

NO. 45942-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW JACK LITTLE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 13-1-00773-6

BRIEF OF RESPONDENT

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DATED January 27, 2015, Port Orchard, WA

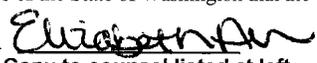

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Little has met his burden of showing that the outcome of trial would have been different if he had testified?
2. Whether the prosecutor properly commented on Little's comments during the commission of the crime, which had nothing to do with his right to silence?
3. Whether evidence that Little told Endicott that he would "kick his ass" and "fuck him up," combined with the absence of a joking manner, Little's history of aggressive behavior, and past dissatisfaction with Endicott was sufficient for the jury to find a true threat?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Matthew Jack Little was charged by information filed in Kitsap County Superior Court with felony harassment of a criminal justice participant – Bremerton Police Sergeant William Endicott. CP 1.

At the omnibus hearing, although defense counsel indicated he was ready for trial, Little complained that he disagreed with counsel's trial strategy and wanted to hire a private attorney. RP (9/17) 3-5. Counsel did not seek to withdraw, so the trial court declined to replace him, and informed Little that if he could obtain private counsel before the trial he was free to file a motion to substitute. RP (9/17) 5-6.

At the trial call, Little filed a motion for new trial, for a continuance and for a change of venue. RP (11/25) 3. Because the victim was unavailable that week and the prosecutor had a trial conflict, the State agreed to the continuance, which was granted. RP (11/25) 3-4, 10.

Little argued that venue should be changed because he had filed complaints against several judges, prosecutors, and public defenders. RP (11/25) 5. The State responded that had a long history of filing complaints against defenders, prosecutors, and judges, but to its knowledge none ever sustained. RP (11/25) 8. The court denied the motion. RP (12/2) 12.

Little also pointed out, in support of his request to change counsel that he had filed a bar complaint against current counsel. RP (11/25) 5. Defense counsel took no position on continued representation. RP (11/25) 7. However, he opined that the mere filing of complaint not dispositive. RP (11/25) 9. The problem was that Little and counsel disagreed on trial strategy. RP (11/25) 9. The court indicated it would review Little's complaint in camera and set the matter for an attorney status hearing. RP (11/25) 10.

At the status hearing, defense counsel noted that the bar complaint against him had already been dismissed. RP (12/2) 6. Counsel also stated that "I intend to employ a trial strategy that is inconsistent with Mr. Little's preferred strategy, and if I stay his attorney, I'm going to pursue

the trial strategy that I believe is most likely to result in a not-guilty verdict.” RP (12/2) 7. The court then queried counsel about his ability to continue representing Little:

THE COURT: Do you believe that it’s appropriate for you to maintain representation of Mr. Little in light of the facts and circumstances as you know them in the case?

MR. WEAVER: I will continue to work on Mr. Little’s behalf as long as I am on the case.

RP (12/2) 7. The court, noting that it had reviewed the complaint, found no basis to remove counsel. RP (12/2) 10.

At trial call, Little again moved to continue trial so he could hire private counsel. RP (12/9 J. Forbes) 2-3. The motion was denied and the matter was set for trial that afternoon. RP (12/9 J. Forbes) 3.

As trial began, Little again moved for a continuance so he could hire private counsel and review Public Records Act documents he had received. RP (12/9 J. Hull) 4. Because Little was represented by counsel who stated he was ready for trial, the court denied the motion. RP (12/9 J. Hull) 8.

After the defense presented a witness and the jury was led from the courtroom, defense counsel indicated he intended to rest his case. RP (12/11) 68. The following colloquy then occurred:

THE DEFENDANT: Your Honor, I don’t know why my counsel – even if I took the stand, he says he won’t ask me any questions, so I guess I won’t take the

stand.

THE COURT: Mr. Weaver, do you need more time with Mr. Little?

THE DEFENDANT: It's not going to change anything, sir.

THE COURT: Okay. I'm asking Mr. Weaver.

THE DEFENDANT: I'm sorry.

MR. WEAVER: We have discussed this at length, Your Honor.

THE COURT: And what you discussed, without getting into particulars, I assume includes the fact that Mr. Little understands he does have the right to testify in this case, but he does not have to testify if he chooses not to; is that right?

MR. WEAVER: He does have the right to testify. The conflict here is –

THE COURT: I don't want you to get into [RP (12/11) 68] privilege, but whatever record you want to make in that regard, it's up to you.

MR. WEAVER: Well, the conflict here is this: He has the right to testify, but I have a – the tactical decision of what questions to ask him, and he wants to get into issues that I believe are either irrelevant or harmful to the theory of the case.

RP (12/11) 69. The defense then rested before the jury. RP (12/11) 70.

The court recessed for three hours and twenty minutes. RP (12/11) 86. The parties then discussed the jury instructions. RP (12/11) 87-93. Little interrupted the proceedings to announce he had changed his mind about testifying. RP (12/11) 93. Counsel moved to reopen the case so Little could testify. RP (12/11) 93-94. The State objected that it had released its rebuttal witnesses. RP (12/11) 94. The trial court denied the

motion:

THE COURT: Based on the record before me, Mr. Weaver, I am going to deny your motion to reopen the case. I believe there has been an ample opportunity for you and your client to converse about whether or not he's going to testify.

Mr. Little, your –

THE DEFENDANT: Your Honor, when I –

THE COURT: Mr. Little, please don't interrupt me. Please don't interrupt me, Mr. Little.

You've indicated a desire to testify at this point. You've made an objection to the strategy of counsel. At this point I'm satisfied that the matter -- both parties have rested, and at this point I'm satisfied that the case should not be reopened. You have had an ample opportunity to discuss this issue with counsel, and so I'm going deny the motion to reopen by Mr. Weaver.

RP (12/11) 94-95.

After deliberating for an hour, the jury found Little guilty. RP (12/11) 135-37; CP 79.

At the sentencing hearing, Little filed another motion for new counsel. RP (1/3) 3. At this point counsel also moved to withdraw because Little was alleging that counsel violated his right to testify. RP (1/3) 4. The motion was granted, new counsel appointed, and an attorney status hearing set. RP (1/3) 8, 14.

At the attorney status, new counsel indicated that she had represented Little in the past and it had resulted in a breakdown in communications and Little filing of a bar complaint against her. RP (1/15)

3-4. The court granted the motion, appointed yet another lawyer, and again set the case for an attorney status hearing. RP (1/15) 3-4.

New counsel filed a motion for new trial alleging that Little had not validly waived his right to testify. CP 208. The court questioned the factual basis for the motion at the hearing:

THE COURT: That was going to be my point: What is -- because as I understand it, certainly Mr. Little knew he had the right to testify. There was conversations about that. He engaged in undoubtedly an intelligent conversation with Mr. Weaver, because there was testimony about that. And they were both given an opportunity at trial; there was a substantial break even after the first defense witness was called by -- I [16] asked Mr. Weaver, "Do you need time with your client to decide whether or not he's going to take the stand?" "Yes, we do." "Take all the time you need." I think about 20, 25 minutes elapsed. They had this conversation.

So, you know, the issue of voluntariness, then -- it relates to coercion, and what's the evidence that Mr. Weaver was coercive in some manner to Mr. Little?

RP (2/24) 17. After taking it under advisement, the court ruled that under existing precedent, the issue was to be evaluated as one of ineffective assistance of counsel. RP (3/3) 3-4. The court found no evidence that counsel had prevented Little from testifying and denied the motion. RP (3/3) 5; CP 322.

B. FACTS

The State's sole witness was Sergeant William Endicott, who supervised the second shift of the Bremerton Police Department Patrol Division. RP (12/11) 8. He had worked for the department for 15 years. He began as a patrol officer, was a K-9 handler, and was narcotics detective for a few years. When he was promoted to sergeant he returned to the Patrol Division. 9. While a detective he wore plain clothes, but otherwise, including in his current position, he wore a uniform. RP (12/11) 9.

As both a patrol officer and as a sergeant, he responded to 911 calls every day. RP (12/11) 9. In 2008, Endicott was called to Little's residence. RP (12/11) 14. Little was extremely upset with the decisions Endicott made at that time. RP (12/11) 15. Little was quite verbal and continued "describing his emotions" as Endicott left. RP (12/11) 16.

In 2008, the exchange with Little began calmly, but he quickly became more agitated. RP (12/11) 43. Endicott had had contacts with Little before 2008. RP (12/11) 44. Other Bremerton officers and sheriff's deputies had had contacts with him as well. RP (12/11) 44. Little started calm and quickly become agitated on almost every contact. RP (12/11) 44.

His report described the 2008 contact as starting as a dialogue but

quickly changing into “His standard incoherent screaming and [he] would not calm down.” RP (12/11) 44. It would be fair to say that Little becomes verbally agitated very quickly. RP (12/11) 45. Little used profanity in the 2008 incident. RP (12/11) 45. It was difficult to have a calm conversation with Little. RP (12/11) 46.

Endicott had contact with Little again in 2009. RP (12/11) 16. Little was again upset by the decisions Endicott made. RP (12/11) 16. Endicott had no further professional contact with Little after 2009. RP (12/11) 16. Endicott had seen him walk by at the ferry terminal but they had had no interaction. RP (12/11) 17.

In July 2013, Endicott went into the Safeway in East Bremerton. RP (12/11) 18. He was on his way to work but in civilian clothes. RP (12/11) 18. He was in line to buy a Lotto ticket. RP (12/11) 18.

Endicott was not aware Little was in the Safeway. RP (12/11) 23. He had not seen Little in years. RP (12/11) 24. After the events Endicott looked at the Safeway security video, which showed both Endicott and Little. RP (12/11) 19; Exh. 15. The video was played for jury during Endicott’s testimony. RP (12/11) 19-20.

Little appeared in the video at 12:15:17. RP (12/11) 24; Exh 15 (screen marked “Cust Srvc”). Endicott was facing the counter, waiting to be served. RP (12/11) 25. Little walked up behind him. RP (12/11) 25.

Endicott did not realize he was there. RP (12/11) 25. Endicott heard Little speaking behind him but did not respond; he did not realize Little was addressing him. RP (12/11) 25.

Then Endicott heard Little say "It is you." RP (12/11) 25. Endicott turned to see who was speaking because the voice was closer. RP (12/11) 25. Endicott turned his head at 12:15:20. RP (12/11) 26. Endicott recognized him and said something to the effect of "How you doing Mr. Little?" RP (12/11) 26-27.

Endicott did not make any moves toward Little or attempt to stop him in any way. RP (12/11) 27. Endicott did not wish to engage with Little. RP (12/11) 28. At roughly 12:16, Endicott turned to face Little. RP (12/11) 29. Endicott found him to be a threat. RP (12/11) 29. Little had said "You're not so tough without your badge and gun." RP (12/11) 30. Little did not appear to be joking. RP (12/11) 30.

Because he had not had contact with Little in years, Endicott's first thought was that Little had mistaken him for another officer. RP (12/11) 30. He asked Little if he was sure he knew who he was. RP (12/11) 30. Little replied, "You're fucking Endicott, and you're not so tough without a gun and a badge." RP (12/11) 30-31. Again, Little did not appear to be joking. RP (12/11) 31.

Little then challenged Endicott to fight him then and there. RP

(12/11) 32. Endicott told him it was not going to happen. RP (12/11) 33. Endicott was 6 feet tall and 158 pounds. RP (12/11) 32.

At 12:16:14, Little moved in and got right in Endicott's face. RP (12/11) 33. Endicott found this very threatening. RP (12/11) 33. He was concerned for his own physical safety. RP (12/11) 33. He was not in uniform was concerned people would not realize he was an officer if an altercation broke out. RP (12/11) 33.

Little told Endicott he would find him one day and beat his ass. He said "You guys are all alike," and made similar comments. RP (12/11) 34. He seemed serious. RP (12/11) 34. Endicott asked Little was he was threatening him. RP (12/11) 35. Little responded with another threat. RP (12/11) 35. Endicott told Little he had crossed the line, and he was calling a deputy. RP (12/11) 35. Little responded, "You ever try to arrest me again, and I'll fuck you up." Endicott took the statement seriously. RP (12/11) 36.

At 12:16:16, Endicott disengaged and attempted to leave the store. RP (12/11) 35. Little followed him halfway to the door and exchanged some words and then went back to the desk. RP (12/11) 37.

Once outside, Endicott immediately called the dispatcher and asked for a deputy to call him back. RP (12/11) 37. He called the sheriff's office because the store was outside of Bremerton city limits. RP

(12/11) 37.

Little never referred to any particular prior contact in the Safeway, as defense counsel pointed out on cross: "He never said, for instance, when we -- when we contacted each other in 2008, you really pissed me off and that's why I'm telling you these things today, correct?" RP (12/11) 46-47. "And he didn't make reference -- you said you also had contact with him in 2009 where he was also agitated. He didn't make any reference to the contact in 2009?" RP (12/11) 47. The cross continued:

Q. He wasn't confronting you about any particular incident that he identified.

A. I don't know what his mindset was, but he didn't verbalize any particular incident.

RP (12/11) 47.

He saw him three or four times at the ferry. RP (12/11) 48.

Endicott was driving by and saw him on the sidewalk. RP (12/11) 48.

They did not have any contact. RP (12/11) 48.

Q. And on those occasions, did he come up and engage you and say, hey, you really pissed me off in 2008/2009?

A. No. I think those -- I'm driving by him at -- the ferry terminal's in one of the routes I make constantly during the day. I saw him on the sidewalk. We didn't have contact.

Q. Okay. And he didn't never come to the police department and ask to talk to you?

A. No, sir.

Q. Did he ever file a complaint with your supervisor

that you -- about anything you'd done?

A. Not that I'm aware of, but I think he's filed complaints; I don't know if any of them were based on my actions. [RP (12/11) 48]

Q. So would it be fair to say on July 1, 2013, when you had this interaction in the Safeway with Mr. Little, it came as a complete surprise to you?

A. Yes, sir.

Q. To this day, you don't know why he engaged the way he did.

A. I have no idea.

RP (12/11) 49.

On redirect, it was brought out that in 2008, Little was the one who requested police assistance. RP (12/11) 49. Endicott did not understand in 2008 why Little became so upset. RP (12/11) 50. They declined to take action, and he "blew up." RP (12/11) 50. Other officers had experienced similar outbursts. RP (12/11) 51. He never had any non-official contacts with Little prior to the Safeway incident. RP (12/11) 52.

Little called Cali Mandak, who worked at the customer service desk at Safeway. RP (12/11) 57. She did not know either Endicott or Little. RP (12/11) 58-59. She did not know Endicott was a police officer. RP (12/11) 60.

Endicott was redeeming a lottery ticket when Little approached. RP (12/11) 60. She was not paying attention to their conversation and did not hear them raise their voices. RP (12/11) 60. It seemed playful to her,

like they were giving each other a hard time. RP (12/11) 60. It did not seem threatening. RP (12/11) 60.

However, after Endicott left, Little commented to her that “People in law enforcement hide behind their badges,” and “They get away with things.” RP (12/11) 66. Little also told her he would like to get into a room with a law enforcement officer. RP (12/11) 66. He also said he would like to fight an officer, but only if he did not have his badge or gun. RP (12/11) 66.

III. ARGUMENT¹

A. LITTLE FAILS TO SHOW THAT THE OUTCOME OF TRIAL WOULD HAVE BEEN DIFFERENT IF HE HAD TESTIFIED.

Little argues that his trial counsel abridged his right to testify. Little initially fails to acknowledge that such claims are weighed under the familiar test for ineffective assistance of counsel.² Since, even if Little’s counsel’s performance was deficient, he fails to show any resulting prejudice, this claim must fail.

In *State v. Robinson*, 138 Wn.2d 753, 982 P.2d 590 (1999), the Supreme Court held that when evaluating a contention that the defendant

¹ Little’s third claim alleges two instances ineffective assistance of counsel. Because those claims are intertwined with his first and second claims, the State does not address the ineffectiveness claims under a separate heading.

² *Cf.* Claim 1 and Claim 3(c) & (d).

was denied the right to testify by his counsel, the “question should be addressed as a claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 204 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).”

Although Little cites to *Robinson*, he, at least in his first claim, ignores the holding of *Robinson* that requires the court to apply the *Strickland* test for ineffective assistance of counsel to the present claim:

We ... decline to adopt a per se reversal rule. In order to prevail on his ineffective assistance of counsel claim, Robinson will therefore have to satisfy the *Strickland* test by proving that Kimberly’s conduct was deficient (*i.e.* Robinson was actually prevented from testifying) and that his testimony would have a “reasonable probability” of affecting a different outcome.

Robinson, 138 Wn.2d at 769 (quoting *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

1. Deficient performance

To satisfy the first prong of the *Strickland* test on such a claim Little “prove that his attorney actually prevented him from testifying.” *Robinson*, 138 Wn.2d at 766. An attorney’s refusal to allow a defendant to testify may be established where the attorney refuses to call the defendant as a witness despite the defendant’s requests, where the attorney uses threats or coercion, or where the attorney flagrantly disregards the defendant’s request to testify. *Robinson*, 138 Wn.2d at 763, 982 P.2d 590. However, “while the decision to testify should ultimately be made by the client, it is entirely appropriate for the attorney to advise and inform the

client in making the decision to take the stand.” *Robinson*, 138 Wn.2d at 763, 982 P.2d 590.

After the State rested, Little presented the testimony of the Safeway clerk. RP (12/11) 57-67. Out of the presence of the jury, defense counsel indicated that he intended to rest. RP (12/11) 68. Little then spoke up and the follow exchange took place:

THE DEFENDANT: Your Honor, I don't know why my counsel – even if I took the stand, he says he won't ask me any questions, so I guess I won't take the stand.

THE COURT: Mr. Weaver, do you need more time with Mr. Little?

THE DEFENDANT: It's not going to change anything, sir.

THE COURT: Okay. I'm asking Mr. Weaver.

THE DEFENDANT: I'm sorry.

MR. WEAVER: We have discussed this at length, Your Honor.

THE COURT: And what you discussed, without getting into particulars, I assume includes the fact that Mr. Little understands he does have the right to testify in this case, but he does not have to testify if he chooses not to; is that right?

MR. WEAVER: He does have the right to testify. The conflict here is –

THE COURT: I don't want you to get into privilege, but whatever record you want to make in that regard, it's up to you.

MR. WEAVER: Well, the conflict here is this: He has the right to testify, but I have a – the tactical decision of what questions to ask him, and he wants to get

into issues that I believe are either irrelevant or harmful to the theory of the case.

RP (12/11) 68-69. Little then rested his case.

Several hours later, Little announced that he had changed his mind and wanted to testify. RP (12/11) 93. His counsel moved to reopen the case. *Id.* The trial court denied the motion.³ It subsequently put its reasoning on the record:

I want to make a record before we proceed further and bring the jury in for instructions and closing.

Mr. Little did indicate an earnest desire to testify in this matter this afternoon and requested that I permit the parties to reopen the case, specifically the defense to reopen their case. I am making a couple of findings:

One, the two witnesses that previously testified in this case, Ms. Mandak and Sergeant Endicott, were under subpoena. They were released upon the parties resting this morning and are no longer under the authority of the court or under subpoena powers; and therefore, I do find that there is a prejudice to the prosecution by reopening the case.

Mr. Weaver also articulated this morning, for strategic reasons he would not be asking his client any questions should his client take the stand, and articulated that on the record as a matter of strategy.

Furthermore, we broke at 11:30. Mr. Little's request was approximately 1:45. Over two hours had elapsed between the time of those discussions and when Mr. Little had asked the Court to reopen the case. So I'm making those findings.

But, certainly, Mr. Little's objections to that are part of the record. Mr. Weaver did move to reopen his case.

³ Although he raised the issue in his motion for new trial, Little does not now claim that the court abused its discretion in refusing to reopen the trial.

That's part of the record. And, certainly, if there's necessary -- if it's necessary that there be appellate review in this case, undoubtedly that will be one of the issues that will be reviewed

RP (12/11) 99-100.

Well after the verdict, Little had new counsel appointed and filed a motion for new trial. CP 208. Based on the foregoing, the trial court concluded that Little had voluntarily waived his right to testify. CP 324.

The State would submit that the trial court was correct. Indeed, that counsel himself moved to reopen the case reflects that if Little had initially chosen to testify, counsel would have put him on the stand. It cannot be said that counsel actually prevented him from testifying.

Little's premise is that a refusal to ask the client *any* questions can constitute a denial of the right to testify. The State has found no case in Washington, the federal system, or any other state that addresses this question. Although the State would have difficulty distinguishing between a refusal to ask *any* questions and an outright denial of the right to testify, the record (despite some assumptions made) is not clear that counsel would have asked no questions. To the contrary, counsel's limited response suggested that there was disagreement as to what questions he might ask:

Well, the conflict here is this: He has the right to testify, but I have a – the tactical decision of what questions to ask him, and he wants to get into issues that I believe are either

irrelevant or harmful to the theory of the case.

RP (12/11) 69. Little never offered any testimony or offer of proof from counsel during the post-trial proceedings to clarify counsel's position. Little, on the other hand, demonstrated a propensity to hyperbole throughout the trial. The State is unprepared to concede on this record that counsel would have declined to ask *any* questions if Little had taken the stand.

Under *Robinson*, the Court could thus remand for further findings. *Robinson*, 138 Wn.2d at 761. However, under *Strickland*, if either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). The State submits that this issue can be resolved on the issue of prejudice.

2. Prejudice

While he devotes four pages of his first claim arguing that counsel denied him the right to testify, Little fails to even acknowledge that he must show prejudice, much less meet his burden of establishing it. As he bears the burden of establishing prejudice, this claim should therefore be denied. Moreover, even though he addresses prejudice in his third claim, he fails to cite any record evidence in support of his claim, instead relying on the argument of counsel. *See* Brief of Appellant at 19-20.

As the Supreme Court explained:

“Because it is primarily the responsibility of defense counsel to advise the defendant of his right to testify and thereby to ensure that the right is protected ... the appropriate vehicle for claims that the defendant’s right to testify was violated by defense counsel is a claim of ineffective assistance of counsel under *Strickland v. Washington*.” *Teague*, 953 F.2d at 1534. *See also Brown*, 124 F.3d at 79. This approach “gives proper deference to the unique role played by counsel in the defendant’s decision to testify.” *Campos*, 930 F. Supp. at 792. Further, evaluating claims like Robinson’s under the ineffective assistance of counsel analysis is appropriate since the defendant is not alleging that the government interfered with his right to testify. *Arguelles*, 921 P.2d at 441 n. 3.

Robinson, 138 Wn.2d at 766.

The Supreme Court went on to “reject” the contention that prejudice should be presumed. *Robinson*, 138 Wn.2d at 768. ““In some cases, the defendant’s testimony would have no impact, or even a negative impact, on the result of his trial.”” *Robinson*, 138 Wn.2d at 769 (*quoting United States v. Tavares*, 100 F.3d 995, 998 (D.C. Cir. 1996)). Little’s is just such a case. Moreover, where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Here, Little made no offer of proof as to what the substance of his testimony would have been. As such he failed to meet his burden below, and the claim was properly rejected.

Moreover, what can be gleaned from the record shows that Little

primarily wanted to get into his alleged claim that the victim was a “dirty cop.” RP (12/9 J. Hull) 26-27. Such evidence, assuming it existed, likely would have been inadmissible under ER 608.

The only other indication of Little’s potential testimony came from his testimony at the CrR 3.5 hearing:

BY MR. WEAVER:

Q. Mr. Little, when you were at the Safeway, who initiated the conversation?

A. From what we know now, it was Sergeant Endicott. He was standing in front of me in the line in blue jeans and a hat. Didn’t even know who he was until he turned and said, “How’s it going, bro?”

MR. WEAVER: Thank you. I have nothing further.

THE COURT: Mr. Anderson.

CROSS-EXAMINATION

BY MR. ANDERSON:

Q. Mr. Little, did Sergeant Endicott ever arrest you while you were there?

A. No.

Q. Did he –

A. He just walked away jubilant, going like, Now, I have something to arrest you, and I’ll be coming to get you soon.

Q. Did he arrest you in the Safeway, Mr. Little?

A. No. Again, as I said, he left jubilantly saying he was going to come arrest me.

Q. Did he handcuff you in the Safeway?

A. No. Again, he walked away jubilantly saying I would be arrested soon.

RP (12/9 J. Hull) 37-38.

This testimony, however, makes little sense. The evidence was that Endicott had had no contact with Little for four years before the incident. It simply was not plausible that he would have instigated a confrontation simply to arrest him. Moreover, the jury viewed the security footage of the incident, which also refutes the contention that Endicott initiated the exchange. Indeed, it shows Little getting “directly in [his] face.” RP (12/11) 33; Exh. 15 at 12:16:14.

Additionally, as counsel brought out as part of his trial strategy that Little’s words were not a true threat, Little was prone to fly off the handle with little provocation. RP (12/11) 43-45, 49-51. It was difficult to have a calm conversation with Little. RP (12/11) 46. He had filed bar complaints against numerous attorneys, prosecutors, and judges. RP (11/25) 5, 8. Counsel told the court that he had “some concerns about [his] ability to control [his] client on the stand.” RP (12/9 J. Hull) 9. If Little had had one of his meltdowns on the stand and frightened the jurors, it would have seriously undermined the defense theory that his comments to Endicott were not true threats.

Given the unlikelihood of the only record testimony provided by Little, the inadmissibility of most of what he apparently want to testify to, and the strong possibility that Little would have actually damaged his own

case by blowing up on the stand, the record fails to show any likelihood of a different outcome if he had testified. This claim should be rejected.

B. THE PROSECUTOR PROPERLY COMMENTED ON LITTLE'S COMMENTS DURING THE COMMISSION OF THE CRIME, WHICH HAD NOTHING TO DO WITH HIS RIGHT TO SILENCE.

Little next claims that the prosecutor impermissibly commented on Little silence by discussing what he did or did not say during the commission of the crime. This claim is without merit because comments on silence are improper because they may be the result of the exercise of a defendant's rights during interrogation. Here the State was not referring to any custodial statement or silence but to the circumstances of the crime itself. Further, because the comments were proper, counsel cannot be faulted for not objecting to them.

A defendant should contemporaneously object to allegedly improper comments. because proper and timely objections provide the trial court an opportunity to correct the misconduct and caution jurors to disregard it. *State v. Emery*, 174 Wn.2d 741, 761–62, 278 P.3d 653 (2012). Further, It prevents abuse of the appellate process and saves the substantial time and expense of a new trial. *Emery*, 174 Wn.2d at 762.

On review, a defendant must first establishes that a prosecutor's statements were improper. *Emery*, 174 Wn.2d at 760. Then, if the

defendant objected at trial, he must show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Id.* If the defendant did not object, he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Here, Little did not object to the comment he now complains of. Regardless, he fails to show impropriety at all.

The State may not, consistent with due process, use post-arrest silence following *Miranda* warnings to impeach a defendant's testimony at trial. *State v. Belgarde*, 110 Wn.2d 504, 511, 755 P.2d 174 (1988) (citing *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)). The *Doyle* principle applies with equal force to comments made in closing argument. *State v. Fricks*, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979). The rationale of the *Doyle* rule is that silence in the wake of *Miranda* warnings may be only an exercise of the right to remain silent, and is therefore "insolubly ambiguous", and does not necessarily tend to show a fabricated defense. *Doyle*, 426 U.S. at 617.

However, an improper comment only occurs when it is "used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Thus the Supreme Court, in the

case on which Little relies, observed that it did “not consider a prosecutor’s statement a comment on a constitutional right to remain silent if the remark was so subtle and so brief that it did not ‘naturally and necessarily’ emphasize defendant’s testimonial silence.” *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008) (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

Here, the prosecutor’s comment, when taken in context, in no way commented on Little’s right to silence. To the contrary, the prosecutor was discussing the evidence presented – Little’s statements to Endicott in the Safeway.

The prosecutor was addressing the central issue of the case, whether Little’s statements were a true threat. Notably, Little does not claim the following passage, which immediately proceeded the comment, was improper:

State has to establish that the person hearing the threat, the victim of the threat, was a police officer. Sergeant Endicott testified to you that he was with the Bremerton Police Department and remains on the Bremerton Police Department for 14 years, that the threat was made because of past actions of Sergeant Endicott as a police officer; and the only evidence before you is the only basis of the relationship between these two people are official police actions.

There is no explanation, none whatsoever, to suggest that the defendant was making these comments other than because he didn’t like Sergeant Endicott’s performance as a police officer. Remember what he says

when he goes back and he talks to Cali, “You know, they hide behind their badges.” His whole source of conflict with the sergeant was the sergeant being a Bremerton police officer.

RP (12/11) 111-12.

The prosecutor then immediately proceeded to a discussion of the next element of the offense:

State has to prove the victim has a reasonable belief that the threat is serious, not a joke. You heard the testimony of Sergeant Endicott, all the things that he had to consider. Sergeant Endicott at that moment on the 1st of July 2013, he has to reflect: “I know this guy. I know the past interactions with him, volatile. I know this person because of reports we have with other officers in the Bremerton Police Department. He tends to be volatile, not always, but he tends to be volatile. Why is he approaching me here in public saying these types of things to me?” That would suggest someone who is a bit out of control, who’s not able to reign in his anger. And people who make threats and can’t rein in their anger, does that make them threatening? Does that make them dangerous? Is it reasonable for him to believe there’s nothing about this that is funny? Five years later he is still carrying that level of hostility, and there’s nothing about his physical mannerisms that suggest that he’s incapable of carrying out the threat.

I suppose if you had a situation where you have a severely disabled person sitting in their wheelchair pounding out a text saying, “If they ever find a cure for the disease that has left me in this condition, I intend to work out in a gym; and if it ever happens, I will hunt you down and beat your ass.” Well, if you look at the person in that situation, you appear to be severely disabled. Whatever it is, MS, cancer – “Sir, you’re not recovering. I know you’re still angry, but there’s nothing you can do about these things. Look at yourself” – that is not a situation that was facing Sergeant Endicott when he was looking at Matthew Little that day.

I don't know if Matthew Little feels justified. He didn't tell us –

MR. WEAVER: Objection.

MR. ANDERSON: – in his statement.

THE COURT: Sustained.

MR. ANDERSON: He didn't tell us in his statement on the 1st of July 2013 when he was talking to Cali Mandak and when he was talking to Sergeant Endicott precisely why he was so angry. He didn't explain to either one of them, "This is the very particular reason why my anger is so high." But the point is, regardless of what it was that happened back in 2008 and 2009 that made him so angry, of all the things that he was entitled to do, he was not entitled to walk up to the detective and to threaten to beat his ass. He crossed the line.

RP (12/11) 112-14.

Contrary to Little's claim, the prosecutor clearly was not commenting on Little's post-arrest silence or his failure to testify. He was commenting on Little's statements in the Safeway. Indeed, that Little never said why he was angry with Endicott was testimony elicited by defense counsel during trial. RP (12/11) 46-49.

These comments were the basis for the charge. He was also commenting on what Little did not say *in the Safeway*, and how Endicott could should have thus taken Little's threats. The prosecutor was neither directly or indirectly commenting on Little's silence; he was discussing the circumstances of the crime, and whether Endicott's fear was reasonable under those circumstances.

Plainly, counsel's first objection was the reflexive response of a seasoned defense lawyer to the phrase "He [Little] didn't tell us." It is instructive that once the prosecutor put the comment in the context "in his statement on the 1st of July 2013 when he was talking to Cali Mandak and when he was talking to Sergeant Endicott" counsel lodged no objection. Under the circumstances, Little's claim that counsel was ineffective for failing to object also fails to meet the *Strickland* prongs of either deficient performance or prejudice.

Finally, any impropriety could not be characterized as so flagrant and ill-intentioned such as to require a new trial. This claim is clearly without merit and should be rejected.

C. EVIDENCE THAT LITTLE TOLD ENDICOTT THAT HE WOULD "KICK HIS ASS" AND "FUCK HIM UP," COMBINED WITH THE ABSENCE OF A JOKING MANNER, LITTLE'S HISTORY OF AGGRESSIVE BEHAVIOR, AND DISSATISFACTION WITH ENDICOTT WAS SUFFICIENT FOR THE JURY TO FIND A TRUE THREAT.

Little's final claim is that the evidence was insufficient for the jury to find that his statements to Endicott constituted a true threat. This claim is without merit.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by

substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). The Court may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *State v. Locke*, 175 Wn. App. 779, 788, 307 P.3d 771 (2013) (citing *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004)). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*,

85 Wn. App. 672, 675, 935 P.2d 623 (1997).

A defendant is guilty of harassment if, without lawful authority, he or she “knowingly threatens ... [t]o cause bodily injury immediately or in the future to the person threatened or to any other person,” and “by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1). This form of harassment is a class C felony if the defendant harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. RCW 9A.46.020(2)(b)(iii) and (iv). For the purposes these sections relating to criminal justice participants, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. RCW 9A.46.020(2)(b).

The crime of harassment applies only to “true threats.” A true threat is a serious threat, not one said in jest, idle talk, or political argument. *State v. Locke*, 175 Wn. App. 779, 790, 307 P.3d 771 (2013) (citing *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)). However, the nature of a threat “depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken.” *State v. C.G.*, 150 Wn.2d 604, 611, 80

P.3d 594 (2003). Thus, statements may “connote something they do not literally say.” *Locke*, 175 Wn. App. at 790. Thus, “whether a statement is a true threat or a joke is determined in light of the entire context” and that a person can indirectly threaten to harm or kill another. *Locke*, 175 Wn. App. at 790 (citing *Kilburn*, 151 Wn.2d at 46, 48). Further, “[t]he speaker of a ‘true threat’ need not actually intend to carry it out. It is enough that a reasonable speaker would foresee that the threat would be considered serious.” *Locke*, 175 Wn. App. at 790.

In addition, this Court has explained that neither RCW 9A.46.020 nor the definition of ‘threat’ in RCW 9A.04.110 require the State to prove a “nonconditional present threat.” *State v. Cross*, 156 Wn. App. 568, 582, 234 P.3d 288 (2010). Assuming evidence shows the victim’s subjective fear, the standard for determining whether the fear was reasonable is an objective standard considering the facts and circumstances of the case. *State v. Alvarez*, 74 Wn. App. 250, 260–61, 872 P.2d 1123 (1994), *aff’d*, 128 Wn.2d 1, 904 P.2d 754 (1995).

In *Locke*, the defendant first sent two email messages to the Governor through a section of the Governor’s website. *Locke*, 175 Wn. App. at 785. In the first email message the defendant identified himself by name and listed his “city” as “Gregoiremustdie.” *Id.* The message itself stated:

I hope you have the opportunity to see one of your family members raped and murdered by a sexual predator. Thank you for putting this state in the toilet. Do us a favor and pull the lever to send us down before you leave Olympia.

Id. In a second email sent minutes later, the defendant called the Governor a name and then stated “You should be burned at the stake like any heretic.” *Id.* Finally, a few minutes later the defendant accessed another section of the Governor’s website titled, “Invite Governor Gregoire to an Event.” . *Locke*, 175 Wn. App. at 786. Through a form on this web page, Locke requested an event (again identifying himself by name and noting that he lived in Washington State) and he identified his organization as “Gregoire Must Die [sic].” *Id.* He requested that the event be held at the Governor’s mansion and stated the event’s subject would be “Gregoire’s public execution.” *Id.* He wrote that the Governor’s role during the event-would be “Honoree.” *Id.* The defendant was charged and convicted of threatening the Governor, and on appeal this Court addressed the issue of whether the defendant’s communications constituted true threats.

This Court held that the first email, while crude and upsetting, was more in the nature of hyperbolic political speech, and thus did not rise to the level of a true threat. *Locke*, 175 Wn. App. at 791. This Court noted that, unlike the first email, the second email (which expressed the defendant’s opinion that the Governor should be “burned at the stake like

any heretic”) expressed more than the desire that the Governor’s policies will lead to horrible consequences to her family. “Rather, its message, expressed twice, is that the Governor should be killed.” *Locke*, 175 Wn. App. at 791. This Court did note that the second email did not state that the defendant would personally kill the Governor. Rather, the email used passive language and conveyed that someone should kill her. *Id* at 791. Given this language, this Court held that “viewed in isolation” this second email would not constitute a true threat. *Id*. However, when this email was viewed together with the third communication, those two “considered together, do cross into the territory of a true threat.” *Id* at 792.

This Court further explained that the third communication (the “event” request) “escalated the violent tone and content of his communications.” *Locke*, 175 Wn. App. at 792. The defendant identified his organization as “Gregoire Must Die [sic],” requested that the event be held at the Governor’s mansion, and stated the subject of the event would be “Gregoire’s public execution,” at which she would be the “Honoree.” *Id*. This court further explained that a member of Congress had been shot in the weeks before the defendant’s emails, and that in such a context a reasonable speaker would foresee that the Governor would take the “event request” seriously. *Id*. Furthermore, “Although *Locke* did not directly state that he himself would kill her, a direct threat is not required for his

communication to constitute a true threat.” *Id.* (citing *Schaler*, 169 Wn.2d at 283–84; *Kilburn*, 151 Wn.2d at 48). This Court further noted that the details of the defendant’s threat threw “the threat into higher relief and translate it from the realm of the abstract to that of the practical,” and they “plainly suggest an attempt to plan an execution, even though Locke may have intended nothing.” *Id.* at 793. Furthermore, the evidence showed a “rapid-fire e-mail sequence of increasing specificity and menace,” and the e-mails suggested a “troubling explosiveness lying behind them.” *Id.* at 793. Thus, this Court concluded that the “message would be taken seriously by a reasonable person.” *Id.* Finally, this Court explained:

The sentiments expressed in the second and third e-mails conveyed no view or position on public issues or policies. To suggest a “profound national commitment” to the protection of such threatening outbursts risks trivializing our critical commitment to uninhibited speech on public issues, even if it crosses into the vehement and caustic. The second and third e-mails were not political speech.

Locke, 175 Wn. App. at 795. This Court thus concluded that the event request, either “viewed alone or together with the second e-mail” was sufficient to show that a reasonable person would foresee that it would be interpreted as a serious expression of intention to harm or kill. *Locke*, 175 Wn. App. at 786-97.

Turning to the evidence in the present case, Little’s threats went far beyond any of the threats in *Locke* and were clearly sufficient to support the conviction. Viewing the evidence in the light most favorable to the

State, the evidence in the present case showed that Little clearly stated that he intended harm Endicott: that he would “beat his ass” or “fuck him up.”

Furthermore, there is evidence that Little meant this to be a serious threat. Little and Endicott had no social relationship. The only contact between them had been professional, and Little had been dissatisfied with them. There was no reason to believe that Little would imagine Endicott would take his comments to be friendly banter or funny.⁴

Little also cites *Kilburn* for support for his claim that his comments were not true threats. *Locke*, however, points out that in *Kilburn* the defendant had regularly joked with other students and was “laughing when he made the statement at issue.” *Locke*, 175 Wn. App. at 794. In the present case, as in *Locke*, there was no evidence that Little was joking or laughing. Thus, *Kilburn* is inapplicable.

Given all of this evidence and viewing it in a light most favorable to the State, the evidence was clearly sufficient to establish that the Defendant’s statements constituted true threats and that a reasonable criminal justice participant would have been placed in reasonable fear that

⁴ Little twice alleges in his brief that he lived out of the county where Endicott worked. The State is unable to find the record basis for this assertion. The pleadings indicate a Bremerton address for Little, which even if outside city limits would still clearly be in Kitsap County. Moreover, Endicott reported seeing Little multiple times at the downtown Bremerton ferry terminal over the years, and the present incident obviously took place in a location that Endicott stopped at on his way to work. This point, even if it had evidentiary support, does not support the contention that Endicott’s fear was unreasonable.

the threats would be carried out. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Little's conviction and sentence should be affirmed.

DATED January 27, 2015.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal flourish extending to the right.

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

KITSAP DISTRICT COURT

January 27, 2015 - 3:34 PM

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