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NO. 53353-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID GARCIA, JR.,  
Appellant.

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

The Honorable John Fairgrieve, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court improperly commented on R.G.'s credibility when it instructed the jury that her testimony need not be corroborated to find Mr. Garcia guilty and the instruction did not include language specifying that the credibility of witnesses is ultimately for the jury to decide.
2. The trial court erred when it instructed the jury on multiple alternative means of committing witness tampering and the state only charged Mr. Garcia with one means: inducing a witness to testify falsely.
3. The trial court abused its discretion when it denied Mr. Garcia's request for an evidentiary hearing related to juror misconduct where the record shows that jurors deliberated before the close of evidence and without all jurors present.
4. The trial court erred when it answered the jury's question related to the elements of witness tampering in a manner that relieved the state of its burden to prove an attempt to tamper with R.G. rather than Ms.

Garcia.

5. The state failed to prove beyond a reasonable doubt that Mr. Garcia committed witness tampering against R.G.

#### Issues Presented on Appeal

1. Did the trial court improperly comment on R.G.'s credibility when it instructed the jury that her testimony need not be corroborated to find Mr. Garcia guilty and the instruction did not include language specifying that the credibility of witnesses is ultimately for the jury to decide?
2. Did the trial court err when it instructed the jury on multiple alternative means of committing witness tampering and the state only charged Mr. Garcia with one means: inducing a witness to testify falsely?
3. Did the trial court abuse its discretion when it denied Mr. Garcia's request for an evidentiary hearing related to juror misconduct where the record shows that jurors deliberated before the close of evidence and without all jurors present?

4. Did the trial court err when it answered the jury's question related to the elements of witness tampering by stating that the defendant does not need to directly contact the witness, which in the negative, relieved the state of its burden to prove an attempt to tamper with R.G. rather than Ms. Garcia?
5. Did the state prove beyond a reasonable doubt that Mr. Garcia committed witness tampering against R.G.?

B. STATEMENT OF THE CASE

Substantive Facts

David and Kathy Garcia are married and previously lived in Vancouver, Washington with Ms. Garcia's two daughters: Rynan and R.G. RP 510-11, 529. After Mr. and Ms. Garcia met, Mr. Garcia acted as a father to both of Ms. Garcia's daughters, but he and R.G. were especially close. RP 443, 513, 636-38. The relationship between Mr. Garcia, Rynan, and R.G. deteriorated as the girls got older. RP 435-37, 524-25. The primary source of tension between Mr. Garcia and Ms. Garcia's daughters was Mr. Garcia's role as the disciplinarian and the punishments he imposed for not doing chores

or breaking house rules. RP 484, 525-27, 596.

In December of 2017, R.G. told Rynan that Mr. Garcia had been touching her inappropriately. RP 450. Rynan informed Ms. Garcia of R.G.'s allegations. RP 452-53. Ms. Garcia did not immediately report the allegations to law enforcement and instead reported them to her friend who works as a crisis counselor and is a mandatory reporter. RP 412, 573-74. Ms. Garcia's friend reported the allegations to Child Protective Services (CPS). RP 414-15. CPS referred the case to the Clark County Sheriff's Department. RP 283, 577.

Detectives spoke with Ms. Garcia and Rynan about R.G.'s disclosure and arranged a child forensic interview for R.G. RP 284-86. During this interview, R.G. disclosed that Mr. Garcia had touched her inappropriately beginning when she was six or seven years old and that the touching progressed to sexual intercourse when she was older. RP 371-79; Ex. 17.

R.G. recalled an incident when she was seven or eight years old where Mr. Garcia touched her chest over her shirt. RP 640-41. R.G. also described how Mr. Garcia would occasionally touch her on her buttocks, vagina, and breasts both over and under her

clothing. RP 644-47. R.G. recalled that Mr. Garcia penetrated her vagina with his finger and performed oral sex on her during some of the incidents. RP 647, 661.

The first instance of sexual intercourse R.G. described occurred when she was still in elementary school and Mr. Garcia asked her to remove her pants and underwear before penetrating her vagina with his penis while they were in the kitchen. RP 642-43. R.G. also described an incident where Mr. Garcia had her remove her skirt and underwear and have sex with him while he was seated outside on the family's patio. RP 657-59. Finally, R.G. described incidents where Mr. Garcia had her stroke his penis with her hand and perform oral sex on him. RP 666-68, 678-79.

The police arrested Mr. Garcia based on the interviews with R.G., Ryan, and Ms. Garcia. RP 286-87. While Mr. Garcia was in jail awaiting trial, Ms. Garcia received a letter addressed to Mr. Garcia at her home address. RP 584-86. Ms. Garcia recognized the handwriting to be Mr. Garcia's. RP 583. The conclusion of the letter contained the following passage:

You and I both know that when R.G. has to testify in court she will never be the same after that and it will mess with her for the rest of her life. So, here is my idea. Honey, there is another way without a victim. There is no case if you drop

the charges and tell them that R.G. won't testify or against me or they don't have a case. If they try to act tough and threaten a subpoena, tell them that R.G. will testify she was mistaken. They will try to take you out, but you have the rights, not them, our daughter, not theirs. You can do this anytime you want. They can't really do shit about it.

Ex. 4; RP 587-88. Ms. Garcia provided this letter to law enforcement. RP 405-06.

### Procedural Facts

The state charged Mr. Garcia with two counts of child molestation in the first degree, four counts of rape of a child in the first degree, and two counts of rape of a child in the second degree. CP 8-11. All of these charges included allegations that the offenses were committed as part of an ongoing pattern of abuse and that Mr. Garcia used a position of trust to commit the offenses. CP 8-11. The state later amended the information to add two counts of witness tampering: one related to R.G., and one related to Ms. Garcia, based on the letter Ms. Garcia received while Mr. Garcia was incarcerated. CP 113-18. Mr. Garcia elected to proceed to a jury trial. CP 27-31.

The state's information charged Mr. Garcia with committing one alternative means of witness tampering: inducing witnesses to testify falsely. CP 160-61. The state charged witness tampering in

count 10 as follows:

That he, DAVID GARCIA, in the county of Clark, State of Washington, between February 9, 2018 and March 7, 2018, did attempt to induce R.G. (female, DOB 2/8/05), a person who the defendant knew was a witness, or a person whom the defendant had reason to believe was about to be called as a witness in an official proceeding, or a person whom the defendant had reason to believe may have had information relevant to a criminal investigation, or a person whom the defendant had reason to believe may have had information relevant to the abuse and neglect of a minor child, *to testify falsely*; contrary to Revised Code of Washington 9A.72.120(a)(a).

CP 161 (emphasis added). The state charged witness tampering in count 9 using identical language, but substituted Ms. Garcia's name for R.G.'s. CP 160-61.

At the close of the state's case-in-chief, Mr. Garcia made a motion to dismiss the count of witness tampering related to R.G. on the basis that the state's evidence only showed an attempt to have Ms. Garcia withhold information from law enforcement, not R.G. RP 733-34. The trial court denied this motion. RP 736-38.

Mr. Garcia objected to one of the state's proposed jury instructions that read as follows:

In order to convict a person in the crime of child molestation in the first degree, rape of a child in the first degree, or rape of a child in the second degree as defined in these instructions it is not necessary that the testimony of the alleged victim be corroborated.

RP 776-77. Mr. Garcia objected to the inclusion of this instruction on the basis that it infringed on the jury's role of determining the credibility of witnesses as discussed in the Washington Supreme Court's comments on corroboration instructions. RP 752-53. The trial court overruled Mr. Garcia's objection and included the instruction in its instructions to the jury:

[TRIAL COURT]: So, again, I don't, you know I'm faced with a situation really where multiple cases would seem to indicate that this is -- it's not error to give this instruction. It's -- this issue has been raised, it's been raised, it was raised. In fact, it was talked about in jury selection. And so, I think the State's going to be apparently making this argument. It's supported by law and it appears that it's appropriate. So, I'm going to deny the defense motion.

RP 755. Following this ruling, Mr. Garcia asked the trial court to include language in the instruction that reaffirmed that the jury is to determine all questions of witness credibility. RP 755-56. The trial court denied this request on the basis that other instructions contain the same information. RP 756.

Although the state only charged Mr. Garcia with attempting to induce Ms. Garcia and R.G. to testify falsely, the trial court instructed the jury as follows:

To convict a defendant of the crime of tampering with the witnesses is charged in Count 9, each of the following elements of the crime must be proved beyond a reasonable

doubt. One, that on or about or between February 9, 2018 and March 7, 2018 the defendant attempted to induce . . . Kathy . . . Garcia to testify falsely, *or without right or privilege to do so, withhold any testimony or absent herself from any official proceeding, or withhold from the law enforcement agency information she had relevant to a criminal investigation of the abuse or neglect of a minor child.*

RP 777-78 (emphasis added). The trial court instructed the jury with identical language on count 10 related to R.G. RP 778. The trial court also included multiple alternative means in its instruction defining witness tampering. RP 777.

During deliberations, the jury submitted the following question to the court: “Does witness tampering require a direct attempt to communicate with a witness?” RP 843; CP 223. The state requested that the court respond by answering “no.” RP 843-44. Mr. Garcia objected to this proposal and asked the court to instruct the jury to refer to the elements in the instructions they had already been given. RP 844. The trial court overruled Mr. Garcia’s objection and granted the state’s request:

[TRIAL COURT]: Alright, well after receiving the question, I did a brief amount of research. Basically, I pulled up the statute and looked at the citations to it and that’s how I came across *Williamson*<sup>1</sup>. . . . *Williamson* indicates that, let’s see, based in the headnotes it’s an attempt to induce a witness to not testify does not require an actual contact with the witness. So, direct – I read direct attempt in the question to

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<sup>1</sup> *State v. Williamson*, 131 Wn. App. 1, 6, 86 P.3d 1221 (2004).

mean actual contact . . . I know probably the safest course is simply to, you know, to refer them back to their instructions, but you know with the way I read the question here, does it require directive attempt. And, it seems that Williamson is on point with that. It's a pretty narrow question and it seems my impression is that -- that Williamson answers the question.

RP 844-45.

The state referred to multiple uncharged alternative means of committing witness tampering during its closing argument:

Basically, the State has to prove that the defendant attempted to induce Kathy and R.G. to either testify falsely, *withhold testimony, absent herself or withhold information*. We have to prove that the defendant knew Kathy Garcia was and R.G. were witnesses or had relevant information. And we have to prove that it happened in the State of Washington. . . . *He attempted to induce Kathy to withhold the testimony of her daughter*. Don't even bring her into court. He attempted to tell her to testify falsely by dropping the charges or *withholding information* and he attempted to do that with R.G. by way of her mom because if R.G. couldn't bring her, she can't be here to tell the truth.

RP 800. The jury found Mr. Garcia guilty as charged and returned affirmative special verdicts related to all of the sentencing enhancements. CP 262-79.

A week after the jury returned its verdict, one of the jurors contacted the trial court and informed court staff that she had observed jurors discussing Ms. Garcia's testimony before the close of evidence and without all of the other jurors present. CP 314-20.

When the juror reported these improper deliberations to jury administration, she was told to “let it go.” CP 319. Mr. Garcia moved for a new trial and asked for an evidentiary hearing at sentencing based on this juror misconduct. RP 859; CP 307. The trial court denied Mr. Garcia’s motion without questioning the reporting juror or any of the other jurors:

[TRIAL COURT]: I don’t find that the defendant has met his burden under *Hawkins* to prove that juror misconduct has occurred. . . . But even if I find the events occurred as she described them, I don’t find that the defendant was prejudiced by this alleged misconduct. Again, as Juror Number 2 indicated, the event she described absolutely not - did absolutely not change her verdict and she, upon questioning by the interviewers I believe on April 12th, indicated that none of these events affected the trial.

RP 866-67. The trial court adopted the state’s sentencing recommendation and sentenced Mr. Garcia to an exceptional sentence upwards of 360 months in prison based on the special verdicts returned at trial. RP 879-83. Mr. Garcia filed a timely notice of appeal. CP 395.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT INCLUDED THE STATE'S PROPOSED INSTRUCTION ON CORROBORATION IN ITS INSTRUCTIONS TO THE JURY AND DID NOT INCLUDE LANGUAGE SPECIFYING THAT THE JURY MUST DECIDE QUESTIONS OF WITNESS CREDIBILITY

Article 4, section 16 of the Washington Constitution provides that “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. art. IV, § 16. It is improper for a judge to communicate to the jury an opinion on the truth or value of witness testimony. *State v. Zimmerman*, 130 Wn. App. 170, 180, 121 P.3d 1216 (2005) (citing *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)). State law does not require corroboration of the alleged victim’s testimony for the state to convict a defendant of a sex offense. RCW 9A.44.020(1). However, when instructing a jury on this point, “trial courts should consider instructing the jury that it is to decide all questions of witness credibility as part of the instruction.” *State v. Johnson*, 152 Wn. App. 924, 936, 219 P.3d 958 (2009).

In *Zimmerman*, this court “reluctantly approved” of a corroboration instruction virtually identical to the one the trial court

gave in Mr. Garcia's trial. *Johnson*, 152 Wn. App. at 935-36 (citing *Zimmerman*, 130 Wn. App. at 181). The *Zimmerman* court relied heavily on the Washington Supreme Court's holding in *State v. Clayton*, 32 Wn.2d 571, 572, 202 P.2d 922 (1949), where the court approved of a corroboration instruction that contained a second sentence informing the jury that while corroboration is not required to convict, questions of witness credibility are for the jury to decide. *Johnson*, 152 Wn. App. at 936. The *Clayton* court cited this additional language in approving of the instruction. "[I]t is plain, we think, that the jury must have understood, from the second sentence of the instruction, that appellant's guilt or innocence was to be determined from *all* the evidence in the case." *Clayton*, 32 Wn.2d at 577 (emphasis in original).

When analyzing this precedent in *Johnson*, the court noted that the Washington Supreme Court has never announced a bright-line rule whether trial courts must include this language in a corroboration instruction, and in *Zimmerman*, the defendant never argued that it was error to omit such language. *Johnson*, 152 Wn. App. at 936. The *Johnson* court concluded that while corroboration instructions are accurate statements of the law, in the absence of

language reiterating that the jury is to decide all questions of witness credibility, “the instruction stating that no corroboration is required may be an impermissible comment on the alleged victim’s credibility.” *Johnson*, 152 Wn. App. at 936-37.

In this case, under *Johnson*, the trial court’s inclusion of a corroboration instruction without language specifying that the jury is to decide all questions of witness credibility constituted an impermissible comment on R.G.’s credibility. A jury instruction that implicitly or impliedly conveys the judge’s opinion on the value of a witness’s testimony is a prejudicial comment on the evidence. *State v. Mellis*, 2 Wn. App. 859, 862, 470 P.2d 558 (1970) (citing *State v. Lampshire*, 74 Wn.2d 888, 447 P.2d 727 (1968)).

The comments to Washington’s pattern jury instructions discuss this concern with corroboration instructions:

The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

11A Washington Pattern Jury Instructions: Criminal 45.02 (4<sup>th</sup> ed. 2015). Instead of leaving questions of witness credibility to the

pattern instructions and arguments of counsel as suggested in the comments, the trial court elected to give an instruction suggesting that R.G.'s testimony is particularly reliable simply because she is the alleged victim.

In Mr. Garcia's case, the trial court declined to adopt the *Johnson* court's directive to add language reaffirming that the jury must still evaluate the alleged victim's credibility even if no corroboration is required to convict. *Johnson*, 152 Wn. App. at 936; *Clayton*, 32 Wn.2d at 577.

The instruction impermissibly suggested that R.G.'s testimony was reliable without the language from *Clayton* and *Johnson* which reiterated and saved the instruction from judicial comment by reaffirming that credibility must be determined by the jury. *Johnson*, 152 Wn. App. at 936; *Clayton*, 32 Wn.2d at 577. The trial court's failure to add this language to its instruction created a comment on R.G.'s credibility in violation of art. IV, § 16 of the Washington State Constitution.

Judicial comments are presumed to be prejudicial and the state bears the burden of proving the error did not affect the outcome of the defendant's trial. *State v. Levy*, 156 Wn.2d 709,

725, 132 P.3d 1076 (2006). R.G.'s credibility was critical during Mr. Garcia's trial. R.G. was the only witness to the incidents forming the basis for the sex charges against Mr. Garcia. The jury's evaluation of her credibility impacted its verdict and the state cannot meet its burden to show that the trial court's comment on the evidence did not affect the outcome of Mr. Garcia's trial. This court should reverse his convictions and remand the case for a new trial. *State v. Hartzell*, 156 Wn. App. 918, 937, 237 P.3d 928 (2010) (citing *Levy*, 156 Wn.2d at 723).

2. THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY ON MULTIPLE ALTERNATIVE MEANS OF COMMITTING WITNESS TAMPERING WHERE THE STATE ONLY CHARGED MR. GARCIA WITH INDUCING WITNESSES TO TESTIFY FALSELY

Appellate courts generally refuse to review issues not initially raised in the trial court. RAP 2.5(a). However, an appellate court may review an unpreserved issue if it constitutes a manifest error affected a constitutional right. RAP 2.5(a)(3). Jury instructions that omit an essential element of the charged crime relieve the state of its burden to prove the elements of the crime beyond a reasonable doubt. *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003)

(citing *State v. Linehan*, 147 Wn.2d 638, 654, 922 P.2d 1285 (1996)). Such an error violates due process and a defendant may raise it for the first time on appeal. *Chino*, 117 Wn. App. at 538 (citing RAP 2.5(a)(3)).

“The manner of committing an offense is an element, and the defendant must be informed of this element in the information.” *State v. Laramie*, 141 Wn. App. 332, 342, 169 P.3d 859 (2007) (citing *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988)). When an information charges one of several alternative means of committing an offense, it is error to instruct the jury that they may consider other means by which the crime could have been committed, regardless of the strength of evidence admitted at trial. *Bray*, 52 Wn. App. at 34 (citing *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942)).

Instructional errors that favor the prevailing party are presumed prejudicial unless it affirmatively appears that the error was harmless. *Chino*, 117 Wn. App. at 540 (citing *Bray*, 52 Wn. App. at 34-35). “[T]he error may be harmless if other instructions clearly and specifically define the charged crime.” *Chino*, 117 Wn. App. at 540 (citing *Severns*, 13 Wn.2d at 549).

Here, the state charged Mr. Garcia with two counts of witness tampering committed by one alternative means: attempting to induce a witness to testify falsely. CP 160-61. However, the trial court's instructions to the jury included three distinct alternative means in the "to convict" instructions discussing the witness tampering counts. RP 777-78. Including these alternative means in the "to convict" instructions constitutes reversible error.

The circumstances of this case are analogous to those analyzed in *Chino*. In *Chino*, the state charged the defendant with intimidating a witness based on one of four alternative means contained in the statute. *Chino*, 117 Wn. App. at 533. The trial court instructed the jury on the charged means of committing the crime, but also included an uncharged means in its "to convict" instruction. *Chino*, 117 Wn. App. at 540. The Court of Appeals held that including the uncharged means in the jury instructions constituted reversible error because there was no other instruction that accurately defined the charged offense, meaning "[i]t therefore remains possible that the jury convicted [the defendant] on the basis of an uncharged alternative." *Chino*, 117 Wn. App. at 540-41.

Similar to the case in *Chino*, here it is possible the jury

convicted Mr. Garcia based on an uncharged alternative means of committing witness tampering. The trial court did not include any other instruction that accurately defined which means of committing the offense the state had charged. The trial court's instructions contain the uncharged means of inducing someone to withhold information from law enforcement or absent themselves from an official proceeding in its "to convict" instruction, and then repeats the same erroneous language in the instruction defining the offense. RP 777-78.

The prejudice to Mr. Garcia was exacerbated when the state argued for the jury to convict Mr. Garcia based on the uncharged means during closing argument. When a prosecutor refers to an uncharged means during closing argument, it exacerbates any instructional error and increases the prejudice to the defendant. *Bray*, 52 Wn. App. at 34 (citing *Severns*, 13 Wn.2d at 549). During closing, the state argued that it bore the burden of proving that "the defendant attempted to induce Kathy and R.G. to either testify falsely, *withhold testimony, absent herself or withhold information.*" RP 800 (emphasis added).

The state also argued that Mr. Garcia was guilty because

“[h]e attempted to induce Kathy to withhold the testimony of her daughter.” RP 800. These arguments parrot the uncharged alternative means contained in the trial court’s instructions to the jury but were not included in the amended information. CP 116-17; RP 777-78.

Because the instructional error favored the state, prejudice to Mr. Garcia is presumed. *Chino*, 117 Wn. App. at 540. This presumption can be rebutted, but only if the trial court includes additional instructions clarifying which means of committing the offense the jury may actually consider. *Chino*, 117 Wn. App. at 540. In Mr. Garcia’s case, the trial court did not include a clarifying instruction. In fact, the trial court included the uncharged means in two separate instructions. RP 777-78.

The state then exacerbated the prejudice to Mr. Garcia by including the uncharged means in its closing arguments. As was the case in *Chino*, the possibility remains that the jury convicted Mr. Garcia based on an uncharged means of committing the offense. His convictions should be reversed, and the case remanded for a new trial.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. GARCIA'S REQUEST FOR AN EVIDENTIARY HEARING RELATED TO JUROR MISCONDUCT WHEN A JUROR REPORTED THAT THE JURY DELIBERATED BEFORE THE CLOSE OF EVIDENCE AND WITHOUT ALL JURORS PRESENT

A juror reported multiple irregularities that occurred during deliberations in Mr. Garcia's trial. This juror reported that some of the jury discussed the case without all jurors present during a lunch break on the third day of Mr. Garcia's trial. CP 318-19. The same juror reported that some jurors discussed the case without all jurors present during deliberations. CP 314-16. Finally, the juror reported that she attempted to report these instances of misconduct to the court clerk, who told her to "let it go." CP 319-20.

A trial court may order a new trial when it appears that a substantial right of the defendant was materially affected by "misconduct of the prosecution or jury" or "[i]rregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial." CrR 7.5(a).

In cases where the moving party's representations are

insufficient to determine whether juror misconduct affected a substantial right of the defendant, a trial court may, and sometimes must, hold an evidentiary hearing. See *State v. Robinson*, 146 Wn. App. 471, 481 n. 7, 191 P.3d 906 (2008) (citing *United States v. Saya*, 247 F.3d 929, 934 (9<sup>th</sup> Cir. 2001)) (evidentiary hearing mandatory unless trial court can determine exact scope and nature of alleged juror misconduct).

The Washington State constitution guarantees all criminal defendants the right to an impartial and unanimous jury verdict. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) (citing Wash. Const. art. I, §§ 21, 22). The constitutional right to a jury trial includes the right to a unanimous verdict and the right to have the jury reach their consensus through deliberations amongst all 12 of the jurors. *Lamar*, 180 Wn.2d at 585.

Motions for a new trial based on juror misconduct are within the trial court's discretion. *State v. Berhe*, 193 Wn.2d 647, 661, 444 P.3d 1172 (2019) (citing *Turner v. Stime*, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009)). A trial court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d

540 (2016) (citing *State v. Barnes*, 85 Wn. App. 638, 669, 932 P.2d 669 (1997)).

Here, the trial court declined to hold an evidentiary hearing on the alleged juror misconduct because it found that Mr. Garcia failed to show that jurors engaged in misconduct or that the alleged misconduct affected Mr. Garcia's trial. RP 866-67. These findings are not supported by the record. The record does not contain the substance of the discussions alleged to constitute misconduct, but the juror reported what she overheard, which included the jury discussing Ms. Garcia's testimony before deliberations. CP 314, 319. While the record does not contain the substance of these discussions, it does establish that jurors were discussing the case before having seen all of the evidence and without all jurors present.

The trial court did not interview each juror to determine the extent of the misconduct, but rather decided *sua sponte*, that the alleged misconduct did not affect Mr. Garcia's trial. The trial court relied heavily on the reporting juror's opinion that the improper discussions she described did not affect the verdict to find that any misconduct did not materially affect Mr. Garcia rights. RP 867.

This reliance is misplaced because trial courts may not consider statements that inhere in the jury's verdict when deciding a motion for a new trial based on juror misconduct. *Turner*, 153 Wn. App. at 589. In other words, "[j]urors may provide only factual information regarding actual conduct alleged to be misconduct, not about how such conduct affected their deliberations." *State v. Reynoldson*, 168 Wn. App. 543, 548, 277 P.3d 700 (2012) (quoting *State v. Marks*, 90 Wn. App. 980, 986, 955 P.2d 406 (1998)).

Thus, the trial court applied an incorrect legal standard when it relied on the juror's statements that inhere in the jury's verdict to find that the conduct did not affect Mr. Garcia's right to a fair trial. Applying an incorrect legal standard constitutes an abuse of discretion. *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). The trial court abused its discretion by relying on the one juror's opinion and when it denied Mr. Garcia an evidentiary hearing based on statements that inhere in the jury's verdict. *Lamar*, 180 Wn.2d at 585. This court should remand Mr. Garcia's case to the trial court with instructions to hold an evidentiary hearing to determine whether jurors engaged in misconduct that affected his right to a fair trial.

4. THE TRIAL COURT COMMENTED ON THE EVIDENCE AND ABUSED ITS DISCRETION WHEN IT ANSWERED THE JURY'S QUESTION REGARDING THE ELEMENTS OF WITNESS TAMPERING IN A MANNER THAT RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ELEMENTS OF THE CHARGE BEYOND A REASONABLE DOUBT

During deliberations, the jury presented a question to the trial court asking whether direct communication between a defendant and witness is necessary to find the defendant guilty of witness tampering. RP 843. Over defense objections, the court instructed the jury that witness tampering did not require direct contact between the defendant and witness. RP 844-45.

Washington court rules permit a trial court to respond to questions from the jury during deliberations. CrR 6.15(f). Whether to give additional instructions during deliberations is within the trial court's discretion. *State v. Jasper*, 158 Wn. App. 518, 542, 245 P.3d 228 (2010) (citing *State v. Ng*, 110 Wn.2d 32, 42-43, 750 P.2d 632 (1988)). However, it is reversible error for the court to comment on the evidence or instruct the jury in a manner that relieves the state of its burden to prove every essential element of the charged crime beyond a reasonable doubt. *State v. Hayward*, 152 Wn. App.

632, 641-42, 217 P.3d 354 (2009) (citing *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

In *Williamson* the court discussed a situation where the defendant attempted to tamper with the victim through a third party by having that third-party demand that the victim change their testimony. *Williamson*, 131 Wn. App. at 4-6. The demand was meant to be conveyed to the victim, and the defendant specifically instructed the third-party to convey specific information to the victim. *Williamson*, 131 Wn. App. at 4. Based on these facts, the *Williamson* court affirmed the defendant's conviction because he attempted to induce the actual victim to change her via a message passed by a third-party. *Williamson*, 131 Wn. App. at 6.

Mr. Garcia's case is factually distinguishable from *Williamson*. While the trial court was correct that the *Williamson* court held that witness tampering does not require direct contact, it misunderstood that in *Williamson*, the court required the defendant to use a third party to induce the victim to alter her testimony. In Mr. Garcia's case the issue concerned whether Mr. Garcia attempted to induce R.G., to testify falsely, withhold testimony, or absent herself from an official proceeding., rather than only attempted to induce

Ms. Garcia to change her testimony.

The trial court's original instructions to the jury accurately conveyed that Mr. Garcia must have attempted to induce R.G. to withhold testimony or absent herself from a proceeding to find him guilty on that count. RP 778. The trial court's reply to the jury's question commented on the evidence because it suggested that the jury could convict Mr. Garcia for tampering with R.G. based on communications asking Ms. Garcia to alter her own statements to law enforcement. This comment is presumed to be prejudicial and the state bears the burden of proving the error did not affect the outcome of the Mr. Garcia's trial. *Levy*, 156 Wn.2d at 725.

The instruction relieved the state of its burden to prove an attempt to tamper with R.G. While Mr. Garcia is not required to communicate directly with R.G. to convict him of tampering with her, the state's evidence must still prove an indirect attempt to induce her to testify falsely, withhold testimony, or absent herself from an official proceeding. RCW 9A.72.120(1); RP 778. In this case, the state's evidence only shows an attempt to induce Ms. Garcia to change her statements. By answering the jury's question in the negative, the trial court suggested that Mr. Garcia is guilty of

tampering with R.G. because he discussed R.G. and her role in the case while asking Ms. Garcia to withhold testimony. This instruction was erroneous and relieved the state of its burden at trial.

Providing a jury instruction that relieves the state of its burden to prove every elements of the charged crimes beyond a reasonable doubt constitutes reversible error. *State v. Sibert*, 168 Wn.2d 306, 315, 230 P.3d 142 (2010) (citing *Pirtle*, 127 Wn.2d at 656). This court should reverse Mr. Garcia's conviction for witness tampering related to R.G. and remand the case for a new trial.

5. THE STATE FAILED TO PROVE  
BEYOND A REASONABLE DOUBT  
THAT MR. GARCIA TAMPERED WITH  
R.G.

To convict a defendant of witness tampering, the state must prove beyond a reasonable doubt that: (1) the defendant attempted to induce a person to testify falsely, absent himself or herself from an official proceeding, or withhold testimony; and (2) the defendant knew that the person was a witness in an official proceeding. RCW 9A.72.120(1).

Evidence is sufficient to support a verdict only if the jury has a factual basis for finding each element of the offense proved 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, 221-222, 616 P.2d 628 (1980). The evidence is viewed in the light most favorable to the prosecution. *Green*, 94 Wn.2d at 221. Appellate courts defer to the trier-of-fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Circumstantial evidence is as reliable as direct evidence. *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The defendant in a criminal case may move for dismissal based on insufficient evidence before trial, at the end of the state's case-in-chief, at the end of all the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001) (citing *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996)). When reviewing a motion to dismiss based on sufficiency, the appellate court will review all of the evidence "using the most complete factual basis available at the time the sufficiency challenge is raised." *State v. McReynolds*, 142 Wn. App. 941, 947, 176 P.3d 616 (2008) (citing *Jackson*, 82 Wn. App. at 608-09). The

court must then determine whether any rational trier of fact could find the essential elements of the charged crime beyond a reasonable doubt. *McReynolds*, 142 Wn. App. at 947 (citing *Green*, 94 Wn.2d at 221).

Mr. Garcia addressed the letter he wrote from jail to Ms. Garcia and asked her to tell prosecutors that R.G. would not testify against him or that R.G. would testify she was mistaken in her original disclosures. RP 588. The letter does not contain any communication directed towards R.G. and there is no evidence in the record that Ms. Garcia showed the letter to R.G.

Witness tampering does not require actual contact with the witness. *Williamson*, 131 Wn. App. at 6. However, cases like *Williamson* are distinguishable from Mr. Garcia's case because the defendant in *Williamson* attempted to communicate with the witness through a third party. *Williamson*, 131 Wn. App. at 4. Here, Mr. Garcia never attempted to communicate with R.G. through Ms. Garcia. Instead, he only attempted to communicate with Ms. Garcia about her role in providing information to law enforcement.

The letter asks Ms. Garcia to "tell them R.G. won't testify against me" and to "tell them that R.G. will testify she was

mistaken.” RP 588. None of these requests can be characterized as an attempt to induce R.G. to testify falsely, withhold testimony, or absent herself from an official proceeding. Rather, they can only be characterized as attempts to have Ms. Garcia alter the information she had communicated to law enforcement.

Even viewing the letter in a light most favorable to the state, it fails to show that Mr. Garcia attempted to induce R.G. to testify falsely. The only requests in the letter related to testimony or appearing in court are directed toward Ms. Garcia and which ask her to withhold information from law enforcement. RP 588.

The state failed to prove that Mr. Garcia tampered with R.G. Its evidence only shows an attempt to tamper with Ms. Garcia. The state presented insufficient evidence to prove the essential elements of witness tampering as they relate to R.G.

The remedy following reversal for insufficient evidence is dismissal of the charge. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1999) (citing *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). The trial court erred when it denied Mr. Garcia’s motion to dismiss for insufficient evidence. This court should reverse his conviction for witness tampering in count 10 and order

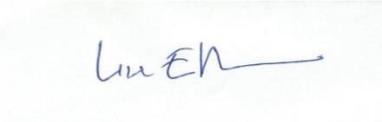
dismissal of the charge.

#### D. CONCLUSION

The trial court improperly commented on R.G.'s credibility when it instructed the jury that her testimony need not be corroborated to find Mr. Garcia guilty and improperly commented on the evidence by answering the jury's question regarding witness tampering in the negative. The trial court also erred when it instructed the jury on multiple alternative means of committing witness tampering when the state had only charged one. Furthermore, the trial court erred by denying Mr. Garcia's request for an evidentiary hearing related to juror misconduct when the record reflects that jurors deliberated before the close of evidence and without all jurors present. Finally, the state failed to prove that Mr. Garcia tampered with R.G. Based on these errors, Mr. Garcia respectfully requests that this court reverses his convictions, dismiss count 10, and remand the case for a new trial on the other charges.

DATED this 3<sup>rd</sup> day of January 2020.

Respectfully submitted,

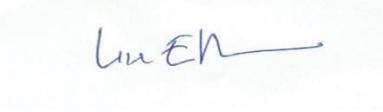


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I, Lise Ellner, a person over the age of 18 years of age, served the Clark County Prosecutor's Office CntyPA.GeneralDelivery@clark.wa.gov and David Garcia, Jr./DOC# 340198, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on January 3, 2020. Service was made by electronically to the prosecutor and David Garcia, Jr. by depositing in the mails of the United States of America, properly stamped and addressed.



\_\_\_\_\_  
Signature

**LAW OFFICES OF LISE ELLNER**

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