

NO. 68829-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LITTERTORY McCALL,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL B. SCHAPIRA

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

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**A. ISSUE PRESENTED**

In order to establish that his right to a fair trial was violated, a defendant raising a claim of improper prosecutorial argument for the first time on appeal must show that the misconduct was flagrant and ill-intentioned and resulted in prejudice that could not have been cured by a jury instruction. Was the defendant's right to a fair trial violated where the prosecutor did not shift the burden of proof, and where, even if the prosecutor's comments were improper, any prejudice could have been cured by a jury instruction?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

The King County Prosecuting Attorney's Office charged Littertory McCall with one count of delivery of cocaine, one count of possession of cocaine with intent to deliver, one count of bail jumping, and one count of possession of marijuana with intent to deliver. CP 12-13. After a jury trial, the defendant was found guilty of delivery of cocaine and was found not guilty of possession of marijuana with intent to deliver. CP 17-18. The jury was unable to reach a verdict on the charges of possession of cocaine with intent

to deliver and bail jumping. CP 19-20. The defendant was sentenced, and timely appealed.

## 2. SUBSTANTIVE FACTS.

On April 1, 2012, Seattle Police Officers Darin Chinn, Forrest Lednicky, and Terry Bailey, among others, were working as part of an operation intended to identify and purchase drugs from street-level drug dealers using an undercover officer dressed in street clothes. RP 74-77, 131-33, 184-86. Officer Chinn was acting as the undercover officer who would purchase the drugs. RP 74-77. After hearing the defendant, Littertory McCall, comment that he needed to make some more money, Officer Chinn approached the defendant and asked if he had "work," which is a street slang phrase to ask if a person has cocaine to sell. RP 77-78. When McCall responded by asking if Officer Chinn wanted "weed," meaning marijuana, Officer Chinn responded that he was looking for "white" or "rock," meaning rock cocaine. RP 78-79. When McCall indicated that he had some, Officer Chinn indicated that he wanted to buy \$60 worth of cocaine. RP 79-80. After walking together a short distance, McCall handed Officer Chinn three pieces of what appeared to be crack cocaine, and Officer Chinn

handed McCall three twenty-dollar bills, the serial numbers of which had been recorded in advance. RP 81-82.

Officer Lednicky was working as the undercover officer who would monitor Officer Chinn to ensure his safety and keep other members of the operation informed of Officer Chinn's location. RP 133-34. Officer Lednicky observed Officer Chinn come into contact with McCall and converse with him briefly. RP 134-35. From about 15 feet away, Officer Lednicky observed McCall reach into his pocket and remove an item, which McCall handed to Officer Chinn in exchange for something Officer Chinn had removed from his pocket. RP 135-37. Officer Chinn separated from McCall, and gave a pre-determined signal to indicate that he had just purchased narcotics. RP 137. Officer Lednicky radioed to uniformed officers, and watched as they arrived and arrested McCall. RP 79.

Officer Bailey was one of the uniformed officers who responded to arrest McCall. RP 187-88. After arresting and handcuffing McCall, Officer Bailey searched McCall and found a small rock of what appeared to be crack cocaine in McCall's pocket, as well as three twenty-dollar bills. RP 188-92. The serial numbers on the bills in McCall's pocket matched the serial numbers on the bills Officer Chinn had used to purchase the suspected crack

cocaine from McCall. RP 193. The suspected crack cocaine purchased from McCall was later tested by forensic scientist Raymond Kusumi of the Washington State Patrol Crime Laboratory, and was found to contain cocaine. RP 216-35.

McCall testified at trial that he and his friends were approached on the street by a man who turned out to be Officer Chinn. RP 355-56. McCall claimed that Officer Chinn was "harassing" McCall and his friends asking if they had drugs to sell. McCall claimed that he spoke to Officer Chinn simply to help Officer Chinn, and asked if Officer Chinn wanted "weed" simply to clarify what Officer Chinn was saying. RP 357. McCall claimed that when Officer Chinn said that he was looking for "white," McCall told him that he didn't have any and started to walk away. RP 357. According to McCall, Officer Chinn then described a Mexican man he was looking for, and when McCall stated that he had seen the man earlier, but didn't know him, Officer Chinn simply handed McCall two twenty-dollar bills, instructed him to give the money to the Mexican man, and walked away. RP 357. McCall claimed that he had tried to give the money back, and insisted that he didn't "know [the Mexican guy] like that," but Officer Chinn kept walking

away. RP 357. McCall denied giving Officer Chinn anything in exchange for the money. RP 390.

In part of her closing argument, the prosecutor stated:

So, as you know, the State has to prove every element of every charge beyond a reasonable doubt. But you also know that beyond a reasonable doubt is not beyond all doubt. It would be impossible to prove something beyond all doubt. It can't be done. But what our law asks is, has the State proven it beyond a reasonable doubt? Now, as you heard in the instructions, if, after fully, fairly, and carefully considering all the evidence or lack of evidence, you have an abiding belief in-in the truth of the charge, then you are satisfied beyond a reasonable doubt. So, what is this saying? It's saying if you believe the charge is true, if you believe it and that is an abiding belief, a belief that's going to stay with you. Abiding talks about the passage of time. So, tomorrow, next week. When you think back on just the same information you have right now, are you going to reach a different conclusion? With no different information, just with the passage of time, are you going to change your mind? If you're not going to, that's an abiding belief. So, it doesn't require that you have not one shred of doubt that there's some scenario that's hypothetically possible under which he might not have done it. No. It asks, do you believe he did it, and is there a reasonable doubt? Is there a reasonable scenario or reasonable explanation for how it might have happened that he didn't commit the crime? So, when you're deliberating, think about that. Is it reasonable to think that he didn't do it? Is there a reasonable probability that this-that it didn't happen, and that is what the-the test requires. If you believe it's true, if you believe the charge is true, and that belief is going to stay with you, then you are satisfied beyond a reasonable doubt, and it is your duty to return a verdict of guilty.

RP 438-39. In her rebuttal closing, the prosecutor at one point stated:

So, when you evaluate the credibility of the witnesses you heard in this case, think about that. Think about which story is reasonable, which story makes sense, which story fits the other circumstances we have. And when you're done doing that, you need to ask, do you actually have a reasonable doubt? Do you actually believe there's a reasonable probability that it didn't happen? Now, just because maybe it's hypothetically possible—yes, it's hypothetically possible that this was a massive plot to frame the Defendant. Hypothetically possible. But, is it reasonable? No, it's not. It is not reasonable to think that this was all some plot. There's no indication it was. And it just doesn't make sense.

So, when you're deliberating and you're thinking about the information you wish you had, or the things you wish you knew, the real question you need to ask is, do you believe that the charge is true? Do you believe what the officers told you? Do you believe not just—you don't have to believe that every single aspect of all of their memories is correct. The question is, do you believe that those facts, those elements that we talked about, do you believe that those facts occurred? Regardless of whatever else was going around, regardless of whoever else was getting arrested or why, or whether it was just a mistake, do you believe that those elements happened? And if you have doubts, ask yourself, is that a reasonable doubt? Is it reasonable to think that that other scenario happened?

RP 463-64. At no point during the prosecutor's closing or rebuttal did the defendant raise an objection. RP 428-40, 457-65.

**C. ARGUMENT**

McCall contends that the prosecutor committed prosecutorial misconduct during closing argument by shifting the burden of proof, thereby denying the defendant a fair trial. This claim should be rejected. At no time did the prosecutor's argument shift the burden of proof to the defendant, and thus it was proper and did not deny the defendant a fair trial.

The Sixth Amendment to the United States Constitution "guarantees a defendant a fair trial but not a trial free from error." State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937, 947 (2009). A defendant who alleges that his right to a fair trial was violated by a prosecutor's improper argument "bears the burden of proving that the prosecutor's conduct was both improper and prejudicial." State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653, 662 (2012); State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432, 442 (2003). Here, McCall did not object to the prosecutor's closing argument at trial. RP 428-40, 457-65. In order to raise a claim of improper prosecutorial argument for the first time on appeal, a defendant must show a "manifest error affecting a constitutional right." RAP 2.5. McCall's failure to object to the allegedly improper argument "constitutes waiver on appeal unless the misconduct is so

flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” that could not have been cured by a jury instruction. Fisher, 165 Wn.2d at 747 (internal quotation marks omitted). Under that heightened standard, even if the court decides that the argument was improper, McCall must still “show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653, 664 (2012) (internal quotation marks omitted).

1. THE PROSECUTOR’S ARGUMENT CORRECTLY STATED THE BURDEN OF PROOF.

In the context of closing arguments, the prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937, 947 (2009). Appellate courts evaluate allegedly improper comments “within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432, 442 (2003)

(emphasis added). McCall is correct that it is improper for a prosecutor to argue that in order to acquit the defendant, the jury must be able to “fill in the blank” with the reason for their doubt, because such argument impermissibly shifts the burden of proof to the defendant. E.g., State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936, 940 (2010); State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653, 663 (2012). However, McCall mistakenly claims the prosecutor’s comments in closing argument were analogous to a “fill in the blank” argument. McCall argues that the prosecutor’s comments implied a “requirement that the defense must somehow present a reasonable scenario for how the offense did not happen” in order for the jury to acquit the defendant. Appellant’s Brief at 7. Yet, when taken in context, it is clear that the prosecutor’s comments were in fact an attempt to help the jury think about the concept of reasonable doubt when evaluating whether the State had met its burden to prove the defendant’s guilt beyond a reasonable doubt.

McCall points to two particular places in the prosecutor’s closing and rebuttal where he claims improper comments were made. In the first, the prosecutor was discussing the “beyond a reasonable doubt” standard, and stated:

So, it doesn't require that you have not one shred of doubt that there's some scenario that's hypothetically possible under which he might not have done it. No. It asks, do you believe he did it, and is there a reasonable doubt? **Is there a reasonable scenario or reasonable explanation for how it might have happened that he didn't commit the crime?**

RP 438-39 (emphasis added<sup>1</sup>). When viewed in light of the entire argument as to the burden of proof, it is clear that the prosecutor's question to the jury of "Is there a reasonable scenario or reasonable explanation for how it might have happened that he didn't commit the crime?" was not presented as a question the jury must answer "in order to acquit" the defendant, as McCall claims. Instead, it was presented as another way to think about the question of "is there a reasonable doubt?" if the jury had decided as a threshold issue that they believed the State's allegations were true.

The second instance where McCall claims the prosecutor's comments were improper occurred in rebuttal, when the prosecutor stated:

So, when you're deliberating and you're thinking about the information you wish you had, or the things you wish you knew, the real question you need to ask is, do you believe that the charge is true?

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<sup>1</sup> The specific comment cited by McCall in his brief is emphasized in bold.

**Do you believe what the officers told you? . . . .**  
[D]o you believe that those elements happened? And if you have doubts, ask yourself, is that a reasonable doubt? **Is it reasonable to think that that other scenario happened?**

RP 464 (emphasis added<sup>2</sup>). The allegedly improper comments did not misstate the burden of proof. Whether the jury believed the testimony of key officers was correctly framed as a threshold issue, since there was no basis to convict the defendant if the jury determined that it did not believe the officers' testimony. And it was entirely proper to urge the jury to examine whether any doubts they had were reasonable ones. The defendant had just testified to a series of events that were incompatible with the events testified to by Officer Chinn and Officer Lednicky. RP 352-57. The prosecutor was essentially telling the jury that if they found the officers' testimony credible, but were concerned about the possibility that some other scenario in which the defendant did not deliver cocaine to Officer Chinn (such as the one testified to by the defendant) might somehow be true, they should evaluate the reasonableness of the other scenario in deciding whether they had a reasonable doubt as to the defendant's guilt. This was a proper argument, and did not shift the burden of proof in any way.

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<sup>2</sup> The specific comments cited by McCall are emphasized in bold.

At no point in closing argument or rebuttal did the prosecutor trivialize the burden of proof or imply that the jury should convict the defendant unless it found a reason not to. She correctly stated that the State had the burden to prove all the elements beyond a reasonable doubt, and that the jury should first determine whether it believed that the defendant was guilty based on the evidence, and then assess whether any doubts they might have were reasonable doubts.

2. EVEN IF THE PROSECUTOR'S ARGUMENT WAS IMPROPER, IT DID NOT RESULT IN PREJUDICE THAT COULD NOT HAVE BEEN CURED BY A JURY INSTRUCTION.

In order to obtain a reversal of his conviction based on improper prosecutorial argument, McCall must "show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653, 664 (2012) (internal quotation marks omitted). McCall incorrectly relies on State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), and State v. Venegas, 155

Wn. App. 507, 523, 228 P.3d 813, 821 (2010), for the proposition that if the court finds that the prosecutor's comments were analogous to a "fill in the blank" argument, then the misconduct was flagrant and ill-intentioned and necessarily requires reversal. Since those cases were decided, the Washington State Supreme Court has ruled that a "fill in the blank" argument, while improper, is not necessarily so flagrant and ill-intentioned that it requires reversal of the conviction. State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012). The court stated that "misconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom." Id. at 762. To that end, "reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured" had the defendant objected. Id. Even when a prosecutor's improper argument touches upon a defendant's constitutional rights, the prejudice is "not per se incurable." Id. at 273.

In Emery, the court held that although the prosecutor's use of a "fill in the blank" argument and comment that the jury's role was to "speak the truth" were improper, the defendants "failed to object and fail[ed] to show that the prosecutor's comments

engendered an incurable feeling of prejudice in the mind of the jury.” Id. This was because the improper comments were “not the type of comments which this court has held to be inflammatory,” such as comments appealing to racial or economic prejudice or comments which personally denigrate the defendant. Id. Instead, the harm of the comments would be to potentially confuse the jury about the burden of proof and the role of the jury. Id. The Emery Court then cited to State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), as proof that any prejudice from such improper comments can be cured with a jury instruction if the defendant objects at trial. In Warren, the prosecutor significantly misstated the presumption of innocence. 165 Wn.2d at 24. However, the defendant objected and the court issued a curative instruction. Id. On appeal, the state supreme court held that although the misconduct was flagrant, the trial court’s instruction effectively cured any prejudice resulting from the improper comment. Id. at 28.

To the extent this court finds that the prosecutor’s statements in closing argument were in fact misconduct, it was misconduct of the type addressed in Emery and Warren, which has the potential to confuse the jury rather than inflame it. As such, any prejudice could have been removed by a curative instruction had

the defendant objected, and the defendant's right to a fair trial was not violated.

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm McCall's conviction.

DATED this 6<sup>th</sup> day of March, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
STEPHANIE FINN GUTHRIE, WSBA #43033  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent in STATE V. LITTERTORY MCCALL, Cause No. 68829-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Betty A. Huddleston  
Name:  
Done in Seattle, Washington

3/7/13  
Date