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Court of Appeals
Division II
State of Washington
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NO. 51837-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS BRADSHAW,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
PROSECUTORIAL MISCONDUCT DEPRIVED BRADSHAW OF A FAIR TRIAL.	1
B. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Abram
___ Wn. App. ___, 2018 WL 4610788 (2018)..... 5

State v. Ashby
77 Wn.2d 33, 459 P.2d 403 (1969)..... 6

State v. Brett
126 Wn.2d 136, 892 P.2d 29 (1995)
rev. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996)..... 6

State v. Burke
163 Wn.2d 204, 181 P.3d 1 (2008) 3, 4

State v. Crane
116 Wn.2d 315, 804 P.2d 10 (1991) 3

State v. Emery
174 Wn.2d 741, 278 P.3d 653 (2012)..... 7

State v. Lewis
130 Wn.2d 700, 927 P.2d 235 (1996)..... 2, 3

State v. Litzenberger
140 Wash. 308, 248 P. 799 (1926) 6

State v. McElfish
190 Wn. App. 1028, 2015 WL 6441716 (2015)..... 5

State v. Perry
24 Wn.2d 764, 167 P.2d 173 (1946) 7

RULES, STATUTES AND OTHER AUTHORITIES

U.S. Const. Amend. V 1

A. ARGUMENT IN REPLY¹

PROSECUTORIAL MISCONDUCT DEPRIVED BRADSHAW OF A FAIR TRIAL.

The State repeatedly glosses over the problematic comments on Bradshaw's right to silence by suggesting it was a "mere reference" that was not substantive evidence of guilt and did not shift the burden of proof. Brief of Respondent (BOR) at 9-17.

Here the prosecutor stated,

Now, Mr. Bradshaw has the absolute fifth amendment right not to testify. You saw it in the jury instructions, the fact that he didn't testify cannot be used against him. And that leaves you with the evidence that the State has presented. You get to draw inferences based on that, absent any other explanation. The evidence that you have explains his behavior, explains why he ran. Again, he doesn't have to testify. He doesn't -- we can't know necessarily what is in his head, because he doesn't have to tell you what he was thinking. He doesn't have to tell you what he knew or didn't know.

2RP 63. In rebuttal closing the prosecutor further emphasized that "we have to speculate because we can't get inside Mr. Bradshaw's head." 2RP 65.

In its response brief, the State claims the prosecutor's repeated emphasis of Bradshaw's failure to testify does not constitute an improper

¹ The State's arguments regarding the State's improper reasonable doubt argument and ineffectiveness of Bradshaw's trial attorney have been sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

"comment" because there was no negative inference associated with the emphasis. BOR at 9-13. In support of this argument, the State cites to State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996). BOR at 9-10. But Lewis is factually distinguishable from what transpired here.

Before his trial on rape and assault charges, Lewis successfully brought a motion in limine to prohibit admission of his behavior at the time of arrest and his statements that "I didn't rape no bitch" or "I will talk to you when I fell like it." Lewis, 130 Wn.2d at 702. During trial the prosecutor asked the lead detective if had talked to Lewis on the phone, eliciting the following answers from the detective:

I told him -- my recollection is that I told him or that he asked me if it was about women. He said those women were just at my apartment and nothing happened, and they were just both cokeheads. He was trying to help them is what he said.

...

And I told him -- my only other conversation was that if he was innocent he should just come in and talk to me about it.

Lewis, 130 Wn.2d at 702-03.

On appeal, Lewis argued the trial court erred in denying his subsequent motion for a mistrial because the detective's testimony was a comment on Lewis' right to remain silent. Lewis, 130 Wn.2d at 704-05. The Supreme Court concluded that the trial did not abuse its discretion in denying the motion for mistrial because the detective did not reveal Lewis

missed appointments or say that Lewis refused to talk to him. The Court noted that the detective made no statements to the jury that Lewis's silence was proof of guilt. Lewis, 130 Wn.2d at 706-07. Significant to the Court's conclusion was the fact that what Lewis told the detective was consistent with Lewis's later testimony. Id. at 706. The Court also noted that the prosecutor did not mention during closing argument, Lewis's refusal to speak with police about the charges or his failure to keep his scheduled appointments with police. Id. at 704.

Unlike Lewis, here Bradshaw did not testify at trial and the prosecutor emphasized his right to silence during closing argument. The prosecutor's repeated remarks during closing argument cannot therefore be considered "so subtle and so brief that [it] did not 'naturally and necessarily' emphasize defendant's testimonial silence." State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008) (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

More importantly, unlike Lewis, here the prosecutor's closing argument invited the jury to infer guilt from Bradshaw's decision not to testify. The prosecutor's repeated references to not knowing what was in Bradshaw's head emphasized that Bradshaw was the only witness who would have been able to cast doubt on the State's theory of the case. Thus, the prosecutor's closing argument invited the jury to speculate that if

Bradshaw could have cast doubt on the State's theory of the case, he would have testified. The unmistakable purpose was to infer that Bradshaw's decision not to testify therefore meant that the State's evidence was uncontradicted.

In contrast in Burke, the Supreme Court reversed Burke's conviction because the State invited the jury to infer guilt from Burke's silence and attempted to use his silence as substantive evidence of his guilt. 163 Wn.2d at 206, 222-23. As part of its case in chief, the State contended that Burke, when given an opportunity to tell his side of the story, terminated his interview with police without ever mentioning that he believed the woman he had sexual contact with was of legal consenting age. Burke, 163 Wn.2d at 208-09.

The Court therefore properly concluded that the State violated Burke's right to silence. As the Court noted, the State advanced the link between guilt and the termination of the interview because the implication was that Burke had invoked his right to silence because he knew he had done something wrong. Burke, 163 Wn.2d at 221-22. The same is true here. The prosecutor emphasized Bradshaw's decision not to testify and speculated about what was in his head before concluding that Bradshaw "knew he was in trouble because he knew that car was stolen." 2RP 63.

The remaining unpublished cases cited by the State are likewise unpersuasive because they bear little factual similarity to what transpired in Bradshaw's case. BOR at 11-13. In State v. McElfish, the prosecutor merely noted, "Now, you cannot hold the defendant not testifying against him. Don't do that. It's the State's job to prove the case." 190 Wn. App. 1028, 2015 WL 6441716, *3 (2015). As this Court properly recognized, the prosecutor's comment, without more, did not infer guilt or suggest that the jury should draw any inferences from McElfish's decision not to testify. Id.

Similarly, in State v. Abram, this Court concluded that a challenged statement was "so subtle and brief, it did not emphasis Abram's right to remain silent." __ Wn. App. __, 2018 WL 4610788, *9 (2018). There, a detective testified that Abram declined to answer questions about knowing how close a pursuing police car was to his own car. This Court noted that the prosecutor did not follow up on the answer regarding Abram's silence, and the prosecutor did not refer to Abram's silence during closing argument. Id.

The State next argues that the prosecutor's comment on Bradshaw's right to silence did not impermissibly shift the burden because the factual evidence, including whether Bradshaw knew the car was stolen could have been disputed by other witnesses. BOR at 13. As the State does here, several Washington cases also cite to State v. Litzenberger, 140 Wash. 308,

311, 248 P. 799 (1926), in which the Supreme Court stated, "Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it, and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his." See, e.g., State v. Brett, 126 Wn.2d 136, 176, 892 P.2d 29 (1995), rev. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); State v. Ashby, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969). The Supreme Court also has indicated that prosecutors may comment on "the defendant's failure to present evidence on a particular issue if persons other than the accused could have testified as to that issue." Brett, 126 Wn.2d at 176 (citing Ashby, 77 Wn.2d at 38).

But Bradshaw's case is easily distinguished from these cases. Although the State suggest that there were other witnesses who could have testified regarding Bradshaw's knowledge, this argument ignores the challenged statements. BOR at 15. Here the prosecutor stated,

[T]he fact that he didn't testify cannot be used against him. And that leaves you with the evidence that the State has presented. You get to draw inferences based on that, absent any other explanation. The evidence that you have explains his behavior, explains why he ran. Again, he doesn't have to testify. He doesn't -- we can't know necessarily what is in his head, because he doesn't have to tell you what he was thinking. He doesn't have to tell you what he knew or didn't know.

2RP 63.

By focusing jurors on the undisputed evidence for which, Bradshaw did not have to tell jurors what "he was thinking" and "what is in his head," the State necessarily and directly referred to the only person positioned to offer such evidence: Bradshaw. Bradshaw was necessarily the only witness could testify to what was in his own head. By employing these arguments in closing argument, the prosecutor improperly commented on Bradshaw's constitutional right not to testify and specifically indicated that Bradshaw was the only witness who could refute the State's evidence.

Finally, the State contends the jury instructions cured the prejudicial effect of the comments. BOR at 17-18. The presumption that jurors follow instructions is overcome when there is evidence the jury was influenced by the improper statement. *Id.* at 380. Arguments intended to create and that actually do create an inflammatory effect on the jury are, in general, incapable of being cured by instruction. *State v. Emery*, 174 Wn.2d 741, 763, 278 P.3d 653 (2012) *Emery*, 174 Wn.2d at 763; *State v. Perry*, 24 Wn.2d 764, 770, 167 P.2d 173 (1946). Such is the case here.

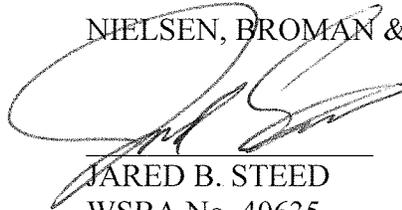
B. CONCLUSION

For the reasons discussed above, and in the opening brief, this Court should reverse Bradshaw's conviction and remand for a new trial.

DATED this 21st day of December, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is stylized and cursive.

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