IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RANDY PERCY BROWN, Appellant.	No. 67676-8-I DIVISION ONE UNPUBLISHED OPINION FILED: March 4, 2013

APPELWICK, J. — Brown argues that there is insufficient evidence to sustain his conviction for tampering with a witness. We affirm.

FACTS

Randy Brown and Helen Gaines have three children and were living together in November 2010. Early on the morning of November 24, 2010, Gaines ran out of their house and flagged down a passerby, who called 911 for Gaines. When police and medical personnel arrived, Gaines told them she awoke to Brown strangling her. She said she was eventually able to free herself from Brown and run outside.

Brown was charged with assault in the second degree – domestic violence. The King County Superior Court also entered a protection order prohibiting Brown from contacting Gaines, including by telephone.

In the weeks following, the jail recorded several telephone calls Brown made to Gaines and others. These calls took place on December 21, 22, 23, and 25; January 3, 6 (two calls), and 12; and February 7. Based on these calls, Brown was charged by amended information with one count of tampering with a witness and three counts of misdemeanor violation of a court order.[1]

[1] The State subsequently withdrew one count of violating the court order.

The telephone calls were played for the jury at trial. Brown admitted that his calls to Gaines violated the court's no-contact order. But, he denied choking Gaines. Instead, he suggested that she made a false allegation to retaliate for his relationship with another woman, Loren,[2] who he said he stayed with the night before the incident.

When the State rested its case, defense counsel moved for a directed verdict on the witness tampering charge. The judge initially granted the motion. But, she noted that she had not read the transcripts of the jail calls played by the State and agreed to review them on the State's motion to reconsider. After reviewing the written transcripts and hearing argument from the parties, the court denied the motion for a directed verdict. The court acknowledged that it was a close case, but concluded it was ultimately a question for the jury.

The jury acquitted Brown on the assault charge, but found him guilty of witness tampering and violating the no-contact order. Brown timely appealed his conviction of witness tampering.

DISCUSSION

I. Sufficiency of the Evidence

Brown argues that there is insufficient evidence to support his conviction for witness tampering. He contends that the State failed to establish that he ever attempted to induce a witness to testify falsely or withhold testimony, so his conviction must be dismissed.

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[2] Loren did not testify at trial and we have no record of her last name. Brown also referred to other women by their first names or nicknames in his phone calls and trial testimony. They also did not testify and we have no record of their full names.

Sufficient evidence supports a conviction when, viewing the evidence in the light most favorable to the State, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Washington's witness tampering statute states, in relevant part:

> (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 following excerpts from the recorded jail calls are relevant to our review.

On December 22, 2010, Brown told Gaines from jail:

> BROWN: Okay. I'm telling you man. You do what you need to do man. You got me in this motherfuckin' (Unintelligible) shit. Get me the fuck up outta here. . . .

In the same phone call, Brown repeatedly called Gaines a "bitch" or "dumb bitch." He also called her a "motherfucker liar" and told her "I'm fuckin' you up" if she was sleeping around or driving his car.

In a December 23 phone call with Gaines, Brown said:

BROWN: I'm talkin' about—you talkin' about yeah. You remember when you did that shit to me before.

GAINES: I'm sayin' yeah.

BROWN: Try to try it again though. Try it again. For real. My (Unintelligible) try it again though. For real. So you better (Unintelligible) the fuck up, so I can try to get the fuck up outta here. . . .

. . . .

BROWN: So try to figure this shit out and try to—you need to go down there tomorrow. 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. . . .

. . . .

BROWN: Okay. Well get—get down here tomorrow man and get this shit off me man. For real. . . . I don't know why you always wanta do this motherfuckin' shit, callin' the police and knowin' we gonna be right back together and (Unintelligible) shit. I don't know why you like to do that, but fuck it. You need to go do what the fuck you gotta do like you did last time when you went and talked to the motherfuckers and I was locked up.

. . . .

BROWN: You remember how you did it when you went and—and—and they fuckin' finally let me out?

GAINES: Yeah.

BROWN: Go—go down there and tell 'em you done it again okay, so I can get the fuck up outta here. Alright?

On December 25, 2010, Brown called Loren, the women he saw the night before the alleged choking. Speaking about Gaines, Brown told Loren:

> BROWN: She said all kinds of shit. I don't know what the fuck she said, but some bullshit like talkin' about I choked her and I don't know some other shit. I don't know what the fuck she told 'em, but you know what I'm sayin' it's all bullshit. Every time she find out you know what I'm sayin', I'm fuckin' with somebody else, this is what she do. You know, but um she—I don't know, she says she was gonna try to get the shit off me. I don't know. She did this same shit before. You know what I'm sayin'. I beat the case, but I don't know. . . .
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> . . . .
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> BROWN: She says she's gonna go talk to the people and te—you know and get this shit off me 'cause she lied like she did before. I just beat a case two month's [sic] ago on her and this other broad that lied. You know what I'm sayin', but um fuck man.

On January 6, 2011, Brown called Gaines twice. The following recorded conversations were played for the jury:

> BROWN: Yeah so uh fuck I'm gonna have to take this shit to trial and, you know what I'm sayin'? Try to beat it at trial. Um, I'm gonna have to uh get uh, uh Nae Nae 'cause uh have Nae Nae come (Unintelligible) have my lawyer contact Nae Nae. Um, Tavia's homegirl.
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> GAINES: Uh, huh.
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> BROWN: And you know what I'm sayin', so she can 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. You feel me? . . .
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> . . . .
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> BROWN: So you know 'cause I was at her house when she called. (Unintelligible) I—I woke up chokin' her.[3]

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[3] It's unclear why Brown is referring to Gaines in the third person while speaking to her. But, Gaines authenticated the voice as hers.

GAINES: Shut up.

BROWN: They're not playin'. That's (Unintelligible) hellah charges. I don't know why homegirl always be doin' this shit every time she get mad. (Unintelligible) wanta call the police. You know. Do this old shit, but Nae Nae will have uh will have my lawyer you know what I'm sayin'? . . .

. . . .

BROWN: And I already told you what I need to talk to—to that bitch Nae Nae for okay? . . .

. . . .

BROWN: So—so I can get my lawyer to call her and so she can tell him what the fuck's up okay. . . .

. . . .

BROWN: Okay, first thing tomorrow, come down to the same room . . .

GAINES: Uh, huh.

BROWN: And make it—get the—get the damn thing off okay?

GAINES: Okay . . .

BROWN: You remember how you got the last one off right? (. . .

. . . .

BROWN: 'Cause I'm (Unintelligible) Just so—and—and they got it so—they got—they—they got the damn thing so cold, we might—might have to have Big Mama come—come—come testify. You hear me?

GAINES: Yeah.

BROWN: You know that (Unintelligible) You know what I'm sayin'? That motherfucker told her to say that. Okay?

GAINES: Uh, huh.

BROWN: To—to them—to them people. Alright?

GAINES: Okay.

BROWN: You feel me?

GAINES: Yeah.

BROWN: And I damn sure don't wanta do that, but you know what I'm sayin', she told them a whole lot. You feel me?

GAINES: Uh, huh.

BROWN: So you know what I'm sayin', I might need Big Mama to come down and say oh yeah she told—you know?

Brown contends that these calls merely show that he was angry and wanted the charges against him dropped. Brown emphasizes that at no time did he literally ask Gaines to testify falsely or withhold evidence. But, the State is entitled to rely on the inferential meaning of the words and the context in which they were used. State v. Rempel, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990).

A number of reasonable inferences can be drawn from these recordings that support Brown's witness tampering conviction. Brown's conversations with Gaines indicate that he wanted her to tell the prosecutor that she lied about him choking her. Brown was even explicit that he wanted Gaines to take notarized letters to the prosecutor to "try to get this shit off [him]." Brown mentioned getting previous charges against him dropped and told Gaines to "do what the fuck you gotta do like you did last time." Similarly, he commanded Gaines to "go down there and tell 'em you done it again okay, so I can get the fuck up outta here."

The jury could infer from this that Brown was again inducing Gaines to lie about the incident, like she had in the past for him. Indeed, Brown is explicit about this in his conversation with Loren. It seems very unlikely to us that Brown

was coercing Gaines to provide sworn statements to the prosecutors that she told the truth in her police report that Brown choked her. Therefore, it was reasonable to infer that Brown was attempting to induce Gaines to tell the prosecutor that she made up the incident and the charges were false.

Brown's conversations about Nae Nae and Big Mama further support the witness tampering conviction. At trial, Brown explained that Nae Nae was his cousin's friend and Big Mama was a woman named December, with whom he had been intimate. But, Brown claimed that he was with Loren the night before the purported choking. A jury could reasonably infer that Brown wanted Nae Nae to testify falsely that he was with her that night. Likewise, Brown never claimed that he was with Big Mama the night of the incident, again implying that he wanted her to testify falsely. Brown demanded that Gaines have his lawyer contact Nae Nae, again attempting to induce her to secure false testimony for him.

Brown relies heavily on Rempel to argue to the contrary. But, Rempel is distinguishable from Brown's case. There, the defendant called the victim from jail to apologize and ask her to drop the charges, because it was going to ruin his life. Rempel, 114 Wn.2d at 81. The victim testified that the calls did not concern her and the defendant was only a nuisance. Id. at 84. The court held that this was insufficient to support the defendant's conviction for witness tampering. Id. at 83. The court explained that it was not holding that the words "drop the charges" can never sustain a conviction. Id. at 84. But, given the context and

the victim's reaction to the request, no inference could be drawn that he actually attempted to induce her to withhold testimony. Id.

In contrast, Brown's language was demeaning, derisive, and threatening toward Gaines, putting his demands in a different context. And, Brown did more than simply ask Gaines to drop the charges. He commanded her to take notarized letters to the prosecutors "to try to get this shit off me." We hold that viewing the evidence in the light most favorable to the State, a rational trier of fact could find that Brown attempted to induce Gaines and other potential witnesses to testify falsely.

II. Statement of Additional Grounds

Brown also filed a statement of additional grounds, in which he makes a number of arguments, mostly related to the revocation of his telephone privileges while he was in custody before trial.

A. Revocation of Telephone Privileges

After Brown was charged by amended information with witness tampering and violation of the no-contact order, the superior court revoked his jail telephone privileges. The revocation order was not designated in the record before us on appeal, but there is a discussion on the record between Brown's defense counsel and the trial judge about the order. Brown argues that the revocation order obstructed his attempt to secure bail, violated his substantive due process rights, burdened his attorney-client communications, and contravened his right to a fair trial.

Brown claims that although the State moved to revoke his telephone privileges because he was tampering with a witness, the State's purpose was in fact to obstruct his attempt to secure bail. Brown explains that without telephone privileges, he could not call the bail agency and complete bail negotiations. But, the court's revocation of Brown's telephone privileges served a legitimate government purpose, despite Brown's arguments to the contrary. Pretrial detainees have a substantive due process right against restrictions that amount to punishment. Valdez v. Rosenbaum, 302 F.3d 1039, 1045 (9th Cir. 2002). There is no constitutional infringement, however, if the restrictions are "'but an incident of some other legitimate government purpose.'" Id. (quoting Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

Here, the revocation order protected Gaines and prevented further witness tampering by Brown. Brown's calls show threatening and derisive language toward Gaines, despite the no-contact order. And, there is sufficient evidence to support Brown's conviction for witness tampering, so it was reasonable for the court to prevent Brown's further illegal interference with witnesses. We find no constitutional violation, because the court's revocation of Brown's telephone privileges clearly served a legitimate governmental purpose. Moreover, there is no evidence that this was Brown's only means of completing the bail negotiations, using his attorney to complete the bail negotiation for him, for instance. No prejudice to his release or trial rights is demonstrated.

Brown also claims that revocation of his telephone privileges made it difficult to contact his lawyer, thereby infringing his Sixth Amendment right to

effective assistance of counsel. However, Brown only claims that loss of his telephone privileges made it difficult to contact his attorney—not impossible. There is nothing in the record before us that shows Brown's attorney was unable to meet with Brown in person at the jail, or that Brown's calls to his attorney were blocked altogether. Indeed, Brown admitted that his lawyer came to see him in jail.

Brown also claims that the jail guards infringed upon his attorney-client privilege, because they made him talk to his counsel on speakerphone and eavesdropped on his calls. Whether this is true or not is not properly before this court. Because this argument is not supported by credible evidence in the record, we cannot review it. See RAP 10.10(c); State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008); State v. Garza, 99 Wn. App. 291, 300-01, 994 P.2d 868 (2000) (holding that superior court must consider whether jail officers' actions were justified in light of security concerns when they seized and inspected defendants' attorney-client communications).

Relevant to this case, though, is that Brown makes no showing that the jail passed on his privileged communications to the prosecutor's office. He makes no assertion that jail officers were acting at the behest of the State, and there is nothing in the record to support such a claim. As such, we find no support in the record before us that Brown was deprived his right to a fair trial.

B. Ineffective Assistance of Counsel

At a pretrial hearing, defense counsel requested that the court reinstate Brown's telephone privileges. Brown claimed that he was forced to call his

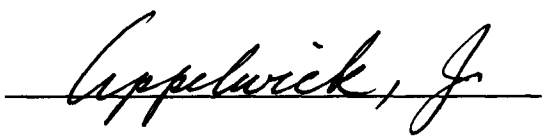
attorney on a monitored, unsecured line. The court told counsel that he could submit a declaration from Brown about his concerns. Then, the court explained, the jail attorney could better determine if jail protocols were being violated. Brown claims that his attorney was ineffective, because he never prepared the declaration setting forth the procedures Brown was subject to after his telephone privileges were revoked.

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficiency prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Brown argues at length why his counsel was deficient, but only briefly asserts that prejudice must be presumed. Nothing indicates that the trial court's suggestions were the only way to resolve the issue of monitored calls to counsel, whether counsel made any efforts to resolve them, or whether it was in fact unresolved. Without evidence in the record demonstrating how counsel's performance prejudiced Brown, we cannot review Brown's claim of ineffective assistance of counsel. See RAP 10.10(c). He requests an evidentiary hearing on the issue. If material facts exist that have not previously been presented and heard, then Brown's recourse is to bring a properly supported personal restrain petition. See Rap 16.4; Alvarado, 164 Wn.2d at 569.

C. Right to a Speedy Trial

Lastly, Brown contends that the court violated his right to a speedy trial. This argument is not supported by the record before us, which demonstrates that Brown waived his right to a speedy trial.

We affirm.



WE CONCUR: