72168-2

NO. 72168-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDREW DEMPSEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LeROY McCULLOUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The trial court has discretion to determine whether a juror has demonstrated inattention or bias. During closing argument, juror number one looked intently at defendant Andrew Dempsey and defense counsel. Defense counsel then moved to excuse juror number one, but refused the trial court's offer to question the juror. Did the trial court properly exercise its discretion in declining to excuse the juror?

2. The Washington Supreme Court expressly has approved WPIC 4.01, which defines a reasonable doubt as "one for which a reason exists." Dempsey proposed WPIC 4.01, which the trial court accepted and used to instruct the jury. Is Dempsey precluded from challenging WPIC 4.01 on appeal because he invited any error? If not, has Dempsey failed to show that the Washington Supreme Court's approval of WPIC 4.01 is both incorrect and harmful?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged defendant Andrew Dempsey with one count of Attempted Rape of a Child in the Second Degree[1] and one count of Violation of the Uniform Controlled Substances Act.[2] CP 8-9. The State

[1] RCW 9A.28.020; RCW 9A.44.076.

[2] RCW 69.50.4013.

alleged that on September 29, 2013, thirty-two-year-old Dempsey attempted to have sexual intercourse with eleven-year-old J.M.,[3] and that Dempsey also possessed methamphetamine. CP 6, 8-9.

A jury convicted Dempsey as charged. CP 72-73; 7RP 119-20.[4] Dempsey received a standard-range sentence of 72 months. CP 122, 125; 7RP 127, 135.

2. SUBSTANTIVE FACTS.

On September 29, 2012, eleven-year-old J.M. used the restroom at the Albertsons grocery store in Burien. 2RP 69-70; 6RP 90-91, 95. He exited the stall and started to walk over to the sink to wash his hands when he suddenly had a "bad feeling." 6RP 98.

J.M. heard a stall door slam behind him and looked back to see Dempsey charging at him. 6RP 98. Dempsey's pants were down around his knees. 6RP 101-02. Dempsey was not wearing any underwear and his penis was semi-erect. 6RP 102, 106-07.

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[3] In an effort to protect his privacy, the State refers to the child victim in this case by his initials. The victim's family members are referred to by relationship only for the same reason.

[4] The verbatim report of proceedings is cited here as follows: 1RP – Mar. 12 and 17, 2014; 2RP – Mar. 17, 18, 19, 20, 24, and 25, 2014; 3RP – Mar. 25 and 26, 2014; 4RP – Mar. 26, 27, and 31, 2014; 5RP – Mar. 31, 2014, and Apr. 1, 2014; 6RP – Apr. 1 and 2, 2014; 7RP – Apr. 3, 4, 7, and 8, 2014, and Jul. 11, 2014. The seven volumes are labeled Volume I – VII.

Dempsey grabbed J.M. from behind and pulled him back toward him, putting his hand over J.M.'s mouth as he tried to scream for help. 6RP 98. Dempsey told J.M. that, if he screamed, he would kill him. 2RP 192; 6RP 98. J.M. pleaded with Dempsey to stop and told him that he would do whatever he wanted. 6RP 99.

Dempsey released J.M., who ran for the bathroom door. 6RP 99, 109, 110-11. Dempsey chased J.M. to the door and slammed it on the child's finger as he tried to escape. 6RP 99, 111-13. He grabbed J.M. again and started dragging him back toward the stalls. 6RP 112-15.

Albertsons employees in a nearby break room heard a commotion in the bathroom and a voice yelling for help. 3RP 99-100; 4RP 54-58. They hurried to the door and opened it, to see Dempsey with his hands around J.M.'s neck and his pants down around his ankles. 3RP 102; 4RP 54-55, 58-61, 87. J.M. called out, "Help me, he's hurting me!" 4RP 64.

One of the employees demanded to know what Dempsey was doing. 4RP 59. The employee pulled J.M. away from Dempsey. 4RP 64-65. J.M. ran out of the bathroom, terrified. 3RP 103; 4RP 65.

J.M. ran to his mother and collapsed on the floor, sobbing and screaming. 2RP 128, 192-93; 4RP 186; 5RP 31. He kept repeating, "He's going to kill me, he's going to kill me." 4RP 107.

Dempsey walked out of the bathroom with his head down, looking sheepish, with his pants still undone. 3RP 108-09, 127; 4RP 75-76. He ignored employees who told him to stop. 2RP 125-26. Employees tackled him to the ground and he bit one of them. 2RP 125-26, 136; 3RP 55-58; 5RP 194-95. While Dempsey struggled with the employees, his backpack fell open, spilling hypodermic needles. 2RP 195; 3RP 58-59; 5RP 195.

Officers responded and took Dempsey into custody. 2RP 70-82; 3RP 141-44. When police arrived, Dempsey's pants were still undone and his genitals were exposed. 2RP 80-81.

A white rocky substance found in Dempsey's backpack subsequently tested positive for methamphetamine. 3RP 145, 156-58; 5RP 151-52.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY DENYING DEMPSEY'S MOTION TO EXCUSE JUROR NUMBER ONE.

Dempsey asserts that the trial court erred by denying his motion, made during closing argument, to excuse juror number one for inattention and bias. Dempsey's claim should be rejected. The trial court properly exercised its discretion in determining that there was insufficient evidence that juror number one was either biased or inattentive.

a. Additional Facts.

At the outset of trial, the trial court instructed the jury on the importance of maintaining an open mind, paying attention, and deciding the case on the basis of the evidence and the applicable law:

> Throughout the trial you must maintain an open mind. You must not form any firm or fixed opinion about any issue in the case until the entire case has been submitted to you for your deliberation.
>
> It is important that you keep your minds open and attentive throughout the trial . . . .

2RP 41.

> As jurors you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts provided to you, and on the law given to you, not on sympathy, bias, or personal preference.

2RP 48-49.

> To assure that all parties receive a fair trial, all of you must act impartially, with an earnest desire to reach a just and proper verdict.

2RP 49.

As the trial progressed, the trial court repeatedly reminded the jury of its duty to keep an open mind and to decide the case based solely on the evidence and the applicable law. 2RP 57; 3RP 14, 80, 116; 4RP 49, 100-01, 164; 5RP 7, 36, 76-77, 139; 6RP 85, 121, 180; 7RP 7, 10, 58. All told, the trial court instructed the jury on this issue eighteen separate times.

After both parties gave closing argument, Dempsey's trial attorney moved to designate as an alternate and excuse juror number one. 7RP 69. She asserted that this juror had wiped her eyes as if she were crying, during the State's initial closing argument, and had stared at defense counsel and Dempsey thereafter. 7RP 69. Dempsey's attorney argued that this behavior demonstrated that juror number one was unable to maintain the presumption of innocence and to listen to all of the evidence. 7RP 69.

The trial court agreed that juror number one had been staring. 7RP 70. However, the trial court took a recess in order to give the parties an opportunity to research the issue. 7RP 75-76.

After the recess, defense counsel argued that RCW 2.36.110 required the trial court to excuse the juror. 7RP 77. She argued that the juror had demonstrated bias and inattention within the meaning of the statute. 7RP 77-78.

The trial court offered to inquire of the juror, in order to gather information about her opinions and level of attention. 7RP 71-72. Dempsey's attorney declined the offer and no inquiry was conducted. 7RP 72, 77.

The trial court then denied Dempsey's motion. 7RP 81. The trial court agreed that RCW 2.36.110 applied and that juror number one was looking intently, during closing argument, at Dempsey and his attorney. 7RP 81-82. However, the trial court reasoned that merely looking in that direction did not mean that juror number one had not been listening and paying attention. 77RP 82. Further, because Dempsey had turned down the trial court's offer to inquire of juror number one, there was no real information about her opinions—i.e., no basis upon which to determine that she was biased. 77RP 82-83.

b. Standard Of Review.

RCW 2.36.110 articulates a trial judge's duty to excuse a juror who, *in the opinion of the judge*, demonstrates bias or inattention:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

Id.

Whether a juror has demonstrated bias or inattention is a determination that falls within the discretion of the trial court. State v. Morfin, 171 Wn. App. 1, 7, 287 P.3d 600 (2012). The trial court has discretion to investigate allegations of misconduct in the manner most

appropriate for a particular case. State v. Elmore, 155 Wn.2d 758, 774-75, 123 P.3d 72 (2005); State v. Jorden, 103 Wn. App. 221, 229, 11 P.3d 866 (2000).

In weighing whether a juror should be excused for inattention or bias, the trial court acts as both an observer and a decision-maker. Jorden, 103 Wn. App. at 229. Thus, a judge has discretion to evaluate the credibility of the challenged juror based on her own observations. Id. As with other factual determinations, appellate courts defer to the trial court's observations. Id. (citing State v. Noltie, 116 Wn.2d 831, 839-40, 809 P.2d 190 (1991)).

A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion as did the trial court. State v. Boyle, 183 Wn. App. 1, 12-13, 335 P.3d 954 (2014).

c. The Trial Judge Properly Exercised Its Discretion In Denying Dempsey's Motion To Excuse Juror Number One.

The trial court properly exercised its discretion when it ruled that there was an insufficient basis upon which to determine that juror number one was either biased or inattentive. The trial court agreed that juror number one had been staring, at times, at Dempsey and his attorney—but

this was the sole information available.[5] As the trial court observed, merely staring in one direction did not mean that the juror had not been listening or paying attention. And because Dempsey refused the trial court's offer to inquire of juror number one, there was no information about her opinions, i.e., any bias. Because it cannot be said that no reasonable judge would have reached the same conclusion as the trial court, Dempsey's claim should be rejected.

Dempsey also relies on a court rule and federal cases for the proposition that the trial court erred. Br. of Appellant at 15-18. These authorities are unpersuasive. While CrR 6.5 requires the discharge of a juror unfit for service, the rule applies only "if . . . a juror *is found* unable to perform the duties" of jury service. Id. (emphasis added). Thus, the discharge duty is only triggered if the trial court, in its discretion, finds the juror unfit. The rule does not require the discharge of any juror that the defendant alleges to be unfit for service.

The federal cases cited by Dempsey also do not support his claim that the trial court erred. They are distinguishable on the facts and actually serve to illustrate by contrast why the trial court in the case at bar acted

[5] The trial court did not find, as defense counsel below claimed, that juror number one appeared to have been crying. 7RP 70 ("I did not see her wiping her eyes with any kind of indication of—that she was crying."). But even if juror number one had an emotional reaction, there was no reason to conclude that she would have been unable to set aside those emotions when deciding the case, as instructed.

appropriately. In United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011), the jury foreperson alerted the court that a specific juror had announced, "'I don't believe in the law[,]'" and, "'I don't trust the law.'" Id. at 1130. The juror had also called in sick to deliberations, but said that she had no plan to go to the doctor and was vague about her illness. Id. The foreperson then sent another note to the judge, stating that "'[r]ather than follow the Court's instructions, this juror does not want to make any decisions based upon the evidence that the prosecution or defense has provided, but rather relies solely upon her feelings.'" Id. The trial court polled the other jurors, all of whom confirmed that the juror had stated that she did not believe in or agree with the law. Id. at 1131. When the trial court questioned the challenged juror, she told the judge that she was unwilling to continue deliberations. Id. at 1132. The trial court dismissed the juror on the prosecutor's motion and replaced her with an alternate. Id. The Eleventh Circuit Court of Appeals held that the trial court acted within its discretion. Id. at 1133.

Likewise, in United States v. Thompson, 744 F.2d 1065 (4th Cir. 1984), the trial judge was alerted that, after viewing a photograph of a murder victim, a juror had told a police officer that he was upset by the evidence. Id. at 1067. The trial judge brought the juror into court for questioning, and the juror informed the court that, "because of my

personal circumstances at home and so on, in seeing that I just think that—I am just not sure that I could be totally fair. I would try to be as much as I could, but I am just not sure I could be totally fair." Id. The defendant moved for a mistrial, which the court denied. Id. The trial court then admonished the juror to keep an open mind, but the juror repeated that he was "not sure" that he could. Id. at 1067-68. The Fourth Circuit Court of Appeals found that the trial court abused its discretion by denying the defendant's motion for a mistrial. Id. at 1068.

Augustin and Thompson are dramatically unlike the case at bar. Augustin was replete with proven instances of juror misconduct, including the juror's statement that she did not believe in the law and her own admission that she was unwilling to continue to deliberate. The juror in Thompson told the trial court that he did not think that he could be fair, despite being directly admonished. In both cases, there was actual evidence of bias, because the trial court inquired of the juror. In the instant case, there is no such evidence and no such record. Both cases are inapposite.

Dempsey nevertheless asserts that "[t]he trial court acknowledged that Juror One appeared unable to follow along." Br. of Appellant at 13. Dempsey cites to preliminary comments by the trial court and fails to acknowledge the trial court's final ruling. It is true that, when Dempsey

first made his motion, the trial court mused that the juror "seemed to be unable to follow as the different attorneys were talking here in the—in the front." 7RP 70. But in making its final ruling, upon further reflection and after hearing argument, the trial court clarified its earlier comments:

> . . . the Court does not believe that staring at defense counsel, or even at the defendant, translates to inattention.
>
> I did note, and stated on the record, that I did see the juror looking intently in that direction. But, can I conclude that by doing so she's not listening or processing the information in another way? I can't do that.
>
> The record, therefore, doesn't establish that the juror has engaged in this conduct, and that there is any inattentiveness at this point, that would support this motion on the part of the defense.

7RP 82. Of course, the trial court's final ruling controls over any earlier tentative comments.[6]

Finally, Dempsey's argument should be rejected because it is contrary to the legal presumption that jurors follow the instructions of the trial court. The trial judge in this case instructed the jury no less than *eighteen* times throughout the trial to keep an open mind and to decide the case based solely on the evidence. 2RP 41, 48-49, 57; 3RP 14, 80, 116; 4RP 49, 100-01, 164; 5RP 7, 36, 76-77, 139; 6RP 85, 121, 180; 7RP 7, 10, 58. Jurors are presumed to follow the instructions of the trial court, absent proof to the contrary. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d

[6] By analogy, a final written order supersedes any earlier oral pronouncement. State v. Skuza, 156 Wn. App. 886, 898, 235 P.3d 842 (2010). A final oral ruling therefore should supersede any earlier, preliminary comments.

125 (2007). There is no proof that juror number one ignored the trial court's repeated instructions. Dempsey's convictions should be affirmed.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF REASONABLE DOUBT.

Dempsey asserts that the trial court instructed the jury on an incorrect definition of reasonable doubt. He claims that WPIC 4.01, the pattern instruction used in this case, misstates the burden of proof by defining a reasonable doubt as "one for which *a* reason exists." WPIC 4.01 (emphasis added); see CP 46, 80 (Instruction 3) ("A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.").[7] This, he claims, improperly requires the jury to articulate a reason for its doubt.

Dempsey's claim should be rejected. He actually proposed this instruction, thereby inviting any error, and is precluded from making this claim on appeal. Even if considered on the merits, Dempsey's conviction

[7] The trial court's instructions to the jury appear to have been filed with the superior court clerk twice. The first time was on April 3, 2014, when the trial court actually instructed the jury. See CP 40-65 (stamped as filed on April 3, 2014); 7RP 4-19 (proceedings of April 3, 2014, giving final approval to instructions and instructing the jury). The second time was on April 8, 2014, the day that the jury returned its verdict. See CP 74-99 (stamped as filed on April 8, 2014); 7RP 118-25 (proceedings of April 8, 2014, returning verdict). It is unclear why the instructions were filed twice. However, the reasonable doubt instruction contained in both copies is identical. Compare CP 46 (Instruction 3) with CP 80 (Instruction 3). The State cites to both copies, below.

should be affirmed because WPIC 4.01 is an accurate statement of law that properly instructs the jury on the meaning of reasonable doubt.

a. Additional Facts.

At a hearing on pre-trial motions, Dempsey's attorney informed the trial court that the defense intended to propose a version of WPIC 4.01 that omitted language regarding having an "abiding belief" in the truth of the charge. 1RP 176-77. However, the defense's version of WPIC 4.01 still defined a reasonable doubt as one for which a reason exists:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> ***A reasonable doubt is one for which a reason exists*** and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

CP 20 (Dempsey's Proposed Version of WPIC 4.01) (emphasis added) (attached as Appendix A).

The trial court ruled that it would instruct the jury using the version of WPIC 4.01 proposed by Dempsey. 6RP 180-81, 192-93. The trial court then instructed the jury using Dempsey's version of WPIC 4.01,

informing the jury that a reasonable doubt is "one for which a reason exists[.]" CP 46, 80 (Instruction 3) (attached as Appendix B); 7RP 11.

b. Dempsey Proposed WPIC 4.01 And Thus Invited Any Error.

Under the invited error doctrine, an appellate court will not review a claimed error if it was invited by the appealing party. State v. Sykes, __ Wn.2d __, 339 P.3d 972, 981 (Dec. 18, 2014) (citing State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)). This doctrine "'prohibits a party from setting up an error at trial and then complaining of it on appeal.'" Id. (quoting Henderson, 114 Wn.2d at 870). Even where constitutional rights are concerned, invited error precludes appellate review. Henderson, 114 Wn.2d at 871. A party may not request a jury instruction and later complain on appeal that the instruction was given. State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979).

Dempsey proposed WPIC 4.01. CP 20; 1RP 176-77; 6RP 180-81, 192-93. Although his version differed from the State's, in that it omitted language regarding an "abiding belief," it included the precise language he now challenges on appeal—that a reasonable doubt is "one for which a reason exists[.]" CP 20. By proposing this instruction, Dempsey invited any error and thus is precluded from challenging it on appeal. Boyer, 91 Wn.2d at 345.

c. The Trial Court Properly Instructed The Jury On The Meaning Of Reasonable Doubt.

Even if considered on the merits, Dempsey's claim should be rejected because the trial court's reasonable doubt instruction was proper. The Washington Supreme Court expressly has approved this instruction. Dempsey has not shown that it is incorrect and harmful.

WPIC 4.01 expressly was approved by the Washington Supreme Court in State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). There, the court noted that the instruction was adopted from well-established language in State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), in which the court, nearly sixty years prior, observed that "'[t]his instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error criticizing the instruction] without merit.'" Bennett, 161 Wn.2d at 308 (quoting Tanzymore, 54 Wn.2d at 291 (alterations original as quoted)). Indeed, the court in Bennett approved so strongly of WPIC 4.01 that it exercised its inherent supervisory authority to require trial courts in this state to issue WPIC 4.01—and *only* WPIC 4.01—in defining reasonable doubt. 161 Wn.2d at 318.

Dempsey has provided this Court with no basis upon which to depart from the holding of the Washington Supreme Court in Bennett.

See State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court). Even if this Court were inclined to entertain a challenge to controlling state supreme court precedent, Dempsey bears the burden of making a "clear showing" that WPIC 4.01 is "incorrect and harmful." In re Stranger Creek & Tributaries in Stevens Cnty., 77 Wn.2d 649, 653, 466 P.2d 508 (1970). He has not done so.

Dempsey relies on the "fill in the blank" line of cases typified by State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), for the proposition that the inclusion of the indefinite article, "a," before "reasonable doubt," incorrectly requires jurors to articulate a specific reason for their doubt. Br. of Appellant at 10-11 (citing Emery, 174 Wn.2d at 760). But Dempsey's argument actually fails under Emery. In that case, although holding that the prosecutor committed misconduct by urging the jury to articulate a reason for its doubt (i.e., to fill in the blank), the Washington Supreme Court observed that the prosecutor had "properly describ[ed] reasonable doubt as a 'doubt for which *a* reason exists[.]'" 174 Wn.2d at 760 (emphasis added). Emery prohibits only the *misuse* of this definition

by prosecutors in closing argument; it starts with the premise that the definition itself is correct.[8]

Dempsey's precise argument has also been raised and rejected before, in the Court of Appeals. In State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975), the defendant argued that the phrase, "'a doubt for which a reason exists[,]'. . . misleads the jury because it requires them to assign a reason for their doubt, in order to acquit[.]" Id. at 4-5. The court rejected this argument because "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign *a reason* for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Id. at 5 (emphasis added).

Even if viewed separately from these controlling authorities, Dempsey's argument is a hypertechnical exercise in semantics that must fail. "The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law." State v. Brown, 29 Wn. App. 11, 18, 627

[8] Dempsey concedes that the Emery court observed that this definition of reasonable doubt is correct, but argues that the court did so "without explanation or analysis." Br. of Appellant at 12. But it is unsurprising that the court felt little need to explain its observation, given that this definition has repeatedly been approved for decades. Regardless, the lack of explication in Emery does not mean that WPIC 4.01 is incorrect and harmful. Dempsey has failed to meet his burden under In re Stranger Creek. 77 Wn.2d at 653.

P.2d 132 (1981); see also Wims v. Bi-State Dev. Agency, 484 S.W.2d 323, 325 (Mo. 1972) ("We have recently said that in determining the legal sufficiency of instructions . . . the court should not be hypertechnical in requiring grammatical perfection, the use of certain words or phrases, or any particular arrangement or form of language, but . . . should be concerned with the meaning of the instruction . . . to a jury of ordinarily intelligent laymen. And it has often been recognized that juries are composed of ordinarily intelligent persons who should be credited with having common sense and an average understanding of our language.") (internal quotation marks and citations omitted).

Put another way, by the United States Supreme Court:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 380-81, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990).

Dempsey's claim is unavailing because he assumes that jurors lack a commonsense understanding of the English language and that they would engage in hypertechnical hairsplitting. The trial court properly instructed the jury on the meaning of reasonable doubt.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Dempsey's convictions for attempted second-degree child rape and possession of methamphetamine.

DATED this 17th day of March, 2015.

Respectfully submitted,

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APPENDIX A

Dempsey's Proposed Instruction – WPIC 4.01

INSTRUCTION NO. ___

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

WPIC 4.01 [excluding bracketed optional language—See Comment] (2011)

APPENDIX B

Trial Court's Instruction Number Three

(Reasonable Doubt Instruction WPIC 4.01)

As indicated in the text of the State's Brief of Respondent, the trial court's instructions appear to have been twice filed with the clerk of the superior court. CP 40-65, 74-99. The State attaches Instruction Number Three from both copies, here, in the interest of thoroughness.

No. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

No. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

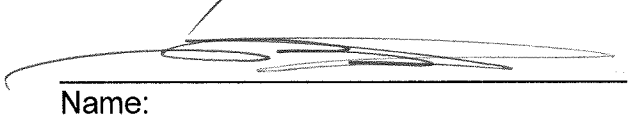
A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mary T Swift, the attorney for the appellant, at swiftm@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Andrew William Dempsey, Cause No. 72168-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 17 day of March, 2015.



Name:
Done in Seattle, Washington