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WASHINGTON STATE
SUPREME COURT

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.

PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

JERRY RAY MEARS, SR. requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Mears seeks review of an unpublished decision of Division III of the Court of Appeals dated December 15, 2015. (Appendix "A" 1-27)

3. ISSUES PRESENTED FOR REVIEW

A. Does the Court of Appeals determination that there was sufficient evidence to support Mr. Mears' convictions of witness tampering and intimidation of a witness lack specificity and thereby fail to create a foundation upon which to base its decision?

B. Was a unanimity instruction required with regard to the witness tampering and intimidation of a witness offenses?

C. Is the Court of Appeals determination that no deliberations occurred prior to an alternate juror being recalled contrary to the record?

D. Where cases are consolidated for trial may the trial court impose legal financial obligations on each case or only on the consolidated cases as a whole?

4. STATEMENT OF THE CASE

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 Herman Mullis and Jack O'Bryan. (Steinmetz RP 6, ll. 22-23; Exhibits 1 and 2)

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)

The pertinent witnesses to the offenses set forth in the respective Informations are:

April Mears | Jack O'Bryan
Herman Mullis | Laura Brown

(Beck RP 64, ll. 16-18; RP 65, ll. 8-9; RP 66, ll. 24-25; RP 68, ll. 10-16; RP 72, ll. 1-6; RP 74, ll. 2-4; ll. 7-16; RP 77, ll. 10-16; RP 80, ll. 5-19; RP 105, l. 24 to RP 106, l. 7; RP 106, ll. 17-22; RP 109, ll. 19-20; RP 125, ll. 20-25)

The Court of Appeals relied upon the following statements made by Mr. Mears, along with testimony from the respective witnesses, when it

ruled that the evidence was sufficient as to the witness tampering and intimidation of a witness counts:

> "'Fine, I'll just blow your f-ing heads off.'"

(Laura Brown) (Beck RP 85, ll. 22-24)

> "'I'm going to blow your motherfucking heads off.'"

(Herman Mullis) (Beck RP 133, ll. 23-25)

> "'Well, you can kiss your shotgun goodbye.'"

(Herman Mullis) (Beck RP 136, l. 25)

> "'You want to be there [*sic*] fucking nigger, go ahead,' 'let them,' 'go ahead and be their nigger.'"

(Note to April Mears) (Beck RP 199, ll. 13-17)

> "'Tick tock; tick tock'"

(Letter to April Mears) (Beck RP 201, l. 10 to RP 202, l. 6)

> "'You will know the truth; someday the truth will come out.'"

(Jack O'Bryan) (Beck RP 199, ll. 20-25)

On March 23, 2014 the jury retired to begin deliberations on Mr. Mears cases. 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 RDC[1]. 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. 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)

The Court of Appeals rendered its Unpublished Opinion on December 15, 2015.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Tampering with a Witness

The Court of Appeals, in its opinion, concluded that the State presented sufficient evidence to support each of the alternative elements of tampering with a witness and witness intimidation. The Court of Appeals is in error.

[1] RDC means redesignation of counts. (CP 78; Appendix "B")

1. Count 13

RDC Count 13 involves 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 information 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 testified 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.

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 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 in-

> formation 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 testimony at trial was anything but convincing. As a result the prosecuting attorney, introduced evidence by means of his own testimony. (*See:* Appendix "C")

As outlined in Appendix "C" 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 evidence, 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 position that the State 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).

Mr. Mears' contact with Ms. Brown 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.)

> 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.

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 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. The conviction must be reversed and dismissed.

C. Lack of Unanimity Instruction

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 "D"; Appendix "E"; Appendix "F")

RDC Counts 13 and 14 set forth all three (3) alternatives of RCW 9A.72.120.

The instructions parallel the language of the Information. As argued in Section A, *infra.,* the State failed to present sufficient evidence of the offenses. 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 "G"; Appendix "H"; Appendix "I"; Appendix "J")

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).

The Court of Appeals conclusion that sufficient evidence supported each alternative is illusory at best.

D. 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 and are attached as Appendix "K".

The Court of Appeals interpreted the trial court's statements concerning jury deliberations as not having commenced. Mr. Mears asserts that the Court of Appeals misinterprets the language and that deliberations had commenced pursuant to the concluding instruction given to the jury. The concluding instruction advises the jury that their first duty is to select a presiding juror. They have to deliberate in order to do so. In fact, the trial court recognized this when the alternate juror returned to deliberate with the jury. The trial court indicated that they could reconsider who had been chosen as the presiding juror.

Whether or not any specific deliberations occurred concerning the testimony and evidence is not contained within the record. Nevertheless, this does not mean that deliberations had not commenced.

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).

E. 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 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.

6. CONCLUSION

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 Court of Appeals opinion is contrary to *State v. Rempel, supra.*

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. The Court of Appeals opinion is contrary to *State v. Kitchen, supra* and Const. art. I, §§ 21 and 22.

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

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. The Court of Appeals opinion is contrary to its own opinion in *State v. Boiko, supra.*

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. The Court of Appeals opinion runs counter to *State v. Blancaflor, supra.* and *State v. Lamar, supra.*

RAP 13.4(b) provides, in part:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Su-

preme Court; or

(2) ...; or

(3) If a significant question of law under the constitution of the State of Washington or of the United States is involved; or

(4) ....

Review should be accepted in order to resolve the issues raised.

DATED this 14th day of January, 2016.

Respectfully submitted,

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No. 32452-4-111; 32453-2-111
State

APPENDIX "A"

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

STATE OF WASHINGTON,No. 32451-6-111) (consolidated with

Respondent,No. 32452-4-111;) No. 32453-2-111)

UNPUBLISI-ŒD OPINION

JERRY RAY NŒARS,

Appellant.

LAWRENCE-BERREY, J. — In three consolidated cases, a jury found Jerry R. Mears, Sr. guilty of two counts of theft of a motor vehicle, theft of a firearm, three counts of first degree trafficking in stolen property, third degree theft, two counts of harassment by threats to kill, two counts of intimidating a witness, two counts of tampering with a witness, and second degree theft. He appeals, alleging (1) sufficient evidence does not

support his tampering with a witness and intimidating a witness convictions, (2) denial of his constitutional right to present a defense, (3) prosecutorial misconduct, (4) unanimity instructional error, (5) failure to properly instruct the jury when an alternate juror was substituted, (6) failure to conduct a same criminal conduct analysis on several of the charges, (7) ineffective assistance of counsel, and (8) sentencing error relating to legal financial obligations (LFOs) and a no-contact order. We address each of Mr. Mears' contentions, and generally [1] affirm.

FACTS

Mr. Mears' wife, April Mears, worked as a live-in caretaker for 80-year-old Jack O'Bryan. Mr. O'Bryan lived on his son's property in a remote area of Okanogan County. Mr. Mears also stayed at the property.

On the property was a Ford F250 truck owned by Michael Brown. Mr. Brown left the truck at the O'Bryan property because he planned to sell or trade it to Mr. O'Bryan's son.

On September 3, 2013, Mrs. Mears and Mr. O'Bryan reported a theft to Okanogan County Sheriffs Office Deputy Justin Weigel. Mrs. Mears and Mr. O'Bryan told the deputy that the Ford truck and a log splitter were taken from the O'Bryan property. They reported that Mr. Mears had originally borrowed the truck, but did not return it, claiming it broke down and then claiming someone stole it. Mrs. Mears also told the officer that Mr. Mears told her he was going to take the log splitter because he felt it was " ' owed to'" him. Report of Proceedings (RP) (Mar. 21, 2014) at 191.

1 The sole exception is that we permit Mr. Mears to file a motion with the trial court for it to correct a possible clerical error in totaling the LFOs,
32451-6-111;

With the assistance of Mrs. Mears, Deputy Weigel located the truck in an alley behind a motel. Joseph Wise provided a handwritten receipt showing he recently purchased the truck from Mr. Mears for $100. After recovering the truck, Mr. Brown returned it to the O'Bryan property. Mrs. Mears expressed fear to the deputy that Mr.
Mears would come back to the O'Bryan property and cause trouble.

On a separate occasion, Mr. Brown's father-in-law, Herman Mullis, reported to Deputy Weigel that Mr. Mears took his shotgun and never returned it. Prior to reporting the shotgun stolen, Mr. Brown; his wife, Laura Brown; and Mr. Mullis attempted to retrieve the gun from Mr. Mears on two occasions. On the second occasion, Mrs. Brown, Mr. Mullis, and Mr. Mears went to Walmart after Mr. Mears told them a friend had the gun and might be there. Mr. Mears then left the Walmart, leaving Mrs. Brown and Mr.
Mullis behind. The gun was never recovered.

Mrs. Brown and her father later moved to the O'Bryan property to help care for Mr. O'Bryan and his property. At the time Mrs. Brown and Mr. Mullis moved to the property, Mr. Mears was no longer staying there.

Mr. Mears later sold a log splitter to Dean Tonner for $40. Mr. Tonner was concerned the log splitter was stolen based on the low price. He suspected the log splitter belonged to the O'Bryans. After confirming the log splitter was indeed stolen from the O'Bryans, Mr. Tonner turned it over to the sheriff's office. Officers arrested Mr. Mears. Under case no. 13-1-00317-0, the State charged Mr. Mears with theft of a motor vehicle for the truck, theft of a firearm for the shotgun, three counts of first degree trafficking in stolen property relating to the truck, shotgun, and log splitter, and third degree theft for the log splitter.

At the time of Mr. Mears' preliminary appearance, he was ordered not to contact the State's witnesses. Specifically, he was told to, "not to contact or go to" Mr. O'Bryan's and Mr. Mullis's respective residences. RP (Mar. 21, 2014) at 291.

Approximately three weeks later, Mrs. Brown and her father, Mr. Mullis, went to a grocery store. Mrs. Brown stayed in the truck in the parking lot. Mr. Mears approached Mrs. Brown as she sat in the truck. Mr. Mears told Mrs. Brown that they were all going to jail, and he was innocent. Mrs. Brown tried to end the conversation, which made Mr. Mears angry. As Mrs. Brown rolled up the truck window, Mr. Mears told her, Fine, I'll just blow your f—ing heads off?" RP (Mar. 20, 2014) at 85. Mrs. Brown took Mr. Mears' threat seriously and believed it was directed to everyone residing at the O'Bryan property.

Two days later, Mr. Mears came to the O'Bryan property early in the morning looking for Mrs. Mears. He was driving a silver sedan. Mrs. Mears refused to speak to him. Mr. Mullis asked Mr. Mears to leave. During trial, Mr. Mears acknowledged that he then said, "I'm going to blow your motherfucking heads off." RP (Mar. 21, 2014) at 134. Mr. Mullis took Mr. Mears' threat seriously and felt by Mr. Mears tone and actions that it was directed to all individuals on the property. Mr. Mullis again told Mr. Mears to leave and he responded, " ' [Y]ou can kiss your shotgun goodbye."' RP (Mar, 20, 2014) at 136. Mr. Mullis called the police.

Sheriff's deputies arrived and found Mr. Mears' shoes, sunglasses, and a set of keys inside Mr. O'Bryan's residence. They also observed Mr. Mears left notes throughout the house. One note stated that Mrs. Mears was the O'Bryan's " ' nigger' " and another was directed to Mr. O'Bryan and that he will " '

know the truth; someday the truth will come out.'" RP (Mar. 21, 2014) at 199. Mr. Mears also ransacked Mrs. Mears' room and left a knife lying on her table.

A few days later, the same silver sedan Mr. Mears was driving earlier was found abandoned on a side roads Arnold Van Hees had previously reported the vehicle stolen after he loaned it to Mr. Mears to purchase car parts and he never returned, Mr. Van

Hees' vehicle contained tools and a Skill Saw valued over $1,500.

The State charged Mr. Mears, under case number 13-1-00347- 1 , with theft of a motor vehicle and second degree theft for the tools.

After Mr. Mears' second arrest, he sent a letter to Mrs. Mears that ended with "'[t]ick, tock; tick, tock' " which Mrs. Mears considered to be a threat toward her. RP
(Mar. 21, 2014) at 202,

The State charged Mr. Mears, under case number 13-1-00350- 1 , with harassment by threats to kill involving Mrs. Brown, two counts of harassment by threats to kill involving Mr. Mullis, intimidating a witness involving Mrs. Brown, two counts of intimidating a witness involving Mr. Mullis, tampering with a witness involving Mr.

O'Bryan, and tampering with a witness involving Mrs. Mears.

All three cases were set for trial on November 5, 2013. The trial court, at defense counsel's request, granted trial continuances on November 4, and again on November 25. On January 13, 2014, the parties agreed to consolidate the three cases. Also in January, the trial court granted defense counsel's request to continue the cases out two trial settings to March 4, As that date approached, two other trials were set to start ahead of

Mr. Mears' trial. The trial court indicated that if Mr. Mears' trial did not start the following week, it would carry the trial setting over to the week of March 17.

On March 19 at 3:00 p.m., Mr. Mears provided the State with a revised witness list. The list included four previously undisclosed witnesses without listing the subject of their testimony, Three were family members of Mr. Mears and one was the defense investigator.

Trial began on March 20, Prior to the start of testimony, the State requested to suppress three of the witnesses disclosed at 3:00 p.m. the day before. The prior day's disclosure contained only the names of the witnesses, not their statements. The morning of trial, the State received an e-mail disclosing the particulars:

> Koeetia Mears: April and Jack came to her residence when jerry [sic] was arrested. Jack said Jerry had permission to sell truck.
>
> Shelby Mears: Jack was crying and in tears when he told Shelby that "jerry [sic] had been wronged" regarding the theft of the truck.
>
> Jerry Mears Jr.: was on [sic] jail visiting booth with April who was crying saying "they're making me do this[.]"

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Defènse counsel contested the request, arguing the witnesses were in the police report, and therefore the State was on notice that they may be called. Defense counsel advised the trial court that it would not object to a trial continuance so the State could interview the new witnesses. The court noted that the case had been continued multiple times and denied the remedy of a continuance. The court determined that Mr. Mears failed to comply with CrR After reviewing what the witnesses would testify about (which consisted mainly of hearsay statements), the court elaborated, "it doesn't comply with the discovery, that well, the . . violation—can't find it's made in bad faith, however, it's an act of delay that

may be viewed in some aspects as to the terminology of willfulness . . . [T]here is a conscious decision not to get this done in a timely manner." RP (Mar. 20, 2014) at 160.

During closing arguments, the prosecutor commented, "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 the property, entered the house where Mrs. 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." RP (Mar. 21, 2014) at 398. The prosecutor continued, "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 Mrs. Mears even after the fact, even after, again, he was told not to contact witnesses or victims." RP (Mar. 21, 2014) at 408. The prosecutor then stated, "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." RP (Mar. 21, 2014) at 408.

After closing arguments, the court instructed the jury to first pick a presiding juror and then "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." RP (Mar. 21, 2014) at 428. The court reiterated to the jury that because it was late on a Friday evening the jury could either start deliberating then or "come back and deliberate on Monday." RP (Mar. 21, 2014) at 428. The jury reported to the bailiff that after picking a foreperson they wished to retire for the weekend. The court,

in setting a return time for Monday, told the jurors to report directly to the jury deliberation room and not to "start the deliberation" until "all twelve of the jurors are present." RP (Mar. 21, 2014) at 437.

On Monday, the court learned one juror was in the emergency room. The alternate juror was asked to return to the courthouse. The court summarized on the record that when the jury left on Friday, the jury had selected a presiding juror and the only issue "really decided [was] whether they were going to deliberate or leave for the weekend and

. .. start[] here on Monday. . [The jury] made that decision to come [on Monday]." RP (Mar. 24, 2014) at 443. The court then instructed the I I jurors, "I do not want you to discuss this case until [the alternate juror] arrives." RP (Mar. 24, 2014) at 446.

On that same day, the jury found Mr. Mears guilty of two counts of theft of a motor vehicle, theft of a firearm, three counts of first degree trafficking in stolen property, third degree theft, two counts of harassment by threats to kill, two counts of intimidating a witness (involving Mrs. Brown and Mr. Mullis), two counts of tampering with a witness (involving Mr. O'Bryan and Mrs. Mears), and second degree theft. The jury found Mr. Mears not guilty of one count of intimidating a witness (involving Mr. Mullis) and one count of harassment by threats to kill (involving Mr. Mullis).

On April l, 2014, the court sentenced Mr. Mears to a high-end standard range sentence of 102 months based on an agreed upon offender score of 9, and assessed LFOs at $1,1 10.50 for each case number for a total obligation of $3,331.50. The court also ordered Mr. Mears to have no contact with Mrs. Mears, Mrs. Brown, Mr. Mullis, and Mr. O'Bryan until April 1 , 2024 (10 years) which the court found "does not exceed the statutory maximum sentence." Clerk's Papers (CP) at 9. Mr. Mears filed three separate notices of appeal of the trial court's April l, 2014 judgment and sentence. This court consolidated the appeals.

ANALYSIS

1. Sufficiency ofEvidence/Jury Unanimity

Mr. Mears first challenges the sufficiency of the evidence to support his convictions for two counts of tampering with a witness (involving Mr. O'Bryan and Mrs. Mears) and intimidating a witness (involving Mrs. Brown). He further argues the court should have provided a unanimity instruction because there are alternative means to commit these crimes.

Evidence is sufficient to support a guilty finding if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L, Ed. 2d 560 (1979)). An evidence sufficiency challenge "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 1 19 Wn.2d 192, 201, 829 P.2d 1068 (1992). we defer to the jury's assessment of witness credibility and evidence weight or persuasiveness. State v. Carver, 1 13 Wn.2d
591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

Witness Tampering. The witness tampering statute states in relevant part,
"A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding .

, . to (a) Testify falsely or withhold any testimony; or (b) Absent himself or herself from such proceedings; or (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation."

RCW 9A.72.120(1).

Here, Mr. Mears came to the O'Bryan property and was asked to leave. Mr. Mears admitted during trial that he then said, "I'm going to blow your motherfucking heads off." RP (Mar. 20, 2014) at 134. This comment was directed to Mr. Mullis, but based on Mr. Mears' tone and actions, Mr. Mullis took it as applying to all individuals on the property. When the police arrived, they observed Mr. Mears left notes throughout the house, calling Mrs. Mears vile names and telling Mr. O'Bryan that he will "'know the truth; someday the truth will come out.'" RP (Mar. 21, 2014) at 199. Mr. Mears also ransacked Mrs. Mears' room and left a knife lying on her table. Later, Mr. Mears sent a letter to Mrs. Mears that ended with " ' [t]ick, tock; tick, tock' " which Mrs. Mears considered to be a threat toward her. RP (Mar. 21, 2014) at 202. These actions occurred after Mr. Mears was arrested.

Viewing these facts in a light most favorable to 'the State, a rational trier of tact could find that both Mr. O'Bryan and Mrs. Mears were witnesses to Mr. Mears' criminal behavior. Through threatening words and actions, Mr. Mears attempted to induce them to testify falsely, withhold testimony, absent himself or herself from such proceedings, and/or withhold from law enforcement relevant information. Thus, sufficient evidence exists to support Mr. Mears' witness tampering convictions involving both Mr. O'Bryan and Mrs. Mears.

Intimidating a Witness. RCW 9A.72.1 10(1), in relevant part, provides that an individual "is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to: (a) Influence the testimony of that person; (b) Induce that person to elude legal process summoning him or her to testify; (c) Induce that person to absent himself or herself from such proceedings; or (d) Induce that person not to report the information relevant to a criminal investigation.-

Here, there was a pretrial, no-contact order that prohibited contact with any of the State's witnesses. Mrs. Brown was a person Mr. Mears either believed might be called as a witness in any official proceeding and/or had reason to believe she had information relevant to a criminal investigation given her involvement with the stolen gun and that she resided on the O'Bryan property. After his release from jail, Mr. Mears confronted Mrs. Brown at a store and told her they were all going to jail and he was innocent, and then threatened to " 'blow your f—ing heads off.'" RP (Mar. 20, 2014) at 85. Mrs. Brown

took the threat as a serious expression of Mr. Mears' intent. The threat was perceived as being directed at her and the other individuals involved.

Viewing this evidence in the light most favorable to the State, a rational trier of fact could find that Mr. Mears used threats to attempt to influence Mrs. Brown's testimony, induce her to elude legal process, induce her to absent herself from any future proceedings, and/or induce her to not report information relevant to a criminal investigation. Evidence is therefore sufficient to support Mr. Mears' intimidating a witness (involving Mrs. Brown) conviction.

Unanimity Instruction. Next, Mr. Mears argues, for the first time on appeal, the court should have provided a unanimity instruction because there are alternative means to commit witness tampering and intimidating a witness. We review de novo whether a unanimity instruction is required. In re Det. ofKeeney, 141 Wn, App. 318, 327, 169 P.3d 852 (2007). We initially note that we reach this issue because the failure to give a unanimity instruction is an error of constitutional magnitude that a defendant may raise for the first time on appeal. State v. Locke, 175 Wn. App. 779, 802, 307 P.3d 771 (2013), review denied, 179 Wn.2d 1021 (2014).

In Washington, criminal defendants have a constitutional right to a unanimous jury verdict. CONST. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). "This right may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime." State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030

(2014) (alteration in original). An alternative means crime sets forth "distinct acts that amount to the same crime." State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010) (alteration in original). "When a crime can be committed by alternative means, express jury unanimity as to the means is not required where each of the means is supported by substantial evidence." State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046 (2006). However, if the evidence is insufficient to support each of the means, a particularized expression of jury unanimity is required. Ortega-Martinez,

124 Wn.2d at 707-08.

As discussed above, sufficient evidence exists to support all alternative means of witness tampering (involving Mr. O'Bryan and Mrs. Mears). Mr. Mears' words and actions show he attempted to induce a witness or person about to be called as a witness to testify falsely, withhold testimony, absent himself or herself from such proceedings, and withhold from law enforcement relevant information. Thus, under Gonzales, a unanimity instruction was not required.

Turning to the intimidating a witness convictions, Mr. Mears challenges the lack of a unanimity instruction relating to the conviction involving Mrs. Brown and the conviction involving her father, Mr. Mullis. As discussed above, sufficient evidence supports all means of committing intimidating a witness; therefore, a unanimity instruction was not required. Regarding Mr. Mullis, because he was with his daughter during the threats, substantial evidence exists that Mr. Mears attempted to induce, and use threats to attempt to induce, the witnesses to withhold information,

not cooperate or appear, and/or not provide complete information, to prevent these cases from proceeding. Accordingly, the court did not err in not providing a unanimity instruction on either intimidation charge.

2. Right to Present Defense

Mr. Mears next argues the trial court abused its discretion in excluding three of his lately disclosed witnesses.

Discovery decisions based on CrR 4.7 are within the trial court's sound discretion. State v, Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). A trial court abuses its discretion when it makes decisions based on untenable grounds or for untenable reasons.
State v. vy Thang, 145 Wne2d 630, 642, 41 P.3d 1159 (2002).

Mr. Mears first argues the State knew he would call three of his relatives to testify on his behalf because they were listed in the police reports. This argument fails. CrR states, "[T]he defendant shall disclose to the prosecuting attorney . no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance ofany oral statements ofsuch witness. " (Emphasis added.) The rule clearly required Mr. Mears to inform the State of the names and addresses of the witnesses and the substance of their testimony by the omnibus hearing. Mr. Mears did not disclose even the witnesses' names until the day before trial. This was a clear violation of CrR4.7(b)(1

Mr. Mears next argues that the trial court's decision to exclude the three witnesses was an unjust discovery sanction and amounted to a denial of his right to present a defense. Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the criminal defendant's right to present a defense. State v. Strizheus, 163 Wn. App. 820, 829-30, 262 P.3d IOO (2011). But a criminal defendant does not have a constitutional right to present inadmissible evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Here, the testimonies of the three desired witnesses were disclosed the morning of trial. The e-mail disclosure shows that their proffered testimonies were entirely hearsay. Because a defendant does not have a constitutional right to present inadmissible evidence, the trial court did not abuse its discretion in disallowing testimony from these witnesses.

3. Prosecutorial Misconduct

Mr. Mears next argues the prosecutor wrongly argued facts not presented during trial during his closing remarks.

A defendant claiming prosecutorial misconduct bears the burden of establishing both the impropriety of the comments and their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Even where the defendant proves improper conduct, misconduct does not constitute prejudicial error unless there is a substantial likelihood it affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). Where, as here, the defendant fails to object at trial, any error is waived except where the conduct is so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id at 719. Indeed, the absence of an objection strongly suggests that the argument did not appear critically prejudicial to the appellant in the context of trial, State v. McKenzie, 157 Wn.2d 44, 53 no, 134 P.3d 221 (2006) (quoting State v. swan, 114 Wn.2d 613, 661, 790 P.2d610 (1990)).

Mr. Mears objects to the prosecutor's comments regarding threatening remarks and notes left at the O'Bryan property to support the tampering with a witness charges. Evidence presented at trial shows Mr. Mears came to the O'Bryan property and was asked to leave. Mr. Mears acknowledged during trial that he then stated, "I'm going to blow your motherfucking heads off," RP (Mar. 20, 2014) at 134. This comment could be construed as being directed to all the occupants of the property. When the police arrived, they observed Mr. Mears left notes throughout the house, calling Mrs. Mears vile names and telling Mr. O'Bryan that he will know the truth; someday the truth will come out.' ' RP (Mar. 21, 2014) at 199. Mr. Mears also ransacked Mrs. Mears'

room and left a knife lying on her table. Later, Mr. Mears sent a letter to Mrs. Mears that ended with "' [t]ick, tock; tick, tock' " which Mrs. Mears considered to be a threat toward her. RP (Mar. 21, 2014) at 202. These actions occurred after Mr. Mears was arrested.

The prosecutor's closing remarks that Mr. Mears made threatening remarks and left threatening notes was supported by the evidence. Accordingly, we perceive no impropriety in the remarks, and therefore no basis for finding prosecutorial misconduct.

4.Alternate Juror Instruction

Mr. Mears argues, for the first time on appeal, he was denied his right to an impartial and unanimous jury because an alternate juror replaced an original juror without special instruction from the trial court.

"Our state constitution requires that in a criminal prosecution an impartial jury render a unanimous verdict." State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) (citing CONST. art. I, §§ 21, 22). To protect this right, a trial court must instruct a jury that has begun deliberations to start anew when an original juror is replaced with an alternate juror. CrR 6.5. Failure to instruct the reconstituted jury on the record that it must disregard all prior deliberations and begin deliberations anew is reversible error of constitutional magnitude. Lamar, 1 80 Wn.2d at 586.

Here, the record shows there were no deliberations before the original juror was excused. The case was submitted to the jury late on a Friday afternoon. The jury conducted two adminis-

trative tasks; it picked a presiding juror and it voted to not start deliberations until Monday. Before deliberations started, the alternate juror was seated. The court clarified on the record that when the jury left on Friday, the jury had selected a presiding juror and the only issue decided was whether it was going to deliberate or leave for the weekend. The court then instructed the I I jurors, "I do not want you to discuss this case until [the alternate juror] arrives." RP (Mar. 24, 2014) at 446. When the alternate arrived, the jury began deliberations. Accordingly, the court did not fail to comply with CrR 6.5 and there was no denial of Mr. Mears' right to an impartial and unanimous jury,

5. Same Criminal Conduct

Mr. Mears next contends, for the first time on appeal, that the trial court erred when it failed to treat some of his convictions as the same criminal conduct for the purpose of calculating his offender score.

Although a criminal defendant may challenge an offender score for the first time on appeal, a defendant waives that right when the alleged error involves a factual dispute or trial court discretion. State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009). Where a defendant is convicted of more than one crime, the sentencing court must make discretionary decisions in determining whether those crimes arose from the same criminal conduct. State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). Thus, by failing to raise the issue of same criminal con-

duct at sentencing, a defendant waives the right to argue that issue on appeal. Jackson, 150 Wn. App. at 892.

During sentencing, the only mention of same criminal conduct was the prosecutor's comment, "Even ifwe treat certain cases as same criminal conduct we still end up with a nine or greater [offender score]." RP (Apr. l, 2014) at 458. Defense counsel then stated that Mr. Mears agreed "with the state in terms ofwhat the sentencing range is on the various counts," RP (Apr. l, 2014) at 462.

Because Mr. Mears did not argue at sentencing that his offenses constituted the same criminal conduct, he cannot raise this issue for the first time on appeal.

Nevertheless, because Mr. Mears was found guilty of 14 offenses, even if the trial court erred by not conducting a same criminal conduct analysis, his offender score would still be a 9, resulting in the same sentence. Thus, Mr. Mears cannot show prejudicial error.

6. Sentencing Error

Mr. Mears next challenges his sentence, arguing the no-contact provision pertaining to Mrs. Mears exceeds the statutory maximum sentence and the combination of the LFOs amounted to an improper consecutive sentence.

A defendant may challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahi, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn,2d 472, 477, 973 P.2d 452 (1999)). we review such challenges de novo, State v.

Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

No-contact order. Former RCW 9.94A,505(8) (2010)[2] states that as a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. "[Tlrial courts may impose crime-related prohibitions, including no-contact orders, for a term of the maximum sentence to a crime." Armendariz, 160 Wn.2d at 120.

The no-contact order in this case prohibited contact with Mrs. Mears for 10 years. Mr. Mears argues that since the only conviction that involved Mrs, Mears carried a five year statutory maximum, the no-contact order could only last five years.

Witness tampering is a class C felony. RCW 9A.72.120(2). The maximum sentence for a class C felony is five years. RCW 9A.20.021(l)(c). However, no-contact orders are not limited to the victims of the crime. State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008). Division One of this court recently explained that when a witness provides testimony for multiple offenses, a no-contact order may apply up to the statutory maximum of those crimes. State v. Navarro, 188 Wn. App. 550, 556-57, 354 P.3d 22 (2015). Mrs. Mears was a witness to several of the crimes, including first degree trafficking in stolen property, involving the truck and log splitter. First degree trafficking in stolen property is a class B felony. RCW 9A.82.050(2). Class B felonies have a 10year statutory maximum. RCW 9At20.021(l Thus,

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[2] we note former RCW 9.94A.505(8) was renumbered as RCW 9.94A.505(9) per the Laws of 2015, ch. 287, § 10, effective July 24, 2015.

because Mrs. Mears testified to an offense that carries a 10-year statutory maximum, the trial court did not err in ordering

Mr. Mears to have no-contact with her for 10 years.

LFOs. Mr. Mears next argues the court violated RCW 9.94A.589(1)(a) by imposing one set of LFOs per case. Here, the court imposed a $500.00 victim assessment, $220.50 in court costs (consisting of a $200.00 criminal filing fee and a $20.50 sheriffs service fee), and $100.00 deoxyribonucleic acid collection fee.

RCW 9.94A.589(states in part, "whenever a person is to be sentenced for two or more current offenses . . . [s]entences imposed under this subsection shall be served concurrently." Mr. Mears argues this statute also applies to LFOs. But, the language of this statute and the cases cited by Mr. Mears provide no authority for requiring imposition of "concurrent" LFOs. In general, LFOs are ordered to provide restitution to the victim and reimburse the courts and attorneys for costs associated with a felony conviction. Fon•ner RCW 9.94A.030(30) (2012).[3] Each case generally involves separate expenses; thus, running LFOs concurrently would be nonsensical. Moreover, here, there were multiple victims, three separate cases filed, and three separate sheriff service fees.

Accordingly, Mr. Mears' argument is unpersuasive.

Lastly, Mr. Mears argues the LFO total should have been $860.50 for each case number instead of $1,110.50. The costs do total $860.50. The higher figure appears to be a clerical error.

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[3] We note that former RCW 9.94Ae030(30) was renumbered as RCW 9.94A.030(31) per the 2015, ch. 287, § 1, effective July 24, 2015.

Mr. Mears may file a motion with the trial court for it to examine and correct this possible clerical error. CrR 7.8(a).

7. Ineffective Assistance of Counsel

Mr. Mears' final contention is that he was denied effective assistance of counsel based on counsel's failure to request a first time offender waiver, argue same criminal conduct at sentencing, object to prosecutorial misconduct, request dismissal of the witness tampering convictions based on insufficient evidence to support the convictions, and not objecting to the no-contact order and LFOs.

A criminal defendant has the right under the Sixth Amendment to effective assistance of counsel. Strickland v, Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. Id If a defendant fails to satisfy either part of the test, the court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). In order to establish the first prong, the defendant must show that his attorney's performance falls below an objective standard of reasonableness. Stenson, 132 Wn.2d at 705-06. There is a strong presumption of effective assistance of counsel and the defendant must establish the absence of a strategic reason for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995), If the attorney's conduct "can be characterized as

legitimate trial strategy or tactics," the conduct cannot be the basis of an ineffective assistance claim. State v.

McNeal, 145 Wm2d 352, 362, 37 1).3d 280 (2002).

The majority of Mears' claims of deficient performance have already been addressed and no error has been found. The one remaining claim is that counsel was ineffective by failing to request a first time offender waiver during sentencing,

RCW).94A.650(2) allows the court to waive the imposition of a standard range sentence for a first time offender and impose a sentence including up to 90 days of confinement. If a defendant qualifies as a first time offender, the court has "broad discretion" to waive the standard range sentence and impose a first time offender sentence. State v. Johnson, 97 Wn. App. 679, 682, 988 Pid 460 (1999).

If there are no disqualifying convictions, the first time offender option is available to the sentencing court without a recommendation by defense counsel. Id Assuming without deciding it was deficient performance for counsel to not request a waiver, Mr. Mears' ineffective assistance of counsel claim still fails because he cannot show prejudice. It was still within the sentencing court's discretion to impose a first time offender waiver even without counsel 's recommendation. The court chose not to.

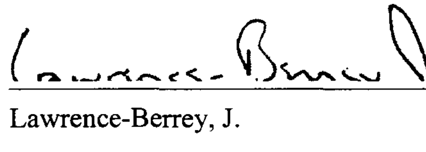
Moreover, the court imposed the high end of a standard range sentence, showing its intent

to impose a higher end sentence given the multiple crimes and victims. Without the prejudice prong, Mr. Mears' ineffective assistance of counsel argument fails.

Hendrickson, 129 Wn.2d at 78.

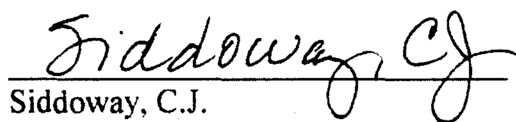
Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

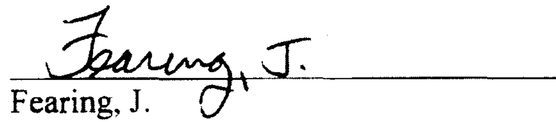


Lawrence-Berrey, J.

WE CONCUR:



Siddoway, C.J.



Fearing, J.

APPENDIX "B"

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 "C"

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.)

APPENDIX “D”

INSTRUCTION NO. 2[illegible]

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 “E”

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 “F”

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, 2015, the defendant attempted to induce a person (April Meara) 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 "G"

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

On or about September 24, 2012 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 Murillo, 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

[illegible]

APPENDIX "H"

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 "I"

INSTRUCTION NO. 15

To convict the defendant of the crime of intimidating a witness, in count 8, 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 "J"

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, 2018, 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 "K"

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 alter-

nate. 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.)

32451-6-III

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

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

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

I certify under penalty of perjury under the laws of the State of Washington that on this 14th day of January, 2016, I caused a true and correct copy of the *RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW* to be served on:

RENEE S. TOWNSLEY, CLERK — E-FILE
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