

NO. 35972-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DONALD EDWARD JEFFERSON,

Appellant.

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY

THE HONORABLE CHRISTINE A. POMEROY

CAUSE NO. 05-1-02201-2

**BRIEF OF RESPONDENT**

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#### **A. ISSUES PRESENTED**

1. Whether the trial court properly granted a mistrial over Jefferson's objection when it was justified by a manifest necessity and/or was necessary to avoid the defeat of public justice which was created by Jefferson's misconduct?
2. Whether there was sufficient evidence that Jefferson committed the offense of first degree identity theft as alleged in count I?
3. Whether there was sufficient evidence that Jefferson committed the offense of tampering with a witness as alleged in count V?

#### **B. STATEMENT OF THE CASE**

The State accepts as adequate, for the purposes of this response, Appellant's "Statement of the Case" [App. Br.2-13].

#### **C. ARGUMENT**

1. The trial court did not error in granting a mistrial where a manifest necessity and/or the ends of public justice would otherwise be defeated which was created by Jefferson's misconduct.

Jefferson contends that the trial court, by allowing the case to be retried after a mistrial was declared, violated his constitutional right not to be twice placed in jeopardy for the same

offense. In reviewing the law it is important to remember as a background that, both before and during the first trial, Jefferson engaged in numerous acts of tampering with the material witness resulting in her contemptuous refusal to testify which resulted in the court's decision to grant a mistrial. When a mistrial is granted without the defendant's consent and after jeopardy has attached, a retrial is not barred by double jeopardy principles when the mistrial was justified by a "manifest necessity." *State v. Graham*, 91 Wn.App. 663, 667, 960 P.2d 457 (1998). In *Arizona v. Washington*, 434 U.S. 497, 504, 98 S.Ct. 824, 830, 54 L.Ed.2d 717 (1978), the United States Supreme Court footnoted the "classic formulation" of "manifest necessity" from *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824):

"...the law has invested courts of justice with the authority to discharge a jury...whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of

public justice would otherwise be defeated..." (emphasis added).

Whether the phrase "manifest necessity" or "evident necessity" is used, the meaning is apparently the same. *Winsor v. The Queen*, L.R. 1 Q.B. 289, 305 (1866).

The propriety of the grant of a mistrial is reviewed for an abuse of discretion. *State v. Browning*, 38 Wn.App. 772, 775, 689 P.2d 1108 (1984). The trial judge is "vested with broad discretionary power to determine whether a trial should be aborted prior to verdict." *State v. Eldridge*, 17 Wn.App. 270, 276-77, 562 P.2d 276 (1977), review denied 89 Wn.2d 1017 (1978). Several guiding principles have emerged for determining whether a judge exercised sound discretion in granting a mistrial for "manifest necessity." They include (1) whether the court acted precipitately, *Arizona v. Washington*, 434 U.S. at 515-14; 920 whether it "accorded careful consideration to [the defendant's] interest in having the trial concluded in a single

proceeding," *id.* at 516 and; (3) whether it considered alternatives to declaring a mistrial. See e.g., *United States v. Jorn*, 400 U.S. 470, 487, 91 S.Ct. 547, 558, 27 L.Ed.2d 543 (1971).

As the record makes quite clear, the trial judge did not act precipitately. He gave the material witness three separate opportunities to testify and purge her contemptuous conduct. Faced with the refusal of the State's witness to testify, which was caused by Jefferson's affirmative misconduct, the trial judge was left no other alternative but to discharge the jury and grant a mistrial to avoid the defeat of the ends of public justice. The trial judge's Findings of Fact and Conclusions of Law for Mistrial [CP 298-300] are fully supported by the record. The jury's findings of guilt in the instant case of Jefferson's felonious acts of tampering with a witness, both before and during the first trial, underscore the correctness of the trial judge's decision to grant a mistrial.

2. Considering the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find Jefferson guilty of the crime of first degree identity theft beyond a reasonable doubt.

Jefferson contends that there was insufficient evidence to support his conviction for Count I, first degree identity theft. The evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the

trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In order to convict Jefferson of the crime of first degree identity theft as alleged in count I, the State had the burden to prove: (1) that on or about the period of time between 11 September 2005 and 13 September 2005, the defendant knowingly obtained, possessed, used or transferred another person's means of identification or financial information with the intent to commit a crime; and (2) that the defendant or an accomplice used another person's means of identification or financial information

and obtained anything of value in excess of \$1,500; and that the acts occurred in the State of Washington. RCW 9.35.020(1)(2); Court's Instruction No. 11 at RP 467-68.

Jefferson concedes that he used the identification of another, Eric Phillips, without Phillips permission, to rent a U-Haul truck that was used to transport furniture from Ideal Home Furnishing. [App. Br. 9-10]. Jefferson further concedes that the furniture which was obtained by his accomplice, Molina, from Ideal was never paid for. [App. Br. 10]. Jefferson does not contest the conviction for first degree theft which was based on the theft of the furniture from ideal. The evidence is clear that Jefferson used a false "cover" name to obtain the means to carry out the first degree theft of property well in excess of \$1,500. The evidence is further clear that he used the false identification to assist in the rental of an apartment where the stolen furniture was stored. Therefore there was sufficient

evidence to support Jefferson's conviction of the crime of first degree identity theft.

3. Considering the evidence in a light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find Jefferson guilty of the crime of tampering with a witness as alleged in count V beyond a reasonable doubt.

Jefferson contends that there was insufficient evidence to support his conviction for tampering with a witness as alleged in count V. In order to convict the defendant of tampering with a witness as alleged in count V in this case, the State had the burden to prove: (1) that on or about the period of 12 April 2006 and 19 April 2006, the defendant attempted to induce a person to either testify falsely or, without right or privilege to do so, withhold testimony; and (2) that the other person was a witness or that the defendant had reason to believe the other person was about to be called as a witness in an official proceeding; and (3) that the acts occurred in the State of Washington. RCW

9A.72.120(1); Instruction No. 31 in Court's Instructions to the Jury at RP 474-75.

As noted heretofore, the evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d at 338. Here, Jefferson admitted that he had letters delivered to Molina (in violation of the no contact order) by Mark Keend. [RP Vol. III 379]. However he denied any knowledge of the letter dated 12 April 2006 that was delivered to Molina by Keend at the Lewis County Jail between 12 April 2006 and 19 April 2006. [RP Vol. III 378-79; RP Vol. IV 432]. The jury as final arbiter of the credibility of Jefferson correctly found his denial unsupported by the evidence. It did not matter who wrote the letter. It did matter that the letter urged Molina to refuse to testify. Tampering with a witness does not

depend solely on the literal meaning of words used to the witness, but can be determined on the basis of the inferential meaning of such words in the context in which they are used. *State v. Scherck*, 9 Wn.App. 792, 514 P.2d 1393 (1973). Communicating a threat through a third party, even where it is claimed that there was no intent that witness receive the threat, is sufficient to sustain a conviction. *State v. Anderson*, 111 Wn.App. 317, 44 P.3d 857 (2002). A reasonable juror could have concluded beyond a reasonable doubt that the defendant had attempted to induce Molina not to testify as a witness against him pursuant to her plea agreement with the prosecution. Therefore, there was sufficient evidence to support the defendant's conviction for tampering with a witness as alleged in count V.

#### **D. CONCLUSION**

Jefferson's conviction should be affirmed. Pursuant to RAP 14.2 and 14.3 and RCW 10.73.160,

the State respectfully requests that appellant be required to pay all taxable costs of this appeal, including the cost of the reproduction of briefs, verbatim transcripts, clerk's papers, filing fee, and the fee to be paid to appellant's court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 910 P.2d 545 (1996).

Dated this 15th day of January, 2008.

Respectfully submitted,



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CERTIFICATE

I certify that on the 16<sup>TH</sup> day of January, 2008 I mailed a copy of the foregoing Response Brief by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

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DATED this 16<sup>th</sup> day of January, 2008.

  
Jeremy Randolph