

**FILED**

AUG 02 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 302423

Consolidated with 302431

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

URIEL PONCE

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR FRANKLIN COUNTY  
The Honorable Carrie L. Runge

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APPELLANT'S OPENING BRIEF

---

TANESHA LANTRELLE CANZATER  
Attorney for Appellant  
Post Office Box 29737  
Bellingham, Washington 98228-1737  
(360) 362-2435

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt an essential element of the witness tampering statute.

2. The trial court erred when it denied Mr. Ponce's motion to dismiss for lack of evidence.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

In order to convict a person of witness tampering, the State must first prove that he attempted to induce a *witness* or *a person he believed would be called as a witness* to testify falsely. Did the State prove beyond a reasonable doubt that Mr. Ponce's brother was a *witness*?

C. STATEMENT OF THE CASE

Antonia Ponce (Ms. Ponce) was fired from Taco Bell in Pasco after 16 years of service. Ms. Ponce contested the firing. She filed an Equal Employment Opportunity complaint against the company that described how the manager pushed her off a chair and how he made derogatory remarks about her appearance and her age. 7/7/11 RP 163; 7/8/11 RP 191-92.

Sometime after Ms. Ponce was fired, the manager received an anonymous telephone call. 7/7/11 RP 105. When the manager identified himself, the man on the other line called the manager a "bitch" and ordered him to come outside. The man told the manager that he was going

to kill him. 7/7/11 RP 106. Initially, the manager believed the caller sounded like one of Ms. Ponce's sons. 7/7/11 RP 108. Two of her sons, Jose Ponce (Jose) and Uriel Ponce (Mr. Ponce) had worked at the Taco Bell before. 7/7/11 RP 163. The manager later testified that he could not tell for certain whether the caller was a "Ponce brother at all." 7/7/11 RP 110.

The manager listened for a minute then hung up the telephone. 7/7/11 RP 108. He was not particularly concerned until after he spoke with a co-worker who encouraged him to make a record of the incident in light of Ms. Ponce's pending complaint. 7/7/11 RP 106-107.

The manager dialed star 69 for the return number and telephoned police. 7/7/11 RP 108. The responding officer asked dispatch to search the number. The number came back to Ms. Ponce's address. 7/7/11 RP 129. At the time, Ms. Ponce lived with her husband and their sons Jose, Mr. Ponce, and Tobias. Tobias's wife and children also lived at the house. 7/7/11 RP 162.

The officer drove to the Ponce residence and spoke with Jose. When the officer realized that Mr. Ponce was not there, he dialed the cell phone number that he received from the manager. A man, who identified himself as Michael Jones, answered. 7/7/11 RP 130-131. Michael Jones

told the officer that he had loaned his telephone to a homeless person. The officer told the court that as soon as he asked if they could meet, the man hung up. 7/7/11 RP 132.

The next morning, the officer served a search warrant at the Ponce residence. Mr. Ponce was there. The officer placed him under arrest and claimed that Mr. Ponce, without provocation, declared that he had lost his cell phone, but that he had a new one. 7/7/11 RP 133. The officer found a cell phone. But it was disconnected and was not the same cell phone that was used to call Taco Bell. 7/7/11 RP 134.

The officer transported Mr. Ponce to jail. There, the officer explained to Mr. Ponce why he had been arrested and advised him of Miranda warnings. 7/7/11 RP 134. According to the officer, Mr. Ponce waived Miranda rights and agreed to speak with him about the case. 7/7/11 RP 135. The officer claimed that Mr. Ponce was confused as to why he was under arrest when police did not find the cell phone or any other evidence to connect him with the telephone call to Taco Bell. 7/7/11 RP 135. According to the officer, Mr. Ponce further claimed that Michael Jones had been using his cell phone, even though he had no idea who Michael Jones was or how he had known Michael Jones. 7/7/11 RP 136.

The State charged Mr. Ponce with felony harassment and with intimidating a witness. CP 147; CP 135-136.

Police released Mr. Ponce from jail. When he returned home, Jose claimed that Mr. Ponce and Mr. Ponce's friend, a girl named Kelsey, presented him with a letter. According to Jose, Mr. Ponce told him to sign a letter in which he admitted that Jose called Taco Bell and threatened the manager. 7/8/11 RP 169; 7/8/11 RP 214; 7/8/11 RP 221. Jose signed the letter. Then immediately telephoned Ms. Ponce. 7/8/11 RP 215; 7/7/11 RP 172.

Ms. Ponce was at work when Jose called. She left work early and returned home. 7/7/11 RP 172. When she arrived there she confronted Mr. Ponce about the letter and asked why the letter was signed in Jose's handwriting. According to Ms. Ponce, Mr. Ponce told her that if Jose confessed that he called Taco Bell, he would get less time because he was a minor. 7/7/11 RP 173.

That day, an investigator who was hired by Mr. Ponce's attorney, stopped Jose on the street and asked if he had signed the letter freely and voluntarily. 7/8/11 RP 229. Jose said yes. 7/8/11 RP 230. About a month later, at the prosecutor's office Jose recanted his confession and told police that Mr. Ponce convinced him to sign the letter. 2/8/11 RP

221; 2/8/11 RP 217. The State charged Mr. Ponce with witness tampering. CP 143-144.

The court appointed Mr. Ponce two attorneys- one to handle the felony harassment case and another to handle his witness tampering case. CP 144; CP 141. The court then consolidated the cases and tried them together. CP 136; CP 140; 6/14/11 RP 2.

At the end of the State's case, one of Mr. Ponce's attorneys moved the court to dismiss the witness intimidation charge for lack of evidence. She argued that the State had to prove at some point during the telephone call with the manager Mr. Ponce used a threat to influence the manager's testimony or to induce the manager to absent himself from proceedings. 7/8/11 RP 263. The State argued the jury could infer what if any effect the telephone call had on the manager's testimony or participation. 7/8/11 RP 264. The court denied the motion and concluded that although somewhat "skimpy", the evidence was sufficient enough for the State to make an argument to the jury. 7/8/11 RP 266.

Mr. Ponce's other attorney moved the court to dismiss the witness tampering charge for lack of evidence. She argued that the State had not proven the elements of the crime; specifically that Jose was witness or a person who was about to be called as witness in the case when he signed

the letter. 7/8/11 RP 266. The State argued that Jose was listed as a witness in the felony harassment case to identify Mr. Ponce's cell phone number. 7/8/11 RP 267. From that, the court found that the evidence was sufficient enough for the witness tampering charge to go to the jury and denied the motion.

The jury found Mr. Ponce guilty of felony harassment and of witness tampering, but not guilty of intimidating a witness. CP 35; CP 39; CP 40; 7/11/11 RP 316. The court sentenced Mr. Ponce to 27 months on both convictions and ordered the sentences to run concurrently. The court imposed a variety of fees and issued restraining orders on behalf of the manager and Jose. 9/16/11 RP 327-330; CP 14-30; CP 17-33. Mr. Ponce appealed both convictions. CP 13; CP 15-16.

Here, Mr. Ponce challenges the witness tampering conviction.

D. ARGUMENT

THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. PONCE'S BROTHER WAS A *WITNESS*.

1. The trial court erred when it denied Mr. Ponce's motion to dismiss for insufficient evidence. In determining the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable

doubt.” State v. Rempel, 114 Wash.2d 77, 82, 785 P.2d 1134 (1990)  
(citing State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980)).  
Circumstantial and direct evidence are equally reliable. State v.  
Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). This Court will  
uphold a conviction against a claim of insufficient evidence if, taking all  
evidence in the light most favorable to the State, any rational trier of fact  
could have found the essential elements of the crime beyond a reasonable  
doubt. State v. Bencivenga, 137 Wash.2d 703, 706, 974 P.2d 832 (1999).

2. The State did not meet its burden of proof. In a criminal  
prosecution, due process requires the State to prove every element of the  
charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; State  
v. Teal, 152 Wash.2d 333, 337, 96 P.3d 974 (2004); In re Winship, 397  
U.S. 358, 361–64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In order to convict a person of tampering with a witness, the State  
must prove that he attempted to induce a *witness or a person he or she has*  
*reason to believe is about to be called as a witness* to testify falsely. RCW  
9A.72.120(1)(a) (emphasis added).

For example, in State v. Williamson, 131 Wash.App. 1, 6-7, 86  
P.3d 1221 (2004), Division Two of this Court upheld a witness tampering  
conviction when it found that the State’s evidence proved the defendant

tampered with a witness when he took a substantial step toward altering the witness's testimony.

In that case, the defendant, Williamson, forced his girlfriend's daughter, MK, to engage in sexual acts with him and others until the child was placed in foster care. DR, a 16-year old boy, who often spent time at the Williamson residence, testified that Williamson sexually abused both him and MK almost every weekend. The State charged Williamson with four counts of child rape, two counts of child molestation, two counts of furnishing alcohol to a minor, four counts of witness tampering, and one count of bribing a witness. State v. Williamson, 131 Wash.App. at 4, 86 P.3d 1221.

Before trial, Williamson met DR at a local motel and asked him to change his story. Williamson then drove DR to his attorney's office to recant. DR recanted his statement, but decided later to testify about the sexual conduct. Id.

A month before trial, Williamson again met with DR and took him for a drive. During the drive, Williamson asked DR to recant his allegations of sexual abuse. Williamson offered to give DR a share of his marital property after his dissolution if he would do so. Williamson also asked DR to contact MK and tell her that her mother and father would go

to jail if she did not take back her statement. Williamson again drove DR to his attorney's office to recant. This time, DR refused to go in. Williamson then called DR and continued to urge him to recant. DR never contacted MK to ask her to recant her statement. Id.

DR testified about the abuse at trial. The jury convicted Williamson of multiple counts of varying degrees of rape, three counts of tampering with a witness, and one count of bribing a witness. The Court imposed an exceptional sentence. Williamson appealed the convictions. He raised a number of issues on appeal. One of which was that the evidence was insufficient to find that he tampered with a witness. He argued that his words "contained no express threat nor any promise of reward." App. Br. at 19. He also argued that because neither he nor DR ever contacted MK, the State could not prove he tampered with the witness. Williamson, 131 Wash.App. at 5, 86 P.3d 1221.

The Court disagreed and found that witness tampering did not require actual contact with the witness, but rather that person's attempt to alter the witness's testimony. And Williamson attempted to alter MK's testimony when he told DR to talk with her about changing it. The Court found in the light most favorable to the State, the evidence was sufficient.

to convict Williamson of tampering with the witness MK. Williamson, 131 Wash.App. at 7, 86 P.3d 1221.

Similarly in State v. Lubers, 81 Wash.App. 614, 622, 915 P.2d 1157, review denied, 130 P.2d 1008 (1996), the Court found the evidence presented was sufficient for a rational trier of fact to find the statutory elements for witness tampering beyond a reasonable doubt.

Lubers, the defendant in that case, was accused of raping a 14 year-old girl. His friend Joseph was also charged, but the State agreed to drop Joseph's charge if he testified truthfully against Lubers. Lubers, 81 Wash.App. at 617, 915 P.2d 1157.

Joseph testified that he and Lubers drank a bottle of wine and decided to call the girl. They arranged to pick her up around 11:00 p.m. Before they picked her up, Lubers spiked another wine bottle with "Visine." He had hoped the girl would drink it and pass out so that he could have sex with her. Id.

According to Joseph, after they picked up the girl, they drove to a park. They all got out of the car and Lubers asked Joseph to retrieve a loaded revolver from the trunk. Lubers got the gun, then he, Joseph, and the girl drank and socialized with people in the park. Some time later, they decided to hike a trail. On the trail, Lubers and Joseph pretended like

they were going to shoot each other. Lubers asked Joseph to feign injury and, when the girl came over to see how he was, Lubers pushed her onto her back and had sexual intercourse with her. The gun was lying next to them. The girl struggled for a while, but finally gave in because she was afraid “they were going to shoot [her].” Id.

Police arrested Lubers several weeks later. State v. Lubers, 81 Wash.App. 618. Lubers called Joseph from jail and asked him to write a letter to Lubers’ lawyer saying that Joseph had lied to the detective. Lubers told Joseph to say that another man, a fictitious person named “Danny Cortez,” was really the rapist, that “Cortez” had initially promised to pay Joseph \$10,000 to name Lubers, and that “Cortez” had threatened to kill Joseph’s family unless he falsely accused Lubers. Lubers, 81 Wash.App. at 618, 915 P.2d 1157

At trial, Joseph testified that Lubers asked him to write a letter that recanted information he had given police as part of a rape investigation, and that named “Danny Cortez” as the rapist. A jury found Lubers guilty of first-degree rape and of witness tampering. Lubers appealed both convictions. Lubers challenged the sufficiency of the evidence used to support the witness tampering conviction.

The Court concluded Joseph was about to be called as a witness and he had information relevant to the investigation. The Court found that Lubers asked Joseph to make a false statement which effectively recanted a prior signed statement to the police, and thereby, to withhold information necessary to a criminal investigation. Lubers, 81 Wash.App. at 622, 915 P.2d 1157.

Finally in State v. Hall, 168 Wash.2d 726, 728, 230 P.3d 1048 (2010), our Supreme Court upheld the evidence used to support a defendant's witness tampering conviction because of his ongoing attempts to persuade his girlfriend, who had information relevant to the case, not to testify or to testify falsely. The defendant in that case, Hall, had dated a woman for roughly two months before she broke off the relationship. He continued to press his attentions on the woman even after he suspected she was seeing another man.

One day he drew a gun on her, pushed the barrel against her head, and told her that he would kill her. He then shoved her down and forced his way into her apartment, where indeed he found another man. Hall then redirected his ire at that other man and chased him out of the house with the gun. When he realized the woman had called police, Hall fled the scene. State v. Hall, 168 Wash.2d at 728, 230 P.3d 1048.

Police contacted Hall's new girlfriend, Aquiningoc. Hall had driven her car to his ex-girlfriend's apartment. Aquiningoc told police that Hall was her boyfriend, that he lived with her, that he had borrowed her car to visit his mother. She also confirmed that he owned a gun. The detective, assisted by members of a SWAT (special weapons and tactics) team, returned to Hall's home and arrested him. They found the gun in the master bedroom closet. State v. Hall, 168 Wash.2d at 729, 230 P.3d 1048.

The State charged Hall with first-degree burglary and with second-degree assault. While in jail, Hall attempted to call Aquiningoc over 1,200 times. Some of the telephone calls were played for the jury where Hall had attempted to persuade Aquiningoc that his legal woes were her fault and that she had a moral obligation not to testify or to testify falsely. Based on those telephone calls, the State charged Hall with four counts of witness tampering. Id.

A jury convicted Hall of three of those counts, as well as first-degree burglary, assault in the second-degree, and unlawful possession of a firearm. The trial court treated each count of witness tampering as a separate unit of prosecution. The Court of Appeals affirmed the convictions. Then, Hall petitioned the Supreme Court to review whether his multiple convictions for witness tampering violated double jeopardy.

The Supreme Court concluded Hall's numerous phone calls constituted one unit of witness tampering and remanded the case to superior court for resentencing. Id.

The witnesses in Williamson, Lubers, and Hall, were either victims of the crime, intimately involved in the commission of the crime, or had relevant information about the crime. Here, because Jose was not at the Taco Bell when the manager received the telephone call and was not believed to have made the call, the State had to specifically point to evidence that proved Jose was a *witness* in order to support a witness tampering conviction.

Only when Mr. Ponce moved the court to dismiss the charge for lack of evidence, did the State reveal that Jose had been named as a witness to identify Mr. Ponce's cell phone number. 7/8/11 RP 267. At trial, however, the State neglected to put on any evidence to prove that fact to the jury.

What is more, when Mr. Ponce allegedly told Jose to sign the confession letter, the State did not prove he had reason to believe Jose would be involved in the case in any way. Furthermore, the State failed to prove that Jose was even aware he had been named as a witness. From the lack of evidence presented to prove that element of the witness tampering

statute, no rational trier of fact could have found as much beyond a reasonable doubt.

3. Reversal is appropriate remedy. Where no rational trier of fact could have found all elements of the crime were proven beyond a reasonable doubt, the reviewing court must reverse the conviction. State v. Hickman, 135 Wash.2d 97, 103, 954 P.2d 900 (1998). “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” Id.

E. CONCLUSION

For the reasons set forth above, Mr. Ponce respectfully asks this Court to reverse the trial court’s decision and to dismiss the witness tampering conviction.

Respectfully submitted this 30<sup>th</sup> day of July, 2012.

  
Tanesha La'Trelle Canzater, WSBA# 34341  
Attorney for Uriel Ponce