

FILED  
COURT OF APPEALS

DATE FILED: 01/12/93

COURT OF APPEALS  
STATE OF WASHINGTON

NO. 34227-8-II

BY 

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID J. LOBE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
CAUSE NO. 05-1-00889-3

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HONORABLE PAULA CASEY, Judge

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RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Considering the evidence in the light most favorable to the State, whether there was sufficient evidence for a rational trier of fact to conclude that the State had proved beyond a reasonable doubt that the defendant had committed the crime of tampering with a witness, on the basis of his having attempted to induce Ericka Attouf to withhold information from a law enforcement agency relevant to the criminal investigation in this case, as alleged in Count 4.

2. Whether it was harmless error beyond a reasonable doubt for the State to have failed to produce sufficient evidence for all of the alternative means alleged for the crime of tampering with a witness in Counts 3 and 4, where there was no evidence presented regarding certain alleged alternative means and so the jury would have based verdicts of guilt on the alternatives which were supported by substantial evidence.

B. STATEMENT OF THE CASE

Victim Tara Pappas met the defendant, David Lobe, in 2003. They began and ended an intimate relationship that same year. Trial RP 81-82. Also in 2003, a domestic violence protection order was entered by Lewis County Superior Court, requiring the defendant to have no contact with Pappas. Trial RP 43, 109. There was no further contact between them until March 2005, at which time Pappas began residing at the defendant's

apartment part of each week. The 2003 protection order was still in effect at that time. Trial RP 109.

As of May, 2005, another woman named Sara Gregoire also had a romantic interest in the defendant. Trial RP 131, 135. On May 14, 2005, Tara Pappas and Sara Gregoire became involved in an argument about the defendant, which took place outside his apartment. Police were called, but Pappas hid so that the police would not find her in contact with the defendant. Trial RP 87-88.

On Monday, May 16, 2005, Pappas was at the defendant's apartment. The defendant became angry, and so Pappas packed her belongings and left. She went to a nearby pay phone and called 911 to report that the defendant had assaulted her. Trial RP 91-95.

Olympia Police Officer Brian Henry responded to Pappas's call for assistance on May 16<sup>th</sup>, and met with her about 4:15 that afternoon. Pappas claimed her head hurt from having been assaulted, but Henry did not observe any injuries. Trial RP

40, 48-49, 54. Pappas also told about the existing domestic violence protection order requiring the defendant to refrain from contacting her. Trial RP 58. Finally, Pappas described what the defendant was wearing when she left. Trial RP 60.

Henry then went to Lobe's apartment to speak with him. Lobe was cooperative and invited the officer into his residence. Henry noted that Lobe's clothing was consistent with what Pappas had described. Trial RP 60-61. Initially, the defendant denied knowing Tara Pappas. Trial RP 62.

The defendant was arrested for violating the protection order. At the jail, the defendant was informed of his Miranda rights, which he chose to waive. Trial RP 33-34. The defendant then admitted he did know Tara Pappas and Sara Gregoire. He also acknowledged there was a court order requiring that he have no contact with Pappas. Trial RP 36-37. He denied seeing Pappas at all on May 16<sup>th</sup>. Trial RP 38.

On May 17, 2005, another protection order was entered, this time by Thurston County Superior Court, prohibiting the defendant from having contact with Tara Pappas. Trial RP 44, 99. On May 19, 2005, an Information was filed in Thurston County Superior Court charging the defendant with one count of assault in violation of a protection order. CP 4.

In July, 2005, the prosecution left a phone message for Ericka Attouf, a friend of Pappas, in order to try and locate Pappas so that Pappas would come to testify in the case against Lobe. Trial RP 139. Attouf then spoke over the phone with Sara Gregoire, who at that time was in an intimate relationship with the defendant. Ericka told Sara about the efforts of the prosecution to locate Tara. Ericka then heard Sara repeat this information to the defendant, whom Ericka could hear in the background Trial RP 139.

The defendant then got on the phone. He encouraged Ericka not to give Tara the information that the prosecution was trying to reach her, and

asked Ericka to make sure that Tara did not go to court to testify against him. Trial RP 139-144.

Then, on July 21, 2005, Tara Pappas had a phone conversation with Sara Gregoire. During that call, the defendant got on the phone and spoke with Tara. He told Tara to call Ericka Attouf and to instruct Ericka that when the prosecution called her, Ericka should tell them that she did not know where Tara was or how to reach her. The defendant further told Tara not to show up at court to testify. Trial RP 105-106.

On July 28, 2005, Olympia Police Officer Cliff Maynard met with Tara Pappas and Ericka Attouf, and learned about what the defendant had encouraged each of them to do. Trial RP 73-74. On July 29<sup>th</sup>, Maynard contacted the defendant and placed him under arrest. The defendant reacted by making angry references to the person he referred to as the "bitch". Trial RP 77-78.

On August 15, 2005, a First Amended Information was filed in Thurston County Superior Court charging the defendant with: Count 1,

assault in violation of a protection order; Count 2, violation of a protection order, Gross Misdemeanor; Count 3, tampering with a witness in regard to Tara Pappas; and Count 4, tampering with a witness in regard to Ericka Attouf. CP 9-10. Ultimately, a jury trial was held on October 25-26, 2005, on a Third Amended Information which charged: Count 1, assault in violation of protection order regarding the events of May 16, 2005; Count 2, violation of protection order regarding the events of July 21, 2005, alleged to be a third offense and therefore a Class C felony; Count 3, tampering with a witness; and Count 4, tampering with a witness. CP 69-70. For Count 1, the defendant was found guilty of the lesser offense of violating the protection order. The defendant was found guilty of Counts 2 through 4 as charged.

A sentence hearing was held on December 9, 2005. The conviction for Count 1 was determined to be a gross misdemeanor, while the conviction for Count 2 was a felony. 12-9-05 Hearing RP 7-8,

12. A standard range sentence of 25.5 months in prison was imposed for Count 2, while standard range sentences of 14 months in prison were imposed for Counts 3 and 4, with all counts served concurrently. CP 107-115.

### C. ARGUMENT

1. Considering the evidence in the light most favorable to the prosecution, that evidence was sufficient for a rational trier of fact to find it proved beyond a reasonable doubt that the defendant committed the crime of tampering with a witness in Count 4 based upon his attempt to induce Ericka Attouf to withhold from a law enforcement agency information relevant to a criminal investigation.

The defendant contends that there was insufficient evidence to support the defendant's conviction for Count 4, tampering with a witness. The evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all

reasonable inferences from the evidence 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). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The defendant correctly notes that, given the manner in which the jury was instructed as to the elements of the crime in Count 4, the defendant was charged with three alternative circumstances and three alternative means of committing the crime of tampering with a witness. First, as to the alternative circumstances, the charge alleged

that on or about July 21, 2005, the defendant was:

(1) a witness; (2) a person the defendant had reason to believe was about to be called as a witness in any official proceeding; or (3) a person the defendant had reason to believe might have information relevant to a criminal investigation. Second, as to the alternative means, the charge alleged that on or about July 21, 2005, the defendant had caused Ericka Attouf to: (1) testify falsely; or (2) to withhold testimony or absent herself from an official proceeding without right or privilege to do so; or (3) withhold from a law enforcement agency information relevant to a criminal investigation. RCW 9A.72.120; Jury Instruction No. 16, CP 89. However, it is not correct that there was insufficient evidence to prove any of the alternative means of committing this crime.

It is correct that there was no evidence the defendant had attempted to induce Attouf to testify falsely or absent herself from the proceeding. However, there was sufficient

evidence for a trier of fact to find beyond a reasonable doubt that the defendant had reason to believe Ericka was a person who might have information relevant to this criminal investigation, and attempted to induce Ericka to withhold that information from a law enforcement agency.

Ericka Attouf testified that the prosecution had left a phone message on her phone attempting to get updated information on how to contact Tara Pappas so that Tara could come to court and testify. Trial RP 138-139. Ericka then spoke to Sara Gregoire by phone and mentioned these phone messages. Ericka could hear Sara repeating the information to the defendant, who could be heard in the background. Then the defendant got on the phone and told Ericka not to give the prosecution the information on how to contact Tara so that Tara would not go to court to testify. Trial RP 139-141.

The existing whereabouts of Tara Pappas, who was an essential witness regarding the events of

May 16, 2005, was information relevant to the criminal investigation leading up to the trial of the defendant for the alleged violations pertaining to that date. The source of the phone messages was simply indicated to be the "prosecution". While it was not specified as to whether the call had come from a police officer investigating the matter in conjunction with the prosecutor's office or from the prosecutor's office directly, such a distinction should not be material to the issue of whether the defendant sought to have Ericka withhold her information from a law enforcement agency.

The crime of tampering with a witness has as its purpose the prevention of attempts to obstruct justice. State v. Stroh, 91 Wn.2d 580, 582-583, 588 P.2d 1182 (1979). The end result of a criminal investigation is a prosecution when the facts warrant such action. It would lead to an absurd result if it was held that the withholding of information relevant to a criminal investigation did not constitute tampering simply

because the information was withheld from an agent of a prosecutor's office rather than a police officer. An interpretation that causes absurd results must be avoided because it will not be presumed that the legislature intended such absurd consequences. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Thus, there was evidence at trial which could justify a reasonable juror from finding that the crime of tampering of a witness had been proved as to Ericka Attouf in attempting to have Ericka withhold information concerning Tara's whereabouts.

A separate question is whether the conviction must be vacated because there was not sufficient evidence to support all of the alternative means alleged for the crime of tampering with a witness in this case. That issue, pertaining to both Counts 3 and 4, is addressed in the next section.

2. The State's failure to present sufficient evidence at trial in support of all the alternative means alleged in Counts 3 and 4 for the crime of tampering with a witness was error, but it can be concluded beyond a reasonable doubt that the jury found the defendant guilty of both

those counts based upon the alternative or alternatives alleged which were supported by substantial evidence, and therefore it was harmless error.

In Counts 3 and 4 of the Third Amended Information, both alleging tampering with a witness, the State alleged three alternative means of committing the crime: (1) the defendant attempted to induce Tara Pappas in Count 3 and Ericka Attouf in Count 4 to testify falsely; (2) or without a right or privilege to do so to withhold testimony or absent herself from an official proceeding; (3) or to withhold from a law enforcement agency information she had relevant to a criminal investigation. CP 69-70. When a defendant is charged with committing a crime by alternative means, the jury is not required to be unanimous as to the means used if the State presents sufficient evidence supporting each of the alleged means. State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994). However, in the absence of sufficient evidence to support all of the alternatives, the lack of a unanimity instruction is error. Id. at 708.

As to Count 3, the defendant claims on appeal that there was no evidence at trial to support the alternative allegation that the defendant had attempted to induce Pappas to testify falsely. The defendant acknowledges there was evidence to support the other two alternatives alleged. Thus, the defendant argues, the conviction for Count 3 must be reversed.

The State agrees that it was error to instruct the jury on Count 3, tampering with a witness, as to the alternative means of testifying falsely. However, instructional error need not result in a reversal of the convictions if it is clear beyond a reasonable doubt that the error was harmless. State v. Linehan, 147 Wn.2d 638, 654, 56 P.3d 542 (2002). When one is charged with having committed a crime by more than one method, and there is a deficiency of proof as to one or more of the methods, the issue is whether it can be ascertained beyond a reasonable doubt that the conviction was founded upon one of the alternative means for which substantial evidence was

introduced. State v. Gillespie, 41 Wn. App. 640, 645-646, 705 P.2d 808 (1985).

As regards Count 3, there was sufficient evidence that the defendant had attempted to induce Pappas to absent herself from the trial proceedings. According to Pappas's testimony, on July 21<sup>st</sup> the defendant encouraged her by phone not to show up to court to testify. The defendant continued to repeat this message until he was able to get Pappas to voice agreement with the idea. Trial RP 105-106. There was also substantial evidence that the defendant attempted to induce Pappas to withhold her address and phone number from law enforcement. Trial RP 105-106.

However, there was no evidence submitted at trial that the defendant had tried to persuade Pappas to offer false testimony. Moreover, the prosecutor did not argue in closing that this alternative means had been proven, focusing instead on the other two. Trial RP 193-194, 203-204. Therefore, it can be concluded beyond a reasonable doubt that the jury did not rely upon

this alternative means in convicting the defendant of the charge in Count 3.

As has already been discussed above, Count 4 charged tampering with a witness in regard to Ericka Attouf. The evidence at trial did not show that the defendant had attempted to induce Ericka to testify falsely or withhold testimony, or to absent herself from an official proceeding. However, the evidence was that he had tried to have her withhold evidence relevant to an investigation, that being the whereabouts of Tara Pappas.

The defendant also argues on appeal that the conviction for Count 4 must be reversed because there was not substantial evidence provided for all the alternatives alleged. Further, since it is the defendant's contention that there was not sufficient evidence for any of the alternatives, the defendant seeks dismissal of this count.

Here again, the State concedes that the failure to provide substantial evidence of every alleged alternative constitutes error. However,

it is also clear beyond a reasonable doubt that the jury necessarily found the defendant guilty of Count 4 based upon the one alternative for which sufficient evidence was provided.

There was simply no evidence presented that the defendant considered Ericka to be a potential witness, or that he sought to have her testify falsely, withhold testimony, or fail to appear at an official proceeding. However, the defendant did expect that the prosecution would have further contact with Ericka in order to locate Tara, and so wished Ericka to withhold the information the prosecution was seeking. Trial RP 105-106, 139-141.

In closing argument, the prosecutor repeatedly referred to the defendant's attempt to have Ericka hide information about Tara.

. . . July 21<sup>st</sup>, pretrial hearing, Mr. Lobe. Well, this isn't - I've got to do something here. I know Ericka and Tara are involved. I'm going to talk to them. And you heard from both. They said the same thing. Tara had moved. I didn't know where she was. Ericka did. David knew Ericka knew, so what did he tell her? Tell them you don't know. Okay?

Trial RP 193.

On the 21<sup>st</sup> of July he decides, Well, I'm going to have contact with Tara again, tell her to absent herself from these proceedings, don't show up to court in Thurston County, state of Washington. Same with Ericka Attouf. Don't tell them where she's at. Those are crimes, and simply having contact with Tara, simply guilty.

Trial RP 195.

On the 21st he contacted both Ericka and Tara and told them don't cooperate with the prosecution, don't tell them where she is, and that's a crime. And when he talks to Tara and reiterates that, just by talking to Tara he's committed the crime of violation of a no-contact order, and I think we just heard that wasn't even an issue. By telling her not to come to court, that's another crime.

Trial RP 203-204.

The only inconsistent statement by the prosecutor in argument was at one point when he stated the following:

Read that official - read the tampering with a witness. A person who known to be called as a witness. The system only works if people aren't allowed to do that. Then he covers his bases and repeats over and over again to Ericka, You don't show up in court. You don't show up in court.

Mr. Lobe is used to intimidating his way out of things, and that's what he's done or attempted to do.

You heard from Tara, "He kept telling me over And over and over again until finally I just said fine. Fine, David." That's not how it works. That's a crime.

Trial RP 193-194. The prosecutor appears to have simply briefly misspoke here in the mention of Ericka's name. The only such testimony was that the defendant repeatedly told Tara not to show up at court until Tara finally agreed, as the prosecutor proceeded to discuss in this passage. Given the evidence, that brief slip of the tongue would not have prevented the jury from recognizing that the only basis for a conviction in Count 4 was the defendant's efforts to have Ericka withhold information about Tara's location.

#### D. CONCLUSION

While the evidence at trial was not sufficient to support all of the alternative means alleged for both Counts 3 and 4, this was harmless error beyond a reasonable doubt. Given the extent of that evidence, the jury necessarily convicted the defendant of those counts based on the alternative or alternatives for each which were supported by substantial evidence. Therefore, the State respectfully requests that the

defendant's convictions for tampering with a witness in Counts 3 and 4 be affirmed.

DATED this 9th day of October, 2006.

Respectfully submitted,



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JAMES C. POWERS/WSBA #12791  
DEPUTY PROSECUTING ATTORNEY

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STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
Respondent	)	DECLARATION OF
	)	MAILING
v.	)	
	)	
DAVID J. LOBE,	)	
Appellant	)	

STATE OF WASHINGTON	)	
	)	ss.
COUNTY OF THURSTON	)	

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 9th day of October, 2006, I caused to be mailed to appellant's attorney, PATRICIA A. PETHICK, a copy of the Respondent's Brief, addressing said envelope as follows:

Patricia A. Pethick,  
Attorney at Law  
P.O. Box 7269  
Tacoma, WA 98406-0269

I certify (or declare) under penalty of perjury  
under the laws of the State of Washington that the  
foregoing is true and correct to the best of my  
knowledge.

DATED this 9<sup>th</sup> day of October, 2006 at Olympia,  
WA.



James C. Powers/WSBA #12791  
Senior Deputy Prosecuting Attorney