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JAN 13 2010

King County Prosecutor
Appellate Unit

NO. 64174-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DEXTER NANCE, JR.,

Appellant.

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

The Honorable Richard D. Eadie, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's multiple convictions for witness tampering violate the prohibition against double jeopardy.

Issue Pertaining to Assignment of Error

Whether appellant's multiple convictions for witness tampering violate double jeopardy, where the convictions were all based on a course of conduct of attempting to persuade a single individual to obstruct justice in a single proceeding?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged Dexter Nance, Jr. with four counts of tampering with a witness. CP 1-3. Nance pled guilty. CP 16-17. The court sentenced Nance to concurrent sentences of 43 months, the top of the standard range, on each count. CP 35, 37. Notice of appeal was timely filed. CP 42.

2. Substantive Facts

Nance was charged with assaulting his former girlfriend. CP 4. While in jail awaiting trial, Nance's phone calls to another friend were recorded. CP 4. There were at least seven phone calls over the course of four days containing multiple requests that someone talk to Nance's former girlfriend to ensure she did not come to court. CP 4-6.

On February 6, 2009, Nance told a friend, "I need Tweety to get in contact with Raya, sit down with her have lunch or dinner and get with her to tell her not to come to court." CP 4. In another call that same day, he told her, "I need you to tell that Bitch what to say and what to do." CP 5. On February 7, 2009, Nance said, "Tell Raya to call the courts and say that her other boyfriend beat her up and not me." CP 5. Later in that same call, he instructs, "it's my job to make Raya not come to court. . . Your job is to do the same thing." CP 5.

During a call the next day, on February 8, 2009, Nance became angry because no one could find Raya. CP 5. On a three-way call, Nance tells another friend, "You got to find this girl." CP 5. The friend asks whether to beat her up, and Nance replies that no, "Hug her, kiss her, and take her out to dinner. Make sure she does not come to court. No fucking police. That is your job. No police. No court." CP 5. In a second phone call that day, Nance is informed that Raya has been contacted and says she will not come to court. CP 6. In another call, Nance said "Make sure she does not come to court and her family does not come to court." CP 6.

On February 9, 2009, Nance told a friend, "Call the bitch Raya, have her write a statement that it was a big misunderstanding – she was pregnant and emotional. Write a statement and send it to the courthouse. Call her right now. Prep talk her. Tell her I love her. I'll write Raya a letter and tell

the bitch what to do.” CP 6. According to the probable cause certification, there are “more calls with tampering evidence.” CP 6.

According to his statement on plea of guilty, Nance, “attempted to induce a person I believed was about to be called as a witness in an official proceeding to absent herself from such proceedings” on February 6, 7, 8, and 9, 2009. CP 17. The person he attempted to induce was his former girlfriend. Id.

C. ARGUMENT

NANCE’S MULTIPLE CONVICTIONS FOR WITNESS TAMPERING VIOLATE DOUBLE JEOPARDY BECAUSE THEY ARE BASED ON A SINGLE COURSE OF CONDUCT COMPRISING A SINGLE UNIT OF PROSECUTION.

Whether the witness tampering statute, RCW 9A.72.120, plainly denotes the unit of prosecution is currently pending before the Supreme Court in State v. Hall, 147 Wn. App. 485, 489, 196 P.3d 151 (2008), review granted, 166 Wn.2d 1005 (2009).¹ Hall was convicted of multiple counts of tampering for attempting to induce a single witness in a single proceeding to change her testimony or leave town, based on a series of phone calls Hall made to the witness while in jail pending trial on other charges. Hall, 147 Wn. App at 487. This Court rejected Hall’s argument that his convictions violated the prohibition on double jeopardy. Id. at 489-90. Whereas Hall argued the statute criminalizes a course of conduct aimed at obstructing

¹ Oral argument is set for January 26, 2010.

justice, this Court held the statute criminalizes each instance of attempting to tamper with a witness. Id. at 489.

Like Hall, Nance contends his convictions violate the prohibition against double jeopardy because they are based on a course of conduct aimed at a single witness in a single proceeding. The dissenting opinion by Division Two in State v. Thomas, 151 Wn. App. 837, 845-849, 214 P.3d 215 (2009), would agree. Based on the reasoning set forth in that opinion, this Court should reconsider its opinion in Hall. Alternatively, Nance raises the argument herein to preserve the issue should the Washington Supreme Court find the statute ambiguous.

Under the double jeopardy provisions of the United States and Washington constitutions, a defendant may not be convicted more than once under the same criminal statute if only one unit of the crime has been committed. U.S. Const. amend. V; Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006) (citing State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005)). The state constitutional provision, Article I, section 9, offers the same scope of protection as its federal counterpart. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The unit of prosecution is designed to protect the accused from overzealous prosecution. State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The statutory unit of prosecution is a question of law reviewed de novo. State v. Ose, 156 Wn.2d 140, 144, 124 P. 3d 635 (2005). The issue of multiple convictions for the same offense in violation of double jeopardy is manifest constitutional error, which may be reviewed for the first time on appeal. See RAP 2.5(a); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). The first step is to analyze the statute in question. State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). Next, courts review the legislative history. Id. Finally, courts analyze the facts to determine whether more than one unit prosecution is present in the individual case. Id.

a. The Witness Tampering Statute Is Ambiguous as to the Unit of Prosecution.

The unit of prosecution for a statute may be either an act or a course of conduct. Tvedt, 153 Wn.2d at 710. Washington's witness tampering statute, RCW 9A.72.120, does not expressly define the unit of prosecution as being either a single act or a course of conduct. It is, therefore, ambiguous because both readings are reasonable in light of the statutory language.

A statute is ambiguous if a reasonable person can interpret it in more than one way. State v. Bash, 130 Wn.2d 594, 601, 925 P.2d 978 (1996). Appellate courts interpret and construe statutes to give effect to all the language used, with no portion rendered meaningless or superfluous. Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Words in

a statute are given their plain and ordinary meaning, unless a contrary intent is evidenced in the statute. State v. Lilyblad, 163 Wn.2d 1, 7, 177 P.3d 686 (2008).

The witness tampering statute, RCW 9A.72.120, provides, in relevant part:

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.

The statutory language most obviously relevant to defining the unit of prosecution is that defining the punishable act: “A person is guilty . . . if he or she attempts to induce” a specifically defined class of individual to engage in specifically defined category of acts. RCW 9A.72.120. The principal issue regarding this language is whether the “attempts to induce” language criminalizes a single act or a course of conduct. Because the

language may reasonably be construed in either fashion, the statute is ambiguous and must be construed in Nance's favor under the rule of lenity.

This Court previously concluded that RCW 9A.72.120 unambiguously defines the unit of prosecution as a single act, rather than a course of conduct. Hall, 147 Wn. App. at 489. Relying on Hall, Division Two reached the same conclusion. Thomas, 151 Wn. App. at 844-45. Contrary to the Hall and Thomas decisions, however, the statute does not expressly define whether the unit of prosecution is a single act or a course of conduct, and the text reasonably supports either conclusion. As the dissent in Thomas recognized, the statute is ambiguous. 151 Wn. App. at 845-49.

In finding the witness tampering statute ambiguous, the Thomas dissent relied on the Supreme Court's opinion in Leyda, 157 Wn. 2d 335. Thomas, 151 Wn. App. at 845-48 (Van Deren, C. J., dissenting). The statute at issue in Leyda, former RCW 9.35.020(1), provides, in pertinent part, "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." Leyda was convicted of four separate counts of identity theft under former RCW 9.35.020(1), after he allegedly stole a credit card and used it four times. Leyda, 157 Wn.2d at 339. The Supreme Court reversed, holding that former RCW 9.35.020 was

ambiguous as to the applicable unit of prosecution. Leyda, 157 Wn.2d at 345.

The Leyda Court focused on the enumerated verbs, “obtain, possess, use, or transfer,” and the disjunctive word “or”. 157 Wn.2d at 345-46. This language indicated that “use” was one way to commit identity fraud, but not the only way. Id. Therefore, each use could not be the unit of prosecution. Id. Instead, once a person has committed any of the enumerated acts (such as possession), subsequent enumerated acts (such as use) are included in the unit of prosecution. Id. at 345.

The Leyda Court also focused on the identity theft statute’s use of “a” in reference to a means of identification: “The identity theft statute. . . uses the singular ‘a.’ It is a means of identification or the financial information that is possessed, obtained, used, or transferred with the intent to commit a crime that defines the unit of prosecution.” Id. at 347 n. 9.

Thus, the Court held that multiple punishments are possible in cases involving multiple victims, but not for multiple uses of a single individual’s identity: “Thus, the State improperly charged him with multiple thefts of Austin’s identity, who, common sense suggests, has only one identity that can be unlawfully appropriated.” Id. at 346-47.

The similarities between the statute at issue in Leyda and the witness tampering statute at issue in Nance’s case compel the conclusion that RCW

9A.72.120(1) is ambiguous and reasonably support Nance's interpretation. Thomas, 151 Wn. App. 846-48 (Van Deren, C.J., dissenting). The witness tampering statute also conspicuously describes the crime using the indefinite article "a." A person is guilty of witness tampering when he or she "attempts to induce a witness or person." RCW 9A.72.120(1). The witness tampering statute also lists, in the disjunctive, several different proscribed acts including attempting to induce a person 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). Applying Leyda's analysis to the witness tampering statute, as the Thomas dissent did, leads to the following conclusion: Once the defendant attempts to tamper with a witness by any of these proscribed methods, the unit of prosecution includes all subsequent tampering attempts directed toward that witness. Thomas, 151 Wn. App. 847 (Van Deren, C.J., dissenting); see Leyda, 157 Wn.2d 345. Thus, while the Legislature criminalized attempts to induce a witness to undertake the proscribed actions, it did not separately criminalize each argument, each telephone call, each letter, or each attempt directed at the same witness. Thomas, 151 Wn. App. 848 (Van Deren, C.J., dissenting).

The lone case relied on by the Hall Court in holding otherwise is State v. Moore, 292 Wis.2d 101, 116, 713 N.W.2d 131 (2006). See 147 Wn. App. at 489-90. However, that case applies the law of Wisconsin, which begins with a presumption that the legislature intends multiple punishments. The Moore court expressly states, “[W]e begin with the presumption that the legislature intended multiple punishments. This presumption may only be rebutted by a clear indication to the contrary.” 713 N.W. at 137.

Such a presumption does not exist under Washington law, and is contrary to the rule of lenity. Under Washington law, where the legislature has not defined the unit of prosecution with specificity, the Court should not interpret the statutory language as permitting multiple punishments:

When choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Tvedt, 153 Wn.2d at 711 (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22, 73 S. Ct. 227, 97 L. Ed. 260 (1952)). The Hall Court’s analysis vitiates this state’s requirement that the legislature set forth the harsher alternative clearly and definitely before the Court chooses that interpretation.

Furthermore, the Hall Court expressly based its conclusion that Hall's interpretation was not reasonable upon its own determination about which of two interpretations appeared to better serve the legislative purpose. 147 Wn. App. at 489. In doing so, the Hall Court expressly looked beyond the language of the statute, the statute's history, and the facts of the case, and attempted to construe the statute in a manner that it deemed would accomplish the legislature's objectives. As the Supreme Court stated in Tvedt, the Court's role is to interpret the statute as it is written, and not to construe the statute in a manner that the Court determines to best accomplish [the] evident statutory purpose:

In determining legislative intent as to the unit of prosecution, we first look to the relevant statute. The meaning of a plain, unambiguous statute must be derived from the statutory language. However, we are not allowed to look for an intent that reasonably could be imputed to the legislature, nor are we permitted to construe an Act in a way that we believe will best accomplish evident statutory purpose.

153 Wn.2d at 710 (internal citations, quotation marks and brackets omitted); see also, Varnell, 162 Wn.2d at 168 (In a unit of prosecution case, the court analyzes the statutory language, the statute's history, and the facts in the case).

Because the language of RCW 9A.72.120(1) is susceptible to more than one reasonable interpretation, it is ambiguous. Bash, 130 Wn.2d at 601. The ambiguity must be construed in Nance's favor, as punishing a course of

conduct, rather than each individual act within that course of conduct. Adel, 136 Wn.2d at 634-35.

b. The Legislative History Is Consistent with Punishment for a Course of Conduct.

The legislative history does not denote a contrary intent on the part of the legislature. There is no dispute that under Nance's interpretation, the act of witness tampering is proscribed and made punishable by the law. Each potential witness is accounted for, and the harm to that person as well as to the proceeding itself is recognized. Although the legislative history indicates the Legislature considers the offense to be grave and contrary to the state's interests in promoting public safety or prosecuting criminals,² these considerations are equally consistent with Nance's interpretation.

At the same time, Nance's construction avoids the absurd result that would result from an overzealous prosecutor's charging decision. For instance, in reliance upon the Hall Court's reasoning, the state could 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. After all, each such action is an "instance" of an attempt to induce a witness.

² The Hall court did not evaluate the legislative history of the witness tampering statute. See Hall, 147 Wn. App. at 489-90.

The dissent in Thomas correctly observed both the lack of clarity in the witness tampering statute, and the arbitrary charging decisions possible under the Hall court's analysis:

There was no consensus about whether the unit of prosecution is each call, each day, or each argument used by Thomas. The State explained that the eight charges here resulted from application of prosecutorial discretion based on either (1) when each of the 36 calls were made during the three-day period, (2) whether the calls were made several hours apart, or (3) whether Thomas relied on different arguments to persuade Montgomery to change her testimony. Finally, the State admitted that it was not entirely clear how the eight charges were derived. The majority's opinion supports this deferential and imprecise approach to deciding the unit of prosecution, contrary to the rule that it is the legislature's job to define a crime's unit of prosecution.

151 Wn. App at 849 (Van Deren, C.J., dissenting).

The Leyda Court expressed its concern that the similar ambiguity in the identity theft statute created the same potential for multiple convictions based on inconsequential distinctions between the charges.

[U]nder the dissent's reading, an overzealous prosecutor might be tempted to divide up a defendant's single course of unlawful conduct ad infinitum, thereby resulting in hundreds of identity theft charges though the distinctions between such charges are inconsequential. Accord State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998). For example, under the dissent's reading as applied retroactively to this case, even though only one credit card from one individual was stolen, Leyda could be charged with one count of identity theft when he obtained the [credit] card, one count for possessing the card initially, one count for transferring the card to Cooley, one count for possessing the card after

Cooley transferred it back to him, and, as was the situation here, four times for each instance the card was used

Leyda, 157 Wn.2d at 344, n. 7.

The Hall court's holding that the unit of prosecution is "any one instance of attempting to induce a witness" allows breaking down a single crime into smaller temporal units. It also permits overzealous prosecution, contrary to the purpose of the unit of prosecution double jeopardy analysis. See, e.g., Turner, 102 Wn. App. at 210.

Nothing in the legislative history indicates that the legislature intended this absurd result. Under the 1909 criminal code, witness tampering included only inducing a person to be absent from proceedings or withhold testimony altogether. Laws of 1909, ch. 249, § 111. Attempts to procure false testimony by means other than bribery³ were classified as suborning perjury. Laws of 1909, ch. 249, § 109. The 1975 code expanded the definition of witness tampering to include both attempts to prevent testimony and attempts to induce a person to testify falsely. Laws of 1975, ch. 260. This broadening of the statute does not indicate whether the legislature intended to punish each proscribed act separately or, as in Leyda, to punish a course of conduct including any or all of the enumerated acts. Thus, the legislative history sheds no light on the unit of prosecution analysis.

³ Bribing a witness was also a separate offense. Laws of 1909, ch. 249, § 71.

c. Nance Engaged in a Single Course of Conduct Aimed at Preventing his Former Girlfriend from Testifying at His Assault Trial.

The facts of the case show a single course of conduct directed at a single witness in a single proceeding. All of the alleged conversations had the same objective and intent -- to obstruct justice in Nance's trial. These facts demonstrate only one single course of conduct, the alleged objective of which was the obstruction of justice in a single proceeding, by a single witness.

The Supreme Court recognizes that the state cannot skirt double jeopardy protections by breaking a single crime into temporal or spatial units. Adel, 136 Wn.2d at 635 (citing Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)). This is precisely what occurred here. The prosecutor broke one attempt to tamper with a witness into four temporal units, one count for each date. CP 1-3.

As the dissent in Thomas pointed out, the temporal divisions are arbitrary. 151 Wn. App at 849 (Van Deren, C.J., dissenting). The probable cause certification describes two calls per day on three of the four dates. CP 4-6. Thus, the prosecutor could have charged at least seven counts, one for each phone call. Several of the phone calls also contained multiple requests to prevent testimony, further multiplying the potential counts. CP 4-6. Moreover, on the third date in question, it appears Nance's former girlfriend

had agreed not to testify. CP 6. Thus, the subsequent discussions of her writing a statement are not a separate attempt to induce, but merely an attempt to cement the prior agreement. Id. The facts of this case demonstrate violation of only a single unit of prosecution, arbitrarily broken down into artificial temporal divisions.

d. The Rule of Lenity Prevents Multiple Convictions for This Single Course of Conduct.

Under the rule of lenity, any ambiguity must be resolved against turning a single violation into multiple offenses. Universal C.I.T. Credit Corp., 344 U.S. at 221-22; Tvedt, 153 Wn.2d at 711; Adel, 136 Wn.2d at 634-35. The language of RCW 9A.72.120 does not unambiguously demonstrate legislative intent to punish a single act, rather than a course of conduct. An interpretation of the statute as proscribing a course of conduct directed toward a single witness to a proceeding is consistent with the purpose of punishing an obstruction of justice, the statutory language, the legislative history, and the facts of this case. Because the statute is ambiguous and Nance's interpretation is reasonable, Nance's interpretation prevails.

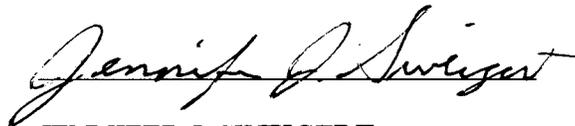
D. CONCLUSION

For the foregoing reasons, Nance requests this court reverse three of his convictions for witness tampering and remand for resentencing.

DATED this 13th day of January, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script that reads "Jennifer J. Sweigert".

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64174-3-I
)	
DEXTER NANCE, JR.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DEXTER NANCE, JR.
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STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JANUARY, 2010.

x Patrick Mayovsky