NO. 32451-6

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

RESPONDENT,

V.

JERRY RAY MEARS, Sr.

APPELLANT

BRIEF OF RESPONDENT

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

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C. STATEMENT OF THE CASE

1. Substantive Facts

Jack O'Bryan resided on a remote piece of property located at 303 Buzzard Lake Road in Okanogan County. RP Trial (hereinafter "RP") 77, 152. The property was owned by his son, Kelly O'Bryan. RP 77. The property was about 14 miles from Okanogan and was not served by a phone line. RP 83. April Mears lived on the property with Jack O'Bryan and acted as a caretaker for the 80 year old O'Bryan. RP 80, 91, 187. The defendant had also stayed at the property with Ms. Mears to assist in taking care of Mr. O'Bryan. RP 155, 163, 187. Even during the time period the

defendant was reportedly staying at the property, he would leave for days at a time. RP 189.

On September 3, 2013, Deputy Justin Weigel was advised there were subjects at the DSHS office who wanted to report a theft. RP 64, 193. Deputy Weigel made contact at DSHS with April Mears and Jack O'Bryan. RP 63-64, 193. They reported a white Ford F250, and a log splitter were taken from the O'Bryan property. RP 66, 192. Jack O'Bryan did not give the defendant permission to take or sell the truck, or to take or sell the log splitter. RP 153-154. The defendant asked to "borrow" the truck form Mr. O'Bryan. RP 190. The defendant later told Ms. Mears the truck had broken down. RP 190. A few days later, the defendant called and told them the truck had been stolen. RP 190. Prior to the log splitter being stolen, the defendant told Ms. Mears "I'm going to get the wood splitter" and get what was "owed" to him. RP 191-192.

The Ford F250 truck was actually owned by Michael Brown, who had purchased the truck and then had taken it to Jack O'Bryan's property to be used for emergency transportation. RP 116-118, 153. Once Mr. Brown had obtain the title for the purchased vehicle he had planned to sell it or trade it to Mr. O'Bryan's son, Kelly. RP 118, 120. Mr. Brown did not give the defendant, or anyone else, permission to sell the truck. RP 118.

With the assistance of Ms. Mears, Deputy Weigel located the truck in an alley behind the Rodeway Inn. RP 66, 193. Ms. Mears expressed to the officer that she feared the defendant would come back to the O'Bryan property and cause trouble. RP 194.

Deputy Weigel contacted a person named Joseph Wise, who provided a handwritten receipt received from the defendant for the $100 Wise had paid for the truck. RP 65-66, 194. The owner of the truck, Mr. Brown, assisted in recovering the stolen truck and returning it to the O'Bryan property. RP 118-119.

On September 3, Herman Mullis also reported to Deputy Weigel that his shotgun was taken by the defendant and never returned. RP 68, 130. Ms. Brown, her husband Michael Brown, and her father Mr. Mullis, were living in Tonasket at the time the gun was provided to the defendant. RP 106, 124-125, 142. Ms. Brown was present when Mr. Mullis provided the shotgun to the defendant. RP 106. Prior to reporting the shotgun stolen, Ms. Brown and her husband, and Mr. Mullis had attempted to retrieve the gun from the defendant on at least two occasions. RP 106-107, 111, 126, 142. The last time, Ms. Brown and Mr. Mullis took the defendant to Walmart after he told them a friend had the gun and might be at there. RP 142. The defendant then left the Walmart leaving Brown and Mullis behind. RP 108-111, 126, 142-143. The gun was never recovered. RP 111, 127.

Laura Brown and her father Herman Mullis moved from Tonasket to the O'Bryan Property to help care for Mr. O'Bryan and his property. RP 79-81, 116, 123-124, 194, 211-212. At the time Ms. Brown and Mr. Mullis moved to the property, the defendant was no longer staying there. RP 91, 146.

The defendant transported the log splitter in his van to meet Dean Tonner. RP 177-178. The defendant sold the log splitter to Mr. Tonner for $40. RP 177-178. Mr. Tonner was concerned about the purchase of the log splitter based on the low price and concerns about the property being stolen from "a guy up on the hill." RP 179. After

purchasing the log splitter, Mr. Tonner drove to O'Bryan's to return the splitter late in the evening of September 3. RP 82, 128, 144, 177, 180, 231. Mr. Mullis asked Mr. Tonner to turn the log splitter to the Sheriff's office. RP 82, 129.

The log splitter was turned over to the Sherriff's office by Mr. Tonner and later returned to the O'Bryan property. RP 68, 166, 177, 180, 213. Mr. Tonner also described the defendant to law enforcement and identified him from a photo. RP 181.

Based on the information provided by the witnesses, Deputy Weigel prepared the probable cause statement for the defendant's arrest. RP 69, CP 194-199. Deputy Weigel began searching for the defendant on September 3rd, and was advised the defendant may be driving a dark colored full size van. RP 69-70, 141, 179.

The defendant was arrested and the van seized. RP 70. At the time of the defendant's preliminary appearance on case 13-1-00317-0, the defendant was ordered to "Not contact, approach, or communicate directly or indirectly with the State's witnesses or any alleged victim." In *addition*, the order went on to specifically require the defendant "not contact or go to" Jack O'Bryan or Herman Mullis.

Probable cause was established for theft of a motor vehicle, theft of a firearm, forgery, and theft third degree. RP 291; See also Appendix "E" of Appellant's Brief. In a subsequent bail reduction order the defendant was required to reside at 117 Riverside Cutoff Road if released. RP 293.

Laura Brown, Mr. Mullis, and Ms. Mears were aware the defendant had been arrested. RP 83, 130, 211.

On approximately September 22rd, Ms. Brown had gone to Caso's with her father Herman Mullis. RP 84, 86, 131. After Mr. Mullis entered the store, the defendant

approached Ms. Brown as she sat in their truck. RP 84, 130. The defendant told Ms. Brown that they were all going to jail and he was innocent. RP 84, 85. Ms. Brown tried to end the conversation. The defendant became angry and Ms. Brown became nervous and rolled up the truck window. RP 84-85. The defendant then told Ms. Brown "Fine, I'll just blow your fucking heads off." RP 84, 85. The defendant remained outside the truck Ms. Brown was seated in for about five minutes. RP 86. Ms. Brown took the defendant's threat to blow their heads off seriously. RP 88, 94, 233. She believed the threat was directed to everyone who was at the O'Bryan property, including herself, Mr. Mullis, Mr. O'Bryan, and Ms. Mears. RP 93, RP 233.

On September 24, at around 4:30 am, a suspicious vehicle came to the gate of the O'Bryan property. RP 131-132, 195. Later that morning, at around 7:30 or 8:00 am, the defendant came to the property in silver colored Subaru. RP 73-74, 131-133, 196.

When the defendant arrived, he yelled that he wanted to speak with April Mears. RP 133. Ms. Mears indicated she didn't want to speak with him. RP 133, 196. Mr. Mullis told the defendant to leave and that the defendant was just causing problems with Jack O'Bryan. 133-134, 145. The defendant told Mr. Mullis: "I'm going to blow your motherfucking heads off." RP 133-134. Mr. Mullis indicated the defendant was mad and that he took the threat seriously and believed the threat to blow their heads off was directed to all of them. RP 134, 139. The defendant then left, driving the gray Subaru. RP 134.

After that threat on September 24, 2013, April Mears, Jack O'Bryan, Herman Mullis, and Laura Brown, contacted Deputy Weigel at the sheriff's office to report the threats to kill that had been made by the defendant and expressed that they were afraid

for their lives. RP 72, 87, 134, 148, 196, 233-234. Ms. Mears was afraid of the defendant, and believed he could carry out the threats that were made. RP 197, 207, 213, 233, 234.

Before leaving to make the report, they secured Mr. O'Bryan's residence. RP 135. After returning to the O'Bryan property, Mr. Mullis initially saw no sign that anybody was there. RP 135, 138, 139. Shortly after Mullis arrived, the defendant exited Mr. O'Bryan's residence. RP 74, 136, 137. Mr. Mullis again told the defendant to leave the property. The defendant told Mr. Mullis: "You can kiss your shotgun goodbye." RP 136. Mr. Mullis tried to call 911, but could not get a connection to 911, so he called his daughter, Laura Brown, and asked her to call the Sheriff's office. RP 74, 137, 139, 148. Ms. Mears and Mr. O'Bryan were with Ms. Brown when she received the call from Mr. Mullis that the defendant had broken into the residence. RP 197. They returned to the residence. RP 198.

Sheriff's deputies arrived and attempted to locate and track the defendant. RP 137, 198. The defendant's shoes, sunglasses and a set of keys were found inside the Mr. O'Bryan's residence. RP 137, 199. The defendant also left notes throughout the house. RP 199. The defendant ransacked Ms. Mears room and left a knife lying on her table.

The Subaru the defendant had driven to the O'Bryan property was abandoned on a side road/trail off of Buzzard Lake Road, and had been taken from Arnold Van Hees. RP 218-220. On September 23, 2013, Mr. Van Hees had given the defendant $100 for car parts and allowed him to drive the Subaru to get the parts. RP 218, 220, 238. That was the last time Mr. Van Hees had seen the defendant or his car until it was recovered.

RP 219, 223-224. At the time it was taken, Mr. Van Hees' Subaru held his carpentry tools, Skill Saw, and other tools valued in excess of $1,500. RP 220, 239.

Deputy Josh Brown took a stolen vehicle report from Mr. Van Hees on September 26, and began looking for the defendant. RP 237, 239. The defendant was located in Riverside, Washington. RP 239. The defendant said the Subaru was up at Buzzard Lake Road, and he had not told Mr. Van Hees that he had left the car there. RP 240, 242. The defendant did not have the keys to the car when the officer contacted him. RP 241, 244. On the way to recover the car Mr. Van Hees stopped at Jack O'Bryan's to pick up the keys that had been left there on the 24th. RP 137, 199, 227. The vehicle was parked off Buzzard Lake Road on a trail, behind a grove of trees. RP 244.

After the defendant's second arrest, he sent a letter to Ms. Mears, that ended with "tick tock; tick tock" which Ms. Mears considered it to be a threat toward her. RP 201-202. Michael Brown (Laura Brown's husband) moved from Tonasket to the O'Bryan property in October, 2013. RP 116.

2. Procedural Facts

The defendant was charged in Okanogan County Superior Court case number 13-1-00317-0 in count 1 with theft of a motor vehicle for the 1984 Ford F250, in count 2 with theft of a firearm for the Remington shotgun, in count with trafficking in stolen property first degree for the 1984 Ford F250, in count 4 with trafficking in stolen property first degree for the Remington shotgun, in count 5 with trafficking in stolen property first

degree for the log splitter, and in count 6 for theft third degree for the log splitter. CP 200-203.

The defendant was charged in Okanogan County Superior Court case number 13-1-00347-1 in count 1 with theft of a motor vehicle for the 1982 Subaru, and in count 2 for theft in the second degree for the tools. CP 169-170.

The defendant was charged in Okanogan County Superior Court case number 13-1-00350-1 in count 1 with harassment threats to kill involving Laura Brown on or about Sept 22, 2013; in count 2 with harassment threats to kill involving Herman Mullis on or about Sept. 22, 2013; in count 3 with intimidating a witness involving Laura Brown, on or about Sept 22, 2013; in count 4 with intimidating a witness involving Herman Mullis, on or about Sept 22, 2013; in count 5 with harassment threats to kill involving Herman Mullis on or about Sept 24, 2013; in count 6 with intimidating a witness involving Herman Mullis, on or about Sept 24, 2013; in count 7 with tampering with a witness involving Jack O'Bryan, on or between Sept 22 and 24, 2013; and in count 8 with tampering with a witness involving April Mears, on or between Sept 22 and 24, 2013. CP 141-145.

All three cases were set for trial on November 5, 2013. RP Motion Hearing 10/21/13, pp. 39-40. At the October 28 status conference for the November 5 trial, defense counsel left two of the cases set for trial for November 5, 2013. RP Motion Hearing 10/28/13, pp. 43-44.

On the November 4, 2013, trial readiness calendar, defense counsel moved to continue the cases set for trial November 5, to a trial date of December 3, indicating the

cases were still being investigated. RP Motion Hearing 11/04/13, p. 47. All three cases were set for trial December 3, 2013. RP Motion Hearing 11/12/13, p. 51.

On November 25, 2013, defense counsel requested, and was granted, another continuance of the trial scheduled for December 3, 2013, over the defendant's objection. RP Motion Hearing 11/25/13, pp. 5-12. Defense counsel indicated at that hearing that a defense investigator had been appointed and the investigation was not completed. RP Motion Hearing 11/25/13 p. 12.

On the December 23, 2013, status conference defense counsel indicated all three cases were to be leave set for trial on January 6, 2014. RP Motion Hearing 12/23/13, p. 56; RP Motion Hearing 12/17/13, p. 54.

On the January 6, 2014, trial readiness calendar, the defendant's trials were continued one week to January 14, 2014 to allow both parties to interview a State's witness. RP Status Conference 01/06/14, pp. 58-60.

On January 13, 2014, the parties agreed to consolidate the cases for trial. Defense counsel also requested an additional continuance of the trial to interview a State's witness and to review some audio tapes from District Court. Defense counsel moved to continue the cases out two trial settings to March 4, 2014. At that hearing, the defendant stated he felt he was being well represented by counsel. RP Motion Hearing 01/12/2014, pp. 13-16. At trial the counts for the three cases were re-numbered to be in consecutive order. CP 148.

On the March 3, 2014 status hearing, defense counsel indicated all three cases were again leave set for trial on March 10, 2014. RP Status Conference 03/03/14, pp. 63-64.

On March 10, 2014, defense counsel stated again the cases were leave set for trial. On that date, there were two other trials set to start before the defendant's trial, and the court indicated if the defendant's case did not start the week of March 10, it would carry over to the second available trial week beginning March 17, 2014. RP Status Conference 03/10/2014, pp. 66-67.

On the March 17, 2014, Status Conference, defense counsel indicated the cases were leave set for trial. RP Status Conference 03/17/2014, p. 69.

On the eve of trial, March 19, defense sent a witness list to the Prosecutor's office and clerk's office at around 3:00 pm. RP 49. The State's attorney was in trial on another case on March 19, and did not see the list until the morning of trial May 20. RP 50, 51. The list included four previously undisclosed witnesses and did not include any indication of what they would testify to. RP 50.

The trial began on March 20, 2014. The court heard motions in limine in the morning as the potential jurors were being assembled. RP pp. 20-35. The jury was selected and sworn in during the morning session. RP 36-42. The morning of trial, the State requested from defense copies of any statements or other materials regarding the newly disclosed witnesses. RP 50. Defense sent an email to the State's attorney who was in court addressing the motions in limine, and also forwarded the email to the bailiff. The email contained one sentence descriptions of what the newly disclosed witnesses may try to testify about. RP 50, 57, 58.[1] The State advised the court that neither the

[1] Appellant's Brief, Appendix "C" indicates the email was sent to the State's attorney at 9:13 am, and to the bailiff at 9:26 am. The emails appeared to be sent after the parties had held motions in limine, and may have already begun jury selection. See RP 35.

State nor its case officer would have any opportunity to interview and investigate any of the witnesses during trial. RP 50-52.

The court indicated the defendant had not complied with CrR 4.7(b) (1). RP 53. Defense counsel indicated the defense investigator had been sent out to speak with the newly disclosed witnesses several weeks before the trial. RP 54. Defense indicated the defense investigator had taken statements from the witnesses, that defense had notes, but had not received a "full report" until the previous day. RP 54-56. The court denied a continuance of the trial that had already begun, and reserved ruling on the State's motion to exclude the witnesses until later in the afternoon. RP 55, 58, 158-159.[2]

In the afternoon, the court found that in reviewing the factors *in State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061, 1071 (1998), a continuance was not reasonable, in light of the late disclosure by defense, the time needed to pursue and question the witnesses, and the failure of defense to comply with its discovery obligations. RP 158-160. The court did not find the violation was in bad faith, but found the violation was willful. RP 160. The court excluded the defense witnesses listed in the defense email. RP 160.[3] The court also noted its concern about a delay and the impact it would have on Mr. O'Bryan. RP 158-159.

The evidentiary portion of the trial concluded on Friday, March 21, and closing arguments continued past 5:00 pm. RP 393. At the conclusion of the trial the judge instructed the jury:

> THE COURT: Ladies and gentlemen of the jury, you've heard all of the evidence, you've been instructed as to the law and you've heard the closing arguments (inaudible) procedures. The only thing left now to do is deliberate. I'm doing a little clock-watching myself. I'd like to (inaudible) --

[2] The State did not move to exclude defense witness Sheila Corson, the defense investigator.
[3] Witnesses listed were Koeetia Mears, Shelby Mears, and Jerry Mears, Jr.

> 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.

RP 428-429. The jury then communicated to the bailiff that after picking a foreperson they wished to retire for the weekend. RP 437. The court, in setting a return time for Monday, told the jurors that the jury cannot start the deliberation until all twelve of the jurors are present. RP 437.

On Monday, March 24, 2014, the court learned that one juror was in the emergency room. RP 443. The alternate juror was called in. RP 443. 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 on Monday; and the jury made the decision to come back on Monday. RP 443.

While awaiting the arrival of the alternate, the court again instructed the eleven jurors not to begin their deliberations until all twelve jurors were present. RP 445, 447.

On March 24, 2013, the jury returned a verdict of guilty on counts 1, 2, 3, 4, 5, 6, 7, 9, 11, 12, 13, 14, 15, and 16; and not guilty on counts 8 and 10. CP 26-28. The defendant was sentenced on April 1, 2014 to a total of 102 months in prison, and assessed standard costs of $1,110.50 on each case. CP 15-25.

D. ARGUMENT

1. There was sufficient evidence to convict the defendant of Tampering in count 13.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. E.g., *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)(citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)).

There are three alternative means of committing witness tampering: attempting to induce a person to (1) testify falsely or withhold testimony, (2) absent himself or herself from an official proceeding, or (3) withhold information from a law enforcement agency. RCW 9A.72.120(1)(a)-(c).

No specific intent need be proved. The defendant must know that the person approached is a witness, or have reason to believe that he is about to be called as such. *State v. Stroh*, 91 Wn.2d 580, 583, 588 P.2d 1182, 1184 (1979).

A person tampers with a witness if he *attempts* to alter the witness's testimony. Witness tampering does not require an actual contact with the witness. Tampering is an attempt to induce the witness not to testify. RCW 9A.72.120. A person violates the witness intimidation statute even if the threat is not communicated to the victim. *State v. Williamson*, 131 Wn. App. 1, 6, 86 P.3d 1221, 1223-24 (2004), as amended (Dec. 13,

2005), *review granted, cause remanded,* 154 Wn.2d 1031, 119 P.3d 852 (2005); *State v. Anderson*, 111 Wn. App. 317, 44 P.3d 857 (2002).

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." RCW 9A.28.020(1). *Williamson*, 86 P.3d at 1224 (defendant completed his attempt to alter witness' testimony when he asked another person to talk to witness about changing her testimony).

Moreover, an attempt to induce a witness to withhold testimony does not depend only upon the literal meaning of the communication used. See *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134, 1137 (1990). Jurors are required to consider the inferential meaning as well as the literal meaning of communications. The literal meaning of words is not necessarily the intended communication. *State v. Scherck*, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973). In *Scherck*, 9 Wn. App. 792, the defendant attempted to dissuade a witness from testifying, by observing the witness had a nice house in a nice neighborhood and that "it would be a shame if anything happened to it." Further, the defendant said that if the case came to trial, it "would be very embarrassing for the victim." *Scherck*, 9 Wn. App. at 794.

The court considers the entire context in which the words were used, which also includes the prior relationship between defendant and witness. See *Rempel*, 114 Wn.2d at 83-84. One can be guilty of an attempt to induce a witness regardless of the effect upon the witness. *Id.*

In the present case, between September 22 and 24, the defendant communicated to Ms. Brown that they were *all* going to jail and he was innocent, and

then threatened to "blow your fucking heads off." He came to the O'Bryan property and again threated to "blow your motherfucking heads off"; and then returned and broke into the residence (despite a no contact order) ransacked it, and left notes that included "Jack you'll know the truth; someday the truth will come out." The defendant's explicit threats, violations of no contact provisions, threats of criminal charges, and attempts to provide the "truth" in this case, communicated to Mr. O'Bryan, or another, was a substantial step to alter the witness's testimony or induce the witness not to testify.

2. There was sufficient evidence to convict the defendant of Tampering in count 14.

In arguing insufficiency of the evidence in Count 14, Appellant argues there were no "direct" threats made to April Mears - because she did not repeat the wording of the threats communicated by the defendant, and that were contained in the record from other witnesses. Appellant's argument attempts to limit the consideration of threats made only to notes that Ms. Mears read; and argues the defendant's failure to "*mention* anything about her being a witness" has some particular relevance.

As discussed in section 2 above, the threat need not be communicated to the victim to constitute the attempt. *Williamson*, 86 P.3d 1221. Appellant ignores the record that Ms. Mears was present at the O'Bryan property when the defendant threatened to blow their heads off. Ms. Mears was also present when that threat, and the threat made at Caso's, were communicated to the police. At that time Ms. Mears told police and later testified that she was afraid of the defendant, and

believed he could carry out the threats that were made. These threats were in addition to the notes left in the residence and the knife left in her room when the defendant broke in.

The defendant knew Ms. Mears was a witness. The defendant told her he was taking the log splitter; and he knew that she could identify him as the last person to have the truck. Ms. Mears was one of the initial reporting parties to law enforcement about the stolen Ford F250 and log splitter; and she assisted law enforcement in recovering the truck.

As stated in Section 1, the defendant's explicit threats, violations of no contact provisions, and threats of criminal charges, communicated directly and indirectly to Ms. Mears, was a substantial step to alter the witness's testimony or induce the witness not to testify.

3. There was sufficient evidence to convict the defendant of Intimidating in count 9.

Jury Instruction 18 stated:

> To convict the defendant of the crime of intimidating a witness, in count 9, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 22, 2013, the defendant by use of a threat against a current or prospective witness (Laura 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.

CP 49.

Appellant is incorrect in his assertion that Ms. Brown was not covered in the defendant's pretrial no contact order. The order specifically prohibited contact with any State's witness. At the time the defendant made the threat, he had been arrested and charged with theft of the shotgun. The defendant knew that Ms. Brown was present when he was provided the gun, and that she had tried on two occasions to recover the gun from the defendant before it was reported as stolen.

The defendant also testified that Ms. Brown had been staying at the O'Bryan property by August of 2013. RP 253. This would have been at or near the time he was removing items like the truck and log splitter from the O'Bryan property.

Instruction 41 stated:

> "Current or prospective witness" means a person endorsed as a witness in an official proceeding, or a person whom the defendant believed might 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.

CP 72. Ms. Brown was a person the defendant either believed might be called as a witness in any official proceeding; and/or he had reason to believe she had information relevant to a criminal investigation.

After his release from jail, the defendant confronted Ms. Brown at Caso's. He waited to approach her until Mr. Mullis had exited the vehicle and entered the store. See RP 279-280. The defendant told Ms. Brown they were all going to jail and he was innocent, and then threatened to blow their heads off. Ms. Brown believed the threat was directed to everyone who was at the O'Bryan property, including herself, Mr. Mullis, Mr. O'Bryan, and Ms. Mears. RP 93, RP 233.

Jury Instruction 39 stated:

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury immediately or in the future to the person threatened or to any other person.
>
> Threat also means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time.
>
> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 70. Ms. Brown took the threat as a serous expression of the defendant's intent. The threat was directed to her and other persons.

The Appellant incorrectly asserts Ms. Brown needed to testify the statement "influenced" her "role as a witness". Under the logic of *Rempel,* one can be guilty of an attempt to induce a witness regardless of the effect upon the witness. *Rempel*, 114 Wn.2d at 83-84. Contrary to Appellant's assertion, if does not require the witness "act in accord with the threat." The crime results from the *defendant's* use of a threat to *attempt to* influence the testimony or induce the witness to act or not act.

4. <u>The trial court properly excluded the defendant's previously undisclosed witnesses</u>.

CrR 4.7(b) requires defense to provide discovery:

> (1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control 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 of any oral statements of such witness....

CrR (h)(2) states:

> (2) Continuing Duty To Disclose. If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

The rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a 2-way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage. *E.g., State v. Boehme*, 71 Wn.2d 621, 632-33, 430 P.2d 527 (1967).

The principles underlying CrR 4.7 have been stated as follows: In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security. See *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)(citing *Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77* (West Pub'g Co. ed. 1971)).

A defendant is required to provide discovery, including witness statements – whether they be written, recorded, or oral. This is true whether the witness interviewed

is the defendant's or the State's witness. *Yates*, 111 Wn.2d at 798 (Court order which required disclosure to State of recorded and written statements given by prosecution witnesses to defense counsel or their investigator was not an abuse of discretion and did not violate defendant's right against compulsory self-incrimination, as statements in question were not made by defendant.); *State v. Strandy*, 49 Wn. App. 537, 745 P.2d 43 (1987)(State was properly permitted to obtain tape recording of defense counsel's interview of State's witness).

The notes taken during such interviews, as well as summaries of interviews prepared by defense counsel or their investigator, can be discoverable if they should be called as witness by defense for purpose of impeaching testimony given by previously interviewed prosecution witness. *Yates*, 111 Wn.2d at 798.

Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. *Hutchinson*, 135 Wn.2d, 882. Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court, *Yates*, 111 Wn.2d, 797, and the factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. *Hutchinson*, 135 Wn.2d, 882, (finding exclusion warranted where State moved to exclude the testimony of defense experts as a sanction for the Defendant's refusal to be examined by the State's expert). See also, *State v. Kipp*, 171 Wn. App. 14, 286 P.3d 68 (2012) *rev'd,* 179 Wn.2d 718, 317 P.3d 1029 (2014)(Trial

court did not abuse its discretion in excluding testimony of defense witness due to defendant's late disclosure of witness information close to trial in violation of rule).

The defendant's cases had been set for trial at least four times and had been on call for trial for nearly two weeks. The defense did not provide the statements, notes or reports it had gathered in the several weeks leading up to the trial. The defendant violated CrR 4.7(b)(1).

Defense disclosed the names of witnesses in the late afternoon the day before trial. The defense then provided one sentence indications of the subject matter the witness may testify about to the bailiff on the day of trial. The jury had been selected and sworn in the morning of trial. There was no less severe sanction available. A continuance would have unnecessarily delayed the case, required the jury to be held over and remain available until such time as discovery was provided and investigation complete.

The information provide by defense the day of trial was that the new witnesses may seek to testify that the defendant had permission to sell the truck; a claim that one of the victims (a state's witnesses presumably) said Jerry was wronged; and that another victim said that they were making her do this. There was no indication the new witnesses were providing firsthand accounts. It appeared defense was seeking to have them testify about hearsay statements, or to offered their testimony as impeachment. However due to the lack of discovery, the court and the State were left to speculate as to what the testimony might entail, and whether it would be admissible even if offered. The preclusion of such speculative witness testimony, favored exclusion of the witnesses.

Prior to trial, defense failed to notify the State of the proposed witnesses' *and* their expected testimony. The State was surprised at trial with the late disclosure of the witnesses, and the non-disclosure of their statements. The State was prejudiced by the inability to counter the testimony with any affirmative evidence. Moreover the failure to provide witness statements prevented the State from effectively investigating the witnesses, their credibility, or the veracity of any statements they may have tried to offer at trial.[4]

The record shows the discovery violation was willful *and* in bad faith (notwithstanding the court's lack of a finding of bad faith). The court's exclusion of the Defendant's experts was warranted in this case. The trial court did not abuse its discretion when it excluded the potential new witnesses disclosed by defense.

5. There was no prosecutorial error as asserted by Appellant

In closing argument, a prosecutor has wide latitude to draw and express reasonable inferences from the evidence. *State v. Mak*, 105 Wn.2d 692, 698, 718 P.2d 407 (1986). The defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239, 1265 (1997); *Mak*, 105 Wn.2d at 726; *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

[4] The Appellant's argument that the State had adequate time to investigate the newly disclosed witnesses is without support. The argument that the State should somehow find adequate time to prepare, where defense failed to turn over discovery even on the first day of a two day trial, would effectively negate any defense discovery obligation to the complete detriment of the state.

Resolution of alleged prosecutorial misconduct is within the sound discretion of the trial court. *Mak*, 105 Wn.2d at 726. A prosecutor's alleged improper argument is viewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the court's instructions to the jury. *State v. Perkins*, 97 Wn. App. 453, 457, 983 P.2d 1177 (1999)(citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), as amended (Aug. 13, 1997),).

A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed 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. *Stenson*, 132 Wn.2d, 719; *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995) aff'd sub nom. *Gentry v. Sinclair*, 693 F.3d 867 (9th Cir. 2012).

In the present case there was no objection, and the Appellant has not met its burden. Opposing counsel's disagreement about evidence and inferences do not support a claim of error.

There was no error in the present case. Appellant's arguments that there were no threats made by the defendant simply ignores the evidence and testimony of the witnesses, who testified about the defendant's statements, the notes, and the defendant's conduct. It also ignores testimony from the witnesses about their assessment of the threats, and law enforcement testimony regarding the witnesses initial reporting of the threats.

6. There was no instructional error for the crimes of tampering and intimidation

Appellant argues the lack of a unanimity instruction for tampering counts. 13 and 14, and intimidation counts 9 and 12, was error. In the present case the information and the jury instructions alleged all three alternatives.

In Washington, criminal defendants have a right to a unanimous jury verdict. Wa. Const. art. I, § 21. In order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007)(citing *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988)).

Thus, to affirm a conviction where there are alternative means of committing a crime and the jury is instructed on each means. The court must find that (1) substantial evidence supports 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) (State presented sufficient evidence that defendant attempted to persuade witness to withhold information but, in closing, argued for the first time that defendant ordered witness to absent herself from the proceedings, an unsupported alternative means see); *State v. Johnson*, 132 Wn. App. 400, 410, 132 P.3d 737 (2006).

If there is insufficient evidence as to any individual means, the entire conviction must be reversed and the case remanded. *State v. Savaria*, 82 Wn. App. 832, 840, 919 P.2d 1263 (1996) *disapproved of by State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003).

In *State v. Gill*, 103 Wn. App. 435, 446-47, 13 P.3d 646, 652 (2000), involving intimidating and instructions on all alternatives, the defendant appeared to have understood that the complaining witness had no power to "drop the charges, but that a witness might seek to get the charges dropped, *however* he or she can; which was what the defendant sought of the witness. The Court in *Gill*, 103 Wn. App. 435 found that alone was sufficient to support each alternative means, where the witness by either changing her testimony or avoiding testifying could prevent the State from proceeding. In *Gill*, 103 Wn. App. 435, the defendant's demand, with his threat to have criminal charges filed against the witness, was sufficient evidence to support the jury's verdict on *any* alternative means. *Gill*, 103 Wn. App., 446-47.

As in *Gill*, 103 Wn. App. 435, there was substantial evidence that the defendant 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 his cases from proceeding.

7. The alternate juror was properly seated before actual deliberation

Replacement of a regular juror by an alternate is governed by CrR 6.5. The defendant did not challenge the trial court's compliance with CrR 6.5 at any time before appeal. Since the issue involved is compliance with a procedural rule rather than a

constitutional issue, it may not be raised for the first time on appeal. *Gentry*, 125 Wn.2d, 616. As in *Gentry*, 125 Wn.2d 570 the defendant not only did not object, but, counsel for the defendant agreed to the final panel.

Even if the defendant had objected at trial, any error would be harmless. In *State v. Blancaflor*, 183 Wn. App. 215, 218, 334 P.3d 46, 48 (2014) the court ruled the failure to instruct the reconstituted jury on the record that it must disregard all prior deliberations and begin deliberations anew was manifest error affecting a constitutional right that could be raised for the first time on appeal. *Blancaflor* relied upon *State v. Lamar*, 180 Wn.2d 576, 585, 327 P.3d 46, 51 (2014).

Yet in *Lamar*, 180 Wn.2d 576, the court found regardless of the CrR 6.5 rule violation in that case, the trial court actually violated the defendant's constitutional right to a unanimous verdict by an impartial jury when the trial court instructed the jurors to bring the alternate "up to speed" on the deliberations that had already occurred and go on from there. *Lamar*, 180 Wn.2d at 582. The court found the instruction affirmatively told the reconstituted jury *not* to deliberate together as is constitutionally required and thus the instructional error that affected the defendant's constitutional right to a unanimous jury verdict as its effect was to bar the reconstituted jury from deliberating together on all aspects of the case. *Id.*

The holdings were fact specific. In the present case, the record is clear the judge asked the jury to select a foreperson and then advise the court if they wished to deliberate Friday evening, or return on Monday. The Jury returned indicating they wished to return Monday. The alternate juror was seated before deliberations began the following Monday.

If Appellant is permitted to raise the issue on appeal, the State has the burden to prove beyond a reasonable doubt that the error is harmless. *Blancaflor*, 183 Wn. App., 218. Constitutional error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Rice*, 120 Wn.2d 549, 569, 844 P.2d 416, 426 (1993). The record is clear the jury elected not to deliberate Friday and returned to deliberate Monday with the alternate in place.

8. The counts 7 and 9; 11 and 12; 15 and 16, and 3 and 5 are not same criminal conduct

RCW 9.94A.589(1)(a) states in part:

> ...whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. ... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

Courts construe the sentencing statute defining "same criminal conduct" narrowly to disallow most assertions of same criminal conduct. *E.g., State v. Wilson*, 136 Wn. App. 596, 613, 150 P.3d 144 (2007)(citing *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994).

To decide whether two crimes involve the same criminal intent for purposes of determining same criminal conduct, the court must examine and compare each statute underlying each crime to determine whether the required intents are the same or different for each crime. *E.g., State v. Hernandez*, 95 Wn. App. 480, 484, 976 P.2d 165 (1999).

For multiple offenses to be same criminal conduct under the sentencing statute, three factors must be shown: two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. If any one element is missing, offenses do not encompass same criminal conduct and must be counted separately in calculating offender score. *E.g., Wilson*, 136 Wn. App., 612-613.

In *State v. Smith*, 124 Wn. App. 417, 102 P.3d 158 (2004) *aff'd,* 159 Wn.2d 778, 154 P.3d 873 (2007), affirmed *Smith*, 159 Wn.2d 778, the defendant's conviction of three second degree assaults based on her single act of firing a gun at a car containing three passengers did not violate principles of double jeopardy; although defendant fired only one bullet into the vehicle, she assaulted three individuals, resulting in three units of prosecution, and since the crimes did not involve the same victim, the crimes did not constitute the same criminal conduct.

Where the statutory intents are the same, the court next objectively views the facts to determine whether a defendant's intent was the same with respect to each count. *E.g., Hernandez*, 95 Wn. App., 484; *State v. Bickle*, 153 Wn. App. 222, 234, 222 P.3d 113 (2009).

It is the defendant who must establish that crimes constitute the same criminal conduct for purposes of calculation of offender score at sentencing. *State v. Phuong*,

174 Wn. App. 494, 299 P.3d 37 (2013) *review denied,* 347 P.3d 458 (Wash. 2015). Even crimes with identical mental elements will not be considered same criminal conduct, which would preclude consecutive sentences, if they were committed for different purposes. *State v. Price*, 103 Wn. App. 845, 857, 14 P.3d 841 (2000). See also, *State v. Grantham*, 84 Wn. App. 854, 860, 932 P.2d 657, 660 - 661 (1997)(Second act of rape against same victim at same place, had the same general objective or purpose as the first act-sexual intercourse, but was not same criminal conduct where the defendant had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act).

The crimes of intimidating a witness and Felony Harassment are not same criminal conduct. The elements of intimidating a witness are that the defendant made a threat, that the threat was made to a current or prospective witness, and that it was made because of the victim's role as a witness. The elements of felony harassment are that the defendant knowingly made a threat to kill and the victim reasonably feared that the threat would be carried out. Each crime requires proof of one or more elements that is not required to establish the other crime. *State v. Fuentes*, 150 Wn. App. 444, 451-52, 208 P.3d 1196, 1199-200 (2009).

Intimidating a witness requires proof of the additional element that the victim be a witness, and felony harassment requires proof of the additional elements of a threat to kill and the victim's reasonable fear the threat would be carried out. Therefore, he charged offenses may be identical in fact because they were both based on a threat to kill a witness, they are not the same under the "same evidence" test because each

crime required proof of additional facts not necessary to prove the other crime. *Fuentes*, 150 Wn. App., 451-52

A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. *Fuentes*, 150 Wn. App., 453.

Finally in double jeopardy analysis the Court determines whether there is an independent purpose or effect for each offense. In doing so, courts presume that the offenses were intended to be punished separately unless there is a clear indication that the legislature did not intend to impose multiple punishments. *Fuentes*, 150 Wn. App. at 454. The intimidating and harassment statutes are located in different chapters of the criminal code. Intimidating a witness is included in chapter 9A.72 RCW, under "Perjury and Interference with Official Proceedings," whereas felony harassment is contained in a separate chapter, RCW 9A.46 under "Harassment." Each statute contemplates different purposes. The purpose of the intimidating a witness statute is to preserve the State's ability to effectively investigate and prosecute criminal offenses, whereas the harassment statute is aimed at making unlawful the repeated invasions of a person's privacy by acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim. *Fuentes*, 150 Wn. App. at 454. Accordingly counts 7 and 9 involving Laura Brown are not same conduct and counts 11 and 12 involving Herman Mullis are not same conduct.

Theft of a motor vehicle involves wrongfully obtaining or exerting control over a motor vehicle with the intent to deprive. RCW 9A.56.065. The legislative intent was to impose meaningful penalties that are proportionate to the crime committed by those who steal motor vehicles. See *Crimes and Offenses, Theft, Motor Vehicles*, 2007 Wash. Legis. Serv. Ch. 199 (T.S.H.B. 1001) (WEST).

Theft in the second degree involves theft of property or services which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9.41.010 *or a motor vehicle.* RCW 9A.56.040.

The elements are different and one offense can be violate without violating the other. They are mutually exclusive. It is also clear the legislature intended them to be punished separately. Accordingly, counts 15 and 16 are not same criminal conduct.

The Appellant's argument that the two trafficking counts are same criminal conduct is also unsupported. The two crimes did not involve the same criminal intent, were not committed at the same time and place, and did not involve the same victims. The Ford F250 belonged to Michael Brown. The log splitter belonged to Jack O'Bryan. The truck was stolen and sold at a different time than the log splitter. The truck was taken by the defendant to Omak where he sold it. The log splitter was taken and transported in the defendant's van for sale to Dean Tonner. Counts 3 and 5 are not same criminal conduct.

9. Concurrent legal financial obligations.

Appellant argues the court violated RCW 9.94A.589(1) by imposing one set of LFO's per case. RCW 9.94A.589 states in part:

> (1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, **the sentence range** for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. **Sentences** imposed under this subsection shall be **served** concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle (emphasis added).

The language of the statute and the cases cited by Appellant provide no authority for requiring imposition of "concurrent" LFO's. The statute address the sentencing ranges imposed and served and is silent on LFO's. RCW 9.94A.030(30) states:

> "Legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines**, and any other financial obligation that is assessed to the offender as a result of a felony conviction**. Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430 (emphasis added).

The plain language of RCW 9.94A.030(30), does not provide authority for the Appellants' proposition.

10. No contact order.

RCW 9.94A.505(8) 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. Appellant cites *State v. Armendariz*, 160 Wn.2d 106, 120, 156 P.3d 201, 208

(2007), that stated: the plain language of the SRA supports the conclusion that trial courts may impose crime-related prohibitions, including no-contact orders, for a term of the maximum sentence to a crime. The SRA's legislative history and its interpretation by the SGC further support the conclusion that RCW 9.94A.505(8) is intended to provide trial courts with authority to impose such orders. Moreover, these same sources support the conclusion that such orders may last for the statutory maximum for the defendant's crime. *Armendariz*, held that the trial court in the present case did not exceed its authority under the SRA in imposing a five-year no-contact order as part of the defendant's sentence for third-degree assault. *Id.*

However, *Armendariz* also held that as part of any felony sentence, such crime-related prohibitions may include orders prohibiting contact with victims *or witnesses* for the statutory maximum term. *Armendariz*, 160 Wn.2d, 108. Similarly, *in State v. Warren*, 165 Wn.2d 17, 33-34, 195 P.3d 940, 948 (2008) the court held the trial court did not abuse its discretion when it imposed a lifetime no contact order protecting the defendant's wife who was a witness to the sexual abuse for which the defendant was convicted.

The no contact order in this case prohibited contact with April Mears, Laura Brown, and Herman Mullis for a period of 10 years, which was the statutory maximum term of counts 1-5, 9, 12, and 15. There was no abuse of discretion in entering the order protecting Ms. Mears.

11. Ineffective assistance

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987)(applying the 2–prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Competency of counsel is determined based upon the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)(citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)).

Courts engage in a strong presumption counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226. The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251, 1257 (1995), as amended (Sept. 13, 1995).

The trial court has broad discretion in sentencing a defendant under the first-time offender option, or in refusing to grant this option, *State v. Boze*, 47 Wn. App. 477, 735 P.2d 696 (1987); *State v. Johnson*, 97 Wn. App. 679, 682, 988 P.2d 460, 462 (1999). A sentence imposed on a first-time offender shall be deemed to be within the standard sentence range for the offense and shall not be appealed. *State v. Wright*, 183 Wn. App. 719, 733, 334 P.3d 22, 29 (2014).

If there are no disqualifying convictions, the first time offender option is available to the judge regardless of the recommendation made by the state or defense. Appellant's arguments that the trial court lost the ability to exercise its discretion is without merit. In the present case the court imposed the high end of the defendant's standard range, 102 months. Defense counsel's failure to request first time offender was no deficient in light of the convictions on three consolidated cases, and based on the court's decision to impose a high end sentence.

There was no ineffective assistance of counsel for not arguing for same criminal conduct. As discussed in Section 8, there was no basis to find any of the offenses were same criminal conduct.

There was not a basis to claim ineffective assistance of counsel at the trial court level for failing to raise prosecutorial error, when the Appellant cannot meet the burden to support a claim prosecutorial error. See Section 5.

There was not a basis to claim ineffective assistance of counsel based on the assertion defense counsel should have moved to dismiss counts 13 and 14. Given that the court takes all facts and reasonable inferences in favor of the state, such a motion is rarely granted. Simply second guessing trial counsel upon review does not establish that defense counsel's representation was deficient. See Section 1 and 2.

Similarly the assertion that counsel was ineffective for failing to challenge the no contact order or the amount of LFO's imposed, is without any support. The claims regarding the no contact order and LFO's are not supported on appeal. The failure to raise meritless positions at the trial court level is not ineffective assistance. See Sections 9 and 10.

E. CONCLUSION

There was sufficient evidence to convict the defendant of tampering in count 13 and 14, and intimidating in count 9 when the evidence viewed in the light most favorable to the state permitted any rational trier of fact to find the essential elements of the crimes beyond a reasonable doubt

The trial court properly excluded defense witnesses disclosed at trial, as a violation of the discovery rules where the violation was willful and prejudicial to the state.

There was no prosecutorial error as alleged where the prosecutor relied on facts in evidence and the rational inferences from those facts.

No instructional error occurred for the crimes of tampering and intimidating where the facts presented supported the alternative means of committing the crime.

The court did not commit error in instructing the jury who had delayed deliberation until the day the alternate juror arrived. No instruction to begin deliberation over was necessary. It there was any error it would be harmless in light of the record.

None of the counts were same criminal conduct when each count had a different intent.

The court was not required to run LFO's for each case that was consolidated for trial concurrently. Additionally the court had authority to issue a 10 year no contact ral of the defendant's counts.

Trial counsel was not ineffective when viewing the record as a whole in the present case.

Dated this 1 day of June 2015

Respectfully Submitted by:

KARL F. SLOAN, WSBA #27217
Prosecuting Attorney
Okanogan County, Washington

I, Karl F. Sloan, do hereby certify under penalty of perjury that on June 1, 2015, I provided by email service a true and correct copy of the Brief of Respondent to:

E-mail: nodblspk@rcabletv.com
Dennis Morgan
Attorney at Law
PO Box 1019
Republic, WA 99166

Karl F. Sloan, WSBA# 27217

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290