

No. 42661-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Channing Davis,**

Appellant.

---

Clallam County Superior Court Cause No. 11-1-00219-4

The Honorable Judge George Wood

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The prosecutor committed misconduct that infringed Mr. Davis's Fourteenth Amendment right to due process.
2. The prosecutor committed misconduct that infringed Mr. Davis's Sixth and Fourteenth Amendment right to a jury trial.
3. The prosecutor improperly expressed his personal opinion in closing arguments.
4. The trial court erred by failing to hold a hearing prior to requiring that Mr. Davis be restrained during his jury trial.
5. The trial court erred by imposing restraints on Mr. Davis without adequate cause.
6. The trial court erred by imposing restraints on Mr. Davis without considering less restrictive alternatives.
7. The trial court erred by failing to determine whether jurors observed Mr. Davis's restraints during trial.
8. Mr. Davis's conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
9. The prosecution failed to prove beyond a reasonable doubt that Mr. Davis inflicted "substantial bodily harm."

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A prosecutor may not express a personal opinion regarding the evidence admitted in a criminal trial. Here, the prosecutor repeatedly expressed his personal opinion during closing arguments. Did the prosecutor commit reversible misconduct in violation of Mr. Davis's rights to due process and to a jury trial under the Sixth and Fourteenth Amendments?

2. Prior to requiring an accused person to attend trial in restraints, a trial judge must hold a hearing to determine the necessity of shackling the person during trial. Here, the judge did not hold a hearing to determine the need for restraints, and Mr. Davis was required to attend trial wearing a leg brace. Was Mr. Davis's conviction entered in violation of his Fourteenth Amendment right to due process?
  
3. To convict Mr. Davis of second-degree assault, the prosecution was required to prove that Mr. Davis intentionally assaulted another and recklessly inflicted substantial bodily harm. Here, the evidence of substantial bodily harm consisted of evidence that Ekregren had difficulty speaking immediately following the fight, that one eye was swollen shut, and that he had bruises that would probably last for several weeks. Did the conviction infringe Mr. Davis's Fourteenth Amendment right to due process because it was based on insufficient evidence?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Channing Davis and Keenan Ekregren both resided at the Forks jail in June of 2011. RP (9/12/11) 63-65. On June 5, 2011, Mr. Davis said he'd gotten into a fight, and Ekregren asked to be taken to the hospital. RP (9/12/11) 64-65. No witnesses saw how the melee started, and the jail's video system did not capture it. RP (9/12/11) 68, 69, 86-90, 94-98; RP (9/13/11) 12, 14.

The state charged Mr. Davis with Assault in the Second Degree, alleging that he "did intentionally assault another person, ...and thereby did recklessly inflict substantial bodily harm..." CP 20.

At the start of trial, the judge instructed Mr. Davis to refrain from walking or moving about the courtroom while the jurors were present, so that they would not be able to see that he was wearing a leg restraint. RP (9/12/11) 5-6. The court did not make any findings or entertain any discussion relating to the restraints. RP (9/12/11) 3-7.

Ekregren did not respond to the state's subpoena for trial. RP (9/13/11) 14. Dr. Washington, who saw Mr. Ekregren at the emergency room on the day of the fight, testified that Ekregren did not know what had happened but complained of a painful head. He observed bruises, a swollen eye, and a bloody mouth. RP (9/12/11) 36-45. The doctor gave

Ekregren 6 pain pills and discharged him, and did not see him again. RP (9/12/11) 44, 54-55, 57.

The prosecution proposed an instruction regarding the definition of disfigurement. The defense objected and the court did not give it. RP (9/12/11) 104-106; RP (9/13/11) 42-50.

The court denied the defense motion to dismiss for insufficient evidence. RP (9/13/11) 16-21.

Mr. Davis testified, and told the jury that when he went to talk with Ekregren, Ekregren swung at him. RP 99/13/11) 23-24. He asserted self-defense. RP (9/13/11) 22-40, 65-82.

During closing argument, the prosecutor told the jury:

My job as a representative of the people of the State of Washington is to prove this case beyond a reasonable doubt. I'd argue to you that I've done that, but I'd point out to you that as we discussed in jury selection it's not proof beyond a shadow of a doubt. It's not proof beyond any doubt. It's not proof beyond 100% absolute proof. It's proof beyond a doubt for which you can state a reason.

I'll reiterate the part that I'd argue is important. Reasonable doubt is one for which a reason exists...

[W]e see Channing Davis march out of his cell, number 3, around the table like a man on a mission I would argue. I'd argue that's what it looked like.

We don't know what's happening but we see Mr. Davis in the door bent over. So, I'd argue the only reason he'd be bent over is because Mr. Ekregren was on the floor.

So, I'd argue, ladies and gentlemen, that it was an assault, it was not a reasonable use of force, it was not self-defense. It was just a flat-out beating.

Okay, the next issue of some interest is going to be the extent of the injury. Have I proven substantial bodily harm. I'd argue that I did...

So first is this disfiguring? Well, I'd argue that it is.

But nevertheless, is it a substantial impairment of a bodily function if he gets his so bad he can't talk for a while, well, I'd argue it is.

So there is a temporary but substantial, I'd argue, disfigurement to his bodily functions, his ability to work his brain, frankly. I mean, he's just out of it for a while.

First I've argued and continue to argue that there wasn't any self defense anywhere in this case. It was just a flat-out beating. I mean, Mr. Davis just went -- once he knew Mr. Ekregren was alone he went into his cell and simply beat the stuffing out of him. I mean, that's our argument as to what happened.

So what is the likelihood that someone of 180 and a slender build is going to start throwing punches at someone who's 5'11, 200, stocky and muscular? I'd argue not very good.

And that's why even if you buy the argument that it's self defense, and I argue that you shouldn't, it was unnecessary and frankly completely unlawful use of force. Unnecessary and unreasonable.

RP (9/13/11) 54-64 (emphasis added)

Later, during rebuttal argument, the prosecutor went on:

First, counsel's correct when he says that Keenan Ekregren is not here. I would like for him to be here, I had the bailiff call for him. He's not. If this were a civil case and I were a private attorney and I was representing Mr. Ekregren in some kind of a case against Mr. Davis for damages I think I'd be in trouble. But the problem is I

don't represent Mr. Ekregren, I'm not his attorney. I'm the attorney for the people of the State of Washington...

Is this something a reasonably person would do to necessarily defend themselves with reasonable use of force? And I'd answer it is not.

Then we look at -- let's look at this one, this is number 6, there's a big blood smear on the floor, blood on the mattress and where's that coming from? I'd argue it's coming from Mr. Ekregren's mouth. I'm not seeing a lot of blood coming out of his black eye. So I mean, that's a lot of blood, okay. It's not necessary. It's not something a reasonably prudent person would do to defend themselves. Again, it's just a flat out beating.

Well, first of course that's not a reasonable use of force but if you think it goes to the argument correctly as to substantial bodily injury or not, and I'd argue first we do have a concussion because we see him groggy, we see him stumbling around, telling the doctor likely unconscious.

So we've proved the injuries and I'd argue that the self defense is not at all what happened.

So I'd argue, ladies and gentlemen, that the verdict supports assault in the 2nd degree and I'd ask you to return a verdict of guilty on assault in the second degree.

RP (9/13/11) 83-87 (emphasis added).

The jury voted guilty. After sentencing, Mr. Davis timely appealed. CP 7, 6.

## ARGUMENT

**I. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. DAVIS'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL, TO DUE PROCESS, AND TO A DECISION BASED SOLELY ON THE EVIDENCE.**

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011).

Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). 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. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000).

B. Permissible Scope of Review

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Prosecutorial misconduct that does not infringe a constitutional right may be raised for the first time on review if it is “so flagrant and ill intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction.” *State v. Walker*, 164 Wash.App. 724, 730, 265 P.3d 191 (2011). The Court of Appeals also has discretion to accept review of any issue argued for the first time on appeal, including issues that do not implicate a constitutional right. RAP 2.5 (a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

- C. The prosecutor improperly expressed his personal opinion regarding the evidence.

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

It is misconduct for a prosecutor to vouch for evidence, or to give a personal opinion on the guilt of the accused. *State v. Reed*, 102 Wash.2d 140, 684 P.2d 699 (1984). A prosecutor may not ““throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.”” *State v. Monday*, 171 Wash.2d 667, 677, 257 P.3d 551 (2011) (quoting *State v. Case*, 49 Wash.2d 66, 71, 298 P.2d 500 (1956))

In this case, the prosecutor emphasized his role “as a representative of the people of the State of Washington” and repeatedly gave his personal opinion on the evidence. In his summation and rebuttal closing, the prosecutor used the personal pronoun “I” approximately 60 times.<sup>1</sup> RP

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<sup>1</sup> Defense counsel also succumbed to the bad habit of using the first person pronoun. This does not, however, excuse or mitigate the prosecutor’s misconduct.

(9/13/11) 54-64, 83-89. Seeking to disguise his misconduct, he substituted the phrase “I’d argue” for the phrase “I believe.” But the expression of personal opinion is not erased simply by a semantic change. The prosecutor’s constant use of “I’d argue” throughout his closing arguments made it abundantly clear that he personally believed in the truth of certain evidence, and that he personally believed that such evidence established substantial bodily harm and the absence of self defense. RP (9/13/11) 54-64, 83-89.

Although defense counsel did not object at trial, the error may be raised for the first time on review because the prosecutor’s misconduct was so pervasive as to create a manifest error affecting Mr. Davis’s right to due process and his right to a jury trial. RAP 2.5(a)(3); *Turner*, at 472; *Sheppard*, at 335 . In the alternative, the argument was so flagrant and ill-intentioned that an objection was unnecessary; any curative instruction would only have highlighted the offending arguments. As many courts have noted, “[a] bell once rung cannot be unring.” *State v. Easter*, 130 Wash.2d 228, 230-239, 922 P.2d 1285 (1996) (internal citations omitted).

The prosecutor’s reliance on personal opinion robbed Mr. Davis of his right to a jury verdict free from improper influence. *Russell II*, see also *State v. Horton*, 116 Wash.App. 909, 921, 68 P.3d 1145 (2003). It

violated his rights to a jury trial and due process. *Id.* For these reasons, his convictions must be reversed and a new trial granted. *Id.*

**II. THE TRIAL COURT VIOLATED MR. DAVIS’S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 3 BY ALLOWING HIM TO BE RESTRAINED AT TRIAL IN THE ABSENCE OF AN “IMPELLING NECESSITY.”**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S.*, at 702 .

B. Mr. Davis was entitled to attend trial free of shackles absent some “impelling necessity” for physical restraint.

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Damon*, 144 Wash.2d 686, 691, 25 P.3d 418 (2001); *State v. Finch*, 137 Wash.2d 792, 844, 975 P.2d 967 (1999). Restraints may not be used “unless some *impelling necessity* demands the restraint of a prisoner to secure the safety of others and his own custody.” *Finch*, at 842 (quoting *State v. Hartzog*, 96 Wash.2d 383, 398, 635 P.2d 694 (1981) (emphasis in original)). The accused has the right to be brought before the court “with the appearance, dignity, and self-respect of a free and innocent man.” *Finch*, at 844.

Restraints are disfavored because they undermine the presumption of innocence, unfairly prejudice the jury, restrict the defendant’s ability to

assist in the defense of his case, interfere with the right to testify, and offend the dignity of the judicial process. *Finch* , at 845; *Hartzog*, at 399. Close judicial scrutiny is required to ensure that the inherent prejudice of restraint is necessary to further an essential state interest. *Finch*, at 846.

The trial court must base its decision to physically restrain an accused person on evidence that s/he poses an imminent risk of escape, intends to injure someone in the courtroom, or cannot behave in an orderly manner while in the courtroom. *Finch*, at 850. Concern that a person is “potentially dangerous” is not sufficient. *Finch*, at 852. Restraints may only be imposed based on information specific to a particular person; a general concern or a blanket policy will not pass constitutional muster. *Hartzog*, *supra*. Finally, restraints should be used only as a last resort, and the court *must* consider less restrictive alternatives before imposing physical restraints. *Finch*, at 850.

A trial court electing to impose restraints must make findings of fact and conclusions of law that are sufficient to justify the use of the restraints. *Damon* , at 691-692. On direct appeal, improper use of restraints is presumed to be prejudicial. *In re Davis*, 152 Wash.2d 647, 698-699, 101 P.3d 1 (2004).

The burden is on the court to remain alert to any factor that may undermine the fairness of trial. *State v. Gonzalez*, 129 Wash.App. 895,

901, 120 P.3d 645 (2005). The judge is responsible for preventing prejudicial occurrences and for determining their effect. *Id.* It is the court’s duty to shield the jury from routine security measures; this duty “is a constitutional mandate.” *Id.* (citing *State v. Hutchinson*, 135 Wash.2d 863, 887-888, 959 P.2d 1061 (1998)).

C. Mr. Davis was prejudiced by the unconstitutional use of restraints during trial: the judge failed to hold a hearing, to consider less restrictive alternatives, and to determine whether any jurors had seen Mr. Davis in restraints.

Mr. Davis appeared at trial wearing a leg brace. RP (9/12/11) 5-6.

No mention was made of the reason for restraints. The court did not hold a hearing, hear evidence, or enter findings. Nothing in the record suggests that Mr. Davis posed an imminent risk of escape, that he intended to injure someone in the courtroom, or that he could not behave in an orderly manner. *Finch*, at 850. Nor is there any indication that the court considered less restrictive alternatives. *Finch*, at 850. Finally, the record does not establish that the court took any but the most basic steps to ensure that potential jurors wouldn’t see the restraints during jury selection, or that seated jurors wouldn’t see the restraints during trial. RP (9/12/11) 3-8.

All of the concerns outlined by the *Finch* Court are implicated by the shacking that took place here. In addition to the practical impact—

prejudice, restriction of ability to assist in the defense, and interference with the right to testify—the restraints here “offend the dignity of the judicial process.” *Finch*, at 845. The illegal imposition of restraints violated Mr. Davis’s due process rights. *Id.*

Because the issue is raised on direct appeal, the court’s improper use of restraints is presumed to be prejudicial. *In re Davis*, at 698-699. His convictions must be reversed and the case remanded with instructions to permit Mr. Davis to appear in court without restraint, absent some impelling necessity. *Id.*

**III. MR. DAVIS’S CONVICTION FOR SECOND-DEGREE ASSAULT VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.**

**A. Standard of Review**

Constitutional questions are reviewed *de novo*. *E.S.*, at 702. The interpretation of a statute is reviewed *de novo*, as is the application of law to a particular set of facts. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009); *In re Detention of Anderson*, 166 Wash.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel*, at 576.

- B. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

- C. The prosecution failed to prove that Mr. Davis inflicted substantial bodily harm.

In interpreting a statute, a court must assume that the legislature means exactly what it says. *State v. Keller*, 143 Wash.2d 267, 276, 19 P.3d 1030 (2001), *cert. den. sub nom Keller v. Washington*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). If the statute is clear on its face, its meaning is derived from the statutory language alone; an unambiguous statute is not subject to judicial interpretation. *State v. Cramm*, 114 Wash.App. 170, 173, 56 P.3d 999 (2002); *State v. Chester*, 133 Wash.2d 15, 21, 940 P.2d 1374 (1997). The court may not add language to a clearly worded statute, even if it believes the legislature intended more. *Id.*

To obtain a conviction for second-degree assault as charged, the prosecution was required to prove that Mr. Davis intentionally assaulted Ekegren and thereby recklessly inflicted substantial bodily harm. RCW 9A.36.021; CP 20. Substantial bodily harm means “bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.” RCW 9A.04.110(4)(b); CP 20.

Here, the prosecution did not establish that Mr. Davis inflicted substantial bodily harm. Ekegren did not testify at trial. The evidence of his injuries consisted of Sgt. Kahn’s testimony (that Ekegren had difficulty talking immediately after the fight), Dr. Washington’s testimony (that on the same day as the fight, Ekegren’s eye was swollen shut and he had bruises that would probably last a few weeks), and a photograph of the injuries (taken at the hospital by Officer Rowley). RP (9/12/11) 36-90, 102-103; Exhibit 14, Supp CP.

This evidence was insufficient to establish substantial bodily harm. First, Ekegren’s difficulty speaking (immediately after the fight) was not substantial enough to endure until he was seen at the hospital. RP (9/12/11) 39. Second, nothing in the record proved how long the injuries observed by the witnesses and documented in the photograph lasted. If

they were insubstantial enough to disappear within a day, they could not qualify as substantial bodily harm, despite their visibility during the hours following the fight.

The evidence was therefore insufficient. The conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

### **CONCLUSION**

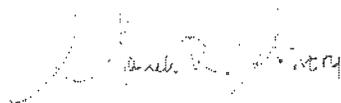
For the foregoing reasons, the conviction must be reversed and the case dismissed with prejudice. In the alternative, the charge must be remanded to the trial court for a new trial.

Respectfully submitted on March 16, 2012,

### **BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Brian Patrick Wendt  
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 March 16, 2012.



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# BACKLUND & MISTRY

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

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A copy of this document has been emailed to the following addresses:

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