about shooting them before."

Brown was charged and convicted of the crime of Intimidating a Judge. On appeal, he argued that there was insufficient evidence to establish that he intended to cause bodily harm to the judge in the future. In reversing and dismissing his conviction, the Court of Appeals recognized that the statute in question required a "true threat" in order for there to be a crime committed. In reversing the conviction, the Court of Appeals stated as follows at pages 591-92:

Although Brown's statements alarmed the collections officer, he expressed only past thoughts about harming the judge and the judge's family, and the ability to see them from his house. He did not express thoughts of harming the judge or the judge's family in the future or about having a plan to do so. These facts suggest that a reasonable person in Brown's position would not foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death. An opposite finding would ostensibly criminalize his previous thoughts, which we will not do. The State has presented insufficient evidence to establish his statements amounted to a 'threat' as defined in RCW 9A.04.110(26)(a).

For similar reasoning, the messages from Gates to Badillo in no way constitute a

“serious statement of intent” by Gates to injure Badillo in any way. Admittedly, a few of the messages contain unkind words directed towards Badillo, but those words do not fit within the narrow definition of a “true threat” as set forth above.

### **Attempt to Influence Testimony**

Aside from the lack of a “true threat” in the messages, there is insufficient evidence, as a matter of law, to establish that Gates was, by means of these eight messages, attempting to influence Badillo’s testimony in any way. This is, of course, one of the elements of the crime of Intimidating a Witness. CP 46.

A useful case with regard to this issue, and the specific facts of this case, is *State v. Brown*, 162 Wn. 2d 422, 173 P. 3d 245 (2007). In that case, the Defendant Brown was overheard by Melissa Hill talking about a burglary that he had just committed with his cousin. The conversation heard by Hill related several details of the burglary and the items which were the fruits thereof. Brown subsequently told Hill that she would “pay” if she spoke with the police, and was charged with Intimidating a Witness as a result. Hill testified that she viewed this as a credible threat against her personal safety and a threat of violence. The charge accused Brown of attempting to influence the testimony of Hill by use of a threat.

In reversing and dismissing Brown’s conviction for Intimidating a Witness, the Washington Supreme Court stated as follows:

...we conclude the evidence is insufficient to support Brown’s conviction...the Information charges Mr. Brown with intimidating a current or prospective witness by attempting to influence the testimony of the witness by use of a threat...The problem, however, is that the State did not prove that Brown threatened Hill in an attempt to

influence her testimony. Rather, the only evidence presented, even when viewed most favorably to the State as required, shows that Brown threatened Hill in an attempt to prevent her from providing any information to the police... Thus, the evidence was insufficient to support the crime that the State did charge...

The same analysis results in the same result in the instant case. While Gates' messages to Badillo may have contained some alarming language, and certainly expressed anger towards Badillo, they in no way convey any attempt to influence Badillo's testimony. There is no mention of testimony, of court proceedings, of trial, or of anything wherein it can reasonably be concluded that Gates was attempting to influence Badillo's testimony. The threat in the *Brown* case, discussed above, comes far closer to attempting to influence testimony than anything said by Gates to Badillo. Yet, even the threat in *Brown* was ruled insufficient, as a matter of law, to constitute the necessary elements of Intimidating a Witness. For the same reasons, the States' evidence in the instant case fell far short of constituting an attempt to influence Badillo's testimony.

#### **Tampering with a Witness**

In order to prove Gates guilty of this charge, the State had to present legally sufficient evidence that Gates attempted to induce Badillo to "testify falsely or, without right or privilege to do so, to withhold any testimony". CP 3 (in case number 08-1-01583-5); CP 48. Essentially the same analysis applies here as was argued above with regard to the charge of Intimidating a Witness. There is nothing in the eight text messages from Gates to Badillo which in any way can be construed, as a matter of law, as attempting to induce Badillo to testify falsely or to withhold any testimony.

In this regard, it is crucial to note that Gates was charged solely under RCW

9A.72.120(1)(a), which addresses testifying falsely and withholding testimony. He was not charged under the provisions of RCW 9A.72.120 (1)(c), which makes it a crime to attempt to induce a witness to “[w]ithhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.”

Again, Gates’ words and language in these text messages are angry, to say the least. However, they in no way mention testimony, nor do they, in any way, indicate an attempt to induce Badillo to testify falsely or to withhold his testimony. Such an intent, as is clear from the case law previously cited, must be clear from the language used by Gates, and the State’s evidence is legally insufficient in that regard.

## II.

**With regard to the charge of Intimidating a Witness, the trial court erred in failing to give a jury instruction defining the requirement that the threat be a “true threat” and defining that term for the jury.**

An examination of the Court’s instructions to the jury reveals that there was no jury instruction either given by the Court or proposed by either of the parties which either (a) stated the requirement that the “threat” alleged must be a “true threat” or (b) defined the term “true threat.” CP 27-46. The only jury instruction which attempted to give any relevant definition was Instruction No. 17 (CP 42), which gave the general definition of the term “threat”.

The key case on this issue is *State v. Schaler*, 145 Wn. App. 628, 186 P. 3d 1170 (2008). In that case (which was a case involving felony harassment, but for which the analysis as to “true threat” would be the same), no jury instruction was either given by the

Court or proposed by either party which defined “true threat” for the jury. In the *Schaler* case, the jury was given an instruction essentially similar to jury instruction no. 17 in the instant case.

The *Schaler* Court first determined that the failure to instruct the jury as to the requirement of and definition of a “true threat” was a “manifest error affecting a constitutional right”, and thus could be raised for the first time on appeal, citing *State v. O’Donnell*, 142 Wn. App. 314, 321-322, 174 P. 3d 1205 (2007) (quoting RAP 2.5(a)(3)).

The Court then went on to discuss two other cases which had addressed the “true threat” issue with regard to jury instructions in other similar contexts. *State v. Johnston*, 156 Wn. 2d 355, 127 P. 3d 707 (2006), had addressed the issue in the context of a prosecution for Threats to Bomb or Injure Property under RCW 9.61.160. *State v. Tellez*, 141 Wn. App. 479, 170 P. 3d 75 (2007), had addressed the issue in the context of a prosecution for Felony Telephone Harassment under RCW 9.61.230(2)(b).

As a result of its analysis of these two cases, the *Schaler* Court concluded as follows:

Here, like in *State v. Johnston*, the statute at issue criminalizes “pure speech,” and accordingly has been limited to prohibit only “true threats.” See *Kilburn*, 151 Wn. 2d at 41, 43 (stating RCW 9A.46.020 “criminalizes pure speech,” and limiting the statute to “true threats”). Therefore, like in *State v. Johnston*, the jury instructions given at trial, by not providing a definition of “true threat,” were deficient. Furthermore, although *State v. Tellez* held “true threat” was not an essential element of the crime of felony telephone harassment, another crime targeting “pure speech,” the court affirmed that a “true threat” must be defined for the jury in order to protect a defendant’s First Amendment rights. See *Tellez*, 141 Wn. App. At 483-484. We conclude that a jury in a criminal harassment prosecution

likewise must be instructed on the concept of “true threat.” Therefore, the definition of “threat” in jury instruction 10 was not sufficient to protect Mr. Schaler’s First Amendment rights. The court erred in failing to instruct the jury on the definition of “true threat.”

The *Schaler* Court ultimately ruled that the failure to define “true threat” in the jury instructions was harmless error on the facts of that case. It found that the threats made by the Defendant were so severe and egregious that no reasonable person could have considered them anything other than “true threats”. The Court distinguished the *Johnston* case, where it was found that the evidence on the issue as to “true threat” was a close one, and that, in view of that fact, the jury should have been instructed as to the definition of “true threat”.

Additionally, it noted that the defense theory of the case had nothing to do with whether the threats made were “true threats” or not, but rather concerned whether the threats were “knowingly” made, i.e. with the intent that they be conveyed to the victims.

Applying these standards to the instant case, it is clear that the jury was not instructed as to the requirement or definition of “true threat”. The analysis is the same in a case such as this, dealing with the crime of Intimidating a Witness, as it is for the other types of cases which criminalize “pure speech”, and which have been discussed previously. It was, therefore, error to fail to instruct the jury as to that matter.

The question then becomes whether that error can be viewed as harmless. As previously argued, the text messages contain very little in the way of actual threats of any kind. This is hardly a case like *Schaler, supra.*, where the threats are clear, continuous, and obviously serious. Rather, it is a case more like *Johnston, supra.*, where the issue as

to whether “true threats” were made is indeed a close one. In fact, it is submitted that the alleged “threats” in the instant case are far less egregious and serious than those deemed “close” in the *Johnston* case. Additionally, unlike the *Schaler* case, the defense theory in the instant case went directly to the issue of whether Gates’ messages were “threats” at all. Defense counsel, in his closing argument, states, at RP 101-102:

There are no threats in here. He’s called him some names, indicates you might get yours, something to do with karma. But when I asked Mr. Badillo what karma was, he thought it was some sort of revenge. So in that perspective maybe since he didn’t know what karma was, he may have perceived it as a threat, but you have to actually look at the messages, at the content of the messages that were sent. There’s no threat contained in any of these messages that you will see. You can see that Mr. Gates is perhaps upset, but there’s not any content in here that would indicate that he’s trying to intimidate him or influence his testimony in any way either.

Given the rather vague nature of the messages themselves, and given the fact that it was the primary defense theory that there were no threats made, in no way can the failure to instruct the jury as to the requirement of and definition of a “true threat” be deemed harmless in this case.

### III.

#### **Gates’ counsel was ineffective in failing to propose jury instructions regarding “true threat” and the included offense of Possession of Stolen Property.**

The Sixth Amendment guarantees criminal defendants the right to assistance of counsel. U.S. Const., Amendment VI. A criminal defendant’s constitutional right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*,

466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Claims for ineffective assistance of counsel are reviewed *de novo*. *State v. Shaver*, 116 Wn. App. 375, 382, 65 P. 3d 688 (2003).

When evaluating a claim of ineffective assistance of counsel, Washington follows the two-prong test set forth by the United States Supreme Court in *Strickland*. *Strickland*, 466 U.S. at 687; *State v. Thomas*, 109 Wn. 2d 222, 225, 743 P. 2d 816 (1987). In order to satisfy the *Strickland* test, a defendant must prove: (1) that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have been different. *State v. Reichenbach*, 153 Wn. 2d 126, 130, 101 P. 3d 80 (2004). Both prongs must be met in order to satisfy the test. *State v. Brockob*, 159 Wn. 2d 311, 344-45, 150 P. 3d 59 (2006).

### **True Threat**

As indicated in prior argument, it was error for the Court not to have instructed the jury as to the requirement of and definition of "true threat" with regard to the charge of Intimidating a Witness. Defense counsel did not propose such jury instructions, though he argued, in closing, that the messages sent by Gates to Badillo were not "threats" at all. There can be no tactical and strategic reason for the failure of defense counsel to request such jury instructions, particularly given the nature of the defense to that charge. Given the already argued and dubious nature of the test messages as "threats" at all, much less "true threats", had the jury been properly instructed as to "true threat" there is every

reason to believe that the outcome would have been different, and that the Defendant Gates would have been acquitted of the charge of Intimidating a Witness.

### **Possession of Stolen Property**

As previously argued, there is a significant question as to when Gates became aware of facts which led him to suspect or believe that the computers were stolen property. There is significant (if not uncontradicted) evidence that he did not gain such knowledge until after the computers had been transported to Badillo's apartment. If, indeed, a jury believed that he gained such knowledge **after** the transfer to Badillo, there would be no evidence of trafficking in stolen property at all. Rather, all there would have conceivably been would have been evidence that Gates continued to possess or control stolen property, which would have arguably supported a conviction only for Possession of Stolen Property in either the First or Third Degree. Such a crime, on the facts of this case, is clearly an included offense to the crime of Trafficking in Stolen Property in the First Degree, and defense counsel was deficient in failing to propose jury instructions concerning Possession of Stolen Property. Had such instructions been given, and had the jury believed, as the evidence indicated, that Gates did not receive any inkling of the nature of the computers as stolen until **after** they were at Badillo's apartment, there is every reason to believe that the outcome would have been different, and that Gates would have only been convicted of the less serious crime of Possession of Stolen Property in either the First or Third Degree.

#### IV.

**The trial court erred in convicting and/or sentencing Gates on both Intimidating a Witness and Tampering with a Witness, or in failing to find that those two offenses constituted “same criminal conduct” for sentencing purposes.**

**(NOTE: This argument need only be considered in the event the sufficiency of the evidence challenges to the crimes of Intimidating a Witness and Tampering with a Witness both fail. If either or both of those challenges to the sufficiency of the evidence is upheld, this argument becomes moot.)**

This argument can be summarized as follows: First, the prosecution and conviction of Gates for both Intimidating a Witness and Tampering with a Witness violates his right against double jeopardy. Second, the offenses of Intimidating a Witness and Tampering with a Witness should merge, based on the facts of this case. Third, if double jeopardy and merger do not apply, the two offenses constitute “same criminal conduct” for sentencing purposes.

#### **Double Jeopardy/Merger**

A useful case with regard to this analysis is *State v. Fuentes*, 208 P. 3d 1196 (Court of Appeals, Division I, decided June 1, 2009). In that case, the Defendant, based upon a single threat made to a witness at the conclusion of her testimony, was charged with Intimidating a Witness and Felony Harassment. He contended on appeal that those two convictions violated double jeopardy. The Court of Appeals began the analysis by stating the double jeopardy is implicated “when the court exceeds the authority granted by the legislature and imposes multiple punishments when multiple punishments are not authorized.” The court indicated that the proper procedure is the four-part test enunciated

in *State v. Freeman*, 153 Wn. 2d 765, 108 P. 3d 753 (2005). The first inquiry is whether the statutory language specifically authorizes separate punishments.

If that test is not conclusive, then the second inquiry becomes whether one offense includes an element not included in the other, and whether proof of one offense would not necessarily prove the other. If that is the case, then it is presumed that the crimes are not the same for double jeopardy purposes.

The third inquiry is whether crimes merge under the merger doctrine, wherein crimes “merge” if one crime is accomplished by an act which is defined as a crime elsewhere in the criminal statutes.

The fourth inquiry is, even if the convictions appear to be for the same offense or for charges that would merge, whether there is an independent purpose or effect for each offense.

Applying this analysis to the instant case, there is no statutory language applicable here which specifically authorizes separate punishments for the crimes of Intimidating a Witness and Tampering with a Witness.

With regard to the second and third inquiries, it is submitted that the two crimes, **as charged in Gates’ case**, are the same for double jeopardy and merger purposes. It is clear that the State is relying on exactly the same facts (i.e. the eight text messages and nothing more) to prove both crimes. The crime of Tampering with a Witness, as charged here, requires proof of an attempt to induce Badillo to “testify falsely or, without right or privilege to do so, to withhold any testimony.” CP 3 (from case number 08-1-01853-5). The crime of Intimidating a Witness, as charged here, requires proof of the use of a threat

against Badillo to “influence [his] testimony”. The only additional element in the latter charge is the “threat”.

It is clear that proof of the crime of Intimidating a Witness, as charged in this case, would necessarily prove the crime of Tampering with a Witness, as charged in this case. Proof that Gates allegedly “tampered with Badillo” is necessarily part of the proof that Gates allegedly “intimidated” Badillo, in that both involve an alleged attempt by Gates to influence Badillo’s testimony. This is the essence of the concept of double jeopardy and merger.

The application of the doctrine in the *Freeman* case, *supra.*, illustrated the point well. In that case, co-Appellant Zumwalt punched a victim in the face, causing serious injuries, and then robbed her of some \$300 in cash and casino chips. He was charged with First Degree Robbery and Second Degree Assault. The *Freeman* Court concluded that “[u]nder the merger rule, assault committed in furtherance of a robbery merges with robbery and without contrary legislative intent or application of an exception, these crimes would merge.” In other words, the assault was part and parcel of the robbery, and as such, could not be separately punished.

Similarly, as charged in the present case, the crime of Tampering with a Witness is, for all intents and purposes, part and parcel of the crime of Intimidating a Witness. The crime of Intimidating a Witness, as charged here, cannot be committed without committing the crime of Tampering with a Witness. Thus, the concepts of double jeopardy and merger should result in the dismissal of the crime of Tampering with a Witness.

As to the fourth inquiry under *Freeman*, the two statutes appear in the same section of the RCW Code, i.e. in RCW 9A.72. In fact, they appear one after the other. The fact that Intimidating a Witness and Felony Harassment (as in the Fuentes case) were contained in separate and distinct sections of the criminal code was significant in the Court's ruling in *Fuentes* that separate punishments were appropriate. The "purpose" and "effect" of both statutes is to preserve the State's ability to effectively investigate and prosecute criminal offenses. That is in stark contrast to the Court's finding in *Fuentes* that the two applicable statutes in that case "each served different purposes." under any rational analysis, the crimes of Intimidating a Witness and Tampering with a Witness, **as charged herein**, serve the same purpose, thus providing another reason why they should merge. Thus, it is clear that these offenses, in Mr. Gates' case, should merge.

#### **Same Criminal Conduct**

RCW 9.94A.589(1)(a) provides that if two or more offenses constitute "same criminal conduct", they shall be treated as one crime for sentencing purposes. "same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." It is interesting to note that in the *Fuentes* case discussed previously, the sentencing court, even though it declined to find a violation of double jeopardy or a reason for the offenses to merge, did find that the crimes of Intimidating a Witness and Felony Harassment did constitute same criminal conduct for sentencing purposes.

In the instant case, at sentencing, the judge did not make a finding that the crimes of Intimidating a Witness and Tampering with a Witness constituted same criminal

conduct. The issues was never raised by either counsel, nor was it ever mentioned by the Court. The Court sentenced Gates on each offense with an Offender Score of 2 points, indicating the lack of a finding that any of the three offenses constituted same criminal conduct.

As has been extensively argued in this Brief, the crimes of Intimidating a Witness and Tampering with a Witness involve exactly the same conduct, the same place and time frame, and the same victim. Clearly, even if double jeopardy/merger do not apply, the concept of same criminal conduct should apply, which would have the effect of reducing Gates' Offender Score on each offense to 1, and requiring a remand for a new sentencing hearing.

## V.

### **There was no valid and legal basis to impose “costs of incarceration” on the Defendant in this case.**

As previously pointed out, in both of the Judgment & Sentence documents in these cases, a box is checked which indicates as follows:

In addition to the other costs imposed herein, the court Finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50.00 per day, unless another rate is specified here:

...  
(JLR) RCW 9.94A.760.

### **Absence of Order by Court**

On the most elementary level, there simply was no order by the Court which imposed “costs of incarceration” in this case. At the sentencing hearing on January 6, 2009, neither the Deputy Prosecuting Attorney nor defense counsel made any reference at

**all** to costs of incarceration. Similarly, neither did the sentencing judge, in pronouncing sentence and related costs, **ever** address “costs of incarceration”. Costs were ordered, including a filing fee and the costs associated with transporting and lodging Mr. Badillo from California, but there was **no mention at all** of imposing costs of incarceration, nor of the findings necessary to impose such costs on Mr. Gates.

### **Statutory Provisions**

There appear to be two statutes in play with regard to the imposition of costs such as those imposed in the instant case. RCW 9.94A.760 reads in relevant part as follows:

Whenever a person is convicted in superior court, the court **may** order the payment of a legal financial obligation as part of the sentence.

...

If the court determines that the offender, **at the time of sentencing**, has the means to pay for the cost of incarceration, the court **may** require the offender to pay the cost of incarceration at a rate of fifty dollars per day of incarceration, if incarcerated in a prison, or the court **may** require the offender to pay the actual cost of incarceration per day of incarceration, if incarcerated in a county jail. (Emphasis added)

A second statute, RCW 10.01.160, addresses the same issue, i.e. the imposition of costs of prosecution, and reads in relevant part as follows:

The court shall not sentence a defendant to pay costs **unless the defendant is or will be able to pay them**. In determining the amount and method of payment of costs, the court **shall** take account of the financial resources of the defendant and the nature of the burden that payment of costs will incur. (Emphasis added).

Several cases have addressed the issue of the imposition of costs and other types of assessments. For example, in *State v. Williams*, 65 Wn. App. 456, 828 P. 2d 1158

(1992), the court sentenced Williams, who had been convicted of Possession of Stolen Property in the Second Degree, to pay an attorney's fee recoupment of \$525, court costs of \$335.10, and as victim penalty assessment of \$100. Williams challenged the imposition of those costs, arguing that the sentencing court had not, as required by statute, made any determination of his ability to pay those costs before imposing them.

Citing RCW 10.01.160 (the language of which at the time was essentially identical to the current version of the statute), the Court of Appeals stated as follows at page 459-460:

However, RCW 10.01.160(3) provides that at sentencing, 'the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.' Although formal findings are not required, RCW 10.01.160(3), which mandates that the sentencing court must be apprised of a defendant's financial condition, **must be followed**. Here the report of proceedings at sentencing reflects that the sentencing court made no inquiry into the financial resources of Williams. (Emphasis added).

Accordingly, the case was reversed and remanded for a new sentencing hearing on the issue of attorney's fees and costs, presumably where the financial resources of Williams would be an issue.

The language of both of the statutes quoted above is mandatory. RCW 10.01.160(3) states that such costs "shall" not be imposed unless the defendant is able to pay, and that the court "shall" take into account the resources of the defendant and the burden such costs would impose. This was not done in Mr. Gates' case.

Similarly, RCW 9.94A.760 authorizes a court to impose costs of incarceration,

but **only if, at the time of sentencing**, the court determines that the defendant has the means to pay those costs. This statute clearly requires, as a condition precedent to a sentencing court's even being able to exercise its discretion in imposing costs of incarceration, an examination and consideration by that court of the defendant's financial condition and resources. This was not done in Mr. Gates' case.

As argued above, the statutory directive is clear and unambiguous - before costs of incarceration can be imposed, the Defendant's financial condition **at the time of sentencing** must be considered. This was made clear by the Legislature in 1995 with the passage of SB 5523, which specified that the financial condition of the defendant **at the time of sentencing** was key. This concern is clearly addressed by the current form of both RCW 9.94A.760 and RCW 10.01.160.

The issue of the imposition of incarceration costs was initially introduced in 1991, by way of amendment, by then Representative Hargrove during his membership on the House Committee on Human Services. See Appendix A (Final Bill Report of ESSB 5363, 04/24/91) and Appendix B (Hargrove Amendment to ESSB 5363) ("If the court determines at the time of sentencing that the offender has the means to pay for the costs of incarceration, the court may require... the cost of incarceration."). This is the provision in play herein.

When Representative Hargrove proposed the amendment in the House Committee on Human Services, committee members expressed great concern with how judges would apply the proposed incarceration costs provision. Representative Hargrove stressed repeatedly that the cost of incarceration provision would only be applied if "the defendant

has the means to pay” (ESSB 5363 H.S. Comm. Record at 4:23). i.e. that it was “means-tested” (Id., at 7:15). It was stressed that neither the financial situation of a defendant’s spouse nor community property would be considered as “means” in a court’s determination (Id., at 5:40).

While the amendment passed, and was ultimately incorporated into the final version of SB 5363, House committee members still expressed concerns over the potentially dangerous implications, including wiping out a defendant’s child’s financial future and, more generally, having the specter of a large judgment following someone after their release from incarceration, thus thwarting their attempts to join the productive ranks of society. See Id., at 11:20, 13:00, and 17:00. But again, these fears were assuaged by repeated urgings that judges are capable of performing a “means-test” during sentencing, and only those defendants with substantial means at the time of sentencing would be considered for responsibility for incarceration costs.

This colloquy clearly established the legislative intent, viz. that only those defendants with substantial resources **of their own at the time of sentencing** would be “eligible” for incarceration costs, and that the imposition of such costs would occur only after a court’s careful consideration and employment of a “means-test” In this regard, see *State v. Heiskell*, 129 Wn. 2d 113, 119-20, 125, 916 P. 2d 366 (1996), to the effect that legislative committee hearings and their colloquies can clearly define the purpose of an amendment.

Thus, it is clear from the statutory language itself and from the legislative history of the relevant statute, that before costs of incarceration can be imposed, the sentencing

court **must** explore the defendant's ability to pay **at the time of sentencing**. It is equally clear that this was not done in Mr. Gates' case.

**E. CONCLUSION**

For the reasons stated herein, this court should reverse and dismiss the Defendant's convictions in this matter or, in the alternative, should reverse the convictions and remand for a new trial and/or a new sentencing hearing, and the Court should further strike the requirement that the Defendant pay costs of incarceration from each Judgment & Sentence herein.

DATED: August 12, 2009.

Respectfully submitted,



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ROBERT M. QUILLIAN,  
Attorney for Appellant  
WSBA #6836

**CERTIFICATE**

I certify that I mailed a copy of the Brief of Appellant by depositing same in the United States Mail, first class postage prepaid, to the following people at the addresses indicated:

Thurston County Prosecuting Attorney  
2000 Lakeridge Dr. SW  
Olympia, WA 98502

Mr. Robert Troy Gates, III  
#326776  
Washington Corrections Center  
P.O. Box 900  
Shelton, WA 98584

DATED this 13th day of August, 2009.

COURT OF APPEALS  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY



ROBERT M. QUILLIAN, WSBA #6836  
Attorney for Appellant

# **APPENDIX A**

**FINAL BILL REPORT**

**ESSB 5363**

**AS PASSED LEGISLATURE**

**Brief Description:** Providing for an administrative process for legal financial obligations.

**SPONSORS:** Senate Committee on Law & Justice (originally sponsored by Senators Thorsness, Rasmussen, Nelson, Newhouse, Hayner, Madsen, A. Smith, Erwin and L. Kreidler; by request of Department of Corrections).

**SENATE COMMITTEE ON LAW & JUSTICE**

**HOUSE COMMITTEE ON HUMAN SERVICES**

**BACKGROUND:**

Legal financial obligation (LFO) refers to the restitution, fines, court costs, or any other financial obligation, other than supervision fees, that has been imposed on a person as part of his or her sentence by the court. Currently, the Department of Corrections oversees the collection of legal financial obligations and may seek court-ordered authority to acquire wage assignments.

A successful process for sending an order of notice of payroll deduction and order to withhold and deliver has been implemented by the Department of Social and Health Services (DSHS) as part of its support enforcement program. It is suggested that a similar procedure be adopted for the Department of Corrections.

**SUMMARY:**

The administrative process for collecting legal financial obligations is modified and streamlined. The Department of Corrections is given the authority to establish the offender legal financial obligation payment schedule if the court fails to set the schedule. If the Department of Corrections sets the payment schedule, the department will be allowed to modify the payment schedule without the matter having to be returned to the court.

The department is also given the ability to issue notice of offender payroll deductions any time after the offender's legal financial obligation payment is more than 30 days late, or immediately, if the court orders its issuance during the time of sentencing.

The Department of Corrections is given authorization to issue orders to withhold and deliver offender property of any kind, when a court-ordered legal financial obligation is due. The department is also allowed to issue a notice of debt in order

to endorse and collect a court-ordered legal financial debt. This notice of debt can be provided through either a notice of payroll deduction or an order to withhold and deliver.

Restitution to a victim must be satisfied first out of an offender's monthly payment. The remainder of the payment may then be distributed proportionally among all other fines, costs, and assessments.

All offenders are required to pay for their cost of incarceration at a rate of \$50 per day if the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration. Payment of all other court-ordered financial obligations, however, shall take precedence over the payment of the cost of incarceration ordered by the court. Funds recovered from offenders will go to the county if an offender is incarcerated in a jail or to the Department of Corrections if the offender is incarcerated in a prison.

**VOTES ON FINAL PASSAGE:**

Senate	46	0	
House	95	0	(House amended)
Senate	45	0	(Senate concurred)

**EFFECTIVE:**

## **APPENDIX B**

By Representative Hargrove

1 ESSB 5363 - H COMM AMD  
2 By Committee on Human Services

3 On page 2, line 23, after "court." insert a new subsection  
4 (2) as follows:

5 "(2) If the court determines at the time of sentencing that  
6 the offender has the means to pay for the cost of incarceration,  
7 the court may require the offender to pay for the cost of  
8 incarceration at a rate of fifty dollars per day of incarceration.  
9 Payment of other court ordered financial obligations, including all  
10 legal financial obligations and costs of supervision shall take  
11 precedent over the payment of the cost of incarceration ordered by  
12 the court. All funds recovered from offenders for the cost of  
13 incarceration in the county jail shall be remitted to the county  
14 and the costs of incarceration in a prison shall be remitted to the  
15 department of corrections."

16 EFFECT: Requires all offenders to pay for the cost of incarceration  
17 at a rate of \$50 per day if the court determines that the offender,  
18 at the time of sentencing, has or will have the means to pay. The  
19 cost of incarceration will be paid last after an offender's other  
20 legal financial obligations. Funds recovered from offenders will  
21 go to the county if an offender is incarcerated in a jail or to  
22 the Department of Corrections if the offender is incarcerated in  
23 a prison.