SUPREME COURT NO. 94868-2
C.O.A. No. 48060-3-II
Cowlitz Co. Cause NO. 14-1-01277-0

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON NEWLEN,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney, Cowlitz County Prosecuting Attorney's Office.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly decided this matter. The Respondent respectfully requests this Court deny review of the June 6, 2017, Court of Appeals' opinion and the July 14, 2017, denial of the motion for reconsideration in *State of Washington vs. Clifton Newlen*, Court of Appeals No. 48060-3-II.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals apply the wrong standard of review in finding Newlen waived his claim of misconduct when his attorney chose not to object to the prosecutor's rebuttal of his attorney's incorrect claim during closing argument?

2. Did the Court of Appeals apply the wrong standard of review in finding Newlen's attorney was not ineffective when he chose not to object to the prosecutor's rebuttal of his attorney's incorrect claim during closing argument?

IV. STATEMENT OF THE CASE

After Thomas Hug attempted to stop Clifton Newlen from cutting down his fence with bolt-cutters, Newlen struck Mr. Hug with the bolt-cutters, fracturing his rib. RP 6/11/15 at 117-120, 125; RP 6/12/15 at 17. Jeannie Brissett, who was taking possession of Mr. Hug's property that day,

before the assault, when Newlen, who she did not know, entered her backyard, told her he was taking his property back, and was already cutting her fence down, she felt he was "a little intimidating." RP 6/11/15 at 81. Rather than debate with Newlen, Brissett decided to wait to discuss the issue with Mr. Hug. RP 6/11/15 at 82.

No testimony was ever admitted that Brissett had told the investigating officer, Sgt Huffine, she had not been intimidated, and the only portion of their conversation that was introduced was with regard to where Newlen was standing in relation to the fence line. RP 6/11/15 at 94, 103, 148. Although no evidence of her conversation with Sgt Huffine had been presented contradicting Brissett's testimony that Newlen was "a little intimidating," Newlen's attorney attempted to use this prior conversation to impeach her on this point during closing argument. RP at 6/12/15 at 130. Newlen's attorney argued that when Brissett testified to being intimidated by Newlen, this was inconsistent with what she told Sgt Huffine at the time, stating:

> Mr. Bentson talks about Jeannie Brissett being an independent witness. I'm not so sure that's accurate. Her testimony *is inconsistent with what she tells Deputy Huffine.* She tells Deputy Huffine Mr. Newlen talks to me from the fence line, you know, he initiates this discussion about the fence line and *never tells Deputy Huffine...he comes inside the fence and in any way is intimidating* or anything else. Now she's in a position, comes in[]to testify later and says,

> you know, he kind of surprises her; he's in her yard; *he's intimidating*.

RP 6/12/15 at 130 (emphasis added).

During rebuttal, the prosecutor responded to this argument:

> You didn't hear the entirety of her [Brissett's] conversation with Sergeant Huffine. Evidence rules don't allow you to hear all of that. She testified to what happened and Defense got a chance to cross-examine her, and there was no – you know, that she was intimidated by him, that's not inconsistent with what she told Sergeant Huffine, that's just not evidence that was presented.

RP 6/12/15 at 139. Newlen did not object. RP 6/12/15 at 139.

Without determining whether or not the prosecutor's argument was improper, the Court of Appeals explained:

> The trial court's reiteration of the instruction to the jury that argument is not evidence and that the jury must consider only the evidence that the trial court admitted without concerning itself about the reasons for the court's ruling, would have cured any risk that the jury would have improperly assumed that the State was suggesting there was additional evidence they should consider.

Slip Op. at 12. Because this instruction obviated any potential for prejudice an additional curative instruction was unnecessary; therefore, Newlen's claim of prosecutorial misconduct failed. *Slip Op.* at 12.

Later, when analyzing Newlen's ineffective assistance claim, the Court of Appeals explained that "Newlen failed to show the prosecutor presented any improper testimony or argument." *Slip Op.* at 18. The Court

of Appeals further stated: "[B]ecause the prosecutor did not commit misconduct there was no reason for defense counsel to object." *Slip Op.* at 18. And, the Court of Appeals found Newlen did not demonstrate prejudice because "there was no reasonable probability that failure to object to any improper argument would have affected the outcome of the trial." *Slip Op.* at 18. Newlen filed a motion to reconsider, claiming the Court of Appeals did not properly consider his claim of ineffective assistance of counsel with regard to his attorney not objecting to the prosecutor's rebuttal argument. The Court of Appeals denied his motion to reconsider.

V. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Newlen's petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Newlen maintains that the Court of Appeals applied the wrong standard of review to his claim of prosecutor misconduct and ineffective

assistance of counsel. Newlen maintains the Court of Appeals' decision is in conflict with a decision of the Supreme Court and that its decision raises a significant question of constitutional law under RAP 13.4(b)(1) and (3). This is incorrect. The issue he raises was not objected to a trial. The Court of Appeals applied the correct standard of review for Newlen's claims of misconduct and ineffective assistance of counsel when there was no objection. For these reasons, his petition does not meet the criteria required for review under RAP 13.4(b).

A. WHEN ANALYZING NEWLEN'S CLAIM OF MISCONDUCT, THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD OF REVIEW.

The Court of Appeals correctly analyzed and rejected Newlen's claim of misconduct based on the prosecutor's rebuttal of his attorney's incorrect claim during closing argument. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed 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. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Newlen argues that the Court of Appeals' opinion "appears to imply" misconduct for a claim of eliciting improper opinion evidence and for the prosecutor's rebuttal of his attorney's incorrect closing argument. *Petition for Review* at 4-5. First, with regard to the claim

of eliciting opinion evidence, Newlen's petition misrepresents the Court of Appeals' opinion, which expressly rejected Newlen's claim that the State had elicited any opinion testimony or made any improper argument based on opinion testimony. *Slip Op.* at 14-15. Because Newlen did not challenge this portion of the Court of Appeals' opinion, he failed to preserve any claim regarding opinion evidence for review. Second, with regard to the rebuttal argument, the Court of Appeals did not imply there was misconduct, but rather chose not to address whether the argument was improper, because Newlen suffered no prejudice. In doing so, the Court of Appeals applied the correct standard of review for Newlen's claim of misconduct when there was no objection at trial.

With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *Id.* at 718 (citing *State v. Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvene,* 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if the conduct was improper "prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial

likelihood the misconduct affected the jury's verdict." *Stenson*, 132 Wn.2d at 718-19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722 (citing *State v. Brett,* 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). However, when the defendant fails to object, a heightened standard of review applies: "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell,* 125 Wn.2d 24, 86, 882 P.2d 747 (1994). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn.App. 446, 458-59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not "remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." *State v. Bebb*, 44 Wn.App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) ("If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.").

"Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *Russell*, 125 Wn.2d at 85. If a defendant—who did not object at trial—can establish that misconduct occurred, then he or she must also 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." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted). Under this heightened standard, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *Russell*, 125 Wn.2d at 85 ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

"[W]hile it is misconduct for the prosecutor to suggest that evidence not presented at trial provides additional grounds for the jury to return a guilty verdict, it is not misconduct for the prosecutor to argue that evidence

does not support the defense theory or to fairly respond to defense counsel's argument." *State v. Thorgerson,* 172 Wn.2d 438, 449-450, 258 P.3d 43 (2011) (citing *Russell*, 125 Wn.2d at 87). A prosecutor's remarks in rebuttal, even if they would otherwise be improper, are not misconduct if they were "'invited, provoked, or occasioned'" by defense counsel's closing argument, so long as the remarks do not go beyond a fair reply and are not unfairly prejudicial. *State v. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (quoting *State v. LaPorte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)). "When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990). A prosecutor's rebuttal comment is not misconduct when an impartial jury might have reached the same conclusion as the prosecutor's comment had it not been made, when the comment was invited by defense counsel's argument. See *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

In *Russell*, the defense advanced a theory that the police did an inadequate job of investigating and that they did not test every conceivable item of evidence. 125 Wn.2d at 87. The prosecutor responded by arguing:

> You may have reason to guess that there is incriminating evidence that has not been developed. You really think that there is evidence of innocence there? The police are only human. They made mistakes, they did the best they could. They developed a lot of incriminating evidence. There may be some that remained undeveloped.

Id. The Court found that the prosecutor's statements were "aimed more at responding to defense criticisms than at finding additional reasons to convict Russell." *Id.* Because the prosecutor was responding to a constant defense theme, "the prosecutor's statement constituted a fair response to that theory." *Id.* Additionally, the court ameliorated any negative impact of the statement when it instructed the jury to base its decision solely on the evidence presented in court, and not to consider evidence that was not presented. *Id.* at 87-88.

Here, the Court of Appeals did not reach the question of whether the prosecutor's rebuttal argument was improper, because it found that Newlen suffered no prejudice as a result. The Court of Appeals held that if the State made an improper argument during rebuttal, the trial court's instruction to the jury that argument was not evidence and the jury must consider only admitted evidence "cured any risk the jury would have improperly assumed the State was suggesting there was additional evidence they should consider." *Slip Op.* at 12. The Court then expressly stated: "Because Newlen has not shown a curative instruction would not have obviated this

potential for error, this prosecutorial misconduct claim fails." *Slip Op.* at 12. Declining to decide whether the argument was improper, when there was no prejudice, did not appear to imply misconduct as Newlen claims. The Court of Appeals' ruling demonstrated its correct understanding of the standard of review for a claim of prosecutor misconduct when there was no objection at trial. Because there Court of Appeals found that Newlen did not suffer any prejudice, his claim of misconduct was properly rejected.

Moreover, the prosecutor's rebuttal argument was not improper. The prosecutor never argued the jury was to consider a fact not in evidence. Conversely, during his closing argument, Newlen's attorney argued:

> Mr. Bentson talks about Jeannie Brissett being an independent witness. I'm not so sure that's accurate. Her testimony *is inconsistent with what she tells Deputy Huffine.* She tells Deputy Huffine Mr. Newlen talks to me from the fence line, you know, he initiates this discussion about the fence line and *never tells Deputy Huffine...he comes inside the fence and in any way is intimidating* or anything else. Now she's in a position, comes in[]to testify later and says, you know, he kind of surprises her; he's in her yard; *he's intimidating.*

RP 6/12/15 at 130 (emphasis added). No testimony was ever admitted that Brissett had told Sgt Huffine she had not been intimidated, and only a few details of their conversation were introduced. RP 6/11/15 at 94, 103, 148. However, despite the fact that no evidence of her conversation with Sgt Huffine—which would have been hearsay—had been presented

contradicting her testimony that she was intimidated, Newlen's attorney argued that when Brissett testified to being intimidated by Newlen, this was inconsistent with what she told Sgt Huffine at the time.

During rebuttal, the prosecutor responded:

> You didn't hear the entirety of her [Brissett's] conversation with Sergeant Huffine. Evidence rules don't allow you to hear all of that. She testified to what happened and Defense got a chance to cross-examine her, and there was no – you know, that she was intimidated by him, that's not inconsistent with what she told Sergeant Huffine, that's just not evidence that was presented.

RP 6/12/15 at 139. Newlen did not object. However, an objection would not have been sustained, as Newlen's attorney invited the response and the prosecutor did not suggest there was additional evidence the jury should consider. Brissett testified she was intimidated by Newlen and no evidence was presented that she had told Sgt Huffine otherwise. The prosecutor neither argued nor implied that she told Sgt Huffine she was intimidated, but merely pointed out that no evidence was presented that she told him she was not intimidated. This countered Newlen's attorney's argument, which went beyond the evidence that had been admitted. Thus, unlike Newlen's attorney's argument, the prosecutor's rebuttal was based only on evidence that had been presented and nothing more. As in *Russell*, the prosecutor's rebuttal constituted a fair response to the defense argument—which was

are not evidence" and that it "must disregard any remarks, statements, or argument that is not supported by the evidence[.]" RP 6/12/15 at 103. Thus, even assuming the prosecutor's argument should have been objected to and an instruction requested, there was no prejudice, because the "jury is presumed to follow the trial court's instructions." *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Because the Court of Appeals properly applied the standard of review to Newlen's misconduct claim, he fails to raise grounds for review under RAP 13.4(b)(1) or (3).

B. WHEN ANALYZING NEWLEN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD OF REVIEW.

Because the Court of Appeals correctly applied the standard of review for his claim of ineffective assistance of counsel, Newlen fails to show grounds for relief on this basis. To show that a failure to object caused counsel to be ineffective the defendant has the burden of showing that "not objecting fell below prevailing professional norms, that the proposed objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Newlen attempts to intertwine two different standards of review—prosecutorial misconduct when there was no objection at trial and ineffective assistance of counsel—to create a new and confusing standard. When there is no

objection, prosecutorial misconduct requires flagrant and ill-intentioned conduct, as well as a showing that no curative instruction could have obviated any prejudicial effect. *See Emery*, 174 Wn.2d at 760-61. Alternatively, a claim of ineffective assistance of counsel based on a failure to object requires showing there was no legitimate tactical reason not to object and then showing the defendant did not suffer prejudice as a result. *See Davis*, 152 Wn.2d at 714. By intertwining the standards of review, Newlen attempts to create an additional means of finding prejudice for his ineffective assistance claim by bootstrapping the ineffective assistance standard to the standard for misconduct. But, he provides no authority for this proposition. His ineffective assistance claim fails because he fails to show the objection would have been sustained, and he fails to show a reasonable probability the outcome of the trial would have been different had his attorney objected.

"Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained." *State v. Fortun-Cebada*, 158 Wn.App. 158, 172, 241 P.3d 800 (2010). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989). Courts presume that "the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the

defendant to rebut this presumption." *State v Johnston*, 143 Wn.App. 1, 20, 177 P.3d 1127 (2007). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Madison*, 53 Wn.App. at 763.

"[W]hile it is misconduct for the prosecutor to suggest that evidence not presented at trial provides additional grounds for the jury to return a guilty verdict, it is not misconduct for the prosecutor to argue that evidence does not support the defense theory or to fairly respond to defense counsel's argument." *Thorgerson*, 172 Wn.2d at 449-450. Any allegedly improper statements by the State in closing argument "should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003). A prosecutor's "remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements[.]" *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1005 (1995).

Here, it was reasonable for Newlen's attorney not to object, because the prosecutor did not argue that the jury should consider excluded evidence. The prosecutor never argued that Brissett told Sgt Huffine she was intimidated. The prosecutor never suggested or implied anything about

the substance of her conversation with Sgt Huffine. The only portion of Brissett and Sgt Huffine's conversation that was admitted was in regard to whether or not Newlen had come inside the fence line. RP 6/11/15 at 94, 103, 148. Yet, Newlen's attorney argued Brissett's testimony was "inconsistent with what she tells Deputy Huffine...and [Brissett] never tells Deputy Huffine…he comes inside the fence and in any way is intimidating or anything else." RP 6/12/15 at 130. When only a portion of their conversation—regarding the fence line—had been admitted, the State was entitled to rebut Newlen's attorney's unsupported claim that this was inconsistent with her testimony that she was intimidated.[1] In no way did this suggest what the substance of her conversation with Sgt Huffine was. Because Newlen's attorney invited the prosecutor's rebuttal during his closing argument, and the prosecutor did not err in rebutting his incorrect claim, it was reasonable not to object.

Additionally, Newlen suffered no prejudice as a result of his attorney's decision not to object. "Prejudice is established if the defendant

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[1] Newlen also maintains "speculation was specifically directed at the claim that Newlen was 'intimidating' to the witness." *Petition for Review* at 5. Brissett's testimony that Newlen was "a little intimidating" was part of her explanation as to why she acquiesced to Newlen cutting the fence. RP 6/11/15 at 81. After Newlen's attorney argued Brissett had not claimed to have been intimidated in her prior conversation, the prosecutor merely explained Newlen's argument that she never told Sgt Huffine she was intimidated went beyond the evidence the jury had heard. Thus, Newlen's argument regarding speculation takes the statements of Brissett, Newlen's attorney, and the prosecutor wildly out of context.

shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols*, 161 Wn.2d 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The Court of Appeals correctly found "there was no reasonable probability that failure to object to any improper argument would have affected the outcome of the trial." *Slip Op.* at 18. Newlen's argument that he suffered prejudice because his attorney failed to request a curative instruction, ignores the instruction the Court of Appeals did consider:

> The trial court's reiteration of the instruction to the jury, that argument is not evidence and that the jury must consider only the evidence that the trial court admitted without concerning itself about the reasons, would have cured any risk that the jury would have improperly assumed that the State was suggesting there was additional evidence they should consider.

Slip Op. at 12. By properly instructing the jury, the trial court eliminated any risk of prejudice from the alleged improper argument. Moreover, Newlen did not suffer any prejudice from the jury not being instructed, when the court did instruct the jury on this issue, even without Newlen requesting such an instruction. Because the jury received the instruction that would have been requested, there is not a reasonable probability that the outcome of the trial would have been different had Newlen's attorney objected and requested a similar instruction.

Further, although in addressing Newlen's ineffective assistance claim the Court of Appeals focused on the only impeachment evidence that was actually admitted—Brissett's prior statements regarding whether or not Newlen entered the fence line—the analysis was still correct. The prosecutor's remarks were invited by defense counsel, and Brissett's earlier conversation with Sgt Huffine was not central to the defense theory: that Newlen did not possess intent when he struck Mr. Hug.

Of course, the alleged harm from the decision not to object must be weighed against the evidence presented at trial. The jury heard evidence that Newlen had an ongoing dispute with Mr. Hug over the fence, was angrily cussing at Mr. Hug, and was cutting the fence. RP 6/11/15 at 81, 114, 118. After Mr. Hug pushed the bolt-cutter head off of the fence, both Mr. Hug and Brissett described Newlen as pulling or rearing the bolt-cutters back, swinging them at Mr. Hug, and striking him. RP 6/11/15 at 85, 101, 119-120. No inconsistency was ever demonstrated between what they originally told Sgt Huffine on this point and their testimony at trial. RP 6/11/15 at 103-06, 147-48.

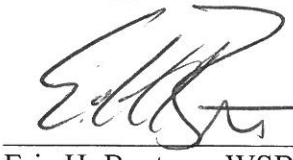
On the other hand, Newlen originally described having been in a tug-of-war with Mr. Hug over the bolt-cutters and claimed Mr. Hug lost his grip yet somehow pulled them into himself. RP 6/12/15 at 51, 56. Then at trial, Newlen dramatically contradicted his earlier statement, claiming that

he attempted to set the bolt-cutters back on the fence but overcorrected and "clipped Hug."[2] RP 6/12/15 at 42. The stark contrast between Newlen's testimony and what he told Sgt Huffine, made his testimony highly questionable. Therefore, it was not surprising the jury found Brissett and Mr. Hug more credible with regard to whether or not Newlen intentionally struck Mr. Hug with the bolt-cutters. Thus, even if the jury instruction had not cured any risk of prejudice, as it did, there was not a reasonable probability that the outcome of the trial would have been any different. Because Newlen did not suffer any prejudice, his claim of ineffective assistance fails, and he raises no grounds for review under RAP 13.4(b).

VI. CONCLUSION

Because the petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 5th day of October, 2017.



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[2] Perhaps the reason for this change in Newlen's rendition of what occurred was due to the realization that when a tug-of-war over an item is occurring and one party lets the item go, the item does not travel toward the person who let go, but in the opposite direction, toward the person who is still pulling.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Supreme Court portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 5th, 2017.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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