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A. Assignment of Errors

Assignment of Errors

1. The evidence was insufficient to sustain a conviction for Tampering with a Witness.

2. The evidence was insufficient to sustain a conviction for Violation of a No Contact Order.

3. The trial court erred by not instructing the jury that it must be unanimous as the date of violation as required by State v. Petrich.

Issues Pertaining to Assignment of Errors

1. Was the evidence sufficient to sustain a conviction for Tampering with a Witness when Mr. Selfridge openly accused his estranged wife of illegal and immoral conduct, but did not attempt to induce her to testify falsely or to withhold testimony?

2. Was the evidence sufficient to sustain a conviction for Violation of a No Contact Order when the evidence did not prove that Mr. Selfridge contacted Ms. Selfridge, as required by the jury instructions?

3. Did the trial court err by not instructing the jury that it must be unanimous as the date of violation for both convictions when the State did not elect which date it was prosecuting, as required by State v. Petrich?

B. Statement of Facts

Kirk Selfridge was originally charged with second degree assault – domestic violence for a fight that occurred between himself and his wife, Tracie Selfridge on the evening of March 6, 2006. CP, 1. On the eve of trial, the State filed an amended information which deleted the assault charge entirely and replaced it with one count of Tampering with a Witness and Violation of a No Contact Order. CP, 5. Mr. Selfridge went to trial on the amended information and was convicted of both offenses. CP, 54. Mr. Selfridge was sentenced as a first time offender and ordered to serve 60 days in jail. CP, 57.

Mr. Selfridge argued that the evidence was insufficient to sustain a conviction for either Tampering with a Witness or Violation of a No Contact Order. RP, 81. The jury was instructed that they could find the offense of Tampering with a Witness if they found that, any time between March 6 and August 31, 2006 he attempted to induce a person who has information relevant to a criminal investigation to testify falsely or to withhold testimony. CP, 45. The jury instruction for the Violation of a No Contact Order required the jury to find that he “willfully had contact with Tracie Selfridge” between March 18 and March 22, 2006. CP, 50. No jury instructions, which were proposed by the State, were adopted by

the Court without modification or objection by the defense. CP, 13, 35; RP, 100. No Petrich instruction was requested or given for either offense.

On March 6, 2006, police came to the Selfridge household and investigated a potential assault. RP, 21-22. As a result of that incident, the court entered a no contact order prohibiting Mr. Selfridge from contacting his wife or coming within 500 feet of her residence or place of work. RP, 22, 66. Ms. Selfridge also initiated divorce proceedings, which were described by her as being “traumatic” and “very difficult.” RP, 22-23.

Approximately two weeks later, the 911 dispatcher received two calls that Mr. Selfridge was at the residence in violation of the no contact order. RP, 64, 68. The first call, on March 18, 2006, came from Holly Goff, a friend and neighbor of Ms. Selfridge. RP, 71. She saw a blue Dodge Caravan that she associated with Mr. Selfridge. RP, 71. She called the police, but they were unable to locate Mr. Selfridge or the vehicle. RP, 72. About five minutes after the police left, Ms. Goff saw Mr. Selfridge drive past the residence in the Dodge Caravan. RP, 73. He waved at her as he passed. RP, 74. There was no testimony about Ms. Selfridge’s whereabouts on this date.

The second 911 call came on March 22, 2006. RP, 68. The sheriff’s office investigated the claim, but was unable to locate Mr. Selfridge. RP, 65. The record does not show who made the 911 call or

why. Nor is there any testimony about Ms. Selfridge's whereabouts on this date.

During the spring of 2006 and after his March 6 arrest, Mr. Selfridge made seven phone calls to Children Family Services to make child abuse referrals and one complaint to Kitsap Animal Control. RP, 44, 57. Carla Meier took the April 6, 2006 call. RP, 40. He alleged Ms. Selfridge was assaulting their oldest child, abusing the children, abusing the pets, and tried to burn down the house. RP, 40-41. Other frequent allegations included that his wife was drinking around the children, allowing a sex offender to live in the home with the children and that the children were at risk and afraid of their mother. RP, 44. On July 14, 2006, Mr. Selfridge made a complaint to Animal Control that Ms. Selfridge had threatened to kill his dog. RP, 57.

Ms. Meier investigated each of the complaints. RP, 43. She determined that Ms. Selfridge was allowing her brother, a registered sex offender, to live in the home with the children. RP, 45. She was also able to confirm that on several occasions Ms. Selfridge had been under the influence of alcohol while taking care of her children. RP, 42. There was also one confirmed occasion of driving under the influence of alcohol while the children were in the car. RP, 50. The other allegations,

including the allegation to Animal Control, were closed as unfounded, however. RP, 45, 60.

On May 21, 2006, Ms. Selfridge was out running errands when she saw the Plymouth Voyager parked in the parking lot of the Seventh Day Adventist Church, 0.7 miles from Ms. Selfridge's home. RP, 25, 28, 66. This is more than 500 feet from Ms. Selfridge's residence. RP, 66. Across the side of the van were the words, "Tracie Selfridge abuses her children and disabled husband." The other side of the van said, "Tracie K. Selfridge molests children." On the back were the words, "Tracie K. Selfridge, service deli manager of Silverdale Albertsons drinks and does drugs on the job." RP, 26. Mr. Selfridge and a friend of his were walking away from the van. RP< 29.

Ms. Selfridge continued home and dropped off her children. RP, 29. She contacted her neighbor, Holly Goff, and the two of them returned to the van with a camera. RP, 29, 76. As they approached, the van drove off with Mr. Selfridge driving the van. RP, 30. Ms. Goff saw Mr. Selfridge look at them and get a fearful look on his face when he saw the camera and took off. RP, 76. Mr. Selfridge was driving very evasively as Ms. Selfridge tried to follow the van and take photos. RP, 1.

C. Argument

1. The evidence was insufficient to sustain a conviction for Tampering with a Witness when Mr. Selfridge openly accused his estranged wife of illegal and immoral conduct, but did not attempt to induce her to testify falsely or to withhold testimony.

RCW 9A.72.120 (1) defines the offense of Tampering with a Witness.

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.

The jury in Mr. Selfridge's case was instructed only on subsection (1) (a), having to do with inducing a witness to testify falsely or to withhold testimony.

In reviewing the sufficiency of the evidence to sustain a Tampering with a Witness charge, the reviewing court must look to the literal words, including the inferential meaning of the words and the context in which they were used, to determine that the words were in fact an inducement to

testify falsely or to withhold testimony. State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990). In Rempel, the defendant called his long time girlfriend from jail after being arrested for attempted rape against her. He told her he was sorry, that he did not “mean it,” and asked her to drop the charges. The Supreme Court unanimously held that the statements of the defendant did not constitute an attempt to testify falsely, to withhold testimony, or to absent herself from the trial. Defendant’s actions, while a “nuisance” and a “menace,” did not constitute tampering.

Whether the reviewing court finds sufficient evidence frequently turns on the exact phrasing of the comment. In one case, the Court dismissed the case where the juvenile defendant offered his mother \$150 to drop the charges or make it a lesser charge because the request to make it a lesser charge did not require her to absent herself from the proceedings. State v. Jensen, 57 Wn. App. 501, 789 P.2d 772 (1990), aff’d sub. nom. State v. Howe, 116 Wn.2d 466; 805 P.2d 806 (1991). On the other hand, courts have affirmed convictions where the defendant literally told the witness what to do. In State v. Williamson, 131 Wn.App. 1 (1994) the defendant told the witness to recant her testimony. In State v. Scherck, 9 Wn. App. 792; 514 P.2d 1393 (1973), the defendant threatened the witness if he did not “refuse to appear as a witness in the trial.” Similarly, in State v. Shroh, 91 Wn.2d 580; 588 P.2d 1182 (1979), the

Court upheld a conviction where the defendant asked a witness not to appear on a subpoena.

The State's theory was twofold. First, the State argued that Mr. Selfridge called Child Protective Service and Kitsap Animal Control "over and over again, each time making wild and crazy accusations against his wife." RP, 102. Second, Mr. Selfridge put "faceless allegations" in red lettering across his van on May 21, 2006. RP, 103.

Taking the State's second argument first, the exact words used by Mr. Selfridge on May 21, 2006 do not constitute an inducement to testify falsely or to withhold testimony. Mr. Selfridge put three phrases on his van: (1) "Tracie Selfridge abuses her children and disabled husband;" (2) "Tracie K. Selfridge molests children;" (3) "Tracie K. Selfridge, service deli manager of Silverdale Albertsons drinks and does drugs on the job." None of these constitute an inducement to testify falsely or withhold testimony. They cannot form the basis of a charge for Tampering with a Witness.

Not only do the comments of Mr. Selfridge not constitute an attempt to induce unlawful behavior from Ms. Selfridge, they constitute protected speech under the First Amendment. Although the First Amendment has never before been applied in Washington, the statute has the potential of chilling protected speech if not applied strictly. While the

State has a clear interest in prohibiting a person from attempting to induce a witness from testifying falsely or absenting himself from the proceedings, care must be taken to avoid interfering with the rights of the accused to speak.

In other contexts, the Washington Supreme Court has not hesitated to overturn criminal convictions based upon speech that most people would construe as offensive or alarming. State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001); State v. Kilborn, 151 Wn.2d 36, 84 P.3d 1215 (2004); State v. Johnson, 156 Wn.2d 355, 127 P.3d 707 (2006). In Williams, the defendant's harassment conviction was overturned after he told his ex-employer that he had a gun and threatened, "Don't make me strap your ass." The Washington Supreme Court said, "[S]peech is protected, even though it may advocate action which is highly alarming to the target of the communication, unless it fits under the narrow category of a 'true threat.' Courts have routinely found First Amendment protection extends to speech and conduct that society at large views as vile, politically incorrect, or borne of hate." Williams at 209 (citations omitted).

In general, courts from other states have given narrowly tailored readings to their witness tampering statutes in order to avoid running afoul of the First Amendment. Deehl v. Knox, 414 So. 2d 1089 (Fla. 1982); State v. Kilgus, 125 N.H. 739, 484 A.2d 1208 (1984); Turney v. State, 936

P.2d 533 (Al. 1997) (jury tampering statute). In each of these cases, the defendant's were arguing that the witness tampering statute was unconstitutionally vague because they infringed on potentially protected speech. The reviewing courts did not agree because the defendant's conduct fell within the core of the statute and the defendant's right to speak with the intent to tamper with a witness is minuscule. Kilgus at 745. But it is far from clear that Mr. Selfridge's intent was to tamper with a witness. Rather, applying a strict, narrow reading to Mr. Selfridge's three comments on his van, his comments do not constitute witness tampering, but protected speech.

The State's other argument was that Mr. Selfridge was making unfounded complaints, which themselves constituted Tampering with a Witness. This argument is without merit. Mr. Selfridge made eight phone calls, seven to CPS and one to Animal Control, between April 6 to July 14, a three month period. While many of his allegations turned out to be unfounded, two of the allegations were confirmed after investigation: Ms. Selfridge was living with a registered sex offender and was drinking in front of the children, including one instance of drinking and driving while the children were in the car.

Mr. Selfridge had the right to make reports about the welfare of his children. As one New Jersey Court put it, "A mere request for

investigational or testimonial assistance ought not to be criminalized on the basis that it might be construed as an effort to suppress evidence of a crime.” State of New Jersey v. Krieger, 285 N.J. Super. 146, 152, 666 A.2d 609 (1995). Although Ms. Selfridge interrupted these complaints as harassing, Mr. Selfridge had the right to request that CPS and Animal Control investigate the safety of his children and animals. The conviction for Tampering with a Witness should be dismissed with prejudice. Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

2. The evidence was insufficient to sustain a conviction for Violation of a No Contact Order when the evidence did not prove that Mr. Selfridge contacted Ms. Selfridge, as required by the jury instructions.

The jury instruction on the Violation of a No Contact Order alleges that Mr. Selfridge “willfully had contact with Tracie Selfridge” between March 18 and March 22, 2006. CP, 50. Mr. Selfridge concedes that the testimony of Ms. Goff was sufficient for a reasonable jury to find that Mr. Selfridge came within 500 feet of Ms. Selfridge’s residence on March 18, 2006. But there was no testimony as to Ms. Selfridge’s location on that date. Because the jury instruction required the jury to find that he had

contact with Ms. Selfridge and not just her residence, the conviction must be dismissed.

When the State proposes an instruction, it assumes the burden of proving the elements contained in the instruction. State v. Hickman, 135 Wn.2d 97; 954 P.2d 900 (1998). The sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions. Hickman at 102, citing Tonkovich v. Department of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948). The jury instruction proposed by the State and adopted by the Court required the State to prove that Mr. Selfridge had contact with Ms. Selfridge, not her residence. The evidence produced at trial proved that Mr. Selfridge had contact with Ms. Selfridge's residence, but not with Ms. Selfridge. The conviction for Violation of a No Contact Order should be dismissed with prejudice. Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

3. The trial court erred by not instructing the jury that it must be unanimous as the date of violation for both convictions when the State did not elect which date it was prosecuting, as required by State v. Petrich.

When the prosecutor presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984). The Washington Supreme Court Committee on Jury Instructions has created a pattern jury instruction for just this purpose. WPIC 4.25. The issue of whether a court must give a Petrich instruction is one of constitutional magnitude and may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Fiallo-Lopez, 78 Wn.App. 717, 899 P.2d 1294 (1995).

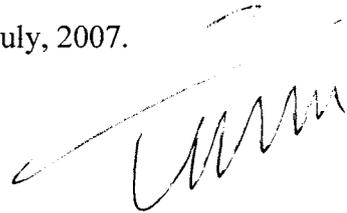
Regarding the first offense, Tampering with a Witness, the State presented and argued two theories to the jury. As discussed above, the State argued that Mr. Selfridges's repeated calls to CPS and Animal Control constituted witness tampering. RP, 102. They also argued that his printed accusation on May 21, 2006 on his van made him guilty. RP, 103. The State did not elect between its theories. The jury instruction permitted the jury to find witness tampering at any time during a nearly six month period, from March 6 to August 31, 2006. The jury was not instructed on the need for unanimity as to which date he tampered with a witness. A new trial is required.

There was also a need for a Petrich instruction on the No Contact Order Violation charge. The jury was given a range of dates, March 18 through March 22, in the “to convict” instruction. CP, 50. Although the jury heard that a 911 call was made on March 22, there was no testimony as to who made the call or what circumstances precipitating the call were. The jury heard that the police investigated the call, but could not locate Mr. Selfridge. In its closing argument, the State did not mention March 22 at all, choosing instead to concentrate its argument on March 18. RP, 106-07. On the one hand, it appears the State elected to prosecute based upon the events of March 18, which would obviate the need for a Petrich instruction. On the other hand, the State proposed and the Court instructed that the jury could consider the events of March 22 in determining whether Mr. Selfridge violated the no contact order. The Court should have either deleted the reference to March 22 from the “to convict” instruction or instructed the jury using a Petrich instruction. The failure to do either was error.

D. Conclusion

The Court should reverse and dismiss both offenses for insufficient evidence. In the alternative, the Court should reverse and remand both convictions for failure to include a Petrich instruction.

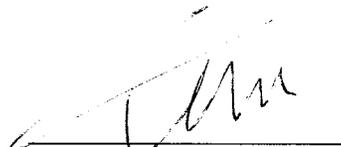
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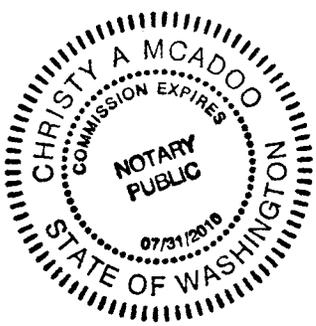
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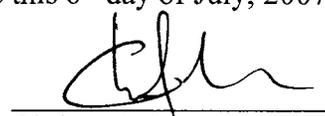
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Dated this 6th day of July, 2007.


Thomas E. Weaver
WSBA #22488
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 6th day of July, 2007.




Christy A. McAdoo
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 07/31/2010