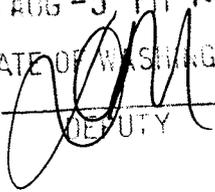


FILED  
COURT OF APPEALS  
DIVISION II

08 AUG -5 PM 1:09

STATE OF WASHINGTON  
BY  DEPUTY

NO. 37112-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

**STATE OF WASHINGTON, Respondent,**

**v.**

**DEDRICK THOMAS, Appellant.**

---

APPELLANT'S BRIEF

---

Rebecca Wold Bouchey  
WSBA #26081  
Attorney for Appellant

P.O. Box 1401  
Mercer Island, WA 98040  
(206) 275-0551

## TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
III.	STATEMENT OF THE CASE.....	1
IV.	ARGUMENT .....	5
	<b>ISSUE 1: THE EIGHT CONVICTIONS FOR TAMPERING WITH ONE WITNESS' TESTIMONY CONSTITUTE THE SAME UNIT OF PROSECUTION FOR PURPOSES OF DOUBLE JEOPARDY BECAUSE THE UNIT OF PROSECUTION IS THE WITNESS OR THE TESTIMONY, NOT THE NUMBER OF PHONE CALLS OVER WHICH THE CONVERSATION OCCURS.....</b>	<b>5</b>
V.	CONCLUSION .....	12

## TABLE OF AUTHORITIES

### CASES

<i>Bell v. United States</i> , 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955) ..	7, 8
<i>State v. Adel</i> , 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).....	6, 8, 10, 11
<i>State v. Bobic</i> , 140 Wn.2d 250, 260, 996 P.2d 610 (2000).....	5, 6
<i>State v. Chenoweth</i> , 127 Wn. App. 444, 111 P.3d 1217 (2005).....	10
<i>State v. Tili</i> , 139 Wn.2d 107, 116-17, 985 P.2d 365 (1999).....	8, 9
<i>State v. Varnell</i> , 162 Wn.2d 165, 168, 170 P.3d 24 (2007).....	6
<i>State v. Westling</i> , 145 Wn.2d 607, 40 P.3d 669 (2002).....	9, 10
<i>State v. Womac</i> , 160 Wn.2d 643, 649, 160 P.3d 40 (2007).....	5

### STATUTES

RCW 69.50.401(e) .....	11
RCW 9A.72.120 .....	7

### CONSTITUTIONAL PROVISIONS

U.S. Constitution amend. 5 .....	5
Washington Constitution, art. 1, sec. 9 .....	5

### COURT RULES

RAP 2.5(a) .....	5
------------------	---

## **I. ASSIGNMENTS OF ERROR**

1. The eight convictions for witness tampering violate double jeopardy because all are based on conduct that forms only one unit of prosecution.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Do the eight convictions for tampering with one witness's testimony constitute the same unit of prosecution for purposes of double jeopardy?

## **III. STATEMENT OF THE CASE**

Dedrick Thomas was charged with eight counts of tampering with a witness and four counts of violating a no contact order arising from a series of monitored telephone calls that allegedly took place between Mr. Thomas and his girlfriend, Victoria Montgomery. CP 1-6 At the time of the calls, Ms. Montgomery had recently testified in a trial in which Mr. Thomas was the defendant. RP3 107.

Ms. Montgomery had been regularly writing to Mr. Thomas in jail and after she testified against him in the trial, she told Mr. Thomas'

mother that Mr. Thomas should call her. RP3 113-14, RP5 211. Over the next three days, Mr. Thomas and Ms. Montgomery spoke several times on the phone. A jail administrator testified that inmate calls are limited to 20 minutes duration, but other than that are unlimited. RP3 88.

The following is a list of the phone calls introduced into evidence:

<u>Date</u>	<u>Time</u>	<u>Cite</u>
1/6/07	20:22	RP3 120
1/6/07	20:44	RP3 122
1/6/07	21:38	RP3 131
1/6/07	22:01	RP3 133
1/7/07	9:41	RP3 135, 139
1/7/07	10:02	RP3 139
1/7/07	12:52	RP4 168
1/7/07	13:44	RP4 169
1/7/07	14:05	RP4 173
1/7/07	18:58	RP4 175
1/7/07	19:30	RP4 178
1/7/07	20:01	RP4 179
1/7/07	20:43	RP4 181
1/7/07	21:06	RP4 182
1/7/07	21:26	RP4 183
1/8/07	12:07	RP5 192
1/8/07	12:13	RP5 194
1/8/07	12:25	RP5 195
1/8/07	12:48	RP5 196
1/8/07	17:45	RP5 197

1/8/07	18:24	RP5 198
1/8/07	19:38	RP5 199
1/8/07	19:58	RP5 201
1/8/07	20:47	RP5 202
1/8/07	21:46	RP5 203
1/9/07	8:12	RP5 204
1/9/07	8:54	RP5 205

During the phone calls, Ms. Montgomery and Mr. Thomas discussed whether she would write a letter saying that she had lied on the stand, that Mr. Thomas had not assaulted her. RP3 122, RP5 216. Ms. Montgomery said clearly that Mr. Thomas never threatened her and that they came up with an alternate explanation for her injuries together. RP5 214, 218. Eventually, Ms. Montgomery wrote a letter to Mr. Thomas' attorney stating that she had lied, that she had actually been assaulted by someone else and had lied because she was scared. RP3 133-34. Further, Ms. Montgomery agreed to say that Mr. Thomas had not threatened her sister and sister's boyfriend with a knife. RP3 132.

After learning of the letter, the prosecutor secured records from the jail of outgoing calls to Ms. Montgomery. RP4 149. Ms. Montgomery did not testify for the defense or testify to the changed story in the assault trial. RP4 151.

At the close of the assault trial, the State charged Mr. Thomas as follows:

<u>Count</u>	<u>Charge</u>	<u>Date</u>	<u>Cite</u>
I	Tampering with a witness, Victoria Montgomery	1/6/07	CP 1
II	Tampering with a witness, Victoria Montgomery	1/6/07	CP 1-2
III	Tampering with a witness, Victoria Montgomery	1/7/07	CP 2
IV	Tampering with a witness, Victoria Montgomery	1/7/07	CP 2
V	Tampering with a witness, Victoria Montgomery	1/8/07	CP 3
VI	Tampering with a witness, Victoria Montgomery	1/8/07	CP 3
VII	Tampering with a witness, Victoria Montgomery	1/9/07	CP 3
VIII	Tampering with a witness, Victoria Montgomery	1/9/07	CP 4
IX	Violation of a No Contact Order, Victoria Montgomery	1/6/07	CP 4
X	Violation of a No Contact Order, Victoria Montgomery	1/7/07	CP 5
XI	Violation of a No Contact Order, Victoria Montgomery	1/8/07	CP 5
XII	Violation of a No Contact Order, Victoria Montgomery	1/9/07	CP 6

Mr. Thomas was convicted on all counts. CP 45-56. The court determined his offender score to be 9+ and sentenced him to 60 months on each of the eight counts of witness tampering, concurrent. CP 62, 64. This appeal timely follows.

#### **IV. ARGUMENT**

**ISSUE 1: THE EIGHT CONVICTIONS FOR TAMPERING WITH ONE WITNESS' TESTIMONY CONSTITUTE THE SAME UNIT OF PROSECUTION FOR PURPOSES OF DOUBLE JEOPARDY BECAUSE THE UNIT OF PROSECUTION IS THE WITNESS OR THE TESTIMONY, NOT THE NUMBER OF PHONE CALLS OVER WHICH THE CONVERSATION OCCURS.**

The legal foundation for the unit of prosecution analysis rests on double jeopardy protections. The double jeopardy clauses of the U.S. Constitution amend. 5, and the Washington Constitution, art. 1, sec. 9, provide three different protections for defendants, "one of which protects against multiple punishments for the same offense." *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). This is a question of law, which is reviewed de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). The remedy for convictions that violate double jeopardy is vacating the offending conviction(s). See *Womac*, 160 Wn.2d at 658-60. This issue can be raised for the first time on appeal. RAP 2.5(a).

The proper question is to determine what act or course of conduct the legislature has defined as the punishable act. When the legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects against multiple convictions for committing just one unit of the crime. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) (citing *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955)). While the unit of prosecution issue is one of constitutional magnitude on double jeopardy grounds, the analytical framework centers on a question of statutory interpretation and legislative intent. *See Adel*, 136 Wn.2d 629.

The first step is to analyze the statute in question to determine the legislative intent as to unit of prosecution. *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). Then, the court looks to the facts of the case in question “because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one ‘unit of prosecution’ is present.” *Varnell*, at 168 (citing *State v. Bobic*, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000)). If the Legislature fails to designate the unit of prosecution within the criminal statute, any resulting ambiguity must be construed in favor of lenity. *State v. Adel*, 136 Wn.2d 629, 635, 965

P.2d 1072 (1998) (citing *Bell v. United States*, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L.Ed. 905 (1955), Doubt is resolved against turning a single transaction into multiple offenses).

The statute at issue here, RCW 9A.72.120, provides in relevant part:

(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 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.

Emphasis added. While the legislature has not specifically defined the unit of prosecution for witness tampering, it appears clear that the statute is violated by inducing “a witness” to testify falsely. Thus, it appears that the unit of prosecution is each witness. All of phone calls forming the basis for the charges in this case relate to one witness, Victoria Montgomery, and her potential testimony in one trial. Many

of those calls are in fact continuations of the same conversation, which was artificially terminated by jail policy after 20 minutes. Because all of these conversations formed an attempt to persuade one witness to change her testimony, this is one unit of prosecution for witness tampering. At worst, the statute here is ambiguous, which triggers the rule of lenity, resolving any ambiguity in Mr. Thomas' favor. *Adel*, 136 Wn.2d at 635; *Bell*, 349 U.S. at 84.

Appellant could not find any direct precedent defining the unit of prosecution for tampering with a witness. Therefore, this appears to be an issue of first impression. However, cases addressing the language in other statutes as it relates to unit of prosecution are helpful in looking to the language of the witness tampering statute.

In *State v. Tili*, 139 Wn.2d 107, 116-17, 985 P.2d 365 (1999), the court held that the rape statute explicitly provided for separate convictions for each act of penetration. In explaining its reasoning, the *Tili* court distinguished the rape statute from the assault statute in this regard:

Tili argues that if he can be charged and convicted for three counts of first-degree rape based on three separate penetrations, then a defendant could also be charged and convicted for every punch thrown in a fistfight without violating double jeopardy. Tili's argument, however, ignores key differences between

the crimes of rape and assault. Unlike the rape statute, the assault statute does not define the specific unit of prosecution in terms of each physical act against a victim. Rather, the Legislature defined “assault” only as that occurring when an individual “assaults” another. *See RCW 9A.36.041*. A more extensive definition of “assault” is provided by the common law, which sets out many different acts as constituting “assault,” some of which do not even require touching. *See, e.g., 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.50 (2d ed. 1994) (WPIC)*. Consequently, the Legislature clearly has not defined “assault” as occurring upon *any* physical act.

*Tili*, 139 Wn.2d at 116-17. Likewise, in the witness tampering statute, the legislature refers to attempting to convince “a witness” to “testify falsely,” which seems to define the unit of prosecution based on the one witness’ testimony, not the number of conversations about the testimony.

In *State v. Westling*, 145 Wn.2d 607, 40 P.3d 669 (2002), our Supreme Court was asked to determine the unit of prosecution for the crime of arson when the defendant was convicted of three counts, one for each automobile damaged in a single fire. The court cited the arson statute, RCW 9A.48.030(1), which provides that:

[a] person is guilty of arson in the second degree if he [or she] knowingly and maliciously causes a fire or explosion which damages a building, *or* any structure or erection appurtenant to or joining any building, *or* any wharf, dock, machine, engine, automobile, *or* other motor vehicle, watercraft, aircraft, bridge, *or* trestle, *or* hay, grain, crop, *or* timber, whether cut or standing or

**V. CONCLUSION**

All of Mr. Thomas' phone calls constituted one unit of prosecution for tampering with a witness. Therefore, it violates double jeopardy to convict Mr. Thomas on eight counts. For that reason, seven of the eight tampering convictions must be dismissed and Mr. Thomas must be resentenced accordingly.

DATED: August 4, 2008

By: Rebecca W. Bouchey  
Rebecca Wold Bouchey #26081  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on August 4, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

*Counsel for the Respondent:*  
Kathleen Proctor  
Office of Prosecuting Attorney  
930 Tacoma Ave. S., Rm. 946  
Tacoma, Washington 98402-2171

*Appellant:*  
Dedrick Demond Thomas  
DOC #306124  
Washington State Penitentiary  
1313 North 13th Ave.  
Walla Walla, WA 99362

FILED  
COURT OF APPEALS  
DIVISION II  
09 AUG -5 PM 1:09  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEDRICK THOMAS

Rebecca W. Bouchey  
Rebecca Wold Bouchey  
WSB# 26081  
Attorney for Appellant