

NO. 47267-8-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEREMY DAVID ROSENBAUM,

Appellant.

RESPONSE TO AMENDED PERSONAL RESTRAINT PETITION

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I. ANSWER TO PETITION

The restraint of Mr. Rosenbaum is lawful, and his petition should be denied.

II. AUTHORITY FOR RESTRAINT OF PETITIONER

The petitioner is being restrained pursuant to the judgment and sentence entered on May 22, 2014, in Cowlitz County Superior Court Cause No. 13-1-01538-0.

III. STATEMENT OF THE CASE

Petitioner was found guilty after jury trial of one count of domestic violence felony harassment, one count of felony harassment, one count of bribing a witness, and two counts of tampering with a witness. The Cowlitz County Superior Court imposed a sentence of 75 total months. The judgment and sentence was previously submitted to this court.

IV. ARGUMENT

A petitioner may request relief through a personal restraint petition when he is under unlawful restraint. RAP 16.4(a)–(c). Our Supreme Court has limited collateral relief available through a PRP “because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992)).

To obtain relief, a personal restraint petitioner must prove either (1) a constitutional error that results in actual and substantial prejudice or (2) a non-constitutional error that “constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” *Davis*, 152 Wn.2d at 672, 101 P.3d 1 (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 792 P.2d 506 (1990)). The petitioner must prove any such error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 94 P.3d 952 (2004). Even if a petitioner shows a constitutional error, he must then meet the burden of showing actual prejudice. If he fails to do so, the petition must be dismissed. *Hews v. Evans*, 99 Wn.2d 80, 660 P.2d 263 (1983). Mr. Rosenbaum here fails to show any constitutional error, and also fails to show actual prejudice.

1. There was sufficient evidence to convict the defendant of two counts of harassment, one count against Julia Weed and one count against Ally Gibson.

The standard of review for a claim of insufficient evidence is, after viewing the evidence in the light most favorable to the prosecution, whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Zamora*, 63 Wn. App. 220, 817 P.2d 880, 882 (1991). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See State v. Price*, 127 Wn. App. 193, 110 P.3d 1171, 1175

(Div. II 2005), *State v. Walton*, 64 Wn. App. 410, 4, 824 P.2d. 533, review denied, 119 Wn.2d 1011 (1992), *State v. Camarilla*, 115 Wash.2d 60, 794 P.2d850 (1990) (appellate court will not review credibility determinations).

a. There was sufficient evidence to support convictions for two counts of felony harassment.

In order for the jury to have reached a verdict of guilty regarding the felony harassment charges, they had to find that (1) the defendant knowingly threatened bodily injury immediately or in the future to both Ally Gibson and Julia Weed; (2) the words or conduct of the defendant put the victims in reasonable fear that the threat would be carried out; (3) that the defendant acted without lawful authority; and (4) that the threats were sent or received in the State of Washington. Court's Instructions to the Jury. Instruction 15, 16; RCW 9A.46.020. The jury also had to find either that the threats consisted of threats to kill the victim or that the defendant was previously convicted of the crime of Violation of a Protection Order against any person who is specifically named in the no contact order, in order for felony harassment to be established.

There is sufficient evidence to support convictions for felony harassment against Julia Weed and Ally Gibson. First, the evidence taken in the light most favorable to the state shows that Mr. Rosenbaum sent Julia Weed multiple threatening text messages. One text said he would make

sure his “rats” would not show up to testify, which Ms. Weed took as a serious threat. RP April 9, page 146. He continued to send text messages, which both Ms. Weed and Ms. Gibson were reading and responding to, through three days. One text message stated, “Say that one more time, you cunt, and I’ll fucking kill you and myself.” RP April 9, page 150. In context, it is clear this was directed at Ms. Weed; she had just sent a text saying that she would change her number. *Id.* Mr. Rosenbaum was aware that the phone number he was texting was Ms. Weed’s phone number. Ms. Weed further testified that she believed Mr. Rosenbaum would carry out the threats, and that she was afraid. RP April 9, page 151. Taking all the evidence in the light most favorable to the State, it is sufficient to support a conviction for felony harassment with threats to kill Julia Weed.

Second, the evidence is sufficient to support a conviction for felony harassment against Ally Gibson. Though Ms. Weed and Ms. Gibson were both sending text message from Ms. Weed’s phone, the context makes it clear which messages were sent from which person. For example, at one point, Ms. Gibson says, “Don’t talk about my child,” and “I will do everything to protect my sister and my baby.” RP April 9, page 156–57. Ms. Gibson testified that she was pregnant with Mr. Rosenbaum’s child during the time of the text messages. RP April 10, page 15. Furthermore, Ms. Weed testified that Mr. Rosenbaum had hit Ms. Gibson before. RP

April 9, page 163. Therefore, when Mr. Rosenbaum sent a text message that said he would beat her worse than before, both women took that as a threat to harm Ms. Gibson. RP April 9, page 158; RP April 10, page 34. Ms. Gibson also testified that Mr. Rosenbaum threatened to send junkies and tweakers find her and hut her, that he would stop at no means to find her, and that she was frightened and that she thought there was a good chance Mr. Rosenbaum would carry out his threats. RP April 10, page 35–38.

Additionally, though the jury found that there were no threats to kill Ms. Gibson, there was sufficient evidence that the defendant was previously convicted of the crime of violation of a protection order against a person specifically named in the no contact order. Delora Wirkkala testified that Mr. Rosenbaum was charged with Violation of a Protection Order against Mr. Spangler, that he pleaded guilty, and that the Judgment and Sentence was entered on July 16, 2013. RP April 10, page 127–130. Because Mr. Rosenbaum had previously been convicted of Violation of a No Contact Order, there is sufficient evidence to support a conviction of felony harassment against Ally Gibson.

Mr. Rosenbaum's assertion that the threatening text messages were mere mockery and hyperbole is an issue of credibility for the jury to decide. Furthermore, Mr. Rosenbaum's assertion that Ally Gibson was not in fear

is an issue of credibility. Credibility is an issue for the jury to decide, and a reviewing court will not review credibility determinations. The jury heard all the testimony regarding the threats made by Mr. Rosenbaum and Ms. Gibson's reactions to those threats. The jury made a credibility determination regarding Ms. Gibson's written statement, her testimony that she was afraid, and all the other testimony. Taking the evidence in the light most favorable to the State, there is sufficient evidence for both counts of felony harassment, including that Ms. Gibson was placed in fear by Mr. Rosenbaum's threats.

b. There was sufficient evidence to support the conviction for bribing a witness.

In order for the jury to have reached a verdict of guilty regarding bribing a witness, they had to find that (1) the defendant knowingly offered, conferred, or agreed to confer a benefit upon a witness or a person he had reason to believe was about to be called as a witness in any official proceeding; (2) the defendant acted with the intent to influence the testimony of that person or induce that person to avoid legal process summoning her to testify or induce that person to absent herself from an official proceeding to which she had been legally summoned; and (3) that any of the acts occurred in the State of Washington. Court's Instructions to the Jury, Instruction 20, 16; RCW 9A.72.090.

The elements of bribing a witness do not include that the bribe must be communicated to the person. The defendant must simply offer a benefit upon a witness with the intent to influence that person's testimony. It is instructive to look at the legislative history of the bribery statute, which was changed to its current form in 1975. The earlier version of the statute required "an agreement or understanding that the testimony of such witness shall be thereby influenced." RCW 9A.72.090 (1974). The legislature specifically removed that language in 1975. *See* RCW 9A.72.090 (1975). The intent, then, was to remove any requirement of an agreement or understanding, leaving only an offer. Furthermore, if the legislature wanted the State to have to prove that the offer was received by or communicated to a specific person, they would have written it into the statute. In the absence of that, the role of this Court is not to write additional elements into the statute.

In this case, Mr. Rosenbaum admitted he sent the letters to "Bonnie" and to his mother, including State's exhibit 1. RP April 10, page 206. In that letter he writes, "Please tell my girl what I am saying, we gotta get her sister on our side, hell I'll pay \$ if I have to." State's exhibit 1. Earlier in the letter Mr. Rosenbaum tells his mother that Ally needs to get Julia on "my/our" side for trial, that they both need to say they overreacted and were just mad, and that they were not scared. Taken in the light most favorable

to the prosecution, this letter shows that Mr. Rosenbaum intended to influence the testimony of Ally and/or Julia, and that he would pay money to make that happen. In other words, he offered to pay Ally or Julia to get them to testify to “his side” of the story. Because the elements of the crime do not include that the influenced person actually receive knowledge of the offer, and because the evidence is sufficient to prove bribery, Mr. Rosenbaum’s petition should be denied.

2. Mr. Rosenbaum’s convictions do not merge, and do not violate Mr. Rosenbaum’s double jeopardy rights.

The merger doctrine only applies when the “legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.*, first degree rape) the State *must* prove not only that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping).” *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005) (emphasis in original).

Double jeopardy principles protect a defendant against multiple punishments for the same offence. *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991). Under the “same evidence” test, a defendant’s double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. *State v. Calle*, 125 Wn. 2d 769, 888 P.2d 155 (1995). If

each offense includes an element that is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same. *Id.*

a. The felony harassment convictions do not merge or violate Mr. Rosenbaum's double jeopardy rights.

The merger doctrine does not apply in this case because Mr. Rosenbaum was convicted of two separate counts of harassment, neither of which were predicated on a crime being accompanied by a separate and distinct criminal act.

Double jeopardy is also not implicated here, though the defendant was convicted of two counts of harassment stemming from a series of text message to two different women. In this case, Mr. Rosenbaum was convicted of harassment against two separate women. Each count contained an element the other did not – specifically, the names of each women. Because the jury had to find in Count One that Mr. Rosenbaum harassed Ally Gibson, and in Count Two that he harassed Julia Weed, the two counts do not violate Mr. Rosenbaum's protection against double jeopardy and his petition should be denied.

b. The convictions for bribing a witness and witness tampering do not merge or violate Mr. Rosenbaum's double jeopardy rights.

Similarly, Mr. Rosenbaum was convicted of two counts of witness tampering against two separate women. Each count contained an element

the other did not – the names of the two women. The merger doctrine also does not apply. Finally, bribing a witness and witness tampering each include an element the other does not. Bribing a witness requires that a benefit be offered or conferred; witness tampering does not. RCW 9A.72.090; RCW 9A.72.120. Tampering with a witness requires an attempt to induce the witness to testify falsely, while bribing a witness requires just the intent to influence the person. Proof that Mr. Rosenbaum committed witness tampering would not necessarily prove that he committed bribery of a witness, and vice versa, so these crimes do not violate double jeopardy.

Finally, Mr. Rosenbaum's statements do not constitute the same course of conduct such that he could only be convicted of one act. He wrote four separate letters, two to his mother, one to a friend, and one to Ally Gibson (which was addressed to "Bonnie"). In each of these letters he makes similar statements regarding making sure Ms. Gibson and Ms. Weed attend trial and testify a certain way. The statements were directed at two different people, so they do not constitute the same course of conduct.

3. Mr. Rosenbaum's due process rights were not violated by the trial court excluding "other suspect" evidence.

Mr. Rosenbaum has not shown error or prejudice regarding other suspect evidence. He claims that the trial court denied his right to present a defense by excluding evidence that Martin Craig Spangler sent the relative

text messages. However, he was permitted to testify regarding Mr. Spangler's involvement. He testified that he lived with Mr. Spangler, that he was texting from Mr. Spangler's phone number, and that he was not the only person texting. RP April 10, page 154; 157; 179. He further testified that nobody other than himself and Mr. Spangler had the phone and that Mr. Spangler was the only other person in the house. RP April 10, page 181. Then, he testified that Mr. Spangler asked for his phone back and gave the phone back. RP April 10, page 184. In other words, Mr. Rosenbaum had the opportunity to explain that Mr. Spangler could have and in fact did send some of the text messages.

Furthermore, Mr. Rosenbaum's attorney argued in closing that the State had not proved that Mr. Rosenbaum sent the text messages. He stated, "We're not even saying that the threat came from my client. Another person had access to the phone." RP April 11, page 76. He went on to argue that the phone belonged to Mr. Spangler who took the phone back from Mr. Rosenbaum, and that Mr. Rosenbaum did not even know about the threatening text messages until the discovery packet was received. RP April 11, page 80. Therefore, the trial court did not exclude evidence regarding other suspects. There was no violation of Mr. Rosenbaum's rights, and no prejudice shown. His petition should be denied.

4. Sufficient foundation was laid for the text messages to be admitted into evidence.

Under Evidence Rule 901, an item to be admitted as evidence must be shown to be what the proponent claims it is. This requirement is satisfied by “evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). One way to authenticate or identify an object is through testimony of a witness with knowledge. ER 901(b)(1). In this case, Julia Weed identified State’s exhibits 10, 11, and 12 as text messages between herself and Jeremy Rosenbaum. She testified that the exhibits were screen shots of her phone with text messages, and that they were fair and accurate copies of the text conversations between the phone number on the texts and her phone. RP April 9, page 126–130. She therefore identified that the exhibits were what they claimed to be, meeting the requirements of ER 901. The trial court therefore did not err in admitting the exhibits.

5. Mr. Rosenbaum was not denied the right to present a defense by the exclusion of testimony regarding drug use.

“The granting or denial of a motion in limine is within the discretion of the trial court, subject only to review for abuse.” *Gammon v. Clark Equipment Co.*, 38 Wn. App. 274, 286 (1984). “A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds.” *Garcia v. Providence Medical Center*, 60 Wn. App. 635, 642

(1991). Irrelevant evidence is typically not admissible at trial, and relevant evidence can be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” ER 401; ER 403.

In this case, the defense attorney did not object to the State’s motion in limine to exclude mention of Ally Gibson’s drug use. RP April 9, page 93–94. In fact, the defense attorney made his own motion in limine to strike references to drug usage in the text messages and the letters as well as in the testimony of Ms. Weed and Ms. Gibson. RP April 9, page 10. The defense attorney furthermore agreed that such testimony is not relevant. RP April 9, page 93–94. In light of that agreement and the issues and evidence presented at trial, the trial court did not abuse its discretion in granting the State’s motion in limine and excluding testimony regarding Ms. Gibson’s drug use. Furthermore, Mr. Rosenbaum fails to show actual and substantial prejudice from this claimed error.

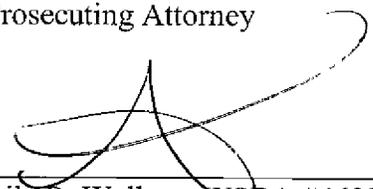
IV. CONCLUSION

The petitioner has failed to meet his burden for a PRP. For the reasons stated above, the personal restraint petition should be denied.

Respectfully submitted this ~~18th~~ day of November, 2015.

RYAN JURVAKAINEN
Prosecuting Attorney

By:



Aila R. Wallace, WSBA #46898
Deputy Prosecuting Attorney
Representing Respondent

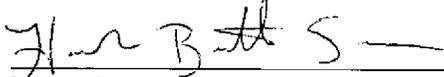
CERTIFICATE OF SERVICE

Hannah Bennett-Swanson, I certify that I sent to the COA Division II portal a true and correct copy of the Response to Amended Personal Restraint Petition and sent a true and correct copy to the Appellant via US mail to:

Jeremy David Rosenbaum
DOC # 868969
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 19, 2015.



Hannah Bennett-Swanson

COWLITZ COUNTY PROSECUTOR

November 19, 2015 - 8:45 AM

Transmittal Letter

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