STATE OF CONNECTICUT *v.* AKOV ORTIZ
(AC 31638)

Espinosa, Bishop and Foti, Js.

Argued September 19, 2011—officially released January 17, 2012

(Appeal from Superior Court, judicial district of Middlesex, Dyer, J.)

Pamela S. Nagy, special public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, was *Timothy J. Liston*, former state's attorney, for the appellee (state).

Opinion

FOTI, J. The defendant, Akov Ortiz, appeals from the judgment of conviction, following a trial by jury, of tampering with a witness in violation of General Statutes § 53a-151 (a), criminal trespass in the first degree in violation of General Statutes § 53a-107 (a) (1) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The defendant makes the following claims on appeal: (1) that his actions could not, as a matter of law, constitute witness tampering, (2) that there was insufficient evidence to support his conviction of witness tampering, (3) that there was insufficient evidence to support his conviction of carrying a pistol without a permit and (4) that the trial court failed to instruct the jury properly as to the elements of witness tampering. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts from the evidence presented. On April 14, 1997, a burglary occurred at a residence located on Plains Road in Haddam. During the course of the burglary, eight guns and a hunting knife were stolen. On April 17, 1997, the defendant told Louis Labbadia that he had committed the burglary. Labbadia reported this information to the police the same day.

In July, 1998, the defendant went to the home of Labbadia's fiancée, Robin Bonita, in Middletown. Bonita told the defendant that Labbadia "had gone to the police . . . ." On or about July 18, 1998, Labbadia was reported missing by his family. His remains were discovered on March 21, 1999, in Middletown.

On June 13, 1999, the defendant went to the home of Kristen Quinn, his former girlfriend, and knocked on her window. The defendant told Quinn that he had killed Labbadia by stabbing him with a knife. The defendant also told Quinn that he had dragged the body into a wooded area and disposed of the knife by throwing it in a river. The defendant indicated that, were it not for his conversation with Bonita, Labbadia would still be alive. Quinn wrote down what the defendant had told her and showed these notes to her mother the following day. Shortly thereafter, this information was conveyed to police.

On August 7, 1999, the defendant again went to Quinn's home. The defendant showed Quinn "a small handgun" and asked her to come outside.[1] Quinn then exited the residence through her bedroom window. The defendant told Quinn that he had the gun for "insurance" if she told "the cops about what he said about [Labbadia]." The defendant said that if Quinn spoke to the police "[her] house was going to go up in smoke . . . ." The defendant stated that he knew where Quinn's grandparents lived. The defendant told Quinn that he was going to "put [her down] on [her] knees,

put the gun to [her] head and scare [her] straight."[2] Later, Quinn informed the police of these events.

At 10:30 p.m. on August 10, 1999, the defendant called Quinn to arrange a meeting at a school near Quinn's home. Quinn told her mother about the call and her mother notified the police. Between 12:15 a.m. and 12:30 a.m. on August 11, 1999, the police apprehended the defendant at the school.

The defendant was charged with threatening in violation of General Statutes (Rev. to 1999) § 53a-62 (a) (1), tampering with a witness in violation of § 53a-151 (a), criminal trespass in the first degree in violation of § 53a-107 (a) (1) and carrying a pistol without a permit in violation of § 29-35 (a).[3] After a trial, the jury found the defendant not guilty of threatening, but guilty of the remaining three charges. On May 29, 2003, the trial court imposed a total effective sentence of six years of incarceration for these crimes. This appeal followed. Additional facts will be set forth below as necessary.

The defendant has presented four issues on appeal. Specifically, the defendant argues that (1) attempting to prevent someone from making statements to the police cannot violate our witness tampering statute, (2) there was insufficient evidence that the defendant possessed the specific intent required for conviction of witness tampering, (3) there was insufficient evidence that the barrel of the gun possessed by the defendant on August 7, 1999, was under twelve inches, as required for conviction of carrying a pistol without a permit, and (4) the trial court's failure to instruct the jury on the specific intent element of witness tampering requires us to reverse his conviction on that charge. We address these arguments in turn.

I

The defendant's first argument is that our witness tampering statute, § 53a-151 (a), cannot be violated by discouraging someone from making statements to the police. This reading of § 53a-151 is foreclosed by *State* v. *Pommer*, 110 Conn. App. 608, 613, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). In that case, the defendant "told [the witness] that although he loved [him] like a brother, if [he] went to the police, it would be 'his ass.' " Id., 620. On appeal, the defendant argued that "[t]he intent to prevent a witness from speaking to the police is not sufficient [to constitute a violation of § 53a-151]." Id., 618. We rejected this reasoning, concluding that § 53a-151 is violated when "a defendant, knowing he has been implicated as a participant in a crime, threatens a likely witness to that crime, to withhold evidence from the police . . . ." Id.[4] "[T]his court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.)

Diaz v. *Commissioner of Correction*, 125 Conn. App. 57, 68 n.9, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011). We therefore decline the defendant's invitation to revisit this issue in the present case.

II

The defendant's second argument is that the state presented "no evidence that he believed an official proceeding was about to be instituted" and therefore there is insufficient evidence to support his witness tampering conviction. We disagree.

We begin our analysis of the defendant's claim by setting forth the standard of review. "Appellate analysis of [a sufficiency of the evidence claim] requires us to undertake a well defined, twofold task. We first review the evidence presented at the trial, construing it in the light most favorable to sustaining the . . . verdict. We then determine whether, upon the facts thus established and the inferences reasonably drawn therefrom, the [finder of fact] could reasonably have concluded that the cumulative effect of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Monahan*, 125 Conn. App. 113, 118, 7 A.3d 404 (2010), cert. denied, 299 Conn. 926, 11 A.3d 152 (2011).

Section 53a-151 (a) provides: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding." Thus, in order to obtain a conviction of witness tampering, the state must prove beyond a reasonable doubt that the defendant believed an official proceeding was pending or was about to be instituted against him. See *State* v. *Cavallo*, 200 Conn. 664, 668–69, 513 A.2d 646 (1986).

In the present case, the defendant argues that when he spoke with Quinn it was "likely that [the] defendant no longer believed he was a suspect" because several months had passed and the police had not yet arrested him. Although the passage of time might make it more likely that the defendant no longer was concerned about the imposition of an official proceeding, the jury was not required to reach that conclusion from the evidence presented. Indeed, the state submitted evidence that less than two months prior to threatening Quinn, the defendant confessed to her that he killed Labbadia by stabbing him and told her that he had dragged Labbadia's body into a wooded area. The evidence also demonstrates that the defendant was concerned that Quinn would report this information to the police and that he had threatened to "put [her down] on [her] knees, put the gun to [her] head and scare [her] straight." Presented with this evidence, the jury reasonably could

have inferred that the defendant believed that an official proceeding was about to be instituted.

III

The defendant's third argument is that his conviction on the charge of carrying a pistol without a permit must be reversed because there was insufficient evidence that the gun he used to threaten Quinn had a barrel length of less than twelve inches. We disagree.

Section 29-35 (a) provides in relevant part: "No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28. . . ." "The term 'pistol' and the term 'revolver', as used in sections 29-28 to 29-38, inclusive, mean any firearm having a barrel less than twelve inches in length." General Statutes § 29-27. Thus, in order to obtain a conviction of carrying a pistol without a permit, the state must prove, beyond a reasonable doubt, that the gun possessed by the defendant on August 7, 1999, was less than twelve inches in length. This element, however, need not be proven with direct numerical evidence. *State* v. *Fleming*, 111 Conn. App. 337, 347, 958 A.2d 1271 (2008), cert. denied, 290 Conn. 903, 962 A.2d 794 (2009).

In *State* v. *Williams*, 231 Conn. 235, 645 A.2d 999 (1994), overruled in part on other grounds by *State* v. *Murray*, 254 Conn. 472, 487, 757 A.2d 578 (2000) (en banc), our Supreme Court concluded that there was sufficient evidence to support the defendant's conviction of carrying a pistol without a permit when several witnesses testified that the defendant had pulled a " 'small handgun' " out of his " 'waist length jacket.' " Id., 252. Specifically, the court reasoned that "it is extremely unlikely that anyone would describe as 'small' a handgun that had a barrel of one foot or longer." Id.; see also *State* v. *Legnani*, 109 Conn. App. 399, 406, 951 A.2d 674, cert. denied, 289 Conn. 940, 959 A.2d 1007 (2008). Likewise, in *State* v. *Miles*, 97 Conn. App. 236, 903 A.2d 675 (2006), this court concluded that the evidence was sufficient to support a conviction when the gun possessed by the defendant was described to the jury as "small" and "silver." Id., 242 n.7; see also *State* v. *Perry*, 48 Conn. App. 193, 198, 709 A.2d 564 ("some measure of descriptive evidence from which the jury may properly infer the barrel length is necessary in order for the state to satisfy its burden of proof"), cert. denied, 244 Conn. 931, 711 A.2d 729 (1998).

In the present case, Quinn described the firearm possessed by the defendant on August 7, 1999, as a "small handgun" that was not a revolver. Moreover, the state submitted expert testimony indicating that semiautomatic handguns do not exceed twelve inches in length. Specifically, Edward Jachimowicz, a firearms tool mark

examiner with the department of public safety, testified that he was familiar with manufacturers of semiautomatic handguns and that he had "never seen" one with a barrel in excess of twelve inches. Presented with this evidence, the jury reasonably could have inferred that the defendant possessed a gun with a barrel length of less than twelve inches on August 7, 1999.

IV

The defendant's fourth argument is that the court erred by failing to instruct the jury that specific intent is an essential element of witness tampering. Although the defendant did not file a request to charge on the count of witness tampering and did not object to the instruction given at trial, he requests review of this claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). Because we conclude that the defendant has waived his right to raise this claim on appeal, we decline to review it under *Golding*.[5] See *State* v. *Kitchens*, 299 Conn. 447, 466–67, 10 A.3d 942 (2011).

The following additional facts are relevant to our resolution of the defendant's claim. The defendant filed a request to charge on February 18, 2003. The defendant concedes that this document did not include an instruction on tampering with a witness.[6] On February 20, 2003, the parties were provided with a written copy of the court's proposed jury instructions. The court entered a copy of these proposed instructions into the record for the purposes of appellate review. Later that day, the trial court held a charging conference on the record during which defense counsel requested several specific alterations to the proposed charge, including revisions to the charge on witness tampering.[7] The following day, the court held an additional conference in chambers off the record. The judge summarized the issues raised in this conference on the record in open court.[8] Thereafter, defense counsel represented to the court that he had no additional objections to the proposed instructions. The instructions actually given to the jury on the charge of witness tampering were identical in all material respects to those contained within the proposed instructions provided to the parties the previous day.

In *Golding*, our Supreme Court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original.) *State* v. *Golding*, supra, 213 Conn. 239–40.

In *State* v. *Kitchens*, supra, 299 Conn. 467, our Supreme Court noted that "[i]n the usual *Golding* situation, the defendant raises a claim on appeal [that], while not preserved at trial, at least was not waived at trial. . . . [A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial . . . ." (Internal quotation marks omitted.) Id. "[W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." Id., 482–83.[9]

In the present case, defense counsel received an advance copy of the court's proposed jury instructions and actively participated in a lengthy charging conference on the record the day before the instructions were given. Moreover, an additional conference was held in chambers the following morning, and the contents of that conference were summarized for the record. We conclude that these facts are sufficient to establish that defense counsel was afforded a meaningful opportunity to review the proposed instructions. Compare *State* v. *Beebe*, 131 Conn. App. 485, 493, 27 A.3d 26 (2011) (meaningful opportunity existed when "[t]he underlying record illustrates that the court provided defense counsel with a copy of the draft jury charge and afforded counsel multiple opportunities to review and to raise objections") and *State* v. *Akande*, 299 Conn. 551, 561–62, 11 A.3d 140 (2011) (defense counsel's overnight review provided meaningful opportunity to review proposed instructions) with *State* v. *Baptiste*, 302 Conn. 46, 54, 23 A.3d 1233 (2011) (no meaningful opportunity when "the trial court held only a brief charging conference and the defendant did not receive a written copy of the instructions"). Consequently, we conclude that the defendant has waived his right to raise this claim, and we decline to review it under *Golding*.[10]

The judgment is affirmed.

In this opinion ESPINOSA, J., concurred.

[1] Quinn also testified that the gun was not a revolver.

[2] According to Quinn, the defendant never carried through with this threat.

[3] These charges pertain to the events of August 7, 1999. The defendant was charged separately for crimes pertaining to the murder of Labbadia and the robbery that occurred on April 14, 1997. Although these charges were eventually consolidated, only those charges relating to the defendant's interaction with Quinn are relevant to the present appeal.

[4] Counsel for the defendant has conceded, both in his brief and at oral argument, that this particular holding of *Pommer* is not dicta and, consequently, must be revisited in order to reverse the defendant's conviction of

witness tampering on this ground.

[5] The defendant also seeks review under the plain error doctrine. See Practice Book § 60-5. We note that the possibility of such review is also foreclosed by our finding of waiver. See *State* v. *Bharrat*, 129 Conn. App. 1, 17, 20 A.3d 9 ("[i]t is well settled . . . that when a right has been affirmatively waived at trial, we generally do not afford review under either *Golding* or the plain error doctrine" [internal quotation marks omitted]), cert. denied, 302 Conn. 905, 23 A.3d 1243 (2011).

[6] The state did not to file a request to charge in the present case.

[7] Unlike conferences examined in other cases; see *State* v. *Baptiste*, 302 Conn. 46, 54, 23 A.3d 1233 (2011); this proceeding provided both the state and the defendant the opportunity to request numerous substantive revisions to the proposed instructions. Indeed, our review of the record indicates that the transcript of this conference consumes approximately eighty-five pages.

[8] Counsel for both the defendant and the state indicated on the record that the summary given by the trial judge was both accurate and complete.

[9] The defendant argues that *Kitchens* cannot be applied retroactively. This argument overlooks not only the general rule that judicial decisions apply retroactively; *State* v. *Balbi*, 89 Conn. App. 567, 576 n.5, 874 A.2d 288, cert. denied, 275 Conn. 919, 883 A.2d 1246 (2005); but also the fact that the standard announced by our Supreme Court in *Kitchens* has, in fact, been applied *retroactively* by our Supreme Court. See *State* v. *Thomas W.*, 301 Conn. 724, 732–33, 22 A.3d 1242 (2011).

[10] The defendant also argues that our Supreme Court's decision in *State* v. *Brown*, 299 Conn. 640, 11 A.3d 663 (2011), prevents a finding of waiver in the present case. We disagree. In *Brown*, the state submitted a request to charge that included an instruction on coconspirator liability, but that instruction was omitted from the charge actually given to the jury. Id., 659. In that case, our Supreme Court stated: "Because we have no record of the charging conference or copy of the court's intended charge, we do not know if the trial court expressly rejected the state's proper request to charge, or included the proper instruction in the copy of the charge that it provided to counsel, but inadvertently omitted it from the actual charge to the jury." Id. The present case is distinguishable from *Brown* because the record before us contains a copy of the trial court's proposed instructions. There are no material differences between these proposed instructions and those actually given to the jury. Consequently, *Brown* is inapposite to our analysis.