In the Court of Appeals of the State of Alaska

Lloyd James Luke,

Appellant,

v.

State of Alaska,

Appellee.

Court of Appeals No. **A-13042**

Order
Supplemental Briefing

Date of Order: **January 8, 2020**

Trial Court Case No. **4FA-16-02072CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Lloyd James Luke was convicted, following a jury trial, of third-degree assault and first-degree witness tampering.[1] On appeal, Luke challenges his conviction for witness tampering, arguing that there is insufficient evidence to support that conviction.

When we review a claim of insufficiency, we are required to view the evidence — and all reasonable inferences to be drawn from that evidence — in the light most favorable to upholding the verdict. *See Eide v. State*, 168 P.3d 499, 500 (Alaska App. 2007). Viewing the evidence in this light, we then determine whether a fair-minded

[1] AS 11.41.220(a)(5) and AS 11.56.540(a)(1), respectively. We note that Luke's judgment states that Luke was convicted under AS 11.56.540(a)(2) ("knowingly induces or attempts to induce a witness to . . . be absent from a judicial proceeding to which the witness has been summoned"). But this is not the theory that was argued to the jury or the theory on which the jury was instructed. Instead, the record shows that the jury convicted Luke of first-degree witness tampering under AS 11.56.540(a)(1) ("knowingly induces or attempts to induce a witness to . . . unlawfully withhold testimony in an official proceeding"). (It appears that the grand jury was instructed under both subsections.)

juror could reasonably find proof beyond a reasonable doubt on all the essential elements of the offense. *Id.* at 500-01.

In the current case, the prosecution's theory was that Luke was guilty of witness tampering because he had attempted to induce a witness — the victim of the assault — to "unlawfully withhold testimony in an official proceeding." *See* AS 11.56.540(a)(1). In support of this theory, the prosecution introduced a letter that Luke sent to his girlfriend while he was in jail. In the letter, Luke writes:

> [I]t would help my case a whole lot if you could tell your ex-boyfriend [the victim of the assault] to ignore the D.A.'s and the court's calls. . . . I don't want to get maxed out for this, ya know? If he does though everybody already knows what will happen at the end of the day.

The prosecutor argued that it was reasonable to infer from this letter that Luke was attempting to induce the victim to avoid testifying by ignoring calls from the district attorney and the courts.[2]

The question for this Court is whether attempting to tell a witness to ignore calls from the district attorney and the courts constitutes "attempt[ing] to induce a witness to . . . unlawfully withhold testimony in an official proceeding."

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[2] Here is the relevant portion of the prosecutor's closing argument:

> He wrote a letter to Miriam Odom. And in that letter, he tampered with a witness. He attempted to get Miriam Odom to contact David Johnson, and told him, in essence, don't testify. Don't listen to the DAs, don't listen to the courts. That's going to help me out in my case. And we're going to know what's going to happen if he does testify. Witness tampering.

The legislative history of AS 11.56.540 suggests that it does not. In *Rantala v. State*, we quoted part of the legislative commentary to AS 11.56.540, which suggested that the legislature did not intend to prohibit attempting to induce a prospective witness to avoid process. *See Rantala v. State*, 216 P.3d 550, 555-56 (Alaska App. 2009) (citing Commentary to Alaska's Revised Criminal Code, 1978 Senate Journal, Supplement No. 47 (June 12), at 81-82). We now reproduce that legislative history as a whole:

> II. Sections 11.56.540; 590. TAMPERING WITH A WITNESS; JURY TAMPERING
>
> The crime of tampering with a witness differs in three primary respects from the crime of interference with official proceedings. First, the means by which tampering with a witness is committed (inducing or attempting to induce) are not as culpable or as overt as the means specified in the crime of interference with official proceedings (force, threat or bribery). Tampering with a witness is consequently graded as a class A misdemeanor.[3]
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> Second, unlike the interference statute, an attempt to induce a prospective witness to avoid process is not made an offense. This distinction is discussed in the Commentary to the Proposed Michigan Revised Criminal Code § 5020 at 414.
>
> > [W]hile [§ 11.56.510] make[s] it unlawful to use a bribe or threat to induce a witness to avoid legal process, [§ 11.56.540] does not bar an attempt to achieve that objective by persuasion or argument. A defense attorney, for example, would not be prohibited from attempting by persuasion or

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[3] In 1982, the legislature amended AS 11.56.540 to make first-degree witness tampering a class C felony. *See* SLA 1982, ch. 122, § 1 (House Bill 573).

> pleading to induce a witness to avoid process by leaving the state. Although the attorney's activity might raise certain ethical issues, it should not give [r]ise to criminal liability, since neither the means used nor the objective sought is unlawful in itself.
>
> Finally, while interference with official proceedings includes acts done with intent to induce a witness to "withhold testimony", tampering with a witness requires an intent to induce a witness to "unlawfully withhold testimony." While it would not be tampering with a witness to persuade a witness to lawfully refuse to testify on grounds of personal privilege, *i.e.*, privilege against self-incrimination, it would be interference with official proceedings to attempt to do so by force, threat or bribe.

Commentary to Alaska's Revised Criminal Code, 1978 Senate Journal, Supplement No. 47 (June 12), at 81-82. Similar legislative commentary can be found in the Alaska Criminal Code Revision, Tentative Draft, Part IV, at 59-60 (1977).

This legislative history was not quoted in the appellant's brief. We therefore think that the State should be given an opportunity to respond to this history and to address its significance in the context of the current case.

Accordingly, **IT IS ORDERED**:

1. On or before **February 7, 2020**, the State shall file a supplemental brief addressing the merits of Luke's legal insufficiency claim in light of the relevant legislative history. The supplemental brief need not conform to all of the requirements

of Appellate Rule 212, although it must include appropriate citations to the record and to the legal authority.

2. After the State has filed its supplemental brief, Luke will have 20 days to file a supplemental brief. The supplemental brief need not conform to all of the requirements of Appellate Rule 212, although it must include appropriate citations to the record and to the legal authority.

3. Upon receipt of the State's supplemental brief and Luke's supplemental brief (if any), the Court will resume reconsideration of this case.

Entered at the direction of the Court.

Clerk of the Appellate Courts

_____
Sarah Anderson, Deputy Clerk

cc: Court of Appeals Judges

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