71254-3

NO. 71254-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MAURICE POLLOCK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY E. ROBERTS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The State adduced evidence that defendant Maurice Pollock committed two acts, either of which could constitute second-degree assault. Although it is unknown which act the jury relied upon to convict Pollock of a single count of second-degree assault, the evidence was sufficient to prove that Pollock committed both acts. Should Pollock's conviction be affirmed?

2. The Washington Supreme Court expressly has approved WPIC 4.01, which defines a reasonable doubt as "one for which a reason exists." No authority contradicts the Court's decision. Has Pollock failed to establish that WPIC 4.01 is incorrect and harmful?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged defendant Maurice Pollock with two counts of first-degree assault. CP 11-12. In Count I, the State alleged that Pollock, with the intent to inflict great bodily harm, assaulted Nigel Greer with a firearm. CP 11; RCW 9A.36.011(1)(a). In Count II, the State alleged that Pollock, with the intent to inflict great bodily harm, assaulted Annaka Lain with a firearm. CP 11-12; RCW 9A.36.011(1)(a).

Pollock's co-defendant, Brandon Wolfe, pleaded guilty prior to trial. Supp. CP __ (Sub No. 133, State's Trial Memorandum at 3). Pollock proceeded separately to trial. The jury acquitted Pollock of both counts of first-degree assault. CP 101, 103; 7RP 11-12.[1] The jury found Pollock guilty of a single count of the lesser included offense of second-degree assault, for assaulting Greer with a deadly weapon, a firearm. CP 102, 105; 7RP 11-12.

Post-verdict, Pollock made a motion to arrest verdict and for a new trial, arguing that the evidence was insufficient to sustain a conviction for second-degree assault. CP 145-53; 7RP 23-37. He also argued (for the first time) that the State had failed to satisfy the doctrine of *corpus delicti*. 7RP 23-29.

The trial court denied Pollock's motion because it was the role of the jury to weigh the credibility of the witnesses, and because there was sufficient evidence to support the verdict. CP 154; 7RP 35-37. The trial court also found that the State adduced sufficient evidence to corroborate Pollock's admissions, satisfying the *corpus delicti* doctrine. CP 154; 7RP 35-36.

[1] The verbatim report of proceedings is cited as follows: 1RP – Sep. 9, 2013; 2RP – Sep. 10 and 11, 2013; 3RP – Sep. 12, 2013; 4RP – Sep. 16, 2013; 5RP – Sep. 17, 2013; 6RP – Sep. 18 and 19, 2013; 7RP – Sep. 20, 2013 and Nov. 8 and 22, 2013.

The trial court imposed a standard range sentence, including a mandatory firearm enhancement. CP 156, 158; 7RP 53.

2. SUBSTANTIVE FACTS.

On November 19, 2010, Pollock received a telephone call from his friend, Brandon Wolfe. 5RP 11, 13, 84. Wolfe was upset because of a disagreement with his neighbor, Nigel Greer, over who was entitled to sell marijuana at the Sunset Vista Apartments in Renton. 2RP 32-34; 5RP 13, 82-84. Wolfe asked for Pollock's assistance. 5RP 84.

Pollock drove over to the apartments, bringing an AK-47 assault rifle, a double-barreled shotgun, two .357 caliber revolvers, and a ballistic vest. 5RP 14-16, 42, 63-64, 89, 130. He took the guns into Apartment 75 (Wolfe's apartment) and showed Wolfe how to use them. 5RP 89.

Pollock then suggested that they walk down the hallway to Apartment 73 (Greer's apartment). 5RP 16, 90-91. Pollock tucked one of the revolvers into the back of his waistband and wrapped the shotgun in a blanket. 5RP 18, 132-34. The plan was to intimidate Greer by threatening him with the firearms. 5RP 133-34.

Pollock knocked on Greer's door and yelled, "Police, search warrant!" or "Open up, it's the police!" 2RP 38-39, 84, 86; 5RP 17, 91, 211.

Greer and his fiancée, Annaka Lain, were startled by the knocking. 2RP 38-39, 84-86. Lain, who was in the bedroom with her one-month-old child, placed the infant on the couch and walked into the main room to see Greer standing by the door. 2RP 82-87. Greer looked through the peephole but could not see anything. 2RP 39. He waited a few minutes and then opened the door to see if anyone was there. 2RP 41.

When Greer opened the door, Pollock and Wolfe were standing nearby. 2RP 43, 87-92; 5RP 91-92. Pollock charged at Greer with the shotgun aimed, unwrapping it from the blanket. 5RP 52-54, 91, 132; Exhibit 13 at 6, 11.[2] Greer jumped back around the corner, saying, "Don't pull that gun." 5RP 53-54.

Pollock said, "This is why I don't deal with niggers" or "I hate fucking niggers." 2RP 46, 93; 5RP 25, 95. He placed a handgun to Greer's forehead. 2RP 46, 62, 93-94.

Lain, who had armed herself in the apartment, fired multiple shots at Pollock to protect Greer. 2RP 47-48, 92-97, 121. Pollock and Wolfe both fired back. 2RP 95; 5RP 29-30, 97.

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[2] Exhibit 13 is a transcript of the recorded statement that Pollock gave to the police. 3RP 51-52. It was admitted into evidence. 3RP 52. The actual audio recording was also admitted, as Exhibit 12. 3RP 51-52. The State cites to Exhibit 13 here for ease of review.

Pollock and Wolfe were both shot in the exchange. 5RP 25, 95. Lain received a bullet hole in her shorts, but neither she nor Greer were injured. 2RP 51, 97.

Pollock later told police and testified that he had fired shots in self-defense after Greer shot at him in the hallway, beyond the alcove to Greer's apartment. 3RP 51-55; 5RP 29-30; Exhibit 13 at 6, 20, 22. However, based on the location and trajectory of bullet strikes found in and around the alcove-area of Greer's apartment, and other evidence, including blood spatter and the location of bullet casings, detectives determined that the physical evidence was inconsistent with Pollock's claim. 3RP 84-89; 4RP 31, 44-45; Exhibit 13 at 23. Instead, the evidence showed that Pollock and Wolfe fired at Greer and Lain from within or immediately next to the alcove of Greer's apartment—not from down the hallway while being pursued, as Pollock claimed. 4RP 31, 44-45; Exhibit 13 at 23.

C. ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT FOR A REASONABLE JURY TO FIND THAT POLLOCK ASSAULTED GREER BY APPROACHING AND CONFRONTING HIM WITH A SHOTGUN.

Pollock argues that his second-degree assault conviction should be reversed because there is insufficient evidence to support one of the two

acts relied upon by the State to support the charge, and that without a special verdict showing which act the jury relied upon, his case must be dismissed.[3]

Pollock's claim is without merit. The evidence, viewed in the light most favorable to the State, was sufficient for a reasonable jury to find that Pollock assaulted Greer either by confronting him with a shotgun or by pointing a handgun to his head.

a. Additional Substantive Facts.

At trial, three witnesses testified that Pollock carried a shotgun (or rifle) wrapped in a blanket to Greer's door. Their testimony follows.

Wolfe testified that when he accompanied Pollock to Greer's apartment, Pollock had tucked a pistol into the back of his pants and had wrapped the shotgun in a blanket. 5RP 132-34.

Lain testified that when she saw Greer open the door of their apartment, she saw a figure in the hallway holding what appeared to be a rifle wrapped in a blanket or a shirt. 2RP 87-88, 90, 107.

Pollock himself testified that he walked with Wolfe down the hallway to Greer's apartment, carrying a shotgun wrapped in a blanket.

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[3] Pollock concedes that the evidence was sufficient to prove that he pointed a handgun to Greer's head, thus committing second-degree assault. Br. of Appellant at 21. He contests only the sufficiency of the evidence to prove the other act relied upon by the State to support the charge—that he assaulted Greer with a shotgun.

5RP 16. He also had a pistol concealed on his person. 5RP 16. When Greer came outside, he charged at Greer with the shotgun aimed and unwrapped it. 5RP 52-53; Exhibit 13 at 6, 11. Greer jumped back around the corner, saying, "Don't pull that gun." 5RP 53-54.

Only Greer denied seeing the shotgun. 2RP 44-45. He also testified that he was a convicted felon and was not allowed to possess a firearm. 2RP 49.

b. Additional Procedural Facts.

Although Pollock was charged with two counts of first-degree assault—one for assaulting Greer and one for assaulting Lain—the trial court also instructed the jury on the lesser included offense of second-degree assault, for each count. CP 133 (Instruction 21), 134 (Instruction 22).

For Count I (assaulting Greer), because the State intended to argue that Pollock committed two different acts, either of which could constitute second-degree assault, the prosecutor proposed, and the trial court issued, a Petrich[4] unanimity instruction:

> As to Count I, the State alleges that the defendant committed acts of the lesser included crime of Assault in the Second Degree on multiple occasions. To convict the defendant on any count of the

[4] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), modified in part by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

> lesser included crime of Assault in the Second Degree as to Count I, one particular act of Assault in the Second Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Assault in the Second Degree.

CP 131 (Instruction 19); see 6RP 8-9; see also CP 190 (State's Proposed Petrich Instruction).

The trial court further instructed the jury that, in order to convict Pollock of committing second-degree assault against Greer, it would have to find:

> (1) That on or about the 19th day of November, 2010, the defendant assaulted Nigel Greer with a deadly weapon; and
>
> (2) That the acts occurred in the State of Washington.

CP 133 (Instruction 21).

The trial court also instructed the jury on the three common law definitions of assault, the pertinent one here being as follows:

> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 121 (Instruction 9); see WPIC 35.50 (defining assault); see also State v. Wilson, 125 Wn.2d 212, 217-18, 883 P.2d 320 (1994) (same).

In closing argument, the prosecutor explained the unanimity requirement, and articulated the two acts relied upon by the State:

Just briefly there is—there are lesser included offenses, and you don't need to deal with those at all if you find the defendant guilty of assault in the first-degree as charged in counts one and two. That is what he is guilty of.

However, if for some reason you believe everything will work [sic] that the defendant has told you, part of what he has told you is that he charged at Nigel Greer with a shot gun pointed—loaded, obviously—and basically chased him back into his apartment.

So if you want to believe everything the defendant said, he's just told you that he is guilty of assault in the second-degree—by charging at Nigel [Greer] and forcing him back into his apartment.

If you get to that count, he is certainly guilty of that count.

The other way he is guilty of that count of assault in the second-degree is by pointing that gun at [Greer's] head as Annaka [Lain] said. That is also an assault in the second-degree.

[. . .]

That is the instruction number 19. It talks about multiple acts of assault in the second-degree. Again you may not get to assault in the second-degree because there's plenty of evidence that he is guilty of assault in the first-degree, but if you do, you have to agree on what act is an assault in the second-degree; was it the pointing of the shotgun? Was it the pointing at the head?

You all have to agree which one—which one it is. You don't have to agree both happened, you just have to be unanimous as to one happened.

6RP 118-20.

c. Standard Of Review.

Evidence is sufficient to support a criminal conviction if, after viewing the evidence in the light most favorable to the State, a rational fact trier could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068

(1992). A claim of insufficiency admits the truth of the State's evidence, as well as all reasonable inferences from the evidence, which must be drawn in favor of the State and against the defendant. Id. An appellate court defers to the trier of fact on all "issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

d. The Evidence Was Sufficient To Prove That Pollock Assaulted Greer By Moving Toward And Confronting Him With A Shotgun.

As noted, Pollock concedes that the evidence was sufficient for a reasonable jury to find that he committed one of the acts constituting second-degree assault alleged by the State—that he pointed a handgun at Greer's head. Br. of Appellant, at 2, 21. He argues only that no reasonable jury could have found that he committed the other act alleged by the State, that he assaulted Greer by moving toward and confronting him with a shotgun. His claim rests on the fact that Greer denied seeing the shotgun. Pollock's argument should be rejected because the jury was not required to accept this part of Greer's testimony. In other words,

Pollock misapplies the standard of review for a challenge to the sufficiency of the evidence.

The evidence at trial was sufficient for a reasonable jury to find that Pollock assaulted Greer by unlawfully placing him in reasonable apprehension and imminent fear of bodily injury, when he confronted Greer with a shotgun.[5] Wolfe and Lain both testified that Pollock was carrying a shotgun or rifle wrapped in either a blanket or shirt. Pollock, himself, told police that he unwrapped the shotgun and aimed it at Greer. He added that Greer leapt back behind the alcove and told Pollock not to pull the gun on him.

While Greer denied seeing the shotgun, his testimony on this point is not dispositive. It is the exclusive province of the jury to weigh conflicting testimony and to determine the credibility of witnesses. Thomas, 150 Wn.2d at 874-75. Having heard testimony that Greer was a convicted felon, and therefore prohibited from possessing a firearm, the jury reasonably could have concluded that Greer denied seeing the shotgun in order to distance himself from any possibility of having retrieved his own firearm.

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[5] Pollock attempted to clarify on the stand that the shotgun was "aimed" but was not "pointed" at Greer. 5RP 52-53. But it was irrelevant whether the shotgun was actually pointed at Greer—the only question is whether the evidence was sufficient to place Greer in reasonable apprehension and imminent fear of bodily injury. No authority requires that a gun actually be pointed at a victim in order to place the victim in such apprehension.

Here, Pollock claimed that, after he aimed the shotgun at Greer, he went back to Wolfe's apartment. 5RP 18. Later, when he and Wolfe tried to leave, they were confronted by an armed Greer in the hallway. 5RP 22-23. Because he was a convicted felon, Greer had an incentive to claim a different sequence of events—that Pollock simply pulled a handgun on him at point-blank range in the alcove, and that the shooting broke out immediately thereafter.[6] 2RP 43-49. With all three other eyewitnesses testifying to Pollock holding the shotgun (including Pollock, himself, who admitted to "charging" Greer with it), and there being no plausible explanation for how Greer could have missed seeing a shotgun in the arms of his assailant, it was reasonable for the jury to conclude that Greer *did* see the shotgun and simply lied about it for some ulterior motive.

The jury also reasonably could have concluded that Greer was misremembering the details of a stressful event that occurred several years previously. The date of the shooting in this case was November 19, 2010. 2RP 32, 82; 5RP 13, 79. Greer did not testify at trial until nearly three years later, on September 11, 2013. 2RP 26. In recounting the events of the shooting, Greer's fiancée broke down in tears and added that it happened "so long ago." 2RP 95, 116. The jury could have concluded

[6] This does not mean, however, that the jury was bound to disbelieve all of Greer's testimony; the jury was entitled to find Greer an unreliable witness in some ways and a reliable witness in others.

that Greer's testimony was similarly influenced by stress and the passage of time.

Ultimately, the evidence and all reasonable inferences must be construed in favor of the jury's verdict. State v. Curtiss, 161 Wn. App. 673, 695, 250 P.3d 496 (2011). While the testimony in this case certainly conflicts on several points, it was the precise role of the jury to resolve those conflicts and to determine which explanation was persuasive. The jury did so and found Pollock guilty of second-degree assault. Because the evidence supports a conviction for that crime, both for pointing a shotgun at Greer and for putting a handgun to his head, Pollock's conviction should be affirmed.

Finally, as part of his challenge to the sufficiency of the evidence, Pollock also argues that the State adduced insufficient corroborating evidence to satisfy the *corpus delicti* doctrine. Br. of Appellant at 18-20. This Court should decline to consider Pollock's *corpus delicti* argument because he failed to preserve it with a timely objection and because he fails to assign error on this basis, on appeal. Even if considered on the merits, Pollock's *corpus delicti* argument should be rejected because the State adduced ample evidence to corroborate his confessions.

"The *corpus delicti* rule is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant

must make proper objection to the trial court to preserve the issue." State v. Dodgen, 81 Wn. App. 487, 492, 915 P.2d 531 (1996) (citing State v. C.D.W., 76 Wn. App. 761, 763-64, 887 P.2d 911 (1995)). Here,

> the failure to object precludes appellate review because [i]t may well be that proof of the *corpus delicti* was available and at hand during the trial, but that in the absence of [a] specific objection calling for such proof it was omitted.

C.D.W., 76 Wn. App. at 763-64 (internal quotation marks and citation omitted) (alterations original)).

Pollock did not raise his *corpus delicti* challenge until after the verdict was returned. 7RP 23-29. This untimely objection was not sufficient to preserve appellate review. See State v. Kendrick, 47 Wn. App. 620, 636, 736 P.2d 1079 (1987) ("By the failure to object at a point that will give the trial judge an opportunity to correct an alleged error, counsel waives the right to predicate an appeal thereon. Raising the issue in a motion for a new trial does not provide the trial court with the requisite opportunity to correct error." (internal citations omitted)); RAP 2.5(a). Thus, Pollock failed to preserve any claim relating to the *corpus delicti* doctrine.

Even if Pollock preserved the issue for appeal, he has failed to raise it properly in this Court. The error stems from Pollock's misapplication of the doctrine. As noted, the *corpus delicti* rule is a

judicially created rule of evidence, not a sufficiency of the evidence requirement. Dodgen, 81 Wn. App. at 492; see also C.D.W., 76 Wn. App. at 763. In other words, it governs whether a defendant's confession is admissible in the first place—not whether the evidence is sufficient to convict. See C.D.W., 76 Wn. App. at 763 (noting that the *corpus delicti* rule requires "proper foundation to be laid before a confession is admitted"); see also State v. Brockob, 159 Wn.2d 311, 327-41, 150 P.3d 59 (2006) (considering the sufficiency of the evidence separately from whether defendants' confessions were properly admitted under the *corpus delicti* rule). Pollock does not assign error on appeal to the admission of his confessions under the *corpus delicti* rule. Br. of Appellant at 1-2. His claim should be rejected.

Finally, even assuming for the sake of argument that Pollock both preserved this claim and properly raised it, his argument is unavailing because the State adduced ample corroborating evidence to allow the admission of his confessions. The *corpus delicti* rule requires that "the body of the crime" be established before the defendant's admissions may be considered. State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). Some independent, corroborating evidence of the crime is required for the defendant's statements to be admissible. Brockob, 159 Wn.2d at 327-28.

The corroboration requirement demands only *prima facie* evidence. Aten, 130 Wn.2d at 656. This standard is satisfied when the State offers "evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved." Id. (internal quotation marks omitted). Direct and circumstantial evidence both may be considered. Id. at 655.

Here, Wolfe and Lain both testified that Pollock was holding a shotgun or rifle, wrapped in a blanket or shirt when he confronted Greer. 2RP 87-88, 90; 5RP 132. Police searched Wolfe's apartment after the shooting and found a shotgun, next to a blanket. 4RP 129-30; Exhibit 18. This evidence is sufficient to support a logical and reasonable inference that Pollock assaulted Greer with a shotgun. The *corpus delicti* doctrine was satisfied, so Pollock's incriminating statements were admissible. Based on his admissions, and the other evidence at trial, the evidence was sufficient to support Pollock's conviction. Pollock's conviction should be affirmed.

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

Pollock asserts that his right to due process was violated when the trial court instructed the jury on an incorrect definition of reasonable

doubt. He claims that WPIC 4.01, the pattern instruction issued 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 115 (Instruction 3) ("A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence."). Pollock's claim should be rejected. He expressly endorsed this instruction, thereby inviting any error, and is precluded from making this claim on appeal. On the merits, the instruction properly informed the jury of the applicable law.

a. Additional Facts.

In a hearing outside the presence of the jury, during the State's case-in-chief, the parties litigated jury instructions before the trial court. Pollock's trial attorney stated that the defense would "endorse all of the other instructions from the state with the exception of the initial aggressor instruction of course." 3RP 113. The trial court asked, "Just to be clear again, Mr. Tavel, so the defense is endorsing all of the state's instructions but for the initial aggressor one?" 3RP 113. Pollock's attorney replied, "Correct." 3RP 113.

The State's proposed instructions included WPIC 4.01. CP 172. This instruction provided that:

> 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. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 172 (citing WPIC 4.01) (emphasis added).

After each side rested, the trial court again inquired of the parties regarding jury instructions. Pollock's trial attorney again indicated that he was objecting only to the initial aggressor instruction. 6RP 91. Pollock also submitted his own instructions, in which he indicated an objection to the State's proposed initial aggressor instruction and an instruction relating to a defendant testifying, but expressly stated that, "The defense endorse[s] the other Jury Instructions as presented by the State." CP 96.

The trial court then instructed the jury with WPIC 4.01, identical to the proposed instruction set forth above, informing the jury that a reasonable doubt is "one for which a reason exists[.]" CP 115 (Instruction 3); 6RP 100.

b. Pollock Joined In Proposing The WPIC 4.01 Reasonable Doubt Instruction 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).

Pollock did not merely indicate that he lacked objection to the State's proposed reasonable doubt instruction. He stated on the record—both orally and in writing—that he was actually endorsing the instruction. CP 96; 3RP 113. Because Pollock joined in proposing this instruction, he invited any error in its submission and is precluded from assigning error on appeal.

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

Even if considered on the merits, Pollock's claim should be rejected because the trial court's reasonable doubt instruction was proper. The Washington Supreme Court expressly has approved this instruction. Pollock 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.

Pollock 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, Pollock 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.

Pollock 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 29-31 (quoting Emery, 174 Wn.2d at 760). But Pollock'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 of reasonable doubt employed by WPIC 4.01 is correct.[7]

Pollock'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, Pollock's argument is a hypertechnical exercise in semantics that should be rejected. "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.

[7] Pollock concedes that the Emery court observed that this definition of reasonable doubt was correct, but argues that the court did so "without explanation." Br. of Appellant at 31. But it is unsurprising that the court felt little need to explain its observation, given that this definition of reasonable doubt has repeatedly been approved for decades. Regardless, the lack of explication in Emery does not mean that WPIC 4.01 is incorrect and harmful. Pollock has failed to meet his burden under In re Stranger Creek. 77 Wn.2d at 653.

11, 18, 627 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).

Pollock'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. Using an instruction approved by

the Washington Supreme Court, 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 Pollock's conviction for second-degree assault.

DATED this 11th day of March, 2015.

Respectfully submitted,

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Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A March, the attorney for the appellant, at MarchK@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Maurice Henry Pollock, Cause No. 71254-3, 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 11th day of March, 2015.

Name:
Done in Seattle, Washington