

NO. 48527-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHERYL LYNN NICKERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00149-1

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

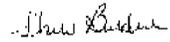
SERVICE	<p>David B. Koch 1908 E Madison Street Seattle, Wa 98122-2842 Email: nielsenc@nwattorney.net</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED September 15, 2016, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Nickerson received ineffective assistance of counsel where the trial court failed to find probable cause for a charge of tampering with a witness but allowed the state to proceed and after hearing the evidence dismissed the charge when the state rested?

2. Whether defense counsel was ineffective for failing to object to evidence that was either admissible, was elicited by the defense, or caused no prejudice?

3. Whether the trial judge commented on the evidence where the remark was regarding an undisputed fact and as such caused no prejudice?

4. Whether cumulative error warrants reversal?

5. Whether appellate costs should be assessed?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Cheryl Lynn Nickerson was charged by second amended information filed in Kitsap County Superior Court with two counts of delivery of methamphetamine, including a school zone enhancement on count one, and with intimidation of a witness. CP 1-4. Before trial, a third amended information was filed that maintained the delivery charges

but changed the intimidation of a witness charge to tampering with a witness. CP 9-13; 3RP 3.¹

The defense objected to the tampering with a witness charge in the third amended information. 3RP 4-5. The factual basis for that charge was a Facebook post by Nickerson advising anyone who read it of the identity and activity of the state's confidential informant (CI), Lindsey Reed. Exhibit 9 at CP 121. The defense argued that the tampering charge violated Nickerson's first amendment free speech right because the Facebook post in question was merely an expression of Nickerson's opinion. *Id.* The defense also argued that the post did not meet the elements of the crime because the post did not expressly seek to have the witness absent herself from the proceedings or change her testimony. *Id.* The defense also argued that the statements made failed to establish any intent by Nickerson to threaten Ms. Reed. *Id.* Finally, the defense argued that presentation of that charge to the jury would cause extreme prejudice to Nickerson's case. *Id.*

The trial court's ruling on the defense objection was deferred. 3RP 6. The trial court expressly declined to rule on probable cause for the tampering charge. *Id.* The trial court opined that even if it found no

¹ The state will follow appellant's numbering of the verbatim report of proceedings: 1RP -11/16/15; 2RP - 11/30/15; 3RP - 11/30/15 and 12/1/15; 4RP - 12/2/15; 5RP 12/3/15; 6RP- 12/11/15.

probable cause, the matter could be presented to the jury for determination, “if, in fact the State presents evidence sufficient to meet the standards for having it presented to a jury.” 3RP 6. The trial court entered a not guilty plea for Nickerson and indicated that “I will go forward on the matter as I understand it until I hear additional information to lead me to believe otherwise.” Id.

During Ms. Reed’s testimony, it was established that Ms. Reed used drugs in violation of her informant agreement with the police. CP 123-24 (informant agreement); 4RP 123-24. The defense sought to impeach with that information. But the police officer in charge of Ms. Reed testified that despite her admitted drug use, she had fulfilled her contract. 4RP 142. When she finished testifying, the trial court inquired of the parties as to whether she could be released from her subpoena. The parties agreed that she was released; the trial court released her and added “And you’re free from the agreement you were under.” 4RP 194.

After the state rested, the defense again moved for dismissal of the tampering charge. 4RP 248. The parties argued the issue at length. 4RP 248-256. The trial court, viewing the evidence in a light most favorable to the state, ruled that the charge was not supported by sufficient evidence and granted the defense motion to dismiss that count. Id. at 257. The defense proposed no further instruction or information to the jury on this

ruling and the record does not indicate that the trial court advised the jury of the reason for the absence of the tampering charge from the final instructions.

Nickerson was convicted of the two delivery counts. 5RP 323. The jury also gave an affirmative answer on the school zone special verdict on count 1. Id. She was sentenced to 99 months on count 1 with 72 months on count 2 served concurrently. 6RP 17.

B. FACTS

Patrol Officer Harold Whatley of the Bremerton Police Department had previously been assigned as a detective in the agency's special operations group. 4RP 59. That group primary investigates drug dealing. 4RP 60. Officer Whatley had been involved in several hundred drug cases. 4RP 62.

Officer Whatley used confidential informants (CI) in his drug investigations. 4RP 67. These people are often offenders trying to work off their crimes. Id. Sometimes they are people who want to get drugs out of their neighborhoods or people with vendetta against an ex-girlfriends or ex-boyfriends. Id. CIs are used because they know dealers. 4RP 68. Also, over time a narcotics officer will be recognized on the streets. Id. The CIs are used to do controlled buys of drugs. Id. They are usually

drug users. 4RP 70. The CI is supervised or “handled” by a particular detective. 4RP 71.

Lindsey Reed was a CI that Whatley handled. 4RP 75. He met her at police headquarters. 4RP 117. Ms. Reed was interested in working off a case against her. 4RP 125; 4RP 150. Her reward would be a positive recommendation by the officer to the prosecution. 4RP 126. She was a drug user. 4RP 151. He reviewed an informant agreement with her. 4RP 118. While working with Whatley, Ms. Reed stayed in contact and followed Whatley’s instructions. 4RP 94. She made two controlled buys from Nickerson. 4RP 113-14. Ms. Reed fulfilled her agreement with Whatley. 4RP 142.

Reed told Whatley that she could buy methamphetamine from Nickerson. 4RP 118. She met Nickerson while the two were in drug court. 4RP 168. She targeted Nickerson because Nickerson was still using. 4 RP 175. Reed had been arrested for a drug charge and provided with Whatley’s number by another officer. 4RP 170. Her informant contract included that she not use drugs while performing the contract. 4RP 173. However, she was still using a little bit. Id.

The first controlled buy from Nickerson was arranged by Reed. 4RP 152. Whatley picked her up at home accompanied by another office. RP 153. She was searched at a secure location that was a park and ride

lot. Id. She always wore flip-flops, yoga pants, a camisole, and a zip up jacket, this to allow easy searching. Id. She would “take my bra out and shake everything.” 4 RP 154. She and Whatley then drove to a Big Lots store in Port Orchard. 4RP 155. She was dropped off and met Nickerson in front of the building. Id. They went into the bathroom and exchanged the drugs and money. Id. Ms. Reed went out, got in the car with Whatley, and handed him the drugs. Id. The entire transaction took between five and seven minutes. Id. They then returned to the same secure location and she was searched again. RP 157. She was then debriefed by the officer. Id.

Soon thereafter, Ms. Reed arranged a second buy from Nickerson. 4RP 157-58. Again, Whatley picked her up and searched her. 4RP 159. They proceeded to a home near Gorst and she was dropped off at the end of the driveway. 4RP 160. She walked to the house and into a concrete area and exchanged the money for the dope. Id. “It was very quick.” 4RP 162. She walked back down the driveway, Whatley picked her up, and she gave him the drugs. 4RP 163. Again, they drove to a secure location and she was searched and debriefed. Id.

After completing the two controlled buys from Nickerson, Ms. Reed was told by her relatives about a Facebook post. 4RP 166. The post included a picture of her and text indicating to any who saw the post to

beware because Reed was a confidential informant. *Id.* This was scary to her because people know who she is and she has children. 4RP 166-67. People knew where she and her children lived. 4RP 182. She considered not coming to testify. *Id.*; 4RP 192.

III. ARGUMENT

A. **NICKERSON'S COUNSEL'S PERFORMANCE WAS NOT DEFICIENT SINCE THE TRIAL COURT REFUSED TO GRANT HER MOTION UNTIL IT HEARD ALL THE EVIDENCE AND THE FACEBOOK POST WAS INDEPENDENTLY ADMISSIBLE AND SO DID NOT CAUSE PREJUDICE.**

Nickerson argues that she received ineffective assistance of counsel because defense counsel failed to file a written motion to dismiss count 3, tampering with a witness, under CrR 8.3(c). This claim is without merit because the defense in fact challenged that count, because the charge was in fact supported by prima facie evidence, because the evidence supporting that charge, that Nickerson claims prejudiced her case, was independently admissible.

A claim of ineffective assistance of counsel is reviewed de novo. *See State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d

322, 334-35, 899 P.2d 1251 (1995); see *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. A reviewing court must make every effort to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). To show deficient representation, the defendant must show that the representation fell below an objective standard of reasonableness based on all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Further, “[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Edvalds*, 157 Wn. App. 517, 525-26, 237 P.3d 368 (2010), *citing State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Similarly, “[t]o establish ineffective assistance based on counsel's failure to request a jury instruction, the defendant must show that he was entitled to the instruction.” *State v. Olson*, 182 Wn. App. 362, 373-74, 329 P.3d 121

(2014).

To show prejudice, the defendant must establish that “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” *Strickland*, 466 U.S. at 687. Prejudice is established when there is a “breakdown in the adversary process that renders the result unreliable.” 466 U.S. at 687.

1. Counsel did in fact challenge the tampering charge.

The record is clear that Nickerson’s trial counsel contested the sufficiency of the charge before the jury heard any evidence. But Nickerson believes defense counsel should have asserted her motions a different way; she should have made the same motion she made but under CrR 8.3. Here, the rule that a reviewing court should not engage in hindsight is particularly apt.

Nickerson’s argument notes that the trial court deferred its ruling on the sufficiency of the charge by declining to find probable cause but nonetheless allowing the state to put on its case. This is a clear indication that the trial court wanted to hear all the evidence on the point before it ruled. The trial court correctly recognized that the state may proceed even without a judicial finding of probable cause. Brief at 12 (appellant concedes this rule). From there, Nickerson argues that if counsel would have used CrR 8.3, the trial court would in fact have dismissed the

tampering charge pretrial. In fact, however, Nickerson has no argument that the trial court would have ruled any differently. It still was within the judge's authority to have all the evidence on the issue presented before he decided whether or not that evidence was sufficient. Seems the proper approach for a cautious jurist.

Moreover, when defense counsel challenged the charge, she also raised free speech, not just sufficiency of the evidence. 3RP 5. Thus defense counsel's motion was in fact broader than the particular lack of prima facie evidence that CrR 8.3(c) addresses. Further still, defense counsel clearly expressed her concern about prejudice to Nickerson's case. Again, the trial court was aware of all the premises involved and yet deferred its ruling. And, again, Nickerson has no argument short of speculation that the trial court would have done differently had the same argument been made under 8.3. And, of course, argument that the trial court would have dismissed pretrial because it did after the state rested is unsound (*post hoc, ergo propter hoc*).

At bottom, the record is clear that defense counsel thought the charge to be infirm and sought to have it removed. In this she failed. But, it is not the result that matters on an ineffective assistance claim. The court in *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), observed that “[t]rial counsel does not guarantee a successful verdict, *State v.*

Adams, 91 Wash.2d 86, 91, 586 P.2d 1168 (1978), and competency is not measured by the result. *State v. White*, 81 Wash.2d 223, 225, 500 P.2d 1242 (1972).” *Thomas* at 228-29. Thus only hindsight supports Nickerson’s claim and this is to be avoided in favor of the presumption that counsel’s representation was proper.

2. *The tampering charge in fact set out a prima facie case and therefore a resort to CrR 8.3(c) would have been unavailing.*

CrR 8.3 (c) provides a defendant with an opportunity to test the sufficiency of the state’s proof prior to trial. The facts asserted must be undisputed. CrR 8.3 (c) (1). Then, “[t]he court shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt.” CrR 8.3 (c) (3). Such dismissal is without prejudice. CrR 8.3 (c) (4).

A ruling on a pretrial motion to dismiss under 8.3(b), governmental misconduct, is reviewed for abuse of discretion. *See State v. Shelmidine*, 166 Wn. App. 107, 111, 269 P.3d 362 (2012). But a motion under CrR 8.3 (c) is reviewed de novo. *See State v. Newcomb*, 160 Wn.App. 184, 188-89, 246 P.3d 1286 (2011). A motion under CrR 8.3 (c) employs the same procedure as a so-called *Knapsted* motion. *Newcomb, supra* at 188 (ftnt. 2); *see State v. Knapsted*, 107Wn.2d 346, 729 P.2d 48 (1986).

Here, the defense renewed its pretrial motion when the state rested. 4RP 249. The trial court granted the motion this time, relying on *State v.*

Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990). A person is guilty of witness tampering if she attempts to induce a witness or a person she has reason to believe is about to be called as a witness in any official proceeding to testify falsely, withhold testimony, or fail to appear. RCW 9A.72.120 (1). The witness tampering statute does not require proof of the defendant's specific intent to obstruct justice. *State v. Rempel*, 53 Wn. App. 799, 805, 770 P.2d 1058 (1989), *reversed on other grounds* 114 Wn.2d 77, 785 P.2d 1134 (1990). It is sufficient to prove the defendant knew the person approached was going to be a witness. *Remple*, 53 Wn. App. at 805.

Further, “an attempt to induce a witness to withhold testimony does not depend only upon the literal meaning of the words used. The State is entitled to rely on the inferential meaning of the words and the context in which they were used.” *Rempel*, 114 Wn.2d at 83-84. Moreover, reviewing courts defer to the trier of fact with regard to conflicting testimony, the weight to be given testimony, and reasonable inferences to be drawn therefrom. *See e.g. State v. Gerber*, 28 Wn. App. 214, 216, 622 P.2d 888 (1981), *rev. denied* 95 Wn.2d 1021 (1981), *citing Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. ED. 560 (1979); (emphasis added).

Here, the words used are those found in Exhibit 9 (CP 121). And, as the trial court found, these words do not include an express request for

Ms. Reed to either change her testimony, withhold information, or absent herself from the proceeding. The post was “scary” to Ms. Reed. 4RP 166-67. It scared her and made her afraid for her children. 4RP 167. The post caused Ms. Reed to consider not coming to testify. Id. and 4RP 192. On cross-examination, Ms. Reed testified that the post “threatened my family and my children.” 4RP 182. This because “[t]here was people that knew where I lived.” Id. When confronted by the defense with the lack of an express threat in the post, Ms. Reed responded that that is a matter of opinion and that she in fact felt that the post was “intimidating.” 4RP 182.

The testimony of Ms. Reed establishes that in the context of this case, the post was a nearly successful attempt to induce Ms. Reed to absent herself from the proceedings. Given that, the dismissal of this count may have been error. The trial court is of course at least presumed to know all of the above stated legal principles. The jury should have been left to decide whether or not the words used proved an “attempt to induce” Ms. Reed under RCW 9A.72.120. Since no particular threat is required by the statute, it is entirely reasonable to consider that, in the context of a person doing the dangerous job of acting as a police informant, an act having made that person’s identity and activity—that person’s secrets—known to the public and thereby subjecting that person in that context to possible embarrassment, ridicule, or actual violence could be inferred to be an attempt to induce.

The state presented a “prima facie case of guilt.” The record is clear that Nickerson knew Ms. Reed would be a witness in the case and thus that element is established at a prima facie level. As argued above, the “attempt to induce” element is established at a prima facie level by the obvious attempt to vex, annoy, embarrass, and endanger Ms. Reed. But since the state did not cross appeal this issue, we must accept the trial court’s ruling.

The point being that Ms. Reed’s testimony on the issue appears to have made the trial court’s ruling a close call. And it is readily apparent that the trial court would not have had this testimony in the mix had it granted a pretrial motion to dismiss. It is apparent from the record that it was this full presentation of the evidence on that charge that the trial court desired in order to rule on the issue. That being the case, it is apparent that the trial court was unlikely to rule until it heard all the evidence on the point and this is so whether the motion was presented as it was or in writing under the rule. On this record, then, a resort to CrR 8.3 (c) pretrial would have been unsuccessful just as the oral motion was unsuccessful.

3. Evidence of the Facebook post was independently admissible on the delivery charges and therefore caused no prejudice.

Since evidence of the Facebook post was independently admissible on the delivery charges, the fact that it was admitted as relevant to the tampering charge caused no prejudice. Nickerson’s statement is

admissible as an admission by party-opponent and as consciousness of guilt.

First, there is no dispute that the statement, the Facebook post, is attributable to Nickerson. Exhibit 9 (CP 121). Therein, Nickerson admits that she knew Ms. Reed before the incidents at trial, having met her in drug court. Nickerson then goes on to admit that she knows Ms. Reed does controlled buys for Ms. Reed's benefit in getting her charges reduced or dismissed. These admissions bottom a reasonable inference that Nickerson knew Ms. Reed when the latter approached her to arrange a controlled buy. In turn, it can then be reasonably inferred that the acquaintance between the two made her a perfect target for Ms. Reed's work with the police. During cross examination defense counsel asked "And do you remember the first time you guys met?" 4RP 168. Ms. Reed replied that she had met Nickerson in drug court. 4RP 168. Thus, a claim of prejudice on this appeal, that Nickerson's drug court attendance was revealed, was in fact elicited by the defense. Brief at 17. And, again, the defense on cross examination asked "And how is it that you chose Cheryl [Nickerson]?" 4RP 175. Ms. Reed replied "I chose her because I knew she was using." 4RP 175-76.

Thus, Nickerson's post, certainly unwittingly, served to bolster Ms. Reed's testimony and as such was clearly relevant to the delivery charges, having a tendency to make Ms. Reed's testimony more likely to be

credible. And, as Nickerson strenuously argues here, Ms. Reed's credibility was a crucially important fact of consequence to the action. ER 401.

The rest of the post is essentially exculpatory. It recites her success in drug court. The phrase "alleged controlled buys" is clearly intended as a denial of the present charges. The same can be said of her determination to not let "Kitsap railroad and scare me. . ." And, finally, her reference to her prior criminal history (here, noting that the cat was let out of the bag by the drug court response to defense counsel's question) is couched in terms of how she has done her time for her past mistakes and wishes to move on from those mistakes.

In all, Nickerson is intentionally revealing Ms. Reed as a snitch while at the same time attempting, perhaps in vain, to paint herself with a positive brush. Nickerson's admissions, then, were intended by her to show that she was a good person contrary to her assertion on appeal that it tended to establish the opposite. Brief at 19.

The standard of review on evidentiary rulings is abuse of discretion. *See State v. Otton*, 185 Wn.2d 673, 677, 374 P.3d 1108 (2016). In this case, the Facebook post was initially relevant to the tampering charge and as such further exercise of the trial court's discretion on the issue of admissibility was unnecessary. But an evidentiary ruling may be affirmed on any correct ground. *State v. Gresham*, 173 Wn.2d 405, 419,

269 P.3d 207 (2012).

ER 801(d) (2) provides that an admission by party-opponent is not hearsay. The rule applies in the present case because the statement was offered against a party and was that party's own statement. Nothing in the rule requires the statement to have been against interest when made. *See* K. Tegland, Washington Practice, Evidence Law and Practice, § 801.35 (6th ed.)(September 2016 update) (citing federal cases). In *U.S. v. Kenny*, 645 F.2d 1323 (9th Cir. 1981), a recording of a phone conversation during which the defendant made admissions was considered.² *Id.* at 1339. The Court held that the statement by the defendant on the recording was not hearsay under Federal Rule of Evidence 801(d) (2). *See State v. Otton*, *supra* at 681 (appropriate to consider "history and purpose" of federal rule 801(d) in construing the same state rule.) Moreover, defense argument that such a statement cannot be introduced unless inconsistent with testimony on the stand was rejected. *Id.* at 1340. Nickerson's Facebook post is admissible as an admission by party-opponent.

The post is also relevant and admissible as evidence of consciousness of guilt. In *State v. Moran*, 119 Wn.App. 197, 81 P.3d 122 (2003), the issue was the admissibility of a letter defendant Moran wrote to a friend asking that friend to influence the testimony of another witness.

² It should be noted that the unilateral recording may well have run afoul of Washington's privacy statute and been deemed inadmissible for that reason.

Id. at 217-18. The letter included foul language toward the other witness and was signed “Your homie Jermaine.” Id. The trial court had admitted the letter, finding that “it obviously shows the defendant’s propensity to try to influence people so that they will be cooperative and more favorable to him and that in and of itself is probative.” Id.

On appeal, Moran argued that the probative value of the evidence was outweighed by prejudice. He further argued that the letter did not constitute a threat toward the witness. He argued that the use of offensive language and reference to “homie” raised the image of gang violence and showed him to be an aggressive person. The *Moran* Court noted that

Evidence that a defendant threatened a witness is relevant because it reveals a consciousness of guilt. Its probative value outweighs the possibility of unfair prejudice. Likewise, evidence that the defendant, or a person acting on behalf of the defendant, tried to prevent a witness from appearing and testifying at trial is relevant because it is evidence of the defendant's guilt.

Id. at 218-19 (citation omitted). In that case, absence of an actual threat in the letter did not change the holding

Although not a threat, Moran's letter to Johnson can be reasonably interpreted as a request that Johnson try to get Burch to change her mind about Moran's guilt and return to her initial favorable statement. While the word “homie” may have gang connotations and the use of offensive language in the letter may have been prejudicial, the trial court's decision that the probative value outweighed the prejudicial effect was not an abuse of discretion.

Id. Similarly, Nickerson’s post can be interpreted as an attempt to influence Ms. Reed even though containing no direct threat. As officer

Whatley said, criminals will sometimes use social media “in hopes that other people will cast a shadow upon those witnesses or cause, you know, cause concern toward those witnesses for people that they’re associated with.” 4RP 229. Moreover, as in *Moran*, that the written communication contained some prejudicial information does not change its relevance for the purpose of establishing consciousness of guilt.

Finally, regarding prejudice on her ineffective assistance claim, Nickerson notes that the state alluded to the Facebook post in closing. She did, saying

You also heard testimony about a Facebook post that defendant made. What can you infer from that? She was concerned. She was concerned about the informant testifying. Why? Why was she concerned? Why didn’t she want her to?

5RP 299. That, then, is the total of the state’s remarks about the post. That is what the state would argue had the post been admitted as consciousness of guilt evidence only. No argument was made that the post constituted a threat or an attempt to induce Ms. Reed to not testify. The consciousness of guilt answer to counsel’s open questions is that Nickerson’s concern was the result of knowing what she had done and that Ms. Reed could establish that. The trial court ruled that the post was insufficient to support the charge but it does establish consciousness of guilt and is admissible for that purpose.

Nickerson’s claim of ineffective assistance fails. Counsel for

Nickerson had no way of making the trial court rule until the trial court decided it had enough information to make a ruling. Her challenge to the tampering charge was broader than that allowed under CrR 8.3(c). In the fullness of time, defense counsel prevailed under circumstances where the idea that there was no prima facie case of guilt was clearly arguable. Without hindsight and with the presumption that the representation was effective, Nickerson's counsel's performance was not deficient. And, since the Facebook post was independently admissible, the fact that the jury saw it and the state argued it does not establish the necessary prejudice. The evidence of the two deliveries was sufficient and the situation here does not undermine confidence in the convictions for those two offenses. The claim fails on both points.

B. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ADMISSIBLE EVIDENCE OR FOR FAILING TO OBJECT TO ANSWERS TO ITS OWN QUESTIONS OR FOR FAILING TO OBJECT TO REMARKS THAT DID NOT REFER TO THE DEFENDANT.

Nickerson next claims that counsel was ineffective for failing to object to various pieces of the evidence. She claims that there should have been objections to evidence of Nickerson's criminal history, arrests, and drug usage. Brief at 22. This claim is without merit because, as argued above, the Facebook post was independently admissible and thus

Nickerson's own admissions provided the jury with the information here complained of and because those admissions were repeated by answers to questions propounded by the defense. Further, officer Whatley's remarks about how he induces people to become confidential informants was not directed at Nickerson and his passing reference to a booking photo in an identification procedure was under the circumstances not prejudicial.

In addition to the rules listed above at pages 4-5, it should be emphasized that

The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.

State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

First, since the Facebook post was admissible even absent the tampering charge, that evidence provided the jury with nearly all the information. The post provided that Nickerson was in drug court and that Nickerson had done her time for her other prior offenses. The jury knew that she had been in drug court and had other history by Nickerson's own admissions. Moreover, the drug court revelation alone makes it obvious that she would know something about illegal drugs.

And the drug court fact came in another way. Defense counsel asked Ms. Reed how she, Ms. Reed, had met Nickerson. She got the predictable and reasonable answer—that they met in drug court. 4RP 168.

Having asked for the answer, the defense lodged no objection to that answer. And, again, defense counsel asked why Ms. Reed targeted Nickerson. Once again she got the predictable answer—Ms. Reed knew she was still using drugs. *Id.* No objection would have been sustained because once again defense counsel got a reasonable answer to her own question. Armed with hindsight, it may be asked why defense counsel asked these questions but that is not Nickerson’s claim here: she assails the failure to object, not the questions that elicited the arguably objectionable fact. The rules of ineffective assistance presume that defense counsel had strategic reasons for these questions. Moreover, the same rules presume that a failure to object is because counsel did not at the time believe these facts appeared to be critically prejudicial. *See State v. Edvalds*, 157 Wn.App. 525-26.

As for officer Whatley’s reference to getting drug dealers off the street and attempting to “burn the bridges” with the drug culture, these remarks are taken out of context: these remarks were being applied to Ms. Reed or to confidential informants in general. 4RP 68-69. Placed in proper context, the remarks had no reference to Nickerson. The allegedly offensive remarks were responsive to the question “Why do you use informants”? 4RP 67. The answer entails an entire transcript page. The answer touched on the fact that informants already know someone who is

dealing. 4RP 68. Informants must be used because after years on the job a narcotics officer's identity is likely compromised. Id. Informants know the people involved, those people being comfortable with them. Id. Some inform because they want out of the drug life. Id. The officer further answered, with reference to potential informants

So one of the things I tell them is, Why don't you help get this poison off the street, these people who are dealing drugs, and while you're at it, you can burn the bridges with the people that you're dealing with.

Because these people that are selling you dope, they're not your friends, you're just a customer to the (sic) them. They just want to make money off you, so they're going to keep selling you dope as long as you keep buying it.

Id. This is merely a recitation of officer Whatley's recruitment practices and in context does not refer to anyone in particular, including Nickerson.

Since that testimony is relevant as to why the officer uses informants and how he gets them to do the job, it is completely unclear what the defense objection would have been let alone the question whether or not such would have been sustained. *State v. Gerds*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007) (showing of deficient performance for failure to object must establish that the objection would likely be successful). The testimony was essentially foundational and not central to the state's case.

Finally, with reference to the officer's reference to a data base

called “I/Leads”, which includes all offenders, context is again important. Officer Whatley testified that he identifies suspects from that source and also from sources like Facebook, Twitter, or the internet. 4RP 76. The “booking photo” remark is an indication that he recognized Nickerson from such a photo when he dropped Ms. Reed off for the second controlled buy. 4RP 99. Once again, the rule presumes that defense counsel did not view these passing references as critically important to the state’s case. Moreover, these passing references are naught but reasonable inferences for the admissible drug court fact. Objection here would have been an attempt to close the barn door after the defense had allowed the horses to escaped.

Nickerson’s claims under this heading, then, fail because the things that she now with hindsight wishes her counsel had objected to were already out because of her own admissions and the questions of her own counsel. Even if these objections, if made, might have been sustained, the objectionable material was harmless in light of the other evidence in the case.

C. IF THE TRIAL JUDGE COMMENTED ON THE EVIDENCE, THE REMARK MADE REFERRED TO AN UNDISPUTABLE FACT AND HAD NO IMPACT ON NICKERSON'S DEFENSE.

Nickerson next claims that the trial court erred by commenting on the evidence. This claim is without merit because the trial judge's remark did not relieve the state of its burden and caused no prejudice since it did not resolve a contested factual issue in the case.

The issue flows from Washington Constitution art. IV, § 16, which provides that "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Such comments are "presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *State v. Brush*, 183 Wn.2d 550, 559, 353 P.3d 213 (2015), quoting *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). Claims of constitutional error are reviewed de novo. See *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014). "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Similarly, a remark that conveys to the jury a trial judge's personal attitude toward the case is prohibited. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The issue is reviewed on a case-by-case basis under the facts and

circumstances of each case. *See, e.g., State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

Although prejudice is presumed, the rule provides that the presumption is rebuttable. The state can rebut prejudice by establishing that the error was harmless beyond a reasonable doubt. *See State v. Hart*, 180 Wn.App. 297, 305, 320 P.3d 1109 (2014). A reviewing court will find constitutional error harmless if “convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *Id.*, quoting *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, *Guloy v. Washington*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). And, “a comment does not prejudice a defendant where overwhelming untainted evidence supports her conviction.” *State v. Lundy*, 162 Wn.App. 865, 873, 256 P.3d 466 (2011), citing *State v. Lane*, 125 Wn.2d 825, 840, 889 P.2d 929 (1995) (internal quotation omitted).

Nickerson correctly observes that the trial judge made the remark in the context of releasing Ms. Reed following her testimony. He said “you’re excused. And you’re free from this agreement you were under.” 4RP 194. This remark was based on the testimony of both officer Whatley and Ms. Reed. In summary, that testimony established --that Ms. Reed was working as an informant in this case; 4RP 75;

--under the informant agreement drug use is prohibited; Exhibit 15, CP 123-24; 4RP 123;

--that Ms. Reed admitted “dabbling” in drug use while under the agreement, there being no dispute of the fact; 4RP 123-24;

--that officer Whatley looks for symptoms of drug usage in multiple face-to-face meetings with the informants he uses; 4RP 73-75 (discussing at length how he knows when a CI is using);

--that Ms. Reed stayed in good contact with Whatley and she was responsive and followed instructions; 4RP 94;

--that officer Whatley was unsurprised that a known drug user like Ms. Reed may use during the pendency of the contract; 4RP 124;

--that Whatley testified under cross examination that Ms. Reed “never showed me any signs that I’d gotten from other people the (sic) had failed their contract. She didn’t appear to be high whenever we met. She stayed in contact with me on a regular basis, as required. x x x She never exhibited to me anything that would make me think she was using.” 4RP 144;

Finally, the following exchange occurred on redirect “Officer Whatley, did Lindsey Reed fulfill her agreement? Yes, she did.” 4RP 142.

Thus the jury knew the answer to Nickerson’s attempt to impeach

Ms. Reed by her violation of the drug ingestion provision of the informant agreement. Before Judge Houser's remark, the person in charge of Ms. Reed as a CI, officer (then detective) Whatley, had testified that by his lights, the only lights that matter, Ms. Reed had performed her duty under the contract and that contract was fulfilled. The Judge's remark, then, simply agreed with the unrebutted testimony of the decision maker's decision that she had done the job. As such the remark was superfluous at worst and innocuous otherwise on an issue that was undisputed by the defense; that is, the defense provided no rebuttal to officer Whatley's testimony that the contract had been fulfilled. The factual question had been resolved by officer Whatley's testimony. *See State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (reversal because comment on disputed issue); *State v. Lundy*, 162 Wn.App. 865, 873³, 256 P.3d 466 (2011) (judicial comment less likely to cause prejudice when fact is not in dispute).

Further, the jury was instructed that

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

³ No other page breaks can be found in the Westlaw screen after page 873.

CP 81. A jury is presumed to follow the trial court's instructions. *See State v. Sivins*, 138 Wn.App. 52, 61, 155P.3d 982 (2007). In *State v. Lampshire*, 74 Wash.2d 888, 892, 447 P.2d 727 (1968), the Court held the "under the facts here" a curative instruction would not have worked. That case does not stand for the proposition that no instruction can cure a judicial comment; it simply could not under the circumstances of that case. Here, the trial judge in fact made no comment on Ms. Reed's credibility. The judge merely noted, consistent with officer Whatley's testimony, that her status as a witness was that she was released from her subpoena and released from her contractual agreement to testify, having just done so.

Moreover, on this record, the remark had little or no affect on the defense case. It remained the fact that Ms. Reed admitted her continued drug use. It remained the fact that the informant agreement prohibited this behavior. It remained the fact that officer Whatley was clearly not that concerned about that fact; he had no problems with the manner in which she performed her contract. It remained that officer Whatley deemed her contract fulfilled. And, in this wise, it was officer Whatley that provided the prosecutor with the fact allowing argument that her contract was fulfilled, not the trial court. *See* Brief at 28. No judicial permission was necessary for the officer to so decide. And, perhaps most significantly, the jury was not tasked with deciding whether or not Ms. Reed had fulfilled her contract. That she had or had not had no impact on the elements of the

delivery charges. It remained that the jury is the sole judge of credibility of the witnesses. CP 81. In sum, the remark had no impact on the evidence that Nickerson used in an attempt to impeach Ms. Reed. If the remark was a comment on the evidence, it was harmless beyond a reasonable doubt in this case.

C. IF ERROR AT ALL, THE CASE LACKS ERROR SUFFICIENT TO WARRANT REVERSAL WHETHER CONSIDERED INDIVIDUALLY OR TOGETHER.

Nickerson next claims that cumulative error warrants a new trial. This claim is without merit because upon analysis it appears that a finding of error is unlikely and, if any, the errors were harmless on this record.

The cumulative error doctrine applies when several errors occurred at the trial court level, none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994).

As argued, error is not established in each instance that it is alleged. This was a drug delivery case with both the state's key witness,

Ms. Reed, and the defendant being intimately involved in the drug culture. Some evidence of this involvement is somewhat inevitable. Particularly where Nickerson herself places those circumstances before the jury by posting her admissions that establish consciousness of her guilty and by the defense eliciting information about drug court and drug use by defense counsel's own questions. Ms. Reed was fair-game for attacks based on her history of drug culture involvement and drug use during the pendency of the investigation. The defense went after her and in so doing cannot have avoided inferences that Nickerson was involved in the same culture and behavior.

There was no accumulation of errors.

D. THE STATE WILL NOT SEEK APPELLATE COSTS.

Nickerson next claims that she should not be assessed appellate costs in the event the state substantially prevails in this appeal. The state does not concede that in the event of affirmance such costs are inappropriate. However, by policy, this office will not seek such costs in this case.

IV. CONCLUSION

For the foregoing reasons, Nickerson's conviction and sentence should be affirmed.

DATED September 15, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney

Office ID #91103
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR

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