

COURT OF APPEALS
DIVISION II

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No. 40693-4-II

STATE OF WASHINGTON

BY cm

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

STATE OF WASHINGTON,

Respondent,

v.

TROY RAYMENT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge
Cause No. 08-1-01943-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the series of telephone conversations and text messages constitute one or two units of prosecution for tampering with a witness.

2. Whether defense counsel was ineffective for failing to object to testimony regarding the damage to the victim's vehicle.

3. Whether the testimony of Destiny Armstrong's aunt, Judy Estes, that she believed Rayment was attempting to coerce Destiny Armstrong into dropping charges against him was impermissible opinion testimony.

B. STATEMENT OF THE CASE.

Destiny Armstrong, 26 years old at the time of trial, met Troy Rayment when she was 16. They lived together, off and on, for about seven and a half years. In 2004 their daughter was born, and they separated when the child was three years old. Early in 2008 there were court proceedings regarding a parenting plan for the girl, which was finalized in May. [03/24/10 RP 35, 39, 41-42] In April of 2008, Armstrong and Rayment jointly owned a vehicle; both names were on the title. Rayment had traded in a vehicle he owned as a down payment when the car was purchased and he had paid some money on the loan. After the couple separated, Rayment had possession of the car, but it was repossessed by the finance company because Rayment did not have a license, and

after that Armstrong was the sole user of the vehicle; she was making payments on it. [03/24/10 RP 51]

One evening in April of 2008, Armstrong went to the Log Cabin Tavern with a man she had recently begun dating and another person who was a friend from work. A few minutes after her arrival there, about 10:00 p.m., the defendant ran across the tavern as Armstrong returned from the restroom, stopped “right in [her] face”, and asked what she was doing there. [03/24/10 RP 42-43, 70] There were words back and forth and Armstrong walked away toward her table. Rayment once again “got in [her] face” and Armstrong pushed him away. He stumbled, half fell onto a table, and stood back up. Armstrong went outside to a beer garden area. A friend of hers looked for Rayment but he had apparently left. [03/24/10 RP 43-44, 73]

About 1:30 in the morning, Armstrong left the tavern and went to the car, finding the windows had been broken out. Armstrong’s friend called the police. [03/24/10 RP 44, 71] Later that morning, Armstrong received a text message from Rayment in which he said that she was going to be in big trouble because she assaulted him. [03/24/10 RP 44] In response, Armstrong sent back a text message accusing him of damaging her car. Rayment

denied causing the damage and said she'd be the one going to jail for assault. [03/24/10 RP 45] Over a period of time there were numerous phone calls and text messages between the two, with Armstrong often bringing up the subject of the broken car windows. She had paid the \$500 deductible to get the car fixed and she was upset about it. Armstrong saved some of the text messages she received. [03/24/10 RP 45-47, 53]

During these conversations and texts, Rayment became aware that he was being prosecuted for breaking the car windows. He offered to pay the deductible amount, give up his attempt to take custody of their daughter away from Armstrong, abandon his efforts to keep Armstrong's mother away from the child, and sign the car over to her as sole owner. In exchange, Armstrong would drop the charges against him. Rayment told her, and she believed, that she could call the prosecuting attorney's office and tell them she did not want to press charges, or that she could simply fail to show up for court, and the matter would be dropped. [03/24/10 RP 48-50] Armstrong further believed that Rayment could get custody of her daughter because he had an attorney and she did not, and she believed that he could have her arrested and jailed for assault. [03/24/10 RP 50] Armstrong agreed to his terms because she was

frightened. However, Rayment continually changed his mind, telling her she was in more trouble than he was and he would just have her arrested, then reverting to his offer as long as she dropped the charges. [03/24/10 RP 52] He sometimes threatened to sue her for the money he had invested in the vehicle. [03/24/10 RP 51-52, 57]

On October 8, 2008, Armstrong showed the text messages to the police. They were photographed by Detective Michael Hirte. [03/24/10 RP 19-23, Exhibits 1-14] Armstrong explained that she had either deleted her own outgoing texts, or had set her phone to automatically delete them, because there was not enough memory capacity on her phone to save all the messages. [03/24/10 RP 85-86]

Rayment was charged with two counts of tampering with a witness, [CP 23] and found guilty by a jury of both. [CP 2]

C. ARGUMENT.

1. The telephone calls and text messages, under the facts of this case, constitute at least two separate crimes of tampering with a witness.

A defendant may not be convicted more than once for the same offense. What constitutes the “same offense” depends upon the unit of prosecution for that offense. State v. Thomas, 158 Wn.

App. 797, 800, 243 P.3d 941 (2010), citing to State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010). Multiple convictions for the same offense would expose a defendant to double jeopardy, which violates both the Washington and the United States constitutions. Claims of constitutional violations are reviewed *de novo*, as are determinations of the unit of prosecution for a particular offense. Thomas, 158 Wn. App. at 800.

In Rayment's case, there were a number of telephone conversations and text messages from Rayment to Destiny Armstrong. Photographs of fourteen of the text messages were entered into evidence. Armstrong testified about numerous other conversations or messages. There is no question but that the bulk of the messages from Rayment were intended to persuade Armstrong to end the prosecution against him for breaking the windows in the car she drove and of which she was a co-owner. Rayment relies on the Hall decision for his argument that all of the messages constituted one course of conduct, and therefore the evidence supported only one count of tampering with a witness.

In Hall, the defendant had called or attempted to call the victim more than 1200 times in an attempt to convince her to either testify falsely or not testify at all. Hall, 168 Wn.2d at 729. He was

charged with four counts of tampering with a witness and convicted of three. Id. Hall argued, and the Supreme Court agreed, that the statute intended to criminalize the attempt to convince the witness, not the length of the process or number of particular acts it took to do so. Id., at 731. Under the facts of that case, the Hall court found that the 1200-plus calls comprised only one unit of prosecution and reversed two of his convictions. In Thomas, the defendant made 29 calls from the jail to the victim, trying to convince her to change her testimony. The Thomas court also found these to be a single course of conduct, forming only one count of witness tampering. Thomas, 158 Wn. App. at 802. In Hall, however, on which the Thomas court relied, the court said:

Our determination might be different if Hall had changed his strategy by, for example, sending letters in addition to phone calls or sending intermediaries, or if he had been stopped by the State briefly and found a way to resume his witness tampering campaign. But those facts are not before us.

.....

We do not reach whether or when additional units of prosecution, consistent with this opinion, may be implicated if additional attempts to induce are interrupted by a substantial period of time, employ new and different methods of communications, involve intermediaries, or other facts that may demonstrate a different course of conduct.

Hall, 168 Wn.2d at 737-38.

In this case there are facts which demonstrate at least two different courses of conduct. Rayment would negotiate with Armstrong until she thought they had an agreement, then change his mind and tell her he was simply going to sue her for the money he had in the car, take her daughter away from her, and have her arrested and jailed for assault. [03/24/10 RP 52, 63] Each time he terminated the negotiations and told her he was going to take legal action against her, and then resumed negotiating with her to drop the charges against him, a new course of conduct began. It is not clear from the testimony how many times this happened, but it did happen at least once, and therefore the facts support the two counts of tampering with a witness for which he was charged and convicted,.

The facts of this case require a different outcome than that of the Hall and Thomas cases. Rayment completed one course of tampering with a witness, withdrew from negotiations and told the victim he was going to take action against her whatever she did, and then resumed another course of conduct of attempting to persuade her to drop the charges against him. The evidence

supports two convictions—two units of prosecution—for tampering with the witness and there is no double jeopardy violation.

2. The evidence regarding the damage to the victim's vehicle was not only relevant but essential to proving the State's case against Rayment for tampering with a witness. Defense counsel was not ineffective for failing to object to it.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct.

2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 2069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation and demonstrate that his lawyers' performance was so deficient that he was deprived of "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)

Rayment argues that his counsel unreasonably failed to object to prejudicial details relating to the malicious mischief charge such as that Armstrong was frightened when Rayment confronted her in the tavern and that her car windows were broken shortly thereafter. He maintains that there was no reason for this evidence to be presented to the jury. On the contrary, the evidence was not only relevant under ER 401, but essential pieces of evidence to prove the State's case. Rayment was on trial for tampering with a witness by attempting to coerce her into dropping the charge against him. That charge was malicious mischief for breaking out the windows in Armstrong's car. Several of the text messages referred to the car windows being broken and the \$500 deductible that Armstrong had to pay. Evidence concerning Rayment's charge of malicious mischief was relevant. Without that evidence, the jury would have had no idea what the whole trial was about. It had nothing to do with his propensity to commit crimes, but rather was part and parcel of the evidence of the crime of tampering with a witness. The fact that Armstrong was frightened when Rayment approached her in the tavern was relevant to her state of mind and thus her willingness to be pressured into agreeing to his demands. Even if her state of mind in the tavern were not relevant, the

evidence against Rayment was overwhelming and the outcome of the trial would not have been different had defense counsel objected and that evidence been excluded.

Rayment further argues that it was error for the trial judge to exclude evidence that the malicious mischief charge had been dismissed. However, the outcome of the malicious mischief charge was completely irrelevant to the charge of tampering with a witness. It had no bearing on the issue before the jury, which was whether or not the phone calls and text messages were an attempt to influence Armstrong's testimony. Whether he was convicted, acquitted, or the charges dismissed, the facts of the tampering case remained the same. The jury was not asked to decide if he had broken the windows of the car or not. It was asked to decide if he had tried to get Armstrong to make the charge against him go away.

Rayment argues that the evidence regarding the malicious mischief charge was improper ER 404(b) evidence. As argued above, evidence of the malicious mischief charge was essential to prove an element of the crime of witness tampering, which was defined for the jury in Instruction 10. [CP 32] The jury had to know that there was an investigation in order to decide if Rayment had

attempted to “induce a family or household member . . . to withhold any testimony or withhold from a law enforcement agency information which he or she has relevant to a criminal investigation.” [CP 33-34]

Rayment argues that the court should have given a limiting instruction, and that without one the jury instructions required the jury to consider the evidence as proof of guilt. He is not specific about what evidence he is talking about, other than the fact that Armstrong was frightened of him in the tavern. If he means the fact that he was charged with malicious mischief, that information was contained in the messages he texted and statements he made to Armstrong, which form the *corpus delicti* of witness tampering. It formed an element of the crime for which he was on trial. He argues that without this information a reasonable juror would have voted to acquit, and that might be true, but only because the juror would have had no idea what the whole trial was about.

Defense counsel did not provide ineffective assistance. His performance did not fall below an objective standard of reasonableness, nor was Rayment prejudiced by anything his counsel did, and he cannot meet either prong of the test for ineffective assistance of counsel.

3. A witness should not give an opinion as to the defendant's guilt, but in this case it was harmless error.

Armstrong's aunt, Judy Estes, observed Armstrong's behavior and heard her responses to some of the phone calls between her and Rayment during the relevant time period. She testified as to those matters at trial. Over the defendant's objection, she was allowed to answer "yes" to the question, "Did you believe, based on everything that you saw, that the defendant was attempting to coerce Destiny into getting the charges dropped.?" [03/24/10 RP 106] The State agrees that this is equivalent to testimony asserting that the defendant was guilty. A witness may not give an opinion, or state a personal belief, that the defendant is guilty. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Such an opinion infringes on the inviolate role of the jury under Washington constitution art. 1, §§ 21, 22, and the seventh amendment to the United States constitution. Id., at 590.

However, constitutional errors can be "so insignificant as to be harmless". State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). While constitutional error is presumed to be prejudicial, it can be harmless "if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the

same result in the absence of the error.” Id. The test is whether the untainted evidence is so overwhelming that, ignoring the tainted evidence, a reasonable jury would still have found the defendant guilty. Id., at 426.

Such is the case here. The unrefuted testimony was that Rayment telephoned Armstrong many times and sent her numerous text messages, with the sole purpose of persuading her to end the prosecution against him for breaking her car windows. Even had Judy Estes never been asked, or had she not answered, the question about her opinion as to guilt, the outcome of the trial would most certainly have been the same.

“Strong policy reasons support the use of harmless error analysis. ‘A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.’ State v. White, 72 Wn.2d 524, 531, 433 P.2d 692 (1967). A reversal should occur only when the reliability of the verdict is called into question.” State v. Neidigh, 78 Wn. App. 71, 78-79, 895 P.2d 423 (1995). There is no reason here to question the reliability of the verdict. The error was harmless.

D. CONCLUSION.

Troy Rayment has not carried his burden of showing that any reversible error occurred during his trial. The Stat respectfully asks this court to affirm his convictions.

Respectfully submitted this 22^d day of February, 2011.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of February, 2011, at Olympia, Washington.


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