NO. 95491-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT RAETHKE,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied.

II. STATEMENT OF THE CASE

The facts are set out in the Court of Appeals opinion.

III. ARGUMENT

A. THERE IS NO REASON FOR THIS COURT TO RECONSIDER A LONG-ACCEPTED DEFINITION OF "REASONABLE DOUBT."

The petitioner first asks this court to review the "abiding belief" language in the standard instruction defining "reasonable doubt." That language has a long history of approval in Washington courts. In 1959, the court said that an instruction including this language had "been accepted as a correct statement of the law for so many years." State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 290 (1959). In 2007, this court again approved an instruction that included this language. Indeed, the court referred to the approved instruction as "the abiding belief instruction." State v. Bennett, 161 Wn.2d 303, 308 ¶ 6, 165 P.3d 1241 (2007). The United States Supreme Court has likewise approved similar language. Victor v. Nebraska, 511 U.S. 1, 7, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (approving instruction defining "reasonable doubt" as existing if the jurors "cannot say they feel an abiding conviction, to a moral

certainty, of the truth of the charge"). There is no valid reason for this court to review this long-approved instruction.

B. BECAUSE THE PETITIONER RECEIVED ONLY ONE TRIAL AND ONE SENTENCE, THIS CASE DOES NOT PRESENT ANY DOUBLE JEOPARDY ISSUE.

The petitioner next argues that the application of a sexual motivation finding to his crime constituted double jeopardy. This argument suffers from at least two major problems. First, the Double Jeopardy Clause of the Fifth Amendment protects against three things: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). Here the defendant received one trial and one punishment imposed. The imposition of a single sentence for a single crime does not constitute double jeopardy. Jones v. Thomas, 491 U.S. 376, 382 n. 2, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989).

Second, this court rejected a substantially identical argument in State v. Thomas, 138 Wn.2d 630, 980 P.2d 1275 (1999). There, the court held that the aggravating factor of sexual motivation could be applied to felony murder predicated on rape. Because felony murder is not inherently a sexual offense, the existence of a sexual

motivation renders that crime more culpable. Id. at 636-37. Similarly, the crime of second degree assault is not inherently a sexual offense, so it can properly be enhanced by a finding of sexual motivation.

The petitioner suggests that the holding of Thomas should be reconsidered in light of the analysis set out in State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995), and Blockburger v. United States, 284 U.SW. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Those cases set out a procedure for determining whether two crimes are the "same offense" for double jeopardy purposes. Since the present case does not involve any double jeopardy issue, these cases are irrelevant. There is no valid reason for this court to grant review to re-examine Thomas.

C. THERE IS NO REASON FOR THIS COURT TO RECONSIDER ITS REPEATED HOLDING THAT THERE IS NO RIGHT TO A JURY TRIAL ON THE EXISTENCE OF PRIOR CONVICTIONS.

The petitioner next claims that he cannot be sentenced as a persistent offender absent a jury finding concerning his prior offense. He fails to mention that this argument has been repeatedly rejected by this court. See, e.g., State v. Witherspoon, 180 Wn.2d 875, 891-92 ¶¶ 32-35, 329 P.3d 888 (2014). Witherspoon specifically held that this rule was not changed by Alleyene v.

United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). The petitioner has provided no reason for reconsidering that holding.

D. THERE IS NO REASON FOR THIS COURT TO CONSIDER THE SUFFICIENCY OF THE EVIDENCE IN THIS PARTICULAR CASE.

Finally, the petitioner argues that the evidence was insufficient to support his conviction. This argument was raised by the petitioner in a pro se statement of additional grounds. The argument ignores the evidence his prior similar offenses, which were admitted as proof of his intent. Slip op. at 2. This issue involves application of a well-established legal standard to the facts of this case. It provides no basis for review.

IV. CONCLUSION

The petition for review should be denied.

Respectfully submitted on February ~~23~~ 26, 2018.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. ROBERT R. RAETHKE, Petitioner.	No. 95491-7 DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 26th day of February, 2018, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Washington Appellate Project; wapofficemail@washapp.org; oliver@washapp.org

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

Dated this 26th day of February, 2018, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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