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

STATE OF WASHINGTON,
Respondent,

v.

JAMES CALVIN PETERSON,
Appellant.

COURT REPORTERS
DIVISION II
10 NOV -1 AM 10:23
STATE OF WASHINGTON
BY [Signature]
DEPUTY

APPELLANT'S BRIEF

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P.M. 10-29-2010

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The Appellant in this case, James Calvin Peterson, was convicted after trial of, *inter alia*, Tampering with a Witness. The State charged he induced the victim in this case, Noel Mitchell, to provide false testimony. Clerk's Papers (CP) 2-3. The crime consisted of three elements: 1) that Mr. Peterson attempted to induce false testimony, 2) that Mitchell "was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings," and 3) that the crime occurred in Washington. CP 29 (to-convict jury instruction). The State failed to prove the first two elements of the crime.

Viewing the evidence in the light most favorable to the State, the evidence showed Mr. Peterson induced Mitchell to provide a story to the prosecuting attorney that would get him out of jail. When that attempt fell through and Mitchell told the prosecutor her own version of events, Mr. Peterson then induced Mitchell to absent herself around the time of trial. Because

neither of these acts showed he attempted to influence Mitchell's testimony at an official proceeding, there was insufficient evidence to convict.

In addition, when the State relied on both acts to prove the single means charged of committing the crime, and a rational juror could have had reasonable doubt as to whether either act proved the charged crime, Mr. Peterson was denied his right to a unanimous verdict by the superior court's failure to provide a unanimity instruction.

For all these reasons, this Court should reverse Mr. Peterson's conviction.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The superior court erred in giving the issue of witness tampering to the jury when the evidence was insufficient to convict as a matter of law.

2. The superior court erred in failing to give a unanimity instruction regarding the witness tampering count.

B. Issues Pertaining to Assignments of Error

1. When the crime of witness tampering as submitted to the jury included the elements 1) that Mr. Peterson attempted to induce false testimony and 2) that Mitchell "was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings," did the State fail to prove the crime when the evidence only showed Mr. Peterson either attempted to induce the victim to tell a version of events to the prosecutor so the charges would be dropped or to absent herself from the trial?

2. When Mr. Peterson was charged with witness tampering by a single means - inducing a witness to testify falsely or withhold testimony - the State argued that two different acts constituted the crime, and the court did not give a unanimity instruction, should this Court reverse because Mr. Peterson's right to a unanimous verdict was compromised?

III. STATEMENT OF THE CASE

A. Procedural History

By information filed October 7, 2009, the State charged Mr. Peterson with Assault in the First Degree with a firearm or deadly weapon in violation of RCW 9A.36.011(1)(a), a domestic violence incident as defined in RCW 10.99.020. CP 1. The information charged the assault occurred on October 5, 2009, against Noel Mitchell. Id. Mr. Peterson was also arraigned on that date and a no-contact order regarding Ms. Mitchell was entered.

On December 1, 2009, the State obtained a continuance because, *inter alia*, it was not able to serve the complaining witness, Noel Mitchell. Verbatim Report of Proceedings for December 1, 2009.

After learning of phone calls from the jail to Ms. Mitchell's phone number, the State filed an amended information on December 3, 2009. This information added the charges of Tampering with a Witness in violation of RCW 9A.72.120(1)(a) and Violation of a No-Contact Order in violation of RCW 26.50.110(1). CP 2-

4. These charges were also alleged to involve Noel Mitchell and covered the dates October 6 through December 1, 2009, and October 7 through December 1, 2009, respectively. Id.

On February 8, 2010, the State filed a second amended information reducing the Assault in the First Degree count to Assault in the Second Degree. CP 5-7.

After a jury trial held February 8-12, 2010, the Honorable Bryan E. Chushcoff presiding, the jury could not agree as to the assault charge. However, it convicted Mr. Peterson convicted of witness tampering and violation of a no-contact order. CP 39-42. The assault charge was dismissed without prejudice. CP 43-44.

The case proceeded to sentencing on April 9, 2010. The parties stipulated as to Mr. Peterson's prior record and offender score. CP 45-49. The court imposed a standard range sentence of 57 months on count II plus costs and fees and a one-year suspended sentence on count III. CP 69-88 & 64-68.

Notice of appeal was timely filed. CP 69-88.

B. Facts Underlying the Witness Tampering Conviction

The witness tampering charge arose from telephone conversations allegedly made by Mr. Peterson from the Pierce County Jail to the victim in this case, Noel Mitchell. Deputy James Scollick, the officer responsible for the inmate phone system, testified about recording inmate telephone calls. He explained that all outgoing calls from the jail are recorded and maintained by computer. He was able to search that system for phone calls made to a number believed to belong to Ms. Mitchell. Scollick copied recordings of those phone calls and the State presented them at trial as Plaintiff's Exhibit 22 (Pl. Exh. 22). The written log of those calls was admitted as Plaintiff's Exhibit 24. Verbatim Report of Trial Proceedings, February 8-12, 2010 (RP) at 103-108, 113, 188 & 115.

The calls were made using several different inmate identification numbers, but all were made to the same telephone number, one previously used to reach Ms. Mitchell. The calls played at trial were made using inmate identification numbers assigned to Mr. Peterson,

Derryck Marquis Williamson and Cory Lee Allen White. RP 113-15 & 99-100. Officer Scollick listened to recordings of Mr. Peterson's voice and offered the opinion that his was the male voice on the recordings played at trial. RP 117 & 128-29.

The recordings of seven phone calls were played for the jury during Ms. Mitchell's testimony. Ms. Mitchell denied the voice on the tape was hers but acknowledged the male voice sounded like Mr. Peterson's. RP 209; 211-12; 212-13; 222-23, & 227. The relevant portions of the conversations involved Mr. Peterson's pending assault charge.

In the relevant portions of the first three calls, Peterson and Mitchell discussed what she should tell the prosecutor about what happened the day of the alleged assault; the next two calls primarily involved discussions about Mitchell's ultimate story to the prosecutor, which did not follow Peterson's script; and in the final two calls Mr. Peterson, *inter alia*, encouraged Mitchell to absent herself from the trial. State's Exh. 22. The first three calls were all made

on October 6, 2009, prior to the filing of the original information in this case, which was done electronically at 10:16 a.m. on October 7. CP 1.

In the first call played at trial, Mr. Peterson discussed what Mitchell should tell the prosecutor so "we can get me out of here tomorrow." Pl. Exh. 22, call from Peterson dated 10/6/09 17:08:10 at 2:54; see also id. at 4:39 & 5:49 (Mitchell saying, "what do you want me to tell the prosecuting attorney?").

Mr. Peterson wanted Mitchell to say he and she had had an argument the day before the argument that resulted in the charges and that the argument occurring on the day of the charges was with Mitchell's boyfriend, Michael Jones.¹ Mr. Peterson explained that since Michael Jones also had a green truck, there would have been natural confusion as to who the argument was with on the day of the charged altercation. Pl. Exh. 22, call from Peterson dated 10/6/09 17:08:10 at 6:17.

1. Michael Jones was the name Mitchell first gave to the police when asked to identify the person involved in the charged altercation. The name was made up; Michael Jones did not actually exist. RP 54 & 172-73.

In the second phone call played at trial, Mr. Peterson told Mitchell to tell his brother that she might need him the next day to take Mitchell "down to the prosecuting attorney's office" to "tell them the truth, tell them what happened." Pl. Exh. 22, call from Williamson dated 10/6/09 18:03:48 at 4:57; see also id. at 13:35 (Peterson saying, "but listen, this is what I want you to go up to the office and say"). The two also discussed the merits of their respective accounts of what happened, factoring in their concern that someone had given Mr. Peterson's license plate number to the police. Pl. Exh. 22, call from Williamson dated 10/6/09 18:03:48.

In the third phone call, Mr. Peterson directed Ms. Mitchell to "go the prosecuting attorney's office" with the story he had devised. Pl. Exh. 22, call from Williamson dated 10/06/2009 18:23:49 at 6:40. He reiterated the desired result of her trip to the prosecutor's: "I could probably get the charges dropped tomorrow." Id. at 8:04. When Mitchell pointed out that she could not speak in court the next day at

his arraignment, Mr. Peterson replied, "But that's why you're gonna come down here and go to the prosecuting attorney's office first." Id. at 8:23. He also advised her to be unavailable at the time of trial and the week or so before trial. Id. at 12:15. Before concluding the call, Peterson reiterated the details of the story and had Mitchell repeat it back to him. Id. at 14:34.

The fourth call played for the jury was from Cory Lee Allen White, who actually spoke to Mitchell throughout the call. White conveyed information to and from a person not on the phone, apparently Mr. Peterson. Much of the conversation consisted of Mitchell's account of the story she told the prosecutor and Peterson's recriminations for not telling the story he had suggested. Pl. Exh. 22, call from White dated 10/7/09 10:23:44.

Call number five was from Mr. Peterson directly. Like the fourth call, it also involved Mitchell's description of her account to the prosecutor, her explanation of why she told that to the prosecutor, and

Mr. Peterson's recriminations. Pl. Exh. 22, call from Peterson 10/07/2009 12:01:39.

In the final two phone calls played to the jury, Mr. Peterson again advised Ms. Mitchell to absent herself around the time of trial. Pl. Exh. 22, call from Williamson dated 10/08/2009 7:11:17 at 6:10 & 15:00 ("all I need you to do is just make sure you don't come to court"); call from Williamson dated 10/08/2009 7:35:10 starting at 12:45 (telling Mitchell to leave a week or two before trial starts).

C. Jury Instructions

The court gave the jury the following to-convict instruction with regard to the witness tampering charge:

To convict the defendant of the crime of tampering with a witness, each of the following elements of the crime must be proven beyond a reasonable doubt:

(1) That during the period of October 6th, 2009 to December 1, 2009, the defendant attempted to induce or person to testify falsely, or without right or privilege to do so, withhold any testimony; and

(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings; and

(3) That these acts occurred in the State of Washington.

CP 29 (Instruction 19).

The court did not instruct the jury that it must be unanimous as to which act proved the charged crime. See CP 8-36.

D. State's Arguments Regarding Witness Tampering

During closing arguments, after discussing the assault charge and addressing the issue of whether the recordings played at trial actually revealed Mr. Peterson speaking with Ms. Mitchell, the State discussed the witness tampering charge. It first reiterated the ways Mr. Peterson told Mitchell to absent herself from the trial, arguing this evidence showed Peterson attempted to induce Mitchell to withhold testimony. RP 288-91. The State next discussed the story Mr. Peterson attempted to get Mitchell to tell the prosecutor, arguing this evidence showed he attempted to induce Mitchell to testify falsely. RP 291-92.

IV. ARGUMENT

Point I: The Evidence Was Insufficient to Convict Mr. Peterson of Attempting to Induce a Person Who Is a Witness or about to Be Called as a Witness in an Official Proceeding to Testify Falsely or Withhold Testimony.

The evidence was insufficient to convict Mr. Peterson of witness tampering as charged. There are three alternate means of committing the crime of tampering with a witness: "attempting to induce a person to (1) testify falsely or withhold testimony, (2) absent him- or herself from an official proceeding, or (3) withhold information from a law enforcement agency." State v. Lobe, 140 Wn. App. 897, 902-03, 167 P.3d 627 (2007); RCW 9A.72.120(1).² The State charged

1. The statute defines the crime, in part, as follows:

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

Mr. Peterson only with the first means of commission, attempting to induce false testimony. CP 5-6 & 29.

As charged, there were three elements to this crime: 1) that Mr. Peterson attempted to induce false testimony, 2) that Mitchell "was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings," and 3) that the crime occurred in Washington. CP 29. The State failed to prove the first two elements charged.

A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, ¶ 9, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829

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).

P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8, ¶ 9; Salinas, 119 Wn.2d at 201.

At trial, the State argued two alternate acts proved the charge of inducing false testimony: 1) Mr. Peterson's attempts to induce Mitchell to absent herself from his trial and 2) his requests that Mitchell give the prosecutor a false version of events. RP 288-92. Neither act established the charged crime.

A. Mr. Peterson's attempt to induce Mitchell to absent herself from his trial does not constitute attempting to induce a person to testify falsely.

Viewing the evidence in the light most favorable to the State, evidence tending to show Mr. Peterson suggested Mitchell go on vacation during his trial failed to prove the crime of tampering with a witness by inducing her to provide false testimony. "It is fundamental that under our state constitution an

accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged." State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988) (en banc), citing, Const. art. 1, § 22 (amend. 10); see also U.S. Const. Amend. VI.

Mr. Peterson was charged with inducing a person to give false testimony by testifying falsely or withholding testimony under RCW 9A.72.120(1)(a). CP 5-6. This means is one of the three alternate means of committing the crime of tampering with a witness. Lobe, 140 Wn. App. at 902-03; cf. RP 288-93 (State argued RCW 9A.72.120(1)(a) sets forth two means of witness tampering, testifying falsely and withholding testimony). This prong of the statute addresses inducing testimony that is false either by lies of commission (testifying falsely) or lies of omission (withholding testimony). RCW 9A.72.120(1)(a).

In this case, in requesting Mitchell to absent herself from his trial, Mr. Peterson was not asking her to provide any type of false testimony; he merely sought her absence. A completely distinct means under

the statute addresses inducing a person to absent him- or herself from an official proceeding. See RCW 9A.72.120(1)(c), Lobe, 140 Wn. App. at 902-03. Mr. Peterson was not charged under this provision. When the State did not prove the crime as charged, this Court should reverse Mr. Peterson's conviction for tampering with a witness.

Similar circumstances required reversal in Irizarry. There, the defendant was charged with aggravated first degree murder. Like the witness tampering statute, the first degree murder statute listed three means of commission: premeditated murder, murder by extreme indifference and felony murder. Aggravated first degree murder was a type of premeditated murder. Thus, the defendant was charged under the first means of commission. 111 Wn.2d at 593-94.

The problem in Irizarry arose with a jury instruction that contained the "lesser included" offense of felony murder, of which the defendant was convicted. The Supreme Court held that felony murder was a different means of committing the crime than the

one charged and reversed the conviction. Irizarry, 111 Wn.2d at 595-96.

Similarly, in this case, the State charged one means of commission of the crime, but attempted to prove facts regarding a different means of commission. Under these circumstances, Mr. Peterson's suggestions to Mitchell that she absent herself from his trial do not prove he induced her to testify falsely or withhold testimony and this Court should reverse his conviction.

B. The conviction cannot stand when the remaining evidence failed to establish the first two elements of the crime: that Mr. Peterson induced Mitchell to testify falsely and that she was a witness about to be called in an official proceeding.

Viewing the evidence in the light most favorable to the State, Mr. Peterson's attempts to induce Mitchell to tell the prosecutor his version of events also did not prove the charged crime. That evidence failed to establish two elements of the crime 1) that Mr. Peterson attempted to influence Mitchell's testimony and 2) that Ms. Mitchell was "a witness or a person the defendant had reason to believe was about to

be called as a witness in any official proceedings.”
CP 29 (to-convict jury instruction).

1. Mr. Peterson did not attempt to influence Mitchell's testimony.

The State failed to prove the first element of the crime because Mr. Peterson's inducements were directed at Mitchell's statement to the prosecutor, not her testimony. "Testimony" means "oral or written statements, documents, or any other material that may be offered by a witness in an official proceeding." RCW 9A.72.010(6). "Official proceeding means a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions." RCW 9A.72.010(4); CP 27-28.

In this case, viewing the evidence in the light most favorable to the State, Mr. Peterson only attempted to influence Mitchell's statements to the deputy prosecutor. He did not intend to induce future false testimony; instead, Mr. Peterson repeatedly and

specifically stated the story was a) for the prosecutor and b) intended to procure his release from jail. Indeed, Mr. Peterson believed that if Mitchell followed his advice, he would be released from custody and no official proceeding would ensue, no testimony would be required. See Pl. Exh. 22. Under these circumstances, Mr. Peterson's insistence that his version of events would result in the end of the case tends to negate the inference that he was attempting to influence Mitchell's testimony. See State v. Jensen, 57 Wn. App. 501, 510, 789 P.2d 772 (1990) *aff'd by State v. Howe*, 116 Wn.2d 466, 805 P.2d 806 (1991) (reversing conviction for witness intimidation in part because defendant's request to witness that she "make it a lesser charge" tended to negate inference that defendant wanted witness to absent herself from trial).

In fact, when Mitchell thought Peterson was telling her what to say at his arraignment and pointed out she could not speak at that hearing, he clarified: "But that's why you're gonna come down here and go to the prosecuting attorney's office first." Pl. Exh. 22, call from Williamson dated 10/06/2009 18:23:49 at 8:23.

Telling Mitchell what to say at a hearing would have been inducing testimony; telling her what to say to the prosecutor with the express purpose of ending the matter was not.

Under similar circumstances, the Supreme Court found insufficient evidence to support a conviction of witness intimidation. State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007). In Brown, the defendant was charged with intimidating a witness by attempting to influence her testimony. The evidence, however, established the defendant had only threatened the witness about speaking to the police. The Court held this evidence was insufficient to support a conviction for attempting to influence testimony:

The problem, however, is that the State did not prove that Brown threatened Hill in an attempt to influence her testimony. Rather, the only evidence presented, even when viewed most favorably to the State as required, shows that Brown threatened Hill in an attempt to prevent her from providing any information to the police.

162 Wn.2d 422, 430.

Similarly, in this case, the evidence most favorable to the State showed Mr. Peterson attempted to

influence Mitchell regarding her statements to the prosecutor, not her testimony. Accordingly, for the same reasons the evidence was insufficient to support the conviction in Brown, it is insufficient here and this Court should reverse.

This Court's decision in State v. Lubers, 81 Wn. App. 614, 915 P.2d 1157 (1996) does not alter this analysis. In Lubers, the defendant attempted to induce a witness to provide a letter containing false statements to the defendant's attorney. This Court held that such an action constituted inducing a witness "to withhold information necessary to a criminal investigation." Id. at 622.

It is unclear from the case which means of witness tampering the defendant in Lubers was charged with. However, because this Court held that the defendant's actions were an inducement "to withhold information necessary to a criminal investigation," it seems apparent he was charged under RCW 9A.72.120(1)(c). That provision addresses inducing a person to "withhold from a law enforcement agency information which he or she has relevant to a criminal investigation." RCW

9A.72.120(1)(c). Thus, to the extent the defendant in Lubers was convicted under RCW 9A.72.120(1)(c), the instant case is distinguishable: Mr. Peterson was not charged under that provision.

On the other hand, the Lubers opinion does not provide the to-convict jury instruction and only cites the first statutory means of commission of witness tampering, to induce a person to testify falsely. Lubers, 81 Wn. App. 614, 622. To the extent the defendant in Lubers was charged only with inducing false testimony and this Court found he could be convicted on evidence that he induced another to withhold information necessary to a criminal investigation, Lubers conflicts with both Brown and Irizarry and should not control the outcome of this case.

For all these reasons, when Mr. Peterson attempted only to influence Mitchell's story to the prosecutor, the State failed to prove the charged crime and this Court should reverse Mr. Peterson's conviction.

2. Mitchell was not "a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings."

The State also failed to prove the second element of the charged crime, that Mitchell was "a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings," because no official proceedings were pending at the time of the influence.

In a criminal case, an official proceeding does not start until the filing of the information or complaint. And, a person is not a witness in an official proceeding unless such a proceeding is pending. Thus, evidence does not prove the person influenced was a witness or about to be called as a witness in an official proceeding unless such a proceeding is pending at the time of the influence. State v. Pella, 25 Wn. App. 795, 796-97, 612 P.2d 8 (1980).

In Pella, the court construed a prior version of the witness intimidation statute. That statute contained language substantively identical to that in Peterson's to-convict jury instruction, "A person is

guilty of intimidating a witness if by use of a threat directed to a witness or a person he has reason to believe is about to be called as a witness in any official proceeding, he attempts to: (a) Influence the testimony of that person.” 25 Wn. App. at 796-97 (emphasis added). Interpreting this language to require an official proceeding be pending at the time of the threat, Division I reversed the conviction for witness intimidation when the defendant threatened the witness one day after arrest, before the information was filed. Id.

For similar reasons, Mr. Peterson’s conviction should be reversed. Here, the information and complaint were filed on October 7, 2009. CP 1. But the evidence showed that all the phone calls in which Mr. Peterson directed Mitchell to tell a particular version of events to the deputy prosecuting attorney occurred on October 6. By the time the information was filed, Mitchell had already given her version of events to the prosecutor and was facing Mr. Peterson’s recriminations for not following his suggestions. See

Pl. Exh. 22. Under these circumstances and the law of Pella, the conviction cannot stand.

While the statute criminalizes broader behavior - including inducing "a person whom [the defendant] has reason to believe may have information relevant to a criminal investigation" to testify falsely, RCW 9A.72.120(1), and this broader definition appeared in the second amended information, CP 5-6, the to-convict jury instruction only allowed conviction if "the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings." CP 29. It is settled law that the State was required to prove the crime as charged to the jury. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) (under law of the case doctrine, State was required to prove elements of robbery set forth in the to-convict jury instruction which added the unnecessary element of venue to crime).

Accordingly, when Mr. Peterson was charged with witness tampering with regard to "a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings," CP

29, the crime was not proved when the incriminating phone calls occurred before the official proceeding was pending.

For all these reasons, the State failed to prove two elements of the charged crime, 1) that Mr. Peterson attempted to induce Ms. Mitchell to testify falsely and 2) that Mitchell was "a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings." CP 29. As a consequence, this Court should reverse Mr. Peterson's conviction for witness tampering.

Point II: When Mr. Peterson Was Charged with Witness Tampering by a Single Means and the State Argued Two Different Acts Constituted the Crime, this Court Should Reverse Because Mr. Peterson's Right to a Unanimous Verdict Was Compromised

Because it is unclear whether the jury was unanimous on the act that constituted the charged crime in this case, this Court should reverse. When a defendant is charged with multiple acts and any one of them could constitute the crime charged, either the State must elect which of such acts is relied upon for

conviction or the court must instruct the jury to agree on a specific criminal act. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007), citing, State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990). The election or instruction protects a defendant's constitutional right to a unanimous verdict. Id.

In this case, while the statute provides alternate means of committing the crime of witness tampering, Lobe, 140 Wn. App. at 902-03, the State charged Mr. Peterson committed it by only one means: by inducing a person to testify falsely or withhold testimony. CP 29. Moreover, the State argued that two different acts constituted the crime. RP 988-93. Under these circumstances, the superior court committed constitutional error in failing to provide a unanimity instruction. See Const. art. 1, § 22 (amend. 10) & U.S. Const. amend. VI.

"Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice." Coleman, 159 Wn.2d 509, 512, citing, State v. Kitchen, 110 Wn.2d 403, 411-12, 756 P.2d 105 (1988).

"The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged." Coleman, 159 Wn.2d 509 citing State v. Kitchen, 110 Wn.2d at 411-12.

While Kitchen and Coleman address situations where conflicting testimony allows a rational juror to reasonably doubt whether one or more incidents actually occurred, their rationale applies to any multiple incidents case where one or more incidents is susceptible to reasonable doubt of the charged crime: "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Kitchen, 110 Wn.2d at 411. It is only when all the alleged incidents equally prove the crime that a defendant is not prejudiced.

In this case, as discussed in Point I above, neither of the acts the State relied on for conviction actually proved the offense. Thus, a rational juror could have had reasonable doubt as to whether either of the incidents proved witness tampering. Under these

circumstances, the Kitchen and Coleman presumption of prejudice cannot be overcome and this Court should reverse the convictions.

V. CONCLUSION

For all of these reasons, James Calvin Peterson respectfully requests this Court to reverse his conviction.

Dated this 29th day of October, 2010.

Respectfully submitted,



Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

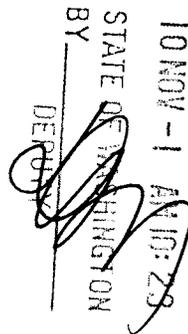
I certify that on this 29th day of October 2010, I caused a true and correct copy of Appellant's Brief to be served by U.S. mail on:

Pierce County Prosecutor's Office
Attention: Appellate Unit
930 Tacoma Avenue South
Tacoma, Washington 98402-2102; and

Mr. James Calvin Peterson
DOC No. 789867, Rm # G-W-112
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Carol Elewski

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