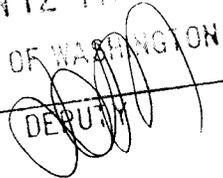


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COURT OF APPEALS  
DIVISION II

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

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State of Washington  
Respondent

v.

**JARROD A. AIRINGTON**  
Appellant

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On Appeal from the Superior Court of Grays Harbor County

Superior Court Cause number 10-1-175-4  
The Honorable F. Mark McCauley

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**REPLY BRIEF**

**Jordan B. McCabe, WSBA No. 27211**  
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## **II. Summary of the Case.**

The State charged Appellant James M. Airington by Information with second degree DV assault by means of strangulation and nothing else. Following a bench trial, the court found that the State's chief witness's statements under oath as well as her prior unsworn allegations were not credible. The court specifically found that the State had not proved the essential element of strangulation.

Instead of acquitting, however, the court found Airington guilty of the uncharged offense of DV fourth degree assault based on alternative means including shoving and sitting upon the victim.

Airington's primary assignment of error is that the judge lacked the constitutional jurisdiction to usurp the role of prosecutor and amend the charges sua sponte. Airington maintains his additional assignments of error while replying to the State's response to the separation of powers claim.

The State relies on distinguishable authorities in claiming that courts can amend the charges sua sponte absent a motion by the prosecutor to amend the Information. Airington asks this Court to reverse his conviction for fourth degree assault and dismiss with prejudice.

### III. Argument in Reply.

1. THE COURT USURPED THE EXCLUSIVE POWER OF THE EXECUTIVE BY SUA SPONTE AMENDING THE CHARGE FROM 2<sup>ND</sup> DEGREE ASSAULT BY STRANGULATION TO 4<sup>TH</sup> DEGREE ASSAULT BY OTHER MEANS.

The State refers the court to RCW 10.61.003,<sup>1</sup> which empowers the fact-finder to acquit a defendant of the offense charged in the Information and convict of a lesser degree of the same offense. Brief of Respondent (BR) at 3. But RCW 10.61.003 does not govern here.

#### **Assault is an Alternative Means Crime**

Assault is an alternative means crime. *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). “Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed. Criminal assault is just such a crime.” *Smith*, 159 Wn.2d at 784 (citing refs).

Specifically, the second degree assault statute articulates a single criminal offense with six separate subsections designating different means

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<sup>1</sup> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense. RCW 10.61.003.

by which the offense may be committed. *Smith*, 159 Wn. 2d at 784, citing RCW 9A.36.021(1)(a)–(f). If the Information charges only one such means, it is reversible error for the jury to convict based on some other means. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

Here, the State charged Airington with 2<sup>nd</sup> degree assault committed specifically by means of strangulation. Having rejected the State's evidence for strangulation, the judge did not then have the option of finding Airington guilty instead of assault by means of shoving or sitting upon. Hypothetically, had the judge determined that Airington tried to strangle Goedker but that the attempt did not rise to the level of a second degree assault, the fourth degree assault conviction would be unobjectionable under RCW 10.61.003. But that is not what happened. Instead, the judge determined that no strangulation of any degree occurred.

Thus, the judge did not reject the proof merely of the degree of the charged offense. He determined that the charged offense did not happen. It was reversible error to convict Airington of an entirely different crime.

### **All Or Nothing**

The question presented by a separation of powers challenge is whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. *State v. Moreno*, 147 Wn.2d 500, 505–06, 58 P.3d 265 (2002). Here, the judge infringed on the prerogative

of counsel for both parties to decide whether to gamble on an all-or-nothing strategy or to give the fact-finder the option of considering a lesser offense. *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). In *King*, it was a legitimate tactic to submit a second degree assault case for a verdict solely on the greater charge because “that well could have resulted in an outright acquittal.” *King*, 24 Wn. App. at 501.

That is, gambling on an all-or-nothing is a legitimate strategy, and is the strategy chosen by the prosecutor here. This choice would have suited defense counsel also, because the evidence for strangulation was vulnerable. And the court did in fact acquit Airington of assault by strangulation. It was not an option for the court to substitute its own judgment.

#### **Peterson Is Distinguishable**

*State v. Peterson*, 133 Wn.2d 885, 948 P.2d 381 (1997), relied on by the State, is distinguishable. As in this case, the judge in a bench trial substituted an offense that was an inferior degree of assault than that charged in the original Information but that was not a lesser included offense. *Peterson*, 133 Wn.2d at 889-90. The Supreme Court held that reducing the charge to an inferior degree during the trial was permitted by RCW 10.61.003. But the State in *Peterson* **amended the Information**

during the trial. *Peterson*, 133 Wn.2d at 890. Here, by contrast, the court substituted its judgment entirely sua sponte.

**Peterson Dictum Is Wrong**

The *Peterson* opinion states that amending the Information in that case was unnecessary under RCW 10.61.003. *Peterson*, 133 Wn.2d at 891. This is (a) obiter dictum and (b) wrong.

(a) The State in *Peterson* did file an amended Information.

Therefore, the question of whether amendment was necessary was not before the Court.

(b) RCW 10.61.003 does not purport to empower a jury — or in this case, a judge sitting as fact-finder — to take upon itself the decision to amend the charge. To interpret it as doing so would render it unconstitutional by usurping the prosecutor’s exclusively executive function of making charging decisions according his or her own best judgment, not that of the judge. *State v. Tracer*, 155 Wn. App. 171, 182, 229 P.3d 847, *review granted*, 169 Wn.2d 1010 (2010).

2. THE INFORMATION WAS DEFECTIVE.

The information must be “a plain, concise and definite written statement of the essential facts constituting the offense charged.” CrR 2.1(e)(1). It must provide notice of the charge the accused must prepare to

meet so that he can present an adequate defense. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). The manner of committing an offense is an element, and the defendant must be informed of this element in the Information. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

The rule that the charging document must give the accused notice of the nature of the allegations so that he can prepare a meaningful defense is of constitutional origin. Const. art. I, § 22 (amend.10); U.S. Const. amend. VI; *State v. Siers*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 4813737 (2010), Slip Op. 63697-9-I at 3, citing *Kjorsvik*, 117 Wn.2d at 97-102. The essential elements consist of the statutory elements of the charged crime and a description of the defendant's conduct that supports every statutory element of the offense. *State v. Powell*, 167 Wn.2d 672, 682, 223 P.3d 493 (2009).

If the accused lacked the requisite notice to prepare an adequate defense, the conviction must be dismissed. *Kjorsvik*, at 105-06; *State v. Hopper*, 118 Wn.2d 151, 56, 822 P.2d 775 (1992). Here, by no "fair construction" can the elements of the charge Airington was convicted of be found in the Information. *Kjorsvik*, 117 Wn.2d at 105; *State v. Hopper*, 118 Wn.2d at 155-56. It charges the alternative means crime of assault

and alleges the sole means of strangulation. This cannot be construed as giving notice to defend against a charge of assault by other means.

The court found the alleged assault was committed not by squeezing Ms. Goedker's neck, but by some unspecified contact that would offend a reasonable person. Had Airington known this, the defense may have elicited rebuttal testimony.

In addition, the criminal procedure statutes require that a charging document must set forth the act alleged to constitute the crime clearly and distinctly and with sufficient certainty, in plain, concise language that an ordinary person can understand. RCW 10.37.050(6) & (7). This does not mean the name of the offense; it means a statement of the acts. *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

**The State Could Have Amended the Information, But Did Not**

If the original Information fails to meet the constitutional requirements, the State may move to amend it, so long as the defendant's substantial rights are not prejudiced. CrR 2.1(d); *State v. Schaffer*, 120 Wn.2d 616, 621, 845 P.2d 281 (1993). Here, the State did not amend the charges.

And even if the court had the power to amend, it could only do so prior to the verdict. *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854

(1987) ; *State v. Herrera*, 95 Wn. App. 328, 330, 977 P.2d 12, 13 (1999).

Instead, the court amended the charge after the State rested its case and after the defense also had rested. The court announced the amendment as part of the verdict.

### 3. DISMISSAL IS REQUIRED.

The powers violation was a fundamental error for which reversal is required under the *Pelkey* rule. See *Peterson*, 133 Wn.2d at 890; *Pelkey*, 109 Wn.2d at 491. Moreover, where the charging document fails to set forth the essential elements of crime in such a way that defendant is notified of the illegal conduct are constitutionally defective, dismissal is required. *Hopper*, 118 Wn.2d at 155.

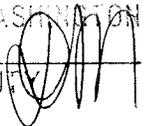
Moreover, Airington maintains his challenge to the sufficiency of the evidence to prove an assault in any degree. Since retrial following reversal for insufficient evidence is prohibited unequivocally, dismissal is the appropriate remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

The Court should dismiss this prosecution with prejudice.

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IV. CONCLUSION

For the reasons stated, the Court should dismiss this prosecution with prejudice.

Respectfully submitted this January 11, 2011.



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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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Date: January 11, 2011

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