NO. 45199-9-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL W. LOWE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Wm. Toni A. Sheldon, Judge
Cause No. 12-1-00529-0

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# AMENDED BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State of Washington

Federal Cases



//

Constitutional Provisions



Statutes



Rules

A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count I, felony harassment, from the jury for lack of sufficient evidence.

02. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Lowe of his constitutional right to a fair trial on the charge of felony harassment.

03. The trial court erred in permitting Lowe to be represented by counsel who provided ineffective assistance by failing to object to the prosecutor's closing argument vis-à-vis the charge of felony harassment that impermissibly commented on Lowe's constitutional right not to testify.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that Officer Blaylock was placed in reasonable fear that Lowe's statement that he was going to kill him would be carried out? [Assignment of Error No. 1].

02. Whether the prosecutor's closing argument, which commented on Lowe's constitutional right not to testify, constituted prosecutorial misconduct that denied Lowe his constitutional right to a fair trial on the charge of felony harassment? [Assignment of Error No. 2].

03. Whether Lowe was prejudiced as a result of his counsel's failure to object to the prosecutor's closing argument vis-à-vis the charge of felony harassment that impermissibly commented on Lowe's constitutional right not to testify? [Assignment of Error No. 3].

## C. STATEMENT OF THE CASE

### 01. Procedural Facts

Michael W. Lowe was charged by second amended information filed in Mason County Superior Court June 27, 2013, with felony harassment, count I, harassment, count II, and bail jumping, count III, contrary to RCWs 9A.46.020(2)(b), 9A46.020(1) and 9A.76.170. [CP 65-67].

No pretrial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 79]. Trial to a jury commenced June 26, the Honorable Toni A. Sheldon presiding.

Neither objections nor exceptions were taken to the jury instructions, Lowe was found guilty as charged, sentenced within his standard range and timely notice of this appeal followed. [RP 80, CP 2-17, 36-38].

### 02. Substantive Fact

In the early evening of December 21, 2012, Mason County police officer Greg Blaylock responded to the report of a physical disturbance in progress at a local apartment complex. A male subject, later identified as Lowe, had left the scene on foot. [RP 28, 35]. When Akasha Garner, who lived downstairs at the complex, heard screaming and fighting upstairs, she went outside and said she was going to call the

police, at which point Lowe "ran down the stairs saying that he was gonna kill (her)." [RP 24].

> I believed he was really going to punch me, like I had to duck a couple of times to get away from him. If I wouldn't have moved myself I would have got hit.

[RP 26].

Lowe, who appeared heavily intoxicated, was soon located several blocks away, handcuffed, arrested and advised of his rights. [RP 29-30]. He denied doing anything wrong. [RP 30, 49]. After being secured in the back seat of Blaylock's patrol car, Lowe became agitated "and started slamming his head off the partition," which caused Blaylock to pull the "seatbelt tighter in an attempt to stop him from injuring himself." [RP 32]. Lowe directed numerous racial and homophobic epithets toward Blaylock, saying he was going "to kill (his) faggot ass" and calling him a "faggot nigger." [RP 31-32]. This happened numerous times. [RP 31-34].

Lowe was taken "to the hospital to be medically cleared for booking." [RP 32]. After getting out of Blaylock's patrol vehicle at the hospital, Lowe walked aggressively toward Officer Matthew Dickinson, who had arrived separately, before Blaylock, who feared "Dickinson was either going to get head-butted or assaulted by Mr. Lowe," grabbed his arm and "pulled him down to the ground for obviously his safety and

Officer Dickinson's safety." [RP 33]. Blaylock said he took Lowe's threats to kill him seriously. [RP 35].

Through Deputy Court Clerk Sharon Fogo, the State introduced the following documents relating to the bail jumping charge: order for pretrial release filed 12/24/12 [RP 61; State's Exhibits 1-2], which set Lowe's next appearance date at 01/08/13 [RP 61], the information in the instant case [RP 62-63; State's Exhibit 3], appeal bond filed 01/03/13 [RP 63; State's Exhibit 4], order directing issuance of bench warrant filed 01/08/13 [RP 64; State's Exhibit 5], and Fogo's clerk's minutes for a hearing on 01/08/13/12, which indicate Lowe failed to appear on that date. [RP 65; State's Exhibit 6].

Lowe rested without presenting evidence. [RP 69].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE THAT OFFICER BLAYLOCK WAS PLACED IN REASONABLE FEAR THAT LOWE'S STATEMENT THAT HE WAS GOING TO KILL HIM WOULD BE CARRIED OUT.

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of

the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

To convict Lowe of felony harassment based on a threat to kill Officer Blaylock, the State was required to prove beyond a reasonable doubt not just that Lowe knowingly threatened to kill Blaylock, but also that Blaylock reasonably feared that the threat to kill him would be carried out. State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003).

Recognizing that "true threats" are not protected speech—and thus within the prohibition of RCW 9A.46.020(1)(a)(i) and (2)(b)—in State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001), our Supreme Court defined "true threat" as "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 individual).'" Williams, 144 Wn.2d at 207-208 (citing State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998) (quoting United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990)); State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004). A "true threat" "'is a serious one, not uttered in jest, idle talk, or political argument.'" State v. Hansen, 122 Wn.2d 712, 717 n.2, 862 P.2d 117 (1993) (quoting United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1976). "(T)he defendant must be aware that the threat is of such an intent." State v. J.M., 144 Wn.2d 472, 481, 28 P.3d 720 (2001).

The State presented insufficient evidence that Officer Blaylock was placed in reasonable fear that Lowe would carry out his threat to kill him. According to Blaylock, Lowe, who was standing in the rain [RP 29], appeared "heavily intoxicated." [RP 30]. Dickinson agreed [RP 49], further describing him as shoeless, noting "he was staggering on the sidewalk." [RP 48-49]. Lowe was frustrated, no doubt. But in this context, it cannot be seriously considered that his belligerent statements to Blaylock could reasonably be interpreted as placing him in fear that the unsettling possibility would be carried out, either at the time they were made or anytime thereafter.

Blaylock's version of reality simply does not add up. It's no more complicated than that. Lowe was restrained: doubled-locked handcuffed, hands behind his back. [RP 39]. He was unarmed. [RP 40]. Not the same for Blaylock and Dickinson. They were armed with offensive and defensive weapons: firearms, tasers, handcuffs, and a nightstick. [RP 36-37, 53]. They were trained officers. And what about Akasha Garner? Lowe said the same thing to her, sans the homophobic part. There was no evidence that she had access to offensive or defensive weapons or that she had received formal training to deal with the situation presented by Lowe, who had even attempted to hit her. [RP 26]. Result: charge reduced from felony harassment to misdemeanor harassment [RP 58], with the State determining that she wasn't in the state of mind that Lowe's threat of killing her would be carried out, which adds a level of absurdity to all of this.

The State failed to satisfy its burden to prove beyond a reasonable doubt that Blaylock was placed in reasonable fear that Lowe's statement that he was going to kill him would be carried out.

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02. THE PROSECUTOR'S CLOSING ARGUMENT, WHICH COMMENTED ON LOWE'S CONSTITUTIONAL RIGHT NOT TO TESTIFY, CONSTITUTED PROSECUTORIAL MISCONDUCT THAT DENIED LOWE A FAIR TRIAL ON THE CHARGE OF FELONY HARASSMENT.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

02.1 Standards of Review

Where it is established that the prosecutor made improper comments, this court reviews whether those improper statements prejudiced the defendant under one of two different standards of review. State v. Emery, 174 Wn. 2d 742, 7761, 278 P.3d 653 (2012)

Where, as here, a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). "The State's burden to prove harmless error is heavier the

more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

However, where the State's misconduct violates a defendant's constitutional rights, this court analyzes the prejudice under a different standard: the stringent constitutional harmless error standard. State v. Easter, 130 Wn.2d 228, 236-37, 242, 922 P.2d 1285 (1996). Under this standard, this court presumes constitutional errors are harmful and must reverse unless the State meets the heavy burden of overcoming the presumption that the error is prejudicial, Id. at 242, which requires proof that the untainted evidence overwhelmingly supports a finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

A prosecutor's obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due

process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

02.2 Improper Comment on Lowe's Decision Not to Testify

The privilege against self-incrimination, or the right to remain silent, is based upon article I, section 9 of the Washington State Constitution and the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. Miranda v. Arizona, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

The scope of this protection extends to comments that may be used to infer guilt from a defendant's silence, see State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Although Lowe did not object to the prosecutor's comment on his right to remain silent, he may raise this issue, which had a practical and identifiable consequence in the trial of this case, and which is a manifest error affecting a constitutional right, for the first time on appeal. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (citing State v. Curtis, 110 Wn. App. at 11; State v. Nemitz, 105 Wn. App. 205, 214, 19 P.3d 480 (2001); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); RAP 2.5(a).

In closing argument, the prosecutor impermissibly commented on Lowe's decision not to testify, thus violating his right to remain silent by

reminding the jury that the State's case relating to the charge of felony harassment had gone unchallenged:

> Well, let's look at the reasonableness of the State's witnesses. Their testimony in this case is uncontradicted.

[RP 93].

> So, with regard to the first count, the threat to kill, the State's proven beyond a reasonable doubt that on December 21st, 2012, that Michael Lowe threatened to kill Officer Blaylock. Officer's Blaylock's testimony, which was uncontradicted, indicated that he was put in fear that that threat would be carried out.

[RP 96].

> In fact, after he had been handcuffed and transported to the hospital, Mr. Lowe was — again, uncontradicted — took on a fighting stance and tried to assault Officer Dickinson.

[RP 97].

A defendant's right not to testify is violated if a prosecutor makes a statement "'of such character that the jury would "naturally and necessarily accept it as a comment on the defendant's failure to testify."'" State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995) (quoting State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987)). A prosecutor may, however, state that certain testimony is undenied "as long

as he or she does not refer to the person who could have denied it." Fiallo-Lopez, 78 Wn. App. at 729.

> "Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it, and, if that results in inferences unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his."

State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 403 (1969) (quoting State v. Litzenberger, 140 Wash. 308, 248 P. 799 (1926)).

When read in context, the prosecutor's comments directly referred to or implied that Lowe was the only person who could rebut the State's case, and were the type a jury would accept as a comment on Lowe's failure to testify, for the record demonstrates he was the only person who could rebut the State's evidence, given that the sole issue relating to the felony harassment charge was whether Lowe had placed Blaylock in reasonable fear that the threat to kill would be carried out. The evidence on this point was less than overwhelming, and it cannot be discounted that the prosecutor's comments did not infringe upon Lowe's decision not to testify, for the prosecutor was plainly urging the jury to consider Lowe's failure to do so as evidence of his guilt, to infer guilt from his silence in not rebutting Blaylock's statements that Lowe would make good on his threats to kill him. Whether viewed as a direct or indirect reference to

Lowe's right to remain silent, it constitutes a constitutional infringement upon this right. See State v. Romero, 113 Wn. App. at 790-91. It was intended to undermine Lowe's only defense: that Blaylock's alleged fear was not reasonable.

The effect of this had a high potential for prejudice, and represents a serious irregularity. This court should be unwilling to assume that the jury missed the State's message. The comments at issue represent a direct comment on Lowe's decision not to testify, and this court cannot say the State did not exploit Lowe's exercise of his right to remain silent. Nor can it be asserted that the evidence presented was so overwhelming that it necessarily leads to a finding of guilt.

02.3 Conclusion

Given that the presumption of innocence is the bedrock upon which criminal justice stands, and the fact that the evidence of Lowe's guilt on the charge of felony harassment was not clear-cut, the prosecutor's misconduct in this case was nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds, thereby minimizing the State's efforts and ensuring that Lowe did not receive a fair trial. Reversal is required.

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03. LOWE WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT THAT IMPERMISSIBLY COMMENTED ON LOWE'S CONSTITUTIONAL RIGHT NOT TO TESTIFY.[1]

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

[1] While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

Should this court determine that counsel waived the issue by failing to properly object to the prosecutor's closing argument that impermissibly commented on Lowe's constitutional right not to testify, then both elements of ineffective assistance of counsel have been established.

First, the record does not and could not reveal any tactical or strategic reason why trial counsel would have failed to object the prosecutor's comments during closing argument for the reasons previously argued. Had counsel so objected, the trial court would have granted the objection under the law previously set forth.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident, again, for the reasons previously set forth.

Counsel's performance was deficient because he failed to object to the prosecutor's comments at issue for the reasons argued above, which was highly prejudicial to Lowe, with the result that he was deprived of his

constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for felony harassment.

E. CONCLUSION

Based on the above, Lowe respectfully requests this court to reverse his conviction for felony harassment.

DATED this 25th day of April 2014.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 25th day of April 2014.

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