

62717-1

62717-1

NO. 62717-1-I

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

REC'D

SEP 30 2009

KING COUNTY Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BARNHILL,

Appellant.

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

The Honorable Deborah Fleck and Brian Gains, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

CHRISTOPHER GIBSON  
KIRA FRANZ  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

2009 SEP 30 PM 4: 17

FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

**TABLE OF CONTENTS**

	Page
A. <u>SUPPLEMENTAL ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Supplemental Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>SUPPLEMENTAL ARGUMENT</u> .....	1
THE EVIDENCE IS INSUFFICIENT TO CONVICT BARNHILL OF WITNESS TAMPERING AS CHARGED IN COUNT III BECAUSE INSUFFICIENT EVIDENCE SUPPORTED THE ALTERNATIVE MEANS CHARGED. ....	1
D. <u>CONCLUSION</u> .....	5

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

State v. Fleming  
140 Wn. App. 132, 170 P.3d 50 (2007)  
review denied, 163 Wn.2d 1047 (2008) ..... 2

State v. Green  
94 Wn.2d 216, 616 P.2d 628 (1980)..... 3

State v. Rivas  
97 Wn. App. 349, 984 P.2d 432 (1999)..... 3

State v. Smith  
159 Wn.2d 778, 154 P.2d 873 (2007)..... 3

State v. Thorpe  
51 Wn. App. 582, 754 P.2d 1050  
review denied, 111 Wn.2d 1012 (1988) ..... 4

State v. Whitney  
108 Wn.2d 506, 739 P.2d 1150 (1987)..... 2

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.72.120 ..... 2, 4

A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The evidence is insufficient to convict appellant of witness tampering, as charged in count III.

Issue Pertaining to Supplemental Assignment of Error

Witness tampering is an alternative means crime. Where two alternative means were charged in count III, but sufficient evidence only supported one of those means, can the conviction be sustained?

B. STATEMENT OF THE CASE

The facts relevant to this issue are set forth in detail in the Brief of Appellant at 3-10 (statement of the case), and 23-31 (argument section C(1)).

C. SUPPLEMENTAL ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO CONVICT BARNHILL OF WITNESS TAMPERING AS CHARGED IN COUNT III BECAUSE INSUFFICIENT EVIDENCE SUPPORTED THE ALTERNATIVE MEANS CHARGED.

In responding to argument C(3) of Barnhill's opening brief, the State conceded that the evidence was so confused on counts IV, V, VI, and VII as to not support convictions for those counts. Brief of Respondent (BOR) at 24, 27. This Court should accept the State's concession of error.

In its response, the State also noted that there is an "alternative means" problem with those counts as well. BOR at 25, 27-28. This issue

also applies to Count III, an additional witness tampering charge. Count III was not attacked by the “evidentiary confusion” argument, as that was the only witness tampering count where the track identification was clear. See BOA at 26.

As the State points out in its response, witness tampering is an alternative means crime. BOR at 27 (citing State v. Fleming, 140 Wn. App. 132, 135-37, 170 P.3d 50 (2007), review denied, 163 Wn.2d 1047 (2008)). Tampering can be committed by inducing the witness to testify falsely, or to absent herself from official proceedings, or to withhold information from a law enforcement agency. Fleming, 140 Wn. App. at 135; RCW 9A.72.120. In this case, the first two means were charged. CP 170-72.

When alternative means are charged, the State must either give a unanimity instruction, or else present sufficient evidence to support conviction on each of the alternative means presented to the jury. State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987); Fleming, 140 Wn. App. at 136. No unanimity instruction was given here. See CP 176-205 (Instructions).

If insufficient evidence supports one of the means submitted to the jury, then the conviction must be reversed unless it can be shown that the verdict was based on only one of the alternative means. Fleming, 140 Wn.

App. at 137 (citing, inter alia, State v. Rivas, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999), overruled on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.2d 873 (2007) (in Rivas, conviction affirmed because while all three alternative means of assault were reflected in the jury instructions, evidence was presented as to only one means, so verdict was necessarily unanimous). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, a reasonable factfinder could find the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

Count I refers to track 1 of the CD and the first section of the transcript. See Exhibit 3 (page 1-7); Exhibit 4 (Track 1); Exhibit 8. On that track, Barnhill encourages H.R.T. to contact his attorney and tell say she lied in her previous statements. Exhibit 3 (page 2-5); Exhibit 4 (track 1).

Barnhill does not encourage H.R.T. to fail to appear; in fact, he repeatedly tells her that if she doesn't appear for court, her previous statements will be used to convict him. Exhibit 3 (page 4); Exhibit 4 (track 1). But he does say "But, they cannot convict me unless you go in there and say that we, that we did anything." Exhibit 3 (page 3); Exhibit 4 (track 1).

This might permit the jury to infer that in speaking with his attorney, H.R.T. is to “set in stone” her version of events and therefore testify falsely when they get to trial.<sup>1</sup> It would not, however, permit a reasonable juror to believe that Barnhill was encouraging H.R.T. to not appear, especially given his repeated comment that if she doesn’t appear, he will be convicted on the basis of her prior statements. Exhibit 3 (page 4); Exhibit 4 (track 1). In this circumstance, it is unclear which basis the jury might have used to convict, but there is insufficient proof under the means of inducing H.R.T. to absent herself from trial. RCW 9A.72.120. Accordingly, that count must also be reversed and dismissed because a unanimous jury cannot be demonstrated. State v. Thorpe, 51 Wn. App. 582, 586-87, 754 P.2d 1050, review denied, 111 Wn.2d 1012 (1988).

---

<sup>1</sup> It bears noting that in a later page in the transcript, Barnhill encourages H.R.T. to run over and give him a hug when they are both in court. Exhibit 3 (page 20); Exhibit 4 (track 4). It is in yet further on in the transcript when Barnhill begins to encourage H.R.T. to not come to court, and even then, H.R.T. expresses confusion: “I thought it was before if I didn’t go [to court] then you go to prison.” Exhibit 3 (page 23); Exhibit 4 (track 5).

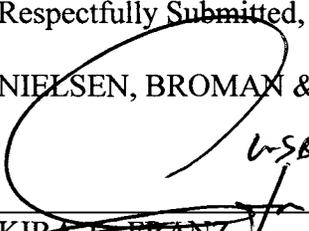
D. CONCLUSION

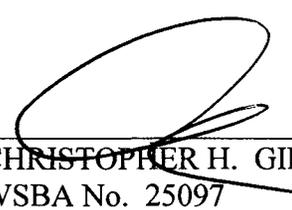
Because insufficient evidence supported one of the alternative means of Count III, and the Court cannot determine whether the verdict was unanimous, Count III must be dismissed.

DATED this 30<sup>th</sup> day of September, 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
KIRA F. FRANZ  
WSBA No. 24824

  
CHRISTOPHER H. GIBSON,  
WSBA No. 25097  
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 62717-1-1
	)	
CHRISTOPHER BARNHILL,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF SEPTEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTOPHER BARNHILL  
DOC NO. 322338  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 SEP 30 PM 4:17

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2009.

x *Patrick Mayovsky*