

69923-7

69923-7

NO. 69923-7-1

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN J. BUCKO,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

D. STATEMENT OF THE CASE ..... 2

E. ARGUMENT ..... 4

    1. THE PROSECUTOR MISSTATED THE LAW IN  
       CLOSING ARGUMENT, VIOLATING MR. BUCKO'S  
       RIGHT TO A FAIR TRIAL ..... 4

        a. Prosecutors have special duties which limit their  
           advocacy ..... 5

        b. The prosecutor may not misstate the law or lower the  
           burden of proof ..... 7

        c. The jury must determine whether the State has proved  
           the charged offense beyond a reasonable doubt. .... 7

        d. The prosecutor's flagrant misconduct requires  
           reversal. .... 11

    2. THE TRIAL COURT ABUSED ITS DISCRETION BY  
       DENYING MR. BUCKO'S REQUEST FOR A DOSA ..... 13

        a. A trial court's denial of a DOSA is reviewable if based  
           on untenable grounds ..... 13

        b. The DOSA request was denied on untenable grounds  
           because the court considered Mr. Bucko's exercise of  
           a constitutional right ..... 16

        c. The DOSA request was denied on untenable grounds  
           because the court had insufficient information to make  
           the determination ..... 19

F. CONCLUSION .....	21
---------------------	----

TABLE OF AUTHORITIES

**Washington Supreme Court**

In re the Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293  
(1980) ..... 13

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) ..... 8, 9, 10

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) ..... 12

State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003) ..... 12

State v. Eide, 83 Wn.2d 676, 521 P.2d 706 (1974) ..... 18

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) ..... 7, 10, 12

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005) 13, 14, 15,

State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968), cert. denied,  
393 U.S. 1096 (1969) ..... 5

State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1976) ..... 5

State v. Mail, 121 Wn.2d 707, 854 P.2d 1042 (1993) ..... 15

State v. Monday, 171 Wn.2d 667, 297 P.3d 551 (2011) ..... 5

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995) ..... 6

State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008) ..... 15

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984) ..... 5, 6

State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955) ..... 7

State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990) ..... 12

**Washington Court of Appeals**

City of Seattle v. Brenden, 8 Wn. App. 472, 506 P.2d 1314 (1973)  
..... 18

<u>State v. Castle</u> , 86 Wn. App. 48, 53, 935 P.2d 656 (1997).....	8
<u>State v. Echevarria</u> , 71 Wn. App. 595, 860 P.2d 420 (1993).....	5
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076, <u>rev. denied</u> , 131 Wn.2d 1018 (1997) .....	6, 7, 13
<u>State v. Montgomery</u> , 105 Wn. App. 442, 17 P.3d 1237 (2001) ....	17
<u>State v. Sith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993).....	6

**United States Supreme Court**

<u>Sullivan v. Louisiana</u> , 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) .....	7, 10
---	-------

**Washington Constitution**

Const. art. I, § 22.....	5, 17, 18
--------------------------	-----------

**United States Constitution**

U.S. const. amend. V .....	17
U.S. const. amend. VI .....	17
U.S. const. amend. XIV .....	17

**Statutes**

RCW 9.94A.533 .....	14
RCW 9.94A.660 .....	13, 14, 19
RCW 9.94A.662 .....	14

**Rules**

RAP 2.4..... 15  
RAP 2.5(a)..... 6

**Other Authorities**

11 Washington Practice: Washington Pattern Jury Instructions:  
Criminal (3<sup>rd</sup> ed. 2008) ..... 9

A. SUMMARY OF ARGUMENT

The prosecutor committed misstated the law in closing argument, despite the trial court's refusal to include the same misstatement in the jury instructions. In addition, the court used inappropriate criteria to deny Mr. Bucko's request for a Drug Offender Sentence Alternative (DOSA).

B. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct by misstating the law in closing argument.

2. The prosecutor's misconduct in closing argument violated Mr. Bucko's right to receive a fair trial.

3. The trial court erred when it considered Mr. Bucko's exercise of his constitutional right to trial as a basis to deny a DOSA.

4. The trial court erred when it denied a DOSA in the absence of sufficient supporting information or evaluations.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor, as a quasi-judicial officer, has an obligation to seek a verdict based upon reason, and the duty to see that the accused is protected from conviction except upon proof beyond a reasonable doubt. Here, the prosecutor misstated the law during

closing argument, arguing that the jury should convict if it had “an abiding belief in the truth of the charge,” despite the fact that the trial court had denied the State’s request for that specific instruction. Did the prosecutor’s misstatement the law -- as well as his insistence that he “would not have been allowed to say it” if it were not true -- lower the burden of proof, imply a judicial comment on the evidence, and deprive Mr. Bucko of a fair trial?

2. A sentencing court abuses its discretion if it denies a DOSA request based on untenable grounds or refuses to exercise discretion at all. The court denied Mr. Bucko a DOSA based on Mr. Bucko’s exercise of his constitutional right to trial, and without sufficient information. Did the court abuse its discretion?

#### D. STATEMENT OF THE CASE

John Bucko was charged with one count of identity theft in the second degree. CP 44-45. The conduct for which he was charged involved using an acquaintance’s driver’s license when he was pulled over for a traffic stop. RP 33-35.<sup>1</sup> The complaining witness testified that he had previously met Mr. Bucko at a motel in

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<sup>1</sup> The verbatim report of proceedings consists of two volumes -- the trial transcript from January 22, 2013 will be referred to as RP; the transcript from the sentencing proceeding on January 24, 2013 will be referred to as 2RP.

Everett during a drug relapse, and implied that the two had used methamphetamine together. RP 45-47, 51-54.<sup>2</sup>

During a colloquy about proposed jury instructions, the prosecutor objected to the court's reasonable doubt instruction, stating it lacked "the abiding belief language." RP 71. The trial court noted the prosecutor's exception for the record and declined to give the "abiding belief" instruction requested by the prosecutor. RP 72, 76; CP 32 (Instruction 3). Despite this ruling, the prosecutor argued in closing that "[o]ne way to describe what beyond a reasonable doubt is if you have an abiding belief in the truth of the charge." RP 89. Mr. Bucko's counsel argued that the prosecutor had added language to the reasonable doubt standard, and pointed out that the jury would not find such language in its instructions. RP 93. The prosecutor then argued in rebuttal that if it weren't a true description of the legal standard, "I would not have been allowed to say it." RP 97.

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<sup>2</sup> The State also elicited testimony indicating that when Mr. Bucko was subsequently arrested for an unrelated matter in Oregon, he again used the complaining witness's driver's license, as he apparently bears a striking resemblance to the other man. RP 58-63. The license was returned to Mr. Bucko in his personal property when he was released from jail in Oregon. RP 62-63.

The jury returned a guilty verdict on the sole count. CP 26. At sentencing, Mr. Bucko asked to be considered for a Drug Offender Sentence Alternative (DOSA). 2RP 2. Rather than ordering a DOSA evaluation or continuing the sentencing hearing, the court proceeded with sentencing. 2RP 10-11. The court indicated that it did not doubt that Mr. Bucko had a history of drug use and an addiction to controlled substances, yet remarked that Mr. Bucko “could have plead [sic] guilty and asked to be screened for a DOSA,” rather than insisting on going to trial. Id.

The trial court denied a DOSA and sentenced Mr. Bucko to the high end of the range, 57 months, exactly as the prosecutor had requested. Id.

Mr. Bucko timely appeals. CP 2-14.

#### E. ARGUMENT

##### 1. THE PROSECUTOR MISSTATED THE LAW IN CLOSING ARGUMENT, VIOLATING MR. BUCKO’S RIGHT TO A FAIR TRIAL.

Despite the fact that the trial court declined to give the “abiding belief” instruction requested by the State, the prosecutor used this very language in his closing, thereby misstating the law and lowering the burden of proof. RP 72, 76, 89, 97.

a. Prosecutors have special duties which limit their advocacy. A prosecutor's improper argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article I, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a "substantial

likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993) (holding that in the absence of a defense objection, reversal for prosecutorial misconduct in closing argument is required only if the misconduct was so prejudicial that it could not have been cured by an objection and appropriate curative instruction).

During closing argument, Mr. Bucko did not object to the improper comment by the prosecutor; rather, he relied on the prior ruling of the trial court and further responded to the improper “abiding belief” language during his own closing argument. RP 93; State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (where the court makes a final ruling on a motion, the losing party is deemed to have a standing objection at trial). Regardless, due to the flagrant nature of the prosecutor’s remark – coming as it did immediately following the court’s denial of his proposed jury instruction -- this issue may be raised for the first time on appeal. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997); RAP 2.5(a).

b. The prosecutor may not misstate the law or lower the burden of proof. The prosecutor “has no right to mislead the jury.” State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955). Misleading arguments, when they are made by an attorney with the quasi-judicial authority accorded to the prosecutor’s office, are substantially likely to taint the jury’s verdict. Id.; Fleming, 83 Wn. App. at 215 (finding manifest constitutional error and reversing conviction, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense).

c. The jury must determine whether the State has proved the charged offense beyond a reasonable doubt. The role of the jury “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). “[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice. Id. at 757 (quoting Sullivan v. Louisiana, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

Over the State’s objection, the court declined to instruct the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had “an abiding belief in the

truth of the charge.” RP 72, 76; CP 32 (Instruction 3). Despite the court’s refusal to charge the jury with this language, the prosecutor argued during closing, “[o]ne way to describe what beyond a reasonable doubt is if you have an abiding belief in the truth of the charge.” RP 89. Mr. Bucko’s counsel argued that the prosecutor had added language to the reasonable doubt standard, and pointed out that the jury would not find such language in its instructions. RP 93. The prosecutor argued in rebuttal that if it were not a true description of the legal standard, “I would not have been allowed to say it.” RP 97.

The presumption of innocence may be diluted or even “washed away” by confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court’s obligation to vigilantly protect the presumption of innocence. Id.

In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), was “problematic” as it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its “inherent supervisory powers,” the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. Id. at 318.

The pattern instruction reads:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt].

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3<sup>rd</sup> ed. 2008) (“WPIC”).

The Bennett Court did not comment on the bracketed “belief in the truth” language. However, recent cases show the problematic nature of such language. In Emery, the prosecution told the jury that “your verdict should speak the truth,” and “the truth of the matter is, the truth of these charges, are that” the defendants are guilty. 174 Wn.2d at 751. These remarks misstated the jury’s role, but because they were not part of the court’s instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the court held that the “abiding belief” language did not “diminish” the pattern instruction defining reasonable doubt. 127 Wn.2d at 657-58. The court ruled that “[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but was not an error.” Id. at 658. The Pirtle Court did not focus its attention on whether this language encouraged the jury to view its role as a search for the truth. Id. at 657-58. Instead, it addressed whether the phrase “abiding belief” was different from proof beyond a reasonable doubt. Id.

Pirtle concluded that this language was unnecessary but not erroneous, which is far from an endorsement of the language. Yet Emery demonstrates the danger of injecting an elusive search for the truth into the definition of the State’s burden of proof. This language invites the jury to be confused about its role and serves as a platform for improper arguments about the jury’s role in looking for the truth, as explained in Emery. 174 Wn.2d at 760.

Where a jury is improperly instructed on the meaning of proof beyond a reasonable doubt, structural error results. Sullivan, 508 U.S. at 281-82. Furthermore, this Court has a supervisory role in ensuring that jury instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318.

The trial court here was clearly concerned about jury confusion when it declined the State's proposed jury instruction and gave the jury its own reasonable doubt instruction – one which excluded the “abiding belief” language. RP 72, 76; CP 32.

This Court should find that here, the prosecutor's decision to willfully disregard the trial court's ruling, and instead to argue that the jury should treat proof beyond a reasonable doubt as the equivalent of having an “abiding belief in the truth of the charge,” misstated the prosecution's burden of proof, confused the jury's role, and denied the accused his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. 6, 14; Const. art. I, §§ 21, 22.

d. The prosecutor's flagrant misconduct requires reversal. Here, Mr. Bucko relied upon the trial court's ruling that the reasonable doubt instruction provided by the court was to be argued by the parties, as the court ruled immediately before closing arguments and so instructed the jury. RP 71; CP 32 (Instruction 3).

Even if this Court finds this prior ruling and Mr. Bucko's argument noting the prosecutor's misstatement of the law was not sufficient objection, the prosecutor's misconduct may be addressed for the first time on appeal because the misconduct was so “flagrant

and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991) (citations omitted); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). “When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor’s comments affected the verdict.” State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Here, the prosecutor argued to the jury that the burden of proof was lower than beyond a reasonable doubt – that of an “abiding belief in the truth of the charge.” RP 89. Emery, 174 Wn.2d at 760. When confronted by Mr. Bucko’s argument that the prosecutor had taken some liberty with the jury instructions – that he had “added a bunch of language to reasonable doubt that you won’t see in your instructions” – the prosecutor became defensive. RP 93. In rebuttal, the prosecutor further argued, “if that is not a true description of the legal standard beyond a reasonable doubt, I would not have been allowed to say it.” RP 97. The prosecutor’s comments were flagrant and ill-intentioned, considering the law of the case established by the trial court’s clear ruling on the “abiding

belief" jury instruction, just moments earlier. RP 71-72, 76; CP 32 (Instruction 3).<sup>3</sup>

Accordingly, because the prejudice resulting to Mr. Bucko from the prosecutorial misconduct was severe, the conviction must be reversed. See Fleming, 83 Wn. App. at 216.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. BUCKO'S REQUEST FOR A DOSA.

a. A trial court's denial of a DOSA is reviewable if based on untenable grounds. "A trial court only possesses the power to impose sentences provided by law." In re the Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980). Consistent with this general limitation on a court's sentencing authority, the DOSA statute structures a court's authority when considering a DOSA. State v. Grayson, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). The program authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. See generally RCW 9.94A.660; Department of Corrections, Drug Offender Sentencing Alternative Fact Sheet.

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<sup>3</sup> The prosecutor also argued on rebuttal that the jury had been read the abiding belief language "at the beginning by the judge." RP 97. This blatant attempt to confuse the jury by noting two disparate sets of instructions should not be condoned.

If the court determines a person is eligible for a DOSA and that it is appropriate, the court shall waive a standard range sentence and impose a sentence which is one-half the midpoint of the standard range sentence, to be served in prison while receiving chemical dependency treatment. RCW 9.94A.660(3); RCW 9.94A.662. Once the defendant has completed the custodial part of the sentence, he is released into closely monitored community supervision and treatment for the balance of the sentence. Id. The defendant has a significant incentive to comply with the conditions of a DOSA, since failure may result in serving the remainder of the sentence in prison. RCW 9.94A.660(7)(c); Grayson, 154 Wn.2d at 338.

The statute provides the court with mandatory criteria to evaluate in determining eligibility. RCW 9.94A.660. An offender is eligible for the special drug offender sentencing alternative if (a) he is not convicted of a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533(3) or (4); (b) he is not convicted of felony DUI-related charges; (c) he has no prior convictions for a sex offense or violent offense within ten years; (d) if convicted of a VUCSA violation, the violation was for a small quantity; (e) he is not subject to

deportation; (f) the standard range is greater than one year; and (g) he has received no more than one prior drug offender sentencing in the prior ten years.

Although generally, a trial court's decision to deny a DOSA is not reviewable, Grayson, 154 Wn.2d at 338, every defendant is entitled to ask the trial court for meaningful consideration of a DOSA request. Id. at 342. Appellate review is appropriate where a trial court “has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” RAP 2.4.

“[T]rial judges have considerable discretion under the SRA, [but] they are still required to act within its strictures and principles of due process of law.” Grayson, 154 Wn.2d at 338. A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); see also State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (failure to follow statutory procedure is legal error reviewable on appeal).

b. The DOSA request was denied on untenable grounds because the court considered Mr. Bucko's exercise of a constitutional right. As the court noted, Mr. Bucko satisfied the DOSA eligibility requirements and had he been evaluated for the program before trial, he likely would have been given the opportunity to enter a DOSA plea by the court. 2RP 10. While addressing Mr. Bucko at sentencing, the court stated:

I gather you're at a loss to come up with some good reason for not imposing the high end of the range, and I feel the same way. I share that same wrestling with why shouldn't I impose a high end? You could have plead [sic] guilty and asked to be screened for a DOSA. My guess is the prosecutor wouldn't have opposed that at the time. The judge probably would have ordered that. And I don't question for a moment that you have a history of drug use and a problem that would be classically labeled as addiction.

2RP 10 (emphasis added).

The trial court demanded that Mr. Bucko explain why he should not be sentenced at the high end of the range as a consequence for his choice to go to trial, rather than "plead guilty and ask ... to be screened for a DOSA." – The trial court further suggested a request for a DOSA would have been granted if it had accompanied a guilty plea, that is, had Mr. Bucko not insisted on

exercising his constitutional right to trial. 2RP 10 (“the judge probably would have ordered that”).

Mr. Bucko had a constitutional right to a jury trial. Const. art. I, § 22; U.S. const. amends. V, VI, XIV; see, e.g., State v. Montgomery, 105 Wn. App. 442, 446, 17 P.3d 1237 (2001). Mr. Bucko exercised this fundamental right when he decided to go to trial, rather than enter a guilty plea.

The exercise of his constitutional rights should not be used against Mr. Bucko in imposing a greater sentence. In considering eligibility for an analogous sentencing alternative, this Court held, “a defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial.” Montgomery, 105 Wn. App. at 446. In Montgomery, the defendant was convicted by a jury of rape of a child in the first degree and child molestation in the first degree. Id. at 443. The sentencing court denied his request for a Special Sex Offender Sentencing Alternative (SSOSA) because his decision to go to trial caused his victim to testify. Id. at 446. “[T]he court also stated that Montgomery’s taking the case to trial was an indication of his unwillingness and inability to acknowledge what he did and his need for treatment.” Id. at 446, n.8. Although finding the error moot because the

defendant was ineligible for SSOSA for other reasons, this Court held,

[t]his was a violation of Montgomery's constitutional rights. Notwithstanding the common belief that an offender must accept past deviancy in order for treatment to be successful, the minimal protections provided by the United States Constitution may not be violated. A defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial.

Id.

Similarly, no penalty can be imposed for the exercise of the right to appeal under Article I, § 22. City of Seattle v. Brenden, 8 Wn. App. 472, 474, 506 P.2d 1314 (1973). “A person cannot be influenced to surrender a constitutional right by imposing a penalty on its use . . . . Legitimate objectives may not be pursued by means that needlessly chill the exercise of basic constitutional rights.” State v. Eide, 83 Wn.2d 676, 679, 682, 521 P.2d 706 (1974) (citations omitted).

There are many reasons why an individual might choose to stand trial or appeal a conviction. As in Montgomery and Brenden, no greater penalty should be imposed against Mr. Bucko based on the exercise of his constitutional right to a jury trial.

c. The DOSA request was denied on untenable grounds because the court had insufficient information to make the determination. The trial court additionally abused its discretion when it denied a DOSA without sufficient information.

The court did not have enough information from which to determine Mr. Bucko's amenability to treatment. At sentencing, Mr. Bucko requested a DOSA evaluation, noting that he was statutorily eligible, had been attending NA while in jail, and had written numerous letters in an attempt to get accepted to the drug court program. 2RP 2. The trial court did not have time prior to the scheduled sentencing hearing to request an evaluation, though it certainly could have continued the hearing to do so. RCW 9.94A.660(4).

The court acknowledged that Mr. Bucko had "a history of drug use and a problem that would be classically labeled as addiction." 2RP 10. However, rather than order a presentence report or an evaluation to assist in the decision-making process, the court simply noted, "Folks who are addicted to drugs often and not surprisingly get involved in criminal behavior." 2RP 10-11. Despite the lack of information specific to Mr. Bucko, the court

denied the request for a DOSA evaluation and sentenced Mr. Bucko to the high end of the range. 2RP 11.

The court's denial of a DOSA was on untenable grounds because the information before the court was insufficient. The matter should have been continued and heard once an evaluation was conducted, a presentencing report submitted.

The trial court's bases for the DOSA denial were untenable. Because the court abused its discretion, the sentence must be vacated and the matter remanded for a new sentencing hearing. Grayson, 154 Wn.2d at 342.

F. CONCLUSION

Because the prosecutor committed misconduct during closing argument by misstating the law and lowering the burden of proof, Mr. Bucko's conviction must be reversed. In addition, because the trial court denied Mr. Bucko's DOSA request based on untenable grounds, the sentence should be vacated and the matter remanded.

DATED this 22<sup>nd</sup> day of July, 2013.

Respectfully submitted,

  
\_\_\_\_\_  
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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69923-7-I
	)	
JOHN BUCKO,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF JULY, 2013, 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:

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STATE OF WASHINGTON

**SIGNED** IN SEATTLE, WASHINGTON, THIS 22<sup>ND</sup> DAY OF JULY, 2013.

x \_\_\_\_\_ 