

70936-4

70936-4

COA NO. 70936-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

CARLA FORD,

Appellant.

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

The Honorable Richard T. Okrent, Judge

AMENDED BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

A handwritten signature in black ink is written over a circular court stamp. The stamp contains the text: 'SUPERIOR COURT OF WASHINGTON', 'DIVISION ONE', and '3/11'. The signature is a cursive-style name, likely 'Casey Grannis'.

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining To Assignments Of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	5
1. THE STATE'S IMPROPER COMMENT ON FORD'S EXERCISE OF HER POST-ARREST RIGHT TO REMAIN SILENT REQUIRES REVERSAL	5
a. <u>The State Presented Evidence That Ford Refrained From Answering An Inculpatory Question During Police Interrogation Following Her Arrest, And Then Argued To The Jury That Ford Was Guilty Based On That Evidence.</u>	5
b. <u>Challenge To Prosecutorial Comment On The Exercise Of A Constitutional Right May Be Raised For The First Time On Appeal.</u>	9
c. <u>The Prosecutor Commented On Ford's Exercise Of Her Right To Post-Arrest Silence.</u>	9
d. <u>The State Cannot Show This Constitutional Error Was Harmless Beyond A Reasonable Doubt.</u>	13
2. THE COURT FAILED TO COMPLY WITH THE STATUTORY REQUIREMENT GOVERNING CONSIDERATION OF SENTENCING ALTERNATIVES FOR THOSE SUBJECT TO CONFINEMENT FOR LESS THAN ONE YEAR.....	16
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Mines,</u> 146 Wn.2d 279, 45 P.3d 535 (2002).....	19
<u>In re Pers. Restraint of Myers,</u> 105 Wn.2d 257, 714 P.2d 303 (1986).....	19
<u>State v. Bahl,</u> 164 Wn.2d 739, 193 P.3d 678 (2008)	17
<u>State v. Burke,</u> 163 Wn.2d 204, 181 P.3d 1 (2008).....	11, 13, 14
<u>State v. Crane,</u> 116 Wn.2d 315, 804 P.2d 10 (1991).....	11
<u>State v. Curtis,</u> 110 Wn. App. 6, 37 P.3d 1274 (2002).....	9, 10
<u>State v. Delgado,</u> 148 Wn.2d 723, 63 P.3d 792 (2003).....	17
<u>State v. Easter,</u> 130 Wn.2d 228, 922 P.2d 1285 (1996).....	9, 10
<u>State v. Emery,</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	13
<u>State v. Fleming,</u> 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>review denied</u> , 131 Wn.2d 1018 (1997)	15
<u>State v. Ford,</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	18
<u>State v. Fricks,</u> 91 Wn.2d 391, 588 P.2d 1328 (1979).....	10

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

<u>State v. Fuller,</u> 169 Wn. App. 797, 282 P.3d 126 (2012), <u>review denied</u> , 176 Wn.2d 1006, 297 P.3d 68 (2013)	11, 12, 14
<u>State v. G.A.H.,</u> 133 Wn. App. 567, 137 P.3d 66 (2006).....	19
<u>State v. Hale,</u> 94 Wn. App. 46, 971 P.2d 88 (1999).....	17
<u>State v. Holmes,</u> 122 Wn. App. 438, 93 P.3d 212 (2004).....	9
<u>State v. Jones,</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	18
<u>State v. Knapp,</u> 148 Wn. App. 414, 199 P.3d 505 (2009).....	12, 13
<u>State v. Lewis,</u> 130 Wn.2d 700, 927 P.2d 235 (1996).....	10, 11
<u>State v. Mail,</u> 121 Wn.2d 707, 854 P.2d 1042 (1993).....	17
<u>State v. Rienks,</u> 46 Wn. App. 537, 731 P.2d 1116 (1987).....	17
<u>State v. Romero,</u> 113 Wn. App. 779, 54 P.3d 1255 (2002).....	9
<u>State v. Rupe,</u> 101 Wn.2d 664, 683 P.2d 571 (1984).....	5
<u>State v. Sanchez,</u> 171 Wn. App. 518, 288 P.3d 351 (2012).....	15

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

State v. Sansone,
127 Wn. App. 630, 111 P.3d 1251 (2005)..... 19

State v. Slattum,
173 Wn. App. 640, 295 P.3d 788 (2013)..... 18

State v. Thompson,
151 Wn.2d 793, 92 P.3d 228 (2004)..... 17

Westerman v. Cary,
125 Wn.2d 277, 892 P.2d 1067 (1994)..... 18

FEDERAL CASES

Bruton v. United States,
391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)..... 6

Doyle v. Ohio,
426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)..... 10

Griffin v. California,
380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)..... 10

Hurd v. Terhune,
619 F.3d 1080 (9th Cir. 2010) 11

Miranda v. Arizona,
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 6, 9, 10

United States v. Wade,
388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)..... 14

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

Sentencing Reform Act	17
RAP 2.5(a)(3).....	9
RCW 9.94A.030(33).....	16
RCW 9.94A.030(54).....	16
RCW 9.94A.535(3)(u).....	4
RCW 9.94A.680	1, 16-18
RCW 9.94A.680(1).....	16
RCW 9.94A.680(2).....	16
RCW 9.94A.680(3).....	16
U.S. Const. amend. V	1, 5, 9, 10, 13
U.S. Const. amend. XIV	1, 5, 10
Wash. Const. art. I, § 9	9

A. ASSIGNMENTS OF ERROR

1. The prosecutor improperly commented on appellant's exercise of her constitutional right to silence, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

2. The court erred in failing to comply with RCW 9.94A.680.

Issues Pertaining to Assignments of Error

1. Whether the State improperly commented on appellant's constitutional right to post-arrest silence by eliciting and exploiting evidence that appellant hung her head and did not answer a detective's question about her involvement in the crime?

2. Appellant was eligible for alternatives to total confinement because, as a nonviolent offender, her standard range sentence was less than a year. RCW 9.94A.680 provides "For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used." Did the court err in failing to comply with this statutory mandate?

B. STATEMENT OF THE CASE

The State originally charged Carla Ford with one count of residential burglary involving the dwelling of Scott Nance on December 10, 2012. CP 59. The State later amended the information to include an

additional count of residential burglary involving the dwelling of Elizabeth Ries on December 6, 2012. CP 53. Ford was tried with co-defendant Shauntel Raymur. 3RP¹ 2.

Evidence produced at trial showed Elizabeth Ries' residence was burgled while her adult son was upstairs studying. 2RP 35-40. A next-door neighbor, Francis Schatz, saw a blue Chevy pickup with two women, one with blonde hair and the other with dark hair, parked nearby. 3RP 39-80. One of the women walked to the front door of the Ries residence, then returned to the pickup and drove off. 3RP 79-80, 83. Later on that day, Schatz saw the same truck parked near the Ries residence. 3RP 84. He wrote down the truck's license plate as "B96127K." 3RP 94. The gate and back door of the Ries residence were open. 3RP 86-87. Schatz left to get coffee and upon his return saw the two women walking in front of the Ries residence with a backpack. 3RP 88, 91. By this time, a police officer had arrived and was talking to Ries. 3RP 88. Schatz was unable to identify Ford as one of the women he saw earlier. 3RP 92, 95, 110. He identified Raymur, the blonde, as the other woman. 3RP 93, 109-10.

Nance, meanwhile, testified that he came home during the day and found Raymur in his house. 3RP 47-48. He pulled a gun on her and asked

¹ The verbatim report of proceedings is referenced as follows: 1RP – 5/10/13; 2RP – three consecutively paginated volumes consisting of 7/29/13, 7/30/13 and 7/31/13; 3RP – 9/18/13.

what she was doing in his home. 3RP 48. She said "I'm with her." 3RP 49. Nance heard another person step out of the bathroom and leave through the back door. 3RP 49. A person Nance later identified as Ford ran out of the driveway. 3RP 49-50. Raymur then ran outside. 3RP 50-51. Nance followed and confronted both women in what he described as a green Chevy truck. 3RP 51-52, 59. He obtained a partial license plate number of "971." 9RP 60-61. The women drove off to the side of him and away. 3RP 52. Nance went back into his house and saw the bedroom drawers had been dumped and various items had been put in a box. 3RP 53.

Police arrested Raymur and Ford after photomontages were shown to the witnesses. 3RP 110. At the time of police contact, Ford was standing outside a truck, which had the license plate number given by Schatz. 3RP 111, 114. Police recovered various items from the truck, including tools, a crowbar, a bolt cutter, a scanner, a head lamp, walkie-talkies, gloves, and a blank check for Ford. 3RP 116-22. A detective testified that burglars use "these types of walkie-talkies and these types of tools to force doors." 3RP 120.

During direct examination of the detective, the State asked whether the detective had questioned Ford about a gun being pulled in relation to the Nance burglary. 3RP 123. The detective answered that Ford

responded to the question by closing her eyes and hanging her head. 3RP 123.

Ford presented an alibi defense on both counts, consisting of witnesses testifying that she was someplace else when the burglaries occurred. 3RP 146-49, 196-99.

A jury acquitted Ford of the Ries burglary but found her guilty of the Nance burglary. CP 34, 36. The jury returned a special verdict that the victim was present at the time of the Nance burglary, which qualifies as an aggravating circumstance under RCW 9.94A.535(3)(u). CP 18.

The State recommended an exceptional sentence of 12 months confinement. 3RP 2. The court imposed a sentence of 9 months confinement, the top of the standard range. CP 9-10. The court noted "[w]e would have been in a very different situation than we're in now" if Nance had fired his gun or if Nance had been hit him with the vehicle, resulting in serious injury or death. 3RP 5. The court also stated "I understand this is your first offense, but I believe this is an appropriate sentence and this will be the sentence of the court." 3RP 6. This appeal follows. CP 1-2.

C. ARGUMENT

1. THE STATE'S IMPROPER COMMENT ON FORD'S EXERCISE OF HER POST-ARREST RIGHT TO REMAIN SILENT REQUIRES REVERSAL.

"The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). The State presented evidence of Ford's post-arrest silence in response to a detective's question and then drew an adverse inference in closing argument that Ford was guilty based on that evidence. In so doing, the State committed prejudicial prosecutorial misconduct by using Ford's partial silence as substantive evidence of guilt. This violated Ford's right to remain silent under the Fifth and Fourteenth Amendments to the United States Constitution. Reversal of the burglary conviction is required because the State cannot show its comment on the exercise of Ford's constitutional right to post-arrest silence was harmless beyond a reasonable doubt.

- a. The State Presented Evidence That Ford Refrained From Answering An Inculpatory Question During Police Interrogation Following Her Arrest, And Then Argued To The Jury That Ford Was Guilty Based On That Evidence.

The affidavit of probable cause shows Ford denied involvement "post Miranda" after she was placed in custody. CP 57. Ford stipulated to

the admissibility of post-Miranda² statements following her arrest. CP 52-54; 1RP 5-7. She did not stipulate to the admissibility of her silence in response to any questions posed.

According to the State's trial memorandum, Detective Ludwig asked Ford about Nance drawing a gun on her. CP 63. According to the State, Ford hung her head and sighed before refusing to answer further questions. CP 63-64.

During pre-trial proceedings, counsel for co-defendant Raymur moved to exclude Ford's statements to Detective Ludwig on the theory that the detective's question "You remember the guy who pulled the gun on *you guys*" implicated Raymur in the crime. 2RP 17-18. After the question was asked, Ford closed her eyes, hung her head and asked for an attorney. 2RP 17-18.

The State responded that it would not seek to admit the portion where Ford requested an attorney because that was a constitutional right. 2RP 18. The State sought to admit the fact that Ford hung her head in response to the question. 2RP 18. The State proposed the "you guys" reference be omitted to avoid a Bruton³ problem. 2RP 18. The court

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

³ Bruton v. United States, 391 U.S. 123, 128, 135-36, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (defendant is deprived of right to confrontation when

questioned how the hanging of the head constituted a statement. 2RP 19. The State believed it was a tacit admission: "She was specifically asked a question about a gun being drawn, she hangs her head and sighs. I think the State can properly – it's relevant because it relates back to a specific incident. This entire time throughout the entire interview Ms. Ford is saying I had nothing to do with it, I don't know what you're talking about. Then they specifically asked about an incident that happened at one of the burglaries and her response is to hang her head and sigh." 2RP 19.

The court asked whether the gesture could also mean "this is baloney." 2RP 19. The State agreed there was an innocent explanation, but that did not mean "it doesn't come in because the State wants to bring it in for something that is not an innocent explanation." 2RP 20.

Raymur's counsel found the State's proposal to remove the "you guys" part of the question acceptable. 2RP 20. The court admitted the hanging of the head as a responsive gesture on that premise. 2RP 20. Ford's counsel did not object to the admission of this evidence.

Later, in front of the jury, the following exchange occurred during the State's direct examination of Detective Ludwig:

Q: You also had a chance to speak to Ms. Ford; is that correct?

she is incriminated by a pretrial statement of a codefendant who did not take the stand at trial).

A: Correct.
Q: Did you speak to her about specifics from one or the other of the burglaries?
A: Yes.
Q: In fact, you asked her about a gun being pulled; is that correct?
A: Yes.
Q: And that would refer to Mr. Nance?
A: Correct.
Q: What was her response or her reaction?
A: She closed her eyes and hung her head.

2RP 123.

On cross examination of Detective Ludwig, defense counsel elicited that the detective asked about her occupation, and Ford replied that she had been a caregiver, did odd jobs, including landscaping, and she had remodeled a house. 2RP 127-28, 132.

During closing argument, the prosecutor told the jury "They go to arrest the defendants and they're there together on December 13th, and there is the same truck. They do a search warrant for it and they find tools that as Detective Ludwig told you are commonly associated with burglaries. Yes, ladies and gentlemen, they have some innocent explanations. A crowbar can be used for a lot of things. Start adding them up, though, latex gloves, a police scanner? When Carla Ford is questioned and said what about the gun being drawn, what does she do? She hung her head and sighed." 2RP 225.

b. Challenge To Prosecutorial Comment On The Exercise Of A Constitutional Right May Be Raised For The First Time On Appeal.

Defense counsel did not object below, but an appellant may challenge an improper comment on the exercise of the constitutional right to silence for the first time on appeal under RAP 2.5(a)(3). State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); State v. Curtis, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002); State v. Holmes, 122 Wn. App. 438, 445-46, 93 P.3d 212 (2004) (direct comment on silence is always a constitutional error; indirect comment of constitutional magnitude where State exploits it).

c. The Prosecutor Commented On Ford's Exercise Of Her Right To Post-Arrest Silence.

Both the state and federal constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); U.S. Const. amend. V; Wash. Const. art. I, § 9. Whenever a criminal suspect is subjected to custodial interrogation, she must be warned of her right to remain silent and informed that any statement she makes can be presented as evidence in court. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Miranda warnings make a suspect's silence "insolubly ambiguous" because that silence could be "nothing

more than [an] exercise of these Miranda rights." Doyle v. Ohio, 426 U.S. 610, 617, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

The State is forbidden from commenting on a defendant's exercise of the right to silence. Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). "Once the suspect is arrested and Miranda rights are read, the State violates a defendant's Fifth and Fourteenth Amendment rights by introducing evidence of his exercise of Miranda rights as substantive evidence of guilt." Curtis, 110 Wn. App. at 11-12 (citing Easter, 130 Wn.2d at 236; State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996)). "The reason for this is that the government, in reading these rights, implicitly assures the accused that he may assert his rights without penalty." Curtis, 110 Wn. App. at 12 (citing Easter, 130 Wn.2d at 238; Doyle, 426 U.S. at 618-19). "The highly prejudicial suggestion that defendant's post-arrest silence is consistent with guilt . . . can be made just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself." State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

The right against self-incrimination is liberally construed. Easter, 130 Wn.2d at 236. "Even when the State may use a defendant's statements at trial, the suspect may exercise the right to silence in response to any question and the State cannot use that partial silence against him at trial."

State v. Fuller, 169 Wn. App. 797, 815, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006, 297 P.3d 68 (2013). "[T]he right to silence is not an all or nothing proposition. A suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial." Fuller, 169 Wn. App. at 814-15 (quoting Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010)).

Focusing largely on the purpose of the remarks, reviewing courts distinguish between "comments" and "mere references" to an accused's right to silence. State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008). "A comment on an accused's silence occurs when 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." Lewis, 130 Wn.2d at 707. A prosecutor's statement on a constitutional right to remain silent is a mere reference only if the remark was so subtle and so brief that it did not "naturally and necessarily" emphasize the defendant's silence. Burke, 163 Wn.2d at 216 (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

The evidence elicited by the prosecutor in Ford's case and the prosecutor's exploitation of that evidence in closing argument amounted to a comment on Ford's exercise of her right to silence. Ford invoked her

right to partial silence in not responding to the question during the custodial interrogation. Fuller, 169 Wn. App. at 816. The prosecutor explicitly focused the jury's attention on evidence of Ford's post-arrest silence in arguing the jury should find her guilty because she did not deny there was a gun pulled during the Nease burglary. 2RP 123. The prosecutor relied on Ford's failure to respond in closing argument as evidence of guilt.⁴ 2RP 225. The State cannot use a suspect's post-arrest silence as substantive evidence of guilt. Fuller, 169 Wn. App. at 816. That is what happened here. The prosecutor wanted "to bring it in for something that is not an innocent explanation" and succeeded. 2RP 20.

State v. Knapp, 148 Wn. App. 414, 199 P.3d 505 (2009) is instructive. In Knapp, the defendant testified at trial, denying he committed the burglary and asserting an alibi defense. Knapp, 148 Wn. App. 418, 421. The prosecutor elicited a detective's testimony about Knapp's reactions upon being told on two occasions that two witnesses had positively identified him: Knapp immediately hung his head and said nothing in the first instance and displayed no reaction in the second. Id. at 419. During closing, the prosecutor argued the jury should find Knapp

⁴ Contrary to the prosecutor's representation, no evidence showed Ford *sighed* in response to the detective's question. The detective testified "She closed her eyes and hung her head." 2RP 123. The detective did not say anything about Ford sighing.

guilty because, both times when witnesses identified him, "[W]hat did he do? He put his head down. Did he say, 'No. It wasn't me'? [sic] No." Id. at 420 (emphasis omitted). The Court of Appeals held the prosecutor impermissibly commented on Knapp's silence in using it as substantive evidence of guilt. Id. at 421.

Ford, like Knapp, hung her head and said nothing. As in Knapp, the elicitation of this evidence unmistakably implicates Ford's right to silence. The prosecutor in closing relied on that evidence in arguing Ford was guilty. As in Knapp, the prosecutor here impermissibly commented on Ford's silence in using it as substantive evidence of guilt.

The State may use silence to impeach the credibility of the defendant if he or she takes the stand and testifies. Burke, 163 Wn.2d at 217. As Ford did not testify, this exception has no application here. "The Fifth Amendment prohibits impeachment based upon the exercise of silence where the accused does not waive the right and does not testify at trial." Id.

d. The State Cannot Show This Constitutional Error Was Harmless Beyond A Reasonable Doubt.

The constitutional harmless error standard applies to direct constitutional claims involving prosecutors' improper arguments. State v. Emery, 174 Wn.2d 741, 757, 278 P.3d 653 (2012). Direct comments on

the invocation of the right to remain silent are therefore reviewed under a constitutional harmless error standard. Burke, 163 Wn.2d at 222; Fuller, 169 Wn. App. at 813, 819. The State bears the heavy burden of establishing that the constitutional error was harmless beyond a reasonable doubt. Fuller, 169 Wn. App. at 813. "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." Burke, 163 Wn.2d at 222.

Evidence of guilt was not overwhelming here. While Nance identified Ford as a participant in the burglary, he only had a glimpse of a woman from inside the house as she ran down the driveway. 3RP 49-50. He then drew his gun on two women in the truck outside from a distance of about feet 50 to 75 feet away. 3RP 52. The truck drove towards him and passed him from maybe five feet away. 3RP 52. Nance described seeing a green Chevy truck whereas the truck associated with Ford was blue. 3RP 59. The jury also heard testimony from an expert witness about factors that could negatively impact the accuracy of Nance's identifications. 3RP 171-76, 189-90.

The unreliability of eyewitness identifications is no secret to appellate courts. "Mistaken eyewitness identification is a leading cause of

wrongful conviction, as recognized by Washington courts." State v. Sanchez, 171 Wn. App. 518, 572, 288 P.3d 351 (2012); see also United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (the "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

Ford, moreover, presented an alibi defense. A defense witness testified Ford was with her at the time the burglary occurred. 3RP 146-49. Commenting on Ford's silence unfairly undermined her defense by unmistakably implying she was guilty of the crime.

The prosecutor apparently believed Ford's post-arrest silence was important enough to emphasize to the jury. Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). The State cannot now plausibly maintain the error was harmless. The burglary conviction must be reversed.

2. THE COURT FAILED TO COMPLY WITH THE STATUTORY REQUIREMENT GOVERNING CONSIDERATION OF SENTENCING ALTERNATIVES FOR THOSE SUBJECT TO CONFINEMENT FOR LESS THAN ONE YEAR.

Under RCW 9.94A.680, "[a]lternatives to total confinement are available for offenders with sentences of one year or less." The statute lists several sentencing alternatives, one of which applies to all such offenders (RCW 9.94A.680(1)), and two of which encompass offenders convicted of a nonviolent offense. RCW 9.94A.680(2), (3).

Ford's conviction for residential burglary qualifies as a nonviolent offense. See RCW 9.94A.030(33) ("Nonviolent offense' means an offense which is not a violent offense."); RCW 9.94A.030(54) (list of "violent offenses" does not include residential burglary). The standard range sentence for Ford's burglary conviction, based on an offender score of zero, was 3 to 9 months. CP 9. Ford qualified for a sentencing alternative under RCW 9.94A.680.

RCW 9.94A.680 provides "For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used."

The court violated this provision. The court did not consider or give priority to the sentencing alternative articulated in RCW 9.94A.680 at

the sentencing hearing. 3RP 4-6. Nor did the court state its reasons in writing on the judgment and sentence for why it did not use an alternative sentence. Pre-printed boilerplate language in the judgment and sentence directs the court to check one of several boxes for why alternatives to total confinement were not used. CP 10. None of the boxes is checked.

When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). "[C]ourts are to give effect to that plain meaning as an expression of legislative intent." State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004).

The plain language of RCW 9.94A.680 requires courts to consider and give priority to sentencing alternatives, and to state their reasons in writing on the judgment and sentence for why a sentencing alternative was not used. The court erred in failing to comply with this statutory requirement.

Standard range sentences can be challenged on appeal if the sentencing court had a duty to follow a specific procedure required by the Sentencing Reform Act and failed to do so. State v. Hale, 94 Wn. App. 46, 53 n.6, 971 P.2d 88 (1999) (citing State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)); State v. Rienks, 46 Wn. App. 537, 541, 731 P.2d 1116

(1987). The court here failed to follow the statutory requirements of RCW 9.94A.680 in imposing the standard range sentence on Ford.

Although Ford did not object below to the court's failure to follow the statutory mandate, sentencing errors may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)); see, e.g., State v. Jones, 118 Wn. App. 199, 204, 208-09, 76 P.3d 258 (2003) (trial court erred in ordering mental health treatment as a condition of community placement without following requisite statutory procedure; challenge addressed for first time on appeal).

The State may argue this sentencing issue is moot because Ford has already finished her sentence. A case is moot when it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief. Westerman v. Cary, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994). However, this Court has the power to decide a technically moot case to resolve issues of continuing and substantial public interest. State v. Slattum, 173 Wn. App. 640, 647, 295 P.3d 788 (2013). Courts consider three criteria in determining whether the requisite degree of public interest exists: (1) the public or private nature of the question presented; (2) the need for a judicial determination for future guidance of public officers; and (3) the likelihood of future

recurrences of the issue. State v. G.A.H., 133 Wn. App. 567, 573, 137 P.3d 66 (2006).

Most cases in which appellate courts utilize the exception to the mootness doctrine involve issues of constitutional or statutory interpretation. In re Pers. Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002). These types of issues tend to be more public in nature, more likely to arise again, and the decisions helpful to guide public officials. Mines, 146 Wn.2d at 285.

Ford's case raises a statutory interpretation question regarding what a sentencing judge must do on the record for an entire class of first time, non-violent offenders subject to less than a year imprisonment. This question is public in nature because it extends beyond Ford's own personal circumstances. The likelihood of recurrence factor is not limited to the questions of whether the appellant herself would be subjected to the same violation. Likelihood of recurrence includes whether the issue would recur for *others* in the future. In re Pers. Restraint of Myers, 105 Wn.2d 257, 261, 714 P.2d 303 (1986); State v. Sansone, 127 Wn. App. 630, 637, 111 P.3d 1251 (2005). In addition, there is a need for a judicial determination for future guidance of public officers because no published authority addresses the issue raised here. Ford therefore requests that this Court review the sentencing issue.

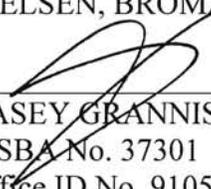
D. CONCLUSION

For the reasons set forth, Ford respectfully requests that this Court reverse the conviction and also hold that the trial court failed to comply with RCW 9.94A.680.

DATED this 9th day of June 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70936-4-1
)	
CARLA FORD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF JUNE 2014.

X *Patrick Mayovsky*

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JUN -9 PM 3:41