

TAMPERING WITH WITNESSES AND INFORMANTS
(N.J.S.A. 2C:28-5a) (Cases arising after September 10, 2008)

The indictment charges defendant in Count(s) _____ with Tampering with Witnesses [Informants] in violation of a statute that reads as follows:

- a. Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted or has been instituted, (he/she) knowingly engages in conduct which a reasonable person would believe would cause a [witness] [informant] to: **(choose applicable section)**
- (1) Testify or inform falsely;
 - (2) Withhold any testimony, information, document or thing;
 - (3) Elude legal process summoning him/her to testify or supply evidence;
 - (4) Absent (himself/herself) from any proceeding or investigation to which (he/she) has been legally summoned;

OR

- (5) Otherwise obstruct, delay, prevent or impede an official proceeding or investigation.

In order for you to find defendant guilty of violating this statute, the State must prove beyond a reasonable doubt each and every one of the following elements:

- (1) that defendant believed that an official proceeding or investigation was pending or about to be instituted or has been instituted; and
- (2) that defendant knowingly engaged in conduct which a reasonable person would believe would cause a witness or informant to:

[INSERT APPROPRIATE SECTION]

- (1) Testify or inform falsely;
- (2) Withhold any testimony, information, document or thing;
- (3) Elude legal process summoning (him/her) to testify or supply evidence;
- (4) Absent (himself/herself) from any proceeding or investigation to which (he/she) had been legally summoned;

OR

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- (5) Otherwise obstruct, delay, prevent or impede an official proceeding or investigation.

The first element that the State must prove beyond a reasonable doubt is that defendant believed that an official proceeding or investigation was pending or about to be instituted or had been instituted. This means that the State must prove beyond a reasonable doubt that defendant knew of an official proceeding or that an investigation was pending or that an investigation had been instituted or was aware of facts that would lead a reasonable person to believe that an official action was pending or about to be instituted or had been instituted.¹ "Official proceeding" is defined as:

a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceedings.

The second element that the State must prove beyond a reasonable doubt is that defendant knowingly engaged in conduct that a reasonable person would believe would cause a [witness] [informant] to:

[INSERT APPROPRIATE SECTION]

- (1) Testify or inform falsely;
- (2) Withhold any testimony, information, document or thing;
- (3) Elude legal process summoning him/her to testify or supply evidence; or
- (4) Absent (himself/herself) from any proceeding or investigation to which (he/she) had been legally summoned;

OR

- (5) Otherwise obstruct, delay, prevent or impede an official proceeding or investigation.

A person acts knowingly with respect to the nature of (his/her) conduct or the attendant circumstances if (he/she) is aware that (his/her) conduct is of that nature, or that such circumstances exist, or (he/she) is aware of a high probability of their existence. [A person acts knowingly with respect to a result of (his/her) conduct if (he/she) is aware that it is practically

¹ State v. D.A., 191 N.J. 158, 170 (2007).

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certain that (his/her) conduct will cause such a result].² "Knowingly," "with knowledge" or equivalent terms have the same meaning.

Knowledge is a condition of the mind that cannot be seen and can only be determined by inferences drawn from the defendant's conduct, words or acts. It is not necessary for the State to prove the existence of such a mental state by direct evidence such as a statement by the defendant that [he/she] had a particular knowledge. It is within the power of the jury to find that the proof of knowledge has been furnished beyond a reasonable doubt by inferences which you may draw from the nature of the acts and circumstances surrounding the conduct of the defendant as they have been presented in the evidence you have heard and seen in this case.

[CHARGE IN ALL CASES]

If the State has failed to prove any one or more of the elements as I have described them to you beyond a reasonable doubt, you must find defendant not guilty of tampering with [witnesses] [informants]. If the State has proven every element beyond a reasonable doubt, you must find defendant guilty of the crime of tampering with [witnesses] [informants].

(If the State alleges that the crime involved the second degree offense, charge the following:)

Our statute provides that Tampering with [a Witness][an Informant] is a crime of the third degree, except that it is a crime of the second degree if the actor employed force or the threat of force.

If you find that the State has proven defendant guilty beyond a reasonable doubt of this crime, then you must determine whether or not the State has proven beyond a reasonable doubt that defendant employed force or threat of force. "Force" means any degree of physical power or strength used against another person, even though it entails no pain or bodily harm and leaves no mark.³ "Threat of force" means that the words or actions of the defendant must be of such a nature as to convey menace or fear of force to the ordinary person. The State contends that defendant (describe force or threat of force alleged).

If you find that the State has proven beyond a reasonable doubt that defendant employed force or threat of force, then you must find [him/her] guilty of Tampering with [a Witness][an

² In *State v. Speth*, 323 N.J. Super. 67, 87 (App. Div. 1999), the Court held that the "practically certain" portion of the definition of knowledge "is not an element of the offense and is incompatible with the crime of witness tampering, as it would put undue weight on whether or not defendant's attempt was likely to succeed." But see footnote 3 *infra*.

³ See Model Charge, N.J.S.A. 2C:15-1, Robbery in Second Degree and Model Charge, N.J.S.A. 2C:29-5, Escape; *State v. Brannon*, 178 N.J. 500, 510 (2004).

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Informant] in the second degree. If, on the other hand, you find that the State has failed to prove this element beyond a reasonable doubt, you must find [him/her] not guilty of Tampering with [a Witness][an Informant] in the second degree.

(If the State alleges that the crime involved the first degree offense, charge the following:)

Our statute provides that Tampering with [a Witness][an Informant] is a crime of the second degree if the actor employed force or the threat of force. It is a crime of the first degree if the actor employed force or the threat of force, and the conduct occurred during an official proceeding or investigation involving a crime enumerated in a portion of our statutes codified at N.J.S.A. 2C:43-7.2.

If you find that the State has proven defendant guilty beyond a reasonable doubt of tampering with [a Witness][an Informant], then you must determine whether or not the State has proven beyond a reasonable doubt that the defendant employed force or threat of force. "Force" means any degree of physical power or strength used against another person, even though it entails no pain or bodily harm and leaves no mark.⁴ "Threat of force" means that the words or actions of the defendant must be of such a nature as to convey menace or fear of force to the ordinary person. The State contends that defendant (describe force or threat of force alleged).

If you find that the State has proven defendant guilty beyond a reasonable doubt of tampering with [a Witness] [an Informant] and that he employed force or the threat of force, then you must find him guilty of Tampering with [a Witness][an Informant] in the second degree. You must then determine whether or not the State has proven beyond a reasonable doubt that defendant's conduct occurred in connection with an official proceeding or investigation involving a crime[s] enumerated in a portion of our statutes codified at N.J.S.A. 2C:43-7.2.⁵ The State contends that defendant's conduct occurred in connection with an official proceeding or investigation involving the crime(s) of **[INSERT ENUMERATED CRIME AS ALLEGED]**.

⁴ See Model Charge, N.J.S.A. 2C:15-1, Robbery in Second Degree and Model Charge, N.J.S.A. 2C:29-5, Escape; State v. Brannon, 178 N.J. 500, 510 (2004).

⁵ P.L. 1997, c. 117 (para. d, subsec. 2).

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I have already defined “official proceeding” for you earlier.⁶

Under the law of New Jersey, **[INSERT ALLEGED ENUMERATED CRIME]** is a crime enumerated in N.J.S.A. 2C:43-7.2.⁷

If you find that the State has proven beyond a reasonable doubt that defendant is guilty of tampering with [a Witness] [an Informant] and employed force or threat of force, then you must find [him/her] guilty of Tampering with a [Witness][Informant] in the second degree. If, on the other hand, you find that the State has failed to prove beyond a reasonable doubt that defendant employed force or threat of force, then you must find him/her not guilty of Tampering with [a Witness][an Informant] in the second degree.

If, however, you find that defendant is guilty of Tampering with [a Witness][an Informant] and that he/she employed force or the threat of force, and the State has proven beyond a reasonable doubt that defendant’s conduct occurred in connection with an official proceeding or investigation involving the enumerated crime alleged, you must find [him/her] guilty of Tampering with a [Witness][Informant] in the first degree. If, however, you find that the State has not proven beyond a reasonable doubt that the actor employed force or the threat of force, and conduct occurred in connection with an official proceeding or investigation involving a crime enumerated in N.J.S.A. 2C:43-7.2, then you must find him/her not guilty of Tampering with [a Witness][an Informant] in the first degree.

⁶ One issue that may arise in a prosecution under this section is whether the State has to prove beyond a reasonable doubt that the defendant knew that the proceeding or investigation of his/her conduct pertains to any of the offenses enumerated in N.J.S.A. 2C:43-7.2 (the No Early Release Act [NERA]). The Committee is divided on the answer to this question, and there is as yet no caselaw that addresses this issue that is directly applicable to this statute. Compare State v. Thomas, 187 N.J. 119, 137-138 (2006) with State v. Sherman, 367 N.J. Super. 324, 350-356 (App. Div. 2004), certif. denied 180 N.J. 356 (2004).

⁷ If the nature of the underlying investigation is disputed, the jury should be instructed as to the elements of the enumerated crime in the Model Jury Charges. The State would have to prove the nature of the criminal investigation beyond a reasonable doubt.