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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II

CLERK

STATE OF WASHINGTON,

Respondent

vs.

DAVID J. LOBE,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Paula Casey, Judge
Cause No. 05-1-00889-3

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT	5
(1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT LOBE WAS GUILTY OF WITNESS TAMPERING IN COUNT IV	5
(2) LOBE’S CONVICTION FOR WITNESS TAMPERING IN COUNT IV SHOULD BE REVERSED WHERE THE COURT FAILED TO GIVE AN UNANIMITY INSTRUCTION AND THE STATE FAILED TO ELICIT SUFFICIENT EVIDENCE TO SUPPORT ALL THE CHARGED ALTERNATIVE MEANS	9
(3) LOBE’S CONVICTION FOR WITNESS TAMPERING IN COUNT III SHOULD BE REVERSED WHERE THE COURT FAILED TO GIVE AN UNANIMITY INSTRUCTION AND THE STATE FAILED TO ELICIT SUFFICIENT EVIDENCE TO SUPPORT ALL THE CHARGED ALTERNATIVE MEANS	11
E. CONCLUSION	12

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10, <i>cert. denied</i> , 501 U.S. 1237 (1991).....	9
<u>State v. Craven</u> , 67 Wn. App. 921, 841 P.2d 774 (1992).....	5
<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996)	9
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	5
<u>State v. Gooden</u> , 51 Wn. App. 615, 754 P.2d 1000, <i>review denied</i> , 111 Wn.2d 1012 (1988).....	9
<u>State v. Hursh</u> , 77 Wn. App. 242, 890 P.2d 1066 (1995)	9
<u>State v. Ortega-Martinez</u> , 124 Wn.2d 702, 881 P.2d 231 (1994)	9
<u>State v. Peterson</u> , 73 Wn. App. 303, 438 P.2d 183 (1968)	9
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	5
<u>Constitution</u>	
Art. 1, sec. 21 of the Washington Constitution	9
<u>Statutes</u>	
RCW 9A.72.120.....	5, 10
<u>Court Rules</u>	
RAP 2.5.....	9

A. ASSIGNMENTS OF ERROR

1. The trial court erred in not finding a lack of sufficient evidence to find Lobe guilty beyond a reasonable doubt of witness tampering in Count IV.
2. The trial court erred in failing to give an unanimity instruction on Count IV (witness tampering) where the State failed to elicit sufficient evidence of all the charged alternatives.
3. The trial court erred in failing to give an unanimity instruction on Count III (witness tampering) where the State failed to elicit sufficient evidence of all the charged alternatives.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to uphold Lobe's conviction for witness tampering in Count IV? [Assignment of Error No. 1].
2. Whether the trial court erred in failing to give an unanimity instruction on Count IV (witness tampering) where the State failed to elicit sufficient evidence of all the charged alternatives? [Assignment of Error No. 2].
3. Whether the trial court erred in failing to give an unanimity instruction on Count III (witness tampering) where the State failed to elicit sufficient evidence of all the charged alternatives? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

David J. Lobe (Lobe) was charged by third amended information filed in Thurston County Superior Court with one count of violation of a no contact order—assault (Count I), one count of violation of a no contact

order—third or subsequent violation (Count II), and two counts of tampering with witnesses (Counts III and IV). [CP 69-70].

Prior to trial, no motions regarding 3.5 or 3.6 were made or heard. Lobe was tried by a jury, the Honorable Paula Casey presiding. Lobe had no objections or exceptions to the instructions. [RP 174]. The jury found Lobe guilty on Count I of a violation of a no contact order, but did not find that an assault had been committed; guilty on Count II of a violation of a no contact order entering a special finding that this was the third such offense; and guilty on Counts III and IV of tampering with witnesses. [CP 98, 99, 100, 101, 102, 103; RP 208-220].

The court sentenced Lobe on Count I—a misdemeanor given the jury's verdict—to a sentence of 12-months; on Count II to a standard range sentence of 25.5-months; on Count III to a standard range sentence of 14-months, and on Count IV to a standard range sentence of 14-months with all of the sentences running concurrently for a total sentence of 25.5-months based on an offender score for the three felonies (Counts II-IV) of 4.¹ [CP 105, 106, 107-115; 12-9-05 RP 12-13].

¹ Lobe has the following separate prior convictions:

2001	Felony VOP
2001	Felony VOP
2001	Assault 2 DV

[CP 108].

Timely notice of appeal was filed on December 29, 2005. [CP 118-127]. This appeal follows.

2. Facts

On May 16, 2005, Olympia Police officer Brian Henry (Henry) was dispatched to pay phone in front of the Thurston County Courthouse regarding a 911 call from Tara Pappas (Pappas). [RP 28-29]. Pappas had called 911 regarding an assault and violation of a no contact order by Lobe. [RP 29-31]. When Henry contacted Pappas, he noted that she was crying and her face was red, but he could see no evidence of an assault. [RP 48]. Henry then went across the street to Lobe's apartment, spoke with Lobe, who was dressed as Pappas had described, confirmed the existence of a no contact order prohibiting Lobe from having contact with Pappas, and arrested him for violation of a no contact order. [RP 32-45].

Pappas testified that she and Lobe had been in a relationship in 2003, but the relationship ended and she had obtained a no contact order against Lobe. [RP 81-83]. Pertinent portions of the no contact order prohibiting Lobe from contact with Pappas were admitted at trial as Exhibits Nos. 1, 2 and 6. [CP 95-97; RP 45, 50, 52]. Pappas further testified that in May of 2005, she had come to Lobe's apartment in Olympia from her home in Winlock and had stayed with him for a couple of weeks. [RP 85-90]. On May 16, 2005, she and Lobe argued with Lobe

threatening her and pulling her hair. [RP 91-93]. Pappas left Lobe's apartment and went across the street to a pay phone in front of the courthouse and called 911. [RP 93]. The 911 call made by Pappas was admitted as evidence (Exhibit No. 3) and played to the jury. [CP 95-97; RP 94-98].

On July 21, 2005, after Lobe had been charged with violating the no contact order related to Pappas, Pappas and her friend, Erica Attouf (Attouf), were on the phone taking turns speaking with Sara Gregoire (Gregoire), Lobe's then girlfriend. [RP 105, 137-140, 143-145]. Lobe came on the line and told Pappas not to cooperate with the prosecution by not giving her address or simply not showing up because then the charge against him would be dropped. [RP 106]. Pappas gave the phone to Attouf and Lobe told Attouf to tell Pappas not to cooperate with the prosecution. [RP 106, 137-140, 143-145].

Admitted as evidence without objections were certified copies of Lobe's two prior judgments and sentences involving violation of no contact orders. [CP 95-97; RP 147]. The State filed its witness list on July 25, 2005, which included Attouf's name as a witness—Attouf was not a witness to the violation of a no contact order related to the May 16th incident, which was the sole charge pending against Lobe on July 21st. [Supp. CP 129].

Lobe did not testify at trial.

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT LOBE WAS GUILTY OF WITNESS TAMPERING IN COUNT IV.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Lobe was charged and convicted in Count IV of witness tampering—Erica Attouf. [CP 69-70, 988]. RCW 9A.72.120 defines the crime of witness tampering as follows:

- (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.

As instructed by the court in Instruction No. 16 [CP 89], the State bore the burden of proving the following elements beyond a reasonable doubt:

To convict the defendant of the crime of tampering with a witness as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 21st day of July, 2005, the defendant attempted to induce a person, Erica Attouf, to testify falsely or, without right or privilege to do so withhold testimony or absent himself or herself from any official proceeding or withhold from a law enforcement agency information relevant to a criminal investigation; and
- (2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The State cannot sustain its burden on this count in two respects:

(1) that Erica Attouf was a witness or was to be called as a witness, or that Lobe had reason to believe she had information related to the pending charge and (2) that Lobe directed Erica Attouf to testify falsely or withhold information or absent herself from an official proceeding.

First, it cannot be disputed that on July 21, 2005, the date Lobe alleged witness tampered with Erica Attouf, Lobe was charged solely with a violation of a no contact order related to Tara Pappas occurring on May 16, 2005. [CP 4]. The only “witnesses” to the crime charged were Pappas—the victim, Officer Henry—the officer dispatched to Pappas’s 911 call, the 911 operator, and Lobe. Attouf was not a “witness” to the crime with which Lobe was charged and he could have no reason to believe that she could in any way become a witness or have information related to the investigation of the May 16th incident. In fact, the State did not even file a witness list, which list included Attouf’s name as a witness until four days following the alleged witness tampering incident on July 25, 2005. [Supp. CP 129]. Further, the State did not even charge Lobe

with witness tampering of Attouf until August 15, 2005. [CP 9-10]. Given these facts, the State cannot establish an essential element of witness tampering it charged in Count IV that Erica Attouf was a “witness,” and his conviction on this count should be reversed and dismissed.

Moreover, the State cannot establish beyond a reasonable doubt a second essential element of witness tampering—that Lobe directed Attouf to give false information, testify falsely, or to absent herself from the proceedings. While it is true the prosecution had left a phone message on Attouf’s voicemail reminding Pappas to keep the prosecution apprised of her address and phone number, the phone message was for Pappas not Attouf. [RP 137-138]. With regard to the phone conversation on July 21st, Attouf’s testimony is unequivocal in that Lobe did not ask her to absent herself from the proceedings, testify falsely, or to give false information—his conversation was directed at Pappas with Attouf acting merely as a conduit. [RP 137-140, 143-145]. The State cannot establish beyond a reasonable doubt this essential element of witness tampering as charged in Count IV.

This court should find that the State has failed to meet its burden of proof beyond a reasonable doubt on two essential elements of Count IV and reverse and dismiss Lobe’s conviction on this count.

- (2) LOBE'S CONVICTION FOR WITNESS TAMPERING IN COUNT IV SHOULD BE REVERSED WHERE THE COURT FAILED TO GIVE AN UNANIMITY INSTRUCTION AND THE STATE FAILED TO ELICIT SUFFICIENT EVIDENCE TO SUPPORT ALL THE CHARGED ALTERNATIVE MEANS.

Art. 1, sec. 21 of the Washington Constitution guarantees a criminal defendant the right to a unanimous jury verdict. "The right to a unanimous verdict is derived from the fundamental constitutional right to a fair trial by a jury, it may be raised for the first time on appeal." State v. Gooden, 51 Wn. App. 615, 617, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988); State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991); State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995). Issues of constitutional magnitude may be raised for the first time on appeal. State v. Peterson, 73 Wn. App. 303, 306, 438 P.2d 183 (1968); State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *see also* RAP 2.5(a)(3).

In alternative means cases, a single offense that may be committed in more than one way, the jury must unanimously agree on guilt for the single crime charged but not on the means by which the crime was committed so long as there is sufficient evidence to support each alternative. State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994); State v. Hursh, 77 Wn. App. at 248. A person can commit

witness tampering by attempting to induce the witness by one of three alternative means: (a) to testify falsely or wrongfully to withhold testimony; (b) to absent herself from the proceedings; or (c) to withhold information relevant to a criminal investigation from a law enforcement agency. *See* RCW 9A. 72.120.

Here, the State charged Lobe in the third amended information with witness tampering of Attouf in Count IV based on all three alternative of witness tampering with the State's charging decision being reflected in the to-convict instruction on this charge. [CP 69-70, 89]. Thus, the State bore the burden of eliciting sufficient evidence to prove beyond a reasonable doubt all of the charged alternatives. The court did not give an unanimity instruction regarding this charge. The State failed to elicit sufficient evidence of all the alternatives as required by the to-convict instruction, as set forth above in the preceding section of this brief. The evidence presented does not constitute sufficient evidence to establish that Lobe attempted to induce Attouf to absent herself from the proceedings, or to testify falsely, and it was the State's burden to do so. Having failed to elicit the requisite evidence to prove beyond a reasonable doubt all the alternatives given the court's failure to give an unanimity instruction, this court should reverse Lobe's conviction for tampering with a witness in Count IV.

- (3) LOBE'S CONVICTION FOR WITNESS TAMPERING IN COUNT III SHOULD BE REVERSED WHERE THE COURT FAILED TO GIVE AN UNANIMITY INSTRUCTION AND THE STATE FAILED TO ELICIT SUFFICIENT EVIDENCE TO SUPPORT ALL THE CHARGED ALTERNATIVE MEANS.

In an effort to avoid needless duplication, the law set forth in the preceding section of this brief is adopted and incorporated herein by this reference given that Count III also involves a charge of witness tampering.

Here, the State charged Lobe in the third amended information with witness tampering of Pappas in Count III based on all three alternative of witness tampering with the State's charging decision being reflected in Instruction No. 13—the to-convict instruction on this charge. [CP 69-70, 86]. Thus, the State bore the burden of eliciting sufficient evidence to prove beyond a reasonable doubt all of the charged alternatives. The court did not give an unanimity instruction regarding this charge. The State failed to elicit sufficient evidence of all the alternatives as required by the to-convict instruction. The evidence elicited at trial—Pappas's testimony and Attouf's testimony—merely establishes that Lobe attempted to induce Pappas to absent herself from the proceedings and/or to withhold information (her address and phone number), but there is no evidence that Lobe attempted to induce Pappas to testify falsely. [RP 105-106, 137-140, 143-145]. The evidence presented

does not constitute sufficient evidence to establish that Lobe attempted to induce Pappas to testify falsely, and it was the State's burden to do so. Having failed to elicit the requisite evidence to prove beyond a reasonable doubt all the alternatives given the court's failure to give an unanimity instruction, this court should reverse Lobe's conviction for tampering with a witness in Count III.

E. CONCLUSION

Based on the above, Lobe respectfully requests this court to reverse and dismiss his convictions in Counts III and IV, and/or remand for resentencing.

DATED this 19th day of June 2006.

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