

Case # 310825

**Statement of Additional Grounds
for Review**

**State of Washington
v.
JAMES L. FRANCIS**

FILED

JUN 05 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS
DIVISION - III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
RESPONDENT,

V.

JAMES L. FRANCIS
Appellant.

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW
(Pro se)

JAMES FRANCIS, Appellant
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S.A.G.

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COURT OF APPEALS
DIVISION - III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

James L. Francis,
Appellant.

No. 310825

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I James Leland Francis, hereafter known as the Appellant, declares under penalty of perjury to title 28 U.S.C.S. 1746, under the laws of the United States of America, and the laws of the State of Washington, that the appellant is of age of majority of sound mind and competent to testify and that the facts stated are true and correct to the best of the appellants first hand knowledge, understanding and belief.

Appellant's case should be reversed and remanded to the Superior Court of Spokane County for new trial.

S.A.G.

ADDITIONAL GROUND - 1

The Superior Court abused its discretion when it;

A.) Denied appellant's Motion to Sever offenses under 4.4(b) a decision that was outside the range of acceptable choices.

B.) Gave no curative instruction "to disregard or strike out hearsay evidence" to the jury.

C.) Chose to ignore the jury's request for the legal definition of one of the essential elements of both crimes.

ADDITIONAL GROUND - 2

The Superior Court violated Appellant's rights to due Process of Law under (Wash. Const. Art. I § 3) when it;

A. Accepted the Guilty verdict on the second degree Robbery charge, when "Force" a necessary element of the crime was not proven beyond a reasonable doubt.

B. Abused its discretion on all of (Additional Ground - 1) for issues A, B and C. 3

ADDITIONAL GROUND - I

A.) The trial court abused its discretion in denying appellant's Motion to Sever Offenses as that decision was outside the range of acceptable choices.

"Trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court's decision is manifestly unreasonable if, based on the facts and applicable law standard, the decision is outside the range of acceptable choices." In Re Custody of Halls, 126 Wn.App 505, 108 P.3d 833 (2005).

Mr. Francis' case involved two distinct charges; Robbery in the First Degree and Robbery in the Second Degree. Different elements define each charge, different evidence existed from each charge, all witnesses except the co-defendant were different for each charge. There was very little (other than police testimony) that was admissible in both. There was potentially very inflammatory evidence of "use of force" and "bodily injury" from the First Degree Robbery that was not admissible in the Second Degree Robbery case. There was also no clear connection between Mr. Francis and the Second Degree Robbery case after the clothing evidence was suppressed at the Motion to Suppress. (RP - 87 L. 5-7) other than the co-defendants' statements.

The factors to be considered by the court when deciding severance are: "(1) the strength of the States evidence on each count, (2) the clarity of the defenses to each count. (3) whether the court properly instructed the jury to consider the evidence of each crime, and (4) the admissibility of the evidence of the other crimes even if they had been tried separately." (severance CrR 4.4(b))

It should be noted here, somewhere that the purpose of the joinder rule is "to protect defendant's from successive prosecutions based solely upon essentially the same conduct. Practical effects include the risk of an unsympathetic jury at trial prejudiced by multiple counts. Thus the joint trial of offenses may cause a substantial disadvantage to the defendant." Joinder creates a significant risk that the jury will convict the defendant upon the weight of the accusations by inferring criminal disposition or upon the accumulated effect of the evidence. State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994). "The defendant can also be prejudiced if the available defenses are inconsistent or if defendant wishes to testify as to one offense but not to the others. (as was the case here).

According to State v. McDaniel, 155 Wn. App. 829, 230 P.3d 245 (2010), "The purpose of joinder is to protect the accused American citizen not to bolster the States evidence on case by introducing otherwise impermissible and inflammatory evidence.

As to the First Factor;

The State had tenuous evidence (at best) of any "use of force" on the Second Degree charge. Eyewitness testimony, the least reliable of all evidence was the only evidence of any "use of force" on this charge. This suspect evidence was refuted not only by the victim herself, (RP. - 238 L. 1-7) but by clear video evidence (Exhibit No. 17). It would have been risky at best for the state to even prosecute for Second Degree Robbery in the face of these facts.

Quoting (American Journal 2d Larceny § 12) "A crime may be notwithstanding that some force was used to take property from the person of another. It is larceny and not Robbery to pick another's pocket, where the only force used is that necessary to lift and remove the thing from the pocket. The sudden taking or snatching of property from the person of another does not involve such force, violence or putting in fear as will constitute the act of Robbery; although, that offense is committed where other acts of violence or force precede or accompany the "snatching."

The victim testified; "the next sense I had was that it was gone or going" (RP. - 238 L. 2-17) when talking about her purse being taken, she did not resist due to the lack of opportunity. When asked specifically if force was used, the victim said "NO". (RP. - 238 L. 2).

On the First Robbery charge, the state had the victims testimony as well as, corroborated witness statements as to the "use of force". Thus the strength of the States evidence was drastically disparate between the two charges existing, fairly convincingly in the First Degree case and quite possibly insufficient to even proceed in the Second Degree.

As to the second Factor in determining severance; The clarity of defenses was ignored or overlooked by the court when it denied the defendants Motion to Sever Offenses and when it decided to join the charges in the First place.

The defendants obvious defense to the Second Degree Robbery charge was the inability of the state to show that force was used, which is an essential element of the charge. The defendants obvious defense to the First Degree Robbery charge was innocence. Without the contamination of the evidence from the Second Degree Robbery charge, the only link the state had between the Appellant Francis and the First Degree Robbery charge was his co-defendants "say so" which is not enough for a conviction in Washington. Un corroborated co-defendant testimony alone is not enough. The Appellant, Mr. Francis would not have been compelled to take the stand and admit guilt to the First Degree Robbery charge in order to assert the lack of "use of force" on the Second Degree charge.

This forced joinder negated both defenses. Prejudice thrives where a defendant is deprived of his two most viable defenses.

As to the third factor; It is questionable whether a jury is capable of following such an instruction, especially, as was the case here when the prosecutor injects hearsay comments time and again into the trial ("she felt like she got hit by a truck") (RP. - 163 L. 21-24). "She said she was in pain she in fact - she said she was gonna go to the doctor and she felt like she had been hit by a car" a quote from (RP. - 164 L. 12-14). The fact that the jury convicted the Appellant Mr. Francis on the Second Degree Robbery with no showing of "use of force" is demonstrative of this problem.

"The argument against joinder is that the defendant is prejudiced for one or more of the following reasons... (3) the jury may cumulate evidence of the various crimes charged and find guilty, when if considered separately it would not find. see - State v. Watkins, 53 Wash. App 264, 766 P.2d 484.

As to the fourth factor in determining a Motion to Sever Offenses; The admissibility of the evidence of one crime in the trial of the other is a huge concern in this case. Evidence of the "infliction of bodily injury" and the "use of force" from the First Degree Robbery charge would not have been admissible in a separate trial on the S.A.G. Second Degree Robbery charge and the 8

corroborated identification of the Appellant from the Second Degree Robbery would not have been admissible in a separate trial on the First Degree Robbery. The State would likely have had to drop the Second Degree Robbery to the Larceny or Theft charge that was actually proper here. If sufficiency of the information had been pursued the State may have had trouble even bringing the First Degree Robbery to trial. Uncorroborated co-defendant testimony may not establish a "prima Facta" case. We don't know. We do know that the Appellant Mr. Francis was denied that option or consideration out right by the joinder.

In both State V. Ramirez, 46 Wash. App 223, 730 P.2d 98 (1986) and State V. Harris, 36 Wash. App 752, 677 P.2d 202. The courts held that when evidence of one count would not be admissible in a separate trial on the other count, denial of a defendants Motion to Sever not only constituted an abuse of discretion but also required reversal.

In Appellant Francis' case the evidence from the First Degree Robbery that would not have been admissible in the Second Degree Robbery trial was evidence of an actual element of the crime being alleged ("use of Force") that could otherwise not have been shown. It was plainly inflammatory and prejudicial providing the state with otherwise unavailable evidence with which to accuse the Appellant.

Common concerns in cases of joinder such as this are that "the jury may cumulate evidence of the various crimes charged and find guilty when if considered separately it would not find so". Drew v. United States 118 U.S. App. D.C. 11 331 F.2d. Also see State v Sutherby 165 Wn.2d 870, 204 P.3d 916.

The trial court in the Appellant Francis' case improperly allowed joinder and denied Severance. It is so obviously prejudicial and not only in hindsight. All of these problems here are foreseeable at the hearing on the Motion to Sever Offenses. The States use of joinder to facilitate using the evidence in the First Degree Robbery case to bolster its chances of a conviction on the unprovable Second Degree Robbery was an ambush and the court facilitated it with its abuse of discretion and refusal to grant severance requiring a reversal.

B.) The trial court abused its discretion when no curative instruction "to disregard hearsay evidence" was given to the jury.

"While it is presumed that jury's follow instructions of the court, instruction to disregard evidence cannot logically be said to remove prejudicial impression created where evidence admitted into trial is inherently prejudicial and of such nature as likely to impress itself upon mind of jurors". State v Miles 73 Wn.2d 67, 436 P.2d 198 (1968).

In the Appellant Francis' case when a sworn police officer (Officer Howe) was giving his testimony on the victims pain from the First Degree Robbery he answered "I want to say something to the effect like she got felt like she got hit by a truck." (RP. -163 L. 23-24). Defense counsel objected to this statement as hearsay and the court sustained the objection. (RP. -163/164 L. 25-2). At this point a curative instruction should have been given to the jury to disregard the police officers statement. A curative instruction is needed or prejudice must be presumed (must exist).

The court instructed the jury to use that information in its deliberations. "The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. IF evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict," (see Instruction No. 1 paragraph 3) unless otherwise instructed by the courts. "One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. IF I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

Do not speculate whether the evidence would have favored one party or the other." (see Instruction No. 1 paragraph 5). The courts failure to so instruct S.A.G. left the jury to believe the hearsay was valid and unimpeachable.

The statements from the police witness were prejudicial and inflammatory to the appellant. (see RP. - 163 L. 21-24 and RP. - 164 L. 11-14). Appellant Francis' entire defense for both the First Degree Robbery charge and the Second Degree Robbery was that there was no "use of force". This hearsay evidence explicitly describes an extreme amount of force, inflicted upon the victim from the First Degree Robbery. Without the courts curative instruction it tainted the jury, affecting their verdict on Appellant Francis' guilt or innocence, violating his due Process to law under (Wash. Const. Art. I § 3)

As said in State V. Green, 71 Wash. Dec. 2d 363, 428 P.2d 540. "The final measure of an error in a criminal case is not whether a defendant was afforded a perfect trial, but whether he was afforded a fair trial."

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial," State V. Devlin, Supra. In that case, speaking of the effect of the introduction of irrelevant evidence of other crimes this court said at 51, 258 P. at 829: The question involved is that of a fair trial. In State V. Pryor, 67 Wash. 216, 121 P.56 this court said: "A fair trial consists not alone in an observance of the naked forms of law, but in a recognition and just application of its principles".

C.) The trial court abused its discretion when it chose to ignore the jury's request for a definition of one of the essential elements of both charged crimes.

State V. O'Donnell, 142 Wn.App. 314 174 P.3d 1205 (Div III 2007). "A defendant is denied a fair trial if the jury must guess at the meaning of an essential element of the crime with which the defendant is charged or if the jury might assume that an essential element need not proven". (U.S.C.A. Const. Amen. 6; West's RCWA Const. Art. I §22)

RCW - 9A.56.200 Robbery in the First Degree.
WPIC - 37.02 First Degree Robbery elements 3 and 4. (Element 3 "that the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person [or that person's property] [or to ~~that~~ the person or property of another]"); (Element 4 "that force or fear was used by the defendant [to obtain or retain possession of the property] [or] [to overcome or prevent resistance to the taking] [or] [to prevent knowledge of the taking].")

RCW - 9A.56.210 Robbery in the Second Degree. WPIC - 37.04 Second Degree Robbery elements 3 and 4. (Element 3 "that the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person [or that person's property] [or S.A.G. to the person or property of another]"). 13

(Element 4 "that the Force or Fear was used by the defendant [to obtain or retain possession of the property] [or] [to prevent or overcome resistance to the taking] [or] [to prevent knowledge of the taking].").

During deliberations, the jury inquired the court for the legal definition of Force (see-inquiry from jury and courts response CP. - 222 / 8-10-12) ~~absolutely proves that the~~. The court ignored the inquiry in its rebuke, leaving the jury to guess at what constitutes "Force" in a Robbery charge. The fact that the jury requested the legal definition of Force, which is given in Blacks Law Dictionary / Seventh Edition as "Actual Force - Force consisting in a physical act, especially a violent act directed against a Robbery victim." absolutely proves that the jury was incapable of determining legally guilt or innocence on any charge with "Force" as a necessary element of the crime.

The court was negligent and abused its discretion for not providing the requested definition and then for accepting a verdict of any kind from a jury that did not understand an essential element of the crimes charged.

The court has discretion to provide definitions under these circumstances. State V. Campbell, 163 Wn. App. 394, 260 P.3d 235 (2011). "It is within the trial court discretion whether to give further instruction to a deliberating jury. State V. Campbell also says "even if the ambiguity of the instructions given was not apparent at the time they were issued, 14

the question identified their deficiency. Where the jury specifically asked whether it must be unanimous in order to return a verdict of "NO" answer on a special verdict Form, where instructions taken as a whole, did not properly inform the jury of the applicable law, the trial court abused it's discretion by not issuing a clarifying instruction.

State V. Becklin, 163 Wash.2d 519, 529-30 182 P.3d 944 (2008). Superior Court Criminal Rule 6.15 (F) entitled "Questions From the jury during deliberations" provides in part that any additional instruction upon any point of law shall be given in writing."

The court had the discretion and abused it leaving the jury to guess at the meaning of a necessary element of both charged crimes and then by accepting their verdict knowing full well that the jury did not have the ability to give a competent verdict. Not only did the Court fail to give the requested definition, it responded by specifically stating "Please continue deliberations. You are to consider only the testimony of the witnesses, the exhibits admitted into evidence, and the instructions of the Court." Inferring that the jury should not ask. Jurors are citizens not trained in law and respectful of authority. The Court rebuked the jury like an insolent child by specifically refusing to address their request in it's response.

ADDITIONAL GROUND-2

1.) The Superior Court violated Appellant's rights to Due Process of Law under (Wash. Const. Art. I §3) when it;

A.) Accepted the Guilty verdict on the Second Degree Robbery charge, when "Force" a necessary element of the crime was not proven beyond a reasonable doubt.

"When reviewing a challenge to the sufficiency of the evidence, appeals Courts consider the evidence in the light most favorable to the state and determine whether any rational "trier of fact" could have found the crimes essential elements beyond a reasonable doubt." State V. Williams, 137 Wash. App 736.

The element of "use of force" a necessary element of the crime charged was not proven to exist, on Appellant Francis' Second Degree Robbery charge. One eyewitness Ms. White testified as to the "use of force" in a manner which suggested its existence. She was proven through video footage (exhibit No. 17) and victims testimony to be false in her assertions to the fact. It should be noted that video footage is very reliable and eyewitness testimony is very unreliable.

S.A.G. Ms. Whites testimony states that she observed a person, a quote "he proceeded out into the parking lot and followed a ~~pe~~ woman closely. 16

and then grabbed her purse. (RP. -260 L. 22-23) When Ms. White was asked to describe to the jury the motion that this person used to grab this womans purse, (RP. -260 L. 24-25) she answered in quote "Well he walked behind her, and then as he got closer ~~to~~ to her he quickened his pace to come up behind her to grab her purse" (RP. -261 L. 1-3) The prosecutor then asked her, in quote "What was your sense of the Force used by this man to grab her ~~Force~~ purse?" (RP. -261 L. ¹¹⁻¹² 13-14) Ms. White's ~~continues to testify~~ answer to the question is "oh it was very quick and deliberate and with a lot of Force" (RP. -261 L. 13-14) Ms. White continues to testify as to observing a struggle over the purse, that took place for a few minutes between a man and this woman. (RP. -261 L. 17-24 and RP. -262 L. 1-3 and RP. -265 L. 4-9)

Another witness Mr. Apted who was the store manager of the Bed, Bath and Beyond at the time of this incident gave his testimony to not witnessing the actual crime take place. "not Firsthand" (RP. -210 L. 6). Mr. Apted does; However, testify to seeing a person snatch a ladies purse and runaway. (RP. -213 L. 9) on the video Footage (Exhibit No. 17) of the Bed, Bath and Beyond parking lot. (see also RP. -214 L. 17-21)

In the trial Appellant Francis took the stand to testify and gave this testimony while explaining the video Footage, From the Bed, Bath and Beyond: (Exhibit No. 17)

Appellant Francis asked by defense counsel what he saw take place on the video footage (RP. - 427 L. 7-8) Appellant Francis answered "it looks like I took her purse." (RP. - 427 L. 9). Defense counsel then asks Appellant Francis what the time on the video showed, Francis answered "it shows 3:37 pm" (RP. - 429 L. 19-20) at this time in the video it showed a man coming from behind the victim Mrs. Altman, (RP. - 429 L. 8-10) The footage is then played forward to the time of 3:37:13 pm (RP. - 430 L. 9) at this point the Appellant Francis testifies to having full possession of the purse by himself. (RP. - 430 L. 1-9)

The victim Mrs. Altman testifies to there not being any "use of force" or an ensuing timely struggle between herself and the man who snatched her purse. (RP. - 237 L. 22-25) (see also RP. - 238 L. 4-7) (see also RP. - ~~238~~ 238 L. 21-22) Mrs. Altman is asked "were you able to grab hold of it?" Mrs. Altman testifies "NO" and that she made no effort to stop her purse from being taken. (RP. - 238 L. 23-25 and RP. - 239 L. 1-4)

This evidence viewed in any light not just that light "which is most favorable to the State" does not support a finding of a "use of force", in fact the opposite is clearly proven violating the Appellant Mr. Francis rights to Due Process of Law.

Due to the errors as explained above and the irrefutable facts established in those explanations Appellant James L. Francis asks this court to grant only the appropriate relief and reverse his convictions and remand for a new trial.

I declare that the foregoing is to and accurate to the best of my knowledge, understanding and belief.

Respectfully Submitted,

~~James Francis~~
Appellant, Pro-se

Dated this day of,
June 3, 2013

James L. Francis
RB-05

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