

No. 45199-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

MICHAEL W. LOWE, APPELLANT

Appeal from the Superior Court of Mason County
State of Washington
The Honorable Judge Toni Sheldon

No. 12-1-00529-0

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>STATE’S RESTATEMENT OF APPELLANT’S ASSIGNMENTS OF ERROR</u> | 1 |
| B. <u>STATE’S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR</u> | 1 |
| C. <u>FACTS AND STATEMENT OF CASE</u> | 2 |
| D. <u>ARGUMENT</u> | 2 |

1. Lowe contends that, because the victim of his crime of felony harassment was an armed law enforcement officer, and because Lowe was intoxicated and under arrest when he threatened to kill the victim, the evidence was insufficient to sustain the jury’s guilty verdict for the crime of felony harassment because it was unreasonable for the victim to fear that the threat would be carried out immediately or in the future. The State counters that the question as to whether the victim’s fear was reasonable was a question properly answered by the jury and that the jury’s verdict is supported by ample evidence in the record.....2

2. During closing arguments the prosecutor commented on several occasions that certain portions of the State’s evidence was “uncontradicted.” Lowe contends that the prosecutor’s comments were an improper reference to Lowe’s decision to exercise his right not to testify. The State contends that the prosecutor’s comments were not a reference to Lowe’s decision not to testify, that the comments were not flagrant or ill-intentioned, that Lowe suffered no undue prejudice from the comments, and that because Lowe failed to preserve the issue with an objection at trial, he should not be permitted to raise

State’s Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

the issue for the first time on appeal.....6

3. Lowe asserts that his trial counsel was ineffective for failing to object at trial when the prosecutor referred to certain portions of the State’s evidence as “uncontradicted.” The State contends that the prosecutor’s comments were not error; and the State further contends that, in any event, because the jury was properly instructed in regard to the defendant’s right not to testify, the context of the prosecutor’s comments as whole shows that there is no likelihood that the jury’s verdicts would have been different in the absence of the prosecutor’s comments. Lowe, therefore, cannot show the required prejudice necessary to prevail on his claim of ineffective assistance of counsel.....8

E. CONCLUSION.....10

State’s Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Page

Table of Cases

State Cases

State v. Ashby,
77 Wn.2d 33, 459 P.2d 403 (1969)..... 8

State v. Brett,
126 Wn.2d 136, 892 P.2d 29..... 8, 9

State v. Greiff,
141 Wn.2d 910, 10 P.3d 390 (2000)..... 11

State v. Hendrickson,
129 Wash.2d 61 –78, 917 P.2d 563 (1996)..... 10

State v. Morris,
150 Wn. App. 927, 210 P.3d 1025 (2009)..... 7

State v. Salinas,
119 Wn.2d 192, 829 P.2d 1068 (1992)..... 6

State v. Stein,
144 Wn.2d 236, 27 P.3d 184 (2001)..... 8

State v. Thomas,
150 Wn.2d 821 –75, 83 P.3d 970 (2004)..... 6

State v. Warren,
165 Wn.2d 17, 195 P.3d 940 (2008)..... 7

State’s Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Federal Cases

Kimmelman v. Morrison,
477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)..... 10

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052, 466 U.S. 668, 104 S.Ct. 2052, 80
L.Ed.2d 674 (1984) 9, 10

Statutes

RCW 9A.46.020(1)(a)(i) and (2)(b)..... 5

Court Rules

RAP 10.3(b) 3

State’s Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S RESTATEMENT OF APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in not taking count I, felony harassment, from the jury for lack of sufficient evidence.
2. 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.
3. 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. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Lowe contends that, because the victim of his crime of felony harassment was an armed law enforcement officer, and because Lowe was intoxicated and under arrest when he threatened to kill the victim, the evidence was insufficient to sustain the jury's guilty verdict for the crime of felony harassment because it was unreasonable for the victim to fear that the threat would be carried out immediately or in the future. The State counters that the question as to whether the victim's fear was reasonable was a question properly answered by the jury and that the jury's verdict is supported by ample evidence in the record.
2. During closing arguments the prosecutor commented on several occasions that certain portions of the State's evidence was "uncontradicted." Lowe contends that the prosecutor's comments were an improper reference to Lowe's decision to exercise his right not to testify. The State contends that the prosecutor's comments were not a reference to Lowe's decision not to testify, that the comments were not flagrant or

State's Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

ill-intentioned, that Lowe suffered no undue prejudice from the comments, and that because Lowe failed to preserve the issue with an objection at trial, he should not be permitted to raise the issue for the first time on appeal.

3. Lowe asserts that his trial counsel was ineffective for failing to object at trial when the prosecutor referred to certain portions of the State's evidence as "uncontradicted." The State contends that the prosecutor's comments were not error; and the State further contends that, in any event, because the jury was properly instructed in regard to the defendant's right not to testify, the context of the prosecutor's comments as whole shows that there is no likelihood that the jury's verdicts would have been different in the absence of the prosecutor's comments. Lowe, therefore, cannot show the required prejudice necessary to prevail on his claim of ineffective assistance of counsel.

B. FACTS AND STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Lowe's recitation of the procedural history and facts, with the exception of additional facts as needed to develop the State's arguments, below.

C. ARGUMENT

1. Lowe contends that, because the victim of his crime of felony harassment was an armed law enforcement officer, and because Lowe was intoxicated and under arrest when he threatened to kill the victim, the evidence was insufficient to sustain the jury's guilty verdict for the crime of felony harassment because

State's Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

it was unreasonable for the victim to fear that the threat would be carried out immediately or in the future. The State counters that the question as to whether the victim's fear was reasonable was a question properly answered by the jury and that the jury's verdict is supported by ample evidence in the record.

The State accepts Lowe's statement regarding the standard of review for claims of insufficiency of the evidence. In the instant case, Lowe contends that the evidence was insufficient to convict him for felony harassment because, he contends, it was unreasonable for the victim to have taken Lowe seriously when Lowe threatened to kill him. Br. of Appellant at 4-7.

The evidence at trial showed that the victim, Officer Blaylock, contacted Lowe to detain him pursuant to an investigation. RP 30. Officer Blaylock had had contact with Lowe in the past, and he knew him to be hostile toward law enforcement. RP 30. Lowe was eventually placed under arrest. RP 30. Lowe threatened Officer Blaylock and told him that he was going to kill him. RP 32, 51. Lowe was extremely hostile. RP 31-33. Lowe continued to threaten Officer Blaylock, telling him that he was going to die and that he was going to kill him. RP 34. Officer Blaylock testified that he took Lowe's threats to kill him seriously. RP 35, 41.

State's Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Based upon these facts, the State charged Lowe, in Count I of a three count information, with felony harassment. CP 65-66. To prove the offense of felony harassment, the State was required to prove that Lowe, without lawful authority, knowingly threatened to kill Officer Blaylock immediately or in the future and that Lowe, by words or conduct, placed Officer Blaylock in reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(a)(i) and (2)(b).

The jury was instructed that one of the elements that must be proved beyond a reasonable doubt was that “words or conduct of the defendant placed [Officer] Blaylock in reasonable fear that the threat to kill would be carried out[.]” CP 58 (Jury Instruction No. 13).

Additionally, the jury was instructed that:

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 54 (Jury Instruction No. 54). After receiving the evidence and after receiving the whole of the court’s instructions to the jury, the jury returned a guilty verdict for the charge of harassment with a threat to kill. CP 38.

Lowe contends that because he was highly intoxicated when he threatened to kill Officer Blaylock, and that because Officer Blaylock is a

State’s Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

trained officer who was armed at the time of the threats, while Lowe was in restraints, it is not reasonable that Officer Blaylock would fear that Lowe would immediately or in the future carry out his threats to kill Officer Blaylock. Br. of Appellant at 5-7. But the context of Lowe's threats shows that his threat to kill Officer Blaylock was not made in jest, that it was not idle talk, and that it was not political argument. RP 29-41. Instead, Lowe exhibited great hostility when making the threats, and the threats were made in a context that indicated an actual intent to carry out the threats. RP 29-41.

On review of a claim of insufficiency of the evidence, the reviewing court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). The context of Lowe's threats to kill show that he was in a highly agitated and hate-filled state of mind when he made the threats, and it was within the province of the jury to view the evidence, to weigh the persuasiveness of the competing theories, and to find that Lowe's threats were a serious assertion of his intent and that it was reasonable for Officer Blaylock to take the threats seriously. *Id.* On these facts the evidence is sufficient to sustain the jury's verdict. *Id.*; *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992).

State's Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

2. During closing arguments the prosecutor commented on several occasions that certain portions of the State's evidence was "uncontradicted." Lowe contends that the prosecutor's comments were an improper reference to Lowe's decision to exercise his right not to testify. The State contends that the prosecutor's comments were not a reference to Lowe's decision not to testify, that the comments were not flagrant or ill-intentioned, that Lowe suffered no undue prejudice from the comments, and that because Lowe failed to preserve the issue with an objection at trial, he should not be permitted to raise the issue for the first time on appeal.

Lowe identifies several instances where the prosecutor during closing argument referred to certain portions of the State's evidence as "uncontradicted," and Lowe contends that these comments were an improper comment on his decision not to testify. Br. of Appellant at 10-13. Lowe did not object to the prosecutor's comments in the trial court, and he now raises this issue for the first time on appeal.

"Absent a timely and proper objection, a prosecutor's alleged misconduct cannot be raised for the first time on appeal unless it was so flagrant and ill-intentioned that no curative instruction could have obviated the resulting prejudice." *State v. Morris*, 150 Wn. App. 927, 931, 210 P.3d 1025 (2009), citing *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). Here, the State contends that the prosecutor's comments were

State's Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

not misconduct, but even if the comments would have been improper, a curative instruction would have cured any resulting prejudice. The prosecutor's comments were neither flagrant nor ill-intentioned, and a timely objection would have resulted in only one instance of the use of the term "uncontradicted" rather than the several instances that occurred in this case. It follows that a timely objection would have obviated any possible prejudice.

But the State maintains that the prosecutor's comments were not misconduct. The trial court in this case correctly 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." CP 51 (Jury Instruction No. 6). The jury is presumed to follow the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). And, "[c]omments by a prosecutor that certain testimony is undenied are not improper so 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) (citing *State v. Ashby*, 77 Wn.2d 33, 38, 459 P.2d 403 (1969); *State v. Crawford*, 21 Wn. App. 146, 584 P.2d 442 (1978)).

Lowe contends that "the record demonstrates he was the only person who could rebut the State's evidence, given that the sole issue

State's Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

relating to the felony harassment charge was whether Lowe had placed Blaylock in reasonable fear that the threat to kill would be carried out.” Br. of Appellant at 12. But the prosecutor did not insinuate that Lowe was the only possible person who could contradict the State’s evidence. Arguably, it would be unlikely that Lowe could offer any testimony in regard to whether another person’s fear – which in this case was Officer Blaylock’s fear – was reasonable. Statements related to undisputed testimony are not flagrant and ill-intentioned so long as there is no reference to who may be in a position to dispute it. *Brett* at 176.

3. Lowe asserts that his trial counsel was ineffective for failing to object at trial when the prosecutor referred to certain portions of the State’s evidence as “uncontradicted.” The State contends that the prosecutor’s comments were not error; and the State further contends that, in any event, because the jury was properly instructed in regard to the defendant’s right not to testify, the context of the prosecutor’s comments as whole shows that there is no likelihood that the jury’s verdicts would have been different in the absence of the prosecutor’s comments. Lowe, therefore, cannot show the required prejudice necessary to prevail on his claim of ineffective assistance of counsel.

Lowe contends that his trial counsel was ineffective because he failed to object when the prosecutor referred to portions of the State’s evidence as uncontradicted. Br. of Appellant at 15-16. To establish

State’s Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

ineffective assistance of counsel, Lowe must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wash.2d 61, 77–78, 917 P.2d 563 (1996). There is a strong presumption that counsel rendered adequate assistance and that counsel made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689–90. “[T]he defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms.” *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

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). The prosecutor's statements in the instant case were not unduly prejudicial and did not imply that Lowe had an obligation to testify or that he was guilty because he did not testify.

A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Brown* at 561. The

State's Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

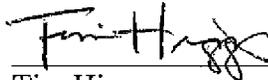
instructions read to the jury in this case remedied any prejudice that may have existed because of the State's comments during closing arguments. CP 51 (Jury Instruction No. 6). In the context of the trial as a whole, there is no probability that the failure to object would have or did affect the jury verdict. The jury is presumed to follow the court's instructions, and because Lowe has not overcome this presumption, he has not shown prejudice as a result of any potentially deficient performance by his trial counsel. *State v. Greiff*, 141 Wn.2d 910, 923, 10 P.3d 390 (2000).

D. CONCLUSION

For the reasons stated above the State asks that the defendant's appeal be denied and that the jury's verdicts be sustained.

DATED: June 24, 2014.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

State's Response Brief
Case No. 45199-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

MASON COUNTY PROSECUTOR

June 24, 2014 - 4:14 PM

Transmittal Letter

Document Uploaded: 451999-Respondent's Brief.pdf

Case Name: State v. Michael Lowe

Court of Appeals Case Number: 45199-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tim J Higgs - Email: timh@co.mason.wa.us

A copy of this document has been emailed to the following addresses:

ted9@me.com