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April 30, 2015
Court of Appeals
Division I
State of Washington

NO. 72712-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

CURTIS RODGERS, JR.,

Appellant.

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

The Honorable Monica Benton, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Insufficient evidence supports the appellant's conviction for witness tampering.

Issue Pertaining to Assignment of Error

The State charged the appellant with witness tampering based on the prong of the statute that prohibits a person from attempting to induce a witness or a person he has reason to believe is about to be called as a witness in any official proceeding to testify falsely.

Where authority from this Court requires an ongoing proceeding to support a charge under this prong, and where there was not yet any charges pending, should the appellant's conviction be reversed and dismissed for insufficient evidence?

B. STATEMENT OF THE CASE¹

The State charged Curtis Rodgers, Jr., with first degree burglary based on allegations he broke into his sister's home and fought with Rodgers's then-girlfriend, Amanda Eskola, in May of 2013. The State

¹ This brief refers to the verbatim reports as follows: 1RP – 10/13/14; 2RP – 10/14/14; 3RP – 10/21/14; 4RP – 10/22/14; 5RP – 10/23/14; 6RP – 10/27/14; 7RP – 10/28/14; 8RP – 10/29/14; 9RP – 10/30/14; and 10RP – 11/14/14.

also charged witness tampering based on a call Rodgers made to Eskola from jail the following day.² CP 1-8, 10-11, 63-64.³

At trial, the State presented evidence suggesting Rodgers entered the home of his sister and her boyfriend without permission shortly after midnight on May 11 and fought with Eskola and the boyfriend. 5RP 52-59; 6RP 22-23; 7RP 63-65, 68. The sister, however, testified that Rodgers had permission to enter the home. 7RP 95-97, 123.

Eskola gave a statement to police the night of the incident. 5RP 64-65. Eskola told police Rodgers knocked on the door but she did not let him in. Rather, Rodgers entered the house through an unlocked door. 5RP 65.

At trial, Eskola testified she let Rodgers in. 5RP 54. She testified she did not tell the truth the night of the incident because the sister's boyfriend was nearby and she wanted to avoid angering him. 5RP 65.

² Rodgers objected to amendment of the information to add witness tampering. The court, however, permitted the State to amend the information on the eve of trial. The court granted the defense a one week continuance. 1RP 4-25; 2RP 41-57; 3RP 2-10; 4RP 2-13; CP 36-52, 105-57. The court later denied Rodgers's request for an additional two-week continuance. 9RP 11-16.

³ The court granted Rodgers's motion to sever a misdemeanor no-contact order violation charge unrelated to the witness tampering charge. 1RP 36; CP 28-35.

The State presented evidence Rodgers called Eskola on a number of occasions during the days following his arrest for burglary the night of the incident. In one such call, placed the afternoon of May 11, the conversation occurred as follows:

RODGERS: But . . . if I take it to trial they're gonna call you as a witness. And what you gonna tell 'em? Huh?

[ESKOLA]: I already gave a statement [to police]. I can't tell 'em anything more than I already told 'em.

RODGERS: Retract that statement lady.

[ESKOLA]: You can do that?

Exh. 1.

The State argued in closing this was the call that supported the tampering charge. 8RP 30-31.

The jury was unable to agree on the burglary charge but found Rodgers guilty of witness tampering. CP 218-21; 9RP 18-27. The court sentenced Rodgers to a prison-based Drug Offender Sentencing Alternative. CP 239-49; RCW 9.94A.660.

Rodgers timely appeals. CP 250-51.

C. ARGUMENT

INSUFFICIENT EVIDENCE SUPPORTS RODGERS'S
WITNESS TAMPERING CONVICTION.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

RCW 9A.72.120, the witness tampering statute, provides in part that:

(1) A person is guilty of tampering with a witness if *he . . . attempts to induce a witness or person he . . . has reason to believe is about to be called as a witness in any official proceeding . . . to:*

(a) *Testify falsely* or, without right or privilege to do so, to withhold any testimony; or

(b) Absent himself or herself from such proceedings; or

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

(Emphasis added.)

“Testimony” means “oral or written statements, documents, or any other material that may be offered by a witness in an official proceeding.” RCW 9A.72.010(6). “Official proceeding” means a “proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions.” RCW 9A.72.010(4); CP 204 (jury instruction 16, defining official proceeding).

Rodgers was charged with, and the jury instructed, under only the (a) prong of the statute. The jury was, moreover, instructed only as to the “testify falsely” portion of that prong. CP 63-64; 4RP 34-35 (court’s ruling limiting State to “testify falsely” portion of (a) prong based on “bill of particulars” filed by State); see State v. Hickman, 135 Wn.2d 97, 105, 954 P.2d 900 (1998) (State must prove each of the elements of the crime as the jury is instructed).

The to-convict instruction required the State to prove that between May 11 and 15, 2013, Rodgers (1) “attempted to induce a person to testify falsely” and (2) “[that] person was a witness or a person [Rodgers] had reason to believe was about to be called as a witness in any official proceedings.” CP 203 (Instruction 15). Insufficient evidence supports this means of witness tampering.

The State's theory as to tampering was that, after pointing out Eskola would likely be a witness at any trial that ultimately occurred, Rodgers told Eskola to "retract" her statement to police. But even in the light most favorable to the State, the evidence was insufficient to show Rodgers attempted to induce false testimony. At the time he urged Eskola to "retract" her statement, there was insufficient evidence Eskola was a witness or a person Rodgers believed was about to be called as a witness in any official proceeding. This is because no "official proceeding" commenced until the information was filed on May 15, 2013, CP 1, whereas the conversation in question occurred four days before that. Exhs. 1, 4, 5; 8RP 30-31.

In State v. Pella, interpreting the 1975 version of the witness intimidation statute,⁴ this Court held that an "official proceeding" had to be pending at the time the threat, the relevant act under the intimidation

⁴ The witness intimidation statute at issue provided as follows:

Intimidating a Witness. (1) A person is guilty of intimidating a witness if, by use of a threat directed to a witness or a person he has reason to believe is about to be called as a witness in any official proceeding, he attempts to:

(a) Influence the testimony of that person. . . .

Former RCW 9A.72.110 (1975) (as quoted in Pella, 25 Wn. App. at 796-97).

statute, was made. 25 Wn. App. 795, 612 P.2d 8 (1980). There, no official proceeding was pending because no complaint had been filed at the time the threat was made. Id. at 797. This Court reversed the defendant's conviction for intimidating a witness. Id. at 797-98.⁵

Although Pella involved the witness intimidation statute, that statute contained the phrase "a person he has reason to believe is about to be called as a witness in any official proceeding" as requiring a charge to be filed at the time of the act. This language is identical to the language in the witness tampering statute at issue in this case.⁶ In Pella, this Court also identified at what point an official proceeding begins. Here, as in Pella, no official proceeding was pending at the time the statements were made. Id. at 797; CP 1-8. Under this Court's Pella decision, insufficient evidence supports Rodgers's conviction.

⁵ This Court distinguished State v. Scherck, 9 Wn. App. 792, 514 P.2d 1393 (1973), observing that that case was construing RCW 9.69.080, the predecessor statute, which did not limit its application to "official proceedings." Pella, 25 Wn. App. at 797-98.

⁶ The witness intimidation and witness tampering statutes were adopted at the same time. Laws of 1975 1st ex.s., ch. 260, §§ 9A.72.110, .120. Although the witness intimidation statute has undergone significant structural changes since Pella was decided in 1980, see, e.g., Laws of 1997, ch. 29, § 1, the witness tampering statute remains similar to the original 1975 format. State v. Stroh, 91 Wn.2d 580, 581, 588 P.2d 1182 (1979) (analyzing 1975 tampering statute).

Rodgers anticipates the State will rely on State v. Lubers, 81 Wn. App. 614, 622, 915 P.2d 1157 (1996), to argue to the contrary. Relying on that case, the State argued in response to Rodgers's Knapstad⁷ motion that there need not be any official proceeding pending. 4RP 17.

In Lubers, during a recorded jail phone call made by Lubers to his co-defendant, Joseph, Lubers told Joseph to write a letter to Lubers's attorney stating that Joseph lied to police about Lubers's involvement in the alleged rape. Id. at 617-18. Lubers instructed Joseph to say "Cortez," a fictional person, actually committed the rape; that Cortez had initially promised to pay Joseph money to name Lubers; and that later Cortez threatened to kill Joseph's family unless he falsely accused Lubers. Id.

The State may contend Lubers was charged under the same means of committing witness tampering as Rodgers and therefore an official proceeding need not be pending for conviction under the (a) prong. But even though the Lubers Court refers to subsection (a) of the witness tampering statute, it does not specify that Lubers was charged under that section alone. Indeed, inclusion of the language of subsection (c) in its

⁷ State v. Knapstad, 107 Wn.2d 346, 357, 729 P.2d 48 (1986) (superior court has authority to dismiss charge pretrial for insufficient evidence of a prima facie case).

analysis suggests otherwise. The Court's sufficiency analysis, in fact, clearly focuses on the (c) prong:

Taking the evidence in the light most favorable to the State, Joseph was about to be called as a witness and he had information relevant to a police investigation. *Lubers asked Joseph to make a false statement, effectively recanting a prior signed statement to the police, and thereby, to withhold information necessary to a criminal investigation.* Joseph's testimony provided sufficient evidence for a rational trier of fact to find the statutory requirements for witness tampering beyond a reasonable doubt.

Lubers, 81 Wn. App. at 622 (emphasis added).

The Lubers Court's analysis conflating the (a) and (c) prongs does not withstand scrutiny and should not trump this Court's decision in Pella, which establishes when official proceedings begin and controls in a case in which only the (a) prong is charged.

Insufficient evidence supports the conviction under the single prong charged and instructed upon. Rodgers's conviction should therefore be reversed and dismissed with prejudice. Brown, 162 Wn.2d at 430; Hickman, 135 Wn.2d at 105-06.

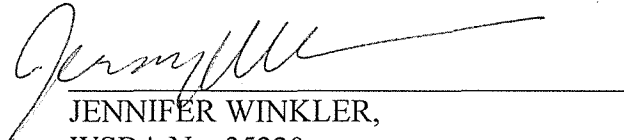
D. CONCLUSION

This Court should reverse and dismiss Rodgers's witness tampering conviction because it is supported by insufficient evidence.

DATED this ^{29TH} day of April, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER,
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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Respondent,)	
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v.)	COA NO. 72712-5-I
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CURTIS RODGERS, JR.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CURTIS RODGERS, JR.
 DOC NO. 721910
 WASHINGTON STATE PENITENTIARY
 1313 N.13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF APRIL 2015.

X *Patrick Mayovsky*