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32451-6-III

(Consolidated with 32452-4-III and 32453-2-III)

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JERRY RAY MEARS, SR.,

Defendant/Appellant.

APPELLANTS BRIEF

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ASSIGNMENTS OF ERROR

1. The State failed to establish, beyond a reasonable doubt, each and every element of the offense of tampering with a witness as set forth in Counts 13 and 14 of the redesignation of counts (RDC) for purposes of trial. (CP 78; Appendix "A")

2. A. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of intimidating a witness as charged in Count 9 of the RDC (involving Laura Brown).

B. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of intimidating a witness as charged in Count 12 of the RDC (involving Herman Mullis).

3. The trial court's ruling excluding Jerry Ray Mears, Sr.'s designated witnesses denied him his constitutional right to present a defense by means of impeaching the State's witnesses.

4. The prosecuting attorney committed misconduct by testifying through his questions during his examination of April Mears.

5. The prosecuting attorney committed misconduct in his closing and rebuttal arguments, which prejudicially impacted the jury deliberations, by supplying information that had not been part of the testimony or exhibits.

6. A. Mr. Mears was denied a unanimous jury verdict as to RDC Counts 13 and 14.

B. Mr. Mears was denied a unanimous jury verdict as to RDC Counts 9 and 12.

7. The trial court failed to instruct the jury to recommence deliberations when an alternate juror returned for participation in those deliberations.

8. Intimidation of a witness and harassment - threat to kill constitute the same criminal conduct under the facts and circumstances of the case (Counts 7 and 9 of the RDC; Counts 11 and 12 of the RDC).

9. Counts 3 and 5 of the RDC (trafficking in stolen property first degree) constitute the same criminal conduct for purposes of sentencing.

10. Counts 15 and 16 of the RDC (theft of a motor vehicle and second degree theft) constitute the same criminal conduct for sentencing purposes.

11. Mr. Mears received ineffective assistance of counsel when his attorney failed to

(a) object to the prosecuting attorney's cross-examination of April Mears;

(b) object to the prosecuting attorney's inserting evidence outside the record during closing and rebuttal argument;

(c) move for dismissal of Counts 13 and 14, following the State's rebuttal case, due to insufficiency of the evidence;

(d) argue same criminal conduct when the prosecuting attorney essentially conceded that Counts 7 and 9; Counts 11 and 12; and Counts 15 and 16 of the RDC were the same criminal conduct;

(e) argue that the no-contact order with regard to April Mears exceeded the maximum penalty for a class C felony;

(f) argue for a first time offender disposition; and

(g) challenge the imposition of multiple legal financial obligations (LFOs) when the cases had been consolidated for trial.

12. The no-contact order involving April Mears exceeds the maximum penalty for a class C felony.

13. The trial court's imposition of LFOs on each case when they had been consolidated for trial is erroneous.

14. A miscalculation occurred in connection with the total of the LFOs.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the State establish, beyond a reasonable doubt, that Mr. Mears attempted to induce Jack O'Bryan to either testify falsely, withhold testimony, absent himself from court proceedings, or withhold information relevant to a criminal investigation as charged in Count 13 of the RDC?

2. Did the State establish, beyond a reasonable doubt, that Mr. Mears attempted to induce April Mears to either testify falsely, withhold testimony, absent herself from court proceedings, or withhold information relevant to a criminal investigation as charged in Count 14 of the RDC?

3. Did the State prove, beyond a reasonable doubt, each and every element of the offenses of intimidating a witness as charged in Counts 9 and 12 of the RDC?

4. Did the trial court deprive Mr. Mears of his constitutional right to present a defense under the Sixth Amendment to the United States Constitution and Const. art. I, §§ 21 and 22 when it excluded his witnesses from testifying due to a claimed violation of CrR 4.7?

5. Did prosecutorial misconduct during cross-examination of April Mears, and inserting evidence outside the record during closing and rebut-

tal arguments, prejudice jury deliberations by supplying information that had not been part of the testimony or exhibits?

6. A. Did the lack of a unanimity instruction, as to the tampering with a witness counts, violate Mr. Mears' constitutional right to a unanimous verdict when there was insufficient evidence as to each of the alternative means charged and the State failed to elect a specific alternative?

B. Did the lack of a unanimity instruction, as to the intimidation of a witness counts, violate Mr. Mears' constitutional right to a unanimous verdict when there was insufficient evidence as to each of the alternative means charged and the State failed to elect a specific alternative?

7. Does failure to instruct the jury to recommence deliberations when an alternate juror is called back to serve require reversal of Mr. Mears' convictions and remand for a new trial?

8. Do intimidation of a witness and harassment as charged in Counts 7 and 9 of the RDC constitute the same criminal conduct for purposes of sentencing as mentioned by the State but not argued by defense counsel?

9. Do intimidation of a witness and harassment as charged in Counts 11 and 12 of the RDC constitute the same criminal conduct for purposes of sentencing as alluded to by the State but not argued by defense counsel?

10. Does trafficking in stolen property as charged in Counts 3 and 5 of the RDC constitute the same criminal conduct for purposes of sentencing?

11. Do theft of a motor vehicle and second degree theft as charged in Counts 15 and 16 of the RDC constitute the same criminal conduct for sentencing purposes?

12. Was Mr. Mears denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22?

13. Does the no-contact order involving April Mears exceed the maximum penalty for a class C felony?

14. Did the trial court err by imposing LFOs on each case when they had been consolidated for trial?

15. Did a miscalculation in the total of the LFOs occur?

STATEMENT OF CASE

Deputy Weigel of the Okanogan County Sheriff's Office was directed to contact April Mears and Jack O'Bryan at the DSHS office in Omak on September 3, 2013. (Beck RP 63, ll. 4-5; RP 63, l. 23 to RP 64, l. 4)

Ms. Mears and Mr. O'Bryan reported the theft of a Ford F-250 PU. They also indicated that there was a wood splitter missing from Mr. O'Bryan's property. (Beck RP 64, ll. 16-18; RP 65, ll. 8-9; RP 66, ll. 24-25)

Herman Mullis was present with Ms. Mears and Mr. O'Bryan. He reported that a shotgun which he had loaned to Mr. Mears had not been returned to him. Ms. Brown was present when Mr. Mullis loaned his shotgun to Mr. Mears. He filed a complaint. (Beck RP 68, ll. 10-16; RP 105, l. 24 to RP 106, l. 7; RP 106, ll. 17-22; RP 108, ll. 19-20; RP 125, ll. 20-25)

Deputy Weigel found the PU behind the Rodeway Inn. He contacted Joseph Wise at the Inn. Mr. Wise had a handwritten receipt signed by Mr. Mears indicating that the PU had been sold to him for $100.00. (Beck RP 65, ll. 14-24; RP 66, ll. 12-20)

The wood splitter was recovered from Dean Tonner. He allegedly purchased it from Mr. Mears for $40.00. (Beck RP 68, ll. 5-9; RP 177, ll. 13-21)

An Information was filed on September 6, 2013 under Okanogan County Cause No. 13 1 00317 0. It charged Mr. Mears with one (1) count of theft of a motor vehicle; one (1) count of theft of a firearm; three (3) counts of trafficking in stolen property first degree; and one (1) count of

third degree theft. (CP 200)

Mr. Mears was arraigned on September 16, 2013. No-contact orders were entered with regard to Mr. Mullis and Mr. O'Bryan. (Steinmetz RP 6, ll. 22-23; Exhibits 1 and 2)

Mr. Mears contacted Ms. Brown at Caso's on September 22, 2013. Her father, Mr. Mullis, had gone into the store. She was sitting in a PU. Mr. Mears began discussing how angry he was and said: "I'll just" -- "fine, I'll just blow your f-ing heads off." She took the threat seriously because she takes all threats seriously. (Beck RP 83, l. 24 to RP 84, l. 3; RP 84, ll. 19-24; RP 85, ll. 22-24; RP 88, ll. 4-5)

On September 24, 2013 Mr. Mullis, Ms. Mears, Mr. O'Bryan and Ms. Brown reported that Mr. Mears had made certain threats toward them. The alleged threats occurred at Caso's, a market; and outside the gate of Mr. O'Bryan's property. Mr. Mullis, Ms. Mears and Ms. Brown were living on the O'Bryan property. (Beck RP 72, ll. 1-6; RP 74, ll. 2-4; ll. 7-16; RP 77, ll. 10-16; RP 80, ll. 5-19)

Deputy Weigel indicated that all of the complaining witnesses had expressed fear that Mr. Mears would carry out his alleged threats. (Beck RP 233, l. 5 to RP 234, l. 6)

An Information was filed on October 1, 2013 under Okanogan County Cause No. 13 1 00350 1 charging Mr. Mears with three (3) counts

of harassment - threat to kill; three (3) counts of intimidating a witness; and two (2) counts of tampering with a witness. (CP 141)

A second Information was also filed on October 1, 2013 under Okanogan County Cause No. 13 1 00347 1 charging Mr. Mears with theft of a motor vehicle and second degree theft. (CP 169)

Arnold VanHees is the owner of a 1982 Subaru. He had his tools in the car. He loaned the car to Mr. Mears and gave him $100.00 to get parts for a van that Mr. Mears was repairing. The car was not returned. Mr. VanHees filed a stolen vehicle report. The car was found off-road beneath some trees near the O'Bryan property. There was a question of whether or not it had run out of gas. (Beck RP 218, ll. 12-14; ll. 20-25; RP 221, ll. 5-12; RP 221, l. 24 to RP 222, l. 1; RP 224, ll. 1-11; RP 244, ll. 15-22)

Mr. Mears was arraigned on Cause Nos. 347-1 and 350-1 on October 7, 2013. He had been rearrested and was in custody. (Steinmetz RP 14, ll. 4-5; RP 21, ll. 4-6)

The jury trial was continued on a number of occasions due to Mr. Mears original attorney resigning from the public defender contract. Witness interviews were also a basis for additional continuances. (Steinmetz RP 47, ll. 18-20; RP 48, ll. 11-25; RP 60, ll. 4-21; Beck RP 5, ll. 15-25)

The cases were consolidated for trial pursuant to the State's mo-

tion. A joinder order was entered on January 13, 2014. (CP 132; Beck RP 13, ll. 7-9; ll. 23-24)

A stipulated CrR 3.5 waiver was entered as to all three (3) cases on February 18, 2014. (CP 131; CP 160; CP 191; Beck RP 18, ll. 9-12)

On March 21, 2014 an order was entered renumbering the counts in the various Informations based upon the prior consolidation for trial. (CP 78; Appendix "B")

On September 24, 2013, during the early morning hours, Mr. Mullis saw a car parked at Mr. O'Bryan's gate. An individual got out of the car for a short period of time. The car then left. (Beck RP 131, ll. 18-24)

Mr. Mears arrived at the O'Bryan property between 7:30 and 8:00 a.m. on September 24. He said he wanted to speak to Ms. Mears. Mr. Mears allegedly stated he was going to blow Mr. Mullis's head off. He also told him "Well, you can kiss your shotgun goodbye." (Beck RP 133, ll. 6-17; ll. 23-25; RP 136, l. 25)

Michael Brown, Laura Brown's husband, owns the F-250 PU. He stated that no one had permission to sell it. (Beck RP 116, ll. 13-14; RP 116, l. 18 to RP 117, l. 2; RP 118, ll. 15-18)

Mr. O'Bryan testified that Mr. Mears did not have permission to take his wood splitter and sell it. (Beck RP 153, l. 22 to RP 154, l. 2)

Ms. Mears testified that Mr. Mears claimed that the F-250 PU had

been stolen. He also told her that "I am going to get the wood splitter." (Beck RP 188, ll. 1-2; RP 190, ll. 3-10; RP 191, ll. 11-12)

Mr. Mears testified at trial. He admitted selling the F-250 PU for $100.00. He denied selling the wood splitter to Mr. Tonner. (Beck RP 315, ll. 22-23; RP 325, ll. 19-21)

The trial court excluded Mr. Mears's prospective witnesses due to a late discovery violation. The witnesses were Shelby Mears, Koeetia Mears and Jerry Mears, Jr. (CP 79; Beck RP 157, l. 25 to RP 161, l. 4; Appendix "C")

Prior to his re-arrest Mr. Mears had gone to the O'Bryan property. He went inside the residence where he and Ms. Mears were living. He left a number of notes throughout the residence. The notes were not produced at trial. She stated that one note contained the following:

> "You want to be their fucking nigger, go ahead," "let them," "go ahead and be their nigger."

(Beck RP 90, ll. 23-25; RP 199, ll. 13-17; RP 208, ll. 9-13)

Ms. Mears also testified that Mr. Mears stated: "Well, just let them run your life or tell them what you're going to do." (Beck RP 196, ll. 11-15)

Ms. Mears received a letter while Mr. Mears was in jail. It was mailed on November 15, 2013. She did not read the letter herself. It was read to her. It contained the following: "Tick tock; tick tock". She took it as a threat. She believed Mr. Mears would carry out the alleged threat. (Beck RP 197, ll. 6-8; RP 201, l. 10 to RP 202, l. 6; RP 301, ll. 8-19; Exhibit 15; Appendix "D")

During the prosecuting attorney's redirect examination of Ms. Mears he began testifying concerning matters not in evidence. Defense counsel failed to object. (Beck RP 212, l. 23 to RP 213, l. 3; RP 213, l. 12-21)

The prosecuting attorney made the following unsupported testimonial statements:

> Q: You were asked about contact at the jail with the defendant. During any -- during that contact did the defendant ask you to go **retrieve some stolen property?**
>
> A: Yes.
>
> Q: **Was that the knife?**
>
> A: Yes.

(Beck RP 212, l. 23 to RP 213, l. 3)

> Q: And during the time of these events, from September through the time and up to the time you went and reported -- to police about the threats and notes, were you fearful of the defendant?
>
> A: Yes.
>
> Q: And do you believe he could -- would have carried out the threats?
>
> A: I do believe that, yes.
>
> Q: Including -- including (inaudible) -- killing you?
>
> A: Yes, I do.

(Beck RP 213, ll. 12-21)

On March 23, 2014 the jury retired to begin deliberations on Mr. Mears's case. The alternate had been excused prior to the jury being sent to the jury room. The jury adjourned late that afternoon. They had selected the presiding juror. On the morning of March 24 one of the jurors did not report for duty. His wife called and advised that he was in the emergency room. An alternate juror was recalled. The trial court did not instruct the jury to begin deliberations anew. (Beck RP 429, l. 14 to RP 430, l. 13; RP 443, ll. 4-21; RP 446, l. 1 to RP 447, l. 15)

The jury found Mr. Mears guilty of Counts 1 through 7, 9, and 11 through 16 of the redesignated counts. They determined he was not guilty of Counts 8 and 10. (CP 26; CP 27; CP 28)

Judgment and Sentence on the consolidated cases was entered on April 1, 2014. No-contact orders were imposed for a period of ten (10) years as to April Mears, Laura Brown, Jack O'Bryan and Herman Mullis. All counts were run concurrent for a total of one hundred and two (102) months. Legal financial obligations were imposed on each of the three (3) cases in the amount of $1,110.50 each. (CP 15)

Mr. Mears filed his Notice of Appeal as to all of the cases on April 22, 2014. (CP 1; CP 146; CP 204)

A restitution order was entered on May 12, 2014 in the amount of $411.00. This represented the value of the shotgun. (CP 171)

SUMMARY OF ARGUMENT

Multiple errors by defense counsel, the prosecuting attorney and the trial court deprived Mr. Mears of his constitutional rights under the Sixth Amendment and Const. art. I, § 22.

The constitutional errors require reversal of his convictions; dismissal of two (2) counts of witness tampering and two (2) counts of intimidation of a witness; and remand for a new trial on the other counts.

Alternatively, if a new trial is not granted, Mr. Mears is entitled to be resentenced due to defense counsel's ineffectiveness at the sentencing hearing. Defense counsel failed to engage in a same criminal conduct analysis; did not request a first time offender waiver; and failed to recognize other sentencing errors committed by the trial court.

ARGUMENT

A. TAMPERING WITH A WITNESS

1. Count 13

RDC Count 13 involves Jack O'Bryan. The charge is tampering with a witness. The original Information states:

> On or between September 22 and September 24, 2013, in the State of Washington the above-named Defendant did attempt to induce **Jack Obryan**, 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, to testify falsely, and/or to unlawfully withhold testimony, and/or to absent himself/herself from such proceedings, and/or to withhold from a law enforcement agency in-

> formation which he/she has relevant to a criminal investigation.

The charge is based upon RCW 9A.72.120(1)(a), (b), and (c).

There is absolutely no testimony in the record from Mr. O'Bryan that Mr. Mears attempted to induce him to testify falsely.

There is absolutely no testimony in the record that Mr. Mears attempted to induce Mr. O'Bryan to withhold his testimony.

There is absolutely no testimony or evidence in the record that Mr. Mears asked Mr. O'Bryan not to appear for court.

There is absolutely no testimony or evidence in the record that Mr. Mears attempted to induce Mr. O'Bryan to withhold information concerning a criminal investigation from a law enforcement agency.

Mr. O'Bryan never testified concerning any conversation with Mr. Mears.

The only evidence that could be considered even peripherally relevant to the charge came through the testimony of Ms. Mears. She was testifying concerning notes that had been left inside the house. There was one in Mr. O'Bryan's room which apparently stated: "Jack, you'll know the truth; someday the truth will come out …." (Beck RP 199, ll. 20-25)

> A person tampers with a witness if he *attempts* to alter the witness's testimony. "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."

State v. Williamson, 131 Wn. App. 1, 6, 86 P.3d 1221 (2004).

The note left in Mr. O'Bryan's bedroom, which was not produced at trial, does not implicate an attempt to alter his testimony. Rather, it is a statement that the truth will come out during the course of the trial.

In *State v. Rempel,* 114 Wn.2d 77, 84, 785 P.2d 1134 (1990) the Court stated:

> … [W]e consider the entire context in which the words were used, which also includes the prior relationship between defendant and [victim] ….
>
> … [T]he effect of the inducement attempt upon the potential witness is not dispositive.

Initially, there was no attempt made by Mr. Mears to induce Mr. O'Bryan to do anything.

The *Rempel* Court, *supra,* went on to examine other cases involving tampering with a witness. It found them factually distinguishable, as is Mr. Mears's case:

> In *State v. Stroh,* 91 Wn.2d 580, 588 P.2d 1182, 8 A.L.R. 4th 760 (1979), the defendant asked the witness to not appear or alternatively change his testimony. In *State v. Wingard,* 92 Wash 219, 158 P. 725 (1916), the defendant promised a reward, made a threat, and urged the witness to ignore a

> subpoena. The facts also distinguish *State v. Scherck,* [9 Wn. App. 792, 514 P.2d 1393 (1973)], where the defendant asked the witness to drop the charges, urged him to refuse to appear, and made a threat. No similar facts or reasonable inferences appear here.

The State failed to prove, beyond a reasonable doubt, that Mr. Mears attempted to tamper with Mr. O'Bryan's testimony in any manner or form. The conviction must be reversed and dismissed.

2. Count 14

RDC Count 14 states:

> On or between September 22 and September 24, 2013, in the State of Washington the above-named Defendant did attempt to induce **April Mears,** 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, to testify falsely, and/or to unlawfully withhold testimony, and/or to absent himself/herself from such proceedings, and/or to withhold from a law enforcement agency information which he/she has relevant to a criminal investigation.

During her direct examination Ms. Mears indicated that there was writing on her calendar to the effect that "you want to be their fucking nigger, go ahead," -- "let them" -- "Go ahead and be their nigger, …."

She also testified that

> Yeah, it was written on my calendars, and -- this is the day that -- "something over your husband," and then there was notes left in each room, like, "Oreo," "Heidi," and -- "Phoebe and Jack are the only ones," --

(Beck RP 199, ll. 20-23)

Ms. Mears's testimony at trial was anything but convincing. As a result the prosecuting attorney, introduced evidence by means of his own testimony.

The following exchange occurred between the prosecuting attorney and Ms. Mears:

> Q: And were you afraid of the defendant?
>
> A: Yes.
>
> Q: Did you -- And did you believe that he would carry out **the threats** that were being made?
>
> A: Yes.

(Beck RP 197, ll. 4-8) (Emphasis supplied.)

What threats? At that point in time there had been no testimony by Ms. Mears concerning any threats.

During the prosecutor's redirect examination the following exchange occurred:

> Q: And during the time of these events, from September through the time and up to the time you went and reported -- to police about **the threats** and notes, were you fearful of the defendant?
>
> A: Yes.
>
> Q: And do you believe he could -- would have carried out **the threats**?
>
> A: I do believe that, yes.
>
> Q: **Including** -- **including** (inaudible) -- **killing you**?
>
> A: Yes, I do.

(Beck RP 213, ll. 12-21) (Emphasis supplied.)

Again, there was no testimony concerning any threats made directly to Ms. Mears. She had not testified that Mr. Mears threatened to kill her. The only testimony came through the prosecutor's own statements. Those statements apparently relied upon the notes which were not produced at trial. The notes themselves, as recalled by Ms. Mears, did not contain any threats.

> Several well-settled standards govern this argument. "A person being tried on a criminal charge can be convicted only by evi-

> dence, not by innuendo." *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 183 (1950). It is reversible error when the prosecutor "'makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege.'" [Citations omitted.] **It** … **is error to question a witness in a manner that suggests evidence exists outside of the record that has been provided to the jury. "Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross-examination when such information is not otherwise admitted as evidence."** *State v. Denton*, 58 Wn. App. 251, 257, 792 P.2d 537 (1990).
>
> **When a prosecutor's questions imply the existence of a prejudicial fact, the prosecutor must be able to prove that fact**. *State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007). Failure to do so may be prejudicial misconduct. *Id.* at 887. The reason is "'not because the facts are inadmissible, but because no witness is willing and available to testify as to those facts.'" *Id.* at 888 (quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.22, at 76 (4th ed. 1999)). As the *Miles* court further explained, the focus must be on whether the prosecutor is imparting his own knowledge without testifying. *Id.* at 887.

State v. Ruiz, 176 Wn. App. 623, 641 (2013). (Emphasis supplied.)

The State did not produce any threatening notes. Ms. Mears did not testify as to any true threats. The letter from Mr. Mears deals with her

relationship with another man. He does not mention anything about her being a witness. "Tick tock, tick tock;" *e.g.,* time will tell.

It is Mr. Mears's position that the State again failed to prove, beyond a reasonable doubt, each and every element of the offense of tampering with a witness as to April Mears. His conviction should be reversed and dismissed.

B. INTIMIDATING A WITNESS

RDC Count 9 states:

> On or about September 22, 2013, in the State of Washington, the above-named Defendant, by using a threat against an individual who the defendant knew was a current or prospective witness, to wit: **Lora Brown**, did attempt to: (1) influence the testimony of that person; and/or (2) induce that person to elude legal process summoning him or her to testify; and/or (3) induce that person to absent himself or herself from such proceeding; and/or (4) induce that person not to have a crime prosecuted; and/or (5) induce that person not to give truthful and complete information relevant to a criminal investigation ….

This count is based upon RCW 9A.72.110(1)(a), (b), (c), and (d).

Ms. Brown was living on the O'Bryan property. Her father, Mr. Mullis, was also living on the O'Bryan property.

Mr. Mears had been charged with theft of a motor vehicle, theft of a firearm, three (3) counts of trafficking in stolen property first degree, and

third degree theft by an Information filed on September 6, 2013 under Okanogan County Cause No. 13-1-00317-0.

Mr. Mullis and Mr. O'Bryan were named as the alleged victims in that Information. The trial court entered a no-contact order with regard to Mr. O'Bryan and Mr. Mullis. Neither Ms. Mears nor Ms. Brown were named in the no-contact order. (Exhibit 1; Appendix "E")

Ms. Brown provided considerable testimony about Mr. Mears's attempts to recover her father's shotgun. The contact at Caso's appears to be the basis for this charge. The pertinent portion of Ms. Brown's testimony concerning that contact follows:

> Q: And how did the defendant contact you?
>
> A: Jerry was actually standing by the grocery store doors, and when he looked up he seen the truck. He stood for a few minutes, and then he walked -- started to walk away, and was about halfway across the parking lot, turned around, come back --
>
> Q: So he saw the truck, walked away, then came back?
>
> A: Yes.

I rolled the window down, and Jerry started talking about we were all going to go to jail, he was innocent, and -- he started getting kind of angry, so I said, "Hey," you know, started rolling the window up, and that's when he said that he was going to -- Well, **he said he should just go up and shoot all of us** --

(Beck RP 84, ll. 11-24) (Emphasis supplied.)

…

A: That was all that was said. I -- just walked away.

Q: Now, did you -- when he first came up and was talking to you, saying, you know, you were all -- you're all going to go to jail?

A: Yeah. I don't know what that was about, but we were all going to go to jail and he was innocent.

Q: And you tried to stop -- end the conversation?

A: I did. I was just nervous.

Q: And you said he became angrier?

A: Yes, he did.

(Beck RP 85, ll. 9-18)

Q: Did he say to you, to the effect of, "I'll just" -- "Fine, I'll just blow your f-ing heads off?"

A: (Inaudible), yes.

(Beck RP 85, ll. 22-24)

Q: And **who did you take that** (inaudible) **to be directed to**?

A: **My father**. (Inaudible).

(Beck RP 86, ll. 3-4) (Emphasis supplied.)

Mr. Mears did not attempt to induce Ms. Brown to elude legal process.

Mr. Mears did not attempt to induce Ms. Brown to absent herself from court proceedings.

Mr. Mears did not attempt to induce Ms. Brown not to report information relevant to the pending charges.

Mr. Mears did not attempt to induce Ms. Brown not to have the charges prosecuted.

Mr. Mears did not attempt to induce Ms. Brown to not give truthful or complete information pertaining to any criminal investigation.

Ms. Brown testified that she took the threat to apply to Mr. Mullis.

RCW 9A.72.110(3)(a) defines "threat" as meaning:

> (i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
> (ii) Threat as defined in RCW 9A.04.110 (27) *now (28).

No immediate threat to use force was made toward Ms. Brown.

RCW 9A.04.110(28) defines "threat" as meaning, in part:

> … to communicate, directly or indirectly the intent:
>
> (a) To cause bodily injury in the future to the person threatened or to any other person;
> ….

Mr. Mears was angry. Mr. Mears declared his innocence. Mr. Mears did not make any statements concerning Ms. Brown's prospective testimony.

RCW 9A.72.110(3)(b) defines "current or prospective witness" as meaning:

> (i) A person endorsed as a witness in an official proceeding;

> (ii) A person whom the actor believes may be called as a witness in any official proceeding;
> (iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation ….

Ms. Brown had not been endorsed as a witness in an official proceeding.

Ms. Brown did not testify that the statements made by Mr. Mears influenced her in any way concerning her role as a witness.

The statute requires that the person charged with the offense make some "attempt" to "influence or induce" another person to act in accord with the "threat". There is a clear absence of any testimony or evidence to support Mr. Mears' conviction for intimidation of a witness as to Ms. Brown.

C. CrR 4.7 SANCTION

The trial court excluded Mr. Mears's prospective witnesses. The trial court reasoned that the late disclosure of the witnesses precluded the State from having an opportunity to question them prior to their testifying.

> Under CrR 4.7(b)(1), defendants must disclose the names and addresses of intended witnesses, as well as the substance of their testimony, no later than the omnibus hearing. Sanctions for violating CrR 4.7 are within the discretion of the trial court. CrR 4.7(h)(7); *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). But

> **"[e]xclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly."** *Hutchinson,* 135 Wn.2d at 882. We review such decisions for manifest abuse of discretion. *State v. Gregory,* 158 Wn.2d 759, 822, 147 P.3d 1201 (2006).

State v. Kipp, 171 Wn. App. 14, 31, 286 P.3d 68 (2012). (Emphasis supplied.)

The trial court relied upon the *Hutchinson* case in making its ruling. As the *Kipp* Court noted, *supra,* in citing *Hutchinson,* "[t]he appropriate remedy for late disclosure is typically to continue the trial to give the other party time to interview the new witness and prepare to address his or her testimony."

Mr. Mears's trial covered multiple days. The State had the ability, through its officers and investigators, to interview Mr. Mears's three (3) witnesses prior to their testifying.

Mr. Mears contends that the trial court abused its discretion by precluding his witnesses from testifying. The correct remedy would have been to allow the State time to conduct the appropriate interviews without necessarily continuing the trial.

In effect, the trial court's ruling gutted Mr. Mears's case. It forced him to testify. It deprived him of his right to a defense.

> The Sixth Amendment guarantees criminal defendants the right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719-20, 230 P.3d 576 (2010). A defendant's right to present a defense includes the right to offer testimony. *Id.* … Hayes was entitled to present evidence attacking Shaw's credibility under ER 806.

State v. Hayes, 165 Wn. App. 507, 520, 265 P.3d 982 (2011).

Mr. Mears's proposed witnesses would have attacked the credibility of two (2) of the State's witnesses; *i.e.*, Mr. O'Bryan and Ms. Mears.

The minimal time it would have taken for an investigator or a law enforcement officer to interview those witnesses would not have adversely impacted the progress of the trial or the State's case.

Mr. Mears contends the trial court abused its discretion when it precluded his ability to impeach the State's witnesses.

> Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

D. PROSECUTORIAL MISCONDUCT

Using his own testimony and conclusions in conjunction with the almost, if not, total lack of evidence as to the elements of tampering with a witness, the prosecuting attorney mislead the jury.

> In order to demonstrate prosecutorial misconduct, one must show that "the prosecuting attorney's conduct was both improper and prejudicial. *State v. Fisher,* 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In the context of closing arguments, misconduct includes making arguments that are unsupported by the admitted evidence.

Personal Restraint of Yates, 177 Wn.2d 1, 58, 296 P.3d 872 (2013).

The following excerpts from the prosecuting attorney's closing argument(s) are indicative of the fact that there was no evidence in the record to support them. It was apparently information that the prosecuting attorney had received; but that no witness could testify to:

> And Counts 13 and 14, tampering, directed towards Jack O'Bryan and April Mears. Now arguably, the tampering, it was more than that. He's charged with tampering; arguably the threats to kill were directed towards the group of them. But in this case he -- came back to this property, entered the house where Ms. Mears and Mr. O'Bryan were living, left his notes -- the notes around there, destroyed her stuff, -- they were witnesses from the very outset of the case when

they reported the theft of the truck -- and the wood splitter.

(Beck RP 398, ll. 7-16)

Tampering charges -- involving Mr. O'Bryan and Ms. Mears, again, as I indicated earlier, come from the fact that the defendant returned to the property, he basically -- gone into the house where they resided, **left threatening notes**, basically tore the place up where he had no right to be. He continued to send letters to Ms. Mears even after the fact, even after, again, he was told not to contact witnesses or victims in the cases, after his second arrest.

In this case, -- defendant did tamper. Now, **he clearly also made threats**. Could that be intimidating? Absolutely. But at a minimum it's tampering, **which was trying to** intimidate or **prevent or hinder those individuals from cooperating, show up, giving evidence**.

(Beck RP 408, ll. 12-24) (Emphasis supplied.)

> The defendant basically -- after being up there -- on the 24th, threatening -- people who were there, and they left to go report him to police -- That's important to remember -- when they leave he comes back in and makes himself at home and **leaves threats** and notes and everything else **at the house**. That's his behavior.

(Beck RP 425, ll. 10-15) (Emphasis supplied.)

"A prosecutor's bare allegations are not evidence, whether asserted orally or in a written document." *State v. Hunley,* 175 Wn.2d 901, 915, 287 P.3d 584 (2012).

E. INSTRUCTIONAL ERROR

1. Tampering

Instructions 21, 22 and 23 are the definition and to-convict instructions for tampering with a witness. No unanimity instruction was given to the jury. (CP 53; CP 54; CP 55; Appendix "F"; Appendix "G"; Appendix "H")

RDC Counts 13 and 14 set forth all three (3) alternatives of RCW 9A.72.120. (Appendix "I"; Appendix "J")

The instructions parallel the language of the Information. As argued in Section A, *infra.,* the State failed to present sufficient evidence of the offense. Even if some evidence could be found the State failed to prove, beyond a reasonable doubt, each of the charged alternatives and did not elect a specific alternative.

> … [W]here there are three alternative means of committing a crime and the jury is instructed on all three, either (1) substantial evidence must support each alternative means on which evidence or argument was presented or (2) evidence and argument must have been presented on only one means.

State v. Lobe, 140 Wn. App. 897, 905, 167 P.3d 627 (2007)*; see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

2. Intimidation

RDC Counts 9 and 12 contain all four (4) alternative means of committing the offense of intimidating a witness. Instructions 17, 18 and 20 parallel the charging language of the Information. (CP 48; CP 49; CP 51; Appendix "K"; Appendix "L"; Appendix "M"; Appendix "N"; Appendix "O")

The lack of a unanimity instruction deprived Mr. Mears of his constitutional right to a unanimous verdict as guaranteed by the Sixth Amendment and Const. art. I, § 22.

"We conclude that in the absence of a clear election by the State as to the alternative means charged, a unanimity instruction should have been given." *State v. Savaria*, 82 Wn. App. 832, 841, 919 P.2d 1263 (1996), *overruled on other grounds by State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003).

The respective instructions include all of the alternative means set forth in the Information. However, the State did not present sufficient evidence as to each of the means charged.

> The right to a unanimous jury verdict includes the right to jury unanimity on the means by which the defendant committed the crime. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980)
>
> …
>
> When the State fails to elect between alternative means, instructions that do not require unanimity on the same means of committing the criminal act are not required if there is substantial evidence supporting each alternative means presented to the jury.

State v. Boiko, 131 Wn. App. 595, 598-99, 128 P.3d 143 (2006).

F. ALTERNATE JUROR

The trial court failed to instruct the jury to commence deliberations anew when an alternate juror took the place of a juror who was unable to continue serving.

The critical facts relating to this issue are contained in the trial court's interaction with the jury:

> THE COURT: Ladies and gentlemen of the jury, you've heard all of the evidence, you've been instructed as to the law and you've heard the closing arguments (inaudible) procedures. **The only thing left now to do is deliberate.**
>
> I'm doing a little clock-watching myself.
>
> **I'd like to** (inaudible) -- **begin the process**. That involves, as indicated -- previously you've been instructed, select a presiding juror.
>
> **I'd like you to take some time to go back to the jury deliberation room and** as I indicated **begin the process of** -- but, -- again, **if you would like to continue your deliberations into this evening, you are free to do so, and you should do so**.
>
> However, I want to be conscious of the fact that it is the end of the week, and if --

the jury -- decides that they would like to come back and deliberate on Monday, I want to make you aware of that -- as an option to you.

Again, I'll leave that to your decision. I don't control that. You do. **You're now the judge of this case**. So, -- turn it to you, to handle that. But I would like you to select a presiding juror.

At the outset of this case we selected an alternate juror. And I'm going to -- I'm sorry -- Juror No. 13 -- your last name. I -- (inaudible).

JUROR: (Inaudible).

THE COURT: (Inaudible) --

JUROR: DuFresne.

THE COURT: Pardon?

JUROR: "DuFresne."

THE COURT: DuFresne. See, there appears to be no R in there, so -- say that to me, -- And I didn't study French. And so I

assume that's -- some form of French. But -- (inaudible).

You are Juror No. 13. You were the alternate.

-- concern would be this, is that if the jurors went back and select their presiding and then -- I just want to be assured that you can all -- should you decide to come back that you can all come back on Monday. If I let Mr. DuFresne go he's the alternate. And **there's a reason that we have an alternate. If a juror becomes sick or cannot participate in some way, we'd like him to know that and be available**. But if I release him today, obviously he's not available, and we deal with the jury that we have. So just make you aware of that.

But, -- what (inaudible) do at this time, Mr. DuFresne, is instruct you that -- you're free to go, you're released from your jury service. However, I would admonish you

not to discuss this case until such time as you're contacted by the bailiff -- Horner -- until such time as the jury has made a decision and issued a verdict in this matter, whenever it may be, and -- basically they will be released to discuss the case with anyone, but until such time as you are contacted, again you're under the still -- admonishment and order of the court not to discuss the case -- not tell anyone how you may or may not have voted in this matter, whatsoever, until we contact you.

Do you think you can do that?

JUROR: Yes, I can do that.

(Beck RP 428, l. 6 to RP 430, l. 13) (Emphasis supplied.)

DELIBERATION

THE COURT: Back on the record with respect to -- State of Washington versus Jerry Mears Sr. matter, (inaudible) cause numbers.

The jury has been -- **started deliberations -- they've indicated that they would**

like to recess for the weekend, and therefore I intend to bring them back out and -- just give them the usual admonishment not to discuss the case, ….

(Beck RP 435, ll. 1-9) (Emphasis supplied.)

… Ladies and gentlemen of the jury, -- understand that you have (inaudible) selected a presiding juror. I understand -- communication with the bailiff is that -- that -- that is yourself, Mr. Haney; is that correct?

JUROR: Yes, sir.

THE COURT: And it's my understanding that the jury has made a decision that they would like to retire this evening, spend the weekend at home and return on Monday morning. Is that correct?

JUROR: That is correct, your Honor.

(Beck RP 437, ll. 1-10)

So, -- instead of nine o'clock it will be eight-thirty, begin your deliberations. We'll ask that you be here at 8:20.

> Again, I've already admonished you before, I'm going to do it one more time -- it can't hurt to tell you enough times -- do not discuss this case with anyone. Continue to wear your badge, bring that back with you so that when you walk in people are fully alert that you are a juror. And **if anybody approaches you and want to discuss the case, what's your response? "No, I can't discuss the case with you at all." We're in deliberations; that's it.**

(Beck RP 438, ll. 15-25) (Emphasis supplied.)

> This morning it came to our attention that **Mr. Beck -- would not be available as a juror -- currently in an emergency room situation.** We do not have a formal report so I'm not going to speculate -- and tell you something I'm not fully aware of 'cause I'm getting it second- and third-hand, (inaudible). So, -- But based on that his wife does work here for the county. It's through her

department that we learned that -- she was not at work today, that she was at the emergency room with her spouse. So I just wanted to convey that, as far as we know.

So, what the court did today is call Mr. Harry DuFresne to come in, and he indicated -- we called him about ten or -- quarter after 8:00. He said it would be about an hour. **So I am giving you that information so -- cause a delay in your deliberations.**

And when I say deliberations, I do not want you to discuss this case until he arrives. Now, Mr. Haney, the other day you indicated that you're the presiding juror. I -- I am not going to tell the jury how to conduct its affairs; that's outside of my purview. But should the jury choose to go forward and -- continue you as the presiding juror, as -- I'll leave that up to the jury's discretion -- for the time being -- Just with a new juror I

> don't know what impact that may or may not have had on that decision.
>
> **But I am going to caution all of you to not discuss this case**, **not to begin your deliberations on this case until Mr. DuFresne arrives.**

(Beck RP 446, l. 1 thru RP 447, l. 2) (Emphasis supplied)

> And so I am going to send you to the jury deliberation room -- waiting Mr. DuFresne be here. **When he arrives you may begin your deliberations.**
>
> So with that, that's my instruction to you.
>
> ….

(Beck RP 447, ll. 13-16) (Emphasis supplied.)

The trial court failed to give the jury the appropriate instruction for recommencing deliberations. WPIC 4.69.02 provides:

> During this trial [Harry DuFresne] was an alternate juror. [Mr. DuFresne] has now been seated as a juror in this case. You must disregard all previous deliberations and begin deliberations anew.

The trial court merely told the jury not to deliberate until the alternate juror arrived. It did not tell them they had to begin deliberations anew.

> It is "reversible error of constitutional magnitude to fail to instruct the reconstituted jury ***on the record*** that it must disregard all prior deliberations and begin deliberations anew." Claims of constitutional error are reviewed *de novo.*

State v. Blancaflor, 183 Wn. App. 215, 222 (August 2014) (quoting *State v. Ashcraft*, 71 Wn. App. 444, 446, 859 P.2d 60 (1993)).

The trial court in *Blancaflor* failed to give the appropriate jury instruction when an alternate returned to engage in deliberations. As the Court noted at 225:

> It is undisputed that this record shows that the trial court instructed the original jury to commence deliberations when it retired to the jury room following closing arguments. It is also undisputed that the court never instructed the reconstituted jury to begin deliberations anew after the original Juror 3 was replaced with an alternate. This latter failure was a manifest error of constitutional magnitude.

State v. Blancaflor, supra, 225.

The record in Mr. Mears' case parallels what occurred in the *Blancaflor* case.

Const, art. I, §§ 21 and 22 require a unanimous verdict by an impartial jury. The failure to properly reinstruct the jury when an alternate returns cannot be anything except a violation of those constitutional provisions. *See: State v. Lamar,* 180 Wn.2d 576, 327 P.3d 46 (2014).

G. INEFFECTIVE ASSISTANCE OF COUNSEL

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.,* it fell below an objective standard of reasonableness based on consideration of all of the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.,* there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas,* 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)).

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Defense counsel was deficient in multiple aspects of the sentencing portion of Mr. Mears' case. Defense counsel's deficiency was of such a nature that Mr. Mears received a sentence of one hundred and two (102) months when he is a first-time offender. Moreover, defense counsel's failure to argue same criminal conduct, when the prosecuting attorney had

theoretically conceded that a number of the counts constituted the same criminal conduct, further exacerbated the sentence imposed by the trial court. (Beck RP 458, ll. 12-22)

1. First-time Offender Waiver

RCW 9.94A.650 applies to first-time offenders. It states, in part:

> (1) This section applies to offenders who have never been previously convicted of a felony in this state, federal court, or another state, and who have never participated in a program of deferred prosecution for a felony, and who are convicted of a felony that is not:
> (a) Classified as a violent offense or a sex offense …;
> (b) Manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug or flunitrazepam classified in Schedule IV;
> (c) Manufacture, delivery, or possession with intent to deliver methamphetamine …;
> (d) The selling for profit of any controlled substance or counterfeit substance classified in Schedule I … except leaves and flowering tops of marihuana; or
> (e) Felony driving while under the influence of intoxicating liquor or any drug or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug.

Mr. Mears was not convicted of any offense that would disqualify him from the first-time offender waiver.

It does not appear that defense counsel even considered arguing a first-time offender waiver to the Court. Rather, he recommended the low end of the standard range on each of the counts. (Beck RP 462, ll. 6-8)

In *State v. Johnson,* 97 Wn. App. 679, 682, 988 P.2d 460 (1999), the Court held:

> As a preliminary matter we hold that Johnson qualifies as a first-time offender: His conviction was not for a violent offense, a sex offense, or a drug offense, and he had no prior record of felony conviction or deferred felony prosecution. … That his current convictions were for two felonies did not preclude a first-time offender sentence. *State v. Welty,* 44 Wn. App. 281, 284, 726 P.2d 472, *review denied,* 107 Wn.2d 1002 (1986). The trial court has broad discretion in sentencing a defendant under the first-time offender option, *Id.* at 283-84, or in refusing to grant this option, *State v. Boze*, 47 Wn. App. 477, 735 P.2d 696 (1987).

The failure of defense counsel to give the trial court the ability to exercise its discretion constitutes deficient performance. It was prejudicial to Mr. Mears because the trial court did not get the opportunity to consider

whether or not Mr. Mears would be a good candidate for the first-time offender option.

2. Same Criminal Conduct

Mr. Mears has conducted a same criminal conduct analysis in a later portion of this brief. He also relies upon that argument in connection with his position that defense counsel was ineffective in not arguing same criminal conduct.

> Defense counsel's failure to argue same criminal conduct at sentencing can amount to ineffective assistance of counsel. *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2002) (concluding that counsel's performance was deficient where counsel did not argue same criminal conduct as to rape and kidnapping charges); *cf. Brown* [*State v. Brown*, 159 Wn. App. 1, 16-17, 248 P.3d 518 (2010), *review denied*, 171 Wn.2d 1015 (2011)] (concluding that defendant received effective assistance of counsel).
>
> "[I]t is the defendant who must establish that crimes constitute the same criminal conduct" at sentencing. *State v. Aldana Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013).

State v. Rattana Keo Phuong, 174 Wn. App. 494, 547, 299 P.3d 37 (2013).

Where the prosecuting attorney hints to defense counsel that he/she would probably not object to an argument for same criminal conduct, defense counsel's failure to pick up on that hint and argue for same criminal

conduct constitutes ineffective assistance of counsel. Applying the same criminal conduct analysis to Mr. Mears' convictions indicates that his offender score would have been sufficiently lowered. The result is a less severe sentence.

2. Failure to Object to Prosecutorial Misconduct

Defense counsel failed to object to the prosecuting attorney testifying during his examination of April Mears. *See:* Section A.2. *infra.*

Defense counsel further failed to object to the prosecuting attorney's closing and rebuttal arguments which introduced evidence outside the record.

Defense counsel's failure in both respects was deficient performance under the standards expected of a reasonably competent attorney.

> As noted by … jury instructions …, "[t]he attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. *They are not evidence.*" …

State v. Smith, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

An objection by defense counsel at the critical junctures in the examination of Ms. Mears, as well as the closing and rebuttal arguments, would have resulted in either a cautionary instruction to the jury (if requested) or a striking of the particular testimony from the prosecutor (if requested).

> … [W]e have held that it is error to submit evidence to the jury that has not been admitted at trial. *State v. Pete*, 152 Wn.2d 546, 553-55, 98 P.3d 803 (2004). The "long-standing rule" is that "'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'" *Id.* at 555 n. 4 (emphasis omitted) (quoting *State v. Rinkes*, 70 Wn.2d 854, 862, 425 P.2d 658 (1967)) ….

Personal Restraint of Glasmann, 175 Wn.2d 696, 705, 286 P.3d 673 (2012).

3. Failure to Move for Dismissal

Defense counsel's failure to move for dismissal of RDC Counts 13 and 14 resulted in Mr. Mears being convicted of two (2) counts of tampering with a witness. The State failed to introduce sufficient evidence, beyond a reasonable doubt, that either Mr. O'Bryan or Ms. Mears were the victims of tampering: *See:* Section A of this brief, *infra.*

> "… [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *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, 616 P.2d 628 (1980).

The facts relating to RDC Counts 13 and 14 all pertain to what occurred at the O'Bryan property. There was no direct contact between Mr. Mears and Mr. O'Bryan. There was no direct contact between Mr. Mears and Ms. Mears.

Certain notes were left in the residence. The testimony does not reflect that the notes pertained to potential testimony of either Mr. O'Bryan or Ms. Mears. The notes themselves were not produced at trial. It was merely Ms. Mears' recollection of non-threatening notes and/or conversations and the prosecuting attorney's testimony that had any bearing on the tampering charges.

No rational trier of fact could have found even a scintilla of evidence to support the elements of the offense(s).

> … [D]efense counsel has a basic duty to protect the defendant's due process interests by challenging the State's failure to prove an essential element of the charged crime. [Citations omitted.]
>
> …
>
> "In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State's case in chief, (c) at the end of all of the evidence, (d) after verdict, and (e) on appeal." *State v. Jackson,* 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996) ….
>
> …

> Ordinarily, counsel's strategic or tactical decisions will not provide a basis for an ineffectiveness challenge. [Citation omitted.] But here, no sound strategic or tactical reason is evident for counsel's failure to move for dismissal at the end of the State's case in chief. … "Moreover, no possible advantage could flow" to [Mr. Mears] from counsel's failure to move for dismissal. *Horness* [*State v. Horness,* 600 N.W.2d 294, 300 (Iowa 1999)] (citing *Osborn v. State,* 573 N.W.2d 917, 922 (Iowa 1998)). Here, counsel's representation was deficient. …

State v. Lopez, 107 Wn. App. 270, 275-77, 27 P.3d 237 (2001).

There was no tenable strategic or tactical reason not to challenge the sufficiency of the evidence as to the tampering with a witness counts. It is apparent from the record that the State failed to prove those counts beyond a reasonable doubt. A motion at the close of all the evidence would have been successful. Mr. Mears was convicted of offenses he did not commit.

4. No-Contact Order

Defense counsel was ineffective in not challenging the no-contact order involving Ms. Mears. *See:* Section H, *supra.*

5. LFOs

Defense counsel was ineffective in not challenging the amount of the LFOs imposed and the miscalculated LFOs. *See:* Section I, *supra.*

H. SAME CRIMINAL CONDUCT

At Mr. Mears' sentencing hearing the prosecuting attorney essentially conceded that Counts 7 and 9, 11 and 12, and 15 and 16 were theoretically the same criminal conduct. Defense counsel did not argue same criminal conduct as to any of those offenses. (Beck RP 458, ll. 14-22)

RCW 9.94A.589(1)(a) defines "same criminal conduct" as follows: "… Two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."

Counts 7 and 9 involve Laura Brown. Mr. Mears was convicted of intimidation of a witness and harassment - threat to kill.

Counts 11 and 12 involve Herman Mullis. Mr. Mears was convicted of intimidation of a witness and harassment - threat to kill.

Counts 15 and 16 involve theft of a motor vehicle and second degree theft of tools that were inside the vehicle.

> Offenses have the same criminal intent when, viewed objectively, the intent does not change from one offense to the next. *State v. Dunaway,* 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). "Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame,* 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Courts have also looked at whether one crime furthers the other or whether the offenses were part of a recognized plan or scheme. *Duna-*

> *way*, 109 Wn.2d at 215 (**furtherance test**); *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990) (**same scheme or plan**).

State v. Kloepper, 179 Wn. App. 343, 357 (2014). (Emphasis supplied.)

Under the State's theory of the case the harassment furthered the offense of intimidation of a witness.

In addition, Mr. Mears contends that since the counts occurred at the same time and place and involved the same victim(s), using the State's theory is indicative of the fact that the same criminal intent was involved. When crimes are "committed simultaneously, it is not possible to find a new intent to commit a second crime after the completion of the first crime." *State v. Taylor*, 90 Wn. App. 312, 322, 950 P.2d 526 (1998).

Any argument that the crimes were not simultaneous will not bear close scrutiny.

The charged offenses involving Ms. Brown occurred at Caso's while she was sitting in a PU.

The charged offenses involving Mr. Mullis occurred during a confrontation at the gate on the O'Bryan property.

There is nothing in the record to indicate that Mr. Mears had the opportunity to pause, reflect and consider whether or not to cease his activities. *See: State v. Mehrabian*, 175 Wn. App. 678, 711 (2013).

RCW 9A.46.020(1) defines harassment as:

> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person;
> … and
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. ….

If the threat amounts to a threat to kill, then the offense is increased from a gross misdemeanor to a felony. *See:* RCW 9A.46.020(2)(a), (b)(ii).

Intimidation of a witness as defined in RCW 9A.72.110 also requires the use of a threat.

1. RDC Counts 7 and 9

The alleged threat involving Ms. Brown constitutes the basis for the harassment charge under the facts and circumstances of Mr. Mears' case. The same alleged threat constitutes the basis for the offense of intimidating a witness.

The State's theory at trial was that by harassing Ms. Brown he was also intimidating her in the hope of impacting her testimony and/or cooperation with law enforcement.

Ms. Brown did not provide any evidence that Mr. Mears' statements were directed at her as a witness. Nevertheless, Mr. Mears con-

cedes a reasonable inference can be drawn from the testimony that those statements had an impact on her.

2. RDC Counts 11 and 12

The alleged threat involving Mr. Mullis constitutes the basis for the harassment charge under the facts and circumstances of Mr. Mears' case. The same alleged threat constitutes the basis for the offense of intimidating a witness.

The State's theory at trial was that by harassing Mr. Mullis he was also intimidating him in the hope of impacting his testimony and/or cooperation with law enforcement.

Mr. Mullis did not provide any evidence that Mr. Mears' statements were directed at him as a witness. Nevertheless, Mr. Mears concedes a reasonable inference can be drawn from the testimony that those statements had an impact on him.

3. RDC Counts 15 and 16

RDC counts 15 and 16 involve theft of a motor vehicle and second degree theft of tools from Mr. VanHees. They occurred at the same time and place. They would appear to have the same criminal intent.

Count 15 states:

> On or about September 23, 2013, in the State of Washington, the above-named Defendant did wrongfully obtain or exert unau-

> thorized control over a motor vehicle of another, to-wit: 1982 Subaru, with intent to deprive such other of such property ….

Count 16 states:

> On or about September 23, 2013, in the State of Washington, the above-named Defendant did wrongfully obtain or exert unauthorized control over property, other than a firearm, … to-wit: hand tools, electric tools, and/or mechanical tools; of a value exceeding $750 but less than $5000, with intent to deprive such other of such property or services ….

The respective counts clearly indicate the same criminal intent. The tools were inside the motor vehicle.

4. RDC Counts 3 and 5

RCW 9A.82.050(1) defines trafficking in stolen property in the first degree as follows:

> A person who knowingly … traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

The word "traffic" is defined by RCW 9A.82.010(19) as meaning "to sell … stolen property to another person …." RDC Count 3 involves the sale of the F-250 PU. RDC Count 5 involves the sale of the wood splitter. Both offenses allegedly occurred on September 3, 2013. The victim in each count was Mr. O'Bryan.

Based upon the Information and the instructions to the jury on these two (2) counts the theft of the F-250 PU and wood splitter initiated and was integrally necessary for the trafficking in stolen property first degree. When the two (2) items were sold the alleged offense of trafficking was completed. The trafficking could not have occurred without the initial theft. (Instructions 7, 8, and 10; CP 38; CP 39; CP 41; Appendix "P"; Appendix "Q"; Appendix "R")

> To determine whether a defendant's acts are a continuing course of criminal conduct, "the facts must be evaluated in a commonsense manner." But the court should also remember that "the doctrine of continuing offenses should be employed sparingly, and only when the legislature expressly states the offense is a continuing offense, or when the nature of the offense leads to a reasonable conclusion that the legislature so intended."

State v. Spencer, 132 Wn. App. 132, 137, 114 P.3 1222 (2005), quoting *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984) and *State v. Green*, 150 Wn.2d 740, 742-43, 82 P.3d 239 (2004).

The facts and circumstances indicate that the acts in question were continuous in nature. They also indicate that they involved the same criminal conduct.

The two (2) events are so conjoined that they constitute a single offense.

I. NO-CONTACT ORDER

In the event that the Court does not reverse Mr. Mears' conviction for tampering with a witness involving Ms. Mears, then the ten (10) year no-contact order entered by the Court is error. Tampering with a witness is a class C felony. RCW 9A.72.120(2).

The maximum penalty for a class C felony is five (5) years. RCW 9A.20.021(1)(c).

The trial court's imposition of a ten (10) year no-contact order as to Ms. Mears is error. *See:* RCW 9.94A.505(5), (8); *State v. Armendariz,* 160 Wn.2d 106, 118-19, 156 P.3d 201 (2007).

J. LFOs

The State consolidated Mr. Mears' three (3) cases for trial. The consolidation of the cases created a single prosecution. When the trial court imposed separate LFOs on each of the cause numbers, it violated RCW 9.94A.589(1)(a) which requires concurrent sentencing.

Mr. Mears finds support for his position in *State v. Bates*, 51 Wn. App. 251, 253, 752 P.2d 1360 (1988). The *Bates* Court relied upon *State v. Huntley*, 45 Wn. App. 658, 662, 726 P.2d 1254 (1986) … [which] held [in part] that:

> *… concurrent sentences are required when the convictions are obtained in a single or consolidated proceeding.*

(Italics ours.)

> Similarly, in *State v. Stark*, 48 Wn. App. 245, 254-55, 738 P.2d 684, *review denied*, 109 Wn.2d 1003 (1987), the court explicitly approved the imposition of concurrent sentences under former RCW 9.94A.400(1)(a) for two bail jumping convictions obtained by a guilty plea in a single proceeding.

Moreover, the trial court miscalculated the amount of the LFOs on each case. The correct total is $860.50 for the consolidated cases as opposed to $1,110.50 on each case.

Mr. Mears contends that as to this issue the case needs to be remanded to the trial court for correction of the LFOs that he owes.

CONCLUSION

Mr. Mears is entitled to have his convictions reversed and the case remanded for a new trial due to the trial court's failure to instruct the jury to begin deliberations anew when an alternate juror was recalled to replace a juror who became ill.

Mr. Mears' convictions for two (2) counts of witness tampering should be reversed and dismissed due to the State's failure to prove those counts beyond a reasonable doubt; *i.e.,* insufficient evidence.

The witness tampering counts should also be reversed and dismissed due to the trial court's failure to provide a unanimity instruction on an alternative means crime, as well as the State's failure to elect a specific means of committing the offense.

Mr. Mears' convictions for two (2) counts of intimidation of a witness should be reversed and dismissed due to the State's failure to prove those counts beyond a reasonable doubt; *i.e.*, insufficient evidence.

The intimidation of a witness counts should also be reversed and dismissed due to the trial court's failure to provide a unanimity instruction on an alternative means crime, as well as the State's failure to elect a specific means of committing the offense.

In the event the witness intimidation counts are not dismissed, they count as the same criminal conduct with the harassment counts for sentencing purposes.

Prosecutorial misconduct and/or ineffective assistance of counsel deprived Mr. Mears of a fair and impartial trial as guaranteed by the Sixth Amendment and Const. art. I, § 22. He is entitled to a new trial.

Finally, in the event Mr. Mears is not granted a new trial, or if the witness tampering and intimidating a witness are not dismissed, he is entitled to be resentenced due to multiple sentencing errors including defense

counsel's lack of arguing for a first time offender waiver and/or requesting a same criminal conduct analysis on various counts.

DATED this 26th day of January, 2015.

Respectfully submitted,

s/ Dennis W. Morgan
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Attorney for Defendant/Appellant.
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Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

APPENDIX "A"

Okanogan County Cause No. 13 1 00317 0

G	Count 1: Theft of a Motor Vehicle	(F-250 PU - 9/1/13)
G	Count 2: Theft of a Firearm	(8/15/13)
G	Count 3: Trafficking in Stolen Property 1°	(F-250 PU - 9/3/13)
G	Count 4: Trafficking in Stolen Property 1°	(Firearm - 8/15/13)
G	Count 5: Trafficking in Stolen Property 1°	(Wood Splitter - 9/3/13)
G	Count 6: Theft 3°	(Wood Splitter - 9/3/13)

Okanogan County Cause No. 13 1 00350 1

G	Count 7: Harassment - Threat to Kill	(Laura Brown - 9/22/13)
NG	Count 8: Harassment - Threat to Kill	(Mullis - 9/22/13)
G	Count 9: Intimidating a Witness	(Laura Brown - 9/22/13)
NG	Count 10: Intimidating a Witness	(Mullis -9/22/13)
G	Count 11: Harassment - Threat to Kill	(Mullis - 9/24/13)
G	Count 12: Intimidating a Witness	(Mullis - 9/24/13)
G	Count 13: Tampering with a Witness	(Jack O'Bryan - 9/22-9/24/13)
G	Count 14: Tampering with a Witness	(April Mears - 9/22-9/24/13)

Okanogan County Cause No. 13 1 00347 1

G	Count 15: Theft of a Motor Vehicle	(VanHees - Subaru)
G	Count 16: Theft 2°	(VanHees - tools)

APPENDIX "B"

Filed
MAR 21 2014
Okanogan County Clerk

SUPERIOR COURT OF WASHINGTON
COUNTY OF OKANOGAN

State of Washington
Plaintiff(s),

Jerry L. Mercy
Defendant(s).

CASE NO. 13-1-00317-0
13-1-00350-1
ORDER 13-1-00347-1

I. BASIS

State moved the court for: re-numbering of Counts in 13-1-00350-1 and 13-1-00347-1

II. FINDINGS

After reviewing the case record to date, and the basis for the motion, the court finds:

The above referenced cases are joined for trial with 13-1-00317-0. To avoid confusion on count numbers, the counts in 13-1-00350-1 and 13-1-00347-1 should be renumbered to make counts consecutive

III. ORDER

IT IS ORDERED that: Counts in 13-1-00350-1 shall be renumbered from 1 through 8 to new numbered counts of 7 through 14. Counts in 13-1-00347-1 shall be renumbered from 1 and 2 to new numbered counts of 15 and 16.

DATE: 3/21/2014

JUDGE: Henry C. Rawson
Nicholas A. Blount #44783

Copy received

54.91

APPENDIX "C"

13-1-00350-1

13-1-00350-1

Mary Horner

Filed

MAR 2 9 2014

Okanogan County Clerk

From: Nick Blount <n.g.blount@gmail.com>
Sent: Thursday, March 20, 2014 9:26 AM
To: Mary Horner
Subject: Fwd: Mears witnesses

---------- Forwarded message ----------
From: "Nick Blount" <n.g.blount@gmail.com>
Date: Mar 20, 2014 9:13 AM
Subject: Meats witnesses
To: "Karl F. Sloan" <ksloan@co.okanogan.wa.us>
Cc:

Koeetia Mears: April and Jack came to her residence when jerry was arrested. Jack said Jerry had permission to sell truck.

Shelby Mears: Jack was crying and in tears when he told Shelby that "jerry had been wronged" regarding the theft of the truck.

Jerry Mears Jr: was on jail visiting booth with April who was crying saying "they're making me do this"

54.9

How sick Can u
get Running
Around With
Butch

How Sick
what He did to His
dad Now a With
him JR's uncle
your family going
to Love this one
Man that's Sick April
Tick Tock Tic Tac

Roy Mears

OKANOGAN COUNTY CORRECTIONS
149 ALDER AVE NORTH
OKANOGAN WA 98840

Master
11/15/2013
US POSTAGE $00.46
ZIP 98840
011D1381121

April Davis
Rout 1 Box 303 Buzzard
LK Rd 98840

APPENDIX "E"

Filed
SEP 05 2013
Okanogan County Clerk

SUPERIOR COURT OF WASHINGTON FOR OKANOGAN COUNTY

STATE OF WASHINGTON, Plaintiff,

vs.

Jerry R. Mears, Defendant.

No. 13-100317-0

ORDER (1) FINDING PROBABLE CAUSE, (2) SETTING CONDITIONS FOR PRETRIAL RELEASE. CHARGES: Theft of Motor Veh., 2d of firearm, forgery & Theft 3rd (3 counts)

THE COURT FINDS there is probable cause to believe defendant committed the above offenses.

IT IS ORDERED that the defendant be released upon the following conditions, SUBJECT TO OTHER HOLDS, WARRANTS OR ORDERS. **THE DEFENDANT SHALL:**

[X] **POST BAIL BOND OR CASH IN THE AMOUNT OF** $ 10,000.00

[ ] Execute an unsecured appearance bond in the amount of $ _____ prior to release, who have been approved by the court in writing prior to release; with solvent and reliable sureties

[ ] Be released on personal recognizance;

[X] **NOT BE RELEASED** without further order of the court setting additional conditions:

[X] (1) Not violate any laws; (2) contact defense attorney once each week and follow the attorney's instructions; (3) appear in court when ordered by court or requested by attorney and at all times when the case is scheduled; (Need Address)

[ ] Maintain residence at _____ such address shall not be changed without written permission of the prosecuting attorney;

[ ] Not leave Okanogan County without prior written approval of the prosecuting attorney;

[X] Not contact, approach, or communicate directly or indirectly with the State's witnesses or any alleged victim;

[X] Not contact or go to JACK O'BRYAN (VICTIM) HERMAN MULLIS (VICTIM);

[ ] Not possess any dangerous weapons or firearms;

[ ] Not drink intoxicating liquor or be where liquor is sold by the drink;

[ ] Not possess controlled substances except as prescribed by physician;

[X] An information, complaint or citation must be filed by the following deadline or defendant shall be released and deemed exonerated from all conditions: 9-9 2013 at 5:00 AM/PM.

[X] **DEFENDANT SHALL NEXT APPEAR** in court on: 9-16 2013 at 8:30 A.M.
For: [X] Arraignment [ ] Other

[ ] OTHER: _____

[X] The contract defender has been appointed to represent the defendant by separate order.

[X] **FAILURE TO COMPLY** with any of the above marked conditions will result in a warrant for defendant's arrest. The defendant may be arrested on probable cause for violation of these conditions.

[ ] Probable cause has not been established and defendant is ordered released without conditions;

[ ] This case is remanded or will be filed in Okanogan County District Court.

DEFENDANT'S ACKNOWLEDGMENT OF CONDITIONS FOR RELEASE

1. I have read the conditions of release and any other conditions of release that may be attached;
2. I agree to follow the conditions and understand that any violation may lead to the forfeiture of any bond posted and to the issuance of a warrant for my immediate arrest and I may be charged with a separate crime.

Defendant's Signature

DATED: 9-5-2013

Interpreter's Signature

JUDGE

WHITE: COURT - GREEN: DEFENDANT - CANARY: JAIL - PINK: PROSECUTOR - GOLDENROD: DEFENSE COUNSEL

2

APPENDIX "F"

INSTRUCTION NO. 21

A person commits the crime of tampering with a witness when 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 or a person whom he or she has reason to believe may have information relevant to a criminal investigation to testify falsely, or without right or privilege to do so, to withhold any testimony, or to absent himself or herself from any official proceedings, or to withhold from a law enforcement agency information which he or she has relevant to a criminal investigation.

APPENDIX "G"

INSTRUCTION NO. 22

To convict the defendant of the crime of tampering with a witness, in count 13, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on between September 22 and September 24, 2013, the defendant attempted to induce a person (Jack Obryan) to testify falsely, or without right or privilege to do so, withhold any testimony, or absent himself or herself from any official proceeding, or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and

(2) That the other person was a witness a person the defendant had reason to believe was about to be called as a witness in any official proceeding, or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "H"

INSTRUCTION NO. 23

To convict the defendant of the crime of tampering with a witness, in count 14, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on between September 22 and September 24, 2013, the defendant attempted to induce a person (April Mears) to testify falsely, or without right or privilege to do so, withhold any testimony, or absent himself or herself from any official proceeding, or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and

(2) That the other person was a witness a person the defendant had reason to believe was about to be called as a witness in any official proceeding, or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "I"

COUNT NO. 7

RCW 9A.72.120 – Tampering with a Witness

On or between September 22 and September 24, 2013, in the State of Washington the above-named Defendant did attempt to induce **Jack Obryan**, 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, to testify falsely, and/or to unlawfully withhold testimony, and/or to absent himself/herself from such proceedings, and/or to withhold from a law

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COUNT NO. 8

RCW 9A.72.120 ~ Tampering with a Witness

On or between September 22 and September 24, 2013, in the State of Washington the above-named Defendant did attempt to induce **April Mears**, 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, to testify falsely, and/or to unlawfully withhold testimony, and/or to absent himself/herself from such proceedings, and/or to withhold from a law enforcement agency information which he/she has relevant to a criminal investigation; contrary to Revised Code of Washington 9A.72.120(1).

Maximum Penalty--Five (5) years imprisonment or $10,000 fine, or both pursuant to RCW 9A.72.120(2) and RCW 9A.20.021(1)(c), plus restitution, assessments and court costs.

DATED this 1st day of October, 2013

KARL F. SLOAN
Prosecuting Attorney
Okanogan County, Washington

By: _____
Karl F. Sloan WSBA# 27217
Prosecuting Attorney

KARL F. SLOAN
Okanogan County Prosecuting Attorney
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APPENDIX "K"

INSTRUCTION NO. 17

A person commits the crime of intimidating a witness when he or she by use of a threat against a current or prospective witness attempts to influence the testimony of that person, or induce that person to elude legal process summoning him or her to testify, or induce that person to absent himself or herself from an official proceeding, or induce that person not to report the information relevant to a criminal investigation or induce that person not to give truthful or complete information relevant to a criminal investigation.

APPENDIX "L"

INSTRUCTION NO. 15

To convict the defendant of the crime of intimidating a witness, in count 9, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 22, 2013, the defendant by use of a threat against a current or prospective witness (Lora Brown) attempted to: influence the testimony of that other person, or induce that person to elude legal process summoning him or her to testify, or induce that person to absent himself or herself from an official proceeding, or induce that person not to have the crime prosecuted, or induce that person not to give truthful or complete information relevant to a criminal investigation; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "M"

INSTRUCTION NO. 20

To convict the defendant of the crime of intimidating a witness, in count 12, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 24, 2013, the defendant by use of a threat against a current or prospective witness (Herman Mullis) attempted to: influence the testimony of that other person, or induce that person to elude legal process summoning him or her to testify, or induce that person to absent himself or herself from an official proceeding, or induce that person not to have the crime prosecuted, or induce that person not to give truthful or complete information relevant to a criminal investigation; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "N"

COUNT NO. 3

RCW 9A.72.110(1) ~ Intimidating a Witness -- Current or Prospective Witness

On or about September 22, 2013, in the State of Washington, the above-named Defendant , by using a threat against an individual who the defendant knew was a current or prospective witness, to wit: **Lora Brown**, did attempt to: (1) influence the testimony of that person; and/or (2) induce that person to elude legal process summoning him or her to testify; and/or (3) induce that person to absent himself or herself from such proceeding; (4) induce that person not to have a crime prosecuted; and/or (5) induce that person not to give truthful and complete information relevant to a criminal investigation contrary to Revised Code of Washington 9A.72.110(1).

Maximum Penalty--Ten (10) years imprisonment or $20,000 fine, or both pursuant to RCW 9A.72.110(4) and RCW 9A.20.021(1)(c), plus restitution, assessments and court costs.

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APPENDIX "O"

COUNT NO. 6

RCW 9A.72.110(1) ~ Intimidating a Witness -- Current or Prospective Witness

On or about September 24, 2013, in the State of Washington, the above-named Defendant , by using a threat against an individual who the defendant knew was a current or prospective witness, to wit: **Herman Mullis**, did attempt to: (1) influence the testimony of that person; and/or (2) induce that person to elude legal process summoning him or her to testify; and/or (3) induce that person to absent himself or herself from such proceeding; (4) induce that person not to have a crime prosecuted; and/or (5) induce that person not to give truthful and complete information relevant to a criminal investigation contrary to Revised Code of Washington 9A.72.110(1).

Maximum Penalty--Ten (10) years imprisonment or $20,000 fine, or both pursuant to RCW 9A.72.110(4) and RCW 9A.20.021(1)(c), plus restitution, assessments and court costs

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APPENDIX "P"

INSTRUCTION NO. 7

A person commits the crime of trafficking in stolen property in the first degree when he or she knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property.

"Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

APPENDIX "Q"

INSTRUCTION NO. 8

To convict the defendant of the crime of trafficking in stolen property in the first degree, in count 3 (Ford F250), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 3, 2013, the defendant, knowingly initiated, organized, planed, financed, directed, managed, or supervised the theft of property for sale to others, or who knowingly trafficked in stolen property; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "R"

INSTRUCTION NO. 19

To convict the defendant of the crime of trafficking in stolen property in the first degree, in count 5 (wood splitter), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 3, 2013, the defendant, knowingly initiated, organized, planed, financed, directed, managed, or supervised the theft of property for sale to others, or who knowingly trafficked in stolen property; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

32451-6-III

(Consolidated with 32452-4-III and 32453-2-III)

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	OKANOGAN COUNTY
Plaintiff,	)	NOS. 13 1 00350 1, 13 1 00347 1
Respondent,	)	& 13 1 00317 0
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	
JERRY RAY MEARS, SR.,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 26th day of January, 2015, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

COURT OF APPEALS, DIVISION III — E-FILE
Attn: Renee Townsley, Clerk
500 N Cedar St
Okanogan, WA 99201

OKANOGAN COUNTY PROSECUTOR'S OFFICE — E-FILE (per-agreed)
Attention: Karl F. Sloan
PO Box 113
Okanogan, Washington 98840-1130
ksloan@co.okanogan.wa.us

JERRY RAY MEARS, SR. #373434 — U.S. MAIL
Airway Heights Correction Center
PO Box 2049
Airway Heights, Washington 99001

s/ Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
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CERTIFICATE OF SERVICE