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DIVISION III

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STATE OF WASHINGTON

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NO. 33322-8-II
Cowlitz Co. Cause NO. 05-1-00173-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

STEPHANIE R. PARIS,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
G. TIM GOJIO/#11370
Deputy Prosecuting Attorney
Attorney for Respondent

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. IDENTITY OF THE RESPONDENT

The respondent is the State of Washington

II. BRIEF RESPONSE

The trial court correctly instructed the jury concerning the telephone harassment law, following the decision in *City of Redmond v. Burkhart*, 99 Wn.App. 21, 991 P.2d 717 (Div. 1, 2000). *Burkhart* declined to follow *State v. Wilcox*, 160 Vt. 271, 628 A.2d 924 (1993), the Appellant's primary case, and under the principle of *stare decisis*, *Burkhart* should be followed since it was neither incorrect or harmful.

III. COUNTERSTATEMENT OF THE CASE

On December 24, 2005, Stephanie Paris called the home of Lorie Haley. See RP 117. Matthew Scharer, Paris's eleven year-old son, looked at the caller ID, and it read "screen block". RP 65. Matthew went to another phone and answered the phone. RP 65-66, 89. Paris said hello to her son Matthew, and Paris asked Matthew to "give the phone to your grandma." RP 67. Matthew kept refusing, but finally gave up and gave the phone to his grandma, Lorie Haley. RP 67. Matthew's brother Tyler had joined the phone call by the time Matthew handed the phone to grandma. RP 67.

Matthew heard his mother threaten grandma, and was scared for “My grandma and me and Tyler.” RP 60. Matthew heard his mother threaten “Like I’m going to kill you and stuff” along with bad words, and that those statements were made by his mom to his grandma. RP 60-61.

That day Lorie Haley was getting ready to go down to her parents for Christmas when the phone rang the morning of December 24, 2004. RP 9. She saw Matthew and Tyler get on the phone, and she noticed that Matthew started getting upset. RP 10. Haley noticed that Matthew was “starting to cry and pace and was just becoming very upset.” RP 10. Haley checked the phone to see what number was listed on caller ID, and observed the call came in from the 208 area code. RP 9, 20.

Haley picked up the phone, and it was Stephanie Paris on the line. RP 11. Haley heard Paris say that Paris was working with a deputy sheriff, “there was one waiting at the bottom of the road and she was coming to get the kids.” RP 12. Haley told Paris “not to do this to us at Christmas time”. RP 13. This led to an argument, and Paris started making threats. RP 14.

Haley testified that Paris told her that “she was going to have the kids no matter what she had to do . . . whether it meant my life or not.” RP 14. Haley testified that Paris said “that she had ways to have me

killed.” RP 14. Haley further testified that Paris said to her:

“get off the phone you F-ing bitch, or I’ll - -

Q. Or I’ll, I’m sorry?

A. Or I’ll kill you.”

RP 51.

Cowlitz County Deputy Sheriff Tory Shelton investigated the case, and spoke with Haley and Matthew about the Christmas-eve phone call.

RP 99. Deputy Shelton contacted Stephanie Paris, and spoke with Paris by telephone on January 15, 2005. RP 101. Paris told Deputy Shelton that she didn’t call on Christmas eve, but that she had tried several times to call her sons. RP 101. At that time Paris denied making any threats. RP 102.

Stephanie Paris changed her story the next time Deputy Shelton contacted her. RP 102. On February 10, 2005, Paris told Deputy Shelton that she had made phone calls that morning but that she hadn’t made any threats. RP 102. Paris denied speaking with her sons on December 24, 2004. RP 103.

IV. DISCUSSION

A. ERROR RAISED FOR FIRST TIME ON APPEAL

1. No Objection at Trial to Jury Instruction.

The Appellant’s claim that ‘make a telephone call’ should refer

only to the initiation of the phone call is raised for the first time on appeal. The record shows that at trial the defense did not object to jury instruction number 7, which states that to “‘make a telephone call’ refers to the entire call rather than the initiation of the call.” See RP 126-28.

2. Appellant’s Concession

According to trial defense counsel, the sole issue at trial was whether or not the defendant threatened to kill Lorie Haley. RP 140. Now the Appellant apparently concedes that she did indeed threaten Lorie Haley at the end of their phone conversation. The appellant writes: “This question is critical in the case at bar because the evidence unequivocally proves that the defendant did not have the intent to ‘harass, intimidate, torment or embarrass’ Lorie Haley when she placed the call [sic] as she had no plans to even talk to her, *whereas her later statements to Lorie Haley at the end of the call when the two did speak certainly support the conclusion that the defendant did eventually speak with the intent to ‘harass, intimidate, torment or embarrass.’*” Br. of App. 9-10 (emphasis added). The State accepts this concession.

B. STANDARD OF REVIEW

The standard of review for an error raised for the first time on appeal is whether there is a “manifest error affecting a constitutional

right.” RAP 2.5(a)(3). “RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988), citing *State v. Coe*, 109 Wn.2d 832, 842, 750 P.2d 208 (1988); and *State v. Peterson*, 73 Wn.2d 303, 306, 438 P.2d 183 (1968). The manifest error exception is a narrow exception and is not applicable where the asserted constitutional error is harmless beyond a reasonable doubt:

[T]he constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can “identify a constitutional issue not litigated below.” *State v. Valladares*, 31 Wn.App. 63, 76, 639 P.2d 813 (1982), *aff’d in part, rev’d in part*, 99 Wn.2d 663, 664 P.2d 508 (1983). The exception actually is a narrow one, affording review only of “certain constitutional questions”. Comment (a), RAP 2.5, 86 Wn.2d 1152 (1976). Moreover, the exception does not help a defendant when the asserted constitutional error is harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Scott, 110 Wn.2d at 687.

C. THE PRIMARY ISSUE ON APPEAL IS WHETHER JURY INSTRUCTION 7 CORRECTLY STATES THE LAW

1. Same Issue for Both Errors

Both claimed errors – that there was a lack of substantial evidence to support the charge of telephone harassment, and the claim that jury instruction number 5 and instruction no. 7 failed to instruct the jury on all

elements of the crime charged – hinge on the claim that the defendant did not have the intent to harass Lorie Haley at the time the defendant initiated the phone call. As such, the Appellant claims there was a lack of substantial evidence to support the telephone harassment charge, and the court’s instruction failed to include all the elements of telephone harassment. See Br. of App. 16-17.

2. No Error Since Jury Instruction Correctly States Law

There was no error here, since the trial court correctly stated the law in jury instruction 7, that the phrase “make a telephone call” refers to the entire call rather than the initiation of the call. *City of Redmond v. Burkhart*, 99 Wn.App. 21, 25, 991 P.2d 717 (Div. 1, 2000). The trial court properly followed the principles of stare decisis, and the Court of Appeals here should follow the decision of Division I in *Burkhart*. Where the Supreme Court has not addressed an issue, an existing Court of Appeals decision is the law that must be followed on the issue. *American Discount Corp. v. Shepherd*, 120 P.3d 96, 102, __Wn.App. __ (Div. 1,2005), *Personal Restraint of Stewart*, 115 Wn.App. 319, 336, 75 P.3d 521 (Div. 1, 2003).

The trial court had no opportunity to rule on the Appellant’s claim on appeal, that it is a necessary element of the crime of telephone

harassment that the defendant have the intent to harass at the time the defendant places the phone call. As pointed out by the Appellant, Division I found that the intent of the defendant upon initially placing the phone call is not an element of the crime of telephone harassment. See Br. of App. 12, *Burkhart*, 99 Wn.App. at 25.

3. Intent at Initiation of Phone Call Not an Element of Telephone Harassment by Threat

The primary thrust of the Appellant's argument is that the telephone harassment statute makes criminal the intent of the caller at the time the caller initiates the phone call. Br. of App. 9-10. The telephone harassment statute does require an intent to harass at the initiation of the phone call when that phone call is made anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues. RCW 9.61.230(1)(b). However, the telephone harassment statute does not require the defendant to have an intent to threaten injury against the person called at the time the caller initiates the phone call. *Burkhart*, 99 Wn.App. at 23. Rather, *Burkhart* held that a caller who forms the intent to "harass, intimidate, torment or embarrass at any point in a telephone conversation is subject to penalty under RCW 9.61.230." *Burkhart*, 99 Wn.App. at 27.

4. **Burkhart Decision Neither Incorrect or Harmful**

Under the principles of *stare decisis*, an appellate court will not overturn a prior holding unless it is shown that it is incorrect or harmful. *State v. Baldwin*, 150 Wn.2d 448, 460, 78 P.3d 1005 (2003), citing *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The Appellant makes several claims that *Burkhart* was incorrectly decided. Br. of App. 13-15. The Appellant also appears to claim that *Burkhart* is harmful by making criminal a phone conversation that is civil in tone for 95 percent of the time, and threatening only 5 percent of the time. Br. of App. 12-13.

5. **Burkhart Should be Followed**

The State rejects the Appellant's contention that the court should not follow *City of Redmond v. Burkhart*, but should apply the reasoning in *State v. Wilcox*, 160 Vt. 271, 628 A.2d 924 (1993). As aptly stated by Judge Coleman in his decision in *Burkhart*, there is no reason to distinguish between a person who "initiates the call with the intent to intimidate" and "those made by a caller who formulates the intent to intimidate mid-conversation. Both callers exhibit the same intent – intimidation. To interpret the statute as treating them differently is to unnaturally constrict its reach." *Burkhart*, 99 Wn.App at 25-26. Even if

the court on appeal were to conclude that Paris did not intend to intimidate Lorie Haley when she initially placed the call (as contended by the Appellant) – which the State does not concede -- *Burkhart* makes clear that it ‘defies common sense’ to not apply the telephone harassment statute (RCW 9.61.230) to someone who formulates the intent to harass mid-conversation. *Burkhart*, 99 Wn.App. at 25.

Without mentioning the principle of stare decisis, the Appellant urges the court to part ways with Division I on the basis that *Burkhart* will make criminal a phone call when only a small percentage of the conversation contains threatening language. Br. of App. 12-13. The Appellant’s argument would require the court to impose a new element on the crime of telephone harassment by stepping into the shoes of the legislature and requiring that a certain threshold percentage of the phone call must contain threatening or harassing language in order for a defendant to be guilty of telephone harassment. The court is not empowered to legislate, nor is it necessary to follow such a tortuous line of reasoning when there is clearly established precedent on the exact issue raised by the Appellant: is it necessary in finding a defendant guilty of telephone harassment that the State prove that the defendant intended to harass when the defendant placed the phone call? *Burkhart* clearly held

that for the crime of telephone harassment the State is not required to prove intent to harass when the defendant initially places the phone call. *Burkhart*, 99 Wn. App. at 25. “This case presents a unique question – does ‘make’ in the context of making a telephone call encompass all stages of the call until the call is terminated or does it describe only the initiation of the call? Based upon the statutory construction as well as the ordinary meaning of ‘make,’ we hold that ‘make,’ as used in RCW 9.61.230, refers to the call in its entirety.” *Burkhart*, 99 Wn.App. at 23.

The Appellant claims that there is “really no logical distinction between one who ‘makes a telephone call and threatens to kill’ (the Vermont statute) as opposed to one who makes a telephone call threatening to kill’ (the Washington Statute).” Br. of App. 12. The Appellant claims that both the Vermont and Washington Statutes “each require two separate types of actions: (1) the making of a telephone call, and (2) the use of specific language.” Br. of App. 13. The Appellant claims that the *Burkhart* decision “illogically collapses both of these actions into a single *actus reas*. By contrast, the plain language of the statute requires to [sic] separate and distinct actions.” Br. of App. 13.

The Appellant claims that the legislature did want to punish people who have bad intent when placing the phone call and not want to punish

people who “without bad intent, use a telephone as a legitimate means of communication, and sometime during the conversation give way to the temptation to utter a threat.” Br. of App. 13. The Appellant cites to no authority to support this claim of legislative intent, and, as such, this argument should not be considered on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

The Appellant does cite *In re Davis*, 142 Wn.2d 165, 12 P.3d 603 (2000), claiming that there is an ambiguity in the law which should be construed under the rule of lenity in favor of the defendant. Br. of App. 14. *Davis* does briefly mention that if the legislature fails to denote the unit of prosecution in a criminal case, the ambiguity should be construed in favor of lenity. *Davis*, 142 Wn.2d at 172, citing *State v. Adel*, 136 Wn.2d 629, 634-35 (1998), citing *Bell v. United States*, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955). The court immediately follows by stating “However, ‘[t]his in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read.’” *Davis*, 142 Wn.2d at 172, citing *Bell*, 349 U.S. at 83, 75 S.Ct. 620. *Davis* may state a general rule concerning ambiguity and the rule of lenity, but is applied in a unit of prosecution case, an issue not raised by the Appellant. While there

is a rule of lenity when there is an ambiguity, the Appellant fails to cite to any authority to support that there is an ambiguity in the Washington State telephone harassment statute, RCW 9.61.230.

Further, the telephone harassment statute as interpreted by *Burkhart*, does need to be read with the ‘saving grace of common sense.’ *Burkhart*’s interpretation of the Washington statute against telephone harassment makes criminal the uttering of the threat during the telephone call, regardless of the intent of the caller at the initiation of the phone call. The uttering of the threat against another while on the phone is the criminal action, not having a bad intent at the start of the phone call. *Burkhart*, 99 Wn.App. at 23.¹

¹ The Washington statute does criminalize phone calls made with the intent to ‘harass, intimidate, torment or embarrass,’ whether or not a telephone conversation ensues, when the phone calls are made: (1) anonymously or repeatedly, or (2) at an extremely inconvenient hour. RCW 9.61.230(1)(b). Under a plain reading of the statute a defendant can violate the telephone harassment statute during the same phone call by: (1) calling with bad intent (telephoning with intent to ‘harass, intimidate, torment or embarrass’ anonymously or repeatedly or at an extremely inconvenient hour, thus violating RCW 9.61.230(1)(b)) and then (2), because the defendant ended up conversing with the victim and uttering a threat to inflict injury on the victim, violating RCW 9.61.230(1)(c). This is the circumstance that may possibly involve the application of the rule of lenity as cited in *In re Davis*, 142 Wn.2d at 172, the case cited by the appellant. Br. Of App. At 14. That, however, is not the case here with Paris, who is charged with the crime of uttering a threat to “inflict injury on the person or property or the person called . . .” RCW 9.61.230(1)(c). The statute criminalizes a phone call not made with the intent to harass, intimidate, torment or embarrass at the initiation of the phone call, but which during the conversation the defendant ‘threatens to inflict injury on the person.’ See *Burkhart*, 99 Wn. App. At 23.

6. Legislature Did Not Amend Statute Since *Burkhart*

In 2003 the legislature amended the telephone harassment statute, RCW 9.61.230. In Chapter 53, Section 39 (effective July 1, 2004), Laws of 2003, the legislation amended the statute as part of a reorganization of the criminal statutes in the RCW. See SB 5758 Final Bill Report (2003). The legislation primarily clarified the classification of crimes as a misdemeanor, gross misdemeanor, or Class A, B, or C felony, and helped to provide that each criminal penalty provision is in a separate subsection that can be uniquely cited. SB 5758, Final Bill Report (2003). As a result the numbering system in RCW 9.61.230 differs from the code cited *Burkhart*, since RCW 9.61.230 had a different numbering system in 2000.

It should be noted that the legislature had the opportunity to amend the telephone harassment statute based upon the *Burkhart* decision, and did not change the substance of the statute in 2003, when the statute could have been amended. The legislature is presumed to be informed about past judicial interpretations of statutes. *State v. Fenter*, 89 Wn.2d 57, 62 (1977). Since *Burkhart* was decided in 2000, the legislature has been aware of the Court of Appeals decision, and the legislature did not change the language of RCW 9.61.230 in response to *Burkhart*. Compare, for example, the response of the legislature to the Supreme Court decision in

In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993), superseded by statute as stated in *In re Detention of Thorell*, 149 Wn.2d 724, 746, 72 P.3d 708 (2003). In that case the legislature in 1995 amended the Community Protection Act in response to the 1993 court decision in *Young*. See, generally, *In re Detention of Smith*, ___ Wn.App. ___, 122 P.3d 726, 740 (Div. 1, 2005).

6. *Wilcox* Not Applicable

The primary thrust of the Appellant's argument is that the Vermont Supreme Court in *State v. Wilcox*, 160 Vt. 271, 628 A.2d 924 (1993), is correct while Judge Coleman in *Burkhart* is wrong. Br. of App. 14. The court in *Wilcox* does not compare the Vermont statute with the Washington statute, though there is discussion in *Wilcox* of the Arizona and Wisconsin statutes and court cases. *State v. Wilcox*, 628 A.2d at 926. *Wilcox* may be rightly decided based upon the Vermont statute, but that has no bearing on the courts in this state. Division I decided *Burkhart* based on their interpretation of the Washington telephone harassment statute. The court in *Burkhart* noted the differences between the Washington statute and the Vermont statute. *Burkhart*, 99 Wn.App. at 25. *Burkhart* determined that the Washington statute makes criminal a phone call even where the caller "formulates the intent to intimidate mid-

conversation.” *Burkhart*, 99 Wn.App. at 25

7. Jury Instructions Follow *Burkhart*

Jury instruction 7, along with jury instruction 5, accurately states the law from the *Burkhart* decision, that the defendant violates RCW 9.61.230 when the defendant made a phone call, and at some time during the conversation the defendant threatened to kill Lori Haley. *Burkhart*, 99 Wn. App. at 25. The jury had to decide whether or not the defendant threatened to kill Lori Haley during the phone conversation on December 24, 2004. It was not necessary for the jury to determine whether the defendant had the intent to threaten Lorie Haley at the time the defendant initiated the phone call since the intent of the defendant at the time of initiating the phone call is not an element of the crime. See RCW 9.61.230. Rather, the act required is whether the defendant spoke a threat to Lorie Haley, thus exhibiting the intent to intimidate Lorie Haley at the time the defendant spoke the threatening words. See *Burkhart*, 99 Wn.App. at 25-26. The jury heard the testimony from the defendant, who denied making any threats. RP 117. The jury also heard the testimony from Lorie Haley that the defendant did threaten Haley, RP 14-15, the testimony from the youngest son Tyler Scharer that the defendant

threatened Haley, RP 81-82, as well as the testimony from Matthew Scharer that the defendant threatened Haley, RP 60-61, 69.

The Appellant's theory of the case on appeal, that Paris did not initiate the phone call intending to threaten Haley, even if supported by the record - which is not the case here - is not supported by case law. See *Burkhart*, 99 Wn. App. at 25-26. *Burkhart* clearly lays out that there is a violation of RCW 9.61.230 when a defendant utters threatening language during a phone call. *Burkhart*, 99 Wn. App. at 25-26.

D. SUFFICIENCY OF THE EVIDENCE

1. Standard of Review

The Appellant also raises the issue of whether there was sufficient evidence to support the conviction. See, generally, Br. of App. 7. While the Appellant initially states most of the correct standard of review for an appellate determination of the sufficiency of the evidence, Br. of App. 7, the Appellant incorrectly applies that standard of review in his discussion. Br. of App. 7-8.

The Appellant does state that when an appellant challenges the sufficiency of the evidence, the test is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt.” Br. of App. 7, citing *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979) and *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). Additionally, a challenge to the sufficiency of the evidence “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

2. Improper Application of Standard of Review

The Appellant incorrectly applies the standard of review when the Appellant writes: “Rather the evidence, even seen in the light most favorable to the defense, only supports the conclusion that the defendant made the telephone call to speak with her children on Christmas eve, that she did speak to her children, and that she did not even intend to speak to Lorie Haley.” Br. of App. 7-8.

The Appellant, likely inadvertently, reverses the proper standard of review, which is that the evidence must be seen in the light most favorable to the prosecution. *Salinas*, 119 Wn.2d at 201. If the Appellant inadvertently reversed the standard of review, the State disputes that the evidence, when seen in the light most favorable to the prosecution “only supports the conclusion that the defendant made the telephone call to

... speak with her children, that she did speak to her children, and that she did not even intend to speak to Lorie Haley.” Rather, the full record shows that there was ample testimony that Paris called the house on Christmas eve, spoke only briefly with her children, and immediately asked her son to put grandma on the phone. RP 67.

3. There was Substantial Evidence to Support Bad Intent at the Initiation of the Phone Call.

In looking at the evidence in the light most favorable to the State, which is the proper standard on review, there is substantial evidence to support that Stephanie Paris called the house to speak with Lorie Haley. Matthew Scharer testified that he answered the phone, that it was his mom on the phone, and after his mom said ‘hi’ she asked Matthew to “give the phone to your grandma.” RP 67. It is a reasonable inference that there were multiple requests from Paris to talk to Lorie Haley because Matthew testified that he “just kept on refusing.” RP 67. There is thus direct testimony that the defendant intended to speak with Lorie Haley when she initially placed the phone call, as related in the testimony of Matthew Scharer. RP 67. Considering that evidence in the light most favorable to the State, along with the reasonable inferences, there was substantial evidence to support the conviction, and thus the trial court did not deny the

defendant her rights under the state constitution as contended by the Appellant. Br. of App. 6.

The Appellant claims that there was a lack of substantial evidence to support that the defendant had the intent to harass or intimidate at the initiation of phone call. Br. of App. 10. The prior section of the state's brief addresses the issue of whether intent to harass or intimidate at the initiation of the phone call is an element of the crime of telephone harassment by threat, and concludes that settled case provides that intent at the initiation of the call is not an element of the crime of telephone harassment by threat. See *Burkhart*, 99 Wn. App. at 25-26.

The Appellant claims that the "evidence unequivocally proves that the defendant did not have the intent to 'harass, intimidate, torment or embarrass' Lorie Haley when she placed the case [sic] as she had no plans to even talk to her, whereas her later statements to Lorie Haley at the end of the call when the two did speak certainly support the conclusion that the defendant did eventually speak with intent to 'harass, intimidate, torment or embarrass.'" Br. of App. 10.

The Appellant fails to consider the full record of testimony at trial. Matthew Scharer testified that Paris did call and asked to speak to Lorie Haley. Matthew Scharer testified that he answered the phone first, and

“my mom said, hi, and then said, give the phone to your grandma. And I just kept on refusing.” RP 67.

“[Defense counsel]: Q. And then after you answered the phone, you said hello, I assume?”

A. Yeah.

Q. Okay. And what happened after you said hello? What was the next thing that somebody said?

A. She said - - uhm, my mom said, hi, and then she said, give the phone to your grandma. And I just kept on refusing and - -

Q. You kept on refusing?

A. Yeah.

Q. Okay. So you said hello, your mom says, give the phone to grandma, but - - but you didn't. Okay. And then what happened next?

A. And then finally, she said, give the phone to grandma, and I just gave up and gave the phone to grandma.

Q. Okay. Had Tyler gotten the phone by then, or do you know?

A. Uh-huh. Yeah. He got on - - he got on the phone.

Q. Okay. So you answer the phone, mom wants to talk to grandma, Tyler gets on the phone, and then you end up giving the phone to grandma?

A. Yeah.”

RP 67.

Both boys testified that they spoke with their mother, the defendant herein. RP 60, 67, 81.²

Lorie Haley testified that she saw Matthew Scharer on the phone, and that Matthew was “starting to cry and pace and was just becoming very upset.” RP 10. Lorie Haley testified about Paris’s Deputy Sheriff ‘threat’, RP 12, and Paris’s threat against Haley. RP 14-15.

Deputy Shelton testified that when he contacted Paris on January 15, 2005, Paris denied making any telephone call on Christmas eve. RP 101. Deputy Shelton further testified that on February 10, 2005, Paris changed her story to state that she did make calls “that morning but that she hadn’t - - she still maintained that she did not make any threats.” RP 102.

The Appellant’s claim that the record “unequivocally proves that the defendant did not have the intent to ‘harass, intimidate, torment or embarrass’ Lorie Haley when she placed” the phone call to the house, Br. of App.10, is not supported by the record.

² Paris, however, denied speaking with her boys that day. RP 117, 121. The record does show that Paris claimed she was calling her kids, and not to speak to Lorie Haley. Paris was asked: “Did you call to talk to Lorie or did you call to talk to your kids? A. My kids.” RP 119. Paris did admit to speaking with Lorie Haley and asked to speak with her

The Appellant's selective citation to the record omits the full testimony presented in court, and is not even supported by the testimony of the defendant at trial. It is perplexing to have the Appellant argue on appeal that the threats against Lorie Haley arose only after Paris was speaking with her boys, see Br. of App. 3, when Paris's trial testimony was that she never spoke with her boys. RP 117, 121. Rather, Paris herself testified that she did not speak with her sons. RP 117 ("Q. Okay. Did you get to talk to your kids? A. No."), RP 121. Paris testified at trial that she did speak with Lorie Haley, who hung up the phone after Paris asked to speak with the boys. RP 117.

The record does show that Lorie Haley observed that the boys were upset. RP 10. Haley testified that she did pick up the phone, and that Tyler and Matt were still on the phone. RP 11. Haley testified that the defendant said "that she was working with a deputy that - - and there was one waiting at the bottom of the road and she was coming to get the kids. And I said - - well, I'll wait." RP 11-12. Haley's testimony continued:

"Q. [Prosecutor] When you heard that, what - - what did you say?"

kids, but Paris denied that there were any threats. RP at 117.

A. Well, I said, Stephanie, not on Christmas. I go, we're all - - we're trying to get ready to go. I go, please don't do this. Don't - - please don't do this now. I go, it's Christmas Eve."

RP 12.

Haley testified that she believed the defendant's comments that the defendant was working with the police officer. RP 13. Haley further testified that she asked the defendant:

"I asked her not to do this to us at Christmas time, to please not do this to us at Christmas time. And she said she didn't care and that, uhm, she was working with this Deputy Sheridan [sic] and he was going to - - they were going to come up and get the kids and - -

Q Okay.

A - - There would be no Christmas and - -

Q And what happened next.

A And so then I said I didn't believe that. And it just led to an argument. And I can't remember all the exact words. I mean, they - - just she got mad, I got mad, and she started making threats."

RP 13-14.

Thus by looking at the full record, and not just the few selective citations to the record cited by the Appellant, the record shows that Haley testified about an extensive and confrontational conversation between the defendant and Haley, where the defendant threatens to take the children

from Haley on Christmas eve. RP 13-14. After the defendant and Haley argue, at that point Haley testified that the defendant threatened her. RP 14. The Appellant's selective citation to the record in the 'factual history' portion of the statement of the case makes it appear that the threats happened when Haley joined the phone conversation. Br. of App. 3 ("when she did so, the defendant said: 'Get off the phone, bitch, or I'm going to fucking have you killed.'").³

It is not up to the appellate court to resolve conflicts in the testimony. Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71 (1990), *State v. Fiser*, 99 Wn.App. 714, 719 (Div. 2, 2000). Rather, the jury here had differing accounts to resolve, whether to believe Paris that she did not speak to her children, and that Paris only had a brief conversation with Haley where she asked to speak with her boys and Haley hung up. RP 117. Or whether to believe Paris's son Matthew Scharer that he spoke with his mother on Christmas eve, and right after saying 'hi' his mom asked to speak to Haley. RP 67. Likewise, the testimony of Tyler Scharer,

³ The selective citation to the record, particularly where the appellant cites first from the testimony of Lorie Haley - the citation RP11-12, - then takes one quote from the testimony of Deputy Shelton, without discussing the full context of either Deputy Shelton's testimony or Lorie Haley's testimony, see Br. of App. 3, appears to violate RAP 10.3(a), which requires that the statement of the case be "A fair statement of the facts and procedure relevant to the issues presented for review, without argument." The appellant's

that he got on the phone, and that his mom was saying to Matthew and Tyler that she was 'going to come down and take us.' RP 80. And again, whether the jury believed the testimony of Lorie Haley where she related that Paris said she was working with a deputy sheriff and they were 'going to come up and get the kids and - - Q. Okay. - - there would be no Christmas and - - " and that Paris was going to have the kids "whether it meant my life or not" and that "she had ways to have me killed." RP 13-14.

Thus when looking at the full record of the testimony presented at trial, there is substantial evidence to support that at the time Paris placed the phone call, Paris was calling to say she was coming to get the kids. See RP 13-14, 80. Paris made further comments threatening Haley that scared Haley. RP 14, 18. Paris's son Matthew heard his mom threaten Haley, and that the threats made Matthew feel scared for "My grandma and me and Tyler." RP 60. Paris's youngest son Tyler testified that he heard his mom say to his grandma "That she was going to kill her," and that made Tyler scared for his grandma. RP 81-82. There is overwhelming evidence on the record to support that the Appellant had the

selective citation of the record without providing the full context is not a "fair statement of the facts" in this case.

intent to 'harass, intimidate, torment or embarrass' Lorie Haley when Paris placed the phone call on Christmas eve, December 24, 2004.

V. CONCLUSION

The trial court properly instructed the jury concerning the law in the State of Washington: that a defendant violates the telephone harassment statutes when the defendant makes a threat to kill the person called, and the defendant acted with intent to harass or intimidate. See Jury Instruction 5, RCW 9.61.230(1). The trial court followed *Burkhart*, 99 Wn.App. at 23, and there was no error. The Court of Appeals should affirm the decision and judgment of the trial court.

Respectfully submitted this 18 day of January, 2006.

SUSAN I. BAUR
Prosecuting Attorney

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

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
Respondent,)
v.) NO. 33322-8
) 05-1-00173-6
STEPHANIE R. PARIS,) AFFIDAVIT OF MAILING
)
Appellant.)

AUDREY J. GILLIAM, being first duly sworn, on oath deposes and says: That on January 18, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

JOHN A. HAYS
ATTORNEY AT LAW
1402 BROADWAY
LONGVIEW, WA 98632

CLERK, COURT OF APPEALS
950 BROADWAY, SUITE 300
TACOMA, WA 98402

FILED
COURT OF APPEALS
DIVISION II
06 JAN 23 AM 9:57
STATE OF WASHINGTON
BY 

each envelope containing a copy of the following documents:

1. BRIEF OF RESPONDENT
2. Affidavit of Mailing.



SUBSCRIBED AND SWORN to before me this January 18, 2006.



Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: 020906