No. _____
Court of Appeals No. 31402-2-III

91050-2

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NANAMBI I. GAMET,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Nanambi I. Gamet, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Gamet requests this Court grant review of the decision of the Court of Appeals, No. 31404-9-III (October 28, 2014). A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The constitutional right to due process guarantees a criminal defendant a fair trial. The admission of unfairly prejudicial evidence of prior crimes may violate a defendant's right to a fair trial. Evidence of Mr. Gamet's prior convictions for violation of a protection order was not relevant for any material purpose in proving the current charges of violation of a protection order, and related only to the classification of the offense and punishment. Does the conclusion of the Court of Appeals that the prior convictions were elements of the offense of violation of a protection order conflict with decisions by the this Court and the United States Supreme Court that have repeatedly held that prior convictions are not elements of the substantive offense, raise a significant question of law under the federal and state constitutions, and involve an issue of substantial public interest that should be determined by this Court?

2. Jury instructions may not relieve the State of its burden to prove every essential element of the charged offense beyond a reasonable doubt. Here, the definitional instruction and the "to convict" instruction for tampering with a witness misstated an essential element of the offense by omission of the prepositional phrase "without right or privilege to do so," which modifies the phrase "to withhold any testimony." Without deciding whether the "right or privilege" belonged to the defendant or the witness, and without further deciding whether the phrase stated an element or an affirmative defense, the Court of Appeals ruled the error was harmless because Mr. Gamet never asserted a privilege. Does this ruling that shifts the burden of production to the defendant conflict with decisions by the this Court and the United States Supreme Court regarding the State's burden of proof, raise a significant question of law under the federal and state constitutions, and involve an issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE

In 2010, Nanambi I. Gamet was convicted of assault in the third degree against his long-time girlfriend, Sandra Castillo, and the court issued a no contact order of protection prohibiting Mr. Gamet from contacting her. RP 504; Ex. 17. Ms. Castillo tried numerous times to have

the order lifted, but the court repeatedly denied her requests. RP 491-92, 504.

At various times in June 2012, Mr. Gamet was in custody on unrelated charges in Yakima City Jail and Yakima County Jail. Telephone calls placed by inmates in both facilities are recorded and Yakima Police Detective Michael Durbin listened to several recorded telephone calls from Yakima City Jail allegedly placed by Mr. Gamet to Ms. Castillo in May 2012. RP 364, 370-71, 414-16; Ex. 3. Detective Durbin also listened to several recorded telephone calls from Yakima County Jail allegedly placed by Mr. Gamet to Ms. Castillo in June 2012. RP 372-73, 612-13; Ex. 4, 5. He interviewed Ms. Castillo as part of his investigation into whether the telephone calls were violations of the no contact order. RP 726-27. Ms. Castillo was uncooperative and she did not want to assist in the prosecution of the charges. RP 728-30.

On August 21, 2012, Detective Durbin listened to a recorded telephone call allegedly placed by Mr. Gamet to Linda Prado, Ms. Castillo's niece, in which Mr. Gamet stated he mailed a letter addressed to her that he wanted given to Ms. Castillo. RP 510-11, 515-16, Ex. 6, 7. Detective Durbin went to Ms. Prado's address and intercepted the letter before she received it. RP 520, 524-25, 646; Ex. 1, 2.

Mr. Gamet was charged with three counts of "felony violation of a protection order - domestic violence," in violation of RCW 26.50.110(5) and 10.99.020, based on the telephone calls placed in May 2012. CP 18-19. He was separately with five counts of "felony violation of a protection order - domestic violence," in violation of RCW 26.50.110(5) and 10.99.020, based on telephone calls placed in June 2012, and one count of tampering with a witness, in violation of RCW 9A.72.120, based on the letter he sent to Ms. Prado. CP 147-49. The matters were consolidated for trial. RP 12, 15. Ms. Castillo appeared at trial only after being arrested on a material witness warrant. Ex. 23-24. She testified that the no contact order was issued against her wishes, the issuing court denied her repeated requests to have the order lifted, she was not afraid of or intimated by Mr. Gamet, and she freely chose not to cooperate with the prosecution of the instant charges. RP 491-93, 495-96.

Mr. Gamet was convicted of all nine counts, as charged. CP 68-73, 174-85.

On appeal, Mr. Gamet argued in part that the trial court erred in admitting evidence of his prior convictions for violation of a protection order because recidivism is not an element of the offense of "felony" violation of a protection order. He also argued the jury instructions for tampering with a witness misstated an element of the offense by omission

of the prepositional phrase "without right or privilege to do so," which modified the phrase "to withhold testimony." The Court of Appeals ruled the prior convictions for violation of a protection order were elements of the felony offense and omission of the propositional phrase was harmless because Mr. Gamet never asserted a right or privilege.

E. ARGUMENT

1. The Court of Appeals' ruling that prior convictions for violation of a protection order are elements of the offense of "felony" violation of a protection order is contrary to decisions by this Court and by the United States Supreme Court that prior convictions are not elements of a crime that must be submitted to a jury.

The fact of recidivism is not an element of the offense of violation of a court order. Both this Court and the United States Supreme Court have repeatedly stated that prior convictions are not elements of a crime, even where those facts increase the defendant's punishment. *Almendarez-Torres v. United States*, 523 U.S. 224, 241, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); *State v. Witherspoon*, 180 Wn.2d 875, 891-94, 325 P.3d 888 (2014); *State v. Wheeler*, 145 Wn.2d 116, 120, 34 P.3d 799 (2001).

In *Almendarez-Torres*, the Court found the fact of recidivism was not an element of the offense of reentry of removed aliens,[1] but, rather, a penalty provision that provided for an increased penalty based on

[1] 8 U.S.C. § 1326(a).

recidivism. 523 U.S. at 226. The Court reasoned that Congress had not stated its intent that the fact of recidivism be considered an element, even though it was contained in the same statute that set out the elements of the offense. *Id.* at 234. The Court noted that recidivism was a fact that "is neither 'presumed' to be present, nor need be 'proved' to be present, in order to prove the commission of the relevant crime." *Id.* at 241. The Court further noted the unfair prejudice that flows from evidence of prior convictions, and stated, "[W]e do not believe, other things being equal, that congress would have wanted to create this kind of unfairness in respect to facts that are almost never contested." *Id.* at 235. The Court then concluded "recidivism ... is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id.* at 243.

This Court has adopted the reasoning from *Almendarez-Torres*, and stated, "Traditional factors considered by a judge in determining the appropriate sentence, such as prior criminal history, are not elements of the crime." *Wheeler*, 145 Wn.2d at 120. More recently, this Court noted, "the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes." *State v. McKague*, 172 Wn.2d 802, 803 n.1, 262 P.3d 1225 (2011). Thus, even though the fact of recidivism increases the punishment for an offense, that result does not make recidivism an element of the offense.

In addition, the penalty classification of an offense is not an element of the offense, even if the classification is contained in the same statute that sets forth the elements of the offense. *State v. Williams*, 162 Wn.2d 177, 187-88, 170 P.3d 30 (2007). In *Williams*, the defendant was charged with bail jumping, in violation of RCW 9A.76.170, which provides, in relevant part:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.
> ...
> (3) Bail jumping is:
> (a) A class A felony is the person was held for, charged with, or convicted of murder in the first degree;
> (b) A class B felony is the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;
> (c) A class C felony is the person was held for, charged with, or convicted of a class B or class C felony;
> (d) A misdemeanor of the person was held for, charged with, or convicted or a gross misdemeanor or misdemeanor.

The Court concluded "Subsection (1) defines the elements of bail jumping and does not explicitly or implicitly reference the penalties in subsection (3)," and, therefore, the provisions of subsection (3) were not elements of the offense. 162 Wn.2d at 188.

Violation of a protection order, RCW 26.50.110, mirrors the structure of the bail jumping statute at issue in *Williams* and the reentry of

removed aliens at issue in *Almendarez-Torres*, and provides in relevant part:

> (1)(a) Whenever an order is granted under this chapter, [or] chapter ... 10.99, ... and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:
> (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;
> (ii) A provision excluding the person from a residence, workplace, school, or day care;
> (iii) A provision prohibiting a person from knowingly coming within, a specified distance of a location;
> (iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or
> (v) A provision of a foreign protection order specifically indicating that a violation will be a crime.
> ...
> (4) Any assault that is a violation of an order issued under this chapter, [or] chapter ... 10.99, ... and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony
> (5) A violation of a court order issued under this chapter, [or] chapter ... 10.99, ... is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, [or] chapter ... 10.99.

As in *Williams* and *Almendarez-Torres*, the acts which establish the "illegality of the behavior" that constitute violation of a protection order are set forth in subsection (1), and subsections (4) and (5) merely determined the circumstances which give rise to an enhanced penalty.

Each time this Court has addressed the question of whether a prior offense is an element, it has unambiguously answered 'no,' even when the prior offense substantially increased the penalty. Despite this line of authority, the Court of Appeals ruled this issue is controlled by *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002), and *State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008). But neither *Oster* nor *Roswell* addressed the question in this case. In *Oster*, the defendant was charged with violation of a no contact order. 147 Wn.2d at 143. The jury was provided a "to convict" instruction that set out the elements of the substantive offense of violation of a no contact order and a separate special verdict form to decide whether the defendant has two prior convictions for violation of a no contact order. *Id.* On appeal, the defendant challenged the bifurcated instructions, but he did not challenge whether the prior convictions were elements of the substantive offense. *Id.* Thus, the issue of whether recidivism was a statutory element was not before this Court.

In *Roswell*, the defendant was charged with communication with a minor for immoral purposes, an offense that is a gross misdemeanor unless the defendant has a prior conviction for a felony sexual offense in which case it is a Class C felony. 165 Wn.2d at192. At trial, the defendant argued his prior conviction for a felony sexual offense was an aggravator and he moved for a bifurcated trial with a jury determination regarding the

charged offense and a judicial determination regarding the prior conviction. *Id.* at 189. On appeal, however, the defendant argued the prior conviction was an element of the offense but that he nonetheless was entitled to bifurcation of the guilt phase from the determination of the prior conviction. *Id.* at 192-93. This Court stated the prior conviction was an element on the grounds, "a defendant charged with felony communication with a minor for immoral purposes can never be convicted of that crime if the State is unable to prove that the defendant has a prior felony sexual offense conviction." *Id.* at 194. However, as in *Oster*, the defendant did not challenge whether recidivism was a statutory element. Moreover, the Legislature did not enact a crime entitled "felony communication of a minor for immoral purposes." Rather, the Legislature enacted a single offense entitled "Communication with a minor for immoral purposes -- Penalties," with various potential penalties depending on the defendant's criminal history. RCW 9.68A.090. Similarly, the Legislature enacted a crime entitled "Violation of order – Penalties," and not "felony violation of a protection order." RCW 26.50.110. The Court of Appeals' reliance on *Oster* and *Roswell* is misplaced.

Mr. Gamet's conduct was the same regardless of his criminal history. The substantive elements of violation of a protection order remained the same; his prior offenses did not alter the crime in any way,

but merely increased the punishment that could be imposed. In this regard, the prior offenses at issue here are indistinguishable from the prior offense at issue in *Wheeler*, or the classification of the offense for which a person was released pending a hearing at issue in *Williams*.

The Legislature has not expressed an intent to make recidivism an element of violation of a protection order, and in the prejudicial nature of such evidence, that intent should not be presumed. *Almendarez-Torres*, 523 U.S. at 235. There is no basis to conclude that the prior convictions are elements of violation of a protection order. Within constitutional limits, the Legislature is free to define the elements of a crime. The Legislature has defined the elements of violation of a protection order in RCW 26.50.110(1). Those elements do not include prior convictions.

The Court of Appeals ruling that prior convictions are statutory elements of the offense of violation of a protection order is contrary to decisions by this Court and by the United States Supreme Court, raises a significant question of law under the federal and state constitutions, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1), (3), and (4), this Court should accept review.

2. The Court of Appeals' ruling that omission of the phrase "without right or privilege to do so that modified the phrase "to withhold any testimony" was harmless because Mr. Gamet did not assert a right or privilege is contrary to well-settled law regarding the State's burden of proof.

A defendant has the due process right to proof beyond a reasonable doubt of every essential element of the charged offense. U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.E.2d 386 (1970); *State v. Mau*, 178 Wn.2d 308, 312, 308 P.3d 629, 630-31 (2013). Accordingly, jury instructions must accurately inform the trier of fact of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). An instruction that misstates or omits an essential element of an offense relieves the State of this burden of proof. *State v. Linehan*, 147 Wn.2d 638, 653, 56 P.3d 542 (2002). "An instruction that relieves the State of its burden to prove every essential element of a crime requires automatic reversal." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

Here, the definitional instruction and the "to convict" instruction misstated the law by omission of the prepositional phrase "without right or privilege to do so," which modifies and limits the phrase "to withhold testimony." an essential element of the offense of tampering with a witness, as charged. RCW 9A.72.120(1)(a) provides in relevant part:

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation ... to:
>
> (a) Testify falsely or, *without right or privilege to do so*, to withhold any testimony....

(Emphasis added).

The jury was provided the following definitional instruction for tampering with a witness, which omitted the prepositional phrase "without right or privilege to do so":

> A person commits the crime of Tampering with a Witness when he or she attempts to induce a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding, or a person whom he or she has reason to believe may have information relevant to a criminal investigation to withhold any testimony or to absent himself or herself from any official proceedings, or to withhold from a law enforcement agency information which he or she had relevant to a criminal investigation.

CP 61 (Instruction 16).

The "to convict" instruction similarly omitted the prepositional phrase "without right or privilege to do so," and provided in relevant part:

> To convict the defendant of the crime of Tampering with a Witness ... each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That ... the defendant attempted to induce a person to withhold any testimony or absent herself from any official proceeding or withhold from a law enforcement agency

> information which she had relevant to a criminal investigation....

CP 63 (Instruction No. 19).

The Court of Appeals questioned, without deciding, whether the "right or privilege" belonged to the defendant or to the witness. Opinion at 12. The Court also questioned, without deciding, whether the challenged phrase was an element of the offense or an affirmative defense. Opinion at 13.

Nonetheless, the Court ruled omission of the phrase from the "to convict" instruction was harmless, even if the phrase was an element of the offense, because Mr. Gamet never asserted a right or privilege. Opinion at 13. However, a defendant does not have standing to assert a personal right or privilege for a third party unless the third party cannot assert the right or privilege on his or her own behalf. *In re Guardianship of Cobb*, 172 Wn. App. 393, 403, 292 P.3d 772 (2012). Also, "the State cannot require the defendant to disprove any fact that constitutes the crime charged." *State v. W.R., Jr.*, No. 88341-6, 2014 WL 5400399, at *2 (Wash. 10/30/2014). Therefore, this ruling implicitly found the right or privilege belonged to the defendant and the challenged phrase is an affirmative defense. But, as indicated by the grammatical structure of the statute, the Legislature did not cast the phrase "without right or privilege

to do so" as an affirmative defense where the defendant has the burden of production. Rather, the phrase functions as an adverb that modifies and limits the immediately following phrase "withhold any testimony." Therefore, omission of the limiting phrase changes the offense and lessens the State's burden by eliminating the requirement that it prove beyond a reasonable doubt that Mr. Gamet acted without a right or privilege.

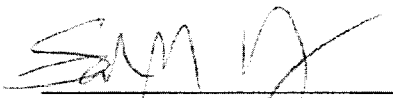
The Court of Appeals ruling that omission of the statutory phrase "without right or privilege to do so" was harmless because Mr. Gamet did not assert a right or privilege conflicts with decisions of this Court and the United States Supreme Court regarding the State's burden to prove every element of a crime charged, shifts the burden of production to the defendant conflict with decisions by the this Court and the United States Supreme Court regarding the State's burden of proof, raises a significant question of law under the federal and state constitutions, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1), (3), and (4), this Court should accept review.

E. CONCLUSION

The Court of Appeals incorrectly ruled recidivism is an element of violation of a protection order and that omission of an essential element from the jury instructions was harmless. For the foregoing reasons, this Court should accept review.

DATED this 18th day of November 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 31402-2-III
Respondent,	)	Consolidated with
	)	No. 31404-9-III
v.	)	
	)	
NANAMBI IBO GAMET,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Nanambi Gamet challenges his convictions for felony violation of a protection order (eight counts) and witness tampering on several grounds, including claims of instructional error. We agree only with his contention that an excessive term of community custody was imposed and remand the matter to strike that provision.

FACTS

Mr. Gamet dated S.C. for a 13 year period. In April 2010, he was convicted of third degree assault, domestic violence, against S.C. Over the objections of S.C., the trial court entered a protective order prohibiting contact between her and Mr. Gamet.

Mr. Gamet was jailed in May 2012 on unrelated topics. While in the Yakima County Jail, he used the Inmate Calling Services (ICS) to place telephone calls. ICS records all calls placed through its service. A review of those recordings revealed that

Mr. Gamet was calling S.C. Those phone calls eventually led to the filing of eight felony counts of violation of a protection order for calls placed in May and June.[1]

Aware of the new charges, Mr. Gamet in August mailed S.C. a letter addressed to her niece, Ms. Prado. He then called Ms. Prado and advised her that the letter, although addressed to Ms. Prado, was for S.C. to read. The letter was mailed to a postal box maintained by S.C.'s mother. Alerted by the phone call, a detective contacted S.C.'s mother and secured her cooperation. When the letter arrived, it was turned over to the detective.

In relevant part, the letter stated:

> Well, about [S.C.], she needs just to hang up every time and not show up to anything anytime, anyplace. I'm going to trial soon. They have until the 4th of next month. I hope she just hangs up on them and I don't know why she even told them to take subpoena to her sisters. The point is to have zero contact if she doesn't want to cooperate, zero.
>
> It's very hard for me to deal with these emotions because she showed last time. If she does that again, I'm forced to go to trial. I hope and pray she doesn't say a single word to them and hang up every time. . . . I know what I'm doing. I don't need her thinking she can help me by talking to them. She only hurts me and herself because one thing I do know in this confusing world is she loves me and I love her, too. . . . They have to let me go if she don't show.

Report of Proceedings (RP) at 710-11. The letter led the prosecutor to add the charge of witness tampering.

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[1] The charges were filed as felony counts due to prior convictions in 2003 and 2004 for violation of a protective order.

At trial, the prosecution played the recordings of the phone calls that supported the eight protection order violation counts, as well as two later jail phone calls that were not charged. The defense objected to the two uncharged calls on several bases, but the court admitted them to establish the identity of the earlier callers and show a common scheme or plan to persuade S.C. not to cooperate with the prosecution. The court also admitted the judgment and sentence as well as a docket printout to establish the two prior convictions for violation of a protection order. Exs. 14, 15.

The jury found Mr. Gamet guilty on all nine counts. Despite competing requests by both sides for an exceptional sentence, the court imposed concurrent standard range sentences of 60 months on each count. The court also imposed a concurrent term of 12 months of community custody on all counts. Mr. Gamet then timely appealed to this court.

ANALYSIS

This appeal challenges the court's ruling on the uncharged telephone calls, the admission of the prior convictions, the sufficiency of the evidence to support the witness tampering count, the validity of the elements instruction on the witness tampering count, and the imposition of community custody.[2] We address the issues in the order stated.

[2] Mr. Gamet also filed a lengthy statement of additional grounds. We will not address those claims. Most of them are not cognizable or are otherwise inadequate for our consideration. RAP 10.10(c). Of those claims we can identify, they are either without merit, were adequately addressed by counsel (*see* RAP 10.10(a)), or are rendered moot by our remand for resentencing.

Uncharged Telephone Calls

Mr. Gamet argues in this court that the court violated ER 404(b) by failing to give a limiting instruction concerning the two uncharged telephone calls. He did not argue that theory below and cannot do so now. Nonetheless, the court also did not abuse its discretion in declining to give a limiting instruction.

Relying upon ER 401, ER 403, and ER 802, Mr. Gamet challenged the admission of the recordings of the two uncharged telephone calls in the trial court. RP at 253. The prosecutor responded that the evidence was relevant to all the charges—the phone calls showed the identity of the speakers in the earlier telephone calls and also showed the defendant's "common scheme" to tamper with S.C. RP at 278-79. The court ordered excision of various statements in the recordings that were prejudicial. RP at 281-83. In response to the prosecutor's common scheme argument for relevancy on the tampering charge, defense counsel argued that the evidence was not relevant to a crime that had not been committed yet and raised the risk of undue confusion of the jury. He therefore asked for a limiting instruction that would tell the jury the tapes were not being offered for the truth of the matters asserted therein and could not be the basis for a tampering conviction. RP at 289-90. The trial court decided that a limiting instruction was unnecessary as the jury would be instructed on the dates of the witness tampering and would not be able to rely upon the earlier telephone calls to convict the defendant on that charge. RP at 291-92.

The standards governing evidentiary challenges are well understood. Evidence that is relevant is admissible. ER 401; ER 402. However, admissible evidence can be excluded when its relevance is substantially outweighed by its prejudicial impact. ER 403. In addition, evidence of "other bad acts" cannot be used as evidence of a person's bad character, but can be admitted for such other purposes as establishing a "common scheme or plan." ER 404(b). A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 429-30, 705 P.2d 1182 (1985). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). An erroneous evidentiary ruling is not prejudicial "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Mr. Gamet attempts to argue this as an ER 404(b) case.[3] That was not his theory below. There he tried to exclude the evidence on relevance, confusion, and hearsay grounds. These bases implicate ER 401, ER 403, and ER 802. The failure to raise an evidentiary objection to the trial court waives the objection. *Guloy*, 104 Wn.2d at 422; *State v. Boast*, 87 Wn.2d 447, 451-52, 553 P.2d 1322 (1976). As explained in *Guloy*:

[3] Defense counsel did cite ER 404(b) in a pretrial memorandum that addressed other issues, but did not expressly apply that theory to his arguments against use of these two recordings.

> A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review.

104 Wn.2d at 422 (citation omitted).

Accordingly, Mr. Gamet may not pursue his ER 404(b) argument in this appeal. If the matter is analyzed under ER 403, as the trial court did, we conclude that there was no abuse of discretion in declining a limiting instruction. The evidence was introduced for multiple purposes. First, it was introduced to tie together the identity of the speakers in the early conversations that were the subject on the protection order violation charges. It also showed the defendant's mindset and determination to convince S.C. not to participate. Accordingly, the recordings were relevant for multiple purposes and an instruction limiting the evidence to one purpose was improper.

With respect to the defense argument that the jury might be confused and convict on the basis of the telephone calls rather than the letter, the trial court correctly pointed out that the elements instruction would define the dates of the offense and, thus, limit the jury to the letter as the basis for the tampering offense. In that circumstance, there was no need to further instruct the jury that the two recordings could not be the basis for a conviction. The court's reason for rejecting the limiting instruction was tenable.

Mr. Gamet waived any ER 404(b) argument by not raising it at trial. The trial judge also did not abuse his discretion in determining that a limiting instruction was unnecessary.

Use of Prior Convictions

Making a reverse-*Blakely*[4] argument, Mr. Gamet contends that the trial court erred in allowing his prior convictions before the jury. At oral argument to this court, his counsel explained that this argument was made in anticipation of the United States Supreme Court changing its jurisprudence. In light of the fact that this argument currently is precluded by existing authority, we will address it only briefly.

The essence of the argument is that because the existence of a prior conviction does not have to be proven to the jury, it cannot and should not be submitted to the jury. This argument is foreclosed by the decisions in *State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008), and *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002).

In *Oster*, a felony no contact order prosecution, the court ruled that the prior convictions functioned "as an element of the" crime. 147 Wn.2d at 146. Although the jury needed to find the existence of the prior offenses beyond a reasonable doubt, it was permissible to have the jury make this finding by a special verdict form rather than include them in the elements instruction. *Id.* at 146-47.

In *Roswell*, a prosecution for communication with a minor for immoral purposes, the court squarely rejected a reverse-*Blakely* argument. 165 Wn.2d at 193-94. Specifically, the court ruled that a trial judge did not have to permit the defense to waive a jury finding of the existence of a prior conviction in favor of a judicial finding. *Id.* at 197-98.

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[4] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

As in *Oster*, here the existence of the prior convictions was properly put before the jury as an element of the protection order counts. As in *Roswell*, the trial court was not required to take this element away from the jury.

The trial court did not err in its elements instructions on the violation of a protection order counts.

Sufficiency of Evidence of Witness Tampering

Mr. Gamet also argues that the evidence did not support the jury's verdict on the witness tampering count. The evidence did permit the jury to find each element of the offense and, thus, was sufficient to support the conviction.

Again, well settled standards govern appellate review of the sufficiency of the evidence to support a conviction. Appellate courts look to see if there was evidence from which the trier of fact could find each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.* Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact and are not subject to review." *Id.* at 874.

Mr. Gamet argues that the evidence is insufficient because it does not show that he induced S.C. to be uncooperative and was similar to the behavior found inadequate to support a conviction in a prior case. We disagree.

The crime of witness tampering is found in RCW 9A.72.120. It states in relevant part:

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation . . . to:
> (a) Testify falsely or . . . to withhold testimony; or
> (b) Absent himself or herself from such proceedings; or
> (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation . . . .

Mr. Gamet was charged under all three prongs of the statute except for the "testify falsely" alternative of RCW 9A.72.120(1)(a). Clerk's Papers at 143.

As indicated in the statute, a person tampers with a witness if he *attempts* to alter the witness's testimony. "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). This court "may infer specific criminal intent from conduct that plainly indicates such intent as a matter of logical probability." *State v. Andrews*, 172 Wn. App. 703, 707, 293 P.3d 1203 (2013) (citing *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004)).

Mr. Gamet argues that S.C. was uncooperative of her own accord and his letter did not influence her. He relies in part on the decision in *State v. Rempel*, 114 Wn.2d 77, 785 P.2d 1134 (1990). There the defendant contacted the victim in an attempted rape prosecution and asked her to drop charges, accused him of doing something he did not do, and told her the charges were ruining his life. *Id.* at 81-82. The prosecutor filed a count of witness tampering. The jury convicted him of that crime. *Id.* at 79.

The Supreme Court found the noted evidence insufficient, determining that the defendant's statements did not amount to an inducement to withhold testimony. *Id.* at 83-84. The court expressly distinguished the facts in *Rempel* from earlier cases where inducement was established. *Id.* at 84 (distinguishing *State v. Stroh*, 91 Wn.2d 580, 588 P.2d 1182 (1979) (defendant asked the witness not to appear or alternatively to change his testimony); *State v. Wingard*, 92 Wash. 219, 158 P. 725 (1916) (defendant promised a reward, made a threat, and urged the witnesses to ignore a subpoena); *State v. Scherck*, 9 Wn. App. 792, 514 P.2d 1393 (1973) (defendant asked the witness to drop the charges, urged him to refuse to appear, and made a threat)).

This case is distinguishable from *Rempel*. Unlike that case, Mr. Gamet managed to meet all three of the charged prongs of the statute. In the letter to S.C., he indirectly urges S.C. not to cooperate with authorities, not to show up to any investigative meetings or speak to the investigators on the phone, and also not to show up to his trial. Specifically, the letter asserts that S.C. "needs just to hang up every time and not show up to anything

anytime, anyplace," and "[t]he point is to have zero contact if she doesn't want to cooperate, zero." RP at 710. Mr. Gamet also urged S.C. not to show at his trial, asserting that the authorities have to let him go if she does not show. RP at 711. Although Mr. Gamet did not attempt to threaten S.C. or bribe her with money or goods, he did attempt to induce her through the letter to withhold testimony, absent herself from proceedings, and withhold from a law enforcement agency information relevant to a criminal investigation.

The fact that S.C. was inclined not to cooperate does not detract from the fact that Mr. Gamet attempted to induce her to not cooperate. The letter permitted the jury to find each element of the crime of witness tampering. The evidence was sufficient to support the verdict on the tampering charge.

Jury Instruction on Witness Tampering

Mr. Gamet also argues that the witness tampering elements instruction was defective by failing to include statutory language "without right or privilege to do so." Because Mr. Gamet was not harmed by the missing language, this argument is without merit.

The language in question comes from the first prong of the statute, which states in pertinent part:

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

> (a) Testify falsely or, *without right or privilege to do so*, to withhold any testimony; . . . .

RCW 9A.72.120 (emphasis added).

The related pattern instructions for this offense—WPIC 115.80 and 115.81[5]—outline the elements for the crime of witness tampering, and brackets the language "without right or privilege to do so," instructing that such bracketed language be used "as applicable."[6] Neither the elements instruction nor the definitional instruction used in this case contained the challenged language. CP at 61, 63.

The court and parties discussed the language at some length during the jury instruction conference, debating whether it modified the "testify falsely" or the "withhold testimony" alternatives, whether the privilege involved belonged to the defendant or the witness, and whether the language stated an affirmative defense or was an element the

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[5] 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 115.80 and 115.81, at 441-42 (3d ed. 2008).

[6] There is no guidance contained within the legislative history related to RCW 9A.72.120 regarding whether the prepositional phrase in question was meant as an affirmative defense or as an element to be proven in each case involving witness tampering by way of attempting to induce a witness to withhold testimony. Case law describes the phrase as pertaining to a legal privilege or right, such as the Fifth Amendment right to remain silent, spousal testimonial privilege, or marital communications privilege. *See, e.g., State v. Sanders*, 66 Wn. App. 878, 833 P.2d 452 (1992) (discussing spousal testimonial and martial communications privilege applying in witness tampering case); *State v. Ahern*, 64 Wn. App. 731, 826 P.2d 1086 (1992) (discussing that an attorney who advised his client of his Fifth Amendment right not to testify would not be subject to witness tampering under the clause).

State needed to prove. RP at 781-88. Determining that there was no claim of privilege at issue in the case, the court declined to require the language in the instructions. We need not resolve the debate whether the challenged phrase is an element of the crime or an affirmative defense, because even if the phrase is an element of the crime, its absence from the jury instructions in this case was harmless beyond a reasonable doubt.

Omission of an element from a "to-convict" instruction is harmless error if it is clear beyond a reasonable doubt that the error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); *State v. Thomas*, 150 Wn.2d 821, 840-41, 83 P.3d 970 (2004). That is the situation here. Mr. Gamet never contended that he was privileged to attempt to dissuade S.C. from cooperating with the prosecution of the case against him.

If the privilege language is an element of the offense, it was not an element at issue in this case. Accordingly, if there was any error, it was harmless beyond a reasonable doubt.

Community Custody Term

Both parties agree that the trial court erred in imposing a term of community custody because the defendant had already been sentenced to the maximum term of incarceration. We agree. Both parties ask that the matter be remanded for resentencing where they can

renew their arguments for an exceptional sentence. We disagree with that remedy and, instead, remand for the court to strike the term of community custody.

The combined term of incarceration and community custody cannot exceed the statutory maximum sentence for the offense. Both witness tampering and violation of a protection order are class C felonies. RCW 9A.72.120(2); RCW 26.50.110(5). The maximum sentence for a class C felony is five years of incarceration. RCW 9A.20.021(1)(c). In the instance when the combined terms of incarceration and community custody exceed the statutory maximum, the legislature has provided that the "term of community custody . . . shall be reduced by the court." RCW 9.94A.701(9).

Because the trial court has no discretion in this circumstance, absent use of the exceptional sentence power that the trial judge already eschewed, the only remedy available on remand would be to strike the community custody term. That is typically the remedy we would order.

The parties desire resentencing, which would occur before a different judge due to Judge Gavin's retirement. However, trial courts lack authority to resentence a defendant absent a basis for reopening a judgment. *State v. Shove*, 113 Wn.2d 83, 87-88, 776 P.2d 132 (1989). A request for resentencing from a party is an insufficient reason to set aside a judgment. *Id.* Accordingly, we see no basis to depart from our customary practice.

The convictions are affirmed. The case is remanded with directions to strike the term of community custody.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Brown, J.

Siddoway, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NANAMBI GAMET, Appellant.	)))))))))	COA NO. 31402-2-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] DAVID TREFRY [David.Trefry@co.yakima.wa.us] YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] NANAMBI GAMET 996903 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF NOVEMBER, 2014.

X_____

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