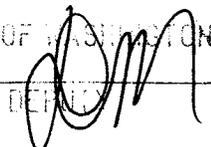


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DIVISION II

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STATE OF WASHINGTON
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No. 37859-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Eldorado Brown,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00154-6

The Honorable Judges Gordon Godfrey,

Mark McCauley, and David Edwards

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The prosecuting attorney committed misconduct that violated Mr. Brown's constitutional right to due process under the Fourteenth Amendment.
2. Mr. Brown's Custodial Assault conviction violated his constitutional right to due process under the Fourteenth Amendment because the state was relieved of its burden to establish each element of the charged crime.
3. The trial court's "to convict" instruction omitted an element of Custodial Assault.
4. The trial court's instructions as a whole allowed conviction without proof of all essential elements of Custodial Assault.
5. Mr. Brown was denied his constitutional right to a jury trial because the jury did not determine that he was not guilty of an assault in the first or second degree, an essential element of Custodial Assault.
6. The trial court erred by giving Instruction No. 2, which reads as follows:

The defendant has been charged by Information with the crime of Custodial Assault.

A person commits the crime of Custodial Assault when he or she assaults a staff member at an adult corrections institution who was performing official duties at the time of the assault.
Instruction No. 2, Supp. CP.

7. The trial court erred by giving Instruction No. 5, which reads as follows:

To convict the defendant of the crime of Custodial Assault, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 21, 2008, the defendant assaulted Leon P. Harder;
- (2) That, at the time of the assault, Leon P. Harder was a staff member at an adult corrections institution;

- (3) That, at the time of the assault, Leon P. Harder was performing official duties; and
 - (4) That the acts occurred in the State of Washington.
- Instruction No. 5, Supp. CP.

8. The trial court violated RCW 7.21.050 by imposing contempt sanctions without following the statutory procedure.
9. The trial judge erred by imposing contempt sanctions without certifying that he had observed Mr. Brown's contumacious conduct.
10. The trial court erred by imposing contempt sanctions on Mr. Brown without giving him an opportunity to speak in mitigation.
11. The trial court erred by entering a written contempt order that was not signed on the record.
12. The trial court violated Mr. Brown's constitutional right to due process under the Fourteenth Amendment by finding him in contempt and imposing contempt sanctions without reasonable notice and an opportunity to be heard.
13. The trial court violated Mr. Brown's constitutional right to due process under the Fourteenth Amendment by imposing a civil contempt sanction without giving him an opportunity to purge the contempt.
14. The trial court erred by denying Mr. Brown credit for time served while he was allegedly in contempt.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecuting attorney may not undermine the presumption of innocence, dilute the reasonable doubt standard, or otherwise weaken the burden of proof. In this case, the prosecuting attorney made arguments weakening the burden of proof and suggesting that the jury could ignore reasonable doubt. Did the prosecutor's misconduct violate Mr. Brown's right to a fair trial under the Due Process Clause of the Fourteenth Amendment?

2. Jury instructions may not relieve the state of its burden to prove each element beyond a reasonable doubt. In this case, the court's instructions relieved the state of its burden to prove that Mr. Brown was not guilty of first or second-degree assault. Did the court's instructions violate Mr. Brown's right to due process under the Fourteenth Amendment?
3. Before imposing a contempt sanction under RCW 7.21.050, a trial judge must certify that he or she observed the contemnor's conduct, and must allow the contemnor to speak in mitigation. The trial judge imposed a contempt sanction without certifying that he had observed the contempt and without allowing Mr. Brown to speak in mitigation. Did the trial judge violate RCW 7.21.050?
4. RCW 7.21.050 requires the judge to sign a written contempt order on the record. Here, the judge did not sign the Order on Contempt on the record, and there is no indication that either Mr. Brown or his attorney was present when the order was entered. Must the Order on Contempt be vacated?
5. Due process requires reasonable notice and an opportunity to be heard before imposition of a contempt sanction. The trial judge imposed a contempt sanction without providing reasonable notice or an opportunity for Mr. Brown to be heard. Did the contempt sanction violate Mr. Brown's right to due process under the Fourteenth Amendment?
6. A sanction for civil contempt must be remedial, allowing the contemnor to purge the contempt by performance of an act that is within his or her power. Although the judge included a purge clause in his order, he remanded Mr. Brown to prison and did not provide any opportunities for him to purge his contempt. Did the judge's Order on Contempt violate Mr. Brown's right to due process under the Fourteenth Amendment?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Eldorado Brown was held at Stafford Creek Corrections Center, and he was frustrated that he was not receiving the mental health treatment he needed. RP (6/3/08) 9, 12; RP (6/16/08) 2-3. He set off the fire alarm multiple times. RP (6/3/08) 12, 37, 58. Two officers were sent to clean off a vent, which had allowed dust to set off the fire alarm. RP (6/3/08) 12, 38. To get to the vent, they had to go outside and through an area called the pipe chase, RP (6/3/08) 11-13. From this unlit outside area, the officers could not see into the cells. RP (6/3/08) 21-22.

While there, Corrections Officer Harder was hit with a liquid spray. RP (6/3/08) 14. The substance was not tested, and when both corrections officers filed their internal reports, neither described it as urine. RP(6/3/08) 18, 20, 27, 42-43, 59. When Harder testified, he said the liquid was urine. RP (6/3/08) 14.

Harder's written report said that the liquid came through the vent from cell C8. Mr. Brown was held in cell C7. RP (6/3/08) 18-19.

The state charged Mr. Brown with Custodial Assault, and a jury heard the case. CP 1-2, 3. The court gave two instructions outlining

Custodial Assault:

The defendant has been charged by Information with the crime of Custodial Assault.

A person commits the crime of Custodial Assault when he or she assaults a staff member at an adult corrections institution who was performing official duties at the time of the assault.
Instruction No. 2, Supp. CP.

To convict the defendant of the crime of Custodial Assault, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (5) That on or about January 21, 2008, the defendant assaulted Leon P. Harder;
- (6) That, at the time of the assault, Leon P. Harder was a staff member at an adult corrections institution;
- (7) That, at the time of the assault, Leon P. Harder was performing official duties; and
- (8) That the acts occurred in the State of Washington.

Instruction No. 5, Supp. CP.

During closing, the prosecutor argued as follows:

There may be some depth as to identity. They did not see who threw the water - through the liquid or the urine, so you might have some doubt. You might be wondering right now is this a reasonable doubt? That's probably the toughest question that you're going to be faced with today what this beyond a reasonable doubt means. There's an idea in the legal system called a reasonable person. But you're all reasonable people. You were all chosen for jury duty. Don't worry about what other people think or this reasonable person idea. But all that matters is what you think.

And there's an instruction that says that if I've proven to you to an abiding belief, I've proven to you beyond a reasonable doubt. So you don't even have to concern yourself in terms of doubt.

You can think about your belief. What is an abiding belief? Abiding belief is one that's going to stick with you. It's one that you're going to take out of this courtroom today. After all of the evidence and after all of the deliberation you still simply believe[,] that's an abiding belief, that's a belief that has stuck with you. And more - most importantly you got to know you did the right thing here today. That's an abiding belief. If someone asks today,

so what happened? Well, I voted guilty. I did the right thing. You ought to know that when you walk out this door that you're doing the right thing, that you're going to make the right choice, guilty or innocent.

RP(6/3/08) 65-66.

Defense counsel did not object to this argument. RP (6/3/08) 65-

71.

The jury convicted Mr. Brown. CP 3. The court held a sentencing hearing, and sentenced Mr. Brown to 43 months incarceration, which was within his standard range. RP (6/16/08) 7; CP 3-11. Mr. Brown declined to sign the Judgment and Sentence, and would not submit to fingerprinting, and the following exchange occurred:

MR. HATCH: Thank you, judge. We will hand up a Judgment and Sentence.

THE COURT: Okay.

MR. HATCH: Your Honor, I reviewed the judgment and sentence for Mr. Brown. It's in order with what the Court indicated. However, Mr. Brown is telling me that he simply is not going to sign it.

THE COURT: Very well. Please step forward Mr. Brown. Please provide the original to the court.

MR. HATCH: That goes for the advisement of rights too, Your Honor.

THE COURT: Okay. The Judgment and Sentence, which has been handed up to me, it conforms with my pronouncement of the sentence. I am signing it in open court and in the presence of Mr. Brown at this time. The advise of rights on appeal, I have signed that document. Mr. Brown, are you refusing to sign this document? No response. I am going to indicate on this document that Mr. Brown is refusing to sign it and is refusing to respond to my question regarding that.

I have noted that and placed my initials under the line where Mr. Brown refused to sign. Okay. Judgment and Sentence

has been signed. You are remanded to the custody of the Department of Corrections.

MR. HATCH: Thank you, Your Honor.

(Whereupon other cases were heard.)

THE COURT: State versus Brown. We are back on the record again. Mr. Brown, I have been informed that you have refused to place your fingerprints on the Judgment and Sentence is that correct? Mr. Brown? Well, here is what we are going to do. Mr. Brown, I am going to order you detained until such time as you agree to be fingerprinted, whatever, if that takes one or 500 days; I don't care. It's not going to count toward your – any time you are already serving. You are going to be doing dead time until you agree to be fingerprinted. You can do it now or whatever you want, that's your choice. So you are remanded to the Grays Harbor County Jail where you will be held until such time that you agree to be fingerprinted; do you want to do it now? No response. Okay. Please remove the defendant from the courtroom. Court is in recess.

RP (6/16/08) 9-11.

The judge did not order Mr. Brown to submit to fingerprinting, and did not use the word “contempt” during the hearing. RP (6/16/08).

At some point, the judge entered a written Order on Contempt.

The Order was signed by the judge and the prosecuting attorney, but not by Mr. Brown or his attorney. The Order remanded Mr. Brown to the Department of Corrections, rather than retaining him in the county jail. Supp. CP, Order on Contempt. Mr. Brown was returned to the Department of Corrections. *See* Notice of Appeal, CP 14-15.

Mr. Brown timely appealed. CP 14-15.

ARGUMENT

I. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT THAT VIOLATED MR. BROWN’S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment Due Process Clause guarantees an accused person the right to a fair trial. U.S. Const. Amend. XIV; *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). A prosecuting attorney is a quasi-judicial officer, charged with ensuring that the promise of a fair trial is fulfilled. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005). A prosecutor’s misconduct “may ‘so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.’” *Moore v. Morton*, 255 F.3d 95, 105 (3d Cir. 2001) (alteration in original) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974)).

Prosecutorial misconduct requires reversal whenever the prosecutor’s improper actions prejudice the accused person’s right to a fair trial. *Boehning, supra*, at 518. Where prosecutorial misconduct infringes a constitutional right, the error can be raised for the first time on review, and prejudice is presumed.¹ *See, e.g., State v. Easter*, 130 Wn.2d 228,

¹ Misconduct that creates a manifest error affecting a constitutional right may be reviewed absent an objection from defense counsel. RAP 2.5(a); *State v. Perez-Mejia*, 134 Wn. App. 907, 920 n. 11, 143 P.3d 838 (2006); *See also State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988).

242, 922 P.2d 1285 (1996); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *State v. Henderson*, 100 Wn.App. 794, 804-805, 998 P.2d 907 (2000).

Criminal defendants have a constitutional right to be presumed innocent and to have the government prove guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A prosecuting attorney commits misconduct by making a closing argument that undermines the presumption of innocence, dilutes the reasonable doubt standard, or otherwise lessens the burden of proof. *See, e.g., United States v. Alex Janows & Co.*, 2 F.3d 716, 722-723 (7th Cir.

1993); *Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990); *Floyd v. Meachum*, 907 F.2d 347, 354 (2d Cir. 1990).

In this case, the prosecutor made arguments that infringed Mr. Brown's due process right to be presumed innocent and to have his guilt determined by proof beyond a reasonable doubt. Specifically, the prosecutor encouraged the jury to convict even in the face of reasonable doubt.

First, the prosecutor told the jurors they were all reasonable people, and that "all that matters is what you think." RP(6/3/08) 65. These statements were designed to suggest that if the jurors thought Mr. Brown was guilty, they could vote to convict (regardless of the existence of reasonable doubt).

Second, the prosecutor told the jurors that if they had an abiding belief, they could disregard their doubts: "[I]f I've proven to you to an abiding belief, I've proven to you beyond a reasonable doubt. So you don't even have to concern yourself in terms of doubt." RP(6/3/08) 65-66. This was an explicit directive to disregard reasonable doubt.

Third, the prosecutor told the jurors that an abiding belief need only endure through the end of deliberation:

[An abiding belief is] one that you're going to take out of this courtroom today. After all of the evidence and after all of the

deliberation you still simply believe[,] that's an abiding belief,
that's a belief that has stuck with you.
RP(6/3/08) 66.

This argument is purely invented; there is no support for this argument in any published opinion in Washington or in the federal court system.

Although not generally defined in instructions, the phrase "abiding belief" presumably does not encompass beliefs that are extinguished at the end of trial; rather, the phrase is meant to convey a long-lasting belief that endures well beyond the end of trial. The prosecutor's attempt to limit the timeframe for the belief weakened the state's burden of proof.

Fourth, the prosecutor encouraged the jury to convict if they thought that voting guilty was "the right thing." RP(6/3/08) 66. This argument is a further attempt to divorce the burden of proof from the concept of reasonable doubt. The prosecutor's argument encouraged the jury to ignore reasonable doubt in favor of "doing the right thing."

Finally, the prosecutor framed "doing the right thing" as a choice between "guilty or innocent," rather than guilty and not guilty. RP(6/3/08) 66. This implied that the jury could convict as long as they didn't believe Mr. Brown was innocent, regardless of whether or not they had a reasonable doubt as to his guilt.

Each of these statements undermined the presumption of innocence, diluted the reasonable doubt standard, and lessened the burden

of proof. Because they directly infringed Mr. Brown's constitutional right to due process, they may be reviewed pursuant to RAP 2.5(a), and are presumed prejudicial. *Lorang, supra*.

A reasonable juror could have voted to acquit Mr. Brown. First, a juror could have decided the state failed to prove the liquid was urine (as opposed to water), and that a light spray of water was not harmful or offensive. *See* Instruction No. 6, Supp. CP. Second, a juror could have decided that Mr. Brown was not the person who sprayed the liquid onto Mr. Harder.

Under these circumstances, it cannot be said beyond a reasonable doubt that any reasonable jury would have reached the same result. *Burke, supra*. Accordingly, the error was not trivial, formal, or merely academic, and Mr. Brown's conviction must be reversed. *Lorang, supra*.

II. MR. BROWN WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS DID NOT REQUIRE PROOF OF EVERY ESSENTIAL ELEMENT.

A. Custodial Assault requires proof that the accused person "is not guilty of an assault in the first or second degree."

Due process requires a state to prove the elements of a crime beyond a reasonable doubt. U.S. Const. Amend. XIV; *Bunkley v. Florida*, 538 U.S. 835, 840, 123 S. Ct. 2020, 155 L. Ed. 2d 1046 (2003); *Winship, supra*. An accused person is deprived of due process if jury instructions

relieve the state of its burden to prove each element. *Polk v. Sandoval*, 503 F.3d 903, 910 (9th Cir. 2007).

The elements of an offense are determined with reference to the language of the statute. See *State v. Leyda*, 157 Wn.2d 335, 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269, 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, 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, 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.

RCW 9A.36.100 defines Custodial Assault (in relevant part) as follows:

A person is guilty of custodial assault if that person is not guilty of an assault in the first or second degree and where the person:
...Assaults a full or part-time staff member... at any adult

corrections institution... who was performing official duties at the time of the assault.

The statute is clear and unambiguous: requires proof that the accused person is not guilty of first or second-degree assault. RCW 9A.36.100(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.

The Supreme Court reached a similar result in *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). In *Azpitarte*, the 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.

Applying *Azpitarte* to RCW 9A.36.100, Custodial Assault requires proof that the assault did not amount to Assault in the First or Second Degree.

B. The trial court failed to instruct the jury that a conviction for Custodial Assault required proof that Mr. Brown was “not guilty of an assault in the first or second degree.”

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, 6, 109 P.3d 415 (2005). The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn.App. 88, 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, 45, 21 P.3d 1172 (2001).

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, 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, 263, 930 P.2d 917 (1997) . The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

The “to convict” instructions here did not require the jury to find that Mr. Brown was not guilty of a first or second-degree assault, as required by RCW 9A.36.100(1). Instructions Nos. 2 and 5, 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*.

C. *State v. Ward* and its progeny do not control this case because the Custodial Assault statute is structured differently and uses different language than the statute in *Ward*.

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 a defendant was not charged with Assault in the First or Second Degree, the state was not required to allege or prove that the assault 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.²

RCW 9A.36.100 cannot be read in the same fashion. Nothing in the statute excuses the state from proving the defendant is not guilty of a higher degree of assault, whether another crime is charged or not. Thus *Ward's* limitation on *Azpitarte* does not affect RCW 9A.36.100, and has no bearing on Mr. Brown's case.

Furthermore, the statute in *Ward* was structured differently than RCW 9A.36.100. The substantive crime addressed in *Ward* was the “[w]illful violation of a court order issued under [certain provisions

² Division II has applied *Ward* to circumstances similar to this case. *See, e.g., State v. Keend*, 140 Wn. App. 858, 870, 166 P.3d 1268 (2007). However, the statute at issue in *Keend* used the same language as *Azpitarte* (the conduct does “not amount to assault in the first or second degree”); the Custodial Assault statute, by contrast, requires the jury to find the accused person “not guilty” of assault in the first or second degree. RCW 9A.36.100.

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 “if that person is not guilty of an assault in the first or second degree” is contained in the very provision defining the substantive crime itself. RCW 9A.36.100. 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 Custodial Assault. This court is not free to disregard the

legislature's choice of language and read this element out of the statute.

Sutherland, supra.

Accordingly, Mr. Brown's conviction must be reversed and the case remanded for a new trial. *Jones, supra.*

III. THE TRIAL COURT'S ORDER ON CONTEMPT VIOLATED RCW 7.21.050 AND MR. BROWN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Judges have both inherent and statutory contempt powers. *In re Dependency of A.K.*, 162 Wn.2d 632, 645, 174 P.3d 11 (2007); RCW 7.21.010 *et seq.* A judge may not exercise the inherent contempt power without specifically finding the statutory procedures and remedies inadequate. *A.K.*, at 647. In this case, the trial judge did not make a specific finding of inadequacy, and thus was limited to imposition of contempt sanctions under the statutory framework. *A.K., supra.*

A. The trial court's Order on Contempt was entered in violation of RCW 7.21.050.

The contempt statute permits a trial judge to impose a contempt sanction for contempt occurring in the judge's presence (also known as "direct contempt.")³ RCW 7.21.050. First, the judge must "certif[y] that

³ Contempt is defined to include intentional "[d]isorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or

he or she saw or heard the contempt.” Second, the judge must impose the sanctions immediately after the contempt, or at the end of the proceeding. Third, the judge may impose contempt “only for the purpose of preserving order in the court and protecting the authority and dignity of the court.” RCW 7.21.050(1). Fourth, the contemnor must be “given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise.” RCW 7.21.050(1). Fifth, “the order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.” RCW 7.21.050(1). Failure to comply with the statute requires reversal of any contempt sanction imposed. *State v. Jordan*, 146 Wn. App. 395, 398, 190 P.3d 516 (2008).

In this case, the trial judge did not comply with RCW 7.21.050. He did not certify that he saw or heard the contempt; nor did he give Mr. Brown an opportunity to speak in mitigation after finding him in contempt.⁴ RP (6/16/08) 9-11. The judge did not sign the Order on Contempt on the record, and there is no indication that either Mr. Brown

to interrupt the due course of a trial or other judicial proceedings; [or] [d]isobedience of any lawful judgment, decree, order, or process of the court.” RCW 7.21.010(1).

⁴ The opportunity to speak in mitigation of the contempt must be given after the court makes the finding of contempt but prior to the imposition of sanctions. *Jordan*, at 403 n. 6.

or his attorney was present when the order was presented. RP (6/16/08);
Supp. CP, Order on Contempt.

Because the judge failed to follow the statutory procedure, the
Order on Contempt must be vacated, and Mr. Brown should not be
deprived of any credit for time served. *Jordan, supra*.

B. The trial court's Order on Contempt violated Mr. Brown's right to
due process under the Fourteenth Amendment.

A contempt sanction is either civil and remedial, or criminal and
punitive. *Int'l Union v. Bagwell*, 512 U.S. 821, 827-828, 114 S. Ct. 2552,
129 L. Ed. 2d 642 (1994). A remedial ("civil") sanction is one imposed to
coerce performance. *See* RCW 7.21.010(3); *Bagwell*, at 827-828.

Remedial sanctions may be imposed when the contemnor still has the
power to purge the contempt by performance: a sanction is remedial only
if "the contemnor is able to purge the contempt and obtain his [or her]
release by committing an affirmative act." *Bagwell*, at 828. A sanction is
not remedial unless "the contemnor has at all times the capacity to purge
the contempt and obtain his [or her] release." *In re Marriage of Didier*,
134 Wn. App. 490, 504, 140 P.3d 607 (2006). Civil contempt sanctions
cannot be imposed upon a contemnor who is unable to purge the contempt
due to circumstances beyond his or her control. *See United States v.*
Ayres, 166 F.3d 991, 997 (9th Cir. 1999).

Due process permits the summary imposition of a contempt sanction only where an act of direct contempt “disturbs the court’s business” such that immediate punishment is essential to prevent ‘demoralization of the court’s authority’ before the public.” *In re Oliver*, 333 U.S. 257, 275, 68 S. Ct. 499, 508, 92 L. Ed. 682 (1948) (quoting *Cooke v. United States*, 267 U.S. 517, 536, 45 S. Ct. 390, 394, 69 L. Ed. 767 (1925)). In all other cases, due process requires reasonable notice and an opportunity to be heard before a sanction is imposed. *Taylor v. Hayes*, 418 U.S. 488, 498, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974).

In this case, the court sanctioned Mr. Brown and ordered him detained—without credit for the time he served—until he submitted to fingerprinting. RP (6/16/08) 9-11. The oral imposition of this sanction occurred without any notice and without an opportunity to be heard (although Mr. Brown was given an opportunity to comply). RP (6/16/08) 9-11. The subsequent written order was apparently entered in the absence of Mr. Brown and his attorney, and neither was given an opportunity to object or speak in mitigation. RP (6/16/08) 9-11; Supp. CP, Order on Contempt.

This procedure violated the Due Process Clause of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Oliver, supra*; *Hayes, supra*. There is no indication that Mr. Brown refused an explicit order. *See* RP,

generally. Nor is there any indication that Mr. Brown's conduct threatened to demoralize the court's authority in the public's eyes. *Oliver, supra*. Nothing suggests that summary imposition of contempt (without reasonable notice and an opportunity to be heard) was required.

Furthermore, instead of keeping Mr. Brown in the county jail and returning him to the courtroom to purge his contempt, the court ordered Mr. Brown transported back to prison. Supp. CP, Order on Contempt. He was never given an opportunity to submit to fingerprinting to purge his contempt. *See RP, generally; see also* Supp. CP, Order on Contempt; *see also* Notice of Appeal, CP 14-15. This, too, violated Mr. Brown's constitutional right to due process under the Fourteenth Amendment. *Ayres, supra*.

Accordingly, the Order on Contempt must be vacated, and Mr. Brown must not be deprived of any credit for time served. *Oliver, supra*.

CONCLUSION

Mr. Brown's Custodial Assault conviction must be reversed and the case remanded to the superior court for a new trial. In addition, the Order on Contempt must be vacated, and Mr. Brown must not be deprived of any credit for time served.

Respectfully submitted on December 1, 2008.

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CERTIFICATE OF MAILING

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

Eldorado Brown, DOC #853769
Washington State Penitentiary
1313 N 13th Ave.
Walla Walla, WA 99362

and to:

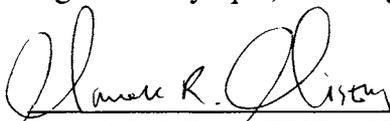
Grays Harbor Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 1, 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 December 1, 2008.



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