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OCTOBER 12, 2011
Court of Appeals
Division III
State of Washington

29783-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASMINE N. SINGH, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The defendant's assignments of error cover the better part of two pages and in the interest of economy, will not be repeated here.

II.

ISSUES PRESENTED

A. WAS THERE SUFFICIENT EVIDENCE PRESENTED SUCH THAT A RATIONAL TRIER OF FACT COULD FIND THE ELEMENTS OF FIRST DEGREE PERJURY?

B. ARE THE SENTENCING CONDITIONS IMPOSED BY THE TRIAL COURT RIPE FOR REVIEW CONSIDERING THE DEFENDANT HAS NOT INDICATED ANY ACTUAL IMPACT FROM THE SENTENCING CONDITIONS?

III.

STATEMENT OF THE CASE

For the purposes of this motion only, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

A. THERE WAS AMPLE EVIDENCE TO SUPPORT THE FINDING OF GUILT FOR FIRST DEGREE PERJURY.

The defendant opens her arguments with a challenge to the sufficiency of the evidence.

As noted in the Statement of the Case, the defendant waived a jury and the case proceeded to a bench trial. The relevant inquiry on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Luna*, 71 Wn. App. 755, 862 P.2d 620 (1993).

Because this is a perjury case, the number of items needed for a conviction are increased. "The requirements of proof in a perjury case are more stringent than those in any other area of law except treason." *State v. Olson*, 92 Wn.2d 134, 136, 594 P.2d 1337 (1979). "Proof of the falsity must meet certain requirements as to form in addition to being proved beyond a reasonable doubt."

According to the court in *Olson, to* prove perjury, the State must present:

1. The testimony of at least one credible witness which is positive and directly contradictory of the defendant's oath; and

2. Another such direct witness or independent evidence of corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence.

State v. Olson, supra.

The defendant has not challenged the Information in this case. The Information lists the following elements:

1. Date of crime.

2. Made a materially false statement by replying "no" to ever talking to the defendant Anthony Singh about witnesses in the case, and the facts of the case and testimony of witnesses;

3. Knowledge that the statement was false;

4. The statement was made under oath in an official proceeding, to-wit: an ER 404(b) Evidence Hearing.

Starting with the unchallenged elements, there is no dispute regarding the date of the crime, the fact that the defendant answered "no" to relevant questions by the prosecutor and that the negative responses were made under oath at an ER 404(b) hearing prior to the beginning of

trial for Anthony Singh, the defendant's brother. The defendant also does not challenge the materiality of the falsehoods.

The defendant argues that the prosecutor's questions were "ambiguous and vague." The defendant argues that it was not her job to make the questions more specific. This may or may not be so. What the defendant did, by accepting the prosecutor's questions without questions or objection, is to lock any answers to the prosecutor's questions into the scope contained in the questions.

The prosecutor asked the defendant if she ever talked to her brother about *any of the witnesses involved in the case?* The defendant now complains about the form of the question but did not do so at the time it was asked. It does not matter which specific witnesses were discussed by the defendant and her brother. The question was whether the defendant had spoken to her brother about *any* of the witnesses in the case. The question is encompassing, but it is not vague. Any witnesses means *any* witnesses. The defendant would like to parse the language of "...the case?" to argue that the defendant might not have known which case the prosecutor was talking about. Since there was only one active case involving the defendant's brother and the defendant was called for an ER 404(b) hearing just prior to the beginning of the brother's case, it

strains credulity to attempt to call the question vague on the basis of the witness not knowing which case the prosecutor might be asking about.

The defendant makes similar arguments for the prosecutor's questions on the facts of the case. The defendant was asked: "You ever talk to him about the facts of the case?" Exh. S7, pgs. 8-9.

The State responds as in the previous discussion. The defendant claims that the question does not specify which facts she might have discussed with her brother. This is correct. However, the question from the prosecutor was whether or not the defendant had ever talked to her brother regarding the facts of the case. Again, the defendant did not ask for clarification nor did she object to the question. The question is a broad one, but it is not ambiguous or vague. Exh. S7, pgs. 8-9. The defendant was asked if she *ever discussed the facts of the case* with her brother. Exh. S7, pgs. 8-9. The specific fact discussed is irrelevant so long as the fact pertained to the case involving her brother. The context of the facts discussed is contained throughout the transcripts of the telephone recordings. Exh. S4-S7.

The last question from the prosecutor reads: You ever talk to him about anything that anybody else has testified about this case?" Exh. S7, pgs. 8-9. The defendant continues to argue that the question was ambiguous and vague. As stated above, this is not correct. Yes, the

question covered a larger area than asking about one specific witness, but that does not make the question ambiguous. The question was designed to find out if the defendant had discussed other person's testimony with her brother. The prosecutor was aware that the defendant was sitting in the courtroom for much of the case and pre-trial matters.

If the logic of the defendant were to be applicable, the data sought by the prosecutor would probably never come to the surface. The prosecutor would have to inquire about each individual witness, tag the question with the case number and generally make the questions such that the defendant would change her arguments to those raised in classic perjury cases where the very specificity of the question makes it difficult to call any particular answer a falsehood. *See, State v. Stump*, 73 Wn. App. 625, 870 P.2d 333 (1994).

The defendant maintains that the State did not meet its burden of proof because it presented no witness with personal knowledge of the case. Brf. of App. 15. The defendant's arguments make an assumption that the witness must have all of the contradiction information, apparently at the time the contradiction is made. There is nothing in the statutes or the caselaw that supports the defendant's arguments on the lack of a witness with personal knowledge of the facts.

The defendant claims that Det. Barrington had no personal knowledge that the defendant was aware of any specific facts in her brother's case, or knew the names of specific witnesses or specific witnesses that had testified prior to the ER 404(b) hearing. The defendant is incorrect. Det. Barrington had personal knowledge that the defendant testified under oath in the ER 404(b) hearing and that simply answered "no." to the questions posed by the prosecutor at the hearing.

The defendant constructs a "straw man" argument by claiming that the detective did not have knowledge of which hearings the defendant attended nor any evidence that specific witnesses from those hearings were discussed in the jail phone calls. The State did not try to prove which hearings the defendant attended as such are not relevant. The State did not attempt to prove that specific witnesses were discussed in the jail phone calls. This line of argument takes the defendant's earlier arguments and applies them to Det. Barrington's testimony. The claims made by the defendant miss the mark. Det. Barrington had direct personal knowledge that the defendant answered no to the prosecutor's questions. These were false answers.

The defendant, for reasons unclear, claims that the jail recordings did not form independent corroborative evidence. The defendant, once again, develops a "straw man" argument by claiming that there was no

evidence as to when the calls were made and no evidence that the defendant knew specific facts and witness names.

At the risk of beating a dead horse, the State notes the defendant's claims regarding the uselessness of the jail tapes are completely irrelevant. The questions asked of the defendant on the stand did not include a question regarding what time she communicated with her brother. There was no question pertaining to the specific person that the defendant and her brother discussed. There was no question pertaining to exactly which facts the defendant discussed with her brother.

The issues thoroughly established by the jail recordings are those contained in the prosecutor's questions. Did the defendant discuss the facts of the case with her brother? Did the defendant talk to her brother about anything that anyone else had testified about this case? Did the defendant discuss any of the witnesses involved in the case? The defendant answered "no" when that was patently false and the falsehood is proven in the jail recordings.

Contrary to the defendant's assertions, the jail recordings go to the very heart of this case by proving that the defendant knew who she was talking to (her brother) and the content of what she said.

The defendant does not question the materiality of the falsehoods involved in this case.

B. THE SENTENCING COURT DID NOT EXCEED ITS AUTHORITY WHEN IT PLACED CRIME-RELATED PROHIBITIONS ON THE DEFENDANT AS PART OF HER COMMUNITY CUSTODY AND THIS ISSUE IS NOT RIPE FOR REVIEW.

The sentencing court imposed three conditions on the defendant:

1. No association or contact with known felons or gang members or their associates.
2. No clothing, insignia, medallions, etc. which are indicative of gang lifestyle. The defendant shall not obtain any new or additional tattoos indicative of gang lifestyle.
3. No possession of weapons.

CP 46-58.

Generally, sentencing conditions are reviewed under an abuse of discretion standard. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009).

The defendant maintains that any sentencing conditions must "...directly relate to the circumstances of the crime." Brf. of App. 20.

The defendant mistakenly argues that there is nothing in the record to indicate there was anything gang-related about the circumstances of the crime. The perjury involved in this case was *only* about gang-related circumstances. The defendant's brother was on trial for gang related activity and the very ER 404(b) hearing at which the defendant committed

perjury was solely for the purpose of the admission of the gang status of the defendant's brother. The tapes recorded from the jail specifically show the defendant discussing gang activity. There was no other reason to commit the perjury *except* to deceive the trial court on the issue of gang membership/activity on the part of the defendant's brother.

All of the community custody restrictions share a common aspect: None have been shown to be ripe for review. This court held in *State v. Autrey*, 136 Wn. App. 460, 470-471, 150 P.3d 580 (2006), that "The unconstitutionality of a community custody condition is not ripe for review unless the person is harmfully affected by the part of the condition alleged to be unconstitutional." *Id.* at 470 *citing State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996).

The defendant has challenged none of the sentencing conditions based on a harmful effect on the defendant. Perhaps, if the defendant wants to own weapons, associate with gang members, wear gang materials and get gang tattoos during the time of her community custody, the defendant would be free to approach the court and the situation would be addressed.

The most obvious immediate problem (curiously not mentioned by the defendant) involving the defendant and the sentencing conditions is the fact that her brother is now a convicted felon as well as an established

gang member. However, it is unlikely that the defendant could have any significant contact with her brother as he was sentenced to 171 months in prison.

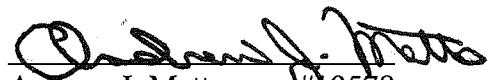
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 12th day of October, 2011.

STEVEN J. TUCKER
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 29783-7-III
v.	)	
	)	CERTIFICATE OF MAILING
JASMINE N. SINGH,	)	
	)	
Appellant,	)	

I certify under penalty of perjury under the laws of the State of Washington, that on October 12, 2011, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Susan M. Gasch
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and to:

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10/12/2011	Spokane, WA	Kathleen Owens
(Date)	**(Place)**	**(Signature)**