

**FILED**

OCT 07, 2011

Court of Appeals  
Division III  
State of Washington

**No. 29564-8-III**

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**WAYMOND SURVELL TURNER,**

**Appellant.**

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**APPEAL FROM  
GRANT COUNTY SUPERIOR COURT**

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**BRIEF OF RESPONDENT**

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**Respectfully submitted:**

**D. ANGUS LEE  
Prosecuting Attorney**

By:   
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## STATEMENT OF THE CASE

On June 16, 2010, the defendant Waymond S. Turner went over to his parents' house, which is located at 1014 Lowry Street, Moses Lake Washington. (1RP 57)<sup>1</sup> The reason he went there was for a family camping trip. (2RP 56) When the defendant arrived at the residence it was approximately 6 am. (2RP 106) The defendant appeared to have an attitude, "like he was upset about something." (2RP 56) The defendant was in and out of his parents' house that day, and he accompanied his father, Martinia Turner-Bey on an errand. (2RP 108)

Around 6 pm the defendant returned to his parents' house. He became upset because his mother was standing in his path and he had to step around her. When he did this he stepped in his father's garden. (2RP 109-111) The defendant's father then asked the defendant why he could not have just asked his mother to move by saying excuse me. The defendant and his father then exchanged angry words. (2RP 109-111) Mr. Turner-Bey then asked his son to leave. (2RP 111) Martinia Turner-Bey testified that he asked his son a total of four times to leave his property before the police arrived. (2RP 114)

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<sup>1</sup> State adopts the defense's transcripts numbering. "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.

Defendant then walked out the front gate, which he damaged while leaving, exchanged words with his father, walked around to the other side of his father's car and hit the garbage can. (2RP 112) Defendant then complained to his father that his father helped everyone else and did not care about him. (2 RP 112 – 113) Defendant's father testified that he has helped his son out a lot. Mr. Turner-Bey then stepped out of the fenced area to fix the fence that his son had damaged when he left. While out there he and his son were exchanging words and his son walked up to him with his hands in the air like he was going to fight. (2RP 115-117) Mr. Turner-Bey said that he then told the defendant that the police were called. Defendant said to Mr. Turner-Bey, "Fuck you. Fuck the police!" (2RP 117). Defendant continued to yell at his father telling him that he had nowhere to sleep and he was eating out of trash cans. (2 RP 120) Mr. Turner-Bey then said that he sarcastically responded to his son's complaints by saying: "Well, 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)

In response, the defendant pulled a knife out of his pocket and said to his father, "well, why don't I take you out?" (2RP 130) Ernestine Tucker, the defendant's mother, was inside calling the police, but could

hear the two men arguing. (2RP 61-62) Ms. Tucker thought the defendant said to his father, "How about I cut you?" (2RP 61-62)

About that time, 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)

At trial, Corporal Beau Lamens, a Grant County Sheriff's Deputy testified that he was the first to arrive at the scene. (1RP 58) When Deputy Lamens first made contact with the defendant he called out to him to get his attention. The defendant responded by turning around real briskly, pulling his right hand from his pocket, and pointing his hand at the deputy with his index finger out and his thumb up in the air to resemble a gun. (1RP 59) Deputy Lamens, feeling concerned for his safety, sought cover behind a van until a second unit arrived at the scene. Once Deputy Dobson arrived at the scene, Deputy Lamens ordered the defendant to the ground. (1RP 60) After several attempts of ordering the defendant to the ground he finally followed the Deputy's orders. The defendant went to his knees, with his back to Deputy Lamens, as Deputy Lamens was approaching the defendant as he was going to place handcuffs on the defendant. (1RP 63) As Deputy Lamens put the first handcuff on, he could feel the defendant starting to stiffen. The defendant then pulled his hands apart, turned around and lunged forward grabbing Deputy Lamens

across the waist. (1RP 63) Deputy Lamens pushed the defendant down to the ground as he was protecting the tools he had attached to his waist. (1RP 63) While the defendant was taken to the ground, Deputy Dobson positioned himself and deployed his taser to the back of the defendant while the defendant was trying to free himself from Deputy Lamens. (1RP 66-67) After the taser was deployed the defendant said to Deputy Lamens -----“I’m done” or “You got me.” (1RP 67) These actions between the defendant and Deputy Lamens were observed by Ms. Tucker, (2RP 62-65) and Mr. Turner-Bey. (2RP 137)

The defendant was then cuffed and the Deputies stood him up. He was walked to the patrol car where the Deputies were going to place him in the back seat. (1RP 67) Deputy Lamens asked the defendant to sit in the back seat of the patrol car, but the defendant refused to do so and was adamant that he was not going to do so. Deputy Lamens then used a technique to get the defendant into the back seat of the police vehicle to stop further altercation. (1RP 70) The technique is called a “knee strike” which is used to disrupt a person’s balance. When the Deputy used the “knee strike” the defendant straightened up and just lunged his head forward and hit the Deputy’s face. (1RP 72)

The defendant was then placed in the patrol car by the Deputies. As they were walking away from the patrol car to interview witnesses and reporting parties, a very loud thud was first heard and then another followed by the sound of breaking glass. (1RP 74) When the Deputies turned around, they observed the remnants of the back window to the patrol car lying about 4 to 6 feet from the vehicle. (1RP 74) The defendant was observed sitting in the back seat of the patrol car next to the window that was kicked out. The police car was out of service for one day. (2RP 43)

The defendant 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) The jury acquitted the defendant of second degree assault with a deadly weapon, and instead convicted him of the lesser charge of unlawfully displaying a weapon, assault third of the officer, and malicious mischief in the second degree. (CP 95-96)

## ARGUMENT

1. **THE STATE PROVED BEYOND A REASONABLE DOUBT THAT KICKING OUT THE WINDOW OF THE POLICE CRUISER CREATED A SUBSTANTIAL RISK OF INTERRUPTION OR IMPARIMENT OF SERVICE RENDERED TO THE PUBLIC.**

The State agrees with the defendant's initial argument when they say: the Court reviews questions of statutory interpretation de novo and interprets 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.

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 State again agrees with the defendant that 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. The defendant now argues that the State has failed to establish the first prong. The State disagrees.

Defense argues that the State failed to show that police service in general was interrupted. The defendant relies on the argument stating that, “under the plain language of the statute, service interruption or impairment must occur” in order for the crime to have been committed. The State argues that is not what the statute requires. The statute is very clear when it requires that a person “knowingly and maliciously creates a substantial risk of interruption or impairment of service rendered to the public. RCW 9A.48.080.

The State argues that the cases that the defendant cites in his brief are helpful in the analysis of this case. Defendant claims that the State failed to prove that he tampered with the police car or physically damaged it sufficiently to support a charge of malicious mischief second. Because this is a challenge to the sufficiency of the evidence, the court reviews the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Hernandez*, 120 Wn. App. 389, 85

P.3d 398 (2004), citing, *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

The facts of this case are not like the facts in the *Hernandez* case. In the *Hernandez* case the evidence presented at trial showed 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. at 400.

The facts in the case at hand do not deal with a 15 minute cleaning of the back seat area of a patrol car. Rather, the facts in this case deal with the defendant kicking the back window twice which resulted in the back window being kicked out and lying 4 to 6 feet from the patrol car. (1RP 74) As the back seat of a patrol vehicle is used to transport persons arrested, the result of not having a window puts the vehicle completely out of commission until it can be replaced. Deputy Dobson testified that the patrol vehicle was out of commission for one day (2RP 43), which means that the patrol vehicle that the defendant damaged could not be used for 24 hours.

Defendant now argues that because there were other vehicles available to use, such as another patrol vehicle, a motorcycle, or even a horse, that no disruption of services was caused by the defendant. But that

reasoning does not look at the actions of the defendant at the time of the crime. Once the defendant kicked out the back window of the patrol vehicle he created a substantial risk that police service would be interrupted. Even though police services were interrupted for one day when the defendant kicked the window out of the patrol care, the State is not required to show that police services were interrupted; it only needs to show that there was a substantial risk that there would be an interruption in services.

Similar in the facts to this case, Division II found in *State v. Gardner*, 104 Wn. App. 641, 16 P.3d 699 (2001), 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." The court found that the acts were disruptive and thus sufficient to support a conviction for second degree malicious mischief. No actual evidence was needed by the court to show an officer could not use the radio service during the clicking by the defendant. But nonetheless the court found that it disrupted service or at the very least there was a substantial risk of service being disrupted.

Viewing the evidence in the light most favorable to the State, the jury could have found beyond a reasonable doubt that the defendant knowingly and maliciously damaged or tampered with the police vehicle

and that he consequently created a substantial risk of interruption or impairment of police services to the public.

- a. TO THE EXTENT DEFENSE COUNSEL CONCEDED THE ELEMENTS OF MALICIOUS MISCHIEF WERE ESTABLISHED, THE DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

In order to establish ineffective assistance of counsel, the appellant must show his attorney's performance was deficient and resulted in prejudice. *In re Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009) (*citing, Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2952, 80 L.Ed.2d 674 (1984)). There is deficient performance when the performance falls below an objective standard of reasonableness. *Id.* (*citing, State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997)). Prejudice will be deemed to have occurred if, but for the deficient performance of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. *Id.* (*citing, State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). However, there is a strong presumption of effective assistance, and the burden is on the defendant to demonstrate the absence in the record of a strategic basis for the challenged conduct. *Id.* (*McFarland*, 127 Wn.2d at 335-36).

The State would agree with the defendant that, 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, (7<sup>th</sup> Cir. 1991)). This approach may help with 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.

In the case at hand it appears that the defense attorney's concession to the crime of malicious mischief second was a sound trial strategy. The defense attorney in this case knew the facts of the case as well as what he felt was the law. The evidence showed that the defendant kicked the back window out of the patrol vehicle. When the defendant did this it immediately made the vehicle in-operative and placed it out of commission. This commonsense approach with the jury paid off later as he was able to argue and win the defendant's actions of pulling out his knife was not an assault but rather an unlawful display of a weapon. A defense attorney is not deemed to be ineffective just because he does not agree with the appellate attorney's argument of the law.

**2. THE DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE WHEN HIS COUNSEL DID NOT REQUEST A BILL OF PARTICULARS ON THE CHARGE OF THIRD DEGREE ASSAULT.**

As described above, in order to prove ineffective assistance, the defendant must show both trial counsel's performance failed to meet a standard of reasonableness and actual prejudice resulted from counsel's alleged failures.

A defendant has a constitutional right to be informed of the nature and cause of the accusation against him or her to enable the defendant to prepare his defense and to avoid a subsequent prosecution for the same crime.<sup>2</sup>

Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged. *Hamling v. United States*, 418 U.S. 87, 41 L.Ed.2d 590, 94 S. Ct. 2887, 2907-08, *rehearing denied*, 419 U.S. 885, 42 L.Ed.2d 129, 95 S. Ct. 157 (1974). (Citations omitted.)

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<sup>2</sup> The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ...." Article 1, § 22 of the Washington State Constitution, which contains language almost identical to the federal constitution, provides: "[i]n all criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him. ..."

In judging the sufficiency of a charging document, though, the law is clear that the prosecuting authority need not allege its supporting evidence, theory of the case or whether or not it can prove its case. *United States v. Buckley*, 689 F.2d 893 (1982), *cert. denied*, 460 U.S. 1086, 103 S. Ct. 1778, 76 L.Ed.2d 349 (1983); *State v. Bates*, 52 Wn.2d 207, 324 P.2d 810 (1958). Charging documents which are not challenged until after the verdict will be more liberally construed in favor of validity than those challenged before or during trial. . . *State v. Kjorsvik*, 117 Wn.2d 93, 107, 812 P.2d 86 (1991). A bill of particulars is not necessary when the means of obtaining the facts are readily accessible to the defendant or the facts are already known to him or her. *See United States v. Kaplan*, 470 F.2d 100 (7th Cir. 1972), *cert. denied*, 410 U.S. 966, 35 L.Ed.2d 701, 93 S. Ct. 1443 (1973).

Defendant now claims that his attorney was ineffective because he did not have a chance to question about the "waist grab" by the defendant at the time of his arrest. The only person who did not see the waist grab was the defendant's mother. The evidence of the waist grab was first introduced by Mr. Turner-Bey's testimony when he said that the defendant was resisting and kept resisting until tased. (2RP 137) Again, by Deputy Lamens when he testified, "as I put the first cuff on I could feel him starting to stiffen up. He pulled his hands apart and turned around and

lunged forward and grabbed me across the waist.” (1RP 63) And again, when Deputy Dobson testified, “Waymond Turner then stood up and spun around and grabbed Cpl. Lamens around the waist.” (2RP 35)

The defense attorney was well aware of the waist grab at the onset of the trial, during the trial and at closing of the trial. The defense attorney was not prejudiced by not being able to interview the witnesses as he heard the testimony and did ask those questions about the first contact with the defendant. There was no prejudice to the defendant for the lack of requesting a bill of particulars as the defense attorney was aware during the entire trial, not just at the closing.

**3. THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING THE TRIAL WHICH WOULD RESULT IN DENYING THE DEFENDANT A FAIR TRIAL.**

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We review 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 jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

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).

Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. The defendant "bears the burden of establishing the impropriety of the prosecuting attorney's comments [during closing arguments] as well as their prejudicial effect." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). In deciding whether the misconduct warrants reversal, the court considers its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Defense argues first that the prosecutor violated the defendant's rights because it used the verb "attacked" when describing the defendant turning around and grabbing the officer around the waist, where his gun, ammo, taser, handcuffs, and other tools he uses daily in his work were located. The Random House Webster's College Dictionary defines the

word "attack" as "to set upon in a forceful, violent, hostile, or aggressive way, with or without a weapon; begin fighting with; to begin hostilities with or start an offensive with." *Random House Webster's Dictionary*, 88, (1991)

First, the State would argue that the defendant's actions that day when he pulled his knife on his father and threatened him, pointed his finger in a manner like a gun at the police when they arrived, not obeying the officer's commands to get to your knees when first ordered to, resisting the officer handcuffing him, getting up off the ground turning around and grabbing the officer's duty belt where the officer's gun is located, still trying to get up even when the officer was lying on top of him until tased, head butting the officer in the chin causing pain and a swollen lip, and finally, kicking out the back window of the patrol car after he was placed in the back seat, show that there is no misconduct by the prosecutor as the evidence supports the allegations argued.

Second, the defendant argues that the statement the prosecutor made to the jury about the defendant saying "You want to die Old Man?" was flagrantly mischaracterizing the statement. No objection was lodged at the time of the statement as well as the prosecutor reminded the jury that "they heard what he testified to." The jurors are the sole persons who must weigh each piece of evidence heard by them. The prosecutor

reminded them of their roles in the decision making by telling them “you heard what he testified to.” There is just no evidence that the prosecutor was trying to inflame the jury by reminding them that they heard what was testified to.

Lastly, the defendant argues that the prosecutor’s comments in closing regarding the effects of domestic violence within our county were at the most a harmless error. The court cured the prosecutor’s comment and informed the jury to disregard the remark. It appears that the jury did disregard the comment as the defendant was not found guilty of the most serious charges of assault second with a knife which was a domestic violence. Instead the jury found the defendant guilty of the lesser included charge of unlawfully displaying a weapon. The State fails to see where the court’s statement failed to articulate exactly what the jury was to disregard.

**CONCLUSION**

For the forgoing reasons, the defendant's convictions for second degree malicious mischief and third degree assault should be upheld.

Dated this 7<sup>th</sup> day of October 2011.

Respectfully submitted,

D. ANGUS LEE  
Prosecuting Attorney

By:   
Edward A. Owens – WSBA #29387  
Chief Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 29564-8-III
	)	
vs.	)	
	)	
WAYMOND TURNER,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
_____	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the *Brief of Respondent* in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Janet G. Gemberling  
[admin@gemberlaw.com](mailto:admin@gemberlaw.com)

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Waymond Survell Turner - #899803  
Coyote Ridge Correction Center  
PO Box 769  
Connell WA 99362

Dated: October 7, 2011.

  
\_\_\_\_\_  
Kaye Burns