

No. 39573-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY DEWAYNE JONES,

Appellant.

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COURT OF APPEALS  
DIVISION TWO  
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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 James R. Orlando, Judge

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed constitutionally offensive misconduct by repeatedly misstating the critical standard of proof beyond a reasonable doubt and the prosecution cannot prove this constitutional error harmless beyond a reasonable doubt.

2. The prosecutor committed flagrant, prejudicial misconduct by misstating crucial evidence.

3. Appellant Anthony Jones was deprived of his Article I, § 7 and Sixth Amendment rights to effective assistance of counsel.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. The prosecutor's constitutionally mandated burden of proof is the essential foundation of our criminal justice system, ensuring the protections of the presumption of innocence and due process. Did the prosecutor commit constitutionally offensive misconduct in a) referring to the question before the jury as whether Jones was "not guilty beyond a reasonable doubt," b) telling the jurors they would have an abiding belief as required if they just thought Jones had committed the crime and c) compared the certainty jurors would have to have in order to believe the state had met its burden with the certainty they would need to guess what word was portrayed on the board in the game show, "Wheel of Fortune," even without all of the letters showing?

Is the prosecution unable to meet the heavy burden of proving the misconduct constitutionally harmless where there was not "overwhelming" evidence that Jones was guilty of possessing drugs with intent to deliver them?

2. Jones admitted that he was in possession of drugs but maintained that he had them only for his personal use and was not possessing them with intent to sell or distribute. The crucial question at trial was thus his intent. There was no evidence that Jones was in possession of anything other than the drugs, such as crib notes or money, which would indicate that he was a drug dealer, nor was Jones seen engaged in any drug deals. The only evidence the prosecution had of “intent” to deal was that some of the drugs were packaged in small units and a claim that Jones had told patrol officers he was at the convenience store that day to sell the drugs. Jones disputed that claim, saying he had never told patrol officers anything of the sort and had only puffed up his role and implied he was a dealer to a specialized officer in order to try to convince that officer to give him a “deal.”

At trial, only one of the patrol officers claimed Jones made the disputed statement, while the other said he did not recall. Did the prosecutor misstate this crucial evidence when he repeatedly declared that both officers had testified that Jones had made the statement?

Further, was counsel ineffective in failing to object to these misstatements and the misstatements and minimizations of the prosecution’s constitutionally mandated burden of proof and the presumption of innocence?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Anthony D. Jones was charged by amended information with unlawful possession of cocaine with intent to deliver, unlawful

possession of oxycodone and unlawful possession of methadone. CP 147-48; RCW 69.50.401(1)(2)(a), RCW 69.50.4013. The possession with intent was also charged as occurring within 1,000 feet of a school bus route stop. CP 147; RCW 9.94A.533(6); RCW 69.50.435.

Jury trial was held before the Honorable James R. Orlando on July 6-8, 2009, after which Jones was found guilty as charged. RP 315-16; CP 142-46. On July 17, 2009, Judge Orlando imposed a standard range sentence at the minimum, declining to impose a “doubler.” RP 338-39; CP 153-66.

Jones appealed and this pleading follows. See CP 149.

2. Testimony at trial

At about 12:45 p.m. on November 21, 2007, Tacoma Police Department officer Kenneth Paul Smith was working with his partner, Henry Betts, when they noticed that a man who was driving a car nearby was not wearing his seat belt. RP 102-108, 133, 164. The area in which this stop occurred is a high-crime area and Smith was working “gang unit” that day, trying to be seen patrolling and enforcing laws. RP 133-35.

The officers made a u-turn in order to follow the car and pulled in behind the man as he drove into the parking lot of a convenience store. RP 109. Smith said they turned on their overhead emergency lights and Smith got out while the man opened his driver’s side door. RP 110. Smith then contacted the man while he had his door open but was still seated in his vehicle. RP 110. Betts got out and went to the passenger side of the car, to “kind of” watch to see what happened. RP 165.

Smith told the man, later identified as Anthony Jones, that he had

been stopped because he was not wearing his seatbelt, asking for Jones' driver's licence, registration and proof of insurance. RP 111. Jones said he did not know he was required by law to wear his seatbelt, handing over the requested items. RP 111.

According to Smith, even before the officer had asked Jones for those identification items, the officer had seen a large pill bottle and some pills "spilled" inside the driver's side door compartment. RP 112. Smith thought it looked like the pill bottle did not have a label on it. RP 113. Smith also said he saw that one of the pills had a "specific number on it, 512." RP 112. The officer said that "512" is stamped on oxycodone tablets which are 5 milligrams, and that oxycodone is a controlled substance. RP 113.

Smith admitted that it was not a crime for someone to have a prescription for oxycodone or have a pill outside of a bottle. RP 113. Because it would be a crime to carry someone else's prescription drugs, however, Smith asked Jones about the bottle and pills. RP 114. Jones said the pills belonged to his wife. RP 114. The officer then asked if there was a label on the pill bottle and Jones responded that there was not. RP 114. Smith asked what the pills were and Jones said they were "percocet," which is a generic name for oxycodone. RP 114.

At that point, the officer told Jones he was under arrest for unlawful possession of a controlled substance. RP 115. Smith had Jones step out of the car and placed him in handcuffs. RP 115. After Jones was read his rights, Smith said, Jones declared that he did not know it was a crime to have Percocet. RP 115-18.

Betts said it was only a “few seconds” after Smith started talking to Jones before Smith had Jones step out of the car. RP 166, 179. Betts did not recall the conversation Smith and Jones had prior to that time. RP 166. When Jones was being handcuffed, Smith pointed Betts to the pill bottles in the driver’s side door to indicate why he had asked Jones to get out of the car. RP 167. Betts did not see loose pills but also said he did not go past the two men to look into the door. RP 168.

Smith started searching Jones and when the officer reached into Jones’ left front pant pocket, Jones said, “[t]his is not good; I am fucked.” RP 119. The officer said that, with that comment, he became concerned that there might be something dangerous in Jones’ pockets, so he asked what Jones had and Jones responded, “I got some stuff that I should not be having.” RP 120. The officer then looked inside the pocket and saw a clear plastic “baggie” with what turned out later to be 19 individually packaged blue “baggies” of white, chalky substance inside. RP 120. Smith suspected the chalky substance to be crack cocaine and asked Jones if it was fake and Jones said, “[n]o, that’s some coke.” RP 122.

Jones was put in the back of the patrol car and Smith searched the car in which Jones had been driving, finding a second pill bottle without a label in the driver’s side door along with the bottle and pills he had seen. RP 125, 171. The pills inside the bottles and in the door amounted to 16 pills of oxycodone (5 milligrams), 20 pills of oxycodone (10 milligrams) and 13 pills of methadone. RP 125-26, 201. The cocaine in the baggies weighed 12.3 grams. RP 201.

Smith admitted that none of the pills was packaged in any way

indicating an intent to sell. RP 137-138. None of the pills which had been loose appeared to be dirty, and Smith could not tell how long the pills had been there. RP 141. Smith did not ask Jones that question, nor did he ask how the pills had gotten there in the first place. RP 141.

Smith testified that Jones told the officers that he had planned to meet someone at the convenience store to sell the pills and crack to that day. RP 131, 141. Betts, however, did not recall Jones saying any such thing. RP 182. In cross-examination, Smith conceded that, when Jones was being searched and obviously “knew he was in some trouble,” he asked to talk to someone “to get out of this situation,” maybe by providing information. RP 148-52, 157. Smith said that it was only after Jones said that he was meeting someone to sell the drugs to that Smith decided to contact an officer who could negotiate something like that. RP 154.

The officers contacted a special agent, Evan Brady, and had him come out to talk to Jones. RP 152. The officers also asked Jones questions like who his supplier was and other things about “bigger fish in the great sea of the drug world.” RP 154. Smith did not put any of that into his report because of concerns about Jones’ safety. RP 155, 158.

Betts said that he and Smith talked to Jones about “different outcomes for this case and different ways this could go or different options that were out there.” RP 172. Betts did not recall hearing Jones say anything about what he was doing with the drugs. RP 172. Betts said the conversation was more “focused on” where Jones could buy more drugs from rather than whether and how much Jones might be selling. RP 182. Betts remembered Brady saying later that he was “going to have

more contact” with Jones. RP 183.

Smith conceded that there is usually some indicia of drug dealing or selling other than just individually packaged baggies that he looks for, such as scales, “crib notes” about sales, cell phones, weapons, and other items. RP 141-42. Another indication is large amounts of cash. RP 152. Aside from the drugs themselves, nothing like that was found on Jones or in the car. RP 143, 153, 180.

Neither Smith nor Betts had previously “known” Jones as a drug dealer. RP 159-61, 184.

A “router” for the Tacoma School District testified that the convenience store was within 1,000 feet of a school bus route stop. RP 194, 199.

Kelley Jones<sup>1</sup>, Anthony’s wife, testified that they had experienced an “ongoing problem” with Jones and pain pills, starting with some pills he was prescribed for dental work and ultimately involving him asking her for her leftovers from surgery and him taking Percocet pills all the time. RP 204-20. She would notice some of her prescription pills she had left over from prior surgeries were missing and she also thought he got pills from people in the neighborhood, on the street, who were “tribal.” RP 206, 211.

Kelley had known Jones since high school, when he did not have a drug problem. RP 212. He had tried to get well, and in 2006, had gone to a treatment program and Narcotics Anonymous meetings for about a year.

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<sup>1</sup>Because they share the same last name, Anthony Jones will be referred to as “Jones” and Kelley Jones will be referred to as “Kelley.” No disrespect is intended.

RP 207. He was getting better but then his grandmother died in September of 2007 and Kelley noticed a drastic change in Jones' behavior. RP 208, 216. She said he would leave and go places and she would not know where he was, and when she woke in the middle of the night while pregnant with their third son, Jones would not be there. RP 208. She would then go outside and see him working on the car or something equally out of character. RP 208.

Kelley then started seeing Jones use pills again, sometimes at least six a day. RP 209. She said she had talked to him a little about it and he said he needed it to relax in order to cope with what was going on in his life. RP 209. She would tell him that she was worried about the potential side effects and that he needed to think about their children. RP 210.

Kelley said she had never seen Jones use cocaine and that he would not "bring that around" her and the children or disrespect her like that. RP 208. She thought he was embarrassed about using it. RP 208. She did say she found some cocaine in the car once but had not otherwise seen it in his pants or anything like that. RP 215.

Kelley said Jones was a good dad but just had the problem of taking the pills to make him "feel more comfortable." RP 210. She could not always tell when he was on the pills. RP 210. Kelley herself does not use any kind of drugs except prescriptions when she had surgery. RP 211.

Kelley conceded that her job paid fairly well and she would give Jones money because he was not working, although he was getting vehicles at auctions, fixing them up and selling them. RP 212. She gave him maybe four or five hundred dollars at a time if he was grocery

shopping or going to pay a bill or something, and she did not “keep tabs on” what else he did with it. RP 212, 218.

Over his attorney’s objection, Jones testified. RP 219-21. He said that he had started having a drug problem at about age 15, beginning with smoking marijuana and then moving on to Valium. RP 221-24. He did some prison time and when he got out was very focused and he did not get involved again in drugs until he started using cocaine after trying it in 2006. RP 225. For that year, he said he was high about a month total in the year, usually on weekends. RP 225.

Jones said that the “tribal Indians” in the neighborhood had a lot of pills, such as Percocet and Vicodin, and he started buying Percocet until in 2007 and 2008 he was taking 10 or 12 a day. RP 226. Percocet was his drug of choice, although he would also use cocaine in “a spurt” every now and then, when the “pressure was really thick,” like at the time the incident occurred. RP 229.

Jones said his criminal history before 2002 was based upon drugs and then he cleaned up and had children after he got out. RP 227. His grandmother’s death was very hard on him, however, because she was essentially his mother. RP 227-28. Her birthday had been the day before this incident and he had thought about taking drugs and taking the “edge off” at that time. RP 229.

Jones was clear that he was not driving in the opposite direction from the officers on the day of the incident but said that instead they pulled up next to him. RP 230-31. After that, he pulled into the parking lot at the store and got out of his car. RP 231-33. Jones was there to get

something to drink or get prepaid minutes for his phone. RP 235. Jones had a “gut feeling” the officers were interested in him because it was “not the first time” he had been “pulled over for no reason,” so he did not even try to go into the store. RP 233. The officers approached him when he was all the way out of the car, with the door shut. RP 234.

Jones asked why he was getting pulled over and the officer said it was because he was not wearing a seatbelt. RP 236. Jones went back to his car to get his identification, insurance and registration and was sitting in the car with the door open to get those things when Smith saw the pills. RP 237.

Jones admitted there were pills in the driver’s side door compartment, specifically Percocet. RP 237. He had in fact bought 20 Percocets about an hour earlier and although he had not taken or bought methadone they probably just got mixed in with the ones he bought. RP 238.

Jones did not know why the pills would be “spilled” as the officer said and did not know how the officer could see any “512” numbers on the pills unless he had “super duper” eyes. RP 239-40. Jones said, however, that he had grabbed “a couple” of pills from his wife’s bottles that day, before he bought the Percocets. RP 240.

Jones said the officers did not read him his rights before he was physically searched. RP 241. He admitted saying something about being fucked or fucking up, saying he was in a daze from previous nights of “using.” RP 241. Jones had gotten the cocaine from a good friend a day or so before. RP 242. His friend had showed Jones what he had available

and Jones had wanted to buy more, but the friend said that was all he had and sold the whole bag to Jones for \$140. RP 244. Jones thought it was a good deal because it was about \$300 worth of crack. RP 244. He used it for a “primo,” when you took a cigar and loaded it with marijuana or cocaine to smoke. RP 243.

Jones explained that he had bought cocaine individually packaged like that all the time. RP 248. He wanted to buy in bulk and spend a lot of money so he did not have to drive around looking for drugs when he wanted them. RP 251-52. He said it took about three or four of the little bags he had to make a “primo.” RP 248.

Jones stated unequivocally that he never had any intent to sell drugs. RP 248. Instead, he was only intending to use them. RP 248. He said he told the officers that and actually asked an officer for a couple of the Percocet pills back because he wanted to take them right then. RP 249.

Jones said that, after he was searched, handcuffed and put into the back of the police car, he knew he was in trouble. RP 245. When he was read his rights, Jones said, he decided he would be silent because he knew the officers there could not do anything for him. RP 245. Instead, he asked to talk to someone who might be able to get him out of the situation, which turned out to be Brady. RP 246. With Brady, the officers showed him photos of people to see if he had seen them before in Tacoma and Jones said he had not, because all of his “targets is in Seattle, Federal Way.” RP 246.

When asked about the statement Smith said Jones made about

meeting someone to sell them the drugs at the convenience store, Jones said both that he never made the statement and that if he had made that statement, he would have said it to Agent Brady but not the patrol officers, to build up his credibility for making a deal with Brady. RP 246-47. He explained that, if he wanted to make a deal to get out of the current mess he was in, he needed to make it seem like he was a drug dealer. RP 264.

Jones said he had to plead to a “bogus charge” in 2007, which was a charge of conspiracy to commit unlawful delivery of cocaine. RP 256. He maintained that he had never done anything other than use cocaine. RP 255-56. Jones also had convictions for second-degree burglary, first-degree burglary and residential burglary in King and Pierce counties. RP 263. He explained that the burglaries were a result of his addiction and committed to support his habit. RP 264.

On cross-examination, Jones stated that the officer who testified as Officer Smith was not the same person that he had contact with that day. RP 257. The person who had pulled him over was younger and taller and Jones thought he had never seen the person who had claimed Jones said he was selling drugs that day. RP 267.

Smith disputed Jones’ version of events, saying he did not pull onto the side of Jones and have eye contact before following him into the store parking lot. RP 135. Betts also said the officers were going the opposite direction from Jones and had to do a u-turn to follow him. RP 164, 178.

D. ARGUMENT

REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR  
COMMITTED MULTIPLE ACTS OF MISCONDUCT AND  
COUNSEL WAS INEFFECTIVE

While trials are adversarial contests, the attorneys involved are not cloaked with equal duties. Instead, as a quasi-judicial officer, a prosecutor has special duties not imposed on other attorneys, which include the duties to ensure justice, seek convictions based solely upon the evidence, and abhor any result which is not made by a jury “free of prejudice and based on reason.” See State v. Huson, 73 Wn.2d 660, 663, 440 P.3d 192 (1968), cert. denied, 393 U.S. 1096 (1989); State v. Reed, 102 Wn.2d 140, 145, 684 P. 2d 699 (1984). The prosecution also bears constitutional burdens, such as the due process burden of proving every element of its case, 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).

In this case, reversal and remand for a new trial is required, because the prosecutor committed serious, constitutionally offensive misconduct by repeatedly misstating and minimizing his burden of proof. Further, the prosecution cannot meet its burden of proving this misconduct “harmless” under the difficult constitutional harmless error standard. In addition, the prosecutor committed flagrant, prejudicial misconduct in misstating crucial evidence, and counsel’s failure to even attempt to minimize the corrosive effect of the prosecutor’s repeated misconduct amounted to ineffective assistance. Even if the individual

errors did not by themselves compel reversal, reversal would be required because the cumulative effect of all of the misconduct deprived Mr. Jones of his constitutionally guaranteed rights to a fair trial before an impartial jury.

a. Constitutionally offensive misconduct in misstating and minimizing his burden of proof and the critical standard of proof beyond a reasonable doubt

First, reversal is required because the prosecutor committed serious, constitutionally offensive conduct by repeatedly misstating and minimizing his burden of proof and the standard of proof beyond a reasonable doubt.

i. Relevant facts

Because Jones admitted possessing the pills and cocaine, the only issue at trial was whether he had done so with intent to deliver the drugs. See RP 281. Jones' defense was that he was just using and that the prosecution had failed to present sufficient evidence of intent, because there was no evidence other than the packaging and the alleged statements of Jones to establish that intent. See RP 281-303.

In rebuttal closing argument, the prosecutor faulted counsel for arguing that the prosecution had not proven its case, arguing that the fact that there was always something defense counsel could think of that the prosecutor should have done or should have given the jury was not "the same as saying the State didn't meet its burden." RP 304. The prosecutor then said:

Just because he can come up with some scenario in which I could have possibly given you more evidence, that is not the same as **saying the defendant is not guilty beyond a reasonable doubt.**

RP 304 (emphasis added).

A moment later, the prosecutor went on to describe reasonable doubt as “if you have an abiding belief,” which the prosecutor said was to be decided as follows:

I ask you to go back there as a reasonable person. If you go - - you look at this evidence and you go, “Yeah, he did that, he possessed that with the intent to deliver,” then you have that abiding belief.

The way I like to explain it is this, is that we’ve all seen the game show Wheel of Fortune. They pop up letter, people pop up letters, the words start spelling out in front of you, at some point there’s enough letters up there were you can guess the word. You know what the word is.

What counsel’s trying to say is, well, not every letter is lit up; not every letter is turned over. You don’t know what the word is yet.

That’s proof beyond all doubt. I don’t need to turn over every single one of those letters. What I need to do is I need to keep turning them over until we all know what the word is. Right?

RP 306. The prosecutor then said that when the jury had looked at all of the evidence together, “I’ve turned over enough letters for you to know what the word is. The word is guilty.” RP 306.

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

In making these arguments, the prosecutor committed serious, prejudicial and constitutionally offensive misconduct, in violation of Jones’ due process rights not only to have the state carry its constitutionally mandated burden of proof but also Jones’ right to enjoy the presumption of innocence and be free from a burden himself. It is misconduct for a public prosecutor, with all of the weight of his office

behind him, to misstate the applicable law, and this 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). A mandatory corollary to the state's constitutionally mandated burden of proof beyond a reasonable doubt is the presumption of innocence with which each defendant is cloaked. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Together, these two concepts form the "touchstone" of our entire criminal justice system, ensuring that only properly supported convictions are obtained and serving as the primary instruments "for reducing the risk of convictions resting on factual error." 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).

Because of their importance, the Supreme Court has recently cautioned prosecutors against yielding to the "temptation to expand upon the definition of reasonable doubt," noting that such argument in closing may well result in improper dilution of that burden and the presumption of innocence. Bennett, 161 Wn.2d at 317-18.

The prosecutor in this case failed to heed this caution, first by characterizing the issue as whether the jury could say "the defendant is not guilty beyond a reasonable doubt," next by describing having an "abiding belief" as simply thinking the defendant "did that," and finally by comparing the decision before the jurors and the certainty they had to have to find Jones guilty with the certainty they would have to have in watching "Wheel of Fortune" and guessing what the relevant word was on

the board.

All of these arguments misstated and minimized the prosecutor's weighty constitutional burden, shifted a burden to Jones and turned the presumption of innocence on its head. First, the jury was not required to decide if it thought Jones was *not guilty* beyond a reasonable doubt - it was not required to find him "not guilty" at all. Instead, the jury's role was to decide whether the prosecutor had proven that Jones was guilty, beyond a reasonable doubt and, if it had a reasonable doubt on that point, it was required to acquit. See e.g., State v. Wright, 76 Wn. App. 811, 824, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). By framing the issue as if the jury had to find Jones "not guilty," the prosecutor effectively turned the presumption of innocence on its head, implying that Jones had a duty to disprove guilt and relieving himself of his constitutionally mandated burden. See, e.g., State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

Even more constitutionally offensive were the prosecutor's arguments that the jury was convinced of guilt beyond a reasonable doubt if it just thought Jones "did it" and if they had the same degree of certainty in his guilt as they would have to have to "guess" what word was on the board in the "Wheel of Fortune" game show even if they did not see all the letters. RP 305-306. Indeed, in Anderson, this Court recently condemned the very same kind of argument, from another prosecutor in the same office:

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.

153 Wn. App. at 432 (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 trivialize 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 rulings:

‘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 - he compared it to the completely trivial matter of *guessing what word was in a puzzle on a television game show*. RP 305-306. 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 they had properly guessed the word in a game show puzzle, even without all the letters. 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. Jones was guilty - the same standard they would use in deciding the incredibly trivial example the prosecution gave.

These arguments - and the misstatements - were not trivial but went to the heart of the entire case against Jones. 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. See Anderson, 153 Wn. App. at 432 (the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed); see also, Bennett, 161 Wn.2d at 315-16 (same). Further, the U.S. Supreme Court has recognized that the error of misstating the standard of proof beyond a reasonable doubt affects the entire proceeding and impacts the jury's ability to properly decide the case. See, e.g. Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

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 Jones' 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 Jones was so overwhelming that it "necessarily" leads to a finding of guilt. 104 Wn.2d at 425. But there is not such evidence here. While there is no question that Jones was in possession of the drugs, there *was* a serious question about whether he was possessing them with intent to sell or distribute. The only evidence tending to support that intent was the nature of the packaging of the cocaine and Jones' alleged statements to the patrol officers. But the bulk packaging was also explained by Jones' testimony that he bought in bulk on a regular basis in order to avoid having to buy more all the time, and the alleged statements were not heard by both patrol officers and were disputed by Jones, who explained making such

statements to Evans as puffery to try to get a “deal.”

It is important to note that 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 seemed to identify 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, however, 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.

Thus, Romero clearly illustrates that, 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 Jones’ guilt of possession with intent, beyond a reasonable doubt. It could well have decided that the state had failed to prove beyond a reasonable doubt that Jones had intended to sell the cocaine, rather than just possess it.

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 stating 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 minimizations and misstatements of his burden, using an extremely evocative and easy-to-understand comparison, were extremely likely to stick with the jury, as was the idea that jurors were required to convict unless they found Jones *not guilty* beyond a

reasonable doubt.

These serious constitutional errors were not harmless, and this Court should so hold and should reverse.

b. Misconduct in misstating crucial evidence

In addition to misstating and minimizing his constitutionally mandated burden of proof, the prosecutor also repeatedly misstated crucial evidence, then relied on those misstatements in arguing Jones' guilt.

i. Relevant facts

In closing argument, the prosecutor admitted that what the case was all about was whether Jones had the required intent to deliver the cocaine. RP 281. He then told the jury that, “[f]irst and foremost,” the evidence of intent came from Jones, who had told the jury what his intent was when he was at the convenience store:

[T]he defendant told us. He said to the cops, “I’m here to sell the drugs. I’m here to sell the pills and the crack. That’s why I came to this 7-Eleven.” That what he tells the cops. **Both the officers testified that that’s what he heard. When he was interviewing him, the defendant said those words.**

RP 281-82 (emphasis added). The prosecutor repeatedly relied on this “fact” in arguing the crucial issue of Jones’ intent, telling the jury it should not find Jones’ denial of making that statement to the patrol officers as credible. RP 283-85. The prosecutor also referred to the statement as Jones’ “confession,” telling the jury that Jones was suddenly saying, “I didn’t say that. I am not a dealer; I only use. Sure, I am going to admit that the drugs were mine; I can’t get out of that.” RP 286. The prosecutor to the jury Jones was thinking, “I am going to deny that I was a

dealer, hoping that by making some admissions I can bolster my credibility in your eyes.” RP 286. Based on the evidence and what Jones “said to the officers,” the prosecutor argued, there was sufficient evidence to prove Jones’ intent and thus that he was a dealer. RP 288.

Jones’ position was that he was a user, not a dealer. RP 281-303. He challenged the claim that Jones had ever said that he was there to sell the drugs as very important in deciding “whether or not the State has proven this beyond a reasonable doubt.” RP 300. He pointed out that anyone trying to sell pills would not have had them spilled out and would have had other things such as crib notes. RP 300.

In rebuttal closing argument, the prosecutor returned to the statement as evidence of Jones, guilt, saying that Jones “said what he’s got the drugs for, the cocaine for, is to sell it,” and that he told that very thing to the jury and the officers. RP 310.

ii. These arguments were flagrant, prejudicial misconduct

No attorney is permitted to misstate the evidence and thus mislead the jury. Davenport, 100 Wn.2d at 763. Nor is an attorney allowed to argue facts not in evidence. Id. This is especially true of the prosecutor, whose status as a quasi-judicial officer entrusts him with special authority in the eyes of the jury and the special responsibility to ensure a fair trial. State v. Reeder, 46 Wn.2d 888, 892-93, 284 P.2d 884 (1955). Even if a prosecutor gets caught up “in the heat of the trial” and becomes “a little over-enthusiastic in their remembrance of the testimony,” he still has a duty to ensure he does not mislead the jury, especially about crucial

evidence. Davenport, 100 Wn.2d at 763; see also, State v. Fullen, 7 Wn. App. 369, 387, 499 P.2d 893, review denied, 81 Wn.2d 1006 (1972), cert. denied, 411 U.S. 985 (1973).

Here, the prosecutor did just that in repeatedly misstating the officers' testimony regarding whether Jones had said he was at the store to sell the drugs to someone. Despite the prosecutor's declarations, both officers did *not* testify that Jones made such a statement - only Smith did. RP 131, 141. Betts specifically did not recall Jones saying any such thing. RP 182. And indeed, Betts did not recall hearing Jones say anything about what he was doing with the drugs. RP 172. Further, Betts said the conversation was more "focused on" where Jones could buy more rather than whether and where he was selling. RP 172-83.

Yet the prosecutor repeatedly told the jury that both officers had said Jones had made such a statement. See RP 281-82, 284, 286, 288, 310.

The potential impact of these misstatements cannot be overstated. Jones' entire defense was that he was a user, not a dealer. And the prosecution's entire case hinged on just two facts: that the cocaine was in packaging which could be consistent with sales and that Jones had allegedly made the statements about which the prosecutor's repeated misstatements were made. The misstatements were thus on a crucial part of the state's case. Further, because of the utter lack of other evidence of dealing - crib notes, scales, money or anything else, the prosecutor's misstatements were necessary in order to support the conviction, and therefore especially egregious.

Reversal is required even though counsel failed to object below. Even where counsel fails to object, this Court will reverse for prosecutorial misconduct which is so prejudicial that it could not have been cured by instruction. See State v. Stith, 71 Wn. App. 14, 20, 856 P.2d 415 (1993). Where, as here, the prosecutor makes material misstatements of crucial facts which go directly to the heart of its case against the defendant, it is appellant's position that such misconduct is so pervasive that it is not curable. This Court should so hold.

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 and the misstatements of crucial evidence 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 (1967); 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 his 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. Jones was entitled and turned the presumption of innocence on its head. Further, as a result of counsel’s ineffectiveness, the jurors’ minds were tainted with evocative images and ideas which allowed them to convict Jones based on something far less than proof beyond a reasonable doubt.

Similarly, counsel’s failure to object to the misstatements of the crucial evidence was ineffective assistance. Again, there was no tactical reason for counsel to fail to object to these repeated misstatements.

Failing to do so resulted in the misstatements going uncorrected - and unquestioned. 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. Jones should be appointed new counsel on remand for any further proceedings, in order to ensure that Mr. Jones receives effective assistance below.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 10th day of March, 2010.

Respectfully submitted,



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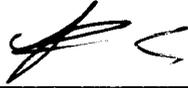
CERTIFICATION OF SERVICE BY MAIL

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 brief, first class postage prepaid, to opposing counsel and the defendant at the following address on this date:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,  
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DATED this 10<sup>th</sup> day of March, 2010.



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