31082-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES L. FRANCIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

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STATUTES

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. In Mr. Francis' trial on two counts of robbery by purse-snatching, the prosecutor improperly commented on the defendant's 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 did.

2. The prosecutor improperly commented on the defendant's 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 comparing Mr. Francis to the co-defendant, who did so.

II.

ISSUES PRESENTED

A. WAS THE PARTIAL REMARK MADE BY THE PROSECUTOR DURING CLOSING REBUTTAL ARGUMENT IMPROPER?

B. DOES THE AMOUNT OF FORCE USED TO COMPLETE THE ROBBERIES MATTER IN THIS CASE?

C. DOES THE "CUMULATIVE ERROR" DOCTRINE APPLY IN THIS CASE?

III.

STATEMENT OF THE CASE

The defendant was charged with two counts of robbery involving taking two women's purses. The information was filed in Spokane County Superior Court on April 4, 2012. CP 9-10.

On March 11, 2012, the police received a report of a robbery at 4727 N. Division, a shoe store. RP 184. Officer Kennedy spoke to witnesses at the scene and then went to the victim's residence. RP 186. The victim was an elderly woman who was visibly shaken and crying. RP 186. She had injuries to her knees. RP 186. The victim, Ms. Bird was able to give a partial description of the person who took her purse. RP 187.

On March 30, 2012 another robbery occurred. RP 187. Witness' description of the defendant's car was a black Chevy Cavalier, which was similar to the car involved in the earlier robbery. RP 188. The police were given a license plate which led to the registered owner's address. RP 188. The license plate showed the car registered to Terry Stefan and Debbie Stefan. RP 188. Officers responded to the Stefan residence but the car was not there. RP 188.

The car arrived later and Terry Stefan spoke to police officers. RP 188. The defendant was identified as a suspect in the robberies. RP 189.

While officers were speaking to Mr. Stefan, the phone rang and it was the defendant calling. RP 190.

According to the statement of facts, Ofc. Kennedy reviewed the security video which showed the defendant chasing down Ms. Bird in the store parking lot. CP 1-8.

After receiving a tip that the defendant was hiding in the restroom at the McDonalds at Division/Longfellow, Officer Howe responded to that location and arrested the defendant. RP 173-74.

The co-defendant, Mr. Stefan, pled guilty to reduced charges of First Degree Theft and one count of Second Degree Robbery. RP 325-26. Part of the agreement required Mr. Stefan to testify for the State. RP 325-26.

The jury returned verdicts of guilty on Count One, First Degree Robbery and guilty of Second Degree Robbery on Count Two. The jury found special verdict forms for both convictions. RP 513-14. The special verdicts pertained to whether the defendant knew or should have known that the victims were particularly vulnerable. RP 513-14.

Following trial the defendant submitted paperwork for an appeal. CP 252-265.

IV.

ARGUMENT

A. ARGUMENT MADE BY THE PROSECUTOR WAS NOT IMPROPER.

The defendant claims that a comment made by the prosecutor in rebuttal closing argument was improper and calls for reversal of the trial.

"We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an *adequate timely objection and request a curative instruction.*" *State v. Charlton*, 90 Wn.2d 657, 144-45, 585 P.2d 142 (1978). (emphasis added.) The defendant did object to the contested comment, but did not request a curative instruction at that point.

Because the defendant waived any objection to the prosecutor's comment by failing to request a curative instruction, the discussion must turn to whether the comment was so flagrant and ill-intentioned that a proper objection from the defendant was not necessary.

The exact statement was: "Unlike Mr. Stefan, he did not enter a plea and come in - " RP 507. This comment, coming in the State's rebuttal closing argument was prompted by the arguments made by trial defense counsel during the defense closing argument.

The defendant's closing argument took an anticipatory bent. RP 500, 501. The defense counsel attempted to argue what the State might say in closing rebuttal argument. RP 501. The defense trial counsel specifically mentioned the defendant's partner in crime, Mr. Stefan. RP 501. One of the defense's early statements reads: "...but it's possible he'll argue to you that Mr. Stefan took responsibility, pled guilty." RP 501. The defense trial counsel then undertakes to claim that Mr. Stefan had other felony matters pending. RP 501. According to defense counsel's closing arguments, Mr. Stefan was looking at a significant amount of jail time prior to the case here so Mr. Stefan had room to negotiate a plea. RP 501.

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-defendants' individual choices pertaining to coming forth and pleading guilty.

It is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

To prevail on an allegation of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect. E.g., *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995) (*citing State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)). Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict. *Pirtle*, 127 Wn.2d at 672, 904 P.2d 245.

The State maintains that there was no improper conduct on the part of the prosecutor. The defense counsel is the party that first questioned Mr. Stefan's decision to enter guilty pleas. It would have been unfair to permit the defense to attack Mr. Stefan's presence as a State's witness but not allow the prosecutor to point out that the defendant did not turn himself in and plead guilty. At no point did the prosecutor comment on the defendant's right to go to trial. The prosecutor was only countering the defendant's closing argument.

The trial court erred in sustaining the defendant's objection. There were no grounds for the exception. Further, as mentioned previously, the defense did not make a proper objection to the prosecutor's comments. As noted in *Pirtle, supra*, the defendant must show improper conduct and prejudicial effect. The State has already shown that there was no improper conduct. As for "prejudicial effect," the defendant has shown none. The jury was instructed that comments from the attorneys was not evidence. RP 462. The defendant cannot show that an

extra instruction could not have reminded the jury of the instruction that attorney's comments were not evidence.

The defendant would like this court to take a leap from a single, unfinished comment, past a mass of evidence (that includes video recordings, testimony of the co-defendant and in-court confessions of the defendant) to reach the conclusion that the prosecutor's comment prejudiced the trial. The attempt to use the prosecutor's comment to dismiss these charges defies logic.

B. THE AMOUNT OF FORCE USED IN A ROBBERY IS IMMATERIAL.

The defendant maintains that in both robberies, the purses were just "taken" from the victim. The State notes that the robbery statute does not require a particular level of force.

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking*; in either of which cases the degree of force is immaterial.* Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. (emphasis added)

The defendant tries to amplify its positions by noting that the jury sent notes to the judge asking questions about "force." The defendant has no more

idea what the jury was curious about than does the State. The jury could just as easily been wondering if they could convict without physical injuries. In any event, it is of little use to attempt to divine a jury's state of mind from juror questions.

The defendant seems to have forgotten that Ms. Bird was pulled off balance by the defendant and fell to the ground. She developed bruises on her leg[s]. In both cases, the purses were taken from the grasp of the victims. The purses were not sitting on a shelf. The obtaining of the purses was not accomplished through some non-physical process. Referring back to RCW 9A.56.190, the degree of force used is immaterial.

The trial defense counsel made extravagant statements of these "horrible" crimes and how embarrassed the defendant was. RP 500. Despite his embarrassment at trial and his blaming of a drug problem for his actions, the defendant now attempts to dodge his guilt by blaming a supposed improper remark by the prosecutor.

The defendant makes a curious claim that the evidence was not overwhelming and highly controverter. The State presented a security camera video recording of the one of the thefts. The defendant testified that he took what turned out to be Ms. Bird's purse. RP 413. The defendant testified that he saw the victim on the ground. RP 415. The defendant told the jury how he took Ms. Altman's purse. RP 421. Ms. Altman testified and described the robbery.

RP 238-45. The trial defense counsel was very explicit in describing the defendant's confessions in front of the jury. RP 500-01. The co-defendant testified to the pair planning to steal from older women. RP 340-43. The co-defendant testified to the defendant committing both robberies. RP 351-52.

It is unclear how the defendant can possibly claim the State's evidence was weak or "highly controverted." There was no testimony or evidence to controvert the mass of testimony pointing to the defendant as the person who robbed two female victims of their purses.

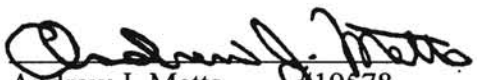
The last line of defendant's argument section is demonstrative of the defendant's illogical positions. The defendant states that "In this totality of circumstances, the State cannot meet its burden to prove the trial prosecutor's closing argument misconduct was "harmless beyond a reasonable doubt..." Brf. of App. 22. In the first place, there was no claimed misconduct in closing argument. The defendant has not cited authority for the concept that the State has some sort of burden to prove that the prosecutor's closing rebuttal remark as harmless. The State's remark was in response to the defense attorney's closing argument.

C. THERE WAS NO ERROR, SO THERE CAN BE NO CUMULATIVE ERROR.

The defendant maintains that no error on the part of the State occurred. Since there was no error, obviously, there could be no cumulative error.

Dated this 3rd day of April, 2013.

STEVEN J. TUCKER
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 31082-5-III
v.	)	
	)	CERTIFICATE OF MAILING
JAMES L. FRANCIS,	)	
	)	
Appellant,	)	

I certify under penalty of perjury under the laws of the State of Washington, that on April 3, 2013, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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and to:

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4/3/2013 (Date) Spokane, WA (Place) Kathleen D. Owens (Signature)