

NO. 45768-7-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

BRUCE J. LENNARTZ,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Gary R. Tabor, Judge  
Cause No. 13-1-01066-0

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BRIEF OF APPELLANT

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THOMAS E. DOYLE, WSBA NO. 10634  
Attorney for Appellant

P.O. Box 510  
Hansville, WA 98340  
(360) 626-0148

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count II, tampering with a witness, from the jury for lack of sufficient evidence.
02. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Lennartz of a fair trial on the charge of tampering with a witness.
03. The trial court erred in permitting Lennartz to be represented by counsel who provided ineffective assistance by failing to object to the prosecutor's improper closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence Lennartz attempted to induce Klampe to testify falsely or to withhold any testimony?  
[Assignment of Error No. 1].
02. Whether the prosecutor's closing argument, which mischaracterized the evidence and impermissibly used the "golden rule" argument, deprived Lennartz of a fair trial on the charge of tampering with a witness?  
[Assignment of Error No. 2].
03. Whether Lennartz was prejudiced as a result of his counsel's failure to object to the prosecutor's improper closing argument?  
[Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Bruce John Lennartz was charged by corrected

second amended information filed in Thurston County Superior Court December 18, 2013, with two felony offenses: assault in the second degree, count I, tampering with a witness, count II, and with seven gross misdemeanors: assault in the fourth degree, count III, interfering with the reporting of domestic violence, count IV, and violation of pretrial no-contact order, counts V-IX, contrary to RCWs 9A.36.041, 9A.36.021(g)(2), 9A.36.150, 9A.72.120(1)(a), 10.99.020, 10.99.040(2), 10.99.040(4) and 26.50.110(1). Each count named Doresa A. Klampe as the victim and alleged domestic violence. [CP 77-79].

No pretrial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 12]. Trial to a jury commenced December 16, the Honorable Gary R. Tabor presiding. The jury failed to reach a verdict on count I (assault second) but convicted Lennartz of the remaining counts, for which he was sentenced within his standard range, and timely notice of this appeal followed. [CP 83-90, 124, 136-145].

02. Substantive Fact<sup>1</sup>

02.1 Counts III-IV: Assault in the Fourth Degree and Interfering with Reporting Domestic Violence

Just past midnight July 14, 2013, police

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<sup>1</sup> The counts are presented in non-sequential order for the purpose of simplifying the presentation of the case.

were dispatched to the scene of a reported incident at a trailer in Thurston County. [RP 176, 249]. Doresa A. Klampe, whose face was scratched and swollen and had a significant gash on the finger of her right hand, [RP 181, 186, 222-23, 251; State's Exhibits 1-9], was hysterical and crying when contacted by the deputies [RP 181, 251], one of whom could "smell the strong odor of alcohol coming from her person." [RP 198]. She said she had gotten into an argument with her boyfriend Lennartz who punched and kicked her and prevented her from calling 911 by breaking one of her cell phones and knocking another out of her hands, saying something to the effect that she would ruin his life if she made the call. [RP 96, 99, 108-111, 113, 196; State's Exhibit 19]. Before leaving, he told her "he'd pull my trailer out back and burn it if I didn't leave." [RP 113].

Lennartz was apprehended several hours later in an RV parked next to Klampe's trailer [RP 216], and after advisement and waiver of rights, denied assaulting her, claiming he had left her trailer earlier that morning when she had slapped him. [RP 217-19]. He didn't know her cell phone was broken. [RP 219].

02.2 Counts V-IX: Violation of Pretrial No-Contact Order/Domestic Violence

A pretrial no-contact order was entered July 15 in open court in Lennartz's presence that prohibited him from having

contact by any means with Klampe and from coming within 500 feet of her residence. [State's Exhibit 8]. It is this order (protection order) that Lennartz was charged with violating in counts V-IX. [CP 77-79].

02.2.1 Count V: July 21, 2013

On July 21, Klampe reported a violation of the protection order and produced text messages sent to her by Lennartz. [RP 118-122, 227, 237-245; State's Exhibits 9-14].

02.2.2 Count VI: July 25, 2013

On July 24, Klampe again reported a violation of the protection order and again produced text messages sent to her by Lennartz. [RP 264-66, 269-70; State's Exhibits 15-18].

02.2.3 Count VII: October 10, 2013

On October 10, Lennartz called and talked to Klampe from the Thurston County Jail. [RP 317-328].

02.2.4 Count VIII: October 14, 2013

On October 14, Lennartz called and talked to Klampe from the Thurston County Jail. [RP 339-342].

02.2.5 Count IX: October 22, 2013

On October 22, Lennartz, using the name Shawn, called and talked to Klampe from the Thurston County Jail. [RP 347-357].

02.3 Count II: Tampering with a Witness/  
Domestic Violence

The State presented—and eventually argued—the following incidents in support of its charge that between July 13 and December 12, 2013, Lennartz attempted to induce Klampe to testify falsely or to withhold any testimony. All telephone conversations refer to calls to Klampe from Lennartz while he was in jail, and all quoted statements therein are attributable to Lennartz, with the exception of two statements attributable to Klampe in sections 2.3.7 and 2.3.9. Separate citations to the prosecutor’s closing argument are provided to illustrate the State’s reliance on each specific occurrence as proof of the charge.

02.3.1 July 21 statement by Klampe to Deputy Ryan Russell: “He (Lennartz) has been coercing me and he texted saying that I caused all this trouble, that I need to go down to the courthouse and I need to fix it, and so, you know, things like that.” [State’s Exhibit 26 at 4]. [Prosecutor’s Closing Argument RP 412].

02.3.2 July 25 text message from Lennartz to Klampe: “It’s our fault. That’s what I’m saying, our fault, not mine or yours, ours. That’s what you should say too.” [State’s Exhibit 18; RP 275]. [Prosecutor’s Closing Argument RP 412].

02.3.3 October 10 telephone call: “I’ll send you another letter today.” [RP 322]. “I’ll write you a couple love letters. I’ll send you a letter, okay?” [RP 327]. [Prosecutor’s Closing Argument RP 412].

02.3.4 October 10 telephone call: “[T]ell them you knew I was texting. Tell them it was them texting me on your phone.” [RP 326]. [Prosecutor’s Closing Argument RP 413].

02.3.5 October 12 telephone call: “And as far as me texting stuff like that, you know, Sammy<sup>2</sup> had your phone too, or had a phone too, right?” [RP 330]. [Prosecutor’s Closing Argument RP 413].

02.3.6 October 10 telephone call: “I told him (investigator), I admitted to a text or whatever and my lawyer got pissed off at me .... [RP 325]. October 12 telephone call: “[M]y lawyer says I messed up, and I messed up by telling the investigator, I told him - - I admitted to texting, okay?” [RP 334]. [Prosecutor’s Closing Argument RP 413].

02.3.7 October 14 telephone call: “But the prosecutor wants to know where these marks (injuries to Klampe) came

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<sup>2</sup> “Sammy” appears to be a reference to Samantha Youckton, the individual who initially reported the domestic disturbance to 911. [RP 179].

from, okay?” [RP 341]. Klampe: “Probably from when she - - probably - - when she broke through the window out that day to get in there that day she when she locked her keys in. Crawled through the window and she fell, fell.” [RP 341]. October 22 telephone call: “Sammy has got to admit to lying, okay? .... And she’s going to have to admit to lying or something, something, you know, but marks on you, where did the marks come from? Everybody says I put them on there. Where did they come from? I love you with all my heart, okay? Okay?” [RP 351]. [Prosecutor’s Closing Argument RP 414-15].

02.3.8 October 22 telephone call: “Larry<sup>3</sup> didn’t say anything about that (letter Klampe said she wrote prosecutor), I don’t know if they got that information or not, I don’t even, I don’t know what happened.” [RP 353]. “Somebody has got to get up there and tell the truth or something, okay?” [RP 354]. [Prosecutor’s Closing Argument RP 415].

02.3.9 October 22 telephone call: Klampe: “If I tell the truth, then I have to go to jail.” [RP 354]. [Prosecutor’s Closing Argument RP 417].

02.3.10 October 14 telephone call: “It’s going to be a big fight. Either I’m going to do it alone. I’ll take Steve out,

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<sup>3</sup> “Larry” is presumably a reference to Larry Jefferson, Lennartz’s attorney. [RP 75].

I'll take Ahear out, I'll take Deny out, I'll take everybody out, everybody that's involved in this shit, I'll take them out, okay? Rick and Michelle, all of them. This is no laughing matter. I don't want to be laughed at."<sup>4</sup> [RP 342]. [Prosecutor's Closing Argument RP 416].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE THAT LENNARTZ ATTEMPTED TO INDUCE KLAMPE TO TESTIFY FALSELY OR TO WITHHOLD ANY TESTIMONY.

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

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<sup>4</sup> No record was made as to the identity of any of the names mentioned in this statement.

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 prove witness tampering, the State had to show (1) that Lennartz attempted to induce Klampe to “[t]estify falsely or, without right or privilege to do so, to withhold any testimony,” RCW 9A.72.120(1)(a), and (2) that Klampe was a witness he “[had] reason to believe [was] about to be called as a witness in any official proceeding.”<sup>5</sup>

As set forth supra at 3-8, the State’s evidence was drawn from statements made by Klampe, text messages, and telephone conversations between Klampe and Lennartz while he was in jail, most of which apparently had nothing to do with the case, an assumption not open to serious question given the State played only four calls from a collection of approximately 40 completed calls [RP 301-04], all of which had been reviewed by law enforcement. [RP 305]. During the first telephone conversation October 10, Lennartz admitted to texting [RP 325], a point emphasized by the State during closing argument. [RP 413]. Despite this, a critical part of the State’s theory of the case centered on the argument that Lennartz was trying to get Klampe to lie or withhold information

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<sup>5</sup> Lennartz is not arguing that Klampe was not a qualified witness.

about this. Citing the October 12 phone call, the prosecutor argued:

“[H]e’s still trying to cook up a new story” by telling Klampe “[a]s far as me texting, Sammy had your phone too, right?” [RP 413]. What Lennartz actually said was “Sammy had your phone, or had a phone too, right?” [RP 330].

The prosecutor was certain about the October 10 call:

But we do know that on October the 10<sup>th</sup> the defendant said, “Tell him it wasn’t even you I was texting.” And this happened during the time when he was talking about you need to write a letter to the prosecutor. You need to write a letter to the judge. It was right after he said, “You need to write a letter to the prosecutor.” He said, “Tell him it wasn’t even you I was texting.”

[RP 412-13].

A review of the October 10 phone call does not disclose this information. Only after Klampe voiced her concern about Lennartz’s incarceration, did he respond:

I don’t know what you can do, honey. Try to get a hold of that gal, try to write a letter to the judge or prosecutor saying we’ll go to classes together, they have to drop the domestic deal.

[RP 324]. Later, the two returned to the topic:

[Klampe]: I’m trying to get that thing off the no-contact order. It says that you have - - she said that I had to go to the counselor and she spoke - -

[Lennartz]: Tell them we'll both go through counseling, tell them, tell them you knew I was texting. Tell them it was them texting me on your phone.

[RP 325-26].

In response to Lennartz telling Klampe that the prosecutor will want to know how she was injured, Klampe suggested the broke-through-the-window story, not Lennartz and not at his suggestion. [RP 341]. It appears the prosecutor wanted it both ways, i.e., to argue seemingly incompatible concepts in the pursuit of Lennartz's guilt. For instance, Lennartz's admissions to texting served as evidence of his violation of the no-contact order. [RP 413]. But when he continually told Klampe to tell the truth, as acknowledged by the prosecutor [RP 415], this conformity to fact morphed into something else: "I submit to you," the prosecutor argued, "that tell the truth was code for come up with some other story and tell everyone that the new story is the truth [RP 415](,)" which is difficult to juxtapose with Klampe's claim that "[i]f I tell the truth then I have to go to jail." [RP 354].

The State's case was constructed on speculation and not reasonable inference to be drawn from the facts. During a phone call on October 10, Lennartz told Klampe he was going to write her "a couple of love letters [RP 327](,)" which the prosecutor used to engage in conjectural thought:

“[W]hat was he saying in those letters? Well, we don’t know. We don’t know.” [RP 412]. And it didn’t stop there.

You heard the defendant talking about when he was going to trial, he said, “I’ll take everybody down.” He’s going to have a big fight. He talked about - - he listed a whole set of names that he was going to bring down with him. We don’t know who those people are. You didn’t hear any evidence about those people. I have no way of knowing and you have no way of knowing whether or not that statement affected Mrs. Klampe, but I submit to you that the defendant may have. The defendant may have known whether or not those people were drug dealers, whether or not Mrs. Klampe was involved in something where she feared these people getting brought down with the defendant. We have no way of knowing that....

[RP 416-17].

A reasonable inference is that Lennartz was convinced that both he and Klampe were at fault [RP 275], that he did not like being in jail, that he wanted the charges to go away and for Klampe to do what she could to bring this about. [State’s Exhibit 26 at 4]. But this is not tampering.

An attempt to induce a witness does not depend solely on the literal meaning of the words used. State v. Rampel, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990). And “induced,” as used in the witness tampering statute, does not require proof of a threat or offer of reward. Id. In Rampel, the defendant called the rape victim several times from jail and told her he was sorry and asked her to drop the charges. He also told her that it was

going to ruin his life, and that he would not do it again. Id. at 81. The Washington Supreme Court held this evidence insufficient to establish that Rampel had attempted to induce the victim to testify falsely or to withhold testimony, reasoning, in part, that “[t]he words ‘drop the charges’ reflect a lay person’s perception that the complaining witness can cause a prosecution to be discontinued.” Id. at 83.

Likewise, no evidence was presented that Lennartz asked Klampe to testify falsely or to withhold evidence, which falls short of the situation in State v. Lubers, 81 Wn. App. 614, 622-23, 915 P.2d 1157, reviewed denied, 130 Wn.2d 1008 (1996), where this court found sufficient evidence of tampering based on testimony that the defendant had asked a witness to make a false statement and thereby effectively recant a prior signed statement the witness had given to the police. Nor is this case similar to State v. Sanders, 66 Wn. App. 878, 890, 833 P.2d 452, review denied, 120 Wn.2d 1027 (1993), where there was sufficient evidence on the basis of the defendant having arranged and paid for the child rape victim’s family to take her out of state so she would be unavailable for trial.

In contrast, the State failed to prove that Lennartz attempted to induce Klampe to testify falsely or to withhold any testimony, with the result that his conviction for tampering with a witness should be dismissed

with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (failure of proof requires dismissal with prejudiced).

02. THE PROSECUTOR'S IMPROPER  
CLOSING ARGUMENT DENIED  
LENNARTZ A FAIR TRIAL ON THE  
CHARGE OF TAMPERING WITH A  
WITNESS.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer whose duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial. 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).

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).

If a defendant, as here, 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).

In the interests of justice, a prosecutor 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).

02.1 The Prosecutor's Closing Argument  
Mischaracterized the Evidence

By varying degrees of nuance, the prosecutor mischaracterized the evidence during closing argument, at one point relying on subtle omission in support of her claim that Lennartz was “trying to cook up a new story [RP 413](,)” quoting him as telling Klampe “[a]s far as me texting, Sammy had your phone too, right? [RP 413](,)” omitting the qualifier “or had a phone too, right?” [RP 330]. At another point, as fully set forth supra at 10, the prosecutor pointed to the October 10 telephone call and again quoted Lennartz as telling Klampe to tell the prosecutor “it wasn't even you I was texting(,)” adding that this happened “during the time when he was talking about you need to write a letter to the prosecutor.” [RP 412-13]. Lennartz never told Klampe during the call to tell the prosecutor she wasn't the person he was texting, just the opposite: “[T]ell them you knew I was texting.” [RP 326]. And the conversation relating to writing a letter to the judge or prosecutor was nothing more than their mutual effort to change the no-contact order. [RP 324-25].

While prosecutors have some latitude to argue facts and inferences from the evidence, they are not permitted, as happened here, to make prejudicial statements unsupported by the record. State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137, 127 S. Ct. 2986, 168 L. Ed 2d 714 (2007).

#### 02.2 The Prosecutor's Closing Argument Violated the "Golden Rule"

The "golden rule" argument urges "the jurors to place themselves in the position of one of the parties to the litigation, or to grant the party the recovery they would wish themselves if they were in the same position." Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 139, 750 P.2d 1257 (1988), clarified, 756 P.2d 142 (1988) (quoting Jacob Stein, Closing Argument sec. 60, at 159 (1985)). It is improper "because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." Adkins, 110 Wn.2d at 141-42 (quoting Rojas v. Richardson, 703 F.2d 186, 191 (5<sup>th</sup> Cir. 1983)).

The prosecutor violated the "golden rule" during closing argument:

In addition, we have over 100 attempted phone calls during this period of time. You can imagine, I submit to you, that it would be quite influencing to have your phone ringing from the Thurston County Jail over 100 times over a period of a few months knowing that the defendant can contact you,

knowing that as you're about to testify that the defendant is still trying to contact you and what sort of affect that had on Mrs. Klampe. [emphasis added].

[RP 418-19].

So you have to ask yourself if you were in her position, in her shoes, not in yours but in hers, you were homeless where the defendant provided you a place to live, the defendant has dirt on you, apparently, apparently has some dirt on some people you hang out with, ask yourselves why she maybe was motivated to change her story.

[RP 450].

The prosecutor's comments fell short of legitimate argument. She could have addressed the points without asking the jurors to imagine themselves in Klampe's situation. But she didn't, instead asking the jurors—literally asking the jurors—at one point to put themselves in Klampe's shoes. In doing so, she invited the jury to decide the case on sympathy, prejudice or bias, rather than on the evidence and the law.

### 02.3 Conclusion

The prosecutor's closing argument was improper. It mischaracterized the evidence by nuanced omission and contextual liberty and contained statements of fact that were not in evidence, including that Lennartz had told Klampe to tell the prosecutor "it wasn't even you I was texting," in addition to asking the jurors to

decide the case only after putting themselves in Klampe's shoes, the cumulative effect of which amounted to flagrant and incurable conduct. See State v. Weber, 159 Wn.2d at 279 ("Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless."). A prosecutor "has no right to mislead the jury." (emphasis in the original). State v. Davenport, 100 Wn.2d at 763 (quoting State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1995)). Given that the evidence of Lennartz's guilt on the charge of tampering with a witness was neither clear-cut nor overwhelming, the prosecutor's misconduct was nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds, which undermined the verdict. The prosecutor's misconduct ensured that Lennartz did not receive a fair trial on the tampering charge. Reversal is required.

03. LENNARTZ WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PROPERLY OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT.<sup>6</sup>

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

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<sup>6</sup> 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.

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).

Should this court determine that counsel waived the issue by failing to properly object to the prosecutor's closing argument as set forth in the preceding section, 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 failed to object to the prosecutor's closing argument for the reasons previously argued. Had counsel so objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

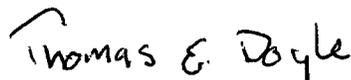
To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability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

Counsel's performance was deficient because he failed to properly object to the argument at issue for the reasons previously argued, which was highly prejudicial to Lennartz, 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 tampering with a witness.

E. CONCLUSION

Based on the above, Lennartz respectfully requests this court to reverse his conviction for tampering with a witness.

DATED this 24<sup>th</sup> day of May 2014.

  
THOMAS E. DOYLE  
Attorney for Appellant  
WSBA NO. 10634

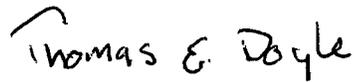
CERTIFICATE

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

Carol La Verne  
[paoappeals@co.thurston.wa.us](mailto:paoappeals@co.thurston.wa.us)

Bruce J. Lennartz #709432  
A.H.C.C.  
11919 W. Sprague Avenue  
P.O. Box 1899  
Airway Heights, WA 99001-1899

DATED this 24<sup>th</sup> day of May 2014.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE  
Attorney for Appellant  
WSBA NO. 10634

**DOYLE LAW OFFICE**

**May 24, 2014 - 4:46 PM**

**Transmittal Letter**

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