

67676-8

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NO. 67676-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RANDY BROWN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I
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A. ISSUES PRESENTED

When a defendant challenges the sufficiency of the evidence, the State's evidence is taken as true and all facts are construed in the State's favor. Here, evidence was presented that Appellant Randy Brown made six phone calls from the King County Jail to Helen Gaines, the victim of his alleged assault. In the calls Brown encouraged Gaines to "get these charges off me", demanded she file notarized letters claiming she lied in her initial police report, and commanded that she assist him in finding two witnesses who could provide him with an alibi. Where the jury had an opportunity to consider each of these calls in their entirety as well as the trial testimony of Gaines and Appellant Brown and judge their credibility individually, is there evidence sufficient to support Brown's conviction for Witness Tampering?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Respondent agrees with and adopts the Appellant's procedural facts.

2. SUBSTANTIVE FACTS

Helen Gaines and Randolph Percy Brown were in a long-term

dating relationship for almost twenty years. 8RP 84-85. The couple has three children in common who carry the defendant's last name. Id.

On November 24, 2010, at 5: 23 a.m. Seattle Police Department officers were dispatched to a disturbance at 10129 Rainier Avenue South. 8RP 77-80. At the time of the incident the house was occupied by Randy Brown, Helen Gaines and their children. 8RP 77-80. Gaines reported that she had run out of her house into the snow covered road after an assault perpetrated by Brown, leaving her children behind. Id. When a female figure appeared on the road, Ms. Gaines flagged her down. 8RP 19. Gaines told the woman, Kimberly Carris, that she had been choked and asked her if she could use her phone to call 911. 8RP 77-80. Carris allowed Gaines to use her phone and police arrived a short while after the call. 8RP 77-80.

When police and medical personnel arrived, Gaines informed them that she had been awoken in the middle of the morning by Brown strangling her. 8RP 95-98. Brown had strangled her for just about a minute and during the period she could not breathe and felt as if she was going to pass out. Id. Gaines was able to struggle against the force and eventually free herself from Brown and run

away. Id. Officer Cambronero from the Seattle Police Department spoke with Gaines to take her report and while doing so, noticed a red welt mark about two to three inches long across her neck, an abrasion on the lower right shoulder area, and red mark on the left shoulder. 8RP 23.

On December 9, 2010, the State of Washington charged the Appellant with Assault in the Second Degree - Domestic Violence along with an aggravating factor that children were present during the commission of the crime. CP 55-58. In addition, the State began monitoring phone calls between the Brown and Gaines from the King County Jail, each of which occurred in violation of a no contact order in the case. On February 4, 2011, the State amended the charges against the defendant based on the jail phone calls to include three counts of Misdemeanor Violation of a Court Order and one count of Tampering with a Witness, both with "Domestic Violence" designations. Id.

Seven jail calls from Brown were played during the trial. The calls that were played were made from the King County Jail on December 21st, 2010, at 2:30; December 22nd, 2010, at 7:59; December 23rd, 2010, at 1810; December 25th, 2010, at 20:04; January 27th, 2011, at 21:07; January 6th, 2011, at 15:46; and January

6th, 2011, at 21:08. 10RP 14-15. Each call was authenticated as containing the voices of Brown and Gaines. 10RP 103-104.

After hearing the testimony of eight witnesses, including Helen Gaines, and listening to each of the seven jail phone recordings, the State rested its case and Brown's trial counsel made a motion for a directed verdict for the charge of Witness Tampering. 10RP 30. Judge Marianne Spearman initially indicated that she would be willing to grant the defense's motion; however, she also noted she had not reviewed the transcripts of the jail calls played by the State. 10RP 31-37. Judge Spearman then allowed the State to provide to her the written transcripts of the calls that had been played for the jury (the transcripts had been displayed on a television screen during the trial and Judge Spearman had not previously been provided with copies). *Id.* After reviewing the transcripts and hearing argument from the parties, the Court denied the motion for a directed verdict. 10RP 31-49.

The defendant testified at trial after the halftime motion. 10RP 60. Brown claimed he was not present at the home at the time of the assault and only arrived at the house with one of his girlfriends, "Loren" or "Lauren" (hereinafter referred to only as Loren) after receiving multiple calls from Gaines. 10RP 67-69. Brown claimed

Gaines was upset at him for spending time with Loren (along with several other girlfriends). Id. Brown denied ever striking Gaines the night of November 24, 2010. 10RP 60-73. Under cross-examination Brown denied ever receiving a no contact order once the case had been filed and did not directly admit that he made any calls to Gaines while in custody. 10RP 73-88. Brown was not asked any questions about inducing a witness to provide false testimony or encouraging them to avoid appearance at trial, nor did he make any unsolicited statements in response to the Witness Tampering charge. 10RP 60-88. Brown identified two individuals referenced in the calls, "Nae Nae" (also referred to as "Nana") and Big Mama, as his cousin's friend (aged nineteen) and his girlfriend, December. 10RP 86-88.

C. **ARGUMENT**

1. **APPELLANT'S CONVICTION IS SUPPORTED BY SUFFICIENT EVIDENCE**

Brown argues that the record does not support his conviction for Witness Tampering. His claim must fail, however, because the evidence, and the reasonable inferences from that evidence, show amply that Brown attempted to induce Helen Gaines, a principle witness in the case against him, to testify falsely and assist him procuring false testimony. Brown's conviction should therefore be

affirmed.

Evidence is sufficient to support a conviction if, viewing it 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. Myles, 127 Wn.2d 807, 816, 903 P.2d 979 (1995). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In assessing the record, circumstantial evidence is considered no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts must "defer to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

When determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the conviction. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107, review denied, 141 Wn.2d 1023

(2000). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The evidence in this case satisfies the deferential test for sufficiency, and the jury could readily find that Brown attempted to induce a witness, Gaines or others, not to testify and to change their testimony.

Under Washington law:

- (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
 - (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
 - (b) Absent himself or herself from such proceedings; or
 - (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

RCW 9A.72.120. The evidence demonstrating Brown’s attempts to tamper with Gaines fell into four areas. First, the State argued at trial that in multiple calls Brown directly demanded in various ways

that Gaines should get the charges “off of him”. Brown used various verbal formulations to effectuate his desires, including “[y]ou got me in this motherfuckin’ (Unintelligible) shit...get me the fuck up outta here”, “[g]et this motherfuckin’ shit off me...get me the fuck up outta here...that’s what I need from you”, and “go down there and get this motherfuckin’ shit off me ‘cause I’m fucked if you don’t”. CP 117, 11RP 8; CP 120, 11RP 8; CP 125-126, 11RP 8.

Each of the general demands is full of derisive language directed toward Gaines, including profanity, commands and demeaning references. Each directly indicated that Gaines needed to do something to have the charges removed. Further, Brown made no protestations of innocence during the calls, only berating Gaines for putting him in the predicament. The jury only had to make a slight inference that Brown was demanding that Gaines do something to remove the charges pending against him by stating she was lying or otherwise. Brown himself noted the severe state he was in given the testimony of Gaines, observations of his children, and the presence of the civilian witness by stating “you need to go down there and get this motherfuckin’ shit off me ‘cause I’m fucked if you don’t.” CP 125-126; 11RP 8. In contrast to a simple request for Gaines to tell the truth (the word truth is never

mentioned by Brown during any of the six calls to Gaines), as claimed by the Appellant's brief, these calls were aggressive, mentally demeaning, and were easily seen by the jury to be the Appellant's attempt to induce Gaines to provide false testimony.

Second, Brown demanded that Gaines directly provide notarized letters to police or prosecutors stating she had changed her testimony. Brown specifically made this demand by stating "I don't give a fuck callin' them people. You need to take your ass down there with some notarized letters and some more shit to try to get this shit off me. Get me the fuck outta here okay." CP 129-131; 10RP 37. This demand was similar to the ones made above; however, it was much more explicit and commanding. Given Gaines testimony at trial that the event did occur, the jury could easily have inferred that these "notarized letters" were attempts to thwart the legal process and provide false testimony and evidence.

Third, the State pointed to the defendant's demand of Gaines to "do like you did last time" in providing a statement to police and prosecutors to have the case dismissed. Brown's specific demand in this arena began "I don't know why you always wanta do this motherfuckin' shit, callin' the police and knowin' we gonna be right back together (Unintelligible) shit...you gotta do like

you did the last time when you went and talked to the motherfuckers and I was locked up.” Id. Brown continued “remember how you did it when you went and – and – and they finally fuckin’ let me out? Go – go down there and tell ‘em you done it again, okay, so I can get the fuck up outta here.” Id. Brown recently had another criminal charge dismissed where Gaines was the victim and the jury could easily infer that “do like you did last time” was a command for Gaines to fail to appear or to appear and lie as in a previous case. Here again, Gaines testified credibly at trial that she was assaulted by Brown and thus this call was seen as a request to thwart her testimony. One additional troubling note that found in each of the calls to Gaines was that Brown never once claimed he did not assault Gaines.

Fourth, the State noted in closing argument that Brown attempted to secure the testimony (through Gaines) of “Nae Nae” or “Big Mama” to provide an alibi for him. This is an argument that was never addressed in either defense counsel’s closing or in Appellant’s brief and was seemingly abandoned by Brown himself in trial. Brown instead claimed in testimony that he did eventually appear at Gaines’ home the night of the alleged assault. The obvious, and reasonable, inference from this change of strategy on

Brown's part is that had he kept up with the defense his children could have been called to rebut the claim that he never was present at the house the night of the alleged assault. Further, Nae Nae and Big Mama may not have been credible witnesses for Brown, so he needed to change strategies in the face of the evidence arrayed against him.

In the jail calls referencing the alibi strategy, Brown stated that Nae Nae could "tell them that I was at her house when uh when, you know what I'm sayin', when the broad called and talkin' you know what I'm sayin' and called and made the false charges." CP 172-173; 11 RP 9-10. This call is doubly duplicitous because Brown refers to "that broad" making the charges while speaking with Gaines herself, the person who made the original allegations (a fact essentially granted at trial). *Id.* When referring to Big Mama, Brown further elaborates that Gaines would have to help in the strategy by using "we" to create a joint plan. He states "they got the damn thing so cold, we might – might have to have Big Mama come – come – come testify...and I damn sure don't wanta do that, but you know what I'm sayin', she told them a whole lot." CP 187-188; 10RP 37; 11RP 11-11. The jury here could easily have inferred that Brown viewed the evidence against him as so strong

("so cold") that he needed to have Gaines secure him a witness. Further, there was some questioning by the Prosecutor indicating that Big Mama was actually Brown's oldest child which would have meant that Gaines would have needed to encourage her daughter to lie at trial. Regardless, these efforts were not meant to help the legal process, and were rather the efforts of Brown to conceal his actions and use Gaines to assist him in obfuscating the truth.

Ultimately, the Appellant claims that he was either was just asking Gaines to tell the police the truth or, alternatively, that he never specifically encouraged her not to testify. However, the record indicates both that Gaines believed the events occurred and that while she was reluctant to testify, she was going to do so because she was forced by the State. Granting all credibility questions to the State, it must be accepted by this Court that Gaines testified credibly. Helen Gaines' specific claims of abuse must be taken as valid, so there was a dangerous claim that Brown was attempting to challenge and hopefully bury. Brown was faced with further supporting facts: Gaines was seen running up to a woman in the early morning in the cold and begging for help, she made a 911 call in the presence of a civilian witness, and a Seattle Police Department Officer observed wounds on Gaines and took

photos of those wounds.

Seen in this context, Gaines was believable, believed the assault occurred, received multiple calls from Brown encouraging her to change her testimony and yet testified truthfully. Further, Brown testified at trial and stated he was not at Gaines' home until she demanded he show up (in contrast to his claims on the jail calls). The jury had the opportunity to observe Brown's mannerisms and overall credibility. In this context, it would be impossible to find that Brown's demands of Gaines were that of an innocent man begging his accuser to right a fundamental wrong.

Faced with multiple examples of Brown's manipulation of Gaines, the Appellant relies primarily on State v. Rempel to argue that more evidence than a mere request to drop charges is needed to provide sufficient evidence to support a charge of Witness Tampering. State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990). However, the reliance on Rempel is misguided. In Rempel, the defendant called his victim shortly after the incident (an attempted rape), apologized for his actions, stated "it" was going to ruin his life, and requested that the victim "drop the charges." The Court noted that in the context provided, the literal words uttered by Rempel did not contain a request to withhold testimony. However,

the court also noted that it did not hold that the words “drop the charges” cannot sustain a conviction if uttered in a factual context which would lead to a reasonable inference that the speaker actually attempted to induce a witness to withhold testimony.

Rempel, 114 Wn.2d at 83.

Here, Brown made multiple calls to Gaines demanding she change her statement to police. Further, he used berating language and provided four separate methods that Gaines could help provide false testimony or induce others to testify falsely. Further, Brown never apologized for what he did and stated on multiple occasions that he was facing tough evidence that would require a change in Gaines’ statement or testimony on the part others. Even ignoring the changes that have been made to the language of the Witness Tampering statute since 1990, Rempel is simply not analogous to this case.

Brown was not attempting to right a wrong that Gaines had created. Rather, he was attempting to induce her to change her statement to police, provide a notarized statement indicating that the event had not occurred, and help him locate alibi witnesses for defenses that never materialized. Unfortunately for Brown, he later made the mistake of claiming that he was present at Gaines’ house

at some point the night of the assault and thus his requests for alibi witnesses could be seen as blatant efforts to secure false testimony. Brown's own protestations to his girlfriend Loren that Gaines was fabricating her allegations, were simply the naked complaints and frustrations of a man facing a situation of his own making that he could not impact. This, along with the multitude of manipulating demands made by Brown in the six other jail phone recordings, demonstrates that there was ample evidence to support his conviction.

The jury in the trial in this case weighed similar arguments to those made in the Appellant's brief and still found Brown guilty of Witness Tampering. The jury had the opportunity to consider each of Brown's calls to Gaines and the credibility of both witnesses in reaching its verdict. There is ample evidence to support the jury's verdict and given the necessity of granting all inferences on evidence and credibility judgments to the jury, this court should not substitute its own opinion for that of the empaneled jury in this case. The Appellant's appeal should be rejected.

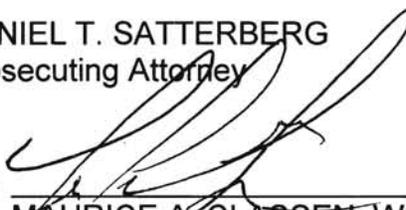
D. CONCLUSION

The Appellant's conviction is supported by a wealth of evidence and therefore it should be upheld.

DATED this 12th day of July, 2012.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RANDY BROWN, Cause No. 67676-8-1, in the Court of Appeals, Division I, for the State of Washington.

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

Jill Carter

Name Jill Carter
Done in Seattle, Washington

7-12-12

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