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Court of Appeals
Division II
State of Washington
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NO. 53353-7-II

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

STATE OF WASHINGTON, Respondent

v.

DAVID GARCIA, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-02699-9

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly instructed the jury**
- II. **The State agrees and concedes the trial court erred in instructing the jury on uncharged alternative means of witness tampering.**
- III. **The trial court did not err in failing to have an evidentiary hearing on the defendant's CrR 7.5 motion for a new trial**
- IV. **Whether the trial court properly responded to the jury's question regarding the witness tampering charge is moot.**
- V. **The State Presented Sufficient Evidence to Support the Conviction For Witness Tampering Against R.G.**

STATEMENT OF THE CASE

The State accepts Garcia's statement of the case.

ARGUMENT

- I. **The trial court properly instructed the jury.**

Garcia argues the trial court erred in giving the jury a non-corroboration instruction and that this instruction impermissibly commented on the evidence. The jury instruction given by the court was proper and did not amount to an improper comment on the evidence. Garcia's claim fails.

The issue of whether a jury instruction is legally correct is reviewed de novo. *State v. Chenoweth*, 188 Wn.App. 521, 535, 354 P.3d

13 (2015). “A jury instruction is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law.” *State v. Johnson*, 152 Wn.App. 924, 935, 219 P.3d 958 (2009). Further, “an instruction that accurately states the applicable law is not a comment on the evidence.” *State v. Zimmerman*, 130 Wn.App. 170, 180-81, 121 P.3d 1216 (2005) (citing *State v. Ciskie*, 110 Wn.2d 263, 282-83, 751 P.2d 1165 (1988)).

RCW 9A.44.020(1) provides that “[i]n order to convict a person of any crime defined in this chapter[,] it shall not be necessary that the testimony of the alleged victim be corroborated.” RCW 9A.44.020(1). The instruction given by the trial court on this issue followed the language of the statute. Therefore, it was an accurate recitation of the law. Further, in *State v. Johnson*, 152 Wn.App. 924, 219 P.3d 958 (2009), this Court recognized that the corroboration instruction given was a proper statement of the law. *Johnson*, 152 Wn.App. at 935-36. There the trial court instructed the jury that: “In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.” *Id.* at 935. This followed the language of the statute, RCW 9A.44.020(1) and was therefore a proper statement of the law. *See id.* Likewise in *State v. Zimmerman, supra*, this Court recognized

that the trial court's instruction, which mirrored RCW 9A.44.020(1) accurately stated the law. *Zimmerman*, 130 Wn.App. at 181.

Further, this instruction was not an improper comment on the evidence. In *State v. Malone*, 20 Wn.App. 712, 582 P.2d 883 (1978), *rev. denied*, 91 Wn.2d 1018 (1979), the Court held that the non-corroboration instruction given, which was nearly identical to the one given in Garcia's case, did not convey an opinion on the alleged victim's credibility and was therefore not a comment on the evidence. *Malone*, 20 Wn.App. at 714-15. The Court affirmed this in *Zimmerman, supra*. In *Zimmerman*, the trial court instructed the jury that "in order to convict a person of the crime of child molestation as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated." *Zimmerman*, 130 Wn.App. at 173-74. The Court in *Zimmerman*, relied on the Supreme Court holding in *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949) to affirm the trial court's giving of the non-corroboration jury instruction. In *Clayton*, the trial court gave the following non-corroboration jury instruction:

You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will

return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Clayton, 32 Wn.2d at 572. The Supreme Court held there that the trial court did not express an opinion as the truth or falsity of the victim's testimony nor did it express an opinion as to the weight the court attached to her testimony. *Id.* at 573-74. This Court is bound by *Clayton* to hold that a non-corroboration jury instruction is not reversible error, despite any misgivings about the instruction, or the fact that the WPIC committee may recommend against corroboration instructions. *Zimmerman*, 130 Wn.App. at 182-83.

Finally, most recently in *State v. Chenoweth*, 188 Wn.App. 521, 354 P.3d 13 (2015), Division I of this Court stated definitively, "it is permissible to instruct the jury that there is no corroboration requirement." *Chenoweth*, 188 Wn.App. at 537. The trial court here followed the opinions discussed above and accurately and permissibly instructed the jury that corroboration of the victim's testimony is not required. The jury was also instructed that the State must prove its case beyond a reasonable doubt and that the jury must be satisfied that there is evidence to support the charge beyond a reasonable doubt. The instruction did not diminish the state's burden, nor was it a comment on the evidence. By simply stating that a victim's testimony need not be corroborated, the court is not stating

or implying that the court itself believes the victim. The court is only saying that the law does not require corroboration for a conviction. This is permissible under the case law discussed above. The trial court did not err. Garcia's claim should be denied.

II. The State agrees and concedes the trial court erred in instructing the jury on uncharged alternative means of witness tampering.

Garcia alleges the trial court erred in instructing the jury on the crimes of witness tampering by including uncharged alternative means in the to-convict instruction. The State agrees and concedes the trial court erred in instructing the jury as the State only charged one means, but the instructions allowed the jury to convict on multiple different means of witness tampering. The remedy is to remand for a new trial on the witness tampering charges.

“Where the information alleges solely one statutory alternative means of committing a crime, it is error for the trial court to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence.” *State v. Chino*, 117 Wn.App. 531, 540, 72 P.3d 256 (2003) (citing *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); *State v. Williamson*, 84 Wn.App. 37, 42, 924 P.2d 960 (1996); *State v. Nicholas*, 55 Wn.App. 261, 272-73, 776 P.2d 1385 (1989); *State v. Bray*, 52

Wn.App. 30, 34, 756 P.2d 1332 (1988)). In *Chino*, the defendant challenged the jury instructions for the first time on appeal, as Garcia does here. *Chino*, 117 Wn.App. at 538. However, because an instruction that omits an essential element of a crime relieves the State of its burden of proof, it constitutes a manifest error affecting a constitutional right and may be reviewed for the first time on appeal pursuant to RAP 2.5(a)(3). *Id.* (citing *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996)). Therefore Garcia may raise this issue for the first time on appeal.

The trial court instructed the jury on three alternative means in the to-convict instruction on both counts of witness tampering. CP 253-54. However, the State only charged Garcia by one means in its information. CP 113-17. By including three alternative means in the to-convict instruction when the State only charged one means in the information, it is possible the jury convicted the defendant on the basis of an uncharged alternative. Accordingly, error is not harmless and reversal and remand for a new trial is necessary. *See Chino*, 117 Wn.App. at 541.

III. The trial court did not err in failing to have an evidentiary hearing on the defendant's CrR 7.5 motion for a new trial

On appeal, Garcia argues the trial court erred by failing to have an evidentiary hearing on his motion for a new trial due to alleged juror

misconduct pursuant to CrR 7.5. The trial court properly analyzed this issue and did not abuse its discretion in denying Garcia's motion without an evidentiary hearing. Garcia's claim fails.

This Court reviews a trial court's investigation into juror misconduct for abuse of discretion. *State v. Earl*, 142 Wn.App. 768, 774, 177 P.3d 132 (2008) (citing *State v. Elmore*, 155 Wn.2d 758, 761, 123 P.3d 72 (2005) and *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)). Here, Garcia, as the party alleging the juror misconduct, had the burden to show that misconduct indeed occurred. *Id.* (citing *State v. Hawkins*, 72 Wn.2d 565, 566, 434 P.2d 584 (1967)). Further, a trial court's decision on a motion for a new trial is discretionary and will be overturned on appeal only for an abuse of that discretion. *State v. Hawkins*, 72 Wn.2d 565, 567-68, 434 P.2d 584 (1967); *State v. Tigano*, 63 Wn.App. 336, 342, 818 P.2d 1369 (1991) (citing *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d (1984); *Richards v. Overlake Hosp. Med. Center*, 59 Wn.App. 266, 271, 796 P.2d 737 (1990), *rev. denied*, 116 Wn.2d 1014, 807 P.2d 883 (1991); *State v. Briggs*, 55 Wn.App. 44, 60, 776 P.2d 1347 (1989); *State v. Rempel*, 53 Wn.App. 799, 801, 770 P.2d 1058 (1989); *State v. Hicks*, 41 Wn.App. 303, 314, 704 P.2d 1206 (1985)). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or

untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

Garcia does not indicate in his briefing what evidence would be different or how an evidentiary hearing would have changed the outcome of his motion for a new trial. The court had the interview of the juror, wherein the defense attorney, a defense investigator, and the prosecutor were present to question the juror. There is no likelihood that this juror would have testified differently from what she indicated in her interview. The defense attached the witness interview transcript in its entirety to its motion for a new trial and therefore the court considered it in its entirety. It's clear from the court's discussion of this issue that the court had considered the transcript and the evidence from the juror. *See* RP 864-66. There is no indication that any other evidence would have been brought forth during an evidentiary hearing. Therefore the trial court did not abuse its discretion in failing to have an evidentiary hearing on this issue when there was absolutely no indication as to what additional evidence would have been presented at the hearing.

A defendant has an absolute right to a trial by a jury that is unbiased, unprejudiced, and free from disqualifying jury misconduct. *State v. Tigano*, 63 Wn.App. 336, 341, 818 P.2d 1369 (1991). A defendant may be awarded a new trial based on juror misconduct "when it affirmatively

appears that a substantial right of the defendant was materially affected.”
State v. Tandecki, 120 Wn.App. 303, 310, 84 P.3d 1262 (2004), *affirmed*,
153 Wn.2d 842, 109 P.3d 398 (2005).

Not all situations involving juror misconduct warrant a new trial.
State v. Tigano, 63 Wn.App. 336, 341, 818 P.2d 1369 (1991). Those
situations that cause prejudice to the defendant warrant a new trial;
situations of juror misconduct which do not cause prejudice to the
defendant do not warrant a new trial. *Id.* (citing *State v. Lemieux*, 75
Wn.2d 89, 91, 448 P.2d 943 (1968); *Briggs*, 55 Wn.App. at 55; *Rempel*,
53 Wn.App. at 801). “To assess whether prejudice has occurred, it is
necessary to compare the particular misconduct with all of the facts and
circumstances of the trial.” *Tigano*, 63 Wn.App. at 342. “The trial judge is
in the best position to make this comparison.” *Id.* (citing *State v. Harvey*,
34 Wn.App. 737, 744, 664 P.2d 1281, *review denied*, 100 Wn.2d 1008
(1983)).

“An allegation that a jury has deliberated prematurely, without
more, does not warrant a new trial.” *State v. Whitaker*, 6 Wn.App.2d 1, 33,
429 P.3d 512 (2018) (citing *Tate v. Rommel*, 3 Wn.App. 933, 937-38, 478
P.2d 242 (1970)). In *Tate*, the Court stated,

[T]he mere revealing of an opinion, as to the ultimate
outcome of a trial by an otherwise unbiased juror, before
submission of the case to the jury, based upon evidence

properly received, while not to be condoned, does not, standing alone, constitute such misconduct as to justify the granting of a new trial.

Tate, 3 Wn.App. at 937-38. Instead, a party must show that the communication prejudiced the outcome of the trial. *Id.* at 938.

Garcia has not alleged that the jurors relied on any evidence outside the record, or upon any evidence improperly received. There is no indication that the jurors' potential discussion of their personal opinion of a witness was in any way prejudicial to Garcia or in any way affected the outcome of the case.

In *State v. Earl*, 142 Wn.App. 768, 177 P.3d 132 (2008), this Court addressed whether personal remarks between jurors was juror misconduct. There, the court considered a situation in which one juror spoke to another juror during a break, and one juror was offended by what was said. *Earl*, 142 Wn.App. at 774-75. The Court held that “[a] personal remark, even a derogatory one, between jurors during a deliberation break, is not juror misconduct if it does not involve the substance of the jury’s deliberations.” *Id.* at 775-76. The Court even noted federal case law which held that juror discussions during a break that do not involve a review of the evidence or debate culpability of the defendant are not jury misconduct, *United States v. Gaskin*, 364 F.3d 438, 464 (2nd Cir. 2004), *cert. denied*, 544 U.S. 990, 125 S.Ct. 1878, 161 L.Ed.2d 751 (2005), and case law which noted that in

determining juror misconduct, courts should focus on whether the communications between jurors constituted deliberations. *United States v. Resko*, 3 F.3d 684, 689-91 (3rd Cir. 1993).

Further, in *Davis v. Woodford*, 384 F.3d 628 (9th Cir. 2004), the Court recognized that “premature deliberations ... though not necessarily proper, [are] not as serious as” other forms of jury misconduct. *Davis*, 384 F.3d at 653. Also, an allegation that a jury has deliberated prematurely, without more, is not enough to warrant a new trial. *Nelson v. Placanica*, 33 Wn.2d 523, 237, 206 P.2d 296 (1949). The party who petitions the court for a new trial on grounds of premature deliberations must establish that the communication prejudiced the outcome of the trial. *Tate*, 3 Wn.App. at 938. Further,

...the mere revealing of an opinion, as to the ultimate outcome of a trial by an otherwise unbiased juror, before submission of the case to the jury, based upon evidence properly received, while not to be condoned, does not, standing alone, constitute such misconduct as to justify the granting of a new trial.

Id. at 937-38.

Because Garcia did not make a prima facie showing of misconduct, it was not error for the trial court to deny his motion for a new trial without holding an evidentiary hearing. A trial court may only grant a new trial based on juror misconduct when it affirmatively appears that a

substantial right of the defendant was materially affected. *State v. Tandecki*, 120 Wn.App. 303, 310, 84 P.3d 1262 (2004). All that Garcia presented to the trial court was speculation. The juror thought she overheard two other jurors discussing a witness, but she is not sure of what she heard; she believed they were speaking again of a witness, but is not sure what she heard. The trial court properly noted this was all speculation and a new trial simply cannot be granted every time a defendant or a juror can speculate that potential misconduct occurred. Garcia failed to show that any of his substantial rights were materially affected. Baseless suspicion of juror misconduct, unsupported by the record, cannot amount to prejudice. The trial court properly denied his request for a new trial or for an evidentiary hearing. Garcia's claim should be denied.

IV. Whether the trial court properly responded to the jury's question regarding the witness tampering charge is moot.

As the State conceded above that the trial court improperly instructed the jury on the witness tampering elements, and the remedy is to reverse the witness tampering counts and remand for a new trial, the issue of how the trial court responded to the jury's question regarding the witness tampering count is moot and need not be decided by this Court as it is not likely to recur on retrial.

V. The State Presented Sufficient Evidence to Support the Conviction For Witness Tampering Against R.G.

Garcia argues there was insufficient evidence presented at trial to support his conviction for witness tampering against R.G. When the evidence is viewed in the light most favorable to the State, it is clear that Garcia's conviction is supported by sufficient evidence. His conviction should be affirmed.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362–65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 893 (2006). 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).

The reviewing Court does not disturb the fact finder's credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing Court's role does not include substituting its judgment for the fact finder's by reweighing the credibility of witnesses or importance of the evidence. *State v. Green, supra*, at 221. "It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable [fact finder] could come to this conclusion." *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1358 (9th Cir. 1993) (overruled in part on other grounds by *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)). This standard of review focuses on whether the trier of fact *could* find the elements proved. *State v. Yallup*, 3 Wn.App.2d 546, 416 P.3d 1250, 1253 (2018) (citing *Jackson, supra*).

Under RCW 9A.72.120(1)(a), a person commits witness tampering when they attempt to induce a person to "testify falsely...." It is sufficient that the defendant "have knowledge or reason to believe that the person is

or probably is about to be called as a witness”; it is not necessary to prove specific intent. *State v. Stroh*, 91 Wn.2d 580, 583–84, 588 P.2d 1182 (1979). Here, where Garcia knew R.G. was the victim, he also knew or had reason to believe she would be called as a witness.

Furthermore, it is sufficient to show a defendant *attempted* to alter the witness’s testimony; it is not necessary to prove actual contact. *State v. Williamson*, 131 Wn.App. 1, 6, 86 P.3d 1221 (2004), as amended (Dec. 13, 2005), *review granted, cause remanded*, 154 Wn.2d 1031, 119 P.3d 852 (2005); *State v. Anderson*, 111 Wn.App. 317, 44 P.3d 857 (2002). “A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” *Williamson*, 131 Wn.App. at 6 (quoting RCW 9A.28.020(1)). Like the defendant in *Williamson*, Garcia attempted, via a third party, to induce a minor victim, R.G., to change her testimony. Whether R.G. received or is even aware of the message is irrelevant. Because Garcia made a substantial step toward altering R.G.’s testimony, a reasonable fact finder could conclude that he tampered with this witness.

Additionally, when analyzing a witness tampering charge the jurors are to “consider the inferential meaning as well as the literal meaning” of the defendant’s communication, or attempted communication, with the witness. *State v. Scherck*, 9 Wn.App. 792, 794,

514 P.2d 1393 (1973). “The literal meaning of words is not necessarily the intended communication. The true meaning of words may be lost if they are lifted out of context.” *Id.* (citing *State v. Wingard*, 92 Wash.2d 219, 158 P. 725 (1916); see also *State v. Rempel*, 114 Wn.2d 77, 83–84, 785 P.2d 1134 (1990)). In *Scherck*, the defendant appeared at the home of a victim and told him that if he refused to appear at trial the State would have to drop the case. In response to the victim’s refusal to withdraw, Scherck commented that the defendant had a nice house and that “it would be a shame if anything happened to it.” *Scherck*, 9 Wn.App. at 794. Scherck added that the experience of testifying at trial could be “very embarrassing.” *Id.* The Division I appeals court found that the State presented sufficient evidence and Scherck’s witness tampering conviction was affirmed. *Id.* at 796–97.

Garcia’s letter was addressed to Ms. Garcia, but it contained passages relating to R.G. Specifically, Garcia told Ms. Garcia, “You and I both know that when R.G. has to testify in court she will never be the same after that and it will mess with her for the rest of her life.” RP 587. Garcia goes on to ask Ms. Garcia to tell prosecutors that R.G. will not testify. RP 588. “If they try to act tough and threaten a subpoena,” the letter goes on to read, “tell them R.G. will testify that she was mistaken.” *Id.* Garcia argues that this cannot be characterized as an attempt to have

R.G. alter her testimony. Br. of Appellant, p. 31. Given the fact that Ms. Garcia is R.G.'s parent, and that as a minor, R.G. is under Ms. Garcia's parental control, a reasonable jury could infer from the context of the communication that Garcia's letter to Ms. Garcia was an attempt to induce R.G. to alter her testimony.

Viewing these facts in a light most favorable to the State, a rational trier of fact could find that Garcia knew or had reason to know that both Ms. Garcia and R.G. were witnesses to be called at trial. In his letter to Ms. Garcia, he attempted to induce them both to testify falsely. These facts provide sufficient evidence for a trier of fact to find, beyond a reasonable doubt, that Garcia's letter to Ms. Garcia constituted witness tampering. The State more than met its burden of proof as to each of the statutory elements. Garcia's claim fails.

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CONCLUSION

The trial court properly instructed the jury on the issue of non-corroboration, however, the trial court improperly instructed the jury on the witness tampering charges and those charges should be reversed and remanded for a new trial. The trial court did not err in failing to grant an evidentiary hearing on potential juror misconduct or in failing to grant Garcia a new trial for the same. In addition, the issue of whether the trial court properly responded to a jury question regarding witness tampering is moot as the charges should already be reversed and remanded for a new trial.

DATED this 22nd day of April, 2020.

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