TENNESSEE COURT OF CRIMINAL APPEALS- EASTERN DIVISION

State of Tennessee Appellee v. Lt. Commander Walter Francis Fitzpatrick, III Appellant	Appellate Court Case Number: E2014-01864-CCA-R3-CD Trial Court Docket #: 14CR69 **APPELLANT'S REPLY BRIEF**

Defendant's Appeal from McMinn County Criminal Court's Conviction Against Walter Fitzpatrick

ORAL ARGUMENT REQUESTED

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Table of Contents

Table of Authorities

Table of Authorities (Cont.)

Argument

I. The Disqualified Grand Juror was Also an Alleged Victim of the Extortion Charge

The State asserts that Commander Fitzpatrick's argument regarding invalidity of the indictment is moot. (St. Br. at 8-9). The State's assertion assumes that the disqualified grand juror was disqualified only as to the harassment and stalking charges. *Id*. However, the undisputed facts of record establish that the disqualified grand juror was also an alleged victim of at least the extortion charge. (Facts discussed further below). Therefore, the indictment is void at least as to the extortion charge as well.

The State's Brief did not dispute that a voting grand juror, Kay Hicks, was an actual victim of the crimes of stalking and harassment. Nor did it dispute any of the facts supporting this conclusion. The State's Brief did confirm that if Ms. Hicks was an actual victim of the crimes charged, then she was "legally ineligible to participate in consideration of those counts." (St. Br. at 9).

In its attempt to rebuff this dispositive issue, the State incorrectly assumes that Fitzpatrick only asserted that Hicks was a victim of the stalking and harassment charges. However, Fitzpatrick's Brief clearly states "The record in the instant case reflects that at least one member of the Grand Jury that voted to indict the defendant was also a victim of the alleged crimes for which she voted to indict." (Fitz Br. at 13). Fitzpatrick's opening statement on this issue is not limited to stalking and harassment. Fitzpatrick also made other non-limiting statements of this issue in Appellant's Brief sections, "Statement of Issues Presented for Review," "Statement of the case," and "Summary of the Argument." *Id*. at 6, 8, & 11-12.

While Fitzpatrick's Brief does have a subsection focusing on the harassment and stalking charges, this in-depth analysis of one sub-part of Fitzpatrick's argument does not waive Fitzpatrick's explicitly asserted grounds supporting invalidity of other charges in the indictment.

Even the subsection discussing the harassment and stalking charges contains the non-limiting statement, "Kay Hicks fits the definition of a victim of the crimes alleged in the indictment against Fitzpatrick, yet she voted on that indictment. (Fitz Br. at 16). This statement refers to all of the crimes alleged in the indictment.

Appellant's Brief focused on the stalking and harassment charges largely because the statutes defining those charges explicitly define terms relevant to Fitzpatrick's argument. That subsection focused on the stalking charge because TCA §39-17-315(a)(6) defines "victim" in a manner that includes grand juror Kay Hicks. (*See* Fitz Br. at 16). As explained in that subsection, the trial court ignored this dispositive issue by noting that Jeff Cunningham was the named victim on the indictment. The court reasoned that no person other than the named victim could possibly be an additional victim to the charged crime. The trial court concluded that Tennessee Rule of Criminal Procedure 6(c) only applies to the victim actually named on the indictment, and cannot possibly apply to any unnamed victims. Appellant's discussion of TCA §39-17-315 is an attempt to point out the error in the trial court's reasoning by pointing to definitions of the term "victim" that include more than the one named individual. The discussion in this subsection of Appellant's initial Brief was not intended to limit his grounds for appeal, as repeatedly set forth throughout his Brief.

Facts of record establish that grand juror Hicks was a victim of the alleged crime of extortion. TCA §39-14-112(a)(E) defines "coercion" as "a threat, however communicated, to:…cause a public servant to take or withhold action." As with the harassment and stalking charges, the facts asserted at trial in support of the extortion charge arose from Fitzpatrick's interactions with the grand jury in January, February, and March of 2014. (*See* citations at Fitz Br. p. 16). The record also reflects that grand juror Hicks felt "scared" and "threatened" by Fitzpatrick's actions in relation to her service as a grand juror.

Because grand juror Hicks was a victim of the alleged crime of extortion as charged on the indictment, Hicks was disqualified to participate in discussion or vote on that indictment. TN R. Crim. Proc., 6(c)(1)(C). Because Hicks did participate in discussion of that indictment, and did vote on that indictment, the indictment is void, at least as to the extortion charge. *Id*. Therefore, the trial court lacked jurisdiction. TN R. Crim. Proc., 12(b)(2); *Wyatt v. State*, 24 S.W.3d 319, (Tenn 2000).

II. Fatal Defect in the Indictment Affected All Counts of the Indictment

The State correctly points out that each charge on an indictment is a separate criminal case. (St. Br. at 8; *citing Usary v. State*, 112 S.W.2d 7 (Tenn.1938), and *State v. Gifford*, 2008 WL 1813105 (Tenn.Crim.App.)). However, the State's assertion that "a defect in one indictment count does not affect the other counts," is not supported by the cited precedent. Neither *Usary* nor *Gifford* discuss the validity of an indictment. Instead, *Usary* discusses double jeopardy in the context of both a verdict and a hung jury arising from a valid multiple-count indictment. *Gifford* interprets Tennessee's expungement statute in light of a valid multiple-count indictment. In neither case was the validity of the indictments at issue. Neither of these cases, nor any of which the Appellant is aware, support the State's assertion that a disqualified grand juror can deliberate and vote on all charges in a single indictment, but only some of those charges are rendered invalid. The reasoning and holdings of *Usary* and *Gifford* simply do not support the State's assertion.

Because the disqualified juror in the instant case was present for the deliberations of all charges on the indictment, all charges on the indictment were illegally prejudiced by her presence. The disqualified juror's presence during deliberation of the extortion and perjury charges, coupled with her statements of being "scared" and "threatened" by the defendant, clearly prejudiced the grand jury's entire deliberations of all charges on the indictment, including

the extortion and perjury charges. Commander Fitzpatrick affirmatively asserted in his initial Brief that he was prejudiced by Ms. Hicks illegal presence during consideration of the indictment. (Fitz Br. at 13). Yet the State did not contradict this assertion in any way.

While it is not required that a grand juror be free from all opinion as to the guilt of the accused, the one exception to this general rule is the presence of a controlling legal provision disqualifying the grand juror. *See Rippy v. State,* 550 S.W.2d 636, 642 (Tenn.1977). This Court recently explained that, "The only express disqualification of grand jurors by reason of interest is provided for in Rule 6(c) (2005), Tennessee Rules of Criminal Procedure." *State v. Aikens,* 2007 WL 1135492 at *7 (Tenn.Crim.App.); *citing Rippy*, 550 S.W.2d 636, 642; *see also* 22-1-104 "Disqualification by interest or relationship."

The State's asserted reading of Rule 6(c) would lead to absurd results. For example, during a bank robbery a customer is taken hostage, kidnapped and raped before being released. Would that customer be able to deliberate and vote to indict her attacker as long as the indictment only charged the perpetrator with bank robbery? Or, more accurately, under the State's reasoning if the rape victim deliberated and voted on a three count indictment the rape and kidnapping charges would be invalidated by her participation, but the bank robbing charge would be completely unaffected by the victim's membership in the grand jury. This reasoning would effectively eliminate the purpose of Rule 6(c).

Ms. Hicks deliberation and vote on the instant indictment while feeling "scared" and "threatened" by the Appellant, tainted the entire proceeding, and unquestionably affected the grand jury's entire charging decision. Therefore, under the clear language of Rule 6(c) Ms. Hicks was legally disqualified to participate and vote on the entire indictment.

Finally, because Ms. Hicks was disqualified to participate in deliberations and vote on the instant indictment, only 11 grand jurors voted on the instant indictment.[1] Because a minimum of 12 grand jurors are required to agree on an indictment, the indictment is void. T.C.A. §40-13-105.

Because the entire indictment is void, the trial court never had jurisdiction over the instant prosecution. TN R. Crim. Proc., 12(b)(2); *Wyatt v. State*, 24 S.W.3d 319, (Tenn 2000).

III. Criminal Extortion Cannot Arise from Petitions to the Government Unless the Prosecution Proves that the Defendant Did Not Actually Desire A Government Response, and that the Defendant had the Specific Intent to Extort

Commander Fitzpatrick has, throughout this case, conceded that the First Amendment does not prevent prosecution of perjury. (Fitz Br. at 19). However, transmuting petitions to the government into criminal extortion is constitutionally permissible under only the most extreme circumstances. Those circumstances do not exist in the instant case.

The State cites three Federal cases in support of its broad and unlimited argument that extortion charges can be supported solely by evidence of petitions to the government for redress of grievances. (St. Br. at 10; *citing United States v. Cross*, 677 F.3d 278, 289 (6th Cir. 2012); *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606 (6th Cir. 2009); and *McDonald v. Smith*, 472 U.S. 479, 484 (1985). However, none of these cases support the State's assertion.

[1] The State's footnote 2 indicates that "The grand jury consisted of Mr. Cunningham and twelve other grand jurors." This statement is correct as to the January and February 2014 grand jury meetings. However, it should be noted that Mr. Cunningham had resigned before the March 12, 2014 grand jury voted to indict Fitzpatrick. On March 12 Judge Reedy appointed Thomas Balkom as temporary grand jury foreman. Before this appointment Mr. Balkom was one of the regular twelve grand jurors. His appointment left the grand jury with only 11 regular members plus Mr. Balkom acting as foreman on the day the instant indictment was voted upon. Nothing in the State's Brief contradicted the fact that disqualification of one grand jury member left the March 12, 2014 grand jury with a total of only 11 qualified jurors. (10 regular members plus Mr. Balkom). A minimum of 12 grand jurors are required to vote on a valid indictment. T.C.A. §40-13-105.

McDonald was a civil libel case. *McDonald*, 472 U.S. 479. It shouldn't be necessary to state that civil libel and criminal extortion have very different legal standards. Further, in *McDonald* the U.S. Supreme Court noted that during arguments about public policy and politics "the occasionally erroneous statement is inevitable." The Court then concluded that liability for defamation involving matters of public interest can only be sustained after proof of actual malice has been produced.

In the instant case, Fitzpatrick was complaining to the government about matters of public interest. Specifically, Fitzpatrick alleged that the foreman of the grand jury (Cunningham) had not been appointed properly. Therefore, at a minimum the State should have been required to prove actual malice. However, the State failed to meet the much lower standard of proof that Fitzpatrick knew his statements were incorrect. (Discussed further below).

Hartman was also a civil case, this time construing the constitutionality of the Federal Fair Debt Collection Practices Act. *Hartman*, 569 F.3d 606. *Hartman* was a review of summary judgment. The 6th Circuit discussed generally the relationship between false statements made in the context of Debt Collection liability and remanded for further fact finding. *Hartman* is of little value to the instant case, except possibly to confuse issues.

Cross was a Federal criminal extortion case. 677 F.3d 278. However, in *Cross* the defendants threatened to expose photos of a celebrity having sex and doing drugs in pubic, unless the celebrity paid the defendants $680,000. *Id*. at 281-2. Answering a challenge to the constitutionality of the Federal statute, the 6th Circuit explained that the statute did not violate the First Amendment's free speech clause only because the statute included a requirement that the government prove the specific intent to extort, beyond a reasonable doubt. *Id*. at 290 ("Because the statute in the present case is limited to extortionate threats, it does not regulate speech relating to social or political conflict, where threats to engage in behavior that may be unlawful

may nevertheless be part of the marketplace of ideas."). Far from supporting the State's asserted argument, *Cross* shows that the 6th Circuit is not willing to find criminal extortion arising from constitutionally protected activities, except under very specific circumstances with narrowly applied statutes and clearly extortionate activities.

Far from proving specific intent to extort, the State in the instant case failed to prove that Fitzpatrick ever directed any threat to Cunningham. Instead, Fitzpatrick's requested government officials, with authority to investigate, to investigate Cunningham. Such a petition to government comes nowhere near to a specific intent to extort.

Next the State attempts to distinguish *United States v. Pendergraft* from the instant case by claiming that Cunningham is a "private citizen." (St. Br. at 13; *discussing* 297 F.3d 1198 (11th Cir. 2002). However, it is undisputed that a grand jury foreman in Tennessee is a government official.

The State also attempts to distinguish *Pendergraft* by arguing that Fitzpatrick "was threatening to harm [Cunningham's] business and personal reputation," whereas in *Pendergraft* the defendants were threatening to sue a government official. (St. Br. at 13). The State's distinction reveals that the holding in *Pendergraft* is actually a stronger an indication that the instant case goes much too far. First, Fitzpatrick never threatened to do anything to Cunningham. Instead he filed petitions with government officials asking those who have authority to investigate; to investigate. Fitzpatrick didn't threaten to act. He simply acted. (This critical distinction is discussed further below.) The defendants in *Pendergraft* at least did make a threat to litigate. Yet the 6th Circuit in *Pendergraft* concluded that allowing a threat of litigation to amount to criminal extortion was a violation of the First Amendment. 297 F.3d 1198. ("The reality is that litigating parties often accuse each other of bad faith. The prospect of such civil cases ending as criminal prosecutions gives us pause."). How much more applicable is this

reasoning to criminalizing a petition to a grand jury, without any preceding threat to do so, and with no personal gain to be had. The difference cited by the State does nothing to help its argument.

The State gives no valid reason or precedent in support of its request that this Court ignore the Federal courts' Noerr-Pennington limits on criminal prosecutions for extortion arising from petitions to the government for redress of grievances. Noerr-Pennington doctrine arose to limit liability in civil suits for alleged abuse of the right to petition. Limits on criminal prosecution arising from the same right should, if anything, be much more stringent. Yet the State asks this Court to completely ignore the Federal Courts' admonition that "liability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances **only if**…the real purpose is **not** to obtain governmental action." *United States v. Hylton*, 558 F.Supp. 872 (S.D.Tex. 1982)(emphasis added); *citing Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Criminal extortion arising from colorable petitions to the government should only follow where the State proves that the petitioner did not intend to obtain government action, but instead specifically intended to extort the victim. *Id*. The State's case against Fitzpatrick, and its Brief, utterly failed on this point. The victim's own testimony shows that the alleged victim himself thought that Fitzpatrick believed the assertions that Fitzpatrick made in his petitions. (*See* Fitz Br. at 22; *citing* Record Vol. V, 76:5-10). The named victim testified that Fitzpatrick "sure acts like he believes" his allegations against Cunningham. *Id*.

When the victim admits that the defendant believed the statements in his petitions, it is impossible to conclude that the defendant's real purpose was not to obtain governmental response to his petitions. The extortion charge in the instant case must be reversed.

IV. No Evidence of a Threat

When a defendant challenges the sufficiency of evidence the appellate court must determine if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 24 S.W.3d 274, 278 (Tenn. 2000).

The State's Brief correctly quotes TCA §39-14-112(a): "'Coercion' means a threat, however communicated…" (St. Br. at 12). But, the State still fails to cite any evidence showing that Fitzpatrick ever threatened Cunningham. In fact, Mr. Cunningham testified that Fitzpatrick never threatened him in any way:

Q: Did Mr. Fitzpatrick ever make any physical, or ever make any threat of physical harm to you?

A: No.

Q: Did he ever threaten you at all?

A: No.

(Record Vol.III, June 16, 2014 Hearing, at 34:4-9)

While "feeling" threatened is sufficient to support a stalking or harassment charge, extortion requires proof that the defendant actually communicated a threat. A threat requires a declaration of an intent to injure another. *Armstrong v. Ellington*, 312 F.Supp. 1119 (W.D.Tenn.1970) ("By definition a 'threat' in law is a declaration of intention to injure another by some unlawful act." emphasis added). Extortion, therefore, requires communication of a threat before taking an illegal action against the person threatened, with the intent that the threat will force the victim to act or refrain from acting. *Id*.

For example, beating a victim is assault, not extortion. Extortion requires the act of first threatening to beat the victim if the victim doesn't act or refrain from acting ("pay me or get beat"). If a defendant never communicated a threat to beat the victim, but instead simply beat the victim, then he cannot be convicted of extortion. In other words, the threat must precede the illegal act and must be intended to change the victim's behavior. *Id.*

In the instant case Fitzpatrick never communicated any threat to Cunningham. Instead Fitzpatrick simply took action. He petitioned the government directly without ever communicating to Cunningham his intent to act. Fitzpatrick's action may have caused Cunningham to change his behavior, but Fitzpatrick's action was not directed to Cunningham, it was directed to the government. Fitzpatrick never threatened to petition the government if Cunningham refused to resign. He simply went directly to the government. If Fitzpatrick had first threatened Cunningham, saying he would petition the government if Cunningham refused to resign, and if that petition was itself a crime, then the elements of extortion might have been fulfilled. But since Fitzpatrick never told Cunningham he would act if Cunningham refused to resign, the element of communicating a threat never happened.

Even if Fitzpatrick had knowingly lied in his petitions to the government, that alone would not have been extortion. It could have been perjury, but without a preceding threat it is simply not extortion.

To use another analogy, simply calling the Police to report a crime is not extortion. Even if the report is knowingly false, such a false report could be the crime of perjury or filing a false report, but it is not extortion. Extortion requires a wrongful threat to call the Police if the victim does not act.

No evidence presented at trial alleges that Fitzpatrick communicated a threat to Cunningham before going directly to government officials. The State's Brief actually confirms

that the asserted "threats" were made in Fitzpatrick's "petitions to the grand jury." (St. Br. at 13). While the evidence fails to identify any specific threat, even if one was identified it would have been an act of Fitzpatrick going directly to government officials, not directing a threat to Cunningham.

Because no evidence of a threat from Fitzpatrick to Cunningham preceded Fitzpatrick petitioning directly to the government, the extortion conviction must be overturned.

V. Evidence Not Sufficient to Support Perjury

The State insists that it produced sufficient evidence to sustain the perjury conviction. (St. Br. at 14). However, perjury is defined as a false statement, under oath, with the intent to deceive. (T.C.A. § 39-16-702). "'Deception' means that a person knowingly: Creates or reinforces a false impression…that the person does not believe to be true." (T.C.A. §39-11-106: (6)(A)(i))(emphasis added); *Shook & Fletcher Supply Co. v. City of Nashville*, 47 Tenn.App. 339, 350 (1960) ("an honest but erroneous expression of opinion is not perjury").

Fitzpatrick did not knowingly lie. In fact, his accuser admitted that Fitzpatrick "sure acts like he believes" his allegations. (Record Vol.V at 76:1-5).

The State's Brief correctly acknowledges that the State's bill of particulars limits the perjury charge to one petition for a protective order. (St. Br. at FN6). Specifically, this charge is limited to the March 12, 2014 petition. (Record Vol. I, at 1-3). The State cites three facts alleged to be "false" in that petition. (St. Br. at 15). However, the state's own assertion highlights the missing "that the person knows to be false" element. Proving that a statement is incorrect is not sufficient to convict for perjury. The State must also prove beyond a reasonable doubt that Fitzpatrick did not believe the assertions to be true.

In order for Fitzpatrick's March 2014 petition for a protective order to be unlawful, the evidence must show that Fitzpatrick not only made incorrect assertions in those petitions, but

that he had an intent to deceive. (T.C.A. §39-16-702, Perjury). However, the named victim testified that Fitzpatrick "sure acts like he believes" his allegations against Cunningham. (Record Vol. V, 76:5-10). Even if circumstantial evidence could have been viewed to imply that Fitzpatrick intentionally lied, his accuser's own testimony directly contradicts this conclusion. (*See* Record Vol. V, 76:5-10). No rational trier of fact could have found that Fitzpatrick had an intent to decieve when the named victim testifies that Fitzpatrick didn't appear to have an intent to deceive.

If Fitzpatrick's petitions were not perjurious, but simply contained honestly held beliefs that were wrong, then his petitions were not unlawful acts. If they were not unlawful acts, then they were constitutionally protected activities. If they were not unlawful acts, then the extortion element of communicating an intent to perform an unlawful act was not fulfilled because Fitzpatrick never communicated directly with Cunningham, and because the act he performed was not unlawful.

Further, the three statements specifically pointed out by the state as false statements on the March 2014 petition, are actually true. The first statement that the State asserts as false is Fitzpatrick's statement that Cunningham assaulted him on February 18, and that Cunningham had approached Fitzpatrick uninvited to threaten physical harm. (St. Br. at 15). However, Cunningham testified that he did approach Fitzpatrick on February 18, accompanied by an armed Sheriff's Deputy, and that he told Fitzpatrick that he cannot come to any more grand jury meetings, and he believed Fitzpatrick's actions were a felony. (Record Vol. VIII at 244:18-245:12; Vol.V at 88:21-89:14 & 92:18-21; Vol.III at 31:6-33:8). Fitzpatrick's statement that he was assaulted and threatened by Cunningham is at least a colorable accusation. *See* T.C.A. §39-

13-101(a)(2). It certainly is not knowingly deceptive beyond a reasonable doubt.[2] The only evidence presented that Fitzpatrick's statement was deceptive was the fact that he made the statement and the victim's self-contradicted assertion that the statement was false.

Next, the State claims that Fitzpatrick's assertion that Cunningham stalked him was false. (St. Br. at 15). The incident described above, where Cunningham approached Fitzpatrick with an armed guard and threatened to have Fitzpatrick charged with a felony, was one of many unwanted contacts. (Record Vol.IV at 154-157). "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed…" T.C.A. §39-17-315(a)(4). "Unconsented contact" includes approaching or confronting that person in a public place. T.C.A. §39-17-315 (a)(5)(B). Cunningham's behavior, as discussed above, qualifies as "unconsented contact." A reasonable person accused of a felony by a grand jury foreman, accompanied by an armed police officer, would feel frightened, intimidated, threatened, and harassed. Fitzpatrick's statement that he was being stalked by Cunningham is at least a colorable accusation. It certainly is not knowingly deceptive beyond a reasonable doubt. Again, the only evidence presented that Fitzpatrick's statement was deceptive was the fact that he made the statement and the victim's self-contradicted assertion that the statement was false.

Finally, the State claims that Fitzpatrick's assertion that Cunningham blocked him six times from appearing before the grand jury is false. However, Cunningham testified that despite all of Fitzpatrick's requests to appear before the grand jury, Cunningham never allowed

[2] The State's Brief acknowledges that the trial judge in this case erred by denying Fitzpatrick's petition for a protective order solely on the basis of a lack of a domestic relationship. (St. Br. at 16). If an experienced criminal court judge can make such an error, no rational trier of fact can conclude that a lay-defendant was knowingly deceptive because he incorrectly accused someone of committing assault.

Fitzpatrick to speak to the grand jury. (Record Vol. V at 14:9-15, 15:22-16:23, & 58:16-59:4, 80:12-81:8).

No rational fact finder could find an intent to deceive when the accuser himself testifies that statements he previously claimed were false, are in fact true.

Conclusion

For all the reasons set forth above the Appellant respectfully requests that this Court reverse the McMinn County Criminal Court's denial of Commander Fitzpatrick's motions to dismiss.

Dated: May 4, 2015.

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CERTIFICATE OF SERVICE

It is hereby certified that on May 4, 2015, the undersigned has served by U.S. mail a true and correct copy of the foregoing "Appellants' Reply Brief" upon the State Attorney General, Criminal Justice Division, P.O. Box 20207, Nashville, TN 37202.

Van R. Irion