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APRIL 28, 2016  
Court of Appeals  
Division III  
State of Washington

No. 33422-8-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ANTHONY A. JOSEPH,

Defendant/Appellant

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Respondent's Brief

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### **III. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR**

**A. The court did not abuse its discretion by allowing testimony that the defendant had been angry and threatening when denied a pencil the previous day.**

**B. If there was an error in admitting the previous interaction with the defendant, it was harmless.**

**C. The State's closing argument did not shift the burden of proof on the case.**

#### **IV. STATEMENT OF FACT**

Laura Mittleider works as a Kittitas County corrections officer at the Kittitas County jail. (Report of Proceedings 26). She has worked there for two years. (RP 26) On October 12 of 2014, she was on duty, working the day shift and doing inspections and then running the request cart. (RP 27) The request cart has various supplies for inmates, like toilet paper, paper, pencils, court forms, soap, toothpaste, etc. (RP 28) The corrections staff approaches each individual door to offer the supplies. (RP 28) Anthony Joseph was an inmate on that date in G mod, and Officer Mittleider offered him the request cart. (RP 28, 29) Joseph got up and came to his cell door. (RP 31) The officer opened up a little opening in the middle of the door, called a cuff port. (RP 31) Mr. Joseph asked for paper and pencils, but the officer told him he could not have any pencils. (RP 32) Mr. Joseph became very angry. He screamed, "I'm

going to kill you, bitch!” and dropped down and reached both his hands through the cuff port. (RP 32) He grabbed the corrections officer’s arm, and she pulled away. (RP 32) He tried spitting at her through the cuff port. (RP 32) Officer Mittleider backed away and called for backup to try to control the situation. (RP 35) She left the cuff port open, which they don’t do, because she did not want more of an incident, so she called someone up to help her close it. (RP 35) Corrections Officer Contreras showed up within seconds. (RP 36, 52) The grabbing caused a red mark on Officer Mittleider’s arm, and a picture of this was shown to the jury. (RP 36-37, 42) Officer Contreras saw that Officer Mittleider was nervous, anxious, a little worked up, and distraught. (RP 52) Officer Contreras had to close the cuff port. (RP 53) Officer Contreras testified that the day before when he told Mr. Joseph he wouldn’t get any pencils, Mr. Joseph was very angry and upset. He cursed, yelled, and made threats. (RP 54) The officer confirmed the red mark on Ms. Mittleider’s arm, saying it was redder than when the picture was taken. (RP 55) When another deputy went to talk to Mr. Joseph later, Mr. Joseph was lying on his bunk and still hostile. (RP 62) And he also saw a red mark on Officer Mittleider’s arm, though by that time it had faded. (RP 61)

Mr. Joseph simply said none of that happened. He asked for a pencil, he was told no, he asked for soap, and he never got either one. (RP 65, 67-68) He said he did not get angry or reach through the cuff port, grab anyone or spit on anyone. (RP 65-68) He said she just closed the cuff port and left. (RP 65)

The jury found Mr. Joseph guilty of custodial assault. (RP 107, CP 62)

This appeal followed.

## V. ARGUMENT

**A. The court did not abuse its discretion by allowing testimony that the defendant had been angry and threatening when denied a pencil the previous day.**

The appellant argues that the court should not have allowed the corrections officer to indicate that the day before this incident, Mr. Joseph was angry with corrections staff that he was not allowed to have a pencil. Specifically, the State asked,

“Q Alright, now, are you familiar with whether or not Mr. Joseph knew he was not going to get a pencil?”

A: I am

Q: Okay. And how are you familiar with that?

A: In the day prior I told him myself that he wasn't going to be getting pencils off the request cart.

Q: Alright. And without saying any specifics, what was his demeanor when told that?

A: He was very angry, upset. He cursed, yelled, made threats.”

(RP 54)

The Appellate Court reviews a trial court's evidentiary ruling for an abuse of discretion. State v. Thang, 145 Wn. 2d 630 (2002) A trial court abuses discretion in an evidence ruling when it is exercised on untenable grounds or for untenable reasons. State v. Wade, 138 Wn. 2d 460 (1999)

The defendant was charged by information with Custodial Assault (CP 1) The jury was told the proper definition of assault. It was told,

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

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

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury and which, in fact, creates in another a reasonable apprehension and imminent fear of bodily injury, even though the actor did not actually intend to inflict bodily injury.” (RP 86-87, CP 59)

The crime of assault under any of the three common law definitions, requires an intentional act. Therefore, in charging Mr. Joseph with assault, the State must prove that Mr. Joseph’s act was an intentional assault. Under Evidence Rule 404b,

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

In this case, the intent of the defendant in lunging through the cuff port and

grabbing the wrist of the corrections officer was directly at issue in the case. The testimony that Mr. Joseph would become angry when denied a pencil was directly relevant and probative as to Mr. Joseph's intent on this date and his motive to lunge at the corrections officer.

In determining whether evidence of other wrongs is properly admitted under ER 404(b), the court must analyze whether the evidence was logically relevant to prove an essential ingredient of the charged crime, and then the court must determine whether the evidence is legally relevant, i.e., whether the probative value of the evidence is substantially outweighed by its prejudicial effect. State v. Saltarelli, 98 Wn.2d 358 (1982) In this case, the probative value of testimony that the very day before, the denial of a pencil made Mr. Joseph very angry at the corrections officer is obviously high with regard to Mr. Joseph's state of mind, his motive, and his intent when a corrections officer denies him a pencil again. The prejudicial effect is very little indeed. No crime was charged for the previous day. The conduct of Mr. Joseph, as testified to by the officer is simply not the kind that would provoke a strong emotional reaction from the jury or engender a danger of unfair prejudice. "Unfair prejudice" is that which is more likely to arouse an emotional response

than a rational decision by the jury. State v. Rice, 48 Wn. App. 7 (1987)

Whether the proffered other acts evidence is more probative than prejudicial is a discretionary determination made by the trial court. Its decision will not be overturned absent a manifest abuse of discretion.

State v. Mak, 105 Wn.2d 692 (1986) at 702-703.

The court ruled during the trial that the State could not mention why Mr. Joseph was being denied a pencil. (RP 46, 47) The State never asked about this nor elicited any testimony about why Mr. Joseph was denied a pencil. (RP entire transcript) Nothing was ever stated or implied about why Mr. Joseph didn't get a pencil. The day before this incident when he was angry, he had already been denied a pencil. Although numerous items on the cart could potentially be weapons (RP 54), no mention or implication was made regarding Mr. Joseph and those items. The testimony that Mr. Joseph did not like being told the day before that he could not have a pencil was offered only to show this made him angry and therefore, that Mr. Joseph had motive and intent to assault the corrections officer on the very next day.

**B. If there was an error in admitting the previous interaction with the defendant, it was harmless.**

In any event, even if the officer's response, telling the jury that Mr. Joseph was angry about not getting a pencil the day before, was more unfairly prejudicial than probative, the error was harmless.

The accused cannot "avail himself of error as a ground for reversal unless it has been prejudicial." Thang, quoting State v. Cunningham, 93 Wn.2d at 823 at 831 (1980) The applicable test for harmless error is whether, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Carleton, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996).

In this case, although the defendant tried to say it was simply a "he said-she said" case, (RP 100) there was evidence that the corrections officer immediately backed away from the door, left the cuff port open (which was against their policy (RP 35, 53-54), called for backup, and that she had a noticeable red mark on her arm where she was grabbed. (RP 36) Plus there was testimony from the responding officer that he got up to

her position within seconds, that the cart was where she said it was (RP 54) (not where the defendant said it was (RP 66), that the cuff port door was indeed open (RP 53) (not closed, as the defendant said it was (RP 65), that Officer Mittleider was “nervous, anxious, a little worked up, a little distraught.” (RP 52) He also saw the red mark on the officer’s wrist. (RP 55) Then a line officer, who testified, told the jury he saw the red mark, now fading an hour later. (RP 61) He also testified that Mr. Joseph was still hostile (RP 62), as opposed to Mr. Joseph, who said he wasn’t angry. (RP 67) Plus, the line officer testified with a photograph, that the cart could not likely have been where Mr. Joseph said. (RP 70) Plus, apart from testimony, the jury got to see a picture of the mark on the officer’s arm. (RP 36-37) So, although there were only two people actually present at the incident, there was plenty of other evidence about what had happened.

Thus, there simply was no reasonable probability that the fact that Mr. Joseph had been angry about the same thing the day before materially affected the result of this trial. The evidence of guilt was overwhelming. Mr. Joseph’s testimony that he asked for a pencil and soap and was told no, that the port was closed, that he wasn’t angry, and that nothing

happened simply did not explain the corrections officer response, her call for assistance, her demeanor, her leaving the cuff port open, her arm, or Mr. Joseph's later attitude. Any error in the admission of Mr. Joseph's previous day's reaction was harmless.

**C. The State's closing argument did not shift the burden of proof on the case.**

Appellant now contends that the State somehow shifted the burden of production of evidence to Mr. Joseph by indicating in the argument [referring to the elements in the To Convict instruction]:

“Well, obviously, 2, 3, and 4 won't be any question. I mean, the testimony—the only testimony—is, in fact, that everybody agrees to is it happened over at the Kittitas County Jail, which is in the State of Washington; that Laura Mittleider was there and that she was a staff member at that correctional institution/local detention facility; the only one in Kittitas County. So that—those two are met.

That at the time of the assault she was performing her official duties. And again, you heard that, that one of the duties of the persons who work there is, you know, to do various things when inspection is over then they bring the request cart around so people can have their toiletries and their toothpaste and [inaudible on tape—muffled].

And so 2, 3 and 4 are not at issue at all.”

But the State did not shift any burden of proof by stating the obvious: that it happened in Kittitas County, that Ms. Mittleider was a corrections officer at a local detention facility and that she was performing her official duties.

The elements referred to, numbers 2, 3, and 4, are:

“ (2) That, at the time of the assault, Laura Mittleider was a staff member at a corrections institution or local detention facility;

(3) That, at the time of the assault, Laura Mittleider was performing official duties; and

(4) That the acts occurred in the State of Washington.” (CP 58)

Everybody did agree to number two and number four. It can't be error to say so. Mr. Joseph testified he was at “this jail back in October.” (RP 65) He testified that he did have contact there with Officer Mittleider. (RP 65) He testified that she opened the cuff port of his door after she asked if he wanted anything. (RP 67-68) He testified that she had the request cart there. (RP 67) He testified that he told her he wanted a pencil and a bar of soap. (RP 65) Although Mr. Joseph had a fifth amendment right not to take the stand and testify, he did in fact take the stand and

testify, and his testimony corroborated the specific elements referenced, that he was in the jail in Kittitas County, and that Ms. Middleider was an Officer there.

Moreover, his testimony also corroborated the officers' testimony that she was performing her duties. The request cart was described and referenced by both the State and the defense. (for the State RP 27-29, 30, 50-51, 54, for the Defense RP 66-67) Again, since there was no issue about any of the elements 2, 3, or 4, it couldn't possibly be misconduct to say so, and it certainly did not shift the burden of proof or burden of production to the defendant to say the evidence at the trial proved these elements. The State presented evidence on all of these and the evidence the defense presented corroborated them. The prosecutor did not tell the jury or suggest that the jury need not consider three elements because Mr. Joseph failed to present evidence on those issues. Mr. Joseph did present some evidence on those particular issues. The prosecutor, referring to all the evidence of the State and the defense, merely remarked that those three are the elements that were not in dispute.

In considering prosecutor remarks in closing arguments, Courts have held that a defendant who fails to object to an improper remark

waives the right to assert prosecutorial misconduct unless the remark was so flagrant and ill-intentioned that it causes enduring and resulting prejudice that a curative instruction could not have remedied. State v. Russell, 125 Wn.2d 24 (1994). This is certainly not a case of flagrant or ill-intentioned argument. This case is nothing like defense's cite of State v. Boehning, 127 Wn. App 511 (2005), where the prosecutor deliberately argued all sorts of facts that were not in evidence.

The defense case of State v. Fedoruk, 184 Wn. App. 866 (2014) is not remotely applicable here, where the defendant testified as he did in this case. The prosecutor did not present unadmitted evidence, express personal opinions, or appeal to intuition. And the prosecutor did not repeatedly refer to matters on which the defense presented no evidence as agreements.

In closing argument, the prosecutor has wide latitude in drawing and expressing reasonable inferences from the evidence. State v. Gentry, 125 Wn.2d 570 (1995) Since Mr. Anthony discussed being at the Kittitas County jail and discussed interacting with Corrections Officer Mittleider as she was bringing the request cart around, his own testimony could reasonably be inferred to agree that he was in fact in Washington state and

he was in the jail, that Officer Mittleider was a corrections officer there, and that she was on duty, performing official duties there at the time of the incident. Neither Feodoruk nor any other case holds that a prosecutor cannot point out elements of a crime for which there is no factual issue.

The argument was never that the jury need not consider three elements of the crime. The argument was that they had been proven and were not in dispute. There was no error.

## VI. CONCLUSION

Since Mr. Joseph's intent was an issue in the case, and his anger at hearing he could not have a pencil was probative of his intent and motive to assault the corrections officer, and since it was not unfairly prejudicial, the testimony of the officer that Mr. Joseph was angry about not having a pencil was not admitted in error.

Since there was overwhelming other evidence that the assault of a corrections officer occurred, even if it *was* error to admit Mr. Joseph's

reaction to not being given a pencil the day before, the error was harmless.

The prosecutor did not argue improperly that the State did not have to prove all elements of the crime, and did not shift the burden of proof or production of evidence to the defendant, where the State mentioned certain elements were not disputed, since the state and defense both presented evidence that Mr. Joseph was at the jail in Kittitas county and that he was interacting with Corrections Officer Mittleider as she was bringing the request cart around to the inmates.

Respectfully submitted,

A handwritten signature in cursive script that reads "L. Candace Hooper".

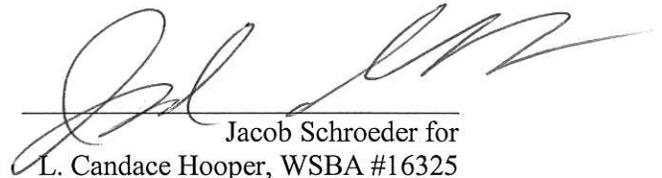
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PROOF OF SERVICE

I, Jacob Schroeder, do hereby certify under penalty of perjury that on April 28, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Respondent's Brief:

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