IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RUSHELLE R. STOKEN, Appellant.	No. 41394-9-II UNPUBLISHED OPINION

Johanson, J. — Rushelle R. Stoken appeals her jury trial convictions and sentences on three counts of unlawful delivery of a controlled substance, one count of intimidating a witness, and one count of tampering with a witness. She argues that (1) the trial court violated her right to confrontation by limiting her cross-examination of the confidential informant, (2) the prosecutor committed prosecutorial misconduct during closing argument by commenting on Stoken's failure to testify, (3) the information charging intimidation of a witness was deficient because it did not allege a "true threat," and (4) her trial counsel provided ineffective assistance of counsel by failing to object to the prosecutor's improper comments and by failing to argue for an exceptional sentence downward. Finding no reversible error, we affirm.

I. FACTS

A. Background

In October 2008, the Grays Harbor Drug Task Force started to investigate possible drug

activities involving Rushelle R. Stoken and Wiley C. Hamilton. During this investigation, the task force used the services of a confidential informant (CI). The CI had agreed to work with the officers in exchange for favorable treatment in a pending drug case.

On November 4, the CI contacted Stoken and arranged to purchase some Oxycodone. After the officers searched the CI for contraband or cash and provided him with cash, the CI purchased some Oxycodone from Stoken, returned to a prearranged location to meet with the officers, and turned over several Oxycodone pills to them. On November 17, following a similar process, the CI purchased some heroin from Stoken. On November 24, again following a similar process, the CI purchased more Oxycodone from Stoken. During each of these drug transactions, Stoken was accompanied by a third person who was not a law enforcement officer.

The State initially charged Stoken with three counts of unlawful delivery of a controlled substance. A month or two before the drug trial, Stoken approached the CI's residence in a black Mercedes driven by a male driver. She told the CI "that [he] needed to forget when it came to trial time what [he] knew, or there would be a problem with what happened to [his] family." Verbatim Report of Proceedings (VRP) at 100**.** The CI interpreted this comment as a threat against his family. Because the CI was a witness in the pending drug trial, the State amended the charges to include one count of tampering with a witness and one count of intimidating a witness in addition to the three drug charges.

B. Procedure

1. Motion to admit evidence of CI's breach of CI agreement

Before trial, Stoken moved to be allowed to present evidence that, following the drug

sales at issue here, the CI was convicted of fourth degree assault and third degree driving with a suspended license in violation of his CI agreement with the task force. This agreement required that the CI not "[']commit [any] criminal acts except those inherent in the activities undertaken at the request of law enforcement.[']" VRP at 17. Stoken argued that, under ER 608,[1] she should be able to present evidence of these new offenses "for impeachment purposes to show that [the CI] has not abided by the contract" and that his failure "to abide by the terms of the contract, could be construed as dishonest on his part." VRP at 11, 17.

The State responded that this evidence was unfairly prejudicial and that the new offenses were not "crimes of impeachment." VRP at 11. The State further noted that the CI had completed the "working portion of [the CI] contract" on December 31, 2008, although the CI was still required under the contract to "testify truthfully" in this case. VRP at 18. The State also reminded the trial court that the parties had stipulated that the CI's prior convictions for

[1] ER 608 provides:

> **(a) Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.
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> **(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross[-]examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

falsification of insurance identification, third degree theft, and two counts of second degree theft were admissible, apparently as crimes of dishonesty.[2]

The trial court found that the CI's breach of his contractual requirement to obey the law was not any more probative of his "credibility" than his failure to obey the criminal law generally and refused to admit evidence of the new offenses. VRP at 20. Stoken did not object to this ruling or to the trial court's characterization of the proposed evidence as character or impeachment evidence.

2. Testimony

The witnesses testified as described above. During the course of the trial, the jury did not hear about the CI's potentially breeching his CI agreement with the task force or his convictions for driving on a suspended license or assault.

3. Closing arguments

Throughout its closing argument, the State commented that much of the testimony was "uncontradicted," without indicating who could have contradicted this evidence or stating that Stoken herself had failed to contradict the State's evidence. VRP at 130. Stoken did not object to any part of the State's closing argument. Instead, her counsel argued that the State had made "a big deal about uncontradicted evidence," and directed the jury to the jury instruction "that tells [the jury] that [the defendant] can sit there silent," and that "[s]he is not required to disprove or generate reasonable doubt." VRP at 133.

The jury found Stoken guilty of three counts of unlawful delivery of a controlled

[2] *See* ER 608(b)(2).

substance, one count of intimidating a witness, and one count of witness tampering.

4. Sentencing

At sentencing, Stoken's counsel argued for a sentence at the low end of the standard range or a "Prison based" Drug Offender Sentencing Alternative (DOSA).[3] The trial court rejected Stoken's DOSA request, commenting that although Stoken might have been a good candidate for DOSA had she not threatened the CI after being arraigned on the drug charges, her act of threatening the CI "changed the whole game," and the trial court would no longer consider a DOSA. VRP (Sentencing) at 10.

The trial court sentenced Stoken to concurrent sentences of (1) 34 months, the top of the standard range, on the intimidating a witness conviction; (2) 34 months, just slightly over midpoint of the 20- to 60-month standard range, on each of the drug convictions; and (3) 12 months, the top of the standard range, on the witness tampering conviction. The trial court elaborated on the 34-month sentences on the drug charges, stating that it was sentencing Stoken to 34 months on each of the drug charges, "[J]ust to make the point to you that it's the subversion of the justice system that is causing you to go to prison for 34 months, not your drug addiction." VRP (Sentencing) at 11.

Stoken appeals her convictions and her sentences.

[3] RCW 9.94A.660.

II. ANALYSIS

A. No Confrontation Clause Violation

Stoken first argues that the trial court violated her constitutional right to confront the CI when it denied her motion to present evidence that the CI had committed crimes in violation of his CI agreement. She asserts that the trial court's ruling denied her the opportunity to question the CI on matters of bias.[4] This argument fails.

> The confrontation clause of the Sixth Amendment guarantees a defendant the opportunity to confront the witnesses against him through cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The trial court retains the authority to set boundaries regarding the extent to which defense counsel may delve into the witness' alleged bias "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id*. at 679.
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> A defendant has a right to confront the witnesses against him with bias evidence so long as the evidence is at least minimally relevant. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). "Bias includes that which exists at the time of trial, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness's accuracy while the witness was testifying." *State v. Dolan*, 118 Wn. App. 323, 327-28, 73 P.3d 1011 (2003) [(emphasis omitted)]; *see also State v. Harmon*, 21 Wn.2d 581, 591, 152 P.2d 314 (1944) (finding the trial court properly measured admissibility of bias evidence by proximity in time to trial testimony). A defendant enjoys more latitude to expose the bias of a key witness. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). We uphold a trial court's ruling on the scope of cross-examination absent a finding of manifest abuse of discretion. *Id*.

State v. Fisher, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (emphasis omitted). In addition, we

[4] Although Stoken also suggests that this evidence should have been admitted for "credibility" purposes, she does not present any argument related to any credibility issues other than potential bias. Accordingly, we limit our analysis to whether the trial court erred in refusing to admit this evidence to establish the CI's potential bias.

can affirm on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

The trial court has discretion to reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (citing *State v. Robbins*, 35 Wn.2d 389, 396-97, 213 P.2d 310 (1950); *State v. Wills*, 3 Wn. App. 643, 645, 476 P.2d 711 (1970), *review denied*, 78 Wn.2d 996 (1971)). Here, the proposed bias evidence was speculative.

Stoken argues that the trial court's ruling prevented her from presenting evidence of bias. Specifically, she argues that the CI's violation of the CI agreement (by committing two new crimes), "put him at risk of losing the benefit of his contract, and thus provided additional motivation to testify in favor of the prosecution during [the] trial." Br. of Appellant at 8-9. But Stoken did not present this same argument in the trial court. Instead, she argued that the evidence of two new convictions, and, arguably, the contract violation, was proper under ER 608 "for impeachment purposes to show that [the CI] has not abided by the contract" and that his failure to comply with his contract was relevant to "dishonest[y] on his part." VRP at 11, 17. But even if we assume this issue is properly before us, Stoken did not present the trial court with any evidence that the CI's commission of these two new offenses interfered with his ability to benefit from the CI agreement—in fact, the CI testified at trial that he had benefitted from the CI agreement because the State had not charged him with the offense that had led to the CI agreement. Because there is nothing in the record beyond speculation supporting Stoken's "bias"

argument, this evidence was not admissible for that purpose, and Stoken's confrontation clause argument fails.

B. Failure to Preserve Prosecutorial Misconduct Claim: No Related Ineffective Assistance of Counsel

Stoken next argues that the State committed misconduct in closing argument by commenting throughout its argument that certain evidence was "uncontradicted." Br. of Appellant at 12. She contends that this argument was an improper comment on her "privilege against self-incrimination." Br. of Appellant at 11. Stoken has failed to preserve this alleged improper error and we will not consider it. Additionally, Stoken does not establish the prejudice necessary to prove that her counsel's failure to object to this potential prosecutorial misconduct was ineffective assistance of counsel.

An appellant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice exists only where there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Brown*, 132 Wn.2d at 561. Defense counsel's failure to object to alleged prosecutorial misconduct at trial fails to preserve the issue for appeal, unless the misconduct is so flagrant and ill intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). Even assuming error here, Stoken fails to meet this

standard and her prosecutorial misconduct argument fails.

Stoken's ineffective assistance of counsel claim based on defense counsel's failure to object to the State's arguably improper argument also fails. To establish ineffective assistance of counsel, Stoken has to show both that her counsel's failure to object to this potentially improper argument amounted to deficient representation *and* that this deficient representation was prejudicial. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Even assuming that the prosecutor's argument here improperly implied that Stoken had an obligation to testify, we hold that defense counsel's failure to object was not prejudicial because the trial court specifically instructed the jury that Stoken was not required to testify and that her failure to testify could not "be used to infer guilt or [to] prejudice her in any way." Clerk's Papers (CP) at 31. Because we presume that the jury followed this instruction and Stoken has not overcome that presumption, Stoken fails to show that any potential deficient performance was prejudicial. *State v. Greiff*, 141 Wn.2d 910, 923, 10 P.3d 390 (2000). Accordingly, her ineffective assistance of counsel claim based on the prosecutor's potential misconduct also fails.

C. "True Threat"

Stoken next argues that the information charging her with intimidating a witness was deficient because it failed to allege that she had attempted to influence testimony by means of a "true threat." Br. of Appellant at 13. This argument also fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, require a charging document to include all essential elements, both statutory and non-statutory, of a crime to inform a defendant of the charges against her and to

allow preparation for the defense. *State v. Phillips*, 98 Wn. App. 936, 939, 991 P.2d 1195 (2000) (citing *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992); *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); *State v. Ralph*, 85 Wn. App. 82, 84, 930 P.2d 1235 (1997)). But when, as here, the defendant waits to challenge the sufficiency of a charging document until her direct appeal, we apply the liberal standard set forth in *Kjorsvik* and construe the information in favor of its validity. *See Phillips*, 98 Wn. App. at 942-43. Under this liberal standard of review, we must decide whether (1) the necessary facts appear in any form, or by fair construction are found, in the charging document; and if so, (2) whether the defendant can show that he or she was nonetheless actually prejudiced by the inartful or vague language that he alleges caused a lack of notice. *Phillips*, 98 Wn. App. at 940 (citing *Kjorsvik*, 117 Wn.2d at 105-06). This standard of review requires "at least some language in the information giving notice of the allegedly missing element(s)"; and, if the language giving notice is present, we then are required to determine whether the "inartful" or "vague" wording actually prejudiced the defendant. *Kjorsvik*, 117 Wn.2d at 106.

RCW 9A.72.110[5] provides in part:

> (1) A person is guilty of intimidating a witness if a person, *by use of a threat* against a current or prospective witness, attempts to:
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> (a) Influence the testimony of that person;
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> (b) Induce that person to elude legal process summoning him or her to testify;
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> (c) Induce that person to absent himself or herself from such proceedings; or
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> (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the

[5] The legislature amended this statute in 2011. Laws of 2011, ch. 165 § 2. These amendments are not relevant here.

> abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

(Emphasis added.)

"The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole." *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (citing *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)). Accordingly, "only threats that are 'true' may be proscribed" by law. *Schaler*, 169 Wn.2d at 283. "A true threat is 'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.'" *Schaler*, 169 Wn.2d at 283 (quoting *Kilburn*, 151 Wn.2d at 43).

The information here stated:

> And I, H. Steward Menefee, Prosecuting Attorney . . . accuse the defendant of the crime of INTIMIDATING A WITNESS, a crime based on a series of acts connected together with Counts 1 through 3, committed as follows:
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> > That the said defendant, Rushelle R. Stoken, in Grays Harbor County, Washington, on or about July 29, 2010, *by using a threat* against an individual who the defendant knew was a current or prospective witness, to wit: [the CI] *did attempt to: influence the testimony of that person*.
>
> CONTRARY TO RCW 9A.72.110(1) and against the peace and dignity of the State of Washington.

CP at 2 (emphasis added). This charge clearly included the statutory "by use of a threat" element. RCW 9A.72.110(1). Even presuming, but not deciding, that a "true threat" is a non-statutory

element of the offense, we hold that the use of the term "threat," combined with the requirement that the defendant used that "threat" to "attempt to . . . influence"[6] a witness's testimony was sufficient under the liberal construction standard to give notice that the "threat" had to be a "true threat" rather than a mere "joke[ ], idle talk, or hyperbole." *Schaler*, 169 Wn.2d at 283.

Because there is "at least some language . . . giving notice of the allegedly missing element[ ]," Stoken must show the failure to further elaborate on the term "threat" resulted in actual prejudice. *Kjorsvik*, 117 Wn.2d at 106. Stoken fails to allege, let alone establish, actual prejudice. Accordingly, this argument fails.

D. Effective Assistance of Counsel at Sentencing

Citing *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002), Stoken argues we should remand this matter for resentencing because her trial counsel provided ineffective assistance by failing to request an exceptional sentence downward based on *State v. Sanchez*, 69 Wn. App. 255, 261, 848 P.2d 208, *review denied*, 122 Wn.2d 1007 (1993). We disagree.

We review ineffective assistance of counsel claims de novo. *State v. White*, 80 Wn .App. 406, 410, 907 P.2d 310 (1995), *review denied*, 129 Wn.2d 1012 (1996). To prevail on such a claim, a defendant must show (1) deficient representation by trial counsel and (2) resulting prejudice. *Thomas*, 109 Wn.2d at 225-26. To establish prejudice, Stoken must demonstrate that, but for her counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). Failure to show either prong will end our inquiry. *State v. Fredrick*, 45 Wn. App. 916, 923, 729

[6] CP at 2.

P.2d 56 (1986).

Since 1993, Washington courts have recognized that a trial court may impose an exceptional sentence downward when the difference between a first controlled drug buy and the cumulative effect of all subsequent buys within a short time span is "nonexistent, trivial or trifling." *Sanchez*, 69 Wn. App. at 261. Defense counsel's failure to argue for a downward departure from the standard range based on *Sanchez* can amount to ineffective assistance of counsel. *McGill*, 112 Wn. App. at 101-02.

Although Stoken's counsel could have argued that the three drug charges (which were based on a series of controlled-buy operations conducted over a relatively short period of time) justified a downward departure from the standard range under *Sanchez*, unlike in *McGill*, where the record showed that the trial court would likely have considered a downward departure, the record here convinces us that any such request would have been futile. *McGill*, 112 Wn. App. at 100. The trial court's strongly-worded oral ruling denying Stoken's DOSA request because of Stoken's later threat against the CI and the court's statement that it was imposing the 34-month sentences on the drug convictions because of this bad behavior, establishes that there was no reasonable likelihood that the trial court would have granted a request for a reduced sentence. Accordingly, Stoken has not demonstrated that her counsel's failure to request an exceptional sentence downward was prejudicial and this argument fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Armstrong, J.

Penoyar, J