

No. 65950-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD MARTINEZ,

Appellant.

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

The Honorable Cheryl Carey

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REPLY BRIEF

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## A. REPLY ARGUMENT

**STATE V. HALL'S "UNIT OF PROSECUTION" DECISION WAS BASED ON THE FACTS OF THAT CASE AND DOES NOT CONTROL OR ESTABLISH THAT A UNANIMITY INSTRUCTION WAS NOT REQUIRED IN THE PRESENT PROSECUTION.**

This is a unanimity case and it has nothing to do with the question whether the State could or could not have charged multiple counts under Double Jeopardy strictures. The State contends in its Brief of Respondent that a unanimity instruction was not required in the present case, because the "unit of prosecution" of the crime of Tampering is the course of calls or contacts made as an effort to influence testimony or procure trial absence. BOR at 9. The State cites State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010), a Double Jeopardy case, which decided that the defendant's 1,200 plus telephone calls all placed to one person, State's witness Aquiningoc, seeking false testimony, constituted merely one "unit" of the crime of Tampering. State v. Hall, 168 Wn.2d at 728.

First, Mr. Martinez's appeal does not involve Double Jeopardy issues. The unit of prosecution analysis under Double

Jeopardy involves an assessment of the propriety of judgments of conviction on multiple counts for which, presumably, the evidence was sufficient and the verdicts are otherwise unimpeached. Mr. Martinez raises a question whether the single conviction on a verdict for Tampering was proper, given that the State produced evidence of multiple, discrete telephone calls. He argues that a Petrich instruction was required, based on the cases and their reasoning cited above.

Second, the State's legal contention that its cited Double Jeopardy cases control this Petrich unanimity case is in error. The State's theory is as follows – if the unit of prosecution for Tampering is the single course of multiple telephone calls, then there are no “multiple acts” requiring a unanimity instruction under Petrich.

However, the unit of prosecution for Tampering may or may not be a course of multiple calls. Unit of prosecution analysis involves review of the language of the criminal statute at hand, and the facts of the particular case, in order to determine if only one unit of the crime was committed despite multiple verdicts of

conviction. State v. Hall, 168 Wn.2d at 730. As the Court has explained :

[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)).

Thus under the facts in Hall, the defendant's multiple calls to the same person constituted a single unit of prosecution. And under the facts of State v. Sutherby, 165 Wn.2d 870, 921, 204 P.3d 916 (2009), the Supreme Court held that possession of multiple pornographic images on the accused's computer system was one unit of prosecution, rather than supporting multiple convictions for each image.

Looking to Sutherby, this Court of Appeals in State v. Furseth, 156 Wn. App. 516, 522, 233 P.3d 902, review denied, 170 Wn.2d 1007 (2010), held that evidence of multiple pornographic images found on a defendant's computer was not evidence of multiple acts (requiring a unanimity instruction). This Court

reasoned that “Sutherby precludes the possibility that a defendant could have committed multiple acts” of possession of pornography such as to require a Petrich instruction since the crime, under Double Jeopardy, is committed once regardless of how many improper images are possessed.

However, under unit of prosecution analysis, contrary to the State’s implication in its Brief of Respondent, multiple acts of Tampering may indeed in a particular case constitute more than one unit of prosecution. State v. Hall does not set forth any per se rule stating that multiple telephone calls are always one unit of prosecution. Indeed, the Court specifically stated:

Our determination might be different if Hall had changed his strategy by, for example, sending letters in addition to phone calls or sending intermediaries.

(Emphasis added.) Hall, at 737. The Court further noted, “We do not reach whether or when additional units of prosecution . . . may be implicated if additional attempts to induce . . . employ new and different methods of communications [or] involve intermediaries.” Id. at 737-38. Likewise, State v. Sutherby does not set forth any rule stating that possession of multiple images is always a sole unit of prosecution. The case depends on the facts.

The present case involves different types acts directed toward different individuals; in particular, one portion of the evidence showed the defendant called an intermediary in the form of the defendant's girlfriend Heather, to whom one of the three calls was made. The State chose to charge one count. A Petrich instruction was required. In support of the charge of Tampering with a Witness pursuant to RCW 9A.72.120, the State introduced evidence of three telephone calls made by Mr. Martinez. Two calls were to his girlfriend Heather; a third was made to the assault complainant Kelly Raley, from Jail on March 19 and 25, 2010, following the original assault charges. 7/15/10RP at 318-19; Supp. CP \_\_\_\_, Sub # 47A (Exhibit list, State's exhibit 7 (CD recording of calls), State's exhibit 23 (transcript of calls)).

The trial prosecutor failed to elect in closing argument which incident or call should be relied on by the jury for conviction on the count, and the trial court did not give a unanimity instruction, thus the defendant's right to an expressly unanimous jury verdict was violated. State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984); see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (same).

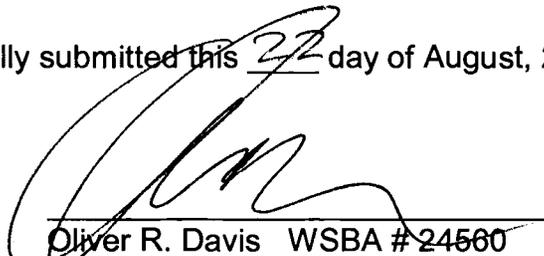
Plainly, the rule of Petrich applies where the State presents evidence of “multiple acts” in support of a single count. Petrich, 101 Wn.2d at 571; see State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); see also State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991). Here, the several factual incidents proffered by the State as supporting the charge of Tampering were controverted, and jurors could have had a reasonable doubt thereon, as to at least one or more of the telephone calls. In addition, at least one of these multiple incidents proffered in support of the count completely failed as sufficient proof of Tampering. Mr. Martinez’s calls to “Heather,” even if they constituted a request that Heather communicate with or influence Raley, do not establish an attempt to induce Ms. Raley to do, or refrain from doing, any of the acts as required for Tampering. But Mr. Martinez’s jury was not given an accomplice liability instruction, much less one pertaining to the Tampering count. See CP 54-83. Discussing with a third party what actions or non-action by a potential witness may have an effect on the criminal case is not an attempt to “induce” that witness.

Certainly, it cannot be said that no juror could have had a reasonable doubt as to any of the acts offered in evidence to support the count. Because this Court cannot be sure that no jurors relied for his or her verdict on a telephone call as to which the evidence was controverted or insufficient, the Petrich error was not harmless beyond a reasonable doubt, and reversal of the conviction for Tampering is required.

**B. CONCLUSION**

Based on the foregoing and on his Appellant's Opening Brief, Mr. Martinez respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 27 day of August, 2011.



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	)	
Respondent,	)	
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v.	)	NO. 65950-2-I
	)	
EDWARD MARTINEZ,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF AUGUST, 2011, 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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U.S. MAIL  
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**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF AUGUST, 2011.

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*[Handwritten Signature]*

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