

COA NO. 39420-1-II
10/12/17
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COA NO. 39420-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

AQUARIUS WALKER,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ARGUMENT IN REPLY.....1

1. THE TRIAL COURT VIOLATED WALKER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY REQUIRING HIM TO TESTIFY IN ORDER TO RECEIVE JURY INSTRUCTIONS ON DEFENSE OF OTHERS.....1

2. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON DEFENSE OF ANOTHER.5

4. PROSECUTORIAL MISCONDUCT VIOLATED WALKER'S RIGHT TO A FAIR TRIAL6

a. The Prosecutor Committed Misconduct By Twisting The Presumption Of Innocence, Diminishing Its Burden Of Proof, And Otherwise Misstating The Law On The Role Of The Jury As It Deliberated On Walker's Fate.....6

i. The Prosecutor Committed Misconduct In Telling The Jury It Needed To Affirmatively Identify A Reasonable Doubt Before It Could Acquit.....6

ii. By Comparing The Jury's Decision To Decisions Made In Everyday Life, The Prosecutor Committed Misconduct In Diminishing The Burden Of Proof Beyond A Reasonable Doubt.....9

iii. The Prosecutor Committed Misconduct In Telling The Jury Its Job Was To Declare The Truth.....9

b. The Prosecutor Committed Misconduct In Commenting On Walker's Right To Present A Complete Defense.....10

c.	<u>The Prosecutor's Misstatement Of The Law On Defense Of Another Comprised The Theme Of Closing Argument</u>	12
d.	<u>The Prosecutor's Misconduct Requires Reversal</u>	13
e.	<u>Counsel Was Ineffective In Failing To Object To The Misconduct</u>	16
4.	CUMULATIVE ERROR VIOLATED WALKER'S CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.....	17
5.	WALKER'S CONVICTIONS FOR BOTH FIRST DEGREE MURDER AND SECOND DEGREE FELONY MURDER VIOLATE DOUBLE JEOPARDY AND REQUIRE THAT HIS SECOND DEGREE FELONY MURDER CONVICTION BE VACATED.....	18
D.	<u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Detention of Gaff,</u> 90 Wn. App. 834, 954 P.2d 943 (1998).....	10
<u>In re Pers. Restraint of Burchfield,</u> 111 Wn. App. 892, 46 P.3d 840 (2002).....	18
<u>State v. Acosta,</u> 101 Wn.2d 612, 683 P.2d 1069 (1984).....	12
<u>State v. Alexander,</u> 64 Wn. App. 147, 822 P.2d 1250 (1992).....	17
<u>State v. Anderson,</u> 153 Wn. App. 417, 220 P.3d 1273 (2009).....	6-9
<u>State v. Belgarde,</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	11
<u>State v. Berg,</u> 147 Wn. App. 923, 198 P.3d 529 (2008).....	18
<u>State v. Borsheim,</u> 140 Wn. App. 357, 165 P.3d 417 (2007).....	18
<u>State v. Carter,</u> 156 Wn. App. 561, 234 P.3d 275 (2010).....	18
<u>State v. Case,</u> 49 Wn.2d 66, 298 P.2d 500 (1956).....	10, 14
<u>State v. Charlton,</u> 90 Wn.2d 657, 585 P.2d 142 (1978).....	13
<u>State v. Davenport,</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	14

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES</u> (CONT'D)	
<u>State v. Echevarria</u> , 71 Wn. App. 595, 860 P.2d 420 (1993).....	14
<u>State v. Elmi</u> , 138 Wn. App. 306, 156 P.3d 281 (2007).....	18
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	1
<u>State v. Fischer</u> , 23 Wn. App. 756, 598 P.2d 742 (1979).....	1
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996),.....	14
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	12
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	5
<u>State v. Horton</u> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	17
<u>State v. Janes</u> , 121 Wn.2d 220, 850 P.2d 495 (1993).....	13
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	2
<u>State v. Neidigh</u> , 78 Wn. App. 71, 95 P.2d 423 (1995).....	16

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES</u> (CONT'D)	
<u>State v. O'Neal</u> , 126 Wn. App. 395, 109 P.3d 429 (2005), <u>aff'd</u> , 159 Wn.2d 500, 150 P.3d 1121 (2007).....	11
<u>State v. Painter</u> , 27 Wn. App. 708, 620 P.2d 1001 (1980).....	3
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	12
<u>State v. Suarez-Bravo</u> , 72 Wn. App. 359, 864 P.2d 426 (1994).....	14
<u>State v. Trujillo</u> , 112 Wn. App. 390, 49 P.3d 935 (2002).....	21
<u>State v. Turner</u> , 169 Wn.2d 448, 238 P.3d 461 (2010)	19-21
<u>State v. Venegas</u> , 155 Wn. App. 507, 228 P.3d 813 (2010).....	6-8
<u>State v. Walden</u> , 131 Wn.2d 469, 932 P.2d 1237 (1997).....	3
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	3
<u>State v. Ward</u> , 125 Wn. App. 138, 104 P.3d 61 (2005).....	21
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	7, 13

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Weber,
99 Wn.2d 158, 659 P.2d 1102 (1983)..... 14

State v. Weber,
127 Wn. App. 879, 112 P.3d 1287 (2005),
aff'd, 159 Wn.2d 252, 149 P.3d 646 (2006)..... 18, 19

State v. Westlund,
13 Wn. App. 460, 536 P.2d 20 (1975)..... 1

State v. Womac,
160 Wn.2d 643, 160 P.3d 40 (2007)..... 20

State v. Woods,
138 Wn. App. 191, 156 P.3d 309 (2007)..... 3, 5, 12, 16

Tonkovich v. Department of Labor & Indus.,
31 Wn.2d 220, 195 P.2d 638 (1948)..... 5

FEDERAL CASES

Ball v. United States,
470 U.S. 856, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985) 18

Smith v. Phillips,
455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) 14

United States v. Jose,
425 F.3d 1237 (9th Cir. 2005)..... 20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>STATUTE, CONSTITUTION AND OTHER</u>	
U.S. Const. amend. V	1
U.S. Const. amend. VI	10

A. ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED WALKER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY REQUIRING HIM TO TESTIFY IN ORDER TO RECEIVE JURY INSTRUCTIONS ON DEFENSE OF OTHERS.

The State asserts the trial court at no time told Walker that he must testify in order to receive defense of another instructions. Br. at 42-44. The record shows otherwise. See Opening Brief of Appellant at 19-22 (citing to the record).

Arguing at cross purposes, the State also claims the trial judge correctly told Walker that he needed to testify in order to obtain defense of another instructions because the evidence was insufficient to justify defense of another instructions in the absence of Walker's testimony. Br. at 34. In support, the State draws evidentiary inferences in its favor to conclude a defense of another instruction was not required in the absence of Walker's testimony. Br. at 35-41. But that is not the correct analysis

In determining whether a defendant is entitled to present a defense of self-defense, the court must view the underlying facts in the light most favorable to the defendant. State v. Westlund, 13 Wn. App. 460, 465, 536 P.2d 20 (1975); State v. Fischer, 23 Wn. App. 756, 758, 598 P.2d 742 (1979); see also State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (when determining if the evidence at trial was sufficient to

support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction). To raise a claim of self-defense, there need only be some evidence admitted in the case *from any source*. State v. McCullum, 98 Wn.2d 484, 500, 656 P.2d 1064 (1983).

Under Instruction 23, the homicide was justifiable "when committed in the actual resistance of an attempt to commit a felony in the presence of the slayer," who "may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident." CP 169. As a defense to the homicide, Walker was entitled to act on appearances in defending Scoot, if he believed "in good faith and on reasonable grounds that another is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger." CP 174 (Instruction 28).

Under Instruction 44, it was a defense to the assault charges that the force used to defend Scoot was lawful, i.e., whether Walker reasonably believed Scoot was about to be "injured." CP 190. Walker was entitled to act on the appearance that Scoot was about to be injured. CP 191 (Instruction 45).

Under Instruction 46, Walker was entitled to use deadly force to defend another person from ordinary battery if there was a subjective and objectively reasonable belief that Scoot was likely to suffer great personal injury. CP 192.

There is a significant difference in the apprehension of "great personal injury" as opposed to mere "injury." State v. Woods, 138 Wn. App. 191, 201, 156 P.3d 309 (2007). But even an ordinary striking with the hands and fists can support self-defense or defense of another based on fear of great personal injury. State v. Walden, 131 Wn.2d 469, 477, 932 P.2d 1237 (1997) (citing State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980)) ("It is well within the realm of common experience that 'an ordinary striking with the hands or fists' might inflict [great personal injury], depending upon the size, strength, age, and numerous other factors of the individuals involved."); cf. State v. Walker, 136 Wn.2d 767, 774-75, 966 P.2d 883 (1998) ("while a simple battery cannot justify the taking of a human life . . . if the facts of a particular case show a reasonable person in the defendant's shoes could have reasonably believed that great bodily harm would result from the battery, then the use of deadly force may have been reasonable despite the victim's being unarmed.").

Setting aside Walker's testimony, evidence shows Scoot was unable to offer any resistance while repeatedly being punched, kicked, and thrown

into the side of a car by men who were much larger than himself. See Appellant's Opening Brief at 25-26 (citing to the record). Five Samoans who were at least six feet tall jumped Scoot and were punching him. 1RP 556, 564, 630-31. Key, a man 14 inches taller and more than twice Scoot's weight, was not going to stop beating Scoot. 1RP 418, 3008, 3019, 3059. Key repeatedly threw Scoot into the side of a car. 1RP 926, 997, 1031, 1141. Key straddled Scoot as he lay helpless on the ground and repeatedly pummeled him with punches while an accomplice repeatedly kicked Scoot in the side. 1RP 2468-71, 2476. Walker could see Scoot being attacked. 1RP 1136-38. Walker fired shots into the air in a failed attempt to discourage further attack. 1RP 1966. Walker fired the gun to protect his friend. 1RP 1967, 2189.

Those circumstances justify defense of another instructions. The State did not object to defense of another instructions at the trial level and makes no effort on appeal to explain what in Walker's testimony was supposedly needed to obtain such instruction.

The State argues evidence showed Scoot did not actually suffer great personal injury from Key and his cohorts. Br. a 41. The contention is irrelevant. Walker was entitled to act on appearances. CP 174 (Instruction 28); CP 191 (Instruction 45).

The State claims "not one witness suggested that Key did anything other than punch or push Tavarrus [Scoot] Moss." Br. at 41. This is simply untrue. See Appellant's Opening Brief at 25-26 (citing to the record).

2. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON DEFENSE OF ANOTHER.

The State claims there was no error in the defense of another instructions because Instruction 46 correctly states Walker "could only use deadly force if the defendant reasonably believed that Moss [Scoot] was subject to 'great personal injury.'" Br. at 52. There is no dispute Walker needed to fear Scoot was subject to "great personal injury" in order to justify the homicide under count I.

Instructions 44 and 45, however, set forth a lesser level of feared injury to justify the non-homicide assaults against Key and Mario Moss. CP 190-91. Under the law of the case doctrine, the parties are bound by the law set forth in the jury instructions. Tonkovich v. Department of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948); State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Instructions 44 and 45 are the law of the case. Walker was entitled to have the verdict on the assault charges involving Key and Mario decided under the injury standard set forth in those instructions. See also Woods, 138 Wn. App. at 195, 201 (where defendant assaulted victim by stabbing him with knife that

did not result in death, use of force justified if defendant reasonably believed he was about to be "injured," as opposed to believing he was about to receive a greater level of injury, such as "great personal injury"). The instructions do not make it manifestly clear that the "great personal injury" standard set forth in Instruction 46 does not apply to the assault counts involving Key and Mario.

3. PROSECUTORIAL MISCONDUCT VIOLATED
WALKER'S RIGHT TO A FAIR TRIAL

This case presents the question of how many times the Pierce County Prosecutor's Office needs to make the same improper arguments before they will be deemed flagrant and ill intentioned.

- a. The Prosecutor Committed Misconduct By Twisting The Presumption Of Innocence, Diminishing Its Burden Of Proof, And Otherwise Misstating The Law On The Role Of The Jury As It Deliberated On Walker's Fate.
- i. The Prosecutor Committed Misconduct In Telling The Jury It Needed To Affirmatively Identify A Reasonable Doubt Before It Could Acquit.

This Court has already determined the prosecutor's "fill in the blank" argument is flagrant misconduct. State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813 (2010). The State complains Venegas and State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009) were decided after the prosecutor here made the same improper argument in

Walker's trial. Br. at 64. But in determining whether misconduct is flagrant and ill intentioned, this Court can take judicial notice that the same prosecutor made the same improper argument before as set forth in a previous unpublished opinion. State v. Warren, 165 Wn.2d 17, 27 n.4, 195 P.3d 940 (2008). John Neeb, the prosecutor in Walker's case, made the same improper "fill in the blank" argument long before Walker's case came to trial as set forth in this Court's unpublished decision in State v. Davis, 146 Wn. App. 1037, Not Reported in P.3d, 2008 WL 3846119 at * 8-9 (filed Aug. 19, 2008). This Court can take judicial notice of that fact in determining the flagrancy of Neeb's misconduct in this case. Warren, 165 Wn.2d at 27 n.4.

The State claims Neeb did not make the same arguments condemned in Anderson and Venegas. Br. at 56-57, 60-61. The State is wrong. The prosecutor's spoken words may not have repeated the improper Anderson and Venegas argument verbatim, but they unmistakably conveyed the same improper message. 2RP 54 (arguing "a doubt for which a reason exists" meant "If you are to find the defendant not guilty in this case, you have to say, 'I had a reasonable doubt.' When someone says, 'What was your reasonable doubt?' You tell them."). The prosecutor's corresponding power point presentation, presumably used to drive home any point that mere spoken words could not, left no doubt on this point. Compare CP 352

("WHAT IT SAYS/A doubt for which a reason exists/ If you were to find the defendant not guilty, you have to say: "I had a reasonable doubt"/ What was the reason for your doubt? 'My reason was _____.'" with Anderson, 153 Wn. App. at 431 ("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.") and Venegas, 155 Wn. App. at 523 ("In order to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is'-blank.").

Instead of defending its misconduct, the State would do well to heed

Judge Quinn-Brintnall's concurring opinion in Anderson:

I concur with the majority in affirming Daniel Anderson's first degree robbery conviction. I write separately only to emphasize the impropriety of the prosecutor's closing argument and to note that Washington has long recognized the "in order to find the defendant not guilty" argument as flagrant and ill-intentioned. . . . But for the fact that Anderson was caught on videotape robbing the Tacoma Save A Lot grocery store, the prosecutor's flagrant misstatements of the burden of proof in closing argument would have deprived the defendant of a fair trial. Given the videotape, however, the evidence of Anderson's guilt was overwhelming and any reasonable juror would have returned a verdict finding him guilty of first degree robbery.

Anderson, 153 Wn. App. at 433-34 (Quinn-Brintnall, J., concurring).

- ii. By Comparing The Jury's Decision To Decisions Made In Everyday Life, The Prosecutor Committed Misconduct In Diminishing The Burden Of Proof Beyond A Reasonable Doubt.

The State elsewhere defends the prosecutor's argument comparing the jury's decision to everyday ones, claiming it is different than the one condemned in Anderson. Br. at 65-66. Again, the State's strained attempt to distinguish does not bear even passing scrutiny. Compare 2RP 55-56; CP 353 (comparing jury's decision to babysitting and surgery decisions) with Anderson, 153 Wn. App. at 425, 431 ("And, so, beyond a reasonable doubt is a standard that you apply every single day . . . [For example, in choosing to have] elective surgery, dental surgery, [you] might get a second opinion. You might be worried, do I really need it? If you go ahead and do it, you were convinced beyond a reasonable doubt;" the prosecutor subsequently gave other examples of situations in which the jurors might be convinced beyond a reasonable doubt to make a decision: "when leaving their children with a babysitter or changing lanes on the freeway.").

- iii. The Prosecutor Committed Misconduct In Telling The Jury Its Job Was To Declare The Truth.

The State concedes the prosecutor misstated the law in telling the jury its job was to declare the truth. Br. at 69.

b. The Prosecutor Committed Misconduct In Commenting On Walker's Right To Present A Complete Defense.

The State acknowledges Walker had the Sixth Amendment right to trial and to present a defense, but argues the defense does not have a right to employ tactics that needlessly delay the trial. Br. at 72. The State in this manner tries to exonerate the prosecutor's argument that Walker's defense was to drag the case out so long that the jury would forget the State's evidence and would not be able to reach a verdict. CP 332. The State claims the prosecutor's comment was directed at Walker's delay in choosing to proceed to trial and call witnesses, citing to portions of the record where the court questioned why defense counsel had not provided a witness list to the prosecutor as required by court order. Br. at 72; RP 3275-77, 3330-31.

A prosecutor, as a quasi-judicial officer, has the duty to ensure that a defendant receives a fair and impartial trial, which means a verdict free from prejudice and based on reason. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). It is improper for a prosecutor to invite the jury to decide a case based on anything other than the evidence. In re Detention of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998).

The discussions related to defense counsel's conduct were heard outside the presence of the jury. They were heard outside the presence of the

jury because such discussion was irrelevant to the jury's task and would have been prejudicial to the defense had the jury heard them. If, as the State claims, the prosecutor's comments were directed at discussions that occurred outside the presence of the jury showing the reason for delay, then the prosecutor's argument is based on facts not in evidence. A prosecutor commits misconduct when he encourages a jury to render a verdict on facts not in evidence. State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 500, 150 P.3d 1121 (2007).

The jury was not privy to the reasons behind why the case was dragging on. The jury heard the evidence. The jury heard Walker challenge the State's case in chief. The jury heard Walker put on a defense. By the time prosecutor Neeb exhorted the jury to find Walker guilty in closing argument, the jury had sat through nearly two months of trial during which time their lives were disrupted and put on hold. The jury was primed, with a little coaxing from the prosecutor, to hold the length of the trial against Walker. Prosecutors may not appeal to jurors' passions and prejudices because such arguments inspire verdicts based on emotion rather than evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). The prosecutor's comment about Walker's supposed plan to frustrate the jury's efforts to reach a verdict unmistakably implied Walker was trying to

frustrate the jury's duty by presenting a thorough defense that took a long time to complete.

Misconduct occurs during closing argument when the prosecutor comments on the exercise of a defendant's constitutional right and invites the jury to draw adverse inferences from its exercise. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); State v. Gregory, 158 Wn.2d 759, 807, 147 P.3d 1201 (2006).¹ The prosecutor's comment invited the jury to find Walker guilty because he had inconvenienced the jury by taking so long to present his defense.

c. The Prosecutor's Misstatement Of The Law On Defense Of Another Comprised The Theme Of Closing Argument.

The State defends the prosecutor's argument that it could accept Walker's defense of another argument only if jurors "would do it too." Br. at 76-77. The State fails to appreciate the gravity of the misstatement of law at issue here.

The State has the burden of proving, beyond a reasonable doubt, the absence of self-defense or, in this case, defense of another, as an element of its case. Woods, 138 Wn. App. at 198; State v. Acosta, 101

¹ In Gregory, the Supreme Court found prosecutor Neeb had resorted to facts outside the evidence to convince jurors they should not spare the Gregory's life and concluded the misconduct required reversal of Gregory's death sentence because it could not have been cured with a jury instruction. Gregory, 158 Wn.2d at 864-867.

Wn.2d 612, 615-16, 683 P.2d 1069 (1984). It is improper for a prosecutor to diminish or otherwise misstate the burden of proof. Warren, 165 Wn.2d at 27.

Whether defense of another is justified under the law does not turn on whether jurors would *act* in the same manner as the accused. Jurors may personally believe they would not have done the same thing faced with the same circumstances. That is not the legal standard for determining whether the State proved the absence of a valid defense beyond a reasonable doubt. The jury is supposed to determine whether a "reasonably prudent person" would have done the same as the defendant. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). A juror may not personally have done the same thing but could still find a defendant's conduct in defending another was subjectively and objectively justified under the reasonable prudent person standard. The State's argument repeatedly conflated the two standards, resulting in a misstatement of the State's burden of proof on the crucial defense of another issue.

d. The Prosecutor's Misconduct Requires Reversal.

In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial: regardless of whether the prosecutor deliberately committed misconduct, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process

clause? State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) (citing (Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the defendant's due process rights to a fair trial. Davenport, 100 Wn.2d at 762. If this Court is unable to conclude from its reading of the record whether Walker would or would not have been convicted but for the improper comments, then it may not deem them harmless. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). The Pierce County Prosecutor's Office, however, has repeatedly used the same improper arguments as a tactic to secure convictions. These are not isolated or accidental arguments. These are not honest mistakes. These are deliberate arguments designed to sway the jury.

Even if no single instance of misconduct denied Walker a fair trial, the combined effect most certainly did. See State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (misconduct "taken together and by cumulative effect" denied defendant a fair trial); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994) (same); Case, 49 Wn.2d at 73

(same). This Court should that office accountable for its actions that deprive the citizens of this state of their right to a fair trial.

The State nonetheless claims any prejudice was neutralized by the prosecutor's own remarks, in which he told the jury that it should disregard any misstatement of the law he was about to make. Br. at 59-60, 67. This is what the prosecutor said: "Disregard any statement I make that is not supported by the facts or by the law that the judge gave you. Disregard any statement that I make. *Because I'm not going to do it.*" 2RP 7 (emphasis added).² The State in its response brief curiously omits the last sentence. The prosecutor, as an officer of the court, is telling the jury that he is not going to misstate the law. And then he goes ahead and misstates the law multiple times. The prosecutor's prophylactic comment itself is evidence of the prosecutor's deliberate and ill-intent. John Neeb, an experienced prosecutor, presumably knows the law. If a prosecutor did not intend to misstate the law, there would be no reason to say such a thing.

² In rebuttal argument, the prosecutor commented "I told you yesterday to hold me to a standard in discussing the facts and the law. And I know that you did that." 3RP 3. The prosecutor then commented it was unfortunate that the State had to take time to correct inaccuracies and misstatements in the defense's closing argument. 3RP 3.

e. Counsel Was Ineffective In Failing To Object To The Misconduct.

The prosecutor's comments were clearly improper. Defense counsel objected to the improper argument regarding the legal standard for determining whether Walker's actions were objectively reasonable. Yet other flagrant abuses went unchallenged, implying to the jury that nothing was wrong with those unobjected-to arguments.

The State contends they were not so flagrant and ill intentioned that objection and instruction could not have cured the prejudice. If the State is right, then there is no sound reason why counsel should not have objected and requested curative instruction to ensure her client's right to a fair trial. An objection and instruction could have redirected the jury to the proper considerations and perhaps cured the prejudice resulting from the improper comments. Counsel had no legitimate tactical reason for not objecting. Defense attorneys must vigilantly defend their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995) ("defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line."); Woods, 138 Wn. App. at 197 (reasonable attorney conduct includes a duty to know the relevant law). The multiple objections invited by the prosecutor's misconduct, but not made,

would have highlighted the prosecutor's desperation in trying to secure convictions based on misstatements of the law. Reversal is required where, as here, defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument).

4. CUMULATIVE ERROR VIOLATED WALKER'S
CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR
TRIAL.

The State argues cumulative error did not deny Walker a fair trial, including prosecutorial misconduct to which no objection was lodged. Br. 83-84. Walker need not repeat his arguments refuting the State's contention here, but reiterates even where some errors are not properly preserved for appeal, this Court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

5. WALKER'S CONVICTIONS FOR BOTH FIRST DEGREE MURDER AND SECOND DEGREE FELONY MURDER VIOLATE DOUBLE JEOPARDY AND REQUIRE THAT HIS SECOND DEGREE FELONY MURDER CONVICTION BE VACATED.

The State claims Walker's conviction for second degree felony murder should not be vacated because it was not reduced to judgment and sentence. Br. at 84-86. According to the State, a trial court's conditional vacature of a lesser conviction offends double jeopardy but a court's failure to vacate the lesser conviction altogether does not offend double jeopardy. Br. at 85.

It is established that the remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense. See, e.g., State v. Weber, 127 Wn. App. 879, 885, 888, 112 P.3d 1287 (2005) (citing In re Pers. Restraint of Burchfield, 111 Wn. App. 892, 899, 46 P.3d 840 (2002); Ball v. United States, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)), aff'd, 159 Wn.2d 252, 149 P.3d 646 (2006); accord State v. Elmi, 138 Wn. App. 306, 321, 156 P.3d 281 (2007); see also State v. Borsheim, 140 Wn. App. 357, 371, 165 P.3d 417 (2007) (vacating multiple convictions that violated double jeopardy); State v. Berg, 147 Wn. App. 923, 937, 198 P.3d 529 (2008) (same); State v. Carter, 156 Wn. App. 561, 568, 234 P.3d 275 (2010) (same). If the State's argument were correct, then the remedy in

cases such as Weber would have been to redact the lesser conviction from the judgment and sentence, not vacate it.

At sentencing, the prosecutor referenced the second degree felony murder conviction (count II) and tied what the trial court should do with that conviction to the Supreme Court's then-pending decision in State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010). 4RP 24-25. The Supreme Court subsequently held double jeopardy cannot be avoided by conditionally vacating a lesser conviction. Turner, 169 Wn.2d at 466. The Supreme Court explained "[t]he double jeopardy clause prohibits the imposition of multiple punishments for the same criminal conduct." Id. at 465. "*In keeping with this principle*, the trial courts in Turner and Faagata vacated the lesser of two convictions that each defendant received for his offense." Id. at 466. (emphasis added). Those vacated convictions could not be kept "alive" by conditional vacature. Id. It necessarily follows a lesser conviction cannot be kept "alive" by failing to vacate it altogether.

The State's attempt to read the Supreme Court's decision in Turner for the opposite proposition does not withstand scrutiny. The Supreme Court recognized it is a basic principle of double jeopardy that "a court has no authority to take a verdict on another charge . . . find that it violates double jeopardy . . . not sentence the defendant . . . on it[,] and just . . . hold it in abeyance for a later time." Turner, 169 Wn.2d at 462 (quoting State v.

Womac, 160 Wn.2d 643, 659, 160 P.3d 40 (2007)) (internal quotation marks omitted). In support of this proposition, Turner cited United States v. Jose, 425 F.3d 1237, 1247 (9th Cir. 2005). Turner, 238 P.3d at 466. The Jose court recognized "the district court should enter a final judgment of conviction on the greater offense *and vacate the conviction on the lesser offense*." Jose, 425 F.3d at 1247 (emphasis added).

There is a simple reason why vacature is necessary. "The term 'punishment' encompasses more than just a defendant's sentence for purposes of double jeopardy." Turner, 169 Wn.2d at 454. "[E]ven a conviction alone, without an accompanying sentence, can constitute 'punishment' sufficient to trigger double jeopardy protections." Id. at 454-55. The lesser conviction in and of itself violates double jeopardy because it may result in future adverse consequences and, at the very least, carries a societal stigma. Id.; Womac, 160 Wn. 2d at 656-58.

The adverse consequence of a conviction is not alleviated by conditional vacation. Id. at 455, 466. How then could the adverse consequence of a conviction be alleviated by no vacation at all?

What is clear from the holdings in Turner and Womac is that a conviction is punishment under double jeopardy jurisprudence. And a conviction remains a conviction regardless of a trial court's clerical decision

not to "enter judgment" on it. The State cannot reconcile its argument with these basic propositions.

State v. Ward, 125 Wn. App. 138, 144-45, 104 P.3d 61 (2005), insofar as it can be read to hold double jeopardy is avoided so long as a conviction is not reduced to judgment and sentence, cannot be reconciled with the reasoning the Supreme Court used to reach its result in Turner and Womac, nor with the long line of cases holding vacature is the proper remedy for a double jeopardy violation.

The State also cites State v. Trujillo, 112 Wn. App. 390, 49 P.3d 935 (2002). Br. at 85. But according to the Supreme Court, there was no double jeopardy violation in Trujillo because the lesser convictions were vacated. Turner, 169 Wn.2d at 463-64.

The impetus behind not vacating the lesser conviction, and the only conceivable reason why such a request was made here, was to avoid the imaginary problem of not being able to rely on the lesser conviction in the event the greater conviction is ultimately reversed on appeal. 4RP 24-25. As the Supreme Court makes clear, the vacated lesser conviction may be reinstated if the conviction for the greater offense is reversed. Turner, 169 Wn.2d at 466. The State now argues Walker's lesser conviction should not be vacated, but one wonders why it even bothers, given that it has no interest to defend here. The only interest at stake is Walker's interest in not being

subjected to double jeopardy by means of multiple *convictions* for the same offense. Walker is entitled to an order vacating the felony murder conviction (Count II).

D. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the convictions and remand for a new trial on all counts. In the event this court declines to do so, then Walker's conviction for second degree felony murder should be vacated.

DATED this 2nd day of November 2010.

Respectfully Submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39420-1-II
)	
AQUARIUS WALKER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2ND DAY OF NOVEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF NOVEMBER, 2010.

x *Patrick Mayovsky*