

63023-7

63023-7

No. 63023-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CLYDE JOHNSON,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 OCT - 2 PM 4: 51

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A. ASSIGNMENTS OF ERROR.

1. Mr. Johnson's multiple convictions for tampering with a witness violates the double jeopardy clauses of the federal and state constitutions.

2. The State did not present sufficient evidence that Mr. Johnson violated a court order prohibiting contact with a protected individual where the order at issue lapsed on the day of the contact.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Do Mr. Johnson's multiple convictions for tampering with a witness violate double jeopardy where the separate convictions are based on a course of conduct involving a single witness and a single proceeding? Assignment of Error 1

2. Was there sufficient evidence that Mr. Johnson violated a court order on July 19, 2008 where the order at issue lapsed on that date? Assignment of Error 2

C. STATEMENT OF THE CASE.

Clyde Johnson is a former boyfriend of Marsette Prentiss. On July 4, 2008, Ms. Prentiss was with her cousin, John Regis Francis, on Yesler Avenue in downtown Seattle meeting a friend. 1/12/08 VRP 41-38, 1/7/08 VRP 90. Ms. Prentiss was sitting on the sidewalk talking to her friend when Mr. Johnson got out of a car and

approached them. 1/7/08 VRP 95-98. Mr. Johnson swore at Ms. Prentiss calling her a "ho" and a "bitch" and then grabbed her near the top of her jacket and dragged her toward a car that had pulled up. 1/7/08 VRP 100-01. He pulled her into the car as she struggled and the car drove off. 1/7/08 VRP 102-03, 105. The car came back a few minutes later and Ms. Prentiss ran out of the car running away from Mr. Johnson. 1/7/08 VRP 107-09.

Ms. Prentiss and Ms. Francis got back to their car and were planning to go to Ms. Francis' home when a car carrying Mr. Johnson pulled up behind their car. 1/7/08 VRP 120-21. Ms. Prentiss sped away but Mr. Johnson continued to follow them. 1/7/08 VRP 122-27. As they were being chased, Mr. Johnson leaned out of the car window swinging a bat while threatening them and eventually shattered their rear window. 1/7/08 VRP 128-29. They drove to a service station and waited there while an employee called the police. 1/7/08 VRP 133.

Seattle police officer David Toner was dispatched to an address looking for Mr. Johnson. 1/7/08 VRP 36-37. He found Mr. Johnson there and arrested him. 1/7/08 VRP 37. On July 5, a judge signed an order prohibiting contact with Ms. Prentiss. Ex 20.

On July 6, Ms. Prentiss went out with Ms. Francis attempting to get into Thompson's bar. 1/7/08 VRP 147-48. While they were outside, Mr. Johnson appeared with a group of people. 1/7/08 VRP 149. He laughed aloud and told Ms. Prentiss, "You thought you could keep me in jail?" 1/7/08 VRP 151. The two got into a verbal argument and they walked behind a nearby building. 1/7/08 VRP 152. It is here that the testimony of Ms. Prentiss and Ms. Francis differ. Ms. Prentiss denied Mr. Johnson assaulted her that night. She testified that she was "irritated and frustrated" because she felt he did not understand that she wanted to be left alone. 1/12/09 VRP 96. She testified that she hit Mr. Johnson multiple times and pulled his hair and that he grabbed her to push her off of him. 1/12/09 VRP 96-97. Ms. Francis testified that after a brief verbal argument, Ms. Prentiss and Mr. Johnson went behind behind a nearby building and when they returned a minute later they continued to argue. 1/7/08 VRP 153-54. Ms. Francis also testified that Mr. Johnson then grabbed Ms. Prentiss by her hair and shoved her with his chest. 1/7/08 VRP 154. At some point Ms. Prentiss fell to her knees and then he kicked her in the face. 1/7/08 VRP 158. Mr. Johnson was later arrested and held in jail. On July 21, a judge issued an order prohibiting him from contacting Ms.

Prentiss. Ex. 21. While being held in jail he made numerous telephone calls to Ms. Prentiss. Ex. 2, 5, 6. Some of the conversations included Mr. Johnson telling Ms. Prentiss that the charges would be dismissed if she did not testify at trial.

A jury convicted Mr. Johnson of assault in the second degree, two counts of felony harassment, felony violation of a court order, seven counts of tampering with a witness and four counts of misdemeanor violation of a court order. CP 81-95. He appeals. CP 96.

Additional pertinent facts are included in the argument section below.

#### D. ARGUMENT

1. MR. JOHNSON'S CONVICTIONS FOR MULTIPLE COUNTS OF WITNESS TAMPERING BASED ON A SINGLE UNIT OF PROSECUTION VIOLATES DOUBLE JEOPARDY.

a. Double jeopardy principles bar a defendant from being convicted more than once for the same criminal conduct.

The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense."

U.S. Const. amend. 5; Const. art. 1, § 9. The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Double jeopardy is a constitutional issue that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); Gocken, 127 Wn.2d at 100. While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the

court may not enter multiple convictions for the same criminal conduct. Freeman, 153 Wn.2d at 770-71

The double jeopardy provisions of the United States and Washington Constitutions provide that a person may not be convicted more than one time under the same criminal statute if he or she has committed only one “unit” of the crime. State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006). The unit of prosecution is designed to protect the accused from overzealous prosecution. State v. Turner, 102 Wn.App. 202, 210, 6 P.3d 1226 (2000).

The unit of prosecution may be an act or a course of conduct. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). The unit of prosecution is determined by examining the statute’s plain language. Leyda, 157 Wn.2d at 342. If the legislature has not specified the unit of prosecution, or if legislative intent is unclear, this Court resolves any ambiguity in favor of the accused. Tvedt, 153 Wn.2d at 711.

b. The unit of prosecution for witness tampering is not predicated on the date of any conduct between the witness and perpetrator.<sup>1</sup> When a defendant is convicted for violating one statute multiple times, the court must determine what unit of

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<sup>1</sup> This issue is pending in the Supreme Court, State v. Hall, 166 Wn.2d 1005, 208 P.3d 1124 (2009).

prosecution the legislature intended within the particular criminal statute. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

At issue here is the witness tampering statute, which 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 or the abuse or neglect of a minor child 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 or the abuse or neglect of a minor child to the agency.

RCW 9A.72.120(1).

The statute defines the prohibited conduct as the attempt to induce “a witness” to do any of the listed acts, including withhold information or withhold testimony, testify falsely, or absent himself or herself, with the purpose of keeping the witness from participating in “any official proceeding.” RCW 9A.72.120(1). The statute’s purpose is to address a person’s efforts to influence a witness to change his testimony, which has the necessary tendency

to obstruct justice. State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979).

The statute defining tampering with a witness defines the prohibited conduct as the attempt to induce “a witness” to do any of the listed acts, including withhold information or withhold testimony, testify falsely, or absent himself or herself, with the purpose of keeping the witness from participating in “any official proceeding.” RCW 9A.72.120(1). The statute’s purpose is to address a person’s efforts to influence a witness to change his testimony, which has the necessary tendency to obstruct justice. State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979).

The language of the statute plainly focuses on “a witness” and “an official proceeding.” RCW 9A.72.120. It contemplates a single individual who is “a witness,” and then targets efforts at affecting this witness’s participation in an official proceeding. RCW 9A.72.010(4) defines “official proceeding” as

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, notary, or other person taking testimony or depositions.

This definition further underscores the focus of witness tampering is keeping a person from participating in a proceeding, rather than

separately criminalizing every contact with this person in order to convince the witness not to participate. Consequently, the statute's legislative purpose and plain language prohibits anyone from engaging in a course of conduct designed to keep a certain person from testifying or offering information in an official proceeding.

The State may not avoid double jeopardy requirements by breaking a crime into a series of temporal or spatial units. Adel, 136 Wn.2d at 635-36. In Adel, the prosecution divided a charge of marijuana possession into the different places the defendant stored the marijuana. The Supreme Court rejected this spatial distinction, and found it an improper effort to segment a single act of possession into multiple convictions when the statute barred possession based on quantity without specifying the time or place the item is possessed. Id. at 636. Likewise, in Leyda, the Court ruled that using one person's identity card multiple times on several days was a single "identity theft" because the statute focused on the identity of the individual whose identification is misused rather than each individual use of a single identification card. 157 Wn.2d at 346-47.

Here, the State broke the alleged tampering into separate events based on the dates of the phone calls. CP 19-23. Each

count involved a telephone call to the same person, Ms. Prentiss, and the “official proceeding” was the instant prosecution.

According to the State, Mr. Johnson’s intent was to stop the prosecution against him by urging Mr. Prentiss to avoid testifying against him. 1/13/09 VRP 24-25, 28-30.

By its very nature, witness tampering is an on-going effort at convincing a person not to testify. Repeated contact over different dates is generally necessary to remind, cajole, and convince the person to resist efforts to give inculpatory evidence.

The unit of prosecution is not based on the number of times the perpetrator of the tampering contacted the witness, but rather by the identity of the witness and the official prosecution at issue.

RCW 9A.72.120.

In Hall, this Court claimed that the statute’s words “attempts to induce a witness,” unambiguously define the unit of prosecution as “any attempt” to induce, in the context of tampering with the person’s testimony. 147 Wn.App. 485, 489, 196 P.3d 151(2008), review granted 166 Wn.2d 1005, 208 P.3d 1124 (2009). However, even if the statute defines the unit of prosecution as “any attempt” to influence a witness, “any” may mean “all” or “one or more” and has been consistently interpreted to define the larger group and not

only a narrow “one.” Sutherby, 204 P.3d at 921-22 (citing numerous examples); see also State v. Ose, 156 Wn.2d 140, 146, 124 P.2d 635 (2005).

Furthermore, if the language of the statute can be interpreted in more than one way, it is ambiguous. Cockle v. Dept. Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001). If the Legislature has not clearly identified the unit of prosecution, or the statute is ambiguous, it must be construed in the defendant’s favor. AdeI, 136 Wn.2d at 634-35. The unit of prosecution for witness tampering is defined by witness and proceeding, not by the date of each contact with the witness. See e.g., Leyda, 157 Wn.2d at 351. If the unit of prosecution is ambiguous, it permits one conviction for Mr. Johnson based on his efforts to stop one witness from testifying against him in a single prosecution.

c. Mr. Johnson’s convictions must be reversed.

Because Mr. Johnson’s convictions for seven counts of witness tampering involved his contact with the same witness and same proceeding, they constituted a single unit of prosecution.

Therefore, six of the seven counts violate his right to be free from double jeopardy and must be vacated and the case remanded for a new sentencing hearing. Leyda, 157 Wn.2d at 351.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT ONE OF THE CONVICTIONS FOR VIOLATION OF A COURT ORDER.

a. The State must prove each element of the charged beyond a reasonable doubt. In a criminal prosecution, constitutional due process requires the state to prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980). In assessing a claim of insufficient evidence, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d at 220-21. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn there from. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. There was insufficient evidence that Mr. Johnson was prohibited from contacting Ms. Prentiss on the date of the alleged violation. In count six, Mr. Johnson was convicted of

misdemeanor violation of a court order, contrary to RCW

26.50.110(1). CP 19, CP 64, CP 86. The statute provides in part:

(1)(a) Whenever an order is granted under... chapter 10.99, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party.

The State alleged that on July 19, 2008, Mr. Johnson contacted Ms. Prentiss by telephone in violation of a court order. CP 19, 64. However, the court order the State alleged that prohibited Mr. Johnson from contacting her lapsed on July 19. Ex. 20. The subject order provided in part:

[T]he defendant shall have no contact...with Marsette Prentiss...**until** fourteen days from the date of this order or further order of this court.

Ex. 20. (emphasis in the original)

The order was signed by the court on July 5. A second order prohibiting contact was not issued until July 21. Ex 21.

“Until” is defined as:

1. Up to the time of: *We danced until dawn.*
2. Before ( a specified time): *She can't leave until Friday.*

The American Heritage Dictionary, 4<sup>th</sup> Ed.

Therefore, Mr. Johnson was prohibiting from having contact up to July 19. But on July 19, the order lapsed.

Because the order lapsed on July 19 and a second order was not issued until July 21, the evidence was insufficient to support a finding he was guilty of misdemeanor violation of a court order on July 19, 2008.

c. Reversal of the conviction is required. Where there is insufficient evidence for a rational trier of fact to find an essential element of a charged crime beyond a reasonable doubt, the conviction cannot stand. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In the case at bar, there was insufficient evidence Mr. Johnson violated a court order on the date charged. Therefore, the conviction must be reversed and dismissed.

#### E. CONCLUSION

For the reasons stated above, Clyde Johnson respectfully asks this Court to reverse all but one of his convictions for witness tampering as they violate double jeopardy, reverse his conviction for count six of violation of a no contact order, and correct his offender score based on the incorrectly calculated criminal history.

DATED this 2<sup>nd</sup> day of October, 2009

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63023-7-I
v.	)	
	)	
CLYDE JOHNSON,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **OPENING 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> CLYDE JOHNSON 733989 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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**SIGNED** IN SEATTLE, WASHINGTON THIS 2<sup>ND</sup> DAY OF OCTOBER, 2009.

X \_\_\_\_\_  
*[Handwritten Signature]*

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