· 70943-7

70943-7

No. 70943-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FRANCIS BATO,

Appellant.

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

REPLY BRIEF OF APPELLANT

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Attorney for Appellant

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A. ARGUMENT

The prosecutor's repeated and flagrant misconduct in her closing argument deprived Mr. Bato of a fair trial.

On appeal, Mr. Bato argues the deputy prosecutor's repeated references to facts outside the trial record during her closing argument deprived him a fair trial. The singular theme of the deputy prosecutor's closing argument was that the jury should convict Mr. Bato because of things he did but of which the jury had heard nothing.

In its response, the State attempts to parse out the deputy prosecutor's statements as if they were made independent of one another. However, this Court must "review a prosecutor's comments during closing argument in the context of the total argument." *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). In reality the statements were made in the course of a singular argument with a unifying theme that Dinah Jimenez had given two divergent versions of the events one to police and one I the course of her testimony. The prosecutor's closing argument was a singular effort to urge the jury to convict Mr. Bato based upon the version of events in Ms. Jimenez's statement to police. The only problem with that theory was that the statement to police was never admitted as evidence.

Because the jury had only heard one version of event it was not a proper inference from the evidence to tell the jury there was a second version. Because there was no evidence of a second version of events and thus was no evidence that Ms. Jimenez had ever changed her story, it was not a proper inference to tell the jury she did so based upon family pressure. Because the jury never heard testimony of knives or threats to police, it was not a proper inference from the evidence to tell jurors of such things. Yet the State's brief attempts to justify each of these things, are arguing they were each proper. That argument defies common sense.

"Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record. *Jones*, 144 Wn. App. at 293 (citations omitted). The version of events presented to the jury in the prosecutor's closing argument, is wholly unsupported by the record. That is what makes it improper.

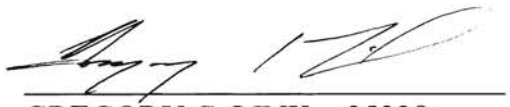
Given the repetition of the misconduct, there is no way to unring the bell. Whether it was a result of bad faith, inadvertence, or ineptness does not alter the fact that the arguments were substantially likely to

affect the verdict. This Court should reverse Mr. Bato's convictions. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

B. CONCLUSION

For the reasons above this Court should reverse Mr. Bato's convictions.

Respectfully submitted this 30th day of June 2014.



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70943-7-I
v.	)	
	)	
FRANCIS BATO,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JOSEPH MARCHESANO, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2014.

X_____

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