IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	McMINN COUNTY
v.	)	No. E2014-01864-CCA-R3-CD
	)	
WALTER FRANCIS FITZPATRICK, III,	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE McMINN COUNTY CRIMINAL COURT

BRIEF OF THE STATE OF TENNESSEE

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Whether any defects in indictment counts for stalking and harassment robbed the trial court of jurisdiction, when there were also valid indictment counts for aggravated perjury and extortion.

II

Whether the evidence is sufficient to sustain the defendant's convictions for aggravated perjury and extortion over his defense that he was petitioning the government for redress of grievances.

STATEMENT OF THE CASE

The McMinn County Grand Jury returned indictment number 54CC1-2014-CR-69, charging the defendant, Walter Fitzpatrick, with one count of harassment, one count of aggravated perjury, one count of stalking, and one count of extortion. (I, 1-5.)[1]

The defendant was tried before a McMinn County Criminal Court jury with the Honorable Jon Kerry Blackwood presiding. (II, 123-25.) The jury convicted the defendant of aggravated perjury and extortion. (II, 124-25.) The stalking charge was dismissed and the jury found the defendant not guilty of harassment. (II, 128-29; V, 133.)

On August 12, 2014, the defendant filed a motion for new trial. (II, 142.) On August 19, 2014, the trial court sentenced the defendant to three years at 30 percent for extortion and three years at 30 percent for aggravated perjury, to be served in TDOC. (II, 156-57.) The sentences were to be served consecutively with Monroe County case numbers 10-213, 11-018, and 12-108. (II, 155-57.) On September 18, 2014, the defendant filed a timely notice of appeal. (II, 159.) On October 22, 2014, the trial court denied the motion for new trial. (II, 164.)

[1] The record on appeal consists of 13 volumes. References to the record on appeal will be by volume and page number.

STATEMENT OF THE FACTS

On February 14, 2014, Vickie Vaughn was working at the McMinn County Circuit Court Clerk's office when the defendant came in, asking to take out a protective order. (Ex. S-1; VII, 106-07, 115.) Ms. Vaughn gave him the paperwork to fill out. (VII, 107.) Before he signed the application for a protective order, Ms. Vaughn swore him in. (VII, 111.) The protective order was denied. (Ex. S-1; VII, 113.)

On March 12, 2014, the defendant again came to the court clerk's office to apply for another protective order. (Ex. S-2; VII, 115-16.) Gwendolyn Crisman swore him in again. (VII, 115-17.) The defendant was seeking protection from Jeffrey Cunningham, who he claimed was stalking him. (Ex. S-2; VII, 120.)

Mr. Cunningham, an employee at Athens Federal Community Bank and a licensed attorney, served as foreperson of the McMinn County Grand Jury from October 2011 through March 2014. (VII, 121-24.)[2] Sometime after Mr. Cunningham began serving as foreperson, the defendant came in and wanted to meet with him. (VII, 133.) The defendant gave Mr. Cunningham a document he wanted Mr. Cunningham to give to all the grand jurors. (VII, 133.) The document seemed to concern the division of the judicial district. (VII, 134.)

The defendant brought another petition, dated November 19, 2012, before the grand jury. (Ex. S-4; VII, 139-41.) He accused a number of individuals of crimes against public integrity, raised allegations of national and local voter fraud, accused the Tennessee Secretary of State and

[2] The grand jury would meet once a month and hear facts that would support allegations in criminal cases before signing off on indictments. (VII, 126-28.) A private prosecutor could also seek an indictment by petitioning the grand jury. (VII, 128-29.) In those cases, the petitioner would be asked to sign an affidavit of evidence, which would be presented to two grand jurors and the foreperson, who would then decide if there was evidence supporting the allegations. (VII, 129.) If there were, the case would be heard before the foreperson and the rest of the grand jurors. (VII, 129.) The grand jury would hear the indictments first and then hear the private prosecution presentments. (VII, 130-31.) Only two votes were needed to get a private prosecution presentment before the full grand jury. (VII, 132.) Twelve votes were needed for the full grand jury to indict. The grand jury consisted of Mr. Cunningham and twelve other grand jurors. (VII, 132.)

Commissioner of Elections of official misconduct, accused President Barack Obama of being ineligible for the presidency by virtue of having been born outside of the United States, and alleged interference with the integrity of the military vote. (Ex. S-4; VII, 142-44; VIII, 145-53.) He did not allege any facts in support of these allegations. (Ex. S-4; VIII, 145, 150, 153.) None of his claims related to national voter fraud or questioning the legitimacy of President Obama's presidency implicated the McMinn County Grand Jury's role. (VIII, 148.)

The defendant asked the grand jury to investigate his allegations, which was not the role of the grand jury. (VIII, 151, 154.) He also asked the grand jury to issue an injunction prohibiting the Tennessee Secretary of State from certifying Tennessee's election results. (VIII, 154.) The whole grand jury heard this petition and determined that there was insufficient evidence and lack of jurisdiction to indict anyone. (VIII, 156-57.)

Mr. Cunningham's next contact with the defendant was on February 19, 2013, when he gave the grand jury another petition. (Ex. S-5; VIII, 159-60.) A three-person panel heard this petition. (VIII, 161.) The petition began with a communication to Sheriff Guy regarding the sheriff's coming to the grand jury that day. (Ex. S-5; VIII, 162.) The communication indicated that the defendant would be challenging Mr. Cunningham's foremanship on the grand jury. (Ex. S-5; VIII, 163.) This was the first time Mr. Cunningham had seen his name mentioned in one of the defendant's petitions. (VIII, 166.) Mr. Cunningham was aware that the defendant had appeared at another grand jury in another jurisdiction. (VIII, 173.)

The defendant's petition referred to the designs of an international terrorist group called "FOGBOW." (Ex. S-5; VIII, 174-79.) None of the allegations in the petition had anything to do with the McMinn County Grand Jury. (VIII, 177, 182, 192.) The petition also alleged that Mr. Cunningham was serving as foreperson illegally. (Ex. S-5; VIII, 182, 191.) Mr. Cunningham

knew his appointment as foreperson by judge's order in 2011 to be valid and lawful and not an indictable offense. (VIII, 187, 192.) This allegation was false. (VIII, 187-88.) The petition alleged that Mr. Cunningham had served illegally as foreperson during 2012. (Ex. S-5; VIII, 188.) This allegation was false. (Ex. S-5; VIII, 188.) The petition alleged that Mr. Cunningham had successfully blocked the defendant's petitions to appear before the grand jury in August and November 2012. (Ex. S-5; VIII, 189.) These allegations were false. (VIII, 189.) The defendant did not come before the grand jury or submit a petition in August. (VIII, 189.) Mr. Cunningham did not block the November petition—twelve grand jurors heard it. (VIII, 190.)

Mr. Cunningham's next encounter with the defendant was on March 18, 2013, when the defendant brought another petition. (Ex. S-6; VIII, 193.) This petition suggested that it was accusing one of the grand jurors of criminal activity. (Ex. S-6; VIII, 194-95.) It expressed the defendant's fear for his life over the government having identified him as a "domestic terrorist, a sovereign citizen, and a vigilante." (Ex. S-6; VIII, 195.) It alleged that Mr. Cunningham had thrown out the defendant's February petition. (Ex. S-6; VIII, 198-99.) This was untrue. (VIII, 199.) There was nothing in this petition that implicated the role of the McMinn County Grand Jury. (VIII, 202-03.)

Mr. Cunningham next encountered the defendant on December 17, 2013, when the defendant appeared with a package, stating that it was to be opened only by a lawfully empaneled juror. (Ex. S-7; VIII, 203-04.) The package contained yet another petition. (Ex. S-7; VIII, 205.) Twelve grand jurors heard the petition. (Ex. S-7; VIII, 206-07.) The petition again accused Mr. Cunningham of blocking the defendant from presenting his petitions to the grand jury, which was untrue. (Ex. S-7; VIII, 208-09, 215.) The petition did not accuse any specific person of any crime or present any evidence of any crime. (Ex. S-7; VIII, 211-12.)

The petition called for Mr. Cunningham's arrest. (Ex. S-7; VIII, 218.) Mr. Cunningham took this as a threat, given how the defendant's petitions had begun to target him more pointedly. (VIII, 218-19.) Mr. Cunningham's knowledge of how the defendant had approached grand juries in other jurisdictions made him apprehensive of the defendant. (VIII, 220.)

The protective order that the defendant applied for in February 2014 alleged that Mr. Cunningham had physically blocked him from presenting his petitions to the grand jury, which was untrue. (Ex. S-1; VIII, 223-25.) The defendant alleged that Mr. Cunningham's actions posed a threat to his liberty and life, which was untrue. (VIII, 234.) He accused Mr. Cunningham of obstructing and preventing the McMinn County Grand Jury from performing its duty and of perverting and obstructing justice. (VIII, 234-35.) This was untrue. (VIII, 235.) The defendant accused Mr. Cunningham of having a sheriff's deputy escort him out of the McMinn County Courthouse under threat of arrest, which was untrue. (VIII, 238.) The application also called for Mr. Cunningham to have his law license revoked and that he be permanently disbarred. (VIII, 230.)

In the protective order that the defendant applied for on March 12, 2014, the defendant claimed that Mr. Cunningham had stalked him. (Ex. S-2; VIII, 240-41.) This was untrue. (VIII, 242.) The defendant claimed that Mr. Cunningham had physically and verbally assaulted him on February 18, 2014, and had approached him uninvited to threaten physical harm. (VIII, 243-44.) All of this was untrue. (VIII, 244.) The defendant alleged that Mr. Cunningham had blocked him six times from appearing before the grand jury. (VIII, 246.) This was untrue. (VIII, 246.)

A protective order, if granted, would have affected Mr. Cunningham's ability to carry firearms in self-defense, which was important to his security because he dealt with large amounts of money in his job. (VIII, 226-29.) The granting of a protective order could also have had

negative repercussions for Mr. Cunningham's employment, which was in the highly regulated banking industry. (VIII, 227-32.) The defendant's allegations caused Mr. Cunningham's friends to contact him, asking him about his being charged as a criminal. (VIII, 231.)

The defendant's false statements made Mr. Cunningham feel alarmed, annoyed, and frightened. (VIII, 249.) The defendant's actions made Mr. Cunningham feel restricted in his movement and exercise of rights, and prevented him from continuing his grand jury service. (VIII, 255-56.)

Jurisdiction of Trial Court

Prior to trial, the defendant challenged the validity of the trial court's jurisdiction by way of the indictment, arguing that Ms. Hicks—a grand juror—was the victim of the same harassment alleged in the indictment returned by the grand jury on which she served. (III, 85-86.) The trial court noted that Mr. Cunningham was the victim named in the indictment and denied the motion. (III, 87.)

ARGUMENT

I. THE TRIAL COURT HAD JURISDICTION BECAUSE THE INDICTMENT COUNTS FOR AGGRAVATED PERJURY AND EXTORTION WERE VALID.

The defendant contends that the trial court lacked jurisdiction because the indictment was invalid due to one of the grand jurors' being an actual victim of one of the crimes alleged in one of the indictment counts.[3] (Def.'s Br. 11-17.) This contention is meritless because the defendant's claim with regards to the stalking and harassment counts is moot and because the trial court had jurisdiction based on the indictment counts for aggravated perjury and extortion.

The Sixth and the Fourteenth Amendments to the United States Constitution and Article I, § 9 of the Tennessee Constitution guarantee the accused the right to be informed of the nature and cause of the accusation. A valid indictment is an essential jurisdictional element, without which there can be no prosecution. *Dykes v. Compton*, 978 S.W.2d 528, 529 (Tenn. 1998). Each indictment count is, in legal contemplation, a separate indictment. *Usary v. State*, 112 S.W.2d 7, 8 (Tenn. 1938). Thus, a multi-count indictment represents multiple criminal cases. *State v. Gifford*, No. E2006-02500-CCA-R3-CD, 2008 WL 1813105, at *4 (Tenn. Crim. App. Apr. 23, 2008), *perm. app. denied* (Tenn. Oct. 27, 2008). In a criminal case, where each count is a separate indictment, a defect in one indictment count does not affect the other counts. *See Usary*, 112 S.W.2d at 9.

The defendant proceeds from the fatally flawed premise that a defect in the indictment counts for stalking and harassment—namely that Ms. Hicks was an actual victim of both and therefore ineligible to vote on those counts[4]—invalidates all counts of the indictment, including

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[3] The State's Section I will address the defendant's Section II; the State's Section II(A) will address the defendant's Section III; the State's Section II(B) will address the defendant's Section IV; and the State's Section II(C) will address the defendant's Section V.

[4] According to Rule 6(c)(1)(C) of the Tennessee Rules of Criminal Procedure, a grand juror who is the victim of an

those counts not implicating Ms. Hicks at all. As shown above, this is not so. The aggravated perjury and extortion counts stand on their own as separate criminal cases.

Even if Ms. Hicks were an actual victim of the stalking and harassment counts and was therefore legally ineligible to participate in consideration of those counts, the defendant's claim is moot. That is because the defendant was convicted of neither of those counts. (II, 128-29; V, 133.)

The doctrine of justiciability prompts courts to stay their hand in cases that do not involve a genuine and existing controversy requiring the present adjudication of present rights. *State v. Scott*, No. 02C01-9508-CC-00234, 1996 WL 432341, at *1 (Tenn. Crim. App. Aug. 2, 1996) (citing *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994)). The concept of mootness deals with the circumstances that render a case no longer justiciable. *Id.* A moot case is one that has lost its character as a present, live controversy. *Id.* A case will generally be considered moot if it no longer serves as a means to provide relief to the prevailing party. *Id.* The two most recognized exceptions to the mootness rule include issues of great public interest and importance to the administration of justice and issues capable of repetition yet evading review. *Id.* Whether to take up cases that fit into one of the recognized exceptions to the mootness doctrine is discretionary with the appellate courts. *Id.*

This case fits neither exception to the mootness doctrine. It presents no issue of great public interest. The defendant's attempts to commandeer and disrupt the grand jury process are, fortunately, unique. The public has no interest in the resolution of the defendant's moribund claims, regardless of his attempts to clothe them in constitutional language. And this is not an

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offense committed against her person shall not be present during or take part in the consideration of a charge of that offense. The return of an indictment requires the concurrence of at least twelve of the members of the grand jury. Tenn. Code Ann. § 40-13-105 (the defendant misstates this as Tenn. Code Ann. § 40-30-105).

issue capable of repetition yet evading review. This is not, for example, a case seeking definition of abortion rights where the period for moving a case through the appellate process often exceeds the human gestation period. Again, the circumstances of this case are unique and unlikely to repeat with the sort of frequency that would demand this Court's review.

Even if, in theory, the indictment counts for harassment and stalking were fatally defective, this does not affect the counts of aggravated perjury and extortion—separate criminal cases. *See Usary*, 112 S.W.2d at 9. The latter indictment counts were valid and vested the trial court with jurisdiction. The defendant does not even challenge the validity of the indictment counts for aggravated perjury and extortion.

II. THE DEFENDANT WAS NOT ENGAGED IN CONSTITUTIONALLY PROTECTED ACTIVITIES.

The defendant contends that because he was petitioning the government for redress of grievances, nothing said in the petitions can be used to support criminal charges. (Def.'s Br. 17-21.) This contention is meritless because the law does not allow someone to make perjurious and extortionate statements, even if ostensibly in the petitioning of government for redress.

A. The Constitution Does Not Protect Perjury or Extortion.

The right of free speech is not absolute at all times and under all circumstances. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *Id.* at 572. Perjury is one of these classes of speech. *United States v. Dunnigan,* 507 U.S. 87, 97 (1993) (observing that "the constitutionality of perjury statutes is unquestioned"). Extortion is another. *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012). The Petition Clause of the United States Constitution does not give license to commit perjury or extortion. *McDonald v. Smith*, 472 U.S. 479, 484 (U.S. 1985) ("[W]e are not prepared to conclude

. . . that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right. Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute"); *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 616 (6th Cir. 2009) ("[T]he Petition Clause protects legitimate petitioning but not sham petitions, baseless litigation, or petitions containing 'intentional and reckless falsehoods'. . . 'there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues'") (citations omitted).

Because the constitution does not protect perjurious or extortionate statements, even when travelling under the guise of petition for redress, the defendant's challenges to his convictions for perjury and extortion become a question of the sufficiency of the evidence.[5] A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. *Id.*

Findings of guilt in criminal actions will be set aside only if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt. Tenn. R. App. P. 13(e). When a defendant challenges the sufficiency of the evidence, the standard for review by an

[5] The defendant's argument is styled as challenging the trial court's denials of his motions to dismiss. "The standard by which the trial court determines a motion for a judgment of acquittal is, in essence, the same standard that applies on appeal in determining the sufficiency of the evidence after a conviction." *State v. Little*, 402 S.W.3d 202, 211 (Tenn. 2013).

appellate court is whether "after considering the evidence in a light most favorable to the prosecution, 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) (quoting *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999)); *see also Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and an appellate court should not reweigh or reevaluate the evidence. *See State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); *Bland*, 958 S.W.2d at 659. These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). Moreover, the State does not have the duty to exclude every other reasonable hypothesis except that of guilt. *State v. Dorantes*, 331 S.W.3d 370, 381 (Tenn. 2011). On appeal, the State is entitled to the strongest legitimate view of the evidence and to all legitimate inferences that may be drawn therefrom. *See Smith*, 24 S.W.3d at 279.

B. The Evidence is Sufficient to Sustain the Defendant's Conviction for Extortion.

A person commits extortion who "uses coercion upon another person with the intent to . . . [o]btain property, services, [or] any advantage or immunity." Tenn. Code Ann. § 39-14-112(a). "Coercion" means a threat, however communicated, to:

(A) Commit any offense;

(B) Wrongfully accuse any person of any offense;

(C) Expose any person to hatred, contempt or ridicule;

(D) Harm the credit or business repute of any person; or

(E) Take or withhold action as a public servant or cause a public servant to take or withhold action.

Tenn. Code Ann. § 39-11-106(a)(3).

The evidence showed that the defendant's application for a protective order, if granted, threatened to affect Mr. Cunningham's ability to carry firearms in self-defense, which was important to his security because he dealt with large amounts of money in his job (VIII, 226-29); threatened negative repercussions for Mr. Cunningham's employment (VIII, 227-32); and caused Mr. Cunningham's friends to contact him, asking him about his being charged as a criminal (VIII, 231), which threatened his reputation and exposed him to contempt and ridicule. The advantage sought by these threats was to remove Mr. Cunningham from the grand jury—something the defendant explicitly called for in his petitions to the grand jury. (Exs. S-5, S-6, S-7; VIII, 218.) Unfortunately, the defendant succeeded in this aim, as Mr. Cunningham testified that the defendant actually coerced him into ending his service as grand jury foreperson. (VIII, 255-56.) This evidence, viewed in the light most favorable to the State, is more than sufficient to sustain the defendant's conviction for extortion.

The defendant cites a number of federal cases that construe the federal Hobbs Act in support of his argument that his activities were not extortionate. (Def.'s Br. 20.) For example, he cites *United States v. Pendergraft*, a case whose "narrow" holding was that a threat to litigate against a county government, even with fabricated evidence in support, does not constitute extortion under the Hobbs Act. 297 F.3d 1198, 1207-08 (11th Cir. 2002). But *Pendergraft* is not remotely similar to this case, where the defendant was not threatening litigation against Mr. Cunningham—a private citizen—but was threatening to harm his business and personal reputation and expose him to contempt and ridicule through intentional falsehood. That is precisely what Tennessee's extortion law forbids.

While the defendant pays lip service to the idea that the constitution does not protect perjury or extortion, he eventually presses for what amounts to absolute protection for petitions for redress, "regardless of the details," in order to prevent a "chilling" effect. (Def.'s Br. 20.) That is an untenable position. A holding in the defendant's favor would encourage disruptive, extortionate, and perjurious behavior against the administration of government and specifically against grand juries and grand jurors. Under the constitutional interpretation the defendant proposes, anyone with a gripe against government could begin systematically attacking grand jurors with spurious, falsified, defamatory attempts to obtain protective orders and petitions, until finally harrying them off the grand jury. And the law would be powerless to prevent this so long as these actors cloaked themselves in the absolute protection of "petitioning the government for redress of grievances." In fact, not even an amendment to the Tennessee Constitution would prevent this sort of mischief under the defendant's notion of what the Petition Clause means. Fortunately, he is wrong. *McDonald*, 472 U.S. at 484; *Hartman*, 569 F.3d at 616.

C. The Evidence is Sufficient to Sustain the Defendant's Conviction for Aggravated Perjury.

Perjury is defined as making a false statement, under oath, with intent to deceive. Tenn. Code Ann. § 39-16-702. Aggravated perjury is perjury where "[t]he false statement is made during or in connection with an official proceeding" and is material. Tenn. Code Ann. § 39-16-703. "Oath" means a solemn and formal undertaking to tell the truth and includes an equivalent affirmation permitted by law as a substitute for an oath administered by a person authorized by law to take statements under oath. Tenn. Code Ann. § 39-16-701(2). "Official proceeding" means any type of administrative, executive, judicial, or legislative proceeding that is conducted before a public servant authorized by law to take statements under oath in that proceeding. Tenn. Code Ann. § 39-16-701(3). "Material" means the statement, irrespective of its admissibility under the

rules of evidence, could have affected the course or outcome of the official proceeding. Tenn. Code Ann. § 39-16-701(1).

The evidence showed that on March 12, 2014, the defendant applied for a protective order. (Ex. S-2; VII, 115-16.)[6] He made this application under oath administered by an employee of the McMinn County Court Clerk's office. (Ex. S-2; VII, 115-17.) In support of this application, the defendant made a number of accusations against Mr. Cunningham:

- That Mr. Cunningham had stalked him (Ex. S-2; VIII, 240-41);
- That Mr. Cunningham had physically and verbally assaulted him on February 18, 2014, and had approached him uninvited to threaten physical harm (VIII, 244);
- And that Mr. Cunningham had blocked him six times from appearing before the grand jury. (VIII, 246.)

All of these allegations were false. (VIII, 242-46.) It was within the jury's province to accredit Mr. Cunningham's testimony to that end over the allegations in the application. These false allegations were certainly material. On the second page of the defendant's application, where it asked the applicant to describe the abuse supporting issuance of the protective order, the defendant referred the reader to pages six and seven, which contained the false allegations. (Ex. S-2.) Not only were these statements material, they were the whole basis for the defendant's application.

The defendant protests that these misrepresentations did not actually affect the outcome because Judge Blackwood indicated that he denied the application due to the lack of a domestic relationship between the defendant and Mr. Cunningham and did not consider the substance of the defendant's allegations. (Def.'s Br. 23; V, 66-67.)

But the standard for materiality is not whether a false statement *actually* changed a proceeding's course or outcome, but whether it *could have*. Tenn. Code Ann. § 39-16-701(1).

[6] The State's bill of particulars indicated that this was the only application it would be relying upon to prove aggravated perjury. (I, 57.)

Tennessee law does not require a domestic relationship between parties for an order of protection to issue—any stalking victim may seek one. Tenn. Code Ann. § 36-3-602(a). "Stalking victim" means "any person, *regardless of the relationship with the perpetrator*, who has been subjected to, threatened with, or placed in fear of the offense of stalking, as defined in § 39-17-315." Tenn. Code Ann. § 36-3-601(11) (emphasis added). It was as an alleged stalking victim that the defendant sought his protective order by making false allegations. (Ex. S-2.) Thus, Judge Blackwood erred by denying the protective order solely on the basis of a lack of a domestic relationship. Had he or another judge ruled correctly on the application, the defendant's false allegations could have influenced the course or outcome of the proceeding.

And the defendant clearly understood this. In his first application for a protective order, where asked to state his relationship to the target of the order, the defendant checked the "Other" box. (Ex. S-1.) This protective order was denied for lack of an appropriate relationship between the parties. (Ex. S-1.) So when the defendant tried a second time, he checked the "Respondent has stalked me" box and included the false allegations at issue. (Ex. S-2.) The defendant thus displayed understanding that he would have a better chance of obtaining the desired protective order if he claimed to be a stalking victim. Accordingly, he tailored his false allegations to be material to this claim. (Ex. S-2.)

The evidence, viewed in the light most favorable to the State, is sufficient to sustain the defendant's conviction for aggravated perjury.

CONCLUSION

This Court should affirm the trial court's decision.

Respectfully submitted,

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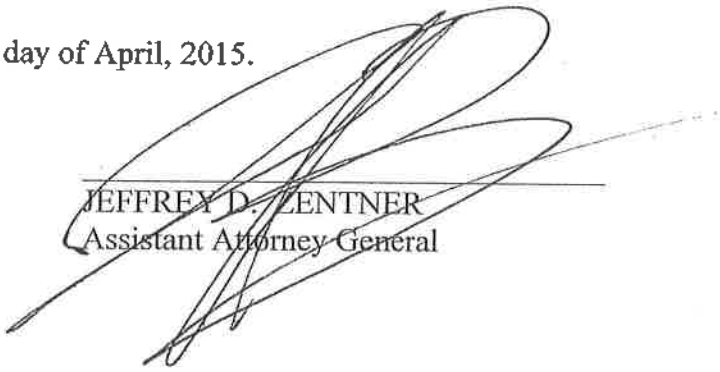
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by first-class mail, postage prepaid to: Van R. Irion, Attorney for the Appellant, 9040 Executive Park Drive, Suite 200, Knoxville, Tennessee 37923, on this 2nd day of April, 2015.



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