IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT TROY GATES, Appellant.	No. 38759-0-II Consolidated with: No. 38762-0-II UNPUBLISHED OPINION

Bridgewater, J. — Robert Troy Gates appeals his convictions of first degree trafficking in stolen property, witness tampering, and intimidating a witness. We affirm.

FACTS

On April 20, 2008, three males broke into Garfield Elementary School in Olympia, Washington, and stole several iMac desktop and laptop computers.[1]

On April 23, Robert Badillo, Gates's acquaintance, tried to move a vehicle for Gates. When Badillo could not start the car, Gates instructed him to move the "merchandise out of the back of the trunk." I RP at 43. Badillo moved three boxes of computers back to his apartment. Gates met Badillo at Badillo's apartment, inspected the boxes, and then left for some time. Gates returned "devastated," telling Badillo that the computers had been stolen, "that some kids had

[1] The burglars stole other items not relevant to this appeal.

snitched them off already," and that Gates did not know where to put the computers. I RP at 45.

The next day, Badillo contacted law enforcement and told them that he did not want to get in trouble, but that he had in his possession items he believed were from the Garfield Elementary School burglary. Law enforcement recovered four iMac desktop computers, five keyboards, four computer mouse devices, and a laptop. The lead investigating officer verified that the computers Badillo turned over to police were from the school burglary. While some of the items had serial numbers, one of the burglars had removed the stickers identifying the equipment as belonging to Garfield Elementary School.

In May, the State charged Gates with first degree trafficking in stolen property. In August, just after Badillo received a subpoena to testify, Gates sent him several text messages. Gates's text messages said, in order,

> [1] . . . "Please call."
>
> . . . .
>
> [2] . . . "Answer you[r] phone. Come with me, man. Please, I got you out of jail. Please come read all this. There [sic] not enough time to read this." Underscore Rob underscore.
>
> . . . .
>
> [3] . . . "You are so messed up. What you get money for that you greedy ass. Take 500 bucks for a friendship. That's so wrong. Why you even say you would then change the report. You knew"
>
> . . . .
>
> [4] "I hope you go to hell. I always help you and you do me like that even after you cry to me and you knew I was going through a hard time with family. Karma will get you." . . . .
>
> . . .
>
> [5] "You are a punk. I hope you die. You are a bitch. After everything I did for you then you ask for help again. You are a bitch. I hope you die in pain bitch. Don't ever show your face to me A." . . .
>
> . . . .
>
> [6] "You know I'm really sick and can't do nothing. Why you got to be a

> snitch? Tell about why. You get paid? You ruined my life and maybe took my." . . .
>
> . . . .
>
> [7] "Why? I thought we was [sic] really good friends. I always helped you. Talk about your marriage problems. Why you do that? If I go to jail, I'm going to kill myself or try. I."
>
> . . . .
>
> [8] "You hurt my feeling [sic] badly. You are killing me. You turn those in and made me move and not see my doctor. I seen him three times since you did it to me." Underscore Rob underscore.

I RP at 62-64. Badillo informed law enforcement, and the State filed additional charges of witness tampering and intimidating a witness.

At trial, Tyson Embry, one of the men who pleaded guilty to crimes associated with the burglary, initially testified that he did not know Gates and that he had never had contact with Gates. During a break, Embry conferred with counsel and then changed his testimony. He stated that he sold the computers to Gates for $1,000. Embry sold the computers to Gates without any packaging or boxes. But he never told Gates the computers were stolen.

Badillo testified that the computers he picked up were boxed up and taped as if new from the store. When Gates's trial counsel asked if Gates told Badillo to hold onto the boxes until Gates "figured out what was going on," Badillo responded, "No. It was stolen property. He knew it was stolen property." I RP at 55. But in Badillo's original statement to law enforcement, he stated that Gates told Badillo the merchandise was stolen after he returned to Badillo's apartment.

The State admitted as exhibits pictures of the text messages Gates sent to Badillo. Badillo summarized the text messages generally as threatening his life, calling Badillo a "punk," and

telling Badillo that he was "going to die." I RP at 54. Badillo believed Gates sent the text messages because Badillo was providing information to the court. Badillo stated that the text messages he received from Gates were frightening.

Ron Morsette, the educational technology director for the Olympia School District, testified that the items Gates possessed were valued at about $4,000 to $5,000.

Gates did not propose any jury instructions nor object to the trial court's instructions. The jury found Gates guilty on all three counts.

ANALYSIS

I. Sufficient Evidence

We review claims of insufficient evidence under the familiar test outlined in *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980), determining whether substantial evidence supports the jury's findings and deferring to the jury on matters of witness credibility and weight of the evidence.

A. First Degree Trafficking in Stolen Property

Gates argues that insufficient evidence supports his conviction for trafficking in stolen property because he did not know the computers were stolen until after he transferred them to Badillo. We disagree.

A person is guilty of first degree trafficking in stolen property if he or she knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property. RCW 9A.82.050(1). "'Traffic'" means

to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person. Former RCW 9A.82.010(19) (2006). A person acts knowingly when he or she is aware of facts, circumstances, or results described by a statute defining an offense, or he or she has information that would lead a reasonable person in the same situation to believe that facts exist which are described by a statute defining an offense. RCW 9A.08.010(1)(b).

Here, Gates was aware of facts that a reasonable person in the same situation would believe constituted trafficking in stolen property. Gates purchased four iMac desktop computers, five keyboards, four computer mouse devices, and one laptop computer for $1,000, a small fraction of their $4,000 to $5,000 value. In addition, the computers were loose, not in boxes. By the time Gates had Badillo pick up the computers, he had boxed them up as if they were new. While Embry testified that he never told Gates the computers were stolen, a reasonable person would suspect that high-end computer equipment sold in a parking lot for a fraction of its value was stolen. Gates had knowledge of these facts when he transferred the computers to Badillo. Sufficient evidence supports Gates's conviction for first degree trafficking in stolen property.

B. Intimidating a Witness

Gates next contends that insufficient evidence supports his conviction for intimidating a witness because his text messages to Badillo were not true threats because he threatened to harm only himself, and not Badillo.

A person is guilty of intimidating a witness, as the State charged Gates, if by use of a threat against a current or prospective witness, he or she attempts to influence the testimony of that person. RCW 9A.72.110(1)(a). As the trial court instructed the jury:

> 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 do any other act that is intended to harm substantially the person threatened *or another* with respect to that person's health, safety, business, financial condition, or personal relationships.

CP at 42 (emphasis added); *see also* RCW 9A.04.110(27)(a), (j).

We must interpret a statute that criminalizes pure speech with the commands of the First Amendment in mind. *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004). Threats are a form of pure speech. *State v. Tellez*, 141 Wn. App. 479, 482, 170 P.3d 75 (2007). This means that the speech criminalized must be unprotected speech, such as a true threat. *Kilburn*, 151 Wn.2d at 43. 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 intent to inflict bodily harm on or to take the life of another person. *Kilburn*, 151 Wn.2d at 43. A true threat is a serious threat, not one said in jest, idle talk, or political argument. *Kilburn*, 151 Wn.2d at 43.

Whether a true threat has been made is determined under an objective standard that focuses on the speaker. *Kilburn*, 151 Wn.2d at 44. Whether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant's place would foresee that, in context, the listener would interpret the

statement as a threat or a joke. *Kilburn*, 151 Wn.2d at 46.

Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. *State v. Johnston*, 156 Wn.2d 355, 365, 127 P.3d 707 (2006). As explained in *Kilburn*, however, a rule of independent appellate review applies in First Amendment speech cases. An appellate court must make an independent examination of the whole record, so as to assure itself that the judgment does not constitute a forbidden intrusion on the field of free expression. *Kilburn*, 151 Wn.2d at 50. The appellate court is required to independently review only crucial facts—those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts. *Kilburn*, 151 Wn.2d at 50-51. Thus, whether a statement constitutes a true threat is a matter subject to independent review. *Johnston*, 156 Wn.2d at 365. But the rule of independent appellate review does not extend to factual determinations such as findings on credibility. *Johnston*, 156 Wn.2d at 365-66.

As the definition of true threat indicates, a true threat can include a stated intent to harm another person or personal relationships. RCW 9A.04.110(27)(a), (j). Here, Gates threatened to kill himself if he went to jail. By threatening to harm himself if Badillo testified, Gates threatened to harm or kill another person. RCW 9A.04.110(27)(a), (j); *Kilburn*, 151 Wn.2d at 43. Gates also stated an intent to harm his and Badillo's personal relationship. RCW 9A.04.110(27)(j). He told Badillo to never again show his face to Gates and that they had been really good friends, indicating they no longer were. Gates sent these text messages only after Badillo received his subpoena to testify. A reasonable juror could infer that Gates made this statement to influence

Badillo's testimony and that Gates was not joking. Gates's statements constituted true threats. An independent review shows that Gates's statements were true threats.

Gates argues that his case is similar to *State v. Brown*, 137 Wn. App. 587, 591-92, 154 P.3d 302 (2007), where we held that a statement of past intent to harm a judge was not a true threat. We held that an opposite finding would wrongly criminalize past thoughts. *Brown*, 137 Wn. App. at 592. But Gates never stated a prior intent to harm. His text messages indicated a future intent that falls outside of *Brown*.

Gates also argues that insufficient evidence supports his conviction for intimidating a witness because the text messages do not mention testimony, court proceedings, or trial. RCW 9A.72.110 does not require hyper technical threats, as Gates urges. In considering charges of intimidating a witness, jurors must ascertain the inferential meaning of statements alleged to be threats, because the literal meaning of words is not necessarily the intended communication. *State v. Gill*, 103 Wn. App. 435, 445, 13 P.3d 646 (2000).

Gates did not send the text messages until after the State charged him with first degree trafficking in stolen property and after Badillo was subpoenaed to testify against Gates. Gates never used the words "testify" or "testimony," but his implication is clear. He was upset that Badillo intended to testify against him.

Gates erroneously relies on *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007). Brown told a woman that "she would 'pay' if she spoke to the police," and she believed this was a credible threat against her personal safety. *Brown*, 162 Wn.2d at 426. The court reversed

Brown's conviction for intimidating a witness because Brown attempted to prevent the woman from providing any information to the police, not influence testimony. *Brown*, 162 Wn.2d at 430. The threat in *Brown* was a specific threat that could not have been construed as including trial or testimony. Here, Gates's threats can be construed as attempting to influence Badillo's testimony.

Sufficient evidence supports Gates's conviction for intimidating a witness.

C. Witness Tampering

Gates next argues that insufficient evidence supports his conviction for witness tampering because he never mentioned testifying falsely or withholding testimony.

A person is guilty of tampering with a witness if, relevantly, he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding to testify falsely or, without the right or privilege to do so, to withhold any testimony. RCW 9A.72.120(1)(a). When determining if statements constitute witness tampering, the State is entitled to rely on the inferential meaning of words and the context in which they were used. *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990).

Gates argues that his text messages, while "angry," do not mention testimony or indicate an attempt to induce Badillo to testify falsely or to withhold his testimony. Br. of Appellant at 13. The message from Gates's text messages is clear. He was upset that Badillo planned to testify against him, he did not want that to happen, and Gates used emotional blackmail to try to make that happen. Gates attempted to use Badillo's friendship, the past help Gates had given Badillo, and the damage the charges had done to Gates's health and life to guilt Badillo into not testifying.

Though Gates never explicitly instructed Badillo not to testify, that is a reasonable inference the jury could have drawn from the evidence. Sufficient evidence supports Gates's conviction for witness tampering.

II. Jury Instructions

Next, Gates argues that the trial court erred in failing to give jury instructions (1) requiring that the threat be a "true threat" and (2) defining that phrase. The State argues that no jury instructions were required for a true threat because it has been inherently included in the statutory definition of witness intimidation.

Jury instructions are sufficient if substantial evidence supports them; they allow the parties to argue their theories of the case; and when read as a whole, properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). We review the adequacy of jury instructions de novo as a question of law. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

Gates did not propose a true threat jury instruction nor object to the absence of such an instruction. Normally, failure to request or object precludes appellate review of jury instructions. *State v. Hickman*, 135 Wn.2d 97, 104-05, 954 P.2d 900 (1998). But an appellant may raise a claimed error for the first time on appeal when it is a manifest error affecting a constitutional right. RAP 2.5(a)(3).

The trial court instructed the jury that

> 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 do any other act that is intended to harm substantially the person threatened or another person with respect to that person's health, safety, business, financial condition, or personal relationships.

CP at 42. Again, 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 intent to inflict bodily harm on or to take the life of another person. *Kilburn*, 151 Wn.2d at 43. A true threat is a serious threat, not one said in jest, idle talk, or political argument. *Kilburn*, 151 Wn.2d at 43.

First, we hold that the trial court did not have to instruct the jury that Gates's statements needed to be a true threat because that instruction is disfavored. The pattern instruction defining "threat" mirrors the one given here, but it also includes an additional paragraph:

> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in [jest or idle talk] [jest, idle talk, or political argument].

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.24, at 72 (3d ed. 2008) (WPIC). A comment to that instruction explained that the instruction intentionally omitted the phrase "'true threat.'" 11 WPIC 2.24, at 73. The comment explains, "Instructing jurors using this term could unnecessarily confuse the issues by causing jurors to speculate about 'false' threats. Accordingly, the committee incorporated the constitutional concepts into the instruction's final paragraph without directly referring to the legal term of art." 11 WPIC 2.24, at 73. While the pattern instructions and comments are not binding, this reasoning is persuasive.

The trial court therefore did not err by not giving a jury instruction requiring that Gates's text messages be true threats.

We next decide whether the trial court erred by not giving a jury instruction defining true threat, such as that given in the last paragraph of 11 WPIC 2.24. A jury instruction defining true threat must be given for several types of crimes, including threats to bomb or injure property, felony harassment, and felony telephone intimidation. *Johnston*, 156 Wn.2d at 366; *State v. Schaler*, 145 Wn. App. 628, 640, 186 P.3d 1170 (2008), *review granted*, 165 Wn.2d 1015 (2009); *Tellez*, 141 Wn. App. at 481, 483. Division Three of this court has held that, unlike the crime of felony harassment, witness intimidation does not require a jury instruction defining true threat. *State v. King*, 135 Wn. App. 662, 671-72, 145 P.3d 1224 (2006), *review denied*, 161 Wn.2d 1017 (2007). As that court reasoned:

> The statute prohibiting harassment covers a virtually limitless range of utterances and contexts, any of which might be protected. Both the speech and context of witness intimidation, by contrast, are limited by the language of the statute. The statute requires the State to prove that the defendant communicated an intent to harm a person who has appeared, presumably against him, in a legal proceeding.

King, 135 Wn. App. at 669-70. The court noted that the statute was not overbroad like felony harassment because the witness intimidation statute outlawed "solely threats to witnesses." *King*, 135 Wn. App. at 670.

King, charged with intimidating a former witness, argued that the trial court should have instructed the jury on the requirements of a true threat. *King*, 135 Wn. App. at 667, 671. The trial court instructed the jury on the elements of intimidating a witness and defined "'threat'" as

"'to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or any other person.'" *King*, 135 Wn. App. at 671.

On appeal, Division Three found the jury instructions sufficient because the evidence established the essential elements of witness intimidation. *King*, 135 Wn. App. at 671. In addition, "the narrow scope of the speech prohibited here eliminates the First Amendment concerns inherent in the broader harassment statute." *King*, 135 Wn. App. at 671-72. The court held that the trial court properly instructed the jury. *King*, 135 Wn. App. at 672.

But in *Brown*, we applied the true threat standard to determine if sufficient evidence supported a conviction for intimidating a judge. That statute is arguably as narrow as intimidating a witness because it applies to the limited situation of threatening a judge because of a ruling or decision of the judge in an official proceeding. RCW 9A.72.160(1). Both statutes apply to threats against participants in a court proceeding because of their participation in that proceeding. Yet we still applied, without explanation, First Amendment protections to the threat. *Brown*, 137 Wn. App. at 591. Indeed, not applying the true threat standard would result in a presumption that any seemingly negative statement made to or about a witness satisfies RCW 9A.72.110. Such a presumption would criminalize pure speech. We reject *King*'s analysis and hold that the true threat standard applies to RCW 9A.72.110.

Any error, though, is harmless. Where we conclude that the trial court erred in failing to instruct the jury on the definition of "true threat," we must decide whether the error was harmless beyond a reasonable doubt. *Johnston*, 156 Wn.2d at 364. A constitutional error such as

erroneous jury instructions, is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Gates argues that the failure to give the true threat jury instructions was not harmless because the text messages contained "little in the way of actual threats" and that his theory had been that he made no threats. Br. of Appellant at 15. Gates's text messages contained clear threats of harm to himself and to Gates's and Badillo's relationship. Gates told Badillo that if Gates went to "jail, [he was] going to kill [him]self or try." I RP at 64. Gates accused Badillo of "killing" him because Gates now could not see his doctor. I RP at 64. Gates did not send these text messages until after Badillo was subpoenaed to testify. A reasonable jury could believe beyond a reasonable doubt that Gates was not joking. Any error is harmless. *Johnston*, 156 Wn.2d at 364. The error was therefore not manifest. *Schaler*, 145 Wn. App. at 641.

III. Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel under the familiar test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), looking for deficient performance and resulting prejudice.

A. True Threat

Next, Gates argues that he received ineffective assistance of counsel where his trial counsel failed to propose a true threat jury instruction or a jury instruction defining that phrase.

Gates argues that the failure prejudiced him because with the proper instruction, the jury would have acquitted him on that count. We disagree.

Even if Gates's counsel was deficient in not proposing the jury instruction, Gates cannot show prejudice. As we stated above, the evidence overwhelmingly supports a finding that Gates sent the text messages to induce Badillo not to testify. It is unlikely that the jury would have found that Gates said the threats as a joke. There is not a reasonable probability that the outcome would have differed. Any deficiency was not prejudicial. *Strickland*, 466 U.S. at 694. Gates did not receive ineffective assistance of counsel.

B. Lesser Included Offense of Possession of Stolen Property

Gates further argues that he received ineffective assistance of counsel because his trial counsel failed to request an instruction on the lesser-included offense of possession of stolen property. We disagree.

A defendant is entitled to an instruction on a lesser-included offense if (1) each element of the lesser-included offense is necessarily included in the charged offense (the legal test), and (2) the evidence in the case supports an inference that the defendant committed only the lesser crime (the factual test). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

To convict Gates of possession of stolen property, the jury would have to find that he did "knowingly . . . receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). The jury was instructed that a conviction

for trafficking in stolen property requires proof that Gates did knowingly "sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." CP at 37.

Each element of possession of stolen property, knowledge and possession of stolen property, is included in trafficking in stolen property. The legal test of *Workman* is satisfied.

Under the factual test, the evidence must raise an inference that only the lesser-included offense was committed to the exclusion of the charged offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Both possession of stolen property and trafficking in stolen property required the jury to believe that at some point during his possession of the computers, Gates knew they were stolen. To convict Gates of possession of stolen property and not trafficking in stolen property, the jury would have to believe that Gates did not sell, transfer, distribute, dispense, or otherwise dispose of the computers. Former RCW 9A.82.010(19). Badillo testified that (1) Gates referred to the computers as "merchandise," (2) had boxed the computers as if new from the store, and (3) transferred them to Badillo. I RP at 43, 46. The jury could reasonably infer that Gates transferred, dispensed, or otherwise disposed of the computers. Gates cannot show that he was guilty of possession of stolen property to the exclusion of trafficking in stolen property. *Fernandez-Medina*, 141 Wn.2d at 455. Gates was not entitled to a jury instruction on the lesser-included offense of possession of stolen property. Gates's counsel's performance was not deficient. Because Gates did not show deficient performance, we need not

reach prejudice. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Gates did not receive ineffective assistance of counsel.

IV. Double Jeopardy

Also, Gates argues that his prosecution and conviction for both intimidating a witness and witness tampering constitutes double jeopardy. He also argues that, on the facts of this case, the two offenses merge. We disagree.

Article I, § 9 of the Washington State Constitution, and the Fifth Amendment to the federal constitution prohibit multiple punishments for the same offense. *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). But a trial court's imposition of more than one punishment for a criminal act that violates more than one criminal statute is not necessarily multiple punishments for a single offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The fundamental issue is whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one statute. *Calle*, 125 Wn.2d at 776. We review de novo whether multiple punishments violate double jeopardy. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007), *cert. denied*, 130 S. Ct. 85 (2009).

Washington courts use a multi-prong analysis to determine whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one statute. *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892, 895, 46 P.3d 840 (2002). First, we look to the statutory language to determine whether the legislature specifically authorized separate punishments. *In re Burchfield*, 111 Wn. App. at 895-96. Second, if the statutes are

silent as to whether the legislature intended specific punishments, we apply the "same evidence" rule of construction to determine whether each legislatively-defined offense has an element not contained in the other. *In re Burchfield*, 111 Wn. App. at 896. Third, if each offense contains a separate element, we look for evidence of legislative intent to treat the crimes as one offense for double jeopardy purposes. *In re Burchfield*, 111 Wn. App. at 896.

Both parties agree that there is no statutory language expressly authorizing separate punishments for witness tampering and intimidating a witness. We agree.

We turn to the same evidence test. *In re Burchfield*, 111 Wn. App. at 896. Gates argues that his convictions for intimidating a witness and witness tampering are the same in fact because the State relied on the same facts for both convictions, the eight text messages. This is incorrect. As stated above, different text messages satisfied the two crimes. When Gates threatened to kill himself, that constituted intimidating a witness. RCW 9A.72.110(1)(a). When Gates used emotional blackmail to try to guilt Badillo into not testifying, his conduct constituted witness tampering. RCW 9A.72.120(1)(a). Different facts proved each crime. They are not the same in fact.

Witness tampering and intimidating a witness are also not the same in law because each has an element not contained in the other. *In re Burchfield*, 111 Wn. App. at 896. Witness tampering requires a knowing attempt to induce a witness to testify falsely, or without the right or privilege to do so, withhold any testimony. RCW 9A.72.120(1)(a). Intimidating a witness requires a knowing threat that attempts to influence a current or prospective witness's testimony.

RCW 9A.72.110(1)(a). Witness tampering requires a non-threatening attempt to influence a witness, while intimidating a witness requires threat. Consequently, under the same evidence test, the two offenses are not identical in law.

Gates further argues that the crimes should merge because they both appear under the same chapter of the Revised Code of Washington and serve the same purpose. The State argues that because the legislative intent indicates that the legislature intended to punish both crimes separately, it is immaterial that both crimes appear in the same chapter of the RCW.

Even if the two offenses do not satisfy the same evidence test, they may still be considered the same if there is clear evidence that the legislature intended both statutes to punish the same conduct. *State v. Baldwin*, 150 Wn.2d 448, 455-56, 78 P.3d 1005 (2003). By examining the statutes' historical development, location in the criminal code, or their differing purposes, we seek to determine whether the legislature intended multiple punishments for the same act. *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

The State points to the note following both RCW 9A.72.110 and RCW 9A.72.120 as proof the legislature intended to punish both crimes separately. In that section, the legislature found that

> witness intimidation and witness tampering serve to thwart both the effective prosecution of criminal conduct in the state of Washington and resolution of child dependencies.
>
> Further, the legislature [found] that intimidating persons who have information pertaining to a future proceeding serves to prevent both the bringing of a charge and prosecution of such future proceeding. . . .
>
> The legislature [found], therefore, that *tampering with and/or intimidating a witness* or other persons with information relevant to a present or future criminal or child dependency proceeding are grave offenses which adversely impact the

state's ability to promote public safety and prosecute criminal behavior.

Laws of 1994, ch. 271, § 201 (emphasis added). The State argues that by using the conjunctive "and," the legislature indicated an intent to treat witness tampering and intimidating a witness separately. Br. of Resp't at 33. We agree. By saying "and/or" the legislature contemplated a situation where conduct satisfies both crimes. The legislature intended to punish the same conduct separately.

The two crimes do not satisfy the same evidence test and the legislature intended to punish them separately. Gates's convictions do not constitute double jeopardy.

V. Same Criminal Conduct

Gates next argues that the trial court erred by not finding that his convictions for intimidating a witness and witness tampering constituted the same criminal conduct. Gates did not dispute the calculation of his offender score or the standard range, and therefore waived his challenge. *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007) (holding that issue waived when defendant failed to ask the sentencing court to make a discretionary call of any factual dispute regarding the issue of same criminal conduct and did not contest the issue at sentencing); *see also In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (defendant waives challenge to same criminal conduct where alleged error involves an agreement to facts).

VI. Costs of Incarceration

Gates argues that there was no valid basis to impose costs of incarceration because the

trial court never ordered it. He also argues that there is no statutory authority under RCW 9.94A.760 or RCW 10.01.160 for imposing costs of incarceration. He argues that under both statutes, the trial court must first make a determination that the defendant has the financial resources to pay the costs. The State argues that Gates waived this assignment of error by not raising it below. We agree with the State.

First, as the State notes, Gates's judgments and sentences are valid orders that order Gates to pay the costs of incarceration. Second, Gates waived his challenge. If the sentencing court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of $50 per day, if incarcerated in prison. RCW 9.94A.760(2). We review a sentencing court's imposition of court costs for abuse of discretion. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). But where the record does not show that an appellant challenged his ability to pay incarceration costs to the trial court, we do not consider such challenge. *State v. Snapp*, 119 Wn. App. 614, 626 n.8, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004).

The trial court orally ordered that Gates pay a filing fee, a crime victim fee, a DNA fee, court-appointed counsel fees, and travel costs for bringing Badillo back to Washington to testify. On Gates's judgment and sentences, the trial court also imposed costs of incarceration under RCW 9.94A.760. Gates did not object to any of these fees or costs. Gates waived his challenge.

In addition, Gates's argument does not raise constitutional concerns. The constitution does not require factual findings on a defendant's ability to pay legal financial obligations in light

of the statutory safeguards afforded defendants unable to pay. *Curry*, 118 Wn.2d at 916. Constitutional principles will be implicated only if the government seeks to enforce collection of the assessments at a time when the defendant is unable, through no fault of his own, to comply. *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992). Here, there is no indication that the government is seeking to enforce collection. Also, Gates can still seek a statutory modification or elimination of his costs of incarceration. A defendant who has been ordered to pay costs and who is not in contumacious default in the payment of them may at any time petition the sentencing court for remission of the payment of costs or for any unpaid portion of it. RCW 10.01.160(4). If it appears to the court's satisfaction that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment. RCW 10.01.160(4). Thus, while we will not review Gates's challenge for the first time on appeal, he can seek relief at the trial court level.

Gates argues that *State v. Williams*, 65 Wn. App. 456, 828 P.2d 1158, 840 P.2d 902 (1992), requires reversal where a sentencing court did not inquire into the defendant's financial resources before imposing costs. First, that case is a Division One case at odds with our holding in *Snapp*. Second, even adopting *Williams*'*s* reasoning, the sentencing court had some knowledge of Gates's financial situation. During sentencing, Gates's defense counsel told the sentencing court that Gates had 58 vehicles titled under his name.[2] But at the same time, the trial court also granted Gates's indigency motion. While these two findings are inconsistent, the trial

[2] Gates made his living buying and selling items on Craigslist.

court still considered Gates's financial resources. There is no error.

VII. Statement of Additional Grounds (SAG)

In his SAG, Gates argues that Badillo improperly mentioned that Gates had marijuana to make him look bad and that this was improper because Gates has a "medical card." SAG (ground 1). Gates also contends that Badillo lied about what Gates was going to do with the computers and that there was a no-contact order not given. Whether Gates had a medical marijuana card and the no-contact order are matters outside the record that we cannot review on direct appeal. *McFarland*, 127 Wn.2d at 335. In addition, witness credibility is a matter for the fact finder that we do not review on appeal. *Thomas*, 150 Wn.2d at 874. Gates's arguments fail.

Affirmed.

A majority of the panel has determined this opinion will not be published in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Bridgewater, P.J.

I concur:

Quinn-Brintnall, J.

Armstrong, J. (Dissent) — I agree with the majority that the trial court erred in not giving the last paragraph of the Washington pattern instruction defining a "true threat." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.24, at 73 (3d ed. 2008). I disagree with the majority that the failure was harmless error.

The majority correctly tests the error by applying the constitutional error standard that requires us to find "beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *see also Johnston*, 156 Wn.2d at 364. But the majority then misapplies the test by concluding that "[a] reasonable jury *could* believe beyond a reasonable doubt that Gates was not joking." Majority at 14 (emphasis added).

We apply the "could believe" standard to a challenge to the sufficiency of evidence. *See State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) ("The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt."). But in reviewing constitutional error, as in the context here, we ask whether any reasonable juror *would* have convicted even if properly instructed. *See Guloy*, 104 Wn.2d at 425. Moreover, the majority assumes in finding no error that if the jury believed that Gates was not "joking" it could conclude only that he must have intended a true threat. This ignores the full range of what Gates may have intended that fit neither a true threat nor a joke, such as "idle talk," "hyperbole," or simply venting his anger with his former friend. *See Kilburn*, 151 Wn.2d at 43 ("A true threat is a

serious threat, not one said in jest, idle talk, or political argument."); *In re Douglas D.*, 626 N.W.2d 725, 739 (Wis. 2001) (A true threat is "a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech."). Speech does not necessarily fit under the "narrow category" of a "true threat" simply because it conveys anger. *See State v. Williams*, 144 Wn.2d 197, 209-10, 26 P.3d 890 (2001).

Gates was clearly upset when he sent Badillo the text messages. He accused Badillo of taking money for turning him in, and hoped Badillo went "to hell" and "die[d] in pain." Majority at 2. But Gates also appeared to be seeking sympathy by telling Badillo: "you know I'm really sick," "[y]ou ruined my life," "I'm going to kill myself or try," and "[y]ou are killing me" because "[y]ou . . . made me move and not see my doctor." Majority at 3. Nowhere in this tirade did Gates explicitly threaten harm *if* Badillo testified against him. Although the evidence is sufficient to convict, it is also sufficiently ambiguous that a jury could conclude the State failed to prove a "true threat" beyond a reasonable doubt. Accordingly, I am not satisfied beyond a reasonable doubt that the jury would have convicted even if properly instructed. *See Guloy*, 104 Wn.2d at 425. I would reverse and remand for a new trial on the charge of intimidating a witness.

_____
Armstrong, J.