

NO. 34781-8-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

FERNANDO FRANCISCO, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. Does sufficient evidence support Francisco's three convictions for reckless endangerment?
2. Did the prosecutor's remarks in closing argument constitute misconduct that was both prejudicial and incurable?
3. Can Francisco challenge for the first time the two-year domestic violence no-contact order imposed as part of his sentence when he agreed to it below?
4. Did the trial court adequately inquire into Francisco's ability to pay discretionary legal financial obligations?

B. ANSWERS TO THE ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. Sufficient evidence supports Francisco's three convictions for reckless endangerment.
2. The prosecutor's remarks in closing argument did not constitute misconduct that was both prejudicial and incurable.
3. Francisco cannot challenge for the first time the two-year domestic violence no-contact order imposed as part of his sentence because he agreed to it below.
4. The trial court adequately inquired into Francisco's ability to pay discretionary legal financial obligations.

II. STATEMENT OF THE CASE

The Appellant, Francisco Fernando, was convicted of fourth degree assault, third degree malicious mischief, and three counts of reckless endangerment. Clerk's Papers (CP) at 127-32. The trial court granted Francisco's half-time motion to dismiss the interfering with the reporting of domestic violence charge. Verbatim Report of Proceeding (VRP) 9/20/16 at 203.

Testimony at trial revealed that Francisco and Monica Salazar Mendoza were married and had three young children together. *Id.* at 82-83, 89. The children were Selina (age four), Fernando (age five), and Jesus (age six). *Id.* at 83. Francisco and Mendoza were not living together due to friction caused by a criminal case involving Francisco's son and Mendoza's daughter. *Id.* at 86.

On April 1, 2016, Mendoza drove Francisco and their children from Wapato, Washington to her mother-in-law's place in Parker, Washington. *Id.* at 87-88, 97. S.F., J.F., and F.F. sat in the backseat of the car. *Id.* at 90. At one point during the car ride, Francisco received a phone call and he began arguing with his wife over who the phone call was from. *Id.* at 88-89. Mendoza pulled over on the side of the highway after the argument became heated. *Id.* at 88. Francisco then struck Mendoza in the face with

his hand after she brought up the details of the case involving Francisco's son and her daughter. *Id.* at 89.

Sometime later, Mendoza pulled back onto the highway and continued driving to her mother-in-law's house. *Id.* at 90, 93. After arriving at the mother-in-law's house, Mendoza received a text message. *Id.* at 91. According to Mendoza, Francisco thought the text was from another man. *Id.* Francisco took Mendoza's phone and struck her in the face with his hand a couple of times. *Id.* at 93, 106, 129. Mendoza pleaded with Francisco to give her phone back. *Id.* at 93. Francisco refused. *Id.* Francisco then got out of Mendoza's car and jumped on the hood. *Id.* Francisco smashed Mendoza's phone against the front windshield, causing it to break. *Id.* at 93, 106; SE 8. Mendoza pleaded with Francisco to stop. *Id.* at 130. Francisco, however, continued smashing Mendoza's phone against the windshield. *Id.* at 93. Mendoza drove her car forward and backward to try get Francisco off of her car. *Id.* at 93. Francisco eventually slid off of the car and grabbed a metal bar from his mother's yard. *Id.* He then used the metal bar to break the back window of Mendoza's car where his three young children sat. *Id.* at 94. The three children screamed as they were showered by pieces of broken glass. *Id.* at 94, 130.

After Francisco broke the back window, Mendoza got out of the car and Francisco confronted her and began arguing with her. *Id.* During the

argument, Francisco punched Mendoza several times in the head and face with a closed fist and Mendoza ended up on the ground. *Id.* at 94, 108. Francisco eventually pinned Mendoza down on the ground using his hands and feet. *Id.* at 96. As Mendoza tried to get up, she heard her mother-in-law tell her to give Francisco the keys. *Id.* Mendoza explained that she thought Francisco and his mother were trying to take her keys away from her but she realized they were actually Francisco's keys because her mother-in-law had her keys in her hand. *Id.*

At one point, Francisco pressed down hard enough on Mendoza's neck that he forced her to let go of the keys. *Id.* at 97. He took the keys from her and drove away in his car. *Id.* at 97-98.

Mendoza testified that during the assault, she was "scared for her life" and did not know why Francisco "had to go that far." *Id.* at 111-12. Mendoza also testified that her phone was completely broken after Francisco smashed it against the windshield of her car. *Id.* at 93, 106.

After Francisco fled, Mendoza called 911. SE 20. Police officers arrived shortly afterward and found Mendoza bruised and covered in blood. VRP 9/20/16 at 108, 110. Officers photographed Mendoza's injuries as well as the damage to her car. SE 1-19. The photos showed that Mendoza had a cut lip, bumps on her head, blood on her chest, face, and clothing, debris on her pants, and scrapes or scratches on her hands and fingers. SE

10-16, 19. One photo showed the smashed screen of Mendoza's phone. SE 8. Other photos showed that the front windshield and back window of Mendoza's car were shattered and that there was broken glass everywhere including in the backseat where the three children sat. SE 2-7.

Sergeant Cory Sanderson of the Yakima County Sheriff's Office saw that Mendoza had a cut lip, injuries to her fingers and hands, and vegetative matter on her pants. VRP 9/20/16 at 170-71. Sergeant Sanderson did not find a metal bar at the scene.

Other evidence admitted at trial revealed that it cost \$427.28 to repair the front and back windshield to Mendoza's car and that Mendoza's shattered phone was purchased new three years ago for \$599.99. *Id.* at 164; *see also* SE 23.

A jury convicted Francisco of fourth degree assault, third degree malicious mischief, and three counts of reckless endangerment. CP at 128-32. The jury also found that Francisco and Mendoza were family or household members. *Id.* at 133, 135-38.

On October 4, 2016, Francisco was sentenced. VRP 10/4/16 at 82. The State recommended a sentence of 364 days, no community custody, restitution, and no-contact orders with Mendoza and their three children. *Id.* at 85-86. Counsel for Francisco argued for a credit for time served sentence (approximately 6 months) and did not oppose a no-contact order

protecting Mendoza. *Id.* at 89. The trial court sentenced Francisco to 9 months of confinement with credit for time served and imposed no community custody. *Id.* at 98. The court also imposed a no-contact order protecting Mendoza, but not her children, and legal financial obligations. *Id.* at 98; *see also* CP at 144-45.

This timely appeal then followed.

III. ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTS FRANCISCO'S THREE CONVICTIONS FOR RECKLESS ENDANGERMENT BECAUSE ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE ESSENTIAL ELEMENTS HAD BEEN PROVEN BEYOND A REASONABLE DOUBT.

Francisco alleges that there was insufficient evidence to support his three convictions for reckless endangerment. *See* Br. of Appellant at 10. He argues that the broken glass from the back window did not create a “considerable” risk of death or serious physical pain or injury to his three children because the glass was safety glass. *See* Br. of Appellant at 10. This argument misses the mark. Evidence admitted at trial proved that Francisco acted recklessly on April 1, 2016 when he broke the rear window of Mendoza’s car. RP 9/20/16 at 94, 169. The evidence further proved that Francisco’s conduct created a substantial risk of death or serious physical injury to his three children because they were all covered in broken glass.

See id. at 94. There was also a substantial risk the children could have been injured by the metal bar Francisco used to break the glass. Francisco came within inches of striking his children with the metal bar in light of the extremely small size of the passenger compartment of Mendoza’s car. *See* SE 5, 7.

In evaluating challenges based on the sufficiency of the evidence, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Aguilar*, 153 Wn. App. 265, 275, 223 P.3d 1158 (2009). There is sufficient evidence to support a conviction “when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 275 (quoting *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1994)). Moreover, a claim of insufficiency of the evidence admits the truth of the State’s evidence and all inferences that can be reasonably drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are interpreted most strongly against the defendant. *Id.* When evaluating the sufficiency of the evidence, circumstantial and direct evidence are considered equally. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the jury was properly instructed as to the elements of reckless endangerment. The trial court instructed the jury that “[a] person is guilty

of Reckless Endangerment when he or she reckless engages in conduct that creates a substantial risk of death or serious physical injury to another person.” CP at 118. Under RCW 9A.36.050(1), “[a] person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.”

The court further instructed the jury that:

To convict the defendant of the crime of Reckless Endangerment in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about April 1, 2016, the defendant acted recklessly;
- (2) That such conduct created a substantial risk of death or serious physical injury to J.F., another person; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 120. This same instruction was used in count five pertaining to F.F. and count six pertaining to S.F. *See id.* at 121-22. That instruction mirrors the Washington Pattern Jury Instruction. *See* WASH. PATTERN JURY INSTRUCTION § 35.33 (4th Ed.). Additionally, the jury was instructed that:

[a] person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Id. at 119. This instruction is also consistent with RCW 9A.08.010(1)(c), which defines the mens rea of recklessness.

After considering all of the evidence, the jury found beyond a reasonable doubt that Francisco acted recklessly when he broke the rear window to Mendoza's car and that his conduct created a substantial risk of death or serious physical injury to his three children—S.F., J.F., and F.F. CP at 130-32. There was overwhelming evidence supporting that every element of the crimes had been proven beyond a reasonable doubt.

1. Francisco acted recklessly.

The first element of reckless endangerment requires the State to prove that Francisco acted recklessly on April 1, 2016. *Id.* at 120-22. As previously discussed, a person acts recklessly when he or she “knows of and disregards a substantial risk that a wrongful act may occur and this disregard

is a gross deviation from conduct that a reasonable person would exercise in the same situation.” *Id.* at 119. The Washington Supreme Court clarified that the mens rea of recklessness has both subjective and objective components. *State v. Rich*, 184 Wn.2d 894, 904, 365 P.3d 746 (2016). Whether Francisco’s conduct was reckless “depends on both what [he] knew and how a reasonable person would have acted knowing these facts.” *Rich*, 184 Wn.2d at 904 (quoting *State v. Graham*, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005)).

Here, the evidence established that Francisco argued with Mendoza in front of their three young children and accused her of infidelity. VRP 9/20/16 at 88, 93. Francisco became physical with Mendoza in broad daylight in front of his three children right alongside the highway and at his own mother’s house. *Id.* 92-95. At his mother’s house, he stole Mendoza’s phone, broke the phone by smashing it against her front windshield, and then took a metal bar and broke the rear window where his three young children sat. *Id.* The children were completely covered in broken glass. *Id.* at 94. He hit the window with such force that it broke through the glass of the back window. SE 5, 16. Shards of glass were on the outside of the car too. SE 16.

Francisco’s three young children could have been seriously injured. For example, they could have gotten shards of glass in their eyes. They

could have been cut by shards of glass. They could have ingested shards of glass. The children could have also been injured by the metal bar in light of the extremely small size of the passenger compartment. Francisco was just inches away from the heads of his very young children when he shattered the back window with the metal bar. Had Francisco struck one of his children with the metal bar, they could have sustained a concussion or a skull fracture. The children were small and vulnerable at four, five, and six-years of age.

A reasonable person under these circumstances would have appreciated the substantial risk that their children could be harmed by breaking the rear window right next to where the children were seated. A reasonable person would not have placed their children in danger of substantial physical injury as Francisco did. Francisco's actions on April 1, 2016 constituted a gross deviation from the conduct that a reasonable person would have exercised under the same circumstances.

2. Francisco created a substantial risk of death or serious physical injury to his three young children when he shattered the back window of Mendoza's car where his children sat.

The second element of reckless endangerment requires the State to prove that Francisco's conduct in breaking the back window of Mendoza's car created a substantial risk of death or serious physical injury to his three

young children. CP at 120-22. No Washington statute defines the term “serious physical injury.” Without a statutory definition for this precise term, courts have held that jurors are to be instructed on the definition of “physical injury” only and then are to use their common sense to determine whether the injury is serious. *See State v. Taitt*, 93 Wn. App. 393, 791-92, 970 P.2d 785 (1999) (finding it unnecessary to define the term “serious physical injury” because it “is adaptable to the type of injury in issue and permits argument both pro and con.”) (quoting *State v. Welker*, 37 Wn. App. 628, 638 n.2, 683 P.2d 1110 (1984)). The Supreme Court defined substantial in the context of a second degree assault case and held it was “considerable in amount, value, or worth” and more than something “having some existence.” *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011). “Physical injury,” on the other hand, is defined as “physical pain or injury, illness, or an impairment of physical condition.” RCW 9A.04.110(4)(a). Courts have also recognized that risk is not the same thing as a certainty. *Graham*, 153 Wn.2d at 407.

In *Rich*, the court found that evidence of driving under the influence combined with speeding, extreme intoxication, the defendant’s knowledge she was “tipsy,” and the defendant “engaging in all of this behavior with a young child in the front seat” was sufficient to prove reckless endangerment. 184 Wn.2d at 910.

The facts of this case closely resemble a recent unpublished decision from Division I, which this Court may look to as persuasive authority. In that case, a defendant picked up an object, threw it at a car as the car drove away, and shattered the rear window where children sat. The court held that “glass from the broken window . . . presented a potential harm to the children, either from external cuts or the children ingesting pieces of glass.” *State v. McCulley*, 2017 Wash. App. LEXIS 340, at 9 ¶ 27 (Wash. Ct. Appeals Feb. 13, 2017). The court also found that the object used to break the window also presented a danger to the children because it could have passed through the window and struck one of the children. *Id.*

Similarly here, Francisco broke the front and rear window of Mendoza’s car with his young children inside. VRP 9/20/16 at 93-94. The metal bar broke through the safety glass of the rear window where the children sat and left shards of broken glass all over the children inside of the car. *Id.* at 94. There were also shards of glass outside near the trunk of the car. *See* SE 5; *see also* VRP 9/20/16 at 94. Mendoza testified that the children had glass “all over them.” VRP 9/20/16 at 94. The children could have been injured from the broken glass either by getting cut by it, getting it in their eyes, or ingesting it. Alternately, the children could have been struck by the metal bar when Francisco smashed the rear window and broke

through the glass. If Francisco struck one of the children with the metal bar, they could have suffered a concussion or a skull fracture.

There was no testimony that the shards of glass from the rear window were not sharp. Francisco falsely assumes that individuals cannot be injured by shards of glass. *See* Br. of Appellant at 14. This argument fails because it presupposes the substantial *certainty* of death or substantial physical harm rather than the substantial *risk* of death or substantial physical harm. Reckless endangerment under RCW 9A.36.050 requires the *risk* of death or substantial physical harm, not the *certainty* of these things as Francisco argues. Accordingly, there is sufficient evidence for a rational trier of fact to find that Francisco's actions in breaking the rear window created a substantial risk of death or substantial physical harm to three young children.

3. Francisco's actions occurred in Washington.

The final element of reckless endangerment requires the State to prove that the incident occurred in the State of Washington. CP at 120-22. The uncontroverted evidence admitted at trial established that Francisco, among other things, took a metal bar and broke the rear window where his children sat while at his mother's house located in Parker, Washington. VRP 9/20/16 at 86-87, 93-94. Therefore, sufficient evidence proves that Francisco's actions on April 1, 2016 occurred in the State of Washington.

The discussion above demonstrates that there is sufficient evidence supporting each element of reckless endangerment. Francisco's three convictions for reckless endangerment should therefore be affirmed.

B. FRANCISCO IS UNABLE TO PROVE THAT THE PROSECUTOR'S REMARKS WERE FLAGRANT OR ILL-INTENTIONED OR THAT THE ALLEGED MISCONDUCT COULD NOT BE REMEDIED BY A CURATIVE INSTRUCTION.

Francisco argues for the first time on appeal that the prosecutor committed misconduct in closing argument by implying that he had a duty to present evidence and by commenting on his right to not testify at trial. *See* Br. of Appellant at 16. He further claims that the prosecutor's arguments were prejudicial and incurable. *See id.* at 22.

In order to prevail on a claim of prosecutorial misconduct, Francisco has the burden of proving both improper conduct and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Misconduct is considered prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). Only when it is clear and unmistakable that counsel is not arguing an inference from the evidence, but expressing a personal opinion does prejudice arise. *McKenzie*, 157 Wn.2d at 54 (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

In cases such as this where defense counsel failed to object, any error is waived unless the conduct was so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by admonition to the jury.” *State v. Stetson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Prosecutors have wide latitude to draw reasonable inferences from the evidence. *Id.* at 727. Although improper, the remarks of the prosecutor 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, unless 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, 86, 882 P.2d 747 (1994). The reviewing court examines the prosecutor’s allegedly improper arguments in light of the entire closing argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Id.*

1. There was no misconduct because the prosecutor’s remarks properly argued inferences from the evidence and rebutted Francisco’s arguments.

Francisco asserts that the prosecutor committed misconduct on multiple occasions. *See* Br. of Appellant at 16-20. Because Francisco never objected to the prosecutor’s arguments below, the inquiry here is limited to whether the prosecutor’s remarks were flagrant and ill-intentioned and

whether those remarks created an “enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Russell*, 125 Wn.2d at 86.

Beginning first with the prosecutor’s remarks regarding self-defense. The prosecutor stated:

Okay, now, this is self-defense. Ladies and Gentlemen, I would submit to you this is kind of a big red herring. I’ve got to – I’ve got to disprove this beyond a reasonable doubt, okay, that there’s self-defense. But the thing is that we’re – we don’t even have – you’d have to speculate to find him guilty by self-defense because there’s all these elements to it. The use of force is okay if it’s used by a person who reasonably believes he’s about to be injured. There’s a reason why I put that in yellow. We’ll talk about it in a minute. And they have to use the force to prevent or attempt to prevent the offense against them, like being assaulted and they can’t use any more force than necessary. Okay, here’s one thing we have evidence about and that is that for there to be self-defense, you have to be able to find that – that he believed he’s about to be injured. What’s the evidence of that? There’s no evidence about what he believed. No evidence at all about what he believed. I would suggest that you just stop right there. You know, if you want to go – if you want to go a step further – and there’s no reason why you should. I think you’d just have to speculate. I would argue to you you’d just have to speculate in order to – to say that he believed he was about to be injured because we don’t know what he believed. No evidence about that whatsoever about what

he really actually believed – what was in his mind at that time.

VRP 9/22/16 at 41-22. Then, in rebuttal closing, the prosecutor stated:

And then Ms. Holmann apparently said, well, that's why – this is why this could be self-defense. You know, he's defending himself against that. Well, that – by the time he was hitting her again or hitting down on the ground, that was all over. And once again, no evidence that he actually believed that he was going to be harmed. No evidence of that at all. It's just a distraction I would suggest to you. It's a – you'd have to speculate to be able – to find self-defense in this case.

Id. at 57.

It is true that a prosecutor cannot argue that the defendant has a burden of proof or “comment on the defendant’s failure to present evidence.” *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). A prosecutor is, however, allowed to point out the improbability or the lack of evidentiary support for the defense theory of the case. *Russell*, 125 Wn.2d at 87. The “mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.” *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009). A prosecutor is also allowed to “state that certain testimony is not denied, without reference to who could have denied it, and may comment

that evidence is undisputed.” *State v. Morris*, 150 Wn. App. 927, 931, 210 P.3d 1025 (2009).

For example, courts have found no misconduct based on flagrant or ill-intentioned remarks when a prosecutor argued:

So the only issue is who did it. That’s what this case boils down to, who did it. You sat through two weeks of testimony. There’s been zero evidence of anyone else who had a motive or the opportunity or the means to commit this crime.

There’s been no alternative theory, no alternative suspect. Jose Muro had no enemies, was not in a dispute, argument or a fight without anybody other than with the defendant.

State v. Gasteazoro-Panigua, 173 Wn. App. 751, ¶ 60, 294 P.3d 857 (2013) (citing to paragraph number as pincite because LexisNexis did not include complete page numbers for reporter). In contrast, courts have found misconduct based on flagrant and ill-intentioned remarks when a prosecutor argued:

How do I dispose that the Defendant reasonably believed that there was imminent danger, when there has been no evidence that the Defendant reasonably believed that there was imminent danger? Ladies and gentleman, there is nothing to disprove that because there is no evidence of it.

State v. McCreven, 170 Wn. App. 444, 470, 284 P.3d 793 (2012). The fatal error in *McCreven* warranting reversal was not the prosecutor's improper remarks on self-defense, but the incorrect jury instructions on self-defense. *Id.* at 471. Courts have also found misconduct based on flagrant and ill-intentioned remarks when a prosecutor argued:

AIM -- I didn't want to come in because of AIM -- he said he was strong in it. They get even with people. She was scared of what he might do or what his friends might do. . . . What is AIM? Sean Finn is the political wing of the Irish Republican Army. AIM is to the English what the Sean Finn is to the Irish. It is a deadly group of madmen. I'm not saying all of them but that's the way they think of it. Kadafi -- feared throughout the world. Why? We don't trust his stability. We don't think [Jane Doe], all four foot three of her, and [John Doe], who is a lot bigger, wanted to spend the rest of their lives looking over their shoulders. Nobody deserves to have to go through that. We don't in our homes. They don't up on the reservation. In the proceedings Mr. Bisagna [defense counsel] says, "Well, I'm an Indian. I'm not afraid of AIM." Well, that's fine. Mr. Bisagna doesn't have an occupation of picking up cans. Mr. Bisagna doesn't live on the reservation. Mr. Bisagna isn't about four foot three inches tall. She was frightened.

. . .

. . . AIM -- the people are frightened of AIM. . . . I remember Wounded Knee, South Dakota. Do any of you? It is one of the most chilling events of the last decade. You might

talk that over once you get in there. That was the American Indian Movement. That was a faction of the American Indians that were militant, that were butchers, that killed indiscriminately Whites and their own. That event didn't end for some six years before all the court battles were done. Is AIM something to be frightened of when you are an Indian and you live on the reservation? Yes it is.

State v. Belgarde, 110 Wn.2d 504, 506, 110 Wn.2d 504 (1988).

Here, the prosecutor's remarks during closing argument did not imply that Francisco had a duty to present evidence regarding self-defense. Rather, the prosecutor argued that Francisco's claim of self-defense was not credible based on the evidence that had been presented. Unlike *McCreven*, the prosecutor reiterated that the State had the burden of disproving self-defense beyond a reasonable doubt. *See* VRP at 9/20/16 at 41 (stating that "I've got to – I've got to disprove this beyond a reasonable doubt, okay, that there's self-defense."). The prosecutor's argument in *McCreven* suggested that "there is nothing to disprove because there is no evidence of it." 170 Wn. App. at 470. That remark likely implied the defendant had a burden of proof. In contrast, the prosecutor in this case did not imply that Francisco had a burden of proof for self-defense or anything else. Reviewing the prosecutor's argument in its entirety, the issues in the case, evidence addressed in the arguments, and the jury instructions reveals that the

prosecutor commented on the lack of evidence supporting the defense's theory, which is permissible under *Jackson*. See also *Russell*, 125 Wn.2d at 84.

In *Jackson*, the defendant alleged the prosecutor committed misconduct by (1) vouching for the credibility of witnesses; (2) burden shifting; (3) commenting on his right not to testify; (4) suggesting that the only way to acquit would be if the State's witnesses were lying; and (5) expressing a personal opinion. 150 Wn. App. at 884-89. The court found that the prosecutor did not vouch for police officers' testimony when the prosecutor argued that the officers reported their observations accurately and that the officers' testimony was accurate and true. *Id.* at 884. The court found no burden shifting when the prosecutor argued "there was not a single shred of testimony" corroborating the defendant's story and invited the jury to compare the defendant's evidence with the State's evidence. *Id.* at 886. The court found no error with the prosecutor's argument that no evidence corroborated the defendant's witness or that any evidence proved that the defendant was intoxicated. *Id.* at 887. The court again found no error with the prosecutor's argument "what possible reason would Trooper Nelson have to lie or make something up that" the defendant was driving the vehicle. *Id.* at 888. And finally, the court found that the prosecutor did not express a personal opinion in arguing "I think maybe [the defendant] might

have ulterior motives.” *Id.* at 889. In each instance, the prosecutor argued reasonable inferences from the evidence. *Id.* at 884-89. This is exactly what the prosecutor did here.

Additionally, the prosecutor’s remarks in rebuttal closing were a fair response to defense counsel’s arguments. Defense counsel argued:

And then, of course, you heard there was evidence of a bat perhaps being used. That she was armed with a bat at some point. Ladies and Gentlemen, because there was no intentional assault and because Mr. Francisco had the right to defend himself from being hit by a car, I ask that you find him not guilty of assault in the fourth degree. And because this is a situation, it’s unfortunate, but it was a heated dispute between a couple. A very heated dispute where everyone lost their tempers. But there’s nothing malicious about it. If you look at the jury instruction for malicious, it’s an evil intent. This isn’t about that. It was losing your temper so I ask that you find him not guilty of malicious mischief in the third degree.

VRP at 9/22/16 at 49. The prosecutor is entitled in rebuttal argument to make a fair response to the defense’s closing argument. *Russell*, 125 Wn.2d at 87. That is what the prosecutor did. The prosecutor alerted the jury to the evidence that had been admitted. The evidence showed that when Francisco struck Mendoza in the car and on the ground, he was not at risk of being hit by the car. VRP 9/20/16 at 94-96. The evidence further showed that Francisco pinned Mendoza on the ground while he punched her

repeatedly in the head and face. *Id.* at 96. This, in return, properly rebutted the defense’s argument that Francisco tried to defend himself from being hit by Mendoza’s car. VRP at 9/22/16 at 49.

Accordingly, the prosecutor’s comments were neither flagrant nor ill-intentioned. Francisco has not met his burden in proving that the prosecutor’s remarks constituted flagrant and ill-intentioned misconduct.

2. The prosecutor did not imply that Francisco had a burden to present evidence and did not comment on his right to not testify.

Francisco argues that the prosecutor committed misconduct by implying he had a burden to present evidence and by commenting on his right to not testify at trial. *See* Br. of Appellant at 20.

A defendant has no obligation to present evidence. *State v. Vassar*, 188 Wn. App. 251, 260, 352 P.3d 856 (2015). A prosecutor, however, is allowed to comment on a defendant’s failure to support his or own theories of the case. *Id.* In cases where “a defendant advances a theory exculpating [him or her], the theory is not immunized from attack. On the contrary, the evidence supporting a defendant’s theory of the case is subject to the same searching examination as the State’s evidence.” *Id.* (quoting *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990)). In *Vassar*, the court found no misconduct when the prosecutor argued the jury needed to

believe everyone else was “mistaken” in order to believe the defendant’s version of what happened. *Id.* at 260-61.

Moreover, a prosecutor violates a defendant’s right against self-incrimination when a prosecutor makes remarks “of such character that the jury would ‘naturally and necessarily accept it as a comment on the defendant’s failure to testify.’” *State v. Fiallo-Lopez*, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995). In *Fiallo*, the court found misconduct when the prosecutor argued there was “absolutely” no evidence to explain why the defendant was present at the restaurant and grocery store when two other individuals were there for a drug transaction. *Id.* Because the prosecutor emphasized the defendant’s silence and shifted the burden to the defendant to explain his whereabouts, the prosecutor’s remarks constituted misconduct. *Id.*

In contrast, courts found no misconduct when a prosecutor argued in rebuttal closing that defense counsel “forgot a big reason” why the defendant did not testify. *In re Pers. Restraint Caldellis*, 187 Wn.2d 127, 143-44, 385 P.3d 135 (2016). The prosecutor’s argument was determined to be a fair response to the defense’s argument. *Id.*

Here, Francisco challenges the argument below on grounds it implied he had a duty to present evidence and commented on his right to not testify. *See* Br. of Appellant at 20.

The prosecutor argued:

. . . And now we don't get to do anymore talking. You folks go back and you have the case and we're handing you the case. The Judge has given you the law and you hold that law in your hand in every sense. It's the law you swore an oath to apply to the facts of this case, Ladies and Gentlemen. And we had a witness that had the courage to come and testify and you listened to her testimony. You looked at all the other evidence. Considered the fact there wasn't anyone that really contradicted almost everything that she said. Considered the fact that she called in and made this 911 call that you heard. You saw the photographs of what happened – and have considered the fact that her testimony is only, I would argue to you, reasonable explanation for how these windows got broken and how she got these wounds and why there's blood all over her, why there's vegetation on her pants. . . . Just another – another example of one of the small details that's explained by Monica's testimony. Doesn't seem reasonably explained by something else. Did she break the windows herself or did he do it? Did she hit herself in the mouth or did he do it?

What makes sense to a reasonable person, Ladies and Gentlemen? What would a reasonable person conclude?

VRP 9/22/16 a 60-61. The prosecutor was again pointing out the lack of evidence supporting the defense theory. The prosecutor never stated or even implied anything about Francisco's right to testify. These are permissible arguments under *Jackson*. What is more, the prosecutor also

reminded the jury that they were to follow the law that the judge instructed them on. It was not improper for the prosecutor to ask the jury what was reasonable to believe happened in light of the evidence presented.

Thus, the prosecutor's remarks in closing did not constitute flagrant or ill-intentioned misconduct. The prosecutor's remarks brought to light the lack of evidence supporting the defense's theory and rebutted the defense's arguments in closing about Francisco acting in self-defense.

3. Francisco is unable to prove that he was prejudiced by the prosecutor's remarks or that the prosecutor's remarks had a substantial likelihood of affecting the jury's verdict.

Francisco also claims that he was prejudiced by the prosecutor's remarks yet he fails to show how. *See* Br. of Appellant at 21-22. Prejudice arises when the prosecutor's remarks "deliberately appealed to the jury's passion and prejudice and encouraged the jury to base the verdict on the improper argument 'rather than properly admitted evidence.'" *In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 711, (2012) (quoting *Belgarde*, 110 Wn.2d at 507-08)). As previously discussed, misconduct is considered prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. *Yates*, 161 Wn.2d at 774.

For example, courts have found prejudice where prosecutors modified exhibits. This was addressed extensively in *Glassman*. In

Glassman, the prosecutor modified exhibits in their PowerPoint to contain inflammatory text. *Id.* at 705-06. One slide modified a photograph by including the caption “WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?” *Id.* at 706. Another slide had the image of the defendant with the word “GUILTY” that flashed across his face three times. *Id.* at 710. The court held that

viewed as a whole, the prosecutor’s repeated assertions of the defendant’s guilt, improperly modified exhibits, and statement that jurors could acquit [the defendant] only if they believed him represented the type of pronounced and persistent misconduct that cumulatively causes prejudice demanding that a defendant be granted a new trial.

Id. at 710.

Here, on the other hand, there were no inflammatory remarks by the prosecutor. There were also no modified exhibits with inflammatory language. The prosecutor neither implied nor suggested that Francisco had a duty to present evidence. Additionally, the prosecutor never commented on Francisco’s right to not testify. Francisco claims that he was prejudiced by the prosecutor’s remarks during closing argument yet he cannot demonstrate how he was actually prejudiced. He has not shown that the prosecutor’s remarks were so “pervasive” that they could not have been remedied by a curative instruction. *Id.* at 707. Nothing has been advanced

to demonstrate that the jury based their verdict on the alleged improper arguments of the prosecutor instead of the properly admitted evidence.

4. Assuming for sake of argument there was flagrant or ill-intentioned misconduct, any prejudice could have been remedied by a curative instruction.

Defense counsel failed to object at any time during when the prosecutor allegedly implied that Francisco had a burden to present evidence and commented on his right to not testify. *See id.* 9/20/16 at 41-43, 57. In order to prevail, Francisco must show that “(1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and; (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *Thorgerson*, 172 Wn.2d at 442). The Supreme Court articulated that “[r]eviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill[-]intentioned and more on whether the resulting prejudice could have been cured.” *Emery*, 174 Wn.2d at 762. The determinative factor then is whether a feeling of prejudice has been engendered or located in the minds of the jury so as to prevent a defendant from obtaining a fair trial. *Id.* (citing *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

Courts have found flagrant or ill-intentioned remarks based on PowerPoint slides that invaded the jury’s province of deciding the

defendant's guilt or innocence. A case in point is *State v. Walker*, 182 Wn.2d 463, 341 P.3d 976 (2015). In *Walker*, the prosecutor's PowerPoint contained over 100 slides with the heading "DEFENDANT WALKER GUILTY OF PREMEDIATED MURDER" and other slides that suggested the defendant was guilty of other crimes. *Id.* at 471-72. One slide stated that "MONEY IS MORE IMPORTANT THAN HUMAN LIFE." *Id.* at 473. While another slide contained a racial slur. *Id.* at 474. Defense counsel never objected to any of the prosecutor's PowerPoint slides. *Id.* The court explained that attorneys are allowed to use multimedia sources such as PowerPoints to summarize and highlight evidence. *Id.* at 477. But, the prosecutor's conduct "was so flagrant, pervasive, and prejudicial that it could not have been overcome with a timely objection and an instruction to the jury to disregard the improper slides." *Id.* at 479.

Entertaining the notion that the prosecutor in this case committed flagrant and ill-intentioned misconduct during closing argument, Francisco has not met his burden in proving that the errors were incurable. The first error Francisco complains of concerns the prosecutor's remarks that there was no evidence Francisco believed he was going to be harmed, which was required for self-defense. *See* Br. of Appellant at 19-20; *see also* VRP 9/20/16 at 41-42, 57; CP at 114. The second and third errors Francisco complains of concern the prosecutor's remarks about shifting the burden of

proof to him and commenting on his right to not testify. *See* Br. of Appellant at 20; *see also* VRP 9/20/16 at 61.

Had Francisco objected in these instances, the trial court could have properly explained the jury's role and explained that the State bears the burden of proof and the defendant bears no burden of proof. That instruction would have then eliminated any possible confusion as well as cured any potential prejudice from the prosecutor's remarks. Francisco also could have moved to strike and had the trial court admonish the jury to disregard the prosecutor's comments.

Francisco also has not shown that there was a substantial likelihood the prosecutor's remarks affected the jury's verdict. Overwhelming evidence supported Francisco's guilt. Mendoza testified that Francisco repeatedly assaulted her, punched her in the face and head, knocked her to the ground and pinned her down, broke her phone by smashing it against the front windshield of her car, and then with a metal bar, smashed the rear window of her car where their three children sat. VRP 9/20/16 at 93-96. Photographs clearly showed Mendoza's injuries and the damage to her car, including shards of glass found both inside and outside of her car and in the backseat where the three children sat. SE 2-7, 10-12, 19. This evidence, in turn, is what led to the jury's guilty verdicts against Francisco.

The trial court's instructions to the jury guided their consideration of the evidence and properly admonished the jury that the attorneys' remarks, statements, and arguments were not evidence. CP at 95. Jurors are also presumed to follow the court's instructions. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). In light of the strength of the evidence presented at trial and the court's instructions, the prosecutor's remarks were not so flagrant or ill-intentioned that Francisco was denied a fair trial. There is no evidence the prosecutor's remarks materially affected the outcome of the trial. Thus, there was no prejudice to Francisco. The alleged misconduct could have been remedied by a curative instruction.

C. FRANCISCO AGREED TO THE TWO-YEAR NO-CONTACT ORDER BELOW AND SHOULD NOT BE ALLOWED TO CHALLENGE IT HERE.

Francisco argues for the first time that the trial court erred when it imposed a two-year no-contact order as part of his sentence. *See* Br. of Appellant at 22. Francisco did not challenge the no-contact order below and actually agreed to it. VRP 10/4/16 at 89-90. The trial court did not err in entering the two-year no-contact order because it was reasonably necessary to prevent future acts of violence by Francisco against Mendoza.

It is commonly accepted that a party may not raise a new argument on appeal that was not raised before the trial court. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013); *see also* RAP 2.5(a). This Court

identified several reasons to decline to address issues not raised at the trial court level, which are compelling.

Good sense lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.

State v. Stoddard, 192 Wn. App. 222, 226-27, 366 P.3d 474 (2016). Francisco should not be allowed to challenge the two-year domestic violence no-contact order when he did not challenge it below and agreed to it. In the event that this Court exercises discretionary review, the record demonstrates that the trial court properly imposed the no-contact order as part of Francisco's sentence.

Even if Francisco had timely objected to the no-contact order, the no-contact order is a crime-related prohibition. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 376, 229 P.3d 686 (2010). The trial court's imposition of crime-related prohibitions is reviewed for an abuse of discretion. *State v. Armendariz*, 160 Wn.2d 106, 112, 156 P.3d 201 (2007). An abuse of discretion arises when the trial court's decision is manifestly unreasonable or is based on untenable grounds. *State v. Brown*, 132 Wn.2d

529, 572, 940 P.2d 546 (1997). A trial court may also abuse its discretion when it applies the wrong legal standard. *Rainey*, 168 Wn.2d at 375. Marriage is “one of the ‘basis civil rights of man,’ fundamental to our very existence and survival.” *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Crime-related prohibitions limiting fundamental rights are permissible if they are “sensitively imposed” and the restrictions must be “reasonably necessary to accomplish the essential needs of the state and the public order.” *Rainey*, 168 Wn.2d at 375 (quoting *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)).

Francisco relies on the unpublished decision of *State v. Bronowski* as persuasive authority to support his argument that the trial court abused its discretion when it imposed the no-contact order that exceeded the length of his statutory maximum sentence. 2016 Wash. App. LEXIS 1481 (Wash. Ct. App. June 21, 2016); *see also* Br. of Appellant at 23-24. In *Bronowski*, this Court held that the trial court abused its discretion when it entered a five-year no-contact order protecting the victim of a gross misdemeanor crime. 2016 Wash. App. at 12-13 ¶ 21. This Court reasoned that protecting the victim did not directly relate to a felony crime; therefore, the trial court erred in entering the five-year no-contact order. *Id.*

This case is distinguishable from *Bronowski* for a number of reasons. First, the problematic no-contact order in *Bronowski* protected a

victim of second degree vehicle prowling. 2016 Wash. App. at 2-3 ¶ 3. Here, the no-contact order Francisco challenges protects Mendoza, a victim of fourth degree assault and third degree malicious mischief. Second, there were no acts of violence against the victim in *Bronowski*. 2016 Wash. App. at 2-3 ¶ 3. There was also little risk the victim in *Bronowski* would be subjected to future acts of violence. Here, there were acts of violence against Mendoza and a risk of future violence. The evidence admitted at trial proved that Francisco violently assaulted Mendoza in front of their three children and his own mother. VRP 9/20/16 at 93-94. And third, the problematic no-contact order in *Bronowski* protected a victim who testified regarding one charge rather than multiple charges. 2016 Wash. App. at 2-3 ¶ 3, 12-13 ¶ 21. In stark contrast, Mendoza's testimony substantiated all five of the charges that Francisco was convicted of. VRP 9/20/16 at 82-84, 87-94.

Courts have held that when a witness provides testimony for multiple offenses, a no-contact order may be applied up to the statutory maximum terms of those crimes. *State v. Navarro*, 188 Wn. App. 550, 556-57, 354 P.3d 22 (2015). As mentioned above, Mendoza's testimony substantiated five of the offenses that Francisco was convicted of including two offenses where she was the victim. Francisco was convicted of fourth degree assault a gross misdemeanor under RCW 9A.36.041; third degree

malicious mischief a gross misdemeanor under RCW 9A.48.090; and three counts of reckless endangerment, which are gross misdemeanors under RCW 9A.36.050. The trial court could have imposed a five-year no-contact order protecting Mendoza because she provided testimony in five gross misdemeanor offenses.

Additionally, the two-year no-contact order was authorized by RCW chapter 10.99, specifically RCW 10.99.050, because the jury found that Francisco and Mendoza were family or household members under RCW 10.99.020(3). *See also* CP 133, 134-37. The jury was properly instructed that family or household members include persons who have a parent or child relationship, persons who are married, or persons who have children in common. CP at 126.

The two-year no-contact order was “sensitively imposed” and “reasonably necessary” to prevent future acts of violence by Francisco against Mendoza. *Rainey*, 168 Wn.2d at 375. *Navarro* and RCW 10.99.050 support that the trial court acted within its discretion in imposing a two-year domestic violence no-contact order.

D. THE TRIAL COURT PROPERLY IMPOSED DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS AFTER CONDUCTING A THOROUGH INQUIRY OF FRANCISCO'S PRESENT AND FUTURE ABILITY TO PAY.

Francisco alleges that the trial court violated *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) when it found he had the present or likely future ability to pay discretionary legal financial obligations (LFOs). *See* Br. of Appellant at 24. Both *Blazina* and RCW 10.01.160(3) require trial courts to assess a defendant's present and future ability to pay discretionary LFOs at sentencing. The extent of what is required in the trial court's "individualized inquiry" is disputed. *Blazina*, 182 Wn.2d at 838.

The *Blazina* Court recognized that "[a] defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." 182 Wn.2d at 832. Francisco did not challenge LFOs below, and should not be allowed to do so now. *See* VRP 10/4/16 at 99-100. In the event that this Court exercises discretionary review, the record demonstrates that the trial court properly assessed Francisco's present and future ability to pay discretionary LFOs.

At the sentencing hearing on October 4, 2016, the trial court inquired into Francisco's ability to pay fairly extensively before imposing LFOs. For example, the court inquired as to Francisco's employment history, whether he anticipated obtaining work after he was released from prison, his average

monthly paycheck, whether he had any property or assets, how many dependents he supported, what his child support obligations were, and if he had any money in the bank. *Id.* at 94-97.

After inquiring into Francisco's ability to pay LFOs, the trial court imposed the following discretionary LFOs: \$300 court appointed attorney fee and \$250 jury fee. *Id.* at 99-100; *see also* CP at 145. The court also capped the costs of incarceration at \$500. *Id.* at 100; CP at 145.

While not conceding this issue, Respondent agrees to strike discretionary LFOs in order to avoid the continued costs of litigation in the event that the Court grants discretionary review.

E. RESPONDENT IS NOT SEEKING COSTS ON APPEAL EVEN IF IT IS PREVAILING PARTY IN THE INTEREST OF JUDICIAL ECONOMY.

Unless directed otherwise, “the party that substantially prevails on review” will be awarded appellate costs. RAP 14.2. The authority to award costs is permissive under RAP 14.2. It is within the Court's discretion to decline to award costs at all. *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In the event that Respondent prevails on appeal, Respondent is not seeking costs in the interest of judicial economy.

IV. CONCLUSION

Sufficient evidence supports Francisco's three convictions for reckless endangerment. Francisco has not shown that the prosecutor's remarks during closing argument were improper or that he was prejudiced by those arguments. Since Francisco failed to object below, he waived the error because he has been unable to demonstrate that the prosecutor's remarks were so flagrant and ill-intentioned that they were prejudicial and could not be cured.

At sentencing, Francisco agreed to a two-year no-contact order protecting Mendoza and should not be allowed to challenge it here. If the Court grants discretionary review, the record reflects that the trial court properly imposed a no contact order as part of Francisco's sentence. Although not conceding the issue, if the Court grants discretionary review, Respondent agrees to strike discretionary LFOs in order to avoid the costs of continued litigation. And, in the event that Respondent is the prevailing party, Respondent is not seeking costs on appeal in the interest of judicial economy.

For these reasons, Francisco's convictions should be affirmed.

Respectfully submitted this 24th day of July, 2017

DECLARATION OF SERVICE

I, Codee L. McDaniel, state that on July 24, 2017, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Ms. Jill Reuter at admin@ewalaw.com.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of July, 2017 at Yakima, Washington.

/s
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YAKIMA COUNTY PROSECUTOR'S OFFICE

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