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DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAMES CALVIN PETERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan E. Chushcoff

No. 09-1-04506-4

BRIEF OF RESPONDANT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly instructed the jury on the tampering charge where the State charged and presented evidence of one means of committing this crime, and the trial court instructed the jury only as to that means?

2. Whether the State adduced sufficient evidence to support the jury's verdict finding defendant guilty of tampering with a witness?

B. STATEMENT OF THE CASE.

1. Procedure

On October 7, 2009, the State charged James Calvin Peterson, hereinafter "defendant," with one count of assault in the first degree. CP 1. The State filed an amended information on December 2, 2009, adding one count of tampering with a witness and one count of violation of a no-contact order (pre-sentence). CP 2-4. On February 8, 2010, the State filed a second amended information changing the assault charge from the first degree to the second degree. CP 5-7. The case came before the honorable Bryan E. Chushcoff for trial on February 9, 2010. 2/9/10 RP 28.¹

¹ The verbatim report of proceedings is contained in 10 volumes. The State will refer to the verbatim report of proceedings by date and page number as follows: 11/25/09 RP, 12/1/09 RP, 12/7/09 RP, 2/4/10 RP, 2/8/10 RP, 2/9/10 RP, 2/10/10 RP, 2/11/10 RP, 2/12/10 RP, and 4/9/10 RP.

After hearing the evidence and deliberating on it, the jury found defendant not guilty of assault in the second degree. CP 39. The jury found defendant guilty of tampering with a witness, and guilty of violation of a no-contact order. CP 40-41. The court sentenced defendant on April 9, 2010. 4/9/10 RP 3; CP 50-68. The court imposed a high-end sentence of 57 months on the tampering with a witness conviction. CP 50-63. The court also imposed a one year suspended sentence on the violating a no contact order conviction, to run consecutive to the witness tampering sentence. CP 64-68. From entry of this judgment and sentence, defendant filed this timely notice of appeal. CP 69-88.

2. Facts

On October 5, 2009, Tacoma Police Officers Kevin Lorberau and Michael Sbory responded to a reported domestic disturbance at 815 South Prospect Street in Tacoma, Washington. 2/9/10 RP 46, 67. A neighbor reported the incident to police. 2/9/10 RP 52, 67. Both officers testified at trial that at the scene they saw Noel Mitchell laying in the middle of the road being treated by fire department personnel for a leg injury. 2/9/10 RP 45, 53, 67. Officer Sbory testified Mitchell had a gouge like injury on her right leg. RP 76.

Officer Lorberau testified he spoke to Mitchell and she told him that during an argument that led to her leg injury, her boyfriend, Michael Jones, spit on, slapped, punched, and grabbed Mitchell by the hair. 2/9/10 RP 54, 70. She claimed her boyfriend then knocked her to the ground, got

into his Expedition and ran over her leg as he drove away from the home. 2/9/10 RP 54, 69. Both officers described Mitchell as hysterical and extremely distraught. 2/9/10 RP 45, 68. After being moved from the street to an ambulance, Mitchell admitted to Officer Sbory that her boyfriend's name was actually James Peterson (defendant), not Michael Jones, the name she previously provided to Officer Lorberau. 2/9/10 RP 72-73. Law enforcement officials located defendant the next day and placed him under arrest. State's Exhibit 22.

Immediately after defendant's arrest, he made several phone calls to Mitchell from the Pierce County Jail. 2/10/10 RP 110-113; State's Exhibit 22. The phone conversations were recorded by the Pierce County jail and seven of these recordings were played for the jury during defendant's trial. The phone calls began on October 6, 2009, after defendant's arrest on the evening before his arraignment, and ended on October 8, 2009. State's Exhibit 22. During these conversations defendant instructed Ms. Mitchell to recant her statements to the police. State's Exhibit 22. Specifically, defendant instructed Ms. Mitchell to tell the prosecutor's office that: 1) Ms. Mitchell and defendant were not dating; 2) the argument leading to Ms. Mitchell's injury was between her and her boyfriend Michael Jones; and 3) both Michael Jones and defendant have green trucks which caused confusion over who actually ran over Mitchell's leg with a car. State's Exhibit 22 (10/6/09 – 17:08:10

at 6:18; 10/6/09 – 18:23:49 at 6:36).² In addition to coaching Mitchell on what story to tell, defendant told Mitchell to get a ride to the prosecutor's office from his brother in order to convince prosecutors to drop the assault charge before defendant's next court appearance. State's Exhibit 22 (10/6/09 – 18:03:48 at 5:00 and 14:34). When Mitchell did not follow defendant's directions, he scolded her and explained why she needed to follow his version of events if she wanted him to get out of jail. (10/7/09 – 10:23:44; 10/7/09 -12:01:39).

In reference to his trial, defendant told Mitchell to leave town during the proceedings. State's Exhibit 22 (10/6/09 – 17:08:10 at 17:13; 10/6/09 – 18:23:49 at 12:15; 10/8/09 – 7:11:17 at 15:00; 10/8/09 – 7:35:10 at 12:44). Finally, defendant repeatedly warned Mitchell about the consequences of her actions, stating, *inter alia*, "You know how much time I'm facing for this?...Do you really want me to get locked up over this small incident for 30 years?" State's Exhibit 22 (10/6/09 – 17:08:10 at 4:08).

During her testimony, Mitchell denied speaking to defendant after his arrest. 2/10/10 RP 207, 209. After listening to recordings of the phone conversations during trial, Mitchell also denied it was her voice on the recordings. *Id.*

² The State will refer to each individual phone call by date and time of the call and then cite to the specific time location of the statement on that particular recording.

C. ARGUMENT.

1. THE JURY REACHED A UNANIMOUS VERDICT IN FINDING DEFENDANT GUILTY OF TAMPERING WITH A WITNESS.

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976), or when the State presents evidence of several acts that could form the basis of one count charged. *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984). On appeal, defendant seems to assert that the State pursued multiple alternative means *and* alleged two acts that could form the basis of the count charged. Brief of Appellant at 27-28.

a. Unanimity as to the crime charged.

Under the first scenario, “where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged [, ...but u]nanimity is not required ...as to the means by which the crime was committed so long as substantial evidence

supports each alternative means.” *State v. Bland*, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993), quoting *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). Where the trial court instructs the jury that there are alternative means of committing the charged criminal act, and does not require a unanimous determination of which alternative is used, courts have required that there be substantial evidence of each alternative. See *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), (citing *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976)), modified on other grounds by *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988).

The State charged defendant with one count of tampering with a witness. CP 2-4. RCW 9A.72.120 establishes three means for committing witness tampering: 1) attempting to induce a person to testify falsely or withhold testimony; 2) attempting to induce a person to absent him- or herself from an official proceeding; or 3) attempting to induce a person to withhold information from a law enforcement agency. In both the Information and the court’s instructions to the jury, the State only alleged defendant committed witness tampering by the first alternate means. CP

2-4³; CP 8-36 (Jury Instruction No. 19). As the jury was instructed on the only alternate means charged, than unanimity is not an issue under this prong of unanimity law; the jury found sufficient evidence to convict defendant for witnesses tampering via the single alternate means by which defendant was charged and by which the jury was instructed.

b. Unanimity as to the acts.

The second scenario occurring in the context of unanimity cases involves the “continuous act.” *Petrich*, 101 Wn.2d at 570. In these cases, a continuing course of conduct may form the basis of one charge in an information, however, one continuing offense must be distinguished from several distinct acts. *Petrich*, 101 Wn.2d at 571, 683 P.2d 173, *citing United States v. Berardi*, 675 F.2d 894 (7th Cir.1982). Where there is unanimity as to a continuing course of conduct, there is no need for jury unanimity as to each individual act within that course of conduct. *State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988).

³ In the amended information, the State alleged that defendant “during the period between the 6th day of October, 2009, and the 1st day of December, 2009, did unlawfully and feloniously attempt to induce Noel Mitchell, a witness or person he has reason to believe is about to be called as a witness in an official proceeding, or has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, to testify falsely or, without right or privilege, withhold testimony, contrary to RCW 9A.72.120(1)(a), and against the peace and dignity of the State of Washington.”

In the case at hand, defendant argues the state relied on multiple acts to support the witness tampering conviction. Brief of Appellant at 27-29. While defendant does not specify which acts he is referring to for this argument, the only acts relied on by the State for the charge were numerous phone calls between defendant and Ms. Mitchell on October 6, 7, and 8. These phone calls constitute one continuous act by defendant, not multiple acts requiring unanimity by a jury. *See State v. Hall*, 168 Wn.2d 726, 230 P.3d 1048 (2010) (1200 calls and attempted calls from Hall to his victim over a 17 day period was one continuous act of tampering with a witness).

In *Hall*, the Washington Supreme Court rejected an argument that each individual call between Hall and his victim could form the basis for individual charges of witness tampering. *Id.* at 731. On this, the Court held the number of attempts to induce a witness to testify falsely is secondary to the statutory aim of criminalizing interference with a witness in any official proceeding, regardless of whether the attempts take, “30 seconds, 30 minutes, or days.” *Id.* The court concluded each call combined to be part of one continuous act of attempting to influence the witness’s testimony. *Id.* at 737.

Similarly, in the case at hand, the jury heard seven phone calls from defendant to Mitchell. State’s Exhibit 22. These calls involved a single witness, were made over a short period of time, and were all made in furtherance of defendant’s sole objective: attempting to influence

Mitchell's testimony. The phone calls were therefore part of one continuous act by defendant, not multiple acts requiring jury unanimity.

Based on the Information, the jury instructions, and the evidence presented at trial, the State charged defendant with one count of witness tampering based on one alternate means for committing the crime, and one continuous act of tampering. Defendant was therefore not entitled to a jury unanimity instruction as unanimity can be clearly inferred from the record below.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF TAMPERING WITH A WITNESS

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable

inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must 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).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict. As such, these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said,

“[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.”

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

On appeal defendant argues the State failed to adduce sufficient evidence to prove defendant tampered with a witness. Brief of Appellant at 13.

To convict defendant of tampering with a witness, the State had to prove that:

- (1) during the period of October 6, 2009, to December 1, 2009, defendant attempted to induce a person to testify falsely, or without right or privilege to do so, withhold any testimony; and
- (2) 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; and
- (3) any of these acts occurred in the State of Washington.

CP 8-36, (Jury Instruction No. 19); RCW 9A.72.120(1)(a). Defendant challenges the sufficiency of the State's evidence proving the first and second elements of the crime. Brief of Appellant at 18.

a. Official proceeding

On appeal, defendant does not challenge the evidence proving Mitchell was a witness. Defendant's only challenge is to whether Mitchell was a witness in an "official proceeding" during the timeframe of defendant's actions. Brief of Appellant at 24. The trial court instructed the jury that:

Official proceeding means a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath.

CP 8-36 (Jury Instruction No. 18). Official proceedings begin with the filing of the complaint. *State v. Pella*, 25 Wn. App. 795, 797, 612 P.2d 8 (1980). The State filed the information in defendant's case on October 7, 2009, at 10:19 am. Of the seven phone calls between defendant and Mitchell offered into evidence, three of them occurred on October 6, 2009. The remaining four phone calls occurred after the State filed the information. *Id.*

Defendant argues on appeal that only those calls made after defendant's arraignment are applicable to the witness tampering charge because Mitchell was not a witness in an "official proceeding" during the October 6 phone calls. Brief of Appellant at 24-25. While raised as a challenge to the sufficiency of the evidence, defendant's challenge would more properly be classified as a challenge to the admissibility of the October 6 phone calls.⁴ Defendant did not challenge the admissibility of the October 6 phone calls in the trial court, and does not now challenge the phone calls' admissibility on appeal.

⁴ *Pella*, the case relied on by defendant in arguing the State failed to prove Mitchell was a witness in an official proceeding, is actually a case of statutory construction, not a case evaluating the sufficiency of evidence to support a witness tampering charge. *State v. Pella*, 25 Wn. App. 795, 612 P.2d 8 (1980).

Challenging the sufficiency of the evidence accepts the State's evidence as true. *Barrington*, 52 Wn. App. at 484. The court instructed the jury to consider all evidence admitted that relates to any proposition at issue. CP 8-36 (Jury Instruction No. 1). In defendant's case, that included evidence of the October 6 phone calls, not objected to below and admitted by the court. By not objecting, defendant waived any challenge to the admissibility of the evidence, and the jury was within their right to consider the evidence before it.

The evidence before the jury was that Mitchell told police officers defendant assaulted her. 2/9/10 RP 54, 69, 72-73. Based on these allegations, defendant was arrested and held in jail awaiting arraignment. State's Exhibit 22 (10/6/09 – 17:08:10). Defendant immediately began calling Mitchell to convince her to retract her statement to law enforcement. *Id.* Viewing this evidence in the light most favorable to the State, the State presented sufficient evidence proving defendant knew Mitchell was about to be called as a witness in an official proceeding.

- b. Testify falsely, or without right or privilege to do so, withhold testimony.

There are three alternate means for committing witness tampering:
1) inducing a witness to testify falsely, or without right or privilege to do so, withhold testimony; 2) induce a witness to absent themselves from an

official proceeding; or 3) induce a person to withhold information from law enforcement conducting a criminal investigation. RCW 9A.72.120. On appeal, defendant argues the State only presented evidence relevant to the second means despite charging defendant under the first. Brief of Appellant at 19.

In deciding defendant's intent in communicating with Mitchell, the jury could consider both the inferential meaning of defendant's statements to Mitchell as well as the literal meaning. *State v. Scherck*, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973). Therefore, defendant need not specifically use the word "testify" when inducing a witness to testify falsely or withhold testimony. *Id.* Evidence that a defendant asked a witness to recant a statement provided to law enforcement during a criminal investigation is sufficient to prove a defendant attempted to induce a witness to testify falsely or withhold testimony. *State v. Lubers*, 81 Wn. App. 614, 622, 915 P.2d 1157 (1996). The facts in *Lubers*, a rape case, are nearly identical to the facts in the case at hand. In *Lubers*, during a recorded jail phone call between Lubers and his co-defendant Joseph, Lubers told Joseph to write a letter to Lubers's attorney stating Joseph lied to police about Lubers's involvement in the rape. *Id.* at 618. Additionally, Lubers instructed Joseph to say "Cortez," a fictional person, actually committed the rape. On appeal, Lubers argued his actions were

merely an attempt to induce a false statement, not false testimony. *Id.* at 622. This court disagreed, stating, “Lubers asked Joseph to make a false statement, effectively recanting a prior signed statement to the police, and thereby, to withhold information necessary to a criminal investigation.” *Id.*⁵

Similar to *Lubers*, defendant did not specifically tell Mitchell to *testify* falsely. Rather, he told her to go to the prosecutor’s office and recant the statement she provided to police after the incident. State’s Exhibit 22 (10/6/09 – 17:08:10 at 6:18; 10/6/09 – 18:23:49 at 6:36). Additionally, just as in *Lubers*, defendant instructed Mitchell to say a fictional person, Michael Jones, was the person actually responsible for the crime. *Id.* Therefore, by asking Mitchell to recant her previous statement and withhold information critical to an ongoing criminal investigation from police, defendant was inducing Mitchell to withhold

⁵ Defendant argues *Lubers* is not applicable to his case because “it is unclear from the case which means of witness tampering the defendant in *Lubers* was charged with.” Brief of Appellant at 22. Defendant goes on to suggest the defendant in *Lubers* was charged with withholding information necessary to a criminal investigation. This court was clear in *Lubers* that the defendant in that case was charged under the same alternative means for committing witness tampering as defendant in the present case. This court’s reference to withholding information relevant to a criminal investigation was a direct quote from the statutory language RCW 9A.72.120 defining who counts as a “witness” under the statute. The full quote, including the line referenced out of context by defendant, was, “a person is guilty of tampering with a witness if he...attempts to induce a witness or person he...has reason to believe is about to be called as a witness in any official proceeding or a person whom he...has reason to believe may have information relevant to a criminal investigation to (a) testify falsely or, without right or privilege to do so, to withhold any testimony.” *Lubers*, 81 Wn. App. at 622.

relevant testimony and provide false testimony. The fact that defendant in the present case asked Mitchell to do this in front of a prosecuting attorney, and therefore a law enforcement official, rather than his own attorney, as in *Lubers*, merely provides more support for the State's assertions that defendant intended to influence Mitchell's testimony.

Defendant's actions went beyond those compared to in *Lubers*. In addition to demanding Mitchell recant her statement to law enforcement, defendant told Mitchell, "Worse case scenario, I'm gonna tell these people, 'I want to take it to trial.' You go take a vacation the week of my trial." State's Exhibit 22 (10/6/09 – 18:23:49 at 12:15). His demands that Mitchell leave town continued through the duration of the phone calls. State's Exhibit 22 (10/8/09 – 7:11:17; 10/8/09 – 7:35:10). Defendant went on to tell Mitchell that if she didn't leave town the police would pick her up and bring her to court. *Id.* Defendant also coupled his demands with statements about the negative consequences he faced if Mitchell did not recant her statement or absent herself from the trial and by scolding Mitchell for actions he saw as detrimental to his case. State's Exhibit 22 (10/6/09 – 17:08:10 at 3:15, 4:08, and 4:36; 10/6/09 – 18:03:48 at 14:34, 16:42; 10/7/09 – 12:01:39). It stands to follow that while defendant did

not specifically tell Mitchell to alter her *testimony*, viewing the evidence in the light most favorable to the State, the content and tone of the phone calls between defendant and Mitchell prove defendant wanted Mitchell to withhold any incriminating testimony that would land him in prison should she be forced to testify.

Defendant compares the case at hand to *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007). Brief of Appellant at 21. *Brown* is easily distinguishable from defendant's case. In *Brown*, a robbery case, Brown returned to his home after committing a robbery. *Brown*, 162 Wn.2d at 426. A woman living at the home overheard Brown discussing details of the robbery. *Id.* When Brown noticed the woman he told her if she notified the police "she would pay." *Id.* The State charged, and the jury convicted Brown of, intimidating a witness. *Id.* The Washington Supreme Court reversed the conviction, finding the State did not offer sufficient evidence proving Brown intended to influence the witness's testimony. *Id.* at 430. *Brown* differs from the case now before this Court because in *Brown*, no official proceedings or criminal investigations were pending against Brown when he made the threat. If no official proceeding or criminal investigation is pending than a threat like the one in *Brown*

does not impede an active criminal investigation or trial. While certainly an attempt to keep the witness from reporting the robbery, the lack of an active criminal investigation does not support an inference that Brown was intending to influence testimony; at the time of the threat the State had no need for the witness's testimony. In contrast, in defendant's case, Mitchell had already reported the incident to police and defendant was in custody. Therefore, his request constituted an attempt to impede an existing and ongoing criminal investigation against him and an attempt to ultimately withhold relevant testimony from his trial.

Viewing the evidence in the light most favorable to the State, by demanding that Mitchell recant her statement to police, provide an alternate version of events to tell law enforcement, leave town for defendant's trial, and accept blame for any negative consequences that could arise from the criminal proceedings, defendant attempted to induce Mitchell to testify falsely and withhold testimony.

