

NO. 36173-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

KIRK SELFRIDGE,

Appellant.

STATE OF WASHINGTON
BY: *Wm*
COUNTY CLERK
CLERK OF COURT
CLERK OF COURT

ORIGINAL

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00387-8

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 7, 2007, Port Orchard, WA
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether evidence that Selfridge engaged in a course of harassment of his estranged wife over several months, combined with his avowed intent to get her to change her story, was sufficient to support his conviction for witness tampering?

2. Whether the State failed to prove the crime of violation of a no-contact order as that offense was charged to the jury? [Concession of Error]

3. Whether the trial court erred in not giving a *Petrich* instruction where Count I involved a continuing course of conduct and Count II was supported by evidence of only one criminal act?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kirk Selfridge was charged by information filed in Kitsap County Superior Court with witness tampering and violation of a no-contact order. CP 5. After trial, the jury found him guilty as charged. CP 54-56.

B. FACTS

Tracie Rickert, formerly known as Tracie Selfridge,¹ was married to Kirk Selfridge for fourteen years. RP 21. They divorced on February 9,

¹ The State will refer to the witness as Rickert, both to avoid confusion with the defendant, and because it was her preference. RP 21.

2007.

An order was entered prohibiting contact between Selfridge and Rickert. RP 22. Selfridge knew of the order. RP 22; Supp CP. The order prohibited Selfridge from having contact with Rickert. RP 65. It also prohibited him from coming from coming within 500 feet of her residence, school, or workplace. RP 66.

On May 21, 2006, Rickert saw Selfridge's van parked not far from her house.² RP 25. Selfridge was driving the van at the time. RP 26. The van bore three statements: "Tracie Selfridge abuses her children and disabled husband," "Tracie K. Selfridge, service deli manager of Silverdale Albertsons drinks and does drugs on the job," and "Tracie K. Selfridge molests children." RP 26.

Selfridge drove off when she came back to take a picture of the van. RP 30. She followed him trying to take pictures. He did not talk to her; was very evasive. RP 31.

Carla Meier was employed with Children and Family Service in the Bremerton office. RP 36. She was assigned to work with Selfridge and Rickert's son Christian, who had been declared a State dependent. RP 37. She was working to "re-invite" Christian back into the family home. RP 37.

² The van was more than 500 feet from the residence when she saw it. RP 66.

Selfridge called Meier several times after the no-contact order was imposed, wanting to know why he could not see his children, even though Meier was only involved with Christian. RP 38.

He would be upset and say that Rickert had done this before and would drop the case. RP 38. He also asserted she would be sorry because he would take everything she had. RP 38, 44. Selfridge commented to Meier twice that he was going to get Rickert to change her story. RP 42. He said that “she had done it before and he was able to have her take it back and was going to make her take it back this time, as well.” RP 43.

Meier was very concerned by Selfridge’s behavior. RP 39. It made Meier concerned for her safety because Selfridge was much larger than her and would come very close to her. RP 39. Selfridge called her on April 6. RP 39.

Selfridge told Meier that Rickert had fabricated the assault charge and had herself assaulted their oldest child. RP 40.

He also asserted that Rickert had tried to burn the house down. RP 40. When Meier and another CPS worker had visited the house, however, there was no sign of any fire. RP 41. They concluded that the complaint was unfounded. RP 41.

Selfridge also alleged that Rickert was abusing their pets. RP 41.

When Meier visited the house, however, the dog was very friendly and did not appear at all afraid of Rickert. RP 41. There were also cats and birds that appeared to be well cared for. RP 41.

Selfridge also claimed he was afraid Rickert would abuse their children. RP 41. He also told her that he was going to have other people make CPS referrals and that he was going to keep doing it himself. RP 42. Other people did lodge referrals. RP 42.

Selfridge also told Meier that Rickert's boss would find out that she was drinking on the job and that she would be fired. RP 42. There was also a complaint lodged with CPS that Rickert had been drinking in the presence of the children. RP 42.

CPS requires that all allegations be investigated. RP 43. Meier contacted Rickert or Christian each time a complaint was lodged. RP 43. Rickert's response was always that she was not surprised and that she was afraid he would come around her house. RP 43.

Selfridge made a total of seven referrals to CPS. RP 44. In addition to the other claims, he also asserted that Rickert was allowing a sex offender to live in her house. She investigated the sex offender allegation, which involved Rickert's brother, but was satisfied that he was never alone with the children. RP 45. All the allegations were investigated by a CPS worker, and

Meier was satisfied that they were all unfounded. RP 45.

Rickert was not surprised by Selfridge's behavior, but she was afraid.

RP 49. She was afraid he would come to her house and "do certain things."

RP 49. Rickert lost track of how many complaints Selfridge had lodged. RP

24. She testified that the complaints made her feel intimidated. RP 24.

After Selfridge file a complaint about Rickert's treatment of her dog, the animal control officer spoke with Humane Society staff who confirmed that the dog had been in good condition the previous week. RP 59. They approved Rickert for the adoption of a second dog. RP 59. Rickert told him the officer it was just another attempt by Selfridge to harass her. RP 59. The officer followed up with Selfridge, who then asserted that he had a tape of Rickert threatening to kill his bird. RP 59. He asked Selfridge to provide a copy of the tape, which he never did. RP 59. The officer closed the complaint as unfounded.

Holly Goff, who was a friend and neighbor of Rickert, saw Selfridge's van at Rickert's house on March 18, and called 911. RP 71. It was parked in the driveway. RP 72. When the police arrived he was not there. RP 73. About five minutes after the police left, Goff saw him drive off in the van. RP 73. She knew it was Selfridge because he waved at her. RP 74. He was alone in the car. RP 75.

Goff went with Rickert the day she saw the van with the writing on it.

RP 76. Selfridge appeared very smug when they showed up until Goff took out her camera. RP 76. Then he got a fearful look on his face and drove off.

RP 76.

III. ARGUMENT

A. EVIDENCE THAT SELFRIDGE ENGAGED IN A COURSE OF HARASSMENT OF HIS ESTRANGED WIFE OVER SEVERAL MONTHS, COMBINED WITH HIS AVOWED INTENT TO GET HER TO CHANGE HER STORY, WAS SUFFICIENT TO SUPPORT HIS CONVICTION FOR WITNESS TAMPERING.

Selfridge argues that the evidence was insufficient to support his conviction for witness tampering. This claim is without merit because taking the reasonable inferences in the light most favorable to the State, the jury could conclude that Selfridge's harassment of his estranged wife was intended to get her to change her testimony in his pending domestic violence case.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even

if the appellate court might have resolved the issues of fact differently.
Basford, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

In his brief, Selfridge attempts to have this Court view his conduct as a series of distinct and permissible actions. Regardless of whether the individual actions would otherwise be lawful, the Legislature may punish such behavior when it is directed at a protective class of individuals, such as witnesses. *State v. Talley*, 122 Wn.2d 192, 208, 858 P.2d 217 (1993).

Moreover, the standard of review requires the evidence to be considered as a whole. Here, the jury was well within its rights as the trier of fact to conclude that Selfridge was engaged in an ongoing course of conduct with the ultimate aim of getting Rickert to change her testimony. That conduct included: (1) placing what amounted to a billboard near Rickert's house where her friends and neighbors would see it, advertising that she was abusing and neglecting her children; (2) repeatedly contacting CPS with largely unfounded allegations about their children; and (3) contacting animal control with unfounded allegations that Rickert was abusing her dog and threatening Selfridge's bird.

The jury was further entitled to conclude that Selfridge's harassing conduct was intended get Rickert to drop the domestic violence charges or to refuse to testify against him. Contrary to the tenor of Selfridge's argument, such a conclusion would not be speculative. Selfridge specifically told the CPS worker assigned to his son that he had gotten Rickert to drop such charges in the past, and would do it this time. He further told the CPS worker that he was going to take everything Rickert had.

Notably, to prove a charge of witness tampering, the State does not have to show that the threat was communicated to the victim. *State v. Williamson*, 131 Wn. App. 1, 6, 86 P.3d 122 (2004), *remanded on other grounds*, 154 Wn.2d 1031 (2005). Moreover, witness tampering is by

definition an attempt crime; a person tampers with a witness if he attempts to alter the witness's testimony. *Williamson*, 131 Wn. App. at 6. "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." *Williamson*, 131 Wn. App. at 6.

Here, Selfridge engaged in a course of continuous harassment of his estranged wife over a period of many months. He announced that he would get her to change her story, as he claimed to have done in the past. The jury was well within its rights to conclude from this evidence that Selfridge was attempting to get Rickert to not testify in the pending domestic violence case. Its determination of the facts should not be disturbed on appeal.

B. THE STATE FAILED TO PROVE THE CRIME OF VIOLATION OF A NO-CONTACT ORDER AS THAT OFFENSE WAS CHARGED TO THE JURY. [CONCESSION OF ERROR]

Selfridge next claims that the evidence was insufficient to support his conviction for violation of a no-contact order, at least as the jury was instructed on that charge. The State concedes that he is correct.

As Selfridge points out, jury instructions, when not objected to, become the law of the case. Further, a defendant may assign error to elements added under the law of the case doctrine, and that assignment "may

include a challenge to the sufficiency of evidence of the added element.” *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). In *Hickman*, the trial court’s to-convict instruction included venue as an element. Because the State did not object, venue became an element that the State had to prove “even though it really is not an element.” *Hickman*, 135 Wn.2d at 99. Because the State did not prove venue, the court reversed the conviction for insufficiency of the evidence and dismissed with prejudice.

Here, although the no-contact order also prohibited Selfridge from coming within 500 feet of Rickert’s residence, Supp. CP, the to-convict instruction, as proposed by the State, and given by the court, required actual contact with Rickert. CP 27, 50. The State is unable to find any meaningful distinction between the present situation and that in *Hickman*. As the evidence only showed willful contact with Rickert’s residence on March 18,³ the State must concede that the evidence was insufficient to prove the charge under the court’s instructions to the jury. This charge should be dismissed on remand.

³ There is no evidence that the contact on May 21 was willful. To the contrary, Rickert testified that Selfridge was evasive attempted to get away from she and Goff on that occasion. RP 25-26, 30-31, 76. Moreover, that contact was outside the period charged. CP 50.

C. THE TRIAL COURT DID NOT ERR IN NOT GIVING A *PETRICH* INSTRUCTION WHERE COUNT I INVOLVED A CONTINUING COURSE OF CONDUCT AND COUNT II WAS SUPPORTED BY EVIDENCE OF ONLY ONE CRIMINAL ACT.

Selfridge next claims that the trial court erred in failing to give a *Petrich* instruction on each charge. This claim is without merit because none was required. The State will address each count separately.

1. Witness Tampering

This Court reviews a trial court's jury instructions for errors of law de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). When several criminal acts are alleged and solely one crime charged, a defendant's right to a unanimous verdict must be protected. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The State may elect the act it relies on or the court must provide a unanimity instruction. *Id.*

No election or instruction is required, however, if the multiple acts constitute a continuing course of conduct. *Petrich*, 101 Wn.2d at 571; *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). This Court reviews the multiple acts using a commonsense approach, considering factors such as time, place, and victim, to determine if one continuous offense may be charged. *Petrich*, 101 Wn.2d at 571; *Love*, 80 Wn. App. at 361. If the defendant has engaged in a series of actions intended to achieve a singular

objective, then the evidence would tend to establish a continuing course of conduct. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

Here, as noted with regard to Selfridge's first claim, *see* Point A, *supra*, the State's entire theory of the case was witness tampering was shown by Selfridge's continuing course of conduct. Indeed, no single act by him was, in itself, criminal. Rather it was his course of conduct that gave rise to, and proved, the charge. The State made this clear in its closing argument:

So for Count I, "To convict Mr. Selfridge of tampering with a witness on or between March 6, 2006, and August 31, 2006." The reason that there's a time frame there and difference in days is because his behavior was over a range of days. This is not contested. The State has proven this beyond a reasonable doubt.

RP 105. Using a commonsense approach, no *Petrich* instruction was required as to Count I. Selfridge's conviction of witness tampering should be affirmed.

2. *Violation of No-Contact Order*

Although the State has conceded that Count II must be dismissed for insufficient evidence, it will briefly address Selfridge's claim that that count required a *Petrich* instruction.

The obvious predicate for a *Petrich* instruction is evidence of more than one criminal act. The only evidence that Selfridge actually violated that no-contact order was on March 18. That there was a 911 call on March 22

fails to establish in any way that Selfridge was present on that date. Plainly all participants in the trial recognized this. In his “half-time” motion to dismiss, defense counsel argued, in reference to the March 18 event:

As far as the violation of a court order, in the light most favorable to the State, I don’t believe that the State can prove that Mr. Selfridge was at that location and *appears to be the only allegation he was at a location where he was not supposed to be.*

RP 82 (emphasis supplied). In closing, the State likewise argued only the March 18 incident. RP 106-08. This claim, although moot, is without merit.

IV. CONCLUSION

For the foregoing reasons, Selfridge’s conviction for witness tampering should be affirmed, and the case should be remanded for dismissal of the charge of violation of a no-contact order and resentencing.

DATED September 7, 2007.

Respectfully submitted,

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