

NO. 65817-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT GUERRERO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I  
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**A. ISSUES PRESENTED**

1. To establish prosecutorial misconduct in closing argument, a defendant must demonstrate that the prosecutor's comments were both improper and prejudicial. Here, the defendant's theory at trial was that a different person had forged the document in question. However, neither the State nor the defendant could locate that person to call him as a witness. In closing argument, the State noted in passing that it was convenient for the defendant that neither side could locate the person he was blaming. The defendant now claims that this constituted an improper invocation of the "missing witness" doctrine. As the prosecutor's comment was based on the evidence, attacked the defendant's theory of the case, challenged the defendant's credibility, and was not actually a "missing witness" argument, has the defendant failed to establish reversible prosecutorial misconduct?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Robert Guerrero, was charged with one county of Forgery (for knowingly submitting a forged order of

dismissal to the King County Superior Court in the effort to dismiss his three prior felony convictions) and one count of Attempted Theft in the First Degree (for suing the King County Superior Court for alleged negligence in failing to have previously processed the ostensible order). CP 64-65. A jury found Guerrero guilty as charged. CP 400-01. The court imposed sentences within the standard range. CP 426-32. This timely appeal followed. CP 416.

## **2. SUBSTANTIVE FACTS**

In 1983, Guerrero pleaded guilty to two counts of Rape in the First Degree and one count of Assault in the Second Degree (all with a deadly weapon) for a series of knife-point sexual assaults. 8RP 20. Guerrero was sentenced by the Honorable James McCutcheon on February 28, 1984. 4RP 717;<sup>1</sup> Supp. CP \_\_\_\_ (Ex. No. 1, Judgment and Sentence). Guerrero was granted a 10 year deferred sentence under then RCW 9.95.200. 4RP 718, 746; Supp. CP \_\_\_\_ (Ex. No. 1, Judgment and Sentence). The Judgment and Sentence was signed by Judge McCutcheon, Wes Hohlbein (Guerrero's attorney at the

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<sup>1</sup> The State adopts the Appellant's designation of the Verbatim Report of Proceedings. See Br. App. at 1, n.1.

time), and Deputy Prosecuting Attorney (DPA) Jeff Baird. 4RP 717, 720-21; Supp. CP \_\_\_\_ (Ex. No. 1, Judgment and Sentence).

Guerrero appears to have complied with the relevant conditions of his deferred sentence. 5RP 837-38, 853; 6RP 1160-61. Guerrero remained on supervision and reported to his Community Corrections Officer as directed until Department of Corrections supervision was terminated on March 18, 1994. 5RP 838; 6RP 1161.

However, in 2004, both the Lewis and Pierce County Prosecuting Attorney's offices filed charges of Failing to Register as a Sex Offender against Guerrero. 6RP 1063, 1177, 1181; 7RP 1210. Although Guerrero was acquitted in a Lewis County bench trial,<sup>2</sup> he lost his job as a result of the arrests and charges. 5RP 914-16. Moreover, his offender level changed. 5RP 914-16, 923-24. As a result of the arrests, charges, and the change in his offender level, Guerrero had significant difficulties obtaining and/or keeping a job. 5RP 807, 914-17; 7RP 1215-17.

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<sup>2</sup> Guerrero was acquitted because the State was unable to prove that Guerrero was properly advised of his registration requirement. 6RP 1064-65. At no time during the trial did Guerrero argue that he had been relieved from the duty to register because his underlying convictions had been overturned, dismissed, or were otherwise no longer valid. 6RP 1065-69.

In August of 2004, Guerrero's new attorney, Thomas Dinwiddie, petitioned the Honorable Nicole MacInnes<sup>3</sup> for: 1) an order of dismissal as to each count; and 2) relief from the requirement that Guerrero register as a sex offender. 4RP 763-64, 790-91. The matter was set for a hearing on December 6, 2004. 4RP 795. At that hearing, Guerrero argued that the Order Terminating Department of Corrections Supervision (dated March 18, 1994) effectively operated as an order of dismissal. 4RP 792-94. At no time did the defense assert that there was an extent order of dismissal that had already been signed or entered (or, indeed, that there were any outstanding orders that had not been filed or received by the court). 4RP 800; 5RP 804. The State opposed Guerrero's requests due to the facts of the underlying case and the nature of the charges and suggested that, at a minimum, Guerrero should provide the court with an updated sexual deviancy evaluation. 4RP 795-98. Guerrero agreed to provide an updated evaluation and the hearing was continued by agreement to February 11, 2005. 4RP 798; 5RP 804. However, Guerrero expressed concern about the delay and commented that he could not get work and was running out of money. 4RP 799-800.

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<sup>3</sup> Judge MacInnes was the successor judge to Judge McCutcheon. 4RP 764.

Prior to the next hearing, Guerrero presented an updated evaluation. 5RP 804-05. However, at the hearing, the State argued that the evaluation was still insufficient. 5RP 805-06. The court gave the defense the option of either setting another hearing (in which Guerrero could call witnesses) or allowing the court to rule based solely on the materials already presented. 5RP 806-07. Guerrero indicated that he wished to set another hearing and call witnesses. 5RP 807. At no time during this hearing did the defense assert that an order of dismissal had been signed or entered or that there were any outstanding orders that had not been filed or received by the court. 4RP 800; 5RP 804. However, during the hearing, Guerrero made a statement to the court, again complaining about the effect that delay had on his employment and financial situation. 5RP 807.

Over the course of the next six months, the hearing was repeatedly continued by Guerrero due to witness availability issues. 5RP 808-09. Eventually, the matter was set for a hearing on September 22, 2005. 5RP 808-09

On September 21, 2005, Dinwiddie unexpectedly faxed the State a copy of a document purporting to be an "Order of Dismissal" of the case that had been entered on February 27, 1994. 5RP 809-12; Supp. CP \_\_\_\_ (Ex. No. 11, Fax 9/21/05). The document

appeared to be signed by DPA Baird, Hohlbein (now deceased), and Judge McCutcheon (also deceased). 4RP 733; 5RP 812. However, there were certain aspects of the document that made it appear "odd." 4RP 738; 5RP 815, 887, 929-30. Although the document was stamped as a "certified copy," it did not contain the usual notary stamp that appears on certified documents. 5RP 816, 887-88. Furthermore, the language of the order itself was inartful and unlike that which had been seen in similar circumstances. 5RP 816, 887-88. Additionally, a number of things simply seemed "wrong" about the appearance of the order. 4RP 738-40; 5RP 815-16, 887-88. Moreover, despite a close review of the clerk's file and a "critical search" within the King County Superior Court Clerk's Office, not even a reference to this document was found in the court file. 5RP 813, 819, 878-79, 892-94. Similarly, a review of the King County Prosecuting Attorney's Office (KCPAO) file also failed to reveal either a copy of the order or a reference to it. 5RP 812, 819. The "original" of this document was never produced by Guerrero.<sup>4</sup> 5RP 832-34.

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<sup>4</sup> The defendant eventually provided the State with another copy of the same ostensible Order of Dismissal. Supp. CP \_\_\_\_ (Sub No. 117, Stipulation and Order Regarding U.S.S.S. Evidence). The defense claimed that this version was a photocopy that Guerrero had made in 1994, immediately after he received it (in the mail) from his attorney. Id. This document was sent to Forensic Document Examiner Joseph Stephens of the Questioned Document Branch of the United States Secret Service for forensic analysis. Id. After examining the document, Stephens was unable to determine when the document was actually printed. Id.

At the court hearing the next day (September 22, 2005), Guerrero claimed that the order had recently been located in a box of documents at his father's house and that he had given it to Dinwiddie, who had faxed it to the State and the court.<sup>5</sup> 5RP 811. At the State's request, the court continued the hearing to give the State time to investigate and to formulate a response to this "newly discovered" order. 5RP 817-18. Guerrero again expressed his dismay and frustration at the delay in resolving his case, particularly as it impacted his financial situation. 5RP 818-19.

Over the next several weeks there was extensive discussion within the KCPAO as to whether the document was valid and, if so, what legal effect it had. 5RP 819. DPA Baird was shown a copy of the purported order and indicated that, while he had no memory of signing the document, it did appear to be his signature. 4RP 730-34; 5RP 819. After these internal discussions, and despite questions

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<sup>5</sup> It was later clarified that Guerrero's brother (John) had actually found the order, which he gave to Guerrero's father (also named John). Guerrero's father gave the order to Guerrero, who gave it to Dinwiddie. 6RP 1197-98. Guerrero repeated this version of events in his interview with Detective Adams, during his civil deposition, and at trial. 5RP 917-18, 920, 993-1000; 6RP 1005-07, 1022-30. At trial, Guerrero's brother (John Guerrero) testified consistently with this, but also added that he found the documents in the very top of a box in his father's closet shortly after Guerrero had been in the room with the door closed and locked. 6RP 1036-39. John Guerrero also testified that there were other papers in the same box that appeared to be court documents that had been altered or tampered with. 6RP 1036-39.

about the origin of the order and some concerns about its authenticity, the State concluded that: 1) there was no concrete evidence that the order was other than what it appeared; 2) despite its inartful language, the order appeared to express the intent of the sentencing court that the charges be dismissed; and 3) that such a dismissal would relieve Guerrero of his obligation to register. 5RP 819-21, 855.

On October 10, 2005, Judge MacInnes signed an Order for Dismissal to give effect to what she believed to be Judge McCutcheon's intent as reflected in the ostensible 1994 Order of Dismissal. 5RP 820-23; Supp. CP \_\_\_\_ (Ex. No. 3, Order for Dismissal). The collateral effect of this order was to relieve Guerrero of the requirement of registration. 5RP 823.

In June of 2006, Guerrero filed a lawsuit against King County, alleging that the failure to file and process the ostensible Order of Dismissal in 1994 resulted in lost wages, mental anguish, emotional distress, and damages to his reputation. 5RP 908-11; Supp. CP \_\_\_\_ (Ex. No. 5, Summons and Complaint). Guerrero also filed a Statement of Arbitrability, indicating that he was seeking more than \$50,000 in damages. 5RP 908, 911.

DPA John Cobb was assigned to represent King County in the lawsuit. 5RP 908. While preparing the response to Guerrero's claims, Cobb was struck by various incongruities in the ostensible order. 5RP 929-31. After looking at the various documents for some time, Cobb eventually realized that the signatures on the ostensible order appeared to be exact copies of the signatures that appeared on the Judgment and Sentence in Guerrero's criminal case. 5RP 931.

At Cobb's request, Bob Dowd, the Manager of Information and Records Services for the King County Superior Court Clerk's Office, examined the documents in question. 5RP 863, 885-86, 888-89. Using a scanner and computer, Dowd was able to electronically overlay the signatures from the Judgment and Sentence and the ostensible Order of Dismissal. 5RP 889-91, 931-32. When this was done, it became apparent that the signatures were exact duplicates. 5RP 889-91, 931-32. Preliminary information about this apparently fraudulent aspect of the document was conveyed to Guerrero's civil counsel. 5RP 932-33. As a result, Guerrero dismissed his suit against the county in March of 2008. 5RP 932-33.

Meanwhile, in late February of 2008, the KCPAO contacted the King County Sheriff's Office to report the suspicion that Guerrero had forged the ostensible 1994 Order of Dismissal. 5RP 989-91.

The case was assigned to Detective Leland Adams for additional investigation. 5RP 989-91. As part of that investigation, Detective Adams and Detective Priebe-Olson interviewed Guerrero at his home. 5RP 993-1000; 6RP 1005-07, 1022-30. During that interview, Guerrero indicated that he had lost work as a result of the circumstances surrounding his arrests, charges, and registration requirement. 5RP 999; 6RP 1026-27. Guerrero was shown a copy of the ostensible 1994 Order of Dismissal. 5RP 996; 6RP 1025. He indicated that he recognized it as the order that he had given to Dinwiddie and Dinwiddie had given to the court. 5RP 996; 6RP 1006, 1025-26. Guerrero claimed that he had received the order in the mail from Hohlbein in 1994. 5RP 996-99; 6RP 1025-26. Guerrero admitted that he had the motive to forge the document and that no one else -- including Hohlbein -- had such a motive. 5RP 1000; 6RP 1005, 1028-29. During the course of the conversation, Guerrero never mentioned having an attorney other than Hohlbein and Dinwiddie. 6RP 1005, 1030. Finally, Guerrero admitted that the order had not been "located" until his attorney (Dinwiddie) told him that he had "better find" the order if "[he] wanted to keep his job." 6RP 1007, 1029.

The ostensible Order of Dismissal, along with other documents from the case, was submitted to Brett Bishop, a forensic scientist and document examiner with the Washington State Patrol Crime Lab. 5RP 946-47, 961-68. Based on his examination, Bishop concluded that the signatures of Judge McCutcheon, DPA Baird, and Hohlbein shared a "common origin" with the same signatures on the 1984 Judgment and Sentence. 5RP 968-69; Supp. CP \_\_\_\_ (Ex. No. 19, Crime Laboratory Report). In other words, the signatures on the dismissal document were "cut-and-pasted" from the Judgment and Sentence and, as such, the "Order of Dismissal [was] not a genuine document." 5RP 968-69; Supp. CP \_\_\_\_ (Ex. No. 19, Crime Laboratory Report).

Based on the discovery that the order was forged, Judge MacInnes signed an order vacating her earlier order of dismissal. 5RP 825-27, 855-56; Supp. CP \_\_\_\_ (Ex. No. 4, Order Vacating Order for Dismissal).

**C. ARGUMENT**

**1. THE PROSECUTOR'S CLOSING ARGUMENT WAS PROPER.**

Guerrero asserts that the prosecutor committed misconduct by improperly invoking the "missing witness" doctrine in closing argument. When the "missing witness" doctrine applies, the jury is instructed, and a party may argue, that the jury may infer that an uncalled witness would have testified unfavorably to the party that failed to call him. Guerrero asserts that the prosecutor's invocation of the doctrine in this case improperly shifted the burden of proof to him. Guerrero's assertion must fail, however, because it mischaracterizes the argument actually made by the prosecutor. Here, the prosecutor did not argue the "missing witness" doctrine. Rather, the prosecutor simply pointed out, *inter alia*, that Guerrero was, at the eleventh hour, attempting to cast all blame for the crime on a person that neither the defense nor the State could find to question or call as a witness. This argument was supported by the evidence and was an appropriate response to the defense theory of the case. As a result, there was no prosecutorial misconduct.

**a. Additional Relevant Facts**

Prior to trial, the defense disclosed its intent to present an "other suspect" defense, based on the assertion that Guerrero had innocently relied on an order that had been forged by someone else. See, e.g., 1RP 85. By the eve of trial, Guerrero had selected James McLees, an ex-attorney,<sup>6</sup> as the person he claimed had forged the ostensible order in question.<sup>7</sup> Prior to trial, the State moved to preclude Guerrero from arguing or introducing evidence of "other suspects." See Supp. CP \_\_\_\_ (Sub No. 65, State's Motion to Preclude The Defendant From Arguing or Introducing Evidence of "Other Suspects"). This issue was extensively briefed and litigated. CP 26-31; Supp. CP \_\_\_\_ (Sub No. 65, State's Motion to Preclude The Defendant From Arguing or Introducing Evidence of "Other Suspects"); 1RP 80-90. The trial court eventually ruled that Guerrero could pursue an "other suspect" defense, but limited the evidence that he could use in doing so. See, e.g., CP 280-84; 2RP 253-72, 293-327; 3RP 409-12; 3RP 431-445, 491-99.

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<sup>6</sup> McLees lost his license to practice law for reasons wholly unrelated to Guerrero's case. 7RP 1228-29.

<sup>7</sup> In the time leading up to trial, the defense had identified numerous other people that it accused of having possibly forged the ostensible order, including the Community Corrections Officer that had previously supervised Guerrero. 1RP 81.

At trial, the State's witnesses testified as outlined above. In addition, the parties agreed upon a stipulation that addressed the fact that so many people involved in the case -- including James McLees -- were unavailable for trial. Pursuant to that stipulation, the parties agree that certain facts were true and could simply be stated to the jury. Supp. CP \_\_\_\_ (Sub No. 116, Stipulation and Order Regarding Unavailable Witnesses). The stipulation was presented and signed by the prosecutor, Guerrero, and Guerrero's attorney, and was accepted by the trial court. Id. Pursuant to the parties' agreement, at the conclusion of the State's case, the court read the stipulation to the jury, which informed them that:

1. Judge James McCutcheon died on September 26, 1994.
2. Wes Hohlbein died on April 26, 1995.
3. Thomas Dinwiddie died on February 26, 2007.
4. It is unknown whether James McLees is alive or dead. Both the State and the defendant have made diligent efforts to locate James McLees. These efforts have been unsuccessful.

Supp. CP \_\_\_\_ (Sub No. 116, Stipulation and Order Regarding Unavailable Witnesses); 6RP 1094.

Over the State's objection, Guerrero actively pursued an "other suspect" defense throughout trial. Many of the State's witnesses were cross-examined regarding their knowledge (or lack thereof) of McLees and/or his alleged involvement. See, e.g., 4RP 751; 6RP 1031, 1127-28. In addition, Guerrero called two witnesses -- Bruce Cook and Julie Shankland -- to testify, *inter alia*, as to the same issues. 6RP 1137-38; 7RP 1221-27. Guerrero himself took the stand and also testified at length regarding McLees. 6RP 1161-65, 1168-71. The focus of Guerrero's direct and cross-examinations regarding McLees was to elicit testimony and admit evidence to attempt to establish that McLees had represented Guerrero in the 1983 cases and had the ability, opportunity, and motive to forge the ostensible 1994 Order of Dismissal.

In the State's initial closing argument, the prosecutor first addressed the reasons why the jury should conclude that Guerrero had forged the order. 7RP 1348-54. In summary, the State's argument was that the ostensible Order of Dismissal was unquestionably a forgery and the evidence showed that only Guerrero had the motive and opportunity to have forged it. In

addition, Guerrero was the only person who benefited from the forgery.

The prosecutor then moved on to address Guerrero's "other suspect" theory of the case. The following exchange then took place:

[PROSECUTOR]: [...] Now, it bec[a]me clear through the course of this trial that the defense has picked the person that they want you to pin the blame on. That person is James McLees, heard the name many times, this 81 year old disgraced former attorney conveniently was not around --

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: -- for no one to find.

[DEFENSE COUNSEL]: Burden shifting.

[COURT]: Uh, overruled.

[PROSECUTOR]: That is unavailable to either side to ask any questions, uh, about this incident.

7RP 1354. The prosecutor then went on to argue at length why the jury should reject the defense theory that McLees was the person who had actually forged the order. 7RP 1354-57. As part of this, the State pointed out that McLees had never been mentioned by Guerrero in any of the prior hearings, trials, filings, depositions, or statements associated with the litigation of his various cases and/or the ostensible Order of Dimissal. 7RP 1355-56.

In his closing, *inter alia*, Guerrero made his theory of the case explicit and specifically argued that McLees was the person who had forged the ostensible Order of Dismissal. 7RP 1374-77.

In the State's rebuttal, the prosecutor again argued to the jury why they should reject the defendant's theory of the case. 7RP 1379-84. As part of this discussion, though, the prosecutor explicitly addressed the issue of the burden of proof, stating:

[Defense counsel is] right about one very important thing, and I don't want this to get lost anywhere in the mix. As the defense, as the defendant, Mr. Guerrero bears no burden of proving himself innocent. The burden is on me to prove him guilty beyond a reasonable doubt. That is absolutely the truth and you should hold me to that burden.

7RP 1379-80.

The jury was properly instructed that the State bore the burden of proving every element of each charge beyond a reasonable doubt; that Guerrero was presumed innocent and bore no burden of proof; and that jurors were the sole judges of the credibility of each witness and of the weight to be given to any particular witness's testimony. CP 351, 355; 7RP 1321-22, 1324.

The jury was not instructed as to the "missing witness" doctrine.<sup>8</sup>

CP 349-97.

**b. The Prosecutor Did Not Argue The  
"Missing Witness" Doctrine, Nor Was There  
Any Prejudice.**

On appeal, Guerrero accuses the prosecutor of improperly shifting the burden to the defense by improperly arguing the "missing witness" doctrine. To establish that a prosecutor's comments were improper and denied a defendant a fair trial, the defendant must show that the comments were both improper and prejudicial. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In this context, a prosecutor's argument cannot be judged in isolation, but must be considered in the context of the evidence presented and addressed in argument, the context of the argument as a whole, and the instructions provided to the jury. State v. Monday, \_\_ Wn.2d \_\_, slip op. at 9 (No. 827236-2, June 9, 2011) (quoting State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)) (internal citations omitted). Here, Guerrero's argument

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<sup>8</sup> Indeed, neither the parties nor the court ever raised the issue of the "missing witness" doctrine. Such an instruction was never proposed nor addressed at any point.

should be rejected because he has failed to establish either impropriety or prejudice.

First, Guerrero has failed to establish that the prosecutor's comments were actually improper. A prosecutor may not imply that a defendant has a duty to present exculpatory evidence. State v. Davis, 133 Wn. App. 415, 422, 138 P.3d 132 (2006), overruled on other grounds, 103 Wn.2d 606, 184 P.3d 639 (2008). However, a prosecutor may argue reasonable inferences from the evidence presented and may attack a defendant's exculpatory theory. Id.; see also State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (a prosecutor may "argue that the evidence does not support the defense theory"). A prosecutor may also challenge a defendant's credibility in closing argument. State v. Copeland, 130 Wn.2d 244, 290-01, 922 P.2d 1304 (1996). Moreover, even prosecutorial remarks that might be improper in a vacuum are not grounds for reversal if they are a pertinent reply to a defense argument. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

Here, as described above, the identified portion of the prosecutor's argument was proper. The prosecutor was entitled to -- and did -- attack Guerrero's credibility as a witness and the reasonableness and believability of his exculpatory theory of the

case as a whole. In this context, the prosecutor's remark was a pertinent reply to the defense argument. Moreover, the prosecutor never departed from the evidence and the reasonable inferences that could be drawn from it.

Guerrero's entire argument of misconduct is premised on the assertion that the prosecutor improperly argued the "missing witness" doctrine. App. Br. at 12-14. His argument fails, however, because the prosecutor made no such argument. Under the "missing witness" doctrine,

where a party fails to call a witness to provide testimony that would properly be part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party.<sup>9</sup>

State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). When the doctrine applies, the jury is instructed that they may infer that the missing witness's testimony would have been unfavorable to the party who failed to call the witness. WPIC 5.20.

Here, the prosecutor did not make a "missing witness" argument. The prosecutor did not imply that McLees would have

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<sup>9</sup> There are a number of limitations on the use of the "missing witness" doctrine against a criminal defendant. State v. Blair, 117 Wn.2d 479, 48890, 816 P.2d 718 (1991). However, they are not relevant given the facts and argument at issue in this case.

provided testimony unfavorable to Guerrero if called as a witness. Nor did the prosecutor suggest that this was the reason that Guerrero had failed to call him to testify. Indeed, the prosecutor never even suggested that Guerrero had "failed" to call McLees as a witness at all. Rather, the State (correctly) indicated to the jury that the fact that McLees did not testify was not the "fault" of either party, but was an unavoidable consequence of the fact that neither side could find him.

Thus, despite Guerrero's assertion to the contrary, the prosecutor never argued or implied that Guerrero's failure to call McLees meant that the jury should infer that McLees's testimony would have been unfavorable to Guerrero. Rather, the prosecutor merely pointed out that it was suspicious that Guerrero's assertion that McLees was the true perpetrator was not made until a time when neither the State nor the defense could locate him to investigate this claim. This argument was based on the evidence and was made in the context of a broader argument challenging the entire reasonability and believability of Guerrero's exculpatory theory as a whole. It was, therefore, not improper.

The prosecutor's statement was also appropriate as an argument to the jury that it should not apply an inchoate version of

the "missing witness" doctrine *against the State*. Here, Guerrero claimed that McLees was the one who forged the document. Given that, it would not be inconceivable for the jury to be curious as to why the State did not call McLees as a witness to deny doing so. As a result, even if not officially instructed on the "missing witness" inference, a juror of reasonable intelligence attempting to apply the appropriate burden of proof might improperly infer that the State had failed to call McLees because his testimony would have been unfavorable *to the State*. As a result, in this context it was appropriate for the State to remind the jury that McLees was unavailable *to both sides* so that the jury would not jump to such a conclusion.

Second, even if the prosecutor's comments were improper, Guerrero has failed to establish prejudice. In order to prove that prosecutorial misconduct was prejudicial, the defendant must prove that there is a "substantial likelihood [that] the misconduct affected the jury's verdict." In re Pirtle, 136 Wn.2d 467, 481-82, 965 P.2d

593 (1998) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).<sup>10</sup> Reversal is not required unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, the prosecutor's comments were brief, were made in the context of directly refuting Guerrero's theory of the case, and the prosecutor never argued that Guerrero had a burden of proof or an obligation to present witnesses to prove his innocence. In addition, as noted above, the jury was properly instructed on the

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<sup>10</sup> Despite Guerrero's assertion to the contrary, an allegation that a prosecutor committed misconduct by improperly arguing the "missing witness" doctrine is analyzed under the "substantial likelihood" standard rather than the "constitutional harmless error" standard (at least in a case where the defendant testified and called witnesses of his own). See State v. Dixon, 150 Wn. App. 46, 58, 207 P.3d 459 (2009); State v. Contreras, 57 Wn. App. 471, 473-74, 788 P.2d 1114 (1990). Thus, in such a case the burden is on the defendant to establish that there is a substantial likelihood that the misconduct affected the jury's verdict rather than on the State to prove that the evidence was so overwhelming that it necessarily leads to a finding of guilt. Id. This standard was not changed by the recent decision in State v. Monday, \_\_\_ Wn.2d \_\_\_, slip op. (No. 827236-2, June 9, 2011). In Monday, the Washington Supreme Court held that "when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict." Id., slip op at 15. However, by the terms of this language, the Court limited its holding to only those situations involving this specific type of prosecutorial misconduct. For other types, the Court left the burden on the defendant to demonstrate a "substantial likelihood [that] the misconduct affected the jury's verdict." Id., slip op. at 8-9 (quoting State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (internal citations omitted)).

burden of proof and that a reasonable doubt could arise even if the defendant produced no evidence. CP 355; 7RP 1324. Moreover, as noted above, the prosecutor himself explicitly reminded the jury during rebuttal argument that the burden of proof lay with the State and that the defendant had no burden. 7RP 1379-80. Furthermore, the evidence supporting Guerrero's claim that McLees was the true culprit was tenuous at best.

Finally, any possibility that the jury would improperly draw a "missing witness" inference against the defendant was negated by the relevant stipulation and by the prosecutor's actual statement, both of which reminded the jury that the reason McLees did not testify was beyond the control of both parties. In other words, no reasonable juror could have improperly inferred anything from Guerrero's "decision" not to call McLees, because the jury was told that no such "decision" had been made. Rather, it was simply the fact that neither side could locate him. Under these circumstances, there is no reasonable likelihood that the alleged prosecutorial misconduct had any affect on the verdict.

D. **CONCLUSION**

For all the foregoing reasons, the State asks this court to affirm the verdict of guilt entered by the jury.

DATED this 17 day of June, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

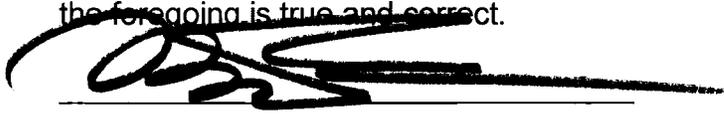
By: 

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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 M. WINKLER, 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 State's Brief of Respondent, in STATE V. ROBERT GUERRERO, Cause No. 65817-4-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.



Date

06/17/11

Done in Seattle, Washington

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