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REC'D  
MAR 30 2012  
King County Prosecutor  
Appellate Unit

NO. 67676-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY BROWN,

Appellant.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mariane Spearman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence is insufficient to sustain appellant's conviction for witness tampering.

Issue Pertaining to Assignment of Error

Appellant was charged with assault, a charge he denied. In several conversations with the complaining witness, he urged her to take action that would result in dismissal of the charge and to contact other potential witnesses should a trial be necessary. Where the State failed to establish that appellant ever attempted to induce a witness to testify falsely or withhold testimony, must appellant's conviction for witness tampering be dismissed?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Randy Brown with (count 1) Assault in the Second Degree – Domestic Violence, (count 2) Tampering With a Witness, and (counts 3 through 5) Domestic Violence Misdemeanor Violation of Court Order. CP 55-58.

The State subsequently withdrew the charge in count 5. CP 70. A jury acquitted Brown on the assault charge in count 1 but found him guilty on the charges in counts 2 through 4. CP 210-214.

The Honorable Mariane Spearman imposed a standard range 51-month sentence on the tampering charge and suspended 12-month sentences on the violations of a court order. 1RP<sup>1</sup> 74-75; CP 222, 227. Brown timely filed his Notice of Appeal. CP 230-242.

2. Substantive facts

Randy Brown and Helen Gaines have known each other for 20 years. They have three children and were living together in November 2010. 8RP 84-85. The assault charge was based on events on the morning of November 24. Gaines ran out of the house, stopped a passerby, and asked the individual to call 911, claiming that Brown had choked her. 8RP 77-80.

Brown denied choking Gaines and suggested she made the false allegation to retaliate for his relationship with another woman, Loren, with whom he was staying the night before. 10RP 62-73. Gaines conceded a motive to ensure Brown was convicted – a CPS worker told her that if Brown were released from prison and had contact with their children, the State could take the children away. 8RP 111-113.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – 3/24/11 and 9/7/11; 2RP – 6/14/11; 3RP – 6/15/11; 4RP – 6/16/11; 5RP – 6/21/11 (a.m.); 6RP – 6/21/11 (p.m.); 7RP – 6/22/11; 8RP – 6/23/11; 9RP – 6/27/11; 10RP – 6/28/11; 11RP – 6/29/11; 12RP – 6/30/11; 13RP – 8/19/11.

Although two police officers responding to the 911 call on November 24 claimed they saw physical evidence on Gaines' neck consistent with choking, an EMT who examined Gaines found nothing whatsoever indicating Brown had assaulted her. 8RP 23, 65; 10RP 19-20, 23.

The tampering and violation of court order charges were based on a series of telephone calls Brown made from the King County Jail. On December 21, 2010, following Brown's arrest on the assault charge, the King County Superior Court entered a protection order prohibiting Brown from contacting Gaines directly or indirectly, including by telephone. Exhibit 16. In the weeks following, the jail recorded several telephone conversations Brown had with Gaines and others. 10RP 7-16. The calls took place on December 21, 22, 23, and 25; January 3, 6 (two calls), and 12; and February 7. Exhibit 17A; CP 108-209.

Brown conceded the calls with Gaines that violated the no contact order and formed the basis for the charges in counts 3 and 4. 10RP 75-76. But he vigorously contested the charge in count 2 that he attempted to tamper with anyone's trial testimony. 11RP 23-25. At the close of the State's evidence, Judge Spearman initially granted a defense motion to dismiss based on a failure of

proof for the tampering charge. 10RP 30-34. She subsequently reconsidered, however, and decided to send the charge to the jury, noting it was a close issue. 10RP 50.

Brown now appeals his conviction for tampering.

C. ARGUMENT

THIS COURT MUST REVERSE BROWN'S CONVICTION FOR TAMPERING WITH A WITNESS DUE TO INSUFFICIENT EVIDENCE.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Under Washington law:

(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 . . .

RCW 9A.72.120(1)(a); see also CP 89 (“to convict” instruction).

As noted above, the State’s evidence allegedly supporting the tampering charge in count 3 was contained in the calls Brown made from jail. The vast majority of the calls have nothing to do with the charges Brown faced. The State relied on several portions of conversations – identified by the prosecutor in response to the defense motion to dismiss and during closing argument – to support its theory of tampering.

The State pointed to portions of Brown’s conversation with Gaines on December 22, 2010:

BROWN: Okay. I’m telling you man. You do what you need to do man. You got me in this motherfuckin’ (Unintelligible) shit. Get me the fuck up outta here. (Unintelligible) fuck bail (Unintelligible) hundred thousand. I can’t do shit. . . .

CP 117; 11RP 8.

BROWN: Get this motherfuckin' shit up off me. Get me the fuck up outta here. That's what I need from you. . . .

CP 120; 11RP 8.

The State pointed to portions of Brown's conversation with Gaines on December 23, 2010:

BROWN: Yeah 'cause we need to talk 'cause this motherfuckin' report that I got is real fucked up. (Unintelligible) For real. (Unintelligible) fuckin'.

GAINES: Move.

BROWN: Did – did you go to – did you try to talk to the prosecutors or whatever?

GAINES: Yeah I did. I (Unintelligible) see that one guy – that one guy there, and they (Unintelligible) told me to call the lady and they tried to give me the (Unintelligible) and said call and leave her message and she'll call me back[.]

. . . .

BROWN: Yeah. You need – yeah for real you need to get – get – go down there and talk to them motherfuckers and get this shit off of me man. For real 'cause (Unintelligible) called them and – and they get back to you, they're not. So you need to go down there and get this motherfuckin' shit off me 'cause I'm fucked if you don't. Just to let you know. Okay?

CP 125-126; 11RP 8.

BROWN: So try to figure this shit out and try to – you need to go down there tomorrow. I don't give a fuck callin' them people. You need to take your ass down there

with some notarized letters and some more shit to try to get this shit off me. Get me the fuck outta here okay.

GAINES: Yeah.

BROWN: You hear me?

GAINES: Yeah.

BROWN: (Unintelligible) might as well get ready to go. For real. You know what I'm talkin' about okay.

GAINES: Yeah.

BROWN: Huh?

GAINES: Yeah.

BROWN: For real. You know what I'm talkin' about?

GAINES: Yeah.

BROWN: Where? Huh?

GAINES: (Unintelligible)

BROWN: Yeah. Exactly. That's probably where the fuck you want me. Right?

GAINES: No.

BROWN: Okay. Well get – get down here tomorrow man and get this shit off me man. For real. (Unintelligible) this shit. (Unintelligible) this shit. I don't know why you always wanta do this motherfuckin' shit, callin' the police and knowin' we gonna be right back together and (Unintelligible) shit. I don't know why you like to do that, but fuck it. You need to go to what the fuck you gotta do like you did the last time when you went and talked to the motherfuckers and I was locked up.

GAINES: Yeah.

BROWN: Hello?

GAINES: Yeah.

BROWN: You remember how you did it when you went and – and – and they finally fuckin' let me out?

GAINES: Yeah.

BROWN: Go – go down there and tell 'em you done it again okay, so I can get the fuck up outta here. Alright?

GAINES: Yeah.

CP 129-131; 10RP 37-37; 11RP 8-9.

The State pointed to a portion of Brown's first conversation with Gaines on January 6, 2011:

BROWN: Yeah so uh fuck I'm gonna have to take this shit to trial and, you know what I'm sayin'. Try to beat it at trial. Um, I'm gonna have to uh get uh, uh Nae Nae 'cause uh have Nae Nae come (Unintelligible) have my lawyer contact Nae Nae. Um Tavia's homegirl.

GAINES: Uh, huh.

BROWN: And you know that I'm sayin', and so she can tell them that I was at her house when uh when, you know what I'm sayin', when the broad called and talkin' you know what I'm sayin' and called and made the false charges. You feel me?

GAINES: Yeah.

BROWN: You see what I'm sayin'?

GAINES: Uh, huh.

BROWN: So you know 'cause I was at her house when she called. (Unintelligible) I – I woke up chokin' her.

GAINES: Shut up.

BROWN: They're not playin'. That's (Unintelligible) hellah charges. I don't know why homegirl always be doin' this shit every time she get mad. (Unintelligible) wanta call the police. You know. Do this old shit, but Nae Nae will have uh will have my lawyer you know what I'm sayin'? If – if – if shit go all the way that far. You know what I'm sayin', which I know they probably are. As soon as I can uh get on this other uh on this other line.

GAINES: Uh, huh.

BROWN: I'll be able to you know what I'm sayin', tell you everything. You know what I'm sayin', a little better alright?

GAINES: Uh, huh.

CP 172-173; 10RP 44; 11RP 9-10.

The State also pointed to several portions of Brown's second conversation with Gaines on January 6, 2011:

BROWN: Alright then. Come on man with that bullshit alright. I'm – I'm not – I don't – I don't need it right now. Okay now, now what I really need you to do is get on down there and get the damn thing off us okay.

GAINES: Yeah.

BROWN: Alright.

GAINES: Uh, huh.

BROWN: Same room that you gotta look into alright?

GAINES: Uh, huh.

BROWN: Where they put it on that okay?

GAINES: Yeah.

BROWN: So go down there and – and – and try to – and get this shit off alright?

GAINES: Uh, huh.

BROWN: I ain't gotta worry about this bullshit 'cause that's 'mo – 'mo shit alright?

GAINES: Yeah.

BROWN: They book these motherfuckers every day for that. Okay.

GAINES: Uh, huh.

BROWN: If you know what I'm talkin' about okay.

GAINES: Yeah.

BROWN: And I ain't got the motherfuckin' time to – to be sittin' up in here for nothin' alright?

GAINES: Uh, huh.

CP 178-179; 10RP 37; 11RP 10.

BROWN: Okay. First thing tomorrow, come down to the same room where – where – where (Unintelligible) Alright?

GAINES: Uh, huh.

BROWN: And make it – get the – get the damn thing off okay?

GAINES: Okay.

BROWN: Alright?

GAINES: Yeah.

BROWN: You remember how you got the last one off right?

GAINES: Yeah.

BROWN: Huh?

GAINES: Yeah.

BROWN: Okay. (Unintelligible) get that fuckin' (Unintelligible) tomorrow. Alright?

GAINES: Yeah.

CP 181-182; 10RP 37.

BROWN: Get it off. I ain't got no damn money to keep givin' these motherfuckers (Unintelligible) fuckin' bail. All my motherfuckin' money on the fuckin' phone. You need – you need to make sure you come down tomorrow. Alright?

GAINES: (Unintelligible) yeah.

BROWN: You hear me?

GAINES: Yeah.

BROWN: Get – get it off. Alright?

GAINES: Okay.

BROWN: For real.

GAINES: I will.

BROWN: 'Cause I'm (Unintelligible) Just so – and – and they got it so – they got – they – they got the damn thing so cold, we might – might have to have Big Mama come – come – come testify. You hear me?

GAINES: Yeah.

BROWN: You know that (Unintelligible) You know what I'm sayin'? That motherfucker told her to say that. Okay?

GAINES: Uh, huh.

BROWN: To – to them – to them people. Alright?

GAINES: Okay.

BROWN: You feel me?

GAINES: Yeah.

BROWN: And I damn sure don't wanta do that, but you know what I'm sayin', she told them a whole lot. You feel me?

GAINES: Uh, huh.

BROWN: So you know what I'm sayin', I might need Big Mama to come down and say oh yeah she told – you know?

GAINES: Uh, huh.

BROWN: (Unintelligible) this is – This is not – this is not – this is not cool. You been in this predicament. I don't know why you like to put them – put 'em in a motherfucker's business like that man. That's wrong, but, it's done. So what –

CP 187-188; 10RP 37; 11RP 10-11.

Certain facts are apparent from these phone conversations. Brown was not happy about his predicament, he wanted the charges dropped, and he wanted Gaines to do what she could to make this happen. But this does not establish tampering.

In State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990), the defendant, who was charged with criminal trespass and rape, called the alleged victim several times from jail. During the calls, Rempel apologized, said he would never do it again, indicated the charges would ruin his life, and asked the alleged victim to drop them. Rempel was convicted of witness tampering and appealed, challenging the sufficiency of the evidence. Id. at 81-82.

The Supreme Court of Washington reversed, finding that neither the evidence, nor reasonable inferences from that evidence, established that Rempel attempted to induce the victim to testify falsely or withhold testimony. Rempel, 114 Wn.2d at 83. The Court reasoned that expressing an opinion regarding the negative impact of the charges and requesting that they be dropped did not, literally speaking, contain a request to withhold testimony. Nor did the words contain a threat or promise of any reward for dropping the charges. Id. The Court noted that, depending on context, a request to "drop the charges" could support a tampering conviction

in a particular case, but that was not the situation in Rempel's case. Id. at 84.

Similarly, at no time did Brown literally ask Gaines to testify falsely or withhold evidence. See 11RP 8, 32 (State tells jury it does not have to prove express request). Nor did context establish the crime. Notably, despite calling Gaines as its own witness, the State never asked her to interpret or provide context for any of the calls Brown made to her from jail. Instead, she was simply asked to confirm that Brown was the caller for those calls in which she was involved. See 8RP 98, 101-105; exhibit 18. Although the State argued to jurors that Brown's conversations with Gaines revealed attempts to induce others to testify falsely or withhold evidence, they passed on asking their only witness capable of establishing this.

The State also failed to establish any attempt to induce false testimony or the withholding of evidence when cross-examining Brown. Instead of asking what his conversations meant, the prosecutor merely asked Brown to confirm that he had placed the calls and to identify Nae Nae and "Big Momma." 10RP 75-76, 86-87. Brown explained that Nae Nae was his cousin's friend and Big

Momma was a woman by the name of December, with whom he had an intimate relationship. 10RP 86-87.

Also undercutting the State's unsubstantiated theory was an additional phone call – between Brown and Loren (also spelled “Lauren” in the record) – which was introduced at trial. See CP 132-149; exhibit 17A. On the call, Brown makes it clear that Gaines is lying about the assault:

BROWN: Her lyin' ass. They got me fucked man. I'm – I'm – I don't know and dude was like he got the same charge and his bail's a hundred thousand. He said everybody that's been comin' in here they ain't been getting' out so I don't know –

LAUREN: What did she say?

BROWN: She said all kinds of shit. I don't know what the fuck she said, but some bullshit like talkin' about I choked her and I don't know some other shit. I don't know what the fuck she told 'em, but you know what I'm sayin' it's all bullshit. Every time she find out you know what I'm sayin', I'm fuckin' with somebody else, this is what she do. You know, but um she – I don't know, she says she was gonna try to get this shit off me. I don't know. She did this same shit before. You know what I'm sayin'. I beat the case, but I don't know. I don't know. I don't know about this one.

CP 138.

BROWN: She says she's gonna go talk to the people and te – you know and get this shit off me 'cause she lied like she did before. I just beat a case two month's ago on her and this other broad that lied. You know what I'm sayin', but um fuck man. Um –

LAUREN: She's gonna keep throwin' you in jail.

BROWN: Don't say that Lauren. Don't say that.

CP 146.

Brown's statements that Gaines was lying about the assault put in context his requests that she drop the charges and contact other potential witnesses. Rather than an attempt to convince witnesses to provide false testimony or withhold truthful testimony, Brown was attempting to repair a wrong Gaines had created. These attempts are no different than the attempts in Rempel to convince the alleged victim to drop the case.

Brown's actions in this case fall well short of those deemed sufficient to prove witness tampering. See, e.g., State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979) (defendant asked witness to not appear or appear and change his testimony); State v. Wingard, 92 Wash. 219, 223-224, 158 P. 725 (1916) (defendant made a threat, promised a reward, and urged witnesses to ignore subpoena); State v. Whitfield, 132 Wn. App. 878, 897-898, 134 P.3d 1203 (2006) (defendant urged victim to lie about circumstances and provided examples of what she should say in court), review denied, 159 Wn.2d 1012 (2007); State v. Lubers, 81

Wn. App. 614, 618, 915 P.2d 1157 (defendant urged witnesses to recant prior statements and/or claim that a fictitious person was the true assailant), review denied, 130 Wn.2d 1008 (1996).

Because the State failed to prove that Brown attempted to induce a witness to testify falsely or withhold testimony, there is insufficient evidence to support the tampering conviction. The conviction should be dismissed with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

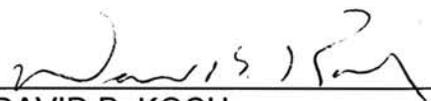
D. CONCLUSION

This Court should reverse and vacate the tampering conviction.

DATED this 40<sup>th</sup> day of March 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

  
\_\_\_\_\_  
DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

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

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STATE OF WASHINGTON	)	
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Respondent,	)	
	)	
v.	)	COA NO. 67676-8-1
	)	
RANDY BROWN,	)	
	)	
Appellant.	)	

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**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 30<sup>TH</sup> DAY OF MARCH 2012, 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] RANDY BROWN  
DOC NO. 748797  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF MARCH 2012.

x Patrick Mayovsky