

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

No. 41394-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Rushelle Stoken,

Appellant.

Grays Harbor County Superior Court Cause No. 09-1-00228-5

The Honorable Judge David Edwards

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court violated Ms. Stoken's confrontation right under the Sixth and Fourteenth Amendments.
2. The trial court violated Ms. Stoken's confrontation right under Wash. Const. Article I, Section 22.
3. The trial court erred by prohibiting cross-examination into the confidential informant's violations of his agreement with the drug task force.
4. The Information was deficient as to Count IV because it failed to allege that Ms. Stoken attempted to influence testimony by means of a "true threat."
5. The prosecutor committed misconduct requiring reversal.
6. The prosecutor improperly commented on Ms. Stoken's failure to testify, in violation of her Fifth and Fourteenth Amendment privilege against self-incrimination.
7. The defendant was denied her right to effective assistance of counsel when her attorney failed to object to prosecutorial misconduct in closing argument.
8. Defense counsel was ineffective for failing to seek an exceptional sentence below the standard range.
9. Defense counsel was ineffective for failing to present relevant authority justifying an exceptional sentence below the standard range.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has the constitutional right to confront witnesses. Here, the trial court restricted Ms. Stoken's opportunity to cross-examine the confidential informant regarding matters affecting credibility and bias. Did the restriction on cross-examination violate Ms. Stoken's Sixth and Fourteenth Amendment right to confront her accuser?

2. A criminal Information must set forth all essential elements of an offense. The Information charged Ms. Stoken with Intimidating a Witness, but failed to allege that she made a "true threat." Did the Information omit an essential element of the offense in violation of Ms. Stoken's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?
3. A prosecutor may not ask a jury to presume guilt from an accused person's failure to testify. Here, the prosecutor argued that the evidence was uncontradicted, when Ms. Stoken was the only person who could have contradicted the evidence. Did the prosecutor unconstitutionally comment on Ms. Stoken's Fifth and Fourteenth Amendment privilege against self-incrimination?
4. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel unreasonably failed to object to prosecutorial misconduct that infringed Ms. Stoken's right to remain silent. Was Ms. Stoken denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel?
5. A reasonably competent defense attorney will argue for an exceptional sentence below the standard range when justified by the facts and the law. In this case, defense counsel failed to seek a mitigated sentence based on clearly established precedent. Was Ms. Stoken denied her right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While in custody, Michael Fields contacted police to work as a confidential informant. RP¹ 87. Fields, who acknowledged using and selling drugs (and who was accused of running a lab from his house) signed a contract in which he agreed to participate in drug buys and testify at any subsequent trial. RP 42-43, 91, 125. The contract also required him to refrain from additional crimes. RP 11, 124. While the contract was pending, Fields was convicted of two additional charges—fourth degree assault and Driving While License Suspended in the Third Degree (DWLS 3). RP 11.

Fields claimed that Rushelle Stoken sold him oxycodone on two occasions, and heroin on another occasion. RP 94-98. Each transaction was initiated at the request of the police. RP 49, 50, 53. Although Fields was searched prior to each buy, the searching officer did nothing more than have him remove his shoes and submit to a patdown. RP 72-74, 79-80, 86. Fields was given prerecorded bills for the transactions; none of this money was ever found in Ms. Stoken's possession. RP 78, 84, 87-88.

¹ With the exception of the November 1 sentencing hearing, the Report of Proceedings is numbered sequentially and will be referred to as RP.

During the first buy, an officer watching from across the highway saw Fields and Ms. Stoken make hand movements, but was unable to see what was exchanged.² RP 112, 120. The state did not introduce evidence of such hand movements from the second and third buys. RP 82-83, 87, 122.

Ms. Stoken was arrested and charged with three counts of delivery. CP 1-2. She was later charged with Intimidating a Witness and Tampering with a Witness, stemming from Fields's claim that she drove by his house, threatened him and his family, and told him to forget what he knew. CP 2-3; RP 99-101. With regard to the Intimidating charge, the Information did not allege that Ms. Stoken made a "true threat." CP 2.

At trial, Ms. Stoken sought to cross-examine Fields about his violation of the terms of his contract with the drug task force, including his new convictions for assault and DWLS 3. RP 11. The trial court refused to allow cross-examination about the new offenses. RP 19-20.

In closing argument, the prosecutor repeatedly referred to the evidence as "uncontradicted:"

Well, the uncontradicted testimony in this case, is that the defendant was observed in a hand-to-hand transaction with the

² Fields testified that he got in the car's back seat; the officer testified that Fields remained outside the car. RP 95, 112.

confidential informant. Handing over Oxycodone to the defendant, observed by the Grays Harbor Sheriff's office...

In short, the uncontradicted testimony regarding count number four [sic] is that the defendant, Rushelle Stoken, in this case, was an active participant in the delivery of Oxycodone...

RP 130

[I]t's not contradicted that any of this occurred in the State of Washington...

They saw what appeared to be drug transaction. Again, for Instruction 14, to convict the crime delivery of a controlled substance, Oxycodone, uncontradicted. She was observed at the scene.

RP 131.

Again, the uncontradicted testimony in this case, showed up, at his house, spoke to his wife, spoke to him, said you better forget what happened...

The uncontradicted testimony, the physical evidence that you will have with you when you are back there deliberating, all of that points to one thing. The defendant's guilt.

RP 132.

Defense counsel did not object to this line of argument. RP 130-132. The prosecutor did not specify who could have contradicted the state's version of events. RP 130-132. However, at least some of the state's evidence suggested that Ms. Stoken was the only person present with Fields during the second and third drug transactions. RP 79-87, 98, 114-115.

Ms. Stoken was convicted of all charges. At sentencing, her attorney did not seek an exceptional sentence below the standard range,

and did not refer the court to authority such as *State v. Sanchez*, 69 Wash.App. 255, 263, 848 P.2d 208 (1993).

Ms. Stoken was sentenced to 34 months in prison. CP 6. She timely appealed. CP 15.

ARGUMENT

I. THE TRIAL COURT VIOLATED MS. STOKEN'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT HER ACCUSER BY RESTRICTING HER CROSS-EXAMINATION OF THE CONFIDENTIAL INFORMANT.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Although evidentiary rulings are ordinarily reviewed for an abuse of discretion, this discretion is subject to the requirements of the Sixth Amendment. *United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).

B. The Sixth and Fourteenth Amendment guarantee an accused person the right to confront her or his accuser, particularly on matters affecting credibility.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amend VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most important aspect of confrontation is the right to conduct meaningful cross-examination of

adverse witnesses. *State v. Foster*, 135 Wash.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). Our Supreme Court has stated that the purpose of cross-examination

...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.

State v. Darden, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citations omitted).

Where credibility is at issue, the defense must be given wide latitude to explore matters affecting credibility. *State v. York*, 28 Wash.App. 33, 621 P.2d 784 (1980). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence “must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the trial.” *Darden*, at 621. Furthermore, an accused person “has a constitutional right to impeach a prosecution witness with bias evidence.” *State v. Spencer*, 111 Wash.App. 401, 408, 45 P.3d 209 (2002).

The threshold to admit relevant evidence is very low, and even minimally relevant evidence is admissible unless the state can show a

compelling interest to exclude prejudicial or inflammatory evidence. *Darden*, at 621; *see also* ER 401, ER 402. Where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *State v. Hudlow*, 99 Wash.2d 1, 16, 659 P.2d 514 (1983); *State v. Reed*, 101 Wash.App. 704, 709, 6 P.3d 43 (2000); *State v. Barnes*, 54 Wash.App. 536, 538, 774 P.2d 547 (1989).

- C. The trial judge violated Ms. Stoken's right to confront the confidential informant by restricting cross-examination relating to his credibility and bias.

Whenever a witness testifies pursuant to an agreement which "allows for some benefit or detriment to flow to a witness as a result of his testimony, the defendant must be permitted to cross examine the witness sufficiently to make clear to the jury what benefit or detriment will flow, and what will trigger the benefit or detriment, to show why the witness might testify falsely in order to gain the benefit or avoid the detriment." *United States v. Schoneberg*, 396 F.3d 1036, 1042 (9th Cir. 2005).

In this case, the court forbade cross-examination into the informant's violations of his agreement. RP 11, 17-20. The informant's new crimes put him at risk of losing the benefit of his contract, and thus provided additional motivation to testify in favor of the prosecution during

Ms. Stoken's trial.³ *Id.* Furthermore, the informant's credibility was critical to the prosecution's case: he was the only witness able to provide direct evidence of Ms. Stoken's guilt on each charge.

The restriction on cross-examination violated Ms. Stoken's confrontation right under the Sixth and Fourteenth Amendments and Article I, Section 22. *Foster*, at 455-56. Accordingly, her conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MS. STOKEN'S RIGHT TO DUE PROCESS AND HER PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Schaler*, at 282. A manifest error affecting a constitutional right may be raised for the first time on review; this includes prosecutorial misconduct that affects a constitutional right.⁴ RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009); *State v. Jones*, 71 Wash.App. 798, 809-810,

³ Under such circumstances, "subtle pressures are present even though no promises have been made [regarding how the violations will be handled]." *State v. Tate*, 2 Wash.App. 241, 247, 469 P.2d 999 (1970).

⁴ In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, ___ Wash.2d ___, ___, ___ P.3d ___ (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

863 P.2d 85 (1993). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).⁵ An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.⁶ *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the

⁵ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

⁶ Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000). In the absence of an objection, such misconduct requires reversal if it is “so flagrant and ill-intentioned” that no curative instruction would have negated its prejudicial effect. *Id.*, at 800.

untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. The prosecutor committed reversible misconduct by commenting on Ms. Stoken's failure to testify.

An accused person has a constitutional privilege against self-incrimination.⁷ U.S. Const. Amend. V; *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). It is "well settled" that the prosecution may not comment on or otherwise exploit an accused person's exercise of the privilege. *State v. Carnahan*, 130 Wash.App. 159, 168, 122 P.3d 187 (2005) (citing *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); *Griffin v. California*, 380 U.S. 609, 613-615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

Argument that evidence is uncontradicted can constitute a comment on the accused person's decision not to testify. Such argument violates the privilege against self incrimination when (1) the prosecutor manifestly intends to refer to the accused person's silence or (2) the remark is of such a character that the jury would naturally and necessarily take it to be a comment on the accused person's silence. *United States v. Tanner*, 628 F.3d 890, 899 (9th Cir. 2010). The latter test is met whenever

⁷ The Fifth Amendment is applicable to the states through the Fourteenth Amendment's due process clause. U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

the accused person is the only witness who could have rebutted the evidence. *Id.* at 900; *see also United States v. Cotnam*, 88 F.3d 487 (7th Cir. 1996); *Freeman v. Lane* 962 F.2d 1252 (7th Cir. 1992); *Williams v. Lane*, 826 F.2d 654 (7th Cir.1987).

In this case, the prosecutor violated Ms. Stoken’s privilege against self-incrimination by repeatedly arguing that the evidence was “uncontradicted.” RP 130-132. The prosecutor’s remarks were manifestly intended to highlight Ms. Stoken’s failure to testify: the prosecutor did not suggest that any other witness would be able to cast doubt on the informant’s testimony; nor was the prosecutor responding to arguments made by defense counsel—since Ms. Stoken’s attorney had not yet addressed the jury. RP 130-132. Furthermore, the repeated references to uncontradicted testimony were of such a character as to naturally and necessarily be taken as comments on Ms. Stoken’s failure to testify. RP 130-132.

Because Ms. Stoken was the only witness who could have contradicted the state’s witnesses, the prosecutor’s arguments infringed her constitutional privilege against self incrimination. *Tanner, supra*. This misconduct is presumed prejudicial. *Toth, supra*. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

III. MS. STOKEN’S CONVICTION FOR INTIMIDATING A WITNESS VIOLATED HER RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 22.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *Schaler*, at 282. A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.* at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. The Information was deficient because it failed to allege that Ms. Stoken attempted to influence testimony by means of a “true threat.”

The Sixth Amendment to the Federal Constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI.⁸ A similar right is secured by the

⁸ This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

Washington State Constitution. Wash. Const. Article I, Section 22. All essential elements—both statutory and nonstatutory—must be included in the charging document. *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992). An essential element is “one whose specification is necessary to establish the very illegality of the behavior.” *Id.* (citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

A person is guilty of Intimidating a Witness when s/he attempts to influence testimony “by use of a threat against a current or prospective witness.” West’s RCWA 9A.72.110. There is an additional, nonstatutory element: to avoid a First Amendment violation, the state must prove the threat constitutes a “true threat” rather than idle chat.⁹ *State v. King*, 135 Wash.App. 662, 145 P.3d 1224 (2006). A “true threat” is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. *State v. Johnston*, 156 Wash.2d 355, 360-361, 127 P.3d 707 (2006).

⁹ Division I has decided that the requirement of a “true threat” is not an element, and need not be alleged in a charging document. *State v. Tellez*, 141 Wash.App. 479, 483-484, 170 P.3d 75 (2007); *State v. Atkins*, 156 Wash.App. 799, 805, 236 P.3d 897 (2010). This is incorrect: a threat that is not a “true threat” is not illegal. Thus the existence of a “true threat” is essential “to establish the very illegality of the behavior.” *Johnson*, at 147. The Supreme Court has explicitly reserved ruling on the question. See *Schaler*, at 289 n. 6.

Here, the state alleged that Ms. Stoken attempted to influence testimony “by using a threat” against a witness. CP 2. The Information did not allege that her threat qualified as a “true threat;” nor can this element be implied from the charging language. CP 2. Accordingly, the allegation in the Information was not (by itself) sufficient to charge a crime, and prejudice is presumed. *King, supra; Kjorsvik, supra*. Because the Information was deficient, Ms. Stoken’s conviction for Intimidating a Witness must be reversed and the charge dismissed without prejudice. *Kjorsvik, supra*.

IV. MS. STOKEN WAS DEPRIVED OF HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of

Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption of adequate performance, though it is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924,

929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009).

Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

C. Ms. Stoken was denied the effective assistance of counsel by her attorney’s failure to object to prosecutorial misconduct in closing.

A failure to object to improper closing arguments is objectively unreasonable “unless it ‘might be considered sound trial strategy.’”

Hodge v. Hurley, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland*, at 687-88). Under most circumstances,

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hurley, at 386 (citation omitted).

In this case, defense counsel should have objected when the prosecutor repeatedly referred to the evidence as “uncontradicted.” RP 130-132. Because the prosecutor’s comments highlighted Ms. Stoken’s exercise of her privilege against self-incrimination, counsel’s failure to object constituted deficient performance. At a minimum, defense counsel should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

Counsel’s failure to object prejudiced Ms. Stoken, because the defense theory involved undermining the informant’s credibility. By highlight Ms. Stoken’s failure to testify, the prosecutor shifted the jury’s attention away from the informant veracity and onto Ms. Stoken’s silence. Had counsel objected, the court could have stricken the prosecutor’s improper comments and instructed the jury to disregard them.

The failure to object deprived Ms. Stoken of her Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley*. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

D. Defense counsel was ineffective for failing to argue in favor of an exceptional sentence below the standard range.

A criminal defendant has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct.

1197, 51 L.Ed.2d 393 (1977). This includes a duty to investigate and present evidence and argument relating to mitigating factors. *See, e.g., Becton v. Barnett*, 2 F.3d 1149 (4th Cir. 1993).

In Washington, a sentencing judge may impose a prison term below the standard range if “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive...” RCW 9.94A.535(1)(g). This mitigating factor applies when multiple delivery convictions result from a series of police-initiated controlled buys. *State v. Sanchez*, at 263; *State v. Hortman*, 76 Wash.App. 454, 886 P.2d 234, 238 (1994). Under such circumstances, the court’s role

is to focus on the difference, if any, between the effects of the first controlled buy and the cumulative effects of subsequent controlled buys. Where that difference is nonexistent, trivial or trifling, there is a basis in law for an exceptional sentence downward.

Hortman, at 461.¹⁰

Defense counsel’s failure to seek an exceptional sentence on these grounds deprives the accused person of the effective assistance of counsel. *State v. McGill*, 112 Wash.App. 95, 47 P.3d 173 (2002).¹¹ In *McGill*, the

¹⁰ *See also State v. Fitch*, 78 Wash.App. 546, 897 P.2d 424 (1995); *State v. Bridges*, 104 Wash.App. 98, 15 P.3d 1047 (2001).

¹¹ *But see State v. Hernandez-Hernandez*, 104 Wash.App. 263, 15 P.3d 719 (2001).

defendant was convicted of three counts of delivery, following a series of police-initiated controlled buys. *Id.*, at 98. He appealed his standard range sentence, arguing that defense counsel was ineffective for failing to request an exceptional sentence under *Sanchez*. *Id.*, at 100. The Court of Appeals held that the defendant had been deprived of effective assistance at sentencing, vacated the defendant's sentence, and remanded for a new sentencing hearing. *Id.* at 101.

In this case, as in *McGill*, Ms. Stoken was convicted of three counts of delivery, based on three police-initiated controlled buys. Two of the deliveries were for the same substance (oxycodone); all three were to the same confidential informant (Field); all three occurred within a three-week period. CP 1-2; RP 42-55. Under these circumstances, her attorney should have asked the court to impose an exceptional sentence below the standard range, based on *Sanchez*. As in that case, the effects of the second and third deliveries were trivial, given the harm caused by the first delivery. *Hortman*, at 461. Had the sentencing judge viewed either Count II or Count III in this manner, he would have sentenced Ms. Stoken within the 12+ to 20 month standard range for a person with an offender score of two, rather than the 20+ to 60 month standard range for an offender score of three. *See* RCW 9.94A.517.

Ms. Stoken was denied the effective assistance of counsel at sentencing. Accordingly her sentence must be vacated and the case remanded to the trial court for a new sentencing hearing. *McGill, supra.*

CONCLUSION

For the foregoing reasons, Ms. Stoken's convictions must be reversed. The tampering charge must be dismissed without prejudice, and the other charges must be remanded for a new trial. In the alternative, Ms. Stoken's sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on July 6, 2011.

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CERTIFICATE OF MAILING

11 JUL -7 PM 12:41
STATE OF WASHINGTON
BY V. [Signature]
DEPUTY

I certify that I mailed a copy of Appellant's Opening Brief to:

Rushelle Stoken, DOC #343851
Mission Creek Corrections Center for Women
3420 NE Sand Hill Road
Belfair, WA 98528

and to:

Grays Harbor Co Pros Ofc
102 W Broadway Ave Rm 102
Montesano WA 98563-3621

And that I sent the original and one copy to the Court of Appeals, Division II, for filing:

All postage prepaid, on July 6, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 6, 2011.

Jodi R. Backlund
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