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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON  
BY Chm  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

SOWANBE COLLINS, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Lisa Worswick

No. 07-1-00089-7

**BRIEF OF RESPONDENT**

GERALD A. HORNE  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to demonstrate that his confrontation rights were violated by the admission of a 911 tape that contained present sense impressions of the caller who was seeking assistance in an emergent situation when, under *Davis v. Washington*, such a tape is non-testimonial?
2. Has defendant failed to demonstrate that the prosecutor's arguments were improper, much less that they were so flagrant and ill- intentioned that an instruction could not have eliminated any prejudice?
3. Should this court apply its own controlling authority and reject defendant's argument that the absence of an assault in the first or second degree is an essential element of assault in the third degree?
4. Should this court apply controlling authority and reject defendant's argument that the use of the common law definitions of assault in the absence of a statutory definition violates the separation of powers doctrine?

B. STATEMENT OF THE CASE.

1. Procedure

On January 4, 2007, the Pierce County Prosecutor's Office filed an information charging appellant, SOWANBE COLLINS ("defendant"), with two counts of assault in the third degree and one count of resisting arrest in Piece County Cause No. 07-1-00089-7. CP 1-2, 3. The alleged victims of the assaults were both police officers. *Id.*

The matter was assigned to the Honorable Lisa Worswick for trial. RP 1-3. After hearing the evidence the jury found defendant guilty as charged. RP 245-248.

At the sentencing hearing on August 10, 2007, the court found defendant had an offender score of 5 and imposed mid-range sentences of 19 months on each of the third degree assaults and a three month sentence on the resisting arrest, all to be served concurrently. CP 4-13; RP 256-262. The court imposed 9-18 months of community custody, \$1,200 in legal financial obligations and gave credit for 220 days served. *Id.*

Defendant filed a timely notice of appeal from entry of this judgment. CP 14.

2. Facts

On January 2, 2007, Officer Jeff Thiry of the Tacoma Police Department contacted the defendant and his companion with regards to a jaywalking violation. RP 54, 62-66. After obtaining defendant's name

and verifying his identity, Officer Thiry discovered that there was an outstanding warrant for the defendant's arrest. RP 66-67, 70-71. By this time a backup officer, Officer Grant, had arrived on the scene. RP 72-73. Officer Thiry informed defendant that he was going to be arrested on an outstanding warrant. RP 74. Initially, defendant complied with Officer Thiry's request that he place his hands behind his back and interlace his fingers. RP 74. But when Officer Thiry tried to place the handcuffs on defendant, he pulled his hands away and turned to confront the officer, taking a fighting stance with arms raised and fists clenched. RP 102-103. Officer Grant used his pepper spray on the defendant. RP 102-103. The pepper spray did not have any effect on the defendant although some of it did get into Officer Thiry's eyes, causing them to sting. RP 104. Both officers were using verbal commands telling the defendant to stop resisting and reiterating that he was under arrest. RP 105. Defendant did not comply with these verbal commands. RP 105. Defendant began to take swings at Officer Thiry, who got out his taser. RP 105-107. Officer Thiry testified that many people will stop resisting when they see the taser, but the sight of the taser had no effect on the defendant. RP 107. As defendant continued to take swings and kick at the two officers, defendant and Officer Thiry fell to the ground. RP 107-108. Officer Thiry used the taser on defendant placing the taser on defendant's lower back or buttocks region. RP 107. Eventually, the officers were able to wrestle defendant to

the ground and take him into custody. RP 108-109. Other officers began to arrive at the scene. RP 108, 113.

Officer Grant of the Tacoma Police Department testified that while on duty on January 2, 2007, around 11:06 p.m., he responded to a call to provided assistance to Officer Thiry on South "J" Street in Tacoma. RP 127-130. When he arrived at the scene he saw Officer Thiry standing with two men on the sidewalk. RP 130-131. Officer Grant recognized one of the men as Raymone Horace; at trial he identified defendant as being the other man at the scene. RP 131. He learned from Officer Thiry that defendant was going to be arrested. RP 132. Officer Grant testified that Mr. Horace contacted him and that his attention was focused on Mr. Horace; Officer Thiry and defendant were behind him. RP 131-132. After a few moments, Officer Grant turned to look in their direction; he saw the defendant pulling his arms out of the cuffing position and turning to confront Officer Thiry. RP 133. Officer Grant testified that based on defendant's lack of compliance and Mr. Horace's hostility that he thought that "things were going downhill pretty quick." RP 133. He got out his pepper spray and aimed a blast at defendant's face. RP 133-134. He could tell that some of the pepper spray had hit Officer Thiry from his reaction. RP 134. He testified that the pepper spray appeared to have only a slight effect on the defendant. RP 134. Officer Grant testified that he then joined Officer Thiry in trying to get the defendant's hands behind his back. RP 135.

A struggle ensued for several minutes. RP 135-136. Defendant aimed kicks at the officers, but Officer Grant managed to avoid them. RP 135. He did not see the defendant take any swings at him with his fists. RP 136. Officer Grant could not testify as to what, if anything, was directed at Officer Thiry as he was focused on his own situation. RP 136. During the struggle the officers and defendant went to the ground on more than one occasion. RP 136. Officer Grant used the pepper spray again. RP 136. Officer Grant indicated that he struck defendant on the side of the face at one point during this struggle. RP 139. During this struggle, Officer Thiry was warning the defendant that he would use his taser if defendant did not stop his resistance. RP 137. Officer Grant also shouted commands to defendant to stop his resistance. RP 138. Officer Grant testified that when Officer Thiry ultimately used the taser, it did not stop the defendant's resistance. RP 137. When the defendant was finally subdued, Officer Grant testified that he was worn out from the struggle. He described the several minutes as being "intense." RP 137.

Officer Grant testified that prior to the struggle he noticed a male and female on the porch at 2134 S. "J" Street and that after the struggle was over, a dozen or more people had gathered in the area. RP 138, 140.

A tape of a 911 call made with regard to these events was admitted into evidence. RP 141-142. The tape contained a call, received at 11:12 p.m., from a woman at 2134 S. "J" Street, who reported that she was

watching two officers trying to arrest a guy and that he was resisting and that there was a friend nearby. Exhibit 1. She indicated they [the officers] were trying to get him on the ground and that it was “not working” and she thought that they [the officers] might need some help. Exhibit 1. She indicated that the guy was on the ground then indicated that he was trying to run. *Id.* She reemphasized “You guys might want to get somebody out here” then immediately indicated that another officer had arrived to help. The caller indicated that there was another guy there and “he’s trying to be really defiant right now.” *Id.*

The defendant testified on his own behalf. RP 146. Defendant testified that on January 2, 2007, he was on his way to his grandmother’s house, when he was stopped by an officer after jaywalking on 21<sup>st</sup> and “J” Streets. RP 146-147. He indicated that after he gave the officer his name and date of birth and that the officer went to his vehicle; the officer came back and told him that he was under arrest and to put his hands behind his back. RP 147. Defendant testified that he complied with this request but that another officer arrived on the scene and sprayed him with pepper spray. RP 148. Defendant testified that his eyes were burning and that he tried to wipe them, but he did not get the chance because he was slammed into a fence, slammed to the ground, and then slammed into a car. RP 148-149. He testified that both officers were doing this to him. RP 149.

Defendant recalled being hit by Officer Grant and being tased. He testified that he locked up when he was tased, and then, after the shock passed through, that he started shaking. RP 151. Defendant testified that a large crowd gathered around the struggle and that the crowd was making a lot of noise yelling back and forth at the police. RP 151-152. Defendant testified that after he was in handcuffs and being treated by medics for the pepper spray, the officers were giving each other high fives. RP 152-153. Defendant testified that he received a black eye from the struggle. RP 153. Defendant allowed that it was possible that he was waving his arms and feet during the struggle as a result of being tased. RP 154, 176-177. Defendant denied that he ever tried to intentionally kick or hit the officers. RP 154, 155. Defendant testified that he was unaware that he kicked an officer. RP 176. He denied ever trying to grab at their clothing or duty belts. RP 154. He testified that he does not remember much about the struggle except that he was in a lot of pain. RP 154-155.

On cross examination, defendant testified that he did not know that he had a warrant out for his arrest and stated that the officer never told him why he was being arrested. RP 157. Defendant reiterated that he was complying with the officer's commands to put his hands behind his back when the other officer used the pepper spray on him. RP 157-160. Defendant denied that he ever clenched his fists. RP 160. He

acknowledged that he might have accidentally pulled his hands away from the first officer, but not intentionally. RP 161-162.

Defendant testified that the crowd that gathered was unruly; at one point the aid car moved down the street to get away from the crowd. RP 171-173.

Defendant also called a private investigator who used to be a Pierce County deputy sheriff to testify regarding the effects of pepper spray on the body and the most effective method of using it. RP 180-197.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S CONFRONTATION RIGHTS BY ADMITTING A 911 TAPE THAT CONTAINED A CALL FOR ASSISTANCE FOR TWO OFFICERS WHO WERE STRUGGLING WITH AN UNCOOPERATIVE ARRESTEE BECAUSE UNDER *DAVIS V. WASHINGTON* SUCH A TAPE IS NON-TESTIMONIAL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421.

The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). For example, in *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993), the court held that Hettich could not raise a *Frye* objection on appeal because he did not make a *Frye* objection at trial.

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that an out-of-court testimonial statement may not be admitted against a criminal defendant unless the declarant testifies at trial or is unavailable, and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 124 S. Ct. at 1374. The decision in *Crawford* was restricted to the use of testimonial hearsay, but “left for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Crawford*, 124 S. Ct. at 1374. The Court, however, gave guidance on the issue by noting various formulations of the “core class” of testimonial statements at which the Confrontation Clause was directed. These include (1) “ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would

reasonably expect to be used prosecutorially;" (2) "extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 124 S. Ct. at 1364.

Recently, in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and its consolidated case, *Hammon v. Indiana*, the Supreme Court provided further guidance with regard to the parameters of statements deemed "testimonial." First, in *Davis*, the Court held that a complainant's 911 telephone call was nontestimonial and, therefore, not subject to the Confrontation Clause of the Sixth Amendment. The court focused on several factors that made the substance of the 911 call of a different character than the testimonial statements at issue in *Crawford*. First, the 911 caller in *Davis* "was speaking about events as they were actually happening, rather than 'describ[ing] past events.'" *Davis*, 547 U.S. at 827, citing, *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)(plurality opinion). The call in *Davis* was "a call for help against a bona fide physical threat" and a request for assistance in resolving a present emergency rather than a relation of past events, hours after the emergency was resolved. *Id.* The questions asked by the 911 operator in *Davis* to establish the identity of the assailant was to assist the officers dispatched to the scene so they

might know, upon arrival “whether they were encountering a violent felon.” *Id.* Lastly, there was a marked “difference in the level of formality between the two interviews.” *Id.* Whereas, Crawford was at the station house responding calmly to a series of questions with both a note taker and tape recorder documenting his responses, the 911 caller in *Davis* involved “frantic answers ...over the phone, in an environment that was not tranquil, or even ... safe. *Id.* In upholding the admissibility of the 911 call, the Court stated:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Davis*, 547 U.S. at 822. The Court reached a different conclusion in the companion case, which also stemmed from a domestic dispute. At issue was Amy Hammon’s statements to investigating police officers at her home after the police responded to a reported domestic disturbance. *Id.* at 819-821. The Court found the characterization of these statements was “much easier” to resolve because they “were not much different” from the statements in *Crawford*. *Id.* at 829. The interrogation arose from “an investigation into possibly criminal past conduct,” “[t]here was no emergency in progress;” Hammon told the officers when they arrived that

“things were fine;” when an officer eventually questioned Hammon a second time and elicited the challenged statements he was not seeking to determine “what is happening,” but rather “what happened.” *Id.* at 830.

In addition to providing further guidance on what constitutes a testimonial statement, the Court explained that it must decide whether the Confrontation Clause applies only to testimonial hearsay. 547 U.S. 823-824. As noted above, this issue was raised but left undecided by the Court in *Crawford*. In *Davis*, the Court clarified that nontestimonial hearsay does not implicate the confrontation clause at all. Thus, any challenge to the admission of hearsay on the basis of the right to confront must assess whether the hearsay at issue is testimonial. *Id.* at 824-825.

In this case, defendant claims that his right of confrontation was abridged by the admission of “testimonial hearsay” in the form of a 911 tape. In the trial court, defendant stipulated to the foundation and authenticity of the tape, but at least in a pretrial hearing, objected to the admission of the tape as violating *Crawford*. RP 4, 25, 141-142. The tape recorded a call from woman, who was reporting that two officers were trying to arrest a man who was resisting them and who indicated that the officers needed some back up assistance; this caller could not be located for trial and did not testify. Exhibit 1; RP 25, 31. After an initial discussion, the court tentatively ruled, subject to the submission of any additional authority, that the tape could be played for the jury but that it would have to be redacted to remove the 911 dispatcher’s reference to the

“bad guy” and her commentary that “this could be a dangerous situation.” RP 36-37. The court indicated that the call was a present sense impression and referred to a recent Supreme Court case that involved two 911 tapes where one was admitted and one was excluded. RP 32-33. The court’s description is consistent with *Davis*, although it is not referenced by name.

At trial the redacted tape was admitted and played for the jury after the court read a stipulation regarding its foundation and authenticity. RP 141-142. When the State offered Exhibit 1 for admission, defense counsel indicated that there was “no objection.” RP 142. On appeal, defendant does not challenge the court’s admission of the hearsay as a “present sense impression” under ER 803(a)(1), but does argue that the tape was testimonial.

Under the principles set forth in *Davis v. Washington*, the trial court did not abuse its discretion in finding that the tape was a call for assistance in an emergent situation; this made it analogous to the non-testimonial 911 tape found admissible in *Davis* and distinguishable from the testimonial tape excluded in the companion case of *Hammon*. The 911 caller in this case was: 1) describing events as they happened; 2) calling to get aid and assistance for the two officers who were in a dangerous situation; and, 3) participating in an informal interrogation process - there were few questions asked of the caller as she provided a verbal description of the rapidly changing situation to the 911 operator. Exhibit 1. The tape in this case is properly characterized as non-

testimonial. Defendant's confrontations rights were not violated by its admission at trial as non-testimonial hearsay does not implicate the confrontation clause at all. Defendant has failed to demonstrate error in the ruling below.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING IMPROPER ARGUMENT MUCH LESS THAT THE CHALLENGED REMARKS WERE SO FLAGRANT AND ILL-INTENTIONED THAT A CURATIVE INSTRUCTION COULD NOT HAVE ALLEVIATED THE PREJUDICE.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Id.*

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the

prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985)(citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). It is not misconduct to argue based on the evidence and the reasonable inferences. *State v. Ranicke*, 3 Wn. App. 892, 897, 479 P.2d 135 (1970). A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

Defendant asserts that the prosecutor engaged in improper argument by making arguments to the effect that for the jury to acquit, it had to disbelieve the State's witnesses and by expressing a personal opinion about the credibility of the witnesses. As will be discussed below, defendant fails to show that the challenged arguments are improper and

fails to show that the arguments were so flagrant and ill-intentioned that no curative instruction could have removed the prejudice.

- a. The prosecutors argument did not improperly shift the burden of proof.

In general, arguments that improperly suggest to the jury that it should shift the burden of proof onto the defendant are improper. In *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), the State had brought second degree rape charges against two defendants. At least one witness thought the sexual intercourse was consensual, the medical evidence was ambiguous, and the only true issue was whether there was forcible compulsion. The defendants did not testify and, in closing arguments, the prosecutor argued that the defendants failed to present any evidence that the complainant had fabricated her story or was confused. The prosecutor concluded: “And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree.” *Fleming*, 83 Wn. App. at 214. Division One reversed, noting that these statements misstate the law and misrepresent both the role of the jury and the burden of proof - in effect, shifting the burden of proof to the defendants and infringing on their right to remain silent. *Fleming*, 83 Wn. App. at 214. Similarly, the prosecutor should not focus on a defendant’s failure to testify or to present other witnesses to provide alternative explanations of the evidence. *See State v.*

*Traweek*, 43 Wn. App. 99, 106-07, 715 P.2d 1148 (1986), disapproved of by *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991)(prosecutorial misconduct to mention that the defense did not present witnesses or explanations).

It is also improper for a prosecutor to ask one witness whether another is lying because it places irrelevant information before the jury. *State v. Casteneda-Perez*, 61 Wn. App. 354, 362, 810 P.2d 74 (1991); *State v. Wright*, 76 Wn. App. 811, 821-22, 888 P.2d 1214 (1995).

Defendant contends that these principles were violated by the emphasized portion of the following argument:

Prosecutor: 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 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.*

There's a list of things in the jury instructions that you're allowed to consider when it comes to credibility, the witness'[s] demeanor, the witness' [s] presentation, their ability to remember things, any interest, bias or prejudice they might have, a whole laundry list of things that are set out for you....

RP 217-218. This argument is consistent with the court's instructions that the jury is the sole judge of credibility. CP 27-45, Instruction No. 1. It is not improper to point out that the testimony of certain witnesses

contradicts the testimony of others and to argue that the jury will have to make a credibility determination. Such an argument does not misstate the law or shift the burden of proof. Moreover, the prosecutor had already indicated, consistent with the court's instructions, that it was the State's burden to prove the elements of the crime. RP 213-214. At no point did the prosecutor suggest that defendant had any burden of producing evidence or proving his innocence. The challenged argument does not include the prosecutor's personal opinion or the opinion of one witness about the credibility of another. Defendant has failed to show that the challenged remark was improper.

- b. The prosecutor did not personally vouch for the credibility of the officers or offer a personal opinion as to the defendant's credibility.

It is improper for a prosecutor personally to vouch for the credibility of a witness. *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). Prosecutors may, however, argue inferences from the evidence; prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), citing *Sargent*, 40 Wn. App. at 344.

Defendant contends that at two different points the prosecutor vouched for the credibility of the officers. He argues that the prosecutor

vouched for their credibility by arguing that lying in court would put their careers at risk.<sup>1</sup> Appellant's Brief at p. 16. Firstly, it is not unreasonable to suggest that a police officer puts his career in jeopardy if he were to lie under oath. Such a generalized argument is applicable to a class of witnesses rather presenting a personal opinion about a particular witness's motivations to provide truthful testimony. The argument made in this case was to focus the jury on a factor that it might consider in evaluating the testimony of the witnesses. The prosecutor was arguing that if you were to believe the defendant, the two officers were corrupt enough to inflict unnecessary violence upon the defendant and to arrest him on trumped up charges, but not so corrupt that they didn't try to make defendant appear to be an extremely violent or dangerous person. Looking at this argument in context of the surrounding argument, the prosecutor was arguing that the defendant's version of events did not make sense overall. The argument

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<sup>1</sup> The prosecutor argued: "The other – another thing that you have to consider when you're talking about credibility here is you have to look at, at guess, the big picture. 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 [them] 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. Officer Thiry told you the defendant kicked him one time in the leg. Officer Grant said the defendant kicked at him and missed. 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 219-220 (emphasis added).

was an attack on the defendant's credibility rather than a vouching for the credibility of the officers.

Defendant also contends that the prosecutor was vouching for the officers' credibility when he made the following italicized argument:

Prosecutor: The officers – I mean you didn't hear testimony that the guys get an award if there's a conviction, get punished if there's acquittal. They don't have hash marks or chalk marks that they catch up [sic]. The fact of the matter is for a lot of them, *it's a hassle to come to court when it's not their regular job*, yet the officers came in and told you what happened. They told you exactly what happened. Their testimonies were slightly different because each of them perceived what they were doing individually.

*The [officers'] testimony has that ring of truth.* You should be convinced beyond a reasonable doubt that the defendant is guilty of assaulting Jeff Thiry and assaulting Daniel Grant and resisting arrest.

RP 226. Again, this is proper argument as to reasons the jury should believe the officers' testimony as opposed to the defendant's. The prosecutor was arguing that the officers did not have any motivation regarding personal gain or loss in seeing the defendant either convicted or acquitted. These arguments go to a witness's bias and personal interest in the outcome of the case which may be properly considered by the jury in credibility determinations. *See* CP 27-45, Instruction No 1. This argument does not set forth a statement of personal belief, as was done in *Sargent* when the prosecutor argued "I believe Jerry Lee Brown. I believe him . . . ." *Sargent*, 40 Wn. App. at 343. Rather, the prosecutor in this

case was drawing an inference from the evidence as to why the jury would want to believe one witness over another. Such argument is not improper vouching for the credibility of a witness.

Finally, defendant contends that the prosecutor was offering a personal opinion as to the defendant's credibility in the following argument:

Prosecutor: Here's what the word "intentionally" means. It means done on purpose. It means the defendant did it on purpose. *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 did believe every single thing he said, he's still guilty of resisting arrest.*

Defendant told you that when he was pepper sprayed, he pulled away from the officer because he wanted to get at his eyes to rub his eyes.

RP 216. Looked at in context, this argument does not constitute a personal opinion as to the defendant's credibility. Rather it is an argument that regardless of whom the jury believes with respect to the assaults, that it should find defendant guilty of resisting arrest because he acknowledged pulling away from the officer as the officer was trying to place the handcuffs on him. Defendant has failed to meet his burden of showing improper argument.

Additionally, because there was no objection below to any of these challenged arguments, defendant would have to demonstrate that the arguments were so flagrant and ill-intentioned that any prejudice could not

have been cured by an instruction. This requires the defendant to show that the prosecutor was intentionally acting in bad faith. None of the arguments reflect bad faith. The first challenged argument refers the jury to the instructions and tells them that they are going to have to make a credibility determination between the defendant and the officers. RP 217-218. The argument allows for the possibility that it might be the officers who are lying and it refers the jury back to the instructions for tools to use to make such a determination. Looked at in context, there is nothing about the content of this argument to suggest that the prosecutor was trying to engage in improper argument. The arguments defendant claims are expressions of the prosecutor's opinion as to credibility do not contain overt statements of personal beliefs. The prosecutor reminds the jury that it must determine credibility and never argues that his opinion should control. Again, defendant cannot show blatant misconduct or that the prosecutor was acting in bad faith. Since he did not object to the arguments in the trial court he has an increased burden and he has failed to meet his burden of showing flagrant and ill-intentioned misconduct.

Finally, defendant argues that he received ineffective assistance of counsel because his attorney did not object to the argument he challenges on appeal. As argue above, the prosecutor's arguments were not improper; therefore the failure to object does not demonstrate deficient performance.

3. UNDER THE DECISIONS OF THIS COURT IN **BLATT** AND **KEEND**, THE TRIAL COURT'S INSTRUCTIONS ON ASSAULT IN THE THIRD DEGREE WERE NOT CONSTITUTIONALLY DEFICIENT AS THE "ABSENCE" OF AN ASSAULT IN THE FIRST OR SECOND DEGREE IS NOT AN ESSENTIAL ELEMENT.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

*State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a

ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

On appeal, defendant assigns error to the trial court's instruction on the definition of assault in the third degree, Instruction No. 5, and the two "to convict" instructions for each of the counts of assault in the third degree, Instruction Nos. 8 and 9. See Brief of appellant at pp. 1-2, 19-25. Defendant did not object to any of these instructions when given the opportunity below. RP 205. Consequently, the only claims that may be raised for the first time on appeal are ones concerning manifest error affecting a constitutional right. RAP 2.5.

Defendant was charged with two counts of assault in the third degree; that statute provides, in part:

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 or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

RCW 9A.36.031(1)(emphasis added). Defendant argues that this court must reverse because the "absence" of first and second degree assault is an

element of third degree assault and the trial court failed to include this “element” in the three jury instructions pertaining to third degree assault. *See* Appendix A, Instruction Nos. 5, 8, and 9. Failure to instruct on all of the essential elements of an offense is constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Thus, the question is whether the absence of first and second degree assault is an essential element of third degree assault.

In support of his argument that absence of first degree assault *is* an element of second degree assault, defendant cites *State v. Azpitarte*, 140 Wn.2d 138, 995 P.2d 31 (2000). In *Azpitarte*, the issue was whether a second degree assault could serve as a predicate assault for the enhancement provision that raises a violation of a no-contact order from a gross misdemeanor to a felony under RCW 10.99.040(4). *Azpitarte*, 140 Wn.2d at 140. The Supreme Court held that a second degree assault cannot serve as the predicate that makes the no-contact violation a felony under RCW 10.99.040(4). *Azpitarte*, 140 Wn.2d at 141. The Court later limited *Azpitarte*’s holding, however, to those instances “when the State additionally charges first or second degree assault” in conjunction with a no-contact order violation. *State v. Ward*, 148 Wn.2d 803, 814, 64 P.3d 640 (2003).

In this case, defendant was not charged with first or second degree assault so, under *Ward*, the principles of *Azpitarte* are not implicated.

In two recent opinions, this court has rejected claims virtually identical to the one raised by defendant's in this case. *State v. Keend*, 140 Wn. App. 858, 166 P.3d 1268 (2007); *State v. Blatt*, 139 Wn. App. 555, 560, 160 P.3d 1106 (2007), *review denied*, \_\_\_ Wn.2d \_\_\_, (2008 Wash. LEXIS 530 (Wash. June 4, 2008)). In *Keend*, this court held "that the phrase 'not amounting to assault in the first degree' does not function as an essential element of second degree assault." 140 Wn. App. at 872 (quoting RCW 9A.36.021(1)(a)). In *Blatt*, this court held that "not amount[ing] to assault in the first or second degree" is not an essential element of third degree assault. *State v. Blatt*, 139 Wn. App. 555, 560, 160 P.3d 1106 (2007) (quoting *Ward*, 148 Wn.2d at 813). *Blatt* and, to a lesser extent, *Keend* are controlling; the absence of first and second degree assault is not an essential element of third degree assault. Because the absence of first and second degree assault is not an element of third degree assault, the jury instructions for third degree assault were not constitutionally deficient. See *Blatt*, 139 Wn. App. at 560; *Keend*, 140 Wn. App. at 872. Defendant did not preserve any other challenge to the instructions in the trial court. Defendant's claim of instructional error is without merit.

4. THE RECENT SUPREME COURT DECISION IN ***STATE V. CHAVEZ*** CONTROLS DEFENDANT’S CLAIM REGARDING THE SEPARATION OF POWERS AND THE LACK OF A LEGISLATIVE DEFINITION OF ASSAULT.

Each of the three branches of government in Washington – legislative, executive and judicial – has certain duties and powers; each branch of government wields only the power it is given. *State v. Moreno*, 147 Wn.2d 500, 505 58 P.3d 265 (2002). The separation of powers doctrine is “to prevent one branch of government from aggrandizing itself or encroaching upon the fundamental functions of another,” while still allowing for some interplay between the branches of government. *Id.*; *State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008).

When a criminal defendant alleges a separation of powers violation, the question before the courts “is not whether two branches of government engage in coinciding activities, but instead whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another branch.” *Chavez*, 163 Wn.2d at 273.

Defendant asserts that the separation of powers doctrine has been violated by the judicial system employing a common law definition of “assault” in the absence of a legislative definition. The Supreme Court recently addressed this issue in a decision that was filed after defendant filed his opening brief. *Chavez, supra*. The Court rejected this argument; this decision controls the resolution of this issue. *Chavez*, 163 Wn.2d at

273-274; see also *State v. Blatt*, 139 Wn. App. 555, 160 P.3d 1106 (2007), review denied, \_\_\_ Wn.2d \_\_\_, (2008 Wash. LEXIS 530 (Wash. June 4, 2008)).

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the convictions below.

DATED: JUNE 18, 2008.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

*Michelle [unclear] WSB 32724 for*  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/18/08 *[Signature]*  
Date Signature

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**APPENDIX "A"**

*Jury Instruction Nos. 5, 8, and 9*

INSTRUCTION NO. 5

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. 8

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 2<sup>nd</sup> 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. 9

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 2<sup>nd</sup> 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.