No. 31402-2-III
Consolidated with No. 314049

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NANAMBI I. GAMET,

Appellant.

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

The Honorable F. James Gavin

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The trial court violated its mandatory duty to give an ER 404(b) limiting instruction as requested.

Mr. Gamet requested the jury be instructed that recordings of telephone calls placed eight weeks prior to the charging period for tampering with a witness were admitted for the limited purpose of showing a common scheme or plan. RP 290. Contrary to ER 105, however, the court refused to give the requested instruction, on the faulty grounds the jury instructions specifically listed the charging period for the tampering charge. RP 290-91, 572-73. ER 105 provides:

> When evidence which is admissible as to one party of for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, **shall** restrict the evidence to its proper scope and instruct the jury accordingly.

(Emphasis added). The term "shall" in a statute imposes a mandatory duty. In re Marriage of Kim, __ Wn. App. __, 317 P.3d 555, 565 (2014). Therefore, the court's refusal to give the requested instruction was in violation of its mandatory duty to do so.

The State argues evidentiary rulings are reviewed for abuse of discretion. Br. of Resp. at 2-3. However, Mr. Gamet challenges the failure to give the requested limiting instruction, which is not

discretionary, and does not challenge the court's evidentiary decision to admit the recordings. The State's argument is inapposite.

The State argues Mr. Gamet's failure to propose a written limiting instruction at the end of the case was a tactical decision. Br. of Resp. at 5. However, as indicated in the State's lengthy quote from the trial court's oral ruling, the court refused to give the requested limiting instruction, either orally or in writing. Br. of Resp. at 4-5; RP 291-92. In light of the court's specific denial of his request for a limiting instruction, the State's argument regarding trial tactics is unsupported by the record.

Failure to give an ER 404(b) limiting instruction requires reversal unless the error was harmless and did not materially affect the outcome of the trial. State v. Gresham, 173 Wn.2d 405, 425, 269 P.3d 207 (2012). Ironically, even the State confuses the limited purpose for which the evidence was admitted, both at trial and on appeal. Although the telephone calls were admitted to establish a common plan or scheme for witness tampering only, the prosecutor argued in closing that a comparison of the voice in the recordings of the uncharged telephone calls with the recordings of the charged calls established Mr. Gamet was the person who placed the charged calls in volition of the no contact order. RP 889-94. This confusion is reflected in the State's argument on appeal that the error was harmless because the recordings of the uncharged calls

were "essential" to identify Mr. Gamet's voice as the person who placed calls in violation of the no contact order. Br. of Resp. at 7-11.

In light of the State's improper reliance on the uncharged calls to establish Mr. Gamet's identity, rather than the limited purpose for which the calls were admitted, and the failure of the court to properly instruct the jury on the limited purpose of the evidence, it is likely the jury similarly relied on the evidence for an improper purpose. The error was not harmless and reversal is required.

2. The State failed to present sufficient evidence to establish tampering with a witness beyond a reasonable doubt.

The State presented insufficient evidence to establish Mr. Gamet attempted to induce Ms. Castillo to withhold testimony, absent herself from trial, or withhold information relevant to the investigation of purported violations of a no contact order. Ms. Castillo testified that she never requested the no contact order, she repeatedly tried to have the order lifted, Mr. Gamet did not attempt to persuade her to act in any particular way, and she freely chose to withhold cooperation with the prosecution of the instant charges. RP 491-93, 495-96.

To establish the charge, the State relied primarily on a letter written by Mr. Gamet to Ms. Prado, with the intent that Ms. Prado give the letter to Ms. Castillo. Ex. 2. In the letter, Mr. Gamet advised Ms. Castillo

how to proceed "if she doesn't want to cooperate." RP 710-11; Ex. 2. Although the letter reflects that Mr. Gamet "hope[s] and pray]s]" Ms. Castillo will not cooperate, the letter does not threaten her or otherwise attempt to prevent her cooperation, if she chose to do so.

The State quotes extensively from State v. Andrews, 172 Wn. App. 703, 293 P.3d 1203 (2013), which it characterizes as "factually very similar" to the instant case. Br. of Resp. at 12-13. This is incorrect because the case is neither legally nor factually similar to the present case. In Andrews, the defendant challenged the admission of text and voice messages and disputed the sufficiency of the evidence to establish he was the source of text and voice messages to the witness. 172 Wn. App. at 704-05. Here however, Mr. Gamet is not appealing the sufficiency of the evidence to establish that he was the source of the calls and letter. Rather, he appeals the sufficiency of the evidence to establish he attempted to induce Ms. Castillo to withhold her cooperation.

Moreover, in Andrews, in one message to the witness, the defendant stated, "You need to fucking stay under the radar. Stay the fuck down and yeah just be like that girl. Now that's on, that, that is on the real because if it happens any difference than yeah, you're gonna have some problems." Id. at 705. In addition, the witness testified the defendant offered her $500 if she did not testify and she was afraid to testify against

the defendant for fear of retaliation for doing so. Id. at 705, 706. By stark contrast here, Mr. Gamet never threatened or tried to bribe Ms. Castillo, and, throughout the investigation and at trial, Ms. Castillo insisted that she was not afraid of Mr. Gamet and she did not wish to cooperate in the prosecution for violation of a court order that she never requested and did not want enforced. RP 491-93, 495-96.

The State mistakenly contends that Mr. Gamet's attempts to obscure his contacts with Ms. Castillo support the charge of tampering with a witness. Br. of Resp. at 14-16, 18-19. Mr. Gamet's actions demonstrate his awareness of the no contact order only, and are irrelevant to the charge of witness tampering.

The State argues the court's denial of Mr. Gamet's Green[1] motion demonstrates that the charges were proved beyond a reasonable doubt. Br. of Resp. 18. This too is incorrect. Under Green, a court may grant a motion to dismiss after the State rests its case in chief only when, after viewing the evidence in the light most favorable to the State, no rational trier of fact could find the essential elements of the offense beyond a reasonable doubt. 94 Wn.2d at 221. This standard is entirely different from a jury determination regarding proof beyond a reasonable doubt after both parties have presented their cases.

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

The evidence relied upon by the State, in addition to Ms. Castillo's testimony, was insufficient to prove tampering with a witness beyond a reasonable doubt, and reversal is required.

3. The trial court erred in admitting evidence of Mr. Gamet's prior convictions for violation of a court order as substantive evidence.

The penalty provision of the violation of a court order statute, RCW 26.50.110, that increases punishment based on recidivism is not an element of the offense. A penalty classification is not an element of the offense, even if the classification is included in the same statute that sets forth the elements of the offense. Almendarez-Torres v. United States, 523 U.S. 224, 241, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); State v. Williams, 162 Wn.2d 177, 187-88, 170 P.3d 39 (2007). Therefore, Mr. Gamet's prior convictions for violation of a court order were irrelevant and erroneously admitted to establish a statutory element of the offense. See Ex. 14, 15, 15A.

The State argues Mr. Gamet waived this issue by acquiescing to the court ruling that the prior convictions were elements of the offense. Br. of Resp. at 22-23. However, acquiescence to a court ruling is not equivalent to waiver of an objection.

The State also argues Mr. Gamet "opened the door" to the prior convictions during cross-examination of Ms. Castillo. Br. of Resp. at 24-

25. The court ruled the prosecutor was able to use the prior convictions to impeach Ms. Castillo, but cautioned, "I don't want you to go into the details about it." RP 499. This ruling clearly indicated the evidence was admissible for the limited purpose of impeachment only, and not as substantive evidence. Evidence admitted to impeach a witness's credibility may not be used as substantive proof of guilt. State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005).

The improper admission of Mr. Gamet's prior offenses as substantive evidence was highly prejudicial, especially given that the prior offenses were similar to the charged offenses. See State v. Bowen, 48 Wn. App. 187, 195-96, 738 P.3d 316 (1987). Reversal is required.

4. The omission of the phrase "without right or privilege to do so" in the instructions for tampering with a witness misstated the law and relieved the State of its burden of proof.

The tampering with a witness statute proscribes in relevant part, attempting to induce a witness to "without right or privilege to do so, to withhold any testimony." RCW 9A.72.120(1)(a). However, neither the definitional instruction nor the "to convict" instruction for tampering with a witness included the phrase "without right or privilege to do so," thereby misstating the law and relieving the State of its burden of proving every essential element of a crime beyond a reasonable doubt. See State v.

Linehan, 147 Wn.2d 638, 653, 56 P.3d 542 (2002) (a jury instruction that misstate or omits an essential element of the offense relieves the State of its burden of proof). Accordingly, reversal is required. See State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) ("An instruction that relieves the State of its burden to prove every essential element of a crime requires automatic reversal.").

The State argues that the phrase was properly omitted because Mr. Gamet did not assert a right or privilege "that would have trumped the law." Br. of Resp. at 28. This argument improperly shifts the burden of production to the defense and is unsupported by the language of the statute. Nothing in the statutory language indicates a legislative intent to cast "right or privilege" as an affirmative defense for which the defense would bear the burden of production. By contrast, for example, in the context of sex offenses, the Legislature enacted a specific statute entitled "defenses to prosecution under this chapter," which squarely place the burden on the defendant by a preponderance of the evidence. See RCW 9A.44.030.

Moreover, the State invades the province of jury and engages in fact-finding by repeatedly arguing, "Appellant has nor [sic] had any 'right or privilege' that he could assert," "there was no 'right or privilege' that could have been asserted by Appellant," "[t]here was nothing in this case

which would even suggest in the slightest that Appellant has a 'right or privilege' to stop or hinder the testimony of Ms. Castillo," and "Appellant has not explained how this 'element' was 'essential' to this case when in fact here was no right of privilege that existed that could have been raised or that needed to be proven." Br. of Resp. at 26, 28-29, 31. Regardless of the State's view of the evidence, this clearly is a factual question that must be submitted to and decided by a jury.

Omission of the phrase "without right or privilege to do so" misstated the law, relieved the State of its burden of proof, and requires reversal.

5. The State properly concedes this matter must be remanded for re-sentencing because the combined terms of confinement and community custody exceed the statutory maximum for the offenses.

The State's concession that this matter should be remanded for resentencing is well-taken. Br. of Resp. at 25-26. Mr. Gamet was convicted of eight count of violation of a court order and one count of tampering with a witness, all of which are Class C felonies with a statutory maximum sentence of 60 months. RCW 9A.20.021(1)(c), 9A.72.120(2), 26.50.110(5). However, the court imposed a term of confinement on each count of 60–month term of confinement plus 12 months of community custody, for a combined total of 72 months. CP 105-11, 201-08. Because

the combined total terms of confinement plus of community custody exceeds the statutory maximum for the offenses, this matter should be remanded for sentencing within the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

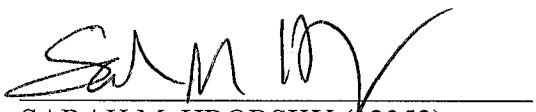
Without citation to authority, the State "implores" this Court to rule that Mr. Gamet is not entitled to resentencing, but he is only entitled to have the Judgment and Sentence amended to remove the 12-month term of community custody. This is contrary to Boyd, in which the Court reversed the defendant's sentence on the grounds the combined term of confinement and community custody was in excess of the statutory maximum, and remanded "to **either** amend the community custody term **or** resentence Boyd on the protection order violation consistent with RCW 9.94A.701(9)." 174 Wn.2d at 473 (emphasis added). The State's argument should be rejected.

B. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Gamet requests this court reverse his convictions for violation of a no contact order and tampering with a witness. In the alternative, Mr. Gamet requests this court reverse his sentence and remand for a new sentencing hearing.

DATED this 14th day of March 2014.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. NANAMBI GAMET, Appellant.	)))))))))	NO. 31402-2-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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