IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TEMICA D. TAMEZ, Appellant.	No. 39130-9-II UNPUBLISHED OPINION

Penoyar, C.J. — Temica Tamez appeals her convictions of one count of tampering with physical evidence, two counts of money laundering, and one count of witness tampering. She asserts that the evidence was insufficient to prove witness tampering. She also argues that the State committed prosecutorial misconduct, eliciting testimony on the ultimate issue of Tamez's guilt, by asking a witness if Tamez knew what her boyfriend, Damien Harris, did for his source of income. We reverse Tamez's witness tampering conviction for insufficient evidence and remand to the trial court for dismissal of this conviction. We affirm her other convictions.

FACTS

In 2008, Tamez lived with Harris. Harris's primary source of income was from selling drugs. On April 18, 2008, police officers arrested Harris and Michael Boyer for selling cocaine. Harris and Boyer also sold drugs with Adrian Morris.

After the arrest, police began an investigation to find Harris's "stash house." II Report of Proceedings (RP) at 59. Officer Kenneth Lundquist went to Cathy Kruse's apartment after learning from her neighbors that Harris frequented her residence. Kruse appeared nervous and agitated and told Lundquist that Harris stopped by her apartment occasionally and "may or may

not have stuff" at the apartment. II RP at 62. Lundquist told Kruse that he suspected Harris kept narcotics, firearms, and money in the apartment, and he asked for consent to search her apartment. Kruse denied Lundquist access to her apartment. Lundquist did not search her apartment that day, because he did not have a search warrant.

Prior to his arrest, Harris used Kruse's apartment to store some of his belongings, including clothing, a bed, a television, money, guns, and drugs. According to Boyer, Harris was under Department of Corrections (DOC) supervision and kept his belongings at Kruse's in order to hide the items from DOC home inspections.

After Harris's arrest, he called Kruse from jail and told her not to let anyone into her home and to give his items to Tamez. Morris visited Kruse's apartment twice. The first time, she allowed him in; the second time, she did not allow him access, because between the first and second trip, Harris had directed her not to let Morris in her apartment. On April 19, police received information that Morris had allegedly gone to Kruse's apartment and tried to force entry into the apartment in order to retrieve evidence and items belonging to Harris.

Kruse also received a phone call from Harris, directing her to look in the pocket of his black jacket, which he had left at her apartment. In the pocket, she found drugs and $2,600 in cash. He directed Kruse to give the money to Tamez and to dispose of the drugs, which she did. Tamez collected $2,400 of the cash. Tamez made at least two trips to Kruse's apartment to collect Harris's belongings. Kruse testified that, at one point, she told Harris that if Tamez was "gonna be irate and raise her voice that I would not allow her to come in." III RP at 230. Kruse testified that Tamez was mostly pleasant during their interactions and Tamez did not express any assaultive or threatening behavior toward Kruse.

Boyer told Tamez about Harris's safe deposit box at HomeStreet Bank. After speaking with Harris, Tamez went to the bank and requested that her name be added to Harris's safe deposit box and bank accounts. A bank employee complied with her request. Tamez never accessed the safety deposit box, because law enforcement had seized the only keys to the box. Lundquist executed a search warrant at the bank and found $25,000 in cash in Harris's safety deposit box.

Lundquist also executed a search warrant of Tamez's room at her mother's house and found a letter Harris had written to Tamez. The letter instructed Tamez to get "the vehicles back and get the money." III RP at 138. Before the arrest, Boyer bought a white GMC Suburban for Harris. After the arrest, Tamez attempted to sell the Suburban. On April 25, police arrested Tamez.

The State charged Tamez with one count of intimidating a current or prospective witness,[1] one count of tampering with physical evidence,[2] two counts of money laundering,[3] and one count of tampering with a witness.[4] She was jointly charged with codefendants Boyer and Harris.[5]

At trial, the jury heard six recorded phone conversations that Harris and Boyer made from the Thurston County Jail. All phone calls placed from a jail phone are recorded and all parties to the conversation receive a notification that the phone call is being recorded. In the days following

[1] RCW 9A.72.110(1)(a), (d).

[2] RCW 9A.72.150.

[3] RCW 9A.83.020(1)(a), (b).

[4] RCW 9A.72.120(1)(a), (b).

[5] Tamez was tried separately.

Harris's arrest, there were hundreds of phone calls between Harris and Tamez.

The jury first heard a phone call between Harris and Rob Bennett. Harris asked Bennett to call Morris and ask him if he went to the "spot." RP (Jail Phone Calls) at 5. Bennett called Morris on another phone while remaining on the phone with Harris. Bennett told Harris that Kruse would not let Morris in her apartment, so he had tried to kick her door open. Harris then had Bennett call Kruse and ask her if the police had found anything; she told him, through Bennett, that she would not let them in. Harris praised Kruse, "Tell her I told you that's good job because they weren't supposed to [go in Kruse's apartment]." RP (Jail Phone Calls) at 12. Kruse told Bennett that Morris had tried to get into her house with a crowbar. Harris asked Kruse, through Bennett, to look in the pocket of his black coat and dispose of the "bags" and to keep the money for Morris. RP (Jail Phone Calls) at 16.

The second phone conversation was between Boyer and his girlfriend, Cassie Simmons. Boyer asked his girlfriend to go to "the spot" and get $2,500 to post bail for him and Harris. RP (Jail Phone Calls) at 21. Harris got on the phone and asked Simmons to "see if you can get ahold of [Tamez] to come bail me out." RP (Jail Phone Calls) at 24. He asked Simmons to meet with Morris and then to go with him to get the cash from Kruse's apartment.

Next, the jury heard a conversation between Tamez, Boyer, and Harris. Tamez told Boyer that she went to pick up Harris's money and "the lady where his shit is threw all his shit outside and picked it up real quick before I got there 'cause I told her I was gonna beat the shit out of her." RP (Jail Phone Calls) at 44. Tamez then gave the money to Morris. Tamez told Harris, "[Kruse] was just stressed out, and she just doesn't want anybody to bother her anymore. She wants everybody just to leave her alone and blah, blah, blah, 'cause it all started this morning

when [Morris] called me when he went over there to get your shit and she was talking shit through the door, so he tried to kick the door off the hinges, and he called me and he was like I need you to act ignorant." RP (Jail Phone Calls) at 46-47.

In another phone conversation, Harris called Tamez. Tamez told Harris she had just spoken with Morris. Tamez said, "[Morris] wishes you would have just had me get everything at once instead of doing piece by piece. . . . He was like Temica, I told you to beat [Kruse's] ass. I was like she didn't come outside (laughing)." RP (Jail Phone Calls) at 58. Harris asked Tamez to get his stuff out of Kruse's apartment. Tamez responded:

> She won't let anybody in the door. You don't understand. He literally tried to kick the door off the hinges, and that's when he was like Temica, go beat her up right now. She—they won't come out. The old broad started crying on the phone with me and hung up on me, and then I called back and I was like look, I'm outside of your house and I ain't playing this shit.

RP (Jail Phone Calls) at 59. Harris then had Tamez call Kruse, and he left a voicemail asking her to let Morris and Tamez pick his stuff up from the apartment.

On April 25, Tamez and Harris had a phone conversation while Tamez was at the bank. Tamez handed her phone to a bank employee and Harris asked the employee to add Tamez to his bank account and safe deposit box.

In the final phone call, Tamez informed Harris that she "could probably get five" for the GMC suburban. RP (Jail Phone Calls) at 87. Tamez told Harris, "Give me till the end of the week and I'll get everything done." RP (Jail Phone Calls) at 90.

The jury acquitted Tamez of intimidating a current or prospective witness but found Tamez guilty of all other charges. Tamez appeals.

ANALYSIS

I. Insufficient Evidence

First, Tamez argues that there was insufficient evidence to support her tampering with a witness conviction. We agree.

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 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

As a preliminary matter, the trial court improperly instructed the jury on an uncharged alternative means of committing witness tampering. Neither party raises this issue on appeal. "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (citing *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948); *Presnell v. Georgia*, 439 U.S. 14, 99 S. Ct. 235, 58 L. Ed. 2d 207 (1978)). "Where the information alleges solely one statutory alternative means of committing a crime, it is error for the trial court to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence." *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). Because the instructional error favored the prevailing party, it is presumed prejudicial unless it affirmatively appears the error was harmless. *Chino*, 117 Wn. App. at 540.

Here, the trial court instructed the jury on attempting "to induce a person to withhold from a law enforcement agency information which he or she had relevant to a criminal investigation."[6] Clerk's Papers (CP) at 32. This was error, because the second amended information stated:

> TAMEZ . . . attempted 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 testify falsely or, without right or privilege to do so, to withhold any testimony or to absent himself or herself from such proceedings.

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[6] The "to-convict" instruction reads:

> To convict the defendant of the crime of tampering with a witness as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> (1) That on or about April 19, 2008, the defendant or an accomplice attempted to induce a person to withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and
>
> (2) That the other person was a witness or a person the defendant or an accomplice had reason to believe was about to be called as a witness in any official proceedings or a person whom the defendant or an accomplice had reason to believe might have information relevant to a criminal investigation; and
>
> (3) That the acts occurred in the State of Washington.

CP at 32; Instr. 26. This is alternative RCW 9A.72.120(1)(c), but Tamez was charged under RCW 9A.72.120(1)(a), (b).

Instruction 24 also includes the uncharged alternative:

> A person commits the crime of tampering with a witness when 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 to testify falsely or, without right or privilege to do so, to withhold any testimony, or to withhold from a law enforcement agency information which he or she has relevant to a criminal investigation.

CP at 30.

CP at 4. The "to-convict" instruction instructs the jury on only one means of committing witness tampering, and she was not charged with this means; it does not affirmatively appear that the error was harmless. Nevertheless, here, Tamez does not argue that the jury instruction is deficient.

With regard to her sufficiency claim, there is insufficient evidence of the charged crime and the instructed crime. Tamez was charged with attempting to induce a witness to testify falsely or, without right or privilege to do so, to withhold any testimony or to absent himself or herself from official proceedings under RCW 9A.72.120(1)(a) and (b).

In *Rempel*, 114 Wn.2d at 83, the court held that the defendant's repeated requests to drop the charges combined with his apologies were insufficient to sustain a tampering charge. The court noted that the defendant made no threats or promises of a reward. *Rempel*, 114 Wn.2d at 83. After considering the entire context in which the words were used, including the prior relationship between the defendant and the witness and the witness's reaction to the requests, the court determined that this request was not an inducement to withhold testimony from trial. *Rempel*, 114 Wn.2d at 84.

During closing argument, the State argued that the witness tampering occurred "when Ms. Kruse was contacted by Ms. Tamez, Mr. Morris on April 19th. If you don't find that they made a threat, did she try to induce, along with Mr. Harris and Mr. Morris, a person to withhold from a law enforcement agency information?" IV RP at 360. Here, Morris, Harris, and Tamez did not explicitly request that Kruse lie, withhold testimony, or absent herself from official proceedings; they also did not promise Kruse a reward.

The State did present evidence at trial that Morris and Tamez threatened Kruse. But nothing in the record ties the threat to witness tampering. Morris tried to kick Kruse's door open

because she would not let him in her apartment and "she was talking shit through the door." RP (Jail Phone Calls) at 47. Morris told Tamez to "beat [Kruse's] ass" after this incident. RP (Jail Phone Calls) at 58. Tamez told Kruse she was "gonna beat the shit out of her" after finding out that Kruse had thrown Harris's belongings outside. RP (Jail Phone Calls) at 44. Kruse testified that Tamez was mostly pleasant in her interactions with Kruse and Tamez did not express any assaultive or threatening behavior toward Kruse. There is no evidence or reasonable inference that any of these threats were an attempt to induce Kruse to testify falsely, withhold testimony, or absent herself from proceedings. Rather, Morris and Tamez threatened Kruse when they could not get into her apartment to remove Harris's belongings.

Further, there is also insufficient evidence that Tamez attempted to induce a person to withhold from a law enforcement agency information which he or she had relevant to a criminal investigation. This is the means of committing witness tampering that the trial court presented to the jury in the "to-convict" instruction. As discussed above, Morris and Kruse did not directly or indirectly request that Kruse lie or promise her a reward. They also did not attempt to induce Kruse to withhold information from a law enforcement agency by threatening her. Harris did tell Kruse that the police "weren't supposed to [go into Kruse's apartment]" and asked her to dispose of the drugs he had kept in her apartment. RP (Jail Phone Calls) at 12. Without deciding whether such comments constitute attempts to induce Kruse to withhold information from a law enforcement agency, Tamez was not on the phone when Harris spoke with Kruse. There is no evidence that Tamez was aware of his request to dispose of the drugs. We hold that insufficient evidence exists to support Tamez's witness tampering conviction and remand to the trial court for dismissal of this conviction.

We note that Tamez also argues that her witness tampering conviction should be reversed because the trial court gave an erroneous recitation of the accomplice liability instruction and she received ineffective assistance of counsel. Because we reverse her witness tampering conviction on other grounds, we decline to address these issues.

II. Prosecutorial Misconduct

Tamez also argues that the prosecutor committed misconduct, eliciting testimony from a witness on the ultimate issue of Tamez's guilt, when he asked Boyer if Tamez knew the source of Harris's money. Specifically, she asserts that, because the State had to prove that Tamez knew Harris made his living from dealing drugs "in order to establish Ms. Tamez's guilt on the charge of tampering with physical evidence and the first count of money laundering," the following exchange constituted misconduct:

> [THE STATE:] Now, in your experience Ms. Tamez—was she involved in the actual drug sales?
> [BOYER:] No.
> [THE STATE:] All right. Did she know what Damien did for his source of money?
> [BOYER:] I can't say yes or no, but I mean, his caliber of a person you can't really not know.
> [THE STATE:] Okay. She's dating a drug dealer?
> [BOYER:] Yeah.
> [THE STATE:] That's his occupation?
> [BOYER:] Yeah.

Appellant's Br. at 27; III RP at 161.

To establish prosecutorial misconduct, Tamez must show both improper conduct and resulting prejudice. *See State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists if there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529,

561, 940 P.2d 546 (1997)). Failure to object to an improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes a prejudice that could not have been neutralized by a curative jury instruction. *Brown*, 132 Wn.2d at 561.

No witness may testify to his opinion by a direct statement or by inference regarding the defendant's guilt. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). "The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion of guilt." *State v. Hayward*, 152 Wn. App. 632, 649, 217 P.3d 354 (2009) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). Though Boyer's testimony addressed an ultimate issue that the jury was required to decide in determining Tamez's guilt, his testimony did not include an opinion as to Tamez's guilt. The prosecutor did not act improperly in eliciting this testimony.

We reverse Tamez's witness tampering conviction and remand to the trial court for dismissal of this conviction. We affirm Tamez's tampering with physical evidence and money laundering convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Concur in result:

Quinn-Brintnall, J.