COA No. 31082-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JAMES FRANCIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

The Honorable Kathleen M. O'Connor

REPLY BRIEF

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A. SUMMARY OF APPEAL

The sole and hotly disputed issue at trial below was whether Mr. Francis committed forceful robberies, or merely takings by theft, when on two separate occasions he grabbed the purse of a woman and ran. In his Appellant's Opening Brief, Mr. Francis argued that the prosecutor improperly commented on his *pre-arrest silence* in closing argument by faulting him for not doing the "responsible" thing and coming forward and talking to the investigating police detectives -- like the co-defendant Mr. Stefan had. Assignment of Error 1.

Additionally, Mr. Francis argued that the prosecutor improperly commented on his exercise of his *right to go to trial* by faulting him for not acting in a responsible way and agreeing to enter a plea of guilty and then provide information to the detectives, and by again comparing Mr. Francis to the co-defendant, who had done so. Assignment of Error 2. Specifically, the prosecutor stated:

> You should find Mr. Francis guilty. You should look at the evidence in deciding whether he wants to be held responsible. Unlike Mr. Stefan, he didn't return home to talk to the police. Unlike Mr. Stefan, he didn't provide a free talk to the detectives pursuant to an agreement to plead guilty. Unlike Mr. Stefan, he did not enter a plea and come in –
>
> MR. GRIFFIN: Objection, your Honor.
> THE COURT: Sustained.

8/9/12RP at 506-08.

B. STATE'S RESPONSE

In response on appeal, the State of Washington contends that the prosecutor's remarks were permissible as a response to defense counsel's closing argument. Respondent writes:

> The defense counsel attacked the co-defendant along the lines of arguing that Mr. Stefan did not take all that much responsibility in pleading guilty. RP 502. Having attempted to impugn Mr. Stefan's testimony, the defense "opened the door" to discussion of the co-defendant's individual choices pertaining to coming forth and pleading guilty.

(Emphasis added.) BOR, at p. 5. This is not what the defense argued. 8/9/12RP at 500-04; see argument infra. The defense did not attack Mr. Stefan. There was certainly no attack on him, the co-defendant, for pleading guilty. Nothing logically or legally warranted the prosecutor's subsequent argument to the jury that the defendant's lack of a guilty plea should be used against him to find him guilty of robbery, not theft, because of his exercise of these rights was a refusal to take "responsibility." The State's contentions in response should be rejected.

In addition, in attempting to avoid a determination of harmful error, the Respondent miscasts the issue by describing the trial case as proving by uncontroverted evidence that Mr. Francis *was* the criminal perpetrator. This is not the issue, since the defendant

obviously admitted to taking the purses – the sole issue was whether the jury would find Mr. Francis guilty of robbery, or find that the crimes were merely 'purse-snatching' type thefts.

The prosecutor below specifically asked the jury to fault Mr. Francis for his failure to come forward and plead guilty and instead go to trial by rejecting his defense that he only committed the lesser included offenses of theft. The jury apparently did just that, and the State cannot prove beyond a reasonable doubt that its prosecutor's misconduct – where he expressly sought to obtain this result, in this improper manner -- was "harmless beyond a reasonable doubt."

Finally, this Court should review the error. RAP 2.5(a), entitled "Errors raised for the first time on review," states that the Court may refuse to review any claim of error not raised in the trial court. Here, Mr. Francis objected. In addition, the Rule also per se permits the defendant to raise manifest constitutional error for the first time in the appellate court. RAP 2.5(a)(3). The State cites Charlton and argues that Mr. Francis did not request a curative instruction, BOR, at p. 4, but Charlton held that improper prosecutorial comment concerning the defendant's exercise of the statutory marital privilege was mindful, flagrant, and ill-intentioned conduct, and thus held that the defendant did *not* waive his right to object to such conduct on appeal

by failing to request a curative instruction following the comment. State v. Charlton, 90 Wn.2d 657, 661-64, 585 P.2d 142 (1978); see State v. Gauthier, ___ Wn. App. ___ (Div. 1) (April 1, 2013) (No. 67377-7-I) (prosecutor's use, of defendant's exercise of his constitutional right to refuse to consent to warrantless search, as substantive evidence of guilt was manifest constitutional error). The fact that the defense did not seek a curative instruction is only one indicia of the overall harmfulness of the prosecutor's improper argument – although it also just as much is treated as reflecting the defense counsel's desire to not further emphasize the prejudicial matter. As argued thoroughly in the Opening Brief, because the prosecutor's improper arguments culminated a theme advanced by the State throughout trial that the co-defendant came forward, but the defendant did not, and thus he was guilty, the constitutional error below was manifest and appealable. AOB, at pp. 3-6, 12-14.

C. REPLY ARGUMENT

DEFENSE COUNSEL IN CLOSING EXPRESSLY DECLINED TO IMPUGN MR. STEFAN BY ARGUING HE HAD ACCEPTED A BENEFICIAL PLEA DEAL, AND THERE WAS NO ATTACK ON STEFAN THAT MADE IT PROPER FOR THE PROSECUTOR TO ASK THE JURY TO CONVICT MR. FRANCIS BECAUSE HE HAD NOT COME FORWARD, AND HAD NOT PLEADED GUILTY.

1. The controversy at trial below was whether robbery, or theft, was committed, not the conceded fact that Mr. Francis was the person who took the purses. In closing argument, Mr. Francis' lawyer noted to the jury that he would not suggest Mr. Stefan "pointed the finger" at Mr. Francis in exchange for a plea deal. He noted that Stefan had plead guilty at a time when he also had other criminal cases pending with longer sentences, and briefly commented that Stefan was not heroically responsible simply because he entered guilty pleas to the current charges. 8/9/12RP at 499-502.

Counsel stated that Mr. Francis, for his part, was before the jury asking that the State prove the allegations at this trial, beyond a reasonable doubt. 8/9/12RP at 500. In addition, Mr. Francis had testified for the jury as was his right. 8/9/12RP at 500. Finally, counsel remarked that Mr. Francis was on trial for robbery, whereas Mr. Stefan's plea was to theft. 8/9/12RP at 501-02.

Counsel then made clear to the jury that its decision and responsibility was to decide whether robbery or the lesser offense(s) of theft was committed. 8/9/12RP at 501-02. The remainder of the defense closing argument centered on factual arguments, going to the elements, on this central dispute in the criminal case. 8/9/12RP at 500-04.

There was no attack on the co-defendant. Indeed, the most significant and lengthy mention of the co-defendant in the defense closing argument occurred when counsel noted that Stefan's testimony as to the incident (which he observed from the get-away car) was consistent with the video evidence, and supported the factual argument that there was no forceful taking as to Ms. Altman. 8/9/12RP at 498-499.

2. <u>These routine defense closing statements did not authorize the prosecutor to launch into a constitutionally improper comparison of the defendant, who had not come forward or plead guilty, and urge the jury to find the greater crime of robbery because Mr. Francis had not done the responsible thing, like the co-defendant had done.</u> The prosecutor improperly used the defense's mention that Mr. Stefan plead guilty as an opportunity to compare and then fault Mr. Francis

for not doing so. This is impermissible, AOB, at pp. 9-11, and the defense closing statements in no way stripped Mr. Francis of his right to be free from comment on his exercise of his constitutional rights to silence and trial. But here, the prosecutor specifically asked the jury to find Mr. Francis guilty because he had irresponsibly used these rights, urging the jury to reject his claim that the was only guilty of theft. This improper argument by the prosecutor was constitutional misconduct, and was as harmful and material to the jury's vote of guilty as the prosecutor expressly intended it to be.

Respondent contends that any improper comment on the defendant's pre-arrest silence and failure to plead guilty is excused or rendered non-error because the comments were a response to arguments by the defense in closing. BOR, at pp. 4-6. This contention must be rejected as factually untenable, as argued above.

Further, the prosecutor's argument was manifestly constitutionally improper, commenting directly on Mr. Francis' silence. See AOB; see, e.g., State v. Holmes, 112 Wn. App. 438, 445, 93 P.3d 212 (2004). As Mr. Francis argued in the Opening Brief, this is error of the sort deemed incurable, even if objection had not been made. State v. Gauthier, supra.

In these circumstances, proper argument by the defense in closing does not give the State *carte blanche* to commit misconduct in closing or to improperly comment on the defendant's exercise of his constitutional rights, and escape invalidation on appeal, under the rubric that it was a response to an argument by the defense. Remarks of a prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, but not if the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). Defense counsel has no power to "open the door" to prosecutorial misconduct.

Perhaps even more critically, as laid out in the facts section of Appellant's Brief, it is abundantly clear that any remark by defense counsel regarding the co-defendant pleading guilty and the defendant not wishing to, was prompted by the State's theme in the evidence phase contrasting the co-defendant's "responsible" act of coming forward in the investigative phase with the fact that the defendant did not do the same. As noted in the Appellant's Opening Brief, the prosecutor presented numerous police and civilian witnesses who

described the co-defendant's early confession to police and his voluntary surrender as soon as he learned he was in trouble, compared to the fact that police had to locate Mr. Francis.

It was the State that introduced the suggestion of a fact pattern at trial that contrasted the defendant with the co-defendant, who plead guilty. Defense counsel's innocuous closing argument simply and wholly properly reminded the jury that Mr. Francis from the beginning believed he was not a robber and was further asserting so at trial, to this, his jury. When the State capped its improper trial theme with the clearly improper remarks in closing the trial, defense counsel quickly objected.

3. <u>Not Harmless</u>. The Respondent finds it curious that Mr. Francis is arguing that the evidence was controverted, because, the Respondent argues, it was clear that Mr. Francis was the criminal perpetrator. BOR, at p. 9. But the controversion plainly referred to in the Opening Brief surrounded the jury question whether the defendant employed the force and committed the other elements necessary for *robbery*. As thoroughly set forth in the Opening Brief, the evidence on these questions was highly controverted, and far from overwhelming. Indeed, this was the essence of the "why" of the trial. The prosecutor concluded its case at that trial by expressly

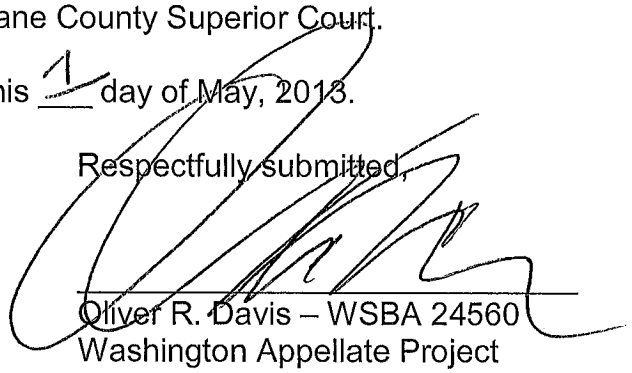
urging the jury to find the greater charges (robbery) and reject the lesser charges (theft), because Mr. Francis had shown his unwillingness to take full responsibility for his actions by not coming forward to police, and by not pleading guilty to robbery. This manifestly unconstitutional misconduct requires reversal.

D. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Francis respectfully asks this Court to reverse the judgment and sentence of the Spokane County Superior Court.

Dated this 1 day of May, 2013.

Respectfully submitted,



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JAMES FRANCIS,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF MAY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF MAY, 2013.

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