72712-5

NO. 72712-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CURTIS RODGERS, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Other Jurisdictions:

Statutes

Federal:

Washington State:

Other Jurisdictions:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUE

1. Viewing the evidence in the light most favorable to the State, has Rodgers failed to show that the State produced insufficient evidence to convict him of witness tampering?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Curtis Rodgers, Jr. with one count of Burglary in the First Degree – Domestic Violence, and one count of Witness Tampering – Domestic Violence. CP 63-64. Although the jury deadlocked on the burglary charge, it convicted Rodgers of witness tampering. CP 218-21; 9RP 19-20.[1] With an offender score of 11, Rodgers's standard sentencing range was 51-60 months in prison. CP 240. The trial court imposed a prison-based Drug Offender Sentencing Alternative. CP 239-49; 10RP 18.

2. SUBSTANTIVE FACTS

On May 10, 2013, Amanda Eskola loaned her iPhone to her boyfriend, Rodgers. 5RP 39-42. When Rodgers failed to return the phone, or answer her calls, Eskola used a tracking device to locate it in North Seattle nearby the house of Rodgers's sister, Christine

[1] The Verbatim Report of Proceedings consists of ten volumes designated as follows: 1RP (10/13/14), 2RP (10/14/14), 3RP (10/21/14), 4RP (10/22/14), 5RP (10/23/14), 6RP (10/27/14), 7RP (10/28/14), 8RP (10/29/14), 9RP (10/30/14), and 10RP (11/14/14).

Williams. 5RP 42-43. Eskola went to Williams's house, but did not find Rodgers or her phone there. 5RP 44-45. Eskola and Williams headed to the phone's apparent location on Aurora Avenue North, and started asking people if they had seen Rodgers. 5RP 48. Eventually they saw Rodgers crawling around on a motel balcony and then enter a motel room, in an apparent effort to hide from them. 7RP 100. After a couple hours, Rodgers came outside and a "big argument" ensued. 5RP 49. Rodgers ultimately walked away from the argument, still in possession of Eskola's phone, and Eskola went back to Williams's house. 5RP 49-50.

Around midnight, Eskola was watching television with Williams's three young children, when she heard Rodgers at the door. 5RP 53. Eskola told police later that night that although she refused to let Rodgers in, he came in through an unlocked door, grabbed her by the leg, and dragged her off of the couch where she had been sitting. 5RP 65-66. Rodgers then pulled Eskola's hair and threw her down to the ground. 5RP 66.

At some point, Jason Rice, the father of Williams's children, got caught up in the fray. 5RP 45, 58. In his statement to police, Rice said that he had told his eleven-year-old son, C.R., not to let Rodgers into the house. 6RP 21, 29. Nonetheless, Rodgers

entered and Rice heard Eskola scream "help me," and "get off me." 6RP 29, 31. Rice told police that Rodgers had punched him in the mouth and a couple of other places before he was able to wrestle Rodgers to the ground. 5RP 31.

Eskola called 911 and reported that Rodgers had "attacked" her and Rice. 5RP 61-62; Ex 2 at 2; Ex 3.[2] At the same time, C.R. ran out of the house, and down the street to the nearby fire station. 5RP 32; 7RP 37-38. The fire captain and another firefighter heard C.R. rapidly knocking on the door. 5RP 21; 7RP 61. C.R. rushed into the station as soon as they opened the door, wearing no shoes or shirt, but only his shorts. 7RP 62. C.R. was pale, wide-eyed, and trembling as he asked, "Can you help me? My uncle is going to kill my Dad." 5RP 22. C.R. identified Rodgers as his uncle, and said that he was "pulling on his auntie's leg."[3] 5RP 26. The fire captain called 911, while C.R. repeatedly asked the firefighters, "Would you please hurry?" and "Is somebody coming?" 5RP 26; 7RP 64.

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[2] Exhibit 2 is a transcript of Eskola's 911 call (Exhibit 3) that the State provided to the jury as a visual aid at trial. 5RP 60-61.

[3] C.R. later told police that it looked like Rodgers was pulling Eskola's leg out of its socket. 7RP 37.

Shortly thereafter, Rice appeared at the station with a police officer. 7RP 64. Rice's lower lip was swollen and bleeding, and he had cuts on his face and hands. 5RP 27; 7RP 39, 65. C.R. refused to return home until he was assured that Rodgers was in handcuffs and in the back of a police car. 7RP 38.

Police arrested Rodgers as he was leaving Williams's property. 6RP 63. Rodgers was booked that night into the King County Jail on burglary and assault charges. Ex 1; Ex 4 at 2, 13.[4] Later that day, Rodgers called Eskola twice, and asked if she was "pressin' charges" on him. Ex. 4 at 2. Referencing the night before, Rodgers said:

> RODGERS: . . . [Y]ou told 'em I pulled your hair baby. . . .
> ESKOLA: That's not what I wanted Curtis, but you scare me. . . . What do you think it looks like when you come in like that? . . .
> RODGERS: Baby you filled out the report.
> ESKOLA: I didn't know that's what would happen Curtis. I've never done that before. . . .
> RODGERS: . . . [W]hy you didn't wanna answer the door?
> ESKOLA: And then you're pounding on the door like you're gonna break it down.
> RODGERS: I was knockin' it. Oh baby. I wasn't poundin' on it. . . .
> ESKOLA: . . . [I]f you don't think any of that happened then I don't know why I'm even talking to you.
> RODGERS: Baby, let me tell you somethin', first and while you're talkin' to me, my phone call is gonna be

[4] Exhibit 1 contains the portions of Rodgers's jail calls that were admitted at trial. The State provided the jury with a transcript of the calls (Exhibit 4). 5RP 74-75. For ease of reference, undersigned counsel's citations are to Exhibit 4.

recorded and it's been recorded. So everything that you're sayin' right now is gonna hold merit when I take this to trial. . . .

RODGERS: . . . [T]hey're gonna put a no-contact order baby . . . Now—now we gotta be a little bit more swifter about it. Now you got to—gotta use uh—uh AKA's and um anonymous names now. You hear me? . . .

ESKOLA: It was crazy last night. I'm like watching all these little kids and they—they got scared because of you. You know? . . . [A]ll I told them was exactly what happened last night. . .

ROGERS: [I]f I take it to trial they're gonna call you as a witness. And what you gonna tell 'em? Huh?

ESKOLA: I mean I already gave a statement. I can't tell 'em anything more than I already told 'em.

RODGERS: Retract that statement lady.

ESKOLA: You can do that?

RODGERS: Yeah. . . . I'm gonna take it to trial. I'm—I'm gonna tell 'em that [C.R.] opened the door. I'm gonna tell 'em the door was unlocked. . . . We can get outta this. We can get outta this but I need your help. Huh? . . . So if I can twist outta this fuckin' noodle. Baby I love you.

Ex. 4 at 2, 4, 6-7, 9-10, 12, 14. Rodgers warned Eskola that a "no-contact order" would be imposed two days later. Ex. 4 at 2. The next day, Rodgers called Eskola twice more, and asked if she "really did tell the police" that he had pulled her hair. Ex. 4 at 15. Eskola responded, "Of course I did baby . . . I have never seen any man do anything like that to anybody in my life ever. So I didn't know what to do." Id.

Three days later, on May 15, 2013, the State charged Rodgers with Burglary in the First Degree – Domestic Violence. CP 1-7. That same day, Eskola called the assigned detective investigating the case to "recant" her original statement, and "re-clarify" some points. 6RP 83-84. Contrary to her initial statement, Eskola told the detective that she let Rodgers inside the house. 5RP 77; 6RP 84. Eskola also said that she had not had contact with Rodgers since the night of the burglary, and that no one had asked her to recant her statement. 5RP 78.

At trial, Eskola testified consistent with her "recant[ed]" statement that she had opened the door for Rodgers the night of the burglary. 5RP 54. Additionally, Eskola testified that she initiated the physical struggle by shoving Rodgers when he got too close to her face. 5RP 54. Eskola explained that she had lied to police on the night of the incident because she did not want Rice to know that she had let Rodgers inside. 5RP 65. Eskola further explained that she had told the officers that Rodgers had assaulted her as a form of "[i]nner retaliation" because he had angered her earlier in the evening and she had been drinking. 5RP 66.

Rice's testimony at trial was also inconsistent with his statement to police on the night of the incident. Rice testified that

he had argued with Rodgers, but denied ever physically fighting with him. 6RP 23, 30.

Rodgers's twin sister, Williams, also testified at trial, despite having previously refused to provide a statement to police. 6RP 87. She testified that Rodgers had been living at the house for three weeks prior to the burglary, that he had permission to enter her home that night, and that she had given him a set of keys to the house. 7RP 95-97, 115, 133.

At the start of trial, the court granted the State's motion to amend the information to include witness tampering based on Rodgers's calls to Eskola immediately following his arrest. 1RP 5-7; 2RP 53-55. The amended information charged Rodgers with attempting "to induce a witness, or a person he had reason to believe was about to be called as a witness in any official proceeding, or a person whom he had reason to believe may have information relevant to a criminal investigation . . . to testify falsely." CP 63-64.

Nonetheless, the court's to-convict instruction for witness tampering contained the following elements:

> (1) That between May 11, 2013 and May 15, 2013, the defendant attempted to induce a person to testify falsely; and

(2) That the other person was *a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings*; and
(3) That the acts occurred in the State of Washington.

CP 203 (emphasis added). Thus, the court did not instruct the jury on the "criminal investigation" prong alleged in the information, specifically that Rodgers attempted to induce a person whom he had reason to believe may have information relevant to a criminal investigation to testify falsely.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS RODGERS'S WITNESS TAMPERING CONVICTION.

Rodgers argues that his witness tampering conviction should be reversed because the State failed to prove that he attempted to induce Eskola, a person who he had reason to believe was about to be called as a witness in an official proceeding, to testify falsely. He contends that an "official proceeding" commences when a charging document is filed under this Court's decision in State v. Pella, 25 Wn. App. 795, 612 P.2d 8 (1980). Viewing the evidence in the light most favorable to the State, and considering the statutory definition of "official proceeding" and the authority supporting the Pella decision, Rodgers's argument fails.

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Fiser, 99 Wn. App. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

A person is guilty of witness tampering if he attempts to induce a (1) witness, (2) person he has "reason to believe is about to be called as a witness in any official proceeding," or (3) person whom he has reason to believe may have information relevant to a

criminal investigation, to testify falsely. RCW 9A.72.120(1)(a). An "official proceeding" is broadly defined as "a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions." RCW 9A.72.010(4).

In Pella, this Court considered whether a person who the defendant "had *no reason to believe* . . . was about to be called as a witness in an official proceeding" fell within the purview of the witness intimidation statute. 25 Wn. App. at 797 (emphasis added). In its brief analysis, the Pella court quoted the statutory definition of an "official proceeding," and then relied solely on two out-of-state cases for the proposition that "[n]umerous cases have held that an 'official proceeding' begins, at the earliest, with the filing of a complaint." Id. (citing State v. Howe, 247 N.W. 2d 647 (N.D. 1976); United States v. Metcalf, 435 F.2d 754 (9th Cir. 1970)). With no further explanation, the court reversed the defendant's conviction because the defendant attempted to intimidate the witness prior to the information being filed, and therefore "an official proceeding was not pending." Id.

Shortly after Pella, the Legislature amended the witness tampering and intimidation statutes to include a person who the defendant "has reason to believe may have information relevant to a criminal investigation." Laws of 1982, 1st Ex. Sess., ch. 47, § 18-19. The Legislature has since expanded the reach of both statutes multiple times, but it has never amended its broad definition of "official proceeding." See e.g., Laws of 1994, ch. 271, § 204-05 (amending both statutes to include withholding information from a law enforcement agency about the abuse or neglect of a minor child); Laws of 2011, ch. 165, § 2-3 (amending both statutes to clarify that each instance of witness intimidation and tampering constitutes a separate offense).

Further, since Pella, this Court has applied the same construction of "official proceeding" to the witness tampering statute. See State v. Sanders, 66 Wn. App. 878, 889, 833 P.2d 452 (1992) (affirming the defendant's witness tampering conviction in part because "the defendant's criminal conduct was properly alleged to have begun *after* the rape charges were filed") (emphasis in original).[5]

[5] Relying on Sanders, the Washington Pattern Jury Instruction Committee has suggested that the "official proceeding" prong of the witness tampering statute "should be limited to conduct occurring during a pending proceeding." WPIC

Pella's conclusion that an "official proceeding" begins with the filing of a complaint, however, rests entirely on two out-of-state cases, neither of which interpreted Washington's witness tampering statute. See Howe, 247 N.W.2d at 652-53 (applying North Dakota's witness statute[6]); Metcalf, 435 F.2d at 756-57 (applying the federal witness tampering statute[7]).

Interestingly, the Howe court affirmed the defendant's witness tampering conviction even though the defendant threatened the witness *prior* to having been arrested, or charged. 247 N.W.2d at 650, 653. In Howe, the witness signed a "criminal

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115.81. The fact that an instruction is approved by the Washington Pattern Jury Instruction Committee, however, "does not necessarily mean" that it is approved by the Washington Supreme Court, or that it is binding authority. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007); State v. Owens, 180 Wn. App. 846, 855 n.6, 324 P.3d 747 (2014).

[6] North Dakota's statute provides in relevant part, that a person is guilty of witness tampering if he "uses force, threat, deception, or bribery . . . with intent to influence another's testimony in an official proceeding." Howe, 247 N.W.2d at 652 (quoting NDCC § 12.1—09—01). North Dakota has adopted a similarly broad definition of "official proceeding," providing that it is a "proceeding *heard or which may be heard* before any government agency or branch or public servant authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with any such proceeding." NDCC § 12.1—01—04(22) (emphasis added).

[7] The federal witness tampering statute does not contain the words "official proceeding," but instead uses significantly narrower language than Washington's witness tampering statute. Compare 18 U.S.C. § 1503 (1996) (criminalizing tampering with or intimidating "any witness, in any court of the United States or before any United States commissioner or other committing magistrate"), with RCW 9A.72.010 (defining "official proceeding" as "a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath"). Given the federal statute's specific requirement that the witness appear in federal court, it is not surprising that the federal statute cannot be invoked until a complaint has been filed.

complaint" against another person, the defendant found out, and then threatened the witness later that day. Id. at 650. Subsequently, the defendant was arrested and charged by information. Id. The Howe court held that the witness's "signing of the complaint . . . commenced an official proceeding" under the North Dakota statute. Id. at 653.

The facts of Howe mirror the facts of this case, where Eskola provided a statement to police incriminating Rodgers, he found out about it, told Eskola to "[r]etract" the statement that same day, and was later charged. Ex. 4 at 2-4, 10, 12; CP 1-7. Pella's reliance on Howe for the proposition that an "official proceeding" requires the filing of a charging document is surprising given Howe's facts.

In contrast, the second case relied on by the Pella court, United States v. Metcalf, involved strikingly different facts than the case presented here. In Metcalf, the Ninth Circuit reversed the defendant's conviction because there was "absolutely no evidence" from which the defendant could have concluded that the witness would be called to testify. 435 F.2d at 757.

Here, however, there can be no question that Rodgers not only had reason to believe that Eskola would be called to testify at his trial, but that he *actually* believed that would be the case. On

scene when the police arrived, having been arrested, and then booked into jail on burglary charges, Rodgers knew that he was under criminal investigation, and that an official proceeding would occur two days later when a no-contact order would be imposed. 6RP 63; Ex. 4 at 2, 3, and 9 (Rodgers telling Eskola repeatedly that a "no-contact order" would be imposed on "Monday," and that they would have to use "AKA's" and "anonymous names" to remain in contact).

Rodgers also knew that Eskola would be a witness at his trial. Ex. 4 at 4 (Rodgers stating "Baby you filled out the report"), 7 (Rodgers reminding Eskola that their phone call is being "recorded," and that "everything you're sayin' right now is gonna hold merit when I take this to trial"), and 12 (Rodgers telling Eskola, "[I]f I take it to trial they're gonna call you as a witness," and then telling her to "[r]etract" her statement to police). Thus, unlike the defendant in Metcalf, there was overwhelming evidence from which Rodgers could conclude that Eskola would be called to testify at trial.

In any event, Howe and Metcalf ultimately shed little light because they did not construe Washington's witness tampering statute. Although Pella held that an "official proceeding" requires the filing of a complaint, this Court is not bound by that holding.

See State v. Morgan, 163 Wn. App. 341, 351-52, 261 P.3d 167 (2011) (a panel of this Court "respectfully disagree[ing]" with another panel's decision, and reaching the opposite conclusion). The Washington Supreme Court has not addressed this issue.

Pella's sparse analysis should be rejected because it is not based on Washington law, and more importantly, cannot be reconciled with the Legislature's broad definition of "official proceeding." As defined in RCW 9A.72.010(4), "official proceeding" is "a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath." The words "complaint," "information," or "charging document" appear nowhere in the definition.

Rodgers's probable cause hearing, which he referenced as the hearing where a "no-contact order" would be imposed, falls squarely within the definition of an "official proceeding." Ex. 4 at 2. It was a "proceeding heard before . . . [a] judicial . . . official authorized to hear evidence under oath." RCW 9A.72.010(4); see also CrRLJ 3.2.1(g) (establishing the procedure for a probable cause hearing in district court on a felony complaint, which includes taking testimony under oath). Moreover, Rodgers's trial certainly qualifies as an "official proceeding."

Although Rodgers could also have been prosecuted under the "criminal investigation" prong of the witness tampering statute, that possibility does not undermine the State's authority to prosecute Rodgers under the broadly defined "official proceeding" prong. See State v. Smith, 159 Wn.2d 778, 783-84, 154 P.3d 873 (2007) (recognizing that a single criminal offense may be committed by alternative means). The fact that the Legislature added the "criminal investigation" prong after Pella does not mean that the Legislature endorsed Pella's interpretation of the statute.[8] Laws of 1982, 1st Ex. Sess., ch. 47, § 18-19. Indeed, the Legislature did not, and has never, amended its original, broad definition of "official proceeding." RCW 9A.72.010(4).

This case points out the critical distinction between a defendant who is *in custody* and under investigation, and a defendant who is *out of custody* and under investigation. At the time Rodgers called Eskola and asked her to "[r]etract" her

[8] Unlike with later amendments to the witness tampering and intimidation statutes, the Legislature did not include an explicit statement of legislative intent preceding the post-Pella amendments. See, e.g., Laws of 1994, ch. 271, § 201 (finding that "a criminal defendant's admonishment or demand to a witness to 'drop the charges' is intimidating" after the Washington Supreme Court held in State v. Rempel, 114 Wn.2d 77, 83-85, 785 P.23d 1134 (1990) that a defendant who repeatedly asked a victim to "drop the charges" was apologizing to, rather than tampering with, the victim); Laws of 2011, ch. 165, § 1 (clarifying the unit of prosecution for each instance of witness tampering and intimidation "[i]n response to State v. Hall," 168 Wn.2d 726, 230 P.3d 1048 (2011)).

statement, he was being held at the King County Jail awaiting a probable cause hearing, and charging decision. Rodgers's in-custody status, combined with the timing and substance of his calls, provided substantial evidence from which a rational trier of fact could find that Rodgers attempted to induce Eskola to testify falsely because, as the victim who had provided a statement to police incriminating him, she was a person who he reasonably believed was about to be called as witness in an official proceeding.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Rodgers's conviction.

DATED this 29th day of July, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the appellant, at Winklerj@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Curtis Wayne Rodgers, Jr., Cause No. 72712-5, in the Court of Appeals, Division I, 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.

Dated this 29 day of July, 2015.

Name:
Done in Seattle, Washington