COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1253-FT **Cir. Ct. No. 2008CM371**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE FINDING OF CONTEMPT IN STATE V. VASILIOS KOSTOPOULOS:

ERIC BRITTAIN,

APPELLANT,

V.

WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE J. MAC DAVIS, PRESIDING,

RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] Attorney Eric Brittain was held in summary contempt by Judge Mac Davis and fined $50. He appeals. When Brittain was addressing the jury in his opening statement after the jury had been impaneled and before testimony was to begin, he looked directly at Judge Davis for about five seconds and then remarked to the jury: "Ladies and Gentlemen, under a lot of—a lot of obstacles, we are here today." Judge Davis ruled that it was a direct imputation on the integrity of the court, a finding of summary contempt was necessary to preserve order in the court, and that it was not improper for the court to wait until Brittain's argument was finished before proceeding with the contempt out of the view of the jury. We affirm.

¶2 Brittain's statement of facts is largely limited to describing the above conduct that caused the contempt finding and the colloquy between Brittain and the court in reaction to that conduct. But, in reading the whole record, we are able to more fully comprehend why Brittain did what he did and why the circuit court ruled it to be contemptuous. Therefore, we must quote the record at extreme length to completely capture the moment.

¶3 Brittain was representing Vasilios Kostopoulos, who had been charged with two misdemeanors—battery and disorderly conduct. Kostopoulos had pled not guilty and demanded a jury trial. By a pretrial order, and over Brittain's objection, the court had decreed that it would conduct the voir dire itself, that counsel would not be allowed to ask questions of the prospective jurors, but that they could submit questions to the court beforehand. The trial commenced on

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

November 25, 2008. The court was called to order and the court asked the jury coordinator to bring the jury panel to the courtoom. While the coordinator was getting the jury, the court read the names of the witnesses he understood would be testifying and asked if he missed anyone. The assistant district attorney answered, "No Sir." Brittain did not answer the question. Instead, he made further inquiry concerning the voir dire issue that had been decided previously in pretrial proceedings. The court cut Brittain off and asked: "Did you hear what my question was?" Brittain answered: "What? I'm sorry." The court then asked, "Are you going to respond to my pending question, or not?" Brittain said, "I apologize, I didn't." The court then commented, "you need to focus better, Counsel. You're often wandering off. When I ask you a question, you don't respond to it."

¶4 After determining that there were no other potential witnesses, the court then asked: "Now what is it that you want, Mr. Brittain?" One of the issues that Brittain wanted to discuss had to do with a list of questions to ask the jurors and Brittain wanted to know "which way you have modified them, or which ones you're going to use. I made an error. I was in a hurry to write up those questions. I feel some inquiry as to—"

¶5 The court cut Brittain off and remarked that "the jury panel is here." Brittain said, "Your Honor, if I may—" The court responded, "no, you may not. Wait." The court then welcomed the jury. The court initiated voir dire. The court conducted the full voir dire and did not allow for individual questioning by either the prosecutor or Brittain.

¶6 Moments into the court's questioning, Brittain interjected and asked to approach. The court said, "No, we'll get to these things. You just have to learn

to be more patient, Counselor. I haven't been a judge 20 years yet, but I'm approaching it and I have handled a few trials. You have a tendency to be impetuous. I guess we all do at times, don't we?" The court then resumed its voir dire. At the conclusion of voir dire, the court focused on one particular prospective juror and asked if either counsel had an objection to striking her for cause due to the fact that she was involved with the Task Force on Family Violence in Milwaukee. The court then said, "Without objection she is stricken." Then, Brittain said: "Your Honor, I would object." The court asked: "You object to strike [her] for cause?" Brittain responded, "I believe that she could be fair." The court replied, "I just asked if you did." The court then struck the juror for cause.

¶7 The court asked counsel if there were any other motions to strike for cause. Brittain said, "I would make a motion for cause, your Honor. I would prefer to do this as a side bar." The court declined, saying, "We don't have the ability to do that. With all these people in the room, your client has to be present at a side bar, the reporter would have to move all of her equipment. So it is very difficult to do."

¶8 Thereafter, Brittain's motions to reject for cause were made without a side bar while the prospective jurors were in court. When the motions were denied, Brittain asked if he could make a "record for the appellate record." The court said, "Yes, but not now." After this occurred twice, Brittain asked the court: "Your Honor, at what point after the jury pool is out that I may make a record?" The court replied, "I'll give you an opportunity to make a record, of course. Is it really necessary that you know when?" To which Brittain answered, "Sorry, your Honor." Then, the court explained that as long as it gets to the appellate record,

Brittain should be fine and said, "I want to make sure that I give you every fair opportunity, but we do have business to conduct."

¶9 Then, the court said, "Besides the things that are already pending is there anything else before I have the clerk swear [in] the jury?" Brittain then said, "Well, there will be some objections to put on the record afterward." The court asked, "Besides what is already pending?" Brittain said, "That is correct." The court replied, "All right. Please, I encourage you, Counsel, to listen carefully to my questions. I try to put meaning in my words for you."

¶10 Thereupon, after the jury was sworn, a recess was declared and the jury left the courtroom. Then, the court allowed Brittain to make his record. The following colloquy occurred:

> MR. BRITTAIN: … I'm going to have to ask for a mistrial, in lieu of a mistrial a new jury pool.
>
> Your Honor, as the jury pool was entering this morning you shouted at me that I couldn't have a side bar. That biases this jury pool against me.
>
> THE COURT: I dispute your claim that I shouted at anyone. I have not raised my voice above what is common when I want to be heard in the courtoom. Go ahead.
>
> MR. BRITTAIN: The client here has a Sixth Amendment right to effective counsel. Counsel cannot be effective if your Honor is showing such bias in the courtroom towards an attorney that it biases—it makes the jury pool basically not believe that I'm being an effective lawyer or being a lawyer that is doing appropriate things in the courtroom. And just asking for a side bar is appropriate.
>
> Your Honor later on you would call me impetuous in front of the jury. You would make comments about my questioning—my questioning—I have every right, in fact, I have a duty, a legal duty, to be my client's advocate, and you were not allowing me to do that or set a record.

I want to give an example. I asked basically for side bar to talk for cause on Thomas Wasberger (phonetic) I guess, the police officer. There is [sic] reasons you had decided to take control of *voir dire* completely. I believe that man should have been stricken for cause.

I—when I looked at him he looked somewhat familiar to me. As you know I'm a defense attorney, I have a contract with the state, I do hundreds and hundreds of cases like this in Waukesha.

THE COURT: I know nothing of the sort, Counsel. But, go ahead.

MR. BRITTAIN: Well, you wouldn't allow me to give my record, or to even have a side bar or to say, your Honor, here is the issue that I have. And, therefore, you took out I believe an absolute—

THE COURT: You haven't identified this as an issue, Counsel. I asked you for your written questions. I asked these people if they knew any of you. No one responded.

MR. BRITTAIN: Well, your Honor, that is why there was a problem of not letting the lawyers to do any follow-up or do any questionings of our own. Because I think it may have came out that we have been on other sides of an issue before.

And by doing that, your Honor, what you have done is you have taken out a peremptory—you have taken out a peremptory strike from this man; and, therefore, not given him a fair trial.

So, your Honor, I'm asking for a mistrial and that we bring back a new jury pool and we do this without shouting at me, without calling me impetuous, without calling me names, and having a fair trial here today. Thank you.

….

THE COURT: Anything else?

MR. BRITTAIN: Well, your Honor, just—just to reemphasize the point. I know that there is case law and the Supreme Court has talked about the importance that a judge comes across impartial. And when words like *impetuous,* and explaining your experience as if I have no experience, you said 20 years, I haven't said to the jury I have had six or seven years experience, you degrade me in

the courtroom, and that is shameful to have that happen to an advocate who is just standing up for someone's constitutional rights.

Really, I do believe that you have not shown a fair impartiality, and I think to make this trial fair for my client we need to have a new jury pool. Thank you.

THE COURT: All right, I'm prepared to rule. First of all, this was the opportunity clearly for Mr. Brittain to raise any issue about the basis for any appellate record he wanted to make about the basis for other motions to strike for cause, he has not done so; therefore, he has made no record beyond what was made during the jury *voir dire*.

Secondly, I'll turn to his motion for a mistrial. It is denied for the following reasons:

I reject Mr. Brittain's characterization that my conduct has been shameful. That's a gross exaggeration. It is a conclusion off of a gross exaggeration.

Yes, I have interrupted Mr. Brittain at times because he has a tendency as shown both this morning, and in the other proceedings in this case, to be unnecessarily verbose, to be unfocused in his comments.

Yesterday or the earlier motion last week he was talking about *stare decisis* in a context where that legal concept had no relevance whatsoever. So, I have taken it upon myself to try and refocus Mr. Brittain into the relevant issues before the Court. He has often been unresponsive to my questions. I'll ask him a question, he'll talk about something else. After discovering that and giving him the opportunity to speak for a few moments, I'll then interrupt to ask him to focus on the question posed.

Now, besides asking him questions and asking him to focus on that, I have given him other opportunities as is appropriate to raise objections, to raise points, and at times he has certainly done that. In fact, he has spoken up far more than anyone else in this proceeding and that may be appropriate.

Now it is important that the trial be conducted in a dignified appropriate manner, that both sides have an opportunity to speak. The trial is not solely so that Mr. Brittain can speak. Since he likes to speak a lot, and he may end up speaking more than the rest of us, and that may be perfectly appropriate, but I need to protect fairness to the

> other side, and make sure that the jury hears my instructions and the other comments that I am required to make under the law.
>
> So, it is not going to be possible to allow one side in any court proceeding to dominate the proceeding, to make it unfair to the other side. And that's the reason why I have tried to conduct the trial in a way to make sure that Attorney Brittain doesn't run away with things.
>
> It is not the only reason, but it is one reason why I conducted the *voir dire* after carefully considering the invited, advance, written request from both sides as to *voir dire* questions they would like to be asked. It was a concern of mine that we would go on far in excess of what is appropriate or necessary for this misdemeanor criminal jury trial.
>
> Now apparently we have more than enough time allocated for the trial. If it is not efficient it breaks down the quality of the trial, and the jury panel and the jurors can't maintain focus and attention indefinitely if we wander everywhere, so we need to focus on finding a fair and unbiased jury. I see no reason to think that we haven't done that. Every person has life experiences and we can never explore all of those, but we have covered all of the important subjects. We followed up on the important subjects.
>
> As has been pointed out the law is clear in this state that we're not to exclude people from a jury simply because of their occupation, policemen, judge, lawyer, as maybe some people in the past thought could be done. I repeatedly queried Officer Wallschlaeger about his job, his contacts. He didn't have anything specific with the Brookfield officer, or the Brookfield situation. He did have institutional contacts. But he told me repeatedly that he thought he could be fair and impartial, that he would base his decision on the evidence presented in court, and that he would follow my instructions on the law. That's what is expected. And I watched him in his answer and I didn't have any reason to think that he was hedging, his answers were clear and straightforward.

¶11 After this exchange, and after the motion was denied, the court was ordered back in session and the court asked the bailiff to bring the jury in. The following discussion occurred between Brittain and the court.

MR. BRITTAIN: Your Honor, if I may?

THE COURT: Counsel, when I asked you if you have anything you don't answer me.

Now the jury is going to be walking in and if I interrupt you when the jury is walking in then you're going to be back here complaining that you were mistreated. How am I supposed to cope with these problems when you do this?

MR. BRITTAIN: Sorry.

THE COURT: Shall I have the jury sent back so you can talk? Or is it something that is not a big deal, like you wanted a different chair?

MR. BRITTAIN: Sure, I think I could, if I could have one moment with you, your Honor, that would be nice. Thank you.

THE COURT: Well, I'll let all the jury come in so they can hear me.

….

THE COURT: The jury is present. Please excuse me, Ladies and Gentlemen, apparently we weren't ready. I'll have to excuse you for a moment. We'll be back to you shortly. So if you go back to the jury room.

….

THE COURT: The jury is absent. What is it, Mr. Brittain?

MR. BRITTAIN: Your Honor, I apologize. I did forget, I did bring this up but we weren't able to talk about it earlier, I was trying to bring it up. You had made a ruling regarding my diabetes that I have a right to eat at counsel table as long as I didn't quote unquote *"bring in a buffet."* I was hoping—

THE COURT: I saw you had a banana in here, you showed it to us and that's fine.

MR. BRITTAIN: I was hoping you could make some type of instruction to the jury to that effect, that I have a medical condition, or I have diabetes and I might be needing to eat.

> THE COURT: I don't really know if that is true. Why don't you in your opening statement just apologize, or mention it if you want that besides water that you may need to eat something because your metabolism requires it. Say whatever you want.
>
> MR. BRITTAIN: Okay, because I just—I just—I don't want the jury to bias my client because I think some people find it very rude, and I don't want the appearance of rudeness in front of the jury.
>
> THE COURT: Well, I don't want that appearance either. But I think you're being over-sensitive both about me and the jury. Like—I don't know these people, but my experience with Waukesha juries is they're attentive, they're generally fairly intelligent.
>
> As you know from census data Waukesha County has some of the most highly educated people as a group in the state. They're not going to be unduly distracted, they're not going to hold it against you and your client, these little kinds of things that are part of daily life. If you spill your water on your table they'll smile and forget about it. Just as if I spill my water they'll forgive me. Don't get overly concerned. Focus on the important aspects of the case.
>
> Anything else before we get the jury back?

¶12 The jury was brought back and the prosecutor gave her opening statement. Then, it was Brittain's turn. This, in pertinent part, is what occurred:

> THE COURT: …. Mr. Brittain?
>
> MR. BRITTAIN: Well, the Judge has instructed me to tell you that I have diabetes.
>
> THE COURT: I have not instructed you to tell them anything. I have told you that you're free to tell them that.
>
> MR. BRITTAIN: I apologize, that I was free to tell you that. And the reason I do that is because when I'm at counsel table sometimes my eyes will get a little watery and I will get a little shaky and I need to eat a little bit of food to get my carbs up. And I will hope that you don't think of me as rude. I don't want to be rude in front of you. So if you see me eating please don't think I'm being rude. I think that is okay.

I want to talk about violence. And, well, what it is like to be in an environment where people yell and scream. And I know that environment because I grew up in one, and my mom was very erratic, very emotionally unstable.

THE COURT: Counsel, this is inappropriate argument. You're not allowed to reflect on personal items like that. Plus it is argument, not opening statement. Please refocus your remarks at this time.

MR. BRITTAIN: I know then a brave man when I see one.

THE COURT: Counsel, that is inappropriate. Return to the lectern, you're not allowed to vouch. Come back to the lectern. Don't put your hands on your client and talk about his character in that fashion. Return to the—

MR. BRITTAIN: Your Honor, if I may under I believe it is State versus—I believe the character is allowed to be talked about if it is an issue.

THE COURT: Not in that context or circumstance. Continue your opening statement.

MR. BRITTAIN: *Beavers versus State*, 63 Wis. 2d, 597, 606.

Imagine what it is to be falsely accused of something, and to know what a conviction would mean to you, especially if you have a two-year old son and your wife is emotionally unstable and erratic, and you're falsely accused, what that means.

I'm going to tell you what happened that day. I'm going to tell you about Bill. I'm going to do it in first person narrative as if I am Bill so that you can know what happened.

THE COURT: I'm not going to allow that, Counsel, that could be confusing. You're the lawyer, you're the advocate, you need to speak as such.

We're not going to have any séances either where you take on anybody's personality. Describe what you expect the evidence to show, please.

MR. BRITTAIN: Your Honor, I'm going to renew my motion that I made earlier that I feel like there is some bias going on.

THE COURT: Members of the Jury, would you excuse us for a moment.

….

THE COURT: The jury is absent. Go ahead, Mr. Brittain.

MR. BRITTAIN: Your Honor, there is absolutely, and I ask you to find the case law that says that I cannot tell my opening statement in first person narrative, as long as I believe what I am telling or communicating to the jury is what the evidence will show I'm allowed to communicate that in any narrative that I believe is appropriate. There is absolutely no case law that says I can't.

And not only that, by you interjecting yourself the way that you have, by *sua sponte* objecting when the State, the government—

THE COURT: Mr. Brittain, don't raise your voice that much, it is impolite. Go ahead and speak. Don't stick your finger in Attorney Will's face like that. You're going to have to sit down. You're having trouble controlling yourself. Sit down. Sit down.

MR. BRITTAIN: Your Honor, I disagree with your characterization.

THE COURT: Sit down. When I give you instruction you are to follow it. Now, go ahead.

MR. BRITTAIN: Your Honor, I want to for the appellate record disagree with your representation. I was standing and making an argument.

THE COURT: I affirm my representation you were raising your voice louder and louder, you were walking towards the District Attorney, you were waving your finger towards her face. It's true you didn't get as close as three feet, but your finger was within four feet of her face. It is not appropriate. Go ahead with your statement.

MR. BRITTAIN: I disagree with your representation. We could probably get affidavits that would say something to the other effect.

THE COURT: Can you stick to the point, why did you want the jury out? You didn't ask for that but I thought it was appropriate.

MR. BRITTAIN: Your Honor, when you *sua sponte* make objections without the State making objections here today, when you put yourself into the role of advocate, in other words, you're objecting, basically you are acting as the government's prosecutor and objecting. And so what is happening is it is creating more and more of a feeling of bias towards me as the advocate. You are undermining his right to get a fair trial by having an effective counsel by basically interjecting yourself into the case. I think that is wrong.

MS. WILL: Your Honor, if I may?

THE COURT: Are you done, Mr. Brittain?

MR. BRITTAIN: Well, your Honor, I would just like to give an opening statement the way that the law allows me to give an opening statement.

THE COURT: Ms. Will?

MS. WILL: Well, your Honor, I apologize, if I think that there is anything else inappropriate in his opening statement I will make an objection. I can't quote the exact rule of evidence, but I believe that it is in the Court's discretion to dictate how a trial is run. I think that talking about your personal opinion of the defendant, or talking about your personal experience, or asking the juror—jury to put themselves in the shoes of the defendant is all inappropriate.

An opening statement is about fact, it is not about an opinion. In fact, this entire trial is not about the opinion of the Defense.

And while I agree it's—it is difficult to give an opening statement, and that when people are interjecting in that opening statement it disrupts someone's flow. However, I think that if that opening statement is inappropriate that it is appropriate to disrupt that, and to some extent I leave that to the Court to decide how they believe opening statement should be told to the jury.

However, if the Court wishes I can begin objecting when those inappropriate statements are made.

THE COURT: Anything else, Mr. Brittain?

MR. BRITTAIN: Your Honor, again, I haven't been presenting, or I don't plan to present anything that I don't

think the evidence isn't going to show, and that's the standard. And—

THE COURT: Well, if that—just a second. That seems patently absurd. Because you're telling about your childhood. I highly doubt there will be any evidence about your childhood during this trial. Am I wrong about that?

MR. BRITTAIN: I'm talking about the first person narrative, your Honor.

THE COURT: No. One of the things that I interrupted you because I thought it was highly inappropriate and prejudicial, and not allowed in this state, is for you to start reflecting on your childhood experiences as they relate to this case. I don't think that there is going to be any evidence on that.

MR. BRITTAIN: Your Honor, that was just a few sentences to introduce this person, and sort of my experience and understanding why, you know, I have many cases I can take and not take, and why this person—

THE COURT: That's exactly the kind of thing that is barred, Counsel. You're not allowed to say, I only take honest clients, for example. Or I only take innocent clients. That is not allowed by counsel.

MR. BRITTAIN: I understand that point, your Honor, and I apologize. And I probably got mis—got kind of into a misstep because of thinking about the diabetes, and thinking about how that affects me at the table, etcetera.

But me wanting to talk about the case in first person narrative as long as I believe that is what the evidence is going to show, is appropriate. You're in effect making me change my opening statement at the day of trial, which again goes to the Sixth Amendment because he is not going to have effective counsel if you're forcing me to change my opening statement.

THE COURT: Anything else?

MR. BRITTAIN: No.

THE COURT: All right. I reject these claims by Mr. Brittain, they're not supported in the law, and they're getting to the point of an absurdity, the claims of Sixth Amendment right to not have his opening statement

changed. Well, that seems to conflict with the idea that you have to follow the rules of law in presenting a trial.

So if he planned his opening argument in which he was going to raise a personal attack against the prosecutor, for example; or he was going to try and tell the jury about evidence that I have ruled was inadmissible or he knows is inadmissible, that means nothing can be done about it because it interferes with his planning, that shows you the absurdness of carrying his line of argument into application here.

Generally speaking in Wisconsin courts an opening statement is not the same as a closing argument. Generally speaking lawyers can't give personal opinions. The word I used to try and caution Mr. Brittain in a minimalist term, way, was to say, you can't vouch. You can't say, I know my client is innocent. I know that my client is telling the truth. That kind of thing is inappropriate.

Now, as far as this first person narrative, that is inconsistent with the idea, the first person narrative is a form of vouching. You're in effect telling the jury, because you're stating it from your own point of view or through your own eyes that it is true. You're trying to use your credibility as a lawyer to bolster the credibility of your case and your client, and that's not allowed.

A lawyer has to act as the third person advocate in a case. Here is what the witnesses are going to say. Here is what the witness said. Here is the conclusion you should draw from that [sic] might be said in a closing argument.

One of the problems we seem to have here, Mr. Brittain, is you want this trial to be about you. You keep talking about you. That's a mistake. Not only is it a strategic error, it is in many instances inconsistent with the law.

This trial is about whether your client committed the crimes charged. We need to focus on the evidence, what witnesses will say, what they have said, and how it should be interpreted by the jury.

By you putting on this performance and then claiming that we're interfering with your client's right to effective counsel, that is a circular argument. You're presenting yourself as ineffective and then complaining about it. That is certainly not the fault of the State, or of the Court.

> You need to follow the rules, you need to listen to my cautions.
>
> As far as me *sua sponte* interjecting myself, I did because it was necessary to try and get you to conform your opening statement to the law in this State.
>
> I am not putting myself into the role of an advocate. If Attorney Will violates any rules and I think they're significant, especially if I think that they in any way jeopardize your client's constitutional rights, I may intervene regardless of whether you object.
>
> And, likewise, I'm not either barring or encouraging parties to object, but when I think fundamental rules are being violated, where fairness may be affected, I will intervene to protect the integrity of the trial process.
>
> It is for the Court, consistent with the statutes and the law, to determine how a trial is to proceed as Attorney Will alluded to. I'm trying to make sure this is fair.
>
> You'll not be giving any first person remarks. You'll not be vouching for credibility, or giving personal opinions. You'll not be talking about your personal life experiences. Do you understand?
>
> MR. BRITTAIN: Your Honor, I will advocate for my client in a way that I believe I have to.
>
> THE COURT: Do you understand what I just said?
>
> MR. BRITTAIN: I understand—
>
> THE COURT: —is the question?
>
> MR. BRITTAIN: —I understand your ruling.
>
> THE COURT: Anything else before we get the jury back?

¶13 Then, Brittain's opening statements resumed before the jury. During this presentation by Brittain, the following took place:

> MR. BRITTAIN: …. And so [his client] comes out and he says, you know what, you're a terrible mother. Now I don't think he wanted to say that really because he has told me, and he said that he wants to be the peacemaker.

> MS. WILL. Objection.
>
> THE COURT: Sustained. Mr. Brittain.
>
> MR. BRITTAIN: Your Honor, I apologize.
>
> THE COURT: Mr. Brittain, you can't talk like that. You have to stick with what you have a reasonable expectation will come off this witness stand.
>
> MR. BRITTAIN: Your Honor, I apologize, I apologize.

¶14 Then, a moment later, this happened:

> MR. BRITTAIN: …. And that this hasn't been just for a couple years, this has been ever since he has known her, that you know when you're living with somebody that is mentally ill or has some problems.
>
> MS. WILL: Objection. I think he mischaracterized.
>
> THE COURT: Sustained.

¶15 Brittain continued with his opening statement and finally made the comment that caused the court to hold him in summary contempt. That utterance was: "And so, Ladies and Gentlemen, under a lot of—a lot of obstacles, we are here today." After Brittain's presentation concluded, the court excused the jury and made the following observation:

> THE COURT: The jury is absent. Have a seat, if you wish.
>
> Mr. Brittain, during your opening statement at one point you made, your sentence was something to the effect of, if so, and then you stopped and you turned, and you had to turn more than 90 degrees to look back at me since you're closer to the jury than I am, and you looked at me and paused for perhaps three to five seconds, and then you turned back and said, we have to proceed with words something to the effect, under a lot of obstacles.
>
> It is my belief that you were attempting to make the argument to the jury that I was interfering with your fair trial rights. You were denigrating the Court. I'm

> considering whether this may be contempt in the presence of the Court. This is your opportunity to explain yourself.

¶16 The court then heard Brittain deny that he was singling out the court and that it was innocent conduct. The court then commented:

> THE COURT: …. I'm going to make a finding of fact that my description was what did happen at the time that this happened. Mr. Brittain had not been walking around, he had been at the lectern for at least several moments or minutes. And then as I described it he was making argument, he paused in the moment and turned all the way back around and looked at me for a relatively long period, three to five seconds, and then he continued his argument as he turned back to the jury talking about the obstacles he was under in this case. And I find that to be the fact. I find it to be contempt in the presence of the Court.

¶17 The court fined Brittain $50. After that, Judge Davis recused himself and declared a mistrial. The case was dismissed without prejudice. Brittain appeals the contempt.

¶18 Brittain first argues that, by his statement, he did not intend to impugn the integrity of Judge Davis. Judge Davis found that it was so designed. After reading the record, we determine that Judge Davis's finding is not clearly erroneous. In our view, as seen from our copious and voluminous record quotes, Brittain's comment about "obstacles" clearly was referring to Judge Davis. This is especially so because, after all that had occurred up to that point, Brittain did a 90-degree turn so as to face Judge Davis, looked directly at Judge Davis for a period of three to five seconds, and then turned back to the jury and commented about the obstacles he had to face in representing his client.

¶19 Brittain's brief did not give us the background leading up to the statement about "obstacles." Rather, the brief-in-chief, again in our view, tried to leave the impression that his comment about being "under a lot of obstacles" had

to be about the general obstacles that a criminal defendant always faces in a trial and that Judge Davis had no basis to believe otherwise. But, as we see from reviewing the skirmishes between himself and the judge, his explanation feigning innocence is incredible. Therefore, we agree that Brittain's comment was intended for the purpose of informing the jury that there was a biased judge presiding on the bench.

¶20 Brittain next argues that his comment, referring to Judge Davis as an "obstacle" to his representation of his client, did not *disrupt* the court proceedings and the contempt order must be reversed for this reason. We have already upheld Judge Davis's finding that Brittain's comment was designed to impugn the court's neutrality. It implied to the jury that Judge Davis was biased against him and his client. This is important because courts are supposed to be neutral tribunals and Brittain was suggesting to the jury that Judge Davis was anything but. When a judge is accused in front of a jury as having a predisposition against him, it impairs the whole idea of a neutral judiciary, and thus, interferes with the administration of justice

¶21 As cogently observed by the State in its responsive brief, the contempt statute nowhere says that there must be a "disruption" of court for a summary contempt to take place. Rather, under WIS. STAT. § 785.01(1)(a), contempt of court is defined in pertinent part as "[m]isconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due to the court." A punitive sanction in the guise of summary contempt is appropriate when the misconduct occurs in the actual presence of the court and only for the purpose of "preserving order in the court and protecting the authority and dignity of the court." WIS. STAT. § 785.03(2).

¶22 So, Brittain is wrong to think that summary contempt may only occur when a court proceeding is impeded or its progress is interrupted by the misconduct. Instead, if the misconduct is such that it "impairs the respect due the court," then it is appropriate for a court to employ the summary contempt procedure. *See* WIS. STAT. § 785.01(1)(a) (defining contempt); *see also* ***Oliveto v. Crawford County Circuit Court***, 194 Wis. 2d 418, 430-432, 533 N.W.2d 819 (1995) (a single remark, which denigrates or impairs the respect due the court, which is uttered in the presence of the court, satisfied the "preserving order" requirement). We have already agreed with Judge Davis that Brittain's actions were intentional and were designed to impugn Judge Davis' impartiality. Thus the "preserving order" and the "protecting the authority and dignity" requirements of the summary contempt procedure were satisfied.[2]

¶23 Brittain finally claims that, because Judge Davis did not impose the contempt sanction "immediately after the contempt of court," as required by WIS. STAT. § 785.03(2), the contempt order must be reversed. This is a non-starter. In ***Currie v. Schwalbach***, 139 Wis. 2d 544, 553, 407 N.W.2d 862 (1987), the contempt was upheld even though, like here, it was imposed after the judge first asked the jury panel to leave the room. As the court there wrote, "[t]his is not a case in which a judge has used the summary procedure to impose a sanction a few days, or even a few hours, after the contumacious act occurred." ***Id.*** Here, the

[2] WISCONSIN STAT. § 785.03(2) explains when summary contempt is appropriate:

> The judge presiding in an action or proceeding may impose a punitive sanction upon a person who commits a contempt of court in the actual presence of the court. The judge shall impose the punitive sanction immediately after the contempt of court and only for the purpose of preserving order in the court and protecting the authority and dignity of the court.

court protected both the record and the continuity of Brittain's opening argument by allowing him to finish before addressing his contumacious behavior. Yes, a few moments had passed, but the statement had cast such a pallor over the proceedings by interjecting an accusation of judicial bias, that a few moments could not erase its effect. The jury had heard the remark. The authority and the dignity of the court had been damaged and a few moments time was not going to repair that damage. We reject Brittain's claim.

By the Court.—Order affirmed.

This opinion will not be published in the official reports. *See* WIS. STAT RULE 809.23(1)(b)4.