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No. 52916-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN MICHAEL SANCHEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable John C. Skinder, Judge
Cause No. 18-1-01054-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the inclusion of an uncharged means of committing tampering with a witness was harmless beyond a reasonable doubt where the facts presented at trial affirmatively demonstrated that the jury could not have found Sanchez guilty of the uncharged means without finding him guilty on the charged means.

2. Whether Sanchez can demonstrate that this trial counsel's performance prejudiced him at trial where the inclusion of an uncharged means of committing tampering with a witness did not affect the outcome of the proceedings.

3. Whether the trial court properly denied a motion for a new trial where the inclusion of an uncharged means in the jury instructions could not have affected the outcome of the proceedings.

4. Whether the trial court properly considered defense counsel's conflict when it was raised and properly protected Sanchez's right to an attorney by allowing his trial attorney to withdraw prior to sentencing.

B. STATEMENT OF THE CASE.

In June of 2018, Rachel Nickels was a listed witness in two Thurston County Superior Court cases against the appellant, John Michael Sanchez. RP 212.¹ While Sanchez was in the custody of the Thurston County jail, the jail placed a mail hold on anything sent from Sanchez's custody unit to Ms. Nickel's address. RP 84-85. Lieutenant Jenny Hovda intercepted an envelope, purported to be from inmate Kyle Baker. RP 85-86. Due to multiple correspondences and having listened to many hours of Sanchez's jail calls, Hovda indicated that the handwriting and content of the letter appeared to come from Sanchez. RP 146-147, 148, 153, 155.

The letter included a sentence, "As long as you don't cooperate, they will drop a lot of this stuff. I will still have to plea to something, but at least it's not, ..." and a sentence that read, "I've been here way too long. I need to be released now. You need to help in that by not cooperating or returning calls and not." RP 155. Rachel Nickels identified Sanchez as the author of the letter based on his handwriting and the content. RP 219-222.

¹ This case has several volumes of report of proceedings. The trial that occurred on October 1 and 2, 2018, occurs in two volumes, sequentially numbered and will be collectively referenced herein as RP. The motion for a new trial hearing and sentencing that occurred on January 16, 2019, will be referred to as 2 RP and hearings on October 24 and 30, 2018, which are reported in a single volume are referred to as 3 RP in this brief.

The State generally accepts the procedural facts contained in the Brief of Appellant, except as they are contradicted by the facts or argument herein. Sanchez was charged with one count of tampering with a witness. CP 1. Following a jury trial, Sanchez was found guilty as charged. RP 323. Prior to sentencing, Sanchez's trial counsel, Angela Colaiuta, moved to withdraw as counsel noting that she became aware of a conflict on October 18, 2018. CP 182. Sanchez agreed that Colaiuta should withdraw, and the trial court granted her motion. 3 RP 9-10.

With substitute counsel, Sanchez moved for a new trial based on the inclusion of an uncharged means of committing tampering with a witness in the jury instructions. CP 189-199. The State conceded that inclusion of the uncharged means was error but argued that the error was harmless. CP 201-245. The trial court agreed, finding that the error uncharged prong and the charged prong "overlap so that there is no way the jury could have convicted the defendant of just the uncharged prong." 2 RP 35.

Sanchez was sentenced to 20 months incarceration. CP 264. This appeal follows. Additional facts are included in the argument sections below as noted.

C. ARGUMENT

1. The jury instructions did include an uncharged means of committing tampering with a witness, however, under the facts of this case, the error was harmless as there was no possibility that the jury could have convicted Sanchez of the uncharged alternative without convicting him of the charged alternative.

Sanchez was charged by Information with one count of tampering with a witness / Domestic Violence, under RCW 9A.72.120(1)(a) and RCW 10.99.020. CP 1. The crime of tampering with a witness includes several alternative means of committing the offense. RCW 9A.72.120(1)(a) includes “testify falsely or, without right or privilege to do so, to withhold any testimony.” RCW 9A.72.120(1)(b) includes “absent himself or herself from such proceedings.”

The criminal information contained only the language included in RCW 9A.72.120(1)(a), reading:

In that the defendant, John Michael Sanchez, in the State of Washington, on or about June 15, 2018, attempted to induce Rachel Nickels, a family or household member, pursuant to RCW 10.99.020, a witness or a 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 testify falsely or, without right or privilege to do so, to withhold any testimony.

CP 1. The trial court's instructions to the jury included the alternative means listed in RCW 9A.72.120(1)(b). RP 281-282, CP 118, 121.

The State concedes that the inclusion of the means listed in RCW 9A.72.120(1)(b) was error, however, the error was harmless. Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); State v. Lundy, 162 Wn. App. 865, 871-72, 256 P.3d 466 (2011) ("[a]n erroneous jury instruction, however, is generally subject to a constitutional harmless error analysis ... Even misleading instructions do not require reversal unless the complaining party can show prejudice.").

"A reviewing court does not focus upon whether the defendant was in fact guilty in determining whether trial error was harmless ... Yet evidence of guilt is relevant because overwhelming evidence of guilt may reduce the possibility that the verdict was seriously affected by trial error." United States v. Walker, 652 F.2d 708, 714 (7th Cir. 1980) (internal cites omitted). Moreover, "[w]e

should avoid multiple trials and attendant uneconomic use of judicial resources when the new trial will inevitably arrive at the same result.” State v. Tharp, 96 Wn.2d 591, 600, 637 P.2d 961 (1981).

In State v. Fleming, 140 Wn. App. 132, 170 P.3d 50 (2007) (overruled in part on other grounds by State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009)) the court concluded that the state presented substantial evidence only that the defendant tried to induce the witness to absent themselves from the proceeding when the defendant asked the witness to disappear until after trial, which the court said only fell under the absent prong. In that case, this Court considered the alternative means of tampering with a witness in the context of unanimity.

Here, based on the evidence presented at trial and the closing arguments - much like Fleming – the jury could only have returned a verdict of guilty if it found beyond a reasonable doubt that the defendant attempted to induce Ms. Nickels to withhold testimony.

Sanchez asserts that State v. Chino, 117 Wn. App. 531, 72 P.3d 253 (2003), is indistinguishable from this case, however that assertion is incorrect. In Chino, "the State charged Mr. Chino with

one count of intimidating a witness under RCW 9A.72.110(1)(d) which states, in pertinent part, “by use of threat ... you attempted to induce that person to not report the information relevant to a criminal investigation or to not give truthful or complete information relevant to a criminal investigation.” Id. at 533.

The court’s instructions to the jury stated:

That on or about November 22, 2001, the defendant by use of a threat against a current or prospective witness attempted to induce that person to absent himself or herself from an official proceeding or induce that person not to report information relevant to a criminal investigation or induce that person not to have the crime prosecuted.

Id. at 537.

Division III of this Court noted, “because the instructional error favored the prevailing party, it is presumed prejudicial unless it affirmatively appears the error was harmless.” Id. at 540, *citing*, State v. Bray, 52 Wn. App. 30, 34-35, 756 P.2d 1332 (1988).

Here, the State charged the defendant with one count of tampering with a witness under RCW 9A.72.120(1)(a). The instructions to the jury stated:

That on or about June 15, 2018, the defendant attempted to induce Rachel Nickels to testify falsely, or without right or privilege to do so, withhold any testimony or absent herself from any official.

RP 281-282, CP 118, 121.

Unlike in Chino, there is no likelihood that the jury could have convicted the defendant of just the uncharged prong because the only substantial evidence presented was his request that the witness withhold testimony. RP 155. Even if the jury considered the absent prong, the method of absencing would have been withholding testimony. On the facts of this case, the two prongs overlap so that there is no way that the jury could have convicted the defendant of just the uncharged prong. The evidence presented at trial affirmatively demonstrates that the error was harmless.

This case is also distinguishable from State v. McDonald, 183 Wn. App. 272, 333 P.3d 451 (2014), where Division I of this court considered a similar issue. In McDonald, the jury was actually only instructed on uncharged means of committing the offense. Id. at 276. The State conceded the error and conceded that it was not harmless. Id. Here, the jury was properly instructed as the charged means. The error was the inclusion in the jury instructions of an uncharged means. However, as noted above, there is no possibility that the jury could have convicted Sanchez of the uncharged means without convicting him of the charges means because the

evidence overlapped. The error was harmless beyond a reasonable doubt.

2. Sanchez's trial counsel did not provide ineffective assistance of counsel because the evidence affirmatively demonstrates a lack of prejudice.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington,

466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the grounds of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 697.

Failure to object to a jury instruction that incorrectly sets out the elements of the crime for which the defendant is charged can constitute deficient performance if it lowers the State's burden of proof or allows the defendant to be convicted of a crime they did not commit. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Sanchez's trial attorney did mention concerns with the use of the pattern jury instruction, stating, "I would suggest to the court that the existing WPIC actually puts multiple elements within the same paragraph and reduces the constitutional burden that is on the prosecution to prove each and every element beyond a reasonable doubt." RP 241. Defense counsel's criticism focused on the identity element of the offense, which she stated was "one of the key issues in [the] case." Id. Defense counsel also noted that her proposed revisions "reflected the fact that with regard to the

information, the prosecution has elected portions of the witness tampering statute, and only those portions apply.” RP 242.

The trial court stated, “the court will be preparing a draft [of the jury instructions] for both of you to review, and then I will hear any objections and exceptions.” RP 253. The trial court noted, “I am not following the defense offer to deviate from the WPICs by either rewording certain things, replacing the “defendant” with “Mr. Sanchez,” or splitting up, in the one case, the instruction.” RP 255.

When the trial court again brought up the jury instructions, defense counsel did not object or take exception to either jury instruction 7 or instruction 10. RP 271-272. As the State has already conceded, it was error for the jury instructions to include the uncharged means listed in RCW 9A.72.120(1)(b). To the extent that defense counsel did not renew an objection to the form of the given jury instructions, that may have been deficient performance. However, Sanchez cannot demonstrate that his attorney’s performance prejudiced him.

First, it is unlikely that the trial court would have changed the jury instructions that were given if counsel had objected. Counsel made a record as to certain concerns that she had with the proposed instructions and the trial court did not modify the version

that was before her for objections and exceptions. Second, as noted above, the inclusion of the uncharged means in the jury instructions was harmless beyond a reasonable doubt. Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d at 487. Because the substantive evidence presented at trial could not have been sufficient for a finding of guilty under the uncharged prong without the jury finding that the charged prong occurred, the inclusion of the uncharged prong in the jury instructions necessarily had no effect on the outcome. Sanchez cannot demonstrate prejudice and therefore his claim of ineffective assistance of counsel fails.

3. The trial court correctly denied Sanchez's motion for a new trial after finding that the evidence affirmatively demonstrated that the inclusion of the uncharged prong of tampering with a witness was harmless beyond a reasonable doubt.

Sanchez argues that the trial court's denial of his CrR 7.5 motion for a new trial was erroneous. "Except where questions of law are involved, a trial judge is invested with broad discretion in granting motions for a new trial. The exercise of that discretion will not be disturbed on appeal absent an abuse of discretion." State v.

Bray, 96 Wn.2d 215, 221, 634 P.2d 868 (1981); State v. Mohamed, 186 Wn.2d 235, 240-241, 375 P.3d 1068 (2016). Trial courts generally have wide discretion in deciding whether or not to grant a new trial because the trial judge who has seen and heard the witnesses is in a better position to evaluate and adjudge than the appellate courts can from a cold, printed record. State v. Lopez, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018). However, that deferential standard does not apply to questions of law and mixed questions of law and fact. Id. at 118; *citing* Mohamed, 186 Wn.2d at 240-241. A trial court's factual findings are reviewed for substantial evidence and its legal conclusions de novo. Lopez, 190 Wn.2d 118.

The trial court considered Sanchez's arguments for a new trial and the State's concession that instructing the jury in regard to RCW 9A.72.120(1)(b) was erroneous. 2 RP 29. The trial court then considered whether the error was harmless beyond a reasonable doubt. The trial court stated

The individuals who are present who were here for the trial know, the real focus of the trial was two things. The largest part of the trial dealt with who wrote and sent this letter. The second part was whether the contents of the letter were sufficient for witness tampering.

2 RP 30. The trial court then discussed the prosecutor's closing argument at trial and found

To the court's mind, the way that was argued is in effect, equating the different prongs that are all contained in subparagraph (1) where it states the Defendant attempted to induce Rachel Nickels to testify falsely or without right or privilege to do so, withhold any testimony, or absent herself from any official proceeding. Again, the evidence in this trial largely focused on who wrote and who sent this two-page letter.

2 RP 31. The trial court then discussed defense counsel's closing argument noting that defense counsel's argument focused on the lack of proof that Sanchez wrote the letter. 2 RP 33-34.

The trial court's analysis on harmless error stated,

I think that, based on a review of that evidence, the error in the jury instructions was harmless beyond a reasonable doubt under the specific facts of this case. This was not a case where there were many different communications that were being discussed, where they were open to different nuances. We are dealing in this case with a two-page letter, where the ... majority of the time argued on this case was who wrote this letter, who sent this letter. The issue of the attempt to induce to testify falsely or without privilege or without right or privilege to do so, withhold any testimony, or absent herself from any official proceeding, were all argued together.

2 RP 34-35. The trial court concluded,

I am persuaded that the State's position is correct. And the State's position regarding that was contained actually in the very end of their response where they

stated that on the facts of this case, the two prongs overlap so that there is no way the jury could have convicted the defendant of just the uncharged prong.

2 RP 35.

The trial court's findings and conclusions were correct. During the State's closing argument, every mention of the absenting herself prong was in conjunction with the charged prong. RP 298, 299-300. All of the argument was focused on the letter admitted as Exhibit 1. Defense counsel's closing argument focused on whether Sanchez wrote the letter and second, whether the letter constituted witness tampering. RP 303.

In arguing that the letter did not constitute witness tampering, defense counsel focused on the fact that the letter was not addressed to Ms. Nickels. RP 310. Neither party distinguished the facts which support the prong 1(a) of RCW 9A.72.120 and prong 1(b) of RCW 9A.72.120. Under the facts of the case, the two prongs were indistinguishable. It was impossible for the jury to find that Sanchez attempted to induce Nickels to absent herself from proceedings without finding that he intended to induce her to withhold testimony. For that reason, the trial court's findings of fact were correct, and the trial court's conclusion of law, even if

reviewed de novo, was correct. The instructional error was harmless beyond a reasonable doubt.

4. The trial court adequately inquired into defense counsel's conflict prior to the sentencing hearing and cautiously appointed new counsel for the sentencing phase of the trial, thereby protecting Sanchez's right to counsel at all proceedings.

After the trial concluded the sentencing hearing, Sanchez's trial counsel, Ms. Colaiuta, moved to withdraw stating that "the interests of Mr. Sanchez are directly adverse to another client." 3 RP 9. Ms. Colaiuta then stated, "Without the court ordering me to do so, I don't feel comfortable going into more detail as it would reveal client confidences." 3 RP 9.

Sanchez addressed the trial court in regard to the motion, stating:

I agree to it. She - - a previous judge had already declared that there was an issue and allowed her to withdraw from the burglary case which she was simultaneously representing me as along with this case. Quillian [referring to defense counsel Robert Quillian] I believe is assigned to the burglary case, I believe is lined up to assist me in this matter as well.

3 RP 9. Ms. Colaiuta then indicated, "the conflict that exists with regard to my representation actually would mean that the whole office is disqualified. 3 RP 10. The trial court then allowed Ms. Colaiuta to withdraw based upon her motion and "the fact it's joined

by Mr. Sanchez.” 3 RP 10. Colaiuta’s motion indicated that she became aware of the conflict on October 19, 2018. CP 182.

Mr. Sanchez was represented by Mr. Quillian during the motion for a new trial and sentencing. See 2 RP generally. Sanchez cites to State v. Chavez, 162 Wn. App. 431, 440, 257 P.3d 1114 (2011), for the proposition that a failure of the trial court to further inquire into a conflict of interest constitutes reversible error. Brief of Appellant, at 17. Chavez falls short of such a proclamation. In Chavez, Division III of this Court found that the trial court denied the defendant representation during a motion to withdraw a guilty plea because, after the original attorney indicated he had a conflict and was allowed to withdraw, the substitute attorney filed a brief stating he saw no issues. Id. at 439-440. The issue in the case was denial of counsel during a critical phase, i.e. the motion to withdraw guilty plea. Id. at 440.

In State v. McDonald, 96 Wn. App. 311, 979 P.2d 857 (1999), the defendant filed a federal law suit against his standby counsel, who was represented in that law suit by the civil division of the Skagit County Prosecutor’s Office. Id. at 314. The trial court denied the motion “without further meaningful inquiry.” Id. Division I of this court found, “when a trial court requires an attorney who

asserts a conflict of interest to continue representing a defendant without making a full inquiry into the nature and potential consequences of the conflict, reversal is automatic.” Id. at 317-318. Distinguishable from McDonald, the trial court was notified of a conflict after the trial and prior to sentencing and the trial court allowed her to withdraw with the acquiescence of Sanchez.

Given that Mr. Sanchez agreed with Ms. Colaiuta, the trial court had sufficient information to rule on her motion to withdraw and properly allowed her to do so. Sanchez makes no argument that any conflict affected his trial. Rather, the argument is that the trial court didn’t further inquire and somehow that means the trial court should have granted a motion for a new trial due to the conflict. Brief of Appellant, at 18. The issue of a conflict was not raised as part of a motion for a new trial. Moreover, the existence of a conflict does not render a verdict infirm without a showing or a “strong possibility that a conflict of interest had an effect on [his lawyer’s] performance.” State v. Dhaliwal, 150 Wn.2d 559, 574, 79 P.3d 432 (2003); State v. White, 80 Wn. App. 406, 412, 907 P.2d 310 (1995); State v. Kitt, 9 Wn. App. 235, 246-247, 442 P.3d 1280 (2019).

Here, as in White, there was no probability that any conflict affected Ms. Colaiuta's performance at trial. She indicated that she was not aware of the conflict until after the trial occurred. CP 182. The verdict was entered on October 2, 2018, more than two weeks prior to the date that Colaiuta indicated she became aware of a conflict. CP 125, 182. Once the trial court was made aware of the conflict, with Sanchez's approval, the trial court properly protected Sanchez's rights by allowing Colaiuta to withdraw. There was no error and Sanchez is not entitled to a new trial.

D. CONCLUSION.

The State concedes that inclusion of the alternative uncharged means of tampering with a witness in RCW 9A.72.120(1)(b) was error. However, the error was harmless beyond a reasonable doubt based on the facts of this case. It was not possible for the jury to find Sanchez guilty of the uncharged means without also finding him guilty of the charged means. Sanchez cannot demonstrate prejudice from his trial counsel's performance and the trial court did not err in denying Sanchez's motion for a new trial. Finally, there was no error in the trial court allowing Sanchez's trial counsel to withdraw prior to sentencing, and Sanchez makes no argument that any conflict affected his trial.

The State respectfully requests that this Court affirm the conviction and sentence in all aspects.

Respectfully submitted this 25th day of September, 2019.

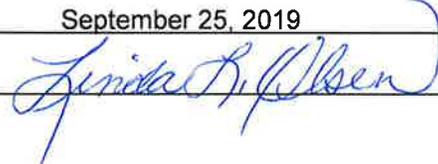


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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: September 25, 2019
Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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