

62435-1  
HEK

62435-1

NO. 62435-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JO WAYNE AARHUS,

Appellant.

2006 AUG -4 PM 4:44  
COURT OF APPEALS  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE DEAN LUM

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DENNIS J. McCURDY  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	5
1. THE LEGISLATURE DID NOT INTEND FOR A DEFENDANT TO BE ABLE TO ENGAGE IN MULTIPLE ATTEMPTS TO TAMPER WITH A WITNESS AND OBSTRUCT JUSTICE AND FACE BUT ONE CHARGE.....	5
2. THE DEFENDANT'S WITNESS TAMPERING CONVICTIONS DO NOT ENCOMPASS THE SAME CRIMINAL CONDUCT, AND THE DEFENDANT IS BARRED FROM RAISING THIS ISSUE ON APPEAL.....	17
3. THE DEFENDANT HAS FAILED TO PROVE THE PROSECUTOR COMMITTED MISCONDUCT .....	23
D. <u>CONCLUSION</u> .....	28

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bell v. United States, 349 U.S. 81,  
75 S. Ct. 620, 99 L. Ed. 905 (1955)..... 6, 14

Callanan v. United States, 364 U.S. 587,  
81 S. Ct. 321, 5 L. Ed. 2d 312 (1961)..... 15

Ebeling v. Morgan, 237 U.S. 625,  
35 S. Ct. 710, 59 L. Ed. 1151 (1915)..... 8

Ex parte Snow, 120 U.S. 274,  
7 S. Ct. 556, 30 L. Ed. 658 (1887)..... 7, 8

Morgan v. Bennett, 204 F.3d 360 (2d Cir.)  
cert. denied, 531 U.S. 819 (2000) ..... 10

United States v. Garrett, 471 U.S. 773,  
105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985)..... 15

Washington State:

In re Connick, 144 Wn.2d 442,  
28 P.3d 729 (2001)..... 19

In re Goodwin, 146 Wn.2d 861,  
50 P.3d 618 (2002)..... 18

In re Shale, 160 Wn.2d 489,  
158 P.3d 588 (2007)..... 18, 19

Palmer v. Jensen, 81 Wn. App. 148,  
913 P.2d 413 (1996) rev on other ground,  
132 Wn.2d 193 (1997)..... 27

State v. Adel, 136 Wn.2d 629,  
965 P.2d 1072 (1998)..... 6

<u>State v. Alvarez</u> , 74 Wn. App. 250, 872 P.2d 1123 (1994), <u>aff'd</u> , 128 Wn.2d 1, 904 P.2d 754 (1995) .....	9
<u>State v. Anderson</u> , 141 Wn.2d 357, 5 P.3d 1247 (2000).....	9
<u>State v. Bryant</u> , 89 Wn. App. 857, 950 P.2d 1004 (1998), <u>rev. denied</u> , 137 Wn.2d 1017 (1999).....	24
<u>State v. C.G.</u> , 114 Wn. App. 101, 55 P.3d 1204 (2002), <u>overruled on other grounds</u> , 150 Wn.2d 604, 80 P.3d 594 (2003).....	16
<u>State v. Contreras</u> , 124 Wn.2d 741, 880 P.2d 1000 (1994).....	16
<u>State v. Elliot</u> , 114 Wn.2d 6, 785 P.2d 440, <u>cert. denied</u> , 498 U.S. 838 (1990) .....	20
<u>State v. Fredrick</u> , 123 Wn. App. 347, 97 P.3d 47 (2004).....	26, 27
<u>State v. French</u> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	15, 21
<u>State v. Gocken</u> , 127 Wn.2d 95, 896 P.2d 1267 (1995).....	6
<u>State v. Grantham</u> , 84 Wn. App. 854, 932 P.2d 657 (1997).....	21
<u>State v. Guizzotti</u> , 60 Wn. App. 289, 803 P.2d 808, <u>rev. denied</u> , 116 Wn.2d 1026 (1991).....	27
<u>State v. Hall</u> , 147 Wn. App. 485, 196 P.3d 151 (2008), <u>rev. granted</u> , 166 Wn.2d 1005 (2009).....	5, 9, 10, 16

<u>State v. Handran</u> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	13
<u>State v. Harvey</u> , 34 Wn. App. 737, 664 P.2d 1281, <u>rev. denied</u> , 100 Wn.2d 1008 (1983).....	24
<u>State v. Jackson</u> , ___ Wn. App. ___, 209 P.3d 553 (2009).....	19
<u>State v. Lessley</u> , 118 Wn.2d 773, 827 P.2d 996 (1992).....	20
<u>State v. Lewis</u> , 115 Wn.2d 294, 797 P.2d 1141 (1990).....	12
<u>State v. Marko</u> , 107 Wn. App. 215, 27 P.3d 228 (2001).....	13
<u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009).....	19, 20
<u>State v. Nitsch</u> , 100 Wn. App. 512, 997 P.2d 1000, <u>rev. denied</u> , 141 Wn.2d 1030 (2000).....	19
<u>State v. Ose</u> , 156 Wn.2d 140, 124 P.3d 635 (2005).....	6
<u>State v. Palmer</u> , 95 Wn. App. 187, 975 P.2d 1038 (1999).....	21
<u>State v. Porter</u> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	21
<u>State v. Price</u> , 103 Wn. App. 845, 14 P.3d 841 (2000), <u>rev. denied</u> , 143 Wn.2d 1014 (2001).....	21
<u>State v. Reed</u> , 102 Wn.2d 140, 685 P.2d 699 (1984).....	24, 27

<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993).....	28
<u>State v. Sutherby</u> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	14
<u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	15, 16
<u>State v. Victoria</u> , 150 Wn. App. 63, 206 P.3d 694 (2009).....	10
 <u>Other Jurisdictions:</u>	
<u>State v. Moore</u> , 713 N.W.2d 131 (Wis.), <u>rev. denied</u> , 718 N.W.2d 724 (2006) .....	11

### Constitutional Provisions

#### Federal:

U.S. Const. amend. V .....	6
----------------------------	---

#### Washington State:

Const. art. I, § 9.....	6
-------------------------	---

### Statutes

#### Washington State:

Laws of 1994, ch. 271, § 201 .....	10
Laws of 1994, ch. 271, § 205 .....	10

Laws of 1997, ch. 29, § 1 .....	10
RCW 9.46.0269.....	9
RCW 9.46.110.....	9
RCW 9.94A.411 .....	12
RCW 9.94A.589 .....	17, 20
RCW 9A.32.055 .....	9
RCW 9A.72.120 .....	7
RCW 26.50.110.....	9

Other Jurisdictions:

Wis. Stat. § 940.42.....	11
--------------------------	----

Other Authorities

Merriam-Webster's Collegiate Dictionary, 11 <sup>th</sup> Edition (2003) .....	25, 26
---	--------

**A. ISSUES PRESENTED**

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

2. Are the defendant's separate phone calls attempting to tamper with a witness the "same criminal conduct" for scoring purposes?

3. A party is free to critique an opposing party's strategy and theory of the case in closing. Did the prosecutor commit flagrant misconduct requiring reversal of the defendant's conviction by using the terms "red herring" and "semantics" in discussing defense counsel's trial strategy?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

A jury found the defendant guilty of second-degree assault, three counts of witness tampering, and four counts of misdemeanor violation of a court order. CP 49-56. The defendant received a

standard range sentence of 16 months for his second-degree assault conviction, concurrent to 12 month concurrent sentences for his witness tampering convictions. CP 98-105. The defendant received 12 month suspended sentences on his misdemeanor violation of a court order convictions. CP 106-08.

## **2. SUBSTANTIVE FACTS.**

Nineteen-year-old Jessica Kim has a six month old baby with the defendant. 4RP 2-4. At the time of this incident, Jessica was attempting to enroll back in school to earn her GED. 4RP 4. On May 6, 2008, upon returning from school, Jessica found the defendant outside her apartment drinking beer and barbecuing with friends. 4RP 7. This angered Jessica because the defendant had entered her apartment and was using her belongings. 4RP 8.

Jessica, and the friend she was with, Cindy Moy, entered the apartment, followed by the defendant. 4RP 5, 10. An argument ensued, with Jessica telling the defendant to gather his possessions and leave, and the defendant calling Jessica a bitch and telling her to leave his things alone. 4RP 10-14. At one point,

Jessica threw some of the defendant's possessions out the door.

4RP 10-14. The two also pushed each other on the stairs.

4RP 13.

After this initial confrontation, Jessica went back inside her apartment and called the police. 4RP 14-15. However, before Jessica could provide the 911 operator with any information, the defendant came back into the apartment prompting Jessica to hang up the phone. 4RP 15-16, 22. In fear, Jessica then barricaded herself in her bedroom. 4RP 17-18. Undeterred, the defendant was able to push the door in, breaking the door and creating two holes in the wall. 4RP 17-20, 39, 41, 46. He then attacked Jessica. 4RP 17-20, 39, 41, 46.

With two hands on her neck, the defendant pressed Jessica against the wall. 4RP 19. Jessica described being unable to breathe, "kind of" blacking out, and then dropping to the floor. 4RP 19-20. Jessica admitted to hitting the defendant when he burst into the bedroom and after he choked her. 4RP 19-20. Jessica also admitted that she pointed a screwdriver at the defendant "to protect" herself. 4RP 59.

Shortly thereafter, after the defendant had left the apartment again, he barged in, breaking the front door lock and damaging the

molding, and attacked Jessica again. 4RP 22; 5RP 46. This time the defendant held Jessica by the neck with one hand until Cindy intervened. 4RP 23-25. As the defendant struck Cindy, Jessica escaped out the front door and called 911. 4RP 25. Before the police arrived, the defendant had fled. 4RP 27, 29. Jessica had bruising on her neck, an injury to her forehead and, her throat hurt. 4RP 27; 5RP 51-53. Cindy Moy testified and confirmed the two separate assaults (although in reverse order), and confirmed that the defendant twice put his hands around Jessica's neck, although it appeared to Cindy that Jessica could breathe while this was happening. 4RP 69-70, 77-78, 85.

Later, after being booked into King County Jail, the defendant called Jessica multiple times from the jail and variously instructed Jessica to come to court and lie or not to come to court at all. 4RP 61-62; 5RP 67-68, 70. The witness tampering charges were based on multiple calls to Jessica made on May 11, 2008. See 5RP 6-15; Exh. 39; Exh. 46.

The defendant did not testify or present any witnesses. Additional facts are included in the sections they pertain.

**C. ARGUMENT**

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

The defendant contends that all of his convictions for witness tampering, save one, must be vacated because, even though each conviction was for a separate attempt to tamper with a witness, all his attempts constitute but one "unit of prosecution." He claims that this Court's decision in State v. Hall,<sup>1</sup> is wrong. The defendant's argument should be rejected. What constitutes a "unit of prosecution" is a pure question of legislative intent. The legislature could not have intended to allow a defendant to continue to attempt to tamper with a witness with impunity, facing but a single charge regardless of the number of acts he commits. The unit of prosecution for witness tampering, supported by the statutory language and legislative intent, is each attempt to tamper with a witness.

The double jeopardy clause of the United States Constitution guarantees that no person shall "be subject for the same offense to

---

<sup>1</sup> State v. Hall, 147 Wn. App. 485, 196 P.3d 151 (2008), rev. granted, 166 Wn.2d 1005 (2009).

twice be put in jeopardy of life or limb." U.S. Const. amend. V. The Washington Constitution offers the same protection. Const. art. I, § 9; State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

When a defendant is convicted of violating one statute multiple times, the proper double jeopardy inquiry is what "unit of prosecution" has the legislature intended as the punishable act under the specific criminal statute. State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998); Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). When the legislature defines the scope of a criminal act, double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime, or "unit of prosecution." Adel, at 634. Thus, the question here is what act or course of conduct has the legislature defined as the punishable act for tampering with a witness.

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

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

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

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

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

RCW 9A.72.120(1).

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

In Snow, the defendant was convicted of three counts of bigamy, each count identical in all respects except that each count covered a different time span that was part of a continuous period

of time. Snow, at 276. The Court noted that bigamy is "inherently a continuous offense, having duration, and not an offense consisting of an isolated act." Snow, at 281. Because bigamy is a continuing offense, the Court held that the defendant committed but one offense. The Court specifically distinguished between statutes aimed at offenses continuous in character versus statutes violated *uno actu*. Snow, at 286.

In contrast, in Ebeling v. Morgan, 237 U.S. 625, 35 S. Ct. 710, 59 L. Ed. 1151 (1915), the Court found that the defendant's seven counts of feloniously injuring a mail bag were not one continuous offense, noting that each offense was complete irrespective of any attack upon any other mail bag, even though the crimes were successively committed on the same rail car on the same day. Morgan, 237 U.S. at 629. The Court distinguished "continuous offenses where the crime is necessarily, and because of its nature, a single one, though committed over a period of time." Morgan, at 629-30.

A conviction for tampering with a witness does not depend on the success of the attempt. By the very language of the statute, it is the attempt to tamper, not the achievement of tampering, that constitutes the crime. Tampering is a choate crime, complete when

a single attempt of tampering is made. There is nothing in the statutory language or in the nature of the crime that suggests the crime is a continuing offense.

In addition, had the legislature intended witness tampering to be a continuing offense, it certainly could have written the statute to convey such a purpose. For example, the legislature could have dictated a punishable offense as someone "who engages in" witness tampering.<sup>2</sup> See State v. Anderson, 141 Wn.2d 357, 368-69, 5 P.3d 1247 (2000) (use of certain language in one instance, and different language in another, evidences different legislative intent); see also State v. Alvarez, 74 Wn. App. 250, 260, 872 P.2d 1123 (1994), (omission of "course of conduct" language in criminal anti-harassment statute indicated legislature consciously chose to criminalize a single act rather than a course of conduct), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995).

This Court's unit of prosecution determination in Hall also reflects the paramount importance the legislature ascribed in

---

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

enacting and amending the witness tampering statute. The legislature made specific findings that "tampering with and/or intimidating witnesses or other persons with information relevant to a present or future criminal. . .proceeding are grave offenses which adversely impact the state's ability to promote public safety and prosecute criminal behavior." Laws of 1994, ch. 271, § 201. Over the years, the legislature has broadened the scope of the statute to cover child abuse investigations, neglect investigations, and former witnesses.<sup>3</sup> Laws of 1994, ch. 271, § 205; Laws of 1997, ch. 29, § 1.

While the unit of prosecution adopted by this Court in Hall satisfies the purposes of the statute, the defendant's desired interpretation does not. Allowing a defendant to continue attempting to tamper with a witness, even after his initial attempts are discovered, with no additional sanction under the statute, leaves the target of the tampering more at risk to potentially

---

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

increasing pressures and coercion, and it increases the likelihood that the tampering will have its intended effect to thwart justice.

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

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

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

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

While this Court's unit of prosecution finding promotes the legislative purposes of the statute, the dire consequences posited by the defendant are not realistic. The defendant presents the

---

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

scare tactic scenario that the state may charge an individual *ad infinitum* for each time he or she requests a potential witness to do one of the listed actions, presumably even in the same sentence, meeting, letter, or phone call.

First, the number of charges any defendant potentially faces is based on the number of criminal acts he engages in. If a defendant assaults or attempts to assault the same victim on five separate occasions, he potentially faces five separate counts--not one count just because attacked the same victim. Thus, it is a defendant's actions that dictate the number of potential charges he may face.

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

Third, the dire consequences suggested by the defendant are ameliorated by the application of the doctrine of "continuing course of conduct." See State v. Handran, 113 Wn.2d 11, 17-18, 775 P.2d 453 (1989). When the State presents evidence of several acts that constitute a "continuing course of conduct," there is but one act for charging purposes. Handran, 113 Wn.2d at 17. To determine whether multiple acts constitute a continuing course of conduct, the court considers the time frame in which the acts were committed, where the conduct occurred, whether the same criminal motive was involved, and whether there was more than one victim. Handran, at 17-18. The facts must be evaluated in a common sense manner. Handran, at 17-18 (two distinct assaults occurring in one place, over a short period of time, and involving the same victim considered but one continuing act); also State v. Marko, 107 Wn. App. 215, 231-32, 27 P.3d 228 (2001) (multiple threats over a 90-minute period of time held to be a continuing course of conduct and one criminal act).

The defendant's dire prediction that multiple convictions might be obtained for each attempt uttered is simply not supportable. Such attempts would constitute but one act. In contrast, where a defendant commits separate distinct acts at

separate times, he properly faces multiple charges, just as any defendant would face multiple charges for committing crimes at different times.

The defendant's citation to cases involving statutes relating to events occurring at a particular moment in time are not helpful. The defendant cites to State v. Sutherby,<sup>5</sup> and Bell v. United States, supra, in support of his argument. Sutherby involved the unit of prosecution for possession of child pornography and whether Sutherby's single act of possessing pornography could be broken up into multiple counts based on the number of photos he possessed. Bell involved the transporting of women for the purposes of prostitution and whether Bell's single act of transporting two women in one car at one time could be broken up into two counts. Both courts rejected the argument that the statutes allowed the acts to be broken up and separately charged in such a manner.

However, Sutherby and Bell pertain to crimes committed at a single moment in time, thus, the unit or prosecution analysis of these cases is of little help. There can be no question that if Sutherby or Bell had committed another violation of the respective

---

<sup>5</sup> State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009).

statutes the following day, each would have been subjected to additional criminal charges.

The more appropriate type of case to analogize is shown by State v. Tili,<sup>6</sup> and State v. French,<sup>7</sup> cases involving acts occurring at differing times. Tili was convicted of three counts of rape for three acts of penetration occurring during a single evening. The Supreme Court rejected Tili's argument that his actions constituted but one unit of prosecution. Likewise, the Court rejected French's argument that his multiple acts of molestation of the same victim constituted but one unit of prosecution.<sup>8</sup> It is these cases, cases that demonstrate that each single act, like each attempt to tamper with a witness, can be punished separately.

Finally, the defendant's hopeful reliance upon the rule of lenity is misplaced. The rule of lenity serves only as an aid for resolving an ambiguity; it is not used to beget one. Callanan v. United States, 364 U.S. 587, 596, 81 S. Ct. 321, 5 L. Ed. 2d 312 (1961). A statute is not ambiguous when the alternative reading is

---

<sup>6</sup> State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999).

<sup>7</sup> State v. French, 157 Wn.2d 593, 141 P.3d 54 (2006).

<sup>8</sup> See also United States v. Garrett, 471 U.S. 773, 778, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985) (nothing prevents Congress from punishing separately each step leading to consummation of a completed result).

strained. State v. C.G., 114 Wn. App. 101, 55 P.3d 1204 (2002),  
overruled on other grounds, 150 Wn.2d 604, 80 P.3d 594 (2003);  
Tilj, 139 Wn.2d at 115. Courts interpret statutes to effectuate the  
legislative intent and to avoid unlikely, strange or absurd results.  
State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

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

**2. THE DEFENDANT'S WITNESS TAMPERING  
CONVICTIONS DO NOT ENCOMPASS THE SAME  
CRIMINAL CONDUCT, AND THE DEFENDANT IS  
BARRED FROM RAISING THIS ISSUE ON  
APPEAL.**

The defendant argues that the sentencing court erred by not holding that his three witness tampering convictions were the "same criminal conduct" under RCW 9.94A.589(1)(a). However, the defendant did not raise this issue at sentencing, and in fact, he affirmatively agreed to his offender score. Thus, he has waived the right to appeal. In any event, his convictions are not the "same criminal conduct."

In pertinent part, RCW 9.94A.589 provides that,

whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offense encompass the same criminal conduct then those current offenses shall be counted as one crime.

RCW 9.94A.589(1)(a).

"Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

Here, the sentencing court sentenced the defendant on each count using an offender score of three, one point for each of the defendant's other current convictions. CP 99. The defendant affirmed that this was what he believed his offender score to be. CP \_\_\_\_, Sub # \_\_\_\_.<sup>9</sup>

The Supreme Court has held that certain alleged sentencing errors can be waived. The Court has stated "that waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." In re Shale, 160 Wn.2d 489, 495, 158 P.3d 588 (2007) (citing In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)).

In Shale, the defendant was informed when he plead guilty that the State calculated his offender score as a nine, like here, based solely on his current convictions. Shale, 160 Wn.2d at 495. Also like here, Shale argued on appeal that the sentencing court erroneously failed to treat some of his crimes as the "same criminal conduct," even though he never asked the sentencing court to

---

<sup>9</sup> See Appendix A, Defense Presentence Report. The defendant's trial counsel submitted a Defense Presentence Report to the sentencing court and prosecutor, but did not submit a copy for the Superior Court file. An agreed order was entered by appellate counsel and the State to enter the first two pages of the Defense Presentence Report in the Superior Court file. At the time of the filing of this brief, the order had not yet appeared on ECR. The order and report will be designated to this Court as soon as a copy appears in ECR.

make this part factual determination. Id. The Supreme Court rejected Shale's claim that he could raise a "same criminal conduct" claim for the first time on appeal. Shale, at 495; see also, State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000) (cited with approval in Shale at 494-95, the same criminal conduct inquiry involves factual determinations and the exercise of discretion, and the "failure to identify a factual dispute for the court's resolution and... [the] failure to request an exercise of the court's discretion," waives the challenge to the offender score); State v. Jackson, \_\_\_ Wn. App. \_\_\_, 209 P.3d 553 (2009) (Jackson's failure to raise a same criminal conduct issue at sentencing constitutes waiver of the right to appeal); In re Connick, 144 Wn.2d 442, 28 P.3d 729 (2001) (by stipulating to his offender score, Connick waived any same criminal conduct challenge).

Shale, Nitsch, Connick, and Jackson are directly on point. A defendant cannot raise a same criminal conduct claim on appeal when he agreed to his offender score or did not alert the sentencing court to the factual discretionary issues involved. Ignoring this entire line of cases, the defendant cites to State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009) and argues that he can raise a same criminal conduct issue for the first time on appeal. This is

incorrect. Mendoza is not a "same criminal conduct" case. Rather, Mendoza dealt with the State's burden of proving prior criminal history at sentencing and whether that issue could be raised for the first time on appeal--issues not present here. Here, the issue at sentencing was how to score current criminal convictions of which the defendant had just been convicted, not their existence, in a situation wherein the defendant not only failed to raise the issue below, but affirmatively agreed to his offender score. Thus, the "same criminal conduct" issue is waived.

In any event, the crimes are not the same criminal conduct. Crimes encompass the "same criminal conduct" if the trial court determines the crimes require the same criminal intent, are committed at the same time, the same place, and involve the same victim. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct and the crimes must be counted separately. Id. A finding that two crimes do not arise from the same criminal conduct will not be disturbed on appeal absent an abuse of discretion. State v. Elliot, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990). A reviewing court must narrowly construe the language of RCW 9.94A.589 to disallow most

assertions of same criminal conduct. State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000), rev. denied, 143 Wn.2d 1014 (2001); State v. Palmer, 95 Wn. App. 187, 191 n. 3, 975 P.2d 1038 (1999).

The defendant is correct that crimes do not have to occur simultaneously to meet the "same time" requirement of the same criminal conduct test. See State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). Still, the crimes must be of a continuous, uninterrupted sequence of conduct over a very short period of time. Porter, 133 Wn.2d at 183 (two drug sales "occurred as closely in time as they could without being simultaneous"). As the Supreme Court has noted, having time "to pause and reflect" between acts can defeat a claim of same criminal conduct. French, 157 Wn.2d at 613-14 (citing with approval State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997)). Having time to reflect shows that the crimes are "sequential, not simultaneous or continuous." French, 157 Wn.2d at 613.

Here, the defendant certainly had time to pause and reflect between each of his attempts to tamper with Jessica Kim. In fact, the defendant even placed an intervening phone call to another person during the period of time that he called Jessica.

The defendant placed eight calls over a span of over an hour to Jessica. Exh. 39; Exh. 46. Four calls did not go through and there was nearly 50 minutes between his first and last call. Between one of the calls the defendant waited almost 20 minutes before calling Jessica again.

During the calls, the defendant's focus was clearly not just on his court case and getting Jessica to lie for him. Instead, the defendant and Jessica talked about their son being sick, how the defendant was placed in the "hole" for calling a jail employee a "bitch," and how he could get his job back when he got out of jail. The defendant talked to his son, told Jessica repeatedly how much he loved her, and talked about the need to talk to his mother. Jessica talked with the defendant about stealing beer, smoking cigarettes, getting a pack for him when he got out, and stealing medicine for their child.

Certainly, between these many calls and between the conversations about his case, the defendant had the time and ability to pause and reflect on his actions. After all, the defendant had to take the separate physical action of calling Jessica, talking with her, hanging up, and then calling her again at a later time. Particularly telling is the fact that the defendant called someone

else during this time period. At 10:26, over a half hour after placing his first call to Jessica, and a half hour before placing his last call to Jessica, the defendant called and spoke to another person. 5RP 9; Exh. 40. The defendant spent over five minutes talking with persons who appear to be family members. See Exh. 40. The defendant then waited another fifteen minutes before calling Jessica again. See Exhibits 39, 40, 46; 5RP 7-9.

The defendant's acts were "sequential, not simultaneous or continuous" and thus not the same "in time" to be considered the same criminal conduct for scoring purposes. This is a part factual discretionary determination for the trial court, and the defendant has not shown that it would have been an abuse of discretion for the sentencing court to so find.

**3. THE DEFENDANT HAS FAILED TO PROVE THE PROSECUTOR COMMITTED MISCONDUCT.**

The defendant contends that the prosecutor committed such flagrant misconduct in closing argument and rebuttal argument that his conviction must be reversed. This claim should be rejected. Argument regarding defense strategy is appropriate prosecutorial

comment and in discussing the defense strategy, the prosecutor did not disparage trial counsel.

When a defendant alleges that the prosecutor's arguments prejudiced his right to a fair trial, he bears the heavy burden of establishing both (1) the impropriety of the prosecutor's arguments and (2) that there was a "substantial likelihood" that the challenged comments affected the verdict. State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984). In closing argument, a prosecutor has wide latitude in drawing and expressing reasonable inferences from the evidence. State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, rev. denied, 100 Wn.2d 1008 (1983). Alleged improper comments are reviewed in the context of the entire argument. State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998), rev. denied, 137 Wn.2d 1017 (1999).

The defendant contends the following passage by the prosecutor disparaged trial counsel and "called into question his ethics and integrity." Def. br. at 18.

This phone call [referring to a recorded phone call placed by the defendant to Jessica from the King County Jail] is probably the most telling call because this is the phone call where the defendant tells Jessica to tell the story about her and Cindy setting the defendant up. He tells Jessica to say she slapped herself a couple of times and that Cindy scratched her

and that's how she got the mark on her forehead. That's how we know, aside from whatever a game of semantics defense is going to try to play, you never in here in the phone calls hear the defendant --

Mr. Jarvis: Objection, Your Honor. Disparaging the role of defense counsel.

The Court: Overruled.

Ms. Woo: You never hear in the phone calls to say come to court and lie. You can tell from the content of what the defendant is saying that he is telling her to come to court and lie because he knows that the information in the police reports and what Jessica eventually testified to is the truth.

6RP 15-16.

"Semantics" is simply a term that refers to the meaning of language. See Merriam-Webster's Collegiate Dictionary, 11<sup>th</sup> Edition at 1129 (2003). The prosecutor here was merely anticipating defense counsel's argument--correctly so--as defense counsel subsequently argued that the defendant did not commit tampering because he never specifically told Jessica to lie.

You never heard Jo [the defendant] tell Jessica to lie. You did hear Jessica called a liar. He never told her to come to court and testify falsely. That statement wasn't there. He never told her not to come to court.

6RP 28. The prosecutor did not disparage or misstate the role of defense counsel. The defendant has failed to meet his heavy burden of proving the prosecutor's statement was misconduct.

The defendant also claims the following passage in rebuttal constituted reversible misconduct.

Ms. Woo: The defense in this case is a shotgun one. Throw as many red herrings out there as possible to confuse the jury and --

Mr. Jarvis: Objection, Your Honor, burden shifting, disparaging defense counsel.

The Court: Overruled.

Ms. Woo: Throw as many red herrings out there as possible to confuse the jury. He's not giving you enough credit. You can see right through how ridiculous his claim of self-defense is.

6RP 30. The prosecutor followed this passage by highlighting the physical evidence that existed regarding the fact the Jessica was strangled, as well as Jessica's multiple 911 calls about being choked, Cindy Moy's 911 call stating the same, and both Jessica and Cindy's testimony. See 6RP 30-33.

The defendant has cited no case in which the use of the common term "red herring" has been held to constitute misconduct. "Red herring" is simply a colloquial term used to describe argument or the presentation of facts that distract attention from the real issue. See Merriam-Webster's Collegiate Dictionary, 11<sup>th</sup> Edition at 1042 (2003). In State v. Fredrick, the Court of Appeals rejected a similar argument regarding the use of the term "red herring," finding

that the term was used to "get the jury to focus on the pertinent evidence in the case." State v. Fredrick, 123 Wn. App. 347, 355, 97 P.3d 47 (2004); see also State v. Guizzotti, 60 Wn. App. 289, 298, 803 P.2d 808 (use of the term "smoke" and describing the defense argument as an attempt to confuse the jury was the prosecutor's inartful but proper attempt to point out that the defense theory was unfounded), rev. denied, 116 Wn.2d 1026 (1991). Again, the prosecutor did not disparage trial counsel nor misstate the roll of defense counsel.<sup>10</sup>

Finally, the defendant must prove that there was a "substantial likelihood" that the challenged comments affected the verdict. Reed, 102 Wn.2d at 145. Neither of the challenged comments was of such significance or of such gravity that the defendant can prove that but for the comments, he likely would not

---

<sup>10</sup> The defense points to a third passage in arguing the prosecutor committed misconduct.

Ms. Woo: Jessica Kim is a perfect victim for the defendant. She's not well-spoken. She hasn't graduated from high school. She's a young, single mother. She's immature. She's not a very good communicator and she's been in and out of foster care since the fifth grade. She can easily be considered a throwaway and it would be very easy to think that she did have it coming as the defendant said.

6RP 2. Counsel does not explain how these comments about Jessica and the defendant disparaged defense counsel. The State, seeing no impropriety in the prosecutor's argument will not address this passage further. Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996) (passing treatment of an issue or

have been found guilty. This is especially true when one considers the fact that the jurors were specifically instructed that "the lawyers' statements are not evidence" and that "[y]ou must disregard any remark, statement, or argument that is not supported by the evidence or the law." CP 62; State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993) (jurors are presumed to follow instructions). In addition, the tampering and violation of court order convictions were based on recorded jail phone calls made by the defendant to Jessica.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 4 day of August, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Dennis J. McCurdy  
DENNIS J. McCURDY, WSBA #21975  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

---

lack of reasoned argument is insufficient to merit judicial consideration), rev. on other grounds, 132 Wn.2d 193 (1997).

# Appendix A

Wood

Court date/time: 9/26/08 1:30PM  
The Honorable Judge Lum

**COPY RECEIVED**

SEP 23 2008

Administrative Director  
KING COUNTY PROSECUTORS OFFICE

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON

Plaintiff,

v.

JO WAYNE AARHUS,

Defendant.

No. 08-1-04112-0SEA

**DEFENSE PRESENTENCE REPORT**

Sentencing Judge: The Honorable Judge Lum

Sentencing Date: September 26, 2008

Offenses: Assault in the Second Degree, 3 counts of Witness Tampering, and 4 counts of Domestic Violence Misdemeanor Violation of a Court Order.

Offender Score: 3

Standard Range: 13-17 Months on Assault in the Second Degree, 9-12 months on Witness Tampering, and 0-365 on each count of Domestic Violence Misdemeanor Violation of a Court Order.

Enhancement: N/A

Defense Calculation of Credit for Time Served: 142 days on the Assault and the Second Degree (from a booking date of 5/7/08). Approximately 137 days on remaining counts from the charging date.

STATUS OF CASE

1 On September 11, 2008, Mr. Jo Wayne Aarhus was found guilty by a jury after trial on  
2 each of the above eight counts. Mr. Aarhus has been incarcerated at the King County Jail from  
3 the time of booking, May 7, 2008, to the present day.

4 DEFENSE RECOMMENDATION

5 The Defense respectfully requests that the Court sentence Mr. Aarhus to the low-end of  
6 the standard range, running all remaining counts concurrent to his commitment on the Assault in  
7 the Second Degree conviction. This lies in contrast to the State's recommendation of the high-  
8 end of the standard range with an additional seven months of time added consecutively (for the  
9 misdemeanor counts) for a total of 24 months. Mr. Aarhus has no objection to the imposition of  
10 a Domestic Batterer's Treatment Program, and is eager to obtain counseling. Mr. Aarhus  
11 respectfully requests that the Court waive any non-mandatory fees and costs, due to the fact that  
12 Mr. Aarhus has been determined to be indigent and will have no income for a substantial period  
13 of time. Jo has no objection to a court order being imposed barring contact with Jessica Kim,  
14 Cindy Mui, and Sharon Moynihan, but would be seeking an allowance under the order for third-  
15 party contact for the sole purpose of child care issues. Mr. Aarhus is in agreement with the  
16 remaining conditions: that he pay a \$500 VPA; that he provide a DNA sample and pay the  
17 associated cost; that he pay restitution if any is ordered; that he have no criminal law violations;  
18 and be placed on community custody for a period of between 18 to 36 months.

19  
20 BASIS FOR RECOMMENDATION

21 Mr. Aarhus is twenty-one-years-old and has been found guilty of a number of horrible  
22 crimes, one of which marks him with a strike. Mr. Aarhus' previous criminal history consisted  
23 of a Driving While License Suspended in the third degree conviction and a Resisting Arrest  
24 charge that was deferred.  
25

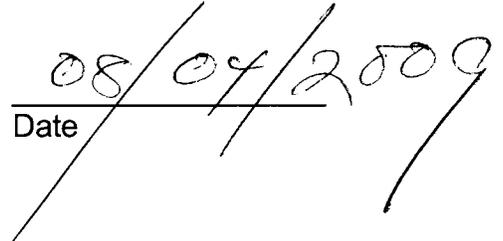
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. AARHUS, Cause No. 62435-1-I, 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.



Name  
Done in Seattle, Washington



Date

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2009 AUG -4 PM 4:44