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NO. 61118-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDRE MENESES,

Appellant.

FILED  
DUNN  
APPEALS  
COURT OF WASHINGTON  
2008 AUG 29 PM 1:14

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PARIS KALLAS

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ERIN S. NORGAARD  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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**A. ISSUES**

1. (a) Telephone Harassment requires proof that the defendant intended to harass or intimidate the victim when he initiated the call. Here, the Telephone Harassment "to convict" instructions, some of which were offered by the defendant, told the jury that the State must prove that the telephone call was made with the intent to harass or intimidate the victim. Do the instructions properly state the intent element of that crime?

(b) "True threat" is not an element of Telephone Harassment or Intimidating a Witness, but rather is a term of art used to define the permissible scope of threat statutes for First Amendment purposes. Here, the court did not include a "true threat" element in the "to convict" instructions, but did give two separate instructions defining that term. Did the court properly instruct the jury on the term "true threats"?

2. Gross misdemeanor Telephone Harassment requires proof of a threat to inflict injury on the person threatened or any member of her family or household. Without objection, the court instructed the jury on the statutory definition of a "threat," which included threats to cause bodily injury, to subject the person threatened or another to physical confinement or restraint, or to do any act intended to substantially harm the health, safety, business, financial condition or personal relationships of

the person threatened or another. Does this instruction accurately define the conduct prohibited by the Telephone Harassment statute?

3. Evidence of a "true threat" is sufficient if an independent review of the record supports a finding that the threat was made in a context or under such circumstances wherein a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily harm or death. During a custody dispute, the defendant left ten angry messages on his ex-girlfriend's phone in which he repeatedly called her and her family "niggers," suggested that he was watching her, and threatened to harm or kill her, her boyfriend, and her newborn child. The defendant also threatened to kill the victim and her boyfriend if she called the police. Is the evidence sufficient to prove that the defendant made "true threats"?

4. Evidence is sufficient to prove the intent element of Telephone Harassment if, viewed in a light most favorable to the State, it permits any rational trier of fact to find beyond a reasonable doubt that the defendant had the intent to harass or intimidate the victim when he initiated the call. Here, the defendant left ten angry messages for the victim, some of which were left in quick succession late at night, during an ongoing custody dispute. From beginning to end, the messages contained sexist and racially derogatory remarks, threats to harm or kill the victim and her

family, and demands by the defendant to see his son. Is there sufficient evidence to prove that the defendant made the calls with the intent to harass or intimidate the victim?

5. The court must give a lesser included offense instruction when each element of the lesser offense is a necessary element of the charged offense, and when the evidence supports an inference that the lesser crime was committed to the exclusion of the charged crime. For the Intimidating a Witness charges, the evidence does not support a finding that the defendant committed the lesser included crimes of Witness Tampering or Attempted Intimidating a Witness to the exclusion of the charged offense. Did the court properly decline to instruct the jury on those lesser included offenses?

6. Double jeopardy does not prohibit multiple convictions for crimes based on the same conduct when the legislature intended for those crimes to be punished separately. Crimes that are dissimilar "in law" and "in fact" strongly indicate that the legislature intended separate punishments. The crimes of Intimidating a Witness and Telephone Harassment, though based on similar conduct in this case, each contain at least one element that is absent from the other, rendering them dissimilar "in law." Given that, did the court properly punish these crimes as separate offenses?

**B. STATEMENT OF FACTS**

**1. PROCEDURAL FACTS**

The State charged defendant Andre Meneses by amended Information with four counts of felony Telephone Harassment (counts I, IV, VIII, and X), two counts of Intimidating a Witness (counts II and VII), and four counts of gross misdemeanor Telephone Harassment (counts III, V, VI, and IX), all of which included a Domestic Violence designation. CP 30-34; 2RP 7.<sup>1</sup> All of the charges arose out of a series of telephone calls that were made between May 4 and May 18, 2007. CP 30-34.

Trial began before the Honorable Paris Kallas on September 24, 2007. 2RP 3. On September 27, 2007, the jury found Meneses guilty as charged on counts I (felony Telephone Harassment), II (Intimidating a Witness), III (gross misdemeanor Telephone Harassment), V (gross misdemeanor Telephone Harassment), VI (gross misdemeanor Telephone Harassment), VII (Intimidating a Witness), IX (gross misdemeanor Telephone Harassment), and X (felony Telephone Harassment). CP 117-28. On counts IV and VIII, the jury found Meneses guilty of the

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<sup>1</sup> The Verbatim Report of Proceedings consists of seven volumes, referred to in this brief as follows: 1RP (September 13, 2007); 2RP (September 24, 2007); 3RP (September 25, 2007); 4RP (September 26, 2007); 5RP (September 27, 2007); 6RP (December 7, 2007); and 7RP (December 14, 2007).

lesser crime of gross misdemeanor Telephone Harassment. CP 117-19, 125.

At sentencing, the court imposed an exceptional sentence below the standard range of 30 months on the Intimidating a Witness charges (counts II and VII),<sup>2</sup> and a standard range sentence of 29 months on the felony Telephone Harassment charges (counts I and X), all to be served concurrently. CP 152-61; 7RP 18-22. For the remaining six misdemeanor counts, the court imposed 12-month suspended sentences with credit for time served. CP 149-51; 7RP 23-24. Meneses timely appealed. CP 162.

## 2. SUBSTANTIVE FACTS

Jamila Willis and Meneses dated several years ago and share a child, Jacoby. 4RP 19-21, 31. Willis is currently dating Andre Prim. 4RP 19. In May 2007, Willis and Prim lived together with Jacoby and their newborn son, Elijah. 4RP 19-20, 31. Willis and Prim have a history of conflict with Meneses. 4RP 64, 75-76, 94-96. On one prior incident, Meneses slashed the tires on Prim's car following an argument between Meneses and Prim.<sup>3</sup> 4RP 75-76. During the two months preceding the charged incidents, Willis and Meneses were involved in a dispute concerning Meneses' visitation with Jacoby. 4RP 37.

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<sup>2</sup> The standard range on the Witness Intimidation counts was 46-61 months. CP 152-61.

<sup>3</sup> This evidence was originally excluded, but was later admitted after Meneses opened the door during his direct examination of Prim. 4RP 68-74.

At 12:51 a.m. on May 4, 2007, Meneses called Willis and left an angry voicemail message threatening to kill Willis and steal her "piece of shit" baby. 4RP 28-29; Ex. 3 (first message).<sup>4</sup> In the message, Meneses repeatedly referred to Willis and Prim as "niggers" and denigrated African-Americans in general. Ex. 3. Meneses then said something to the effect of, "[b]itch you wanna fucking press charges bitch, . . . press mother-fucking charges bitch and see what happens to your ass, see how long your fucking left living . . ." Ex. 3. Meneses then followed that with a reminder, "[b]itch you can get my fucking, bitch I'm a gangsta, bitch it's in the blood, Piru. . . ." Ex. 3. Meneses ended the message by telling Willis that he would "smoke" her "corny-ass family" and said, "don't fuck with me okay, I want to see my son that's it." Ex. 3.

At 12:55 a.m., Meneses called Willis again and left another threatening message. Ex. 3 (second message).<sup>5</sup> Meneses began this message by calling Willis a "dumb-ass bitch" and then told her that he and his "boy homies" had her house surrounded and could "take [her] out any time." Ex. 3. Meneses called Willis' newborn child a "nigger baby" and said, "we'll fucking kill every body bitch fuck you, you know what I'm

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<sup>4</sup> Exhibit 3 includes ten messages, each of which represents different counts. Ex. 3; 3RP 7-14. Counts II (Intimidating a Witness) and III (gross misdemeanor Telephone Harassment) are based on this first message. CP 30-31; 3RP 9-11.

<sup>5</sup> Count I (felony Telephone Harassment) is based on this message. CP 30; 3RP 8-9.

saying, you aint gonna have no peace in your fucking life, bitch, okay . . . bitch, you're dead 'ho' fuck you, fuck you bitch." Ex. 3. Meneses again reminded Willis of his purported gang affiliations and then threatened to "blow [Prim's] brains out right in front of his momma. . . ." Ex. 3.

Five minutes later, Meneses called Willis again and left another threatening message. Ex 3 (third message).<sup>6</sup> Meneses began this message by calling Willis a "stupid bitch" and Prim a "bitch-ass nigger." Ex. 3. Meneses told Willis to "let [him] be a father to [his] son and [to] quit playing these dumb-ass fucking games." Ex. 3. Meneses then said, "I don't play, I'll fucking kill for real you know I'm saying, look at my mother-fucking profile." Ex. 3.

Two minutes later, at 1:02 a.m., Meneses called Willis again. Ex. 3 (fourth message).<sup>7</sup> In this relatively short message, Meneses told Willis, "do I got to come and snatch your ass up bitch, you know, right in front of your little baby, fucking smack the shit out you bitch, hey, here I come." Ex. 3.

Later that same day, at 5:17 p.m., Meneses left Willis another message. Ex. 3 (fifth message).<sup>8</sup> In this message, Meneses again referred

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<sup>6</sup> Count IV (felony Telephone Harassment) is based on this message. CP 31; 3RP 11.

<sup>7</sup> Count V (gross misdemeanor Telephone Harassment) is based on this message. CP 32; 3RP 12.

<sup>8</sup> Count VI (gross misdemeanor Telephone Harassment) is based on this message. CP 32; 3RP 12.

to Willis' baby as a "piece of shit" and said that the baby would "grow up and be a piece of shit just like his dad." Ex. 3. Meneses then told Willis, "[s]o don't play fucking . . . hard ball with me I just wanna see my son, my seed, simple as that, . . . this is the last time I'm gonna tell you I wanna see my son this weekend before I take matters into my own hands." Ex. 3.

A few days later, on May 10, 2007, Meneses left several more telephone messages for Willis. Ex. 3. At 1:32 p.m., Meneses left a message calling Willis a "stupid fat black bitch" and demanded to see his son. Ex. 3 (sixth message).<sup>9</sup> Meneses mentioned the "Filipino Mafia," called Prim her "pathetic black nigger boyfriend," and said that Prim was a "dead man." Ex. 3. Meneses then yelled:

[g]o ahead call the police bitch, see what happens you stupid fucking fat black whore, . . . this is fucking international bitch, you know what bitch, if you want to call police you're fucking, we got fucking Filipino gangstas coming from the Philipines to kill your fucking boyfriend who's the father of your piece of shit nigger child right now bitch, okay, that's my son in your house bitch, you want fucking gangstas at your house bitch, do something you stupid fucking whore.

Ex. 3.

Meneses left another message at 1:43 p.m. Ex. 3 (eighth message).<sup>10</sup> In this message, Meneses again referenced his alleged gang

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<sup>9</sup> Count VII (Intimidating a Witness) is based on this message. CP 32-33; 3RP 12-13.

<sup>10</sup> Count IX (gross misdemeanor Telephone Harassment) is based on this message. CP 33; 3RP 13.

affiliations and reminded Willis that he knew where she worked. Ex. 3. Meneses told Willis that he had her surrounded at work and was going to have his gang friends "snatch [her] up and put her in check" for not letting him see his son. Ex. 3. Meneses then threatened to solve their visitation problem "street style" if Willis did not let him see his son, and would "go so far [as to] . . . take [Willis'] fucking family." Ex. 3.

Meneses called Willis back seven minutes later and said, "[h]ey bitch let me ask you a question? Where the fuck you gonna go, huh, bitch, where the fuck you gonna go huh? Look outside you dumb fucking whore." Ex. 3 (ninth message).<sup>11</sup>

Later that night, at 9:35 p.m., Meneses left another threatening message for Willis. Ex. 3 (seventh message).<sup>12</sup> Meneses again repeatedly called Willis a "stupid black nigger," mentioned his gang ties, and said that he would "slit her baby." Ex. 3. Meneses ended the message yelling, "Call me right now bitch, I'll come over and kill everybody." Ex. 3.

On May 18, 2007, at 10:30 p.m., Meneses left the following message for Willis:

Listen up, bitch, you made the biggest fucking mistake in your life. You think I give a fuck bitch. I'm gonna come and kill you and your fucking baby and your, and your

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<sup>11</sup> There were no specific charges based on this particular message, but it was admitted and played along with the other messages. Ex. 3; 3RP 7-14.

<sup>12</sup> Count VIII (felony Telephone Harassment) is based on this message. CP 33; 3RP 13.

baby daddy, bitch . . . I have a gun 'ho,' I'm gonna kill you  
bitch.

Ex. 3 (tenth message).<sup>13</sup>

Willis saved all ten messages but did not call the police right away because she did not want to further escalate the conflict with Meneses. 4RP 23, 44-45. Willis also feared that Meneses would retaliate if she reported him to the police. 4RP 44-45. During the early morning hours on May 19, 2007, however, Willis and Prim called the police after someone severely damaged their vehicles. 4RP 75-78. During that investigation, Willis reported Meneses' threatening phone calls. 4RP 12, 23-24.

At trial, Willis testified that she felt threatened by Meneses' messages and that she has seen Meneses with a gun in the past. 4RP 31, 40-43. Prim also testified that, although he initially did not take Meneses seriously given the nature of their ongoing conflict, he came to regard the threats as serious over time. 4RP 53-56, 64-67.

Meneses did not testify at trial, but argued lack of specific intent to threaten or harass Willis and lack of evidence to prove that his threats were "true threats." 4RP 96-97; 5RP 42-46. The jury rejected Meneses' theory and found him guilty on all counts as outlined above. CP 117-28.

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<sup>13</sup> Count X (felony Telephone Harassment) is based on this message. CP 34; 3RP 13-14.

**C. ARGUMENT**

**1. THE "TO CONVICT" INSTRUCTIONS  
CORRECTLY STATE THE LAW AND DID NOT  
RELIEVE THE STATE OF ITS BURDEN OF  
PROOF.**

Meneses contends that his convictions must be reversed because of faulty jury instructions. Meneses specifically argues (1) that the Telephone Harassment convictions must be reversed because the instructions incorrectly state the intent element, and (2) that all of his convictions must be reversed because the "to convict" instructions fail to include a "true threat" element. These arguments should be rejected. First, Meneses invited any error by proposing instructions virtually identical to the ones he now challenges on appeal. Second, the instructions given properly instructed the jury on the intent element of Telephone Harassment. Third, the definition of a "true threat" is not an element of any of the charged crimes, and thus need not be included in the "to convict" instructions. Finally, any error in the "to convict" instructions was harmless beyond a reasonable doubt.

**a. Relevant Facts.**

The court gave the following "to convict" instruction for the Intimidating a Witness charges:

To convict the defendant of the crime of intimidating a witness, . . . each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about [date specific to count] the defendant by use of a threat against a current or prospective witness attempted to induce the person not to report the information relevant to a criminal investigation or induce that person not to have the crime prosecuted and
- (2) That the acts occurred in the State of Washington.

CP 89-90.

The Court gave the following "to convict" instruction for the felony Telephone Harassment charge in count I:

To convict the defendant of the crime of Telephone Harassment as charged in count I each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 4<sup>th</sup> 2007 the defendant placed a telephone call to Jamila Willis;
- (2) *That the telephone call was made with the intent to harass or intimidate Jamila Willis;*
- (3) That the defendant threatened to kill Jamila Willis and
- (4) That the acts occurred in the State of Washington.

CP 74 (emphasis added). The court gave nearly identical instructions for the remaining Telephone Harassment counts.<sup>14</sup> CP 75-81.

The court also gave Meneses' proposed instructions for the lesser included charge of gross misdemeanor Telephone Harassment in counts I, IV, VIII, and X. CP 83-86. Those instructions were nearly identical for each count and read as follows:

To convict the defendant of the lesser crime of Telephone Harassment . . . each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about [date specific to count] the defendant placed a call to Jamila Willis;
- (2) *That the telephone call was made with the intent to harass or intimidate Jamila Willis;*
- (3) That during the telephone call the defendant threatened to inflict injury on the person of Jamila Willis;
- (4) That the acts occurred in the State of Washington.

CP 83-86, 98-101 (emphasis added).<sup>15</sup> Meneses also proposed the following additional instruction:

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

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<sup>14</sup> Although the "to convict" instructions for the remaining counts differed with respect to the date of offense and/or the type of threat made, the second element in all of the instructions was identical to that given in this instruction. CP 75-81.

<sup>15</sup> Meneses' proposed instructions omitted the third "threat" element. CP 98-101. The Court caught the error during closing argument, corrected the instructions, and notified the jury of the change. CP 83-86; 5RP 18-21.

that the telephone call must be initiated with the intent to harass, intimidate, torment, or embarrass another person.

A "true threat" is a statement made in the context or under such circumstances wherein a reasonable person in the listener's position would foresee that the statement would be interpreted as a serious expression of an intention to inflict bodily harm upon or to take the life of another individual, and there must be 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.

CP 111.

The court rejected that instruction but gave the following related instructions:

No. 7

A person commits the crime of Telephone Harassment when he or she, with intent to harass or intimidate any other person, makes a telephone call to such other person threatening to inflict injury on the person called or any member of the family or household of the person called.

A person also commits the crime of Telephone Harassment when he or she, with the intent to harass or intimidate any other person, makes the telephone call to such other person threatening to kill that person or any other person.

*To be a threat, a statement must occur in a context or under such circumstances where a reasonable person would foresee that the statement would be intended as a serious express of intention to carry out the threat.*

No. 8

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.*

CP 71-72 (emphasis added).

Meneses did not object to any of the "to convict" instructions, nor did he propose any "to convict" instructions that included the definition of "true threat" as an element. CP 95-111; 4RP 99-103; 5RP 3-5.

**b. Meneses Invited Any Error In The Telephone Harassment "To Convict" Instructions.**

Meneses challenges the Telephone Harassment "to convict" instructions for failing to specify that the State must prove that he had the intent to harass Willis when he initiated the calls. Meneses further challenges all of the "to convict" instructions for failing to include an element defining "true threat." The Court should reject all challenges to the Telephone Harassment instructions because Meneses invited any error in those instructions.

The doctrine of invited error precludes a party from requesting a jury instruction at trial and then seeking reversal on appeal based on a claim of error in the requested instruction. State v. Henderson, 114 Wn.2d 867, 868-71, 792 P.2d 514 (1990). In other words, "[a] party cannot request an instruction and later complain on appeal that the instruction should not have been given." Id. at 870 (quoting State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)). This doctrine applies even when the alleged error implicates constitutional rights. Id. at 871.

In this case, Meneses proposed several "to convict" instructions for the lesser included Telephone Harassment charges that were either given by the court (instructions 19-22) or were nearly identical to those that were given by the court (instructions 10-17). CP 74-81, 83-86, 98-101. Although Meneses himself did not propose instructions 10-17, the intent element in those instructions, the element at issue in this appeal, is identical to the intent element in Meneses' proposed instructions. CP 74-81, 83-86, 98-101. In addition, none of Meneses' proposed "to convict" instructions contain a separate "true threats" element. CP 83-86, 98-101. Under these circumstances, the invited error doctrine precludes Meneses from challenging the Telephone Harassment "to convict" instructions for either failing to specify the intent element or failing to

include an element defining "true threat."<sup>16</sup> City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002) (invited error doctrine precludes review of missing elements in "to convict" instructions when the defendant is the one who proposed the instruction); State v. Ahlquist, 67 Wn. App. 442, 447-48, 837 P.2d 628 (1992) (defendant may not complain on appeal of a "to convict" instruction that was virtually identical to defendant's proposed instruction), *abrogated on other grounds*, State v. Hammond, 121 Wn.2d 787, 854 P.2d 637 (1993).

Moreover, the fact that Meneses proposed a separate instruction stating that the "telephone call must be initiated with the intent to harass, intimidate, torment, or embarrass" does not save the challenge on appeal. For example, in State v. Studd, 137 Wn.2d 533, 545, 973 P.2d 1049 (1999), a consolidated case, all six defendants proposed an erroneous self-defense instruction. Some of the defendants also proposed an instruction that either clarified or remedied the error. Id. at 542-44. On appeal, the court held that the defendants who proposed the erroneous instruction without attempting to include a clarifying instruction invited the error and were not entitled to appellate review. Id. at 546-47. In a footnote, the court also recognized, however, that the invited error

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<sup>16</sup> Because Meneses did not propose any "to convict" instructions for the Intimidating a Witness charges, the State is not arguing that the invited error doctrine precludes review of the "to convict" instructions for those counts.

doctrine would not apply to a defendant who proposed a clarifying instruction that was denied by the court. Id. at 548 n.4.

In this case, although Meneses offered a separate instruction including language on the intent element, that instruction does little more than rephrase the language contained in the "to convict" instruction given by the court. CP 111. Meneses' proposed instruction can hardly be deemed remedial under these circumstances. Accordingly, the exception noted in Studd does not apply in this case.

In sum, because Meneses invited any error in the Telephone Harassment "to convict" instructions, he cannot challenge them on appeal.

**c. The Telephone Harassment "To Convict" Instructions Correctly State The Intent Element.**

Even if Meneses is permitted to challenge the "to convict" instructions that he proposed, his argument still fails because the instructions correctly state the law. "Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied." State v. O'Donnell, 142 Wn. App. 314, 321, 174 P.3d 1205 (2007) (quoting Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995)). On appeal, this Court reviews alleged errors of law in jury instructions de novo. Id.

The court must instruct the jury on all essential elements of the crime charged. Id. at 322 (citing State v. Van Tuyl, 132 Wn. App. 750, 758, 133 P.2d 955 (2006) (citing U.S. CONST. amend. VI; Const. art. I, § 22)). "A jury instruction which omits an essential element of a crime relieves the State of its burden of proving each element of the crime charged beyond a reasonable doubt and is a violation of due process." Id. (citing State v. Davis, 27 Wn. App. 498, 506, 618 P.2d 1034 (1980), *disapproved of on other grounds*, State v. Riker, 123 Wn.2d 351, 869 P.2d 43 (1994)).

To prove Telephone Harassment, the State must prove beyond a reasonable doubt that Meneses made a telephone call to Willis with the intent to harass or intimidate her and either threatened to kill Willis or a member of her family or household (for the felonies), or threatened to inflict injury on the person of Willis or a member of her family or household (for the gross misdemeanors). RCW 9.61.230(1)(c), (2)(b), (3); CP 30-34, 74-81. With respect to the intent element, the State must prove that Meneses formed the specific intent to harass when he initiated the calls to Willis. State v. Lilyblad, 163 Wn.2d 1, 4, 177 P.3d 686 (2008). Here, the "to convict" instructions satisfy this requirement.

In Lilyblad, the defendant was charged with felony Telephone Harassment for threatening to kill her son's paternal grandmother during

an argument over the telephone. Lilyblad, 163 Wn.2d at 4. In that case, the court gave the following "to convict" instruction:

To convict the defendant of the crime of Telephone Harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 24, 2004, the defendant made a telephone call to Lori[e] Haley;
- (2) That the defendant threatened to kill Lori[e] Haley;
- (3) That the defendant acted with the intent to harass or intimidate Lori[e] Haley; and
- (4) That the acts occurred in the State of Washington.

Id. at 5. The trial court also instructed the jury that "'[m]ake a telephone call' refers to the entire call rather than the initiation of the call." Id.

The defendant appealed, challenging the court's failure to properly instruct the jury that the specific intent to harass must be formed when the call is initiated. Id. Division Two of this Court found the statute ambiguous, adopted the defendant's interpretation of the statute under the rule of lenity, and reversed the conviction. Id. The State appealed and the Supreme Court affirmed, but not for the same reasons as those relied upon by the Court of Appeals. Id. at 8-13.

In its decision, the Supreme Court rejected Division Two's interpretation of the Telephone Harassment statute as ambiguous and

found that the statutory language clearly requires the State to prove that the defendant formed the intent to harass the victim when the defendant initiated the call. Id. at 8-9, 12. Because the instructions in that case stated otherwise, the Court reversed the conviction. Id. at 13.

In this case, the instructions comport with the holding in Lilyblad and correctly state the intent element of Telephone Harassment. Unlike the "to convict" instructions in Lilyblad, the instructions here explicitly instructed the jury that the State must prove that the telephone calls were "made with the intent to harass or intimidate Jamila Willis." CP 74-81, 83-86. These instructions track the very same language in the Telephone Harassment statute that the Lilyblad court found to be unambiguous and subject to only one reasonable interpretation, that the specific intent to harass must be formed when the defendant initiates the call. In addition, unlike in Lilyblad, the court here did not give any additional instructions relieving the State of its burden to prove that Meneses formed the intent when he initiated the calls to Willis.

Moreover, because the court properly instructed the jury on the intent element in the "to convict" instructions, the court was not required to further instruct the jury on this element elsewhere in the instructions. State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988) (stating that requested instruction need not be given if the subject matter is sufficiently covered

elsewhere in instructions). Although the portion of Meneses' proposed instruction specifying that intent must be formed at the initiation of the call is a correct statement of the law under Lilyblad, the court did not err in declining to give that additional instruction because the instructions given adequately apprised the jury of that specific element. Meneses' challenge to the instructions on that basis therefore fails.

**d. "True Threat" Is Not An Element Of Telephone Harassment.**

Meneses argues that the trial court erred in failing to include a "true threat" element in the Telephone Harassment "to convict" instructions. This argument is based upon the incorrect premise that a "true threat" is an element of the crime of Telephone Harassment. This argument was rejected in State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007), and must also be rejected here.

Because the Telephone Harassment statute criminalizes pure speech, it must comport with the requirements of the First Amendment. Id. at 482-83. To avoid unconstitutional infringement on protected speech, statutes criminalizing threatening language must be read as prohibiting only what is termed "true threats." Id. at 482 (citing State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001) (citations omitted)). A "true threat" is "a 'statement made in a context or under such

circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life' of another person." Id. (quoting State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)).

In Tellez, a case involving the same issue raised in this appeal, this Court held that the term "true threat" is a definitional term that delineates the permissible scope of threat statutes for First Amendment purposes. Tellez, at 484. Thus, the term "true threat" defines the "threat" element of Telephone Harassment, but is not itself an element and therefore need not be included in the "to convict" instruction. Id.

Here, Meneses argues that Tellez was wrongly decided and relies upon State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006), to support his argument. This argument is unpersuasive. In Johnston, the defendant was charged with threats to bomb under RCW 9.61.160(1).<sup>17</sup> At trial, Johnston proposed a definition of threat that included "true threat" language. The trial court refused to give the instruction. On appeal, Johnston challenged the court's failure to define "true threat" for the jury. Id. at 358, 364.

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<sup>17</sup> In pertinent part, RCW 9.61.160(1) provides that:

It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy.

Before the Supreme Court, Johnston and the State were in agreement that for First Amendment purposes, the threats to bomb statute must be construed to limit its application to "true threats." Id. at 359, 363. The parties were in further agreement, and the Supreme Court concurred, that the jury instructions "were erroneous because they did not *define* 'true threat.'" Id. at 364, 366 (emphasis added). Because the trial court did not provide the jury with a definition of "true threat," the Supreme Court remanded the case, requiring that the jury be "instructed on the meaning of a true threat." Id.

As the Tellez court correctly recognized, Johnston did not argue, nor did the Supreme Court hold, that "true threat" was an actual element of the crime that must be included in the "to convict" instruction. Tellez, 141 Wn. App. at 483. Rather, the Johnston court reiterated that threat statutes must be limited to proscribing "true threats" and that in defining the word "threat" for the jury, the court must use language that will limit the scope of the conduct prohibited under the statute to "true threats."

In this case, the court gave two separate instructions properly defining the term "true threat." CP 71-72. Because the court provided proper instructions that included all the elements in the Telephone Harassment "to convict" instructions and proper definitional instructions

encompassing the First Amendment concerns expressed in Tellez,  
Meneses' argument fails.<sup>18</sup>

**e. Intimidating A Witness Does Not Require A  
Separate Instruction Defining "True Threat."**

Meneses' argument regarding the absence of a "true threat" element in the Intimidating a Witness "to convict" instructions further fails because that crime does not require an instruction defining "true threat." See State v. King, 135 Wn. App. 662, 669-72, 145 P.3d 1224 (2006), review denied, 161 Wn.2d 1017 (2007). In King, the defendant was convicted of Intimidating a Witness under RCW 9A.72.110(2) for threatening a former witness because of the witness's role in an official proceeding. Id. at 667-68. On appeal, the defendant challenged the court's failure to give an instruction defining "true threat." Id. at 668.

In its decision, the court distinguished the crime of Intimidating a Witness from the crime of Felony Harassment in that, unlike Felony Harassment, which "covers a virtually limitless range of utterances and contexts that might be protected speech, both the speech and context of witness intimidation . . . are limited by the language of the statute." Id. at

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<sup>18</sup> While the defendant has limited his argument to a claim that a "true threat" is an element, the instructions here satisfy the Supreme Court's requirements of due process because the jury was "informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted." State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988).

669-70. Because the provision of the Intimidating a Witness statute at issue in the case prohibits a narrow category of threats (i.e., threats to injure a person who has appeared against another in a legal proceeding), the court found that the statute did not prohibit constitutionally protected speech. Id. at 670. Given that, the State was not required to prove, nor was the Court required to instruct the jury, that the threats must be "true threats." Id. at 671-72.

Although Meneses was charged with violating a different subsection of the Intimidating a Witness statute, the reasoning of King applies nonetheless. RCW 9A.72.110(1)(d), the provision under which Meneses was charged and convicted, prohibits threats designed to induce a current or prospective witness to not report criminal behavior to the police. Like the provision in King, this provision, which prohibits solely threats to witnesses, proscribes a narrow category of inherently threatening speech that is not constitutionally protected. See King, at 670-72. Thus, for the Intimidating a Witness charges, the State was not required to prove that Meneses made "true threats," and thus the failure to include an element to that effect was not error.

However, even if this Court disagrees with the analysis in King and finds that the State must prove "true threats" for the Intimidating a

Witness charges, the court's instructions defining "true threat" sufficiently advised the jury of that requirement. Reversal is therefore not required.

**f. Any Error Was Harmless.**

Even if some or all of the "to convict" instructions were deficient, any error was harmless. "When a to-convict instruction fails to contain all elements essential to the conviction, such an error is harmless only if the reviewing court is 'convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error.'" O'Donnell, 142 Wn. App. at 322-23 (quoting Van Tuyl, 132 Wn. App. at 758) (citation omitted)). Here, the instructions meet this test.

First, the instructions did not mislead the jury as to the State's burden of proof regarding the intent element of Telephone Harassment. The Telephone Harassment "to convict" instructions properly informed the jury that the State had to prove that Meneses made the calls to Willis with the intent to harass or intimidate her, and there were no other instructions expressly allowing the jury to find that the intent could be formed at any point other than the inception of the call. CP 62-92. The prosecutor also made numerous references in closing argument to the fact that the State must prove that Meneses made the call to Willis with the intent to harass or intimidate her. 5RP 11, 16, 24, 26, 44, 48-49; see State v. Williams, 158 Wn.2d 904, 917, 148 P.3d 993 (2006) (failure to include knowledge

element in "to convict" instruction for unlawful firearm possession harmless error in part because defendant argued the missing element in closing). Finally, the evidence as to Meneses' intent was overwhelming given the nature, the number, and the contents of the messages. Meneses initiated each message to Willis with foul and derogatory comments and, in most messages, launched almost immediately into threats to harm or kill Willis or some other member of her family. This is not a case where Meneses made threats at some point in the middle of what began as a consensual, two-party conversation. See e.g., Lilyblad, 163 Wn.2d at 4 (defendant made threats during argument that ensued in the middle of a consensual telephone conversation). Under these circumstances, no reasonable jury could conclude that Meneses initiated the calls to Willis with any intent other than to harass or intimidate her. Thus, it is unlikely that further elaboration on the intent element, either in the "to convict" instructions or elsewhere, would have altered the Telephone Harassment verdicts.

It is equally unlikely that the omission of a "true threat" element in the "to convict" instructions had any impact on the verdicts. As noted above, the jury was properly instructed twice on the definition of a "true threat," once in the instruction defining Telephone Harassment and again in the instruction defining "threat." CP 71-72. Thus, if there was any

question in the "to convict" instruction as to what the State was required to prove, that question was clearly answered by the two definitional instructions. Add to that the fact that both the State and Meneses repeatedly referenced the "true threat" definition in closing argument, and it is quite clear that the jury was adequately instructed on the State's burden to prove "true threats." 5RP 13, 44, 48-49.

Finally, given the nature of the threats in this case (e.g., threats to kill Willis, Prim, and her baby, threats to "smack the shit out of" Willis, threats to steal Willis' baby), and the context in which those threats were made (i.e., repeated phone calls, some in the early morning hours, during an ongoing custody dispute), the jury would have concluded regardless that Meneses' threats were "true threats." Under these circumstances, it is clear beyond a reasonable doubt that the absence of a "true threat" element in the "to convict" instructions did not contribute to the verdicts. Any error was therefore harmless.

**2. THE INSTRUCTION DEFINING "THREAT" PROPERLY STATES THE LAW.**

Meneses argues for reversal of his gross misdemeanor Telephone Harassment convictions in counts II, V, VI, and IX based on an alleged error in the definition of "threat." Meneses specifically argues that the court gave the wrong definition of "threat" for the gross misdemeanor

Telephone Harassment charges, thereby allowing the jury to convict Meneses on conduct broader than what he was charged with. This argument fails. Meneses waived his right to appeal this issue because he failed to object to the instruction below. However, even if not waived, the claim still fails because the jury instruction correctly states the law.

**a. Relevant Facts.**

In counts III, V, VI, and IX, the State charged Meneses with gross misdemeanor Telephone Harassment under RCW 9.61.230(3), alleging that Meneses called Willis with the intent to harass or intimidate her and threatened to inflict *injury on the person of Willis, Prim, and/or Elijah*, and the court instructed the jury accordingly. CP 30-34, 75, 77-78, 80. Pursuant to the statutory definition of "threat" under RCW 9A.04.110(25), the court also gave instruction number 8 quoted above. See discussion supra, Part C, 1(a); CP 72. Although Meneses proposed his own instruction further defining the term "true threat," he did not propose any instructions attempting to clarify the statutory definition of "threat," nor did he object specifically to the statutory language in instruction number 8. CP 15-22, 111-12; 4RP 100-03. Meneses for the first time challenges this definitional instruction on appeal.

**b. Meneses Waived His Right To Appeal The Instruction.**

Courts generally will not review an alleged error that is raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998). Under this narrow exception, the defendant bears the burden of identifying a legitimate constitutional error and must establish that the alleged error actually affected his rights. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 433 (1999). Here, Meneses has not met this burden.

Meneses asserts that he is entitled to appellate review of the "threat" instruction despite his failure to object below because the faulty instruction relieved the State of its burden of proving all elements of the gross misdemeanor Telephone Harassment charges. This argument is incorrect. Indeed, Meneses is entitled to have the jury instructed on the elements that the State must prove. The definition of "threat," however, is not an element of Telephone Harassment, but is instead strictly definitional. State v. Marko, 107 Wn. App. 215, 219-20, 27 P.3d 228 (2001). An error in definitional instructions is not a manifest constitutional error that may be raised for the first time on appeal. Scott, 110 Wn.2d at 689-91 (failure to define the term "knowledge" in burglary

instruction not a manifest constitutional error); Ng, 110 Wn.2d at 44-45 (failure to define "theft" in a robbery instruction not a manifest constitutional error); State v. Pawling, 23 Wn. App. 226, 232-33, 597 P.2d 1367 (1979) (failure to define "assault" in first degree burglary instruction not a manifest constitutional error). Thus, Meneses cannot now challenge the definitional instruction on appeal.

**c. Meneses' Challenge Fails On The Merits Regardless.**

Even if Meneses did not waive his challenge to the "threat" instruction, his argument still fails because the instruction correctly states the law. Meneses argues that the "threat" instruction is defective because it allowed the jury to convict Meneses for conduct broader than what he was charged with. This argument is unpersuasive and is based on an incorrect reading of the Telephone Harassment statute.

As pleaded and proved in this case, the gross misdemeanor Telephone Harassment charges require proof of a threat to inflict injury on the person of Willis or her family members (i.e., Prim or Elijah). CP 30-34, 75, 77-78, 80. Meneses suggests that this language limits the offense to threats to inflict *bodily* injury as opposed to some other kind of personal injury, yet nowhere in the statute can such a limitation be found. The statute and corresponding "to convict" instructions in this case

reference the general term "injury," which encompasses the broader range of conduct included in the statutory definition of "threat."

An "injury" is "an act that damages, harms, or hurts," or, alternatively, a "hurt, damage, or loss sustained." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1164 (1993). Under this definition, the restraint or physical confinement of another is certainly an act that is harmful or hurtful, and thus a threat to restrain or physically confine someone (i.e., "I'll steal your baby") clearly constitutes a threat to inflict "injury" on that person. Similarly, any act that is intended to harm a person's "health, safety, business, financial condition, or personal relationships" is also undoubtedly an act that "damages, harms, or hurts" that person. Thus, a threat to do any one of those things also constitutes a threat to inflict "injury" on that person.

In short, the "threat" instruction correctly stated the law with respect to the gross misdemeanor Telephone Harassment charges and did not relieve the State of its burden of proving each element of that offense. Meneses' argument therefore fails.

**3. THE EVIDENCE IS SUFFICIENT TO PROVE THAT MENESES' THREATS WERE "TRUE THREATS."**

Meneses maintains that the evidence in this case is insufficient to prove that he made "true threats" to Willis. Given the evidence in this case, Meneses' argument is unpersuasive.

Because Meneses' sufficiency of the evidence argument implicates First Amendment concerns, "[i]t is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings." State v. Schaler, \_\_\_ Wn. App. \_\_\_, 186 P.3d 1170 (2008) (quoting Kilburn, 151 Wn.2d at 49). Instead, this Court applies the rule of independent review "under which this court 'must independently review the crucial facts in the record, i.e., those which bear on the constitutional question.'" Id. Review is not entirely de novo, but does require "full review of only those facts in [the] record that relate to the First Amendment question whether certain expression was unprotected." Id. However, the Court must still defer to credibility findings. Id.

As noted above, a "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted. . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Kilburn,

151 Wn.2d at 43. Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Id. at 44. The relevant question is whether a reasonable person in the speaker's position would foresee that in context, the listener would interpret the statement as a serious threat. Id. at 46. Here, Meneses' threats clearly meet this test.

Meneses left a total of ten angry voicemail messages for Willis in which he repeatedly called her sexist and racially derogatory names and threatened to harm and kill Willis and her family, including her newborn child. Ex. 3. Some of those calls were made late at night in quick succession. Ex. 3 (calls 1-4). The messages also came during a time of heightened conflict in Meneses' and Willis' already volatile relationship, and the calls themselves were directly related to that conflict. 4RP 37; Ex. 3. In addition to the repeated threats to harm and/or kill, Meneses also referenced the fact that he was watching Willis and at one point stated that he had a gun, a claim made all the more concerning given that Willis had seen Meneses with a gun in the past. 4RP 31; Ex. 3 (call 2, 8, 10). Willis testified that she took the threats seriously and delayed reporting the threats out of fear of further retaliation by Meneses. 4RP 44-45. On these facts, no reasonable person in Meneses' position could *not* conclude that Willis would interpret the threats as serious threats to harm or kill her and her family.

In addition, to the extent that this Court finds that Intimidating a Witness requires proof of "true threats," see discussion supra Part C, 1(e), the evidence is equally sufficient. Toward the end of the first message (count II), after Meneses threatened to steal Willis' baby, Meneses challenged Willis to press charges against him and "see what happens to [her] ass, see how long [she is] fucking left living." Ex. 3. Meneses then reminded Willis of his alleged gang affiliation and ended the call with, "don't fuck with me, okay . . ." Ex. 3. In the sixth message (count VII), at the end of a long and angry tirade and immediately after he threatened to kill Prim, Meneses told Willis that he would have "Filipino gangsters" kill Prim if she called the police. Ex. 3. Given the context in which these threats were made, there is no question that they are "true threats."

In support of his challenge to the sufficiency of the evidence, Meneses relies upon the fact that he opened the first of ten messages with the line, "you might laugh," and suggests that this undermines the seriousness of the threats that follow. This argument not only ignores the statement that immediately precedes that comment, "Hey check this out nigger," but also ignores the angry, racist rant that immediately follows it. Ex. 3. It also ignores the nine subsequent messages in which Meneses repeatedly threatened the lives of Willis and her family. Ex. 3. Meneses' statements within the messages cannot be considered in a vacuum,

independent of and apart from the other messages. Here, Meneses' messages, either individually or as a whole, are sufficient to prove that the threats he made are "true threats." No reasonable person in Meneses' position could conclude otherwise.

Finally, Meneses argues that Prim's vacillating fear levels further proves that his threats were not "true threats." This argument is also unpersuasive and overlooks the fact that Willis, not Prim, was the person threatened. Although Meneses made threats to harm and kill Prim in the messages, the threats were made with the intent to harass Willis, not Prim. Thus, the appropriate inquiry is whether a reasonable person in Meneses' position would foresee that Willis, not Prim, would interpret his statements as serious threats. Prim's state of mind is therefore irrelevant.

In sum, an independent review of the record clearly supports a finding that Meneses made "true threats." This Court should therefore affirm all of Meneses' convictions.

**4. THE EVIDENCE SUFFICIENTLY ESTABLISHES THAT MENESES MADE THE CALLS TO WILLIS WITH THE INTENT TO HARASS OR INTIMIDATE HER.**

Meneses challenges the sufficiency of the evidence for the Telephone Harassment convictions, arguing specifically that the evidence fails to show that he initiated the calls to Willis with the intent to harass or

intimidate her. Given the overwhelming evidence of intent in the record, this argument also fails.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. State v. Hendrickson, 129 Wn.2d 61, 81, 917 P.2d 563 (1996).

The elements of a crime may be established by either direct or circumstantial evidence, one type being no more valuable than the other. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Therefore, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id.

Additionally, issues concerning conflicting testimony and credibility determinations are for the finder of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus, the appellate court must defer "to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citation omitted).

As previously discussed, the evidence of intent in this case is overwhelming. See discussion supra, Part C, 1(f). Given the nature and the context of the messages, there is no question that Meneses initiated each call with the intent to harass or intimidate Willis. Meneses' argument that he called Willis simply to communicate his desire to see his son is an understatement. Again, Meneses asks this Court to assess his statements in a vacuum, separate and apart from the rest of the messages and completely outside of the context in which they were made. Here, there is no dispute that Meneses was angry with Willis over the visitation issue. Meneses obviously blamed Willis for the dispute and was intent on letting her know that he would harm her and her family if she continued to prevent visitation with his son. In this context, when viewing the evidence in the light most favorable to the State, there is no question that Meneses initiated each one of the calls to Willis with the intent to harass or intimidate her. This Court should therefore affirm the Telephone Harassment convictions.

**5. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON THE LESSER CHARGES OF WITNESS TAMPERING AND ATTEMPTED INTIMIDATING A WITNESS.**

Meneses argues that his Intimidating a Witness convictions must be reversed because the trial court failed to instruct the jury on the lesser

included offenses of Witness Tampering and Attempted Intimidating a Witness. This argument fails because Meneses was not entitled to instructions on either of these offenses.

**a. Relevant Facts.**

The State charged Meneses with two counts of Intimidating a Witness under RCW 9A.72.110(1)(d) for knowingly attempting to induce Willis, a current or prospective witness, by use of a threat, not to report information relevant to a criminal investigation, and the jury was so instructed. CP 30-34, 89-90. Meneses asked the court to instruct the jury on lesser included offenses of Witness Tampering and Attempted Intimidating a Witness. CP 103-05; 4RP 99-100.<sup>19</sup> Although the court found that the proposed lesser included offenses were legally valid, the court rejected Meneses' request on the grounds that there was no factual basis for the lesser offenses. 4RP 100; 5RP 4.

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<sup>19</sup> As to the Witness Tampering charge, Meneses sought specifically to instruct the jury on RCW 9A.72.120(1)(c), which states in relevant part:

A person is guilty of tampering with a witness if he or she attempts to induce . . . a person whom he or she has reason to believe may have information relevant to a criminal investigation . . . to

(c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation . . .

RCW 9A.72.120(1)(c).

**b. The Evidence Does Not Support Meneses' Proposed Lesser Included Instructions.**

The court must instruct the jury on a lesser included offense when the following two conditions are satisfied: (1) each element of the lesser offense is a necessary element of the charged offense; and (2) the evidence supports an inference that the lesser crime was committed instead of the charged crime. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Allen, 127 Wn. App. 945, 950, 113 P.3d 523 (2005).

In this case, the State agrees that each element of the proposed Witness Tampering charge (RCW 9A.72.120(1)(c)) is a necessary element of Intimidating a Witness as charged in this particular case. The State also agrees that Attempted Intimidating a Witness is a lesser offense of Intimidating a Witness. RCW 10.61.010. Thus, the only issue is whether the facts support the giving of the lesser included instructions. In this case, the court correctly found that they did not.

As to the Witness Tampering charge, no jury taking the evidence in the light most favorable to Meneses could find that he committed Witness Tampering instead of Intimidating a Witness. Stated in alternative terms, no jury could find that Meneses attempted to induce Willis to not call the police without the use of threats. In the first call, Meneses said, "bitch you wanna fucking press charges bitch, . . . press

mother fucking charges bitch and see what happens to your ass, see how long your fucking left living." Ex. 3. Later in the sixth message, Meneses told Willis that his "Filipino gangsta" friends would "kill [her] fucking boyfriend" if she went to the police. Ex. 3.

On these facts, it was the threats themselves by which Meneses attempted to induce Willis not to call the police. There is no reasonable basis on which the jury could find that Meneses tried to persuade Willis to refrain from calling the police if the jury did not find that Meneses also threatened Willis in the process. If, as Meneses argues, the jury believed he was simply joking or exaggerating in the messages, then it could not have found that he was guilty of Witness Tampering. Under no reasonable reading of the facts would it be possible for Meneses to have only committed the crime of Witness Tampering. Thus, the court properly rejected that lesser included instruction.

Similarly, the facts also do not support a finding that Meneses committed Attempted Intimidating a Witness instead of the completed crime. Again, the evidence in this case shows that Meneses called Willis multiple times and left angry messages in which he repeatedly stated that he was going to kill her and her family. Ex. 3. In two of those calls, Meneses also threatened to harm or kill Willis and Prim if Willis called the police. Ex. 3. By leaving these messages, Meneses completed the act

of attempting to induce Willis to refrain from calling the police. No reasonable jury considering this evidence in the light most favorable to Meneses could conclude that he only took a substantial step towards that act. Again, if the jury believed that Meneses was joking in his attempt to induce Willis not to call the police, then it could not have found that he took a substantial step towards the commission of that act. Thus, the jury could not have found that Meneses only committed the lesser crime of Attempted Intimidating a Witness. The court therefore properly declined that lesser included instruction as well.

**6. MENESES' CONVICTIONS FOR INTIMIDATING A WITNESS AND TELEPHONE HARASSMENT DO NOT VIOLATE DOUBLE JEOPARDY.**

Meneses argues that double jeopardy prohibits separate punishments for his Intimidating a Witness (count II) and gross misdemeanor Telephone Harassment (count III) convictions. Meneses also argues that the double jeopardy violation requires vacation of his Intimidating a Witness conviction. Both arguments are incorrect. First, there is no double jeopardy violation because the statutes under which Meneses was convicted fail the "same evidence" double jeopardy test and do not otherwise indicate a legislative intent to be punished as one offense. Second, the proper remedy for any violation is vacation of the gross misdemeanor Telephone Harassment conviction.

Without question, subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In many cases, a defendant's conduct, even a single act, may violate more than one criminal statute. Without question, a defendant can permissibly receive multiple punishments for a single criminal act that violates more than one criminal statute. Id. at 858-60 (finding no double jeopardy violation where a single act of intercourse violated the rape statute and incest statute). Double jeopardy is only implicated when the court exceeds the authority granted by the legislature and imposes multiple punishments where multiple punishments are not authorized. Id. at 776. Therefore, a reviewing court's role "is limited to determining what punishments the legislative branch has authorized," and determining whether the sentencing court has properly complied with this authorization. Id.

In Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the Legislature.<sup>20</sup> The first step is to review the language of the statutes to

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<sup>20</sup> Calle represented an affirmation of the rejection of the factual type analysis that was being conducted by some courts prior to the early 90's. In 1993, the United States Supreme Court specifically overruled the "same conduct" fact based test for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, our State Supreme Court did the same, recognizing that a fact based test had been rejected by the United States Supreme Court and that the State double jeopardy clause does not provide broader protection than its federal counterpart. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995).

determine whether the legislation expressly permits or disallows multiple punishments. Id. at 776. Should this step not result in a definitive answer, the court turns to step two to determine legislative intent, the two-part "same evidence" or "Blockburger" test.<sup>21</sup> This test asks whether the offenses are the same "in law" and "in fact." Id. at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Id. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Id. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Id. at 778-80. This search for "clear evidence" of contrary legislative intent is the third step of a double jeopardy analysis.

Meneses contends that as charged and proved here, his convictions for Intimidating a Witness and gross misdemeanor Telephone Harassment are the same "in law" and "in fact," and thus under the second step of the Calle test, his convictions violate the prohibition against double jeopardy.

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<sup>21</sup> United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

This is incorrect.<sup>22</sup> Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, 125 Wn.2d at 777. In other words, the court must determine "whether each provision *requires* proof of a fact which the other does not." In re Personal Restraint of Orange, 152 Wn.2d 795, 817-18, 100 P.3d 291 (2004) (emphasis added). If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle, 125 Wn.2d at 777.

As charged and proved here, the elements of Intimidating a Witness (count II) are an attempt to induce a current or prospective witness not to report information relevant to a criminal investigation by the use of a threat. RCW 9A.72.110; CP 30-31, 89. As charged and proved here, the elements of gross misdemeanor Telephone Harassment (count III) are making a telephone call to another with the intent to harass or intimidate that person and threatening to inflict injury on the person threatened or any member of his or her family or household. RCW 9.61.230(3); CP 31, 75.

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<sup>22</sup> In regards to step one, the Intimidating a Witness and Telephone Harassment statutes neither expressly allow nor expressly disallow multiple punishments for a single act. See RCW 9.61, RCW 9A.72. Thus the court must turn to the "same evidence" test.

These elements are not the same. To convict Meneses of Intimidating a Witness, the State must prove that, by use of a threat, he attempted to induce Willis, a person with information relevant to his criminal behavior, not to report that behavior to the police. There is no requirement, as there is for the Telephone Harassment charge, that the threat be communicated over the telephone, nor is there any specific intent element. Likewise, Telephone Harassment does not require proof that Willis was a current or prospective witness or person with information relevant to a criminal investigation, nor does it require proof that the threat was made for purposes of inducing Willis not to report a crime. Because each offense contains at least one element that the other does not, the two offenses are not the same "in law" and thus fail the "same evidence" test.

Although the "same evidence" test is not always dispositive of the double jeopardy issue, the application of the test in this case is a strong indicator that the legislature intended separate punishments for these crimes. While such a presumption can be overcome by "clear evidence of contrary intent," Meneses has not presented any argument or authority in

the legislative history of these statutes to overcome this presumption.<sup>23</sup>

Calle, 125 Wn.2d at 780.

Still, Meneses argues that the acts he committed proved both crimes and thus satisfy the "same evidence" test. This argument is misguided. This is merely the factual prong of the "same evidence" test and is an attempt to mesh the two into one indistinguishable test.<sup>24</sup> This is not the law. It is not whether the facts of a given case may have been used to obtain convictions for more than one offense, it is whether one statute "requires proof of a fact which the other does not." In re Orange, 152 Wn.2d at 817-18.

Meneses further relies on Dixon to support his double jeopardy argument. This reliance is also misplaced. Dixon, 509 U.S. 688. In Dixon, a consolidated case, one of the defendants was charged with possession of cocaine based on conduct for which he had previously been

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<sup>23</sup> An examination of the relevant statutes further supports the conclusion that the legislature intended to punish Intimidating a Witness and Telephone Harassment separately. First, the statutes are located in different chapters of the criminal code. See Calle, 125 Wn.2d at 780. Intimidating a Witness is included in RCW 9A.72, Perjury and Interference with Official Proceedings, while Telephone Harassment is included in RCW 9.61, Malicious Mischief -- Injury to Property. Second, the offenses themselves also serve two different purposes. The purpose of the Intimidating a Witness statute is to preserve the State's ability to effectively investigate and prosecute criminal offenses. Laws of 2004, ch. 271. In contrast, the primary purpose of the Telephone Harassment statute is to regulate "the thrusting of an unwanted communication upon one who is unable to ignore it." Lilyblad, 163 Wn.2d at 12.

<sup>24</sup> It also seems to be an attempt to revert back to the "same conduct" test previously rejected by both the United States Supreme Court and the Washington State Supreme Court. See Dixon, 509 U.S. at 704; Gocken, 127 Wn.2d 95.

held in criminal contempt of court. Id. at 691-92. Applying the "same evidence" test to the two offenses, the Court found that the later possession of cocaine charge violated double jeopardy because that charge was based on the same underlying felony for the criminal contempt charge and was therefore a "species of [a] lesser-included offense" of the criminal contempt charge. Id. at 698. The Court found a double jeopardy violation because the "drug offense did not include any element not contained in his previous contempt offense." Id. at 700.

Dixon is distinguishable from this case for the reasons already noted above. Here, unlike in Dixon, both Intimidating a Witness and Telephone Harassment each include elements not contained in the other offense. Meneses therefore violated two separate statutes that fail the "same evidence" test, and the court properly imposed punishment for each offense. There is no double jeopardy violation.

Finally, even if there is a violation, the proper remedy is vacation of the gross misdemeanor Telephone Harassment conviction. Meneses argues that the double jeopardy violation requires vacation of the Intimidating a Witness charge rather than the Telephone Harassment charge. This is incorrect. The proper remedy for a double jeopardy violation is vacation of the "lesser conviction." State v. Jones, 117 Wn. App. 721, 727 n.11, 72 P.3d 1110 (2003) (citations omitted). Since

Intimidating a Witness is a class B felony and Telephone Harassment in count III is a gross misdemeanor, the proper remedy for any double jeopardy violation is vacation of the Telephone Harassment conviction. RCW 9.61.230(3); RCW 9A.72.110(4); Jones, 117 Wn. App. at 727 n.11.

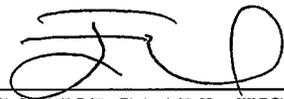
**D. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm all of Meneses' convictions.

DATED this 29 day of August, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
ERIN S. NORGAARD, WSBA #32789  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elizabeth Albertson, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ANDRE MENESES, Cause No. 61118-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name  
Done in Seattle, Washington

8/29/08

Date

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