IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JOSE ORTIZ-SALDANA,
Defendant-Appellant.

Washington County Circuit Court
C132952CR; A157142

Ricardo J. Menchaca, Judge.

Argued and submitted November 5, 2015.

George W. Kelly argued the cause and filed the brief for appellant.

Jamie Contreras, Assistant Attorney General, argued the cause for respondent. On the brief were Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Pamela J. Walsh, Assistant Attorney General.

Before Armstrong, Presiding Judge, and Hadlock, Chief Judge, and Egan, Judge.

HADLOCK, C. J.

Reversed.

HADLOCK, C. J.

Defendant appeals a judgment of conviction for tampering with a witness, ORS 162.285, assigning error to the trial court's denial of his motion for judgment of acquittal based on insufficiency of the evidence. Defendant contends, among other things, that the record does not include evidence from which a reasonable factfinder could infer that he knowingly attempted to induce false testimony at an official proceeding. We agree and, accordingly, reverse.[1]

In reviewing a trial court's ruling on a motion for judgment of acquittal, we state the facts in the light most favorable to the state, reviewing those facts "to determine whether a rational trier of fact *** could have found the essential element of the crime beyond a reasonable doubt." *State v. Cunningham*, 320 Or 47, 63, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995). Applying that standard of review, we must determine whether the evidence is sufficient to support a factfinder's verdict of guilt beyond a reasonable doubt, not whether we believe that defendant is guilty. *Id.*

At the time of the events in question, defendant, his wife, their sons, A and O, and O's then-girlfriend, the complainant, lived together. Following an incident between the complainant and A, the complainant left the house and reported to police that A had attempted to sexually assault her. Later that evening, the complainant returned to the house, where she spoke with defendant and his wife. During that conversation, defendant asked the complainant what had happened, but he and his wife also told the complainant that the assault was her fault. The complainant was scared and angry that defendant and his wife did not believe her, and she left.

The next morning, O brought the complainant back to the house, where she had a second conversation with defendant and his wife. Defendant told the complainant that he wanted her to reconsider what had happened and to think

[1] Because we agree with defendant that the evidence presented was not sufficient to show that defendant attempted to induce false testimony at an official proceeding, we do not address additional arguments that defendant makes in support of his contention that he was entitled to a judgment of acquittal.

about what she would say to the police. The complainant told defendant that she had already spoken with the police and could not change the story. Defendant responded, "Well, just think for his sake. Because [A] just got out of prison and if he goes back, he's going to be in there for a longer time and just think how that's going to hurt us as *** his parents if he goes back to prison." Defendant and his wife urged the complainant to call the police and say there had been a misunderstanding and that "it didn't happen like that." At some point during that conversation, defendant said, "what's done is done." As the complainant and O left, defendant told the complainant to let him know later that night if she had changed her mind about "what [she] had told the cops."

That evening, defendant asked the complainant if she had considered changing her story. After she told him that she had not thought about it, defendant told her to "[l]et us know *** because tomorrow's Monday."

Later that same evening, the complainant again encountered defendant and his wife, who "were being hysterical." The pair told the complainant that the assault had never happened, that A's story differed from hers, and that she was lying. Defendant also called the complainant a "cop caller" and physically charged at her, although O stepped between them. The complainant then called 9-1-1 and, later, the detective assigned to her case. Following her conversation with the detective, the complainant continued to receive calls and text messages from defendant's wife's phone. The calls continued on Monday and defendant's wife sent one more text message that Tuesday, but the complainant did not speak with either defendant or his wife about the incident after that, and that was the last time either of them pressured her about the case.

A few days later, the detective assigned to the complainant's case arrested and interviewed defendant. Defendant acknowledged knowing that his son, A, was a suspect in a crime against the complainant. Although defendant denied attempting to get the complainant to drop the charges, he told the detective that A had told him that "the, in quotes, rape wasn't true." Defendant also acknowledged that he told the complainant that reporting that incident

could send A to prison for 10 or 20 years and that her report would ruin his son's life.

Defendant was charged with tampering with a witness. ORS 162.285. He waived his right to a jury trial, and his case was tried to the court. After the close of the state's case, defendant moved unsuccessfully for a judgment of acquittal. The court subsequently convicted him of tampering with a witness, in violation of ORS 162.285.

On appeal, defendant contends that the trial court erred when it denied his motion for judgment of acquittal because the record did not include evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant knowingly attempted to induce the complainant to offer false testimony in an official proceeding. The state responds that the trial court did not err because the record includes evidence sufficient to support such a finding.

We begin our analysis by considering the statute that defines the crime with which defendant was charged. ORS 162.285(1)(a) provides that a person commits the crime of tampering with a witness if the person "knowingly *** attempts to induce *** a person the person believes may be called as a witness in any *official proceeding* to offer false testimony or unlawfully withhold any testimony." (Emphasis added.) The definition of "official proceeding" focuses on the taking of sworn statements:

> "[A] proceeding before any judicial, legislative or administrative body or officer, wherein sworn statements are received, and includes any referee, hearing examiner, commissioner, notary or other person taking sworn statements in connection with such proceedings."

ORS 162.225(2).

A person can be guilty of witness tampering if the person attempts to prevent a potential witness from testifying in an official proceeding that has not yet commenced but that may occur in the future. *State v. Bailey*, 346 Or 551, 564, 213 P3d 1240 (2009). However, a person's action of reporting a crime to police does not, itself, qualify as testimony in an official proceeding. Thus, not every "attempt to dissuade a

person from reporting a crime" to police can be prosecuted under ORS 162.285(1)(a). *Id.* at 565. The Supreme Court has described what differentiates those two situations:

> "[T]o constitute a violation of the statute, the offender's knowing inducement or intended inducement must reflect, either directly or by fair inference, that the offender *at that time* specifically and reasonably believes that the victim will be called to testify at an official proceeding."

Id. (emphasis added). Additionally, the defendant must have intended to induce the person not to testify or to testify falsely at that future proceeding. *Id.* at 567. Accordingly, a court must focus on what a defendant "reasonably might be deemed to have had in mind at the moment he made the threats[,]" and not what the person whom the defendant threatened "eventually might be called upon to do." *Id*. at 565.

In *Bailey*, the court described a series of inferences that the evidence must support in a witness-tampering case in which the defendant is prosecuted for attempting to induce a witness not to testify in a future official proceeding. *Id.* at 567. To sustain a conviction, the record must support reasonable inferences that: (1) the defendant did not want a crime reported to the police; (2) if the crime was reported, a criminal investigation and, possibly, a criminal prosecution would follow; (3) the defendant believed that the person he threatened would be a witness in that prosecution; and (4) the defendant's acts or words were intended to induce the person "not to testify in that hypothetical future criminal prosecution." *Id.*; *see also State v. Kaylor*, 252 Or App 688, 697, 289 P3d 290 (2012), *rev den*, 353 Or 428 (2013) (applying that test). In *Bailey*, the court concluded that the record could not support the fourth necessary inference because nothing about the threats the defendant made in that case referred, either explicitly or implicitly, to a future prosecution. The most that could be said was that the defendant "threatened immediate consequences if [another person] made a report about [a crime] to the police." 346 Or at 567.

Defendant contends that *Bailey* controls this case. According to defendant, his attempt to induce complainant to make false statements—like the defendant's attempt in

Bailey—related only to her report to law enforcement officers, not to any potential future proceeding.

The state views the evidence differently. It contends that the record supports an inference that defendant's attempted coercion of the complainant was not limited to inducing her to change her story to the police, but also was related to a potential future prosecution. In support of that argument, the state relies on *State v. Berg*, 346 Or 569, 213 P3d 1249 (2009). In *Berg*, the defendant's neighbors had reported that the defendant had trespassed on their property and engaged in other offensive conduct. *Id.* at 571. Defendant and his friend each told one of the neighbors—repeatedly—that they would "make sure that [she] didn't show up in court," and they made a variety of threats to support that assertion. *Id.* at 572. Applying its holding in *Bailey*, the court upheld the defendant's conviction for witness tampering, reasoning that a reasonable factfinder could infer from the evidence that the defendant believed the victim might be a witness in an official proceeding and that his threats against her were intended to induce her to withhold testimony. *Id.* at 572-73.

The state's assertion that a similar result is appropriate here relies on defendant's references to what would happen to A and to his family were A again imprisoned. The state points out that, although defendant did not mention testimony in a trial, the extended prison term to which he refers would necessarily follow such an official proceeding. In the state's view, that relationship between the potential for a long prison sentence and an official proceeding creates a reasonable inference that defendant was referring to that hypothetical official proceeding when he spoke with the complainant, which makes this case more similar to *Berg* than to *Bailey*. The state concludes that, viewing the evidence in the light most favorable to the state, the trial court correctly determined that a rational factfinder could have found that defendant reasonably believed that the complainant would be called to testify against his son at an official proceeding, and was attempting to induce her not to do that.

Defendant acknowledges that here, as in *Bailey*, a factfinder could reasonably infer the first three of the four

required inferences: that defendant attempted to make the complainant change her story to the police, that defendant understood that a criminal investigation and prosecution were possible, and that, were a prosecution to occur, the complainant would likely be a witness. However, defendant argues that the record does not support the necessary fourth inference, *i.e.*, that defendant was attempting to induce the complainant to give false testimony at that hypothetical future proceeding. We agree. Under *Bailey*, evidence that defendant reasonably believed that the complainant would be called to testify against A at an official proceeding is not enough. 346 Or at 567. Defendant's reference to A's possible imprisonment reflects nothing more than that reasonable belief. It is not enough to support the necessary *additional* inference, that is, that defendant's statements to the complainant were "intended to induce [her] not to testify in that hypothetical future criminal prosecution." *Id.*

We conclude that here, as in *Bailey*, the state's theory improperly focuses on what the complainant eventually might be called upon to do if A is prosecuted, rather than what defendant reasonably might be deemed to have had in mind when he attempted to induce the complainant to change her story. Here, as in *Bailey*, any leap from defendant's comments regarding his son's potential imprisonment to the conclusion that he was attempting to induce the complainant to give false testimony at a future trial is speculative, not inferential. All of the evidence concerning defendant's statements to the complainant is directed solely to her interactions with law-enforcement officers. The complainant testified that defendant wanted her to reconsider what she would say to the police. Defendant and his wife wanted the complainant to call the police to say that there had been a misunderstanding and that the assault had not occurred as she had initially reported. In asking complainant to change her story quickly, defendant referred to the next day being a Monday, suggesting that his concerns were immediate and related to the complainant's police report, not to a hypothetical future criminal proceeding. The most that the record supports is a reasonable inference that defendant believed that the complainant would be a witness in a hypothetical future proceeding, and that he hoped to induce

the complainant to change her story to the police to stop any such proceeding before it started. But the record does not support an inference that defendant was attempting to induce the complainant not to testify at such a proceeding, if it occurred. A different conclusion could be reached only through impermissible speculation. The trial court therefore erred when it denied defendant's motion for judgment of acquittal.

Reversed.