

No. 31402-2-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

NANAMBI I. GAMET,

Appellant.

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

The Honorable F. James Gavin

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SUPPLEMENTAL ASSIGNMENT OF ERROR AND  
BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The jury instructions on tampering with a witness misstated an essential element of the offense, in violation of Mr. Gamet's constitutional right to due process and to proof beyond a reasonable doubt.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

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." Did this misstatement of an essential element of the offense relieve the State of its burden of proof in violation of Mr. Gamet's right to due process and to proof beyond a reasonable doubt?

C. ARGUMENT

**The definitional instruction and the “to convict” instruction for tampering with a witness misstated an essential element of the offense, requiring reversal.**

- a. The issue of instructional error may be raised for the first time on appeal.

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*, \_\_\_ Wn.2d \_\_\_, 308 P.3d 629, 630-31 (2013). A jury 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). Instructions that relieve the State of its burden is a manifest error of constitutional magnitude that may be raised for the first time on appeal. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001); *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003); RAP 2.5(a)(3). Therefore, this issue is properly before the court.

2. A court commits reversible error when its jury instructions fail to accurately define every essential element of the charged offense.

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); *State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007).

When reviewing the effect of a specific instruction, the instruction is viewed in context with the other instructions. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). “When read as a whole, jury instructions must make the legal standard ‘manifestly apparent to the average juror.’” *State v. Bland*, 128 Wn. App. 511, 514, 116 P.3d 428 (2005) (citing *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). A challenge to jury instructions is a question of law that is reviewed de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 102 P.3d 1219 (2005); *Pirtle*, 127 Wn.2d at 656.

3. The definitional instruction and the “to convict” instruction misstated the law by omission of a prepositional phrase “without right or privilege to do so,” which modified and limited an essential element of the offense of tampering with a witness.

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).

Mr. Gamet recognizes that the phrase “without right or privilege to do so” is bracketed in the relevant Washington Pattern Jury Instructions, with the suggestion that the bracketed material be used “as applicable.”



WPIC 115.80, 115.81 (11A Washington Pattern Jury Instructions: Criminal 441-43 (3<sup>rd</sup> ed. 2008)). However, omitting the phrase is contrary to legislative intent, 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 that the Legislature chose to include 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.

4. The instructional error requires reversal.

A misstatement of the law in a jury instruction that relieves the State of its burden of proving every essential element of the offense is a violation of due process and requires reversal. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). “An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002); *see also State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) (“[A] conviction cannot stand if the jury was instructed in a manner that would relieve the State” of its burden of proving each element of the crime

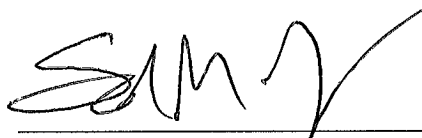
charged): *Linehan*, 147 Wn.2d at 643 (“Instructing a jury so as to relieve the State of its burden to prove all elements of the case is reversible error.”). Reversal of the conviction for tampering with a witness is required.

D. CONCLUSION

Omission of the phrase “without right or privilege to do so” misstated an essential element of the offense of tampering with a witness, in violation of Mr. Gamet’s right to due process and to proof beyond a reasonable doubt of every element of the offense. For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Gamet respectfully requests this Court to reverse his convictions, or, alternatively, reduce the term of community custody.

DATED this 8<sup>th</sup> day of October 2013.

Respectfully submitted,



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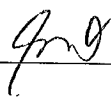
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8<sup>TH</sup> DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL ASSIGNMENT OF ERROR AND BRIEF OF APPELLANT** 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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**SIGNED** IN SEATTLE, WASHINGTON THIS 8<sup>TH</sup> DAY OF OCTOBER, 2013.

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