

No. 47308-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

vs.

SEBASTIAN HALLER,

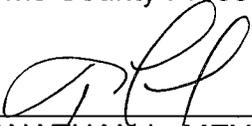
Appellant

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. STATEMENT OF THE CASE

Desiree Prue became a paid confidential informant for the Centralia Police Department in 2014. RP 75. Ms. Prue did not have any criminal charges pending, she became an informant because heroin had ruined her life. RP 75. Ms. Prue decided to target Arthur Heilman-Haller¹ because he had sent her some messages trying to get rid of drugs when he knew she was trying to stay clean because she had her children back. RP 89. Ms. Prue and Arthur have a history together, as they had a child together that had been taken away due to their drug use. RP 73, 86. Ms. Prue did not have a relationship with Haller, Arthur's older brother, she had met him a few times but did not really know him. RP 89, 105.

Ms. Prue worked with Centralia Police Officer Adam Haggerty in her role as a confidential informant. RP 35, 41, 75. On May 2, 2014 Ms. Prue called Arthur to arrange to purchase a quarter ounce of heroin. RP 40, 75-76. The deal was for \$340 for the quarter ounce of heroin and the buy took place at 1014 Yakima Street in Centralia. RP 41, 77. Ms. Prue went to the residence, went into Arthur's room, where Haller was sitting in a chair across from Arthur's bed. RP 78,

¹ The State will refer to Arthur Heilman-Haller as Arthur, as he is referred to as Art and Arthur throughout the transcript and so not to confuse him with his brother, Sebastian Haller, no disrespect intended.

108. Ms. Prue gave the money to Haller and Haller gave the heroin to Ms. Prue. RP 78, 108. Haller also gave Ms. Prue some needs, cooker caps and some cotton. RP 80. Ms. Prue handed all the items over to Officer Haggerty. RP 42-45.

The second controlled buy was done on May 5, 2014. RP 46. Ms. Prue again arranged with Arthur to purchase a quarter ounce of heroin for \$340. RP 46, 80. Ms. Prue was set up with a recording device, which was working when she went up to the residence but was turned off when she entered the residence. RP 61. Ms. Prue did not intentionally turn off the recording device. RP 85. Haller was not present for the second buy but supplied the heroin to Arthur earlier with the expectation that Arthur would give the money to Haller when Haller returned. RP 110. Ms. Prue admitted she relapsed during the second controlled buy, did heroin, the paramedics were called and she ended up in the hospital because of it. RP 82, 152. Ms. Prue gave the heroin she purchased from Arthur to Officer Haggerty. RP 47-49.

Officer Haggerty applied for and was granted a search warrant for 1014 Yakima Street. RP 50. Officer Haggerty and several other officers served the search warrant on the residence on May 8, 2014 at between 9:00 a.m. and 10:00 a.m. in the morning. RP 50.

The front door was unlocked when they made entry into the house so there was no need to break down the door, the officers just turned the door knob and walked in. RP 283. The officers had their guns at low ready and did not point them at anyone. RP 284. There were three people located in the house at the time of the search warrant. Arthur, who came out of his bedroom, which is towards the end of the right-hand side of the hallway. RP 51, 137. Kathy Challender, Arthur and Haller's mother, who came out of her bedroom at the left-hand side at the end of the hallway. RP 36, 81, 137. Haller exited the bathroom, which is located directly across from his bedroom. RP 137-38.

Haller, who was fully clothed, told Officer Withrow he was about to take a shower. RP 138. Officer Withrow found, in the bathroom that Haller had exited, on the floor, right above the drain of the standup shower, a black nylon case with a lanyard on it. RP 138-39. The case was not wet. RP 139. Inside the case was a Camel chew container that had marijuana, a little bag of hash oil and two other bags that had two methadone pills and two oxycodone pills. RP 140. Outside the bag was a plastic bag that contained methamphetamine, another bag that contained heroin, a bag that contained tramadol and various clean, empty plastic bags. RP 140.

In the hallway closet, across from Haller's bedroom, Officer Withrow located heroin. RP 144-45. The heroin was sitting on the floor of the closet, in the open. RP 149.

In Haller's bedroom, Sergeant Shannon collected mail that was addressed to Haller. RP 163. Sergeant Shannon also found a black bag that had other smaller black bags inside of it. RP 163. Inside the bag he found a small set of scales, packaging materials for packaging up drugs, glass pipes with residue that tested positive for drugs and he also found a bag full of money. RP 163-64. The bag contained everything a drug dealer would need to conduct business, except the drugs. RP 182. There was \$462 found in the bag. RP 182. Officers also found needles all over the residence, with the majority located in Haller's bedroom. RP 52.

The State charged Haller with Counts I and II: Delivery of a Controlled Substance – Heroin – in a School Zone, Count III: Possession of Heroin with the Intent to Deliver – in a School Zone, Count IV: Possession of Methamphetamine, Count V: Possession of Oxycodone, and Count VI: Possession of Methadone. CP 1-6. The charges were later amended to clarify the dates of the deliveries and add three counts of Tampering with a Witness. CP 8-14, 22-28. The State alleged in the Tampering with a Witness charges that Haller

was making phone calls from the Lewis County Jail and attempting to have contact with Arthur regarding what Arthur should testify to. CP 18-19.

Haller elected to have his case tried to a jury. See RP. As part of its case in chief the State was going to seek to admit three separate phone calls Haller had made from the Lewis County Jail in order to prove the Tampering with a Witness charge. RP 11-19. Haller's trial counsel objected to admissibility of the phone calls, stating they were not relevant and they were more prejudicial than probative. RP 11. The trial court ruled the calls were relevant and it would not sanitize the facts. RP 17. Therefore, Haller decided it would be best to enter into a stipulation to the foundation of the phone calls to avoid the need for the State to call someone from the jail, thereby, the jury did not hear the phone calls made from within the Lewis County Jail. RP 19, 131-32; CP 31-32; Ex. 39.²

The State called Arthur to testify. RP 105. Arthur's testimony was similar to Ms. Prue's although, there were some differences. RP 108-09. According to Arthur, he and Ms. Prue got high and hung out during the second heroin purchase. RP 109. Arthur also testified that

² The State will be filing a supplemental designation of Clerk's papers, which will include exhibit 39.

Haller kept his door padlocked when Haller was not home. RP 115. Arthur further testified that no one, including Haller or anyone on Haller's behalf, had asked him to come in and testify falsely. RP 116. Arthur also admitted he had stolen from Haller when Haller went to prison. RP 120-21.

Haller testified on his own behalf. RP Haller claimed as of May 2014 he no longer used heroin and he no longer lived at the Yakima street residence. RP 233, 233-37. Yet, Haller also testified the Yakima street residence was also his home. RP 237. Haller denied selling heroin to Ms. Prue. RP 245.

Haller was convicted as charged. CP 70-78. Haller was sentenced to 192 months. CP 94. The trial court ran Haller's three school bus stop enhancements consecutively to each other to come up with the 192 months. RP 394-95. Haller timely appeals his conviction and sentence. CP 105-17.

The State will supplement the facts as necessary throughout its argument below.

II. ARGUMENT

A. THE STATE CONCEDES ERROR WHEN THE COURT RAN ALL THREE SCHOOL BUS STOP ENHANCEMENTS CONSECUTIVE TO EACH OTHER.

Haller argues, and the State concedes, error when the court ran all three school bus stop enhancements consecutive to each other. Therefore, this Court must remand the case back to the trial court for resentencing.

Haller was convicted of Count I: Delivery of a Controlled Substance – Heroin, Count II: Delivery of a Controlled Substance – Heroin, and Count III: Possession of a Controlled Substance with Intent to Deliver – Heroin, and the jury returned a special verdict that Haller had committed all three within 1000 feet of a school bus route stop. CP 70-72, 79-81. Each school bus stop enhancement carries with it an additional 24 months of additional prison time. RCW 9.94A.533(6); RCW 69.50.435(1). The trial court sentenced Haller to 192 months in prison. CP 94. The trial court got 192 months by giving Haller high end of the standard range for Counts I, II and III, which was 120 months and running the three school bus stop enhancements consecutively, adding 72 months to each sentence for a total of 192 months. RP 395-96, CP 94.

Haller was sentenced on March 11, 2015. RP 388. The State acknowledged when it made its sentencing recommendation in regards to the school bus stop enhancements that the issue was before the Washington State Supreme Court. RP 391, 395. Subsequent to Haller's sentencing the Washington State Supreme Court decided the case the State mentioned during sentencing, *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015). The Supreme Court held that school bus stop enhancements, pursuant to RCW 9.94A.533(6) must be ran consecutive to the base sentence they attach to, but they do not run consecutive to each other. *Conover*, 183 Wn.2d at 719.

Therefore, pursuant to the recent decision in *Conover* this Court should remand Haller's case back to the trial court for resentencing in regards to the school bus stop enhancements.

B. SUFFICIENT EVIDENCE WAS PRESENTED TO THE JURY PROVING HALLER TAMPERED WITH A WITNESS ON AT LEAST THREE OCCASSIONS AS OUTLINED AT TRIAL.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

Exhibit 39 was the recording of jail telephone calls made by the defendant. RP 227. These are the calls that formed the basis of the Tampering charges. The jury heard a recording played from 2:35 into the call to 3:40 of the call from December 12, 2014. There was a call from December 16, 2014. That call played from 1:03 to 1:24

minutes and 3:21 to 4:55 minutes. RP 227-228. Finally, a telephone call from December 19, 2014 played from 2:23 to 3:29 minutes. RP 228.

During these calls, Haller indicates that "...Arthur can come over and testify the drugs were his, not mine and then that would get me off. So, when you talk to Arthur next, relay that message that I want him to come over and testify that the drugs were his. We might be [subpoenaing] him from over there to come over here for my trial." Ex. 39, December 12, 2014, 2:35-3:14 minutes.

Further evidence was provided by Haller saying "They want to bring Arthur over from Walla Walla to testify on my behalf....[A]sk her if she talked to Arthur yet. I asked her to talk to Arthur.... I wanted her to relay a message to him and now I want her to relay another message to him that he's going to be called over to the Lewis County Jail to testify on my behalf....If he just says everything in the house was not mine, I have a good chance of winning my case and of course they can't charge him again....So if he just says they weren't mine, then I should be good to go....Ask grandma to relay a message to Arthur...saying that he is going to be called over to testify for me." Ex. 39, December 16, 2014, 1:03 to 1:24 and 3:21 to 4:55 minutes.

Haller also said "Have you talked to Arthur? Well they're going to pull him next Wednesday, he's going to be on the chain bus coming back over here and he will probably be in Lewis County by next Friday. Because I want him to testify for me saying that wasn't mine. He has to testify and say it wasn't mine....There is no way that he can get anymore charges. They will not charge him. All he has needs to do is say that the drugs were not mine and then I will not get 12 years. So you have to talk him into it." Ex. 39, December 19, 2014, 2:23-3:29 minutes.

1. There Was An Attempt To Induce False Testimony.

Haller repeatedly tells the caller what Arthur needs to say when he testifies and reassures the caller that Arthur cannot get into any more trouble by testifying in such a manner. At one point, Haller even tells the caller to "...talk him into it." Ex. 39, December 19, 2014, 3:20-3:29 minutes.

Haller makes it very clear as to how Arthur is expected to testify. Ex. 39. Further, Haller makes it clear that Arthur cannot get into any further legal trouble if he does testify as requested. *Id.* Haller's attempts failed and Arthur testified for the State at trial. RP 105.

An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Given the contents of the telephone calls, the jury concluded Haller did attempt to get Arthur to testify falsely. See RCW 9A.72.120(1)(a). The jury is in the best position to answer that question. *Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

2. Sufficient Evidence Was Admitted To Allow The Jury To Determine The Crimes Of Tampering Occurred Within The Boundaries Of Lewis County, Washington.

There is no question Haller is referring to Lewis County, Washington. The trial was in Lewis County, Washington. The jurors each were from Lewis County, Washington. Jurors are only eligible to serve if they are residents of Lewis County, Washington. See RCW 2.36.070. Finally, Arthur, the subject of the call and the charges at issue, appeared in Lewis County, Washington and testified before a jury made up of residents of Lewis County, Washington. CP 105.

The contents of the telephone calls also make it apparent the crimes occurred in Washington. Haller consistently refers to Arthur coming “here” to testify. Ex. 39. There are at least one-half dozen references to “over here”, “here” or “Lewis County” made by Haller in the portions of the calls admitted. Ex. 39.

In this case, sufficient evidence was presented the crimes of Tampering with a Witness occurred within the state of Washington. It is reasonable for a jury to infer, based upon all of the facts and evidence, the crimes of Tampering occurred in Lewis County, Washington. See *Goodman* at 781.

C. HALLER COMMITTED THE CRIME OF TAMPERING WITH A WITNESS ON THREE (3) SEPARATE OCCASSIONS AND, AS A RESULT, WAS PROPERLY CONVICTED ON THREE (3) SEPARATE COUNTS. DOUBLE JEOPARDY DOES NOT APPLY.

Unit of prosecution is a question of law. See e.g. *State v. Hall*, 168 Wn.2d 726, 230 P.3d 1048 (2010). Unit of prosecution is at issue here on the Tampering with a Witness charges as well as the sentencing on the possessory charges.

1. Double Jeopardy, As To The Charges Of Tampering With A Witness, As Used Here, Does Not Apply. As A Result, The Defendant Was Properly Convicted.

In *Hall*, as pointed out in the Haller's opening brief, the court dealt with the very issue now before the court. However, Haller fails to inform the court that after, and in direct response to, *Hall*, RCW 9A.72.120, that statute at issue here, was amended. RCW 9A.72.120 now reads as follows:

(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; or (b) Absent himself or herself from such proceedings; or (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency. (2) Tampering with a witness is a class C felony. (3) For purposes of this section, each instance of an attempt to tamper with a witness constitutes a separate offense.

"In response to *State v. Hall*, 168 Wn.2d 726 (2010), the legislature intends to clarify that each instance of an attempt to intimidate or tamper with a witness constitutes a separate violation for purposes of determining the unit of prosecution under the statutes

governing tampering with a witness and intimidating a witness." *Intent*, Session Laws 2011, chapter 165 § 1.

Given the clear indication of the legislature in response to the holding of *Hall*, Haller's double jeopardy/unit of prosecution argument must fail.

2. The Trial Court Properly Sentenced Haller For His Separate Possessory Drug Charges.

The defendant was convicted of nine (9) crimes as a result of the trial at issue. CP 89-90. The Judgment and Sentence revealed seventeen (17) prior convictions which formed the basis of the offender score. *Id* at 91-92.

Conviction six (6) on the Judgment and Sentence lists a non-felony offense. *Id.* at 91. In addition, convictions two (2), three (3), four (4), fifteen (15) and sixteen (16) are listed as same criminal conduct. *Id.* at 92. As a result, these five (5) convictions only score as two (2) points (one point for convictions 2, 3 and 4 one point for convictions 15 and 16). Going into trial, the defendant had 13 felony points. CP 91-92.

RCW 9.94A.525(1) dictates "[a] prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender

score is being computed shall be deemed 'other current offenses'.... If the court did, as accused by Haller, include each possessory offense in his offender score, Haller would have been sentenced on an offender score of 21, not 19. CP 92. Instead, the court properly determined that counts IV, V, and VI were to be scored as one (1) crime. See *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994).

The state does concede an error in the Judgment and Sentence. Counts IV, V and VI should have been denoted in the Judgment and Sentence as encompassing the same criminal conduct. CP 91. That was not done, but does not impact the determination of offender score nor the sentence imposed in this matter.

D. HALLER RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Haller's Attorney Was Not Ineffective During His Representation Of Haller Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Haller must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different.” *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

3. The Defendant Was Not Unduly Prejudiced By The Testimony Of The State’s Witnesses.

Haller alleges trial counsel was ineffective for failing to object to “Incarceration and Fear”. See Brief of Appellant, §5(a), page 20. However, such is not the case. Appellant claims of ineffective assistance of counsel in “...(1) elicit(ing) from Arthur that Haller had been incarcerated; (2) did not object to the CI testifying that Haller had been incarcerated, [sic] and (3) failed to object to Arthur’s testimony that he was afraid of Haller. RP 88, 102-104, 120.”

The arguments fail. RP 88, as cited by Haller, is the cross-examination of the CI. Trial counsel asked “[t]ell me about your relationship with [Haller].” *Id.* The CI responded by testifying:

I don't have a relationship with [Haller]. I've met him a few times. He's not my brother-in-law. He's not my kid's uncle. He's nothing to me. I don't really know [Haller]. He's always been in prison for this. Met him a few times.

Id. Defense counsel then asked “[h]ave you ever had a conversation before May 2nd, 2014, with Sebastian [Haller]?” *Id.*

The witness responded:

Maybe when I was like a teenager. But honestly, no, I don't really think I've sat and had a conversation with [Haller]. Like I said, he's been in prison....

Id.

Neither question was designed to solicit a response regarding Haller and prison. This is in stark contrast to the situation in the case relied on by Haller. See *State v. Saunders*, 91 Wn. App 575, 958 P.2d 364 (1998). In *Saunders*, defense counsel asked his client "...if he had any prior convictions for similar offenses." *Id.* at 577. Here, the CI made a passing comment that did not speak to *what* the conviction was for that sent Haller to prison. In addition Haller claims the prison sentence referred to was for drugs. There appears to be nothing presented at trial substantiating the claim. Certainly, no reference to the record was made in Haller's brief.

The same is true with the issue of fear. See Brief of Appellant, page 20; RP 101-102. The question "So it's your recollection today that Art put the money that you gave him in [Haller]'s drawer?" RP 101-102, cannot reasonably be expected to draw the response of "Yeah. Art's not going to rip him off. He's scared of him." RP 102.

Finally, Arthur mentioned his brother, Haller, had been in prison. RP 120. This was not solicited by the State. Rather, the

witness was questioned about a conversation when "...[Arthur] got out of prison last time[.]" RP120. The response was actually more telling about Arthur, not Haller. Arthur responded "[w]e had a nice talk over things I had done when he was in prison....I had [sic] stole some of his things. *Id.*

There is no showing that, but for these comments, the defendant would have been found not guilty. *Horton* at 921-22. It was not a secret Haller was incarcerated. From the telephone calls, it is obvious he is in a controlled environment as he cannot reach out to Arthur and even mentions the Lewis County Jail. Ex. 39, December 16, 2014, 1:03 to 1:24 and 3:21 to 4:55 minutes. In addition, given the Tampering charges, it is not unreasonable for Arthur to be in fear of Haller.

4. There Was No Benefit To Argue Merger When The Possessory Crimes Were Treated As A Singular Offense In The Judgment And Sentence.

Trial counsel did not argue merger in this matter because merger was not at issue. As noted earlier, the possessory drug offenses counted as only one offense at sentencing. This fact formed the basis of the offender score and the sentence imposed. CP 91-92.

In addition, the Tampering statute expressly indicates the revision was in response to *Hall* and, as a result, each instance is a separate crime. RCW 9A.72.120(3).

“To merit reversal, [Haller] would have to demonstrate that, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” See *State v. Millante*, 80 Wn. App. 237, 246, 908 P.2d 374 (1995). Here, Haller has two issues. First, he cannot show an error by defense counsel. Secondly, Haller can show no prejudice.

Therefore, Haller’s trial counsel was not deficient and his claim of ineffective assistance of counsel fails. This Court should affirm his convictions.

E. HALLER HAS NOT MET HIS BURDEN TO SHOW HE WAS PREJUDICED BY THE DEPUTY PROSECUTOR’S ERROR.

Haller claims the deputy prosecutor committed prosecutorial error (misconduct)³ by arguing in closing the Tampering charges

³ “‘Prosecutorial misconduct’ is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial.” *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public’s confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association’s Criminal Justice Section (ABA) urge courts to limit the use of the phrase “prosecutorial misconduct” for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial

occurred within the state of Washington. Brief of Appellant, page 24. Further, Haller alleges error when the deputy prosecutor, in closing, referenced a stipulation entered into between the parties. *Id.* at 28.

While the deputy prosecutor did make comments, there was no error arguing the crimes alleged occurred in Washington. In addition, although a stipulation was entered into that was not introduced to the jury, the mention of it to the jury was harmless error and not prejudicial to Haller in any way.

1. Standard Of Review.

The standard for review of claims of prosecutorial error is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

Misconduct” (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term “prosecutorial misconduct” is an unfair phrase that should be retired. *See, e.g., State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant’s arguments, the State will use the phrase “prosecutorial error.” The State will be using this phrase and urges this Court to use the same phrase in its opinions.

2. The Statement By The Deputy Prosecutor That The Tampering Charge Occurred In Washington Has Not Been Shown To Be Error, Nor Has It Been Shown To Be Prejudicial.

A claim of prosecutorial error is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury.” *State v. Thorgerson*, 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

To prove prosecutorial error, it is the defendant’s burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor’s conduct, full trial context includes, “the evidence presented, the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. Monday*, 171 Wn.2d 667, 675,

257 P.3d 551 (2011), *citing State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when “there is a substantial likelihood the misconduct affected the jury’s verdict.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Here, Haller claims error because the deputy prosecutor indicated the Tampering offenses occurred in the state of Washington. Appellant Opening Brief, page 27. The citation to the record by Haller references a comment made outside the presence of the jury. *Id.* and RP 375. The actual argument to the jury was “...these phone calls were made in the state of Washington.” RP 329. This statement was made without objection. *Id.* However, it did not go unanswered. Trial counsel argued the issue of proof as to where these calls occurred. RP 356-357.

“[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence.” *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. As was outlined *supra*, it is a reasonable inference the calls occurred in the state of Washington given all of the information known to the trier of fact. *Supra*.

If, *arguendo*, the statement by the deputy prosecutor was in error, there is no showing such comment was prejudicial in any way. In fact, defense counsel addressed the issue in his closing. RP 356-357.

Likewise, Haller cannot establish any prejudice when the deputy prosecutor referenced a stipulation in the rebuttal closing argument. RP 368. In that instance, Haller's trial counsel did object and was sustained. *Id.* When the court instructed the jury it was reminded "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence." CP 37; RP 304. This was also reinforced during trial counsel's closing argument. RP 357. Juries are presumed to follow the court's instructions unless there is evidence showing that did not occur. *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Here, there is no evidence suggesting the jury did not follow the court's instructions.

"The trial judge is generally in the best position to determine whether the prosecutor's actions were improper and whether, under the circumstances, they were prejudicial." *Ish*, 170 Wn.2d at 195-96. In this matter, the trial court correctly decided the deputy prosecutor's

statement was improper and made the proper corrective action by sustaining the objection. This Court should find that Haller has not met his burden to show that the deputy prosecutor's error was prejudicial and therefore the error was harmless. Haller's convictions should be affirmed.

F. THERE WAS SUFFICIENT INFORMATION PROVIDED AT THE SENTENCING HEARING TO PROVIDE A BASIS FOR THE TRIAL COURT'S IMPOSITION OF THE LEGAL FINANCIAL OBLIGATIONS.

Haller argues that the trial court imposed legal financial obligations without any meaningful consideration of his ability to pay. Brief of Appellant 29-31. The information shared by Haller himself at sentencing indicates that he is capable of working. RP 397-398. During sentencing, Haller argued with the court. *Id.* Haller indicated money earned while he worked "...can go to my hygiene or coffee....So I'm paying my fines while I'm in prison....I'd rather not get credit for [work]." *Id.* This court should affirm the imposition of the legal financial obligations.

A defendant who at the time of sentencing fails to object to the imposition of non-mandatory legal financial obligations is not automatically entitled to review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Unpreserved legal financial errors do not command review as a matter of right. *Blazina*, 182 Wn.2d at 833.

The trial court is required to consider a defendant's current or future ability to pay the proposed legal financial obligations "based upon the particular facts of the defendant's case." *Id.* at 834.

There was no objection to the imposition of legal financial obligations at the sentencing hearing. RP 393-398. A timely objection could have made a clearer record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear a challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal).

The trial court's finding was supported by the record, this court should affirm the imposition of legal financial obligations. If this Court holds the trial court's findings are not sufficient the State respectfully requests this Court remand for a hearing whereas the trial court has

the ability to do a full inquiry as to Haller's ability to pay his legal financial obligations and enter findings based upon that inquiry.

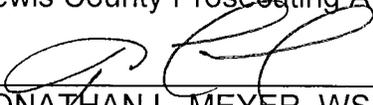
III. **CONCLUSION**

Haller was convicted as charged based upon the evidence. Haller received effective assistance from his trial counsel throughout the proceedings. Haller did not meet his burden to show he was prejudiced by the deputy prosecutor's error and therefore cannot prevail on a claim of prosecutorial error. This Court should affirm Haller's convictions. There was sufficient information provided at the sentencing hearing for the trial court to impose the non-mandatory legal financial obligations.

RESPECTFULLY submitted this 14 day of January, 2016.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:



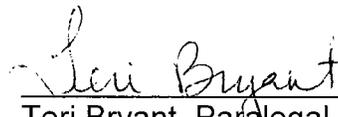
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. SEBASTIAN HALLER, Appellant.	No. 47308-9-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Jonathan L. Meyer, Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 15 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lise Ellner, attorney for appellant, at the following email addresses: Liseellnerlaw@comcast.net.

DATED this 15th day of January, 2016, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

January 15, 2016 - 11:26 AM

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