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NO. 62971-9-I

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

REC'D
MAY 12 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

NICOLAI L. GOLODIUC,

Appellant.

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

The Honorable Jeffrey M. Ramsdell, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Appellant's right to be free from double jeopardy was violated when he was sentenced on four counts of witness tampering where the unit of prosecution for that offense permits only one count.

Issue Pertaining to Supplemental Assignment of Error

Appellant was charged with four count of witness tampering based on four letters sent to the same witness in a single proceeding. He was convicted, and sentenced, on all four counts, with his sentencing score increased accordingly. The Washington State Supreme Court, however, has recently determined the proper unit of prosecution, for multiple attempts by identical means to influence the testimony of a single witness in a single proceeding, to be one offense. Is dismissal of three counts of witness tampering, and resentencing based on the resulting lower offender score, required?

B. STATEMENT OF THE CASE¹

1. Procedural History

The King County Prosecutor charged Nicolai Golodiuc by a third amended information with seven felony counts, including four counts of witness tampering: Count V – tampering with a witness (RCW 9A.72.120), committed on March 25, 2008; Count VI – tampering with a witness, committed on July 11, 2008; Count VII – tampering with a witness, committed on July 18, 2008; and Count VIII – tampering with a witness, committed between February 18 and August 18, 2008. CP 28-32. The jury found Golodiuc guilty of all the felony counts, including the four witness tampering counts. CP 68-74.

At sentencing, counsel argued for scoring the witness tampering courts as a single point based on same criminal conduct analysis. 9RP 10. The court, however, denied this request.

Next, with regard to the request to find the witness tampering counts to be same course of conduct, that's a fairly easy analysis. Although the same person was involved, and I suppose you could make an argument the same intent was involved, that being to dissuade a person from participating in the prosecution, they didn't occur at

¹ This brief adopts and incorporates the Statement of the Case, Section B, from Appellant's Opening Brief. This brief, in addition to the Opening Brief and the Reply Brief, refers to the verbatim report of proceedings as follows: 1RP – August 8, 2008; 2RP – November 4, 2008; 3RP – November 5, 2008; 4RP – November 10, 2008; 5RP – November 13, 2008; 6RP – November 17, 2008; 7RP – November 18, 2008; 8RP – November 19, 2008; 9RP – January 30, 2009.

the same time. So, there could be no rational basis to find the same criminal conduct or same course of conduct for counts five through eight. I will deny that request.

9RP 14.

Golodiuc was scored as 7, and the court imposed the top of the standard range on all counts, with the 89-month term for the first-degree burglary in Count 3 determining the length of the sentence. CP 84; 9RP 15-16. Golodiuc timely appealed. CP 94-107.

The Opening Brief of Appellant was filed on August 31, 2009. In that brief, Golodiuc argued there was insufficient evidence to support all three charged alternative means for witness tampering. See Brief of Appellant (BOA) at 36-44. The State's Response Brief was filed on November 20, 2009. In that brief, the State conceded the evidence of all three means was insufficient as to Counts VI and VII, but argued the sufficiency of the evidence for Counts V and VIII. See Brief of Respondent (BOR) at 27-35. Golodiuc's Reply Brief was filed on January 8, 2010. To date, this Court has not set a date for consideration of Golodiuc's appeal.

On April 22, 2010 the Washington State Supreme Court issued its opinion in State v. Hall.² In that opinion, the Court addressed the appropriate unit of prosecution for the charge of witness tampering.

2. Substantive Facts³

Golodiuc was charged with four counts of witness tampering based on four letters found by L.V. in Visharenko's apartment. 5RP 61-62. L.V. said she heard Golodiuc was sending Visharenko letters and decided to find them. 5RP 60. These letters, written in Russian, were attributed to Golodiuc. 5RP 60-62. Three of the letters had envelopes and at least two were addressed to Golodiuc's two-and-a-half-year-old son. 5RP 72-73. The fourth letter did not have an envelope, and that count was alleged between the date of Golodiuc's arrest and the date L.V. found the letters and turned them over to the prosecutor. CP 31-32, 67; 5RP 77, 96; 8RP 27.

Visharenko acknowledged she received the letters from Golodiuc. 6RP 37. Visharenko, however, denied the March 25, 2008 letter was

² No. 82558-1 (filed April 22, 2010) (Chambers, J. writing for a unanimous court); see also 2010 WL 1610966. A copy of the slip opinion is attached as an appendix).

³ A full version of these substantive facts appears in the opening brief. AOB at 14-18. This abridgement is presented for the Court's convenience.

written to her. 6RP 38. Rather, Visharenko said the letters were meant for Golodiuc's mother, who was not a witness at the proceeding. 6RP 40-42.

C. ARGUMENT

UNDER THE UNIT OF PROSECUTION ANALYSIS OF STATE V. HALL, ONLY ONE COUNT OF WITNESS TAMPERING CAN BE MAINTAINED.

Prior to sentencing in this case, Golodiuc had no previous felony convictions. CP 78, 82; see also 9RP 13-14 (discussing first-time offender sentencing). Thus, his offender score of 7 on his first degree burglary conviction reflects the other current convictions, including the four counts of witness tampering. CP 82, 88. Under the unit of prosecution for witness tampering analysis in State v. Hall, however, Golodiuc's four counts for that offense should have been charged and scored as a single count.

In Hall, the defendant had made more than 1,200 telephone calls from jail attempting to persuade a potential witness not to testify or to testify falsely. Hall, slip op. at 2. Hall was charged with four counts of witness tampering and convicted of three. Id. at 3. He appealed on double jeopardy grounds, arguing the unit of prosecution should be a single offense for each witness and each proceeding.⁴ This Court rejected that

⁴ State v. Hall, 147 Wn. App. 485, 489, 196 P.3d 151 (2008), reversed, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 1610966 (April 22, 2010).

argument, held the unit of prosecution for witness tampering was the number of attempts regardless of the number of witnesses or proceedings, and affirmed the three convictions.⁵ The Supreme Court reversed. Hall, slip op. at 1.

The Supreme Court began its analysis by noting the prohibition, under double jeopardy, against multiple convictions for the same offense. Hall, slip op. at 3 (citing State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005)). When a defendant is convicted of multiple violations of the same statute, the question of whether a defendant faces multiple convictions for the same crime turns on the unit of prosecution. Hall, slip op. at 2 (citing State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)). A unit of prosecution can be either an act or a course of conduct. Hall, slip op. at 5 (citing State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005)).

The Supreme Court considered whether witness tampering is a continuing offense or whether it is committed anew with each act of attempting to persuade a potential witness not to testify or to testify falsely. Hall, slip op. at 4. The Court's analysis addressed the statutory language, the legislative history, and the facts of the case. Id. (citing State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007)).

⁵ Hall, 147 Wn. App. at 489-90.

Addressing the statutory language, the Court noted if the legislature fails to specify the unit of prosecution or its intent is unclear, the rule of lenity requires any ambiguity be “resolved against turning a single transaction into multiple offenses.” Hall, slip op. at 4 (citing Tvedt, 153 Wn.2d at 711 (quoting State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) (quoting Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 2d 905 (1955))). Examining the statutory language of RCW 9A.72.120⁶, the Court found the evil addressed in the crime of witness tampering was the attempt to “induce a witness” not to testify or to testify falsely. Hall, slip op. at 5.

The number of attempts to “induce a witness” is secondary to that statutory aim, which centers on interference with “a witness” in “any official proceeding” (or investigation). RCW 9A.72.120(1). The offense is complete as soon as a defendant attempts to induce another not to testify or to testify falsely, whether it takes 30 seconds, 30 minutes, or days.

⁶ RCW 9A.72.120 – Tampering with a Witness – provides in part:

(1) A person is guilty of tampering with a witness if 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 or a person whom he or she has reason to believe may have information relevant to a criminal investigation . . . 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[.]

Hall, slip op. at 5 (emphasis in original).

Thus, the plain language of the statute supports the conclusion that “the unit of prosecution is the ongoing attempt to persuade a witness not to testify in a proceeding.” Hall, slip op. at 8. The Court found support for this analysis in the legislative history behind the current witness tampering statute. Id. at 8-10. “The obstruction of justice is the evil which the statute was designed to forestall.” Id. at 10 (quoting State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979)). The Hall Court found the legislative history consistent with “criminalizing the act of obstructing justice by tampering with a witness no matter how many calls are made in an attempt to accomplish the act.” Hall, slip op. at 10.

In addition to the statutory language and history, the Court considered the factual basis for the charges. Hall had made more than 1,200 telephone calls to his girlfriend attempting to persuade her not to testify or to testify falsely. Hall, slip op. at 2. Hall was charged with four counts of witness tampering and convicted of three. Id. at 3. Considering these facts, the Court found a continuing and on-going course of conduct aimed at the same person, in an attempt to tamper with her testimony at a single proceeding. Id. at 10-11.

The Court noted that in certain circumstances, changing strategies from telephone calls to letter writing or using intermediaries in addition to making telephone calls might implicate an additional offense. Hall, slip op. at 12. In addition, the Court said resuming a witness tampering campaign, which had been interrupted by state intervention, could also result in an additional charge under certain circumstances. Id. But those facts were not before the Court. Id.

Under the facts of this case, Hall controls. Golodiuc was charged with four counts of witness tampering based on four letters intended to be read by one witness, Nataliya Visharenko. CP 65-67; 8RP 24. Testimony regarding two of the letters indicates they were addressed to Visharenko's two-and-a-half year old son, Benjamin, but as the State argued below, the fact the letters were addressed to a child who could not read suggests an attempt to avoid the no-contact order intended to protect Visharenko. Supp. CP ___ (sub no. 7, No Contact Order (filed 02/29/2008)); 5RP 72-73; 8RP 26-27. Further, the salutation on all the letters indicate Visharenko was the intended recipient. 5RP 65, 70-71, 74, 78. Thus, there is no evidence Golodiuc attempted to enlist the active involvement of an intermediary.

Like Hall, Golodiuc utilized one means – letters – to obstruct justice by influencing the testimony of a single witness – Visharenko. In

like manner, there was no state interruption of Golodiuc's attempt to influence Visharenko's testimony. No evidence was presented, or charges laid, indicating any further communication between Golodiuc and Visharenko after L.V. discovered the letters in August 2008 and turned them over to the prosecutor. CP 28-32; 5RP 69, 96. Rather, the letters each refer to ongoing communications between Golodiuc and Visharenko indicating a single continuous course of conduct:

"I don't know. What are we going to do next? As you might remember, I asked you not to call. . . . I'm waiting for your response."⁷

"You know that I am waiting for the news from you. . . . Tell them that you decline speaking and nothing will happen to you because you showed up at the trial. . . . Think about it and write to me."⁸

"Finally, I received a letter from you. . . . Thank God everything is all right. Hopefully everything will be okay with your job, too. And especially if you do what I asked you of in the last letter."⁹

"If you don't understand something, then write to me and ask. I will respond. Don't worry about the letters, and just don't worry. Nobody reads them. This is forbidden by law. This is confidential, confidentiality of correspondence."¹⁰

⁷ SRP 65-66.

⁸ SRP 71-72.

⁹ SRP 74.

¹⁰ SRP 76.

“Why don’t you write to me a reply? I need to know what is your mood and what are you planning to do so that I know how to behave myself at the trial.”¹¹

As in Hall, the evidence in this case reveals a single course of conduct attempting to influence a single witness utilizing a single mode of communication, without interruption by the State. And under Hall, remand for resentencing based on a single count of witness tampering is required. Hall, slip op. at 13.

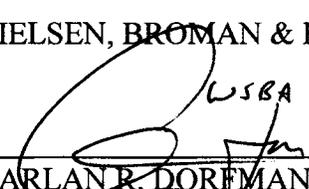
D. CONCLUSION

As an alternative to the argument presented in section C.3 of the opening brief, this Court should remand for resentencing all of the felony counts scoring a single point for Witness Tampering.

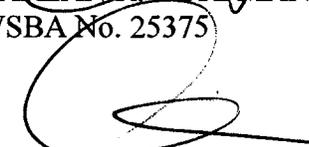
DATED this 12th day of May 2010.

Respectfully submitted,

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¹¹ SRP 78.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 82558-1
)	
v.)	En Banc
)	
ISIAH THOMAS HALL,)	
)	
Petitioner.)	
_____)	Filed April 22, 2010

CHAMBERS J. — We are asked to determine the unit of prosecution for the crime of witness tampering when the defendant makes multiple phone calls to a single witness in an attempt to persuade that witness not to testify or to testify falsely in a single proceeding. We conclude that Isiah Thomas Hall’s numerous phone calls constituted one unit of attempting to “induce a witness” to not testify or to testify falsely. We reverse the Court of Appeals and remand to the superior court for resentencing.

I

Melissa Salazar briefly dated Hall in November and December 2006. Hall continued to press his attentions on Salazar after she broke off the relationship and

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after he suspected she was seeing another man. On January 14, 2007, he came to her apartment with a gun. When she stepped into the hall to talk to him, he drew that gun, pushed the barrel against her head, and announced his intent to kill her. He then shoved her down and forced his way into her apartment, where indeed he found another man. Hall then redirected his ire at that other man and chased him out of the house, gun raised. Upon realizing that Salazar was calling the police, Hall fled the scene.

Police contacted Desirae Aquiningoc because Hall had been driving a vehicle registered to her. Aquiningoc told the officers that Hall was her boyfriend, that he lived with her, that he had borrowed her car on that January 14 to visit his mother, and that he owned a gun. It appears that his purpose was not to visit his mother but rather to confront Salazar. The detective, assisted by members of a SWAT (special weapons and tactics) team, returned to Hall's home and arrested him. The gun was found in the master bedroom closet. Later, Aquiningoc would testify that Hall told her he had shot at his mother's boyfriend on January 14 and that afterward he had taken the gun to a friend's house for a few days.

Based on what happened at Salazar's apartment, Hall was charged with first degree burglary and second degree assault and held in jail pending trial. While in jail, Hall attempted to call Aquiningoc over 1,200 times. During those phone calls, some of which were played for the jury, Hall attempted to persuade Aquiningoc that his legal woes were her fault and that she had a moral obligation not to testify or to testify falsely.¹

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Based on phone calls made on March 22, March 30, and April 4, Hall was charged with the four counts of tampering with a witness that are before us today. A jury convicted Hall of three of those counts (as well as first degree burglary, assault in the second degree, and unlawful possession of a firearm) and he was sentenced to a total of 126 months. The trial judge treated each count of witness tampering as a separate unit of prosecution.² His convictions were affirmed by the Court of Appeals, 147 Wn. App. 485, 196 P.3d 151 (2008), and Hall successfully petitioned this court for review of whether his multiple convictions for witness tampering violated double jeopardy, 166 Wn.2d 1005, 208 P.3d 1124 (2009).

II

Only a question of law is before this court. Review is de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005) (citing *State v. Johnston*, 100 Wn. App. 126, 137, 996 P.2d 629 (2000)). A defendant may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple convictions for the same offense. *Id.* at 770-71 (citing *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997); *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983)). Whether or not a defendant faces multiple convictions for the same crime turns on the unit of prosecution. *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)).

¹ Phone calls made from the King County jail are automatically recorded. Given that all parties are very clearly informed of this, we held this practice does not violate a prisoner's statutory right to privacy. *State v. Modica*, 164 Wn.2d 83, 90, 186 P.3d 1062 (2008).

² Had the trial judge treated all three counts of witness tampering as a single unit of prosecution, it would have reduced Hall's offender score and thus the standard range for sentencing purposes. Hall was sentenced within the standard range based upon his offender score.

III

We must decide whether witness tampering is a continuing offense or whether it is committed anew with each single act of attempting to persuade a potential witness not to testify or to testify falsely. We recently summarized the general analytical approach to determine the unit of prosecution:

[T]he first step is to analyze the statute in question. Next, we review the statute’s history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one “unit of prosecution” is present.

State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007) (citing *State v. Bobic*, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000)). “[I]f the legislature fails to define the unit of prosecution or its intent is unclear, under the rule of lenity any ambiguity must be ““resolved against turning a single transaction into multiple offenses.””

State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728 (2005) (quoting *Adel*, 136 Wn.2d at 634 (quoting *Bell v. United States*, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 2d 905 (1955)).

The witness tampering statute says in relevant part:

(1) A person is guilty of tampering with a witness if 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:

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

(b) Absent himself or herself from such proceedings.

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RCW 9A.72.120(1). A unit of prosecution can be either an act or a course of conduct. *Tvedt*, 153 Wn.2d at 710; *see also Ex parte Snow*, 120 U.S. 274, 286, 7 S. Ct. 556, 30 L. Ed. 658 (1887).

In *Varnell*, 162 Wn.2d 165, we considered the unit of prosecution for solicitation for murder. The defendant solicited an undercover police detective to kill four people and was convicted of four separate counts. This court found that only one solicitation happened:

The language of the solicitation statute focuses on a person's "intent to promote or facilitate" a crime rather than the crime to be committed. The evil the legislature has criminalized is the act of solicitation. The number of victims is secondary to the statutory aim, which centers on the agreement on solicitation of a criminal act. The statute requires only that the solicitation occur; that is, where a person offers to give money or some other thing of value to another to engage that person to commit a crime. The solicitation has occurred regardless of the completion of the criminal act.

Id. at 169. Hall argues we should take a similar approach here. He argues the evil the legislature has criminalized is the attempt to "induce a witness" not to testify or to testify falsely. The *number* of attempts to "induce a witness" is secondary to that statutory aim, which centers on interference with "a witness" in "any official proceeding" (or investigation). RCW 9A.72.120(1). The offense is complete as soon as a defendant attempts to induce another not to testify or to testify falsely, whether it takes 30 seconds, 30 minutes, or days. We agree.

By way of comparison, in *Tvedt* we found multiple units of prosecution did arise from the same course of conduct. There, a defendant was convicted of four

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counts of robbery for robbing two convenience stores. Both a clerk and a customer were in each store. This court affirmed entry of four counts, noting:

The language of RCW 9A.56.190 shows that the legislature's intent was to define the unit of prosecution in terms of a taking of personal property *and* in terms of an offense against the person from whom or in whose presence and against whose will the property is forcibly taken. The unit of prosecution need not be defined by only a single characteristic or element of a crime and the legislature has not done so.

Tvedt, 153 Wn.2d at 712. There, the unit of prosecution was each separate victim from whom or in whose presence property was forcibly taken. This followed from the language of the statute “that ‘[a] person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of force.’” *Id.* at 711 (alteration in original) (quoting RCW 9A.56.190). “By describing the crime of robbery as it did, the legislature established an offense which is dual in nature—robbery is a property crime and a crime against the person.” *Id.* Thus, whenever both factors are met, a single unit of prosecution occurs. By contrast, witness tampering only requires an attempt to induce a witness to not testify or to testify falsely. RCW 9A.72.120(1).

A plainer case was presented in the context of stolen “access devices,” such as credit and debit cards. *State v. Ose*, 156 Wn.2d 140, 146, 124 P.3d 635 (2005). There, the defendant pleaded guilty to 25 counts of second degree possession of stolen property under RCW 9A.56.160(1)(c), which provides that “[a] person is guilty of possessing stolen property in the second degree if He or she possesses

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a stolen access device.” RCW 9A.56.160(1)(c); *Ose*, 156 Wn.2d at 143, 145. The defendant appealed based on the unit of prosecution. This court focused in on the legislature’s choice of the indefinite article “a” in “a stolen access device” and rejected her challenge. We reasoned “because the word ‘a’ is used only to precede singular nouns except when a plural modifier is interposed, the legislature’s use of the word ‘a’ before ‘stolen access device’ unambiguously gives RCW 9A.56.160(1)(c) the plain meaning that possession of each stolen access device is a separate violation of the statute.” *Ose*, 156 Wn.2d at 146. The witness tampering statute does not say “an attempt,” or “any attempt,” which would bring the language more in line with *Ose*.

The State calls our attention to *State v. Alvarez*, 74 Wn. App. 250, 872 P.2d 1123 (1994), where the Court of Appeals found that a harassment charge could be based on one threat. *Id.* at 260. Under the harassment statute, a person was guilty if, among other things, he or she “‘knowingly threatens’” another. *Id.* at 255 (quoting RCW 9A.46.020). The defendant argued that there has to be more than one threat, noting that the legislative statement of intent targeted “‘repeated invasions of a person’s privacy by acts and threats which show a pattern of harassment.’” *Id.* at 256 (quoting RCW 9A.46.010). The court noted that the legislature could have said “course of conduct” in the statute, but did not, and declined to import the language of the statement of intent into the elements of the statute. The State suggests that if the legislature intended a single unit of prosecution be based on a course of conduct, it would have said so plainly. However, the

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Alvarez court was answering a very different question than the one posed here: whether the court should “override the unambiguous elements section of a penal statute” by adding language from a statement of intent. *Id.* at 258. Here, we are simply interpreting the words set forth in the statute itself.

The State also argues that if the legislature intended witness tampering to be an ongoing offense, it would have used phrases similar to “engages in a pattern or practice” or “repeatedly harasses or repeatedly follows” or “at least two previous convictions.” Suppl. Br. of Resp. at 10 & n.2 (citing RCW 9A.32.055 (homicide by abuse); RCW 9.46.0269 (gambling activity); RCW 26.50.110(5) (felony violation of a no contact order)). While we agree with the State that the language could have been more precise, in the statutes cited, repetition *is* an element of the substantive crime. By contrast, as the State properly notes, “[t]amper is a choate crime, complete when a single attempt of tampering is made.” *Id.* at 10. No repetition is necessary. But that does not reveal the unit of prosecution.

The plain language of the statute supports the conclusion that the unit of prosecution is the ongoing attempt to persuade a witness not to testify in a proceeding. Assuming for the moment that the plain language does not resolve the matter before us, under *Varnell* we turn next to the history of the statute. In 1901, our legislature enacted the obstruction of justice statute that preceded our witness tampering statute. It provided:

If any person shall wilfully and corruptly hinder, prevent, or endeavor to hinder, or prevent, any person from appearing before any court of justice as a witness, or from giving evidence, in any action or

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proceeding, with intent thereby to obstruct the course of justice, he shall be deemed guilty of the misdemeanor of tampering with a witness, and, upon conviction thereof, shall be punished by imprisonment in the county jail for any period not exceeding one year, or by fine not exceeding one thousand dollars, or both, in the discretion of the court.

Laws of 1901, ch. 17, § 1 (codified as former RCW 9.69.080, *repealed by* Laws of 1975, 1st Ex. Sess., ch. 260). Four years later this court found that a defendant “was guilty of the offense described in the statute if he willfully and corruptly endeavored to prevent [a witness] from appearing as a witness in that case, or from giving evidence therein, with intent to obstruct the course of justice.” *State v. Bringgold*, 40 Wash. 12, 20, 82 P. 132 (1905), *overruled on other grounds by State v. Hamshaw*, 61 Wash. 390, 112 P. 379 (1910). The unit of prosecution was not at issue in that case. In the 1970s, the legislature removed the requirement that the State prove the defendant intended to obstruct justice, possibly because of a constitutional challenge that the statute was vague or overbroad. *State v. Hegge*, 89 Wn.2d 584, 586, 574 P.2d 386 (1978). The last time the statute was significantly amended was in the mid 1990s, when the legislature expanded it to encompass attempts to tamper with witnesses in child dependency cases, noting,

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 finds 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 finds, therefore, that tampering with and/or intimidating witnesses 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. Over the years, the statutory purpose has remained the same. "The obstruction of justice is the evil which the statute was designed to forestall." *State v. Stroh*, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979). While this history is not determinative of the legislature's intended unit of prosecution, it is consistent with criminalizing the act of obstructing justice by tampering with a witness no matter how many calls are made in an attempt to accomplish the act.

The final consideration under *Varnell* is whether "the facts in a particular case may reveal more than one 'unit of prosecution' is present." 162 Wn.2d at 168. This principle played a part in *Jensen*, where this court found that three separate conversations, where the defendant attempted to solicit someone to kill a total of four people, was properly chargeable as two counts of solicitation to commit murder, not four. *State v. Jensen*, 164 Wn.2d 943, 195 P.2d 512 (2008). The court found that each time the defendant attempted to entice a new person to kill supported a separate charge. *Id.* at 958-59 ("a separate unit of prosecution arises when the facts support the conclusion the defendant enticed a different person, at a different time and place, to commit a distinct crime"). But one of the three conversations in *Jensen* did not support a separate charge because it simply confirmed the details of an earlier one. *Id.* at 957. In this case, the course of

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conduct was continuous and ongoing, aimed at the same person, in an attempt to tamper with her testimony at a single proceeding. There is not the sort of separate efforts shown in *Jensen*.

The State urges and the Court of Appeals found persuasive a Wisconsin Court of Appeals case, *State v. Moore*, 2006 WI App 61, 292 Wis. 2d 101, 713 N.W.2d 131. The relevant statute uses similar language to our own: “Except as provided in s. 940.43, whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding or inquiry authorized by law, is guilty of a Class A misdemeanor.” *Id.* at 106 (quoting Wis. Stat. § 940.42). The defendant was charged with battering a woman and her daughter and had sent at least seven letters from jail to the woman attempting to persuade her and her daughter not to testify. He was charged and convicted with 14 counts of intimidating a witness, 2 counts based on each letter. *Id.* He contended the charges were multiplicitous and violated the legislature’s intent.

But while the statutory language is similar, Wisconsin’s common law approach to the unit of prosecution is much different than ours. Wisconsin presumes the legislature intended multiple punishments and requires “clear indication to the contrary.” *Id.* at 113 (quoting *State v. Anderson*, 219 Wis. 2d 739, 751, 580 N.W.2d 329 (1998)). In Washington, by contrast, “[u]nless the legislature clearly and unambiguously intends to turn a single transaction into multiple offenses, the rule of lenity requires a court to resolve ambiguity in favor of

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one offense.” *Jensen*, 164 Wn.2d at 949 (citing *Adel*, 136 Wn.2d at 634). Given that difference, *Moore* is not helpful. The Court of Appeals also reasoned that unless each new conversation is separately chargeable, the defendant will have no incentive to stop attempting to tamper with a witness. But if we adopt that reasoning, the corollary is that each conversation is a separate crime and, in this case for example, could lead to as many as 1,200 separate crimes. Such an interpretation could lead to absurd results, which we are bound to avoid when we can do so without doing violence to the words of the statute. *Wright v. Jeckle*, 158 Wn.2d 375, 380-81, 144 P.3d 301 (2006) (citing *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003)). It seems unlikely the legislature intended that a person could be prosecuted for over a thousand crimes under the circumstances presented here.

Our determination might be different if Hall had changed his strategy by, for example, sending letters in addition to phone calls or sending intermediaries, or if he had been stopped by the State briefly and found a way to resume his witness tampering campaign. But those facts are not before us.

V

Double jeopardy forbids the entry of multiple convictions for the same offense. A defendant may be convicted of multiple counts for the same offense arising out of the same course of conduct as long as each charge represents a separate unit of prosecution. We have a multistep analytical approach to determine the unit of prosecution. As always, we first look to the statute to glean the intent of

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the legislature. Then we look to the statute's history, and finally to the facts of the particular case. If there is still doubt, we apply the rule of lenity in favor of a single unit. In this case, we hold the plain language of the statute reveals that the legislature intended to criminalize inducing "a" witness not to testify or to testify falsely. We hold, under the facts of this case, Hall committed one crime of witness tampering, not three. However, we recognize that the facts of a different case may reveal more than one unit of prosecution. We do not reach whether or when additional units of prosecution, consistent with this opinion, may be implicated if additional attempts to induce are interrupted by a substantial period of time, employ new and different methods of communications, involve intermediaries, or other facts that may demonstrate a different course of conduct. We reverse the Court of Appeals and remand for resentencing.

State v. Hall (Isiah Thomas), No. 82558-1

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice Gerry L. Alexander

Justice James M. Johnson

Justice Richard B. Sanders

Justice Debra L. Stephens

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62971-9-I
)	
NICOLIA GOLODIUC,)	
)	
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 12TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NICOLIA GOLODIUC
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AIRWAY HEIGHTS, WA 99001

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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF MAY, 2010.

x *Patrick Mayovsky*