

FILED
Court of Appeals
Division II
State of Washington
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No. 53000-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM RICARDO LOWE,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

William Lowe and Susan Mantesta were involved in a sometimes contentious romantic relationship. During an argument between the two, and in light of Mr. Lowe's refusal to leave her home, Ms. Mantesta called the police. During a phone call to the police, Mr. Lowe was heard threatening Ms. Mantesta.

Mr. Lowe's conviction for intimidating a witness must be reversed for insufficient evidence where the State failed to prove Mr. Lowe's threat was an attempt to induce Ms. Mantesta not to call the police. Alternatively, the \$100 DNA collection fee must be stricken where Mr. Lowe has two prior felony convictions in Washington.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented that Mr. Lowe attempted to induce Ms. Mantesta not to contact the police.

2. The trial court erred in imposing the \$100 DNA collection fee.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove all of the elements of an offense beyond a reasonable doubt. In proving the offense of intimidating a witness, the State must prove the defendant attempted to

induce a current or prospective witness not to report information relevant to a criminal investigation. Here, the State proved Mr. Lowe threatened Ms. Mantesta but failed to prove the threat was done with an attempt to induce her not to report an incident she was on the phone to the police reporting. Is Mr. Lowe entitled to reversal of his conviction with instructions to dismiss for a failure of the State to prove the offense beyond a reasonable doubt?

2. Amendments to the statutes authorizing imposition of Legal Financial Obligations (LFO) bar imposition of the DNA fee where the defendant is indigent and he has already had DNA taken from a prior felony conviction. These amendments apply to all those whose appeal is pending at the time of the legislation's passage. Is this Court required to strike the \$100 DNA collection fee imposed by the trial court where Mr. Lowe was indigent and had several Washington prior felony convictions?

D. STATEMENT OF THE CASE

William Lowe and Susan Mantesta were in an on-again off-again domestic relationship. RP 268. In June 2018, Mr. Lowe and Ms. Mantesta were not living together but Mr. Lowe was staying with Ms. Mantesta because he had recently been evicted from where he was living. RP 269.

On June 25, 2018, Mr. Lowe returned to Ms. Mantesta's residence after being away for several days and immediately went to sleep. RP 272. Ms. Mantesta, believing Mr. Lowe was being unfaithful, looked through Mr. Lowe's phone and confirmed her suspicions. RP 273. When he awoke, Ms. Mantesta confronted Mr. Lowe and an argument ensued. RP 273.

Ms. Mantesta told Mr. Lowe he would have to leave. RP 273. When she repeated her demand, Mr. Lowe angrily flipped over a table and went into the bathroom. RP 274. In response to Mr. Lowe's claim that all white people are the same, Ms. Mantesta responded in kind but used a racial epithet. RP 275. Mr. Lowe, who is African-American, angrily pushed Ms. Mantesta against a wall and threatened to kill her. RP 276-78.

Ms. Mantesta once again told Mr. Lowe he had to leave, and when he did not, she called 911 and reported the incident. RP 279. While she was on the phone to the police, Mr. Lowe made some comments to Ms. Mantesta:

Q. Do you remember any of what he was saying while you were on the phone with 911?

A. Yeah, he said that by the time -- he was going to burn my house down and kill me by the time they got there.

RP 281.

Ms. Mantesta did not believe Mr. Lowe would carry out his threat:

Q. Did you believe his threats that time?

A. To burn my house and kill me? No.

Q. Why not?

A. 'Cause they were just threats. He wasn't -- he was on the sofa. He wasn't making an aggressive move to me. He was just trying to get me to not call the police.

RP 281-82.

When the police arrived, and after speaking to Ms. Mantesta, arrested Mr. Lowe. RP 234. Mr. Lowe was subsequently convicted of felony harassment, intimidating a witness, and fourth degree assault.

CP 89-91; RP 442. Mr. Lowe was acquitted of third degree malicious mischief. CP 85, 87, 93; RP 441-42.

At sentencing, despite Mr. Lowe having a felony conviction in 2005 and another in 2006, the trial court imposed the \$100 DNA collection fee. CP 171, 177.

E. ARGUMENT

1. There was insufficient evidence that Mr. Lowe intimidated Ms. Mantesta.

- a. *The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, 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.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

- b. *The State failed to prove Mr. Lowe made a threat in an attempt to induce Ms. Mantesta not to call the police.*

Mr. Lowe was charged with the specific alternative means of intimidating a witness under RCW 9A.72.110(1)(d), which requires the State to prove that: Mr. Lowe, “by use of a threat against a current or prospective witness, attempt[ed] to . . . [i]nduce that person not to report the information relevant to a criminal investigation . . .”

Here, by his plain words overheard on the phone call, Mr. Lowe did not “attempt to induce” Ms. Mantesta not to report to the police what had happened. Ms. Mantesta was not afraid Mr. Lowe would carry out his threat and she was on the phone reporting the incident when Mr. Lowe made his statement, thus providing further evidence he did not interfere with her attempt to report the incident.

- c. *Mr. Lowe’s conviction for intimidating a witness must be reversed with instructions to dismiss the charge.*

Since there was insufficient evidence to support the conviction for intimidating a witness, this Court must reverse that conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *See State v. Linton*, 156 Wn.2d 777, 784, 132 P.3d 127 (2006) (“Acquittal of an offense terminates jeopardy.”); *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009) (“A reversal for insufficient

evidence is deemed equivalent to an acquittal, for double jeopardy purposes, because it means ‘no rational factfinder could have voted to convict’ on the evidence presented,” *quoting Tibbs v. Florida*, 457 U.S. 31, 40-41, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”).

2. Amendments to the statutes authorizing legal financial obligations requires that the \$100 in legal financial obligations against Mr. Lowe be stricken.

In 2018, the law on legal financial obligations changed. Laws of 2018, ch. 269. Now, it is categorically impermissible to impose discretionary costs on indigent defendants. RCW 10.01.160(3). The Washington Supreme Court has determined that these changes apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). In other words, that the statute was not in effect at the time of the trial court’s decision to impose legal financial obligations does not matter. *Id.* at 747-48. Applying the change in the law, the Supreme Court in *Ramirez* ruled the trial court impermissibly

imposed discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.*

Mr. Lowe has several Washington State felonies since 1990. Since that time, Washington has required defendants with a felony conviction to provide a DNA sample. Laws of 1989, ch. 350, § 4; RCW 43.43.754. Here in light of Mr. Lowe's prior felony convictions, this Court must presume that a DNA sample has been collected from Mr. Lowe prior to the current judgment and sentence. Given this, the trial court erred in imposing the \$100 DNA collection fee and it must be stricken.

F. CONCLUSION

For the reasons stated, Mr. Lowe asks this Court to reverse his conviction for intimidating a witness. In addition, Mr. Lowe asks that the \$100 DNA collection fee be stricken.

DATED this __ day of July 2019.

Respectfully submitted,

s/Thomas M. Kummerow

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