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Court of Appeals
Division III
State of Washington

33909-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS A. LIMPERT, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

STATUTES

RULES

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Mr. Limpert's constitutional right to confront witnesses was violated when an officer testified about statements co-defendant Desarae Dawson made to the officer that directly implicated Mr. Limpert.

2. The prosecutor committed misconduct by inflaming the passions and prejudices of the jurors and relying on facts not in evidence.

3. The trial court improperly overruled Mr. Limpert's objection to the prosecutor's misconduct.

4. The trial court erred in imposing $800 in legal financial obligations (LFOs).

II. ISSUES PRESENTED

1. Was Mr. Limpert's constitutional right to confront witnesses violated when his attorney allowed an officer to repeat one hearsay statement the victim made to the co-defendant, when the victim-declarant testified at trial, and where the hearsay statement also opened the door for the defendant to delve into a full array of favorable, exculpatory statements made by the co-defendant?

2. Did the prosecutor commit misconduct during closing such that his remarks were so flagrant and ill-intenitoned that it must have affected the jury's verdict?

3. Should this court decline to accept review of the mandatory costs imposed, where no objection was raised in the trial court.

III. STATEMENT OF THE CASE

During July 2014, Ms. Makelle Hamilton was recuperating from surgery at the Howard Johnston Hotel. RP 245. She was there with her boyfriend, Josh Roullier, and her brother, Patrick Hamilton. RP 246-47, 259. While recuperating from the surgery, she was taking prescribed medicines, as well as heroin and methamphetamine. RP 251. Her boyfriend, Mr. Roullier, also had some prescribed medicine. RP 249. To obtain some extra money, Ms. Hamilton and Mr. Roullier decided to sell some of Mr. Roullier's prescribed medicine. RP 251. They contacted Brenden McCullough, who Ms. Hamilton knew because she had dated his sister. RP 249-51. Brenden McCullough then devised a plan whereby he, Defendant Limpert, and Defendant Ms. Dawson would purchase the drugs from Ms. Hamilton, but, by trick, short her with a roll of one dollar bills wrapped in a twenty to make it look like a large amount of cash.[1]

[1] Mr. Limpert confessed to the police that he had helped plan the theft of pills which was Brenden McCullough's idea. RP 332. He told Detective Tofsrud that he and Brenden McCullough had devised a plan wherein Brenden McCullough would purchase the drug Sub Oxone from Makelle Hamilton and further that they created this wad of bills, if you will, falsifying the actual amount of what money amount was inside the wad by wrapping a bunch of ones with a twenty dollar bill. RP 332. Ms. Dawson had also supplied some of the money for the ruse. RP 336.

Mr. McCullough went to Ms. Hamilton's hotel room to buy the drugs and secured the transaction with the small amount of money and a cell phone for collateral. RP 252-53. McCullough then left with the drugs, under the guise of attempting to get the rest of the money. RP 255. Josh Roullier became upset with Ms. Hamilton because McCullough had left with his drugs without paying in full; Roullier left the hotel to get his drugs back from McCullough. RP 255.

While Roullier was away, Michelle Pearson came into the hotel room to retrieve her cellphone that Mr. McCullough had left as collateral for the drugs. RP 255. Ms. Hamilton refused to return the phone, and Ms. Pearson was forced to leave without it. RP 356. Ms. Pearson contacted the co-defendants Ms. Desarae Dawson and Mr. Limpert, and asked them to get her phone from Ms. Hamilton. RP 384. Dawson and Limpert went into the room to attempt to retrieve the phone for Ms. Hamilton. RP 256. At that time, Ms. Hamilton's brother left to find Mr. McCullough and Mr. Roullier. RP 257.

Ms. Hamilton testified that the only reason Mr. Limpert came into the room was that he wanted her to return Michelle Pearson's phone.[2] She

[2] Q: Okay. Now, when they came into the room, they asked you – first thing they asked you about or told you why they were there is that they wanted to get Michelle's phone back for her; is that right?

testified Limpert initially pulled a knife, but after she questioned his manliness in pulling a knife on a female, he immediately put it away.[3] RP 258. Thereafter, Mr. Limpert began fighting with Ms. Hamilton – she ended sitting on the floor and he began choking her. *Id*. Ms. Hamilton's brother, Patrick, returned to the room and interceded in the fight. *Id*. After he and Defendant Limpert fought for a short time, they stopped when Limpert was informed that the victim, Ms. Hamilton, was Patrick's sister. RP 259. Mr. Limpert had known Patrick since they were kids, but was not

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> A: [Ms. Hamilton] Yeah.
>
> Q: They didn't ask you for any of the money Brenden McCullough gave you; is that right?
>
> A: Well, why would -- no.

RP 273.

[3] > Makelle Hamilton: I don't know. Desarae says, "You're gonna die, bitch," and Nick pulled a knife on me and I was like, really, like you're going to pull a knife out on a fucking female. And he, like, you could tell that he, like, questioned himself and he put his knife away and then he, like, approached me and we started fighting and -- I don't know. He got me from sitting on the bed to sitting on the ground and he had me pushed -- I was sitting up with my back against the bed and he was choking me and I don't know how -- if Desarae let my brother in or how he got himself back into the hotel room.

RP 258.

aware Ms. Hamilton was his sister. RP 300-301. Ms. Hamilton had a bruise on her chest from the assault. RP 264. Mr. Limpert then offered to help Ms. Hamilton get the drugs or the money back from Mr. McCullough. RP 276-77. Ms. Hamilton then returned Ms. Pearson's phone. RP 277.

Ms. Dawson was charged with and found not guilty of first degree robbery and conspiracy to commit first degree robbery. RP 461. Mr. Limpert was charged with and found not guilty of first degree robbery and conspiracy to commit first degree robbery. RP 461. However, Mr. Limpert was convicted of attempted second degree assault, a class C felony, for attempting to assault Ms. Hamilton while trying to retrieve the phone. RP 461. It is from that judgment that he appeals.

IV. ARGUMENT

A. THE INTRODUCTION OF HEARSAY STATEMENTS OF THE VICTIM, WITHOUT OBJECTION, THROUGH HEARSAY STATEMENTS OF A CO-DEFENDANT, DOES NOT CONSTITUTE MANIFEST CONSTITUTIONAL ERROR, AND IS UNREVIEWABLE UNDER RAP 2.5.

Defendant Limpert contends the prosecutor violated his right to confront witnesses when he asked Detective Tofsrud regarding what co-defendant Ms. Dawson said she heard the *victim say* about the defendant

pulling a knife.[4] Defendant Limpert also alleges error occurred when the same detective related that co-defendant Dawson stated "they" were going after the phone … that the victim would not return." *Id*. Respondent will deal with the first statement in depth - however, the second statement allegedly implicating the defendant is incorrectly reported. The question eliciting the alleged erroneous testimony was: "why was there a commotion in the room," and the witness's answer was: "Because there was a phone that the victim would not return." RP 335. That response did not implicate Defendant Limpert.

Initially, the defendant's failure to object to the hearsay statement of the victim garnered through the double hearsay of Detective Tofsrud precludes this issue from being raised on appeal. Secondly, the issue is one of trial tactics, and invited error – the defendant used this question as an open door to explore all of his co-defendant's exculpatory statements, and did so over the State's objections to inviting *Bruton* error into the case. Additionally, the victim declarant – the one making the statement - was subject to confrontation and extensive cross-examination, alleviating any

[4] Appellant's Br. at 7-9 (RP 334-37). However, it was established that Co-defendant Dawson never saw the knife, but was only repeating a (hearsay) statement made by Ms. Hamilton. *See* RP 353.

confrontation issue, real or imagined, that arose in the case. Finally, the error, if any, was harmless.

1. **The appellant, alleging for the first time on appeal that his constitutional right to confrontation was violated, has not demonstrated that the error is either constitutional or manifest. Additionally, the failure to object or raise the issue at trial was a tactical decision such that any error was not only waived by the failure to object, but invited by his exploration of all of the exculpatory statements made by the co-defendant.**

No procedural principle is more familiar than a right of any sort may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *United States v. Olano,* 507 U.S. 725, 731, 8 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *Yakus v. United States,* 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944). It is a fundamental principle of appellate jurisprudence that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5.

RAP 2.5 is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *State v. Strine*, 176 Wn.2d at 749, quoting *New Meadows Holding Co. v. Wash. Water Power Co.,* 102 Wn.2d 495, 498, 687 P.2d 212 (1984). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where

the court noted the rule requiring objections helps prevent abuse of the appellate process:

> [I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from "riding the verdict" by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.
>
> BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.[5] Specifically regarding RAP 2.5(a)(3), our courts have indicated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*,

[5] An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

110 Wn.2d 682, 687, 757 P.2d 492 (1988). Defendant's failure to object should bar review of his confrontation claim.

a) Constitutional error.

There is no constitutional error. Defendant Limpert contends the prosecutor violated his right to confront witnesses when he posed a question to his detective regarding what co-defendant Ms. Dawson heard the *victim say* about the defendant pulling a knife. Appellant's Br. at 7-9; RP 334-37.

In *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Court found that the admission of an out-of-court confession by a nontestifying co-defendant violated the defendant's confrontation right. *Id.* at 128. There, Bruton and a man named Evans were prosecuted jointly for an armed postal robbery. *Id.* at 124. Before trial, a postal inspector interrogated Evans in jail. *Id.* Evans *confessed* to the crime and implicated Bruton. *Id.* At trial, Evans did not take the stand but the postal inspector testified that Evans *confessed* to committing the crime with Bruton. *Id.* The trial court instructed the jury to disregard the confession as to Bruton's guilt or innocence. *Id.* Ultimately, the jury convicted Bruton. *Id.* The Court reversed, holding that the use of Evans's confession violated Bruton's confrontation right, even with the limiting instruction. *Id.* at 128.

Most recently, our State Supreme Court, relying on extensive federal jurisprudence, determined that *Bruton* confrontation issues are

limited to *testimonial* out-of-court statements made by nontestifying co-defendants. *State v. Wilcoxon*, 185 Wn.2d 324, 329–31, 373 P.3d 224 (2016).[6] In its discussion of whether a *Bruton* issue requires a separate confrontational analysis than that later established in *Crawford* and *Davis*,[7] the Court concluded it did not. *Wilcoxon*, 185 Wn.2d at 332-335. This is of import because the right to confrontation is not violated by admitting a declarant's hearsay statements as long as the declarant testifies as a witness and is subject to full and effective cross-examination. *State v. Price*, 158 Wn.2d 630, 640, 146 P.3d 1183 (2006); *State v. Clark*, 139 Wn.2d 152, 159, 985 P.2d 377 (1999).

In the present case, the declarant of the statement "he just pulled a knife[]" was the victim, Ms. Hamilton.[8] The statement was introduced

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[6] In doing so, the Court parenthetically included the following propositions: *United States v. Clark*, 717 F.3d 790, 816 (10th Cir. 2013) (concluding that because a coconspirator's out-of-court statements were nontestimonial, "they [fell] outside the protective ambit of the Confrontation Clause and, by extension, *Bruton*"); *Thomas v. United States*, 978 A.2d 1211, 1224–25 (D.C. 2009) (concluding that where "a defendant's extrajudicial statement inculpating a co-defendant is *not* testimonial, *Bruton* does not apply, because admission ... would not infringe the co-defendant's Sixth Amendment rights"). *Wilcoxon*, 185 Wn.2d at 333-34.

[7] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

[8] As in child hearsay cases, the one repeating the child's statement is not the declarant, the child is the declarant. *See, e.g., State v. Quigg,*

through double hearsay - related from Ms. Hamilton, to co-defendant Ms. Dawson, to Detective Tofsrud. However, Ms. Hamilton, the declarant, testified at trial that Limpert pulled a knife - but after she questioned his manliness in pulling a knife on a female,[9] he immediately put it away. RP 258.

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72 Wn. App. 828, 834, 866 P.2d 655 (1994) (If both the child hearsay declarant and the hearsay recipient testify at trial, then there is no issue of constitutional magnitude involved in admitting child hearsay.) In *Quigg,* the court declined to consider the defendant's allegation that the court erred in admitting hearsay evidence that went beyond the scope of RCW 9A.44.120 when the defendant did not object to the testimony at trial on those grounds, and when the hearsay declarant testified at trial subject to full cross-examination. 72 Wn. App. at 834–35. Here, both Ms. Hamilton (the hearsay declarant) and Detective Tofsrud (the hearsay recipient) testified at trial and were subject to cross-examination. Thus, the alleged error did not rise to the level of a constitutional violation, this Court should decline to consider Limpert's argument for the first time on appeal.

[9] A. (Answer by **Ms. Hamilton)**: I don't know. Desarae says, "You're gonna die, bitch," and Nick pulled a knife on me and I was like, really, like you're going to pull a knife out on a fucking female. And he, like, you could tell that he, like, questioned himself and he put his knife away and then he, like, approached me and we started fighting and -- I don't know. He got me from sitting on the bed to sitting on the ground and he had me pushed -- I was sitting up with my back against the bed and he was choking me and I don't know how -- if Desarae let my brother in or how he got himself back into the hotel room.

RP 258.

Ms. Hamilton, the declarant, was extensively cross-examined by Mr. Limpert's attorney. RP 266-282. He established that in exchange for her testimony and cooperation, she had been promised no charges would result from her drug dealing,[10] she was high at the time of the incident on pain pills and heroin,[11] that she did not get along with co-defendant Dawson, that she was unsure of how much money the drug deal involved, that Ms. Pearson came into the room to retrieve her phone and offered to prove it was her phone,[12] and that she choose to ignore any proof regarding the phone. RP 270. Furthermore, cross-examination established the only reason either defendant came to Ms. Hamilton's room was to get the phone back for Ms. Pearson. RP 274. Mr. Limpert's counsel established that Ms. Hamilton would not give the phone back unless the defendants brought the pills back or paid in full the amount owing,[13] and that Defendant Limpert had offered to help Ms. Hamilton get her drugs or full payment for the drugs, after the "fighting" had taken place. RP 276. Counsel then laid the foundation for introducing the impeaching evidence (Mr. Randy Smelter

[10] RP 266-67.

[11] RP 267.

[12] RP 270.

[13] RP 275.

and Mr. Tesch) that Ms. Hamilton had lied about the presence of any knife. RP 280.

Because Ms. Hamilton was the declarant of the hearsay statement, testified at trial to the facts surrounding that hearsay statement, and was subject to full cross-examination on that and all other matters, there is no confrontation violation. "[T]he confrontation clause is not violated when the court admits a declarant's out-of-court statements, so long as the declarant testifies as a witness at trial and is subject to cross examination." *In re Personal Restraint of Grasso,* 151 Wn.2d 1, 14, 84 P.3d 859 (2004) (quoting *California v. Green,* 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)).

b) Additionally, the failure to raise the alleged confrontation issue at trial was a tactical decision of trial counsel. Any error was not only waived by the failure to object, but invited by counsel's exploration of all of the exculpatory statements made by the co-defendant to the detective.

All of co-defendant Ms. Dawson's hearsay statements were delved into at length by Mr. Limpert's counsel. RP 266-82. After the State opened the door to the double hearsay statement of Ms. Hamilton, as made to Ms. Dawson, and as reported by Detective Tofsrud, Mr. Limpert's counsel was able to cross-examine the detective regarding all of the favorable statements Ms. Dawson made *without subjecting her to the prosecutor's*

cross-examination. The advantage of this tactic is clear. He had the detective testify that Ms. Dawson believed that this was simply a theft of pills (uncharged). RP 345-46. In this way, he was able to bolster this tactical approach of establishing guilt for a lesser, uncharged crime, the shortage of money for payment for illegal drugs, a theft, rather than a conspiracy to commit robbery or a robbery:

> Q: (Mr. Stine, attorney for defendant Limpert): Okay. And it sounded like the plan that Mr. McCullough had come up with was to give a lesser amount of cash than was bargained for, then he would take the pills and run basically. Is that the gist of how this was explained to you?
>
> A: I don't know that I ever had any discussion with any of the defendants regarding what would occur if the theft progressed into a robbery.
>
> Q: That's not what I asked. So from what you gathered from talking to Mr. Limpert, *and it seems likely especially with Ms. Dawson*; what was planned was they would just short Ms. Hamilton the money for the pills and that was about as far as the plan went. Is that accurate?
>
> A: From what they told me, yes.
>
> Q: Okay. So there was never any statement from either Mr. Limpert *or Ms. Dawson* that there was going to be any weapons or violence or any threats made as part of the plan that Mr. McCullough came up with?

> MR. TREECE (prosecutor): Objection. I think again we're getting into a situation where it might call for a wrong answer based upon what defendants may have said.[14]
>
> THE COURT: I apologize, Counsel. Probably should rephrase the question so we don't get off in left field.

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[14] The State objected twice to Limpert's counsels' questioning of the detective regarding what statements Ms. Dawson had made because of the potential Bruton issues:

> Q: (By Mr. Stine, attorney for Defendant Limpert): And during your interview, I believe at least with Ms. Dawson if not with both of -- with her and Mr. Limpert, did they explain to you where they went after they left the Howard Johnson?
>
> MR. TREECE: *Objection, your Honor. We're getting to -- by not separating the defendants we're getting into the possibility of mixing some Bruton issues.*

RP 344 (emphasis added).

And;

> Q:(By Mr. Stine): Okay. So there was never any statement from either Mr. Limpert or Ms. Dawson that there was going to be any weapons or violence or any threats made as part of the plan that Mr. McCullough came up with?
>
> MR. TREECE: *Objection. I think again we're getting into a situation where it might call for a wrong answer based upon what defendants may have said.*

RP 347 (emphasis added).

Q: (BY MR. STINE) With -- Mr. Limpert never made a statement that part of the plan with Mr. McCullough was that there would be any force or threats used?

A: No.

Q: And during your interview with Ms. Dawson, she likewise never said part of the plan involved any use of force or threats?

A: No.

Q. And, in fact, at some point isn't it true that *you told Ms. Dawson that without an assault, it's just a theft*, or something along those lines?

A: Something along those lines, yes.

Q: Okay. And is it accurate from the statements you took that any physical altercation was -- seems solely limited to trying to retrieve the telephone?

A: Yes. That's fair to say.

Q: And in the discussions about what Mr. McCullough's plan was, isn't it true that there was no mention of the phone being used in the transaction, either; it was just basically this short roll of cash but there wasn't any mention that a phone would be part of the transaction?

A: I never talked to -- are you asking what –

Q: What -- anybody who was describing this transaction to you.

A: Yes. People I talked to, yes, if that's what the plan was, yes.

Q: That it didn't involve the phone; it was just the cash?

A: Correct, yes.[15]

RP 346-48 (emphasis added).

Admitting the incriminating confession of a nontestifying co-defendant at the defendants' joint trial may deprive the defendant of his Sixth Amendment right of confrontation. *Bruton,* 391 U.S. at 135–37. *See also State v. Cotten,* 75 Wn. App. 669, 690, 879 P.2d 971 (1994). But otherwise inadmissible evidence may become admissible if a witness "opens the door" and the evidence is relevant to an issue at trial. *State v. Gefeller,* 76 Wn.2d 449, 455, 458 P.2d 17 (1969); *State v. Stockton,* 91 Wn. App. 35, 40, 955 P.2d 805 (1998). *See also United States v. Reyes–Alvarado,* 963 F.2d 1184, 1187 (9th Cir. 1992) (under invited error doctrine, defendant could not claim error under *Bruton* where defense counsel elicited statement).

By using the the statements made by co-defendant Dawson, the attorney for Mr. Limpert effectively established there was never a conspiracy to commit robbery, there was no robbery, but simply a retrieval of a telephone belonging to one other that the possessor. Mr. Limpert's

[15] Additionally, it was established that co-defendant Dawson never saw the knife, but was only repeating a (hearsay) statement made by Ms. Hamilton. RP 353.

attorneys' choice of trial tactics, including disregarding the State's twice expressed objections regarding potential *Bruton* issues,[16] effectively eviscerated the State's case. This tactic resulted in not guilty findings as to the class A felonies of first degree robbery and conspiracy to commit first degree robbery, leaving only an uncharged crime of theft of illegal drugs by deception (one dollar bills wrapped up in a twenty), and a fight (attempted assault, class C felony) in an attempt to obtain the cell phone from victim Ms. Hamilton.

c) Manifest Error.

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is "manifest." Here, any error relating to the defendant's failure to object to the double hearsay statement was not manifest or obvious, as required by RAP 2.5.

> In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. *See Harclaon,* 56 Wn.2d at 597, 354 P.2d 928; *McFarland,* 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the

[16] Fn. 14, *supra*.

> trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant's claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have clearly noted a *Bruton* or confrontational violation and remedied it. While simply failing to object to the admission of hearsay evidence would not have triggered the doctrine of invited error, affirmatively engaging in cross examination eliciting a series of hearsay statements, after the door was open to such statements, makes the issue one of trial tactics and affirmative invited error. Therefore, whether a confrontation violation occurred is *debatable* and therefore not *manifest* – not obvious or flagrant as is required by RAP 2.5.

2. <u>Harmless error.</u>

Any error in the introduction of the double hearsay statement regarding Ms. Hamilton's statement was harmless. She testified that the presence of the knife was of little consequence - the defendant put it away after she questioned his machismo. It was only thereafter that the assault took place, the physical "fighting" in an attempt to retrieve the phone. RP 259. The complained-of double hearsay (he said she said that she said

he had a knife) was countered by the much more reliable single hearsay of the co-defendant Dawson that she never saw a knife. RP 353.

Mr. Limpert was not convicted of the class A felony of first degree robbery, or the class B felony of conspiracy to commit first degree robbery. He was convicted of attempted second degree assault, a class C felony. The definition of assault included only a battery, not the common law intimidation class of assault. *See* Instruction No. 20, stating "An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person." CP 95; RP 414. Because there was no battery with the knife, the assault could not be based upon the momentary display of the knife.

B. THIS COURT SHOULD DECLINE TO ACCEPT REVIEW OF THE ALLEGED ERRORS OCCURRING DURING CLOSING ARGUMENT BECAUSE THE ONLY OBJECTION RAISED WAS "THAT'S ANOTHER STATE'S LAW." THERE HAS BEEN NO SHOWING THE COMMENTS WERE INCURABLE, AND THE DEFENDANT HAS NOT DEMONSTRATED THAT ANY REMARK WAS SO FLAGRANT AND ILL-INTENTIONED THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT IT AFFECTED THE JURY'S VERDICT.

The defendant contends the short analogy to the O.J. Simpson Las Vegas hotel robbery, stated for the proposition that you cannot just take personal property belonging to someone else by self-help and force,[17] constituted prosecutorial misconduct. *See*, Appellant's Br. at 8-9, 15-20. However, the law in Washington State is just that: one cannot take specific property by force when that specific property does not belong to the taker, even if that person believes someone else has a superior right to possession than the person in current possession of the item.[18]

Standard of review regarding closing argument.

The defendant has the burden when claiming prosecutorial misconduct to show *both* improper conduct and resulting prejudice. *State v. Fisher,* 165 Wn.2d 727, 747, 202 P.3d 937 (2009). A prosecutor's conduct

[17] He thought he was going to get personal property of his own when he went into that motel room. The fact of the matter is, the police are there for a reason, and you can't just go around being your own enforcer when you think that you're in the right.

[18] *See State v. Self*, 42 Wn. App. 654, 659, 713 P.2d 142 (1986).

is prejudicial only if there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

If a defendant fails to properly object to alleged prosecutorial misconduct at trial, he fails to preserve the issue unless he establishes that the misconduct was so flagrant and ill-intentioned that it caused an enduring prejudice that could not have been cured with an instruction to the jury. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); *State v. Hilton*, 164 Wn. App. 81, 98, 261 P.3d 683 (2011).[19] The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

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[19] Objections are required [during closing argument] not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." *Emery*, 174 Wn.2d at 762. Moreover, objections "serve[] the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from 'riding the verdict' by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address." *Strine*, 176 Wn.2d at 749-50.

Here, the defendant's only objection to the State's Simpson analogy in closing was: "Objection, your Honor. That's another state's law." Because trial counsel made only the "other state's law" objection, only that objection is preserved for appeal. ER 103(a)(1) (must state specific ground of objection); *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993); *State v. Mak*, 105 Wn.2d 692, 719, 718 P.2d 407 (1986) (party who objects on one ground at trial may not raise a different ground on appeal); *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (same). Therefore, the defendant's new arguments regarding the propriety of the argument were not preserved by the objection voiced at trial.

However, an appellate court may consider the propriety of a ruling on a general objection if the specific basis for the objection is "apparent from the context". *State v. Braham*, 67 Wn. App. 930, 934–35, 841 P.2d 785 (1992) (quoting *State v. Pittman*, 54 Wn. App. 58, 66, 772 P.2d 516 (1989)); *see also State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987); ER 103(a)(1). It may be fair to consider Mr. Limpert's objection to be that prosecutor's statement was an incorrect statement of the law. However, it was not. The law in Washington as to self-help is that the statutory defense of good faith claim of title available under RCW 9A.56.020(2), is generally only available to *the party* claiming title

or entitlement to the specific property taken from him. That was the stated purpose for the analogy.[20]

Therefore, the statement was not improper. In any event, the argument did not engender an incurable feeling of prejudice that had a substantial likelihood of unfairly affecting the verdict. Ms. Dawson was found not guilty of *all* charges, Mr. Limpert was found not guilty of *all* robbery charges, leaving *only* the assault conviction. The Simpson robbery analogy was, apparently, totally ineffective. Perhaps the jury found that this case, involving low level drug deals at the Howard Johnson hotel and an ensuing fight over a cheap,[21] throwaway phone, had little to do with movie star/athletes seeking the return of expensive sports memorabilia at a top end Vegas hotel? In any event, the defendant has failed to establish either that limited analogy was *both* improper and resulted in prejudice.

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[20] "The fact of the matter is, the police are there for a reason, and you can't just go around being your own enforcer when you think that you're in the right" RP 421.

[21] Ms. Hamilton: Well, I said it's one of those that you get for, like, ten bucks, but it was probably more than that.

Q. It's a low-end phone?

A. Yes. It's like a Track-look, a pay-as-you-go-phone type thing.

RP 293.

C. THIS COURT SHOULD DECLINE TO ACCEPT REVIEW OF THE MANDATORY COSTS IMPOSED, WHERE NO OBJECTION WAS RAISED IN THE TRIAL COURT.

Mr. Limpert challenges the superior court's imposition of LFOs. Although no objection was made in the trial court, he asks this Court to review the issue pursuant to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Mr. Limpert's *Blazina* claim fails because the LFOs at issue here are all mandatory rather than discretionary. The sentencing court imposed a $500.00 victim assessment fee, a $200.00 criminal filing fee, and a $100.00 DNA collection fee. Each of these is mandated by statute. *See* RCW 7.68.035; RCW 36.18.020(2)(h); RCW 43.43.7541. As such, they must be imposed regardless of the defendant's ability to pay. *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016).

As to defendant's objection to costs on appeal, this Court is free to examine the defendant's submissions.

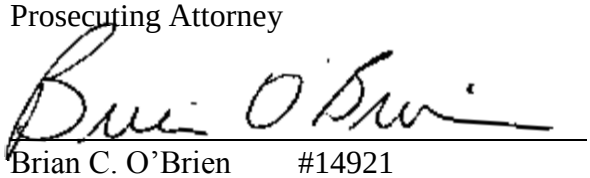
V. CONCLUSION

Mr. Limpert's right to confrontation was not violated. There was no error occurring in closing argument, nor was there any showing of harm

resulting from the closing argument. Any issue regarding LFOs was waived by the failure to raise them. All LFOs imposed were mandatory in nature.

Dated this 20 day of September, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



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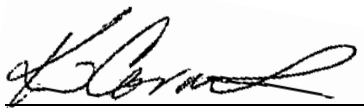
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. NICHOLAS ADAM LIMPERT, Appellant.	NO. 33909-2-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 20, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

David Donnan, Kathleen Shea, and Marla Zink
wapofficemail@washapp.org

9/20/2016 (Date) Spokane, WA (Place)  (Signature)