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SUPREME COURT
STATE OF WASHINGTON

NO. 82558-1 · 2009 JUL 27 P 3-12

BY RONALD W. GARDNER

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISIAH THOMAS HALL,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Is the unit of prosecution for witness tampering each attempt to induce a witness to testify falsely, or can a defendant engage in innumerable attempts to induce a witness to testify falsely or not appear, but be subjected to only one criminal charge?

B. SUMMARY OF ARGUMENT

In jail for holding a gun to the head of his ex-girlfriend, Hall phoned a key witness and attempted to get her to tell a certain story in court. Eight days later he phoned the same witness and attempted to persuade her to go on vacation during trial. Five days later, Hall again phoned the witness and attempted to convince her not to come to court for trial. Hall was convicted of the underlying crimes, as well as three counts of tampering with a witness.

For the first time on appeal, Hall argued that the legislature, in enacting the witness tampering statute, was not focused on the act--the actual attempt to induce a witness not to cooperate, but rather, he posits, the legislature was focused on the specific witness and specific pending proceeding. Thus, according to Hall, a defendant can make multiple attempts to tamper with a witness with impunity, subject to but one count of tampering with a witness,

regardless of the number or manner of acts of attempting to induce a witness not to cooperate.

The Court of Appeals rejected Hall's argument, finding that the language of the statute did not support Hall's argument, nor would the purpose of the statute be effectuated by such an interpretation. See State v. Hall, 147 Wn. App. 485, 196 P.3d 151 (2008). The Court of Appeals is correct. The witness tampering statute, RCW 9A.72.120, focuses on the specific witness, the specific proceeding in which the witness would be testifying, and on each specific act of tampering, each separate attempt to induce a witness not to cooperate.

To accept Hall's interpretation would lead to the absurd result that a defendant could commit innumerable acts of witness tampering, continuing even after being discovered, continuing even through the course of a trial, and the defendant would be subjected to but one criminal charge. On the other hand, Hall's dire prediction that this interpretation would lead to charges *ad infinitum*, for each request made in the same sentence, meeting, letter or phone call, is without merit. Such requests would fall within the concept of a "continuing course of conduct," and would constitute but a single count.

C. STATEMENT OF THE CASE

Hall was convicted by a jury of first-degree burglary, second-degree assault and unlawful possession of a firearm. CP 63, 68-69. These charges stemmed from Hall forcefully entering the apartment of Mellissa Salazar, his ex-girlfriend, and holding a gun to her head. 2RP 178-80, 191-93. After assaulting Ms. Salazar, Hall fled and was later arrested at the home of his live-in girlfriend, Desirae Aquiningoc. 4RP 493, 501-02. After being arrested, Hall admitted to police that he had been to Salazar's residence and argued with her, but he denied that he was armed or that he even possessed a firearm. 4RP 503-04. Subsequently, officers searched Aquiningoc's home and recovered a revolver hidden in a pink basket in a bedroom closet, and ammunition hidden in a dental retainer case. 4RP 507-08.

Aquiningoc testified at trial. On the day of the assault/burglary, Aquiningoc heard Hall angrily talking on the phone. Hall then told Aquiningoc that his mother's boyfriend was "beating up on her" and that he needed to go take care of it. 3RP 349. Hall then left the residence. 3RP 349.

An hour or so later, Hall came running back into the home. Hall seemed nervous and said that he had shot at someone at his

mom's house and that they had called the police. Aquiningoc took him to a friend's house. 3RP 350-51. When Aquiningoc picked Hall up a few hours later, he told her that he had left the gun at his friend's house. 3RP 351. A few days later, Hall asked Aquiningoc for a ride to his friend's house so that he could retrieve the gun. 3RP 353.

After his arrest, Hall called Aquiningoc several times a day from the jail, and she periodically visited him. 3RP 382-84. During several of these calls and visits, Hall asked Aquiningoc not to testify in the case against him. In fact, he was angered by the fact that Aquiningoc had given a statement to the police, and he blamed her for his trouble. 3RP 390. Hall instructed Aquiningoc to put the subpoena for his case back into the mailbox, and urged her to "go on a vacation" or to stay at his mother's house during the trial so that the prosecutor could not find her. 3RP 399-400. He also asked her to make up a story about the gun and say that the gun belonged to one of her friends. 3RP 392.

Many of the conversations from the jail were recorded, and the State played excerpts of the calls at trial. 3RP 395; Ex. 22; Ex. 23. A transcript of the calls was provided for the jury to read as

they listened to the taped calls. Ex. 24. Specific calls corresponded with each of the tampering counts.

In regards to count VI, on March 22, Hall called Aquiningoc and said, among other things, "You might have to do something for me...get me out of here...what you said on the tape...and to the police...incriminated me." Ex. 24 at 5. Hall told Aquiningoc that he would let her know "what to say" and he asked her if she remembered "that story I told you." Ex. 24 at 5. Hall added, "Everything I been tell, telling you to do I mean you know you gotta do it though baby okay?" Ex. 24 at 8. Aquiningoc explained at trial that Hall was referring to a conversation they had had at the jail in which Hall instructed her to change her story about the gun. 3RP 392, 397.

In regards to count VII, eight days later, on March 30, Hall called Aquiningoc and encouraged her to evade her subpoena. Hall instructed Aquiningoc to "go on a vacation for a minute" and that he would give her the "heads up" as to when. Ex. 24 at 14; see also 3RP 400.

In regards to count VIII, five days later, on April 4, Hall called Aquiningoc and directed her to put the subpoena "back in the mailbox and just act like you didn't get it." Ex. 24 at 15. He then told her, "don't come to court." Ex. 24 at 15.

Hall did not testify. Additional facts are included in the argument section to which they pertain.

D. ARGUMENT

**THE LEGISLATURE DID NOT INTEND FOR A
DEFENDANT TO BE ABLE TO ENGAGE IN MULTIPLE
ATTEMPTS TO TAMPER WITH A WITNESS AND
OBSTRUCT JUSTICE AND FACE BUT ONE CHARGE.**

Hall contends that all of his convictions for witness tampering, save one, must be vacated because, even though each conviction was for a separate attempt to tamper with a witness, and each separate attempt occurred days apart, all his attempts constitute but one "unit of prosecution." This claim should be rejected. What constitutes a "unit of prosecution" is a pure question of legislative intent. The legislature could not have intended to allow a defendant to continue to attempt to tamper with a witness with impunity, facing but a single charge regardless of the number

of acts he commits. The unit of prosecution for witness tampering is each attempt to tamper with a witness.¹

The double jeopardy clause of the United States Constitution guarantees that no person shall "be subject for the same offense to twice be put in jeopardy of life or limb." U.S. Const. amend. V. The Washington Constitution offers the same protection. Const. art. I, § 9; State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

When a defendant is convicted of violating one statute multiple times, the proper double jeopardy inquiry is what "unit of prosecution" has the legislature intended as the punishable act under the specific criminal statute. State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998); Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). When the legislature defines the scope of a criminal act, double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime, or "unit of prosecution." Adel,

¹ In his petition to this Court, Hall does not claim that he is not factually guilty of three counts of witness tampering under the unit of prosecution adopted by the Court of Appeals. Were he to do so, his factual argument would fail. See State v. Whitfield, 132 Wn. App. 878, 134 P.3d 1203 (2006) (two calls, a week apart, attempting to induce a witness to testify in a certain manner, provided sufficient evidence to support two counts of witness tampering), rev. denied, 159 Wn.2d 1012 (2007). Rather, Hall argues only the legal proposition that the unit of prosecution adopted by the Court of Appeals is wrong.

at 634. Thus, the question here is what act or course of conduct has the legislature defined as the punishable act for tampering with a witness.

In determining the unit of prosecution for a particular statute, the court must examine the language of the statute at issue. State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005) (each possession of an access device is one "unit of prosecution," even where the defendant possesses multiple access devices at one time). In pertinent part, the witness tampering statute reads as follows:

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or 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:

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or

(b) Absent himself or herself from such proceedings; or

(c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

RCW 9A.72.120(1).

The principal focus in determining whether the legislature intended multiple acts to constitute but one crime is whether the legislature intended the punishable offense to be a continuing offense. See Ex parte Snow, 120 U.S. 274, 7 S. Ct. 556, 30 L. Ed. 658 (1887). This is in contrast to statutes aimed at offenses that can be committed *uno actu*, or in a single act. Snow, 120 U.S. at 286.

In Snow, the defendant was convicted of three counts of bigamy, each count identical in all respects except that each count covered a different time span that was part of a continuous period of time. Snow, at 276. The Court noted that bigamy is "inherently a continuous offense, having duration, and not an offense consisting of an isolated act." Snow, at 281. Because bigamy is a continuing offense, the Court held that the defendant committed but one offense. The Court specifically distinguished between statutes aimed at offenses continuous in character versus statutes violated *uno actu*. Snow, at 286.

In contrast, in Ebeling v. Morgan, 237 U.S. 625, 35 S. Ct. 710, 59 L. Ed. 1151 (1915), the Court found that the defendant's seven counts of feloniously injuring a mail bag were not one continuous offense, noting that each offense was complete

irrespective of any attack upon any other mail bag. Morgan, 237 U.S. at 629. The Court distinguished "continuous offenses where the crime is necessarily, and because of its nature, a single one, though committed over a period of time." Morgan, at 629-30.

A conviction for tampering with a witness does not depend on the accomplishment or success of the attempt. It is the attempt to tamper, not the achievement of tampering, that constitutes the crime. Tamper is a choate crime, complete when a single attempt of tampering is made. There is nothing in the statutory language or in the nature of the crime that suggests the crime is a continuing offense.

In addition, had the legislature intended witness tampering to be a continuing offense, it certainly could have written the statute to convey such a purpose. For example, the legislature could have dictated a punishable offense as someone "who engages in" witness tampering.² See State v. Anderson, 141 Wn.2d 357,

² The legislature could also have used the words and phrases "repeatedly," "pattern" or "course of conduct," but chose not to do so. See e.g., RCW 9A.32.055 Homicide by Abuse (using phrase "engages in a pattern or practice of assault against a child"); RCW 9.46.0269 Professional Gambling (using phrase "engages in" gambling activity); RCW 9.46.110 Stalking (using phrase "repeatedly harasses or repeatedly follows"); RCW 26.50.110(5) Violation of a No Contact Order (using phrase "at least two previous convictions").

368-69, 5 P.3d 1247 (2000) (use of certain language in one instance, and different language in another, evidences different legislative intent); see also State v. Alvarez, 74 Wn. App. 250, 260, 872 P.2d 1123 (1994) (omission of "course of conduct" language in criminal anti-harassment statute indicated legislature consciously chose to criminalize a single act rather than a course of conduct), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995).

The Court of Appeals' unit of prosecution determination also reflects the paramount importance the legislature ascribed in enacting and amending the witness tampering statute. The legislature made specific findings that "tampering with and/or intimidating witnesses or other persons with information relevant to a present or future criminal. . . proceeding are grave offenses which adversely impact the state's ability to promote public safety and prosecute criminal behavior." Laws of 1994, ch. 271, § 201. Over the years, the legislature has broadened the scope of the statute to cover child abuse investigations, neglect investigations, and former

witnesses.³ Laws of 1994, ch. 271, § 205; Laws of 1997, ch. 29, § 1.

While the unit of prosecution adopted by the Court of Appeals satisfies the purposes of the statute, Hall's desired interpretation does not. Allowing a defendant to continue attempting to tamper with a witness, even after his initial attempts are discovered, with no additional sanction under the statute, leaves the target of the tampering more at risk to potentially increasing pressures and coercion, and it increases the likelihood that the tampering will have its intended effect to thwart justice.

The Wisconsin Supreme Court, in rejecting a similar challenge to its witness tampering statute, put it aptly:

Attempts by anyone to intimidate any witness, or to prevent any witness from testifying, are a direct assault on the integrity of our judicial system....[T]he legislature obviously recognized the importance of maintaining this systemic integrity by treating each attempt as seriously as a completed act...the threat to the integrity of the judicial system is equally significant in each instance.

³ Expanding the scope of the statute to cover acts committed against former witnesses shows the legislature was also acutely concerned with the safety of the actual witness, contravening Hall's assertion that the sole purpose of the statute is to prevent the obstruction of justice. See State v. Victoria, 150 Wn. App. 63, 206 P.3d 694 (2009); Morgan v. Bennett, 204 F.3d 360, 367 (2d Cir.) ("[I]ntimidation of witnesses raises concerns for both the well-being of the witness and her family and the integrity of the judicial process"), cert. denied, 531 U.S. 819 (2000).

* * * * *

Under Moore's reasoning, there would be no incentive to stop attempting to intimidate a witness once the process had begun. Whether a person sent one letter or one hundred letters attempting to intimidate the witness, there would be only one act, regardless of the number of letters and regardless of whether the witness decided to testify. Moore's interpretation would hardly serve to eliminate witness intimidation; indeed, it might well encourage it.

State v. Moore, 713 N.W.2d 131, 138 (Wis.), rev. denied, 718 N.W.2d 724 (2006).⁴

While the Court of Appeals' unit of prosecution promotes the legislative purposes of the statute, the dire consequences posited by Hall are not realistic. Hall presents the scare tactic scenario that "the state may charge an individual *ad infinitum* for each time he or she requests a potential witness to do one of the listed actions, even in the same sentence, meeting, letter, or phone call." Def. Pet. for Review at 6.

First, the number of charges any defendant potentially faces is based on the number of criminal acts he engages in. If a defendant assaults or attempts to assault a victim on five separate days, he potentially faces five separate counts--not one count

⁴ The Wisconsin statute uses similar language to Washington's witness tampering statute, making unlawful "attempts to so prevent or dissuade any witness from attending or giving testimony at any trial." Wis. Stat. § 940.42.

because it is the same victim. Thus, it is a defendant's actions that dictate the number of potential charges he may face.

Second, filing decisions are regulated by law and standards of prosecution. See RCW 9.94A.411; State v. Lewis, 115 Wn.2d 294, 307, 797 P.2d 1141 (1990) (The filing decision was "within the prosecutor's filing standards, standards promulgated to secure the integrity of the SRA's sentencing framework. The charging decision adequately reflects the defendant's actions and ensures that his punishment is commensurate with the punishment imposed on others committing similar offenses and ensures that the punishment for a criminal offense is proportionate to the seriousness of the offense").

Third, the dire consequences suggested by Hall are ameliorated by the application of the doctrine of "continuing course of conduct." See State v. Handran, 113 Wn.2d 11, 17-18, 775 P.2d 453 (1989). When the State presents evidence of several acts that constitute a "continuing course of conduct," there is but one act for charging purposes. Handran, 113 Wn.2d at 17. To determine whether multiple acts constitute a continuing course of conduct, the court considers the time frame in which the acts were committed, where the conduct occurred, whether the same criminal motive was

involved, and whether there was more than one victim. Handran, at 17-18. The facts must be evaluated in a common sense manner. Handran, at 17-18 (two distinct assaults occurring in one place, over a short period of time, and involving the same victim considered but one continuing act); also State v. Marko, 107 Wn. App. 215, 231-32, 27 P.3d 228 (2001) (multiple threats over a 90-minute period of time held to be a continuing course of conduct and one criminal act).

Hall's dire prediction that multiple convictions might be obtained for each attempt uttered in a single letter or phone call is simply not supportable. Such attempts would constitute but one act. In contrast, where Hall committed separate distinct acts on separate days, he properly faced multiple charges, just as any defendant would face multiple charges for committing crimes on different days.

Finally, Hall's hopeful reliance upon the rule of lenity is misplaced. The rule of lenity serves only as an aid for resolving an ambiguity; it is not used to beget one. Callanan v. United States, 364 U.S. 587, 596, 81 S. Ct. 321, 5 L. Ed. 2d 312 (1961). A statute is not ambiguous when the alternative reading is strained. State v. C.G., 114 Wn. App. 101, 55 P.3d 1204 (2002), overruled on other

grounds, 150 Wn.2d 604, 80 P.3d 594 (2003); State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). Courts interpret statutes to effectuate the legislative intent and to avoid unlikely, strange or absurd results. State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

Hall's interpretation is not only strained, it would lead to absurd results, undercut the legislature's intent, and create a giant loophole in the statute. As stated above, Hall's desired interpretation of the statute would allow a defendant to continue to obstruct justice with impunity, even after his acts are discovered and even throughout the course of trial. In fact, a defendant may well be emboldened to continue such activity by the fact that he is not subject to further criminal charges. The legislature could not have intended such an interpretation, and if the legislature had intended such an interpretation, it knew how to use language so indicating. In contrast, the Court of Appeals' interpretation, supported by the plain reading of the statute, makes sense and best effectuates the legislative intent--holding defendants accountable for their discrete criminal acts, protecting witnesses, and preventing the obstruction of justice.

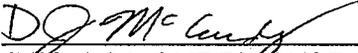
E. **CONCLUSION**

For the reasons cited above, this Court should affirm Hall's three convictions for tampering with a witness.

DATED this 24 day of July, 2009.

Respectfully submitted,

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Eind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the State's Supplement Brief of Respondent, in STATE V. HALL, Cause No. 82558-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

7/27/09
Date