

No. 39418-9-II

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

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STATE OF WASHINGTON,  
Respondent,  
v.  
LEONARD JOHNSON, JR.,  
Appellant.

10 JUN 20 PM 12:12  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Lisa Worswick, Judge

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Leonard Johnson, Jr.'s state and federal due process rights to have the state prove its case against him beyond a reasonable doubt were violated when the prosecutor repeatedly misstated and minimized her burden of proof in closing argument.

2. Johnson's Article 1, § 22 and Sixth Amendment rights to effective assistance of counsel were violated when counsel failed to object to the prosecutor's repeated misstatements of the prosecution's constitutionally mandated burden of proof.

3. The constitutional error of misstating the state's burden of proof was not harmless beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is misconduct for a prosecutor to misstate the law. Such misconduct amounts to a constitutional violation when it directly impacts a constitutional right of the defendant.

a. The state and federal due process guarantees require the prosecution to prove every part of its case, beyond a reasonable doubt. Further, the presumption of innocence mandates that the jury must acquit unless and until the prosecution meets that burden of proof.

In this case, the prosecutor told the jury that it could not acquit Johnson unless the jurors could specifically state a reason that they doubted his guilt. In addition, in the prosecutor's "powerpoint" visual presentation used in closing argument, the prosecutor projected an image which told the jurors that the reasonable doubt instruction said that, "[i]n

order to find the defendant not guilty, you have to say: 'I doubt the defendant is guilty, and my reason is \_\_\_\_.' And you have to fill in the blank." CP 167.

Is reversal required based on the prosecutor's misstatement and minimization of her constitutionally mandated burden of proof?

b. Application of the standard of proof beyond a reasonable doubt is the means by which the constitutional presumption of innocence and the due process rights of the accused are guaranteed. Many courts, including this one, have recognized that the certainty required to find that the state has proven its case beyond a reasonable doubt is far greater than the certainty people have when making everyday decisions, no matter how important.

In this case, the prosecutor compared the decision jurors faced in this criminal trial with figuring out what picture a puzzle depicted when only half the puzzle pieces were put together.

Is reversal required based upon this further improper minimization and misstatement of the prosecution's constitutionally mandated burden of proof?

c. Where a prosecutor commits misconduct which directly impacts a constitutional right, prejudice is presumed and reversal is required unless the prosecution can prove that the "overwhelming untainted evidence" is so strong that any reasonable jury would have convicted the defendant in the absence of the misconduct. Can the state meet that heavy burden where the prosecutor's misconduct directly impacted the jury's ability to evaluate all of the evidence and there was

thus no evidence left “untainted” upon which the convictions can rely?

Further, could the state meet the constitutional harmless error test where there is conflicting testimony and the jury was required to make a credibility determination which was definitely affected by the misconduct?

2. In the unlikely event the Court finds that the prosecutor’s constitutionally offensive misconduct could possibly have been cured by objection and instruction, was counsel prejudicially ineffective in failing to seek such remedies?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Leonard Johnson, Jr., was charged by information with unlawful possession of a controlled substance and obstruction of a law enforcement officer. CP 1-2; RCW 9A.76.020(1); RCW 69.50.4013(1).<sup>1</sup> The jury found him guilty of unlawful possession but deadlocked on the other count. RP 226; CP 86-87. The obstruction count was later dismissed with prejudice. RP 235.

Johnson appealed and this pleading follows. See CP 135.

2. Testimony at trial

Officer Jeff Thiry of the Tacoma Police Department (TPD) was on patrol in his car on May 4<sup>th</sup>, 2008, at about 9:40 p.m. when he saw

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<sup>1</sup>The verbatim report of proceedings consists of two bound volumes, which will be referred to as follows:  
the volume containing the proceedings of December 16, 2008, as “1RP;”  
the volume containing the chronologically paginated dates of May 11, 12, 14 and 15 and June 12, 2009, as “RP.”

someone riding a bicycle on a sidewalk without wearing a bicycle helmet. RP 23-26. Because failing to wear a helmet was a violation of the law, Thiry decided to pull over and contact the person on the bike. RP 27. Without turning on his siren or lights, Thiry pulled his car in front of the man so that the man was riding towards him. RP 27, 51. After Thiry started getting out of his car, the man turned his bike and pedaled in a different direction. RP 27, 50, 52. According to Thiry, before the man did so, he first made eye contact with Thiry. RP 27.

At that point, Thiry said, he turned on his emergency lights and siren and began to chase the man, later identified as Leonard Johnson, Jr. RP 27, 37, 53. Thiry also used his radio to notify dispatch that a man on a bike was trying to “elude.” RP 27.

Thiry described following Johnson into a grocery store parking lot, where Johnson changed directions and went into a donut shop lot, after which he returned to the grocery store lot. RP 28. At one point, when the bike was riding on a sidewalk, Thiry drove his car down that sidewalk, too. RP 28. Thiry did not talk to or holler to the man, nor did he issue any commands over his patrol car PA system. RP 30-53. According to Thiry, the bike ultimately ran into a vehicle which was illegally parked across the sidewalk and, when the bike fell over, Johnson got up and started running away. RP 29. Thiry followed on foot and, after a quarter of a block, activated his “electronic patrol device” or “taser” and struck Johnson in the back. RP 29.

Thiry thought the taser shock did not have much effect because Johnson continued to run, going into the middle of a street. RP 29.

Because the taser did not seem to be working, the officer then increased his speed, caught up to Johnson and physically took him down onto the ground. RP 29. It was only at that point that Thiry started saying “[s]top, police; stop resisting; you’re under arrest.” RP 35. Thiry then physically kept control of Johnson until other officers arrived. RP 32, 35.

One of those officers, TPD Officer Kevin Bartenetti, said he saw Thiry trying “some kind of control tactic” on Johnson and also noted taser wires going across Johnson’s back. RP 77-81. Bartenetti said Johnson was “resistant” when Bartenetti tried to grab his arm, so the officers muscled Johnson to the ground. RP 81. When another officer arrived the three of them continued to try to “overpower” Johnson and an officer started using the “taser” to strike Johnson. RP 83. This continued until they could engage in “cuffing under power,” which meant getting Johnson handcuffed while he was being “tased.” RP 36. Johnson ultimately suffered “muscular incapacity” after being “dry stunned” on his calf. RP 83-84.

An officer read Johnson his rights and searched him while he was on the ground, finding a sandwich “baggy” with “rocks” inside, which later tested positive for cocaine. RP 38, 85, 145. The “rocks” were found in the right front pocket of a blue hooded sweatshirt Johnson was wearing, but nothing else incriminating was found anywhere else on Johnson. RP 104-105, 108, 110. After he was read his rights, Johnson was yelling unintelligible words. RP 97, 98, 100.

Crack is sold on the street in “rock” form and the price depends upon the size of the “rocks.” RP 42. Thiry guesstimated that there

appeared to be at least three “rocks” in the bag which he thought would be worth about \$40 each, “street value.” RP 42.

After Johnson had been sufficiently “tased” so that the officers were able to get him into handcuffs, he was put into the backseat of Thiry’s patrol car. RP 44. Thiry said that Johnson continued to “be somewhat noncompliant and still would not cooperate.” RP 44. Other officers similarly declared that Johnson was not cooperative with efforts to get him in the car, would not stand or walk and had to be carried to the car, straightened his legs out at one point and “hindered” efforts to get him into the backseat, and either jumped or fell against the door frame of the car when they were trying to put him in. RP 86, 113.

By this time, Johnson had been subjected to “tasing” multiple times. Although the “taser” is considered “non-lethal use of force,” Thiry admitted it “basically locks your muscles up when it makes contact and causes compliance by failure to use bodily functions.” RP 33. The device uses small “barbs” which then go into the subject and hold the electronic current. RP 32-34. At the time the muscles lock up, the person is incapacitated. RP 60.

Officer Robert Hannity, who was also present, described tasing Johnson when he arrived, using a “stapling technique” into Johnson back and then into his calf, so the “maximum amount of muscle groups” would be affected by the electricity. RP 121, 128. The officer heard Johnson shout after the tasing so he knew there was “a good circuit” but it still took a little time for the officers to get Johnson’s hands out from underneath him. RP 128. The officer went through three complete cycles

of the device in order to incapacitate Johnson sufficiently to handcuff him. RP 129.

Every time an officer uses a “taser” on a citizen, they are required to justify that use of non-lethal force by documenting it in their general report and having a supervisor come to the scene to investigate and write a “use-of-force” report. RP 57. Thiry said that different people react differently to the taser and some of them do not seem to have much response. RP 70.

Thiry denied that he had approached Johnson that night because he had presumed Johnson was a “gangbanger.” RP 46. Instead, the officer said, he had discovered after the arrest that Johnson had “been associated with gang members,” according to certain reports. RP 46. Thiry could not say, however, what “reports” had so indicated. RP 46. Thiry also said he had not had that information until he returned to his patrol vehicle and tried to figure out “why he did not want to talk to me and had fled” when Thiry had tried to contact him about the helmet violation. RP 75.

In the section of his police report regarding “offense details,” however, Thiry had written the notation “gang related.” RP 48, 67. He maintained that the notation was because of the people who came and started “interfering with police” while Johnson was being arrested. RP 48. By the time Johnson had been subdued, a large group of people had gathered in the area and were “causing commotion.” RP 44. In fact, other officers had to start doing “crowd control” while the fire department arrived and “medically cleared” Mr. Johnson to go to jail. RP 44.

Although he had declared that the “interfering” acts were “gang

related, Thiry was unwilling to say the people involved were “gang people.” RP 49. Instead, he declared that “officers there had identified them as associates of gang activity.” RP 49. Thiry admitted, however, that Johnson’s mother was one of the people who came and spoke to officers, as did other family members. RP 49.

Thiry thought there were between 7 and 15 people outside causing a “ruckus.” RP 58. According to Thiry, the people appeared “[h]ostile towards” the police, because they were accusing the police of using “unnecessary force” on Johnson. RP 71. Several of them were demanding to be allowed to check on Johnson and were unhappy they were being denied that access. RP 71. An officer said that people were very angry and it could have “erupted into a big riot there” because there was a lot of “screaming and drama and posturing.” RP 136.

TPD Officer Keith O’Rourke, who was also there, said that the “commotion” became “like a small demonstration against the police on the street there with several individuals,” including one who said he was Johnson’s brother and was “aggressive” with O’Rourke about what was going on. RP 91-92, 97. Johnson’s mother came along and was able to “calm them down,” however. RP 98. No one had to be arrested for interfering and everyone was just “loud.” RP 102. A number of the people stayed on their porches, some of them with cameras documenting what was going on. RP 102. An officer said the people just looked like “neighborhood folks.” RP 102.

Thiry said that, usually, when he approaches someone for not wearing a helmet, they do not run away. RP 30-31. He said that having

someone flee from him makes the failure to wear the helmet “no longer an infraction” and makes it become “a criminal offense.” RP 31.

Leonard Johnson, Jr., testified that he was at a memorial barbecue with his family the day of the incident. RP 147. The barbecue was for his nephew, who had died two days earlier. RP 147. Johnson lived in the Hilltop area of Tacoma, as did his mother and his sister. RP 147.

Johnson had left the barbecue when it was just about over, heading to his girlfriend’s house on his sister’s bike. RP 148. Although it had been warm and sunny when he had arrived at the memorial, it had gotten a little colder after the sun had set and Johnson, who was wearing only a t-shirt and some jeans, grabbed a sweatshirt jacket which was laying around. RP 149, 166. He asked whose jacket it was and no one was really paying attention but someone said “[p]ut it on if you’re cold,” so he did. RP 149. He then left on the bike and rode around the block a little because he had eaten a little too much. RP 148-49. RP 148-49.

Johnson said that, when he was riding and went to cross a street, he saw some headlights and heard an engine “revving” so he immediately made a u-turn and headed back to his sister’s house. RP 150. He explained that he was concerned someone was going to try to run him over. RP 152, 169.

Johnson did not notice that there was a police officer nearby until Johnson had crossed the grocery store parking lot and gone down a street. RP 150. At that point, he saw the officer’s car turning and they almost collided, so Johnson swerved a little to the right. RP 150. The brakes on the bike “weren’t the best” so his momentum kept him going and he hit

the curb and went head over heels coming over the handlebars, stumbling off the bike but not quite falling. RP 151, 154.

As he was catching his balance on his feet and looking at the ground, Johnson saw what looked like “a red laser beam” on the ground next to him. RP 151. The next thing he knew, his legs were “locking up.” RP 151. He did not realize what was going on and only later found out he was “being tased.” RP 151.

Johnson said the officer did not have his flashing lights activated on the patrol car, nor was the siren activated when the officer stopped that car. RP 155, 173. Johnson did not know that the officer was trying to stop him or get his attention and said he had not made eye contact with the officer before he started pedaling away. RP 174. Johnson said he would have stopped and talked to the officer if he had known the officer wanted to speak to him. RP 175.

Thiry’s report never indicated anything about having turned his siren on at this point in the incident. RP 56.

The officer was shouting “[f]reeze, freeze, freeze,” so Johnson put his hands up and said, “I surrender. I surrender. I surrender.” RP 153. Johnson had no idea what was going on and the officer just “instantly” tased him again, this time in the stomach. RP 153, 156. Johnson’s body kept locking up every time he was tased, which Johnson described as “like every muscle in my body tensed up.” RP 153. Johnson’s hearing was “kind of impaired” and he was having trouble with his body so when the officer started ordering him to “[g]et on the ground,” Johnson could not do so. RP 156. He tried to explain that his legs were locked up but the

officer responded by tasing him again. RP 156.

Ultimately Johnson was able to get on the ground, trying to surrender, but the officer kept tasing him more. RP 156. Johnson tried to put his hands behind his back as he was being told to do but he was having trouble doing so. RP 157.

Johnson said he was fully cooperative throughout the entire incident. RP 176-78. He was aware that he was charged with obstructing a law enforcement officer but said he was not trying to “delay” the officer in his duty at all. RP 179.

Johnson said that it was “very painful” to be tased. RP 157. He felt really dizzy and “kind of out of it” when the fireman was talking to him and his balance was “fairly off” after that, too. RP 158. When the officers were trying to pick Johnson up and get him in the back of the police car they kept telling him to walk straight and he kept trying to tell them he felt really weak. RP 158. It seemed to Johnson as if the officers did not really want to know how he was feeling. RP 158.

Johnson said he was not trying to wrestle with the officers and it was just that his body was jerking and he could not hear anything when he was being tased. RP 180. He did not “refuse” to walk to the car but just could not do it. RP 181.

Johnson did not remember an officer finding anything in the sweatshirt he had borrowed. RP 188.

Johnson had gone to the hospital several times since the incident, first when he was in the holding cell when he was checked and a nurse said his heart was “acting up.” RP 158-59. After she checked him a

second time and found the same results, he was taken to the emergency room and ultimately released back to the jail. RP 159.

Johnson knew it was not proper to ride with a helmet but had seen lots of people doing it and had never seen any of them get arrested. RP 159-60. He has never been involved with or associated with gangs and did not threaten the officers in any way. RP 160. He did not recall having his hands under his body but said instead he had them behind his back or directly out. RP 160. He tried to tell the officers he was not resisting but was having trouble with his body and the officers kept screaming at him and shocking him. RP 161.

Johnson did not have any drugs on him as far as he knew that day. RP 163. He explained that he does not do drugs and did not know to whom the sweatshirt jacket belonged. RP 163.

D. ARGUMENT

THE PROSECUTOR COMMITTED SERIOUS,  
CONSTITUTIONALLY OFFENSIVE MISCONDUCT AND  
COUNSEL WAS INEFFECTIVE

Under both the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). It is misconduct for a public prosecutor, with all of the weight of her office behind her, to misstate the applicable law when arguing the case to the jury, and this is especially true where the misstatements affect the defendant's constitutional rights.

See, e.g., State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

In this case, reversal is required, because the prosecutor committed serious, prejudicial and constitutionally offensive misconduct by repeatedly misstating and minimizing her burden of proof and improperly shifting a burden to Mr. Johnson. Further, counsel was ineffective in response to these acts of misconduct. Because the prosecution cannot prove these constitutional errors harmless, this Court should reverse.

a. Relevant facts

In closing argument, in discussing the reasonable doubt instruction, the prosecutor first read the instruction to the jury, then went on:

**What that says is “a doubt for which a reason exists.” In order to find the defendant not guilty, you have to say, ‘I doubt the defendant is guilty and my reason is I believed his testimony that he just borrowed that sweater, sweatshirt, jacket, one item, two items, he wasn’t sure what he was wearing and he didn’t know that the cocaine was in there and he didn’t know what cocaine was. And then you have to also believe that either he really didn’t hear the lights and sirens or that Officer Thiry really forgot to turn them on and that a lot of those events didn’t really happen or more events that didn’t.**

**To be able to find reason to doubt, you have to fill in the blank, that’s your job.**

RP 202-203 (emphasis added).

Apparently during this part of the argument, the prosecutor used a “powerpoint” presentation, which she projected in front of the jury and which “defined” the instruction on reasonable doubt as follows:

WHAT IT SAYS:

A doubt for which a reason exists

In order to find the defendant not guilty, you have to say,

“I doubt the defendant is guilty, and my reason is \_\_\_\_\_.”  
And you have to fill in the blank.

CP 167.

The prosecutor also told the jury that “beyond a reasonable doubt” did not mean “beyond any doubt” and that there were other ways things could have happened but “is that a reasonable explanation for what happened?” RP 203.

A moment later, the prosecutor compared the certainty jurors would have to have to have an “abiding belief in the truth of the charge” and be satisfied that the state had proven its case beyond a reasonable doubt to the degree of certainty the jurors would need in order to think they knew what picture was depicted on a puzzle:

I like to look at abiding belief and use a puzzle to analogize that. You start putting together a puzzle and putting together a few pieces, and you get one part solved. So with this one piece, you probably recognize there’s a freeway sign. You can see I-5. You can see the word “Portland” from looking in the background. You may or may not be able to see which city that is, but it is probably near one that is on the I-5 corridor.

You add another piece of the puzzle, and suddenly you have a narrower view. It has to be a city that has Mount Rainier in the background. You can see it. It can still be Seattle or Tacoma, or if you weren’t familiar, you might think that mountain might be Mt. Hood, and it could be Portland.

You add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.

RP 204. An image of a puzzle with only six pieces was broadcast at that point as part of the “powerpoint” presentation. CP 170-74.

- b. The arguments were misconduct which misstated the prosecutor’s constitutional burden and improperly shifted the burden of proof to Johnson

In making these arguments, the prosecutor committed serious,

prejudicial misconduct, in violation of Johnson's due process rights to have the state carry its constitutionally mandated burden of proof.

Due process not only requires the prosecution to carry the full weight of its burden of proof but also protects the defendant's right to a fair trial, which can be violated by improper statements of a prosecutor which mislead the jury as to the law. Davenport, 100 Wn.2d at 763.

Here, both those due process protections were violated by the prosecutor's arguments below, because the prosecutor's comments were a serious misstatement of the crucial burden of proof the prosecution was required to carry and shifted part of that burden to Johnson, and because the result was denial of Johnson's right to a fair trial.

First, the prosecutor committed serious misconduct and relieved herself of the full weight of her constitutionally mandated burden of proof in telling the jury that, "[i]n order to find the defendant not guilty," the jurors had to say, "I doubt the defendant is guilty and my reason is," either that the jurors believed everything Johnson said or come up with some other reason, because "[t]o be able to **find reason to doubt, you have to fill in the blank, that's your job.**" RP 202-203 (emphasis added). Not only did she *state* this improper argument, she projected it on the wall, declaring that the instruction defining reasonable doubt not only "says" that reasonable doubt is "[a] doubt for which a reason exists" but also:

In order to find the defendant not guilty, you have to say:

"I doubt the defendant is guilty, and my reason is \_\_\_\_."

And you have to fill in the blank.

CP 167.

This argument was misconduct which minimized the prosecutor's constitutionally mandated burden of proof and turned the concept of proof beyond a reasonable doubt - and the jury's proper role - on their heads. The argument told the jury they were required to *convict* unless they could find a specific reason not to do so. Further, the argument implied that Johnson was responsible for supplying such a reason to the jurors in order to avoid being convicted.

These arguments were clear misconduct. It is not the jurors' duty to presumptively *convict*; it is their duty to presumptively *acquit*, unless and until they find that the state has met its constitutionally mandated burden of proof. See State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995); see also, State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Further, "[j]urors may harbor a valid reasonable doubt even if they cannot explain the reason for the doubt." See State v. Medina, 147 N. J. 43, 52, 685 A.2d 1242 (1996), cert. denied, 520 U.S. 1190 (1997). Telling the jurors that they needed to come up with a specific reason they believed Johnson was not guilty was the same as saying that there is a presumption of guilt, rather than a presumption of innocence. See, e.g., State v. Boswell, 170 W. Va. 433, 442-43, 294 S.E.2d 287 (1982); State v. Banks, 260 Kan. 918, 926-28, 927 P.2d 456 (1996). Such argument "fundamentally misstates the reasonable doubt standard" and "impermissibly risks" causing the jury to apply a standard of proof less than that mandated by the constitution. See Chalmers v. Mitchell, 73 F.3d

1262, 1274 (2<sup>nd</sup> Cir.), cert. denied, 519 U.S. 834 (1996) (Newman, J., dissenting).

Indeed, this Court has recently so held. State v. Anderson, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2009 WL 4639643) (December 8, 2009). In Anderson, a prosecutor from the same prosecutor's office as here made virtually the same argument, telling the jury "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." \_\_\_ Wn. App. at \_\_\_ (slip Op. at 6). This Court found the argument was improper:

By implying that the jury had to find a reason in order to find Anderson not guilty, the prosecutor made it seem as though the jury had to find Anderson guilty *unless* it could come up with a reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that Anderson was responsible for supplying such a reason to the jury in order to avoid conviction.

\_\_\_ Wn. App. at \_\_\_ (slip Op. at 6) (emphasis in original).

Further, in Anderson, this Court also condemned the same kind of argument the prosecutor made here in making the "puzzle" analogy:

The prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making were also improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden. **By comparing the certainty required to convict with the certainty people often require when they make everyday decisions-both important decisions and relatively minor ones-the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson.** This was improper.

\_\_\_ Wn. App. at \_\_\_ (slip Op. at 7) (emphasis added).

Indeed, many courts have disapproved of comparing the decision-

making which occurs in a criminal case with the decision-making that jurors engage in on a daily basis, even regarding important matters. More than 40 years ago, a federal court recognized that, while “[a] prudent person” acting in “an important business or family matter would certainly gravely weigh” the considerations and risks of such a decision, “such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment.” Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). Just a few years later, the highest court in Massachusetts found that comparing everyday decisions to the decision of a jury about whether the state had met its constitutional burden “understated and tended to trivialized the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.” Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272 (Mass. 1977).

Courts in federal jurisdictions and in other states such as Vermont, Massachusetts and California have also reached the same conclusion: that analogies to even important personal decisions improperly “trivialize[] the proof-beyond-a-reasonable-doubt standard” and create the impermissible risk of convictions based on something less than the constitutionally mandated standard. See, State v. Francis, 561 A.2d 392, 396 (Vt. 1989); see also, U.S. v. Noone, 913 F.2d 20, 28-29 (1<sup>st</sup> Cir. 1990), cert. denied, 500 U.S. 906 (1991); People v. Johnson, 119 Cal. App. 4<sup>th</sup> 976, 14 Cal. Rptr. 3d 780 (Cal. 2004); Commonwealth v. Rembiszewski, 461 N.E.2d 201, 207 (Mass. 1984).

Ferreira clearly illustrates the strength of the reasoning behind

these cases. In Ferreira, the judge told the jury that proof beyond a reasonable doubt required the jury to be “as sure” to convict as they were when making “important decisions” in their own lives, such as

whether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are.

364 N.E.2d at 1271-72.

On review, the appellate court found that these examples “understated and tended to trivialized the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.” 364 N.E.2d at 1272. The court went on:

‘The inherent difficulty in using such examples is that, while they may assist in explaining the seriousness of the decision before the jury, they may not be illustrative of the degree of certainty required.’ We think the examples used here, far from emphasizing the seriousness of the decision before them, detracted both from the seriousness of the decision and the Commonwealth’s burden of proof. . . **The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.**

364 N.E.2d at 1273 (quotation omitted) (emphasis added). As the First Circuit has noted, “[t]he momentous decision to acquit or convict a criminal defendant cannot be compared with ordinary decision-making without risking trivialization of the constitutional standard.” Noone, 913 F.2d at 28-29.

Here, the prosecutor did not compare the certainty required to

decide the case with that required to make *important* personal decisions - she compared it to the trivial matter of what picture is shown on a jigsaw puzzle. RP 204; CP 170-74. Rather than reflecting the gravity of the decision the jurors had to make and the true weight of the prosecutor's constitutional burden, the prosecutor's arguments trivialized the juror's decision into something far less. As a result, the jurors were misled about the proper standard to apply, believing they only had to be as sure of guilt to convict as they were sure that it a puzzle depicted a certain picture when there was only half of the puzzle completed. The prosecutor's arguments thus told the jury that it effectively had to be convinced of guilt only by a preponderance i.e., that it was more likely than not that Mr. Johnson was guilty - the same standard they would use in deciding the incredibly trivial question of what picture was on a puzzle.

These arguments - and the misstatements - were not trivial but went to the heart of the entire case against Johnson. Unlike other misstatements of the law, misstatement of the correct standard of proof beyond a reasonable doubt is especially egregious because of its impact on the constitutional rights of the defendant and the very core of our criminal justice system. The correct standard of proof beyond a reasonable doubt is the "touchstone" of that system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, as the Supreme Court has recognized, correct application of the standard is the primary "instrument for reducing the risk of convictions resting on factual error." Id.

Further, as this Court noted in Anderson, the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed, so that it absolutely essential to ensure that the jury is not misled as to the correct standard. Anderson, \_\_\_ Wn. App. at \_\_\_ (slip Op. at 6-7); see State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). That standard has been subject to so many years of litigation and is now so carefully defined that our Supreme Court has recently warned against the “temptation to expand upon the definition of reasonable doubt,” because such expansion may well result in improper dilution of the prosecution’s constitutional burden and the presumption of innocence. Bennett, 161 Wn.2d at 317-18.

Reversal is required. Because the prosecutor’s multiple acts of misconduct misstated and minimized the prosecutor’s constitutionally mandated burden of proof and the jury’s proper role, the misconduct directly affected Johnson’s constitutional due process rights to have the prosecution shoulder the burden of proving its case against him beyond a reasonable doubt. As a result, the constitutional “harmless error” standard applies. See, e.g., State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). That standard requires the prosecution to shoulder a very heavy burden, which the prosecution cannot meet unless it can convince this Court that *any* reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

The prosecution cannot meet that burden here. To prove that any jury would have reached the same result absent the error and the

constitutionally offensive misconduct was thus “harmless,” the prosecution has to show that the untainted evidence against Johnson is so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

The difficulty for the prosecution here is that *none* of the evidence in this case was “untainted” by the prosecutor’s misstatements and minimizing of his constitutionally mandated burden of proof. The proper standard of proof beyond a reasonable doubt is the means of providing the “concrete substance for the presumption of innocence” guaranteed to all the accused. Winship, 397 U.S. at 363. Unless the jury properly understands the correct standard of proof beyond a reasonable doubt, the entire trial is affected, because a “misdescription of the burden of proof vitiates all the jury’s findings.” Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Indeed, in Sullivan, where the misdescription came from the court rather than the prosecutor, the Court found that the error was so significant and corrosive that it could not be subjected to “harmless error” analysis, even the constitutional standard. 508 U. S. at 280-81. Otherwise, the Court held, it would allow the appellate court to engage in pure speculation about what it thinks the jury might have done if it had not been so misled. Id.

As a result, this is not a case where, as in Easter, the prosecutor’s comments drew a negative inference on the defendant’s exercise of a constitutional right but other evidence was unaffected by that improper inference. See, e.g., Easter, 130 Wn.2d at 242. Instead, here, the prosecutor’s misconduct affected the jury’s perception of *all* of the

evidence, thus tainting the jury's entire decision-making process. The misconduct here was not limited in effect to simply part of the evidence - it went to the entire case against Mr. Johnson.

In addition, even if there had been some "untainted" evidence here, the constitutional harmless error test could not be met. The standard of finding "overwhelming untainted evidence" is far different than the standard of establishing that there was "sufficient evidence" to support a conviction challenged for insufficiency on review. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). In Romero, shots were fired in a mobile home park, Romero was seen in the area by officers and other witnesses, he ran from officers just after the crime, officers found a shotgun inside the mobile home where Romero was hiding, shell casings were found on the ground next to the mobile home's front porch, descriptions of the shooter identified Romero, and an eyewitness was "one hundred percent" positive the shooter was Romero. Romero, 113 Wn. App. at 783-84. There were a few minor problems with the identification and Romero himself denied being the shooter. 113 Wn. App. at 784. That evidence was sufficient, the Romero Court found, to uphold the conviction against a challenge for insufficiency of the evidence. 113 Wn. App. at 797-98.

But that same evidence was not sufficient to satisfy the constitutional harmless error test, which applied because an officer made comments about Romero not speaking to police, in violation of Romero's Fifth Amendment rights. Despite the strong evidence supporting the conviction, the Court found, there was not "overwhelming evidence" of

guilt, because there was conflicting evidence on certain points. 113 Wn. App. at 793. The Court could not “say that prejudice did not likely result due to the undercutting effect on Mr. Romero’s defense.” 113 Wn. App. at 794. Because the evidence was disputed, the jury was “[p]resented with a credibility contest,” and “could have been swayed” by the sergeant’s comment, “which insinuated that Mr. Romero was hiding his guilt.” 113 Wn. App. at 795-96.

Here, the jury was also presented with a credibility contest. And there were significant differences in the versions of events given by state’s witnesses and Mr. Johnson. In closing argument, the prosecutor admitted that the only issue in relation to the charge of possession of cocaine was whether Mr. Johnson unwittingly possessed the cocaine in the pocket of the jacket. RP 199-200. While there was *some* evidence from which a trier of fact could find that Johnson had such knowledge, there was also evidence from which it could have found to the contrary. As Romero clearly illustrates, regardless whether the case against a defendant is strong enough that it would withstand scrutiny on a challenge for sufficiency of the evidence, even a strong case in the state’s favor does not satisfy the “overwhelming evidence” test and overcome constitutional error such as that committed by the prosecutor here.

Put simply, a jury which was not improperly misled as to the true burden of proof the prosecution had to shoulder could well have found that the state failed to prove Johnson’s guilt beyond a reasonable doubt. It could well have evaluated credibility far differently and concluded that Johnson was, as he claimed, unaware of the drugs in the pocket of the

borrowed jacket. It clearly had questions about the state's case, as evidenced by its inability to come to a unanimous decision that Johnson was, as the state claimed, guilty of having obstructed the officers. Obviously, some of the jury believed Johnson's statements that he was, in fact, suffering from the effects of the repeated shocks from the taser rather than trying to obstruct the officers.

Notably, although this Court does not look at whether constitutional misconduct could have been cured by instruction when the constitutional harmless error standard is applied, it is worth noting that the error could not have been so cured in this case. The concept of reasonable doubt is so complex that even learned judges have difficulty defining it. See State v. Castle, 86 Wn. App. 48, 51-56, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997), disapproved on other grounds by Bennett, supra. The prosecutor's minimization of her burden, using evocative and easy-to-understand comparisons, were extremely likely to stick with the jury, as was the idea that Johnson was somehow required to "create" reasonable doubt and the jury must find a specific reason for having such a doubt in order to acquit.

This is especially true because of the "powerpoint" presentation shown to the jurors while the prosecutor's misstatements were made. It is well-recognized that use of such "demonstrative aids" ensures heightened retention of the concepts demonstrated by the jurors. See Caldwell, et. al, The Art and Architecture of Closing Argument, 76 Tul. L. Rev. 961, 1042-44 (2002). Indeed, studies have revealed just how effective, noting that "juries remember **85 percent of what they see as opposed to only 15**

**percent of what they hear.”** Chatterjee, *Admitting Computer Animations: More Caution and a New Approach Are Needed*, 62 Def. Couns. J. 34, 36 (1995) (emphasis added).

Put another way, “[i]nformation that jurors are merely told, they will likely forget; information they are told and shown, they will likely remember. It is that simple.” Caldwell, *supra*, at 1043. And visual aids such as the powerpoint presentation used in this case communicate to and resonate with the jurors in ways “no amount of verbal description by itself could.” Belli, *Demonstrative Evidence: Seeing is Believing*, Trial, July 1980 at 70-71. Such images are more easily recalled during deliberations and are more memorable for jurors, thus lending more weight to whatever they portray. Caldwell, *supra*, at 1044-45.

Thus, the prosecutor’s misconduct in this case was magnified a hundredfold and its corrosive impact extreme. The jury was not just *told* the wrong standard; it was *shown* it in a way which ensured that the jurors would believe that the prosecution’s burden was far less than the constitution required, and that Johnson himself had a burden, too. The mere giving of the general reasonable doubt instruction could not have mitigated the prosecutor’s “explanation” of what it meant. And no curative instruction could have remedied the pervasive corroding effect of the prosecutor’s arguments, as they were cemented in jurors’ minds by the images.

The correct standard of reasonable doubt is the very centerpiece of our entire criminal justice system, because it is the “prime instrument for reducing the risk of convictions resting on factual error.” *Cage*, 498 U.S.

at 40. The prosecutor's arguments here repeatedly told the jury that the prosecutor was not required to meet his constitutionally mandated burden of proof but rather something far more like a "preponderance" standard. The arguments also told the jury they had to come up with specific reasons for their doubts, implying that Johnson had some burden to create such a doubt. These serious constitutional errors were not harmless, and this Court should so hold and should reverse.

c. In the alternative, counsel was ineffective

In the unlikely event this Court finds that the prosecutor's repeated, comprehensive and compelling misstatements of the law and reduction of his constitutionally mandated burden of proof could have been cured if counsel had objected and requested curative jury instructions, this Court should nevertheless reverse based on counsel's ineffectiveness. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137

Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general, the decision whether to object or request instruction is considered “trial tactics,” that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel’s failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel’s failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no “tactical” reason for failing to object to the prosecutor’s multiple, serious misstatements of her constitutional burden of proof. An objection to the misstatement would likely have been sustained, because any reasonable trial court would have recognized that the prosecution’s argument was clearly improper and minimized the constitutional protections to which Mr. Johnson was entitled.

As a result of counsel’s ineffectiveness, the jurors’ minds were tainted with evocative images and ideas which allowed them to convict Johnson based on something far less than proof beyond a reasonable doubt. Counsel’s ineffectiveness provides yet another ground upon which the constitutionally infirm convictions in this case should be reversed.

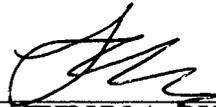
Further, based upon that ineffectiveness, Mr. Johnson should be appointed new counsel on remand for any further proceedings, in order to ensure that Mr. Johnson receives effective assistance below.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and should order new counsel appointed for any further proceedings below.

DATED this 19<sup>th</sup> day of January, 2010.

Respectfully submitted,



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CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402;

TO: Leonard Johnson, Jr., at his current address on file.

DATED this 19<sup>th</sup> day of January, 2010.



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STATE OF WASHINGTON  
BY \_\_\_\_\_  
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SUPERIOR COURT  
DIVISION I

State v. Leonard Johnson, Jr., No. 39418-9-II

**AMENDED CERTIFICATION OF SERVICE BY MAIL**

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402;

TO: Leonard Johnson, Jr., Bkg 2009163040, Pierce County Jail, 910 Tacoma Ave S., Tacoma, WA. 98402.

DATED this 21<sup>st</sup> day of January, 2010.



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