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NO. 61118-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2008 JUN 25 PM 4:54

STATE OF WASHINGTON,
Respondent,

v.

ANDRE MENESES,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Paris Kallas

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Mr. Meneses was convicted of two counts of felony telephone harassment, six counts of gross misdemeanor telephone harassment, and two counts of intimidating a witness. In this appeal, Mr. Meneses contends that 1) the jury was not instructed that the intent to harass, intimidate, or torment must be formed at the initiation of the telephone calls; 2) the "to convict" instructions did not include the essential element that the threats be "true threats"; 3) there was insufficient evidence to prove "true threats"; 4) there was insufficient evidence to prove Mr. Meneses acted with the intent to harass, intimidate, or torment at the time the phone calls were initiated; 5) the trial court erred in refusing to instruct the jury on lesser included offenses for the witness intimidation charges; 6) the jury instruction defining "threat" did not comport with the statutory definition of telephone harassment; and 7) the convictions in Counts II and III, based on the same telephone call, violated the prohibition against double jeopardy. These errors require reversal of all convictions.

B. ASSIGNMENTS OF ERROR.

1. The jury instructions were constitutionally deficient because they failed to inform the jury that they had to find the

telephone calls were initiated with the intent to harass, intimidate, or torment.

2. The "to convict" instructions were defective because they did not include the essential element that the threats be "true threats."

3. The State presented insufficient evidence to prove true threats.

4. The State presented insufficient evidence to prove Mr. Meneses acted with the intent to harass, intimidate, or torment at the time the phone calls were initiated.

5. The trial court erred in not instructing the jury regarding the lesser included offenses of witness tampering and attempted witness intimidation as to the two charges of intimidating a witness.

6. For the gross misdemeanor telephone harassment charges, the statute requires proof of a threat "to inflict injury," but the jury was given a definition of "threat" that was much broader, allowing them to convict based on threats other than threats to injure.

7. The convictions in Counts II and III, based on the same telephone call, violated the prohibition against double jeopardy.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The jury must be informed of all elements necessary for conviction. Here, the jury instructions failed to inform the jury that the defendant's intent to harass, intimidate, or torment must be formed at the initiation of the telephone call. Does the failure to instruct the jury on this required element necessitate reversal of the convictions for telephone harassment? (Assignment of Error 1).

2. "To convict" instructions must include all essential elements of the offense. Where a statute attempts to criminalize pure speech by the use of a threat, both the federal and state constitutions require that only "true threats" be proscribed. Here, all ten charges were based on pure speech: voice messages left on a telephone. Moreover, all ten charges included the making of a threat as part of the charge. Proof of true threats, then, constituted an essential element of the offense. Where none of the "to convict" instructions listed true threats as an element necessary for conviction, does this deficiency require reversal of all convictions? (Assignment of Error 2).

3. A conviction for any of the ten charges against Mr. Meneses required proof beyond a reasonable doubt that the so-called threats made were "true threats." Must his convictions be

reversed where the State failed to prove beyond a reasonable doubt that he made "true threats"? (Assignment of Error 3).

4. A conviction for telephone harassment requires proof beyond a reasonable doubt that the defendant made the telephone call with the intent to harass, intimidate, or torment. Furthermore, the State must prove beyond a reasonable doubt that the requisite intent was formed at the time the phone call was initiated. Must Mr. Meneses's convictions for telephone harassment be reversed where the State failed to so prove beyond a reasonable doubt? (Assignment of Error 4).

5. Regarding the two charges of intimidating a witness, defense counsel offered instructions that would allow the jury to consider the lesser included offenses of tampering with a witness, and attempted intimidating a witness. Did the trial court err in refusing to instruct the jury on these lesser included offenses? (Assignment of Error 5).

6. As charged against Mr. Meneses, the gross misdemeanor telephone harassment charges required proof that he threatened "to inflict injury." However, Court's Instruction No. 8 gave the jury a much broader definition of "threat" that allowed them to convict based on threats other than threats to injure. This

was the only definition of threat given to the jury. Where the State told the jury in closing argument that it could convict based on a threat of physical confinement or restraint, was Mr. Meneses prejudiced by the instructional error? (Assignment of Error 6).

7. Counts II and III both arose from the very same call (call number one) made to Ms. Willis, and required the same intent to intimidate. As charged and prosecuted, proof of the telephone harassment charge in Count III also proved the charge of intimidating a witness in Count II. Are the offenses the same such that a conviction for both violates the prohibition against double jeopardy? (Assignment of Error 7).

D. STATEMENT OF THE CASE.

Andre Meneses has a son, Jacoby (age seven), with Jamilla Willis. 9/26/07RP 19[1]. Mr. Meneses and Ms. Willis split up several years ago, and Ms. Willis currently lives with her boyfriend, Andre Prim, their five-month-old baby, Elijah, and Jacoby. 9/26/07RP 19-20. From March until May of 2007, Mr. Meneses and Ms. Willis were involved in a dispute over whether Mr. Meneses could have visitation with Jacoby. 9/26/07RP 37.

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[1] The Verbatim Report of Proceedings consists of several volumes and will be referred to by the date, followed by "RP" and the page number.

In the course of a different investigation, Jamila Willis informed police that Mr. Meneses made numerous telephone calls to her, leaving what she described as threatening messages on her phone. 9/26/07RP 12, 22-23. Ms. Willis gave police access to these messages, and from them a police detective made a tape of ten recorded phone messages. 9/26/07RP 23-24; Ex. 3. In the various phone messages, Mr. Meneses expressed his frustration and anger over Ms. Willis's unwillingness to let him see his son. Ex. 3. He used profanity and racial slurs, and made various so-called threats, although he disputed at trial that they constituted "true threats." Ex. 3.

Mr. Meneses was originally charged with one count of felony telephone harassment. CP 1. Before trial, the charges were amended to add three additional counts of felony telephone harassment, four counts of (gross misdemeanor) telephone harassment, and two counts of intimidating a witness. CP 30-34. The deputy prosecuting attorney informed the court that the added charges were all based on the original discovery. 9/13/07RP 2. This is correct, as all ten charges were based on the messages left

by Mr. Meneses and placed on the single tape recording made by the police detective.[2]

The jury ultimately found Mr. Meneses guilty on all ten counts, although on counts IV and VIII he was found not guilty of felony telephone harassment and guilty of the lesser included gross misdemeanors of telephone harassment. CP 117-19, 125. The trial court sentenced Mr. Meneses to thirty months incarceration, which constituted an exceptional sentence of less than the standard sentence range. The sentence was based on the court's findings that Mr. Meneses's actions were a continuing course of conduct, all charges were sufficiently factually connected, charges were originally filed as a single count, Mr. Meneses should not be penalized for exercising his right to go to trial, and the multiple offense policy would result in an excessive sentence. CP 147-48;

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[2] The defense expressed a need to know which count in the amended information related to what conduct, particularly since many of the charges were alleged to have been committed on the same day. 9/24/07RP 11-12. The trial court asked the deputy prosecuting attorney to so specify. 9/25/07RP 7. The deputy prosecuting attorney explained the basis for the charges as follows: the tape consists of ten recorded phone messages. Count I is based on call 2, Counts II and III are based on call 1, Count IV is based on call 3, Count V is based on call 4, Count VI is based on call 5, Count VII is based on call 6, Count VIII is based on call 7, Count IX is based on call 8, and Count X is based on call 10. 9/25/07RP 9-14. The deputy prosecuting attorney presented the same information to the jury in her closing argument. 9/27/07RP 8-32.

12/14/07RP 19. This appeal of the convictions timely follows. CP 162.

E. ARGUMENT.

1. STATE V. LILYBLAD REQUIRES REVERSAL OF ALL TELEPHONE HARASSMENT CONVICTIONS BECAUSE THE JURY WAS NOT INSTRUCTED THAT MR. MENESES HAD TO FORM THE SPECIFIC INTENT TO HARASS OR INTIMIDATE AT THE TIME HE INITIATED THE CALLS.

a. The jury must be informed of all necessary elements for conviction. The burden is always upon the State to establish every element of the crime charged by proof beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); United States Constitution, Fourteenth Amendment; Washington Constitution, article 1, section 3. Accordingly, the trial court must instruct the jury on every element of the crime. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984).

b. That the phone calls be initiated with the intent to harass, intimidate, or torment is an element of the crime of telephone harassment. One element of the crime of telephone harassment (RCW 9.61.230) is the intent to harass or intimidate at the time the phone call is initiated. State v. Lilyblad, 163 Wn.2d 1, 13, 177 P.3d

686 (2008)[3] ("the crime of telephone harassment requires proof that the defendant formed the intent to harass the victim at the time the defendant initiates the call to the victim"). The court in Lilyblad held that the failure to instruct the jury on this element of the crime constituted an error of constitutional magnitude that could be raised for the first time on appeal. Id. at 5.

In Lilyblad, neither the definition of telephone harassment nor the "to convict" instruction given to the jury defined when the intent to harass must be formed. The jury was given a separate instruction that "make a telephone call" referred to the entire call rather than the initiation of the call. Holding that the trial court failed to properly instruct the jury as to an element of the crime, the conviction was reversed. Id. at 13.

In the instant case, the jury did not receive a separate instruction about the meaning of "make a telephone call." However, as in Lilyblad, neither the definition of telephone

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[3] Prior to this decision, there was a split among the divisions in the Court of Appeals. Division I held that the telephone harassment statute applied to a caller who formed the intent to harass or intimidate "at any point" in a telephone conversation. City of Redmond v. Burkhart, 99 Wn.App. 21, 991 P.2d 717 (2000). Division II maintained that the intent to harass must be formed at the time the defendant initiated the call. State v. Lilyblad, 134 Wn.App. 462, 140 P.3d 614 (2006).

harassment nor the to-convict instructions included the element that Mr. Meneses must have formed the intent to harass or intimidate at the time he initiated the calls. CP 71, 74-81. The defense offered a jury instruction which stated in part:

> You may find the defendant guilty of the greater charge of harassment, with a threat to kill, only if you find beyond a reasonable doubt that the defendant made a true threat, and that the telephone call must be initiated with the intent to harass, intimidate, torment, or embarrass another person.

CP 111 (emphasis added). The court declined to give the requested instruction. As a result of the trial court's ruling, nowhere in any of the instructions was the jury informed that one element of the crime of telephone harassment was the intent to harass, intimidate, or torment at the initiation of the phone call. CP 62-92.

c. The failure to so instruct the jury requires reversal of all convictions for telephone harassment. The jury was not instructed on every element of the crime as both the federal and state constitutions require. Rather, the jury was left to believe the necessary intent could be formed at any time during the call. Because the jury instructions relieved the State from proving beyond a reasonable doubt that Mr. Meneses had the specific intent to harass or intimidate when he initiated the calls, all of his

convictions for telephone harassment (Counts I, III, IV – VI, and VIII – X) must be reversed. Lilyblad, 163 Wn.2d at 13; see also Neder v. United States, 527 U.S. 1, 18-19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (failure to instruct on every element is harmless only if supported by uncontroverted evidence); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) ("An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal").

2. THE "TO CONVICT" INSTRUCTIONS GIVEN TO THE JURY WERE DEFECTIVE BECAUSE THEY DID NOT INCLUDE THE ESSENTIAL ELEMENT THAT THE THREATS BE "TRUE THREATS".

a. The "to convict" instruction must include all elements essential for conviction. The due process clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every element of the crime charged. State v. McCullum, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983) (citing In re Winship, 397 U.S. at 364). An essential element of a crime is one that must be proven to "establish the very illegality of the behavior." State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)(citing United States v.Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991

(1983)). An element need not be listed in the statute defining the crime to be considered essential. Id.

Also required by principles of due process, the "to convict" instruction must include all essential elements of the crime. State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953). The court in Emmanuel explained:

> In effect, the judge furnished a yardstick by which the jury were to measure the evidence in determining appellant's guilt or innocence of the crime charged. The jury had a right to regard [the to-convict instruction] as being a complete statement of the elements of the crime charged. This instruction purported to contain all essential elements, and the jury were not required to search the other instructions to see if another element alleged in the information should have been added to those specified in [the to-convict instruction].

Emmanuel, 42 Wn.2d at 819; see also State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005) ("We generally adhere to the principle that the "to convict" instruction must contain all elements essential to the conviction"). The omission of an element from the "to convict" instruction is a manifest constitutional error that may be raised for the first time on appeal. Mills, 154 Wn.2d at 6. The adequacy of a challenged "to convict" jury instruction is to be reviewed de novo on appeal. Id. at 7.

b. That the threat made was a "true threat" is an essential element of all charges against Mr. Meneses and must be included in the "to convict" instructions. The United States Constitution, First Amendment states in pertinent part: "Congress shall make no law... abridging the freedom of speech." What constitutes a "threat" must be distinguished from what is constitutionally protected speech. Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). Where a statute criminalizes pure speech, a prohibition against threats must be narrowly read as prohibiting only "true threats" in order to pass constitutional muster. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). A true threat "must be a serious threat, and not just idle talk, joking or puffery." Id. at 46. 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 take the life of" another person. State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001) (quoting United States v. Khorrami, 895 F.2d 1186 (7th Cir. 1990)).

In State v. Tellez, 141 Wn.App. 479, 170 P.3d (2007), the Court of Appeals found that the telephone harassment statute must

be construed so as to proscribe only "true threats." However, the court also found that "true threat" was not an element, but, rather, a "constitutional concept" that merely defined and limited the scope of the essential threat element. Id. at 484 (citing State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006)).

The court's reliance on Johnston for its decision in Tellez is misplaced. In Johnston, a bomb threat case, the Washington Supreme Court reversed for failure to give a limiting instruction defining "threat" in terms of "true threat." Id. at 366. The Johnston court was not asked to decide (nor did it consider) whether a "to-convict" instruction is inadequate if it does not require the jury to find a true threat beyond a reasonable doubt. And while Johnston never explicitly stated that a true threat is an essential element of the crime, it did refer to the instructional error as that "involving the elements of a crime." Id. at 364.

The basis for all ten charges against Mr. Meneses was the series of messages he left on Ms. Willis's phone - - in other words, pure speech. As charged, all ten Counts required that the State prove a "threat." CP 30-34. To prove any of the charges against Mr. Meneses, the State was required to prove both the statutory elements of the offense and that Mr. Meneses's statements were

"true threats." Kilburn, 151 Wn.2d at 54. Since the State had to establish that Mr. Meneses made "true threats" in order to establish that his conduct was illegal, proof of a "true threat" was an element of all charges against Mr. Meneses. Johnson, 119 Wn.2d at 147.

In Court's Instruction No. 8, the trial court gave the jury a definition of "threat" based on RCW 9A.04.110 with additional language added to limit a threat to true threats. CP 72. The "true threat" language was also included in the definition of the crime of telephone harassment. CP 71 (Court's Instruction No. 7). However, none of the "to convict" instructions limited "threat" to only "true threats." CP 74-81, 89-90. The to-convict instructions were defective because they failed to include the essential element of "true threats" as an element that the State must prove beyond a reasonable doubt.

c. The error resulting from the incomplete "to convict" instructions requires reversal of all Mr. Meneses's convictions. A "to convict" instruction that does not "plainly, explicitly, and correctly" state all the elements required for conviction is "constitutionally defective." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). In Brown, 147 Wn.2d at 339, the court noted that not every omission in a jury instruction relieves the State of its

that not every omission in a jury instruction relieves the State of its burden to prove each element of the crime charged, and it utilized a harmless error analysis to determine whether reversal of a conviction was warranted. Under the harmless error analysis, an instructional error can be found harmless only if, beyond a reasonable doubt, "the error complained of did not contribute to the verdict obtained." Id. at 341.

Although the jury was instructed regarding "true threats", the requirement that threats be limited to "true threats" was not included in any of the "to convict" instructions. The "to convict" instructions purported to contain all the essential elements of the crimes charged, and the jury had a right to regard them as complete. Emmanuel, 42 Wn.2d at 819. The main issue at trial was whether Mr. Meneses made "true threats," or whether his words were mere puffery. The error in the to-convict instructions went to the heart of the defense. The error is not harmless and requires reversal of all convictions. Emmanuel, 42 Wn.2d at 819; Mills, 154 Wn.2d at 7; Smith, 131 Wn.2d at 265.

3. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT MR. MENESES MADE "TRUE THREATS," A NECESSARY ELEMENT FOR ALL OF THE CHARGES.

a. The State must prove each element of a crime beyond a reasonable doubt. The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. at 364; U.S. Const. amends. 6, 14; Wash. Const. art 1, §§ 3, 21, 22. The test for determining the sufficiency of the evidence 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." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The existence of a fact cannot rest upon "guess, speculation, or conjecture." State v. Hutton, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

In determining whether sufficient evidence of "true threats" supports the verdict, the relevant question is "whether there is sufficient evidence that a reasonable person in [the defendant's]

position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death." Kilburn, 151 Wn.2d. at 48; State v. Brown, 137 Wn.App. 587, 591, 154 P.3d 302 (2007). Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, 151 Wn.2d at 44; State v. Johnston, 156 Wn.2d 355, 364, 127 P.3d 707 (2006). A true threat "must be a serious threat, and not just idle talk, joking or puffery." State v. Kilburn, 151 Wn.2d at 46.

Because the sufficiency of the evidence inquiry implicates core First Amendment protection, the objective standard is "a difficult standard to satisfy," and an appellate court must independently review the constitutionally critical facts in the record that bear on the question of whether a true threat was made. Kilburn, 151 Wn.2d. at 53-54; Johnston, 156 Wn.2d at 365 ("whether a statement constitutes a true threat is a matter subject to independent review").

b. The State failed to prove beyond a reasonable doubt that Mr. Meneses made "true threats". A reasonable person in Mr. Meneses's shoes would not foresee that Ms. Willis would take his threats seriously given that he was prone to exaggeration and that

he had not been taken seriously in the past. While the effect of the "threat" upon the other person is not dispositive, the witnesses' reaction is relevant because it tends to disprove the State's claim that the context of the words spoken shows they were true threats.

Mr. Meneses began the very first call with the words, "you might laugh." Ex. 3 (call 1). He referred to himself as a gangster and as being involved in the Piru Filipino Mafia multiple times. Ex. 3 (calls 1, 2, 6, 7, and 8). However, Ms. Willis clearly did not take these statements seriously. She testified that she was in a relationship with Mr. Meneses for three years, had known him for ten years, and to her knowledge he was not involved in any Piru Mafia. 9/26/07RP 21, 30.

When asked by the deputy prosecuting attorney whether she took the comments by Mr. Meneses to be threats, Ms. Willis answered "yes." 9/26/07RP 40-42. However, she did not testify in what way she felt threatened, and she never testified that she seriously believed he was going to do the things he said in the messages. When Mr. Meneses talked on the phone about "taking matters into his own hands," she was concerned he might slash her

car tires,[4] or "knock on my door or something." 9/26/07RP 44-45. Ms. Willis agreed with defense counsel that Mr. Meneses was, at times, a "pathetic loser." 9/26/07RP 30.

Mr. Prim testified at trial that he took the threats seriously, stating "we live in a time where you can't not take statements that are made seriously." 9/26/07RP 53. He said over time, he had come to take the comments by Mr. Meneses more seriously. 9/26/07RP 64-65. However, he admitted that when he initially gave a statement to the police detective, he said, "we really never have taken this stuff seriously." 9/26/07RP 56, 63. He also admitted telling the detective that Ms. Willis had "never taken him seriously, because he never follows through with things that he's ever said or done." 9/26/07RP 57. Mr. Prim described to the detective that when he and Mr. Meneses had disputes in the past that could have potentially become physical, Mr. Meneses would run away. 9/26/07RP 67.

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[4] Mr. Prim testified that back in 2003, Mr. Meneses had slashed his car tires. 9/26/07RP 75-76. When Deputy Mendez contacted him and Ms. Willis in May of 2007 it was in part to investigate damage done to cars belonging to him and Ms. Willis. He did not see who did the damage, but inferred it might be Mr. Meneses. 9/26/07RP 77-80.

c. The failure of the State to prove all elements of the charge requires that all convictions be reversed and dismissed with prejudice. All ten of the charges against Mr. Meneses required proof of a true threat. CP 30-34. A reasonable person in Mr. Meneses's position would not foresee that his comments would be taken as more than "puffery." Kilburn, 151 Wn.2d at 46. Where the evidence was insufficient to prove that the threats made were "true threats," reversal of all counts is required, and double jeopardy prohibits retrial. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

4. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. MENESES ACTED WITH THE INTENT TO HARASS, INTIMIDATE, OR TORMENT; OR THAT SUCH INTENT WAS FORMED AT THE TIME THE PHONE CALLS WERE INITIATED.

a. The State failed to prove beyond a reasonable doubt that Mr. Meneses's intent was to harass, intimidate, or torment. In order to commit the crime of telephone harassment under RCW 9.61.230, the defendant must make a telephone call "with intent to harass, intimidate, [or] torment any other person." Ms. Willis testified that for the two months prior to the phone messages being

left on her answering machine, she and Mr. Meneses were involved in a dispute about whether or not he could have visits with his son. 9/26/07RP 37. It is clear from listening to the tape of the phone calls that Mr. Meneses was upset at not being allowed to see his son, and that his intent in calling was to convince her that he be able to do so. Ex. 3 ("I want to see my son that's it" (call 1); "If that's my son then let me be a father to my son" (call 3); "All I want to do is see my son" (call 5); "I just wanna see my son" (call 5); "I wanna see my son this weekend before I take matters in my own hands" (call 5); "I wanna see my son, I wanna see him right now, okay" (call 6); "you better let me see my son right now bitch" (call 8)). Mr. Meneses made the phone calls with the intent of being allowed visitation with his son. The State did not prove beyond a reasonable doubt that Mr. Meneses acted "with intent to harass, intimidate, [or] torment" as required by RCW 9.61.230.

b. The State failed to prove beyond a reasonable doubt that Mr. Meneses had the intent to harass, intimidate, or torment at the initiation of each phone call. As previously discussed, the charge of Telephone Harassment requires proof that the requisite intent be formed at the initiation of the phone call. Lilyblad, 163 Wn.2d at 13. In this case, even if this Court finds that Mr. Meneses made

the calls with the intent to harass, intimidate, or torment, the State failed to present evidence as to when he formed such intent. For example, in Count VI (based on call 5), Mr. Meneses begins the telephone call by saying, "Yeah, Jamila, I'm tired of you playin this little fuckin game okay. All I want to do is see my son ...". Ex. 3 (call 5). The State did not prove that Mr. Meneses initiated each of the phone calls with the intent to harass, intimidate, or torment.

c. The failure of the State to prove all elements of the charge requires that all convictions for telephone harassment be reversed and dismissed with prejudice. After viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of telephone harassment beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. at 319. Where the evidence was insufficient to prove that Mr. Meneses acted with the intent to harass, intimidate, or torment; and that such intent was formed at the initiation of each of the phone calls, reversal of all charges for both felony and gross misdemeanor telephone harassment (Counts I, III, IV, V, VI, VIII, IX, and X) is required, and double jeopardy prohibits retrial. Hickman, 135 Wn.2d at 103; Hardesty, 129 Wn.2d at 309.

5. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LESSER OFFENSES OF TAMPERING WITH A WITNESS AND ATTEMPTED INTIMIDATION OF A WITNESS, REQUIRING REVERSAL OF THE CONVICTIONS FOR INTIMIDATING A WITNESS.

Mr. Meneses was charged by amended information with two counts of intimidating a witness under RCW 9A.72.110. CP 30-34. As charged in the amended information, the State alleged that Mr. Meneses, "by use of a threat against Jamila Willis, a current or prospective witness, did knowingly attempt to induce that person not to report information which was relevant to a criminal investigation." CP 30-34 (Counts II and VII). The definition of "current or prospective witness" includes a "person whom the actor has reason to believe may have information relevant to a criminal investigation." RCW 9A.72.110(3)(b)(iii). The jury was instructed regarding this definition. CP 88 (Court's Instruction no. 24).

At trial, the defense offered lesser included instructions for witness tampering. CP 103-05; 9/26/07RP 99-100. The charge of tampering with a witness under RCW 9A.72.120, as applicable in this case, provides that a person is guilty if he "attempts to induce" a "person whom he or she has reason to believe may have information relevant to a criminal investigation" to "withhold from a

law enforcement agency information which he or she has relevant to a criminal investigation." Witness tampering differs from witness intimidation in that it does not require the use of a threat.

The defense also offered a jury instruction regarding attempted intimidation of a witness. 9/26/07RP 99-100. "Criminal attempt" is defined in RCW 9A.28.020(1): "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime."

The trial court refused to instruct the jury regarding both tampering with a witness, and attempted intimidating a witness. 9/26/07RP 100; 9/27/07RP 4. The trial court ruled that there was not a factual basis to find that only the proposed lesser offenses took place. The court reasoned that the only basis for the witness intimidation charges was a threat, and that the "jury is either going to find there was a threat to induce or no conduct." 9/26/07RP 100.[5]

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[5] After asking defense counsel if he had any exceptions to the court's proposed instructions, the trial court reiterated that it was adhering to its earlier ruling that lesser offense instructions for the witness intimidation charges were not warranted. 9/27/07RP 3-4.

The standard of appellate review depends on whether the trial court's refusal to give a jury instruction was based on a matter of law or of fact. Where the trial court refuses to give a proposed jury instruction based on a factual dispute, the decision is reviewed under an abuse of discretion standard. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

a. The jury should have been instructed regarding witness tampering as a lesser included offense of witness intimidation. Generally, an accused may only be convicted of offenses contained in the indictment or information. Schmuck v. United States, 489 U.S. 705, 717-18, 109 S.Ct. 2091, 103 L.Ed. 734 (1989). However, RCW 10.61.006 contains an exception. It provides that "the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." Where requested, a party is entitled to an instruction on a lesser included offense where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong). State v. Berlin, 133

Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

A requested jury instruction on a lesser included offense should be administered "if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). Although affirmative evidence must support the issuance of the instruction, such evidence need not be produced by the defendant. Rather, the trial court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000); State v. McClam, 69 Wn. App. 885, 889, 850 P.2d 1377, rev. denied, 122 Wn.2d 1021, 863 P.2d 1353 (1993); State v. Gostol, 92 Wn.App. 832, 838, 965 P.2d 1121 (1998). Finally, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. Fernandez-Medina, 141 Wn.2d at 455-56.

Since the relevant portions of the witness tampering and witness intimidation statutes are nearly identical except that witness tampering does not include the use of a threat, the commission of each element of witness tampering must necessarily be proved to

establish the greater offense of witness intimidation (as charged). Thus, the requested witness tampering instruction satisfied the legal prong of the Workman test.

With regard to the factual prong, evidence was produced which would justify a reasonable person in concluding that only the lesser offense of tampering with a witness had been committed. Testimony from witnesses put into question whether the so-called threats constituted true threats. Ms. Willis testified that she did not take Mr. Meneses's comments regarding being involved in the mafia seriously. 9/26/07RP 30. Mr. Prim told the police detective that neither he nor Ms. Willis took Mr. Meneses's statements seriously, and that Mr. Meneses never followed through on his so-called threats. 9/26/07RP 56-57, 67. Mr. Meneses's defense was based largely on his position that the State had only proven mere "puffery," and not "true threats." 9/27/07RP 36-37, 41-42, 44-46.

If the jury was not convinced beyond a reasonable doubt that the so-called threats uttered by Mr. Meneses were "true threats," it would be appropriate for them to then consider the lesser charge of witness tampering. Viewed in the light most favorable to Mr. Meneses, the evidence supported the inference that he was guilty of only witness tampering and not witness

intimidation. The jury, as fact-finder, should have been allowed to decide whether Mr. Meneses was guilty of intimidating a witness, or whether he was only guilty of tampering with a witness.

b. The jury should have been instructed regarding attempted witness intimidation as a lesser included offense of witness intimidation. Mr. Meneses was also entitled to a jury instruction regarding the lesser crime of attempted intimidation of a witness. RCW 10.61.010 provides that "[u]pon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged." (emphasis added). An attempt to commit a crime consists of the following elements: 1) the intent to commit the crime; and 2) commission of an overt act. State v. Christensen, 55 Wn.2d 490, 490-91, 348 P.2d 408 (1960). "[A]n attempt to commit a crime is included in the crime itself." State v. Mannering, 150 Wn.2d 277, 284, 75 P.3d 961 (2003). The trial court agreed that an instruction for attempted intimidating a witness was legally available, but held that it was not warranted under the facts of the case. 9/26/07RP 100. However, such an instruction was factually warranted for the same reasons that the witness tampering instruction was warranted.

c. Failure to instruct the jury on witness tampering and attempted witness intimidation prejudiced Mr. Meneses and requires reversal of his two convictions for intimidating a witness. A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case if there is evidence to support that theory. Fernandez-Medina, 141 Wn.2d at 461-62; State v. Redmond, 150 Wn.2d 489, 495, 78 P.2d 1001 (2003). Since there was substantial evidence in the record which affirmatively raised the inference that Mr. Meneses was guilty of only witness tampering or attempted witness intimidation, and not witness intimidation, the requested instructions should have been given. Fernandez-Medina, 141 Wn.2d at 461-62. The failure of the trial court to give the requested instructions constitutes prejudicial error and requires reversal of the convictions in Counts II and VII for intimidating a witness. Id. at 462; Redmond, 150 Wn.2d at 495; State v. Williams, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997).

6. THE JURY INSTRUCTION DEFINING "THREAT" WAS DEFECTIVE BECAUSE IT DID NOT COMPORT WITH THE STATUTORY DEFINITION OF TELEPHONE HARASSMENT.

a. The telephone harassment statute requires a threat "to inflict injury," but the jury was wrongly given a much broader definition of "threat," allowing them to convict based on threats other than threats to injure. Parties are entitled to instructions that properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case. State v. Redmond, 150 Wn.2d at 493.

Mr. Meneses was charged in Counts III, V, VI, and IX with Telephone Harassment (gross misdemeanor) for allegedly "threatening to inflict injury on the person or property of Jamila Willis, or to any member of her family or household." CP 30-34; RCW 9.61.230(1)(c).

The State offered the following jury instruction defining threat:

> Threat means to communicate, directly or indirectly, the intent:
> To cause bodily injury in the future to the person threatened or to any other person; or
> To subject the person threatened or any other person to physical confinement or restraint; or
> To do any other act which is intended to harm substantially the person threatened or another with

> respect to that person's health, safety, business, financial condition or personal relationships.
>
> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

Suppl. CP ___ (Sub. No. 113). The last paragraph of the instruction was added to limit threats to "true threats." The remainder of the instruction was from WPIC 2.24 based on the definition of threat in RCW 9A.04.110(27).

Defense counsel did not offer this instruction in its packet of proposed jury instructions. CP 95-112. Rather, defense counsel offered two alternate jury instructions defining a threat. CP 111, 112. Neither of these two proposed defense instructions contained an overly broad definition of threat. However, the trial court did not give the defense proposed instructions, and instead used the State's version. CP 72 (Court's Instruction No. 8).

b. The use of Court's Instruction No. 8 relieved the State of its burden to prove every element of telephone harassment beyond a reasonable doubt. The State must prove all elements of the charge beyond a reasonable doubt. In re Winship, 397 U.S. at 364; U.S. Const. amends. 6, 14; Wash. Const. art 1, §§ 3, 21, 22.

Court's Instruction No. 8 was the only definition of threat that the jury received. CP 62-92. This definition is much broader than the definition of threat in the telephone harassment statute, which is limited to threats to kill (felony telephone harassment) or threats to inflict injury to persons or property (gross misdemeanor telephone harassment). RCW 9.61.230. The instruction was not only inaccurate as to the telephone harassment charges, but given its broad definition of "threat," the instruction made it easier for the State to prove the charges. In this way, the use of Court's Instruction No. 8 relieved the State of its burden to prove an essential element of the charge. If a jury instruction relieves the State of its burden to proven an element of the crime charged, the error is of constitutional magnitude and may be raised for the first time on appeal. State v. Stein, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001).

c. The error requires reversal of the telephone harassment convictions in Counts III, VI, and IX. An instructional error can be found harmless only if, beyond a reasonable doubt, "the error complained of did not contribute to the verdict obtained." Brown, 147 Wn.2d at 341.

In closing argument, the deputy prosecuting attorney discussed the factual basis for Count III, which was Mr. Meneses's comment to Ms. Willis in the first phone call, "I'll steal your baby." 9/27/07RP 25. The prosecutor argued to the jury that Mr. Meneses was guilty in Count III because the definition of "threat" in Jury Instruction Number 8 included threats of physical confinement or restraint:

> Now, you know from your jury instruction number eight that deals with a threat, that a threat to physical confinement or restraint is considered a threat, and for the defendant to call this mother and tell her that he's going to steal her baby is, in fact, a threat.

9/27/07RP 25. Given that there was no threat to injure in this phone call as required by RCW 9.61.230, the jury had no basis to find Mr. Meneses guilty absent the defective instruction.

In Count VI, based on telephone call number five, Mr. Meneses said to Ms. Willis, "This is the last time I'm gonna tell you. I want to see my son this weekend before I take matters in my own hands." Ms. Willis testified that she believed Mr. Meneses "taking matters into his own hands" meant that he might slash her tires or "knock on my door or something." 9/26/07RP 44-45. Again, the jury may have found a threat based on Court's Instruction No. 8

without finding a threat to injure persons or property as required by the Telephone Harassment statute.

In Count IX, based on call number 8, Mr. Meneses said: "You better let me see my son right now, bitch. I will not involve the court. I will fucking solve this street gangster style, bitch. I will go so far to ...take your fucking family, bitch." This was not a direct threat to injure persons or property, and the jury may not have so found, but may rather have found a "threat" based on the definition contained in the erroneous jury instruction.

The improper use of Court's Instruction No. 8 for the telephone harassment charges was not harmless regarding Counts III, VI, and IX, requiring reversal of those convictions.

7. THE CONVICTIONS IN COUNTS II AND III FOR INTIMIDATING A WITNESS AND TELEPHONE HARASSMENT VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY.

a. The prohibition against double jeopardy prohibits multiple convictions for the same offense. The double jeopardy clauses of the Fifth Amendment to the United States Constitution[6] and Article I, section 9 of the Washington Constitution protect a criminal

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[6] The Fifth Amendment double jeopardy clause applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969).

defendant from multiple convictions and punishments for the same offense. Ball v. United States, 470 U.S. 856, 861, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); State v. Bobic, 140 Wn.2d 250, 260, 996, P.2d 610 (2000). The Washington State double jeopardy clause provides the same scope of protection as does the federal double jeopardy clause. Bobic, 140 Wn.2d at 260. A violation of the prohibition against double jeopardy is a manifest constitutional error that may be raised for the first time on appeal. Id. at 257; RAP 2.5(a).

Where a defendant is charged with violating two separate statutory provisions for a single act, courts must determine whether, in light of legislative intent, the charged crimes constitute the same offense. To answer this question, they look to "whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932); In re Pers. Restraint of Orange, 152 Wn.2d 795, 817, 100 P.3d 291 (2004).

In determining whether proof of one offense also establishes another charged offense, the inquiry must focus on the offenses as they were charged and prosecuted in a given case, rather than a

mere abstract comparison of statutory elements. Whalen v. United States, 445 U.S. 684, 694, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (defendant's conviction for both rape and felony murder in the commission of a rape violated the prohibition against double jeopardy, even though one could be guilty under the felony murder statute without committing a rape); Orange, 152 Wn.2d at 818-19.

An alleged double jeopardy violation is reviewed de novo. State v. Knutson, 88 Wn.App. 677, 680, 946 P.2d 789 (1997). If there is doubt as to the legislative intent, the rule of lenity requires the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694.

b. Mr. Meneses's convictions for intimidating a witness in count II and telephone harassment in count III, as charged and prosecuted, violated double jeopardy. The appropriate inquiry focuses on whether the evidence to prove telephone harassment, as charged and prosecuted, also proved the crime of intimidating a witness, as charged and prosecuted. Orange, 152 Wn.2d at 818.

The telephone harassment charge in count III alleged that Mr. Meneses, "on or about May 4, 2007, with intent to harass, intimidate, or torment another person, did make a telephone call to Jamila Willis, threatening to inflict injury on the person or property

of Jamila Willis, or to any member of her family or household." CP 31. In Count II, Mr. Meneses was charged with intimidating a witness. The amended information alleged that Mr. Meneses, "on or about May 4, 2007, by use of a threat against Jamila Willis, a current or prospective witness, did knowingly attempt to induce that person not to report information which was relevant to a criminal investigation." CP 31. The evidence offered by the State to prove the telephone harassment charge consisted of the phone messages Mr. Meneses left on Ms. Willis's phone. The same evidence was used to establish the charge of intimidating a witness in Count II. Counts II and III not only arose from the same incident date, but were both based on the same phone call (call number one) according to the deputy prosecuting attorney. 9/25/07RP 9; 9/27/07RP 24, 29. Both charges required the same intent and both alleged threats to the same person.

While it is true that the two crimes have different statutory elements, this is not a bar to finding that Mr. Meneses's act constitutes the same offense. United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). In Dixon, the defendant was originally charged with second-degree murder. Id. at 691. He was released on bond with a condition that he not

commit any criminal offense. Id. While awaiting trial, Dixon was arrested on a drug charge (possessing cocaine with the intent to distribute). Id. He was then found guilty of criminal contempt for violating the court's order. Id. at 691-92. The Court held that the subsequent prosecution for the drug offense was barred by double jeopardy. Id. at 712. The crimes of criminal contempt and drug possession clearly have completely different statutory elements. Nevertheless, since proof of the contempt charge also proved the drug charge, the offenses were the same. Id. at 699-700. "Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution violates the Double Jeopardy clause." Id. at 700.

Here, proof of the telephone harassment charge also proved the charge of intimidating a witness. It is irrelevant whether telephone harassment could be established without also proving witness intimidation in another scenario. Whalen, 445 U.S. at 694. The two offenses, as charged and prosecuted, constituted the same offense and Mr. Meneses's convictions on both Counts II and III violate the prohibition against double jeopardy. See Orange, 152 Wn.2d at 820 ("The two crimes were based on the same shot directed at the same victim, and the evidence required

to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault").

c. The proper remedy is vacation of the conviction in Count II for intimidating a witness. Where, as here, two convictions violate the prohibition against double jeopardy, the remedy is to vacate the conviction for the offense that formed part of the proof of the other offense. State v. Read, 100 Wn.App. 776, 792-93, 998 P.2d 897 (2000), aff'd. on other grounds, 147 Wn.2d 238, 53 P.3d 26 (2002). Accordingly, the conviction in Count II for Intimidating a Witness (which formed part of the proof of Telephone Harassment) must be vacated.

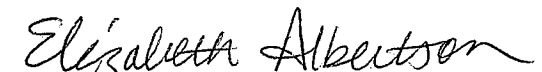
F. CONCLUSION.

Reversal of all convictions is required where 1) the jury was not instructed that the intent to harass, intimidate, or torment must be formed at the initiation of the telephone calls; 2) the "to convict" instructions did not include the essential element that the threats be "true threats"; 3) there was insufficient evidence to prove "true threats"; 4) there was insufficient evidence to prove Mr. Meneses acted with the intent to harass, intimidate, or torment at the time the phone calls were initiated; 5) the trial court erred in refusing to instruct the jury on lesser included offenses for the witness

intimidation charges; 6) the jury definition of "threat" did not comport with the statutory definition of Telephone Harassment; and 7) the convictions in Counts II and III, based on the same telephone call, violated the prohibition against double jeopardy.

DATED this 25th day of June, 2008.

Respectfully submitted,



ELIZABETH ALBERTSON (17071)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 61118-6-I
v.	)	
	)	
ANDRE MENESES,	)	
	)	
Appellant.	)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 25TH DAY OF JUNE, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ANDRE MENESES 825995 MCNEIL ISLAND CORRECTIONS CENTER PO BOX 881000 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF JUNE, 2008.

X_____

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