

Supreme Court No.: 94319-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Petitioner,

v.

D'ANGELO SALOY,

Petitioner/Cross-Respondent.

ANSWER TO CROSS-PETITION

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A. ISSUES PRESENTED

The Court of Appeals correctly determined that (1) the prosecutor committed constitutional error when she specifically stated Mr. Saloy was the only person who could provide certain evidence in his case and (2) defense counsel properly preserved the objection when she moved for a mistrial outside the presence of the jury after closing argument. Should the Court deny the State's cross-petition where these issues do not warrant review under RAP 13.4(b)?

B. ARGUMENT

The State has failed to establish a basis for review under RAP 13.4(b) for the issues raised in its cross-petition.

The Court of Appeals correctly found the prosecutor committed misconduct when she improperly commented on Mr. Saloy's constitutional right to testify. Slip Op. at 18. It also correctly determined that defense counsel properly preserved the objection for appellate review when she moved for a mistrial directly following the State's argument. Slip Op. at 17.

In her closing argument, the deputy prosecuting attorney told the jury that no one except for Saloy "can conclusively say or has conclusively said how many people were in the car" the night of the shooting. 8/6/14 RP 64. This did not merely touch on a constitutional

right, as the State claims, but was a direct comment on Saloy's failure to testify. As the Court of Appeals found, "[a]lthough the prosecutor attempted to clarify the statement by adding 'or has conclusively said,' the prosecutor specifically stated that the defendant was the only one who could provide that evidence." Slip Op. at 18.

The cases upon which the State primarily relies, *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), and *State v. French*, 101 Wn. App. 380, 4 P.3d 857 (2000), do not preclude the court's application of a constitutional harmless error standard. In both *Emery* and *French*, the courts reiterated that the constitutional harmless error standard applies to direct constitutional claims involving a deputy prosecutor's improper comments. *Emery*, 174 Wn.2d at 757; *see also French*, 101 Wn. App. at 386. In *Emery*, the State undermined the presumption of innocence. 174 Wn.2d at 759. In *French*, the prosecutors improperly attempted to shift the burden of proof to the defendant. 101 Wn. App. at 385. In neither case did the prosecutor directly comment on the defendant's failure to testify, as the State did here.

In addition, the Court of Appeals was correct to find that defense counsel properly preserved the issue for appeal. Slip Op. at 17. Similar to *State v. Lindsay*, defense counsel noted that she had repeatedly objected during the State's closing argument and declined to immediately object

after this comment because she did not wish to highlight the improper statement. 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014); 8/6/14 RP 74. Defense counsel did, however, object and move for a mistrial immediately following the State's closing argument. 8/6/14 RP 74. This was sufficient under *Lindsay*. 180 Wn.2d at 441; *see also United States v. Prantil*, 764 F.2d 548, 555, n.4 (9th Cir. 1985). The Court of Appeals was correct to apply the constitutional harmless error standard. Slip Op. at 18; *see also Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

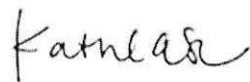
The State argues generally that the Court should accept review of the additional issues in the interests of justice. Cross-Petition at 8. This does not provide a basis for review and this Court should deny the State's cross-petition. The Court of Appeals properly determined the prosecutor directly commented on Mr. Saloy's failure to testify and defense counsel properly objected under *Lindsay*. As to this issue of prosecutorial misconduct, this Court should consider only whether the constitutional error committed was harmless. *See* Petition for Review at 18.

C. CONCLUSION

The State has failed to satisfy the criteria of RAP 13.4(b) and its cross-petition should be denied.

DATED this 12th day of May, 2017.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kathleen A. Shea".

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 94319-2**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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