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NO. 60538-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ISIAH HALL,

Appellant.

REC'D
JUN 19 2008
King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2008 JUN 19 PM 4:51

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

The Honorable Richard D. Eadie, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. BECAUSE HALL'S INTERPRETATION OF RCW 9A.72.120 PROVIDES A REASONABLE DEFINITION OF THE UNIT OF PROSECUTION, THE RULE OF LENITY APPLIES, REQUIRING REVERSAL OF ALL BUT ONE OF HIS WITNESS TAMPERING CONVICTIONS.

The state's reading of RCW 9A.72.120, the witness tampering statute, is not the only reasonable interpretation of the statute. Hall's interpretation of the statute, as it relates to the unit of prosecution, can be summarized as follows:

The statute focuses on the *specific witness* and the *specific proceeding*. The purpose of the statute is to punish the attempt to obstruct justice in a specific proceeding. Thus, the unit of prosecution is one offense per person per official proceeding.

Hall's urged interpretation of the statute is entirely reasonable. A statute is ambiguous if it can reasonably be interpreted in two or more ways. State v. Keller, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001). If the statute is ambiguous, it must be construed in the defendant's favor. In re Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999); State v. Adel, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). Accordingly, the rule of lenity applies and compels the relief Hall requests. See, e.g., State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728 (2005).

The state wrongly asserts that Hall's interpretation "clearly conflicts with legislative intent" and would "lead to absurd results." Brief of Respondent (BOR) at 13. However, the state provides no evidence of the legislature's intent that squarely supports its urged interpretation or demonstrates a "clear conflict" between the legislature's intent and Hall's urged interpretation. Although the state points to the fact that the legislature considers the offense itself to be "grave" and contrary to the state's interests in promoting public safety or prosecuting criminals, this fact does not shed any light whatsoever on the legislature's intended unit of prosecution. BOR at 14. Hall's interpretation of the statute is consistent with these legislative findings . . . there is no dispute that under Hall's interpretation, the act of witness tampering is proscribed and made punishable by the law.

The state next points out the fact that the legislature has "broadened" the statute to encompass additional types of behavior. BOR at 14. But this fact does not make Hall's interpretation of the statute any less valid than the state's interpretation. These legislative enactments shed no light on the question of the proper unit of prosecution.

The state argues that Hall's urged interpretation of the statute would "lead to absurd results," yet provides no example of such an absurd result.

BOR at 13. Because Hall's interpretation is entirely consistent with the legislature's aim of punishing witness tampering, is based on the language of the statute, and is focused on the type of harm the statute seeks to prevent . . . obstruction of justice through influencing a witness in a given proceeding . . . it neither conflicts with legislative intent, nor leads to absurd results.

The state also attempts to import aspects of the criminal attempt statute, RCW 9A.28.020, into its statutory construction argument. BOR at 13. However, Hall was not charged with attempt under RCW 9A.28.020. Thus, the statutory language in question on Hall's appeal is the language of RCW 9A.72.120. The problem with the state's argument concerning this statute is that it ignores the portion of the statute that focuses on the specific proceeding. Assuming the state's interpretation is reasonable, so is Hall's. Under the rule of lenity, Hall prevails.

The state has not established either that Hall's urged interpretation of RCW 9A.72.120 is unreasonable, or that it would lead to absurd results. Hall's reasonable interpretation of the statute is that the unit of prosecution is one per witness per official proceeding. All of Hall's witness tampering convictions involved the same witness and the same official proceeding.

The rule of lenity compels reversal of all but one of Hall's witness tampering convictions.

2. HALL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Hall's trial counsel failed to object to inadmissible evidence of Hall's prior criminal history and, in fact, unnecessarily presented such highly prejudicial evidence in the defense case. Hall's trial counsel also failed to object to a police officer's testimony that based on his initial investigation, he "determined that several crimes occurred." Finally, Hall's counsel failed to object when a police officer showed the jury a bullet cartridge that was not offered or admitted into evidence.

The state asserts that the photograph of court documents referring to Hall having served jail time for an earlier arrest, found at Aquiningoc's home, is not prejudicial because admission of the document was consistent with a defense strategy of "downplay[ing] Hall's connection to the home where the firearm was found." BOR at 26-27. However, Hall's counsel could have sought admission of the exact same exhibit with a redaction eliminating the prejudicial reference to Hall's criminal history. Assuming the exhibit served a tactical purpose by showing that Hall's address was different from Aquiningoc's, there was no tactical reason to inform the jury of Hall's prior crime. Counsel's failure was entirely negligent and

constituted ineffective assistance of counsel. Evidence of a defendant's other crimes can be so highly prejudicial that, in certain situations, curative instructions are not considered sufficient to remove the prejudicial effect. State v. Mack, 80 Wn.2d 19, 490 P.2d 1303 (1971); State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

The state's argument that the jury would not be unfairly prejudiced by the multiple references to Hall's criminal history are not persuasive. The state asserts that the admission of the document indicating that Hall was "released from jail" was not prejudicial because Hall was released on "personal recognizance" which the state surmises indicated that that court did not "believe Hall to be a danger to the community." BOR at 27. In a similar vein, the state argues that Detective Pavlovich's testimony referring to Hall's "booking photo" and "warrants" from prior crimes and investigation was not prejudicial. According to the state:

The mere fact that someone has been in jail or had been arrested does not indicate a propensity to commit a serious crime. The jury could just as easily have concluded that the defendant was in jail for a minor offense

. . . .

The remark related to warrants was equally ambiguous. A failure to appear for a court hearing can occur for any number of reasons, such as the failure to receive notice regarding the hearing.

BOR at 31. These arguments are pure speculation and presuppose that the average juror possesses an advanced degree of familiarity with the judicial process. The assumption is not warranted and is at odds with the rationale behind rule 404(b) and the caselaw recognizing that evidence of a defendant's other crimes can be so highly prejudicial that curative instructions may not be sufficient to remove the prejudice. Mack, 80 Wn.2d 19; Miles, 73 Wn.2d at 71.

Here, the jury was repeatedly presented with evidence depicting Hall as a criminal. Such evidence came from Hall's counsel and the state's witnesses, including a police officer. This evidence depicted Hall as a repeat offender, with a history of domestic violence against the complaining witness. Jurors were more likely to conclude that Hall was guilty of the charged offense as a result. See, e.g., State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997); State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987). The combined effect of the unfairly prejudicial evidence prejudiced Hall's right to a fair trial and requires a new trial.

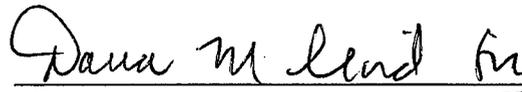
B. CONCLUSION

For the reasons stated herein and those stated in appellant's opening brief, this Court should reverse appellant's convictions.

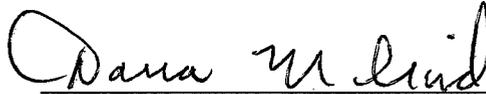
DATED this 19th day of June, 2008.

Respectfully submitted,

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