

NO. 48180-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

MALACHI MARK WATKINS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01230-4

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The Information Properly Notified Watkins of all Essential Elements of the Crime of Failure to Register.**
- II. Sufficient Evidence Supports Watkins's Conviction for Witness Tampering.**

STATEMENT OF THE CASE

Malachi Watkins (hereafter 'Watkins') was charged by information with Failure to Register as a sex offender contrary to RCW 9A.44.132(1)(a) and Tampering with a Witness contrary to RCW 9A.72.120(1). CP 2. Watkins proceeded to a bench trial on the two counts. RP 8-10. For the purpose of the trial, Watkins entered a stipulation regarding his prior sex offense convictions, agreeing he had been so convicted. CP 5-6. At trial, the State presented several witnesses, including Watkins's father, Dale Watkins¹, and several law enforcement officers. The trial court entered findings and conclusions after the trial for both the CrR 3.5 hearing and bench trial. CP 26-29. The trial court found Watkins guilty of Failure to Register and Witness Tampering and sentenced him to a standard range sentence. CP 8-18.

The evidence at trial showed that Dale, Watkins's father, told the investigating detective that Watkins was no longer living at their residence

¹ The State refers to Dale Watkins throughout its brief as Dale. The State intends no disrespect and does so only for the sake of clarity and ease of reading.

as of a month prior to July 4, 2015. RP 63. In fact, Dale had signed a written statement he wrote, under penalty of perjury, that Watkins no longer lived at the residence. RP 30-31. However, at trial, Dale testified that Watkins was still living at the residence and that if he told the police officer anything different it was a mistake. RP 29, 32. Dale indicated his written statement was a mistake as well. RP 30-31. Dale testified that he was involved in a phone conversation with Watkins and his wife. RP 43. During this conversation Dale, his wife, and Watkins discussed the written statement Dale had provided police in this case. RP 45. Dale also indicated he was aware of prior phone calls between his wife and their son, Watkins, that occurred before August 22, 2015. RP 45-46. From these conversations, Dale believed Watkins wanted him to recant his statement to police. RP 46.

The State admitted a recording of a phone conversation between Watkins and his mother from July 29, 2015. RP 99-117. Watkins and his mother discussed that Dale had signed a paper saying Watkins did not live at the house anymore. RP 105. Watkins's mother stated that she thought Dale got "caught up in the fact that the officer was female and was polite and personable with him..." RP 106. Watkins stated, "and there's a reason to recant your statement," and "[s]tuff gets thrown out all the time because of recanted statements." RP 106.

The State also admitted a recording of a phone call between Watkins, his mother, and Dale from August 22, 2015, during which they discuss the written statement Dale signed for the police officer and wherein Watkins discusses that a witness can just “recant” the statement, and “say, hey, no more of this statement.” RP 40, 120-35. Watkins also discussed his belief that if the statement was written by the police officer and only signed by Dale that it was not going to hold up against him in court. RP 40. During this conversation Watkins told Dale that “that’s all they have going—you know, going on their side really.” RP 41. Dale understood from this phone conversation Watkins’s desire to have Dale take back his statement. RP 47.

Detective Katie Bieber of the Camas Police Department testified at trial. RP 59-72. On July 4, 2015 she went to the home of Dale Watkins to do a sex offender registration check for the person of Malachi Watkins. RP 61-62. Detective Bieber made contact with Dale and asked if Watkins was living there. RP 63. Dale told Detective Bieber that Watkins was not living there and had not lived there for about a month. RP 63. Dale said Watkins was somewhere in Portland, but that he did not have contact information for him. RP 63. Detective Bieber provided Dale with a witness form that he filled out. RP 65-66. Dale filled out the witness form and signed it. RP 66.

Portland Police Officer Mall was on duty on June 22, 2015, working in NE Portland near mall 205. RP 137-38. Officer Mall saw Watkins in Portland on that date. RP 139. Watkins identified himself to Officer Mall as “Watson,” which the officer soon found out was a false name. RP 140-41. Officer Mall confronted Watkins about this, and he looked nervous and said he probably had a warrant. RP 141. Officer Maul confirmed Watkins did not have a warrant for his arrest at the time. *Id.*

On July 7, 2015, Detective Kirgiss of the Clark County Sheriff’s Office went to Portland police’s east precinct to contact Watkins who had been arrested there on a warrant. RP 74-75. Watkins had been detained on the Clark County warrant by the Portland Police Bureau. RP 76.

Detective Folsom of the Clark County Sheriff’s Office testified that he is familiar with Watkins and his file as a registered sex offender with Clark County. RP 78-81. On March 3, 2015, Watkins filled out a one year verification form; Detective Folsom went over this form with Watkins, and Watkins listed his address as 1750 NW Brady Rd, Camas, Washington. RP 83-84. Detective Folsom told Watkins if he had any changes in address that he had to come in person to enter the change within three days. RP 84. Between June 5, and July 4, 2015, Watkins was still required to comply with registration requirements. RP 84-85. Clark

County Sheriff's Office received no updates or changes to Watkins's registration after March 3, 2015. RP 85.

ARGUMENT

I. The Information Properly Notified Watkins of all Essential Elements of the Crime of Failure to Register.

Watkins alleges the information failed to set forth all of the elements of the offense of failure to register and urges this court to reverse and dismiss his conviction. However, the information clearly sets forth all the essential elements of the crime. Watkins's claim is meritless.

A charging document is constitutionally adequate if it sets forth the essential elements of the crimes charged. U.S. CONST. amend. VI; Wash Const. art I, sec. 22 (AMEND. 10); *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). A defendant must be given notice of the "nature and cause of an accusation against [him] so that a defense can be prepared." *Campbell*, 125 Wn.2d at 801. Though the information need not use the exact words of the statute, the words used must reasonably apprise a defendant of the elements of the crime. *State v. Kjorsvik*, 117 Wn.2d 93, 108-09, 812 P.2d 86 (1991). When a defendant raises this issue for the first time on appeal, this Court applies a stricter standard of review and liberally construes the language of the charging document in favor of validity. *Id.* at 103-05. Under this standard, the Court asks whether the

elements of the offense “appear in any form, or by fair construction can ... be found, in the charging document.” *Id.* at 105. When the issue is raised for the first time on appeal, the appellate court may construe the information quite liberally, and should be guided by common sense and practicality. *State v. Hopper*, 118 Wn.2d 151, 155-56, 822 P.2d 775 (1992). If the Court construes the information quite liberally, then it must also be satisfied the defendant has suffered no prejudice as a result of the vague or ambiguous language in the information. *Id.* at 156.

Watkins was charged by information with:

COUNT 01 - FAILURE TO REGISTER AS A SEX OFFENDER WITH ONE PRIOR (OCCURRING AFTER 6/10/10) – 9a.44.132(1)(a)

That he, MALACHI MARK WATKINS, in the County of Clark, State of Washington, on or about and between June 5, 2015, and July 4, 2015, having a duty to register under RCW 9A.44.130 for a felony sex offense as defined in that section, to-wit: Clark County Superior Court Cause No. 01-8-00119-7 – Child Molestation in the First Degree (3 counts) and Incest, and having been convicted in this state or pursuant to the laws of another state of a felony failure to register as a sex offender on one prior occasion, to-wit: Clark County Superior Court Cause No. 01-8-01163-0, did knowingly fail to comply with any of the requirements of RCW 9A.44.130; contrary to Revised Code of Washington 9A.44.132(1)(a).

CP 2. This charging document is constitutionally adequate. The State alleged Watkins had previously been convicted of multiple sex offenses which gave him a duty to register, and that he failed to comply with any of

the requirements of the statute. CP 2. The language used in this charging document is clear. Case law has held that the specific way in which a defendant violates the failure to register statute is not itself an essential element of the crime and does not need to be included in a charging document. *State v. Bennett*, 154 Wn.App. 202, 224 P.3d 849 (2010); *State v. Peterson*, 145 Wn.App. 672, 186 P.3d 1179 (2008), *aff'd*, 168 Wn.2d 763, 230 P.3d 588 (2010). In all ways, the charging language mirrors the statute.

A person commits the crime of failure to register as a sex offender if he or she “has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.” RCW 9A.44.132(1). The language of the charging document in Watkins’s case mirrored this statutory language exactly. Watkins claims, however, that this statutory language failed to apprise him of the nature of the charge because it did not say that he “failed to register.” However, the title of the offense in the information is “failure to register.” Any claim that Watkins has that he did not know that he was being accused of failing to register is frivolous. In bold, all caps type, the words “**FAILURE TO REGISTER**” appear in the charging document. And the specific language following the “failure to register” title of the crime mirrored that of the statute. From a reading of the case law, it is

clear that all essential elements of the offense were included in the information. *See Bennett, supra, Peterson, supra.* The information here was constitutionally adequate. This Court need not even take a “liberal” reading of the information to find that every essential element of the crime appears. However, if this Court does find that saying the defendant did “fail to register” within the charging document is required by due process, then this Court may be satisfied that those words adequately appear in the title of the crime charged. CP 2. And even if this Court takes a “liberal” reading of the information, Watkins must prove prejudice resulted in order to obtain relief. *Hopper*, 118 Wn.2d at 155-56. Watkins does not allege, nor could he prove, any prejudice resulted. It is clear from the record below that Watkins was aware of the exact allegations against him and of all the elements of the crime of failure to register that the State proved. Watkins was prepared with a defense, and even had the luck of having a key State’s witness recant his testimony. Watkins suffered no prejudice here from the construction of the information.

The Information was adequate to put Watkins on notice of the nature of the crime and of all essential elements. His claim is meritless.

II. Sufficient Evidence Supports Watkins's Convictions for Witness Tampering.

Watkins alleges the State presented insufficient evidence to prove he committed the crime of tampering with a witness. Specifically, Watkins claims the State failed to prove that he attempted to induce his father to testify falsely to withhold testimony. However, taking all the evidence in the light most favorable to the State, there is more than sufficient evidence that Watkins committed the crime of witness tampering. His conviction should be affirmed.

When a defendant claims evidence is insufficient to sustain his conviction, this Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Evidence that is direct

or circumstantial may be equally presented to the jury. Circumstantial evidence is no less reliable than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975).

Here, the essential elements of the crime are that Watkins attempted to induce the witness to testify falsely or to withhold any evidence. Significant evidence of Watkins's commission of the failure to register came from his father, Dale Watkins. Dale told police, and testified, that Watkins was not living at the residence for at least two weeks prior to July 4, 2015. CP 27. The trial court found that on July 29, 2015 Watkins called his mother and said that his father, Dale, could recant his prior statement to the police about Watkins's living situation. CP 28. On August 22, 2015, Watkins called his mother again; she was traveling in a car with her husband, Dale, at the time. On this call, Dale being present in the vehicle, was able to hear some of the statements Watkins made to his mother. CP 28. Watkins again stated that Dale could recant his statement to the police officer. CP 28. Dale believed Watkins wanted him to recant his prior statement to the police officer. *Id.*

The crux of a witness tampering charge is a definitive attempt to affect the testimony of a witness. *State v. Thompson*, 153 Wn.App. 325, 335, 223 P.3d 1165 (2009) (discussing *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990)). No express threat or promise of reward is

required to sustain a witness tampering charge. *Id.* Neither is direct evidence of an attempt to induce a change in testimony or absent a witness from trial. Circumstantial evidence, including reasonable inferences, is sufficient so long as the jury (or trier of fact) is convinced of a defendant's guilty beyond a reasonable doubt. *Thompson*, 153 Wn.App. at 335 (citing *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999)).

In *State v. Scherck*, 9 Wn.App. 792, 514 P.2d 1393 (1973)

Division I of this Court upheld a witness tampering conviction where the defendant told the victim “[i]f you refuse to appear as a witness in a trial against [Scherck’s friend], the State will have no course but to drop the case.” *Scherck*, 9 Wn.App. at 794. The defendant also noticed that the victim had a nice neighborhood and that it would “be a shame if anything happened to it,” and that the trial would be “very embarrassing” for the victim. *Id.* In that case, the Court indicated that the jurors were required to consider the inferential meaning of the defendant’s conversation with the victim. *Id.* Scherck’s argument was that all he did was ask the victim to drop the charges, and that this was not tantamount to an attempt to prevent the victim from appearing as a witness. *Id.* The Court on appeal rejected this argument and stated it was simply “semantics.” *Id.* The current version of the witness tampering statute is different than the one considered in *Scherck*, *supra*, however the reasoning of *Scherck* still

applies. Watkins was charged under the current version of the statute and alleged to have attempted to or actually induced a person he knew to be a witness to testify falsely, withhold testimony, absent himself from proceedings, or withhold information from law enforcement. CP 2.

In *State v. Williamson*, 131 Wn.App. 1, 86 P.3d 1221 (2004), the Court found that to sustain a conviction for witness tampering, the witness did not actually have to be successfully tampered with, but if a defendant attempted to alter a witness's testimony, the elements of the crime are met. *Williamson*, 131 Wn.App. at 6. A person is guilty of attempting to commit a crime if he intends to commit the crime and takes a substantial step towards the commission of that crime. *Id.* (quoting RCW 9A.28.020(1)). Proof of actual communication with the victim is not required. *Id.* (stating that a person violates the witness intimidation statute even if a threat is not communicated to the victim).

Even if a defendant's literal words do not constitute an unequivocal request to withhold testimony, he can still be convicted of witness tampering. "The State is entitled to rely on the inferential meaning of the words and the context in which they were used." *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990). Direct statements are not necessary to convict for witness tampering, and the trier of fact must

consider the inferential meaning as well as the literal meaning of the defendant's words. *See Scherck*, 9 Wn.App. at 794.

Here, in talking with his mother about his pending case, the potential prison sentence, and the evidence against him, Watkins indicated that his father, Dale, had good reason to “recant [his] statement.” RP 106. He went on further to tell his mom that cases get “thrown out all the time because of recanted statements.” *Id.* Dale and Watkins's mother live together and she discussed her conversations with Dale. RP 45-46. Dale was then present for another conversation in the car with Watkins's mother when Watkins again discusses that a witness can “recant” a statement and “say, hey, no more of this statement.” RP 40, 120-35. Watkins also talked during this phone conversation about how the statement was only written by the police officer and not Dale and then it would not hold up in court. RP 40. Watkins also told Dale that his statement was all the State had in his case by saying, “that's all they have going—you know, going on their side really.” RP 41. Dale testified that Watkins was still living at the residence in July 2015 and that if he told the police officer anything different it was a mistake. RP 29, 32. Dale Watkins indicated his written statement was a mistake as well. RP 30-31. The evidence further showed that Dale had told police that Watkins was not living at the residence and had not in about a month. RP 63. Dale also

signed a written statement he wrote, under penalty of perjury, regarding Watkins's residence status. RP 30-31.

Not only did Watkins actually attempt to induce Dale to recant and change his statement, but he succeeded in getting Dale to recant and change his statement. Dale did in fact recant at trial and indicated that anything he said about Watkins no longer living there was a "mistake." RP 29, 32. Taking everything into consideration as the Courts direct we must, the context of the conversation and the inference from the statements Watkins made to his mother and to his father, show that Watkins was trying to have Dale recant his statement to police. Watkins succeeded with this attempt. Taking the evidence in the light most favorable to the State, and all reasonable inferences that can be drawn therefrom, it is clear that a reasonable trier of fact not only could, but did, find Watkins guilty of witness tampering. The trial court's verdict was appropriate and based on sufficient evidence. The trial court should be affirmed.

CONCLUSION

The information properly and adequately informed Watkins of all essential elements of the crime of failure to register as a sex offender. Watkins was on notice of the charge and was not deprived of any constitutional rights because of any deficiency in the charging language.

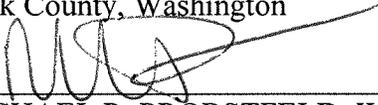
The State presented sufficient evidence of the crime of tampering with a witness and the trier of fact properly found him guilty. Watkins's claims are meritless and the trial court should be affirmed.

DATED this 25th day of July 2016.

Respectfully submitted:

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