

68829.4

68829.4

NO. 68829-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

LITTERTORY MCCALL,

Appellant.

REC'D
DEC 10 2012
King County Prosecutor
Appellate Unit

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

The Honorable Carol B. Schapira, Judge

8
DEC 10 2012
3:50

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	6
THE PROSECUTOR SHIFTED THE BURDEN OF PROOF BY ARGUING THAT, TO ACQUIT, THE JURY MUST FIND A “REASONABLE EXPLANATION” OF HOW MCCALL DID NOT COMMIT THE OFFENSE.	6
a. <u>The Prosecutor Repeatedly Undermined the State’s Burden and Shifted the Burden to the Defense to Come Up With a Reason to Acquit.</u>	7
b. <u>This Flagrant Misconduct Requires Reversal Regardless of Objection Below.</u>	9
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Anderson</u> 153 Wn. App. 417, 220 P.3d 1273 (2009).....	8
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007).....	6
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	9
<u>State v. Johnson</u> 158 Wn. App. 677, 243 P.3d 936, 940 (2010) <u>rev. denied</u> , 171 Wn.2d 1013 (2011)	7, 8, 9, 10, 11
<u>State v. Venegas</u> 155 Wn. App. 507, 228 P.3d 813 (2010) <u>rev. denied</u> , 170 Wn.2d 1003 (2010)	7, 9, 10
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191, 196 (2011).....	7, 9, 10, 11

A. ASSIGNMENT OF ERROR

Prosecutorial misconduct that shifted the burden of proof during closing argument denied appellant a fair trial.

Issue Pertaining to Assignment of Error

During closing argument, the prosecutor argued the jury must ask whether there was a “reasonable scenario or a reasonable explanation for how it might have happened that [appellant] didn’t commit the crime.” Did this argument flagrantly misstate the burden of proof beyond a reasonable doubt and unfairly shift the burden to the defense in violation of appellant’s due process rights?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Littertory McCall with one count of delivery of cocaine, one count of possession of cocaine with intent to deliver, one count of possession of marijuana with intent to deliver, and one count of bail jumping. CP 12-13. The jury acquitted McCall of possession of marijuana with intent to deliver and could not agree on a verdict on possession of cocaine with intent to deliver or bail jumping. CP 18-20. The jury found McCall guilty of delivery of cocaine, and the court imposed a residential drug offender sentencing alternative. CP 17, 71. Notice of appeal was timely filed. CP 81.

2. Substantive Facts

On April 1, 2012, McCall was downtown with friends, wearing his number 34 Bo Jackson jersey and shopping for presents for his daughter. RP 349, 396-97. A man he described as Mexican approached and tried to sell him some cocaine, but he declined. RP 351-52.

A bit later, McCall testified, another man (who turned out to be undercover Seattle Police Officer Chinn) approached him and his friends and repeatedly asked if they had “work,”¹ to the point where his friends felt harassed and began to get angry. RP 355-57. Trying to calm the situation down, McCall asked the man if he wanted “weed” because he knew where the man might be able to buy some. RP 357. When the man said no, he wanted “white,” McCall told him he did not have any and walked away. RP 357.

Then the man said he was looking for someone, and described the Mexican person McCall had seen earlier. RP 357. McCall said he had seen him, but did not know him. RP 357. McCall testified the man then shoved cash towards him and told him to give it to the Mexican because he owed him. RP 357. McCall testified he tried to give the money back, but the man walked away. RP 357.

¹ Chinn testified “work” was street slang for cocaine. RP 78.

Giving up, McCall pocketed the money, set down his backpack and walked a few feet away to talk to his friend Mississippi. RP 357-58. When he noticed some people appearing to touch his backpack, he turned his back to Mississippi and headed towards his backpack. RP 358. He noticed police riding up quickly on bicycles, but did not believe they were there for him. RP 358, 367.

Suddenly, he was tackled from behind and forced to the ground. RP 359. He testified the officers pulled everything out of his pockets and then suddenly came up with some white rocks that they must have planted on him. RP 362. He and Mississippi, who was wearing almost the same outfit, were both arrested. RP 363-64.

Chinn testified he was undercover downtown when he heard McCall mutter something about needing to make more money. RP 74-77. Chinn testified he made eye contact and asked McCall if he had any "work." RP 78. Chinn claimed McCall responded by asking if he wanted "weed." RP 78. Chinn said no, he wanted "white rock," meaning rock cocaine. RP 79.

According to Chinn, McCall asked how much he wanted. RP 79. Chinn said he wanted 60, meaning \$60 worth, and McCall said he had it. RP 80. After a short walk, Chinn claimed, McCall held up his right hand in a fist and said, "Here it is." RP 80-81. Chinn asked him if it was good, and McCall assured him it was. RP 81-82. Chinn claimed McCall then dropped

three white rocks into his hand. RP 82. Chinn looked at it and then gave McCall \$60 of pre-recorded buy money. RP 82.

Chinn then walked away and signaled the arrest team. RP 83. He did not stay to ensure the correct person was arrested and he could not recall what the signal was. RP 84, 107. At the police station later, Chinn identified a photograph of McCall. RP 83-84. He turned the suspected cocaine he claimed to have received from McCall over to the evidence officer. RP 86. He testified he was "100% certain" McCall sold it to him. RP 93. Raymond Kusumi, of the Washington State Patrol Crime Lab testified Exhibit 3, the substance allegedly obtained by Chinn in his interaction with McCall, was cocaine. RP 220-22.

Officer Lednicky testified he was undercover and "trailing" after Chinn that day. RP 132-33. He testified he saw Chinn buy drugs from a man in a black hat and a number 34 jersey. RP 134. He saw a brief conversation followed by a brief hand-to-hand exchange, but did not see what Chinn received. RP 136-37, 144. Nor could he hear what was said. RP 142. He testified he stayed in constant visual contact with the man until the arrest team arrived. RP 137. He identified McCall as the man involved in the transaction with Chinn and the man arrested a few minutes later. RP 138.

Officer Bailey received a radio signal to arrest a man described as a black male with braids and a number 34 jersey. RP 188. He arrested McCall and searched him. RP 188-91. He testified he found what he believed to be rock cocaine and three \$20 bills in McCall's pocket. RP 191. He testified the serial numbers of the bills he recovered matched those on the copy made of the buy money used by Officer Chinn. RP 198. He testified he was "100% certain" McCall is the man he arrested. RP 203.

Officer McAuley picked up and searched McCall's backpack. RP 159. In it, he found \$3,100 and some small bags of suspected marijuana. RP 162-65. He seized the money because he believed it was money involved in narcotics transactions. RP 175-76, 199. However, police later returned McCall's money after verifying that it was indeed merely his tax return. RP 175-76.

Seattle police conducted at least two or three other "buy-bust" operations downtown that afternoon. RP 94-96, 139. Officer Vaca corroborated McCall's testimony that another, similarly dressed black man was arrested around the same time and place. Vaca arrested another black male in a black hat on the east sidewalk of the 1500 block of Third Avenue that day. RP 329-30, 332-33. The person he arrested was interviewed and released. RP 337, 342.

McCall denied ever saying anything about needing to make some more money. RP 388. He denied giving Chinn anything. RP 390.

During closing argument, the prosecutor explained the reasonable doubt standard required a “reasonable scenario or a reasonable explanation for how it might have happened that he didn’t commit the crime.” RP 439. He argued the test required the jury to ask “Is there a reasonable probability that this -- that it didn’t happen.” RP 439.

In rebuttal, the prosecutor urged the jury to compare the reasonableness of the differing accounts of events. RP 462-63. He then argued, “Do you actually believe there’s reasonable probability that it didn’t happen?” and “if you have doubts, ask yourself, is that a reasonable doubt? Is it reasonable to think that that other scenario happened?” RP 464.

C. ARGUMENT

THE PROSECUTOR SHIFTED THE BURDEN OF PROOF BY ARGUING THAT, TO ACQUIT, THE JURY MUST FIND A “REASONABLE EXPLANATION” OF HOW MCCALL DID NOT COMMIT THE OFFENSE.

The presumption of innocence and the corresponding burden of proof beyond a reasonable doubt is the “bedrock upon which [our] criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). To mislead the jury regarding these fundamental principles constitutes great prejudice because it reduces the State’s burden and

undermines a defendant's due process rights. State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936, 940 (2010) rev. denied, 171 Wn.2d 1013 (2011) (citing Bennett, 161 Wn.2d at 315). McCall's conviction should be reversed because the prosecutor misstated the burden of proof beyond a reasonable doubt with an argument that is substantially the same as the "fill in the blank" argument that has been repeatedly condemned by this Court.

a. The Prosecutor Repeatedly Undermined the State's Burden and Shifted the Burden to the Defense to Come Up With a Reason to Acquit.

In closing, the prosecutor argued the jury should ask itself whether there was "a reasonable scenario or reasonable explanation for how it might have happened that he didn't commit the crime." RP 439. Then, on rebuttal, he argued the only real questions were, "Do you believe what the officers told you?" and "If you have doubts . . . [I]s it reasonable to think that that other scenario happened?" RP 464.

This requirement that the defense must somehow present a reasonable scenario for how the offense did not happen is no different from the "fill in the blank" argument this Court has specifically repudiated several times before. See State v. Walker, 164 Wn. App. 724, 731-32, 265 P.3d 191, 196 (2011); Johnson, 158 Wn. App. at 684-85; State v. Venegas, 155 Wn. App. 507, 523 n. 16, 525, 228 P.3d 813 (2010), rev. denied, 170 Wn.2d 1003 (2010). As in Walker, Johnson, and Venegas, the

prosecutor's comments shifted the burden of proof to the defense, misstated the import of reasonable doubt, and minimized the seriousness of the jury's inquiry.

In Johnson, the prosecutor argued, "In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is I believed his testimony that he just borrowed that . . . sweatshirt . . . and he didn't know that the cocaine was in there, and he didn't know what cocaine was.'" 158 Wn. App. at 682. The prosecutor continued, "To be able to find reason to doubt, you have to fill in the blank." Id.

The court held this so-called "fill in the blank" argument was unquestionably improper because it "subverted the presumption of innocence." Id. at 684 (discussing State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)). It did so by implying "that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him." Johnson, 158 Wn. App. at 684. The "fill in the blank" argument also "trivializes" the jury's role in assessing the State's case because it focuses "on the degree of certainty the jurors would have to have to be willing to act, rather than that which would cause them to hesitate to act." Id.

Like the arguments in Johnson, the prosecutor's argument here trivialized the degree of certainty the jury should have to convict by

focusing instead on the certainty they should have of an alternative explanation. The prosecutor's argument shifted the burden of proof because it strongly suggested the jury should convict unless it found a reason not to, unless it could come up with a "reasonable scenario or reasonable explanation for how it might have happened that he didn't commit the crime." RP 439. Although it was couched in slightly different terms, the prosecutor made essentially the same argument the court declared to be misconduct in Johnson, Venegas, and Walker. The argument here was equally improper.

b. This Flagrant Misconduct Requires Reversal Regardless of Objection Below.

A prosecutor is a quasi-judicial officer with an independent duty to ensure a fair trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). The right to a fair trial is violated when the prosecutor commits misconduct that is likely to affect the jury. Id. at 747. Even when there is no objection at the time, misconduct requires reversal when it is so flagrant and ill-intentioned that the resulting prejudice could not have been cured by instructing the jury. Id.

It is flagrant and ill-intentioned misconduct for a prosecutor to shift the burden of proof by telling the jury it must "fill in the blank" with a reason to find the defendant not guilty. Walker, 164 Wn. App. at 731-32; Johnson,

158 Wn. App. at 684-85; Venegas, 155 Wn. App. at 523 n. 16, 525. While a published decision condemning the argument is not essential to finding the misconduct flagrant, this argument has been repeatedly condemned in published decisions over the past two years. Id. Given the well-established law regarding the importance of the reasonable doubt standard and the impropriety of attempting to trivialize or shift the state's burden, this argument was flagrant, and ill intentioned.

Incurable prejudice is shown when the case hinges on credibility, and, therefore, "the prosecutor's improper arguments could easily serve as the deciding factor." Walker, 164 Wn. App. at 738. The court reversed in Johnson because with conflicting evidence and a flagrant misstatement of the reasonable doubt standard, it could not conclude the verdict was not affected. Johnson, 158 Wn. App. at 685-86. In Walker, the court reversed noting that that case, too, hinged on credibility. 164 Wn. App. at 738.

As the prosecutor acknowledged during closing argument, McCall's case also rested entirely on who the jury believed. RP 459. McCall admitted he was on Third Avenue that day, interacted with Chinn and was arrested. RP 349-59. But he strenuously denied having any cocaine on his person or selling it to Chinn. RP 362, 390. McCall's testimony was partially corroborated, because the cash he was carrying indeed turned out to be simply his tax return, just like he said. RP 175-76, 372. Chinn testified he

bought the cocaine from McCall, but no other officer or witness could corroborate that testimony. RP 137, 156-57, 188. It was his word against McCall's. As in Walker, the prosecutor's arguments could have served as the deciding factor. 164 Wn. App. at 738.

The Walker court also noted prejudice from the prosecutor's repetition of the improper arguments as a theme of closing argument. Id. The same is true here. The prosecutor ended his closing remarks by focusing on whether the jury could name a reason to find McCall was not guilty, a "reasonable scenario or a reasonable explanation for how it might have happened that he didn't commit the crime." RP 439. He continued to focus the jury on what it needed to find to acquit by arguing the jury should ask "Is there a reasonable probability that this -- that it didn't happen." RP 439. The theme continued in rebuttal, when the prosecutor argued, "Do you actually believe there's reasonable probability that it didn't happen?" and "if you have doubts, ask yourself, is that a reasonable doubt? Is it reasonable to think that that other scenario happened?" RP 464.

The prosecutor's argument that the jury must find a "reasonable scenario or a reasonable explanation for how it might have happened that he didn't commit the crime" was flagrant and ill-intentioned misconduct that could not be cured by instruction under Walker and Johnson. Walker, 164 Wn. App. at 738; Johnson, 158 Wn. App. at 685-86. The prosecutor's

misconduct undermined the burden of proof beyond a reasonable doubt and shifted the burden to the defense. In the context of a trial that hinged on credibility, that improper argument was likely to have been the deciding factor. This Court should reverse McCall's conviction because prosecutorial misconduct in closing argument denied him a fair trial.

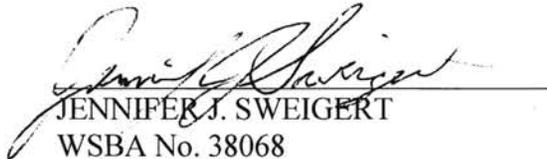
D. CONCLUSION

Because his trial was tainted by prosecutorial misconduct that undermined the burden of proof beyond a reasonable doubt, this Court should reverse McCall's conviction.

DATED this 17th day of December, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON

Respondent,

v.

LITTERTROY MCCALL,

Appellant.

)
)
)
)
)
)
)
)
)
)
)

COA NO. 68829-4-1

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 10TH DAY OF DECEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LITTERTROY MCCALL
2510 WESTERN AVENUE
APT. 406
SEATTLE, WA 98121

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF DECEMBER 2012.

x Patrick Mayovsky

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

NOTICE TO APPELLANT RE:
STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

Re: Case No. 68829-4, State v. Littertory McCall

Dear Appellant:

Your attorney has filed a proof of service indicating that you were mailed a copy of the opening brief in your appeal. If, after reviewing that brief, you believe there are additional grounds for review that were not included in your lawyer's brief, you may list those grounds in a Statement of Additional Grounds for Review. RAP 10.10.

Because the Statement of Additional Grounds for Review is not a brief, there is no required format and you may prepare it by hand. No citations to the record or legal authority are required, but you should sufficiently identify any alleged error so that the appellate court may consider your argument. A copy of the rule is enclosed for your reference.

Your Statement of Additional Grounds for Review must be sent to the Court within 30 days. It will be reviewed by the Court when your appeal is considered on the merits.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

DATE: 12/12/12

RULE OF APPELLAGE PROCEDURE 10.10
STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

(a) Statement Permitted. A defendant/appellant in a review of a criminal case may file a pro se statement of additional grounds for review to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel.

(b) Length and Legibility. The statement, which shall be limited to no more than 50 pages, may be submitted in handwriting so long as it is legible and can be reproduced by the clerk.

(c) Citations; Identification of Errors. Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. Except as required in cases in which counsel files a motion to withdraw as set forth in RAP 18.3(a)(2), the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review.

(d) Time for Filing. The statement of additional grounds for review should be filed within 30 days after service upon the defendant/appellant of the brief prepared by defendant/appellant's counsel and the mailing of a notice from the clerk of the appellate court advising the defendant/appellant of the substance of this rule. The clerk will advise all parties if the defendant/appellant files a statement of additional grounds for review.

(e) Report of Proceedings. If within 30 days after service of the brief prepared by defendant/appellant's counsel, defendant/appellant requests a copy of the verbatim report of proceedings from defendant/appellant's counsel, counsel should promptly serve a copy of the verbatim report of proceedings on the defendant/appellant and should file in the appellate court proof of such service. The pro se statement of additional grounds for review should then be filed within 30 days after service of the verbatim report of proceedings. The cost for producing and mailing the verbatim report of proceedings for an indigent defendant/appellant will be reimbursed to counsel from the Office of Public Defense in accordance with Title 15 of these rules.

(f) Additional Briefing. The appellate court may, in the exercise of its discretion, request additional briefing from counsel to address issues raised in the defendant/appellant's pro se statement.

 COPY

NO. 68829-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

LITTERTORY MCCALL,

Appellant.

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

The Honorable Carol B. Schapira, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

COURT OF APPEALS
DIVISION ONE
DEC 10 2012

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	6
THE PROSECUTOR SHIFTED THE BURDEN OF PROOF BY ARGUING THAT, TO ACQUIT, THE JURY MUST FIND A “REASONABLE EXPLANATION” OF HOW MCCALL DID NOT COMMIT THE OFFENSE.	6
a. <u>The Prosecutor Repeatedly Undermined the State’s Burden and Shifted the Burden to the Defense to Come Up With a Reason to Acquit.</u>	7
b. <u>This Flagrant Misconduct Requires Reversal Regardless of Objection Below.</u>	9
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Anderson</u> 153 Wn. App. 417, 220 P.3d 1273 (2009).....	8
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007).....	6
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	9
<u>State v. Johnson</u> 158 Wn. App. 677, 243 P.3d 936, 940 (2010) <u>rev. denied</u> , 171 Wn.2d 1013 (2011)	7, 8, 9, 10, 11
<u>State v. Venegas</u> 155 Wn. App. 507, 228 P.3d 813 (2010) <u>rev. denied</u> , 170 Wn.2d 1003 (2010)	7, 9, 10
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191, 196 (2011).....	7, 9, 10, 11

A. ASSIGNMENT OF ERROR

Prosecutorial misconduct that shifted the burden of proof during closing argument denied appellant a fair trial.

Issue Pertaining to Assignment of Error

During closing argument, the prosecutor argued the jury must ask whether there was a “reasonable scenario or a reasonable explanation for how it might have happened that [appellant] didn’t commit the crime.” Did this argument flagrantly misstate the burden of proof beyond a reasonable doubt and unfairly shift the burden to the defense in violation of appellant’s due process rights?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Littertory McCall with one count of delivery of cocaine, one count of possession of cocaine with intent to deliver, one count of possession of marijuana with intent to deliver, and one count of bail jumping. CP 12-13. The jury acquitted McCall of possession of marijuana with intent to deliver and could not agree on a verdict on possession of cocaine with intent to deliver or bail jumping. CP 18-20. The jury found McCall guilty of delivery of cocaine, and the court imposed a residential drug offender sentencing alternative. CP 17, 71. Notice of appeal was timely filed. CP 81.

2. Substantive Facts

On April 1, 2012, McCall was downtown with friends, wearing his number 34 Bo Jackson jersey and shopping for presents for his daughter. RP 349, 396-97. A man he described as Mexican approached and tried to sell him some cocaine, but he declined. RP 351-52.

A bit later, McCall testified, another man (who turned out to be undercover Seattle Police Officer Chinn) approached him and his friends and repeatedly asked if they had “work,”¹ to the point where his friends felt harassed and began to get angry. RP 355-57. Trying to calm the situation down, McCall asked the man if he wanted “weed” because he knew where the man might be able to buy some. RP 357. When the man said no, he wanted “white,” McCall told him he did not have any and walked away. RP 357.

Then the man said he was looking for someone, and described the Mexican person McCall had seen earlier. RP 357. McCall said he had seen him, but did not know him. RP 357. McCall testified the man then shoved cash towards him and told him to give it to the Mexican because he owed him. RP 357. McCall testified he tried to give the money back, but the man walked away. RP 357.

¹ Chinn testified “work” was street slang for cocaine. RP 78.

Giving up, McCall pocketed the money, set down his backpack and walked a few feet away to talk to his friend Mississippi. RP 357-58. When he noticed some people appearing to touch his backpack, he turned his back to Mississippi and headed towards his backpack. RP 358. He noticed police riding up quickly on bicycles, but did not believe they were there for him. RP 358, 367.

Suddenly, he was tackled from behind and forced to the ground. RP 359. He testified the officers pulled everything out of his pockets and then suddenly came up with some white rocks that they must have planted on him. RP 362. He and Mississippi, who was wearing almost the same outfit, were both arrested. RP 363-64.

Chinn testified he was undercover downtown when he heard McCall mutter something about needing to make more money. RP 74-77. Chinn testified he made eye contact and asked McCall if he had any "work." RP 78. Chinn claimed McCall responded by asking if he wanted "weed." RP 78. Chinn said no, he wanted "white rock," meaning rock cocaine. RP 79.

According to Chinn, McCall asked how much he wanted. RP 79. Chinn said he wanted 60, meaning \$60 worth, and McCall said he had it. RP 80. After a short walk, Chinn claimed, McCall held up his right hand in a fist and said, "Here it is." RP 80-81. Chinn asked him if it was good, and McCall assured him it was. RP 81-82. Chinn claimed McCall then dropped

three white rocks into his hand. RP 82. Chinn looked at it and then gave McCall \$60 of pre-recorded buy money. RP 82.

Chinn then walked away and signaled the arrest team. RP 83. He did not stay to ensure the correct person was arrested and he could not recall what the signal was. RP 84, 107. At the police station later, Chinn identified a photograph of McCall. RP 83-84. He turned the suspected cocaine he claimed to have received from McCall over to the evidence officer. RP 86. He testified he was "100% certain" McCall sold it to him. RP 93. Raymond Kusumi, of the Washington State Patrol Crime Lab testified Exhibit 3, the substance allegedly obtained by Chinn in his interaction with McCall, was cocaine. RP 220-22.

Officer Lednicky testified he was undercover and "trailing" after Chinn that day. RP 132-33. He testified he saw Chinn buy drugs from a man in a black hat and a number 34 jersey. RP 134. He saw a brief conversation followed by a brief hand-to-hand exchange, but did not see what Chinn received. RP 136-37, 144. Nor could he hear what was said. RP 142. He testified he stayed in constant visual contact with the man until the arrest team arrived. RP 137. He identified McCall as the man involved in the transaction with Chinn and the man arrested a few minutes later. RP 138.

Officer Bailey received a radio signal to arrest a man described as a black male with braids and a number 34 jersey. RP 188. He arrested McCall and searched him. RP 188-91. He testified he found what he believed to be rock cocaine and three \$20 bills in McCall's pocket. RP 191. He testified the serial numbers of the bills he recovered matched those on the copy made of the buy money used by Officer Chinn. RP 198. He testified he was "100% certain" McCall is the man he arrested. RP 203.

Officer McAuley picked up and searched McCall's backpack. RP 159. In it, he found \$3,100 and some small bags of suspected marijuana. RP 162-65. He seized the money because he believed it was money involved in narcotics transactions. RP 175-76, 199. However, police later returned McCall's money after verifying that it was indeed merely his tax return. RP 175-76.

Seattle police conducted at least two or three other "buy-bust" operations downtown that afternoon. RP 94-96, 139. Officer Vaca corroborated McCall's testimony that another, similarly dressed black man was arrested around the same time and place. Vaca arrested another black male in a black hat on the east sidewalk of the 1500 block of Third Avenue that day. RP 329-30, 332-33. The person he arrested was interviewed and released. RP 337, 342.

McCall denied ever saying anything about needing to make some more money. RP 388. He denied giving Chinn anything. RP 390.

During closing argument, the prosecutor explained the reasonable doubt standard required a “reasonable scenario or a reasonable explanation for how it might have happened that he didn’t commit the crime.” RP 439. He argued the test required the jury to ask “Is there a reasonable probability that this -- that it didn’t happen.” RP 439.

In rebuttal, the prosecutor urged the jury to compare the reasonableness of the differing accounts of events. RP 462-63. He then argued, “Do you actually believe there’s reasonable probability that it didn’t happen?” and “if you have doubts, ask yourself, is that a reasonable doubt? Is it reasonable to think that that other scenario happened?” RP 464.

C. ARGUMENT

THE PROSECUTOR SHIFTED THE BURDEN OF PROOF BY ARGUING THAT, TO ACQUIT, THE JURY MUST FIND A “REASONABLE EXPLANATION” OF HOW MCCALL DID NOT COMMIT THE OFFENSE.

The presumption of innocence and the corresponding burden of proof beyond a reasonable doubt is the “bedrock upon which [our] criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). To mislead the jury regarding these fundamental principles constitutes great prejudice because it reduces the State’s burden and

undermines a defendant's due process rights. State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936, 940 (2010) rev. denied, 171 Wn.2d 1013 (2011) (citing Bennett, 161 Wn.2d at 315). McCall's conviction should be reversed because the prosecutor misstated the burden of proof beyond a reasonable doubt with an argument that is substantially the same as the "fill in the blank" argument that has been repeatedly condemned by this Court.

a. The Prosecutor Repeatedly Undermined the State's Burden and Shifted the Burden to the Defense to Come Up With a Reason to Acquit.

In closing, the prosecutor argued the jury should ask itself whether there was "a reasonable scenario or reasonable explanation for how it might have happened that he didn't commit the crime." RP 439. Then, on rebuttal, he argued the only real questions were, "Do you believe what the officers told you?" and "If you have doubts . . . [I]s it reasonable to think that that other scenario happened?" RP 464.

This requirement that the defense must somehow present a reasonable scenario for how the offense did not happen is no different from the "fill in the blank" argument this Court has specifically repudiated several times before. See State v. Walker, 164 Wn. App. 724, 731-32, 265 P.3d 191, 196 (2011); Johnson, 158 Wn. App. at 684-85; State v. Venegas, 155 Wn. App. 507, 523 n. 16, 525, 228 P.3d 813 (2010), rev. denied, 170 Wn.2d 1003 (2010). As in Walker, Johnson, and Venegas, the

prosecutor's comments shifted the burden of proof to the defense, misstated the import of reasonable doubt, and minimized the seriousness of the jury's inquiry.

In Johnson, the prosecutor argued, "In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is I believed his testimony that he just borrowed that . . . sweatshirt . . . and he didn't know that the cocaine was in there, and he didn't know what cocaine was.'" 158 Wn. App. at 682. The prosecutor continued, "To be able to find reason to doubt, you have to fill in the blank." Id.

The court held this so-called "fill in the blank" argument was unquestionably improper because it "subverted the presumption of innocence." Id. at 684 (discussing State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)). It did so by implying "that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him." Johnson, 158 Wn. App. at 684. The "fill in the blank" argument also "trivializes" the jury's role in assessing the State's case because it focuses "on the degree of certainty the jurors would have to have to be willing to act, rather than that which would cause them to hesitate to act." Id.

Like the arguments in Johnson, the prosecutor's argument here trivialized the degree of certainty the jury should have to convict by

focusing instead on the certainty they should have of an alternative explanation. The prosecutor's argument shifted the burden of proof because it strongly suggested the jury should convict unless it found a reason not to, unless it could come up with a "reasonable scenario or reasonable explanation for how it might have happened that he didn't commit the crime." RP 439. Although it was couched in slightly different terms, the prosecutor made essentially the same argument the court declared to be misconduct in Johnson, Venegas, and Walker. The argument here was equally improper.

b. This Flagrant Misconduct Requires Reversal Regardless of Objection Below.

A prosecutor is a quasi-judicial officer with an independent duty to ensure a fair trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). The right to a fair trial is violated when the prosecutor commits misconduct that is likely to affect the jury. Id. at 747. Even when there is no objection at the time, misconduct requires reversal when it is so flagrant and ill-intentioned that the resulting prejudice could not have been cured by instructing the jury. Id.

It is flagrant and ill-intentioned misconduct for a prosecutor to shift the burden of proof by telling the jury it must "fill in the blank" with a reason to find the defendant not guilty. Walker, 164 Wn. App. at 731-32; Johnson,

158 Wn. App. at 684-85; Venegas, 155 Wn. App. at 523 n. 16, 525. While a published decision condemning the argument is not essential to finding the misconduct flagrant, this argument has been repeatedly condemned in published decisions over the past two years. Id. Given the well-established law regarding the importance of the reasonable doubt standard and the impropriety of attempting to trivialize or shift the state's burden, this argument was flagrant, and ill intentioned.

Incurable prejudice is shown when the case hinges on credibility, and, therefore, "the prosecutor's improper arguments could easily serve as the deciding factor." Walker, 164 Wn. App. at 738. The court reversed in Johnson because with conflicting evidence and a flagrant misstatement of the reasonable doubt standard, it could not conclude the verdict was not affected. Johnson, 158 Wn. App. at 685-86. In Walker, the court reversed noting that that case, too, hinged on credibility. 164 Wn. App. at 738.

As the prosecutor acknowledged during closing argument, McCall's case also rested entirely on who the jury believed. RP 459. McCall admitted he was on Third Avenue that day, interacted with Chinn and was arrested. RP 349-59. But he strenuously denied having any cocaine on his person or selling it to Chinn. RP 362, 390. McCall's testimony was partially corroborated, because the cash he was carrying indeed turned out to be simply his tax return, just like he said. RP 175-76, 372. Chinn testified he

bought the cocaine from McCall, but no other officer or witness could corroborate that testimony. RP 137, 156-57, 188. It was his word against McCall's. As in Walker, the prosecutor's arguments could have served as the deciding factor. 164 Wn. App. at 738.

The Walker court also noted prejudice from the prosecutor's repetition of the improper arguments as a theme of closing argument. Id. The same is true here. The prosecutor ended his closing remarks by focusing on whether the jury could name a reason to find McCall was not guilty, a "reasonable scenario or a reasonable explanation for how it might have happened that he didn't commit the crime." RP 439. He continued to focus the jury on what it needed to find to acquit by arguing the jury should ask "Is there a reasonable probability that this -- that it didn't happen." RP 439. The theme continued in rebuttal, when the prosecutor argued, "Do you actually believe there's reasonable probability that it didn't happen?" and "if you have doubts, ask yourself, is that a reasonable doubt? Is it reasonable to think that that other scenario happened?" RP 464.

The prosecutor's argument that the jury must find a "reasonable scenario or a reasonable explanation for how it might have happened that he didn't commit the crime" was flagrant and ill-intentioned misconduct that could not be cured by instruction under Walker and Johnson. Walker, 164 Wn. App. at 738; Johnson, 158 Wn. App. at 685-86. The prosecutor's

misconduct undermined the burden of proof beyond a reasonable doubt and shifted the burden to the defense. In the context of a trial that hinged on credibility, that improper argument was likely to have been the deciding factor. This Court should reverse McCall's conviction because prosecutorial misconduct in closing argument denied him a fair trial.

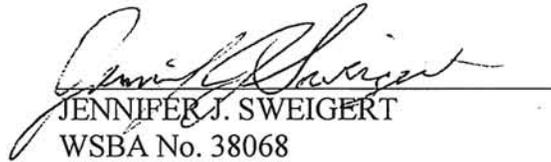
D. CONCLUSION

Because his trial was tainted by prosecutorial misconduct that undermined the burden of proof beyond a reasonable doubt, this Court should reverse McCall's conviction.

DATED this 10th day of December, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON

Respondent,

v.

LITTERTROY MCCALL,

Appellant.

)
)
)
)
)
)
)
)
)
)

COA NO. 68829-4-I

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 10TH DAY OF DECEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LITTERTROY MCCALL
2510 WESTERN AVENUE
APT. 406
SEATTLE, WA 98121

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF DECEMBER 2012.

x Patrick Mayovsky