91517-2

IN THE SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

MICHAEL W. LOWE,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 45199-9-II
Appeal from the Superior Court for Mason County
The Honorable Toni A. Sheldon, Judge
Cause No. 12-1-00529-0

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is MICHAEL W. LOWE, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the unpublished opinion in the Court of Appeals, Division II, cause number 45199-9-II, filed March 3, 2015. No Motion for Reconsideration has been filed in the Court of Appeals.

A copy of the unpublished opinion is attached hereto in the Appendix at A1-A8.

C. ISSUES PRESENTED FOR REVIEW

01. 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?

02. 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?

D. STATEMENT OF THE CASE

As provided in Lowe's Brief of Appellant, which sets out facts and law relevant to this petition and is hereby incorporated by reference, he was convicted of felony harassment, harassment, and bail

jumping. On appeal, he argued, in part, that his conviction for felony harassment should be reversed because the prosecutor committed misconduct during closing argument by commenting on Lowe's constitutional right not to testify, and because he received ineffective assistance of counsel for his counsel's failure to object to the prosecutor's argument.

Relying on this court's decision in State v. Brett, 126 Wn.2d 136, 176, 892 P.2d 29 (1995)—"Comments by a prosecutor that certain testimony is undenied are not improper as long as there is no reference to who may be in a position to deny it."—Division II found no misconduct, holding:

> The prosecutor's comments were not improper because the prosecutor did not reference or suggest who would be able to contradict the evidence. Further, although Lowe argues that the prosecutor "directly referred to or implied that Lowe was the only person who could rebut the State's case," there is no indication that Lowe is the only person would could rebut the evidence....

[Slip Op. at 7]. There are reasons to be cautious about this opinion.

E. ARGUMENT

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions, and raises a significant question under the Constitution of the State of Washington

and the Constitution of the United States, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

01. 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.

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).

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)).

This much is clear: It is unreasonable to suggest, as did Division II [Slip Op. at 7], that anyone other than Lowe could rebut the State's case as to the charge of felony harassment presented through the testimony of police officers Blaylock and Dickinson, or that the prosecutor was not

suggesting that Lowe was the only person who would be able to contradict the evidence. Argument to the contrary is profoundly flawed. 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.

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.

02. 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

[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.

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).

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.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and reverse Lowe's conviction for felony harassment and remand for retrial consistent with the arguments presented herein

DATED this 1st day of April 2015.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

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

Tim Higgs timh@co.mason.wa.us	Michael W. Lowe #781931 C.C.C.C. 12200 Bordeaux Road P.O. Box 37 Littlerock, WA 98556-0037

DATED this 1st day of April 2015.

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Attorney for Appellant
WSBA NO. 10634

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL W. LOWE, Appellant.	No. 45199-9-II UNPUBLISHED OPINION

LEE, J. — A jury found Michael W. Lowe guilty of felony harassment, harassment, and bail jumping. Lowe appeals, arguing that (1) the State presented insufficient evidence to support the conviction, (2) the prosecutor committed misconduct, and (3) he received ineffective assistance of counsel. Because the State presented sufficient evidence, the prosecutor did not commit misconduct, and he did not receive ineffective assistance of counsel, his arguments fail. We affirm.

FACTS

Shelton Police officers Greg Blaylock and Matthew Dickinson responded to a report of a disturbance in progress. Dispatch notified Blaylock and Dickinson that an involved party, Michael Lowe, left the scene of the disturbance on foot. Blaylock and Dickinson found Lowe intoxicated nearby.

Blaylock arrested Lowe for his involvement in the disturbance. Blaylock placed Lowe in his patrol car. Because of Lowe's intoxication, Blaylock was transporting Lowe to the hospital. While in the patrol car, Lowe continuously thrashed and hit his head against the interior of the

patrol car, screamed racial and homophobic obscenities at Blaylock, and threatened to kill Blaylock.

Dickinson met Blaylock and Lowe at the hospital. When Blaylock took Lowe out of the patrol car at the hospital, Lowe took a fighting stance, rocked his head back, and aggressively walked towards Dickinson. Out of fear that Lowe would head-butt Dickinson, Blaylock and Dickinson restrained Lowe on the ground until a wheelchair arrived.

After being medically cleared for booking, Blaylock transported Lowe to the jail. While being transported to the jail, Lowe continued to thrash around the patrol car, scream obscenities at Blaylock, and threaten to kill Blaylock.

In the second amended information, the State charged Lowe with felony harassment, harassment, and bail jumping. The State presented two witnesses regarding the felony harassment charge: Officers Blaylock and Dickinson. Blaylock and Dickinson testified that Lowe was aggressive, took a fighting stance, and threatened to kill Blaylock. Blaylock testified that when he and Dickinson approached Lowe, Lowe was belligerent and intoxicated, and that he knew Lowe to be hostile towards law enforcement from previous interactions. Blaylock also testified that Lowe repeatedly yelled racial and homophobic slurs while threatening to kill him. Blaylock further testified that he took Lowe's threats to kill him seriously.

During the State's closing arguments, the prosecutor commented that the State's evidence was uncontradicted. Lowe did not object during closing arguments. Following deliberations, the jury returned guilty verdicts for all three counts. Lowe appeals.

ANALYSIS

Lowe challenges only the conviction for felony harassment.[1] Lowe alleges that (1) the State presented insufficient evidence that Officer Blaylock reasonably feared that Lowe would carry out his threat to kill Blaylock, (2) the prosecutor committed misconduct by commenting on Lowe's right not to testify, and (3) he received ineffective assistance of counsel because his counsel did not object during the State's closing arguments. We disagree and hold that the State presented sufficient evidence to support the conviction and that the prosecutor did not commit misconduct. Furthermore, because the prosecutor did not commit misconduct, Lowe's argument that he received ineffective assistance of counsel fails. We affirm Lowe's conviction.

A. SUFFICIENCY OF THE EVIDENCE—FELONY HARASSMENT

Lowe alleges that the State presented insufficient evidence to support his conviction. Specifically, Lowe argues that the State presented insufficient evidence that Officer Blaylock reasonably feared that Lowe would carry out the threat to kill him. Lowe's argument fails.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the 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). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are deemed equally

[1] Lowe does not challenge the convictions for misdemeanor harassment and bail jumping.

reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Under RCW 9A.46.020, to convict Lowe of felony harassment, the State must prove beyond a reasonable doubt that Lowe knowingly threatened to kill Blaylock immediately or in the future, and that in the circumstances, Lowe's words or conduct placed Blaylock in "reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(a), (b).

Here, viewed in a light most favorable to the State, the evidence is sufficient to establish that Blaylock was in reasonable fear that Lowe would carry out his threats to kill Blaylock. Blaylock testified that he took Lowe's threats to kill him seriously. Blaylock also testified that he knew Lowe to be hostile towards law enforcement, Lowe was hostile and aggressive towards him, Lowe was physically aggressive in the patrol car, and Lowe took a fighting stance with another officer.

To the extent Lowe argues that Blaylock could not have taken his threat to kill Blaylock seriously because Lowe was in handcuffs, this argument fails. A jury can find that the fear that the threat would be carried out in the future is reasonable where a mere temporary condition prevents the threat from being carried out immediately. *See State v. Cross*, 156 Wn. App. 568, 584, 234 P.3d 288 (2010). In *Cross*, the defendant, who was in handcuffs, threatened to assault the police officer "if he wasn't in handcuffs." 156 Wn. App. at 583. Relying on the fact that the defendant would not remain handcuffed indefinitely, we held that the officer's fear that the defendant would carry out the threat was reasonable because the condition preventing the defendant from carrying it out—handcuffs—was temporary. *Cross*, 156 Wn. App. at 583. We

hold that the State presented sufficient evidence to establish that Blaylock reasonably feared that Lowe would carry out his threats to kill Blaylock. Accordingly, Lowe's claim fails.

B. PROSECUTORIAL MISCONDUCT

Lowe argues that the prosecutor committed misconduct by directly commenting on Lowe's decision not to testify during the State's closing argument. Lowe's argument fails.

To prevail on a claim of prosecutorial misconduct, Lowe must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012) (citing *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011)). Once a defendant has demonstrated that the prosecutor's conduct was improper, we evaluate the defendant's claim of prejudice under two different standards of review, depending on whether the defendant objected to the misconduct at trial. *Emery*, 174 Wn. App. at 760. If the defendant objected, he must "show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Emery*, 174 Wn.2d at 760-61 (citing *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010)).

"If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct" was flagrant and ill intentioned. *Emery*, 174 Wn.2d at 760-61 (citing *State v. Stenson*, 132 Wn.2d 668, 726-27, 940 P.2d 1239 (1997), *cert. denied*, 523 U. S. 1008 (1998)). The defendant is presumed to have waived any error by not objecting because objections are required to prevent additional improper remarks and abuse of the appellate process. *Emery*, 174 Wn.2d at 762. Therefore, when there is no objection, we apply a heightened standard requiring the defendant to show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial

likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). When reviewing a prosecutor's misconduct that was not objected to, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762.

"In closing argument, a prosecutor is afforded wide latitude to draw and express reasonable inferences from the evidence." *State v. Reed*, 168 Wn. App. 553, 577, 278 P.3d 203, *review denied*, 176 Wn.2d 1009 (2012). When analyzing prejudice, we do not look at the comment in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008). "Comments by a prosecutor that certain testimony is undenied are not improper as long as there is no reference to who may be in a position to deny it." *State v. Brett*, 126 Wn.2d 136, 176, 892 P.2d 29 (1995); *see State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952 (2012).

Lowe argues that during the State's closing argument, the prosecutor "directly referred to or implied that Lowe was the only person who could rebut the State's case" and that the comments were the type that "a jury would accept as a comment on Lowe's failure to testify." Br. of Appellant at 12. During the State's closing argument, the prosecutor made the following remarks:

> Well, let's look at the reasonableness of the State's witnesses. Their testimony in this case is uncontradicted. . . .
>
> . . . .
>
> 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 Blaylock's testimony, which was uncontradicted, indicated that he was put in fear that that threat would be carried out. If not immediately, because Mr. Lowe was handcuffed in the back of the cruiser, but in the future at some other time. 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.

Report of Proceedings (RP) at 93, 96-97. Lowe did not object at trial.

The prosecutor's comments were not improper because the prosecutor did not reference or suggest who would be able to contradict the evidence. Further, although Lowe argues that the prosecutor "directly referred to or implied that Lowe was the only person who could rebut the State's case," there is no indication that Lowe is the only person who could rebut the evidence.[2] Br. of Appellant at 12. Because we hold there was no misconduct, Lowe's claim fails.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Lowe alleges that he received ineffective assistance of counsel because defense counsel failed to object to the prosecutor's closing arguments. We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To

[2] We note that the trial court instructed the jury as follows: "The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way." RP at 86. We presume that the jury follows the court's instructions. *Anderson*, 153 Wn. App. at 428.

rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Grier*, 171 Wn.2d at 33.

Lowe has not demonstrated that defense counsel's performance was deficient. Defense counsel was not deficient by not objecting during the State's closing arguments because the prosecutor's comments during closing arguments were not improper. *Sells*, 166 Wn. App. at 930. Because Lowe has not shown that defense counsel's performance was deficient, he has not met his burden to show that he received ineffective assistance of counsel. Lowe was not denied effective assistance of counsel when his trial counsel did not object during the State's closing arguments. Accordingly, his claim of ineffective assistance of counsel fails.

We affirm Lowe's conviction.

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 in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, P.J.

Melnick, J.

DOYLE LAW OFFICE

April 01, 2015 - 4:45 PM

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