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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 APR 16 PM 1:26

No. 70943-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

FRANCIS BATO,

Appellant.

---

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

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BRIEF OF APPELLANT

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GREGORY C. LINK  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct deprived Francis Bato a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees an individual a fair trial. Courts have long held that it is improper for a prosecutor in closing argument to refer to facts not in evidence. Where the deputy prosecutor's closing argument was predicated almost entirely on a version of events unsupported by the record, and was substantially likely to affect the jury's verdict, is a new trial required?

C. STATEMENT OF THE CASE

Dinah Jimenez testified her former boyfriend, Mr. Bato, was at her apartment when she received a call from her new boyfriend. 8/8/13 RP 58. According to Ms. Jimenez Mr. Bato became angry. *Id.* Ms. Jimenez said Mr. Bato became angrier still when she told him he needed to leave. *Id.* at 61. Mr. Bato refused to leave and told Ms. Jimenez that she could not leave either. *Id.* at 62-63. Ms. Jimenez testified Mr. Bato stood in front of her at one point and held her by both arms. *Id.* at 63-64.

Eventually Ms. Jimenez sent a message to her new boyfriend via her laptop and he contacted police. *Id.* at 62-63, 69-70. Mr. Bato was arrested. 8/12/13 RP 54.

The State charged Mr. Bato with unlawful imprisonment, fourth degree assault, interfering with domestic violence reporting, and violation of a no-contact order. CP 13-14.

Police officers took a written statement from Ms. Jimenez following Mr. Bato's arrest. 8/12/13 RP 43. At trial, the court refused to admit Ms. Jimenez's written statement as substantive evidence. 8/12/13 RP 13.

A jury convicted Mr. Bato as charged. CP 45-50.

D. ARGUMENT

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

1. *Prosecutorial misconduct deprives a defendant his due process right to a fair trial.*

A prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1934). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. *State v. Monday*, 171 Wn.2d

667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

“A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.” *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Here, the State’s closing argument was predicated on a version of facts which was unsupported by the evidence. Because Mr. Bato repeatedly objected at trial and because the nature and repetition of misconduct created a substantial likelihood of affecting the jury’s verdict, this court should reverse Mr. Bato’s convictions. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

*2. The deputy prosecutor repeatedly and prejudicially referred to facts which were not supported by the evidence.*

In reviewing the prosecutor’s arguments in this case it is necessary to first understand that there was no evidence presented to the jury that Mr. Bato ever had a knife. There was no evidence presented to the jury that he dragged Ms. Jimenez. There was no evidence that he threatened to kill her or any other person. There was

no evidence presented to the jury, that Ms. Jimenez had ever described the events differently than the manner in which she testified.

The State had offered Ms. Jimenez's statement from the night of the incident. However, the court refused to admit the exhibit as prior testimony under ER 801(d)(1). 8/12/13 RP 13. Moreover, the court concluded the statement did not meet the foundational requirements of an excited utterance and police witnesses were not permitted to testify to the substance of the statement. 8/12/13 RP 54. Thus, all the jury heard was that Ms. Jimenez had made a statement to police. 8/12/13 RP 43-45.

Undeterred by the evidence actually admitted at trial, early in her closing argument the deputy prosecutor, Mari Isaacson, said, "now you've heard two versions [of] what happened that night." 8/13/13 RP 38. Ms. Isaacson continued, "[u]nderstandably, you may want to know about everything that happened, such as knives, the threats, the dragging. And I submit to you that is what happened." *Id.* Defense counsel immediately objected to Ms. Isaacson's reference to facts outside the record, saying "No one testified to the majority of those things" *Id.* The court overruled the objection and told the jury that closing arguments are not themselves evidence." *Id.* at 38-39.

Ms. Isaacson quickly returned to her theme that Ms. Jimenez had offered two versions of events. *Id* at 40. The deputy prosecutor claimed that Ms. Jimenez was minimizing events saying, “you bet that [Ms. Jimenez] is getting pressure from [her sister-in-law] about this case.” *Id.* a 45. Again, Mr. Bato objected to Ms. Isaacson reference to facts outside the testimony. *Id.* Again, the court overruled the objection and told the jury that arguments are not evidence. *Id.*

The deputy prosecutor continued, telling the jury that Ms. Jimenez gave two versions of events “what she told the police that night and what she said here in court. And you know she told you a different story than what she told them.” *Id.* at 46. Ms. Isaacson asserted the account had changed because in court Ms. Jimenez said Mr. Bato “didn’t cause her any pain that night. She said that he didn’t drag her to the bedroom, that he didn’t grab those knives, he didn’t threaten to kill the police, he didn’t threaten to kill her.” *Id.* at 47. Again, Mr. Bato objected that there was no evidence Ms. Jimenez had ever said any of those things prior to trial. *Id.* Again the court overruled his objection. *Id.*

The prosecutor continued, saying “in front of you, what she’s trying to do is take back what she perceives to be the worst for him: the

knives, the dragging throwing her on the bed, threatening to kill.” *Id.* at 48. Yet again the court overruled Mr. Bato’s objection. *Id.* And so, Ms. Isaacson continued.

After he kept her in the room, after he had the knives, after he had threatened her life . . . all the while her young children were at home with her. That’s what she said then. That was after that happened, but before she had the opportunity to think it over, before she succumbed to pressure from her family and from the Defendant himself. So that version is what really happened.

*Id.* at 49. When Mr. Bato interposed an objection, the court again overruled the objection.

The sum of the closing argument was based upon evidence that was never presented to the jury. The deputy prosecutor invited the jury to imagine a set of facts far more serious than the evidence presented to them. That imaginary set of facts involved threats with knives and threats to kill police officers, rather than the simple assault the jury heard described. Those imaginary facts involved pressure from unidentified person on Ms. Jimenez to change her testimony. No matter how much Ms. Isaacson wished it were otherwise, there was no evidence to support any of her claims.

Having painted a picture of events far more severe than established by the evidence, the prosecutor concluded her argument

saying Ms. Jimenez “deserves justice in this case, even if she doesn’t want it. And justice here means the Defendant is convicted of these crimes . . . . He needs to be held accountable.” *Id.* at 53. Mr. Bato objected saying the jury’s task was to determine if the State proved its case not to hold Mr. Bato accountable. Again, the court overruled the objection.

Following closing arguments, Mr. Bato made a motion for mistrial based upon the State’s improper argument. 8/13/13 RP 85. The court acknowledged it had refused to admit Ms. Jimenez’s prior statement. *Id.* at 86. Nonetheless, the court reasoned it properly overruled the objections and “took the opportunity to inoculate and remind the jurors that what the attorneys says [sic] is not in and of itself evidence.” *Id.* The judge added that he did not believe the prosecutor acted in bad faith. *Id.*

“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. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (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

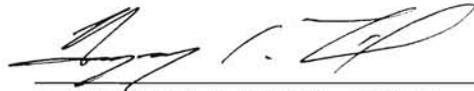
improper. It did not “inoculate” the jury to tell them the prosecutor’s argument is not itself evidence, but then permit the prosecutor to continue along the same path. By permitting the prosecutor to repeatedly refer to facts outside the record, and overruling defense objections to her doing so, the jury could properly believe there was nothing wrong with what Ms. Isaacson was doing or saying. The court permitted Ms. Isaacson to leave the very clear impression in juror’s minds that information was withheld from them, and that information established a far more serious crime. The state’s arguments were improper and prejudicial.

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. *Emery*, 174 Wn.2d at 760.

E. CONCLUSION

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

Respectfully submitted this 14<sup>th</sup> day of April 2014.

A handwritten signature in black ink, appearing to read 'G. C. Link', is written above a horizontal line.

GREGORY C. LINK – 25228  
Washington Appellate Project – 91072  
Attorneys for Appellant

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

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

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **OPENING 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> FRANCIS BATO 2121 E JEFFERSON ST. #208 SEATTLE, WA 98122	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF APRIL, 2014.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710