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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

No. 37859-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

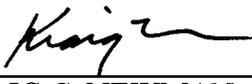
ELDORADO BROWN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Eldorado Brown was charged with the crime of Custodial Assault for an incident that occurred on January 21, 2008. On that day, Mr. Brown was being housed at the Stafford Creek Correction Center in the intensive management unit. (RP 06-03-08, at 10-11). The State alleged that Mr. Brown had intentionally thrown an unknown liquid on one of the guards of the correction facility.

The case was ultimately tried before a jury. At trial, testimony established that the appellant was being housed in a cell by himself. Earlier that day numerous fire alarms had been activated by a fire detector behind the appellant's cell. (RP 12). The guards on duty believed that the defendant was forcing dust into the area behind his cell where the fire detector was located. This dust would set off the detector.

Corrections Officer Leon Harder and Jesse Reese were instructed to go behind the appellant's cell and clean out the access area so that further alarms would not be activated. (RP 13). Officer Harder heard the appellant state that there was somebody in his pipe chase. The officer was then struck by a substance that he believed was urine that came through the vent on the appellant's cell. (RP 14). Harder then heard the appellant

state, “I got that f---er.” (RP 14). Harder had been previously warned by the appellant that he would get Harder back for an incident where the appellant believed that he was wronged. (RP 15).

At the time of this incident there was only one person in the defendant’s cell. (RP 16). Officer Jesse Reese testified that he had also seen the liquid come from the appellant’s cell. (RP 38). Officer Reese also heard the appellant laughing stating something to the effect of , “Get out of my cell.” (RP 39).

At the conclusion of the trial the defendant was convicted as charged.

State did not commit misconduct in its closing argument.

While presenting a criminal case, a prosecutor must seek a verdict free of prejudice and based upon reason, fairness, and the evidence. *State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976) “Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect.” *Id.* “Allegedly improper argument should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *Id.*

The United States Supreme Court addressed “prosecutorial misconduct” in *Namet v. United States*, 373 U.S. 179 (1963). In *Namet*,

the Court recognized that some lower courts were of the opinion that error may be based upon a concept of prosecutorial misconduct. Such a claim was said to arise when the government made a conscious and flagrant attempt to build its case out of inferences arising from the use of testimonial privilege. In other words, such a claim did not arise out of mere negligence or out of “simple” trial error.

The issue was first addressed by the Washington Supreme Court in *State v. Nelson*, 72 Wn.2d at 282. In *Nelson*, the prosecutor called a witness whom the prosecutor knew would claim his Fifth Amendment privilege against self-incrimination solely as a means of getting the government’s theory of the case before the jury via the questions asked of the witness. The court stated that “the prosecutor called Patrick to the stand, and in the presence of the jury, asked 28 questions of Patrick outlining substantially in its entirety the State’s theory of the case.” *Id.* at 282. The “conduct of the prosecutor in placing Patrick on the stand, knowing that Patrick intended to claim his privilege against self-incrimination to questions relating to the alleged crime, and seeking to get the details of Patrick’s purported confession before the jury by way of impermissible inferences drawn from the witness’ refusal to answer the questions propounded, constituted a denial of Nelson’s right to confrontation under the Sixth Amendment.” *Id.*

In *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988), the defendant testified that he had some affiliation with the American Indian

Movement (AIM). The prosecutor made several references to AIM in his closing argument. The court characterized the prosecutor's closing argument as follows:

The remarks were flagrant, highly prejudicial and introduced "facts" not in evidence.

A prosecutor cannot be allowed to tell a jury in a murder case that the defendant is "strong in" a group which the prosecutor describes as "a deadly group of madmen," and "butchers that kill indiscriminately." The prosecutor likened the American Indian Movement members to "Kadafi" and "Sean Finn" of the IRA. This court will not allow such *testimony*, in the guise of argument, whether or not defense counsel objected or sought a curative instruction. An objection and an instruction could not have erased the fear and revulsion jurors would have felt if they had believed the prosecutor's description of the Indians involved in AIM. This court cannot assume jurors did not believe the prosecutor's description. We have repeatedly explained that the question to be asked is whether there was a "substantial likelihood" the prosecutor's comments affected the verdict. *State v. Reed*, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984); *State v. Charlton*, *supra* at 664. There is a substantial likelihood this egregious departure from the role of a prosecutor did affect the verdict. "If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." 110 Wn.2d at 508-09.

A defendant's failure to object or move for a mistrial at the time a prosecutor in a case makes an allegedly improper statement is strong evidence that the argument was not critically prejudicial to the defendant. *State v. Pastrana*, 94 Wn. App. 463, 480, 972 P.2d 557 (1999) *citing* *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). The fact that defense counsel did not object to the prosecutor's statement "suggests that it was of little moment in the trial." *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993). Absent a proper objection, the issue of

prosecutorial misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered. *State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001).

To determine whether the remarks were prejudicial the court must analyze them in context, taking into consideration the total argument, the issues in the case, the relevant evidence, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). If the court is satisfied that the outcome of the trial would not have been different had the alleged error not occurred, given all the evidence, then the error is harmless. *Rogers*, 70 Wn. App. at 631.

The appellant first claims that stating to the jury: “all that matters is what you think,” is a malicious effort to undermine the State’s burden. The state is allowed to make true comments on the instructions given to the jury. The jurors in this case were instructed by the court that they were “the sole judges of credibility of the witnesses and what weight is to be given to the testimony of each.” It is a true statement that all that matters to the outcome of a criminal trial is what the jurors think. It would be improper for the juror to consider the opinion of anyone outside the jury panel or to weigh his or her personal judgment against some perceived expectation of society. The former is simply impermissible and the latter is bias.

Secondly, the appellant claims that the state made a specific directive to the jury to disregard their reasonable doubt. The jury was instructed that: “[i]f, after such consideration, you have an abiding belief in truth of the charge, you are satisfied beyond a reasonable doubt.” This instruction given the jury an alternative to weighing the evidence presented to them solely in terms of there doubt. The logical consequence of this instruction is that if a juror has an abiding belief in the defendant’s guilt, but is confused as to the meaning of reasonable doubt, that juror has been satisfied beyond a reasonable doubt and should vote for conviction. The State’s statements merely highlight this instruction and were a fair comment on it.

The State also made a fair comment on the meaning of abiding belief. The State did not present its explanation of the phrase as a definition or suggest any legal definition existed other then the common meaning of the words. In the absence of a legal definition word in jury instruction will have there common meaning.

Lastly, the appellant claims misconduct by the state’s use of the phrase “the right thing.” Suggesting that the jurors do the right thing is not malicious.

State was not required to disprove higher degrees of assault.

A charging document must contain all of the essential elements of a crime in order to put the defendant on notice of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). An Information which charges a crime in the language of the statute, which defines the crime, is sufficient to apprise an accused person of the nature of the accusation, however it is not necessary to make the accusation in the exact language of the statute to sufficiently inform the defendant of the nature of the charge. *State v. Leach*, 113 Wn.2d 679, 686, 782 P.2d 552 (1989).

When the sufficiency of an Information is challenged for the first time on appeal, it is liberally reviewed to determine if the Information reasonably apprises the defendant of the elements of the crime and whether the defendant suffered any actual prejudice from any vague or inartful language contained in the Information. *State v. Kjorsvik*, at 102-106. However, before engaging in such an analysis, it is necessary to make a threshold determination that the Information omits an essential element of the crime. *State v. Williams*, 133 Wn.App. 714, 718, 136 P.3d 792 (2006).

In *Williams*, the court reviewed the Bail Jumping statute, RCW 9A.76.170, to determine if the statutory language which specifies the penalty classification of the crime depending on the classification of the underlying felony was an essential element which must be alleged in the Information. The court held that the jury did not need to know or

consider the penalty classification in order to determine whether the defendant committed the crime of Bail Jumping. It was not an essential element of the crime. For the same reason, the jury did not have to be instructed in the to convict instruction on the class of the underlying crime in order to find the defendant guilty. *State v. Williams*, 133 Wn.App. at 720-721.

The appeal courts have also addressed similar arguments on Felony Violation of No Contact Orders and Third Degree Theft. *In State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), the Supreme Court addressed the issue of whether the statutory language, which described the Assault element in the crime of Domestic Violence Protection Order Violation as one that does not amount to Assault in the First or Second Degree, constituted an essential element of a Felony Violation of a No Contact Order. *State v. Ward*, 148, Wn.2d at 810-811. The Supreme Court in *Ward* held that the "does not amount to" provision elevates a no contact violation when any assault is committed and thus, did not function as an essential element of Domestic Violence Protection Order Violation, but rather served to explain that all assaults committed in violation of a no contact order will be penalized as felonies. *State v. Ward*, 148 Wn.2d at 812-813. The *Ward* court went on to point out that if they were to interpret the "does not amount to" language as an essential element of the crime, it would not advance the Legislature's purpose and would place the defendant in the awkward position of arguing that his

conduct amounted to a higher degree than that charged by the State. *State v. Ward*, 148 Wn.2d at 813.

The appellant distinguishes *Ward* in that the Custodial Assault statute is structured differently and worded differently than the Protection Order Statute. The difference is inconsequential to this case. Case law cited above is clear that not every word in a criminal statute must be contained in the information. Only the essential elements of the crime must be included. An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. *Id.* at 811.

This statute makes any assault on a corrections officer a felony. The essential elements are the fact of an assault and the fact that the victim was an employee of a correction facility.

If the lack of greater level of assault was an essential element of the crime, the very purpose of the statute would be undermined. The purpose of this statute is the heightened protection of correction officer from *any* assault. If the appellant is correct, then in cases where the correction officer was injured, but not severely injured, the statute would not apply, which is contradictory to its purpose.

In such cases, there would be some question whether the injury was or was not substantial bodily injury. Reasonable doubt would exist as to whether the defendant committed Second Degree Assault, so he could not be prosecuted under that statute. Because there is injury,

reasonable doubt would exist whether he in fact *did not* commit the crime of Second Degree Assault, so he could not be prosecuted under the Custodial Assault Statute. His conduct would be a misdemeanor despite the fact that he assaulted the officer more severely than required by statute. This is contrary to the intent of the legislature.

Even if the Court finds error, in this case it is harmless. There was no evidence presented at trial that anything but a simple assault occurred. This assault was not committed with a weapon or did it cause any injury. There are no facts that could raise any doubt as to whether this was a Second Degree Assault. For this reason the error did not have an effect on the verdict, beyond a reasonable doubt.

The Trial Court's imposition of sanctions for contempt was proper.

While the State basically agrees with the appellant's presentation of the law, it disagrees with the analysis. Punishment for contempt is within the sound discretion of the trial court. *In re Marriage of Mathews*, 70 Wash.App. 116, 126, 853 P.2d 462, *review denied*, 122 Wash.2d 1021, 863 P.2d 1353 (1993). In reviewing a trial court's finding of contempt, an appellate court reviews the record for a clear showing of abuse of discretion. *In re James*, 79 Wash.App. 436, 439-40, 903 P.2d 470 (1995). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *In re James*, 79 Wash.App. at 440, 903 P.2d

470. See *Templeton v. Hurtado*, 92 Wash.App. 847, 852, 965 P.2d 1131, 1133-1134 (1998).

The trial court's Order on Contempt was proper under RCW 7.21.050 and should be upheld. The appellant's first claim is that the judge "did not certify that he saw or heard the contempt." (Appellant's Brief at 20). As in *State v. Hobble*, the order at issue does not expressly state that the trial judge saw or heard the contempt. However, under prior statutes, which similarly required that if the contempt consisted of acts done in the immediate view and presence of the court, the judgment had to so recite, the Supreme Court concluded that the requirement was satisfied where "the only reasonable construction of the language of the order, read as an entirety, is that the unseemly acts recited were done in the face of the court." *State v. Hobble*, 126 Wash.2d 283, 295, 892 P.2d 85, 92 (1995) citing *State v. Buddress*, 63 Wash. at 30, 114 P. 879. (The court said the words of the former statute "in the immediate view and presence" of the court were equivalent to the common law phrase "in the face of the court". *Buddress*, at 29, 114 P. 879.)

Here, the trial court found that the defendant refused to place his fingerprints on the Judgment and Sentence. The only reasonable interpretation is that the defendant was in open court to be sentenced. This interpretation is certainly supported by the verbatim record in this case. This satisfies the requirement that the judge "certify he or she saw the contempt."

Next the judge must “impose sanctions immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court.” RCW 7.21.050(1). The appellant makes no argument that these requirements were not met in this case.

“The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise.” RCW 7.21.050(1). In this case, the appellant refused to sign the Judgment and Sentence and refused to answer the court when questioned about his behavior. (RP 06-15-08 at 10). The judge signed the document without the appellant’s signature and remanded him into the custody of the Department of Corrections. (RP 06-15-08 at 10). The case was later recalled and the judge was informed that the defendant was now refusing to submit to fingerprinting on the Judgment and Sentence. (RP 06-15-08 at 10).

The judge tried to clarify this by addressing the appellant as follows: “Mr. Brown, I have been informed that you have refused to place your fingerprints on the Judgment and Sentence is that correct? Mr. Brown?” (RP 06-15-08 at 10). After informing the appellant of the sanction for his contempt, the judge asked the appellant “do you want to do it now? No response. Okay.” (RP 06-15-08 at 11). The trial court gave the appellant ample opportunity to mitigate his contempt, either by complying with the court’s order or explaining his behavior. The court

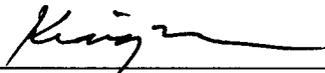
gave the appellant the opportunity required by the statute and should not be penalized because the appellant refused to take advantage of such opportunity.

Finally, “[t]he order of contempt shall recite the fact, state the sanctions imposed, and be signed by the judge and entered on the record.” RCW 7.21.050. The record on appeal is unclear as to the circumstances under which the Order of Contempt was entered. If the Court finds that the procedure used in this case was defective, then the remedy should remand for entry of the order on the record, not a vacation of the contempt sanction.

CONCLUSION

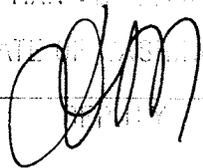
For the reasons stated above, the State requests that the appeal be denied.

Respectfully Submitted,

By: 
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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

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v.

DECLARATION OF MAILING

ELDORADO BROWN,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 13th day of March, 2009, I mailed a copy of the Brief of Respondent to Eldorado Brown 853769; Washington State Penitentiary; 1313 North 13th Avenue; Walla Walla, WA 99362, and Manek R. Mistry; Backlund & Mistry; 203 Fourth Avenue East, Suite 404; Olympia, WA 98501-1189 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 13th day of March, 2009, at Montesano, Washington.

