NO. 30242-3-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

vs.

URIEL PONCE

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

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A. COUNTERSTATEMENT OF THE ISSUES

1. **DID THE STATE OFFER SUFFICIENT EVIDENCE ESTABLISHING JOSE PONCE AS A WITNESS OR A PERSON THE DEFENDANT HAD REASON TO BELIEVE WAS ABOUT TO BE CALLED AS A WITNESS, TO TESTIFY FALSELY OR TO WITHOLD ANY TESTIMONY OR ABSENT HIMSELF FROM ANY OFFICIAL PROCEEDING.**

B. RESPONSE TO STATEMENT OF THE CASE

Freddy Chavez worked as a manager at Taco Bell in 2011 (RP 102-03). He managed two members of the Ponce family, Jose Ponce and Antonia Ponce. (RP 103-04). During this time he became somewhat familiar with Antonia Ponce's other sons (Tobias, Antonio, and Uriel) and their voices. (RP 104-05). Eventually, Mr. Chavez fired both Antonia and Jose. (RP 104). Jose was fired for repeatedly calling in sick which he had done out of laziness. (RP 225-26). Following Antonia's termination, she began to file a lawsuit against Taco Bell and Mr. Chavez. (RP 105). She alleged that Mr. Chavez had made a derogatory comment about her age and appearance. (RP 192).

On January 10, 2011, Mr. Chavez received a phone call at Taco Bell. (RP 105). Mr. Chavez said "[t]hat he was gonna beat me. For me to better come outside when he got there, that he was gonna beat me, kill me. (RP 106). Mr. Chavez believed the voice sounded similar to Antonia Ponce's sons. (RP 108). Mr. Chavez used star 69 to determine that the call came from a particular number. (RP 108).

Officer Jeremy Jones of the Pasco Police Department then responded to the scene and contacted Mr. Chavez. (RP 129). Mr. Chavez reported he had received a call from 509-727-7720. (RP 129). Officer Jones did a reverse on the number and discovered it returned an address on South 5th Avenue, Pasco. (RP 129). Officer Jones was familiar with the address and knew it to be the Ponce family residence. (RP 129). Officer Jones immediately went to that address at 1020 S. 5th Avenue, Pasco. (RP 130, 162). Residing at that address was Antonia Ponce, Tobias Ponce, his wife, their three children, the Appellant, and Jose Ponce. At that address Officer Jones contacted Jose and Antonia Ponce and discovered that the Appellant was not home. (RP 130, 204). At that time Officer Jones confirmed that the number used to make

the call belonged to the Appellant. (RP 204-05).

According to Jose Ponce, the Appellant had his own room at the back of the residence and Jose was not allowed into to the room because it remained locked. (RP 209). Jose did not have access to the Appellant's phone and the Appellant kept his phone with him at all times. (RP 167, 190, 211). Antonia confirmed this with her testimony and said the Appellant never let anyone, including Jose, borrow his things or his phone. (RP 168, 184).

Officer Jones then called the number in question, while at that location. (RP 130). A person answered that call and identified himself as "Michael Jones." (RP 131-32). Prior to the officer telling the caller anything about the threat or the case, the caller told the officer someone had stolen his phone and used it to make calls. (RP 132).

The next day Officer Jones served a warrant at the residence to locate the phone in question. (RP 133). At this time Officer Jones placed the Appellant under arrest and the Appellant told him, unsolicited, that he had lost his phone. (RP 133). Later, under Miranda, the Appellant indicated he had used the phone number of 509-727-7720 but that his phone with that number had

been taken and used by "Mike Jones." (RP 136).

Detective Jeff Harpster was assigned to the case to follow up on the investigation. (RP 115). Detective Harpster used a search warrant to trace the number in question, 509-727-7780. (RP 116). The information provided by Sprint confirmed that a call had come to Taco Bell at the time in question from 509-727-7780, and that the number was registered to a Ponce family member who lived at the residence on South 5th Street. (RP 120). One of the Ponce family members associated with that phone was the Appellant, effective December 30, 2010. (RP 119).

On January 14th, 2011, an Information was filed in Franklin County Superior Court alleging one count of Felony Harassment. Around March 23, 2011, several months after charges had been filed against the Appellant, the Appellant, along with Kelsey Cavazos, approached Jose Ponce. (RP 213). The Appellant told Jose to sign a letter confessing to the Felony Harassment because "it would get him out of doing a lot of time." (RP 213-14, 227). Jose signed the letter out of fear the Appellant would harm him if he did not take the blame for the charges. (RP 214). Jose called Antonia and told her about the letter and she became angry. (RP 216).

Antonia, later confronted the Appellant about the letter and he admitted he had made Jose sign the letter because he was a minor and would get less time. (RP 173). The Appellant also admitted to Antonia that he had been the one to call Mr. Chavez on the day in question. (RP 174).

When questioned about the letter at the prosecutor's office, Jose admitted the Appellant had made him sign the letter. (RP 217). Jose stated that he had not used the Appellant's phone and that he did not threaten Mr. Chavez. (RP 220). At that time Jose told the prosecutor that his brother had a bad temper and asked if his recantation could be hidden from him. (RP 217).

Based on this information the State filed the charge of Witness Tampering on May 2, 2011. (CP 143). While the charges were pending the Appellant begin to discuss the case with witness Kelsey Cavazos over the jail's recorded phone system. (Supplemental Report of Proceedings, dated June 28, 2011, hereinafter, Supp. RP.). The Appellant repeatedly asked Cavazos to testify that Jose had taken the blame for the crime. (Supp. RP 24-25). The Appellant said if she testified for him he would be released from jail. (Supp. RP 28). He also repeatedly encouraged

Cavazos to keep her answers short and to not change her story. (Supp. RP 26). At one point the Appellant attempted to let Cavazos know, through a very primitive code, she should withhold any details to avoid being tripped up:

> Ponce: Okay look remember how the scripture was written?
>
> Kelsey: Yes.
>
> Ponce: Okay, uh, uh um that scripture, that scripture John 3:16, um uh wasn't written --- they don't ask you what year, what time it was written that scripture you know what I mean? Don't even answer you see what I'm saying.
>
> Kelsey: Okay.
>
> Ponce: Not until asked. You see what I mean.
>
> Kelsey: Yeah.
>
> Ponce: If you look up when a scripture was written. You see what I mean. So just, just, just ---
>
> Kelsey: Just what?
>
> Ponce: Do what it is alright?
>
> Kelsey: Okay.
>
> Ponce: Okay so pretty much you know what it is right? Hey I need you to come see me this weekend. I need to see you.

(Supp. RP 29-30).

The case proceeded to trial on July 8, 2011. (RP 179). As lay witnesses, the State called Freddy Chavez-Rangel, Antonia Ponce, and Jose Ponce. (RP 3-4). During closing argument the Appellant argued that the threats to Mr. Chavez had not put him in actual fear anything would happen to him. (RP 300). He argued that Mr. Chavez didn't bother to call police and didn't believe the threat was real "...but the person saying the words has to know that the person receiving the words reasonably believed that he can actually carry them out and he is not saying them in jest or idle talk." (RP 300-01). The Appellant also indicated that testimony showed that Jose and Antonia had a motive to threaten Mr. Chavez, but that the Appellant had no such motive because he had not worked for or really known Mr. Chavez. (RP 306-07).

The jury found the Appellant guilty of Tampering with a Witness and not guilty of Intimidating a Witness. (CP 39-40).

C. RESPONSE TO ARGUMENT.

1. JOSE PONCE'S TESTIMONY ESTABLISHED HIM AS A PERTINENT WITNESS IN MULTIPLE ASPECTS OF THE APPELLANT'S CASE, BOTH BEFORE AND AFTER THE APPELLANT APPROACHED HIM ABOUT PERJURING HIMSELF ON THE APPELLANT'S BEHALF.

According to the "to convict" instruction, the State alleged the Appellant committed Tampering with a Witness on or between March 28, 2011 to April 10, 2011, by attempting to induce Jose Ponce to testify falsely and that Jose Ponce "was a witness or a person the defendant had reason to believe was about to be called as a witness to testify or withhold any testimony or absent himself or herself from any official proceeding..." (CP 63). The State has the burden of proving that Jose Ponce was a witness in the Appellant's pending case.

To determine if Jose Ponce was a witness, one must consider the definition of witness used by the trial court. The only instruction given to the jury regarding witness definition was given using WPIC 115.53:

> "Current or prospective witness" means a person endorsed as a witness in an official proceeding, or a person whom the defendant believed might be called as a witness in any official proceeding, or a person whom the defendant had reason to believe might have information relevant to a criminal proceeding.

(CP 59). This broad definition of witness covers both formal witnesses appearing in court and individuals who simply have information a defendant might think is relevant to a criminal

proceeding. Jose Ponce had such information and testified to that information at trial. This established sufficient evidence for the Appellant's conviction for Tampering with a Witness.

When considering claims of insufficiency of the evidence, the Court acknowledges that a reviewing court is not ideally placed to second guess the trier of fact:

> The standard for determining whether a conviction rests on insufficient 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. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury.

In re Martinez, 171 Wash.2d 354, 364, 256 P.3d 277 (2011) (citations omitted). When looking at the information offered by Jose Ponce through this lens, it is clear that he had evidence relevant to many different aspects of the Appellant's case. This evidence ranged from information about the Appellant and his phone, to the Appellant's relevant character traits, to information which simply eliminated himself as a potential third-party perpetrator.

Officer Jones indicated during his testimony that he contacted Jose Ponce at the outset of the case. He did not give details of the conversation, as it would have constituted hearsay. However, Jose Ponce's testimony at trial shows his knowledge of the case at the outset of the investigation. Both he and his mother, Antonia, told the trial court that the Appellant was particular about his things and did not allow others to touch them. Specifically, Jose and Antonia said the Appellant kept his phone with him and would never have allowed Jose to use the phone. According to both Jose and Antonia, the Appellant was not on good terms with Jose. The Appellant had become angry about Jose even using his weight set and would not have given him access to his cell phone.

This information is important in the case because Detective Harpster had used a search warrant to trace the number back the residence where a large number of people lived. Law enforcement needed to confirm that the Appellant had exclusive access to the phone in question. Jose's testimony helped provide this evidence for the jury.

This evidence was also relevant because law enforcement

needed to rebut the story given by the Appellant upon his arrest. He claimed the phone had been taken and used by "Mike Jones." In light of Jose and Antonia's testimony about the Appellant keeping his phone to himself it made little sense for the jury to believe a homeless individual by the name of "Michael Jones," had access to the phone during the time period when the threats were made.

Another way which Jose connected to the original case as a witness stemmed from his position as a former employee at Taco Bell. He had worked for Taco Bell and been fired by the victim, Mr. Chavez. Mr. Chavez, had told police he was familiar with the voices of several of Antonia Ponce's sons. One of those being Jose. He could not identify which Ponce made the threats by voice alone. This made Antonio, Uriel, and Jose all suspects. Additionally, Jose lived at the same address as the Appellant; the address associated to the phone number used in the threat to kill. Jose was a potential suspect in the investigation even before the Appellant convinced him to sign a letter of confession. In fact, the primary reason Jose became a credible third-party perpetrator for the Appellant was because evidence existed that he had motive

and opportunity to make the original call. If Jose had no connection to the phone or had no motive to make the call his false confession would not have been compelling.

The information Jose provided at trial eliminated him as a suspect and pointed to the Appellant as the perpetrator. One of the ways Jose accomplished this for the State was by explaining he did not have a motive for the crime. According to Jose, he had been fired for repeatedly calling in sick. Unlike his mother's explanation for this, he conceded that he had called in sick mainly out of laziness. This testimony showed he did not have motive for the crime. He admitted his termination from the restaurant was justified.

Jose also denied making the phone call or having access to the phone. Rather then having a missing witness who could be blamed by the Appellant for the crime, law enforcement had a witness available to counter such assertions. This avenue of rebuttal was confirmed by the testimony of the Appellant's mother who indicated Jose could not have made the calls and that the Appellant had admitted he made the threat to Mr. Chavez.

Lastly, Jose provided information about the Appellant's

character and reputation which was consistent with the threat made to Mr. Chavez as being a true threat. Jose told the jury that the Appellant had a bad temper and that he was physically afraid of his brother. At the prosecutor's office, when he confessed the Appellant had forced him to sign to confession letter, Jose asked the State to keep that information from his brother because he feared retaliation.

One of the issues in the Felony Harassment case, raised specifically by the Appellant, was whether the threat made to Mr. Chavez was a true threat. During closing argument, the Appellant argued the person making the threat much actually intend for it to be taken seriously. According to Appellant's counsel, nothing indicated the caller in this case wasn't merely using idle talk or jest. She went on to say that the words used by themselves resembled idle jest and not actual threats. Jose testimony about the Appellant's anger issues and physical violence cut against the argument that he would call someone only as a joke or jest.

The Appellant argues that the State failed to prove Jose was a witness because they offered no testimony naming him as a witness. Such testimony would not have been appropriate. The

Appellant's approach would require the State to offer a witness to opine about Jose's connection with the case. In other words, such an approach suggests that Officer Jones or Corporal Harpster should have testified why they considered Jose a witness around the time of the incident. Such an opinion would negate the jury's role as the trier of fact. It is improper for the State's witnesses to opine that Jose was a witness in the case:

> [n]o witness is permitted to express an opinion that is a conclusion of law, or merely tells the jury what result to reach. If a question calling for a conclusion of law is put to a lay witness, the response is barred under Rule 701 because it is not "helpful to a clear understanding of the witness's testimony or of a fact in issue." If the question is put to an expert witness the response is barred under Rule 702 because it does not "assist the trier of fact to understand the evidence or to determine a fact in issue.

5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 704.5 at 267 (5th ed. 2007). If the State had allowed its witnesses, such as Officer Jones and Detective Harpster, to testify that Jose was a witness in the case they would be offering a legal opinion as to an element of the offense.

The proper inquiry when considering whether the State proved that Jose Ponce was a witness is to inquire whether Jose

Ponce had sufficient information to lead the Appellant to believe Jose might be called as a "witness in any official proceeding" or had "information relevant to a criminal proceeding." WPIC 115.53. From such information, the jury was then allowed to infer or come to the conclusion that Jose Ponce was a witness at the time he was approached by the Appellant and asked to perjure himself.

Whether Jose was aware he was a witness or whether he had specifically been subpoenaed is not a specific element of Witness Tampering. The jury was provided information Jose had about the incident and made the conclusion that Jose was a potential witness, or that he had information pertinent to the case, and that the Appellant had approached him to testify as a result of that. This common sense conclusion makes sense because the reason the Appellant approached Jose was because he was sufficiently connected to the case to make an ideal third-party perpetrator.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Martinez at 354. The jury made a reasonable inference that Jose Ponce was a witness in the case or had

pertinent information about the case and that the Appellant knew this. The Appellant took advantage Jose Ponce's connection to the case to attempt to fabricate a defense. The jury followed this logic and found the Appellant guilty of Witness Tampering.

The Appellant attempts to argue that Jose does not fit the traditional witness for purposes of the statute. This interpretation ignores actual language of the statute. A plain reading of RCW 9A.72.120 indicates that *any* witness or potential witness is entitled to the protection of the statute.

> When interpreting a statute, "the court's objective is to determine the legislature's intent." The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statue is plain on its face, we "give effect to that plain meaning." In determining the plain meaning of a provision, we look to the text of the statutory provision in question, as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." An undefined term is "given its plain and ordinary meaning unless a contrary legislative intent is indicated. If, after reasonable interpretation, it is ambiguous and we "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.

State v. Ervin, 169 Wash.2d 815, 820, 239 P.3d 354 (2010) (citations omitted).

RCW 9A.76.120 uses the word "witness" in the language of the statute. WPIC 115.53 defines the "current or prospective witness" in a broad fashion which is consistent with a legislative intent to be inclusive in the statute's protection. It includes witnesses specifically identified by the State and any person who may simply have information relevant to a criminal case.

The common definitions of the term witness also remains broad. The first four common meanings of witness are "(1) attestation of a fact or event: testimony (2) one that gives evidence; specifically: one who testifies in a cause or before judicial tribunal (3) one asked to be present at a transaction so as to be able to testify to its having taken place (4) one who has personal knowledge of something." **Webster's Online Dictionary,** http://www.webster.com/dictionary/witness (last visited August 22, 2012). None of these definitions limits the term witness based on level of evidentiary importance. The first and fourth definitions are consistent with the WPIC definition and seem to most accurately reflect the spirit of the statute: protection for any individual who has knowledge about a criminal activity.

The Appellant cites three cases in support or his legal argument. State v. Williamson involved a defendant attempting to transport the victim out of State. 131 Wash.App. 1, 86 P.3d 1221 (2004). State v. Hall involved a defendant attempting to tamper with the testimony of the victim. 168 Wash.2d 726, 230 P.3d 1048 (2010). State v. Lubers involved a defendant seeking to alter the testimony of a co-defendant who had turned State's witness. 81 Wash.App. 614, 915 P.2d 1157 (1996)

The Appellant argues that these cases stand for the proposition that witness tampering can only occur if the witness is "intimately involved in the commission of the crime." This ignores a plain reading of the statute. Neither the RCW nor the plain meaning of the words used in the statute include such a limitation. To force the State to prove the witness was intimately involved with the commission of the crime is to add an element to the statute which does not exist.

V. CONCLUSION:

Although Jose Ponce may not have been as helpful to the prosecution as the State hoped, that does not disqualify him as a

witness under the witness tampering statute. Nor does it strip him of the protections of the statute which the legislature intended for all witnesses. On the basis of the arguments set forth herein, it is respectfully requested that the decision of the Superior Court for Franklin County be affirmed on the merits pursuant to RAP 18.14.

Dated this 17th day of October, 2012.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By:
Brian V. Hultgrenn,
WSBA #34277
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 17th day of October, 2012, a copy of the foregoing was delivered to Uriel Ponce #320489, Appellant, Washington Corrections Center, P.O. Box 900, Shelton WA, 98584 and to Tanesha LaTrelle Canzater, opposing counsel, P. O. Box 29737, Bellingham, WA 95228-1737 by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Signed and sworn to before me this 17th day of October, 2012.

Notary Public in and for
the State of Washington,
residing at Kennewick.
My appointment expires:
May 19, 2014.

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