COA No. 31082-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JAMES FRANCIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

The Honorable Kathleen M. O'Connor

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS

WASHINGTON CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND COURT RULES

TREATISES

UNITED STATES COURT OF APPEALS CASES

UNITED STATES SUPREME COURT CASES

A. ASSIGNMENTS OF ERROR

1. In Mr. Francis' trial on two counts of robbery by purse-snatching, the prosecutor improperly commented on the defendant's pre-arrest silence in closing argument by faulting him for not doing the "responsible" thing and coming forward and talking to the investigating police detectives, like the co-defendant Mr. Stefan did.

2. The prosecutor improperly commented on the defendant's exercise of his right to go to trial by faulting him for not acting in a "responsible" way and agreeing to enter a plea of guilty and then provide information to the detectives, and by comparing Mr. Francis to the co-defendant, who did so.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. At trial, the co-defendant (who plead guilty after charging) stated that he and Mr. Francis had planned to commit robberies of purses from women, in order to get money for drugs. The prosecutor presented numerous police and civilian witnesses who described the co-defendant's early confession to police and his voluntary surrender as soon as he learned he was in trouble, compared to the fact that police had to locate Mr. Francis.

In closing argument, did the prosecutor improperly comment on the defendant's pre-arrest silence when he faulted him for not

responsibly coming forward and talking to investigating police detectives, and by comparing Mr. Francis to the co-defendant Mr. Stefan, who did so?

2. Did the prosecutor also improperly comment on the defendant's exercise of his right to go to trial by faulting him for not responsibly agreeing to enter a plea of guilty and provide information to the detectives, and by comparing Mr. Francis to Mr. Stefan, who did so?

3. The evidence that the defendant committed robbery by using force, as opposed to the lesser offense of taking the purses by first degree theft, was highly controverted, by the victims including Ms. Altman, and by the defendant who testified. The evidence of robbery was far from overwhelming. In closing, when the prosecutor faulted the defendant for not responsibly coming forward, and for not responsibly pleading guilty, the prosecutor explicitly argued that Mr. Francis' irresponsibility now extended to his claim to the jury that he was only responsible for committing the lesser crimes of theft, which the prosecutor, therefore, urged the jury to reject.

During deliberations, the jury sent out an inquiry asking for a definition of the term "force" for purposes of robbery, attesting to the jury's equipoise on the robbery charges. The jury however found Mr.

Francis guilty of robbery. Must this Court reverse Mr. Francis' robbery convictions, where the State cannot prove that the prosecutor's improper impugnments of the defendant's exercises of his several constitutional rights were harmless beyond a reasonable doubt?

C. STATEMENT OF THE CASE

1. Charges and Trial. Mr. James Francis was charged with two counts of robbery for taking the purses of two elderly women outside of shopping malls, in separate incidents on March 11 and March 30, 2012. CP 9-10 (information); 8/7/12RP at 79-94 (testimony of Ms. Bird); 8/8/12RP at 234-38; Supp. CP ___, Sub # 64 (Minutes with Exhibit list attached – Exhibits 15, 17). Mr. Francis testified that he simply grabbed the purses off the victims' shoulders and ran. 8/9/12RP at 406-412, 419-24.

The co-defendant, Mr. Stefan, drove his family's car as the 'get-away' vehicle in each instance. He testified against Mr. Francis pursuant to a guilty plea with the prosecutor, and said that he and the defendant executed the crimes to obtain money. 8/9/12RP at 335-39.

At trial, the prosecutor also presented several Spokane police officers to testify about how Mr. Stefan came forward, and about the

contrasting law enforcement efforts undertaken to apprehend Mr. Francis. Officer Erin Raleigh investigated the two incidents, and went to the home of the co-defendant. She requested that Mr. Stefan's parents telephone their son and ask him to come home, which they did, and which he immediately did, to speak with the waiting officer Raleigh. 8/7/12RP at 145-47. Raleigh agreed with the prosecutor that the Stefan parents were very cooperative – a "10" on a scale of 1 to 10 – in assisting the police. 8/7/12RP at 146. When Mr. Stefan arrived at the home, helpfully driving the get-away car, he was also cooperative with police questioning. 8/7/12RP at 148-49.

According to Officer Dustin Howe, at some point the police learned about the other participant, the defendant Mr. Francis. An investigating detective had the co-defendant, Mr. Stefan, telephone Mr. Francis on his cell phone. 8/7/12RP at 169-71. Officer Howe then described how the police had to first go to Mr. Francis' residence, where they were unsuccessful in finding him; then, ultimately through further investigation, the officers were able to locate Mr. Francis at a McDonald's restaurant, where they arrested him. 8/7/12RP at 168-72. Officer Stephanie Kennedy testified similarly about these investigative efforts. 8/7/12RP at 187-89.

Continuing the same theme, the prosecutor also presented Officer Anthony Lamanna, who testified that Mr. Stefan cooperated with the officers investigating the crime reports, whereas the police had to continue investigating and searching for Mr. Francis, until they were successful in apprehending him. 8/7/12RP at 202-03. In addition, according to the police work with the mother, the Spokane police detectives had tried different attempts at finding Mr. Francis, but were ultimately successful at using a ruse to learn his location. 8/7/12RP at 221-24. Mr. Stefan described why and how he later plead guilty, agreeing to testify in a trial against Mr. Francis, who did not. 8/9/12RP at 325-27.

2. Closing argument. In the defense closing argument, Mr. Francis argued that there was no force necessary for robbery, and stated that Mr. Francis was not guilty and did not desire to plead guilty like Mr. Stefan did pursuant to his deal with the State. 8/9/12RP at 493-97, 499-500. Then, in the State's rebuttal closing argument, the prosecutor *faulted* Mr. Francis for not responsibly coming forward as Mr. Stefan did and talking to investigating police detectives, and for not responsibly agreeing to enter a plea of guilty and to provide information to the detectives, like the co-defendant had done. 8/9/12RP at 506-07.

Mr. Francis' counsel objected, and the trial court sustained the objection. 8/9/12RP at 507. The prosecutor briefly noted that a defendant has a right to go to trial. 8/9/12RP at 507. However, the prosecutor then continued on, to again compare the "responsible" co-defendant Stefan who braved being a snitch and plead guilty, with the irresponsible defendant. 8/9/12RP at 508. The prosecutor then *explicitly* argued that the jury, because of these past failures on the defendant's part, should reject Mr. Francis' current contention that "he should be found responsible only of a lesser crime." 8/9/12RP at 509.

3. Jury inquiry – "force" of robbery. During deliberations, the jury sent out an inquiry as to the charges before it, asking, "What is the legal definition of force?" CP 222. The trial court responded that the jury should read its instructions. CP 222.

Following the verdicts, the trial court declined to impose an exceptional sentence based on particular vulnerability, 8/10/12RP at 540, and instead imposed standard range sentences. Mr. Francis appeals. CP 240 (judgment), CP 252 (notice of appeal).

D. ARGUMENT

THE STATE'S IMPROPER COMMENTS ON MR. FRANCIS' EXERCISE OF HIS CONSTITUTIONAL RIGHTS CAUSED THE JURY TO REJECT HIS DEFENSE THAT HE ONLY COMMITTED THEFT, AND THE MISCONDUCT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

1. Constitutional misconduct. Mr. Francis was under no obligation to come forward before his arrest, and he was under no obligation to plead guilty to robbery for purse-snatching as the co-defendant did. The prosecutor's obvious misconduct in closing argument warranted Mr. Francis' objection, and the trial court's immediate ruling. Although the prosecutor briefly noted in subsequent argument that the defendant had a right to trial, the constitutional misconduct in this case was, in addition, a direct and improper impugnment of the defendant's exercise of his right to pre-arrest silence, and violated Mr. Francis' Due Process right to a fair trial. U.S. Const. amend. 5;[1] U.S. Const. amend. 6;[2] U.S. Const. amend. 14; Wash. Const. art. 1 §§ 9, 21.

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[1] The Fifth Amendment states that no person "shall . . . be compelled in any criminal case to be a witness against himself." U.S. Const. amend. 5. The Washington Constitution, article 1, § 9, contains almost identical language, and the Washington Supreme Court has determined that the two provisions are to be interpreted equivalently. State v. Earls, 116 Wn.2d 364, 375, 805 P.2d 211 (1991).

[2] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" U.S. Const. amend 6. The Washington Constitution, article 1, § 21 provides, "The right of trial by jury shall remain inviolate[.]"

The prosecutor explicitly faulted Mr. Francis for failing to come forward early, and then for failing to plead guilty later, contending that all this conduct showed a lack of responsibility, and therefore required the jury to reject Mr. Francis' defense that he was now responsible only for theft:

> Whether you like him, dislike him, or are completely neutral about him, the evidence in this case showed, beyond a reasonable doubt, that he committed robbery from these women. And part of being responsible is being held responsible. Not for a lesser crime, but for the crime that you actually committed.
>
> Mr. Griffin [defense counsel] said that Mr. Stefan had little bargaining power. That's the way he described his situation. I think the reason that those words were chosen, little bargaining power, is because, frankly, the case against both these gentlemen was so strong that he didn't feel he had bargaining power to go anywhere. And indeed the case is strong.
>
> You should find Mr. Francis guilty. You should look at the evidence in deciding whether he wants to be held responsible. Unlike Mr. Stefan, he didn't return home to talk to the police. Unlike Mr. Stefan, he didn't provide a free talk to the detectives pursuant to an agreement to plead guilty. Unlike Mr. Stefan, he did not enter a plea and come in –
>
> MR. GRIFFIN: Objection, your Honor.
>
> THE COURT: Sustained.
>
> MR. MARTIN: Unlike Mr. Stefan – and he has the right to a trial, I want to be absolutely certain about that, just like we discussed in voir dire. Regardless of the strength of the evidence, Mr. Francis has the right to a fair trial and to be convicted beyond a reasonable doubt. Mr. Stefan, however, felt that he was responsible for what happened in this case. And he felt – certainly he felt that he could get

> the benefit of a bargain. But you could imagine how hard it must be to get on the stand and be what people in jail might call a snitch and give testimony against your friend. It's not easy. And he had to come in here and do that.
>
> Mr. Francis's situation was different. He didn't go home when the police were there, he was found at a McDonald's. His clothing was different. He was not rushing to accept responsibility. Now that he's accused of these crimes, he is saying he should be found responsible only of a lesser crime, not of the crime of which he's actually guilty, which is robbery in the first degree to Ms. Bird, robbery in the second degree to Ms. Altman, and I hope that you will find him guilty of both those crimes.
>
> THE COURT: Thank you, counsel.

8/9/12RP at 506-08. These twin arguments were improper.

First, it is improper for a prosecutor to make comments asking the jury to draw a negative inference from the defendant's exercise of a constitutional right. State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006). Comments "naturally and necessarily" focus on the defendant's exercise of a constitutional right when they either explicitly, or implicitly, direct the jury's attention to its exercise for no valid reason. State v. Ramirez, 49 Wn. App. 332, 336-37, 742 P.2d 726 (1987).

Here, the prosecutor's comments were immediately and obviously identifiable as explicit, or at a minimum implicit, improper impugnment of Mr. Francis's failure to plead guilty (unlike Mr. Stefan) and accept responsibility. Mr. Francis had a Sixth Amendment right

to take his case to trial and the prosecutor below improperly sought guilt on the basis that he exercised that right. U.S. Const. amend. 6 (right to criminal trial); U.S. v. Tarallo, 380 F.3d 1174, 1194 (9th Cir. 2004) (noting impropriety of inviting the jury to "view Defendant disfavorably for exercising his constitutional right to plead not guilty and have a trial") (citing Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort[.]")).[3]

Second, it was improper for the prosecutor to repeatedly fault Mr. Francis for not responsibly coming forward and talking to investigating detectives, and for not responsibly agreeing to provide information, unlike the co-defendant. 8/9/12RP at 506-07. The constitutional right to remain silent while police are investigating a crime, protected by the Fifth Amendment and the Washington Constitution, of course fully exists prior to a person's arrest. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996) (citing Doe v.

[3] The prosecutor's brief remark acknowledging defendants' right to go to trial does not in any way cure this aspect of the misconduct. State v. Evans, 163 Wn. App. 635, 646, 260 P.3d 934 (2011) (measured against the standard of argument required of the prosecutor as a quasi-judicial officer, the prosecutor's closing argument misconduct of shifting the burden of proof overstepped the bounds of advocacy, despite the prosecutor's strategem of "cleverly" mixing the misstatements in with other proper remarks that the jury should hold the State to its burden).

United States, 487 U.S. 201, 210-12, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988)). Enforcement of the due process right takes the form of the prohibition that the State, at trial, may not use a defendant's silence, failure to speak up, or failure to come forward against him to show guilt. Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Griffin v. California, 380 U.S. 609, 619, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979); U.S. Const. amend. 14.

Therefore, the defendant's failure to come forward may not be used by the State as "substantive evidence of defendant's guilt." State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).

Improper prosecutorial comment on a 'failure' of the suspect to speak up takes place simply where the defendant's silence is *elicited* by the State, which occurs in several ways, including where the State comments on the defendant's silence by testimony elicited at trial, and/or in the State's closing argument. State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). Thus in Romero, the Court noted that even where the testimony about the defendant's silence was limited, and despite the fact that the prosecutor did not "harp" in closing argument on the officer's testimony about the defendant's failure to speak up, the State's presentation of its case

overall constituted an improper comment on silence because – as here – it "injected [the matter] into the trial for no discernible purpose other than to inform the jury that the defendant refused to talk to police." (Emphasis added.) Romero, 113 Wn. App. at 793.

Here, of course, the State's improper purpose was discernibly express, since the prosecutor directly linked Mr. Francis' silence with his urging to the jury of guilt on the greater charges. A direct comment on silence, such as here, is always a constitutional error. See State v. Holmes, 122 Wn. App. 438, 445, 93 P.3d 212 (2004) (citing Romero, 113 Wn. App. at 790). In either event, constitutional prejudice was caused because the State's closing argument exploited an improper emphasis on silence as a means of soliciting the jury's guilty verdicts. Romero, at 790-91 (citing Easter, at 236).

2. Appealability. Mr. Francis may appeal. Where the defendant objects to closing argument misconduct, he may appeal. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

(i). Flagrant.

Even if the defendant had not objected, he may appeal where the comments were so flagrant or ill intentioned that an instruction could not have cured the prejudice of the improper exploitation.

State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). In Mr. Francis' trial, flagrancy is demonstrated by the fact that the Washington appellate courts' decisions, including the foregoing cited cases, have long condemned the practice of seeking to hinge a defendant's guilt on his exercise of his constitutional rights. See. e.g., Easter, supra.

Similarly, flagrancy is demonstrated by the fact that the trial court had made clear to the prosecutor, by sustaining Mr. Francis' objection, that the closing arguments in question were improper. Yet, the State continued again with the same improper contentions -- that Mr. Francis' failure to responsibly come forward required the jury to reject his claim that he was now only responsible for theft.

Finally, flagrancy is demonstrated by the fact that the State's improper arguments did not objectively seem mistaken; rather, the improper remarks paralleled the factual account that arose at trial, through multiple prosecution witnesses who attested to the co-defendant Mr. Stefan quickly coming forward (and later pleading guilty), unlike Mr. Francis who did not come forward and had to be found and arrested. Certainly, the prosecutor's improper closing arguments about Mr. Francis' failures of responsibility contrasted demonstrably with the State's narrative at trial; as for one of many

instances, when the prosecutor asked the co-defendant's mother this question:

> And what did you feel about the level of responsibility or what sort of responsibility your son had take [sic], if anything, toward what happened?

8/8/12RP at 273. (Ms. Stefan felt that her son had taken responsibility for his wrongs, but both defendants were wrong. 8/8/12RP at 273). The State's subsequent improper closing arguments flagrantly capitalized on the foundation of its trial portrayal of the co-defendant in comparison to Mr. Francis, summing up the evidence by faulting the defendant for asserting his multiple constitutional rights instead of taking responsibility for robbery.

(ii). Incurable.

No curative instruction could possibly erase the prejudice resulting when the State's unwarranted statements turned the facts at trial into a final closing pronouncement that shamed Mr. Francis for asserting his constitutional rights, and urged the jury on this very basis to reject the lesser theft offenses because Mr. Francis was irresponsible and still refused to admit robbery. Any inadequate technical preservation of any portion of the prosecutor's multi-pronged improprieties in closing should not be a basis for insulating the State's misconduct from this Court's scrutiny on review. See,

e.g., State v. Evans, 163 Wn. App. 635, 647-48, 260 P.3d 934 (2011) (reversing in part because no curative instruction could have erased the panoply of violation of several constitutional rights in closing argument causing an unfair trial); State v. Venegas, 155 Wn. App. 507, 525, 228 P.3d 813 (2010) ("flagrant" misconduct to attack defendant's use of constitutional rights with improper argument).

Long before these recent cases, the cumulative error doctrine has allowed this Court to review multiple errors including misconduct that resulted in denial of a fair trial, including where some of the errors were inadequately preserved. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Constitutional errors -- as shown in the present case -- are more likely to form the basis for cumulative error than multiple non-constitutional errors. Russell, 125 Wn.2d at 94. This Court has discretion under RAP 2.5(a)(3) to review every aspect of the State's misconduct as part of a cumulative error analysis to ensure that Mr. Francis was not deprived of a fundamentally fair trial by the prosecutor's actions. State v. Alexander, 64 Wn. App. at 150-51; U.S. Const. amend. 14.

For all these reasons, appeal should be taken based on the range of constitutional misconduct in closing, the effect of which pervaded the entire case. RAP 2.5(a).

3. Reversal. Given the errors below, the competing factual assertions and arguments in the case, and the State's ultimately marginal proof of robbery, the State cannot prove "harmlessness" beyond a reasonable doubt.

(i) The State must prove beyond a reasonable doubt that there is no substantial likelihood of any effect on the verdict obtained.

Prosecutorial misconduct is "harmless" only if there is no substantial likelihood that the State's improper statements in closing argument affected the verdicts. See, e.g., State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Here, the prosecutor explicitly asked the jury to make a connection between Mr. Francis' failure to come forward, plead guilty, and take "responsibility," and his guilt for the greater charged crimes of robbery. Thus, by the deputy prosecutor's own stated terms, the misconduct was materially prejudicial, it was therefore not harmless, and reversal is required under Reed's "substantial likelihood" standard. 8/9/12RP at 507.

Further, where a prosecutor's closing argument misconduct amounts to constitutional violations including commenting on a failure to come forward and a failure to plead guilty, it is the State that must show, beyond a reasonable doubt, that the error was "harmless" because of overwhelming evidence. See, e.g., State v. Berube, 171 Wn. App. 103, 112, 286 P.3d 402 (2012) (noting applicability of constitutional harmless error test where a prosecutor comments on the defendant's silence) (citing State v. Easter, supra, 130 Wn.2d at 228); State v. Fuller, 169 Wn. App. 797, 812, 282 P.3d 126 (2012). The untainted evidence must meet this overwhelming standard. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Here, the State's *de minimis* case on the proof of robbery rather than the lesser offense of first degree theft requires reversal, particularly where the evidence was highly controverted. In State v. Holmes, 122 Wn. App. 438, 447, 93 P.3d 212 (2004), the Court of Appeals reversed child molestation convictions where the prosecutor in closing improperly faulted the defendant for having failed to admit guilt, because although the victims' testimony was compelling, the defense's controverting theory of the case was also believable. In State v. Knapp, 148 Wn. App. 414, 425, 199 P.3d 505 (2009), the Court reversed the defendant's burglary conviction where the

prosecutor committed misconduct by commenting on the defendant's refusal to offer himself up as guilty to the police, because although the evidence was sufficient to convict, the defendant presented a competing case at trial, supported by testimony. And in Romero, supra, the Court reversed where a government witness improperly characterized the defendant as uncooperative and silent during the police investigation, because the case included competing characterizations of what occurred during the criminal incident. State v. Romero, 113 Wn. App. at 794.

Finally, State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008), was a case where the State in argument invited the jury to consider the defendant's silence to be evidence of his guilt on the sex offense charged. State v. Burke, 163 Wn.2d at 208-09, 213-18. The prosecutor implied, by emphasizing the fact of silence during the police investigation for no other conceivable purpose, that the defendant's failure to speak up showed Burke was guilty. Burke, 163 Wn.2d at 208-09. This constitutional error was not "harmless beyond a reasonable doubt" because

> [r]epeated references to Burke's silence had the effect of undermining his credibility as a witness, as well as improperly presenting [his silence as] substantive evidence of guilt for the jury's consideration.

State v. Burke, 163 Wn.2d at 222-23. The present case is similar. The prosecutor in closing listed multiple ways in which the defendant, 'unlike the co-defendant Mr. Stefan,' had failed to accept responsibility and come forward to admit guilt, and openly asked the jury to decide that these failures of "responsibility" undermined Mr. Francis's claims as a trial witness that he only committed theft. 8/9/12RP at 506-08. The conceivable purpose of these arguments was to cause improper prejudice.

(ii) Evidence not overwhelming and highly controverted.

Reversal is required in this case where the trial evidence did not overwhelmingly prove robbery, and was highly controverted. Robbery is a taking by force from the person. RCW 9A.56.190; CP 205 (jury instruction 12). But the force necessary to physically snatch property does not necessarily establish guilt for robbery by using force on the person. See State v. Austin, 60 Wn.2d 227, 232, 373 P.2d 137 (1962) (but finding no error in refusing instruction to this effect, where evidence did not support instruction); see also W. LaFave & A. Scott, Criminal Law § 8.11(d) at 781 (2nd ed.1986) (the "weight of authority supports the view that there is not sufficient force to constitute robbery when a thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the

taking"); State v. Netling, 46 Wn. App. 461, 465, 731 P.2d 11 (1987) (property taken from pocket is not robbed by force from the person).

Here, first, Ms. Bird, whose purse was taken on March 11, stated that a man who she could not identify pulled on the strap of her purse, and then he suddenly had it in his possession. 8/7/12RP at 79-80. Ms. Bird had tried to hold onto her purse and fell and scraped her knee. 8/7/12RP at 82; 8/712RP at 132, 138. She stated, however, that the purse was taken off her shoulder so fast she did not even remember turning her head. 8/7/12RP at 93-94.

Second, in particular, the March 30 incident, outside of the Bed Bath and Beyond store, was described to the store manager as a "purse snatching," 8/7/12RP at 209-10, and did not establish robbery of the victim. The surveillance video of this incident showed a person approach Ms. Altman, the shopper, and "grab her purse and run away." 8/7/12RP at 214; Supp. CP ___, Sub # 64 (Minutes with Exhibit list attached - Exhibit 17).

At trial, Ms. Altman testified that she was walking toward her car after shopping at the bed and bath store, when she sensed a shadow over her left shoulder. 8/8/12RP at 234, 237. Suddenly, she described, "the next thing that I saw was my purse going off the end of my arm." 8/8/12RP at 237. Ms. Altman stated that everything

happened so fast, there was no "force applied," and suddenly her purse was gone. 8/8/12RP at 238. Further questioning confirmed that the purse was simply taken:

> Q: Did you have a sense of what was taking the purse off your shoulder?
> A: No. The next sense I had was that it was gone or going.
> Q: Did you do anything before your purse was actually gone?
> A: No.
> Q: Were you able to grab ahold of it?
> A: No.
> Q: Did you make any effort to stop your purse from being taken from you?
> A: No. Because it takes a moment to have the sense that this is actually happening to you.

8/8/12RP at 238. On cross-examination, Ms. Altman confirmed that her purse was gone before she registered what was happening. She expressed relief that she had not had time to try and grip the purse and try to prevent its taking, since, in retrospect, she would not have wanted a struggle. 8/8/12RP at 252-53. This is not overwhelming uncontroverted proof of robbery by use of force.

Finally, the jury's inquiry during deliberations, asking the court, "What is the legal definition of force?," demonstrates that this particular jury deemed the matter at hand a close determination. The issue of constitutional harmful error is determined not by reference to "what effect the constitutional error might generally be expected to

have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.182 (1993)). Here, the prosecutor's improper arguments evidently had the desired outcome-determinative effect, causing the jury – initially in equipoise -- to decide on robbery for the taking of the purses in the two counts.

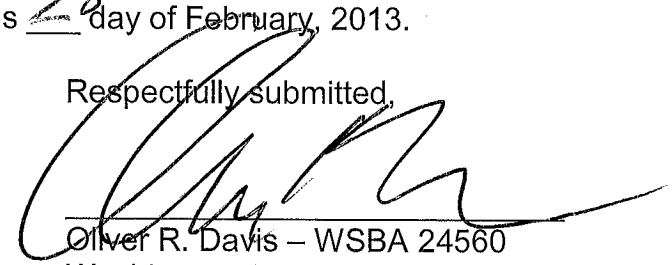
In this totality of circumstances, the State cannot meet its burden to prove that the trial prosecutor's closing argument misconduct was "harmless beyond a reasonable doubt," and reversal is required.

E. CONCLUSION

Based on the foregoing, Mr. Francis respectfully asks this Court to reverse the judgment and sentence of the Spokane County Superior Court.

Dated this 28 day of February, 2013.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 31082-5-III
	)	
JAMES FRANCIS,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF FEBRUARY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF FEBRUARY, 2013.

X_____

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