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DECEMBER 9, 2014  
Court of Appeals  
Division III  
State of Washington

32566-1-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID L. GILMAN, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF GRANT COUNTY

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APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The court violated due process by entering judgment on a verdict where the evidence was insufficient to support an essential element of the offense.

B. ISSUE

1. The accused asked a third party to appear at a court hearing and lie on his behalf. The third party consistently and repeatedly refused to do so. State officers and prosecutors were not aware of the existence of this third party prior to the hearing. Is this evidence sufficient to support finding that the accused reasonably believed the third party was, or would be called as, a witness to a legal proceeding?

C. FACTS

Prior to November 26, 2013, David Gilman had been arrested and released on conditions which included not having contact with Rachelle Thomas or their children. (RP 73-74; Exh. 1) On November 26, Officers Scott Ent and Kohl St. Peter visited Ms. Thomas's home on an unrelated matter. (RP 104, 113) A man who was at the apartment identified himself to the officers as David Gilman. (RP 105)

In reviewing some police reports Sergeant Mike Williams learned a person identified as Mr. Gilman had been with Rachelle Thomas at her home on November 26. (RP 72) He checked several resources and located a copy of the document which specified that Mr. Gilman was released from jail on condition he not have contact with his daughter or her mother. (RP 73-74; Exh. 1) He asked Officers Ent and St. Peter to provide more detailed reports of their visit to Ms. Thomas and he referred this information to the prosecutor's office. (RP 81-82)

On January 22, 2104 the court held a hearing to determine whether Mr. Gilman had violated the terms of his conditional release. (RP 105) Ms. Thomas testified that the man whom police encountered in her home on November 26 was not Mr. Gilman. (RP 108) She told the court the man was "Frankie Lazar." (RP 108) Following the hearing Officer Ent asked Ms. Thomas to provide him with additional information so he could locate and talk to Mr. Lazar. (RP 131-32) Officer Ent eventually found a photograph of a person named Frank Larioz which Ms. Thomas identified as the person who had been at her apartment in November. (RP 132-33) Prior to the January 22 hearing, none of the officers involved in this case were aware of a person named Lazar or Larioz being involved in any way. (RP 82, 132)

Officer Ent and Sergeant Williams visited Mr. Larioz. (RP 135) Mr. Larioz told the officers he knew David Gilman and showed them a message exchange on his telephone, and permitted them to photograph the cell phone screen images. (RP 76, 134-35) Mr. Larioz assured the officers that he had not been at the home of Rachelle Thomas on November 26.

The State charged Mr. Gilman with one count of witness tampering, RCW 9A.72.120. (CP 1) The charge was tried to a jury.

Officers Ent and St. Peter identified the defendant as the man they had seen in Ms. Thomas's apartment and testified that they had interviewed Mr. Larioz, who did not resemble the man they had seen in November.

Mr. Larioz testified that Mr. Gilman had repeatedly asked him to go to court and to testify that he, not Mr. Gilman, was Ms. Thomas's November visitor. (RP 186-87) He repeatedly told Mr. Gilman that he would not lie for him and that he had never agreed to do so. (RP 186, 197) When they spoke in person Mr. Gilman asked him "to say something where I was when I wasn't" and he responded "that I had just got out of prison, that I'm not willing to go back and lie in front of a judge for your faults." (RP 186) Mr. Gilman had made the same request on several

occasions and “I got to the point where I got aggravated with him and told him to get the hell out of my - - out of my face.” (RP 193)

He identified the content of the images on his phone as communications between himself and Mr. Gilman. (RP 187-88) The photographs show that on January 18 Mr. Gilman asked Mr. Larioz to testify on his behalf, to which Mr. Larioz responded:

Look dude you told the police officer your first and last name I don't feel like lying to a judge when he asked me that question why did you tell the police officer your name is David Gilman you know what I mean I can get charged for lying to a judge and I'm not trying to do that

(Exh. 2, pp. 33-34)

The court instructed the jury:

Instruction No. 7: To convict the defendant of the crime of tampering with a witness, each of the following elements of the crime must be proved beyond a reasonable doubt:

One, that on or about January 22, 2014, the defendant attempted to induce a person to testify falsely; and

Two, that the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings; . . .

(RP 282) The jury found Mr. Gilman guilty. (RP 319)

## D. ARGUMENT

### 1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT CONVICTION.

For a jury to find a defendant guilty of a crime, the State must prove all essential elements of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (construing U.S. Const. amend. XIV, § 1). Evidence is sufficient to prove guilt if, after viewing the evidence in the light most favorable to the State, any rational jury could find all essential elements 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)). An evidence sufficiency challenge admits the truth of the State's evidence and any inferences the jury may reasonably draw from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court defers to the jury's assessment of witness credibility and evidence weight. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

A reasonable belief that the person to be induced "is about to be called as a witness" is an essential element of witness tampering:

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason

to believe may have information relevant to a criminal investigation . . . to:  
(a) Testify falsely . . . .

RCW 9A.72.120.

Mr. Larioz was not a witness at the hearing on January 22, 2014. The evidence in this case establishes that Mr. Gilman hoped that Mr. Larioz could be called as a witness to falsely testify that he was the person in Ms. Thomas's apartment on November 26. But Mr. Larioz's testimony and the messages displayed on his cell phone establish that at no time could Mr. Gilman have reasonably believed that Mr. Larioz could be induced, bribed, shamed or cajoled into testifying as Mr. Gilman wished. (Exh. 1, pp. 34-40) The State presented no evidence that Mr. Gilman had reason to believe the State would call Mr. Larioz as a witness. The State presented no evidence that Mr. Larioz gave Mr. Gilman any reason to believe he would perjure himself on Mr. Gilman's behalf. There is no evidence to support an essential element of the charged offense, namely the inference that Mr. Gilman had reason to believe Mr. Larioz was, or would be called as, a witness in the proceeding to review the alleged violation of the conditions of his release.

Principles of double jeopardy bar retrial when evidence insufficiently supports a conviction. *Burks v. United States.*, 437 U.S. 1, 10–11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

E. CONCLUSION

The charge against Mr. Gilman should be dismissed.

Dated this 9th day of December, 2014.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32566-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
DAVID L. GILMAN,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on December 9, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

D. Angus Lee  
dlee@co.grant.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on December 9, 2014, I mailed a copy of the Appellant's Brief in this matter to:

David L. Gilman  
Grant County Jail Inmate  
PO Box 37  
Ephrata, WA 98823

Signed at Spokane, Washington on December 9, 2014.

  
Janet G. Gemberling  
Attorney at Law