

63441-1

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NO. 63441-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KATHY WALKER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE PROSECUTOR CLEARLY INVOKED THE CIVIL DOCTRINE OF RES IPSA LOQUITUR IN CLOSING ARGUMENT, LOWERING THE BURDEN OF PROOF.

Despite the State's protestations that the prosecutor's comments during closing argument did not attempt to lower or shift the burden of proof, the verbatim report of proceedings speaks for itself. The State argues that the prosecutor here "was not trying to invoke the civil doctrine of *res ipsa loquitur* in his closing argument to the jury, Resp. Brief at 8, despite the fact that the prosecutor invoked those very words:

[T]here's an old saying in the law that comes from the Latin and the saying is, 'Res ipsa loquitur.' And you may have heard this. It literally means the thing speaks for itself.

3/3/09 RP 25 (emphasis added).

Shortly thereafter, the prosecutor returned to this theme, using the civil negligence standard once again, regarding the second dog. The prosecutor again argued, over defense counsel's objection: "Res ipsa loquitur. The thing speaks for itself." 3/3/09 RP 26 (emphasis added).

The prosecutor's dramatic lowering of the burden of proof during his closing argument to something resembling strict liability must be soundly rejected as a clear violation of Ms. Walker's right to a fair trial and due process of law. State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930) (holding that a prosecutor is a quasi-judicial officer, whose duty it is to assure a defendant a fair and impartial trial, "in the character of fair play"). Washington also disfavors strict liability crimes, where the State is improperly relieved of its burden to prove an essential element of proof. See, e.g., State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000) (reversing conviction where the State was relieved of its burden to prove knowledge).

## 2. REVERSAL IS REQUIRED.

The cumulative effect of various instances of prosecutorial misconduct may violate a defendant's right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Due to the several instances of misconduct in the closing argument during Ms. Walker's trial discussed in appellant's opening brief, there is a substantial likelihood the

cumulative effect affected the jury's verdict; therefore, this Court should reverse her conviction. Reed, 102 Wn.2d at 146-47.

B. CONCLUSION.

For the foregoing reasons, Ms. Walker respectfully requests this Court reverse her conviction and remand the case for further proceedings.

DATED this 5<sup>th</sup> day of April 2010.

Respectfully submitted,

  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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	)	
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	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5<sup>TH</sup> DAY OF APRIL, 2010, 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:

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APPELLATE UNIT	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[  
**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF APRIL, 2010.

X \_\_\_\_\_  
*gmk*

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