

No. 36648-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sowanbe Collins,

Appellant.

Pierce County Superior Court

Cause No. 07-1-00089-7

The Honorable Judge Lisa Worswick

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (866) 499-7475

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ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Collins' constitutional right to confront the witnesses against him by admitting testimonial hearsay.
2. The trial court erred by admitting the 911 tape.
3. The trial judge erred by replaying the erroneously admitted 911 tape a second time during the jury's deliberations.
4. The trial judge erred by replaying the erroneously admitted 911 tape a third time during the jury's deliberations.
5. The prosecutor committed misconduct that was flagrant and ill-intentioned.
6. The prosecutor committed misconduct by telling the jury that acquittal required them to conclude the officers were lying.
7. The prosecutor committed misconduct by inserting his personal opinion about Mr. Collins' credibility.
8. The prosecutor committed misconduct by vouching for the credibility of the officers.
9. If the prosecutor's misconduct does not meet the flagrant and ill-intentioned standard, Mr. Collins was denied the effective assistance of counsel by his attorney's failure to object and request a curative instruction.
10. Mr. Collins' third-degree assault convictions violated due process because the prosecutor was not required to prove that Mr. Collins acted under circumstances not amounting to first or second degree assault.
11. The trial court's "to convict" instruction omitted an element of Assault in the Third Degree.
12. The trial court erred by giving Instruction No. 5, which reads as follows:

A person commits the crime of Assault in the Third Degree when he assaults a person who is a law enforcement officer performing his official duties at the time of the assault.

Instruction No. 5, Supp. CP

13. The trial court erred by giving Instruction No. 8, which reads as follows:

To convict the defendant of the crime of Assault in the Third Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 2nd day of January, 2007, the defendant assaulted Jeff Thiry;
- (2) That at the time of the assault Jeff Thiry was a law enforcement officer performing his official duties; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 8, Supp. CP.

14. The trial court erred by giving Instruction No. 9, which reads as follows:

To convict the defendant of the crime of Assault in the Third Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 2nd day of January, 2007, the defendant assaulted Daniel Grant;
- (2) That at the time of the assault Daniel Grant was a law enforcement officer performing his official duties; and
- (3) That the acts occurred in the State of Washington

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 9, Supp. CP.

15. The trial court's instructions as a whole allowed conviction without proof of all essential elements of Assault in the Third Degree.

16. Mr. Collins was denied his constitutional right to a jury trial because the jury did not determine whether or not he acted under circumstances not amounting to first or second-degree assault, an essential element of Assault in the Third Degree.

17. The statutory and judicial scheme criminalizing assault violates the separation of powers doctrine.

18. The trial court erred by instructing the jury with a definition of "assault" created and expanded by the judiciary.

19. The trial court erred by giving Instruction No. 6, which reads as follows:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

Instruction No. 6, Supp CP.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Sowanbe Collins was charged with two counts of Assault in the Third Degree and one count of Resisting Arrest. At trial, the court admitted a 911 recording of a witness describing the struggle between Mr. Collins and two police officers. The witness did not testify at trial.

During jury deliberations, the tape was replayed for the jury twice.

1. Did the trial court violate Mr. Collins' constitutional right to confront witnesses by admitting testimonial hearsay? Assignments of Error Nos. 1-4.

In closing arguments, the prosecuting attorney told the jury that an acquittal required disbelieving the officers, expressed his personal opinion that Mr. Collins was lying, and vouched for the officers' credibility. Defense counsel objected to one instance of misconduct.

2. Did the prosecuting attorney commit misconduct so flagrant and ill-intentioned that reversal is required? Assignments of Error Nos. 5-9.

3. If the prosecutor's misconduct does not meet the flagrant and ill-intentioned standard, was Mr. Collins denied the effective assistance of counsel by his attorney's failure to object and request curative instructions? Assignments of Error Nos. 5-9.

At trial, the court's instructions did not require proof that the two assaults were committed under circumstances not amounting to first or second-degree assault.

4. To obtain a conviction for Assault in the Third Degree, must the state prove that the assault occurred under circumstances not amounting to first or second-degree assault? Assignments of Error Nos. 10-16.

5. Did the trial court's instructions omit an essential element of Assault in the Third Degree? Assignments of Error Nos. 10-16.

6. Did Mr. Collins' third-degree assault convictions violate due process because the prosecutor was not required to prove that the assaults occurred under circumstances not amounting to first or second-degree assault? Assignments of Error Nos. 10-16.

7. Was Mr. Collins denied his constitutional right to a jury trial because the jury did not determine each element of Counts I and II beyond a reasonable doubt? Assignments of Error Nos. 10-16.

The Washington legislature has criminalized assault, but has not defined the core meaning of that crime. In the absence of a legislative definition, the judiciary has, over the course of more than a century,

defined and expanded the core meaning of assault without input from the legislature.

8. Does the legislature's failure to define "assault" violate the constitutional separation of powers? Assignments of Error Nos. 17-19.

9. Does the judicially created definition of "assault" violate the constitutional separation of powers? Assignments of Error Nos. 17-19.

10. Does the judicial expansion of the crime of assault without legislative input violate the constitutional separation of powers? Assignments of Error Nos. 17-19.

11. Does the separation of powers doctrine require the legislature to define crimes with something more than a bare circular reference to the crime itself? Assignments of Error Nos. 17-19.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sowanbe Collins was walking across the street in the Hilltop neighborhood of Pierce County when he was spotted by a police officer. Since Mr. Collins crossed where there was not a crosswalk, the officer contacted him. RP 62-63. Mr. Collins walked into a yard, and came back to the officer after he was requested to return. RP 63. The officer asked for Mr. Collins' identification, and for the identification of his companion. RP 66. A second officer arrived to provide assistance. RP 72.

Mr. Collins had an outstanding arrest warrant. RP 71. According to the officer, Mr. Collins pulled away while being handcuffed, assumed a "fighting stance", and was unaffected by pepper spray. RP 102-105. The officers described Mr. Collins as hitting and kicking them. Mr. Collins was eventually subdued by multiple officers and repeated taser hits. RP 105-108, 135-138. Mr. Collins was charged with Resisting Arrest and two counts of Assault in the Third Degree. CP 1-2.

During the incident, a woman named Ms. Mitts called 911 from a nearby house and described what she saw from her vantage point. Her call was recorded. At trial, the state sought to admit the tape of the 911 call as substantive evidence, referring to it as a non-testimonial present sense impression. RP 31-37. Mr. McBroom objected, arguing that the 911

recording contained testimonial hearsay and thus was inadmissible under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). RP 31-36. The trial judge admitted the tape, and it was played for the jury. RP 36-37, 142.

Mr. Collins testified, denying any intentional assault and characterizing the melee as an attack on him by the authorities. RP 135-197.

In its Instructions to the Jury, the court defined Assault in the Third Degree as follows:

A person commits the crime of Assault in the Third Degree when he assaults a person who is a law enforcement officer performing his official duties at the time of the assault.
Instruction No. 5, Supp. CP

To convict the defendant of the crime of Assault in the Third Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 2nd day of January, 2007, the defendant assaulted Jeff Thiry;
- (2) That at the time of the assault Jeff Thiry was a law enforcement officer performing his official duties; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
Instruction No. 8, Supp. CP.

To convict the defendant of the crime of Assault in the Third Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 2nd day of January, 2007, the defendant assaulted Daniel Grant;
- (2) That at the time of the assault Daniel Grant was a law enforcement officer performing his official duties; and
- (3) That the acts occurred in the State of Washington

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 9, Supp. CP.

During closing arguments, the prosecutor made the following arguments to the jury:

[T]his is the only time you're going to hear me say this, because I don't suggest you should believe a single word the defendant said from the witness stand, but if you believe every single thing he said, he's still guilty of resisting arrest.

...

That's what makes this case somewhat different than others and actually somewhat more important than others because the defendant decided to testify. What he told you was, "They assaulted me," not, "I was trying to kick out, you know, because I was frustrated and angry," or "I just was mad at myself for having a warrant, so I kind of swung my arm around, and I accidentally hit the officer." That's a different defense. That is, "They attacked me."

So you have to determine the credibility of the witnesses. You're the ones who determine who is telling you the truth. We would like to believe in our system that when someone raises their right hand and takes an oath to tell the truth that they do it, but that's not always the case. In this case it can't be the case because the two officers took the same oath the defendant did and said something completely different, so someone wasn't telling the truth under oath. It's for you to decide who that was.

...
Essentially what's going on here according to the defendant, you have two officers who assaulted him for no reason, attacked him and beat on him for no reason. Then they decided they would not only arrest him for the warrant but charge him with assaulting him [sic] and then they would come into court and risk their careers to testify that he assaulted them. Not only that, but when they testified, when they lied under oath, they minimize it. . . I mean, if these guys are going to trump up charges after beating the defendant, why don't they come in and say he punched me in the face, or punched me in the chest, or punched me repeatedly, or kicked me in the groin. These officers are going to make it bad for this guy if they're actually out to set him up. That's what I'm talking about when I talk about the ring of truth.
RP 216-220.

During jury deliberations, the jury asked to hear the 911 recording again. They did not indicate whether or not they had a specific question to be answered. The court played the tape, and then, at one juror's request, played the tape a second time. RP 243-244.

Mr. Collins was convicted of all three charges, sentenced, and he appealed. CP 4-13, 14.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. COLLINS' SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES BY ADMITTING TESTIMONIAL HEARSAY INTO EVIDENCE.

The Sixth Amendment to the U.S. Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. This

provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 at 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV. A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L. Ed. 2d 638 (1990). Alleged violations of the confrontation clause are reviewed *de novo*. *State v. Medina*, 112 Wn.App. 40 at 48, 48 P.3d 1005 (2002); *U.S. v. Mayfield*, 189 F.3d 895 at 899 (9th Cir., 1999).

The admission of testimonial hearsay violates the confrontation clause (unless the declarant is unavailable and the accused had a prior opportunity for cross-examination). *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A statement is testimonial if a reasonable person in the declarant's position would anticipate that the statement would be used in investigating or prosecuting a crime. *State v. Hendrickson*, 138 Wn.App. 827 at 833, 158 P.3d 1257 (2007); *see also United States v. Summers*, 414 F.3d 1287 at 1302 (10th Cir. 2005).

Where hearsay is offered in the form of a 911 call, “the call must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness.” *State v. Davis*, 154 Wn.2d 291 at 301; 111 P.3d 844 (2005) *affirmed sub nom Davis v.*

Washington, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). A 911 call may contain both testimonial and nontestimonial statements. *Davis*, at 304.

Where a statement is testimonial, the fact that it may fall within a hearsay exception is immaterial; the confrontation clause requires exclusion. *See Summers*, at 1303 (“Our conclusion that [the] statement constituted testimonial hearsay forecloses reliance on the present sense impression exception to the hearsay rule.”)

In this case, the caller was a witness to the struggle, and conveyed her perceptions of what was happening between the officers and Mr. Collins. Exhibit 1, Supp. CP. Because the caller was a disinterested third party (rather than a participant) and because she gave a factual description of the struggle, it would be unreasonable for her to think her statements would not be used in a subsequent prosecution. She was not a victim calling for help; instead, she was more like a witness relaying information.

The trial judge’s decision to admit the tape was based on her determination that the caller’s statements fit within the “present sense impression” exception to the rule against hearsay. RP 36-37. But the correct inquiry is whether or not a reasonable person in the caller’s shoes would expect the statements to be used in a criminal prosecution, regardless of whether or not the statement fits within a particular hearsay

exception. *Hendrickson*. The trial judge did not evaluate the call under the proper test. Her decision to admit the tape violated Mr. Collins' constitutional right to confront the witnesses against him: the tape contained testimonial hearsay, there was no showing that the witness was legally unavailable within the meaning of *Crawford*, and Mr. Collins had not had a prior opportunity for cross-examination. The error was compounded when the trial judge replayed the recording twice for the jury during deliberations.

Because the 911 recording contained testimonial hearsay, it should not have been admitted at trial. *Crawford, supra*. Applying the stringent constitutional test for harmless error, the convictions must be reversed unless the prosecution establishes beyond a reasonable doubt that the jury would have reached the same result without the error. *State v. Smith*, 148 Wn.2d 122 at 139, 59 P.3d 74 (2002). The prosecution cannot make this showing. Mr. Collins' convictions must be reversed and his case remanded to the superior court for a new trial.

II. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*,

127 Wn. App. 511 at 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor's improper actions prejudice the accused's right to a fair trial. *Boehning, supra, at 518*. Prejudice is established whenever there is a substantial likelihood that instances of misconduct affected the jury's verdict. *Boehning, supra, at 518*. Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *State v. Henderson*, 100 Wn.App. 794 at 804-805, 998 P.2d 907 (2000).

Under certain circumstances, prosecutorial misconduct may be reviewed even absent an objection from defense counsel. Misconduct to which no objection was made requires reversal (1) if it is so flagrant and ill-intentioned that a curative instruction would not have remedied the prejudice, or (2) if it creates a manifest error affecting a constitutional right, and the state is unable to prove that the error is harmless beyond a reasonable doubt. *Boehning, supra, at 518*; RAP 2.5 (a); *State v. Perez-Mejia*, 134 Wn. App. 907 at 920 n. 11, 143 P.3d 838 (2006); *See also State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988).

A. The prosecutor committed misconduct by telling the jury that acquittal required disbelieving the officers.

It is misconduct for a prosecutor to argue that an acquittal requires the jury to find that the state's witnesses are either lying or mistaken.

State v. Fleming, 83 Wn.App. 209 at 213, 921 P.2d 1076 (1996); *see also State v. Casteneda-Perez*, 61 Wn.App. 354, 362-63, 810 P.2d 74 (1990), *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991) (“[I]t is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying”); *State v. Wright*, 76 Wn.App. 811 at 826, 888 P.2d 1214, *review denied* 127 Wn.2d 1010, 902 P.2d 163 (1995).

Here, the prosecutor made numerous statements suggesting that acquittal required the jury to disbelieve the officers:

We would like to believe in our system that when someone raises their right hand and takes an oath to tell the truth that they do it, but that’s not always the case. In this case it can’t be the case because the two officers took the same oath the defendant did and said something completely different, so someone wasn’t telling the truth under oath. It’s for you to decide who that was.
RP 217-218

This mischaracterization of the burden of proof, as in *State v. Fleming, supra*, is misconduct requiring reversal.

B. The prosecutor committed misconduct by expressing a personal opinion about Mr. Collins’ credibility and by vouching for the officers’ credibility.

A prosecutor has a duty to act impartially and in the interest of justice. *State v. Rivers*, 96 Wn.App. 672 at 675, 981 P.2d 16 (1999).

Comments that encourage a jury to render a verdict on facts not in evidence are improper. *State v. Stith*, 71 Wn.App. 14, 856 P.2d 415 (1993). “A prosecutor may not suggest that evidence not presented at trial

provides additional grounds for finding a defendant guilty.” *State v. Russell*, 125 Wn.2d 24 at 87, 882 P.2d 747 (1994). *See also State v. Martin*, 69 Wn.App. 686, 849 P.2d 1289 (1993).

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wn.App. 909 at 921, 68 P.3d 1145 (2003); *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984); *U.S. v. Frederick*, 78 F.3d 1370 at 1378 (9th Cir. 1996), *citing United States v. Roberts*, 618 F.2d 530 at 533 (9th Cir.1980), *cert. denied*, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981). Misconduct occurs when it is clear that counsel is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Price*, 126 Wn.App. 617 at 653, 109 P.3d 27 (2005); *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990); *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986); *State v. Papadopoulos*, 34 Wn.App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983).

Here, the prosecutor expressed a clear personal opinion disparaging Mr. Collins’ credibility by making the following statement:

And this is the only time you’re going to hear me say this, because I don’t suggest you should believe a single word the defendant said from the witness stand, but if you believe every single thing he said, he’s still guilty of resisting arrest.

RP 216.

The prosecutor also vouched for the officers' credibility, suggesting that lying would put their careers at risk, that they should be trusted because it was a "hassle" for them to come to court, and that their testimony had a "ring of truth" to it. RP 220, 226.

Because Mr. Collins' credibility was critical to his defense, the prosecutor's misconduct was prejudicial, and the convictions must be reversed. *Price, supra*.

C. The prosecutor's comments were so flagrant and ill-intentioned that no curative instruction would have neutralized them

In the absence of an objection to misconduct, reversal is required if the misconduct is so flagrant and ill-intentioned that a curative instruction would not have corrected the error. *State v. Henderson*, 100 Wn.App. 794, 998 P.2d 907 (2000); *State v. Jones* 117 Wn.App. 89 at 90-91, 68 P.3d 1153 (2003). Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *State v. Henderson, supra*, at 804-805.

Here, defense counsel made one objection to the prosecutor's improper remarks; the remaining instances of misconduct violated well-established rules (of which the prosecutor should have been aware) and thus were flagrant and ill intentioned. RP 216-220, 226. The misconduct

prejudiced Mr. Collins, since his defense rested heavily on his own credibility.

By expressing his own personal opinion, by vouching for the officers, and by encouraging the jurors to convict unless they concluded the officers were lying, the prosecutor violated Mr. Collins' right to a fair trial. For all these reasons, the convictions must be reversed, and the case remanded for a new trial. *Reed, supra*.

D. In the alternative, Mr. Collins was denied the effective assistance of counsel when his attorney failed to object and request a curative instruction to negate the prosecutor's repeated instances of misconduct.

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel" Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), *citing Strickland, supra*.

To establish deficient performance, a defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

The failure to object to prosecutorial misconduct can constitute ineffective assistance of counsel under the Sixth Amendment. U.S. Const.

Amend. VI; *State v. Horton*, 116 Wn.App. 909, 68 P.3d 1145 (2003).

Here, there was no strategic reason for defense counsel's failure to object to the numerous instances of prosecutorial misconduct and to request a curative instruction to counter the effect of the misconduct.

In the absence of a curative instruction, the jury was likely swayed by the prosecutor's personal opinion of the evidence and by his improper characterization of the burden of proof. The jurors would have understandably been reluctant to vote "not guilty," knowing that an acquittal (under the prosecutor's logic) would be equivalent to a finding that the officers were lying. Accordingly, defense counsel's failure to object and request a curative instruction requires reversal of the conviction. *Horton, supra*.

III. THE TRIAL COURT'S INSTRUCTIONS FAILED TO REQUIRE PROOF THAT THE ASSAULT OCCURRED UNDER CIRCUMSTANCES NOT AMOUNTING TO FIRST OR SECOND-DEGREE ASSAULT.

The elements of an offense are determined with reference to the language of the statute. *See State v. Leyda*, 157 Wn.2d 335 at 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269 at 274, 110 P.3d 1179 (2005). The meaning of a statute is a question of law reviewed *de novo*. *State Owned Forests v. Sutherland*, 124 Wn.App. 400 at 409, 101 P.3d 880 (2004). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186 at 194, 102

P.3d 789, (2004). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Sutherland, supra*, at 409; *see also State v. Punsalan*, 156 Wn.2d 875, 133 P.3d 934 (2006) ("Plain language does not require construction;" *Punsalan*, at 879, *citations omitted*). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

In *State v. Azpitarte*, 140 Wn.2d 138 at 141, 995 P.2d 31 (2000), the Supreme Court examined *former* RCW 10.99.040(4)(b), which punished as a class C felony any assault in violation of a no contact order "that [did] not amount to assault in the first or second degree." *Former* RCW 10.99.040(4)(b). The Supreme Court gave effect to the plain language of the statute, and held that the prosecution was required to allege and prove an assault not amounting to assault in the first or second degree to obtain a conviction for Assault in Violation of a Protection Order:

[W]ithout a showing of ambiguity, we derive the statute's meaning from its language alone.... By finding that any assault can elevate a violation of a no-contact order to a felony, the Court of Appeals reads out of the statute the requirement that the assault "not amount to assault in the first or second degree." We will not delete language from a clear statute even if the Legislature intended something else but failed to express it adequately. *Azpitarte*, at 142.

RCW 9A.36.031(1)(g) defines Assault in the Third Degree as follows:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:...(g) Assaults a law enforcement officer...

Here, as in *Azpitarte*, the statute is clear and unambiguous: it exempts from the crime any acts that constitute a first or second-degree assault. RCW 9A.36.031(1). Accordingly, the absence of a first or second degree assault is an essential element of the crime, which must be alleged in the Information, included in the “to convict” instructions, and proved to a jury beyond a reasonable doubt. *Azpitarte, supra*.

In *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), the Supreme Court reinterpreted *Azpitarte*, restricting its application in certain limited circumstances. Applying convoluted logic, the Court in *Ward* held that the language at issue in *Azpitarte* (“does not amount to assault in the first or second degree”) was only an essential element of Assault in Violation of a No Contact Order if the defendant was also charged with Assault in the First or Second Degree.

Under *Ward*, if the defendant was not also charged with Assault in the First or Second Degree, the state was not required to allege or prove that the assault in violation of the no contact order did “not amount to assault in the first or second degree.” The legislature’s goal, according to

the Supreme Court, was to punish assault in violation of a no contact order as a felony, but not if the defendant was already charged with another felony assault:

Since the State did not charge Ward or Baker with first or second degree assault, the State was not required to allege that petitioners' conduct did not amount to assault in the first or second degree... The omitted language is not necessary to find felony violation of a no-contact order because the State did not additionally charge first or second degree assault. Accordingly, all elements of the crime were submitted to the jury for a finding beyond a reasonable doubt. *Ward, supra, at 813-814.*

It is difficult to imagine how *Ward's* reinterpretation of *Azpitarte* would apply to this case. As the Supreme Court made clear in *Ward*, its holding was based on the assumption that a defendant could be convicted of Assault in the First (or Second) Degree, or of Assault in Violation of a No-Contact Order, but not of both.

RCW 9A.36.031(1)(g) cannot be read in the same fashion. Nothing in the statute permits the state to charge a defendant with both a higher degree charge and a lower degree charge for the same conduct.¹ Thus *Ward's* limitation on *Azpitarte* does not affect RCW 9A.36.031, and has no bearing on Mr. Collins's case.

¹ The only exception is for alternative charges.

Furthermore, the statute in *Ward* was structured differently than RCW 9A.36.031. The substantive crime addressed in *Ward* was the “[w]illful violation of a court order issued under [certain provisions authorizing such orders].” *Former* RCW 10.99.040(4) (1997) and *former* RCW 10.99.050(2) (1997). Other provisions of each statute varied the penalty depending on the circumstances; these provisions did not create separate crimes, but instead enhanced the sentence for the base crime. *Ward, supra*, at 812-813. By contrast, there is no single statute defining a base crime of assault and setting varying penalties based on the circumstances of the crime. *See* RCW 9A.36 generally. Instead, the phrase “under circumstances not amounting to assault in the first or second degree” is contained in the very provision defining the substantive crime itself. RCW 9A.36.031. It is not set forth in a separate provision establishing penalties for a base crime.

This structure is identical to the structure used in RCW 9A.36.011, which requires that Assault in the First Degree be committed with intent to inflict great bodily harm:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm...
[commits one of the acts described in the statute.]
RCW 9A.36.011

Just as the intent to inflict great bodily harm is an element of Assault in the First Degree, the absence of a first or second degree assault is an element of Assault in the Third Degree. This court is not free to disregard the legislature's choice of language and read this element out of the statute. *Sutherland, supra*.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67; 941 P.2d 661 (1997). The failure to instruct on all the elements of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415 (2005). The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn.App. 88 at 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn.App. 40 at 45, 21 P.3d 1172 (2001). *See*

State v. Brown, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439, (1987).

A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). The jury has the right to regard the “to convict” instruction as a complete statement of the law. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997) . The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003).

The “to convict” instructions here did not require the jury to find that the assault was committed “under circumstances not amounting to assault in the first or second degree,” as required by RCW 9A.36.031(1). Instructions Nos. 8 and 9, Supp. CP. Because the instructions omitted an essential element, the assault convictions must be reversed and the case remanded for a new trial with proper instructions. *Jones, supra; Brown, supra*.

IV. RCW 9A.36.031 VIOLATES THE SEPARATION OF POWERS.²

- A. The legislature has failed to define the core meaning of the crime of assault.

The doctrine of separation of powers is derived from the constitutional distribution of the government's authority into three branches. *State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002). The state constitution divides political power into legislative authority (article II, section 1), executive power (article III, section 2), and judicial power (article IV, section 1). *Moreno*, at 505. Each branch of government wields only the power it is given. *Moreno*, at 505; *State v. DiLuzio*, 121 Wn.App. 822 at 825, 90 P.3d 1141 (2004).

The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the “fundamental functions” of another. *Moreno*, at 505. A violation of separation of powers occurs whenever “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, at 506, *citations omitted*. Judicial independence is threatened whenever the judicial branch is assigned or allowed tasks that

² The Supreme Court heard argument on this issue on October 23, 2007. *State v. Chavez*, 134 Wn. App 657, 142 P.3d 1110 (2006), *review granted at* 160 Wn.2d 1021 (2007).

are more properly accomplished by other branches. *Moreno at 506, citing Morrison v. Olson*, 487 U.S. 654 at 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

It is the function of the Legislature to define the elements of a crime. *State v. Wadsworth*, 139 Wn.2d 724 at 734, 991 P.2d 80 (2000). This is so “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community... This policy embodies ‘the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.’” *U.S. v. Bass*, 404 U.S. 336 at 348, 92 S.Ct. 515, 30 L. Ed. 2d 488 (1971), *citations omitted*.

The legislature has criminalized assault; however it has not defined the core meaning of that crime-- the verb “assault.” *See, generally*, RCW 9A.36.³ Instead, it has employed a circular definition (in effect, an “assault is an assault”), and allowed the judiciary to define the conduct

³ There are some statutes, not applicable here, which specifically define the elements of certain assault-like crimes, without using the word “assault” in the definition. *See, e.g.*, RCW 9A.36.011(1)(b): “A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: ...Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance.” *See also, e.g.*, RCW 9A.36.031 (1)(d): “A person is guilty of assault in the third degree if he or she... With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.” Because these subsections define the core conduct giving rise to criminal liability, they do not violate the separation of powers.

that is criminalized. The appellate courts have done so, enlarging the definition to criminalize more and more conduct over a period of many years. This violates the separation of powers. *Moreno, supra*.

B. The judiciary has enlarged the definition of “assault” to criminalize more and more conduct over the past 100 years.

At the turn of the last century, Washington’s criminal code included a definition of assault. In 1906 the Supreme Court noted that “An assault is defined by the Code to be an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution.” *State v. McFadden*, 42 Wash. 1 at 3, 84 P. 401 (1906). In 1909, the legislature adopted a new criminal code. The Supreme Court noted that the section defining assault (Rem. & Bal. Code SS 2746) “was repealed by the new criminal code, and so far as we are able to discover, the term assault is not defined in the latter act.” *Howell v. Winters*, 58 Wash. 436 at 438, 108 Pac. 1077 (1910). In the absence of a statutory definition, the Supreme Court imported a definition from the common law, quoting from a treatise on torts:

“An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is within its range; the

pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; 'A right to live in society without being put in fear of personal harm.'" Cooley, *Torts* (3d ed.), p. 278
Howell v. Winters, at 438.

This common law definition was broader in scope than the pre-1909 code section, because it required only an apparent (as opposed to an actual) ability to inflict bodily injury.

Howell v. Winters was a civil case. It was not until 1922 that the common law definition adopted by *Howell v. Winters* was approved by the Supreme Court for use in a criminal case. In *State v. Shaffer*, 120 Wash. 345 at 348-350, 207 P. 229 (1922), the Supreme Court, consistent with its holding in *Howell v. Winters*, expanded the criminal definition of assault to cover situations where the defendant lacked the actual ability to inflict bodily injury. The same definition was endorsed again in two cases from 1942. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 125 P.2d 681 (1942) was a civil action for malicious prosecution which turned in part on the criminal law's definition of assault; *State v. Rush*, 14 Wn.2d 138, 127 P.2d 411 (1942) was a criminal case described by the court as being "indistinguishable" from *Shaffer, supra*. *State v. Rush*, at 140.

Thirty years later, the core definition of “assault” expanded further, again without any input from the legislature. This expansion appeared in *dicta* in the Supreme Court’s opinion in *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972). In that case, the Court (in *dicta*) quoted from a federal case on assault:

There can in actuality be two concepts in criminal law of assault as noted in *United States v. Rizzo*, 409 F.2d 400, 403 (7th Cir. 1969), *cert. denied*, 396 U.S. 911, 90 S.Ct. 226, 24 L.Ed.2d 187 (1969).

One concept is that an assault is an attempt to commit a battery. There may be an attempt to commit a battery, and hence an assault, under circumstances where the intended victim is unaware of danger. Apprehension on the part of the victim is not an essential element of that type of assault. . . .

The second concept is that an assault is ‘committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.’ The concept is thought to have been assimilated into the criminal law from the law of torts. It is usually required that the apprehension of harm be a reasonable one. *State v. Frazier*, at 630-631.

Following *Frazier*, Washington’s judicially-created definition of assault was enlarged to include (1) actual battery (consisting of an unlawful touching with criminal intent, not necessarily injurious), (2) an attempt to commit a battery (whether or not injury was intended), and (3) placing another in apprehension of harm (whether or not injury was intended). *See, e.g., State v. Garcia*, 20 Wn.App. 401 at 403, 579 P.2d 1034 (1978); *State v. Strand*, 20 Wn.App. 768 at 780, 582 P.2d 874

(1978). These three definitions make up the core definition of the crime of assault today. *See* WPIC 35.50; *see also State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007).

Since the legislature removed the statutory definition of assault from the criminal code in 1909, the judiciary has stepped in to fill the vacuum and has undertaken to define the crime. This violates the separation of powers because it encroaches on a core legislative function.

Moreno, supra; Wadsworth, supra.

C. Two recent cases incorrectly limit the legislature's responsibility to define crimes.

Two recent decisions address the legislature's responsibility to define crimes. In *State v. David*, the Court of Appeals interpreted

Wadsworth narrowly:

When our Supreme Court ruled that the Legislature defines the elements of a crime, it meant that the Legislature must set out in the statute the essential elements of a crime... It has never been the law in Washington that courts cannot provide definitions for criminal elements that the Legislature has listed but has not specifically defined. Nor has this practice generally been viewed as a judicial encroachment on legislative powers. On the contrary, the judiciary would be acting contrary to the Legislature's legitimate, express expectations, as well as failing to fulfill judicial duties, if the courts did not employ long-standing common-law definitions to fill in legislative blanks in statutory crimes. The Legislature is presumed to know this long-standing common law. *State v. David*, 134 Wn.App. 470 at 481, 141 P.3d 646 (2006), *citations and footnotes omitted.*

In *State v. Chavez*, 134 Wn.App. 657, 142 P.3d 1110 (2006),
review granted at 160 Wn.2d 1021 (2007), the court expanded on *David*.
In a part-published opinion, the court drew an analogy between the assault
statute and those statutes defining the crimes of bail jumping, protection
order violations, and criminal contempt:

Although the legislature's function is to define the elements
of a crime, the "legislature has an established practice of defining
prohibited acts in general terms, leaving to the judicial and
executive branches the task of establishing specifics." *Wadsworth*,
139 Wn.2d at 743. For example, the bail-jumping statute
criminalizes the failure to appear before a court, RCW 9A.76.170,
but the courts determine the dates on which the defendant must
appear. *Wadsworth*, 139 Wn.2d at 736-37. In protection-order
legislation, the legislature specifies when the orders may be issued
and the criminal intent necessary for a violation, but the courts
determine the specific prohibitions. *Wadsworth*, 139 Wn.2d at 737.
The legislature has broadly defined the elements of criminal
contempt as intentional disobedience to a judgment, decree, order,
or process of the court, but the courts declare the specific acts of
disobedience. *Wadsworth*, 139 Wn.2d at 737. The legislature's
history of delegating to the judiciary how statutes will be
specifically applied demonstrates that the practice does not offend
the separation of powers doctrine...
Chavez, at 667.

In each of these situations-- bail jumping, protection orders, and
contempt-- the legislature has defined the general crime, and the
remaining terms are case-specific. For example, a bail-jumping defendant
is charged with failing to appear on a specific court-ordered date
applicable to her or his case only. A protection order violation is proved
with reference to a specific court order that applies only to the defendant

charged. A contempt charge rests on a specific “judgment, decree, order, or process of the court,” applicable to the defendant.

Bail jumping, protection order violations, and contempt of court are qualitatively different from the assault statutes, and Division II’s analogy to these crimes is inappropriate. The case-specific facts in these crimes stem from judicial action, but otherwise are no different from other (nonjudicial) facts such as the posted speed limit in a reckless driving case, or the ownership of a building in a burglary case. There are no core terms undefined by the legislature in any of these statutes.

The *Chavez* court also found the statute constitutional because the legislature “has instructed that the common law must supplement all penal statutes.” *Chavez*, at 667, *citing* RCW 9A.04.060. While this is true, it does not absolve the legislature of performing its essential function in defining the core meaning of a crime. Nor does the legislature’s acquiescence render an unconstitutional division of labor constitutional, as the court suggested. *Chavez*, at 667. The legislature and the judiciary may cooperate to define assault; however, their cooperation must comply with the constitution.

David and *Chavez* should be reconsidered. The two cases improperly limit the legislature’s responsibility, allow the judiciary to determine what conduct constitutes the core of a crime, and give the

appellate courts the power to criminalize more and more conduct, as has occurred with the crime of assault over the past century.

D. This court should adopt a rule requiring the legislature to adequately define the conduct that constitutes a crime.

Under *David* and *Chavez*, the legislature need only set forth the elements of the crime without any further guidance. *David, supra, at 481.*

In many cases, this will adequately define the conduct constituting a crime. In fact, an example of such a crime is found in RCW 9A.36.031:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: ... (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering...
RCW 9A.36.031.

Because this subsection adequately defines the core conduct giving rise to criminal liability, they do not violate the separation of powers. By contrast, RCW 9A.36.031(1)(g), the section under which Mr. Collins was charged, uses a circular definition of assault: a person is guilty of Assault in the Third Degree if he “[a]ssaults a law enforcement officer.” RCW 9A.36.031(1)(g). The circularity is even more stark in RCW 9A.36.041: a person is guilty of assault in the fourth degree if “he or she assaults another.”

The problem with such circular formulations is that the core of the crime remains undefined, and the judiciary remains free to expand the

crime (as it did in the case of assault.) Indeed, without legislative action, appellate courts could continue to expand the definition of assault to cover more behaviors not currently criminal-- hostile and insulting gestures, for example. Or, again without legislative action, appellate courts could restrict the definition of assault, criminalizing only that conduct that was considered assaultive at the turn of the last century.

This court should adopt a rule that requires a crime to be defined with something more than a bare circular reference to the crime itself. For example, the problems with RCW 9A.36 could be ameliorated with a statutory definition of the term "assault." The legislature has done just that in the theft statute. Like the assault statutes, the statutes criminalizing theft (RCW 9A.56.030 *et seq.*) declare that a person is guilty of theft if he or she commits theft. *See, e.g.*, RCW 9A.56.030, .040, .050. Unlike the assault statutes, however, the legislature has defined the term "theft." *See* RCW 9A.56.020. In the context of the theft statutes, this definition solves the circularity problem and complies with the constitutional separation of powers.

If this court were to adopt a rule requiring offenses to be clearly defined with something more than a circular definition, the legislature could define assault however it chose. By adopting a noncircular

definition, the legislature would avoid the separation of powers problem posed by the current statutory scheme.

E. Counts I and II must be reversed and the charges dismissed.

The statutory scheme criminalizing assault violates the constitutional separation of powers. Because Mr. Collins was convicted under an unconstitutional statute, his assault convictions must be reversed and the charges dismissed with prejudice.

CONCLUSION

The 911 tape, admitted over Mr. Collins' objection, contained a non-testifying witness' description of the struggle between Mr. Collins and the two officers. Mr. Collins never had the opportunity to interview that witness, much less test her statements through cross-examination. The trial court's decision admitting this testimonial hearsay violated Mr. Collins' constitutional right to confront witnesses, and requires reversal of his convictions.

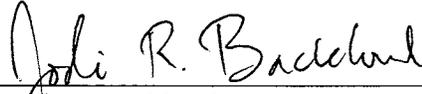
In addition, the prosecutor committed misconduct that was flagrant and ill-intentioned by misrepresenting the burden of proof to the jury, by expressing his personal opinion about Mr. Collins' credibility, and by vouching for the officers' credibility. This misconduct was so extreme that it requires reversal, especially in light of defense counsel's overruled objection. If the issue is not preserved for review, then Mr. Collins was denied the effective assistance of counsel by his attorney's failure to raise additional objections and request curative instructions.

The trial court's instructions to the jury omitted an essential element of Assault in the Third Degree. Because the statute clearly requires proof that the assault did not amount to assault in the first or second degree, the "to convict" instructions must also include this requirement, and the failure to include this element requires reversal.

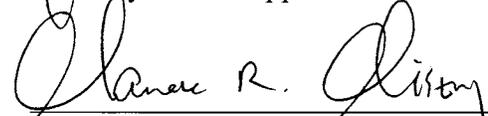
Finally, the legislature's failure to provide a definition of the core meaning of the crime of assault violates the separation of powers. The judicial branch should not be required to define crimes, since that is a purely legislative function. Mr. Collins' assault convictions are based on an unconstitutional statute. Counts I and II must be vacated and the charges dismissed with prejudice.

Respectfully submitted on February 27, 2008.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant *(amp)*



Manek R. Mistry, No. 22922
Attorney for the Appellant

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Sowanbe Collins, DOC #884694
Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

and to:

Office of the Prosecuting Attorney
930 Tacoma Ave. South, Room 946
Tacoma, WA 98402-2171

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 27, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 27, 2008.

Janeke R. Olison # 22922
~~Jodi R. Backlund, No. 22917~~
Attorney for the Appellant