

FILED
October 12, 2015
Court of Appeals
Division I
State of Washington

NO. 72545-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES STEPHEN HURLEY, III,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIDGETTE E. MARYMAN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	3
SUFFICIENT EVIDENCE SUPPORTS HURLEY'S CONVICTION FOR TAMPERING WITH A WITNESS	3
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Alvarez, 128 Wn.2d 1,
904 P.2d 754 (1995)..... 3

State v. Fiser, 99 Wn. App. 714,
995 P.2d 107, review denied,
141 Wn.2d 1023 (2000)..... 4

State v. Goodman, 150 Wn.2d 774,
83 P.3d 410 (2004)..... 3, 4

State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990)..... 4, 5, 8, 9

State v. Stroh, 91 Wn.2d 580, 588 P.2d 1182 (1979)..... 4

State v. Whitfield, 132 Wn. Ap. 878, 134 P.3d 1203 (2006)..... 5

State v. Wingard, 92 Wash. 219, 158 P. 725 (1916)..... 5

Statutes

Washington State:

RCW 9A.72.120 4

A. ISSUES PRESENTED

Whether sufficient evidence supports Hurley's conviction for tampering with a witness, where Hurley called the victim, told her to get him out of custody, and urged her to change her testimony.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant James Hurley was charged by amended information with assault in the second Degree (count 1), felony harassment (count 2), unlawful imprisonment (count 3), tampering with a witness (count 4) and misdemeanor violation of a court order (counts 5-7). CP 12-15. The State further alleged that each of the crimes involved domestic violence. Id. At the conclusion of its case, the State amended count 1 to assault in the fourth degree-domestic violence, and dismissed count 2. CP 68-72.

The jury found Hurley guilty of assault in the fourth degree-domestic violence, tampering with a witness-domestic violence, and three counts of domestic violence violation of a court order. CP 105-110. The Court imposed a standard-range sentence. CP 122-132.

2. SUBSTANTIVE FACTS

On December 30, 2013, Hurley assaulted his wife, Nicole Guevarra. Lost in an unfamiliar neighborhood, Guevarra ran to a nearby convenience store, leaving her belongings—including her purse, inhaler, and dog—in the truck. Ex. 12, 13. Once there, Guevarra called 911 to report that she had come to Seattle from Spokane in her husband's semi-truck, and he was "kicking the crap out of [her]." Id.

When police arrived, Guevarra was out of breath, hysterical, and crying. RP 162-64. She had visible red marks on her face and her neck. Id. Police took a statement from Guevarra, and then found Hurley at his truck nearby. RP 166. Hurley, who still had Guevarra's possessions, had bite marks on his right arm and on his back. RP 166, 188. Hurley was arrested. 168. On December 13, 2013, the court issued a no-contact order, prohibiting Hurley from contacting Guevarra. RP 152-53.

While in custody, Hurley called Guevarra several times between January 5, and January 13, 2014. Ex. 29. Those calls were recorded, pursuant to the King County Jail's policy. RP 204-206. Both Hurley and Guevarra were informed that the calls were being recorded. RP 206-7. Several of these calls were the basis for

charges of violating a court order. RP 260. The call made on January 6, 2014, at 7:06 p.m. was the basis for the witness-tampering charge. RP 263-64. Guevarra did not testify at trial.

C. **ARGUMENT**

SUFFICIENT EVIDENCE SUPPORTS HURLEY'S
CONVICTION FOR TAMPERING WITH A WITNESS

Hurley asserts that the State did not prove that he was guilty of tampering with a witness. This argument should be rejected because there was sufficient evidence from which a rational jury could find that Hurley attempted to induce Guevarra to testify falsely, withhold testimony or absent herself from trial.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. Id. Circumstantial and direct evidence carry equal

weight when reviewed by an appellate court. Id. A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

A person commits the crime of tampering with a witness if he attempts to induce a witness to testify falsely, withhold testimony, or absent himself or herself from official proceedings. RCW 9A.72.120. Proof of such an attempt does not depend only on the literal meaning of the words used. State v. Rempel, 114 Wn.2d 77, 83, 785 P.2d 1134 (1990). The State is entitled to rely on the inferential meaning of the words and the context in which they were used. Id. at 83–84. Although the relative-success of the inducement is not dispositive, it is relevant to that context. Id. at 84.

Sufficient evidence supports a conviction for witness tampering where a defendant asked a witness not to appear or to change his testimony, State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979), or made promises or threats when urging a witness to

drop the charges. State v. Wingard, 92 Wash. 219, 158 P. 725 (1916). Likewise, where a defendant urges a victim to lie about the crime and provides examples of how to do so, that is sufficient to sustain a conviction for witness tampering. State v. Whitfield, 132 Wn. App. 878, 897-98, 134 P.3d 1203 (2006).

Hurley claims that the facts here resemble those in Rempel, where the defendant's alleged attempts to induce the victim not to testify included telephone calls containing an apology, a statement that "it" was going to ruin his life, and a request that she "drop the charges." Rempel, 114 Wn.2d at 83. The victim testified that the defendant's calls did not concern her and that he was only a nuisance. Id. at 84. This evidence was not sufficient to support the witness tampering conviction. Id.

In contrast, the conversations between Hurley and Guevarra demonstrate that Hurley was controlling and manipulating her in order to get her help—either by changing her testimony or by failing to testify. Notably, Hurley had to do this in veiled language, since he knew his conversation was being recorded. Although Hurley did not expressly tell Guevarra to change her testimony, his attempt to persuade her to do so was clear:

HURLEY: Anyway, though so. So yeah, so you gonna (unintelligible). What are you gonna tell her that she recommends—because one of the reasons that they kept me here is 'cause they're sayin' that you know that uh that you were worried about me gettin' out. You know what I mean?

UNKNOWN: Yeah.

HURLEY: So. You know. I mean hopefully, that's not a problem no more, right?

UNKNOWN: No.

HURLEY: Huh?

UNKNOWN: I said no.

HURLEY: You know hopefully that could be expressed to the—you know that—

UNKNOWN: Yeah, it will be.

Ex. 29 at 3. The implication of this exchange is that Guevarra should change what she had previously told the court about her safety concerns so that Hurley could be released. He also pressured her to change her testimony about the facts of the crime:

HURLEY: Yeah, I know. That's what I'm sayin'. Well they're sayin' because that you know—you know—they're sayin' 'cause I—I guess because I uh so you're sayin' that I fuckin' held you hostage in the truck and wouldn't let you out. You know what I mean.

UNKNOWN: Well I did, and I said I tried to get out like five times, but you didn't want me out of the truck because the guy that you worked with.

HURLEY: Well maybe (unintelligible) maybe you could just exaggerating that many. You know what I'm sayin'. (Unintelligible).

UNKNOWN: No, it was four or five. I remember clearly.

HURLEY: No, you—you're not listenin' to what I'm sayin'.

UNKNOWN: Uh, huh.

HURLEY: You know what I mean.

OPERATOR: You have one minute—

HURLEY: You know.

OPERATOR: remaining.

HURLEY: I mean if you want me out, maybe you know.

Ex. 29 at 5-6. Despite Guevarra's strong insistence that she had told the truth to the police, Hurley repeatedly told her that she should now claim that it was an exaggeration. Hurley tied his directions to his demand that Guevarra get him out of custody.

Hurley also repeatedly insisted that Guevarra "get [him] out of here," to which Guevarra replied that she could just "send stuff to the advocate, and you know not go to court." Ex. 29 at 5. Hurley replied, "I love you." Although not an explicit demand to absent herself, Hurley was encouraging her to do so.

The Court in Rempel emphasized the importance of going beyond the words and looking to context when considering whether sufficient evidence proved tampering. The context in Hurley's case is distinguishable from Rempel. In Rempel, the jury heard about the alleged tampering from the victim, who testified that the calls had no effect on her. Rempel, 114 Wn.2d at 84. In contrast, here the jury was able to *hear* the calls between Hurley and Guevarra. Given the opportunity to hear the tone-of-voice and speech patterns, they could better understand why and how Hurley was able to influence Guevarra.

In addition to the actual tampering call, the jury heard several other calls that added context to the relationship and helped the jury to understand how Hurley could control Guevarra. He professed his love for her, hoping to maintain connections with her. Ex. 29 at 1, 2, and 7. He repeatedly promised to seek treatment if she helped him get out, in an attempt to reassure her that it was safe for him to be released. Ex. 29 at 2, 3, and 7. Hurley reminded Guevarra that she knew what to do because they'd done it before. Ex. 29 at 7. He advised her how to go about delivering messages about her lack of participation. Ex. 29 at 8. When Guevarra said that she would do one last favor for him and then be done with him,

Hurley used guilt and anger to try to control her. Ex. 9-12.

Although none of the calls contained explicit directives—because Hurley knew that he was being recorded—the context of the calls helps to show how Hurley could manipulate and control Guevarra regarding whether and how to testify.

The final contextual distinction between the instant case and Rempel involves the effect on the witness. In Rempel, the victim testified truthfully at trial, and said that the defendant's calls had no effect on her decision to testify. Rempel, 114 Wn.2d at 84. In contrast, Guevarra did not testify in court. A jury could reasonably conclude that Hurley's attempts at tampering were successful.

Based on both the content of the January 6 call and the overall context of Hurley and Guevarra's relationship, sufficient evidence supports the jury's finding that Hurley was guilty of tampering with a witness.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hurley's conviction and his judgment and sentence.

DATED this 12 day of October, 2015.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: Bridgette E. Maryman
BRIDGETTE E. MARYMAN, WSBA# 38720
Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Christopher Gibson, the attorney for the appellant, at Gibsonc@nwattorney.net, containing a copy of the Brief of Respondent, in State v. James Stephen Hurley, III, Cause No. 72545-9, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 12 day of October, 2015.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Name:
Done in Seattle, Washington