

NO. 79114-7
Cowlitz Co. Cause NO. 05-1-00173-6

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Petitioner,

v.

STEPHANIE RENA LILYBLAD (PARIS),

Respondent.

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SUPPLEMENTAL BRIEF OF PETITIONER

SUSAN I. BAUR
Prosecuting Attorney
G. TIM GOJIO/WSBA 11370
Deputy Prosecuting Attorney
Attorney for Petitioner

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. ANALYSIS

A. Standard of Review

Statutory interpretation involves questions of law that an appellate court reviews de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In construing a statute, the court's objective is to determine the legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 9. "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn*, 146 Wn.2d at 9-10. The "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003); *Campbell & Gwinn*, 146 Wn.2d at 10-12. If after that examination, the provision is still subject to more than one reasonable interpretation, it is ambiguous. *Id.* If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary. *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998); *State v. Roberts*, 117 Wn.2d 576, 585, 817 P.2d 855 (1991). See generally *State v. Jacobs*, 154 Wn.2d 596, 600-601, 115 P.3d 281 (2005)

B. *Lilyblad* decision

The court in *Lilyblad* determined that RCW 9.61.230 was ambiguous, and, as such, the rule of lenity is to be applied in favor of the defendant. The court ruled that the statute was:

ambiguous as to: (1) whether the caller must make the telephone call with the intent to harass, intimidate, torment or embarrass another person or (2) whether the caller at any time during the conversation may formulate the intent to harass, intimidate, or embarrass another person.

Lilyblad, 134 Wn. App. At 468.

The *Lilyblad* court declined to apply *State v. Wilcox*, 160 Vt. 271, 628 A.2d 924 (1993), which held that telephone call must be initiated with the intent to harass, intimidate, torment or embarrass another person. The *Lilyblad* court also declined to follow the decision of Division I in *State v. Burkhart*, 99 Wn.App. 21, 991 P.2d 717 (2000). *Lilyblad*, 134 Wn.App. at 468.

The *Lilyblad* court found that the intent requirement in the telephone harassment statute is unclear, particularly in light of the colloquy on the Senate Journal by Senator Martin Durkan, where the Senator stated that 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.” *Lilyblad*, 134 Wn.App. at note 3, at 468¹.

The *Lilyblad* court did not analyze the structure of RCW 9.61.230 to determine if the interpretation (that the caller must make the telephone call with the intent to harass, intimidate, torment, or embarrass another person) was reasonable in the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Wash. Pub. Ports Ass’n*, 148 Wn.2d at 645. See *Lilyblad*, 134 Wn.App. at 468-69.

C. Problems with *Lilyblad* Decision

1. Pertinent Intent Exists at Time of Threat or Act

(a) Statutory History

The telephone harassment statute was originally enacted in 1967, and had four elements or prongs.

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

¹ It is more likely that Senator Durkan inserted his point of order to alleviate fears that telephone solicitors would be subject to criminal sanctions under the telephone harassment statute. The Senator was most likely noting that a telephone solicitor would not have the intent to harass, or intimidate the person called when the call was placed. However, the clear language of the statute would still impose penalties upon the telephone solicitor who calls another person, and then, deviating from business, uses lewd lascivious language or threatens to inflict injury on the person called, so long as the telephone solicitor has the intent to harass or intimidate. The fact that the caller is a telephone solicitor does not exempt that solicitor from criminal liability under RCW 9.61.230

- (1) using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
 - (2) anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or
 - (3) threatening to inflict injury on the person or property of the person called or any member of his family; or
 - (4) without purpose of legitimate communication;
- shall be guilty of a misdemeanor.

LAWS OF 1967, CH. 16, SECTION 1.

The legislature amended the statute in 1985, as part of the chapter enacting the laws against harassment. That amendment provided the primary substantive change in the language of the statute, where the legislature removed the fourth prong “without purpose of legitimate communication” and expanded the threatened people under the third prong to include members of the called persons household. LAWS OF 1985, CH. 288, SEC. 11. The legislature apparently removed the “without purpose of legitimate communication” prong to bring the statute “into conformity with a recent appellate court decision.” Final Bill Report, Substitute Senate Bill 3012, Ch. 288, Laws 1985. The legislature also increased the basic penalty to a gross misdemeanor, and the punishment for multiple violations were increased to a class C felony. LAWS OF 1985, CH. 288, SEC. 11.

In 1985 when the legislature created the laws against harassment, the legislature stated that the law was “aimed at making unlawful the repeated invasions of a person’s privacy by acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim.” LAWS OF 1985, CH. 288, SEC. 1; RCW 9A.46.010. By that language the legislature connected the “pattern of harassment designed to coerce, intimidate, or humiliate the victim” with the “acts and threats” of the actor RCW 9A.46.010. The legislature connected the criminal act (the ‘acts and threats’) with intent at the time the threat is made, or the time that the acts occur. The law against harassment is a related provision to the telephone harassment law. See Laws of 1985, Ch. 288, Sec. 6, and RCW 9A.46.060.

In 1992 and 2003 the legislature enacted further changes in the telephone harassment law, primarily by specifying that the crime is a class C felony if there is a threat to kill, or if there were prior violations involving the same victim or victim’s family. LAWS OF 1992, CH. 186, SEC. 6, and LAWS OF 2003, CH. 53, SEC. 39.

(b) Plain Language of Statute: The Phrase “Make a Telephone Call” in RCW 9.61.230, Modifies “Every Person” and Does Not Modify Intent.

In the telephone harassment statute the phrase “make a telephone call” modifies the phrase “every person” and does not modify the phrase “intent to harass, intimidate, torment or embarrass.” See RCW 9.61.230².

The term “make a telephone call” is not defined by the statute. Undefined statutory words are “given their common law or ordinary meaning”. *State v. Merritt*, 91 Wn. App. 969, 974, 961 P.2d 958 (1998) (citing *State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995); *State v. Smith*, 117 Wn. 2d 263, 270-71, 814 P.2d 652 (1991)). Most people would understand that when a person makes a telephone call he or she is still in the process of making that call until that person hangs up the telephone receiver. Nevertheless, “[a] court may resort to a dictionary to determine the meaning of a statutory term if the common and ordinary meaning of the term is not readily apparent.” *Id.* (citing *Zachman v. Whirlpool Fin. Corp.*, 123 Wn. 2d 667, 671, 869 P.2d 1078 (1994)).

“Make” is defined as “1. to bring into existence by shaping or changing material, combining parts, etc.: *to make a dress; to make a channel; to make a work of art; ... 25. To deliver, utter, or put forth: to*

² The court of appeals in *Lilyblad* notes that at oral argument the State argued that *Burkhart* stood for the proposition that as long as one party formulated the intent to intimidate during the telephone call then there may be penalties under the telephone harassment statute. *Lilyblad*, 134 Wn.App. at note 2, at 467. The State does not contend that someone who is called can be penalized under the telephone harassment statute. Rather, the State agrees that the person prosecuted for telephone harassment must initiate the phone call. *Lilyblad*, 134 Wn.App. at note 2, at 467.

make a stirring speech". WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY 1161 (New rev.ed. 1996). WEST'S LEGAL THESAURUS/DICTIONARY 473 (SPECIAL DELUXE EDITION 1986), includes the following words to define "make": "... create, ... originate, ... mold, assemble, shape, ... build, form, forge, ... accomplish, ... compose, develop, ... formulate, ... bring to pass, ... generate, ... complete; ... evolve, achieve, ..." These dictionary definitions help to establish the common understanding of what it means to make a telephone call. Making a telephone call, like making a speech or making a work of art, is a process beginning with origination, continuing through development, formulation, or evolution, and ending with completion. It is not limited to the very narrow view of only picking up the telephone receiver, but instead includes the process of lifting the receiver, dialing the telephone, conversing, and hanging up. Until the person hangs up the telephone, that person has not completely made the call, and, therefore, that person can form the requisite intent at any time before the call is terminated.

The opinions that address the telephone harassment statute do provide some guidance. In *Seattle v. Huff*, 111 Wn.2d 923, 767 P.2d 572 (1989), the court discussed the constitutionality of a Seattle ordinance that is very similar to the telephone harassment statute at issue in this case. In several places, the court discusses the requisite intent in relation to when

the threat was made and not when the telephone call was placed. For example, the court indicated that “[t]he Seattle ordinance proscribes threats of physical injury or damage made with the intent to harass, intimidate, torment, or embarrass.” *Huff*, 111 Wn.2d at 925-26. Later in the opinion, the court stated that:

We find it reasonable for the Seattle ordinance to distinguish between threats of physical injury or property damage made with the requisite intent and other communication. The category of calls falling within the prohibition is narrow: **threats must be made with the requisite intent**, must threaten physical injury or property damage, and must be directed to the listener or a member of the listener’s family.

Huff, 111 Wn.2d at 927 (emphasis added). When discussing how the focus of the statute is on the caller and not on the subjective reaction of the listener, the court stated that, “[the Seattle ordinance] defines the proscribed conduct solely in reference to the caller: *did the caller make the threat with intent to harass, intimidate, or torment.*” *Huff*, 111 Wn.2d at 930 (emphasis added) (citation omitted). It is important to note that the court did not ask if the caller *made the telephone call* with the requisite intent but instead, focused on whether the caller *made the threat* with the requisite intent. The *Huff* court also does not acknowledge a difference between a caller who dials the telephone with the requisite intent and one who forms the intent to harass during the telephone call. “*Any viewpoint*

may still be expressed over the telephone without penalty unless there is an accompanying threat.” Huff, 111 Wn.2d at 928 (emphasis added).

In *State v. Ashker*, 11 Wn. App. 423, 523 P.2d 949 (1974), *overruled on other grounds, State v. Braithwaite*, 92 Wn.2d 624, 600 P.2d 1260 (1979), the defendant argued that the charging document was insufficient because it did not contain the element of intent to harass, intimidate, torment or embarrass. The court agreed and dismissed the case. Of importance in the *Ashker* decision is the court’s delineation of the elements of the crime. Specifically, the court found that “a person commits the crime defined in RCW 9.61.230(3) when he: (1) makes a telephone call to another person; (2) threatens injury; (3) to such other person, or his property, or to any member of his family; (4) ‘with intent to harass, intimidate, torment or embarrass’ such other person.” *Ashker*, 11 Wn. App. at 426. Under the *Ashker* analysis, a person would be guilty of the crime if he called and threatened injury to the victim with the intent to harass, intimidate, torment or embarrass the listener. It is not necessary that the call be made with the intent to harass but that the threat be made with that purpose.

State v. McGee, 122 Wn.2d 783, 786 (1993) may also provide some guidance. The court construed a criminal statute, and declined to apply the rule of lenity when the petitioner claimed that the phrase “within

one thousand fee” modified either the verb “deliver” or the term “to a person” in RCW 69.50.435(1). *McGee*, 122 Wn.2d at 786.

The *McGee* court determined that the petitioner’s interpretation was “unreasonable” so the rule of lenity does not apply, since a statute is ambiguous only where there are two or more reasonable interpretations. *McGee*, 122 Wn.2d at 787. The *McGee* court held that the phrase “within one thousand feet” modified the term “violates RCW 69.50.401(a).” *McGee*, 122 Wn.2d at 788. (The RCW 69.50.401(a) cite in *McGee* refers to “Any person who violates RCW 69.50.401(a).) Similarly here, with RCW 9.61.230, the phrase “make a telephone call” refers to “Every person”, the first phrase in the telephone harassment law. While this may be contradictory to the “last antecedent” rule, *McGee*, 122 Wn.2d at 786, citing *Boeing Co. v. Department of Licensing*, 103 Wn.2d 581, 587 (1985), this is in accord with a common sense reading of the statute.

This is consistent with the overall scheme of RCW 9.61.230. At only one time in the telephone harassment statute is the intent of the caller measured at the time the phone call is ‘initiated’, that is when the person makes the phone call “anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues;” RCW 9.61.230(1)(b). At other times the intent of the caller in the telephone

harassment statute is notable when the ‘acts and threats’ occur. RCW 9A.46.010, RCW 9.61.230(1)(a) and (c). The legislative intent in noting that they are making criminal “acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim”, RCW 9A.46.010, ties the intent (the pattern of harassment designed to coerce, intimidate, or humiliate the victim – language which mirrors the first clause from RCW 9.61.230(1) in question here “with intent to harass, intimidate, torment or embarrass any other person”) with the acts and threats of the person, in this case, the person making the telephone call.

(c) The Statutory Interpretation in *Lilyblad* is Unreasonable.

Under *Lilyblad* the court appears to require intent to harass, etc., to attach at the “initiation” of the phone call. *Lilyblad*, 134 Wn.App. at 468-69. However, the *Lilyblad* court does not define “initiation”. Apparently the “initiation” of the phone call comment of the court in *Lilyblad* is meant to contrast with the *Burkhart* decision’s comment that “to interpret RCW 9.61.230 to govern only those calls dialed while the caller has the intent to intimidate defies common sense.” *Lilyblad*, 134 Wn.App. at 467, citing *Burkhart*, 99 Wn.App. at 25-26.

“Statutes are construed so as to avoid strained or absurd consequences.” *Merritt*, 91 Wn. App. at 973 (citing *Wright v. Engum*, 124 Wn.2d 343, 351-52, 878 P.2d 1198 (1994)). The *Lilyblad* decisions results in a statute that has absurd consequences. *Lilyblad* leads to several possible problems concerning intent – is the State required to prove that the caller has the intent to intimidate at the time the caller utters the threat or uses lewd language, or does there need to be any proof of intent when the threat or lewd language is uttered? Is the State required to prove that the caller maintained the intent to intimidate at all times from the dialing of the phone call until the lewd language or threat is uttered? What of the caller who has the intent to use lewd language at the start of the phone call, fails to utter such lewd language, and who then, apparently, changes intent by uttering a threat to inflict injury or kill the person called? These problems are not addressed in *Lilyblad*.

The problem with requiring the State to prove intent when the caller initiates the phone call is that requirement is only applicable for the second prong of the telephone harassment statute, where there is no requirement that conversation “ensues”. RCW 9.61.230(1)(b). Both the lewd language and the threatening prongs require that some conversation occur in order for the crime to be completed. RCW 9.61.230. Focusing primarily on the intent of the caller when the telephone call is “initiated”

obscures the necessary intent of the caller when the threat is uttered, or the lewd language is used.

“Although a statute is ambiguous if it is susceptible to two or more reasonable interpretations, a statute is not ambiguous merely because different interpretations are conceivable.” *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392, review denied, 131 Wn.2d 1020 (1996) (citing *State v. Sunich*, 76 Wn. App. 202, 206, 884 P.2d 1 (Div. 2, 1994)); See also *State v. Taplin*, 55 Wn. App. 668, 670, 779 P.2d 1151 (Div. 1, 1989) (“The parties’ ability to argue two interpretations of a statute does not necessarily render the statute ambiguous.”) (citing *Armstrong v. Safeco Ins. Co.*, 111 Wn.2d 784, 790-91, 765 P.2d 276 (1988)); *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), abrogated on other grounds, *State v. Nolan*, 141 Wn.2d 620 (2000). The telephone harassment statute is unambiguous regardless of the different interpretations advanced by both sides. The narrow and overly strict interpretation of the statute in *Lilyblad* is not reasonable when the plain meaning of the words of the statute are considered in the context of the entire statute. “This court will not adopt ‘a forced, narrow, or overstrict construction which defeats the intent of the legislature.’” *State v. Lee*, 82 Wn. App. 298, 306, 917 P.2d 159 (Div. 1, 1996), *aff’d*, 135 Wn. 2d 369, 957 P.2d 741 (1998) (quoting *State v. Cann*, 92 Wn.2d 193, 197-98, 595 P.2d 912 (1979)). It appears that the

legislature intended to prohibit any person from making threats over the telephone with the intent to harass, intimidate, torment or embarrass the listener. So long as the intent accompanies the threat there is no need to determine when the intent was formed.

(d) *Lilyblad* and Obscene Telephone Calls:

Both *Lilyblad* and *Burkhart* involved the threat to inflict injury/threat to kill prong of the telephone harassment statutes. *Lilyblad* creates problems for prosecuting the lewd language prong of telephone harassment. Obscene phone calls are known in psychiatry as telephone scatologia, and involves the attempt by the caller to “provoke fear, shock or aversion in strangers”. M. Price et al., INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 25 (2002) 37–49. An obscene phone call may involve elements of voyeurism, and the caller “may pretend to conduct a survey about sexual behavior, while keeping his true motive hidden.” M. Price et al., INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 25 (2002) 37–49 at 48.

A 1994 Canadian national survey disclosed that:

“83.2 percent of the 1,990 women interviewed had received obscene or threatening telephone calls. Divorced and separated women, young women, and women living in major metropolitan areas were most likely to have been victims of this harassment. The ‘most disturbing’ calls usually came at night when the respondent was home alone. The typical caller was an adult male unknown to the woman. Relatively few women reported these

calls to the police or the phone company, and those who did tended to get an unhelpful response. Most women said that the calls affected them emotionally, with fear being by far the most prevalent response.

Obscene and Threatening Telephone Calls to Women: Data from a Canadian National Survey, Michael D. Smith, Norman N. Morra, *Gender and Society*, Vol. 8, No. 4 (Dec., 1994), pp. 584-596.

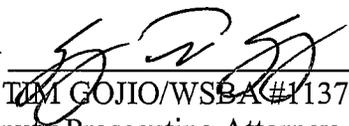
Lilyblad appears to make it difficult for the State to prosecute the caller who “may pretend to conduct a survey about sexual behavior”, and uses that guise to use lewd, lascivious invasive language during the phone call. Hopefully, *Lilyblad* will not prevent prosecution of those who disguise obscene phone calls in that or other ways.

II. CONCLUSION

The court should follow the reasoning of the *Burkhart* decision, reverse the decision of the court in *Lilyblad*, and affirm the conviction of the defendant.

Respectfully submitted this 5th day of July, 2007

SUSAN I. BAUR
Prosecuting Attorney

By 
G. TIM GOJIO/WSBA #11370
Deputy Prosecuting Attorney
Representing Petitioner