NO. 31402-2-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NANAMBI IBO GAMET,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error in both the opening and amended briefs. These can be summarized as follows;

1. The trial court failed to give a limiting instruction for ER 404(b) evidence.
2. Insufficient evidence was presented to support the conviction for Tampering with a Witness.
3. The trial court erred by admitting evidence of Appellant's prior convictions for violation of a protection order.
4. The trial court exceeded its sentencing authority.
5. The jury instruction for Tampering with a Witness misstated an essential element.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no error by the court regarding ER 404(b) instructions, the jury instructions was proper.
2. There was sufficient evidence presented to support the charge of Tampering with a Witness, beyond a reasonable doubt.
3. The trial court did not err when it allowed admission of Appellant's prior convictions for violation of a no contact order.
4. The court did err when it imposed a sixty month sentence, the statutory maximum, along with an additional twelve months of community custody.
5. The jury instruction for Tampering with a Witness was correct.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall

not set forth an additional facts section. The State shall refer extensively to large section of the record within the argument section of this brief.

III. ARGUMENT.

The actions of the trial court were well within its discretion, were based on the rules of evidence and case law.

RESPONSE TO ALLEGATION ONE - RECORDED CALLS.

Mr. Gamet has not challenged the admission of the phone in this appeal; he did challenge the admission in the trial court. He indicates that the information was admitted over objection at trial but on appeal he limits his allegation to the alleged "failure" by the trial court to verbally instruct the jury at the time the recordings were played that they, the jury, was to only use the information in those recordings for the purpose of proof that the calls were placed by Appellant and received by the Ms. Castillo, the named person in the no contact orders. RP 290

This court recently addressed the issue of the admission of text messages and the Tampering statute in State v. Andrews, 172 Wash.App 703, 293 P.3d 1203 1205, 1206, (Wash.App. Div. 3 2013) stating "We review evidentiary rulings for abuse of discretion; discretion is abused when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. State v. Magers, 164 Wash.2d 174, 181, 189 P.3d 126 (2008)."

The actions of the trial court were well founded and well reasoned, State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) has been cited in over seven hundred cases for good reason;

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. State ex rel. Clark v. Hogan, 49 Wash.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. MacKay v. MacKay, 55 Wash.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wash.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).
>
> Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other

The trial court did not err when it did not verbally "instruct" the jury as to "ER 404(b)." Further, the Appellant did not raise this alleged error at the time the actual instructions to the jury were proposed and finalized. Appellant only submitted two proposed jury instructions, neither of which addressed this alleged error. (CP 171-3) The following is the totality of the discussion regarding the Appellant's request for this instruction.

MR. KROM: So in light of the Court's rulings, I'm

going to request, if the Court is willing to do so, that the Court orally indicate, uh -- indicates to the jury at the time the tapes are played, that these are not being offered for the truth of the matter asserted. Because the Court has indicated that you are going to permit the playing of the tapes because they're not hearsay because they're not being offered for the truth of the matter asserted.

So I think the jury should be told when they're being presented the evidence that that's not the basis that they're being allowed to hear them. And we may seek further also a clarifying instruction as you indicated on the issue about the Tampering, that they're only supposed to rely upon those tapes that relate to the -- or the letter relating to August 20 -- 24th to establish this charge.

THE COURT: I think the instructions it would be an element instruction would take care of the second aspect of that first aspect.

MR. KROM: All right.

THE COURT: What do you think?

MR. SOUKUP: I'm sorry, can you say that again, Your Honor?

THE COURT: Not offered for the truth of the matter, give an instruction.

MR. SOUKUP: To the jury?

THE COURT: Yep.

MR. SOUKUP: I don't think it's appropriate because there's no assertions that the State's trying to prove. And I think what it's going to sound like to the jury is, you know, there's something wrong with these tapes, that they're not -- you know, they don't prove anything basically. But no one's on there saying this is a conversation between Nanambi Gamet and Sandra Castillo.

There's no assertions that the State's trying to prove. What the State is trying to prove is that things were said and these things tend to show that this is a conversation between these two people, but there's no assertions that the State is trying to prove. So when there's no assertions that the party's trying to prove, I don't think that instruction's appropriate, I think it's confusing.

THE COURT: I agree with that. Denied as to the first one, but as to the second motion, as far as it being related to August 20 to 24 or to conform to the evidence as of that date, certainly the instruction will indicate

that on or about between August 20 and 24, meaning that that's when the jury has to find it. They can't go back to June or sometime and say oh, gosh, in June or May he made the following comment, therefore I think that he's guilty based upon that. No, it'll explicitly say in the elements instruction the date and clearly you can argue.
MR. KROM: Thank you, Your Honor.

It is apparent from this conversation colloquy that attorney for appellant, Mr. Krom was satisfied with the decision of the court. This is further supported by the fact that Appellant did not propose any further "instruction" to the jury regarding this issue at the time the formal jury instructions were proposed. It is very possible that reason Mr. Krom did not request an actual "instruction" be given to the jury at the close of the case was tactical. Courts have long recognized that deciding whether to request a limiting instruction—which may only serve to emphasize damaging evidence—is ordinarily a tactical decision. See State v. Price, 126 Wn.App. 617, 649, 109 P.3d 27 (2005) and cases cited therein; State v. Embry, 171 Wn.App. 714, 762, 287 P.3d 648 (2012), review denied, No. 88162-6 (Wash. May 1, 2013), and cases cited therein; United States v. Gregory, 74 F.3d 819, 823 (7th Cir. 1996) (characterizing the decision not to request a limiting instruction as "solidly within the accepted range of strategic tactics employed by trial lawyers in the mitigation of damning evidence"). Accordingly, a party who claims deficient performance for

counsel's failure to request a limiting instruction must be able to explain why, in the defendant's particular case, the decision was not tactical.

In State v. Kidd, 36 Wn. App. 503, 506-7, 674 P.2d 674 (1983) the court found the admission of a past act by Kidd was wrong but stated "The "other purposes" listed in ER 404(b) are not exclusive. The true test for admissibility of unrelated crimes is not only if they fall into any specific exception, but if the evidence is relevant and necessary to prove an essential ingredient of the crime charged." The court in Kidd then stated "Although the trial court erred in admitting the evidence of the prior criminal conduct, we find that the error was harmless. Because the erroneous admission of other crimes by a defendant is not of constitutional magnitude, the standard of proving "harmless error beyond a reasonable doubt" is inapplicable. Instead, the error is harmless if there is a reasonable probability that the outcome of the trial would not have been materially different had the error not occurred. (Citations omitted.)

In this case there is no doubt that the State proved the charged crimes beyond a reasonable doubt. The calls that were played to support those charges were identified as having been originated by Appellant and received by Ms. Castillo. There were specific facts in the calls such as defendant having been hit by a train, (RP 407, 503) the number of years they were together ({RP 388-9, 421) the fact that there was a previous

assault and of course the fact that there were previous no contact orders which Appellant had violated. All of these facts were discussed in the phone calls. RP 503-8

The State was required to prove beyond a reasonable doubt;

(1) That on or about May 8, 10 (6:24 AM, 10:18 AM), June 26 (two occasions) and June 27 (three occasions) 2012, there existed a no-contact order applicable to the defendant;
(2) That the defendant knew of the existence of this order;
(3) That on or about said date, the defendant knowingly violated a provision of this order;
(4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
(5) That the defendant's act occurred in the State of Washington.

Playing the calls also allowed the jury to hear these same two voices on numerous occasions. On most of those occasions the calls were placed using the name of a real person, "Jose Salgado" who obviously was not Appellant. RP 529, 540, 614. When Ms. Prado was contacted in the recorded call the same voice on the phone stated that it was "Nambi Gamet." RP 512-4

There was the occasional slip where the conversation actually revealed who at least one of the parties was, "MR. GAMET: Yeah, right. You forgot who Nambi Gamet is, huh? I ain't forgot who I am." RP 388

Many of these specific facts were confirmed by Ms. Castillo such as defendant having been hit by a train, (RP 496, 503) the number of years they were together ({RP 489, 503) the fact that there was a previous

assault and of course the fact that there were previous no contact orders which Appellant had violated. All of these facts were discussed in the phone calls. RP 503-8 Ms Castillo admitted/confirmed that there was a no contact order in place. RP 488, 491-2 that she was in Drug Court and had graduated. RP 484-6

The defense was a complete denial that this person who was calling Ms. Castillo was Appellant. The playing of the additional calls allowed the jury to evaluate the voices on those recordings in conjunction with the testimony of the various witnesses, mainly Det. Durbin who testified regarding the previous violations, the identity of the person named in those violations, (RP 413-14) the voices found in the recordings (RP 414-16) and the actual identification of the defendant through a certified copy of Appellant's drivers license, the fact that Appellant had cut his long hair (RP 438-9) The calls were all placed to a specific number that was identified as belonging to Ms. Castillo, the named party in the no contact orders and the party identified as one of the people speaking in the recordings. (RP 419-20)

There was no error in the admission of these recordings. The Appellant and Ms. Castillo knew as they made these calls that they were being recorded, they purposefully used third parties to initiate the calls and the spoke in the "third party" in an attempt to make it sound like they were

talking **about** Appellant and his companion, not that they were the Appellant and Ms. Castillo. The State had to prove that they were in fact the people on those recordings; the only way that could be accomplished was through those tapes.

It is clear from the tapes and from the testimony of Ms. Castillo that she was not going to cooperate with the State in proving that these crimes had been committed. One of the later calls from June was especially telling. In that phone call the person responding to the automated operator states his name "Jose Salgado" in this instance and in this one particular phone call it was in fact "Jose Salgado" who was speaking. It is clear from this call that there had been additional charges filed and Appellant was attempting to contact the victim through Mr. Salgado using Mr. Salgado literally to speak to Ms. Castillo while Mr. Gamet "Anthony" was standing next to Mr. Salgado telling him what to say. It is obvious that "Anthony" is Mr. Gamet. Before the victim Ms. Castillo answers Mr. Salgado is heard on the recording stating "Nambi, wake up." RP 614 Eventually "Anthony" takes the phone (RP 618) and there is a discussion regarding the charges arising from the previous phone calls, of course the conversations are done in third party to a great extent. RP 613-29

MS. CASTILLO: I don't understand how the courts or whatever can put that on there, you know, when his girlfriend didn't even --
MR. SALGADO: Yeah, but, see, the whole thing is, the girlfriend's the victim, if she don't show up to the court and point the finger at him that he violated it, then they
have to drop the charges. And --
MS. CASTILLO: (Inaudible) and she didn't?
MR. SALGADO: But there's certain things that a person can do like, remember when, uh, you can go in and file that paper work and stuff like that so (inaudible) can have that dropped and as long as there was no new charges, like, if they had a new contact order and someone comes up and they call for assault and he beats her up again --
MS. CASTILLO: Yeah.
MR. SALGADO: -- that's what they're there for. That's what the reason those no violation no-contact order, to protect that person from getting beat up again
or getting assaulted again. Because that's the first -- that's the reason why they were put in place because of a domestic violence situation that was physical, you see
what I'm saying? And they're put in place to protect that person. But when a person they call and they talk or something, or just contact each other on the phone or see
each other and say hi, that's not what the law was written for. That's not -- that no-contact order is not put in place to punish somebody for doing that.
MS. CASTILLO: No.
MR. SALGADO: And the courts recognize that and that's why they, uh, you know, sometimes they give people breaks and they just drop the charges and stuff like that. But,
see, if there was -- like, if he called and threatened you to beat you up or --
MS. CASTILLO: Yeah.
MR. SALGADO: -- or, you know, put pressure on you or whatever it is, then that's what the law was written for. So this law that there's no protection order is really flimsy thing, it can be manipulated in certain ways. But it's the law whatever it is it may be, but no matter what, if a victim -- there's a crime against a person and if that person don't go to court –
RP 623-5

It was essential in order for the charges to be proven for some of the recordings to be played. The very basis for these counts was that the

calls were made by Appellant to Ms. Castillo. "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

This court must read the testimony of the victim Ms. Castillo to understand the absolute necessity for the admission of these recordings. This is a victim who had been the subject of a prior assault who was denying that anything had occurred and if it did she was not the victim of anything nor was she scared. She testified that she had determined of her own volition that she did not want the no contact orders, not that she and Appellant had violated them of course just that she did not want them in place in case she and he wanted to get back together which they did. The only possible "error" that could be considered by this court from the admission of the recordings would be that the trial court had allowed too many to be played or that the playing of the tapes was too extensive.

For the sake of argument even if there was error the courts in this state have on numerous instances stated "An evidentiary error is not harmless "if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " State v. Neal, 144 Wash.2d 600, 611, 30 P.3d 1255 (2001) (internal quotation

marks omitted) (quoting State v. Smith, 106 Wash.2d 772, 780, 725 P.2d 951 (1986)).”

As was stated in State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985):

> The Washington Supreme Court has applied two different tests to determine whether error is harmless beyond a reasonable doubt. Under the "contribution" test, the question is whether the tainted evidence contributed to the finding of guilt. Under the "overwhelming evidence" test, the question is whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt. Under either test, the admission of the guilt scent testimony was harmless error. (Citations omitted.)

There was no error when the court admitted the recorded phone calls placed by Appellant to the victim, Ms. Castillo.

RESPONSE TO ALLEGATION TWO - WITNESS TAMPERING

This court recently addressed the question of sufficiency of the evidence in a tampering case factually very similar to this present case which also arose from Yakima County. In State v. Andrews, 172 Wash.App 703, 293 P.3d 1203 1205-1206, (Wash.App. Div. 3 2013) this court ruled;

> The issue is whether sufficient evidence supports Mr. Andrews' witness tampering conviction.
>
> Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier,* 157 Wash.2d 1, 8, 133 P.3d 936 (2006). On appeal, we draw all reasonable inferences from the evidence in favor

of the State and interpret them most strongly against the defendant. *Id.* In the sufficiency context, this court considers circumstantial evidence as probative as direct evidence. *State v. Goodman,* 150 Wash.2d 774, 781, 83 P.3d 410 (2004). We may infer specific criminal intent from conduct that plainly indicates such intent as a matter of logical probability. *Id.* We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Raleigh,* 157 Wash.App. 728, 736, 238 P.3d 1211 (2010), *review denied,* 170 Wash.2d 1029, 249 P.3d 624 (2011).

The crime of witness tampering may be committed by three alternative means: attempting to induce a person to (1) testify falsely or withhold testimony, (2) absent himself or herself from an official proceeding, or (3) withhold information from a law enforcement agency. RCW 9A.72.120(1)(a)-(c).

Mr. Andrews contends nothing links the texts and voice messages to him. But the jury could reasonably infer from the text messages, voice messages, and Ms. Frazier's testimony that Mr. Andrews was attempting to induce Ms. Frazier to be absent from Mr. Ralston's trial. The text messages state they were from Yoshie. Ms. Frazier testified the voice messages were from Yoshie. And, Yoshie is Mr. Andrews' alternative name. Indeed, he has a tattoo of the name Yoshie on his body. Additionally, Ms. Frazier testified to a phone conversation about her not testifying against Mr. Ralston and an offer by Mr. Andrews for $500 in exchange for her silence. The evidence was sufficient for any rational trier of fact to find the essential elements of the charged crime were proved beyond a reasonable doubt. Therefore, Mr. Andrews' evidence insufficiency claim fails.

See also, State v. Lubers, 81 Wn. App. 614, 915 P.2d 1157 (1996)

and State v. Whitfield, 132 Wn.App. 878, 1213, 134 P.3d 1203 (2006);

In reviewing the sufficiency of the evidence to support a guilty verdict in a criminal case, we view the evidence in the light most favorable to the State to determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wash.2d 216,

> 221, 616 P.2d 628 (1980). In making this determination, we consider circumstantial and direct evidence equally reliable. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). We defer to the fact finder in resolving conflicting testimony and in evaluating the credibility of witnesses and the persuasiveness of material evidence. State v. Carver, 113 Wash.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).
> ...
> RCW 9A.72.120(1) provides: "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 ... to: (a) Testify falsely or, without right or privilege to do so, to withhold any testimony." (Emphasis added.) "A person tampers with a witness if he *attempts* to alter the witness's testimony." State v. Williamson, 120 Wash.App. 903, 908, 86 P.3d 1221, *amended on recon.,* 131 Wash.App. 1, 2004 WL 614504, 2004 Wash.App. LEXIS 3712 (2004). "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). (Emphasis in original.)

The State can not find a single instance in the record where Gamet categorically states that he did not write the letter in question. It was clear from the testimony of Ms. Prado and the recording of the phone call from Appellant to Ms. Prado that there was a letter sent to the victim Ms. Castillo. Even though Appellant is using his own name he is still trying to obscure the fact that he is trying to get the letter to Ms. Castillo without actually sending it to her or telling Ms. Prado just to give the letter to Ms. Castillo;

MR. GAMET: Okay. I just, uh, I sent you a letter for to the address and the letter that she got, that she should just read that, so, uh.

MS. PRADO: She (inaudible)?
MR. GAMET: She gave me the (inaudible) for that.
MS. PRADO: Oh, uh-huh.
MR. GAMET: And (inaudible). Yeah, I sent the letter yesterday. (Inaudible).
MS. PRADO: Would you send it through (inaudible)?
MR. GAMET: Yeah, to the (inaudible).
MS. PRADO: Oh, (inaudible), or to my mom's?
MR. GAMET: Yeah.
MS. PRADO: Oh, okay. And my name's there?
MR. GAMET: Yeah.
MS. PRADO: Okay. I don't know -- I know as of yesterday we didn't get nothing, but.
MR. GAMET: Okay. Well, she said you had this letter that said she was going to put money on the phones for me, she told me (inaudible) Tuesday.
RP 514-5

Further, it is the State's position that Appellant admitted that there was in fact contact between he and Ms. Castillo, the claim is that despite any contact she made her decision not to work with the State independent of that contact:

Q All right. Now, the prosecutor has indicated that there's some letter that was sent somewhere between August 20th and August 24th of 2012. Did you ever receive any such letter?
A No.
Q All right. Did that letter cause you to make the decision not to cooperate with the prosecutor?
A No.
Q All right. Had you made that decision a long time ago prior to that?
A Yes.
Q Was that decision made independently by yourself?
A Yes.
Q Was that the product of anything done by Mr. Gamet or said by Mr. Gamet?
A No.

Q Regardless of whether he'd said or done anything, what would your decision have been?
A The same.
Q All right. So you made that decision independently?
A Oh, yes.
Q Not connected with anything said or done by Mr. Gamet?
A Not at all.
Q And not connected in any way with a letter you never received, is that correct?
A I've never seen a letter.
RP 494-5

Appellant challenges the sufficiency of the evidence to support his conviction for witness tampering. When this court reviews a challenge of the sufficiency of the evidence, it shall view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The elements of a crime can be established by both direct and circumstantial evidence one is no less valuable than the other. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). The direct evidence

from the letter and the conversation with Ms. Prado is damning. The State has supplementally designated the exhibit which is the actual letter, the letter can be read by this court.

There was sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd,* 136 Wash.2d 939, 969 P.2d 90 (1998).

The credibility of Ms. Castillo was of utmost importance. She clearly did not want to assist the State in this prosecution. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990

The facts presented to the jury were without a doubt sufficient to meet the test set forth in, State v. Bucknell, 183 P.3d 1078, 1080 (2008) "In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." (Citations omitted.)

It was obvious to the trial court when it ruled over and over and over that there was no basis to dismiss the charges that the State had proven this charge beyond a reasonable doubt. Once again the State supplemented the record with the letter that was admitted and therefore it is now in the record before this court and may be reviewed in its entirety.

The appellant's culpability is further supported by his actions when he contacted Ms. Prado by phone a stated that she needed to get the information to he aunt. This is one of the few if not the only phone call were the Appellant actually used his own name to access the phone system. RP 512 The statements in the recoding which was supplementally designated and is therefore in the record before this court demonstrates that Appellant not only attempted to prevent the testimony of Ms. Castillo but was once again violating the no contact/protection order and he knew that. There was no reason for Appellant to send this letter discussing how Ms. Castillo was to basically just "go up in smoke" to a person whom he had only met one other time and that was back in "07: other than a rather obvious attempt to circumvent the court order that was in place. This all the while knowing full well that his words were being recorded. This is further evidenced by the content of the later two calls where it is obvious that Appellant is now aware of the new charges and

that they arose from and investigation based on the use of the phone and of the mail. RP 510-22

"Intent to attempt a crime may be inferred from all the facts and circumstances." State v. Bencivenga, 137 Wash.2d 703, 709, 974 P.2d 832 (1999). The reasoning by the court for denying, on more than one occasion, the motion to dismiss at the end of the State's case is very helpful;

> THE COURT: Well, the statute clearly states that the elements are that a person attempts to withhold. It doesn't say that it has to be withheld or that someone has to be approached and they don't go testify and the case is over. I think that it was identified by her as coming from there, it was sent there. You can have reasonable inferences from the evidence and circumstances, which I think support the elements of it.
>
> And I said I was going to review Williamson at an appropriate time and I'll do that, so I'm admitting it. I think it's -- I have admitted it and I'm continuing to admit it. Because I did take a brief look at Williamson and I'm not so sure that Williamson stands for what you're saying it stands for. And the other case that was cited, that was –
>
> RP 651-2
>
> **...**
>
> THE COURT: All right. We're on the record. Good afternoon. The jurors are not here. With regard to the motion to dismiss the Tampering With a Witness charge, I don't believe that Williamson and Rempel are authority for supporting that motion to dismiss. As a matter of fact, in Williamson, the case was reversed, but it was reversed on an issue related to exceptional sentencing and it was sent back on an exceptional sentence.
>
> It says, the evidence that the defendant asked one of the victims to ask the other victim to recant her

statement to the police was sufficient to support the conviction of tampering with a witness. But that the exceptional sentence based on findings made by the court and not the jury violated Sixth Amendment because the judge made those findings.

It said certainly it is a case where if a person speaks to another person and tells that person to contact the alleged victim and has language that is sufficient to support tampering with a witness, that's good enough. You don't have to actually communicate it.

And, in fact, in State versus Rempel, which was cited, it says, one can be guilty of an attempt to induce a witness regardless of the effect upon the witness. The witness's reaction here can be relevant because it tends to disprove the State's claim in that case, but that was where he said drop the charges. And they held in that case, well, just telling somebody to drop the charges and apologizing, that doesn't in any way give some kind of an indication that they're trying to keep somebody from going to court or keeping them from testifying or providing evidence to the police as a matter of law.

That's not what we have here. We have a situation in which a letter was written and whether it was communicated or not to her, I mean, as far as the content of it, is not relevant to the crime itself because the crime is the crime of an attempt. And as a matter of fact in Williamson, as well as, I think, Rempel, it says, a person violates --

Well, let's see, wait a minute. A person tampers with a witness if he attempts to alter the witness's testimony. Williamson completed his attempt to alter M.K.'s testimony -- that's the person who was the alleged victim -- when he asked D.R. to talk with M.K. about changing her testimony. That was a completed act. Says he completed his attempt to alter her testimony -- or M.K.'s testimony -- when he asked D.R. to talk with M.K. about changing her testimony. The act here is completed when he sends the letter.

And I think that these both are authority which support the State's case in this, and so I'm denying that motion.

Now, if you have to rely upon, as they mention here in this case, the evidence, reasonable inferences from the evidence and the context in which they were used and, therefore, I don't believe that the motion is well taken. It's denied.
RP 770-2

Shortly after this ruling then trial court rules again:

THE COURT: As I indicated previously, I think the Williamson case addresses that fairly closely. I don't think we're talking about a lesser included offense where you must prove all the elements of the lesser when you prove the greater. I think what we're talking about here is they want an instruction saying an attempt to commit the crime, and the legislature has determined that the crime is an attempt crime.

That's the actual crime itself. It's an attempt to tamper with a witness. If they had said this is a crime that isn't an attempt one, there might be a good argument there except that it says, a person tampers if he attempts to tamper with a witness. I mean, you just have to attempt to do so, so the completed crime is really an attempt and, as stated in Williamson, it's that same language that Mr. Gamet is relying upon.

It says -- I'll read the entire paragraph -- a person tampers with a witness if he attempts to alter – actually, attempts is emphasized -- to alter the witness's testimony. Then it's, quote, "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. Williamson completed his attempt to alter M.K.'s testimony when he asked D.R. to talk with M.K. about changing her testimony."

In this case I could say -- that's Page 6 -- could say Mr. Gamet completed his attempt to alter the testimony when he sent the letter, and that's the completion. That's the completion part, it's completed at that point. Legislature has said an attempt to commit this crime is the actual crime itself. So there cannot be an attempt to

attempt to commit a crime.

And I still believe that I'm correct in that regard and I believe that Williamson and also Rempel, 114 Wn.2d 77, support that when you take into account all the evidence, the reasonable inferences from the evidence that are presented here.
RP 778-9

...

THE COURT: Well, under those circumstances I still think that Williamson is on point and I think you just have an attempt and it's there. If I am incorrect and if Mr. Gamet is convicted, we'll be told about it if he appeals. And I understand the argument. I mean, it's a good argument, but I don't think that's what the law says. So I'm still sticking with my ruling on it.
RP 781

RESPONSE TO ALLEGATION THREE – IMPROPER ADMISSION OF PRIOR CONVICTIONS FOR VIOLATION OF NO CONTACT ORDERS.

Appellant stated that he understood that prior no contact orders were to be admitted, he only objected to other contacts with law enforcement;

MR. KROM: Thank you, Your Honor. We do start out in our motions in limine, Your Honor, asking that there be no reference to any prior police contacts with the Defendant, no -- I don't know if you want to deal with these one at a time under --
THE COURT: I do.
MR. KROM: Okay.
THE COURT: Well, thinking in terms of prior contact as being prior conviction for purposes of a charge. We still have -- well, we still -- you have to prove there's an element of a crime, a prior conviction; right?
MR. SOUKUP: Right.
THE COURT: Well, then, that's prior contact with police. Are you talking about that, Mr. Krom?

MR. KROM: Well, I understand that they have that obligation, but I'm talking about any other prior police contacts that they've -- any other arrests. There are a number of charges where there were not convictions or cases where there were convictions, but those convictions should not be admissible under ER 609. So other than the specific limited necessity that they have to establish prior conviction or convictions to establish the underlying basis for their charge, we'd ask that they not be allowed to go into any other prior contact with Mr. Gamet.
RP 29-30

Once again, the State was required to prove beyond a reasonable doubt;

(1) That on or about May 8, 10 (6:24 AM, 10:18 AM), June 26 (two occasions) and June 27 (three occasions) 2012, there existed a no-contact order applicable to the defendant;
(2) That the defendant knew of the existence of this order;
(3) That on or about said date, the defendant knowingly violated a provision of this order;
(4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
(5) That the defendant's act occurred in the State of Washington.

The State is required to prove each and every element beyond a reasonable doubt. The information which charged Appellant specifically states for each count of FELONY violation of a protection order:

Count 1 - FELONY VIOLATION OF A PROTECTION ORDER - DOMESTIC VIOLENCE RCW 26.50.110(5) and 10.99.020
CLASS C FELONY- The maximum penalty is 5 years imprisonment and/or a $10,000.00 fine.
On or about May 8, 2012, in the State of Washington, with knowledge that the Yakima County Superior Court had previously issued a protection order, restraining order, or no contact order pursuant to Chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in State of Washington vs Nanambi lbo Gamet, Cause No. 09-1-02221-1, which protects Sandra Lee Castillo, you violated the order while the order was in effect by knowingly violating the restraint provisions therein, and/or by knowingly

violating a provision excluding you from a residence, a workplace, a school or a daycare, and/or by knowingly coming within, or knowingly remaining within, a specified distance of a location, and you have at least two previous convictions, Yakima County Superior Court Cause Number 09-1-02221-1 and 04-1-01485-4, for violating a provision of a court order issued under Chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW, or any valid foreign protection order as defined in RCW 26.52.020.

Furthermore, you committed this crime against a family or household ember. (RCW 10.99.020.)

The prior no contact was brought in because the defendant opened the door. He can not now claim error that occurred due to his defense strategy. He is not claiming now that his attorney was ineffective Mr. Gamet was very actively involved with his own defense.

MR. SOUKUP: Anyway, I kind of assume this goes without saying, but just so it's not any surprise, you know, in response to Mr. Krom's questions Ms. Castillo said, you know, she wasn't afraid, she wasn't threatened and all that kind of thing. Obviously I want to ask her about the fact that the 2010 no-contact order came out of a Third Degree Assault conviction in which she was the victim, and also the fact that she was the victim in both the 2002 and 2003 Violation of No-Contact Order convictions.
THE COURT: So how detailed do you want to go into that?
MR. SOUKUP: That's about it -- yes or no.
MR. KROM: Well, we'll object. I think that the question specifically I was asking about relates to the charges that are before the Court, and there has been no allegation of any acts of violence perpetrated by Mr. Gamet towards Ms. Castillo since this incident. All the allegations do not involve violence or threats. All the allegations before the Court involve these telephone calls and/or this letter that was sent that she never received.
MR. SOUKUP: All of which is irrelevant and prejudicial, but he's opened the door and I just want to complete the subject with these simple questions.
THE COURT: She has said she's not threatened, not afraid of him. It seems to me that in a limited fashion you can go into that.
MR. SOUKUP: That's all I'm going to do.

THE COURT: And it's been opened. But I don't want you to go into the details about it.
MR. SOUKUP: No.
MR. KROM: I'll want to follow up if that happens, to clarify that nothing has occurred since this order in April of 2010 involving any violence between the two of them.
THE COURT: Is that a fact or is the State going to then be able to bring in something that's non-charged or something?
MR. SOUKUP: I don't even know.
MR. KROM: To my knowledge, there is no violence act, is there?
MR. SOUKUP: I don't know, but I'll look.
MR. GAMET: There's no alleged violence, nothing up in Seattle.
THE COURT: Well, what I'm thinking of -- I'm not thinking of allegations or anything. I'm thinking of if there has ever been some kind of a complaint or something filed that was a non -- it was just filed that claims that he assaulted her in some way during that time period, but it never got to court and never has an official document. And don't say anything, you're on the record. You were going to speak up there, so. So it's very limited. I'll allow him to talk about, you know, in response to that that one was issued as a result of a Third Degree Assault conviction and then the 2002 and 3 where she was a victim in those.
MR. SOUKUP: Okay.
THE COURT: And I guess if you want to go on from there, make sure that you know what the answer might be.
MR. SOUKUP: All right. That's good advice for everyone.
RP 498-500

RESPONSE TO ALLEGATION FOUR – SENTENCE.

The State concedes this issue, the sentence imposed is in excess of that allowed. The maximum sentence of 60 months was imposed on these class C felonies along with an additional 12 months of community custody. Clearly that is not a sentence allowed and therefore this matter should be remanded for correction of that error. The State would implore this court to make is clear that the remand is for the sole purpose of

amending the Judgment and Sentence to remove this additional 12 month period of supervision which is in excess of the statutory maximum. The State would implore this court it clearly indicate that this is NOT a "resentencing" of Appellant which clearly would allow Appellant to appeal that "resentencing." This request for a clearly mandated order regarding this technical correction of the Judgment and Sentence is in the interests of justice and judicial economy.

RESPONSE TO ALLEGATION FIVE – MISSING ELEMENT.

This is an issue with no basis. Appellant has not supported this allegation with a single fact that would demonstrate that there was any prejudice or that there was a single basis for the use of this phrase. The discussion by the State and the trial court was correct and Appellant has nor had any "right or privilege" that he could assert. This is a phrase that was inserted to insure that actual privileged communication would not be infringed upon by this law; clearly that is not the case here.

This very court stated "The crime of witness tampering may be committed by three alternative means: attempting to induce a person to (1) testify falsely or withhold testimony, (2) absent himself or herself from an official proceeding, or (3) withhold information from a law enforcement

agency. RCW 9A.72.120(1)(a)-(c)." State v. Andrews, 172 Wash.App 703, 293 P.3d 1203 1205 (Wash.App. Div. 3 2013)

The reason the law requires that a party not just raise "an" issue, that it raise "the" issue both at trial and on appeal is that if it is not done at the trial court there is no ability to cure the alleged problem. The contribution of Appellant at trial was not that he had a right to assert any privilege but that perhaps Ms. Castillo did. The State assured the court that is there was the possibility of some charge arising from the testimony of Ms. Castillo that the State would grant her immunity. RP 478- 81 It is interesting to note that the actions of Mr. Krom by stating that perhaps Ms. Castillo should not testify or take the stand are exactly the situation contemplated by the inclusion of the phrase "right of privilege" the failure to include this phrase has also been challenged by Appellant and is addressed elsewhere in this brief.

State v. Wicke, 91 Wn.2d 638, 642-3, 591 P.2d 452 (1979):

> In order to preserve error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it. State v. Fagalde, 85 Wn.2d 730, 539 P.2d 86 (1975). Ideally, this will be done during the course of trial, but the error may be raised in a motion for a new trial. Seattle v. Harclaon, 56 Wn.2d 596, 354 P.2d 928 (1960). Under most circumstances, we are simply unwilling to permit a defendant to go to trial before a trier of fact acceptable to him, speculate on the outcome and after receiving an adverse result, claim error for the first time on appeal which,

> assuming it exists, could have been cured or otherwise ameliorated by the trial court. State v. Perry, 24 Wn.2d 764, 167 P.2d 173 (1946). Even an alleged violation of such an important policy rule as CrR 3.3, our speedy trial rule, is subject to waiver if not raised timely. State v. Williams, 85 Wn.2d 29, 530 P.2d 225 (1975).

There was extensive discussion between the court and the Deputy Prosecuting Attorney during the portion of the trial were instruction were proposed, considered, changed and finally excepted, objected to and adopted. There is not one single word from Gamet indicating that he believed that he had a "right or privilege" that would have trumped the law. Appellant did not attempt to assert this alleged "element" for himself, but proffered that it could have been asserted by Ms. Castillo.

Once again this is an issue that was raised in the trial court but not as it has been now on appeal. There was no basis for the use of this phrase, it did not lessen the burden on the State. It is also a point without a point, once again there was no "right or privilege" that could have been asserted by Appellant that would overcome his actions in attempting to get Ms. Castillo not to come to court and testify and or to change her story and or to just refuse to cooperate all things that he attempted to do.

There was nothing in this case which would even suggest in the slightest that Appellant had a "right or privilege" to stop or hinder the

testimony of Ms. Castillo. RP 786-88, 800-806 Appellant cites to no case in this or any other state which support his theory.

The discussion was whether to include this section or not based on the belief of the State, which the court ultimately agreed with, that this term pertained to and actual privilege.

MR. SOUKUP: Yeah, I don't think it should be in there. It is bracketed and my understanding of it is that if there's some evidence that the person -- you know, the Defendant had some right or privilege to do these things, to induce a person to testify in a certain way.
...
MR. SOUKUP: I think it does modify withhold any testimony or absent them self, but I also think that there's a burden on the Defense to put on some evidence of that before it becomes an issue, and that's why they have it bracketed. Because it's kind of hard to show – I don't know how you prove that he doesn't have right or privilege. Oh, for example, if he was -- let's say they were married and there was marital privilege.
THE COURT: Right.
MR. SOUKUP: Then he would have a right to, you know, tell his wife, I don't want you to testify.
THE COURT: Right. So you're saying it should cross out without right or privilege to do so?
MR. SOUKUP: Right, because there's no evidence of that.
THE COURT: Mr. Krom? You don't think this should be given at all, I realize that.
MR. KROM: Right. Yeah, we're excepting to the giving of the instruction at all. To the extent it is given, I don't know if that could arguably refer to any right or privilege that the witness in this case, Sandra Castillo, might have and I think there is the possibility that she may have a Fifth Amendment right or privilege to withhold information. She doesn't have to provide relevant information to a criminal investigation if she thinks it may incriminate her. (Emphasis mine)
MR. SOUKUP: Well, Your Honor, there's absolutely no evidence of that.
MR. KROM: Well, we objected to her being questioned about certain areas along those lines and there is, at least according to the

interpretation of the detective, discussion about drug usage and whatnot in the recordings that could potentially incriminate the speaker. So I think it should probably just be left in.
MR. SOUKUP: Your Honor, I think under this instruction the Defendant has to have the right or privilege, not the --
THE COURT: I think that's what it's saying, too. It's the person who commits the crime. Well, I don't see that there's any evidence even if there was any right or privilege to do so that she would have.
MR. SOUKUP: Right.
THE COURT: Because he would have to assert that she had this right and she didn't say or do any -- it seems kind of strange that it would be in there. Well, let's look.
MR. SOUKUP: Think it must apply to actual evidentiary privileges. If she were his attorney, he could tell her, don't reveal my confidential information to law enforcement.
THE COURT: All right. I must not have -- I don't think that -- let's see. I think you're correct in that it says without right or privilege to do so to withhold any testimony, it alters that one -- I mean, it relates to that. I'm going to read it more carefully. Without right or privilege to do so, I do not believe it applies to this circumstance. It'll have to be changed**.**
MR. KROM: We're going to strike that out?
THE COURT: Yes.
MR. KROM: All right.
RP 787-8 (Emphasis mine.)

There are few cases that discuss this section of the law, the few that do make it clear that the assertion and privilege that is protected would be one such as the marital privilege; "Neither spousal testimonial nor marital communications privilege applied in witness tampering case where the tampering was specifically for purpose of frustrating effective prosecution of child sexual abuse case. State v. Sanders, 66 Wn. App. 878, 833 P.2d 452 (1992), review denied, 120 Wn.2d 1027, 847 P.2d 480 (1993). Sanders discusses both privilege and the tampering statute. See

also, State v. Ahern, 64 Wn. App. 731, 734 and footnote 2, 826 P.2d 1086 (1992) where there was a question as to whether his trial counsel had "tampered" with witnesses. The court in Ahern states that there would be no tampering if the attorney had advised a person that they had a "right or privilege" to not testify because the law specifically allowed for that.

State v. Johnson, 9 Wn. App. 766, 514 P.2d 1073 (1973) indicates as follows;

> As stated in Cunningham v. State, 488 S.W.2d 117, 121 (Tex. Crim. App. 1972), quoting from 1 McCormick & Ray, Evidence SS 502, pp. 424-25 (2d ed.):
>
> > "The mere fact that information was communicated in confidence or under pledge of secrecy does not raise a privilege. And in the absence of statute the courts have rarely extended to other relationships the protection which the common law afforded to communications between attorney and client and husband and wife. . . ."

There was no "right of privilege" which could have been raised by Appellant, there was no error here. Appellant has not explained how this "element" was "essential" to this case when in fact there was no right or privilege that existed that could have been raised or that needed to be proven.

This court will review alleged errors of law injury instructions de novo. State v. Hayward, 152 Wn. App. 632, 641, 217 P. 3d 354 (2009). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury

of the applicable law. Hayward, 152 Wn. App. at 641. “Due process requires the State to bear the `burden of persuasion beyond a reasonable doubt of every essential element of a crime. '" State v. Deal, 128 Wn.2d 693, 698, 911 P. 2d 996 (1996) The State fully acknowledges that it is a constitutional and reversible error to instruct the jury in a manner that would relieve the State of its burden to prove every essential element of a criminal offense beyond a reasonable doubt. Id at 641 -42, this court will analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. *Id* at 642.

> State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008):
>
> In general, an error raised for the first time on appeal will not be reviewed. State v. Kirkman, 159 Wash.2d 918, 926, 155 P.3d 125 (2007). An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This is a "`narrow'" exception. Kirkman, 159 Wash.2d at 934, 155 P.3d 125 (quoting State v. Scott, 110 Wash.2d 682, 687, 757 P.2d 492 (1988)). A "`manifest'" error is an error that is "unmistakable, evident or indisputable." State v. Lynn, 67 Wash.App. 339, 345, 835 P.2d 251 (1992). An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "`plausible showing'" "`that the asserted error had practical and identifiable consequences in the trial of the case.'" State v. WWJ Corp., 138 Wash.2d 595, 602-03, 980 P.2d 1257 (1999) (quoting Lynn, 67 Wash.App. at 345, 835 P.2d 251). "The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001) (citing WWJ Corp., 138 Wash.2d at 603, 980 P.2d 1257).

While Appellant did take exception to this "instruction" at the trial court it was based on an entirely unrelated basis.

IV. CONCLUSION

For the reasons set forth above this court should deny allegations one through five of this appeal. The sixth allegation regarding the clerical error in the Judgment and Sentence is correct and must be returned to the Superior Court to be addressed.

Respectfully submitted this 18th day of February 2014,

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DECLARATION OF SERVICE

I, David B. Trefry state that on February 18, 2014 I emailed a copy, by agreement of the parties, of the Respondent's Brief , to Sarah Hrobsky at wapofficemail@washapp.org and by US Mail to Nanambi Gamet DOC 996903, Monroe Corrections Center TRU, P.O. Box 888, Monroe, WA 98272-088.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of February, 2014 at Spokane, Washington.

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