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Court of Appeals
Division III
State of Washington

NO. 32566-1-III

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DAVID LYLE GILMAN, APPELLANT

Appeal from the Superior Court of Grant County
The Honorable John M. Antosz

No. 14-1-00059-9

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When considering the evidence in the light most favorable to the State, was there sufficient evidence to convince a rational trier of fact that defendant was guilty of tampering with a witness?

B. STATEMENT OF THE CASE.

1. Procedure

On January 24, 2014, the Grant County Prosecuting Attorney's Office (State) charged David Lyle Gilman (defendant) with tampering with a witness, RCW 9A.72.120. Defendant's jury trial began on June 4, 2014, before the Honorable John M. Antosz. RP 44.

After the State rested its case-in-chief, defendant moved to dismiss based on the sufficiency of the evidence. RP 233. Specifically, defendant argued he had not tampered with a "witness" as contemplated by RCW 9A.72.120 because the person he had tampered with had not been subpoenaed by the State, nor did the State expect the person to testify at an official proceeding. *See* RP 234–40. The court listened to argument from both parties at length and denied defendant's motion, reasoning defendant's actions constituted tampering against both a "witness" and a

person defendant “ha[d] reason to believe” would be called in an official proceeding. RP 264–65.

The jury found defendant guilty as charged. CP 45.

On June 24, 2014, the court sentenced defendant to 75 days in custody.¹ CP 50 (paragraph 4.1(a)). That same day, defendant timely filed a notice of appeal. CP 66–67.

2. Facts

On November 26, 2013, Moses Lake Police Department (MLPD) Officers Kohl St. Peter and Scott Ent responded to a possible assault at an apartment at 845 East Hill in Moses Lake, Washington. RP 104, 127–28. They found four individuals in the apartment: defendant, Rachelle Thomas, and two children. RP 104, 128. The officers left shortly after determining nothing had occurred.

A few days later, MLPD Sergeant Mike Williams reviewed the reports filed by Officers St. Peter and Ent from the events above. RP 72–73. Previously, Sgt. Williams had been investigating defendant on an unrelated, pending case (cause number 13-1-00215-1), and discovered defendant had violated the conditions of his pretrial release on that case by contacting Ms. Thomas and her children. RP 72–74. Sgt. Williams

¹ Defendant had an offender score of zero with a standard range of one to three months. CP 49 (paragraph 2.3).

informed the State of the violation and the State subsequently moved the court to reconsider defendant's condition of release on the unrelated matter (13-1-00215-1). The court scheduled a hearing on January 22, 2014 to hear the State's motion.

At the hearing, Officers St. Peter and Ent were surprised to hear Ms. Thomas testify defendant *was not* present at the apartment on November 26, but rather a man she identified as "Frankie Lazar." RP 108, 129–30. Officer St. Peter was baffled by Ms. Thomas' testimony because he recognized defendant as the same person he contacted at the apartment and had verified defendant's identity through dispatch that evening. RP 105–06. Officer Ent was also surprised by Ms. Thomas' testimony because he knew defendant from previous contacts and easily recognized defendant as the man at the apartment. RP 129.

Officer Ent immediately began investigating Ms. Thomas for perjury. RP 131–32. The next morning he interviewed Ms. Thomas, who clarified that "Frankie Lazar" was actually defendant's friend, "Frankie Larioz." RP 184–85. Familiar with Mr. Larioz, Officer Ent and Sgt. Williams drove to his apartment to question him about the events of November 26. RP 76, 134.

Mr. Larioz told officers that leading up to the January hearing, defendant had repeatedly asked him—both in person and via electronic

communications—to appear with Ms. Thomas and lie to the judge on defendant’s behalf. RP 184–97. Specifically, defendant asked Mr. Larioz “numerous times” to “stand in front of the judge” and claim he (not Gilman) was at the apartment in November. RP 186–87. Defendant coupled his requests with threats to kill himself and offers to give Mr. Larioz money and a job. RP 218; Pl. Ex. 2.

Mr. Larioz documented some of the messages from defendant, which showed defendant’s name and picture, and showed the officers his phone. RP 77, 84–85, 135–36. However, while Officer Ent retrieved a camera to take photographs of the messages, defendant contacted Mr. Larioz and learned officers were there. RP 226. Before Officer Ent returned, the messages on Mr. Larioz’ phone no longer showed the name or picture of the sender—presumably because defendant had removed Mr. Larioz as a contact on his own, corresponding Facebook account. RP 145–46, 226. Based on their investigation, officers moved forward with witness tampering charges against defendant.

Defendant did not present a case on his own behalf. Instead, defense counsel cross-examined the officers to highlight that before the January-22 hearing, none of the officers knew about Larioz’ potential involvement in the case. RP 81–83, 110–12, 140–43. He also showed that Mr. Larioz pleaded guilty to lesser charges the day before he testified,

though Mr. Larioz indicated his pending criminal charges had no influence on his testimony. RP 198–99.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO CONVINCED A RATIONAL TRIER OF FACT THAT DEFENDANT WAS GUILTY OF TAMPERING WITH A WITNESS.

When reviewing for sufficiency of the evidence, the court must view the evidence in the light most favorable to the State to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981); *see also State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (holding that all reasonable inferences from the evidence must be interpreted in favor of the State and interpreted most strongly against the defendant).

Circumstantial and direct evidence are considered equally reliable on review. *Thomas*, 150 Wn.2d at 874. Determinations regarding conflicting evidence or credibility are up to the trier of fact and not subject

to review. *Id.* Specifically regarding credibility determinations, the Washington State Supreme Court has held that “great deference” must be given to the trier of fact’s determinations because “[i]t, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

To prove defendant was guilty of tampering with a witness, the State had to prove the following elements beyond a reasonable doubt:

- (1) That on or about January 22, 2014, the defendant attempted to induce a person to testify falsely; and
- (2) 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 proceeding; and
- (3) That any of these acts occurred in the State of Washington.

CP 41 (Instruction No. 7).²

It is irrelevant whether defendant succeeded in his attempt. *See State v. Whitfield*, 132 Wn. App. 878, 898, 134 P.3d 1203 (2006). “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. *Id.* at 897.

On appeal, defendant does not contest the sufficiency of the evidence regarding the first or third elements of the crime. *See Appellant’s Brief* at 5–7. The State presented evidence sufficient to prove defendant

² The jury instruction corresponds with RCW 9A.72.120.

repeatedly attempted to induce Mr. Larioz to testify falsely at the January hearing and the acts occurred in Washington.³ RP 184–97; Pl. Ex. 2.

When considering the evidence in the light most favorable to the State, there was sufficient evidence for the jury to determine that Mr. Larioz was a person who defendant had reason to believe was about to be called as a witness in an official proceeding.

First, the jury heard evidence that defendant and Ms. Thomas, together, approached Mr. Larioz and asked him to stand in front of a judge and lie to the court. RP 186–87. This infers defendant, prior to visiting Mr. Larioz, had conspired with Ms. Thomas to fabricate a story about who was present in the apartment in November. RP 186–87. Apparently defendant had already succeeded in convincing Ms. Thomas to testify on his behalf, so even though Mr. Larioz rejected defendant’s offer, defendant—at the moment of inducement—had reason to believe Mr. Larioz was about to be called as a witness.

Second, defendant had every reason to believe Mr. Larioz would be called as a witness because defendant, through Ms. Thomas, made Mr.

³ In fact, defendant concedes the first element and acknowledges he attempted to induce Mr. Larioz to testify falsely at an official proceeding: “The accused asked a third party to appear at a court hearing and lie on his behalf.” Appellant’s Brief at 1. Additionally, the evidence showed the crime occurred in Washington because every witness testified that the acts occurred in Moses Lake and the underlying conditions of release that defendant violated prevented him from leaving Washington State. *See* Pl. Ex. 1A. The trial court held this evidence was sufficient for the jury to infer the crime occurred in Washington when it denied defendant’s halftime motion to dismiss. RP 265–66.

Larioz' testimony relevant and necessary *during* the hearing. After Ms. Thomas lied on his behalf, defendant should have anticipated the State would call Mr. Larioz to rebut Ms. Thomas' perjury even though the State did not know about Mr. Larioz until the hearing. Officer Ent's actions immediately following the January-hearing prove exactly that: he interviewed Ms. Thomas in the hallway to investigate her for perjury and further investigate the veracity of her claims. He also contacted Mr. Larioz as soon as possible to determine whether Mr. Larioz was present at Ms. Thomas' apartment in November.

Further evidence that defendant had reason to believe Mr. Larioz was going to be called to testify was that he communicated with Mr. Larioz while Sgt. Williams and Officer Ent were at Mr. Larioz' apartment. RP 226. In order to cover his witness-tampering tracks, defendant immediately deleted Mr. Larioz from his Facebook account in hopes to prevent officers from reviewing the incriminating messages. RP 145-46, 226. Defendant's blatant attempt to cover the crime manifests that he recognized officers were going to call Mr. Larioz to testify.

By conspiring with Ms. Thomas to lie, defendant had reason to foresee the State would investigate that claim and call Mr. Larioz to testify. These facts, especially when considered in the light most favorable

to the State, would convince a rational trier of fact that defendant was guilty of tampering with a witness.

Defendant requests this court to consider only two reasons why he might not have had a reason to believe Mr. Larioz was about to be called at the proceeding: (1) the State did not call or list Mr. Larioz to be a witness, and (2) Mr. Larioz rejected defendant's offer to testify falsely—thus defendant merely “hoped” Mr. Larioz would testify but could not “reasonably believe” he would. Appellant's Brief at 6.

Defendant's first premise does not support his position because it is not determinative of the issue before the court. It confuses what could be sufficient evidence to satisfy culpability under the statute with what is actually necessary. Under RCW 9A.72.120, tampering with a witness does not require the State to subpoena the tampered person or otherwise put a defendant on notice who it intends to call. Certainly evidence (e.g., via subpoena, witness lists) that the State intended to call a particular person in a proceeding would be *sufficient* to demonstrate a defendant had reason to believe a person is about to be called to testify. However, such evidence is not necessary under the plain language of the statute.

The State Supreme Court held as much when it construed a former version of the witness-tampering statute: “The offense is committed by endeavoring to prevent any person, *whether subpoenaed as a witness or*

not, from appearing and giving evidence.” *State v. Bringgold*, 40 Wn. 12, 19–20, 82 P. 132 (1905), *overruled on other grounds by State v. Hamshaw*, 61 Wn. 390, 112 P. 379 (1910). The same reasoning should apply today.

This argument also overlooks evidence, like this case, that defendant tampered with a person entirely within his control and/or outside of the State’s knowledge. If the court were to adopt defendant’s reasoning, the statute should read: “a person is guilty of tampering with a witness if he attempts to induce a person he has reason to believe is about to be called [*by the government*] as a witness” But the statute is silent as to which party may call the witness.

Defendant’s second argument fails because RCW 9A.72.120 does not criminalize defendant’s actions only if he believed he successfully induced a person to testify falsely. It only matters he “attempt[ed] to induce” a witness to testify falsely at any official proceeding. *See, e.g., Whitfield*, 132 Wn. App. at 897; *State v. Williamson*, 131 Wn. App. 1, 6, 86 P.3d 1221 (2004).

Defendant’s second reason also fails because it greatly extends the duration of time a defendant must have a “reason to believe” a person is about to be called as a witness. It does not matter that on the morning of the hearing defendant did not anticipate Mr. Larioz to testify. The statute

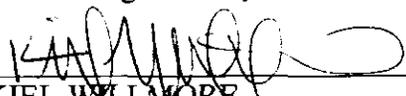
does not read so narrowly. Defendant had “reason to believe” when he and Ms. Thomas initially approached Mr. Larioz and attempted to induce him to lie.

D. CONCLUSION.

The State offered sufficient evidence to convince a rational trier of fact that defendant was guilty of witness tampering. Defendant had reason to believe Mr. Larioz was about to be called to testify in an official proceeding when he tried to induce Mr. Larioz to testify falsely. Additionally, defendant had reason to believe the State would call Mr. Larioz to rebut Ms. Thomas’ perjury, as evidenced by his attempts to delete his communications to Mr. Larioz while officers investigated the crime. For these reasons, the State respectfully requests this Court to affirm defendant’s conviction.

DATED: March 9, 2015.

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32566-1-III
)	
v.)	
)	
DAVID LYLE GILMAN,)	DECLARATION OF SERVICE
)	
Appellant.)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter on Janet G. Gemberling, Attorney for Appellant, by e-mail, receipt confirmed, pursuant to the parties' agreement:

Janet G. Gemberling
admin@gemberling.com

That on this day I delivered to the Grant County Sheriff an envelope addressed to Appellant containing a copy of the Brief of Respondent for delivery to the Appellant in the Grant County Jail.

David Lyle Gilman
Grant County Jail
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Dated: March 9, 2015.



Kaye Burns