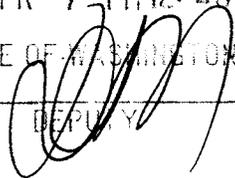


FILED
COURT OF APPEALS
DIVISION II

09 APR -7 PM 12:40

STATE OF WASHINGTON
BY 
DEPUTY

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 Reply Brief

Manek R. Mistry

Jodi R. Backlund

Attorneys for Appellant

BACKLUND & MISTRY

203 East Fourth Avenue, Suite 404

Olympia, WA 98501

(360) 352-5316

FAX: (866) 499-7475

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 4

**I. The prosecutor’s misconduct violated Mr. Brown’s
Fourteenth Amendment right to due process..... 4**

**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..... 7**

**III. The contempt order violated RCW 7.21.050 and Mr.
Brown’s right to due process. 7**

CONCLUSION 9

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Floyd v. Meachum</i> , 907 F.2d 347 (2d Cir. 1990).....	5
<i>Mahorney v. Wallman</i> , 917 F.2d 469 (10th Cir. 1990).....	5
<i>Moore v. Morton</i> , 255 F.3d 95 (3d Cir. 2001).....	4
<i>United States v. Alex Janows & Co.</i> , 2 F.3d 716 (7th Cir. 1993)	5
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)	4

WASHINGTON CASES

<i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000)...	4, 5, 6, 7
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988)	5
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P. 3d 899 (2005).....	4
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	5, 6
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	4
<i>State v. Henderson</i> , 100 Wn.App. 794, 998 P.2d 907 (2000).....	5
<i>State v. Jordan</i> , 146 Wn. App. 395, 190 P.3d 516 (2008).....	8
<i>State v. Perez-Mejia</i> , 134 Wn. App. 907, 143 P.3d 838 (2006)	4

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV	4, 5, 6, 7
------------------------------	------------

WASHINGTON STATUTES

RCW 7.21.050 7

OTHER AUTHORITIES

RAP 2.5 4, 6

ARGUMENT

I. THE PROSECUTOR'S MISCONDUCT VIOLATED MR. BROWN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

People accused of crimes have 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). Prosecutors are supposed to ensure that defendants receive a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005).

Prosecutorial misconduct may violate an accused person's Fourteenth Amendment right to due process. *Moore v. Morton*, 255 F.3d 95, 105 (3d Cir. 2001). Where misconduct creates a manifest error affecting a constitutional right, the error can be raised for the first time on review, and prejudice is presumed. RAP 2.5(a); *see also, e.g., State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

Since prejudice is presumed, reversal may be required even where the misconduct is not flagrant or ill-intentioned, and even where a curative instruction might have alleviated prejudice—where constitutional error is concerned, the state must show that the error is harmless beyond a reasonable doubt. *See, e.g., 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). Respondent's argument to the contrary is incorrect. *See* Brief of Respondent, p. 5.

Error is harmless beyond a reasonable doubt if it is trivial, formal, or merely academic, if it did not prejudice the accused, and if it in no way affected the final outcome of the case. *Lorang*, at 32. The reviewing court must be convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and that the 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).

It is misconduct for a prosecutor to undermine the presumption of innocence, dilute the reasonable doubt standard, or otherwise lessen 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). The prosecutor in this case made such arguments, violating Mr. Brown's Fourteenth Amendment right to due process.

The prosecutor's comments encouraged the jury to convict even in the face of reasonable doubt. In particular, the prosecutor said "all that matters is what you think," "you don't even have to concern yourself in

terms of doubt,” “[you should vote to convict if that’s] the right thing,” choose between “guilty or innocent,” “[An abiding belief is] one that you’re going to take out of this courtroom today.” RP(6/3/08) 65-66.

When examined in context, these statements undermined the presumption of innocence, diluted the reasonable doubt standard, and lessened the burden of proof. They infringed Mr. Brown’s Fourteenth Amendment right to due process. Thus they are subject to review for the first time on appeal, and are presumed prejudicial. RAP 2.5(a); *Lorang, supra*.

The state has not attempted to show the misconduct was harmless beyond a reasonable doubt; instead, Respondent erroneously relies on the “flagrant and ill-intentioned” standard. Brief of Respondent, p.5. The “flagrant and ill intentioned” standard does not apply where the error involves a violation of a constitutional right.

The misconduct was not harmless beyond a reasonable doubt. Based on the testimony, jurors could have decided that Mr. Brown was not the perpetrator, or that he sprayed water (not urine) and thus did nothing that was harmful or offensive. *See* Instruction No. 6, CP 19. It cannot be said beyond a reasonable doubt that any reasonable jury would have reached the same result. *Burke, supra*. The error created by the

prosecutor's misconduct was not trivial, formal, or merely academic.

Accordingly, 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.

Mr. Brown rests on the argument set forth in the opening brief.

III. THE CONTEMPT ORDER VIOLATED RCW 7.21.050 AND MR. BROWN'S RIGHT TO DUE PROCESS.

The sentencing judge violated RCW 7.21.050 and Mr. Brown's Fourteenth Amendment right to due process when he imposed contempt and entered a written contempt order for Mr. Brown's refusal to submit to fingerprinting. The judge imposed contempt and entered the order:

- (1) In the absence of any directive requiring Mr. Brown to submit to fingerprinting;
- (2) In the absence of a threat to the court's authority;
- (3) Without finding that the statutory contempt powers were inadequate;
- (4) Without certifying that he saw or heard the contempt;
- (5) Without notice and an opportunity to be *heard*;¹

¹ Mr. Brown was given a single opportunity to *comply*, but not to be *heard*. RP (6/16/08) 9-11

- (6) Without allowing Mr. Brown to speak in mitigation *after* the finding of contempt but *before* the imposition of sanctions;
- (7) Without entering the written order on the record in the presence of Mr. Brown and/or his attorney; and
- (8) Without giving Mr. Brown an opportunity to purge the contempt.

Respondent addresses only Mr. Brown's statutory arguments, ignoring his due process claim. Brief of Respondent, pp. 10-13. Because of this, the contempt order should be reversed on due process grounds.

Respondent erroneously contends that the record supports an implicit finding that the judge saw or heard the contempt. Brief of Respondent, p. 11. In fact, the record shows that Mr. Brown's refusal occurred while the court was occupied with other business. RP (6/16/08) 10. Respondent also claims that the judge gave Mr. Brown an opportunity to explain his behavior. Brief of Respondent, p. 12. This is incorrect; the court invited Mr. Brown to submit to fingerprinting, but did not ask for any explanation or information in mitigation. Finally, Respondent concedes that the record does not show how the court's written order was entered.

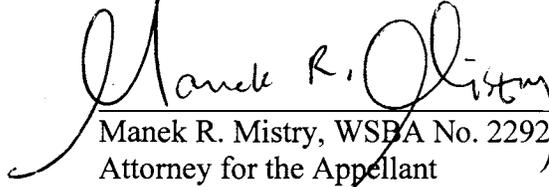
For all these reasons, the contempt order must be vacated. *See State v. Jordan*, 146 Wn. App. 395, 398, 190 P.3d 516 (2008).

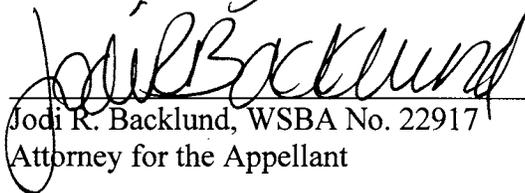
CONCLUSION

Mr. Brown's conviction must be reversed and the case remanded for a new trial. The Order on Contempt must be vacated, and Mr. Brown must not be deprived of any credit for time served.

Respectfully submitted on April 6, 2009.

BACKLUND AND MISTRY


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


Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

CERTIFICATE OF MAILING

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

Eldorado Brown, DOC #853769
Monroe Correctional Complex
P. O. Box 7002
Monroe, WA 98272

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

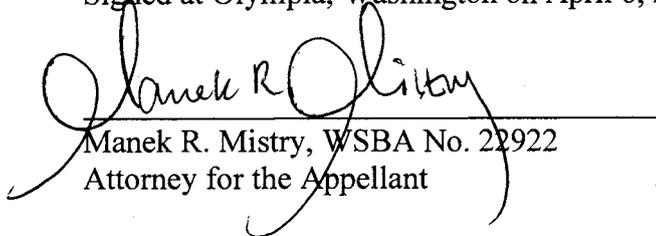
FILED
COURT OF APPEALS
DIVISION II
09 APR -7 PM 12:40
STATE OF WASHINGTON
BY _____
DEPUTY

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

All postage prepaid, on April 6, 2009.

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 April 6, 2009.



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