72515-7

FILED
Nov 02, 2015
Court of Appeals
Division I
State of Washington

No. 72515-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

EC EDWARD COBB,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Mr. Cobb's constitutional right to jury unanimity was violated in regard to the witness tampering charge because the State presented evidence of several distinct acts, any one of which could constitute the crime, but the jury was not instructed it must be unanimous as to which act it was relying upon

The State contends no jury unanimity instruction was required in regard to the witness tampering charge because the 15 jail telephone calls, made over a period of three months, "represented a continuing course of conduct." SRB at 12. The State misapplies the Petrich rule.

Under Petrich, "[w]hen the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). "The determination of whether a unanimity instruction was required turns on whether the prosecution constituted a '*multiple acts* case.'" State v. Furseth, 156 Wn. App. 516, 520, 233 P.3d 902 (2010), review denied, 170 Wn.2d 1007, 245 P.3d 227 (2010) (quoting State v. Bobenhouse, 166 Wn.2d 881, 892, 214 P.3d 907 (2009) (emphasis in Bobenhouse). The determinative question is whether the "prosecution is based on evidence that the defendant committed multiple criminal

acts, any one of which would constitute the charged crime." Id. at 517-18.

There should be no dispute that this is a "multiple acts case." Each of the 15 alleged telephone calls is a separate distinct criminal act, any one of which could constitute the charged crime. The witness tampering statute expressly provides that "each instance of an attempt to tamper with a witness constitutes a separate offense." RCW 9A.72.120(3).

Contrary to the State's argument, whether or not a crime can be charged as a continuing course of conduct is relevant in deciding whether the case is a "multiple acts case" for purposes of jury unanimity. State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995). A unanimity instruction may not be required if the State alleges multiple acts but the crime may be charged as a continuous course of conduct. Id. Conversely, if the crime *cannot* be charged as a continuous course of conduct, a unanimity instruction must be provided when the State alleges multiple possible criminal acts.

Again, there should be no dispute that the crime of witness tampering *cannot* be charged as a continuous course of conduct. The

Legislature made plain that "each instance of an attempt to tamper with a witness constitutes a separate offense." RCW 9A.72.120(3).

Thus, if the State alleges that the defendant engaged in multiple attempts to tamper with a witness, the State has necessarily charged multiple distinct criminal acts. Under those circumstances, the case is a "multiple acts case" for purposes of the Petrich rule. Petrich, 101 Wn.2d at 572; Furseth, 156 Wn. App. at 520.

Here, the State alleged that Mr. Cobb made at least 15 separate telephone calls, over a period of three months, to different individuals. Each telephone call was a separate distinct attempt to tamper with the witness and could have separately supported the criminal charge. RCW 9A.72.120(3). Therefore, in order to safeguard Mr. Cobb's constitutional right to jury unanimity, the jury should have received a unanimity instruction, or the State should have elected the act it was relying upon. Petrich, 101 Wn.2d at 572; Furseth, 156 Wn. App. at 520. Failure to do so was constitutional error. Petrich, 101 Wn.2d at 572; Furseth, 156 Wn. App. at 520. For the reasons provided in the opening brief, the error was not harmless beyond a reasonable doubt and the conviction must be reversed.

B. CONCLUSION

For the reasons provided above and in the opening brief, the convictions for witness tampering and felony violation of a no-contact order must be reversed.

Respectfully submitted this 2nd day of November, 2015.

/s/ Maureen M. Cyr
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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