IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TROY CHRISTOPHER RAYMENT, Appellant.	No. 40693-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Troy Rayment guilty of two counts of witness tampering. Rayment appeals, arguing that (1) his multiple telephone calls and text messages to a single witness should be treated as one unit of prosecution for double jeopardy purposes, (2) he was denied effective assistance of counsel when his trial counsel failed to object to allegedly prejudicial evidence, and (3) his right to a trial by an impartial jury was violated when a witness offered an opinion as to his guilt. *State v. Hall*, 168 Wn.2d 726, 230 P.3d 1048 (2010), issued after Rayment's trial, governs the unit of prosecution for witness tampering charges and supports Rayment's argument that because the charges alleged that he tampered with a single witness, he may be convicted of only one count of witness tampering. In addition, because we agree with

Rayment that the witness's opinion testimony violated his right to a fair trial, we reverse and remand for a new trial.

FACTS

Rayment and Destiny Armstrong began dating in 2000, and had a child together in 2004. After their relationship ended in 2007, they went to court to resolve the issue of their daughter's custody.

In April 2008, while the custody matter was still pending, Rayment and Armstrong encountered one another at a local tavern. Armstrong testified that Rayment stopped "right in [her] face" and asked what she was doing there. Report of Proceedings (RP) (March 24, 2010) at 43. The pair exchanged angry words and when Armstrong tried to walk away, Rayment once again "got in [her] face." RP (March 24, 2010) at 43. Armstrong pushed him away, causing Rayment to stumble and fall onto a table.

When Armstrong left the tavern, she discovered that her car windows were broken. The next morning, Rayment sent a text message to Armstrong stating that she was "going to be in big trouble" for assaulting him. RP (March 24, 2010) at 44. Armstrong responded by accusing Rayment of damaging her car, which he denied.

Over the next month, the pair spoke on the phone and sent text messages to each other several times. Armstrong, upset over having to spend $500 to repair the car window damage, threatened to press charges for malicious mischief. Rayment offered to pay for Armstrong's $500 insurance deductible, sign his car over to her, and also settle the child custody dispute if she would "just drop the charges on him." RP (March 24, 2010) at 48. Rayment texted Armstrong

stating, "If u do what i say then i will do what u say." Ex. 4. The pair believed that the malicious mischief charges would be dropped if Armstrong called the prosecutor and said that she did not want to press charges or if she simply failed to show up for court.

On May 21, 2008, the State charged Rayment with third degree malicious mischief–domestic violence,[1] which the State subsequently dismissed. On January 22, 2010, the State charged Rayment with two counts of witness tampering under RCW 9A.72.120(1)(a) and (c).

At trial, Armstrong testified that Rayment tried to convince her not to show up to court on the malicious mischief charge:

> Q. Did he ask you—you had mentioned that he had asked you not to show up in court. Did he tell you that, specifically?
> A. Yeah, that was one of the things that was brought up in one of our phone conversations. I don't remember, you know, when it was exactly, but that was just one of the things that we had talked about. And I don't know it was how far into this thing that, you know, he said that, but that was one of the, you know possibilities was, you know, that I just don't show up at all.

RP (March 24, 2010) at 49-50.

Armstrong also testified about the incident that gave rise to the dismissed malicious mischief charge and about her fear during the couple's altercation in the tavern. Armstrong's aunt, Judy Estes, testified, over Rayment's objection that Estes would be stating a legal

[1] RCW 9A.48.090(1) provides in relevant part, "A person is guilty of malicious mischief in the third degree if he or she . . . (a) [k]nowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree." RCW 10.99.020(5)(n) defines third degree malicious mischief as a crime of "domestic violence" when committed "by one family or household member against another." RCW 10.99.020(3) provides that "persons who have a child in common regardless of whether they have been married or have lived together at any time" qualify as "[f]amily or household members."

conclusion, that she "believe[d], based on everything that [she] saw, that [Rayment] was attempting to coerce [Armstrong] into getting the charges dropped." RP (March 24, 2010) at 106. During closing argument, the State argued that the jury should find Rayment guilty of two counts of witness tampering if the jurors agreed on any two text messages that met the elements of the charge.

The jury found Rayment guilty as charged. On April 8, 2010, the trial court sentenced Rayment to concurrent six-months confinement for both charges. Rayment timely appeals.

DISCUSSION

Double Jeopardy

Rayment argues that his two tampering convictions violate his right to not be put in jeopardy twice for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9. Specifically, he argues that his multiple telephone calls and text messages should be treated as one unit of prosecution for double jeopardy purposes. The State counters that the telephone calls and text messages constitute at least two separate crimes of witness tampering. We agree with Rayment.

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Washington State Constitution provides a similar prohibition. Wash. Const. art. I, § 9. "A defendant may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple convictions for the same offense." *Hall*, 168 Wn.2d at 729-30 (citing *State v.*

Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005)). Whether a defendant faces multiple convictions for the same crime turns on the unit of prosecution. *Hall*, 168 Wn.2d at 730.

The witness tampering statute provides, in relevant part,

> 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 . . . to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; 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).[2]

Our Supreme Court recently stated that the evil the legislature had criminalized is "the attempt to 'induce a witness' not to testify or to testify falsely. The *number* of attempts to 'induce a witness' is secondary to that statutory aim, which centers on interference with 'a witness.'" *Hall*, 168 Wn.2d at 731 (quoting RCW 9A.72.120(1)). The offense of witness tampering "is complete as soon as a defendant attempts to induce another not to testify or to testify falsely, whether it takes 30 seconds, 30 minutes, or days." *Hall*, 168 Wn.2d at 731.

We previously applied the unit of prosecution analysis in *Hall* to a multiple count witness tampering conviction involving a single witness and reversed seven of the eight witness tampering convictions. *State v. Thomas*, 158 Wn. App. 797, 802, 243 P.3d 941 (2010). Here, as in *Hall* and *Thomas*, Rayment made numerous telephone calls to a single witness to convince her not to testify. The fact that Rayment sent text messages as well as telephone calls does not alter

[2] Rayment was not charged with violating RCW 9A.72.120(1)(b) ("[a]bsent himself or herself from such proceedings").

the analysis. Rayment's numerous telephone calls and text messages to Armstrong for a single purpose constitute a continuing course of conduct aimed at the same witness in a single proceeding and amount to one unit of witness tampering. *See Hall*, 168 Wn.2d at 737; *see also Thomas*, 158 Wn. App. at 802.

Normally, the proper remedy would be to reverse one conviction and remand for resentencing. *See, e.g.*, *Hall*, 168 Wn.2d at 738; *Thomas*, 158 Wn. App. at 802. But because we hold that the trial court committed reversible error when it admitted improper opinion testimony over Rayment's objection, we reverse and remand for a new trial or other proceedings consistent with this opinion.

Opinion Testimony

Rayment argues that his constitutional right to trial by an impartial jury was violated because his convictions were based in part on impermissible opinion testimony. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The State concedes that the witness should not have given an opinion as to Rayment's guilt, but argues that the testimony was harmless error. We agree with Rayment.

A witness may not give an opinion or state a personal belief that the defendant is guilty. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Impermissible opinion testimony regarding the defendant's guilt is reversible error when such evidence violates the defendant's constitutional right to a jury trial by interfering with the independent determination of the facts by the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Constitutional errors require reversal unless they are so insignificant as to be harmless. *State v.*

Maupin, 128 Wn.2d 918, 928, 913 P.2d 808 (1996) (quoting *State v. Hoffman*, 116 Wn.2d 51, 96-97, 804 P.2d 577 (1991)). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

Applying this standard to the evidence in this case, we cannot say that Estes's opinion testimony was so insignificant as to have no effect on the jury's verdict. The witness tampering statute does not expressly prohibit a defendant from requesting that a witness ask the prosecutor to dismiss charges.[3] Rayment's vague text messages and Armstrong's equivocal, indefinite testimony that Rayment asked her to do a number of things is not so overwhelming as to convince us beyond a reasonable doubt that the jury likely would have reached the same result without Estes's improper opinion testimony. *Guloy*, 104 Wn.2d at 425. Because we cannot state with confidence that the outcome of the trial would not have differed absent Estes's improper testimony of her opinion, the error was not harmless. Accordingly, we reverse Rayment's convictions for witness tampering, and remand for further proceedings consistent with this opinion.[4]

[3] We note that, in some circumstances not here present, the victim and defendant may enter into an agreement which requires the dismissal of misdemeanor charges. RCW 10.22.020. But the compromise of misdemeanors statute, ch. 10.22 RCW, does not apply to an offense committed "[b]y one family or household member against another as defined in RCW 10.99.020 and was a crime of domestic violence as defined in RCW 10.99.020." RCW 10.22.010(4). As noted above, RCW 10.99.020(5)(n) defines third-degree malicious mischief – domestic violence as a crime of domestic violence and RCW 10.99.020(3) provides that "persons who have a child in common regardless of whether they have been married or have lived together at any time" qualify as "[f]amily or household members." *See* note 1 *supra*. Therefore, RCW 10.22.010 does not apply to Rayment's case.

[4] Because we reverse and remand, we do not reach Rayment's claim that he received ineffective

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.

QUINN-BRINTNALL, J.

We concur:

WORSWICK, A.C.J.

JOHANSON, J.

assistance of counsel.