

29564-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WAYMOND S. TURNER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF GRANT COUNTY

APPELLANT'S BRIEF

Julia A. Dooris
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence existed to support Mr. Turner's conviction for second degree malicious mischief.
2. Trial counsel's concession that Mr. Turner was guilty of second degree malicious mischief constituted ineffective assistance.
3. Trial counsel's failure to request a bill of particulars constituted ineffective assistance.
4. The prosecutor's repeated misconduct denied Mr. Turner his State and Federal Constitutional rights to a fair trial.

B. ISSUES

1. Where the State simply proves that a single police cruiser is out of commission for one day for repairs, does sufficient evidence exist of a substantial risk of interruption or impairment of service rendered to the public?
2. Does the second degree malicious mischief statute, RCW 9A.48.080(1)(b), require that the State prove nothing more than mere damage to an emergency vehicle that requires one day in the body shop and out of service for repairs?

3. Does trial counsel render ineffective assistance that prejudices the defendant when trial counsel admits he failed to request a bill of particulars and therefore failed to anticipate, inquire about, prepare for, or defend against an additional act supporting third degree assault of an officer and defendant is convicted?
4. Did repeated and flagrant mischaracterization of the evidence in closing by the prosecutor constitute misconduct sufficient to deny Mr. Turner a fair trial?
5. Were Mr. Turner's State and Federal Constitutional rights to a fair trial violated when the prosecutor committed misconduct by repeatedly, intentionally mischaracterizing the evidence during closing argument?

C. STATEMENT OF THE CASE

In mid-June, 2010, 25-year-old Waymond S. Turner had planned to go on a camping trip with his parents. (2RP¹ 105) Mr. Turner was in

¹ The transcripts are not numbered sequentially. "1RP" refers to the trial proceedings from October 6, 2010. "2RP" refers to the trial proceedings from October 7, 2010. "3RP" refers to the trial proceedings from October 8, 2010. "4RP" refers to the trial proceedings beginning with September 14, 2010 and ending with sentencing on November 10, 2010.

and out of his parents house that day, and he accompanied his father, Martinia Turner-Bey on a few errands. (2RP 107)

At approximately 6:00 p.m., Mr. Turner returned to his parents' house. He became frustrated because his mother was in his way, and he eventually stepped in his father's prized garden. (2RP 109) This upset Mr. Turner-Bey, and father and son exchanged angry words. (2RP 109-111) Mr. Turner-Bey asked his son to leave. (2RP 111; 60)

Mr. Turner complained that he needed financial help, and his father was not providing help. (2RP 111-12) Mr. Turner-Bey responded, "Well, you know, if you can't get -- you know, if you can't make it in life, you know ... if you can't make it in life, why make everybody suffer? You might as well, you know, take yourself out." (2RP 130)²

Mr. Turner-Bey's suggestion upset his son. In response, Mr. Turner pulled a small knife out of his pocket and said to his father, "well, why don't I take you out?" (2RP 130) Ernestine Tucker, Mr. Turner's mother, was inside calling the police, but she heard the two men arguing. (2RP 61-62) Ms. Tucker thought Mr. Turner said to his father, "How about I cut you?" (2RP 61-62)

² Mr. Turner-Bey testified at trial that he was being sarcastic. (2RP 130)

At that moment, Mr. Turner-Bey saw that a sheriff had arrived at the house and was making his way toward the two men. (2RP 134) Mr. Turner-Bey yelled to the officer, "Here you go, right here!" (2RP 135)

Both Ms. Tucker and Mr. Turner-Bey watched as their son was approached by the officers and eventually handcuffed and carried to the patrol car. Ms. Tucker reported that she witnessed the first contact with the police (2RP 65) and "the officers were trying to arrest Waymond. Told him to go to his knees... And he kind of didn't do what they said, so they tased him." (2RP 62)

Ms. Tucker did not see any other contact between her son and the deputy before her son was tased. (2RP 68) Ms. Tucker saw that after the officers picked Mr. Turner up out of the dirt and carried him to the police car, Mr. Turner's head contacted the officer's head under his chin. (2RP 68)

Mr. Turner-Bey saw the officers order Mr. Turner to the ground. He saw Mr. Turner go to the ground, and an officer began to handcuff him. At that point, Mr. Turner-Bey saw Mr. Turner resist, and an officer "put him down to the ground." (2RP 137) Mr. Turner-Bey watched Mr. Turner continue "resisting", and saw the officers tase Mr. Turner. (2RP 137) He saw the officers load the handcuffed Mr. Turner into the police cruiser. (2RP 137)

While in the police cruiser, Mr. Turner kicked out the rear passenger side window. (2RP 41; 69; 139) The police car was out of service for one day. (2RP 43)

Mr. Turner was charged with three counts: (1) second degree assault with a deadly weapon related to the incident with his father; (2) second degree malicious mischief under RCW 9A.48.080(1)(b); and (3) third degree assault of an officer. (CP 1-2)

Regarding the third degree assault, the Information stated:

On or about the 16th day of June, 2010, in the County of Grant, State of Washington, the above-named Defendant, did assault a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; contrary to the Revised Code of Washington 9A.36.031(1)(g).

(CP 2)

At trial, Corporal Beau Lamens, a Grant County Sheriff's Deputy testified that he was first on the scene. (1RP 58) Once the second officer, Deputy Keven Dobson arrived, Corporal Lamens ordered Mr. Turner to his knees. The Corporal testified that while Mr. Turner was on his knees, the officer began to handcuff him, but Mr. Turner resisted: "As I put the first cuff on I could feel him starting to stiffen up. And he pulled his hands apart and turned around and lunged forward and grabbed me across the waist." (1RP 63) The Corporal testified that his immediate response was:

“I ... grabbed him and with my body weight just sprawled my legs out to trap his movements and bring him to the ground.” (1RP 63) Next, Deputy Dobson shot Mr. Turner with the taser gun. (1RP 66)

Corporal Lamens also testified at trial that he could not persuade Mr. Turner to get into the police car. Mr. Turner insisted on speaking with his father before he got into the car. In order to force Mr. Turner into the car, the Corporal admitted he kned Mr. Turner in the femoral nerve, to knock him off balance. (1RP 70) Corporal Lamens testified that the blow knocked Mr. Turner off balance, and “he kind of like bent at the waist, and at which time he lunged forward and head-butted me in the top of the lip.” (1RP 70) The Corporal stated that the inside of his lip was “bruised” from striking his teeth, and his lip was swollen for a couple of hours. (1RP 94)

Deputy Dobson also testified at trial, and said that he watched Mr. Turner eventually comply with the commands to go to his knees. (2RP 66) The deputy reported that he saw Corporal Lamens put one handcuff on Mr. Turner. He testified that after one handcuff was on, Mr. Turner stood, “and spun around and grabbed ahold of Corporal Lamens around the waist.” (2RP 36) The Deputy stated that Corporal Lamens then tackled Mr. Turner and they both went to the ground. (2RP 36)

During closing argument, over objection, the prosecutor repeatedly argued that Mr. Turner “attacked” Corporal Lamens. (3RP 28 (two references); 29 (2 references); 30; 32; 79) The court overruled the objection, and held: “[T]his is a question for the jury to determine whether the evidence will support that or not.” (3RP 28)

Also during closing, the prosecutor spoke of the knife and characterized Mr. Turner’s comment to his father as “[t]hat day, Ladies and Gentlemen, Mr. Turner-Bey stated his son took it out, opened the knife, heard the click, came in and said "You want to die, Old Man?" Or you heard what he testified to.” (3RP 34)

Additionally, in closing the prosecutor argued that domestic violence was an epidemic and many people are killed every year:

Now, you may hear argument that "Oh, come on. It's just a family fight. He really didn't mean to do it." Again, the State would argue that, you know, it doesn't matter if he meant to do the harm there. It's whether it's reasonable for the father to feel that way. This is just a family issue there. It's just domestic violence. Ladies and Gentlemen, domestic violence is one of the worst things in our country right now. People get harmed. People get killed by that all the time.

(3RP 36) The court sustained an objection and instructed the jury to “disregard the last argument.” (3RP 37)

Also during closing argument, the State argued that the “waist grab” of Corporal Lamens was evidence to support the third degree assault charge:

MR. OWENS: The Defendant gets down on his knees. He puts one cuff on him. What does the mother say she saw? What does Corporal Lamens say he saw -- or happened to him? And what does Keven Dobson say? The Defendant immediately stands up, turns around, and hits the officer. Boom.

MR. BILLINGSLEY: Objection. Misrepresents the testimony.

MR. OWENS: Of course.

MR. BILLINGSLEY: Well, of course it does because that's not --

THE COURT: Okay. You're going to get your chance. Members of the Jury, since I've instructed you before, I'm not going to -- I'm not going to sustain that objection, but I don't want you to interpret that comment as evidence. You should -- you should -- you should base your decision on the evidence that you find, not -- and if it's at variance with what counsel -- either counsel says, you should disregard it.

(3RP 26)

(Bench conference.)

MR. BILLINGSLEY: Your Honor, the Assault 3 has been and always has been about whether or not my client headbutted this Corporal Lamens. Now there's something else about some reaction to -- it's now being detained and being thrown down in the dirt like a dog, it is now being characterized as Assault 3. When, in fact, the only thing that was every represented in all of our discussions throughout the entire case was whether or not my client headbutted him at the car.

THE COURT: Hold on a second. Can I see the file? Looking at the -- at the Information, what it says is that the Defendant assaulted a law enforcement officer. It doesn't even say (inaudible) --

THE REPORTER: Excuse me?

THE COURT: It doesn't even say it was Beau. It doesn't even -- that's why we have Bills of Particulars to narrow these things down.

MR. BILLINGSLEY: Well, I didn't have any time to do any of that, Your Honor. You put the rocket docket to try and get my cases done before the 26th. So if you want to depict stuff like that, then that has to be on the record so I --

THE COURT: All right. That's fine. It seems to me that Mr. Owens is to -- can argue any of the evidence that was put before the Court.

MR. BILLINGSLEY: Okay.
(End bench conference.)

(3RP 26-27)

During the defense closing, counsel told the jury that he had not anticipated that the waist grab might be evidence of a third degree assault:

MR. BILLINGSLEY: ... I've got to admit to you, I didn't contemplate that the State would argue that that was an assault. That the first time, you know, my client was down on his -- and didn't want the cuffs put on him was an assault. And that's my fault. You expect an amount of professional courtesy that puts you on notice that this is what they're talking about.

(3RP 41) The State objected and the lawyers convened in a bench conference. (3RP 41)

Subsequently, defense counsel complained during a bench conference that he was not on notice that the State intended to use the alleged waist grab as a basis for the third degree assault: "I argued that the Assault 3 should be dismissed for deficiency of evidence. He never said

anything about that. I could have -- I could have put up, you know, a case.

I could have asked about that incident.” (3RP 42)

Later, defense counsel moved for a mistrial on the same basis:

And, you know, I would have talked -- I would have had demonstrations of how one cuff was on, the position that my client was in, how he could have attacked from his knees, what the reaction was. I mean, it sounds like he just wanted to know what's going on. "Am I under arrest?" I should have been allowed to explore the arrest thing more, the lack of an arrest. All of these things would have been relevant to that issue. But in order to make this case go quicker, in order to do what makes the most sense for the time before the Court and the jury, I focused in on the headbutt. That's all I was ever led to believe. And I think it's a mistrial situation. If you want to consider my comment as part of the reasons it should be a mistrial, I'd asked the Court to call a mistrial.

(3RP 46-47) The court denied the motion. (RP 47)

Defense counsel ended closing argument by informing the jury that Mr. Turner was guilty of second degree malicious mischief: “The crime that was committed here was Unlawful Display of a Weapon and Malicious Mischief in the 2nd degree.” (3RP 76)

The jury acquitted Mr. Turner of second degree assault with a deadly weapon, and instead convicted him of the lesser charge of unlawfully displaying a weapon. (CP 95-96) The court sentenced Mr. Turner to a total of 22 months incarceration, in addition to three months community custody. (CP 112-13) He appeals.

D. ARGUMENT

1. THE STATE FAILED TO PROVE THAT KICKING OUT THE WINDOW OF THE POLICE CRUISER CREATED A SUBSTANTIAL RISK OF INTERRUPTION OR IMPAIRMENT OF SERVICE RENDERED TO THE PUBLIC.

Second degree malicious mischief is defined:

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously....(b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

RCW 9A.48.080(1)(b)

The court reviews questions of statutory interpretation *de novo* and interpret statutes to give effect to the legislature's intentions. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 672-73, 146 P.3d 893 (2006). The court begins by examining the plain language of the statute. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838-39, 215 P.3d 166 (2009). The court employs traditional rules of grammar in discerning the plain language of the statute. *Chevelle*, 166 Wn.2d at 839.

The plain language of RCW 9A.48.080(1)(b) requires that the alleged act must both (1) create a substantial risk of interruption or impairment of service rendered to the public, and (2) consists of physical

damage or tampering with an emergency vehicle. In this case, the State failed to establish the first prong. While the police cruiser was out of service for a short time period, the State failed to show that police service in general was interrupted. Under the plain language of the statute, service interruption or impairment must occur. In this case, no evidence exists that the officer was unable to complete his duties using an alternate cruiser, unmarked car, motorcycle, bicycle or even police horse. Nor did the State establish that every police vehicle was in use, and that no back-up cars were available.

Two published Washington cases have interpreted this statute, but neither case is helpful to this analysis because this issue was not raised or decided. In 2001, Division Two found that Mr. Gardner's use of his foster brother's police radio, depressing the transmit button caused "disruptive clicking sounds on the law enforcement frequency." *State v. Gardner*, 104 Wn. App. 541, 16 P.3d 699 (2001). The court provided little analysis, and briefly concluded that the acts were disruptive and thus sufficient to support a conviction for second degree malicious mischief.

In 2004, Division Three found that repeated spitting inside a police car, that required approximately 15 minutes to disinfect, was insufficient to establish a substantial risk of interruption or impairment of service to the public. *State v. Hernandez*, 120 Wn. App. 389, 85 P.3d 398 (2004)

(“Unlike the defendant in *Gardner*, Mr. Hernandez did not disrupt emergency services by physically manipulating a device crucial to those services.”)

The plain language of the statute requires that police service be interrupted, not simply that the car is damaged to the extent it is out of service for any period of time. The plain language requires more than simple damage to a vehicle. The statute requires risk of service interruption – this implies two factors – that the police force cannot do its job effectively without that particular vehicle, and that no other mode of transportation is available for that particular officer to use to complete his duties to the public.

If the Legislature’s intent was to trigger culpability when any damage to an emergency vehicle that required time in the shop and was therefore out of service, the required wording of the statute would be different. If that was the case, the statute would simply consist of the second prong – that an emergency vehicle was damaged to the extent it required service. Instead, the statute requires the State show that the damage to this vehicle created “a substantial risk of interruption or impairment of service rendered to the public.” RCW 9A.48.080(1)(b). The State did not establish this factor. As a result, insufficient evidence

existed to support Mr. Turner's conviction for second degree malicious mischief. This conviction should be reversed.

- a. To The Extent Trial Counsel Conceded The Elements Of Malicious Mischief Were Established, Mr. Turner Received Ineffective Assistance Of Counsel.

The Sixth Amendment to the United States Constitution guarantees the right to counsel. To satisfy the constitutional command, an attorney must perform to the standards of the profession; failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Ineffective assistance of counsel claims are adjudged under the standards of *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That test is whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692. In evaluating ineffectiveness claims, courts are deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Id.* at 689-691.

Where the evidence of guilt on a particular count is overwhelming and there is no reason to suppose that any juror doubts it, conceding guilt on that count in closing can be a sound trial tactic. *State v. Silva*,

106 Wn. App. 586, 596, 24 P.3d 477 (2001) (*quoting Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir.1991)). This approach may help win the jury's confidence, preserve the defendant's credibility, and lead the jury toward leniency by conceding that the defendant is guilty of a lesser charge. *See Silva*, 106 Wn. App. at 596 n. 37 (*quoting Underwood*, 939 F.2d at 474). If the concession is a matter of trial strategy or tactics, it is not ineffective representation. *Silva*, 106 Wn. App. at 599.

But in this case, the concession was not sound trial strategy or tactics. Instead, the concession in this case constituted ineffective assistance because counsel failed to challenge the State's evidence that the service to the vehicle created a substantial risk of interruption or impairment of service rendered to the public. Instead, counsel conceded that Mr. Turner was guilty and the jury should so convict him. The failure to require the State to prove each element of the crime, and the directive to the jury that they should convict Mr. Turner failed to meet a standard of reasonableness and caused prejudice – *i.e.*, Mr. Turner was convicted. This conviction should be reversed.

2. MR. TURNER RECEIVED INEFFECTIVE ASSISTANCE WHEN TRIAL COUNSEL FAILED TO REQUEST A BILL OF PARTICULARS AND THEREFORE FAILED TO PRESENT A DEFENSE TO AN ALLEGED ACT OF THIRD DEGREE ASSAULT.

As detailed above, in order to prove ineffective assistance, Mr. Turner must establish both trial counsel's performance failed to meet a standard of reasonableness, and actual prejudice resulted from counsel's failures. *See Strickland, supra*. In this case, the Information related to the third degree assault of an officer merely stated that the defendant "did assault a law enforcement officer... who was performing his or her official duties at the time of the assault..." (CP 2)

Washington Courts have distinguished a constitutionally deficient Information from an Information that is "merely vague." *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985); *State v. Leach*, 113 Wn.2d 679, 687, 782 P.2d 552 (1989). When an Information states each statutory element of a crime, but is vague as to some other matter significant to the defense, the defendant must request a bill of particulars to correct the defect. *State v. Bergeron*, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985). The function of such a bill is to amplify or clarify particular matters considered essential to the defense. *State v. Noltie*,

116 Wn.2d 831, 844, 809 P.2d 190 (1991). The bill of particulars is necessary in order to avoid prejudicial surprise:

The test in passing on a motion for a bill of particulars should be whether it is necessary that defendant have the particulars sought in order to prepare his defense and in order that prejudicial surprise will be avoided. A defendant should be given enough information about the offense charged so that he may, by the use of diligence, prepare adequately for the trial. If the needed information is in the indictment or information, then no bill of particulars is required. The same result is reached if the government has provided the information called for in some other satisfactory form.

State v. Noltie, 116 Wn.2d at 845 (*quoting* 1 C. Wright, Federal Practice § 129, at 436-37 (2d ed.1982)) (footnotes omitted).

Where a defendant fails to timely request a bill of particulars, the defendant is prohibited from challenging the Information on appeal. *Holt*, 104 Wn.2d at 320; *Leach*, 113 Wn.2d at 687.

In this case, trial counsel failed to request a bill of particulars. It was not until the State's closing argument that defense counsel realized that the State was relying upon two separate, alternative acts to prove the third degree assault charge. Defense counsel admitted that he was caught off guard, and that he had failed to ask questions or explore the alleged "waist grab" assault because he had no idea that the State intended to use that act as a basis for the third degree assault charge.

Both Mr. and Mrs. Turner were present at the time, and could have given testimony – supporting or contrary – about the alleged waist-grab, but counsel never inquired of these witnesses. Neither Mr. or Mrs. Turner mentioned an alleged “waist grab” by their son of the officer. It is impossible to know if those witnesses would have corroborated or disputed the State’s version of the incident.

As a result, Mr. Turner was prejudiced, because he provided no inquiry, much less a defense to the waist grab allegation of the third degree assault. Because defense counsel failed to request a bill of particulars, and thus failed to anticipate the necessity of mounting a defense to the alleged “waist grab” of the officer, Mr. Turner received ineffective assistance and was prejudiced.

3. PROSECUTORIAL MISCONDUCT DENIED
MR. TURNER HIS FEDERAL AND STATE
CONSTITUTIONAL RIGHTS TO A FAIR
TRIAL.

“Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial.” *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008) (*citing State v. Hudson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968)).

The court reviews a prosecutor’s comments during closing argument in the context of the total argument, the issues in the case, the

evidence addressed in the argument, and the subsequent jury instructions. *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant. *State v. Jones*, 71 Wn. App. 798, 808, 863 P.2d 85 (1993).

A defendant bears the burden of (1) establishing prosecutorial misconduct and (2) demonstrating that the conduct prejudiced his defense in that there is a substantial likelihood that the improper argument affected the verdict. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003) (citing *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999)). In deciding whether the misconduct warrants reversal, the court considers its prejudicial nature and cumulative effect. *Boehning*, 127 Wn. App. at 518.

In *Boehning*, the prosecutor's repeated references to dismissed rape counts and suggestions that the victim's statements supported those charges impermissibly asked the jury to infer that the defendant was guilty of crimes that had been dismissed. Additionally, the prosecutor's statements were not supported by trial testimony. The *Boehning* court concluded that "such argument improperly appealed to the passion and

prejudice of the jury and invited the jury to determine guilt based on improper grounds. This error alone compels reversal.” *Boehning*, 127 Wn. App at 522.

In this case, the prosecutor committed a variety of instances of misconduct. First, the evidence did not support the prosecutor’s repeated statements that Mr. Turner “attacked” Corporal Lamens. The evidence was that in resisting the second handcuff, Mr. Turner partially stood, grabbed the Corporal around the waist, and the Corporal then tackled Mr. Turner. This evidence simply does not support the inflammatory verb “attack” that the prosecutor used seven times in his closing to describe Mr. Turner’s action.

Second, the prosecutor flagrantly mischaracterized Mr. Turner’s statement to his father. Mr. Turner-Bey testified his son said, “Why don’t I take you out?” and Ms. Tucker thought she heard, “How about I cut you?” Neither of these statements come close to what the prosecutor told the jury the statement was: “You want to die Old Man?”³ (3RP 34) The prosecutor’s subsequent, half-hearted attempt at backtracking “Or you heard what he testified to” does not ameliorate the prejudice the prosecutor established by trying to inflame the jury.

³ No objection was lodged. But an objection would have been futile, given the court’s earlier overruling of a mischaracterization objection.

Third, the prosecutor again attempted to appeal to the jury's passion and prejudices by arguing that this was one of many domestic violence cases that currently plague this country, and that people are being killed in these very situations: "Ladies and Gentlemen, domestic violence is one of the worst things in our country right now. People get harmed. People get killed by that all the time." (3RP 36)

The court's instruction to the jury to "disregard the last argument" was vague and likely confusing to the jury. (3RP 37) The court's statement failed to articulate exactly what the jury was to disregard, and what it should consider.

The cumulative effect of the prosecutor's misconduct – the repeated inflammatory mischaracterization of the evidence and the blatant attempt to appeal to the prejudices and passion of the jury – had a prejudicial impact on Mr. Turner's case. Mr. Turner was convicted of third degree assault of an officer, and it cannot be confidently concluded that the improper "attack" argument had no role in the jury's decision.

Because the prosecutor committed multiple instances of misconduct, Mr. Turner was denied his constitutional right to a fair trial. His convictions on malicious mischief and third degree assault should be reversed and remanded for a new trial.

E. CONCLUSION

For the foregoing reasons, Mr. Turner's conviction for second degree malicious mischief should be reversed, and he should be granted a new trial on the third degree assault charge.

Dated this 1st day of June, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29564-8-III
)	
vs.)	CERTIFICATE
)	OF MAILING
WAYMOND S. TURNER,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on May 31, 2011, I mailed copies of Appellant's Brief in this matter to:

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and

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Signed at Spokane, Washington on May 31, 2011.



Robert Canwell
Legal Assistant