 72545-9

NO. 72545-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES HURLEY, III,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Laura Inveen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence is insufficient to sustain appellant's conviction for witness tampering.

Issue Pertaining to Assignment of Error

Appellant was charged with witness tampering based on jail calls he made to his wife, the complaining witness in charges against appellant for assault, felony harassment and unlawful imprisonment. In the jail-call conversations with the complaining witness, appellant inquired whether what she had previously told law enforcement was correct and asked her to do what she could to get him released from jail, but never asked her to testify falsely, withhold evidence or absent herself from any legal proceedings. Where the State failed to establish appellant ever attempted to induce a witness to testify falsely, withhold testimony or absent themselves from any legal proceedings, must appellant's conviction for witness tampering be dismissed for lack of evidence?

B. STATEMENT OF THE CASE

1. Procedural Facts

On January 2, 2014, the King County Prosecutor charged appellant James Stephen Hurley, III, with second degree assault - domestic violence, felony harassment - domestic violence, and unlawful imprisonment - domestic violence. CP 1-3. The prosecutor alleged that on December 30,

2013, Hurley strangled his wife, Nicole Guevarra, in the cab of his semi truck, threatened to kill her, and kept her from leaving the cab until she bit him. CP 4.

The State subsequently withdrew the felony harassment charge, and amended the assault charge to fourth degree, a misdemeanor. CP 12-15, 72; RP[1] 241. The State, however, also added several new charges based on Hurley's alleged contact with Guevarra through jail calls, including one count of witness tampering and three misdemeanor violations of a court order. CP 12-15. A motion to dismiss the witness tampering and unlawful imprisonment charges following the prosecution's case-in-chief was denied. RP 238-40.

A jury acquitted Hurley of unlawful imprisonment, but found him guilty on the remaining charges (fourth degree assault, witness tampering and three counts of misdemeanor violation of a court order), all as "domestic violence" offenses. CP 105-113; RP 309-311. The Honorable Laura Inveen imposed a standard range 16-month sentence on the tampering charge and concurrent 364-day sentences on the misdemeanors. CP 122-32; RP 334. Hurley appeals. CP 133-34.

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[1] There are five consecutively paginated volumes of verbatim report of proceedings referenced herein collectively as "RP."

2. Substantive facts

Guevarra did not testify at trial, nor did Hurley or any other civilian witnesses. As such, the jury verdicts were based on the testimony of responding/investigating law enforcement officers and admitted exhibits.

The witness tampering charge was based on claims that during jail calls between Hurley and Guevarra, Hurley attempted to induce Guevarra to testify falsely, withhold evidence and/or absent herself from his criminal trial. CP 13-14; RP 262-66 (prosecutor's closing); see CP 91-93 (court's instructions 12-14, defining and setting forth elements of witness tampering charge). Only those portions of the calls that recorded what Hurley said were admitted for substantive purposes, and the rest was admitted only to give context to Hurley's statements, and the jury was so instructed. RP 132, 138, 249-50.

To help the jury understand the five jail call recordings played they were provided with a transcript of the calls. RP 224-25; Ex.29.[2] Excerpts from the five calls were played to the jury during the final witness's trial testimony and during the prosecutor's closing argument. RP 226-27, 262-66; Ex.28. The jury was also allowed to listen to the all the calls again

[2] A copy of Ex.29 is attached as an appendix.

during the first day of deliberations, and the January 6, 2014 jails calls once again on the second day of deliberations. RP 302, 308.

C. ARGUMENT

THIS COURT MUST REVERSE HURLEY'S WITNESS TAMPERING CONVICTION FOR LACK OF EVIDENCE.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

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(1); see also CP 92 ("to convict" instruction for witness tampering).

As noted above, the State's evidence allegedly supporting the tampering charge was contained in the calls Hurley made from jail on January 6, 2014. The State relied on several portions of conversations – identified by prosecutor during closing argument – to support its theory of tampering. RP 262-66. Specifically, the State relied on the following excerpts:

> HURLEY: Anyway, though so. So yeah, so you gonna (unintelligible). What are you gonna tell her that she recommends-because one of the reasons that they kept me here is 'cause they're sayin' that you know that uh that you were worried about me gettin' out. You know what I mean?

Ex. 29 at 3 (reference by the prosecutor in closing at RP 263).

> HURLEY: Just get me out of here.
>
> UNKNOWN: I'm not gettin' out. I'm just-I'm tryin' to get it-
>
> HURLEY: (Unintelligible).
>
> UNKNOWN: through your head-
>
> HURLEY: Get me out of here.

UNKNOWN: Huh?

HURLEY: Get me out of here.

UNKNOWN: I can't. I can just send that-I can just send that stuff to the advocate, and you know not go to court.

Ex.29 at 4-5 (referenced by prosecutor in closing at 263-64).

UNKNOWN: You know I didn't lie in my report. Everything that I said happened. Well you blacked out. I don't know where you go, but-

HURLEY: (Unintelligible).

UNKNOWN: it's not in-

HURLEY: The police turned some shit around and that. Oh.

UNKNOWN: Oh, I'm sure they did. That's why I wanted to go on the fourteenth because it's like I don't want anybody else speakin' for me. It makes me nervous. You know they really want to nail you.

HURLEY: They're what?

UNKNOWN: They want to nail you. I was like-I was-I was so floored when I seen what your-when they took-she told me what your charges were. I was like what the fuck.

HURLEY: Yeah, I know. That's what I'm sayin'. Well they're sayin' because that you know-you know-they're sayin' 'cause I-I guess because I uh so you're sayin' that I fuckin' held you hostage in the truck and wouldn't let you out. You know what I mean.

UNKNOWN: Well I did, and I said I tried to get out like five times, but you didn't want me out of the truck because the guy that you worked with.

HURLEY: Well maybe (unintelligible) maybe you could just exaggerating that many. You know what I'm sayin'. (Unintelligible).

UNKNOWN: No, it was four or five. I remember clearly.

HURLEY: No, you-you're not listenin' to what I'm sayin'.

UNKNOWN: Uh, huh.

HURLEY: You know what I mean.

OPERATOR: You have one minute-

HURLEY: You know.

OPERATOR: remaining.

HURLEY: I mean if you want me out, maybe you know. It don't matter. Whatever happens, happens. I love you okay.

UNKNOWN: I love you too.

HURLEY: Get me the fuck out of here okay. If you can. If you can't, you can't, whatever. You know what I mean.

UNKNOWN: Well, the kids are really confused, and they just need good role models.

HURLEY: I know, but well.

UNKNOWN: They're scared.

HURLEY: Okay. You know.

Ex.29 at 4-6 (referenced by prosecutor in closing at RP 264).

HURLEY: Yeah.

UNKNOWN: We'd be out of the building.

HURLEY: Yeah. Hey, I love you (unintelligible).

UNKNOWN: I love you too.

HURLEY: Sorry about all this.

UNKNOWN: Me too.

HURLEY: Okay. You know what I'm sayin'? So you know-you know. I mean worse comes to worst-I mean if they-you know how to do this. We we've done it before.

UNKNOWN: Yeah.

HURLEY: But this time-hey listen-this time, I'll-I'll go get on some medication when I get out okay.

UNKNOWN: Yeah.

HURLEY: I promise.

UNKNOWN: Thank you.

HURLEY: Okay. I mean if it's court-ordered or not, I will get on some-some kind of anti-anxiety, de-depression medication. You know what I'm sayin'?

UNKNOWN: Yeah.

HURLEY: Okay. But you got to-

UNKNOWN: Yeah.

HURLEY: (unintelligible) too okay.

UNKNOWN: I am.

HURLEY: I mean otherwise I mean you know that's the only way it's gonna work, okay?

> UNKNOWN: I know I am. I'm just goin' to meetings and hangin' out with Carol. The things that I always do.
>
> HURLEY: Uh, huh.

EX. 29 at 7-8(referenced by the prosecutor in closing at 264-65).

Certain facts are apparent from these excerpts; Hurley was not happy about his predicament, he wanted out of jail, and he wanted Guevarra to do what she could to make it happen. But this does not establish tampering.

In State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990), the defendant, who was charged with criminal trespass and rape, called the alleged victim several times from jail. During the calls, Rempel apologized, said he would never do it again, indicated the charges would ruin his life, and asked the alleged victim to drop them. Rempel was convicted of witness tampering and appealed, challenging the sufficiency of the evidence. Id. at 81-82.

The Supreme Court of Washington reversed, finding that neither the evidence, nor reasonable inferences from that evidence, established that Rempel attempted to induce the victim to testify falsely or withhold testimony. Rempel, 114 Wn.2d at 83. The Court reasoned that expressing an opinion regarding the negative impact of the charges and requesting that they be dropped did not, literally speaking, contain a request to

withhold testimony. Nor did the words contain a threat or promise of any reward for dropping the charges. Id. The Court noted that, depending on context, a request to "drop the charges" could support a tampering conviction in a particular case, but that was not the situation in Rempel's case. Id. at 84.

Similarly, at no time did Hurley ask Guevarra to testify falsely, withhold evidence or absent herself from any associated legal proceedings. See RP 262-66 (prosecutor never argues Hurley asked or told Guevarra to testify falsely or to withhold evidence, but instead only that he asked her to change what she had previously told police, e.g., that she no longer feared him being released from jail). Nor do reasonable inferences from the evidence establish the crime. Although the prosecutor argued to jurors that Hurley's conversations with Guevarra revealed attempts to induce her "to change what she's saying, or he wants her to not come and testify," (RP 266), the record belies these claims. A close review of the jail call recordings reveals Hurley never asked Guevarra to testify falsely, withhold evidence or absent herself from the proceedings.

Rather than an attempt to convince Guevarra to provide false testimony or withhold truthful testimony, the recordings reveal only that Hurley inquired of Guevarra whether she was still as concerned about his possible release as she had previously indicated to law enforcement, and if

not then to relay that to the appropriate authorities (Ex. 29 at 3), and posed to her the possibility she may have overstated what happened when she told law enforcement he prevented her from leaving the truck cab five times (Ex.29 at 5-6). These remarks and inquiries are no different than the attempts in Rempel to get the alleged victim to drop the case.

Hurley's actions in this case fall well short of those deemed sufficient to prove witness tampering. See, e.g., State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979) (defendant asked witness to not appear or appear and change his testimony); State v. Wingard, 92 Wash. 219, 223-224, 158 P. 725 (1916) (defendant made a threat, promised a reward, and urged witnesses to ignore subpoena); State v. Whitfield, 132 Wn. App. 878, 897-898, 134 P.3d 1203 (2006) (defendant urged victim to lie about circumstances and provided examples of what she should say in court), review denied, 159 Wn.2d 1012 (2007); State v. Lubers, 81 Wn. App. 614, 618, 915 P.2d 1157 (defendant urged witnesses to recant prior statements and/or claim that a fictitious person was the true assailant), review denied, 130 Wn.2d 1008 (1996).

Because the State failed to prove Hurley attempted to induce a witness to testify falsely, withhold testimony or absent herself from trial, there is insufficient evidence to support the tampering conviction. The conviction should be dismissed with prejudice. State v. Hickman, 135

Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

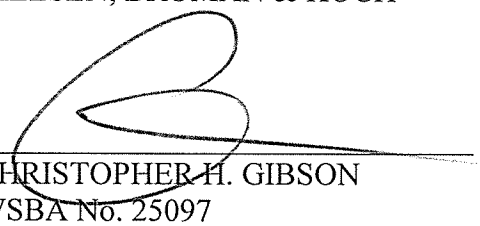
D. CONCLUSION

For reasons stated, this court should reverse and dismiss with prejudice Hurley's conviction and sentence for witness tampering.

Dated this 2nd day of June, 2015.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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