

NO. 47308-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN HALLER
Appellant.

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

The Honorable James Lawler, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by imposing consecutive school zone enhancements.
2. The state failed to prove beyond a reasonable doubt an essential element of witness tampering: that the charges occurred in the State of Washington.
3. The state failed to prove beyond a reasonable doubt an essential element of witness tampering: that Haller attempted to induce his brother to testify falsely.
4. The trial court erred by sentencing Haller to three separate counts of witness tampering where they constituted a single unit of prosecution.
5. Defense counsel was ineffective for failing to argue that Haller's three separate counts of witness tampering constituted a single unit of prosecution for sentencing.
6. The trial court violated Haller's right to be free from double jeopardy by imposing three separate sentences for three possession of controlled substance charged that were part of the same criminal conduct.
7. Defense counsel was ineffective for failing to object to testimony regarding Haller's prior incarceration.
8. Defense counsel was ineffective for failing to object to testimony that Art was afraid of Haller.

9. The prosecutor committed prejudicial misconduct by thrice commenting on Haller's right to remain silent- thus inferring guilt by silence.
10. The trial court erred by imposing legal financial obligations without first determining Haller's ability to pay.

Issues Related to Assignments of Error

1. Did the trial court err by imposing consecutive school zone enhancements after *State v. Conover*?
2. Did the state fail to prove beyond a reasonable doubt an essential element of witness tampering: that the charges occurred in the State of Washington, where the only evidence presented on location indicated the "Lewis County Jail"?
3. Did the state fail to prove beyond a reasonable doubt an essential element of witness tampering: that Haller attempted to induce his brother to testify falsely, when there was no testimony to support such an inference?
4. Did the trial court err by sentencing Haller to three separate counts of witness tampering where they constituted a single unit of prosecution for double jeopardy purposes?
5. Was defense counsel ineffective for failing to argue that Haller's three separate counts of witness tampering constituted a single unit of prosecution for sentencing?

6. Did the trial court violate Haller's right to be free from double jeopardy by imposing three separate sentences for three possession of controlled substances that were part of the same criminal conduct?
7. Was defense counsel ineffective for failing to object to testimony regarding Haller's prior incarceration for a drug charge that was irrelevant and highly prejudicial?
8. Was defense counsel ineffective for failing to object to testimony that Art was afraid of Haller when it was irrelevant and highly prejudicial?
9. Did the prosecutor commit prejudicial misconduct by thrice commenting on Haller's right to remain silent- thus inferring guilt by silence?
10. Did the trial court err by imposing legal financial obligations without first determining Haller's ability to pay?

B. STATEMENT OF THE CASE

1. Procedural Facts

Sebastian Haller was charged and convicted by a jury of the following crimes: Count I, delivery of a controlled substance –heroin within 1000 feet of a school; Count II, delivery of a controlled substance – heroin within 1000 feet of a school; Count III, possession of a controlled substance –heroin with intent to deliver within 1000 feet of a school; Count IV, possession of a controlled substance- methamphetamine; Count

V, possession of a controlled substance- Oxycodone; Count VI, possession of a controlled substance- Methadone; Count VII tampering with a witness; Count VIII tampering with a witness; Count IX tampering with a witness. CP 70-78; 89-100. The court imposed three consecutive school zone enhancements. Id. This timely appeal follows. CP 105-117.

2. Substantive Facts

(i) Controlled Buys-Deliveries

On two occasions, Officer Haggerty with the Centralia police department, arranged with a confidential informant (CI), Desiree Prue, to buy heroin from 1014 Yakima Street, in Centralia WA. RP 34-50. The CI called Art Haller (Art), Haller's brother on Art's telephone to arrange to purchase \$340 dollars-worth of heroin from Art on May 2, and May 5, 2014. RP 40-46, 56, 57.

The CI is the mother of Art's child and his ex-girlfriend. RP 73. The CI is also a drug addict and has crimes of dishonesty. RP 74. Although the CI claimed to be clean, she smoked heroin during the second controlled buy. RP 74, 102-103

Contrary to everyone else's testimony, the CI testified that she was positive that Art got heroin from Haller's room for the second controlled buy. RP 101. The CI described holding a blanket that served as a door to Haller's bedroom while Art got the heroin for the sale, but Haller, Art and the police all testified that Haller had a door that he kept locked at all times when he was not present. RP 100-101, 113-115, 149. In fact, the only room without a door was Art's room. RP 235.

Haller grew up in the Yakima Street house, and lived there full time for a period until October 31, 2013. RP 233. In October, Haller moved out to live with his girl-friend who did not get along with Haller's family. RP 236. Before the first buy, Haller learned that the CI, the mother of Art's child was coming over, and Haller who had never met the CI, wanted to meet her. RP 241.

The CI testified that she called Art to set up the buy, arrived at the Yakima Street address, went in to Art's room where Haller was seated, gave Haller some money in exchange for heroin, Haller left and returned with some needles and then the CI left. RP 78-80, 90.

Art pleaded guilty to selling drugs to the CI in May 2014. RP 106. Art testified that Haller provided the heroin for the sales and weighed and packaged the heroin before the CI arrived. RP 108. Contrary to the CI, Art indicated that the CI put money on the table and Haller put the heroin on a table but neither engaged in an exchange. RP 108.

Haller testified that he did not provide the heroin for either sale and that on May 2, 2014, he left immediately after he met the CI. RP 242. The CI testified that the buy money went in to Haller's bag, but after the police executed a search warrant, the police found the buy money in Art's wallet, and none in Haller's possession or in his room. RP 65-66, 80.

The CI set up the second buy exclusively with Art. RP 40-46, 56, 57. During the second buy, the CI testified that Haller was not at home but she had to wait for him to return to obtain the heroin. Haller never returned, but Art sold her the heroin. RP 81-82, 97. Although the CI did

not witness Art obtaining heroin from Haller's room and did not witness Art putting the buy money in Haller's room, she testified that Art obtained the heroin from Haller's room and put the buy money in Haller's room. RP 82, 98.

The CI also told the police that Art took the money and put it first in his sweatshirt and then into his jeans. RP 290. The CI also testified that she could see into Haller's bedroom, but the door was closed and padlocked to keep Art out, because he had stolen from Haller in the past. RP 100-101, 114-15.

Art did not get the heroin from Haller's room; he had it in his possession; he put it down in his room for the CI who gave him money which he pocketed. RP 109, 114-115, 118. The CI used heroin intravenously during the second buy and was identifiably intoxicated as she exited the Yakima St. house. RP 99, 117. On cross-examination, the CI admitted that she did not see Art get the drugs or see him put the money in Haller's room and that she was under the influence during this entire buy. RP 61-62, 99, 109, 224.

After the second controlled buy, the police executed a search warrant for the Yakima St. house. RP 50. When the warrant was served, Haller's mother was home along with Haller and Art. RP 51. According to Haggerty, the mother came from her bedroom, Art came from his bedroom and Haller came from the bathroom which is directly across from his room. RP 51, 64.

The police found needles in every room. RP 52, 58, 60-61. Cathy Haller, the mother has a bathroom in her bedroom suite and the second bathroom is in between Art and Haller's bedrooms. RP 64. Art claimed that he only used his mother's bedroom and Haller testified that he and his brother and all of the guests use the bathroom in the hall, and that Art sometimes uses his mother's bathroom as well. RP 247.

During the search the police found a black nylon bag on a lanyard in the shower in the hall bathroom. RP 142. The bag contained marijuana, hash oil, 2 methadone pills, 2 oxycodone pills in a tin of Snus, a bag of methamphetamine, heroin, 20 tramadol and some empty zip lock bags. RP 140. The police also found zip lock bags with heroin in the hall closet. RP 145. The closet also contained blankets, and old sports memorabilia, including a mitt and helmet. RP 145. Haller indicated the closet was used for storage and that he had not used the closet for several years and was unaware that drugs were in that closet. RP 150, 247-48.

Somewhere in Haller's room, in an unidentified location, the police found a bag containing methamphetamine residue, two glass pipes, scales, packaging material, smaller bags and \$462 that did not match the buy money. RP 146, 164, 172, 180-82. No one saw Haller possess the drugs in the hall closet, the bathroom or his room. RP 147-48. There was no identifying information to link the drugs found to Haller. RP 173.

Haller explained that his girlfriend had packaged up Haller's belongings and put them in his closet and that he was unaware of the contents, but that he did not live at the Yakima St. address when the search

occurred but did spend the night on occasion. RP 233, 236-39. Haller did not put the drugs in the bathroom or the hall closet and was not involved in the controlled buys. RP 247-48, 259, 262.

During the search the police found the drug buy money in Art's wallet, blow heroin in Arts room, needles, and zip bags for packaging dope. RP 60-61, 65, 70, 149.

(ii) Witness Tampering

Haller called his grandmother three times to ask her to encourage Art who was in prison to testify for Haller. 1RP 5-29. On one occasion, Haller's grandfather answered the phone. 1RP 5-29. Haller's grandmother is 85 years old and his grandfather is 87 years old and has dementia. RP 260-61. Haller called his grandmother to ask her to talk to Art because he did not know if Art would testify and tell the truth because Art had stolen from Haller and was not trustworthy. RP 252-55. Haller never asked his grandmother or grandfather to ask Art to testify false. Rather, he just wanted to reassure Art that if he testified truthfully he would not get into more trouble. RP 254-55, 259-60, 277. At the time of Haller's trial, Art was incarcerated for the drug dealing incidents related to this case. RP 106. Art testified that no one asked him to testify falsely in Haller's case. RP 116.

Haller stipulated that the telephone calls were made from the Lewis County jail. CP 31-32. The stipulation did not contain any evidence that the calls were made in the State of Washington. RP 375-76; CP 31-32. The court denied the prosecutor's request to amend the jury instructions to

include that the witness tampering occurred in the State of Washington. RP 375-76.

(iii) Prosecutorial Misconduct

Even though the prosecutor admitted that there was no evidence that the witness tampering took place in the State of Washington, during rebuttal closing, over sustained objection, the prosecutor informed the jury that the witness tampering took place in the State of Washington. RP 375-76, 368.

(iv) Ineffective Assistance of Counsel.

Defense counsel did not object to the CI testifying that Haller had been in prison. RP 88. Counsel also elicited from Art that Haller had been previously incarcerated. RP 120. Counsel did not object to Art twice testifying that he was afraid of Haller. RP 102-04.

C. ARGUMENTS

1. THE TRIAL COURT ERRED BY IMPOSING SCHOOL ZONE SENTENCING ENHANCEMENTS TO RUN CONSECUTIVE TO EACH OTHER.

The school bus stop enhancement statute—RCW 9.94A.533(6) prohibits the trial court from running multiple enhancements consecutively to each other and only permits the enhancement to run consecutively to the drug crime sentence it enhances. *State v. Conover*, __P.3d__(2015).¹ RCW 9.94A.533(6). RCW 9.94A.533(6) provides:

¹ Trial counsel's performance was not deficient on this issue when he failed to object to the trial court's imposition of consecutive school

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50 or 9.94A.827 or. All enhancements under this subsection *shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.*

(Emphasis added.). The Court analyzed this statute and compared it to the firearm enhancement statute - RCW 9.94A.533 in which the legislature specifically provided that each firearm enhancement was to be run consecutive to all other firearm enhancements. LAWS OF 1998, ch. 235, § 1(3).

By contrast, the school zone enhancement does not contain this explicit language. “[T]he legislature clearly knows how to require consecutive application of sentence enhancements and chose to do so only for firearms and other deadly weapons’ but not for the drug zone enhancement statute at issue.” *Conover*, quoting, *State v. Jacobs*, 154 Wn.2d 596, 603, 115 P.3d 281 (2006), *superseded by statute in Gutierrez v. Department of Corrections*, 146 Wn.App. 151, 188 P.3d 546 (2008).²

Conover is on point and controls the outcome of this issue. In *Conover*, as in this case, the defendant was convicted of three counts of

zone enhancements because *State v. Conover*, __P.3d__ (August 2015) was decided after sentencing in Haller’s case. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

² See *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991) (“ ‘[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.’ ” (alteration in original) (internal quotation marks omitted) (quoting *In re Del Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990))).

delivering heroin within 1,000 feet of a school bus stop, in violation of RCW 69.50.401(1) (delivery) and RCW 69.50.435(1)(c) (school bus stop enhancement). The trial court imposed three 24-month school bus stop enhancements—one for each delivery count—and ran them consecutively to Conover’s 48-month base sentence *and* consecutively to each other. The total sentence was 120 months of confinement. The Supreme Court reversed the consecutive sentence enhancements. *Conover, supra*.

This case is legally indistinguishable from *Conover* and factually similar. Here Haller was convicted of two counts of delivery of Heroin and one count of possession with intent to deliver Heroin, each with a 24 month school zone enhancement which the trial court ran consecutive to each other and consecutive to the 120 month base sentence. CP 89-100. Here, as in *Conover*, the trial court erred as a matter of law in imposing consecutive school zone enhancements. Accordingly this Court must vacate the multiple school zone enhancements and remand for resentencing with only a single school zone enhancement.

2. THE STATE FAILED TO PROVE
BEYOND A REASONABLE DOUBT
THREE COUNTS OF WITNESS
TAMPERING.

The state failed to prove that Haller tried to induce his brother to lie for him and the state also failed to prove that the acts occurred in the State of Washington.

A challenge to the sufficiency of the evidence, requires this Court

to determine whether, viewing the evidence in the light most favorable to the state, could any rational trier of fact have found all of the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To convict Haller of tampering with a witness, the applicable jury instruction required that the State prove the following elements beyond a reasonable doubt: (1) That during on or about December 12, 16, and 19, 2014 the defendant attempted to induce a person to testify falsely; and (2) That the other person was a witness...; and (3) That the acts occurred in the State of Washington. CP 35-68 (JI 23, 24, 25).

RCW 9A.72.120 provides in relevant part:

(1) 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 or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony

Id.

a. Insufficient Evidence of an Attempt to Induce False Testimony.

The “attempts to induce Art to testify falsely” element was not satisfied because the evidence demonstrated that Haller just wanted his brother to testify truthfully and was concerned that his brother might not want to testify for fear of getting himself into further trouble. RP 252-26; 1RP 5-29. There was no evidence that Haller wanted Art to lie for him and there was no evidence that Haller applied any pressure on Art. Art testified that no one asked him to lie for Haller on the stand. Rather Haller simply called his grandparents three times to ask them to talk to Art to encourage him to testify truthfully for Haller that the drugs were not Haller’s. Accordingly, the state failed to prove that Haller attempted to induce his brother to testify falsely. RP 116; 1RP 5-29.

b. Insufficient Evidence the Witness Tampering Occurred in Washington State.

In the Third Amended Information, the state alleged in counts VII, VIII and IX that the acts occurred in the State of Washington. CP 22-28. The state must prove all essential elements of the crime charged, including the state where the acts occurred. *State v. Sibert*, 168 Wn.2d 308, 312, 230 P.3d 142 (2010); RCW 94.04.100.

Jury instructions 23, 24, 25 listed the State of Washington as an essential element of these crimes.

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

- (1) That on or about December 12, 2014, the defendant attempted to induce a person to testify falsely; and
- (2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a

witness in any official proceedings: and
(3) **That any of these acts occurred in the State of Washington.**

...

(Emphasis added) CP 35-68.

The state did not present any evidence that the acts occurred in the State of Washington. Rather the only evidence indicating the location of the alleged witness tampering charges came from a stipulation entered into between Haller and the state. CP 31-32. The stipulation indicated that the calls were place from a Lewis County jail telephone. CP 31-32. There was no reference to the State of Washington, and no testimony that the acts occurred in the State of Washington. CP 31-32; RP 252-26; 375-76.

In fact, after the defense rested, the state acknowledged that “I could not establish where those calls were made from because of a stipulation that the defendant made that prevented me calling a witness who would establish where those calls were made from.” RP 375. The court reminded the prosecutor that he and the defense agreed to the stipulation and that the court would not permit the state to amend the to: convict instructions. RP 375.

Because the state failed to present any evidence that the acts occurred in the State of Washington, no reasonable jury could have so found. The remedy for failure to present sufficient evidence to prove an essential element beyond a reasonable doubt is to remand for reversal and dismissal with prejudice. *Sibert*, 168 Wn.2d at 328.

3. THE TRIAL COURT VIOLATED HALLER'S

RIGHT TO BE FREE FROM DOUBLE
JEOPARDY BY SENTENCING HIM TO THREE
SEPERATE WITNESS TAMPERING CHARGES
BASED ON A SINGLE UNIT OF
PROSECUTION FOR A CONTINUUM OF
TELEPHONE CALLS REGARDING THE SAME
WITNESS.

The plain language of the witness tampering statute considers the unit of prosecution to be the ongoing attempt to persuade a witness not to testify in a proceeding. *State v. Hall*, 168 Wn.2d 726, 734, 230 P.3d 1048 (2010). More than one unit of prosecution may occur in certain scenarios not present in this case, if the defendant attempts to persuade more than one person to testify falsely, or uses multiple methods of communication such as letter, telephone, etc., or if there is a substantial amount of time in between the communications. *Hall*, 168 Wn.2d at 735-37.

In *Hall*, the Supreme Court recognized that if the unit of prosecution was each communication effort to coerce or intimate the same person to testify falsely, that “could lead to as many as 1,200 separate crimes. Such an interpretation could lead to absurd results”. *Hall*, 168 Wn.2d at 737 (*quoting, Wright v. Jeckle*, 158 Wn.2d 375, 380-81, 144 P.3d 301 (2006)(citation omitted)). The Court in *Hall* determined it “unlikely the legislature intended that a person could be prosecuted for over a thousand crimes under the circumstances presented here.” *Hall*, 168 Wn.2d at 737.

Haller made three telephone calls to his grandmother, and on one occasion his grandfather answered the telephone. Each conversation related to Haller asking his grandmother to remember to talk to his brother Art to ask him to testify on Haller’s behalf, and to communicate that Art would not get into any more trouble if he testified that the drugs were not

Haller's. RP 116; 1RP 5-29.

Haller did not attempt to convince anyone other than his brother to come and testify on Haller's behalf. Haller only made three telephone calls, and the calls were placed within 7 days of each other on: December 12, 16, and 19, 2014. 1RP 5-29; Exhibit 39. Under *Hall*, there was only one single unit of prosecution. Accordingly, this Court must reverse Haller's three convictions for witness tampering and remand for resentencing on only one single charge, if the charge survives the sufficiency of the evidence challenge.

4. THE TRIAL COURT VIOLATED HALLER'S
RIGHT TO BE FREE FROM DOUBLE
JEOPARDY BY SENTENCING HIM TO THREE
SEPERATE POSSESSION CHARGES BASED
ON A SINGLE UNIT OF PROSECUTION.

Haller's three possession convictions in counts IV, V, and VI for: Oxycodone; Methamphetamine and Methadone should have been considered the same criminal conduct for purposes of calculating his offender score. And trial counsel was ineffective for failing to make this argument below. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The sentencing court calculates an offender score for purposes of sentencing by adding current offenses and prior convictions. RCW 9.94A.589(1)(a). The offender score for each current offense includes all other current offenses unless the trial court finds "that some or all of the current offenses encompass the same criminal conduct." RCW 9.94A.589(1)(a). Where the court makes such a finding, those current offenses are counted as one crime for sentencing purposes. RCW

9.94A.589(1)(a). Offenses constitute the same criminal conduct if they are (1) committed with the same criminal intent, (2) committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a); *Vike*, 125 Wn.2d at 410. “Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” *State v. Adame*, 56 Wn.App. 803, 811, 785 P.2d 1144 (1990).

In determining whether multiple crimes constitute the same criminal conduct, courts consider “how intimately related the crimes are,” “whether, between the crimes charged, there was any substantial change in the nature of the criminal objective,” and “whether one crime furthered the other.” *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

c. Simple Possessions Merge.

Vike, controls this issue. *Vike*, 125 Wn.2d at 410. In *Vike*, the state Supreme Court held that concurrent counts of simple possession of two or more controlled substances constitute the same criminal conduct for sentencing purposes. *Vike*, 125 Wn.2d at 410.

As in *Vike*, Haller committed the three current possession offenses at the same time and place and all three offenses “involved the same victim (the public at large). *Vike*, 125 Wn.2d at 410. The Court in *Vike* also determined that the intent involved in each offense was identical regardless of the different nature of each controlled substance because multiple acts of simultaneous simple possession constitute the same criminal conduct under former RCW 9.94A.400(1)(a); current RCW

9.94A.586(1)(a).

d. Not Harmless Error.

The state may argue that the error is harmless and remand not required because the standard range for the offenses did not change. This is not correct because it is not possible to determine if the standard range would change due to other sentencing errors raised in this appeal which in fact may change the standard range. However, even when a change in offender score does not alter the standard range for the offense, RCW 9.94A.517(1) requires remand for resentencing unless the record clearly shows that the trial court would have imposed the same sentence regardless of the error. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (citing *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

Here, the state asked for the high end of the standard range for each count plus the erroneously imposed multiple school zone enhancements. RP 391, 394, 395. The defense asked for a DOSA and for the low end of the standard range. RP 390, 393. The court after considering “the number of points here” (19), denied the request for a DOSA and imposed the high end. RP 393, 396. The trial court expressly stated that it imposed the high end due to Haller’s offender score of 19. If the possession charges merged, and the possession with intent to deliver heroin and the heroin delivery merge, as well as the three counts of witnesses tampering being considered the same criminal conduct, Haller’s offender score would be reduced by at least 5 points. Under these circumstances, it is uncertain whether the trial court would have imposed

the same high end sentence or perhaps, he would have imposed a mid, or low end sentence. FOR these reasons, this court must vacate the sentence and remand for resentencing.

5. COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE: MERGER OF THE POSSESSION CHARGES; MERGER OF THE WITNESS TAMPERING CHARGES; FOR FAILING TO OBJECT TO THE TESTIMONY REGARDING HALLER'S PRIOR INCARCERATION, AND FOR FAILING TO OBJECT TO ART'S TESTIMONY THAT HE WAS AFRAID OF HALLER.

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and Washington article I, section 22. While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*,

171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel’s performance.” *Grier*, 171 Wn.2d at 33; citing, *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999). Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

a. Failure to Object to Prior Incarceration and Fear.

There is no tactical or strategic reason why counsel: (1) elicited from Art that Haller had been incarcerated; (2) did not object to the CI testifying that Haller had been incarcerated, and (3) failed to object to Art’s testimony that he was afraid of Haller. RP 88, 102-04, 120.

In *State v. Saunders*, 91 Wn. App. 575, 958 P.2d 364 (1998), this Court reversed a conviction for prejudicial ineffective assistance of counsel where defense counsel offered evidence of a prior conviction for possession of illegal drugs that would not have been admissible at trial if introduced by the state. *Saunders*, 91 Wn. App. at 578-581. This Court held that there were “no reasons of tactics or strategy for offering the evidence.”

In that case, counsel did not challenge the evidence in a pretrial motion and so had no reason to believe the evidence would come in if offered by the State. Additionally, the state never attempted to prove the prior conviction in its case. The Court held “we can discern no reason from the record why counsel “would not have objected to such damaging prejudicial evidence.” *Saunders*, 91 Wn. App. at 578-579 (quoting, *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996)).

Saunders is on point. Here, as in *Saunders*’, Haller’s prior conviction and incarceration for drug charges was not admissible under ER 609. Further as indicated in *Saunders*, “[e]vidence of a prior conviction is inherently prejudicial when the defendant is the witness because it shifts the jury focus from the merits of the charge to the defendant’s general propensity for criminality.” *Saunders*’, 91 Wn.App. at 580 (quoting, *State v. Hardy*, 133 Wn.2d 701, 710, 946 P.2d 1175 (1997)). “And greater prejudice may result from the nature of the conviction; the more similar the prior crime to the one presently charged, the greater the prejudice.” *Hardy*, 133 Wn.2d at 711.

Here, the prior conviction was for a drug charge, an ordinary drug conviction not probative of Haller's veracity, and the same type of crime for which he was being prosecuted in this case. Given the tendency to distract the jury from the charges and evidence in the current trial, and to find guilt based on propensity, there simply are no reasons of tactics or strategy for not moving to suppress the evidence. In *Saunders* the defendant was prejudiced because the state's case was "not overwhelming". *Saunders*, 91 Wn.App. at 580.

Here, too the evidence against Haller was not overwhelming. The defense was unwitting possession and there was significant evidence that the CI lied on the stand, Haller was not present for the second buy and the CI set up the buys exclusively with Art, not Haller. Thus, if the jury believed that the drugs were Art's or that Haller was unaware of the drugs in the closet or in his room, it could have accepted his unwitting possession defense. With these facts, there is a reasonable probability that the outcome would have been different but for the introduction of Haller's prior conviction. *Strickland*, 466 U.S. at 694; *Hardy*, 133 Wn.2d at 712-13.

b. Failure to Argue Merger

Generally, when counsel fails to argue at sentencing that the offenses constituted the same criminal conduct, that argument is waived on appeal. *State v. Brown*, 159 Wn.App. 1, 16-17, 248 P.3d 1029 (2011), *rev. denied*, 171 Wn.2d 1015, 249 P.3d 1029 (2011). Notwithstanding the lack of objection, because the claim of error is of constitutional

magnitude, Haller may claim ineffective assistance of counsel for the first time on appeal. *State v. Greiff*, 141 Wn.2d. 910, 924, 10 P.3d 390 (2000); *State v. Phuong*, 174 Wn.App. 494, 547, 299 P.3d 37 (2013).

Defense counsel's failure to argue same criminal conduct at sentencing was ineffective assistance of counsel. *State v. Saunders*, 120 Wn.App. 800, 824-25, 86 P.3d 232 (2004) (concluding that counsel's performance was deficient where counsel did not argue same criminal conduct as to rape and kidnapping charges).

Although "it is the defendant who must establish that crimes constitute the same criminal conduct" at sentencing,³ when there exists a reasonable possibility that the sentencing court would have found that the witness tampering charges and the possession charges merged had Haller's counsel so argued, counsel prejudices the defendant by failing to make the argument. *Strickland*, 466 U.S. at 694; *Hardy*, 133 Wn.2d at 712-13.

As noted *infra*, the possession charges merged under *Vike*, 125 Wn.2d at 410 and the witness tampering charges merged under *Hall*, 168 Wn.2d 726, 734-737. Given the facts of this case, defense counsel's failure to argue same criminal conduct at sentencing constituted deficient performance. *Id.* Moreover, there is certainty under *Hall* and *Vike*, that, had counsel so argued, the trial court would have found that the witness tampering charges merged and the possession charges merged.

³ *State v. Graciano*, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013).

Ultimately, Haller was prejudiced by counsel's deficient performance during trial and at sentencing. Accordingly, this court should remand for a new trial, and if Haller is convicted again, with directions for the sentencing court to follow *Vike* and *Hall*.

6. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT IN CLOSING ARGUMENT WHEN HE ARGUED FACTS IN SUPPORT OF THE WITNESS TAMPERING CHARGE THAT WERE NOT IN EVIDENCE.

Contrary the evidence, the prosecutor told the jury that the witness tampering occurred in the State of Washington when there was absolutely no evidence to indicate the state in which those charged occurred. RP 368; CP 31-32. Arguing facts not in evidence constitutes prosecutorial misconduct. *State v. Glassman*, 175 Wn.2d 696, 704-05, 286 P.3d 673 (2012).

Prosecutors are a quasi-judicial officers of the court, charged with the duty of ensuring that an accused receives a fair trial. *State v. Jones*, 144 Wn.App. 284, 289, 183 P.3d 307 (2008); *State v. Boehning*, 127 Wn.App. 511, 518, P.3d 899 (2005). To be worthy of the office, prosecutors have a duty to seek justice, not convictions. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956); *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), citing *State v. Huson*, 73 Wn.2d 660, 440 P.2d 192 (1968).

To establish prejudicial misconduct warranting a new trial, Haller must show that the prosecutor's conduct was improper and prejudiced her

right to a fair trial. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); *Jones*, 144 Wn.App. at 290. Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

This court reviews comments made in closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

When a defendant fails to object to an improper remark, he waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill- intentioned that it causes prejudice that a curative instruction could not have remedied.” *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (*Overruled on other grounds in State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014)); *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

Recently, the state Supreme Court in *Glassman*, 175 Wn.2d at 704-05, “unequivocally denounced” a prosecutor submitting evidence to the jury that has not been admitted at trial. *Glassman*, 175 Wn.2d at 704-705 (citing *State v. Pete*, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004)).

The “long-standing rule” is that ““consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.” ” *Id.* at 555 n. 4, 98 P.3d 803 (quoting *State v. Rinke*, 70

Wash.2d 854, 862, 425 P.2d 658 (1967) (emphasis omitted)); *see also, e.g., State v. Boggs*, 33 Wash.2d 921, 207 P.2d 743 (1949), *overruled on other grounds by State v. Parr*, 93 Wash.2d 95, 606 P.2d 263 (1980).

Glassman, 175 Wn.2d at 705. In *State v. Pete*, 152 Wn.2d 546, 98 P.3d 803 (2004), the Supreme Court explained evidence that is “outside all the evidence admitted at trial, either orally or by document[]’..... is improper because it is not subject to objection, cross examination, explanation or rebuttal.” *Pete*, 152 Wn.2d at 552-553 (emphasis in original) (citations omitted).

In *Glassman*, the prosecutor altered admitted evidence to influence the jury to find the defendant guilty. *Id.* Specifically, the prosecutor put captions under a bloody, disheveled photographic image of Glassman that challenged his veracity. The Court held that “the prosecutor’s modification of photographs by adding captions was the equivalent of unadmitted evidence. There certainly was no photograph in evidence that asked [for example] ‘DO YOU BELIEVE HIM?’” *Glassman*, 175 Wn.2d at 706.

The Court held the altering evidence was prejudicial in the same manner as the admission of facts not in evidence because both involved the improper use of the “prestige associated with the prosecutor’s office [] [and] because of the fact-finding facilities presumably available to the office.” *Glassman*, 175 Wn.2d at 706.

In *Pete*, the prosecutor inadvertently sent to the jury, Pete’s written signed statement and a police report. *Pete*, 152 Wn.2d at 553. The report

and statement were inculpatory; the police report indicated that Pete was involved in the beating; and Pete's written statement indicated that he took property from the victim. *Pete*, 152 Wn.2d at 554. The Court reversed holding that the introduction of these two documents was prejudicial because one indicated that Pete took property which was inculpatory and the other contradicted his defense which "seriously undermined" his general denial defense by *Pete*, 152 Wn.2d at 554-555.

In *Rinkes*, 70 Wn.2d at 855, 425 P.2d 658, the prosecutor inadvertently sent a newspaper editorial and cartoon highly critical of "lenient court decisions and liberal probation policies". *Rinkes*, 70 Wn.2d at 862-863. Although inadvertent, the court held that the material was "very likely indeed" to be prejudicial and assumed that "the requisite balance of impartiality was upset" because the material was "clearly intended to influence the readers" and "may well have evoked" "the necessity for being stricter and less careful about observing legal principles and procedure in dealing with defendants accused of crime." *Rinkes*, 70 Wn.2d at 862-63.

Here, the introduction of facts not in evidence was not inadvertent, rather it was deliberate. The prosecutor knowingly argued facts not in evidence, i.e. that the crimes occurred in the State of Washington. RP 375. The prosecutor knew that he did not have any evidence to prove this elements, but nonetheless, argued to the jury that he had proved this beyond a reasonable doubt. RP 375.

Glassman like *Pete* and *Rinkes* supports reversal because the

impact of the prosecutor's improper use of the prestige of his office to argue facts not in evidence destroyed the balance required for a fair trial.

Here, the prosecutor misstated the facts by informing the jury that the witness tampering occurred in Washington State but there was no such evidence. RP 375; CP 31-32. The only evidence in support of the location of the witness tampering came from a stipulation that simply indicated that the telephone calls were recorded from within the Lewis County jail. CP 31-32.

After acknowledging that he could not establish that the witness tampering occurred in Washington State, the prosecutor committed prejudicial, flagrant and ill-intentioned misconduct when he stated in rebuttal closing:

I want to move on to the witness tampering because this particular aspect caused me problems because of the final element that this occurred in the State of Washington. There was a stipulation that indicated where this crime occurred.

RP 368. Although the objection was sustained, the taint could not be removed by a curative instruction because the prosecutor himself provided the missing element for the entire jury venire to hear. *Id.* If the jury had not heard from the prosecutor that the witness tampering charges occurred in the state of Washington, they would not have had any ability to find that the state met its burden on this element. Accordingly, there is a substantial likelihood the misconduct affected the verdict because the prosecutor provided an element that he admitted he could not prove for lack of evidence. RP 375-76. For these reasons this Court must reverse and

remand for a new trial.

7. THIS COURT SHOULD REVERSE AND REMAND FOR RESENTENCING BECAUSE THE TRIAL COURT FAILED TO DETERMINE HALLER'S ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS (LFO'S).

To the extent any charges survive the other challenges raised herein, this Court should still reverse and remand for resentencing with instructions for the trial court to engage in the analysis set forth by the Supreme Court recently in *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.2d 680 (2015), prior to imposing legal financial obligations on Haller, who is indigent. Because the trial court did not follow the requirements of RCW 10.01.160(1), and because this case presents the very same policy concerns which compelled our highest court to act even absent an objection below in *Blazina*, this Court should reverse and remand for a new sentencing hearing.

Under RCW 10.01.160(1), a trial court can only order a defendant convicted of a felony to repay court costs as a part of a judgment and unless the defendant is or will be able to pay them. In sentence if the court first considers the defendant's specific financial ability to pay. RCW 10.01.160(3) provides:

The court shall not order a defendant to pay costs determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

In *Blazina*, trial counsel did not object to the imposition of LFO's under RCW 10.01.160(3). The Supreme Court held that the failure to

comply with the mandatory requirement to determine the defendant's ability to pay before imposing LFO's was error requiring reversal of the imposition of the LFO's until such time as the trial court made the proper determination. *Blazina*, 344 P.3d at 685 (emphasis in original).

The Court in *Blazina*, explained that an inquiry into a defendant's ability to pay required "each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances." *Blazina*, 182 Wn.2d at 838-89.

Here, the trial court did not inquire into Haller's ability to pay at sentencing, yet it is undisputed that Haller was declared indigent at the beginning of the entire trial court process and again for the purposes of appeal. CP 85-88.

The Court here and in *Blazina* ordered LFO's using the preprinted boilerplate on the judgment and sentence:

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS** The court has considered the total amount owing, the defend[ant]'s past, present and future ability to pay legal financial obligation, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 89-100.

In this case, there were no boxes checked to indicate that Haller had a present or future ability to pay. *Id.* Further, the trial court ordered a \$500 crime victim assessment, \$2400 for court-appointed attorney fees/costs and a \$200 criminal filing fee, a \$2000 fine under RCW

9A.20.021; a \$100 lab fee; and a \$100 DNA fee for a total of \$5300. CP 89-100. The order also required that payments will commence upon Haller's release from incarceration. Id.

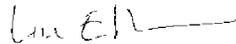
Under *Blazina*, because the trial court did not inquire into Haller's ability to pay, this Court should reverse the imposition of LFO's and remand for a determination of Haller's ability to pay.

D. CONCLUSION

Sebastian Haller respectfully requests this Court reverse the witness tampering charges and dismiss with prejudice and remand the remaining charges for a new trial and new sentencing.

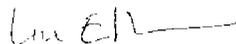
DATED this 30th day of October 2015.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutors appeals@lewiscountywa.gov and Sebastian Haller DOC# 766834 Stafford Creek Corrections 191 Constantine Way, GB-12 Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed, on October 30, 2015. Service was made electronically.



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amended page 4 to change Art:s room to Haller's room.

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