

FILED  
Court of Appeals  
Division I  
State of Washington  
9/27/2018 3:52 PM

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
10/8/2018  
BY SUSAN L. CARLSON  
CLERK

Supreme Court No. 96392-4  
Court of Appeals No. 76056-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JORDAN TASCA,

Petitioner.

---

PETITION FOR REVIEW

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KATHLEEN A. SHEA  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND THE DECISION BELOW ... 1

B. ISSUE PRESENTED FOR REVIEW ..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT IN FAVOR OF GRANTING REVIEW .....6

This Court should accept review because prosecutorial misconduct  
deprived Mr. Tasca of his constitutional right to a fair trial.....6

a. Mr. Tasca was denied a fair trial when the deputy prosecutor  
impugned defense counsel’s integrity. .... 7

b. The prosecuting attorney improperly shifted the burden to Mr.  
Tasca and mischaracterized its burden during closing  
argument. ....9

E. CONCLUSION ..... 11

## TABLE OF AUTHORITIES

### **Washington Supreme Court**

<i>In re Pers. Restraint of Glasmann</i> , 175 Wn.2d 696, 286 P.2d 673 (2012).....	6, 7
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014).....	7, 8, 9
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	6, 7
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	9, 10

### **Washington Court of Appeals**

<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	9
<i>State v. Johnson</i> , 158 Wn. App. 677, 243 P.3d 936 (2010).....	10
<i>State v. Swanson</i> , 181 Wn. App. 953, 327 P.3d 67 (2014).....	7

### **United States Supreme Court**

<i>Estelle v. Williams</i> , 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).....	6
--	---

### **Decisions of Other Courts**

<i>Bruno v. Rushen</i> , 721 F.2d 1193 (9 <sup>th</sup> Cir. 1983).....	7
---	---

### **Constitutional Provisions**

Const. art. I, § 22 .....	6
U.S. Const. amend. VI.....	6
U.S. Const. amend. XIV .....	6

**Washington Rules**

RAP 13.4..... 1

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Jordan Tasca requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Jordan Tasca*, No. 76056-4-I, filed July 23, 2018. The State's motion to reconsider was denied August 28, 2018. A copy of the opinion and denial of the motion to reconsider are attached in an appendix.

B. ISSUE PRESENTED FOR REVIEW

A defendant may be denied his constitutional right to a fair trial when the prosecuting attorney acts improperly and the defendant is prejudiced. Should this Court grant review where, in closing argument, the State prejudiced Mr. Tasca by improperly disparaging defense counsel, shifting the burden to Mr. Tasca, and mischaracterizing the State's burden?

C. STATEMENT OF THE CASE

Kenneth Williams' livelihood depends on his ability to maintain his commercial driver's license. 10/20/16 RP 89. He is currently a driver for the United States Postal Service, but previously drove a bus for King County Metro Transit. 10/20/16 RP 65.

When Mr. Williams was running late to work as a bus driver one morning, a state trooper observed him traveling 98 miles per hour

in a 60 mile-per-hour zone. 10/25/16 RP 175-76. When the trooper stopped Mr. Williams for speeding, Mr. Williams alleged he was a victim of road rage, claiming that a car the trooper observed safely traveling the speed limit had attempted to run him off the road.

10/25/16 RP 178-79. The officer placed Mr. Williams under arrest for reckless driving. 10/20/16 RP 78; 10/25/16 RP 180. Mr. Williams pled to a reduced charge in order to retain his commercial driver's license. 10/20/16 RP 91.

However, Mr. Williams was ultimately forced to resign from his job as a bus driver, in lieu of termination, after physically assaulting a rider and lying about it. 10/25/16 RP 192-3, 198-99. Mr. Williams falsely claimed he had acted in self-defense after a rider pushed him. 10/20/16 RP 80. In fact, a video recording showed Mr. Williams had followed the riders off the bus and assaulted one of them. 10/25/16 RP 192-93. Even after he was confronted with the recording, Mr. Williams refused to admit the truth. 10/20/16 RP 80.

Jordan Tasca is a 26-year-old student at Renton Technical College, studying computer science. 10/25/16 RP 208. He grew up in a family where it was common to own guns for hunting and protection,

and he kept a handgun under the driver's seat of his car. 10/25/16 RP 209-10.

One afternoon Mr. Tasca was driving home from class on the way to a friend's house when something he did angered Mr. Williams, who was driving on the same roadway. 10/25/16 RP 211-12. Mr. Williams began honking and abruptly forced his car into Mr. Tasca's lane, cutting him off. 10/25/16 RP 212. Mr. Tasca hit his brakes and swerved, but was able to straighten his car out and continue driving. 10/25/16 RP 213. Mr. Tasca assumed Mr. Williams was upset because Mr. Tasca had been looking at his cell phone while driving. 10/25/16 RP 214.

Mr. Williams slowed his car below the speed limit and Mr. Tasca moved into the left lane to get around him. 10/25/16 RP 214. As the two cars approached a traffic light, Mr. Tasca passed Mr. Williams and Mr. Williams hung out of the driver's side window with his middle finger raised, yelling expletives at Mr. Tasca. 10/25/16 RP 215. Mr. Williams then swerved his car into Mr. Tasca's car, forcing Mr. Tasca to swerve in response. 10/25/16 RP 217. Surrounded by traffic, with nowhere to go, Mr. Tasca was terrified. 10/25/16 RP 218, 220. He did the only thing he could think of and pulled his gun out from under the

driver's seat. 10/25/16 RP 218. He showed Mr. Williams the gun and told him he was not messing around, and to please get away from him. 10/25/16 RP 218.

Mr. Tasca then pulled his car off the road as quickly as he could, but Mr. Williams responded by pulling over behind him. 10/25/16 RP 220-21. Mr. Tasca performed a U-turn across several lanes of traffic to get away, but Mr. Williams followed, leading Mr. Tasca to fear that Mr. Williams also had a gun. 10/25/16 RP 222.

In fact, Mr. Williams followed Mr. Tasca in order to photograph his license plate. 10/20/16 RP 70. Mr. Williams called 911 and reported to police that a man whom he later identified as Mr. Tasca was looking at his cell phone while driving and cut Mr. Williams off in traffic. 10/20/16 RP 67. Mr. Williams reported that he had only honked in response, but Mr. Tasca reacted by pointing a gun at him. 10/20/16 RP 67, 69-70. He also claimed at one point Mr. Tasca had attempted to get out of his car, as if to confront Mr. Williams, but Mr. Williams could not maintain a consistent story about whether this happened before or after Mr. Tasca pulled out the gun. 10/20/16 RP 69, 84. Mr. Williams claimed that both accounts were "true" because they reflected his recollection at the time each statement was made. 10/20/16 RP 84-85.



Mr. Tasca was arrested outside of his home. CP 16. Law enforcement performed a search of the home after his arrest, discovered a firearm, and applied for a search warrant based on their observations during the initial search. CP 16. The trial court denied Mr. Tasca's motion to suppress the evidence found in his home. CP 29-30.

During the trial, the prosecutor argued to the jury that Mr. Tasca's attorney's use of impeachment evidence was designed to "distract" them. 10/25/16 RP 263. The prosecutor also told the jurors they should consider whether the State's theory or the defense's theory was more plausible in order to reach a verdict. 10/25/16 RP 267

A jury found Mr. Tasca guilty of felony harassment. CP 96. After finding a first time offender waiver was appropriate, the court imposed two days in jail, with credit for time served, and ordered Mr. Tasca to pay \$600 in legal financial obligations. CP 102-103.

On appeal, the Court of Appeals determined the trial court failed to make the "appropriate findings and conclusions of law with regard to the independent source doctrine" at the suppression hearing and remanded Mr. Tasca's case for a new hearing. CP 29-30; App. A at 5, 8. The State filed a motion to reconsider as to this issue, and the Court

of Appeals denied that motion. App. B. The Court of Appeals declined to find the State committed prosecutorial misconduct. App. A at 8.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

**This Court should accept review because prosecutorial misconduct deprived Mr. Tasca of his constitutional right to a fair trial.**

“The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.2d 673 (2012) (citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); U.S. Const. amends. VI, XIV; Const. art. I, § 22. A prosecutor is obligated to perform two functions: “enforce the law by prosecuting those who have violated the peace and dignity of the state” and serve “as the representative of the people in a quasijudicial capacity in a search for justice.” *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

“[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.” *Berger*, 295 U.S. at 88. “It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to

bring about a just one.” *Id.* A prosecutor’s misconduct may deny a defendant his right to a fair trial and is grounds for reversal if the conduct was improper and prejudicial. *State v. Swanson*, 181 Wn. App. 953, 957, 327 P.3d 67 (2014) (citing *Glasmann*, 175 Wn.2d at 703-04; *Monday*, 171 Wn.2d at 675).

- a. Mr. Tasca was denied a fair trial when the deputy prosecutor impugned defense counsel’s integrity.

A prosecutor is prohibited from impugning the role or integrity of defense counsel. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). “Prosecutorial statements that malign defence counsel can severely damage an accused’s opportunity to present his or her case and are therefore impermissible.” *Id.* (citing *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9<sup>th</sup> Cir. 1983)). When a prosecuting attorney makes statements that suggest defense counsel acted with deception or dishonesty, this directly impugns defense counsel’s integrity and reversal is warranted. *Id.* at 433.

During his closing argument, the deputy prosecutor told the jury:

[PROSEUCTOR]: Members of the jury, this case is not about Kenneth Williams’ employment at Metro three and a half years ago. It’s not about getting pulled over for reckless driving three years ago.

Those are brought up to distract you from what happened on –

[DEFENSE COUNSEL]: Objection, disparaging Defense counsel.

THE COURT: Overruled.

[PROSECUTOR]: Those were brought up to distract you from what happened on January 6, 2016.

10/25/16 RP 263.

In *Lindsay*, our supreme court reversed after finding, in part, that the deputy prosecuting attorney violated the defendant's right to a fair trial when he referred to defense counsel's argument as a "crock." 180 Wn.2d at 433. The court found the term implied defense counsel was deceptive and dishonest. *Id.*

Similarly, here the prosecutor's assertion that defense counsel's use of impeachment evidence was simply a distraction implied Mr. Tasca's attorney was acting with deception to distract the jurors from the real issue in the case. In fact, the impeachment evidence was extremely important to the jury's deliberations, as it weighed heavily into the jury's determination of Mr. Williams' credibility.

The Court of Appeals disagreed Mr. Tasca's case is comparable to *Lindsay* because the prosecutor's comments did "not rise to the same level." App. A. at 7. But the underlying message to the jury here and in

*Lindsay* is the same: that defense counsel was acting deceptively in an attempt to mislead the jury. The prosecutor's statement was improper, and this Court should accept review.

- b. The prosecuting attorney improperly shifted the burden to Mr. Tasca and mischaracterized its burden during closing argument.

The "State bears the entire burden of proving each element of its case beyond a reasonable doubt." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). "Arguments by the prosecution that shift the burden of proof onto the defense constitute misconduct." *State v. Thorgerson*, 172 Wn.2d 438, 466, 258 P.3d 43 (2011). The State's argument is also improper when it fails to convey the gravity of the State's burden. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010).

In *Fleming*, the prosecuting attorney shifted the burden to the defendants in closing argument, arguing that they had failed to offer explanations for the State's evidence against them. 83 Wn. App. 214. The court reversed, finding that the misconduct was not harmless beyond a reasonable doubt and agreeing with appellate counsel's characterization that "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging

in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.” *Id.* at 215.

In his closing argument, the deputy prosecutor similarly shifted the burden to Mr. Tasca when he told the jury:

Ladies and gentleman, just because you have two conflicting stories, that does not mean there’s reasonable doubt. Look at the stories, look at the testimony, and *think about which is more plausible.*

10/25/16 RP 267 (emphasis added). Mr. Tasca objected, but the trial court overruled the objection. 10/25/16 RP 267.

The State’s argument informed the jury that, rather than hold the State to its burden to prove all of the elements of the crime beyond a reasonable doubt, the jury should reach a verdict based merely on an evaluation of which version of events was more plausible.

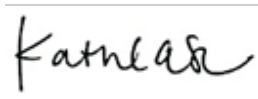
The Court of Appeals declined to reverse after finding this was not the *only* basis upon which the State urged the jury to find Mr. Tasca guilty. App. at 8. But regardless of whether this was this was the only basis provided by the State, it shifted the burden to Mr. Tasca and mischaracterized the State’s burden. *See Thorgeron*, 172 Wn.2d at 466; *Johnson*, 158 Wn. App. at 685. This Court should accept review.

E. CONCLUSION

For all of the reasons stated above, this Court should grant review of whether the State committed prosecutorial misconduct.

DATED this 27<sup>th</sup> day of September, 2018.

Respectfully submitted,

A rectangular box containing a handwritten signature in cursive script that reads "Kathleen A. Shea".

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Kathleen A. Shea – WSBA 42634  
Washington Appellate Project  
Attorney for Petitioner

APPENDIX A

**COURT OF APPEALS, DIVISION ONE OPINION**

**July 23, 2018**



2018 JUL 23 AM 8:36

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

THE STATE OF WASHINGTON,	)	
	)	No. 76056-4-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
JORDAN JOHN TASCA,	)	
	)	
Appellant.	)	FILED: July 23, 2018
	)	

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APPELWICK, C.J. — Tasca was convicted of felony harassment. He argues that the trial court erred in upholding a search warrant under the independent source exception and that the prosecutor committed misconduct. We reject Tasca's claim of prosecutorial misconduct. But, because the trial court did not make findings necessary to apply the independent source exception, we remand for a new hearing on the application of the independent source exception consistent with this opinion. The trial court may determine whether to take additional evidence at the hearing and shall enter new findings of fact and conclusions of law on the motion to suppress.

**FACTS**

A vehicle had begun tailgating Kenneth Williams after that same vehicle had cut him off during a lane change. Williams slowed down in response. The other

driver then pointed a gun at him. Williams called 911 and provided a description and a photo of the vehicle.

Shortly after the incident, sheriff's deputies arrived at the residence where the suspect vehicle was registered. A deputy observed the suspect vehicle in the carport. The deputy knocked on the door, and Jordan Tasca, the registered owner of the vehicle, answered. He was placed under arrest without incident. While in handcuffs Tasca stated, " '[I]s it a felony to run someone off the road?' " Williams arrived at the residence and positively identified Tasca as the suspect. Police performed a "protective sweep" of Tasca's residence. One officer observed a handgun during that sweep. Officers then obtained and executed a search warrant, recovering a firearm and magazine during the search.

Tasca was charged with one count of felony harassment. He moved to exclude the evidence seized from his residence, because the warrant was granted based on evidence discovered during a warrantless protective sweep of the residence, and there were no circumstances that justified the warrantless sweep. The trial court agreed that the warrantless search was unlawful. But, it ruled that the warrant was nevertheless valid, because the evidence was sufficient to justify a search warrant even when excising the improperly obtained evidence, namely, the observation of the firearm:

The warrant provides for a search of car or home. It's clear in the affidavit that the defendant was located in his home shortly after the incident. There is probable cause to believe that by virtue of the size of the contraband being sought that it would be reasonable that that firearm would be found in the home with Mr. Tasca or in his car, which he wasn't in at the time. I do so find that the warrant remains valid even

with the excised portions, and the search incident to said warrant is valid.

A jury convicted Tasca as charged. He appeals.

## DISCUSSION

Tasca makes two arguments. First, he argues that the trial court erred in erred in upholding a search warrant for Tasca's home. Second, he argues that the prosecutor committed misconduct in closing argument.

### I. Search Warrant

Tasca argues that the trial court upheld the search warrant for his residence based on a misapplication of the independent source doctrine.

Absent an exception to the warrant requirement, a warrantless search is impermissible under both article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. State v. Johnson, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996), abrogated on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). Generally, evidence seized during an illegal search is suppressed under the exclusionary rule. See State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). In addition, evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine. State v. Gaines, 154 Wn.2d 711, 717, 116 P.3d 993 (2005)

However, evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action. Id. at 718. Under this "independent source" doctrine, an unlawful search

does not invalidate a subsequent search if (1) the issuance of the search warrant is based on untainted, independently obtained information, and (2) the State's decision to seek the warrant is not motivated by the previous unlawful search and seizure. State v. Miles, 159 Wn. App. 282, 284, 244 P.3d 1030 (2011).

Under this test, we first must determine the validity of the warrant absent the illegally obtained information. Whether facts set out in an affidavit are sufficient to conclude that probable cause exists is a question of law that we review de novo. State v. Nusbaum, 126 Wn. App. 160, 166-67, 107 P.3d 768 (2005). Probable cause exists where the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that evidence of the crime may be found at a certain location. State v. Jackson, 150 Wn.2d 251, 264-65, 76 P.3d 217 (2003).

Here, the trial court determined that the lawfully obtained information that was included in the warrant application was sufficient to show probable cause, even when the evidence of the illegal protective sweep was excluded. Tasca argues that this conclusion was erroneous.

We disagree. The officers received a report that an individual had brandished a weapon in a road rage incident. Roughly one hour later, they arrived at the registered address of the vehicle whose driver brandished the weapon. The suspect's vehicle was in the open carport. When handcuffed, Tasca asked the officers, "[I]s it a felony to run someone off the road." This indicated that he was involved in the incident. A firearm was reported to have been brandished, but the officers had not yet located it. It was reasonable to infer that the weapon may have

been located inside of Tasca's vehicle or residence. The warrant was supported by probable cause independent of the wrongfully obtained evidence.

Second, the independent source exception requires courts to analyze whether the State's decision to seek the warrant was motivated by the fruits of the illegal search. Miles, 159 Wn. App. at 284. The record does not show that the trial court made such findings here, and the State concedes this.

However, the State argues that Tasca made no argument below regarding the motivation prong of the independent source exception and therefore Tasca has waived this argument. Under RAP 2.5(a), we need not consider arguments raised for the first time on review, except for manifest errors affecting a constitutional right. But, in his motion to suppress, Tasca sufficiently cited Gaines, 154 Wn.2d at 718. In that case the court analyzed the multiple prongs of the independent source exception analysis. See id. at 718, 721. And it recognized the officer motivation prong based on controlling United States Supreme court authority, Murray v. United States, 487 U. S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d. 472 (1988).<sup>1</sup> Presenting this authority to the trial court was sufficient to raise both prongs of the test before the trial court.

Under Murray, it is the function of the trial court to determine the facts. Following Murray, we remand to the trial court for appropriate findings and conclusions with regard to the independent source doctrine. See id. at 542-44.

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<sup>1</sup> In Murray the court remanded, in part because the district court made no findings on whether officers would have sought the warrant in question but for an initial illegal entry into a suspect's property. 487 U.S. at 542-43.

II. Prosecutorial Misconduct

Tasca next argues that the prosecutor committed misconduct in two ways.<sup>2</sup> First, Tasca argues that the prosecutor impugned defense counsel's integrity. Second, Tasca argues that the prosecutor also committed misconduct by shifting the burden to Tasca.

Allegations of prosecutorial misconduct are reviewed for abuse of discretion. State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). The defendant bears the burden of showing that the comments were (1) improper and (2) prejudicial. Id. We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

A. Impugning Defense Counsel's Integrity

Tasca argues that the prosecutor impugned defense counsel's integrity when he told the jury that "this case is not about Kenneth Williams' employment at Metro three and a half years ago. It's not about getting pulled over for reckless driving three years ago. Those are brought up to distract you." Tasca objected, but was overruled.

A prosecutor may argue that the evidence does not support the defense theory. Lindsay, 180 Wn.2d at 431. However, a prosecutor may not impugn the

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<sup>2</sup> Prosecutorial Misconduct that prejudices a defendant warrants a new trial. State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). Therefore, although we remand for findings regarding the independent source exception, we also must address Tasca's prosecutorial misconduct argument.

role or integrity of defense counsel. Id. at 431-32. Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible. Id. at 432.

Tasca analogizes to Lindsay. There, our Supreme Court found prosecutorial misconduct when the prosecutor referred to defense counsel's presentation as a "crook." Id. at 433-34. It reasoned that this "implies deception and dishonesty," and therefore was improper. Id. at 433.

Tasca argues that the same is true here. We disagree. Here, the defense focus on the conduct of the victim three years prior had nothing to do with the facts of this case. It was evidence which would put the victim in a less sympathetic light and perhaps undermine his credibility. The comment does not rise to the same level as allegations that counsel is dishonest and was not so improper and prejudicial to amount to misconduct.

#### B. Burden Shifting

Tasca also argues that the prosecutor improperly shifted the burden to Tasca by stating, "[J]ust because you have two conflicting stories, that does not mean there's reasonable doubt. Look at the stories, look at the testimony, and think about which is more plausible." Tasca also objected to this statement, but was again overruled.

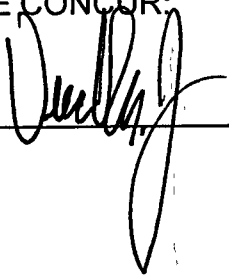
Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. Lindsay, 180 Wn.2d at 434. Tasca argues that this statement did exactly that, because it invited the jury to convict based on the theory that it found more


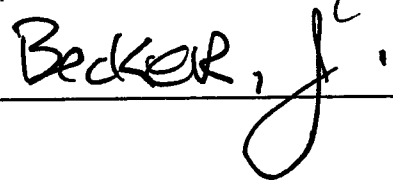
plausible. But, here the prosecutor merely urged the jury to find his theory more plausible. He did not invite the jury to convict the jury solely because that theory was more plausible. The prosecutor was entitled to compare theories of the case, and urge the jury to find the prosecution's theory more plausible, without shifting the burden. This remark was not improper.

The trial court did not abuse its discretion in finding no prosecutorial misconduct.

We remand for a new hearing on the application of the independent source exception consistent with this opinion. The trial court may determine whether to take additional evidence at the hearing and shall enter new findings of fact and conclusions of law on the motion to suppress.

WE CONCUR:

  
\_\_\_\_\_

  
\_\_\_\_\_  
  
\_\_\_\_\_



APPENDIX B

**ORDER DENYING MOTION FOR RECONSIDERATION**

**August 28, 2018**


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

THE STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 JORDAN JOHN TASCA, )  
 )  
 Appellant. )  
 )

No. 76056-4-1  
  
ORDER DENYING MOTION  
FOR RECONSIDERATION

The respondent, State of Washington, filed a motion for reconsideration. The appellant, Jordan Tasca, filed an answer. A panel of the court has determined that the motion should be denied. Now, therefore, it is

ORDERED that the motion for reconsideration is denied.

  
Chief Judge

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76056-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Jennifer Joseph, DPA  
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King County Prosecutor's Office-Appellate Unit

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: September 27, 2018

# WASHINGTON APPELLATE PROJECT

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## Transmittal Information

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**Appellate Court Case Title:** State of Washington, Respondent v. Jordan John Tasca, Appellant  
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