IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67432-3-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
JAMES CALVIN PETERSON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: October 3, 2011

Spearman, J. — James Peterson was convicted by a jury of tampering with a witness, after he made phone calls from the Pierce County jail to Noel Mitchell, whom he had allegedly assaulted. He appeals, claiming (1) his conviction is not supported by sufficient evidence, (2) he was denied his right to a unanimous verdict, and (3) the recording of the phone calls violated his right to privacy. We hold that the evidence did not support Peterson's conviction as charged and reverse. We do not address his other claims.

FACTS

On October 5, 2009, police officers Kevin Lorberau and Michael Sbory arrived at an address in Tacoma after receiving a report that a woman had been run over by a car. They saw Noel Mitchell lying in the middle of the road being treated by fire department personnel. She was screaming and had a gouge-like injury on her leg. She told Lorberau that during an argument her boyfriend spit

on, slapped, and punched her and grabbed her by the hair. He knocked her to the ground, got into his Expedition, and ran over her leg as he drove away. Mitchell said her boyfriend's name was Michael Jones. After being moved from the street to an ambulance, Mitchell said her boyfriend's name was actually James Peterson.[1]

Peterson was found and arrested the next day, October 6. That evening, he made three phone calls to Mitchell from the Pierce County jail.[2] In the first call, Peterson berated her for not picking up her phone and said he was facing assault in the first degree. Mitchell said she would write a letter telling the truth, that he had never touched her and that she had jumped in front of the car when he tried to leave. He responded, "That's not what we're going with." Peterson instructed her to tell the prosecuting attorney that the two of them had gotten into an argument the day before the incident and that the argument on the day of the incident was actually between Mitchell and her boyfriend, Michael Jones. Peterson said that since Jones also had a green truck, there would naturally have been confusion on October 5 as to who ran over Mitchell's leg. Mitchell was to say that she and Peterson were not dating, but were just good friends. Peterson said he could probably be out of jail by the next day if she did this.

[1] "Michael Jones" was a made-up name.

[2] Deputy James Scollick, the officer responsible for the inmate phone system, copied recordings of these phone calls and they were presented at trial as plaintiff's exhibit 22. The written log of the calls was admitted as plaintiff's exhibit 24.

In the second phone call, Peterson told Mitchell to have his brother pick her up early in the morning and take her "down to the prosecuting attorney's office" to "tell them the truth, tell them what happened." He emphasized that it had to be in the morning because he was scheduled to go to court at 1:30 in the afternoon. Mitchell again said she wanted to tell the prosecuting attorney that what happened was her fault, but Peterson said that account would not be accepted. The two discussed the merits of their respective accounts and the fact that someone had given Peterson's license plate number to the police.

During the third phone call, Peterson again told Mitchell to go to the prosecuting attorney's office with the story that Peterson and Mitchell had gotten into a fight the day before the incident and the neighbors had been mistaken. Mitchell pointed out that she would not be able to speak at his arraignment, to which he responded, "But that's why you're gonna come down here and go to the prosecuting attorney's office first." Peterson told Mitchell that in the worst-case scenario, he would take it to trial and she should take a vacation during trial.

On October 7 at 10:16 a.m., the day after Peterson's arrest and these three phone calls, the State electronically filed an information charging Peterson with domestic violence assault in the first degree with a firearm or deadly weapon. The same day, after the information was filed, two more phone calls were placed to Mitchell from the jail. The first was placed by another inmate

who conveyed information to and from Peterson. Mitchell said she wrote a statement saying the incident had been a complete accident and misunderstanding. She explained that she did not say what Peterson wanted her to say because she felt it was not believable. Instead, she said, she told the truth. Mitchell said she would be at Peterson's arraignment at 1:30 and that the prosecutor would have her statement before the arraignment. Peterson expressed anger that she told this story to the prosecutor, calling her a "stupid bitch." During the second call on October 7, Peterson repeatedly berated Mitchell for not listening to him, saying that what she told authorities the first time and her subsequent differing account made him look even more guilty. He said, "Fuck it, I'm going to ride this out, whatever happens, happens." He said if he had to do some time, he would do some time.

That day, Peterson was arraigned and a no-contact order was entered regarding Mitchell. On October 8, the morning after his arraignment, two more phone calls took place between Peterson and Mitchell. They again argued about her account to the prosecutor and why she had not given his account instead. Peterson asked Mitchell whether she would be there for him. She said yes. He said the only way the situation was "beatable" was for her not to show up to trial, because the case would be dropped. He said he was going to take the case to trial and what he needed was to know whether she was on his side. He told her if she was pulling his chain, to let him go. He told her to make sure

not to come to court because if she came to court, he would "get time" no matter what she said, no matter whether she said he did it or not. He again chastised her for not listening to him from the beginning, saying that had she done so, the charges would have been dropped. Peterson instructed Mitchell to go somewhere else a week or two before trial started.

On December 1, 2009, the State obtained a continuance, partly because it could not find and serve Mitchell. The State then learned of phone calls from the jail to Mitchell's phone number. Accordingly, it filed an amended information, adding one count of tampering with a witness and one count of violation of a no-contact order. On February 8, 2010, the State filed a second amended information, reducing the count of assault in the first degree to one count of assault in the second degree.

At Peterson's trial, recordings of the seven phone conversations were played for the jury. Mitchell testified at trial, but denied speaking to Peterson after his arrest. After listening to recordings of the phone conversations, she denied it was her voice on the recordings. The prosecutor told the jury in closing argument that Peterson's instructions to Mitchell to go on vacation during his trial constituted an attempt to induce her to withhold testimony and that his instructions to Mitchell about which story to tell the prosecutor's office constituted an attempt to induce her to testify falsely.

The jury could not reach agreement on the charge of assault in the

second degree but found Peterson guilty of tampering with a witness and violating a no-contact order.[3] The court imposed a high-end sentence of 57 months on the count of tampering with a witness, and a one-year suspended sentence on the contact-order violation to run consecutively.

DISCUSSION

Peterson claims on appeal that (1) the evidence was insufficient to support his conviction for tampering with a witness, (2) the trial court violated his right to a unanimous verdict by failing to give a unanimity instruction, and (3) the recording of the phone calls violated his privacy rights. We hold that the evidence does not support his conviction for tampering with a witness as charged by the State. We reverse and remand. In light of our decision, we do not address his other claims.

Sufficiency of the Evidence

On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences must be drawn in favor

[3] The assault charge was dismissed without prejudice.

of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. Id. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335 (1987)). Thus, this court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992) (citing State v. Longuskie, 59 Wn. App. 838, 801 P.2d 1004 (1990)).

Here, the State was required to prove each of the following elements beyond a reasonable doubt:

> (1) That during the period of October 6th, 2009 to December 1, 2009 [Peterson] attempted to induce a person to testify falsely, or without right or privilege to do so, withhold any testimony; and
> (2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings; and
> (3) That any of these acts occurred in the State of Washington.[4]

"Testimony" means "oral or written statements, documents, or any other material that may be offered by a witness in an official proceeding." RCW 9A.72.010(6). "Official proceeding" means a "proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear

[4] Jury instruction 19.

evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions." RCW 9A.72.010(4).

Peterson contends that neither of the two acts relied on by the State—(1) his attempts to get Mitchell to be absent from his trial and (2) his instructions for her to tell a false story to the prosecutor—proved beyond a reasonable doubt that he attempted to induce Mitchell to testify falsely or withhold any testimony. Regarding the former, he points out that he was not charged under RCW 9A.72.120(1)(b), under which a person is guilty of tampering with a witness by attempting to induce another person to absent himself or herself from an official proceeding. Regarding the latter, he points out that he was not charged under RCW 9A.72.120(1)(c), under which a person is guilty of tampering with a witness by attempting to induce another person to withhold from a law enforcement agency information which he or she has relevant to a criminal investigation. Peterson argues that here, as in State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1988) (en banc), the State charged one means of committing the crime but attempted to prove facts regarding a different means.[5]

[5] The problem in Irizarry arose with jury instructions that included not only the charged offense of aggravated murder in the first degree but also, over the defendant's objection, the "'included offense'" of felony murder. Irizarry, 111 Wn.2d at 592-93. The statute for murder in the first degree listed three means of commission: (1) premeditated murder, (2) murder by extreme indifference to human life, and (3) felony murder. Aggravated murder was a type of premeditated murder. Id. at 593-94. The defendant was convicted of felony murder. Id. at 592. The court held that felony murder was not a lesser included offense within the offense of aggravated murder in the first degree; that the jury instructions violated the rule that a defendant cannot be tried for a crime not charged; and reversed the defendant's conviction. Id. Here, Peterson was charged with one means of committing tampering with a witness and the jury was instructed as to only that means, so the exact problem in Irizarry did not happen here.

In addition, Peterson argues that at the time he told Mitchell to go to the prosecuting attorney with a different story, the evidence did not show that she was a witness or a person he had reason to believe was about to be called as a witness in any official proceeding. Citing State v. Pella, 25 Wn. App. 795, 612 P.2d 8 (1980), Peterson contends that an "official proceeding" does not commence until the filing of the information. Here, the information was filed on October 7, while the phone calls in which he sought to induce Mitchell to change her statement occurred on October 6.

The State, relying on State v. Lubers, 81 Wn. App. 614, 622, 915 P.2d 1157 (1996), argues that it is sufficient to prove an attempt to induce a witness to testify falsely or withhold testimony with evidence that the defendant asked a witness to recant a statement provided to law enforcement during a criminal investigation or to absent herself from the proceedings. And while the State concedes that under Pella, "official proceedings" did not commence until the information was filed on October 7, it argues that because Peterson did not object to admission of the October 6 phone calls below, nor does he on appeal, they were properly considered by the jury as evidence he knew Mitchell was about to be called as a witness in an official proceeding.

We agree with Peterson that the facts are insufficient to support his conviction as charged by the State. First, the evidence was insufficient to show that Peterson attempted to induce false testimony because at the time he

instructed Mitchell to tell a false story to the prosecutor and recant her statements, there was insufficient evidence to prove that Mitchell was a witness or a person Peterson believed was about to be called as a witness in any official proceeding. The State concedes that, under the jury instructions given in this case, no "official proceedings" commenced until the information was filed on October 7.[6] The State also does not dispute Peterson's claim that each of the three calls in which he instructed Mitchell to tell a false story to the prosecuting attorney's office occurred on October 6, before the information was filed. Thus, as in Pella, an "official proceeding was not pending" at the time the statements were made. Pella, 25 Wn. App. at 797.[7]

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[6] Pella interpreted a former version of RCW 9A.72.110, the witness intimidation statute, which stated in pertinent part, "A person is guilty of intimidating a witness if, by use of a threat directed to a witness or a person he has reason to believe is about to be called as a witness in any official proceeding, he attempts to: . . . Influence the testimony of that person . . . ." Pella, 25 Wn. App. at 796-97. Here, the witness tampering statute provides:

> 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: . . .

RCW 9A.72.120(1) (emphasis added). Thus, Pella's interpretation of the language in the witness intimidation statute—to require as a matter of law that an information be filed for a defendant to have reason to believe a person is about to be "called as a witness in any official proceeding"—may not apply to the current witness tampering statute in light of the additional language in the latter. However, here, such additional language was not included in the to-convict instruction, though it was included in the second amended information. The to-convict instruction required the jury to find "[t]hat the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings[.]" Neither party took exception to the court's proposed instructions. As such, they are the law of the case. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). Given that the language in the to-convict instruction here essentially mirrors the language in the statute interpreted by Pella, we will apply the holding of that case and accept the State's concession that official proceedings begin with the filing of an information.

[7] We reject the State's argument that because Peterson did not challenge the admissibility of the October 6 phone calls, the jury properly considered them. Even viewing this evidence in the light most favorable to the State, it shows only that before the information was filed, Peterson

Second, the evidence was insufficient to prove that Peterson attempted to induce Mitchell to withhold testimony. The State argues that the evidence was sufficient where it showed that Peterson instructed Mitchell not to appear at his trial and to recant her statement to the prosecutor's office. We disagree. Accepting the State's argument regarding Peterson's instruction for Mitchell not to appear would require us to conclude there is no distinction between asking a witness to withhold testimony under RCW 9A.72.120(1)(a), which was charged here, and asking a witness to absent herself from an official proceeding under RCW 9A.72.120(1)(b), which was not charged. We would have to conclude that evidence of the latter is proof of the former. But the statute itself draws the distinction between those two means of committing tampering with a witness. Indeed, if we were to conclude that there is no distinction between them, subsection (b) of the statute would be meaningless. This is contrary to the rule of statutory interpretation that requires us, whenever possible, to give effect to every word in a statute, leaving no part superfluous. Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). Subsection (a) prohibits inducing a person to testify falsely by affirmative statement or by withholding any testimony, "without right or privilege" to do so. Viewing the statutory provisions in context, it is evident that inducing the withholding of testimony refers to inducing testimony

attempted to get Mitchell to change the story she had previously given to the prosecutor's office. This is insufficient to establish beyond a reasonable doubt that Mitchell was a witness or person Peterson believed was about to be called as a witness in an official proceeding.

that is false by way of omission.[8] Subsection (b) addresses different criminal conduct, inducing a person to fail to appear as a witness in a trial or other proceeding.

Here, while the State may have presented substantial evidence that Peterson attempted to induce Mitchell to fail to appear for trial, it did not charge, nor was the jury instructed on, this means of committing the crime. It presented no evidence that Peterson attempted to induce Mitchell to withhold testimony, i.e., testify falsely by omission, the means of committing the crime that it did charge.

The State also argues that evidence that Peterson attempted to induce Mitchell to recant her statement to the prosecutor's office is sufficient evidence of inducing her to withhold testimony. This contention is likewise untenable. As we have noted, because there was no official proceeding at the time Peterson made these efforts, Mitchell was not a witness or a person Peterson had reason to believe was about to called as a witness in an official proceeding. We point out that the State did not charge Peterson with violating RCW 9A.72.120(1)(c), which makes it tampering with a witness to withhold information relevant to a criminal investigation from a law enforcement agency, such as the prosecutor's

[8] The latter is made plain by the statute's reference to "right or privilege." Thus, if a wife seeks to induce her husband to withhold testimony or a client attempts to induce his lawyer to withhold testimony, it is not, in most circumstances, a crime under this statute. Those individuals would possess an applicable "right or privilege."

office.

The State's reliance on Lubers on this point is misplaced. In Lubers, during a recorded jail phone call made by Lubers to his co-defendant, Joseph, in a rape case, Lubers told Joseph to write a letter to Lubers's attorney stating that Joseph lied to police about Lubers's involvement in the rape. Lubers, 81 Wn. App. at 617-18. Lubers instructed Joseph to say "Cortez," a fictional person, actually committed the rape; that Cortez had initially promised to pay Joseph money to name Lubers; and that later Cortez threatened to kill Joseph's family unless he falsely accused Lubers. Id.

The State contends Lubers was charged under the same alternative means for committing witness tampering as Peterson and that the court concluded Lubers's attempt to get Joseph to withhold information necessary to a criminal investigation by recanting a prior statement to the police was sufficient evidence of an attempt to induce false testimony. We do not agree. Although the court made reference to subsection (a) of the witness tampering statute—the subsection under which Peterson was charged—it did not state that Lubers was charged under solely this section. Indeed, the inclusion of the language of subsection (c) in its analysis suggests otherwise.

In sum, the evidence presented at trial did not support Peterson's conviction for tampering with a witness as the offense was charged by the State.

Reversed.

WE CONCUR:

Cox, J.

Becker, J.