72168-2

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NO. ~~72168-1-I~~

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDREW DEMPSEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable LeRoy McCullough, Judge

# BRIEF OF APPELLANT

MARY T. SWIFT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The reasonable doubt instruction required more than a reasonable doubt to acquit and shifted the burden to appellant to provide the jury with a reason for acquittal.

2. The trial court erred in refusing to designate a juror as an alternate when the juror demonstrated bias and inattention before deliberations began.

Issues Pertaining to Assignments of Error

1. The trial court instructed the jury that a "reasonable doubt is one for which a reason exists." Does this instruction require the jury to have more than reasonable doubt to acquit and impermissibly shift the burden of proof by instructing the jury it must be able to articulate a reason before it can have a reasonable doubt?

2. The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee the right to trial by an impartial jury. RCW 2.36.110 requires a trial judge to excuse a juror who has manifested unfitness through "bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." Did the trial court violate appellant's right to an impartial jury by refusing to designate a juror as an alternate after she demonstrated bias and inattention before deliberations began?

B. STATEMENT OF THE CASE

The State charged Andrew Dempsey with one count of second degree attempted child rape and one count of methamphetamine possession. CP 8-9. The State alleged that on September 29, 2012, Dempsey attempted to have sexual intercourse with 11-year-old J.M. CP 8. The case proceeded to trial on March 20, 2014. 2RP 38-39. The following evidence was introduced at trial.

On September 29, 2012, J.M., along with his mother and two sisters went shopping at Albertson's in Burien, Washington. 4RP 185-89; 5RP 27-31; 6RP 97-98. J.M. had to use the restroom, so he went by himself while his family shopped. 4RP 185-86; 6RP 97-98.

The Albertson's restrooms are adjacent to the employee break room. 2RP 117. The men's restroom has two stalls, including one large handicap stall. 2RP 122. The light in the men's room is on a motion sensor, so it turns off if there is no movement. 2RP 169-70. Several Albertson's employees acknowledged that homeless people often use the store restrooms to bathe and sometimes use drugs. 3RP 65; 4RP 79-80, 131.

When J.M. entered the restroom, the light was turned off and he said it smelled like cigarettes inside. 6RP 97-98. After J.M. used the toilet in the smaller stall, he heard a stall door slam and saw Dempsey coming towards him. 6RP 97-100, 128. Dempsey grabbed J.M. and told J.M. he was going

to kill him. 4RP 171; 6RP 97-98, 108-09. J.M. testified Dempsey's pants were down and his penis was "a little bit straight." 6RP 106-07. J.M. explained, "I'm not sure, but I think it was erected." 6RP 106-07.

Dempsey and J.M. continued to struggle for a few minutes. 6RP 112-16. J.M. told Dempsey, "I'll do whatever you want, however you want me to do." 6RP 99. But J.M. said Dempsey never made any demands, instead only telling J.M. he was going to kill him. 6RP 134, 139. Nor did Dempsey attempt to undress J.M. or touch J.M.'s private parts. 4RP 87-89; 6RP 116, 141. J.M. thought Dempsey looked like he was on drugs because there were scars on his face. 6RP 55, 142.

Three Albertson's employees—Barbara Kallstrom, Teasha Ward, and Terrie Carlson—overheard a commotion from the break room. 3RP 99-100; 4RP 54-58; 5RP 159-63. Ward walked to the men's restroom, opened the door, and saw Dempsey with J.M. in a chokehold. 4RP 61, 87-89. Ward recalled that Dempsey's pants were around his ankles, but she did not see his penis. 4RP 61, 64, 87-89. She shouted at Dempsey, "What the fuck are you doing?" 4RP 59-60. Dempsey let go of J.M., who ran back into the store, screaming, "He's trying to kill me, he's trying to kill me." 3RP 103; 4RP 107; 5RP 165. Though Ward did not see Dempsey's penis and J.M. was fully clothed, she told the store manager, "There's a man trying to rape a little boy in the bathroom." 4RP 64-66, 87-89.

Dempsey soon exited the restroom and turned right toward the emergency exit door, which triggers an alarm if opened. 3P 109-10; 5RP 183. He then turned around and walked toward the front of the store, moving slowly. 3RP 109-10, 129-31. Kallstrom said Dempsey looked unkempt, like he was homeless, and was doing up his pants as he left the restroom. 3RP 108, 127. Carlson, who is familiar with people using methamphetamine, remembered that Dempsey looked "higher than a kite," with a belt in his hand and dilated eyes, despite the bright lights in the store. 5RP 179, 183-84. Carlson also thought Dempsey looked homeless, because his clothes were dirty and he looked "very scraggly." 5RP 185.

As Dempsey tried to leave, the store manager stopped him. 2RP 125-26. When Dempsey refused to stop, several store employees tackled him to the ground. 2RP 125-26, 3RP 55-59. Dempsey struggled and thrashed on the floor, and bit one of the men holding him down. 2RP 78, 135; 3RP 31-32; 5RP 195.

The store employees also attempted to wrestle away the bag Dempsey had with him. 3RP 58-59. One said Dempsey had a "death grip" on the bag. 2RP 58-59. The bag eventually tore open and scattered Dempsey's belongings across the floor, including several hypodermic needles and a small baggie of methamphetamine. 2RP 58-61; 3RP 157-58,

193-95; 4RP 138. Store employees recalled that some of the needles looked used, because they did not have caps on them. 3RP 58-59, 73; 4RP 136.

Meanwhile, a shopper, Shawna Miller, called 911. 2RP 185-86. Miller sat with J.M. and his family while she spoke with the 911 dispatcher. 2RP 191-92. Miller testified J.M. said Dempsey "told me that if I screamed he would fucking kill me." 2RP 192. However, police did not ask Miller to provide a statement until January 2013, and she admitted the details of the incident were muddled in her memory. 3RP 36-41. Miller also recalled Dempsey appeared intoxicated, because he was disorganized, in a state of undress, and thrashing around as several men held him to the ground. 2RP 196. She thought this behavior was consistent with someone high on methamphetamine. 3RP 31-32.

Officer Benjamin Miller arrived first. 2RP 69-70, 77. He found three or four men holding Dempsey on the ground about 40 feet inside the front door. 2RP 74-75. Miller patted Dempsey down for weapons and found none. 2RP 80-81. Detective Ostrum arrived soon after. 3RP 142-43. She believed Dempsey looked homeless and his behavior was indicative of someone on methamphetamine. 3RP 191-92; 4RP 23. Officer Miller then arrested Dempsey and transported him to the Burien precinct. 2RP 83.

At the precinct, officers made Dempsey remove his clothes and put on a Tyvek jumpsuit. 4RP 47; 5RP 109. There was no button on his pants

and his clothes were damp, even though it was not raining that day. 4RP 41-47; 6RP 52. Detective Christine Elias thought Dempsey's wet clothes could be consistent with methamphetamine use, because the drug raises body temperature, which can cause a person to sweat profusely. 4RP 44-47; 6RP 55. Despite believing Dempsey looked high on methamphetamine, the lead detective did not test Dempsey for drug use. 6RP 52-57.

At trial, the court gave the standard reasonable doubt jury instruction, WPIC 4.01,[1] which reads, in part: "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 80; 7RP 11-12.

In closing, the State alleged Dempsey intended to rape J.M., because of his partially erect penis. 7RP 26. In response, defense counsel argued Dempsey's behavior indicated only a serious methamphetamine addiction, but no intent to rape. 7RP 32. Dempsey did not try to touch J.M. sexually or make any sexual demands of J.M. 7RP 43, 49. Instead, grabbing J.M. was the result of drug-induced paranoia. 7RP 46-48. Defense counsel also emphasized the witnesses' hazy memories of the incident and the numerous

[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

inconsistencies in their stories. 7RP 38-42. Thus, defense counsel asked the jury to convict Dempsey of methamphetamine possession and acquit on attempted rape. 7RP 57.

After the State's rebuttal, but before deliberations began, defense counsel moved to designate Juror Number One as an alternate and excuse her. 7RP 69. Counsel pointed out that, during the State's closing argument, Juror One was "wiping her eyes as if she was crying. And then spent the rest of the time staring at myself and Mr. Dempsey."[2] 7RP 69. There were tissues next to Juror One's seat. 7RP 72. Dempsey's counsel further noted, "It appeared that she was unable to retain the presumption of innocence, and to listen to all of the argument and the evidence." 7RP 69. The State opposed Juror One's designation as an alternate, arguing defense counsel had only a subjective belief of Juror One's mindset. 7RP 69.

The trial court acknowledged Juror One was "visually fixated at an angle," "staring at the defendant and at defense counsel," and "seemed to be unable to follow as the different attorneys were talking." 7RP 70. The court further noted:

> And unlike the other jurors who kind of watched what was going on, the one juror was -- I don't want to say in

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[2] Dempsey had two attorneys. While one gave closing argument, the other sat at counsel table with Dempsey. See 7RP 69. Juror One fixated on Dempsey and his counsel sitting with him, instead of on his counsel giving closing argument. 7RP 69-70.

> a trance. I don't want to say that she was -- but there was something very unique about her approach and the way that she watched counsel. I did notice that.

7RP 70. However, the court denied the motion, concluding the record did not establish Juror One's inattention or bias. 7RP 81-83. The court further believed there was no information about Juror One's substantive opinion in the case. 7RP 82. Juror One remained on the jury through deliberations. 7RP 84, 120.

The jury found Dempsey guilty as charged on both counts. CP 72-73. The court sentenced him to 72 months confinement. CP 125. Dempsey timely appealed. CP 110.

C. ARGUMENT

1. THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL.

Dempsey's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 80; 7RP 11; see also 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). The Washington Supreme Court requires trial courts to give this instruction in every criminal case. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

However, WPIC 4.01 is constitutionally defective for two reasons. First, it instructs jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement on reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt is identical to "fill-in-the-blank" arguments, which Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same thing. Instructing jurors with WPIC 4.01 is constitutional error. This court should accordingly reverse and remand for retrial.

Having a reasonable doubt is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to acquit. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

"Reasonable" means "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). Thus, for a doubt to be reasonable, it must

be logically derived, rational, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

The inclusion of the article "a" before "reason" in WPIC 4.01 improperly alters and augments the definition of reasonable doubt. In the context of WPIC 4.01, "a reason" means "an expression or statement offered as an explanation of a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to "reason," which refers to a doubt based in reason or logic, "a reason" requires reasonable doubt to be capable of explanation or justification. In other words, WPIC 4.01 requires not just a reasonable doubt, but also an explainable, articulable doubt.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). But, in order for the jury to acquit under WPIC 4.01, reasonable doubt is insufficient. Rather, Washington courts instruct jurors that they must also be able to point to a reason that justifies their reasonable doubt. Any juror could have reasonable doubt but also have

difficulty articulating or explaining the reason for that doubt. A case might present such voluminous and contradictory evidence that a juror with legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. But, despite having reasonable doubt, the juror could not vote to acquit under WPIC 4.01. By requiring more than a reasonable doubt to acquit, WPIC 4.01 violates the federal and state due process clauses. U.S. CONST. amends. V, XIV; WASH. CONST. art. I, § 3; Winship, 297 U.S. at 364.

Requiring jurors to articulate a reason for having reasonable doubt is also precisely what Washington courts prohibit in the context of prosecutorial misconduct. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Therefore, such arguments are flatly barred "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759-60.

For instance, in State v. Walker, the court held improper a prosecutor's PowerPoint slide that read, "'If you were to find the defendant not guilty, you *have* to say: 'I had a reasonable doubt[.]' What was the reason for your doubt? 'My reason was ____.'" 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (quoting clerk's papers). Likewise, in State v. Venegas, the court found flagrant and ill-intentioned misconduct where the prosecutor

argued in closing, "'In order to find the defendant not guilty, you have to say to yourselves: "I doubt the defendant is guilty, and my reason is"—blank.'" 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (quoting report of proceedings); see also State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 936 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

Although it does not explicitly tell jurors to fill in a blank, WPIC 4.01 implies that jurors need to do just that. Trial courts instruct jurors that a reason must exist for their reasonable doubt. This is, in substance, the same exercise as telling jurors they need to fill in a blank with an explanation or justification in order to acquit. If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, then it makes no sense to allow the same undermining to occur through a jury instruction.

The State may argue that the Emery court already approved of the "reason to doubt" language. In considering a challenge to fill-in-the-blank arguments, the Emery court said, "the argument properly describes reasonable doubt as a 'doubt for which a reason exists.'" 174 Wn.2d at 760. But the court made this statement without explanation or analysis. Nor was the Emery court considering a direct challenge to the WPIC 4.01 language. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045

(1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue."). Instead, just like fill-in-the-blank arguments, WPIC 4.01 "improperly implies that the jury must be able to articulate its reasonable doubt." Id. By requiring more than just a reasonable doubt to acquit, WPIC 4.01 impermissibly undercuts the presumption of innocence and is therefore erroneous.

Dempsey's jury was instructed pursuant to WPIC 4.01 that it must articulate a reason for having reasonable doubt. This was constitutional error because it improperly shifted the burden to Dempsey to provide such a reason and required more than reasonable doubt to acquit Dempsey. This court should reverse and remand for retrial before a jury that is accurately instructed on the meaning of reasonable doubt.

2. THE TRIAL COURT VIOLATED DEMPSEY'S RIGHT TO A FAIR AND IMPARTIAL JURY BY REFUSING TO DESIGNATE A BAISED AND INATTENTIVE JUROR AS AN ALTERNATE.

Juror One demonstrated bias and inattention before deliberations began when she cried during the State's closing and then fixated on Dempsey during defense counsel's closing. The trial court acknowledged Juror One appeared unable to follow along. Juror One's actions revealed an unwillingness to retain the presumption of innocence through deliberations, and further suggest she allowed emotion and prejudice to overcome her

rational thought process. This violated Dempsey's constitutional right to an impartial jury. As such, the trial court abused its discretion in failing to safeguard this right and replace Juror One with an alternate juror.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantees the right to a fair trial "by an impartial jury." U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. This right "is compromised when the trier of fact is unable to render a disinterested, objective judgment." United States v. Thompson, 744 F.2d 1065, 1068 (4th Cir. 1984). Thus, the determination of whether to excuse a juror rests on whether the juror can remain impartial. United States v. Brothers, 438 F.3d 1068, 1071 (10th Cir. 2006). This court reviews a trial court's decision to excuse a juror for abuse of discretion. State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000).

The U.S. Supreme Court defines an impartial jury as "a jury capable and willing to decide the case solely on the evidence before it." Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); see also United States v. Cabrera-Beltran, 660 F.3d 742, 749-50 (4th Cir. 2011) (explaining that a juror is impartial only if she can lay aside her opinion and render a verdict based solely on the evidence presented in court). "Clearly, such a jury must be composed of members who not only are free of bias in favor of or against a particular party but are also able, in a more basic sense, to carry out their function." Brothers, 438 F.3d at 1071.

In Washington, the dismissal of an unfit juror is governed by statute:

> 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.

RCW 2.36.110. While the statute governs what justifies dismissal of a juror for unfitness, CrR 6.5 outlines the specific procedure for such a dismissal. It provides: "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the jurors place on the jury." CrR 6.5 (emphasis added). Thus, before deliberations begin, the trial judge has a "continuous obligation" to replace a biased or inattentive juror with an alternate. Jorden, 103 Wn. App. at 227. Such action is necessary to protect the accused's right to an impartial jury.

The right to an impartial jury is also reflected in the court's jury instructions. For instance, Dempsey's jury was instructed: "It is your duty to decide the facts in this case based upon the evidence presented to you at trial." CP 75; 7RP 7; WPIC 1.02. Likewise:

> As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties

> receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 78; 7RP 10; WPIC 1.02.

Furthermore, the presumption of innocence continues through deliberations, until the jury reaches a verdict: "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." CP 80; 7RP 11; WPIC 4.01. Similarly, the jurors were instructed they must not reach an individual decision on guilt until they deliberated with one another: "As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors." CP 79; 7RP 10-11; WPIC 1.04.

Few Washington cases have considered the propriety of dismissing or refusing to dismiss a juror before deliberations begin. In Jorden, the trial court excused a juror who fell asleep several times during trial. 103 Wn. App. at 224-25. Because the juror did not hear all the evidence presented, her fitness was compromised, and the trial judge was required to dismiss her under RCW 2.36.110 and CrR 6.5. Id. at 230. The Jorden court also explained that the issue of whether the sleeping juror prejudiced Jorden's

right to a fair trial was premature, because she was removed before deliberations began. Id. at 229.

Given the dearth of Washington cases, federal cases are instructive. Federal Rule of Criminal Procedure 24(c)(1) allows federal courts to "impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties." Therefore, just like under RCW 2.36.110 and CrR 6.5, a biased juror must be dismissed and replaced with an alternate. United States v. Thompson, 744 F.2d 1065, 1068 (4th Cir. 1984).

In Thompson, the trial court refused to declare a mistrial when a juror became upset after seeing a photo of the deceased victim and then gave equivocal responses to repeated questions about his ability proceed with an open mind. Id. at 1067-68. The Fourth Circuit held the trial court abused its discretion in proceeding with the trial instead of replacing the juror with an alternate. Id. at 1068. "[T]he right to an impartial jury dominated all other considerations, and [the juror's] equivocal responses to the court's questions so compromised the defendants' right to an impartial jury that they outweighed any concerns about the expense of a mistrial." Id. at 1069.

Federal courts also hold that a trial court properly dismisses a juror who demonstrates an inability or unwillingness to follow the court's instructions. For instance, in United States v. Augustin, the jury foreperson

informed the trial court that one juror already "made up her mind well in advance of deliberations." 661 F.3d 1105, 1130 (11th Cir. 2011). The trial court found the juror "violated her oath and duty . . . to follow the Court's instructions on the law and apply the law to the evidence or lack of evidence." Id. at 1132 (internal quotation marks omitted). Her replacement with an alternate was therefore proper. Id. Similarly, in Cabrera-Beltran, trial court properly dismissed prospective jurors who indicated they might not be unable to accept court-approved translations. 660 F.3d at 750.

These cases demonstrate that the accused's right to an impartial jury is paramount and must dominate "all other considerations." Thompson, 744 F.2d at 1068; see also United States v. Taylor, 554 F.2d 200, 202 (5th Cir. 1977). When a juror shows even the *possibility* of bias, the appropriate action is to replace that juror with an alternate. See United States v. Bolden, 596 F.3d 976, 981 (8th Cir. 2010) (holding the trial court acted properly in "erring on the side of caution" and replacing a possibly biased juror with an alternate). Otherwise, the right to an impartial jury is imperiled.

When applied here, these cases necessitate reversal. Juror One demonstrated inattention, bias, and inability to follow the court's instructions. First, the trial court acknowledged Juror One's inattentiveness, finding that she "seemed unable to follow as the different attorneys were talking." 7RP 70. Similar to the sleeping juror in Jorden, Juror One ignored

defense counsel's closing argument while she was "visually fixated" on Dempsey. But, unlike Jorden, the issue of prejudice is not premature. Juror One was not replaced with an alternate, and therefore deliberated with the other jurors despite her inattentiveness. Once the trial court recognized Juror One's inattention, RCW 2.36.110 and CrR 6.5 *required* her to be replaced with an alternate.

Juror One's crying during the State's closing and then her fixation on Dempsey also demonstrates she let emotion and prejudice overcome her rational thought process. The presumption of innocence continued through deliberations until the jury reached a verdict. CP 80; 7RP 11. Jurors were also instructed to refrain from making an individual determination of guilt until they deliberated with one another. CP 79; 7RP 10-11. Washington courts hold that a juror is unfit when he or she exhibits prejudice by refusing to follow the law, as given in the court's instructions. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). Juror One's actions showed she made up her mind before deliberations began and before discussing the evidence with her fellow jurors. Her bias could have easily tainted the deliberations. This undermined the presumption of innocence and violated the court's instructions.

A juror is impartial only if she can lay aside her emotions and render a verdict based solely on the evidence presented in court, after deliberating

with her fellow jurors. Juror One demonstrated she was unwilling and unable to be impartial. Once the trial court became aware of this, it had a duty to replace her with an alternate. CrR 6.5 provides a simple, straightforward procedure for doing so.

Though RCW 2.36.110 gives trial courts discretion to determine juror unfitness, that discretion is cabined by the accused's constitutional right to an impartial jury, which "dominate[s] all other considerations." Thompson, 744 F.2d at 1068. The trial court's refusal to designate the biased juror as an alternate violated Dempsey's right to an impartial jury. This court should reverse Dempsey's convictions and remand for a new trial before a fair and impartial jury.

D. CONCLUSION

For the reasons stated above, this court should reverse Dempsey's convictions and remand for a new trial before a properly instructed, impartial jury.

DATED this 31st day of December, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorney for Appellant

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

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| STATE OF WASHINGTON | ) | |
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| Respondent, | ) | |
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| vs. | ) | COA NO. 72168-1-I |
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| ANDREW DEMPSEY, | ) | |
| | ) | |
| Appellant. | ) | |

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

[X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
W554 KING COUNTY COURTHOUSE
516 THIRD AVENUE
SEATTLE, WA 98104
paoappellateunitmail@kingcounty.gov

[X] SHAWN SCHULZE
DOC NO. 373553
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA,WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 31ST DAY OF DECEMBER 2014.

X Patrick Mayovsky

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

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| STATE OF WASHINGTON | ) | |
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| Respondent, | ) | 72168-2 |
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| vs. | ) | COA NO. ~~72168-1-I~~ |
| | ) | |
| ANDREW DEMPSEY, | ) | |
| | ) | |
| Appellant. | ) | |

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**CORRECTED DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

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APPELLATE UNIT
W554 KING COUNTY COURTHOUSE
516 THIRD AVENUE
SEATTLE, WA 98104
paoappellateunitmail@kingcounty.gov

[X] ANDREW DEMPSEY
DOC NO. 373553
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA,WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 5TH DAY OF JANUARY 2015.

X Patrick Mayovsky