

63441-1

63441-1

NO. 63441-1-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KATHY WALKER,

Appellant.

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

APPELLANT'S OPENING BRIEF

FILED
APPELLATE DIVISION #1
COURT OF APPEALS
STATE OF WASHINGTON
2010 JAN -5 PM 4:47

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A.	SUMMARY OF ARGUMENT	1
B.	ASSIGNMENTS OF ERROR.....	1
C.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.	1
D.	STATEMENT OF THE CASE.....	2
E.	ARGUMENT.....	3
	1. MS. WALKER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT	3
	a. The prosecutor misstated the law during closing argument, shifting the burden of proof, requiring a new trial.	4
	b. Prosecutorial misconduct is properly before this court.	6
	c. Prosecutors have special duties which limit their advocacy.	8
	d. The prosecutor's additional misconduct in closing argument denied Ms. Walker a fair trial.....	9
	e. Reversal is required.....	11
F.	CONCLUSION.....	11

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) 7

State v. Crediford, 130 Wn.2d 747, 927 P.2d P.2d 1129 (1996) 4

State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003) 7

State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968), cert. denied,
393 U.S. 1096 (1969) 8

State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1976) 8

State v. McHenry, 88 Wn.2d 211, 558 P.2d 188 (1977) 4

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984) 7, 8

State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), cert. denied,
498 U.S. 1046 (1991). 7

Washington Court of Appeals

State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993) 8

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996)..... 8, 10

State v. Sith, 71 Wn. App. 14, 856 P.2d 415 (1993) 9

United States Supreme Court

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147
L.Ed.2d 435 (2000) 4

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d
403 (2000) 4

<u>Estelle v. Williams</u> , 425 U.S. 501, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976)	4
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	4

United States Constitution

U. S. Const. amend. V	3
U.S. Const. amend. XIV.....	3

Washington Constitution

Article 1, § 3	3
Article 1, § 21	3
Article 1, § 22	3

Rules

RAP 2.5(a)(3).....	7
--------------------	---

A. SUMMARY OF ARGUMENT

Kathy Walker's right to receive a fair trial was violated where the prosecutor's improper closing argument denied Ms. Walker her right to due process of law by shifting the burden of proof, affecting the jury's decision.

B. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct by misstating the law in closing argument, thereby improperly shifting the burden of proof.

2. The prosecutor committed misconduct by presenting improper closing argument and arguing facts not in evidence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor, as a quasi-judicial officer, has an obligation to seek a verdict based upon reason, and the duty to see that the accused is protected from conviction except upon proof beyond a reasonable doubt. Here, the prosecutor repeatedly stated during closing argument that the fact that two dogs died created a situation of "res ipsa loquitur – the thing speaks for itself." Did the prosecutor's reference to this civil tort liability theory during closing argument misstate the law, lowering the burden of proof and depriving Ms. Walker of a fair trial? (Assignment of Error 1)

2. The State's duty to ensure a fair trial precludes the prosecutor from arguing facts not in evidence, or from employing improper argument during closing. In the instant case, the prosecutor's tone throughout the closing argument was improper, including: "where there's smoke, there's fire. Where there's deception, there is guilty knowledge." Did the prosecutor's misconduct during closing argument deprive Ms. Walker of her right to a fair trial? (Assignment of Error 2)

D. STATEMENT OF THE CASE

In late September 2007, Kathy Walker was a single mother living with her daughter, McKenzie, at 947 23rd Avenue, in Seattle. 3/2/09 RP 195; Ex. 12.¹ During an interview at the Seattle Animal Shelter, Ms. Walker explained that some transient women from her neighborhood had left two dogs with her, asking her to keep them in her yard. 1/2/09 RP 195; Ex. 12. When these women abandoned the dogs without providing sufficient food for their upkeep, Ms. Walker, overwhelmed with providing for herself and for her daughter, found she could not afford to properly care for the dogs. Id.

¹ The verbatim report of proceedings consists of four volumes of transcripts from February 25, 2009, through March 3, 2009. The proceedings will be referred to herein by the date of proceeding followed by the page number, e.g. "2/25/09 RP ___." Sentencing was held on April 10, 2009. References to the file will be referred to as "CP."

At trial, the prosecutor argued during his closing that Ms. Walker's behavior was "an abomination." 3/3/09 RP 51. The prosecutor stated that "where there's smoke, there's fire," and other similarly inflammatory rhetoric. 3/3/09 RP 21. The prosecutor also informed the jury that "there's an old saying in the law that comes from the Latin and the saying is, 'Res ipsa loquitur.' And you may have heard this. It literally means the thing speaks for itself." 3/3/09 RP 25. The prosecutor went on to describe the condition in which the dogs were found, and suggested to the jury that it was Ms. Walker's conduct that spoke for itself.

As a result, Ms. Walker was convicted of two counts of animal cruelty in the first degree. CP 28. She timely appeals. CP 64-65.

E. ARGUMENT.

1. MS. WALKER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. 5, 14; Wash. Const. art. 1 §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425

U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996).

The Fourteenth Amendment also “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The requirement that the government prove a criminal charge beyond a reasonable doubt – along with the right to a jury trial -- has consistently played an important role in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

a. The prosecutor misstated the law during closing argument, shifting the burden of proof, requiring a new trial. In his closing argument, the prosecutor managed to undermine the long-standing constitutional principles of reasonable doubt and the burden of proof – not once – but by twice referring to the common law tort liability theory of res ipsa loquitur. First, as the prosecutor was attempting to explain a

gap in his timeline to the jury during closing argument, the prosecutor abruptly changed his tone, and began:

[T]here's an old saying in the law that comes from the Latin and the saying is, 'Res ipsa loquitur.' And you may have heard this. It literally means the thing speaks for itself.

What we do know is that this black dog was starved to death just like the brown dog. We know the black dog was found next to the brown dog. Like the brown dog, the black dog was not free.

3/3/09 RP 25.

Later, the prosecutor returned to this improper theme, providing the jury with another impromptu lesson in tort law. Unable to explain to the jury the reason that Ms. Walker should be held responsible for the two deceased dogs found on her property when the animal shelter had received a phone call concerning only one, the prosecutor argued: "I submit to you when they called on September 30th, one of these dogs had died. And by the time Officer Adams got there, the second dog had died." 3/3/09 RP 26.

When defense counsel promptly objected to this argument as not supported by the evidence, the prosecutor repeated his misconduct, declaring: "Res ipsa loquitur. The thing speaks for itself." 3/3/09 RP 26.

The prosecutor's dramatic lowering of the burden of proof during his closing argument to something resembling strict liability must be soundly rejected as a clear violation of Ms. Walker's right to a fair trial and due process of law. State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930) (holding that a prosecutor is a quasi-judicial officer, whose duty it is to assure a defendant a fair and impartial trial, "in the character of fair play"). Washington also disfavors strict liability crimes, where the State is improperly relieved of its burden to prove an essential element of proof. See, e.g., State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000) (reversing conviction where the State was relieved of its burden to prove knowledge).

b. Prosecutorial misconduct is properly before this court. Defense counsel did not object directly to the above remark, because the record indicates that defense counsel was likely still on his feet following his objection to the "second dog" argument at the time the second "res ipsa loquitur" comment occurred. 3/3/09 RP 26. Generally, an objection to prosecutorial misconduct is waived by the failure to timely object and request a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046

(1991). However, the issue may be addressed for the first time on appeal when the misconduct was so “flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect.” Id. (citations omitted); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996).

“When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor’s comments affected the verdict.” State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (conviction reversed where prosecutor repeatedly called defendant a liar during closing argument).

Although the instances of misconduct quoted above were not objected to by defense counsel when made, the issues are nonetheless properly presented for the first time on appeal, since the “res ipsa loquitur” statements were so “flagrant and ill-intentioned” as to irrevocably prejudice the jury, lowering the burden of proof and impacting the verdict in this case – thus affecting Ms. Walker’s constitutional right to due process. RAP 2.5(a)(3). Because Ms. Walker’s conviction resulted from prejudicial prosecutorial misconduct, it must be reversed. See

also State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (finding manifest constitutional error and reversing conviction, despite failure of defense counsel to object at trial, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense in closing argument).

c. Prosecutors have special duties which limit their advocacy. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

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

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

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such

comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

d. The prosecutor’s additional misconduct in closing argument denied Ms. Walker a fair trial. The prosecutor also committed additional misconduct in closing argument, violating Ms. Walker’s right to due process of law.

First, the prosecutor argued facts not in evidence. As discussed above, although there was no evidence that animal control had been called concerning two dogs, the prosecutor argued that Ms. Walker should be held responsible for both deceased dogs found on her property, arguing: “I submit to you when they called on September 30th, one of these dogs had died. And by the time Officer Adams got there, the second dog had died.” 3/3/09 RP 26. There was no foundation for this argument in the record, and this properly preserved objection was overruled by the trial court. Id. This misconduct was

compounded by the fact that the prosecutor followed the comment immediately with one of his “res ipsa” comments. Id.

The prosecutor also used improper argument, stating: “where there’s smoke, there’s fire. Where there’s deception, there is guilty knowledge.” 3/3/09 RP 21. Later, the prosecutor argued that Ms. Walker’s actions constituted “an abomination.” 3/3/09 RP 51. Although these incidents of misconduct were promptly objected to by defense counsel, the objections were overruled by the trial court. 3/3/09 RP 21, 51.

As in Fleming, the prosecutor here repeatedly implied that because Ms. Walker was charged with an “abominable” offense, she was not entitled to the same constitutional protections as others. “The State must convict on the merits, and not by way of misstating the nature of reasonable doubt, misstating the role of the jury,... and improperly shifting the burden of proof to the defense.” 83 Wn. App. at 216. The prosecutor’s “where there’s smoke, there’s fire” argument, along with his repeated “res ipsa” comments, served to undermine fundamental principles of due process and to deprive Ms. Walker of a fair trial.

e. Reversal is required.

The cumulative effect of various instances of prosecutorial misconduct may violate a defendant's right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Due to the several instances of misconduct in the closing argument during Ms. Walker's trial, there is a substantial likelihood the cumulative effect affected the jury's verdict; therefore, this Court should reverse her conviction. Reed, 102 Wn.2d at 146-47.

F. CONCLUSION.

For the foregoing reasons, Ms. Walker respectfully requests this Court reverse her conviction and remand the case for further proceedings.

DATED this 5th day of January 2010.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorney for Appellant