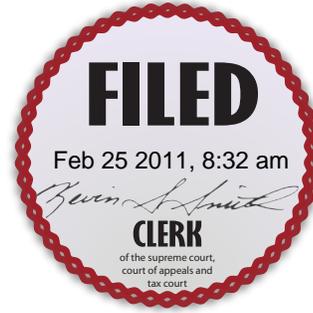


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MONICA SEXTON,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 30A01-1008-CR-479

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APPEAL FROM THE HANCOCK SUPERIOR COURT  
The Honorable Terry K. Snow, Judge  
Cause No. 30D01-1002-FD-45

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**February 25, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Chief Judge**

## Case Summary and Issues

Following a jury trial, Monica Sexton was convicted of aiding in obstruction of justice and conspiracy to commit aiding in obstruction of justice, both Class D felonies. Sexton appeals her convictions, raising three issues for our review which we consolidate and restate as two: whether sufficient evidence exists to support her convictions and whether entry of judgment of conviction and sentence for both crimes violates the Indiana Double Jeopardy clause. Concluding sufficient evidence supports the aiding in obstruction of justice conviction but double jeopardy principles preclude conviction of conspiracy to commit aiding in obstruction of justice, we affirm in part and reverse and remand in part.

## Facts and Procedural History

In February of 2010, Sexton was in Henry County Jail awaiting trial on a charge of theft. Sexton's then-boyfriend, Christopher Sexton,<sup>1</sup> was ordered to appear as a witness for the State for the first day of her trial on February 22, 2010. However, he failed to appear as ordered. That night, Sexton made three phone calls from the jail that were recorded pursuant to regular jail rules. Sexton made one phone call to her brother, James Emmons, and two phone calls to Carina Prince, Emmons's girlfriend. In the first phone call to Prince, Sexton asked if Prince had seen Christopher, and then said, "[T]his is what you need to do when he calls back tell him to hide. I'm getting ready to beat this case if he does not come in . . . . Tell him, do not get found." Transcript of State's Exhibit 4 at 2. Prince replied, "I know . . . . As soon as I talk to him I will tell him . . . ." *Id.* at 3. In the second phone call to Prince, Sexton again implored Prince, "Look, they are getting

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<sup>1</sup> The two have since married.

ready to find me not guilty. Tell that mother fucker do not get found! Do not!” Id. at 4. Prince replied, “I have already told him the cops have been here . . . all day.” Id. At the conclusion of the conversation, Sexton again told Prince, “Find him girl, and tell him to hide!” Id. at 5. Prince replied, “I will . . . . [Your brother] told me if Chris called tell him to fucking go somewhere and don’t move.” Id. In the phone call to Emmons, Sexton asked, “Were you able to get the message to him?” Id. at 7. Emmons replied, “No, but he knows . . . . I mean, yeah, basically yeah.” Id. Later in the conversation, Sexton told Emmons to “[k]eep calling the jail and makes sure he is not in the jail. . . . Make sure he knows not to be found.” Id. at 10. Emmons replied, “I know.” Id. Officer Jerold Fortner of the Greenfield Police Department listened to the phone calls, recorded them, and brought them to the attention of the deputy prosecutor in Sexton’s theft case when trial resumed the next day. Christopher did not appear in court on the second day of trial either.

On the basis of the jail phone calls, the State charged Sexton with aiding, inducing or causing obstruction of justice, and conspiracy to commit aiding, inducing or causing obstruction of justice, both Class D felonies. She was also alleged to be an habitual offender. A jury found Sexton guilty of aiding, inducing, or causing obstruction of justice and conspiracy. Sexton then admitted to the habitual offender allegation. The trial court entered judgment of conviction and sentenced her to three years on each count, to be served concurrently, enhanced by eighteen months for the habitual offender finding. Sexton now appeals her convictions.

## Discussion and Decision

### I. Sufficiency of the Evidence

#### A. Standard of Review

Our standard of reviewing a sufficiency claim is well-settled: we do not assess witness credibility or weigh the evidence, and we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). When confronted with conflicting evidence, we consider it in a light most favorable to the conviction. Id. We affirm the conviction “unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. . . . The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” Id. (quotations and citations omitted).

#### B. Obstruction of Justice

Obstruction of justice, as relevant to Sexton’s case, is defined as:

- (a) A person who:
  - (1) knowingly or intentionally induces, by threat, coercion, or false statement, a witness or informant in an official proceeding or investigation to:
    - (A) withhold or unreasonably delay in producing any testimony, information, document, or thing;
    - (B) avoid legal process summoning him to testify or supply evidence; or
    - (C) absent himself from a proceeding or investigation to which he has been legally summoned; [or]
  - (2) knowingly or intentionally in an official criminal proceeding or investigation:
    - (A) withholds or unreasonably delays in producing any testimony, information, document, or thing after a court orders him to produce the testimony, information, document, or thing;
    - (B) avoids legal process summoning him to testify or supply evidence; or
    - (C) absents himself from a proceeding or investigation to which he has been legally summoned . . . .

Ind. Code § 35-44-3-4. In addition, “[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense . . . .” Ind. Code § 35-41-2-4. The information charging Sexton alleges she “did knowingly or intentionally aid, induce or cause another person, to wit: James Emmons, Carina D. Prince, or Christopher Sexton, to commit an offense, to wit: Obstruction of Justice or Aiding, Inducing or Causing Obstruction of Justice.” Appellant’s Appendix at 1.

Sexton contends the State failed to prove she committed this crime because it failed to prove she threatened or coerced Emmons’s or Prince’s cooperation or Christopher’s absence. She cites only subsection (a)(1) of the obstruction of justice statute in making her argument. She overlooks subsection (a)(2) and the fact that neither the information nor the State’s arguments at trial alleged a threat or coercion. The jury was preliminarily instructed as to both subsections (a)(1) and (a)(2) of the obstruction statute. However, in discussing Sexton’s motion for directed verdict at the close of the State’s evidence, the trial court noted there had been no evidence of a threat or coercion and therefore only subsection (a)(2), if any, would apply to this case. See Transcript at 227. The State agreed with the trial court’s assessment, and the trial court’s final instructions to the jury refer only to the elements of subsection (a)(2). Therefore, the State was proceeding only under the theory that Sexton had violated subsection (a)(2) of the obstruction statute.

Considering the evidence supporting the verdict, especially the recordings of the phone calls themselves, we conclude the State proved beyond a reasonable doubt that Sexton committed aiding in obstruction of justice as defined by subsection (a)(2) of the

statute. Sexton told Prince that if Christopher stayed away, she would be acquitted of the theft charge because the State would have a difficult time proving its case without his testimony. She implored both Prince and Emmons to get in touch with Christopher and tell him not to come to court and further, to hide so that he could not be found by police, arrested for failure to appear, and brought to court to testify against her. A reasonable fact-finder could find, based upon this evidence, that Sexton aided Christopher in committing obstruction of justice by intentionally inducing or causing him to absent himself from her trial, to which he had been summoned to appear as a witness. See Ind. Code § 35-44-3-4(a)(2)(C).

## II. Double Jeopardy

Having determined that sufficient evidence supports Sexton's aiding in obstruction of justice conviction, we need not address her sufficiency claim as to the conspiracy conviction because the State concedes double jeopardy precludes her conviction of both aiding in obstruction of justice and conspiracy to commit aiding in obstruction of justice. See Brief of Appellee at 10-11.

Article 1, section 14 of the Indiana Constitution states, "No person shall be put in jeopardy twice for the same offense." Two or more offenses are the same if, with respect to either the statutory elements of the challenged offenses or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Nicoson v. State, 938 N.E.2d 660, 662 (Ind. 2010). "Conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished" violates the prohibition against

double jeopardy. Grinstead v. State, 845 N.E.2d 1027, 1037 (Ind. 2006) (quotation and citation omitted).

Sexton was charged with conspiracy to commit aiding, inducing or causing obstruction of justice by:

knowingly agree[ing] with another person, to wit: James Emmons or Carina Prince, to aid, induce or cause another person, that being Christopher Sexton, to withhold or unreasonably delay in producing testimony or information in an official criminal proceeding after a court ordered Christopher Sexton to produce that testimony or information or to continue to absent himself from an official criminal proceeding to which he had been legally summoned.

Appellant's App. at 2. Despite the statutory requirement that the State "allege and prove that either the person or the person with whom he agreed performed an overt act in furtherance of the agreement," Ind. Code § 35-41-5-2(b), the information does not allege a specific overt act. See Appellant's App. at 2 ("Further, either [Sexton] or James Emmons or Carina Prince committed an overt act in furtherance of that conspiracy."). At trial, the State argued the agreement between Sexton, Emmons, and Prince was that Emmons and/or Prince get in touch with Christopher and tell him to stay away from court the next day and that the overt act in furtherance of that agreement was that Sexton called Prince back after the first call and then also called Emmons with instructions to pass on the message. Assuming without deciding that this was a sufficient overt act to prove the conspiracy charge, there is a reasonable possibility the evidentiary facts used by the jury to find an overt act were the same as the evidentiary facts used to establish the essential

elements of aiding in obstruction of justice.<sup>2</sup> Both convictions cannot stand, and we therefore vacate the conviction for conspiracy to commit aiding in obstruction of justice.

### Conclusion

Sufficient evidence supports Sexton's aiding in obstruction of justice conviction. However, convictions for both aiding in obstruction of justice and conspiracy to commit aiding in obstruction of justice violate the Indiana Double Jeopardy Clause. We remand to the trial court with instructions to vacate Sexton's conspiracy conviction and amend the sentencing order as appropriate.

Affirmed in part; reversed and remanded in part.

RILEY, J., and BROWN, J., concur.

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<sup>2</sup> Although we have held there is no double jeopardy violation in situations where the facts supporting a first charge could theoretically also serve as the overt act of a conspiracy charge but the jury was instructed on additional facts supporting an overt act such that the jury could have used any one of several bases for finding an overt act, see Redman v. State, 743 N.E.2d 263, 268 (Ind. 2001), here, the jury was not instructed on any facts supporting an overt act. The only specific mention of an overt act was the State's argument in closing regarding Sexton's repeat phone calls.