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NO. 63447-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

OTIS WILLIAMS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE DOUGLASS NORTH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

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? This Court has previously held that the unit of prosecution is each attempt to tamper with a witness. See State v. Hall, 147 Wn. App. 485, 196 P.3d 151 (2008), rev. granted, 166 Wn.2d 1005 (2009).

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged by second amended information with first-degree burglary (count I), felony violation of a court order (count II), unlawful possession of a firearm (count III), and first-degree malicious mischief (count IV). CP 30-34. All of these charges arose out of an incident occurring on November 16, 2008, involving Lavonya Walker, the mother of the defendant's child. CP 1-6.

Subsequent to these acts, the defendant had repeated contact with Lavonya and as a result of these contacts the defendant was charged with witness tampering (count V, for acts

committed during a time intervening between November 16, 2008 and November 21, 2008), witness tampering (count VI, for acts committed during a time intervening between November 22, 2008 and December 3, 2008) and two counts of violation of a court order. CP 30-34.

A jury acquitted the defendant of counts I through IV, the charges arising from the original incident on November 16, and found the defendant guilty as charged on counts V through VIII, the charges based on the defendant's subsequent contacts with Lavonya. CP 81-88.

With an offender score of seven, the defendant received concurrent 38-month standard range sentences for each tampering conviction, and suspended sentences on the two misdemeanor no-contact order convictions. CP 90-101.

2. SUBSTANTIVE FACTS

After the alleged acts leading to the charges in counts I through IV, the defendant was placed under arrest and was housed in the King County Jail. 4RP¹ 10, 22-23. All outgoing calls from the

¹ The verbatim report of proceedings is cited as follows: 1RP--2/26/09, 2RP--3/5/09, 3RP--3/9/09, 4RP--3/10/09, 5RP--3/11/09, 6RP--3/12/09, 7RP--3/16/09, 8RP--3/17/09, and 9RP--4/24/09.

jail are routinely monitored and recorded. 4RP 36. From his date of arrest on November 16, 2008, through December 3, 2008, the defendant made a multitude of telephone calls to Lavonya. 4RP 47-62. The defendant even called Lavonya as he was going through the process of being booked. 4RP 45.

The calls were recorded and played for the jury. See Ex 44-56; 4RP 40. The jury found that in the calls the defendant attempted to induce Lavonya to testify falsely or to withhold relevant testimony. CP 63-64.

At trial, Lavonya testified that the defendant was the father of her baby, that she loved him and still wanted to be with him. 4RP 93, 97. Lavonya then claimed that she made up all the allegations against the defendant, saying that she was drunk, had mental health problems, was jealous because she had seen the defendant with another woman, and that the defendant had never even been at her house on November 16th. 4RP 97, 106, 112-13. Lavonya testified that she paid a person \$50 to call the police and say the defendant had a gun and was assaulting her. 4RP 116. She professed that the defendant had not kicked in her door as reported, but that the door had been kicked in on a previous occasion. 4RP 107. Finally, in explaining away her statement

made to responding police officers, Lavonya claimed, "my bipolar just was like, switching off and on...[I]ie, tell the truth...I lied."

4RP 123.

Additional facts are included in the sections they apply.

C. ARGUMENT

**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 one of his convictions for witness tampering must be vacated because, even though each of his two convictions involved separate attempts to tamper with a witness, and the attempts occurred during different time frames, all his attempts constitute but one "unit of prosecution." This claim 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. As this Court has previously held, the unit of prosecution for witness tampering is each attempt to tamper

with a witness. Hall, 147 Wn. App. 485; accord, State v. Thomas, 151 Wn. App. 837, 214 P.3d 215 (2009).

The double jeopardy clause of the United States Constitution guarantees that no person shall "be subject for the same offense to 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. 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 accomplishment or success of the attempt. 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.² 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

² 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").

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 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.³ Laws of 1994, ch. 271, § 205; Laws of 1997, ch. 29, § 1.

While the unit of prosecution adopted by the Court of Appeals satisfies the purposes of the statute, the defendant's

³ 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 assertion 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); Morgan v. Bennett, 204 F.3d 360, 367 (2d Cir.) ("[I]ntimidation 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).

desired interpretation does not. Allowing a defendant to continue 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 increasing pressures and coercion, and the increasing 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).⁴

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. Scare tactic scenarios have been suggested wherein the State could charge an individual *ad infinitum* for each time he or she requests a potential witness to do one of the listed actions, even in the same sentence, meeting, letter, or phone call.

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 a victim on five separate days, he potentially faces five separate counts--not one count because it is 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

⁴ 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.

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 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 dire prediction that multiple convictions might be obtained for each attempt uttered in a single letter or phone call is simply not supportable. Such attempts would constitute but one act. In contrast, where the defendant here committed separate distinct acts on separate days, he properly faced multiple charges, just as any defendant would face multiple charges for committing crimes on different days.

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 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); State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). 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 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, supported by the plain reading 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.⁵

⁵ In addition, the defendant's reliance on the dissent in Thomas, *supra*, and the dissent's analogy to the Supreme Court's analysis of the unit of prosecution for identity theft from State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006), is unpersuasive. Not only is the language of the identify theft statute (RCW 9.35.020(1)) dissimilar to the language of the witness tampering statute, but the dissent in Thomas completely ignores the fact that witness tampering is an attempt crime, while identity theft is not. Critical to the analysis is the fact that the tampering need not be completed to constitute a criminal offense, thus each attempt to tamper can be a crime. This is not true under the identity theft statute that criminalizes the "possession, use, or transfer" of a person's identity.

D. **CONCLUSION**

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

DATED this 4 day of January, 2010.

Respectfully submitted,

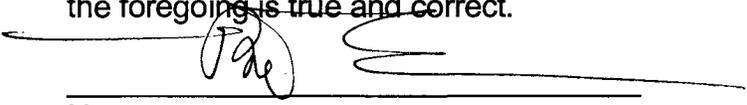
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jonathan Palmer & Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. WILLIAMS, Cause No. 63447-0-1, 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.



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