SUPREME COURT NO. 99468-4
COURT OF APEALS NO. 79677-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES EDWIN MULLINS,

Petitioner.

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

The Honorable Janet Helson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner James Edwin Mullins, the appellant below, seeks review of the Court of Appeals decision in State v. Mullins, noted at 14 Wn. App. 2d 1065, 2020 WL 6270331, No. 79677-1-I (Oct. 26, 2020), following denial of his motion for reconsideration on December 31, 2020.

B. ISSUES PRESENTED FOR REVIEW

1a. Per the jury instructions in this case and the plain language of RCW 9A.72.120, does the existence of a privilege to withhold testimony negate an element of one means of the witness tampering statute, does the prosecution bear the burden of proving the absence of such privilege beyond a reasonable doubt, and, as was conceded on the record, did the prosecution fail to carry its burden here?

1b. Does the Court of Appeals' failure or refusal to address or even acknowledge the due process element-negation analysis, which Mr. Mullins clearly briefed, warrant review not only on the merits but also as a violation of Mr. Mullins's constitutional right to appeal?

2. Based on trial evidence, the Court of Appeals decision claims a jury could have found the absence of a testimonial privilege, rejecting Mr. Mullins's sufficiency challenge to one of the alternative means of witness tampering. Incongruously, the decision also claims the trial court correctly denied Mr. Mullins's request to present significant

evidence regarding the privilege because it was not relevant. Should review be granted to address the Court of Appeals' self-contradicting denial of Mr. Mullin's right to evidence in his defense?

3. Were four different letters sent in a two-month period, which do not demonstrate the same objective intent and which were sent to intermediaries rather than to the witness, separate acts of witness tampering rather than a continuing course of conduct, such that a unanimity instruction was required as to which of Mr. Mullin's acts constituted witness tampering?

4. The trial court applied the RAP 2.3 discretionary review criteria to its own decision on the spousal privilege issue and denied Mr. Mullins the opportunity to seek discretionary review in the Court of Appeals. Should the Court of Appeals' decision that refuses to acknowledge the record be reviewed despite the likely mootness of this issue?

C. STATEMENT OF THE CASE

After Mr. Mullins's last appeal, his second degree murder and witness tampering convictions were reversed and the case was remanded for a new trial. CP 48-49. The prosecution proceeded to retry Mr. Mullins on both charges. CP 465-66. At retrial, the jury acquitted Mr. Mullins of

second degree murder. CP 556; 2RP[1] 80. The jury convicted Mr. Mullins of witness tampering. CP 558; 2RP 80. The prosecution's sole proof of witness tampering consisted of four letters Mr. Mullins allegedly sent to his common law wife, Norma Silver. Exs. 13-16. Ms. Silver could not recall seeing any of the letters. 3RP 1087, 1161-62.

Before trial, Mr. Mullins moved to assert a claim of spousal privilege to preclude Ms. Silver from testifying against him. CP 50-150. The trial court heard significant testimony regarding the existence of a valid Idaho common law marriage. 3RP 4-157, 196-232. Ultimately, the trial court denied Mr. Mullins's motion, finding he had failed to prove the privilege by a preponderance of the evidence and the state had proved the absence of a privilege by clear, cogent, and convincing evidence. CP 574. Ms. Silver testified at trial. 3RP 1010-30, 1052-71, 1079-93, 1106-31, 1152-81.

At the close of the state's case, the defense moved to dismiss the witness tampering charge, asserting, "Among the elements of [witness tampering] in the statute and reflect in the WPIC to convict instruction is the State has to prove beyond a reasonable doubt that [Mullins and Silver] were

[1] Mr. Mullins references the verbatim reports of proceedings as follows: 1RP—consecutively paginated transcripts dated April 24, June 8, August 3, August 21, August 24, September 28, October 12, October 26, and November 9, 2018; 2RP—consecutively paginated transcripts dated November 14, December 14, December 18, and December 19, 2018, and January 25, 2019; 3RP—consecutively paginated transcripts dated November 15, November 19, November 20, November 27, November 28, December 3, December 4, December 5, December 6, December 10, December 11, December 12, and December 13, 2018; 4RP—transcripts containing closing arguments dated December 14, 2018.

not married or domestic partners." 3RP 1562-63. Defense counsel specifically relied on RCW 5.60.060(1), which establishes Washington's spousal testimonial privilege and also proposed a jury instruction regarding this privilege. 3RP 1566-67; CP 517. The defense raised similar arguments in a motion to arrest judgment after the jury found Mullins guilty of witness tampering. CP 569-71; 2RP 112-13. The trial court denied the motions to dismiss, indicating that it had already ruled on the "legal question" of spousal privilege before trial, finding that the state had proved the absence of any privilege by clear and convincing evidence.. 3RP 1568-69; CP 574.

In addition to the motion to dismiss, the defense also wished to elicit evidence during its case-in-chief regarding the spousal privilege, intending to argue the prosecution had failed to prove the absence of a spousal privilege beyond a reasonable doubt. 3RP 1568-69, 1571-73, 1832-33, 1835. The defense requested an instruction defining privilege. 3RP 1832-35; CP 517. Counsel argued, "The burden of proof is on the State to prove beyond a reasonable doubt there was not a privilege" and "independent of the Court's [pretrial] ruling . . . the jury has to make a determination of the facts and apply the law to the facts." 3RP 1835.

The trial court denied any evidence of spousal privilege beyond "one question to be asked about . . . what [Mr. Mullins] considered their relationship," denied the requested instruction, and precluded defense

counsel from arguing the spousal privilege defense in closing argument. 3RP 1571-73, 1834-35. Nevertheless, the trial court included privilege language in the jury instructions. The court defined the crime to include the language of one of the elements: "without right or privilege to do so, to withhold any testimony, or to absent himself or herself from any official proceedings." CP 546 (emphasis added). The to-convict instruction read, in party, "during a period of time intervening between January 1, 2015 and March 31, 2015, the defendant attempted to induce a person to testify falsely or, without right or privilege to do so, withhold any testimony, or absent himself or herself from any official proceeding . . . .CP 547 (emphasis added).

The trial court provided no unanimity instruction to the jury as to the crime of witness tampering. The prosecution did not elect a particular act that constituted witness tampering, instead just generally referring to the letters Mr. Mullins allegedly sent in summation. 4RP 10-11, 15, 34.

Mr. Mullins appealed, CP 584, contending among other things that the state had failed to prove the absence of privilege beyond a reasonable doubt because it negated an element of witness tampering. The Court of Appeals did not see fit to acknowledge this argument and instead held that the trial court had resolved the privilege issue under ER 104 before trial and the jury could have rationally found the absence of privilege. Slip op., 4-5.

Within barely a page of acknowledging a jury could have found the absence of privilege, the Court of Appeals also rejected Mr. Mullins's claim that he was denied the constitutional right to present privilege evidence in his defense because, somehow, such evidence was irrelevant. Slip op., 5-6. The Court of Appeals also concluded that four separate letters with varying recipients and some not addressed to Ms. Silver at all, were a continuing course of witness tampering conduct making a Petrich[2] unanimity instruction unnecessary. Slip op., 8-9. Finally, the Court of Appeals claimed that "The trial court did not bar Mullins from seekinmg discretionary review or purport to dive[s]t this court of the power to decide whether discretionary review was warranted, which is dishonest because it is so plainly contradicted by the record. Slip op., 12.

D. ARGUMENT IN SUPPORT OF REVIEW

1. **Review should be granted to address the "right or privilege" to withhold testimony as a negating defense of witness tampering, given that the state did not prove the absence of a right or privilege beyond a reasonable doubt**

The crime of witness tampering has three alternative means. State v. Lobe, 140 Wn. App. 897, 902-03, 167 P.3d 627 (2007). The means at issue here is that stated in RCW 9A.72.120(a), "Testify falsely, or without right or privilege to do so, to withhold any testimony." The jury was instructed on

[2] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

this means. CP 547. When the jury is instructed on alternative means, the defendant's right to a unanimous jury is protected by asking "whether sufficient evidence exists to support each of the alternative means presented to the jury."[3] State v. Ortega Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). If the evidence is sufficient to support each of the means, "a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." Id. at 707-08. But "if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." Id. at 708.

In one letter, Mr. Mullins wrote, "I pray my wife will not testify and endanger herself by tricks which would catch her being inaccurate and getting a perjury charge." Ex. 15. He also wrote, "Pray she doesn't commit perjury - A wife does not have to testify against her husband." Ex. 15. In another hodgepodge of materials comprising another exhibit that he sent to a priest, who then forwarded the letter to Ms. Silver, Mr. Mullins wrote, "Would Norma [Silver] like a new pick-up? She only has to tell the truth and write to me." Ex. 14. These are the only statements in the entire record

[3] Appellate courts review challenges to the sufficiency of the evidence by asking whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

that pertain to the veracity of Ms. Silver's testimony and, in each, Mr. Mullins asks her to be truthful. He never asked her to testify falsely. He disagrees with the Court of Appeals that these statements could be viewed as asking Ms. Silver to lie. Slip op., 5.

As for the second part of RCW 9A.72.120(1)(a)—"without right or privilege to do so, to withhold any testimony"—the state failed to prove beyond a reasonable doubt that Mr. Mullins had no privilege to withhold Ms. Silver's testimony, which was its burden.

Under State v. W.R., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014), "when a defense necessarily negates an element of an offense, it is *not* a true affirmative defense, and the legislature may not allocate to the defendant the burden of proving the defense" as a matter of Fourteenth Amendment due process. W.R. contended that the "trial court violated his due process rights when it allocated to him the burden of proving consent, which he maintains negates the element of forcible compulsion" of second degree rape. W.R., 181 Wn.2d at 763. The court agreed, drawing important distinctions between an affirmative defense that merely excuses a defendant's conduct and a defense that negates an element of the offense. Id. at 763-65. "The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist." Id. at 765.

Under the language of the statute, a person is guilty of witness tampering if he attempts to induce a witness to withhold any testimony "without right or privilege to do so." The plain language indicates that, if the person has a right or privilege to induce a witness to withhold any testimony, the crime of witness tampering has not occurred. The right or privilege to induce a witness to withhold testimony necessarily negates the withholding testimony element of witness tampering. Because a right or privilege negates this element of witness tampering, due process requires the State to prove the absence of this right or privilege. W.R., 181 Wn.2d at 763. The state did not even attempt to prove the absence of a right or privilege to withhold Ms. Silver's testimony.

In his sufficiency motions in the trial court, Mr. Mullins acknowledged the state had presented some evidence that he and Ms. Silver were not married. 3RP 1012, 1562. But he contended the state had produced "no evidence whatsoever on the issue of domestic partnership and whether or not they were domestic partners," the absence of which required dismissal. 2RP 112-13; 3RP 1562-63, 1566-67; CP 517, 569-71. The trial court agreed that the state had presented no evidence of a domestic partner privilege: "if it were a factual issue for the jury, there is no evidence that they were not in a domestic partnership." 3RP 1570. The state failed to prove the absence of the negating privilege beyond a reasonable doubt.

The Court of Appeals and the trial court denied the motion because they concluded the trial court had already dealt with the privilege issue before trial under ER 104. Slip op., 5. But the legislature has indicated that a privilege negates an element of the withholding testimony element of crime in the statute's text, presenting a due process concern that an evidentiary rule cannot resolve. And the Court of Appeals acknowledged that the privilege question was one for the jury to determine, given that the jury received instruction on it and could have rationally concluded there was no privilege. Op. at 5-6. So, the privilege issue wasn't in fact resolved under ER 104(a) in Mr. Mullins's trial.

In addition, the standard of proof is different. The trial court determined that Mr. Mullins had failed to prove privilege by a preponderance and that the state had proved the absence of privilege by clear and convincing evidence. CP 574. But the state's burden before the jury was to prove the absence of the privilege beyond a reasonable doubt. The Court of Appeals does not explain how the trial court's pretrial ruling on the privilege controls the jury's determination when the jury is instructed on the issue and the state bears a higher burden of proof before the jury. The Court of Appeals decision fails to employ the basic due process element-negation analysis in conflict with W.R., and its erroneous and incomplete decision should be reviewed under RAP 13.4(b)(1) and (3).

Review should also be granted because the Court of Appeals' refusal to address element negation was a willful denial of Mr. Mullins's right to appeal. The Washington Constitution guarantees the accused "the right to appeal in all cases[.]" CONST. art. I, § 22. Included in the right to appeal is the right to have the appellate court consider the merits of the issues raised on appeal. State v. Rolax, 104 Wn.2d 129, 134-35, 702 P.2d 1185 (1985). Where the nature of the appeal is clear and the relevant issues are briefed along with citations, the Court of Appeals has no lawful basis for failing or refusing to consider the merits of an issue. State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); accord State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998) (Court of Appeals will reach merits if issues are "reasonably clear" from briefing). The Court of Appeals decision conflicts with these cases and the right to appeal, and turns the appellate process into a sham. Review of this issue should be granted under all RAP 13.4(b) criteria.

2. **The Court of Appeals self-contradicting decision that the jury could rationally find the absence or privilege but that privilege evidence was also irrelevant should be reviewed, as it conflicts with constitutional precedent on the right to present evidence in one's defense**

The right to present evidence in one's defense is the very essence of due process in a criminal trial. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). "A defendant's right to an opportunity to be heard in

his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). If the accused brings forth relevant evidence in his defense, "'the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" Id. at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). "The State's interest in excluding prejudicial evidence must also 'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" Id. "[F]or evidence of *high* probative value 'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22.'" Id. (quoting Hudlow, 99 Wn.2d at 16). "[E]vidence of high probative value could not be restricted regardless of how compelling the State's interest may be in doing so would deprive the defendants of the ability to testify to their versions of the incident." Id. at 721.

The defense contended that the prosecution failed to prove the absence of Mr. Mullins's privilege to withhold Silver's testimony. Absent dismissal for insufficient evidence, the defense made clear that it intended to elicit evidence during its case-in-chief regarding the spousal privilege and intended to argue that the prosecution had failed to prove the absence of a

spousal privilege beyond a reasonable doubt in closing argument. 3RP 1568-69, 1571-73, 1832-33, 1835. The defense also asked for an instruction defining privilege in conjunction with the definition and to-convict instructions on witness tampering. 3RP 1832-35; CP 517.

The trial court denied any opportunity to present any evidence of spousal privilege beyond "one question to be asked about how [Mr. Mullins] -- what he considered their relationship," denied Mr. Mullins's request for an instruction defining privilege, and precluded defense counsel from arguing the spousal privilege defense in closing argument. 3RP 1571-73, 1834-35. Despite the court instructing the jury with language that witness tampering is committed when a person attempts to induce a witness "to testify falsely or, without right or privilege to do so, to withhold any testimony," the trial court concluded that it had already ruled that no spousal privilege existed. CP 546-47 (defining witness tampering with privilege language); 3RP 1834-35 (refusing to give definition of privilege because it had already concluded there was no privilege); 3RP 1570 ("I don't believe that [spousal privilege is] a factual issue for the jury"). The Court of Appeals also determined that privilege evidence was irrelevant, despite the jury instructions. Slip op., 5-6.

The trial court deprived Mr. Mullins of his Sixth Amendment and article I, section 22 right to present a defense to the witness tampering charge and the Court of Appeals decision conflicts with constitutional precedent in

concluding otherwise. The jury was instructed that "without a right or privilege to do so" a person could not induce another to withhold any testimony. CP 546-47. The instructions themselves put the issue of a right or privilege to withhold testimony at issue in the case. If the jury had to make any determination on the privilege, which the Court of Appeals decision acknowledges the jury did, then any evidence Mr. Mullins wished to present about the privilege was highly relevant to that determination.[4] Because the Court of Appeals decision conflicts with Washington Supreme Court constitutional precedent on the right to present a defense, review should be granted under RAP 13.4(b)(1) and (3).

3. **The Court of Appeals' continuing course of conduct analysis is inconsistent with the language of the witness tampering statute and in conflict with unanimity precedent**

The Court of Appeals' rejection of Mr. Mullins's unanimity argument based on a continuing course of conduct conflicts with precedent and the language of the statute. The decision should be reviewed under RAP 13.4(b)(1), (3), and (4).

Criminal defendants have a constitutional right to a unanimous verdict by a 12-person jury. CONST. art. I, § 22; State v. Kitchen, 110 Wn.2d at 409. When the state presents evidence of more than one act that could

[4] Mr. Mullins had significant competent evidence supporting the existence of a privilege, which he had presented before trial. 3RP 4-125, 196-23.

form the basis of a single charge, the state must elect which act the jury should rely on in deliberations or the trial court must instruct the jury to be unanimous on a specific act. State v. Petrich, 101 Wn.2d at 572.

Under the witness tampering statute, "each instance of an attempt to tamper with a witness constitutes a separate offense." RCW 9A.72.120(3). The legislature added this language to the statute in response to a Washington Supreme Court decision that construed witness tampering as a continuing course of conduct crime. See State v. Hall, 168 Wn.2d 726, 731-32, 230 P.3d 1048 (2010) (holding witness tampering is course of conduct crime for purpose of double jeopardy); LAWS OF 2011, ch. 165, §§ 1, 3 (codified as amended at RCW 9A.72.120(3) in response to the Hall decision). Thus, each attempted inducement of a witness to testify falsely, withhold testimony without a privilege to do so, or absent himself or herself from official proceedings is a separate act, not a continuing course of conduct.

No unanimity (Petrich) instruction was provided to the jury in this case. Nor did the prosecution tell the jury which of Mullins's alleged witness tampering acts to rely on in its deliberations; it just referred to Mullins's four letters and the statements contained in them generally.[5]

[5] 4RP 10 ("Read the letters he sent her in early 2015, after he had been charged in this case and after he was directed to not have any contact with her."); 4RP 10-11 ("And when you read those letters, look at the way he uses love and faith to try and manipulate her. He pulled

Nevertheless, the Court of Appeals decision concluded that the four separate letters Mr. Mullins sent constituted a continuing course of conduct. Evidence that charged conduct occurred at different times and places suggests that several distinct acts occurred rather than one continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 452 (1989). A series of actions intended to secure the same objective supports finding a continuing course of con duct. Id. The courts use "common sense to determine whether criminal conduct constitutes one continuing course of conduct or several distinct acts." State v. Lee, 12 Wn. App. 2d 378, 392, 460 P.3d 701, review denied, 195 Wn.2d 1032, 468 P.3d 621 (2020). The use of different methods, such as sending letters in addition to other communications or using intermediaries could defeat a continuing course of conduct determination. Hall, 168 Wn.2d at 737.

Not only does the Court of Appeals decision conflict with the language of the witness tampering statute, it also conflicts with basic continuing course of conduct analysis. The letters did not convey the same objective. Exhibit 16, for instance, says nothing about withholding

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every string he could think of in those letters to keep her from telling you the truth."); 4RP 15 ("That with those letters and with his writings, he attempted to induce a witness, Norma Silver, to testify falsely, change her story or to withhold testimony or absent herself from court. 'You don't have to testify, Norma. Do you want a new truck? All you have to do is tell the truth. I'm merciful. I forgive you Norma."); 4RP 34 ("What the law requires is that he attempted to get her to change her story or not come to court. And the letters that he wrote to her in his own words, in his own handwriting, are very clear.").

testimony or absenting a witness from proceedings, and in fact does not convey any clear objective; rather, it discusses several religious themes and expresses sadness at not being permitted to communicate. Exhibit 13 was a letter to Father Timothy, a Catholic priest, asking him to intervene to permit contact. See also Ex. 14 (Fr. Timothy forwarding letter to Ms. Silver). Exhibit 13 discusses the incident giving rise to the murder charge, Mr. Mullins's physical disabilities, significant religious discussion, and an assertion that there "should never have been a restraining order" between Mr. Mullins and Ms. Silver as "man and wife." Ex. 13. Exhibits 14 and 15 contain more explicit statements that Ms. Silver should not have to testify because of the spousal privilege, "we do not need court," and pleading with Ms. Silver to tell the truth about what happened. Viewed in a commonsense manner, each letter sent on a different day conveys different and nonoverlapping intentions rather than a singular objective. They were not a continuing course of conduct.

Also, Exhibits 13 and 14 show that Mr. Mullins used Fr. Timothy as an intermediary; he did not consistently direct his communications to Ms. Silver. Exhibits 15 and 16 might have been addressed to the same address, but they were sent "care of" others. Mr. Mullins's use of various intermediaries to attempt to communicate with Ms. Silver for some

communications suggests that each letter qualifies as a separate act, not a continuing course of conduct. Hall, 168 Wn.2d at 737.

The Court of Appeals decision conflicts with the witness tampering statute and the precedent cited above on the constitutional issue of jury unanimity. Review should be granted under RAP 13.4(b)(1), (2), and (3).

4. **The Court of Appeals' refusal to acknowledge the record with respect to Mr. Mullins's claim about the trial court's denial of discretionary review merits Supreme Court review**

The trial court denied Mr. Mullins discretionary review of the pretrial denial of his spousal privilege claim, applying the RAP 2.3 criteria to its own actions. It stated, "I do not find that the standard is met under RAP 2.3 in terms of staying these proceedings and allowing an interlocutory appeal." 3RP 333 (emphasis added). It also stated, "the fact that I'm denying discretionary review and denying a stay does not mean that Mr. Mullins can't ultimately appeal this decision . . . ." 3RP 333 (emphasis added). The record is clear: the trial court denied discretionary review to Mr. Mullins altogether.

Astoundingly, Court of Appeals claims the trial court "did not bar Mullins from seeking discretionary review or purport to divert this court of the power to decide whether discretionary review was warranted. Rather, the court indicated that a stay was not warranted because it did not see any

legitimate basis for discretionary review under RAP 2.3(b)." Slip op., 12. The Court of Appeals decision is false as the trial court was recorded saying, "I'm denying discretionary review" and "I do not find the standard is met under RAP 2.3 in . . . allowing an interlocutory appeal." This did indeed bar discretionary review and divest the Court of Appeals of the power to decide if review was warranted; the trial court's rulings were not limited to denying a stay. The Court of Appeals' choice to misrepresent the record should be reviewed under RAP 13.4(b)(4). And review of the issue should be granted even if it is moot, as it presents a question of public nature and would disabuse any notion that trial courts may unilaterally deny discretionary review of their own decisions, preventing the same error in the future. See In re Pers. Restraint of Mattson, 166 Wn.2d 730, 736, 214 P.3d 141 (2009) (courts should review matter of continuing public interest, one that presents a question of public nature, needs an authoritative determination for future guidance of public officers, and likely might recur). RAP 13.4(b)(4) merits review of this issue.

E. CONCLUSION

Because he satisfies all RAP 13.4(b) review criteria, Mr. Mullins asks that this petition for review be granted.

DATED this 1st day of February, 2021

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES EDWIN MULLINS, Appellant.	No. 79677-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — James Mullins appeals his conviction upon retrial for tampering with a witness. He asserts that the evidence was insufficient for a jury to find him guilty. He further asserts that the trial court erred by denying his right to present a defense, denying his right to a unanimous jury, violating his right to bail, and denying him the opportunity to seek appellate discretionary review. And in a statement of additional grounds, Mullins asserts the existence of spousal privilege as a defense to the crime. Finding no error, we affirm.

FACTS

On May 9, 2014, James Mullins shot and killed Lazaro Lopez. The only eyewitness to the shooting was Lopez's sister Norma Silver, who had been in a relationship with Mullins for over 25 years. The relationship was an abusive one.

At the time of the shooting, Mullins and Silver were staying with Mullins' mother in Federal Way. Silver stayed up all night cleaning because Mullins' brother was expected to visit that day. In the morning, Mullins scolded Silver because he felt she had not done much. Shortly thereafter, Lopez arrived and

asked to see Silver. This angered Mullins. Mullins berated Lopez for showing up early in the morning. Mullins, who was angry at Lopez for previously stating that the death of Silver's teenage son was God's will, prodded Lopez about Lopez's son's cancer by asking if it was God's will. Silver told Mullins that she was done with their relationship and that she was leaving with Lopez. Lopez put his hand on Mullins' shoulder, told Mullins to restrain himself, and smacked him on the cheek to get him to "snap . . . out of [it]." Mullins pulled Lopez to the ground, and they wrestled. When Lopez got up and stepped back, Mullins pulled out a gun and shot him. Mullins turned to Silver and said, "[Y]ou saw that it was self-defense." Silver responded that it was not self-defense, and Mullins said, "[W]ell, then I'm done for."

The State charged Mullins in an amended information with murder in the second degree. Mullins, in violation of a no-contact order, subsequently sent four letters to Silver which formed the basis for an additional charge of witness tampering. Prior to trial, Mullins moved to assert a claim of spousal testimonial privilege to preclude Silver from testifying against him and to dismiss the witness tampering charge. The court denied Mullins' motion. At the close of the State's evidence, Mullins moved to dismiss the witness tampering charge based on insufficient evidence or, in the alternative, to introduce evidence regarding the existence of spousal privilege. The court denied Mullins' motion to dismiss and denied any evidence of spousal privilege beyond one question regarding what Mullins considered his relationship with Silver to be.

At trial, Silver testified that Mullins did not act in self-defense. Mullins testified in his own defense. He admitted shooting Lopez but claimed that Lopez was trying to kill him and that he aimed at Lopez's leg in self-defense. Mullins further testified that the letters were intended to provide Silver with emotional support, not to prevent her from testifying.

A jury convicted Mullins as charged. This court reversed his convictions on appeal and remanded for a new trial. On December 18, 2018, a second jury acquitted Mullins of murder in the second degree but found him guilty of witness tampering.[1] The court granted Mullins' request for immediate release because he had served all the time a standard range witness tampering charge would entail. Mullins appeals.

ANALYSIS

Sufficiency of the Evidence

Mullins argues that the evidence was insufficient to support his conviction for tampering with a witness. We review a claim of insufficient evidence for "whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003). An appellant challenging the sufficiency of the evidence admits the truth of the State's evidence. State v. Witherspoon, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence

[1] By special verdict, the jury rejected Mullins' self-defense claim.

is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of witness credibility. Witherspoon, 180 Wn.2d at 883.

Witness tampering is a crime that may be committed by three alternative means: attempting to induce a person to (1) testify falsely or withhold testimony without privilege to do so, (2) absent himself or herself from an official proceeding, or (3) withhold information from a law enforcement agency. RCW 9A.72.120(1)(a)-(c); State v. Lobe, 140 Wn. App. 897, 902-03, 167 P.3d 627 (2007). Here, the jury was instructed that to convict Mullins of witness tampering, it needed to find beyond a reasonable doubt that he "attempted to induce a person to testify falsely or, without right or privilege to do so, withhold any testimony, or absent himself or herself from any official proceeding."

Mullins contends that the State failed to present evidence on the alternative means that he attempted to induce Silver to "testify falsely or, without right or privilege to do so, withhold any testimony."[2] To the contrary, he asserts that the letters he sent to Silver show that he repeatedly asked Silver to tell the truth and expressed concerns that testifying falsely could constitute perjury. We disagree. Although Mullins never expressly instructed Silver to lie, the letters demonstrate that Mullins attempted to persuade her to go along with his version of the facts by referencing their religious beliefs and proclaiming his love for her while repeatedly asserting that he acted in self-defense, claiming that she did not

[2] Mullins concedes that a rational juror could have concluded that he attempted to induce Silver to absent herself from court proceedings, contrary to RCW 9A.72.120(1)(b).

witness the incident, and declaring that she was his common law wife. In addition, Mullins insinuated that Silver would benefit by testifying in his favor or suffer consequences if she did not. For example, in one letter, Mullins included an advertisement for a $22,000 Silverado pickup truck along with the statement: "Would Norma like a New Pick-up? She only has to tell the truth and write to me!" In another letter, Mullins asserted that Silver would be guilty of several felonies if she was not his wife and stated, "I pray my wife will not testify and endanger herself by tricks which would catch her being inaccurate and getting a perjury charge." Viewing this evidence in the light most favorable to the State, a rational trier of fact could find that Mullins was attempting to persuade Silver to lie for him.

Mullins further argues that due process required the State to introduce evidence at trial to affirmatively prove that he was "without right or privilege" to withhold Silver's testimony. Mullins is incorrect. The spousal testimonial privilege prevents one spouse from being examined as a witness for or against the other spouse without consent. RCW 5.60.060(1). Under ER 104(a), "preliminary questions concerning . . . the existence of a privilege . . . shall be determined by the court." Here, prior to trial, Mullins asserted the privilege and claimed that Silver could not testify against him because she was his common law wife. After stating that the existence of the privilege was a legal issue, the court ruled that it did not exist in Mullins' case. As a result, Silver testified at trial against Mullins. Given the fact that Silver testified at trial, in addition to language in the letters indicating that Mullins sought to persuade Silver of the existence of

a common law marriage, a rational jury could find that Mullins had no right or privilege to prevent Silver from testifying.

Right To Present a Defense

Mullins argues that the trial court violated his constitutional right to present a defense when it denied his request to introduce evidence and argument at trial that he believed Silver was his common law wife. This court reviews an alleged denial of the constitutional right to present a defense de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

The Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution guarantee the right to present a defense. State v. Burnam, 4 Wn. App. 2d 368, 375-76, 421 P.3d 977, review denied, 192 Wn.2d 1003 (2018). "'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" Jones, 168 Wn.2d at 720 (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). However, the right is not absolute. "'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" State v. Lizarraga, 191 Wn. App. 530, 553, 364 P.3d 810 (2015) (alteration in original) (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)). "[A] defendant's interest in presenting relevant evidence may 'bow to accommodate other legitimate interests in the criminal trial process.'" Lizarraga, 191 Wn. App. at 553 (internal quotation marks omitted)

(quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)).

Here, prior to trial, the court denied Mullins' motion to assert spousal privilege. Mullins' claim was based primarily on the alleged existence of a common law marriage in Idaho between Mullins and Silver. The court denied Mullins' motion, finding no credible evidence of a common law marriage or domestic partnership. Mullins has not challenged this ruling. Because the court had already ruled that no spousal privilege existed, evidence seeking to prove the alleged existence of the privilege was not relevant. "Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence." Jones, 168 Wn.2d at 720 (emphasis omitted). The exclusion of such evidence did not violate Mullins' right to present a defense.

Unanimous Jury

Mullins asserts that the trial court violated his constitutional right to be convicted by a unanimous jury because each of the four letters that formed the basis for his witness tampering conviction was a distinct criminal act and the State did not elect which one it was relying on to support the witness tampering charge. The State responds that a unanimity instruction was not required because the letters constituted a continual course of conduct. The State is correct.

We review the adequacy of jury instructions de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the

case, and properly inform the jury of applicable law when read as a whole. State v. Boyd, 137 Wn. App. 910, 922, 155 P.3d 188 (2007).

In an alternative means case, where a single offense may be committed in more than one way, the jury must be unanimous as to the act constituting the crime charged. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988)). "When the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act." State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). However, no unanimity instruction is required when the evidence demonstrates a "continuing course of conduct" rather than several distinct acts. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). "We use common sense to determine whether criminal conduct constitutes one continuing course of conduct or several distinct acts." State v. Lee, 12 Wn. App. 2d 378, 393, 460 P.3d 701, review denied, 195 Wn.2d 1032 (2020). "We evaluate whether the evidence shows conduct occurring at one place or at many places, within a brief or long period of time, to one or multiple different victims, and whether the conduct was intended to achieve a single or multiple different objectives." Lee, 12 Wn. App. 2d at 393 (footnote omitted).

Here, Mullins wrote each of the four letters to Silver from jail during a two-month period pending trial. Each letter had the same objective, which was to persuade Silver not to cooperate with the State in its prosecution of Mullins for

second degree murder. When viewed in a common sense matter, these multiple acts formed a continual course of conduct. No unanimity instruction was required.

Right to Bail

Mullins asserts that the trial court violated his constitutional right to bail following reversal of his convictions on appeal and remand for retrial.[3] He concedes that the issue is moot because the trial court released him immediately after the jury acquitted him of second degree murder. He nevertheless contends that this court should review the issue because the circumstances present a matter of continuing and substantial public interest. We disagree.

An issue is technically moot if the appellate court can no longer provide effective relief. State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). An appellate court may nevertheless review a moot issue if it presents a matter of "continuing and substantial public interest." State v. Beaver, 184 Wn.2d 321, 330, 358 P.3d 385 (2015). In making this determination, we consider three factors: "'[(1)] the public or private nature of the question presented, [(2)] the desirability of an authoritative determination for the future guidance of public officers, and [(3)] the likelihood of future recurrence of the question.'" Hunley, 175 Wn.2d at 907 (alterations in original) (internal quotation marks omitted) (quoting In re Pers. Restraint of Mattson, 166 Wn.2d 730, 736, 214 P.3d 141

[3] Article I, section 20 of the Washington State Constitution provides that "[a]ll persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great."

(2009)). "This exception is not used in cases that are limited to their specific facts." Beaver, 184 Wn.2d at 331.

A review of the record indicates that the circumstances Mullins now challenges were fact-specific and unlikely to recur. Following Mullins' preliminary hearing and finding of probable cause in 2014, bail on the second degree murder charge was set at $1,000,000 cash or surety bond. After this court reversed and remanded his convictions for a new trial, a transport order directing that Mullins be transported from the Department of Corrections (DOC) to the King County Correctional Facility was entered on March 28, 2018. From April through October 2018, Mullins appeared in court multiple times but did not request a bail hearing. At an omnibus hearing on October 12, 2018, the prosecutor noted that when Mullins was transported back from DOC on remand, he was "booked into jail on a no bail warrant, DOC hold." The prosecutor therefore asked the court to reinstate bail at $1,000,000.[4] Mullins objected to any bail being set. The court signed an order reinstating bail and allowing Mullins to request a different amount at a bond hearing.

A few days prior to trial, Mullins filed a motion to strike language in the transport order indicating that he was to be returned to DOC after his case was over. The prosecutor explained that Mullins was being held solely on the murder charge, not on the DOC transport order. On this basis, the court denied Mullins' motion because the problem had been resolved and it appeared the State had

[4] There is no DOC warrant in the record. The prosecutor likely was referencing the transport order.

not acted in bad faith. After Mullins was acquitted on the murder charge and found guilty of witness tampering, the court granted his motion for immediate release because he had served time beyond that required for a standard range sentence on the latter charge.

Although there appears to have been some confusion regarding the effect of the transport order, there is no indication that the situation is likely to recur. Moreover, the record does not support Mullins' assertion that the court denied him any opportunity for bail from April through October 2018. Mullins never moved for reconsideration of bail after his preliminary appearance as provided by CrR 3.2(j)(1). And nothing in the transport order restricted Mullins from requesting or posting bail. Judicial review of this moot issue is unwarranted.

Discretionary Review

Mullins argues that the trial court erred by denying him the opportunity to seek discretionary review of its pretrial ruling concluding that he failed to establish that Silver was his common law wife. After the trial court issued its ruling, Mullins stated, "I'd like to appeal this thing." Defense counsel informed the court that he was not retained to represent Mullins in an interlocutory appeal and questioned whether the issue met the requirements for discretionary review. He nevertheless requested a stay of the proceedings to allow Mullins to pursue an interlocutory appeal under RAP 2.3.[5] The court ruled that "the standard is [not]

[5] Under RAP 2.3(a)-(c), the appellate court may grant discretionary review if the superior court has committed an "obvious error," a "probable error [which] . . . substantially alters the status quo," or "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court."

met under RAP 2.3 in terms of staying these proceedings and allowing an interlocutory appeal." The court noted that Mullins retained the right to challenge the pretrial ruling on appeal.

Mullins does not disagree that the court had discretion to refuse his request for a stay pending discretionary review. Rather, he asserts that the trial court lacked authority to unilaterally deny him the opportunity to seek discretionary review. Mullins concedes that the issue is moot given that he did not challenge the trial court's denial of his spousal privilege motion on appeal, but asks this court to review the issue as a matter of continuing and substantial public importance. The record does not support Mullins' claim. The trial court did not bar Mullins from seeking discretionary review or purport to divert this court of the power to decide whether discretionary review was warranted. Rather, the court indicated that a stay was not warranted because it did not see any legitimate basis for discretionary review under RAP 2.3(b).

Statement of Additional Grounds

Mullins first asserts that credible evidence supported the existence of an Idaho-based common law marriage with Silver. He cites State v. Denton, 97 Wn. App. 267, 270-71, 983 P.2d 693 (1999), in support of the proposition that failure to procure a marriage license does not invalidate a ceremonial marriage. But the trial court found Mullins' testimony regarding the existence of a common law marriage not credible. It further found credible Silver's testimony indicating that she never agreed to be married to Mullins. Such determinations are for the trier

of fact and are not subject to review. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Mullins further asserts the existence of a legally valid Native American marriage. Mullins provides no evidence or authority in support of this assertion.

Mullins next claims that the trial court was judicially estopped from concluding that no common law marriage existed because a Washington court in 2001 agreed that he and Silver were married. But the trial court judge considered this evidence and gave it little or no weight because there was no evidence that a judge "made a considered decision on that issue that would be binding on this court." Mullins provides no evidence indicating that this ruling was in error.

Mullins further argues that he was illegally held for seven months without opportunity for a bail hearing, thereby preventing him from obtaining more evidence that would have proved the existence of a common law marriage. He asserts that the prosecutor deliberately entered false information into the King County Correctional Facility computer about the reason he was being held in King County Correctional Facility in order to prevent him from obtaining a bail hearing. The record does not support this assertion.

Affirmed.

WE CONCUR:

APPENDIX B

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES EDWIN MULLINS,

Appellant.

No. 79677-1-I

ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, James Edwin Mullins, has filed a motion for reconsideration of the opinion filed on October 26, 2020. Respondent, State of Washington, has filed an answer to appellant's motion for reconsideration. The panel has determined that appellant's motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE COURT:

Judge

NIELSEN KOCH P.L.L.C.

February 01, 2021 - 4:04 PM

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