

NO. 45942-6-II

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

STATE OF WASHINGTON

Respondent,

v.

MATHEW LITTLE
Appellant.

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

The Honorable Kevin Hull, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove that Little made a true threat in the charge of harassment of a public officer.
2. The state failed to prove that officer Endicott reasonably feared Little would carry out his threat to harm.
3. Little's right to silence was violated by the prosecutor's repeated comments during closing argument that Little did not explain himself.
4. Counsel was ineffective and Little was prejudiced by counsel's failing to permit Little to testify.
5. Counsel was ineffective and Little was prejudiced by counsel's failing to object to the prosecutors comments on Little's right to silence.
6. Little was denied his due process right to testify.

Issues Presented on Appeal

1. Did the state failed to prove that Little made a true threat in the charge of harassment of a public officer where he told the off duty officer in the Safeway store that he wanted to fight and that if the officer ever arrested him, he would " fuck him up"?
2. Did the state failed to prove that officer Endicott reasonably

feared Little would carry out his threat to harm, where Endicott knew that Little easily became verbally offensive when angry?

3. Was Little's right to silence was violated by the prosecutor's repeated comments during closing argument that Little did not explain himself?
4. Was counsel ineffective and was Little prejudiced by counsel's failing to permit Little to testify when Little was unequivocal in his wish to testify and where Little's testimony would have created reasonable doubt?
5. Was counsel ineffective and was Little prejudiced by counsel's failing to object to the prosecutors comments on Little's right to silence during closing argument in a weak case where Little was not permitted to testify?
6. Was Little denied his due process right to testify where he unequivocally wanted to testify but his attorney refused to ask him any questions?

B. STATEMENT OF THE CASE

a. Procedural and Trial Facts.

Mr. Little was charged and convicted of harassment of a public officer under RCW 9A.46.020(1)(a)(i), (b); 2(b)(1)(a)(iii). CP 1-5. According to

Officer Endicott, on July 1, 2013, he was standing in line at a Safeway store waiting to buy a lottery ticket when Little said “it’s you”. RP 24-25 (12-11-13). Endicott knew Little from having responded to a 911 call at Little’s residence in 2008 and in 2009. According to Endicott, Little was not pleased with how Endicott resolved those situations. RP 13-16(12-11-13). Endicott testified that after 2009, he had no contact with Little until four years later when he met Little at Safeway on July 1, 2013. RP 17, 38 (12-11-13).

On July 1, 2013, Endicott was dressed in civilian clothes and not on duty. RP 18-19 (12-11-13). In response to Little’s identification of Endicott, Endicott testified that he responded with “ how are you doing Mr. Little”. RP 26 (12-11-13). Little approached Endicott and Endicott testified that he felt that Little was threatening. RP 29 (12-11-13). According to Endicott, Little said, “you’re not so tough without your gun and badge. RP 30. Endicott asked Little, “are you sure you know who I am?”, to which Little responded, “you’re fucking Endicott and you are not so tough without a gun and badge”. RP 30 (12-11-13).

According to Endicott, Little challenged Endicott to a fist fight, to which Endicott responded, “it’s not going to happen”. RP 32-33 (12-11-13). Endicott did not think Little was joking. RP 32 (12-11-13). Neither Little nor Endicott raised their voices during this interaction. RP 33-34. According to Endicott, Little stated that one day he would find Endicott and “beat” his “ass”, and “you

guys are all alike”. RP 34 (12-11-13). Endicott testified that he believed that Little was serious. RP 34- 36 (12-11-13). Endicott told Little that he crossed the line and would be calling for a deputy to arrest Little. RP 35 (12-11-13).

Endicott walked away and Little did not try to follow, but said “you ever try to arrest me again, and I’ll fuck you up”. RP 35-37 (12-11-13)

b. Right to Testify

Cali Mandak, a Safeway clerk assisted Little and Endicott on July 1, 2014. She did not hear their conversation but observed their interactions to be friendly, casual and not threatening. RP 57-60 (12-11-13).

Before trial, Mr. Little expressed his wish to fire is attorney due to a conflict over strategies. RP 3-4 (9-17-13). The trial court denied the motion. RP 5-6 (9-17-13). Mr. Little also expressed his wish to testify. RP 5 (9-17-13). Again, during trial before the defense rested, on the record, Little informed the trial court that he wanted to testify, and his trial counsel, on the record, stated that he would not ask Little any questions if he took the stand. RP 68-69 (12-11-13). After the state rested, but before closing argument, Little again informed the court that he wanted to testify. RP 93-94 (12-11-13).

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 –

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 68-69 (12-11-13).

At the end of the state's case, after counsel made a motion to dismiss,

Little again informed the court that he wanted to testify. RP 93 (12-11-13).

THE DEFENDANT: Your Honor, I want to exercise my right to testify. Whether my attorney doesn't want to question me or not, I'm willing to take on what the prosecutor says.

After hearing what is here, and all this is out there, at least I need to be able to look the jury in the eye, would like to look the jury in the eye and say this is my side. I did not approach Sergeant Endicott like it's all been led on to believe. Sergeant Endicott spoke to me first. I did nothing wrong in this case. I just told the man that you got no business talking to me. You're the reason I moved out of the city limits. And I -- I don't approve of how the defense has handled this so far. Everything is running around. No. At least at this point after

lunch and listening to these jury instructions and whatnot, I would like to exercise my right and testify.

THE COURT: Mr. Weaver, do you want to respond to those comments of your client in any way?

MR. WEAVER: Your Honor, I would move to reopen the defense case in chief.

RP 93-94. The trial court denied counsel's motion to reopen the case with the following comments. RP 95.

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 94-95 (12-11-13).

THE DEFENDANT: At least for the record, I continue to try, but he says, "No, I will not ask you a question. I don't want you on the stand." And I've always wanted to be on the stand.

RP 95 (12-11-13). The trial court made the following 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 [sic]. Mr. Weaver did move to reopen his case. 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 99-100. (12-1113).

After the jury returned a verdict, Little requested to proceed pro se.

RP 3 (1-3-14). Counsel restated the request as a motion to withdraw because Little wanted a new attorney for the evidentiary hearing to determine if he was prevented from testifying. RP 4-6. (1-3-14). To complete the record, trial counsel made the following statements:

MR. WEAVER: If I were substitute counsel, after talking with Mr. Little and myself, I think that I would want to have me testify. And I can tell the Court that what I'm going -- I would testify to is that Mr. Little and I had a disagreement from the beginning about trial strategy, and that I didn't have any questions to ask Mr. Little on the stand that were going to further the trial strategy that I was pursuing. I don't know if that's error or not. And, quite frankly, at the -- at the trial level, I'm not sure it makes that big of a difference. But at this

point, I think that the appellate record is less than complete. And whether it's error or not I think is going to be determined by courts higher than this, but I would like Mr. Little to have a chance to have a complete record when he gets up there.

RP 7. (11-3-14).

Over defense objection, the trial court appointed Michelle Taylor who was known to have a conflict of interest. RP 12-13 (1-3-14). As soon as she was appointed, Taylor move to withdraw due the conflict of interest and the trial court appointed the Hunko Law firm. RP 3-4 (1-15-14). After the Hunko law firm was appointed, the trial court granted the defense an evidentiary hearing to determine if Little was denied his right to testify. RP 7 (1-24-14).

During the pre-evidentiary hearing, the trial court insisted that just because counsel would not ask Little questions on the witness stand, this did not prevent Little from testifying. RP 10-22 (2-24-14). During the evidentiary hearing, the court relied on the test for ineffective assistance of counsel in *Strickland v. Washington* to determine whether Little was denied his right to testify. RP 3 (3-3-14).

The trial court denied the motion for a new trial deciding that Little was not prejudiced and that the state was prejudiced because the state released officer Endicott who worked a few miles down the road from the court house. RP 3-4 (3-3-14). Presumably, the court believed it would have

been a hardship to recall Endicott.

c. Motion to Reopen Defense case.

The trial court denied the defense motion to reopen its case to permit Little to testify. RP 93-94 (12-11-13).

Then there was the issue of whether or not the case should be reopened. My decision to deny defendant's motion to reopen the case was neither arbitrary nor untenable. There was a showing of actual prejudice because a potential necessary rebuttal witness had been released. Sergeant Endicott was excused without objection from the defendant. Upon being released, Sergeant Endicott was no longer under subpoena, and the Court no longer had any mechanism to compel his attendance. Furthermore, when the prosecution articulated its concern about no longer having a rebuttal witness under subpoena, this concern went unchallenged by the defendant. Likewise, there was no motion by the defendant to recess the trial to determine whether Sergeant Endicott could or would return for trial. I'm not aware of any authority that requires the prosecution to take an absence from the trial and attempt to retrieve previously-excused witnesses or witness to accommodate defendant's desire to testify after both parties have rested, nor was there a request to do so. Of additional importance, there's no authority before me that says the Court has a duty to accommodate this request *sua sponte*.

RP 5-6 (March 3, 2014).

d. Prosecutor Comment on Right to Remain Silent.

Over defense objection, during the closing argument, the prosecutor commented on Little's right to remain silent by making the following remarks: "I don't know if Matthew Little feels justified. He didn't tell us --". RP 113-114 (12-

11-13). Although the judge sustained this comment, counsel did not object to the following remarks which commented on Little's right to remain silent.

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."

Id.

This timely appeal follows. CP 339

C. ARGUMENTS

1. MR. LITTLE WAS DENIED HIS CONSTITUTIONAL RIGHT TO TESTIFY.

a. Standard of Review.

Constitutional questions are reviewed de novo. *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010).

b. Right To testify is Constitutionally Guaranteed.

The right to testify on one's own behalf is guaranteed by article 1, section 22 (amend. 10) of the Washington Constitution and by the Sixth and Fourteenth amendments to the United States Constitution. *Rock v. Arkansas*, 483 U.S. 44, 52-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

c. Little Did Not Waive His Right To Testify.

The constitutional right to testify is absolute, and cannot be abrogated, even by defense counsel. *Rock*, 483 U.S. at 49; *State v. Thomas*, 128 Wn2d 553, 558, 910 P.2d 475 (1996); *State v. King*, 24 Wn.App. 495, 499, 601 P.2d 982 (1979). Because a defendant's right to testify "is personal, it may be relinquished only by the defendant, and the defendant's relinquishment of the right must be knowing and intentional." *U.S. v. Gillenwater*, 717 F.3d 1070 (9th Cir. 2013) (quoting, *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir.1993)).

Here, the trial court erroneously ruled that Little made a knowing, voluntary and intelligent decision not to testify because the trial court informed him of that right, Little had time to confer with his attorney, and despite the fact that his attorney refused to ask him any questions, the trial court believed that Little could have taken the stand and testified even if he just sat there looking like a fool. RP 6-7. (March 3, 2014).

The state Supreme Court in *State v. Robinson*, 138 Wn.2d 753, 761, 982 P.2d 590 (1999) explained that if the decision not to testify is contrary to the defendant's wishes, the defendant has not made a knowing, voluntary, and intelligent waiver of his right to testify. *Robinson*, 138 Wn.2d at 763 (citing,

¹ Mr. Hunko explained to the court that if Mr. Weaver refused to ask Little questions, he would look like a fool RP9, 17 (February 24, 2014).

United States v. Teague, 908 F.2d 752, 759 (11th Cir.1990)), *vacated by* 932 F.2d 899 (11th Cir.1991), *rev'd on reh'g on other grounds by en banc*, 953 F.2d 1525 (11th Cir.1992).

In other words, a defendant's right to testify is violated if “the final decision that he would not testify was made against his will.” 908 F.2d at 759. *See also Jordan v. Hargett*, 34 F.3d 310, 312-13 (5th Cir.1994); *Lema v. United States*, 987 F.2d 48, 53 (1st Cir.1993) (right to testify is violated if a defendant's will to testify is “overborne” by defense counsel).

Regardless of the attorney’s opinion about the best strategy for a case, “[t]he ultimate decision whether or not to testify rests with the defendant.” *Thomas*, 128 Wn.2d at 558. Thus an attorney cannot “flagrantly disregard the defendant's desire to testify.” *Robbins*, 138 Wn.2d at 763, (citing, *United States v. Robles*, 814 F.Supp. 1233, 1242 (E.D.Pa.1993); *United States v. Butts*, 630 F. Supp. 1145, 1147 (D.Me.1986)). “[A]ttorneys can prevent their clients from testifying by refusing to call the defendant as a witness even though the attorney knows that the defendant wants to testify.” *Robinson*, 138 Wn.2d 753, 762-763.

“It is unreasonable to impose upon defendants the burden of personally informing the court that their attorney is not acceding to their wishes to testify because defendants might feel “too intimidated to speak out of turn.” *Robinson*

138 Wn.2d at 764, quoting, *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991). Moreover, requiring a defendant to object at trial against the wishes of counsel “assumes a sophisticated defendant who is knowledgeable in both constitutional rights and criminal trial process.” *Robinson*, 138 Wn.2d at 764 citing, and quoting, Louis M. Holscher, *The Legacy of Rock v. Arkansas: Protecting Criminal Defendants' Right to Testify in Their Own Behalf*, 19 New Eng. J. On Crim. & Civ. Confinement 223, 264-265 (1993).

In *Robinson*, the Court held that “to prove that an attorney actually prevented the defendant from testifying, the defendant must prove that the attorney refused to allow him to testify in the face of the defendant's unequivocal demands that he be allowed to do so.” *Robinson*, 138 Wn.2d at 764. Under *Robinson*, Little was prevented from testifying because trial counsel knew that Little wanted to testify and the trial court knew that Little wanted to testify, but neither permitted Little to take testify. Taking witness stand and sitting without being able to communicate to the jury cannot possible satisfy the right to testify.

In Little's case, he was unequivocal in his desire to testify. He repeatedly informed counsel and the court that he wanted to testify and explained to the court that he did not testify because his attorney would not ask him any questions. RP 5 (9-17-13); RP 68-69, 93, 95 (12-9-13). Little's

decision not to take the stand after counsel informed him that he would not ask questions does not amount to a knowing waiver of the right to testify. *Robinson*, 138 Wn.2d at 762-763. Counsel's refusal to call Little as a witness, and his refusal to ask questions even though he knew Little wanted to testify, actually prevented Little from testifying.

This Court should remand for a new trial to permit Little his constitutional right to testify.

2. LITTLE WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER COMMENTS ON HIS RIGHT TO SILENCE DURING CLOSING ARGUMENT.

a. Standard of Review for Misconduct

To prevail on a claim of prosecutorial misconduct, a defendant must show that "in the context of the record and all the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). To establish prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442-443, 258 P.3d 443 (2011). Prejudice is not determined in isolation but "in the context of the total argument, the issues in the case, the evidence, and the

instructions given to the jury.” *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). If the defendant fails to object at trial, the defendant 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.” *State v. Emery*, 174 Wn.2d 741, 760–61, 278 P.3d 653 (2012).

b. Improper Comment on Little’s Silence.

The Fifth Amendment to the United States Constitution states that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” Article I, section 9 of the Washington State Constitution states that “[n]o person shall be compelled in any criminal case to give evidence against himself.” Both provisions guarantee a defendant the right to be free from self-incrimination, including the right to silence. *State v. Knapp*, 148 Wn.App. 414, 420, 199 P.3d 505 (2009).

The State violates this right when it uses the defendant's constitutionally permitted silence as substantive evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). More specifically, the state may not make closing arguments that infer guilt from the defendant's silence. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Here, the prosecutor made closing argument that inferred guilt by silence when he stated: “I don't know if Matthew Little feels justified. **He didn't**

tell us –“(Emphasis added) RP 113-114 (12-11-13). Although the judge sustained this comment, counsel did not object to the following remarks which commented on Little’s right to remain silent.

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."

(Emphasis added) Id.

The above comments violated Little’s right to silence because they used Little’s constitutionally permitted silence as substantive evidence of guilt. *Burke*, 163 Wn.2d at 217. Three times, the prosecutor told the jury that Little did not explain himself- thus three times the prosecutor invited the jury to use the absence of statements as substantive evidence of guilt.

c. Reversible Error.

Constitutional error is presumed to be prejudicial and the State has the burden of proving the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Little did not waive this argument because the misconduct was so flagrant or ill-intentioned that no curative instruction could have eliminated the prejudice. *Emery*, 174 Wn.2d at 760–761; *Escalona*, 49 Wn.App. at 256-257.

Perhaps one comment on silence would not have been flagrant or ill-intentioned, but three comments cannot be anything but flagrant or ill-intentioned because the comments emphasized Little's silence, the comments were direct and in the context of the entire argument, intended to infer guilt.

Reversal is required because under the "overwhelming untainted evidence test" it appears beyond a reasonable doubt that the jury would not have reached the same result in the absence of the error. *Guloy*, 104 Wn.2d at 425.

3. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PERMIT LITTLE TO TESTIFY AND FOR FAILING TO OBJECT TO IMPROPER PROSECUTOR COMMENTS ON LITTLE'S RIGHT TO SILENCE.

Because counsel is responsible for protecting the defendant's constitutional rights, once the defendant establishes that he was prevented from testifying, the Court must determine if counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Robinson*, 138 Wn.2d at 765-766.

- a. Standard of Review.

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

b. Ineffective Assistance of Counsel

To establish ineffective assistance, an appellant must show deficient performance and prejudice. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Furthermore, trial strategy “must be based on reasoned decision-making,” and there must be some indication in the record that counsel was actually pursuing the alleged strategy. *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007); *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”). The presumption of adequate performance is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130.

c. Deficient Performance For Preventing Little From Testifying.

In *Robinson*, the Court held that if the defendant can prove that his

attorney prevented him from testifying, he satisfies the first prong of the *Strickland* test. *Robinson*, 138 Wn.2d at 766. Here the first prong of the *Strickland* test is satisfied because Little was unequivocal in his wish to testify and his trial attorney prevented him from testifying by refusing to put him on the stand and by refusing to ask questions.

d. Prejudice.

To satisfy the second prong of the *Strickland* test, Little must demonstrate that his testimony would have a “reasonable probability” of affecting a different outcome. *Robinson*, 138 Wn.2d at 599. In Little’s case, Mr. Hunko, appointed for the evidentiary hearing, set forth sufficient facts for this Court to conclude that Little was prejudiced because he was unable to tell the jury that: (1) Endicott’s report was inaccurate; (2) Endicott antagonized Little; and (3) Endicott had a history of making inaccurate reports. RP 12 (February 24, 2014).

However, in this case, Mr. Little was putting the Court on notice time and time and time again that he had -- he wanted to testify. He wanted to put his version of it. In September 27th, he tells the Court that what Sergeant Endicott is saying is not -- in his reports is not true. How do you get that before the jury without putting your defendant on the stand and asking him questions?

RP 12 (February 24, 2014). Little also wanted the jury to be able to evaluate

his credibility. RP 11, 1412 (February 24, 2014). As early as the Sept 27, 2013 hearing, Little informed counsel of this problem with Endicott's inaccurate report. RP 12 (February 24, 2014).

There were only two witnesses in this case: Ms. Cali Mandak and Endicott. Mandak was present during the conversation between Little and Endicott but did not hear any of the actual words. RP 59-60 (12-11-13). Mandak observed that the conversation between Little and Endicott seemed, friendly and casual, not threatening. RP 60. (12-11-13). Little told Mandak that "people in law enforcement hide behind their badges" and Little expressed his wish to get into a fight with Endicott if he did not have a gun and a badge. RP 66 (12-11-13).

Little did not however engage Endicott in a fight even though Endicott was in civilian clothes. RP 18-19 (12-11-13). Endicott left the store and Little did not try to follow or fight. RP 37 (12-11-13). If Little had been permitted to testify, he could have explained that Endicott knew Little was 'mouthy' and knew that Little's words were uttered in anger, but they were not true threats. Had this evidence been presented to the jury, there is a reasonable probability that Little' testimony would have convinced the jury that if Little intended to harm Endicott he would have done so, creating reasonable doubt sufficient to likely change the outcome of the trial. For this reason, Little was

prejudiced by counsel's failure to permit him to testify.

- e. Counsel Was Deficient for Failing to Object to Improper Prosecutor Comments on Little's Silence.

If this Court deems the prosecutorial misconduct was not preserved for review, counsel was ineffective for failing to make a timely objection. In order to show that defense counsel was ineffective for failing to make a particular objection, the defendant must show that (1) failure to object fell below an objective standard of reasonableness, (2) the proposed objection would likely have been sustained, and (3) the result of the trial would have differed had the objection been made. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

When counsel makes one objection that is sustained, but fails to make the same objection for the same repeated misconduct, this Court cannot presume that "the failure to object was the product of legitimate trial strategy or tactics" *State v. Johnston*, 143 Wn.App. 1, 20, 177 P.3d 1127 (2007). Rather, this presumption is rebutted because if counsel made the objection, he or she clearly intended to prevent the jury from hearing the offending comments, particularly here, where the trial court sustained the first and only objection.

By sustaining the first objection to the improper comment on Little's silence, the trial court indicated that it agreed with counsel that the prosecutor's comments on silence were improper. If counsel had objected to the second and third comments, the court would have sustained those objections too. *Grier*, 171 Wn.2d at 33; *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 748, 101 P.3d 1 (2004) (the defendant demonstrates ineffective assistance of counsel when he demonstrates the objection would have been sustained).

f. Prejudice

When the trial court sustained the first objection, it informed the jury that the comment on silence was improper. However, when counsel failed to object to the second and third comments, the jury was tacitly led to understand that the second and third comments were proper. This permitted the jury to consider impermissible evidence to infer guilt, which prejudiced Little's right to a fair trial.

Similarly in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), the trial court granted a motion in limine to exclude evidence of Escalona's prior conviction but the evidence was erroneously admitted through a witness. Although the trial court instructed the jury to disregard the testimony regarding the prior offense, the jury found Escalona guilty after the court denied the

motion for a mistrial. *Escalona*, 49 Wn.App. at 256-257.

The Court of Appeals held the trial court abused its discretion by not declaring a mistrial after the victim testified in front of the jury that Escalona had a record of having stabbed someone. The Court of Appeals reversed the conviction because it was concerned that the jury might have used the information of Escalona's prior conviction to conclude he had acted on this occasion in conformity with the assaultive behavior he had demonstrated in the past. *Escalona*, 49 Wn.App. at 256-57.

Here, trial counsel's failure to object to the second and third comments on Little's right to silence created prejudice that was more damaging than if counsel had made no objection at all to any of the comments because the last two comments would not have been highlighted as permissible. In *Escalona*, the Court was concerned that the jury would rely on impermissible evidence of prior drug offenses and here the concern is similar: the reliance on the impermissible inference of guilt based on Little's silence.

Here, a curative instruction might or might not have removed the prejudice from a single comment, but three comments highlighted the silence and inference of guilt that created a reasonable probability that but for counsel's failure to object, the outcome would have differed. This is particularly so because of the implicit approval of the last two comments on

Little's silence, following one objected to comment. Counsel's failure to object prejudiced Little because the jury was permitted to infer guilt based on inadmissible evidence. To satisfy Little's right to a fair trial, this Court must reverse and remand for a new trial.

4. THE STATE VIOLATED MR. LITTLE'S DUE PROCESS RIGHTS BY FAILING TO PROVE BEYOND A REASONABLE DOUBT THAT HE MADE A TRUE THREAT OR THAT ENDICOTT'S FEAR WAS REASONABLE.

a. Standard of Review

Constitutional questions are reviewed de novo. *Schaler*, 169 Wn.2d at 282. The reviewing court conducts an independent review of the record in First Amendment cases “ ‘ so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.’ ” *State v. Kilburn*, 151 Wn. 2d 36, 49– 50, 84 P. 3d 1215 (2004) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 508, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)).

b. Due Process Requires the State Prove Beyond a Reasonable Doubt Each Essential Element of the Crime Charged.

The due process clause of the Fourteenth Amendment requires the state

to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient to support a conviction, if viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008).

In this case, to prove harassment of a public official under RCW 9A.46.020(1) and (2)(b)(iii) and (iv), the state was required to prove beyond a reasonable doubt:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
 - (ii) To cause physical damage to the property of a person other than the actor; or
 - (iii) To subject the person threatened or any other person to physical confinement or restraint; or
 - (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
 - (b) The person by words or conduct places the person

threatened in reasonable fear that the threat will be carried out. “Words or conduct” includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

....

(2)(b) A person who harasses another is guilty of a class C felony if any of the following apply..... (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) 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. For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.

c. The State Failed to Prove Little Made a True Threat.

In this case, the state failed to prove that Little made a true threat against Endicott. ” To avoid violating the First Amendment, a statute criminalizing threatening language must be construed “as proscribing only unprotected true threats.” *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013). A true threat is “ ‘a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement

would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life' of another person." *Kilburn*, 151 Wn. 2d at 43.

Even if couched in the language of threats, communications are not true threats if they are in fact "merely jokes, idle talk, or hyperbole." *Schaler*, 169 Wn.2d at 283. Words alone do not constitute malicious harassment "unless the context or circumstances surrounding the words indicate the words are a threat." RCW 9A.36.080(1)(c).

Here, Little was in a public place with Endicott, both were in line at Safeway, neither raised their voices, and Little never made any physical attempt to harm Endicott. Little could have fought with Endicott who was not in uniform, but instead chose to just use his words, which Mandak described as friendly banter.

Moreover, Endicott knew that Little was a hot head who easily ramped up verbal abuse when angry. Little also no longer lived in the area and according to Endicott, he had not had contact with Little for the past 4 years. Little's communications were no more than idle expressions of anger, not true threats. Additionally the infrequency of Little and Endicott's encounters and Little's residence out of the county, support the notion that Little's words were not true threats. Because the communication was not a true threat, the state failed to prove the crime of harassment beyond a reasonable doubt.

c. State Failed To Prove Endicott's Fear Was Reasonable.

The state failed to prove that Endicott's fear was reasonable under the circumstances. First, Little lived out of the county where Endicott worked and Endicott had not seen Little for four years and there was no reason to believe that he would see Little for another four years. Second, Endicott knew that Little was a hothead who easily escalated to verbal anger. RP 44-46. Third, based on Endicott's past encounters with Little he also knew that Little never resorted to physical violence against Endicott. Fourth and finally, Little had every opportunity to fight or harm Endicott if that was his intent, but that was not Little's intent. Under the circumstances, an experienced officer such as Endicott would not have reasonably feared that Little would cause him any harm.

Reviewing the evidence in the light most favorable to the state, the state failed to prove that Little made a true threat and that Endicott's fear was reasonable under the circumstances. The remedy here for failing to prove the essential elements of a crime is remand for reversal with prejudice. *Montgomery*, 163 Wn.2d at 586.

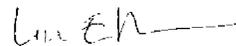
D. CONCLUSION

Mr. Little respectfully requests this Court reverse his conviction based

on insufficient evidence, or in the alternative, remand for a new trial based on ineffective assistance of counsel, denial of the right to testify, and prosecutorial misconduct.

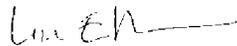
DATED this 15th day of September 2014.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Officer kcpa@co.kitsap.wa.us a true copy of the document to which this certificate is affixed, on September, 16 2014. Service was made by electronically to the prosecutor and Mathew Little Kitsap County Jail 614 Division St MS-33 Port Orchard, WA 98366-4614 by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

ELLNER LAW OFFICE

September 16, 2014 - 10:03 AM

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