# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>DAMIEN DARNELL HARRIS,<br><br>Appellant. | No. 40006-5-II<br><br><br><br><br>PUBLISHED IN PART OPINION |

Johanson, J. — After a bench trial, the trial court found Damien Harris guilty of leading organized crime, two counts of unlawful delivery of cocaine, unlawful possession of cocaine with intent to deliver, two counts of money laundering, solicitation to commit first degree murder, and maintaining a building or dwelling for drug purposes. The trial court imposed an exceptional 609-month sentence. Harris's appeal raises numerous challenges to evidentiary rulings, his convictions, and his sentence. In the published portion of our opinion, we address the double jeopardy issue. In the unpublished portion, we address the veracity of an affidavit and the probable cause finding for a search warrant and the numerous errors asserted in Harris's statement of additional grounds for review (SAG) and supplemental SAG.[1] We affirm the trial

[1] RAP 10.10.

court's order denying the suppression of evidence and affirm Harris's convictions and sentence.

## FACTS

### Background[2]

In March 2008, the Thurston County Narcotics Task Force (Task Force) began investigating Damien Harris. Detectives Ken Lundquist and Randy Hedin-Baughn coordinated with confidential informant Dale "Cyrus/Syrus" Shipman to schedule a series of controlled buys of cocaine from Harris. Before an April 16 buy, Detective Lundquist searched Shipman for drugs or personal money and then provided him with $40 of prerecorded traceable funds. Detective John Hess drove Shipman to the buy location. Upon arriving at the buy location, Shipman exited the vehicle, entered Harris's vehicle, and exchanged the $40 in traceable funds for crack cocaine. Harris was his vehicle's only other occupant during the drug transaction with Shipman. After the buy, Shipman turned over the drugs to Detective Hess, and Detective Lundquist searched him again at the designated meet location.

On April 18, Shipman scheduled a second controlled buy of cocaine from Harris. Before the buy, Detective Lundquist searched Shipman and provided him with $40 of prerecorded traceable funds. Detective Hess, who was still undercover, drove Shipman to the buy location. Harris arrived at the location in a car with Michael Boyer. Shipman entered Harris's vehicle; simultaneously, Steven Parra arrived and also entered Harris's vehicle. Parra purchased crack

[2] The background facts rely exclusively on unchallenged findings the trial court entered. The trial court entered 22 pages of findings of facts and just over 4 pages of conclusions of law. On appeal, Harris assigns error only to the factual findings from part of page 16 through part of page 19 of the trial court's written order. Accordingly, the remaining 19 pages of factual findings are verities on appeal. *See State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

cocaine from Harris, and then Shipman purchased $40 of crack cocaine from Harris using the prerecorded funds. Shipman then returned to Detective Hess's vehicle and turned over the drugs to him; then, at the designated meet location Detective Lundquist searched him again.

Shortly thereafter police arrested Harris and Boyer. During jail booking, Boyer told officers he had hidden contraband "in his rectum." Clerk's Papers (CP) at 133. Detective Matt Renschler recovered from Boyer a plastic bag containing money, crack cocaine, and marijuana. The recovered money included the prerecorded $40 that Shipman had used during the second controlled buy. When asked if the recovered drugs belonged to Harris, Boyer responded that "he did not want to die and he was concerned for his life." CP at 133. At trial, Boyer ultimately testified that most of the recovered drugs belonged to Harris.[3]

Following Harris's arrest, police investigation efforts turned to an apartment where Harris stayed periodically. Landlord Kathy Kruse initially told Detective Lundquist that Harris stayed at the apartment "occasionally" and denied the police permission to enter it. CP at 134. Detective Lundquist returned three days later with a search warrant but did not find anything of evidentiary value. This time, though, Kruse explained that she rented Harris the same room for $20 a day, and eventually the rental agreement became "$20.00 worth of crack cocaine a day." CP at 135.

Kruse also told police about a three-person phone conversation Harris initiated from jail after his arrest between Kruse, Harris, and Rob Bennett. During that phone conversation, Harris instructed Kruse to enter his apartment and retrieve drugs and money from a jacket in the closest.

[3] This recovered cocaine served as the basis for Harris's eventual charge of unlawful possession of a controlled substance with intent to deliver.

Kruse found the drugs and approximately $2,600 in the jacket pocket. Harris instructed Kruse to smoke or flush the "golf ball sized pieces of rock cocaine" down the toilet and to deliver the money to "one of his associates." CP at 135. Kruse testified at trial that Adrian Morris came to her apartment to retrieve the money and to secure Harris's other belongings. Eventually, as Harris further instructed, Kruse gave the money to Harris's girlfriend, Temica Tamez. During a recorded jail phone conversation, Tamez told Harris that she "told [Kruse that Tamez] was going to beat the shit out of her" for retrieving the $2,600. CP at 135.

After talking with Kruse, Detective Lundquist began monitoring Harris's jail phone conversations. Through call monitoring, Detective Lundquist learned that Harris had reported Tamez's Olympia home as his residence to his Department of Corrections officer. Detective Lundquist obtained and executed a search warrant on Tamez's Olympia house, took pictures of clothing in a closet that suggested Harris lived there, and located a handgun in the same closet.[4]

On April 28, based on other recent jail phone conversations, Detective Lundquist filed an affidavit and application for a warrant to search Harris's safe deposit box. The affidavit outlined the two controlled buys, the subsequent searches at Kruse's building and Tamez's Olympia residence, and several jail phone calls between Harris and Tamez. Detective Lundquist included the following description of Harris's and Tamez's jail phone conversations in the probable cause statement:

> Of the phone calls I have listened to, Harris instructs Tamez to go to his bank and contact "Josh" and only "Josh" to gain access to a safe deposit box and conceal items in it before law enforcement can find them.

[4] Based on various trial testimonies, the trial court ultimately found that the firearm was not operable because of the time it would take to secure and replace a missing firing pin.

> I listened to the phone calls from April 25, 2008, at approximately 0901 hours. At this time, Harris called Tamez as Tamez was in the bank speaking with "Josh." The phone was handed to "Josh" and Damien Harris verbally authorized "Josh" to add Temica Tamez to his account and to his safe deposit box.
>
> Harris made another phone call to Tamez at 0944 hours. During that phone call, Tamez told Harris that she had been given access to his banking accounts and the safe deposit box. It is my belief that the evidence, Task Force buy money, that was taken from Kathy Kruse's apartment on April 19, 2008, was placed in that safe deposit box to prevent law enforcement from gaining access to the buy money.

CP at 59-60.

The trial court approved a warrant to search the safe deposit box, and police executed it that same day. Police confirmed that Tamez was a signer on the safe deposit box and found $25,000 in cash in it, but the police did not find the first controlled buy funds.

After searching the safe deposit box, police continued to monitor Harris's jail calls. Based on information learned through these calls, detectives served a search warrant on Tamez's Lacey residence, and detectives recovered letters from Harris directing Tamez to claim the $25,000 in the safe deposit box as her own. Harris's letters instructed people to falsify documents and hide evidence of various crimes and sources of drug sale proceeds.

In September 2008, simultaneous to its ongoing investigation of Harris, the Task Force investigated Boyer and another Harris associate, Adrian Morris. After his release from jail, Boyer contacted Shipman to sell him more drugs and firearms. As police watched Boyer's residence in anticipation of the drug buy, they observed Morris arrive at Boyer's residence. Officers followed Morris when he left Boyer's home and observed him make additional drug transactions. Officers

executed search warrants of Morris's car and home, and Boyer's home, and they found more cocaine. Police arrested Morris and Boyer.

After his September 2008 arrest, Boyer agreed to tell the Task Force about his knowledge and involvement in a drug trafficking organization. He identified Morris and Harris as the organization's other primary participants. Boyer also revealed that Harris had asked him to kill Shipman for his role as a confidential informant. Boyer ultimately entered a plea agreement with the State to testify against Harris.

Trial Procedure

The State filed an amended information in Thurston County Superior Court charging Harris with leading organized crime[5] (count I); first degree unlawful possession of a firearm[6](count II); two counts of unlawful delivery of a controlled substance (cocaine)[7] (counts III, IV); unlawful possession of a controlled substance (cocaine) with intent to deliver[8] (count V); two counts of money laundering[9] (counts VI, VII); tampering with a witness[10] (count VIII); solicitation to commit first degree murder[11] (count IX); and maintaining a building or dwelling for

[5] RCW 9A.82.060(1)(a).

[6] RCW 9.41.040(1)(a).

[7] RCW 69.50.401.

[8] RCW 69.50.401.

[9] RCW 9A.83.020(1).

[10] RCW 9A.72.120(1)(a).

[11] RCW 9A.32.030(1)(a) and former RCW 9A.28.030 (1975).

drug purposes[12] (count X).

Before trial, Harris filed a pro se motion to suppress the $25,000 officers found in his safe deposit box. Harris's attorney subsequently filed two suppression motions and the trial court held two separate hearings to consider Harris's arguments.

At the first hearing, the trial court considered whether to authorize a full *Franks*[13] hearing; that is, the trial court considered whether Detective Lundquist had made material misrepresentations or omissions in the affidavit for the safe deposit box search warrant that merited a full evidentiary hearing on the content of the affidavit. Harris argued that Detective Lundquist misrepresented that Tamez had "access" to the safe deposit box because Lundquist knew, from an April 25, 2008 jail phone call, that Tamez did not have a key to the box, yet recklessly failed to include in his affidavit that Tamez did not have a key. Report of Proceedings (RP) (Oct. 5, 2009) at 8. The State responded that Tamez had legal access to the safe deposit box on April 25 and that she could have secured a key in the period before Detective Lundquist sought a search warrant three days later. Moreover, the State argued that Harris had not met his burden to show any omission was reckless or that Tamez's lack of a key negated the trial court's probable cause finding. The trial court found that Detective Lundquist did not make a false statement about Tamez's ability to "access" the safe deposit box or omit any material information. RP (Oct. 5, 2009) at 19. Accordingly, the trial court denied Harris a full *Franks* hearing.

At the second hearing, the trial court considered whether the trial court that authorized the

[12] RCW 69.50.402(1)(f).

[13] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

search warrant had abused its discretion when finding that Detective Lundquist's affidavit established probable cause to search the safe deposit box. Harris argued that no nexus existed between the alleged crimes and the expectation of finding any relevant evidence in the safe deposit box. He argued that there were too many inferences needed for a connection between the first controlled buy and finding that buy's traceable funds in the safe deposit box.

Based on its review of Detective Lundquist's affidavit, the trial court determined that the previous court had not abused its discretion by finding probable cause for the search warrant. The trial court relied in part on the alleged jail phone conversation in which Harris told Tamez to access the safe deposit box to conceal evidence.

Harris waived his right to a jury trial and his right to have a jury decide aggravating exceptional sentence factors. Over the course of the nine-day bench trial, the State called numerous witnesses, including Detective Lundquist, several other police officers, Shipman, Kruse (landlord), Tamez, and Boyer. Harris called three witnesses, and he opted not to testify.

Boyer testified extensively about the activities of a drug trafficking organization.[14] He grew close to Harris when they were both in jail and they discussed "doing 'business' together" when released from custody. CP at 139. Once both were out of jail, they began "associating regularly." CP at 139. Boyer met Morris through Harris and learned that Harris and Morris had been "long time friends and associates." CP at 139. Boyer testified that the three men worked together to protect their drug business's territory but that Harris was the primary provider of cocaine. Boyer further testified that Harris protected his cocaine source and that Harris received

[14] Of particular importance to some of the issues in Harris's SAG, the trial court's written findings heavily incorporated Boyer's trial testimony.

powdered cocaine and processed it into crack cocaine.

Boyer also testified about being in jail with Harris in April 2008, after the controlled buys. Harris told Boyer he wanted Shipman killed. Harris then arranged to post Boyer's bail using the money Harris had in his jacket at Kruse's apartment. Boyer also testified that Harris told him that Boyer and Morris would "have to take care of the drug customers and keep the drug enterprise going while Harris was incarcerated." CP at 140. Harris then provided Boyer the phone numbers for his drug sources and customers. Boyer testified that when he got out of jail, he "worked with Adrian Morris to keep the drug business going for Mr. Harris." CP at 140.

Also, after Boyer's release, Harris sent him a letter requesting that he kill Shipman in exchange for money. Boyer tried to recruit Leonard Hamilton to kill Shipman. The police never recovered Harris's letter to Boyer, but at least two other witnesses testified to reading its content. They testified that the letter requested the killing of a confidential informant named "Syrus" for $5,000. CP at 141. Harris sent Boyer other letters asking about "know[ing] where Syrus is. . . . What's the problem[?]" and saying "man yall suppose to be staying on the low and trying to find the _._. What is going on with that[?]" CP at 141.

The trial court issued its decision from the bench. The trial court entered extensive findings of fact and conclusions of law. The trial court found Harris guilty of leading organized crime (count I), two counts of unlawful delivery of cocaine (counts III, IV), unlawful possession of cocaine with intent to deliver (count V), two counts of money laundering (counts VI, VII), solicitation to commit first degree murder (count IX), and maintaining a building or dwelling for drug purposes (count X). The trial court entered not guilty verdicts for first degree unlawful

possession of a firearm (count II) and tampering with a witness (count VIII). The trial court entered special findings that (1) Harris committed several of the offenses shortly after being released from a prior incarceration and (2) some of the offenses were major violations of the Uniform Controlled Substance Act[15] related to trafficking.

The trial court sentenced Harris and denied Harris credit for any time Harris had recently served in jail. Also, the trial court entered seven different no-contact orders for either ten years or life terms, including lifetime prohibitions on contact with Morris, Boyer, and Shipman. Harris appeals.

## ANALYSIS

### Double Jeopardy

Harris argues that the trial court violated his constitutional freedom from double jeopardy because in addition to entering his conviction for leading organized crime, it also entered separate convictions for the predicate offenses required to establish the crime of leading organized crime. Specifically, Harris argues that he cannot be separately convicted on two counts of unlawful delivery of a controlled substance, two counts of money laundering, and one count of solicitation to commit first degree murder, because those convictions were "incidental to, a part of, or coexistent with" his conviction for leading organized crime. Br. of Appellant at 7 (all caps omitted). The State responds that double jeopardy proscriptions do not apply here because (1) the offenses charged are not the same under the "same evidence test" and (2) the legislature indicated its intent for conviction of leading organized crime to be a separate and in addition to its

[15] Ch. 69.50 RCW.

predicate offenses. Br. of Resp't at 5. We agree with the State.

*Three-Step Analysis*

Article I, section 9 of the Washington Constitution and the Fifth Amendment to the federal constitution protect persons from a second prosecution for the same offense and from multiple punishments for the same offense imposed in the same proceeding. *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 48-49, 75 P.3d 488 (2003) (citing *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995)). Nevertheless, the legislature may constitutionally authorize multiple punishments for a single course of conduct. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 1436, 63 L. Ed. 2d 715 (1980)).

To determine whether the legislature authorized multiple punishments, Washington courts use a three-step analysis. *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892, 895, 46 P.3d 840 (2002). We first look for express language within the statute authorizing separate punishments. *Calle*, 125 Wn.2d at 776. Second, if the statutory language is silent, we apply the "same evidence"[16] test. Under the same evidence test, two statutory offenses are the same for double jeopardy purposes if the offenses are identical in law and in fact. *State v. Hughes*, 166 Wn.2d 675, 682, 212 P.3d 558 (2009); *Calle*, 125 Wn.2d at 777. Under the legal prong of the analysis, if each offense includes an element not included in the other and requires proof of a fact the other does not, then the statutory offenses are not constitutionally the same under this test and double jeopardy prohibitions are not violated. *Hughes*, 166 Wn.2d at 682; *Calle*, 125 Wn.2d at

[16] Washington's "same evidence" test is sometimes referred to as the "same elements" test or "the *Blockburger* test." The federal rule is very similar to Washington's test. *See Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

777. The legal element analysis requires more than just a facial comparison of the statutory offenses' requirements. *Hughes*, 166 Wn.2d at 684. Although the "same evidence" test is a significant indicator of legislative intent, it is not dispositive. *Calle*, 125 Wn.2d at 780. Third, we discern whether the legislature has "clearly indicated its intent that the same conduct or transaction will not be punished under both statutes." *Hughes*, 166 Wn.2d at 682; *see Calle*, 125 Wn.2d at 780. This part of the analysis involves reviewing legislative history, the statutory structure, and the purpose of the statutes. *Hughes*, 166 Wn.2d at 684. Where the results of the same evidence test would allow multiple convictions to stand, only "clear evidence of [a] contrary [legislative] intent" can override the same evidence test results. *Calle*, 125 Wn.2d at 780.[17]

Here, both parties agree, correctly, that the criminal statutes in question do not contain specific language authorizing separate punishments for the same conduct. Therefore, we apply the "same evidence" test, inquiring whether, as charged, each offense includes elements not included in the other and whether proof of one offense also proves the other. *Calle*, 125 Wn.2d at 777.

A. Same Evidence Test

Harris argues that the offense of leading organized crime requires a "pattern of criminal profiteering activity," which means three or more predicate offenses. Br. of Appellant at 10. The State correctly responds that the elements for the offense of leading organized crime are

[17] *See State v. Smith*, 165 Wn. App. 296, 266 P.3d 250 (2001), *petition for review filed*, No. 86951-1 (Wash. Jan 5, 2012).

distinguishable from those of the predicate offenses.

RCW 9A.82.060 (leading organized crime) provides:

> (1) A person commits the offense of leading organized crime by:
>
> (a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity.

Here, the element of leading "any three or more persons" is not present in any of Harris's predicate crimes[18] and is, therefore, a distinguishable element. Further, RCW 9A.82.010(4) provides that a pattern of criminal profiteering includes:

> [A]ny act, including any anticipatory or completed offense, committed for financial gain . . . and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following:
>
> (a) Murder, as defined in RCW 9A.32.030 and 9A.32.050;
>
> . . .
>
> (q) Delivery or manufacture of controlled substances or possession with intent to deliver or manufacture controlled substances under chapter 69.50 RCW;
>
> . . .
>
> (t) Money laundering, as defined in RCW 9A.83.020.

Although RCW 9A.82.010(4) includes numerous potential predicate offenses, it also requires that the potential predicate offense be "committed for financial gain." Applying the "same evidence" test, the "leading organized crime" offense includes elements not included in Harris's predicate offenses; and, mere proof of solicitation to commit first degree murder, money laundering, and delivery of a controlled substance would not have proved leading organized crime without meeting additional elements. *Calle*, 125 Wn.2d at 777.

Although the "same evidence" test is a significant indicator of legislative intent, it is not

[18]Harris's predicate crimes include: solicitation to commit first degree murder, money laundering, and delivery of a controlled substance.

dispositive. *Calle*, 125 Wn.2d at 780. In spite of having different elements, multiple punishments may violate double jeopardy protections where the legislature intended a single punishment for a higher degree of a single crime rather than multiple punishments for several, separate, lesser crimes. *See State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983).

B. Merger

Harris argues that the merger doctrine is "simply another way" to determine whether the legislature authorized multiple punishments and that the merger doctrine precludes his conviction for his predicate offenses because they were "incidental to, a part of, or coexistent with" his conviction for leading organized crime. Br. of Appellant at 11, 12 (emphasis omitted). We disagree.

The merger doctrine evaluates whether the legislature intended multiple crimes to merge into a single crime for punishment purposes. *Vladovic*, 99 Wn.2d at 419 n.2 (citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Merger applies only where the State must prove an act separately defined as a crime by the criminal statutes to prove an additional crime. *Vladovic*, 99 Wn.2d at 420-21. Where the legislature has provided a statutory scheme distinguishing different degrees of a crime, we may determine that the legislature intended a single punishment for a higher degree of a single crime rather than multiple punishments for several, separate, lesser crimes. *See Vladovic*, 99 Wn.2d at 419. In *Johnson* I, for example, the crimes of assault and kidnapping merged into first degree rape because these two crimes were elements necessary to prove first degree rape; additional convictions for assault and kidnapping would therefore constitute double jeopardy. *State v. Johnson*, 92 Wn.2d, 671, 681, 600 P.2d

1249 (1979) (*Johnson* I), *cert. dismissed*, 446 U.S. 948 (1980); *State v. Johnson*, 96 Wn.2d 926, 936, 639 P.2d 1332 (1982) (*Johnson* II), *overruled on other grounds by Calle*, 125 Wn.2d at 775.

If the evidence required to prove one crime is also necessary to prove a second crime or a higher degree of the same crime, we consider whether the facts show that the additional crime was committed incidental to the original crime. *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). If one crime was incidental to the commission of the other, the merger doctrine precludes additional convictions; but, if the offenses have independent purposes or effects, the court may impose separate punishment. *Vladovic*, 99 Wn.2d at 421. To establish an independent purpose or effect of a particular crime, that crime must injure the person or property of the victim or others in a separate and distinct manner from the crime for which it also serves as an element. *Johnso*n I, 92 Wn.2d at 680.

Harris specifically argues that, because the element of "pattern of criminal profiteering activity" within the offense of "leading organized crime" requires underlying predicate offenses, these predicate offenses are "incidental to, a part of, or coexistent with" his conviction for leading organized crime. Br. of Appellant at 12 (emphasis omitted). RCW 9A.82.010(12) defines the required pattern of criminal profiteering activity:

> [M]eans engaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act of criminal profiteering. In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events.

Because the element of "pattern of criminal profiteering activity" requires predicate crimes, we ask whether the offense of leading organized crime causes injury or harm that is separate and distinct from the predicate crimes. *Johnson* I, 92 Wn.2d at 680. To make this inquiry, we may look to other clear evidence that the legislature considered the offenses to be a separate and distinct harm. *Calle*, 125 Wn.2d at 780.

C. Other Evidence of Legislative Intent

We look for other clear evidence of legislative intent, such as the statutes' historical developments, differing purposes, and different locations in chapters of the criminal code. *Calle*, 125 Wn.2d at 779-80.

To combat organized crime in 1984, the legislature modeled chapter 9A.82 RCW after the federal RICO statute[19] and enacted it as the "Washington State Racketeering Act." Final Legislative Report, 48th Leg., at 197 (Wash. 1984); *State v. Thomas*, 103 Wn. App. 800, 805, 14 P.3d 854 (2000), *review denied*, 143 Wn.2d 1022 (2001).

The 1984 Legislative Report noted:

> A Washington State RICO would provide similarly effective tools for law enforcement officers in their efforts to thwart the sophisticated elements of organized crime.
> . . .
>
> New crimes aimed at conduct associated with organized crime and the use of funds gained through illegal activities are created including . . . leading organized crime. The commission of these new crimes and other serious crimes already in statute is known as "racketeering."

[19] The Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941-48 (1970) (codified as 18 U.S.C. §§ 1961-1968)).

Final Legislative Report at 197-98. In 1985, the legislature removed from the definitions of crimes constituting criminal profiteering those crimes that were not felonies under Washington law and renamed it the "Criminal Profiteering Act."[20] *Thomas*, 103 Wn. App. at 805.

The 1984 Final Legislative Report stated that the legislature intended to create "[n]ew crimes" because the legislature did not intend for the predicate crimes to merge with the new crime of leading organized crime. Final Legislative Report at 197. We have noted:

> [W]e observe that a community faces a greater peril from collective criminal activity than it does from criminal activity by one individual. A criminal enterprise which is composed of a number of persons, whether it is known as a gang, a mob, or a criminal syndicate, poses a great challenge to law enforcement agencies. Furthermore, the specter of such organized wrongdoing tends to make the general public feel that it is held hostage by the criminal enterprise.

*State v. Smith*, 64 Wn. App. 620, 625-26, 825 P.2d 741 (1992). Similarly here, it appears the legislature intended additional punishment for the societal harm of leading organized crime, a punishment separate and distinct from any underlying predicate crimes.

Harris's conviction for leading organized crime includes two additional and distinguishing elements: Harris lead "any three or more persons" and he committed the predicate offenses "for financial gain." Further, the legislature intended additional punishment, separate and distinct from the underlying predicate crimes, for the societal harm of leading organized crime. Therefore, we hold that Harris's convictions for predicate offenses and for the crime of leading organized crime do not constitute double jeopardy.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record

[20] Former Ch. 9A.82 RCW, Laws of 1985, ch. 455, § 1.

in accordance with RCW 2.06.040, it is so ordered.

Failure To Assign Error Or Support With Argument

As an initial matter, Harris does not argue the vast majority of findings to which he assigns error. We do not review "issues for which inadequate argument has been briefed or only passing treatment has been made." *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)). Accordingly, findings not related to the safe deposit box issues briefed on appeal are, in effect, unchallenged verities.

Moreover, most of the challenged findings are an overview of the State's allegations, an overview of the evidence presented at trial, or reasonable inferences from the evidence presented at trial, which, on appeal, we view in the light most favorable to the State. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). Also, many of the unchallenged findings of fact, which are verities on appeal, provide the substantial evidence necessary to support the challenged findings.

Motion To Suppress Safe Deposit Box Contents

Harris challenges the trial court's ruling on his motion to suppress the $25,000 found in his safe deposit box. First, he challenges whether probable cause existed for a search warrant. Second, he argues that Detective Lundquist made material misrepresentations in his affidavit in support of the search warrant. This argument is best understood as a challenge to the trial court's denial of a *Franks* hearing.[21] The State responds that Detective Lundquist's affidavit does not

[21] Harris raises similar *Franks* hearing arguments in his supplemental SAG and specifically challenges the evidentiary support that in a jail phone conversation he told Tamez to "gain access to a safety deposit box and conceal items in it before law enforcement can find them." Supp. SAG at 1 (emphasis omitted).

contain false or deliberate misrepresentations and that the trial court did not abuse its discretion by relying on reasonable inferences to find probable cause to issue a search warrant. We generally agree with the State's arguments and discern no error.

A. Probable Cause Determination

Two different standards apply to our review of a probable cause determination. The first standard applies to "historical facts" in the case, i.e., the events "'leading up to the stop or search.'" *In re Det. of Petersen*, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002) (quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)). The trial court or magistrate must first find whether information from confidential informants or anonymous tips has enough reliability and credibility to qualify as historical fact. *See Petersen*, 145 Wn.2d at 800. We review such findings for abuse of discretion, giving appropriate deference to the trial court. *Petersen*, 145 Wn.2d at 800.

Under the second standard, the trial court or magistrate must also "decide the legal issue [of] whether the qualifying information as a whole amounts to probable cause." *Petersen*, 145 Wn.2d at 800. We review this legal conclusion de novo. *Petersen*, 145 Wn.2d at 800; *see also State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007). "It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The [issuing judge] is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution require that a trial court issue a search warrant on a determination of

probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Probable cause exists where the affidavit sets forth "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." *Maddox*, 152 Wn.2d at 505. Thus, "probable cause requires a nexus between [1] criminal activity and the item to be seized, and also [2] a nexus between the item to be seized and the place to be searched." *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997).

First, we acknowledge that nothing in the record before us supports Detective Lundquist's probable cause statement that Harris told Tamez in a jail conversation to explicitly "conceal items in [the safe deposit box] before law enforcement can find them." CP at 80.[22] But, there are no other historical facts challenged in the affidavit; thus, even if we redact this challenged unsupported statement from the affidavit, we review de novo whether the remaining facts and the qualifying information as a whole, provide probable cause to support the search warrant for the safe deposit box. *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992); *Petersen*, 145 Wn.2d at 800-01.

The search warrant affidavit provided the following relevant facts. Police searched for traceable funds from an April 16, 2008 controlled buy from Harris. Between Harris's April 18 arrest and the April 21 execution of a search warrant on the Kruse apartment, Harris contacted

[22] In his supplemental SAG, Harris alleges that Detective Lundquist misrepresented recorded jail conversations when he stated that Harris told Tamez to conceal evidence from law enforcement in the safe deposit box. Because we determine that probable cause existed to support the warrant *without* the challenged statement, we need not review this particular challenge.

Kruse and had her remove $2,600 and drugs from a jacket in his closest. Kruse gave the $2,600 to Tamez before April 21, and Tamez maintained frequent contact with Harris over the next several days. In a tape-recorded jail phone call on April 25, Harris authorized adding Tamez's name to his accounts and safe deposit box and, about an hour later Tamez confirmed with Harris that she had received "access" to the safe deposit box. CP at 60.

These facts establish a nexus between the controlled buy involving Harris and the search for the controlled buy's traceable funds in the safe deposit box. Reasonable inferences suffice to connect these independent events such that probable cause existed to suspect that the traceable funds might be in the safe deposit box. Harris had two days before his arrest when he could have placed the traceable funds in his safe deposit box himself. Accordingly, one may reasonably infer that Harris wanted Tamez to access the safe deposit box to either hide evidence in it or remove damaging evidence from it. Harris did try to hide or destroy evidence through Kruse. One may reasonably infer that he would continue these efforts through Tamez. The trial court did not err because probable cause supported the search warrant of the safe deposit box.

B. Franks Hearing Denial

We review a trial court's denial of a *Franks* hearing for an abuse of discretion. *State v. Wolken,* 103 Wn.2d 823, 829, 700 P.2d 319 (1985).

Normally, once issued, a search warrant is entitled to a presumption of validity, and courts give great deference to the magistrate's determination of probable cause and resolve any doubts in favor of the warrant. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). But a reviewing court may invalidate a warrant, and the fruits of a search may be suppressed, if it finds

that the applying officer intentionally or recklessly omitted or misrepresented material information from the warrant affidavit. *Chenoweth*, 160 Wn.2d at 470. A defendant challenging a warrant on this basis is entitled to an evidentiary hearing if he makes a substantial preliminary showing of the omissions or misrepresentations and their materiality. *Franks*, 438 U.S. at 155-56. An omission is material if it was necessary to the finding of probable cause. *State v. Copeland*, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996).

Probable cause exists where facts and circumstances sufficiently establish a reasonable inference that a defendant is involved in criminal activity and evidence of the criminal activity can be found at the place to be searched. *State v. Atchley*, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). Accordingly, the test for probable cause when information is allegedly omitted from a search warrant affidavit is whether the affidavit remains sufficient to support a finding of probable cause with the omission inserted and/or the misrepresentation redacted. *Garrison*, 118 Wn.2d at 873. Thus, if the affidavit supports probable cause even when the omitted information is considered, and any misrepresented information redacted, the suppression motion fails and no *Franks* hearing is required. *Garrison*, 118 Wn.2d at 873.

Harris argues that Detective Lundquist's affidavit omits the material fact that Tamez did not have access to the safe deposit *in fact*, because she did not have a key. Based on an April 25 phone call, Tamez stated that her name was added as a user of the safe deposit box but that she did not yet have a key to the box. Thus, the accurate characterization of the information allegedly omitted from the affidavit was that "as of April 25, although Tamez had authority to enter the safe deposit box she did not have a key." But even assuming without deciding that this information

should have been included in the affidavit, this information does not alter the probable cause analysis. Detective Lundquist sought the search warrant three days *after* Tamez made the referenced tape-recorded statement. Even including this information, a reasonable trial judge evaluating the affidavit for probable cause would have inferred that Tamez was actively seeking to gain key access to the safe deposit box. After all, it took Tamez less than three days to remove evidence from the Kruse apartment. Given all the facts in the affidavit, a reasonable trial judge would conclude that Harris's and Tamez's goal was either to hide or remove relevant evidence from the safe deposit box quickly. In a race among the police, Harris, and Tamez to access the safe deposit box first, Tamez had more than a three-day head start to secure *actual* access. Thus, the information allegedly omitted from the affidavit would actually have bolstered the trial court's probable cause finding.

The trial court did not err in denying a full *Franks* hearing for allegedly misrepresented or omitted information in the affidavit of probable cause for the search warrant of the safe deposit box. The trial court did also not err by denying Harris's motion to suppress.

## Statement of Additional Grounds

Harris alleges that numerous substantive and procedural violations occurred at various stages of his trial and at sentencing. The record does not support these allegations.

### A. Charging Information

Harris first argues that the State violated his right to due process by failing, in its information, to (1) name three or more people Harris led, in order to prove the offense of leading organized crime and (2) identify whom he solicited to commit murder. We disagree.

To be constitutionally adequate, charging documents must include all essential elements of the crime. *State v. Tandecki*, 153 Wn.2d 842, 846, 109 P.3d 398 (2005). The State must include only those elements it must prove beyond a reasonable doubt to convict a defendant of the charged crime. *State v. McCarty*, 140 Wn.2d. 420, 425, 998 P.2d 296 (2000). The primary goal of this rule is to give defendants notice of the nature of the accusations against them so they can prepare an adequate defense. *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). When challenged for the first time on appeal, the reviewing court liberally construes the charging document in favor of validity. *Tandecki*, 153 Wn.2d at 848-49.

We apply the *Kjorsvik* two-prong test to determine the sufficiency of the charging document. *Kjorsvik*, 117 Wn.2d at 105-06. We ask: (1) if the necessary elements appear in any form, or if it can find the necessary elements by fair construction, in the charging document, and if so, (2) if the defendant can show that the inartful or vague language actually prejudiced him. *Kjorsvik*, 117 Wn.2d at 105-06. Unless there is some inartful language in the document elements, however, the reviewing court will not reach the prejudice question. *City of Auburn v. Brooke*, 119 Wn.2d 623, 636, 836 P.2d 212 (1992).

1. Leading Organized Crime Count

Under RCW 9A.82.060(1)(a), a person leads organized crime by intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity with the acts occurring in Washington. Applying the *Kjorsvik* two-prong test to Harris's charge of leading organized crime, we first ask if the necessary elements appear in any form in the charging document. The charging document

articulated all of the statutory elements of the crime:

> In that the defendant, DAMIEN DARNELL HARRIS, in the State of Washington, as a principal or as an accomplice, during the period of time between January 13, 2008 and September 19, 2008, did intentionally organize, manage, direct, supervise, or finance any three or more persons with the intent to engage in a pattern of criminal profiteering activity.

CP at 3. The charges included in the amended information substantially follow the wording of the statute, which embodies all the elements of the crime. Thus, the State did not violate the first prong of the *Kjorsvik* test. *Kjorsvik*, 117 Wn.2d at 105-06.

The second prong of the *Kjorsvik* test asks whether Harris can show that the inartful or vague language actually prejudiced him. *Kjorsvik*, 117 Wn.2d at 106. The court may look outside the information to determine if there was actual prejudice. *State v. Goodman*, 150 Wn.2d 774, 789, 83 P.3d 410 (2004). Harris argues that the State named the required three or more people only in its opening statement and that several persons on the State's witness list did not testify; therefore, he was "left to guess which people were comming [sic] to testify." SAG at 4. The charging statement contained all the elements of leading organized crime, thus informing Harris of the charges against him; Harris does not cite any authority for his apparent contention that the State is required to include the names of witnesses in the charging document, and we know of none. Harris acknowledges that the State provided him with its witness list, thus enabling him to prepare his defense. Harris has also failed to show any prejudice flowing from the wording of the amended information.

2. Solicitation of Murder Count

Under former RCW 9A.28.030 (1975), a person commits criminal solicitation when, with

intent to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct, which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed. Under RCW 9A.32.030, a person commits first degree murder when, with a premeditated intent to cause the death of another person, he causes the death of such person or of a third person.

Harris's amended charging information provided:

> In that the defendant, DAMIEN DARNELL HARRIS, in the State of Washington, during a period of time between April 22, 2008 and May 16, 2008, with intent to promote or facilitate the commission of Murder in the First Degree, to wit: with premeditated intent to kill, to cause the death of another person, he offered to give or gave money or other thing of value to another to engage in specific conduct which would constitute suc[h] crime and/or would establish complicity of such person in its commission or attempted commission had such crime been attempted or committed.

CP at 5. Harris argues that the charging information did not specify the person he solicited to commit murder. Again, applying the *Kjorsvik* test here, (1) the necessary elements appear in the amended charging information, and (2) Harris does not attempt to show actual prejudice based on the charging information's use of "another" instead of specifying whom he solicited to commit murder. *Kjorsvik*, 117 Wn.2d at 105-06; CP at 5. As we just noted in the previous section of this opinion, because the State provided him its witness list and the charging information contained the necessary elements, Harris received notice of the nature of the accusations against him, such that he could adequately prepare a defense.

B. Validity of Search Warrant on Tamez's Lacey Residence

Harris next challenges the validity of a search warrant executed on Tamez's Lacey residence. Neither the challenged search warrant nor affidavit of probable cause for this search warrant is in the record on review. On direct appeal, we do not consider matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995). Accordingly, we cannot evaluate the propriety of this search warrant in Harris's direct appeal. Moreover, following trial, Harris's defense attorney filed a motion for mistrial based partially on evidence obtained at Tamez's residence. The motion asserted that the evidence had been illegally obtained and that it related to the State's tampering with a witness charge. The trial court entered a not guilty verdict on the tampering with a witness count. Thus, any error in admitting this evidence was harmless.

C. Discovery Violation

Harris alleges that the State failed to provide his defense attorney with discovery related to "the 'Nick Taylor' letter." SAG at 7. It appears from the record this alleged error concerns a love letter Tamez never actually sent to Harris in which she stated she would not "tattletale" against him. 6 RP at 1092. The State never moved to admit this letter, and the trial court permitted a police officer to testify about it only to the extent the testimony explained why he obtained a search warrant. Even assuming Harris adequately preserved for review a discovery violation, we do not disturb a trial court's discovery violation decision in the absence of a showing that the violation materially impacted the trial outcome. *State v. Woods*, 143 Wn.2d 561, 582, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001). In the context of a nine-day bench trial concerning multiple serious drug charges, solicitation, money laundering, and leading organized

crime, Harris has not shown that a passing reference to a love letter explaining the procurement of a search warrant prejudiced the trial outcome.

D. Confrontation Clause and Hearsay Violations

Next, Harris contends that the trial court violated his right to confront 12 different witnesses whose statements detectives "read into [the] record." SAG at 6. He also argues that these statements constitute hearsay testimony. Finally, Harris argues that the State violated his right to confront an "informant" at trial. SAG at 14. These claims are without merit.

Harris's claims misrepresent what happened at trial. Detectives did not read into the record statements by missing witnesses. Instead, police officers testified based on their own personal knowledge about their extensive investigation process into Harris's criminal activities. The detectives did not testify about the substance of interviews with these various challenged witnesses but, instead, answered yes or no questions about whether the interviews confirmed information in their investigation. A detective casually mentioned during testimony some of the "witnesses" mentioned in Harris's challenge, including Kyle Britton, who was a driver in a car stopped after police observed the vehicle participate in a drug sale with Morris. The other names included in Harris's challenge do not appear anywhere in the verbatim transcript of proceedings, specifically "Corey Scott" and "Scott Uchida." Regarding Harris's hearsay allegations, his defense attorney objected on hearsay grounds numerous times, but the trial court admitted the statements that Harris appears to challenge because they were not offered to prove the truth of the matter asserted.

Finally, Harris fails to provide adequate information supporting an alleged violation for not being allowed to confront an "informant" at trial. SAG at 14. His assignment of error fails to identify which informant the State prevented him from confronting; and the record before us

reveals none. Both Shipman, who helped coordinate the initial controlled buys, and Boyer, who provided evidence of Harris's extensive drug activities, served as informants; both Shipman and Boyer testified at trial and were subject to cross-examination. "Scott Uchida," who Harris identifies as a confidential informant in a note in his SAG, is not once referenced in the record. SAG at 6. Again, we cannot consider matters outside the record in a direct appeal. *McFarland*, 127 Wn.2d at 338 n.5. Harris has failed to show a violation of his right to confrontation.

E. Sufficiency of the Evidence

Harris challenges the sufficiency of the evidence proving his leading organized crime, solicitation of first degree murder, and two money laundering convictions. The unchallenged findings, which are verities on appeal, belie Harris's assertions and we affirm his convictions.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the trier of fact's decision, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from the evidence. *Kintz*, 169 Wn.2d at 551 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Circumstantial evidence and direct evidence are equally reliable. *Thomas*, 150 Wn.2d at 874. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

1. Leading Organized Crime

Under RCW 9A.82.060(1)(a), a person leads organized crime by intentionally organizing,

managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity. *State v. Munson*, 120 Wn. App. 103, 106, 83 P.3d 1057 (2004); *State v. Barnes*, 85 Wn. App. 638, 667-68, 932 P.2d 669, *review denied*, 133 Wn.2d 1021 (1997).

Here, the trial court entered findings that supported Harris's intentionally managing, supervising, or financing, *at least* three separate individuals in a cocaine distribution business. First, Boyer testified that Harris supplied both Boyer's and Morris's drug dealing endeavors. Second, Boyer testified that Harris instructed him to work with Morris to "keep the drug business going for [Harris]." CP at 140. Third, sufficient evidence supports that Harris incorporated Tamez in his drug enterprise. Specifically, Harris included Tamez in concealing and destroying drugs and money to hide the extent of his business. Fourth, Harris instructed Tamez to secure money for Boyer's bail, which then allowed Boyer to take over the temporary management of Harris's business. Accordingly, sufficient evidence supports Harris's leading organized crime conviction.

2. Solicitation of First Degree Murder

Under former RCW 9A.28.030, a person commits criminal solicitation when, with intent to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct, which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed. Under RCW 9A.32.030, a person commits first degree murder when, with premeditated intent to cause the death of another person, he causes the death

of such person or of a third person.

Here, Boyer testified that before being released from jail, Harris asked him to kill Shipman. Boyer and at least one other witness testified at trial that Harris sent Boyer a letter requesting he kill an informant in exchange for $5,000. To the extent Harris's challenge relies on credibility determinations of this testimony, we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75. Accordingly, sufficient evidence supports Harris's conviction for solicitation of first degree murder.

3. Money Laundering

Under RCW 9A.83.020, a person launders money when that person conducts or attempts to conduct a financial transaction involving the proceeds of specified unlawful activity and (a) knows the property is proceeds of specified unlawful activity; or (b) knows that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds, and acts recklessly as to whether the property is proceeds of specified unlawful activity; or (c) knows that the transaction is designed in whole or in part to avoid a transaction reporting requirement under federal law. *State v. Casey*, 81 Wn. App. 524, 531-32 n.18, 915 P.2d 587, *review denied*, 130 Wn.2d 1009 (1996).

For one money laundering conviction, the trial court concluded that the State proved beyond a reasonable doubt that Harris directed the transfer of $2,600 from the Kruse apartment to Tamez to post Boyer's bail. The trial court also concluded that the $2,600 was the product of unlawful drug activity, in part relying on a finding that Harris had "no legitimate source of income

that would account for all the money Harris was connected to in this case." CP at 144.

Harris argues that this conviction cannot stand because Tamez did not have knowledge or specific intent to launder money. Harris confuses the elements of this offense because the offense concerns *his* knowledge and intent, not Tamez's. Sufficient evidence supports the trial court's conclusions and the first of Harris's money laundering convictions.

The second money laundering conviction related to Harris's attempt to conceal the $25,000 found in his safe deposit box. Harris alleges police illegally searched and seized the safe deposit box's contents, which the court already evaluated in his suppression motion challenges. The trial court did not err in denying his suppression motion for the $25,000. And the trial court's finding that Harris had "no legitimate source of income" to account for the funds supports the notion that money came from illegal criminal activity. CP at 144. Sufficient evidence supports Harris's second money laundering conviction.

F. Credit for Time Served

Harris argues that the trial court erred in not giving him credit for time served for his drug offender sentencing alternative (DOSA)[23] hold between April 18, 2008 and August 29, 2008, and between November 7, 2009 and November 19, 2009.

An offender must receive credit for pretrial detention time served. *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992). A sentencing court's failure to allow such credit violates due process, denies equal protection, and offends the prohibition against multiple punishments. *State v. Cook*, 37 Wn. App. 269, 271, 679 P.2d 413 (1984). But the sentencing court generally

[23] RCW 9.94A.660.

does not allow credit for time served on other charges. *In re Costello*, 131 Wn. App. 828, 834, 129 P.3d 827 (2006). The Sentencing Reform Act (SRA)[24] does not authorize giving credit for time served on other sentences. *State v. Watson*, 63 Wn. App. 854, 859, 822 P.2d 327 (1992). Instead, "credit for time served" refers solely to the offense for which the offender received a sentence. *Watson*, 63 Wn. App. at 860.

Before trial, Harris served time in jail on a DOSA sentence. But the record, including the extensive findings of fact and conclusions of law, does not indicate the specifics of Harris's DOSA hold. At sentencing, the State told the trial court that RCW 9.94A.589[25] required the court to run Harris's DOSA sentence consecutive to his sentence for these charges and that Harris had only just finished or would soon finish his DOSA sentence. Therefore, the State argued, all the time Harris had served in jail awaiting trial was time served toward only his DOSA sentence. The trial court agreed and wrote in Harris's judgment and sentence, "Defendant shall not receive credit for any time served." CP at 28. Because, the record does not contain specifics of Harris's DOSA sentence, we cannot judge the trial court's ruling. *McFarland*, 127 Wn.2d at 338 n.5.

G. Morris No-Contact Order

Harris next argues that the trial court abused its discretion by imposing a lifetime no-contact order between him and Morris. He argues that Morris did not testify at trial and that

[24] Ch. 9.94A RCW.

[25] RCW 9.94A.589(2)(a) Consecutive or concurrent sentences:

> Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

"[n]o evidence tied [Morris] to me." SAG at 12. The record is replete with evidence of Morris and Harris's involvement in a drug organization and Harris's supervision of Morris's involvement in the organization. The trial court did not abuse its discretion by imposing a lifetime no-contact order on Harris for Morris, which is the same prohibition the trial court imposed on Boyer, Harris's other primary drug enterprise associate.

H. Prosecutorial Misconduct

Finally, Harris alleges six grounds for prosecutorial misconduct. We evaluate claims of prosecutorial misconduct under two different tests, depending on whether or not the defendant objected to the alleged misconduct below. If a defendant objected to alleged misconduct at the trial court, 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 (1997), *cert. denied*, 523 U.S. 1008 (1998). A defendant's failure to object to a prosecuting attorney's improper remark subjects the defendant's claim to a more rigorous standard of review, and the defendant must demonstrate that the remark was 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. *State v. Sakellis*, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011). Regardless, we discern no error.

First, Harris claims the State committed misconduct in filing defective charging information for the leading organized crime and solicitation of first degree murder charges. We already evaluated the propriety of the charging information. As we determined that the charging information did not contain these defects, the State did not file inadequate charging documents.

Second, Harris asserts the State committed misconduct for a discovery violation related to the "Nick Taylor Letter." SAG at 3. As we already discussed, even assuming without deciding that error exists in the discovery and admission of this evidence, Harris cannot show prejudice.

Third, Harris contends that the State improperly commented on his attorney's failure to present argument on several of the State's drug charges. But, it is not improper to respond to a defense argument, or lack thereof, in rebuttal argument.

Fourth, Harris baldly asserts that the State committed misconduct in violation of ER 404(b). But Harris fails to present any arguments to any specific ER 404(b) evidence that he believes the State improperly presented or argued, nor do we find any improperly presented evidence.

Fifth, Harris argues that the State improperly elicited Detective Lundquist's false testimony concerning jail phone statements made to Tamez to "conceal items in it before law enforcement can find them." SAG at 3 (emphasis omitted). But even if the State's eliciting of this testimony was improper, which we do not hold, in context of all the unchallenged factual findings, Harris cannot show that the trial's outcome would differ.

Sixth, Harris claims that the State sought a lifetime no-contact order for Morris "out of spite." SAG at 3. To the extent this error is really an allegation of prosecutorial vindictiveness, Harris must show actual vindictiveness or a presumption of vindictiveness. *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). But the record shows that the State sought no-contact orders with a variety of Harris's drug business associates and did not selectively seek a no-contact order involving Morris. Harris fails to meet his burden to prove the State's vindictiveness in

seeking the Morris no-contact order.

## Conclusion

After thoroughly reviewing the record and arguments on appeal, we discern no error. We affirm the trial court's order denying the suppression of evidence and affirm Harris's convictions and sentences.

Johanson, J.

We concur:

Hunt, P.J.

Van Deren, J.