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Court of Appeals  
Division III  
State of Washington

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW O. HASTINGS,

Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF WALLA WALLA COUNTY

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RESPONDENT'S BRIEF

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Respectfully submitted:



by: Teresa Chen, WSBA 31762  
Deputy Prosecuting Attorney

P.O. Box 5889  
Pasco, Washington 99301  
(509) 545-3561

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### **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

### **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the trial and conviction of the Appellant.

### **III. ISSUES**

1. Did the trial court abuse its discretion in denying the motion for new trial where there is no challenge to the validity of the jury instructions and the court's failure to consult counsel in responding to a jury inquiry is harmless beyond a reasonable doubt?
2. Did the trial court abuse its discretion in denying the motion for new trial where the jury did not view the Defendant under physical restraint and the Defendant has not shown that the contact with the jail deputy had a substantial or injurious effect or influence on the jury's verdict?

#### **IV. STATEMENT OF THE CASE**

The Defendant Matthew Hastings was convicted by a jury of residential burglary, violation of a protection order, and theft in the third degree – all with domestic violence. CP 120-23, 175-76.

Off and on for several years, the Defendant lived with Nancy Newman and her dog at her cabin home in Walla Walla. RP 12-14, 22. The relationship deteriorated, and Ms. Newman got a restraining order against the Defendant on March 26, 2014. RP 14-15. A few days later, when the Defendant asked to collect his property from Ms. Newman's home, she told him that due to the restraining order, he should go through the sheriff. RP 16.

On April 23, 2014, Ms. Newman reported that the Defendant had taken her dog and her jewelry and sped off in his van towards Oregon. RP 17-18, 26-27, 66-69. Deputy Edwards located the Defendant at a nearby residence. RP 28. The dog came running to greet the deputy, and the Defendant had Ms. Newman's jewelry in his front pocket. RP 18-19, 28-29.

The day after closing arguments concluded, the defense made a motion to dismiss based on the jury's viewing of the Defendant's exit from the courtroom. CP 86-90; RP 113. After deliberating for approximately 45 minutes, the jury had been excused for the night to resume deliberations the

next day. CP 156. In exiting the small courtroom, the jurors had to file past counsel table. CP 156-57. As the jurors were leaving, a jail deputy came in and gestured toward the Defendant, saying, “Matt, c’mere, let’s go.” CP 87, 157; RP 113. Defense counsel whispered for the Defendant to wait until the jurors had exited, but the jailer continued to summon the Defendant and grasped his upper arm. *Id.* The Defendant exited with the jailer and walked down the hallway without further restraint. CP 157; RP 126. Defense counsel argued that despite the fact that the Defendant was not under any physical restraint, the court should apply the law regarding the inherent prejudice of shackles. CP 89.

After verifying that there had been neither physical nor verbal contact between the Defendant and the jurors and that the Defendant had been without any shackles or handcuffs, the court denied the motion observing that the Defendant had merely been in the presence of staff. RP 115.

During deliberations, the jury inquired whether the crime intended in a burglary could be:

- A. Violation of restraining order
- B. Theft
- C. Both
- D. Just entering unlawfully

CP 124. The court responded only that “you have the Court’s instructions on

the law. Please refer to your instructions and continue to deliberate.” *Id.* The court’s instructions to the jury fully defined the crimes of residential burglary, violation of a protection order, and theft – and no other crimes. CP 99, 106-07, 109-10.

The jury returned a verdict on October 8. RP 115-16. On October 16, the Defendant filed a motion for new trial, renewing the challenge to the deputy’s escort and arguing that the court had committed prejudicial error in responding to a jury inquiry without consulting the parties. CP 140-47. The State filed a response. CP 156-65. The court denied the motion, finding that the court’s response to the inquiry did not prejudice the Defendant. RP 127.

On appeal, the Defendant renews the arguments made in the motion for new trial.

## V. ARGUMENT

### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL BASED ON THE COURT’S RESPONSE TO THE JURY INQUIRY.

The trial court’s ruling on a motion for new trial is reviewed for abuse of discretion. Brief of Appellant at 10, *citing State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). The trial court did not abuse its discretion

in denying a motion for new trial where the claimed error was harmless beyond a reasonable doubt.

In the motion for new trial, the Defendant argued the trial court had violated CrR 6.15. CP 142-44.

The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

CrR 6.15(f)(1) (emphasis added). The court failed to notify parties or provide an opportunity for them to comment. The Defendant has correctly noted that the State has the burden of proving the error was harmless beyond a reasonable doubt. CP 142; Brief of Appellant at 10.

The Defendant argues that he was prejudiced by the court's response, which he believes would have permitted the jury to convict him for a non-crime. Brief of Appellant at 10; CP 143-44. This is not plausible. The jury

was referred to the existing instructions which properly define the crimes of residential burglary, violation of a protection order, and theft. CP 99, 106-07, 109-10. No other crimes are defined which could confuse the jury. And there is no challenge to the correctness of these instructions. *State v. Langdon*, 42 Wn. App. 715, 718, 713 P.2d 120 (1986) (“even if the jury could have been genuinely confused” about the instruction, the actual instructions are not challenged on appeal or down below such that the adequacy of the instruction is not properly a matter of review).

Because the court’s instructions to the jury are a correct statement of the law, and because the court’s response directed the jury to review that correct statement, there is no prejudice. The trial court did not abuse its discretion in finding the error harmless beyond a reasonable doubt.

There are several cases directly on point which uphold the lower court’s decision.

In *State v. Langdon*, the defendant argued that referring the jury back to previously given instructions is prejudicial error, because it does not answer the jury’s question. *State v. Langdon*, 42 Wn. App. at 718. The court of appeals disagreed. When the court’s response to a jury query is a neutral instruction which simply refers the jury back to the previous instructions, any

error is harmless. *State v. Langdon*, 42 Wn. App. at 717. This is because the court has no duty to answer a jury question. It is within the court's discretion whether to give any further instructions. *State v. Langdon*, 42 Wn. App. at 718, *citing* CrR 6.15(f)(1) and *State v. Miller*, 40 Wn. App. 483, 489, 698 P.2d 1123 (1985).

In *State v. Jasper*, 158 Wn. App. 518, 525-26, 246 P.3d 228 (2010), the court again referred the jury back to the original instructions. Absent a clear record, the court of appeals presumed that the lower court failed to consult with counsel. *State v. Jasper*, 158 Wn. App. at 540 n. 13. The defendant argued that he was prejudiced by the court's failure to provide an additional instruction regarding an unargued statutory defense. *State v. Jasper*, 158 Wn. App. at 542. The court of appeals held that the trial court's actual "reply was not erroneous." *State v. Jasper*, 158 Wn. App. at 543. "The trial court's response was neutral and did not convey any affirmative information and did not communicate to the jury any information that was harmful to Jasper." *Id.*

The Defendant Hastings argues that his case should be distinguished from *Jasper*, because the clarification requested there regarded an available statutory defense. Brief of Appellant at 9. But the *Jasper* court made no such

distinction. Rather it repeated the language in *Langston* that the court is under no obligation to answer a jury question. *State v. Jasper*, 158 Wn. App. at 542. Nor is there any such distinction under the recognized standard. The only question is whether the court's failure to instruct as defense would have proposed was prejudicial or harmless beyond a reasonable doubt.

Here the court's instructions are correct and unchallenged. Referring the jury back to those instructions correctly answered the jury's question. The response, although given without the benefit of the parties' consultation, is harmless beyond a reasonable doubt. The lower court did not abuse its discretion in so finding.

Insofar as the Defendant attempts to reframe the issue as a constitutional violation of his right to be present, this is decided matter of law. A criminal defendant has a due process right to be present during critical stages of his trial, but a chambers conference on jury instructions is not a critical stage. *State v. Miller*, 179 Wn. App. 91, 103-04, 316 P.3d 1143 (2014). There is no right to be present during in-chambers or bench conferences between court and counsel on legal matters, at least when those matters do not require the resolution of disputed facts. *State v. Corbin*, 79 Wn. App. 446, 449, 903 P.2d 999 (1995) (holding the presentation of CrR 3.5

findings and conclusions is not a critical stage).

The core of the constitutional right to be present is the right to be present when evidence is being presented. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge...’ ” *Gagnon*, 470 U.S. at 526, 105 S.Ct. at 1484 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, *United States v. Williams*, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857, 93 S.Ct. 140, 34 L.Ed.2d 102 (1972), at least where those matters do not require a resolution of disputed facts. *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

*In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994).

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL BASED ON THE JURY’S VIEW OF THE DEPUTY’S UNRESTRAINED ESCORT OF THE DEFENDANT.

As the Defendant acknowledges, the trial court’s decision is reviewed for abuse of discretion. Brief of Appellant at 6. The decision will be upheld so long as it is not manifestly unreasonable or untenable, i.e. outside the range of acceptable choices given the facts and law. *Id.*, citing *State v. Neal*,

144 Wn.2d 600, 609, 30 P.3d 1255 (2001) and *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The Defendant reviews the law on the prejudice of restraint and the standards which permit using physical restraints. Brief of Appellant at 11-12. However, the Defendant was not physically restrained. CP 163-64. He was not shackled. He was not cuffed. He was not clad in inmate attire. He was only summoned. The Defendant calls the distinction between actual physical restraint and no physical restraint “a distinction with little difference.” Brief of Appellant at 12. In fact, it makes all the difference. All the relevant law refers to chains, shackles, irons, or cuffs. CP 162-63.

The Defendant has provided no authority with similar facts to demonstrate that an unrestrained escort is equivalent to the physical restraints of shackling. This Court should not consider argument that is unsupported by legal authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *State v. Logan*, 102 Wn.App. 907, 911 n. 1, 10 P.3d 504 (2000).

Even were the facts different, the Defendant would have the burden of showing that the jury's brief glimpse of the Defendant in shackles had a substantial or injurious effect or influence on the jury's verdict. *State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998); *State v. Fleming*, 140 Wn. App. 132, 138, 170 P.3d 50 (2007) (the mere fact that a jury sees an inmate in shackles does not mandate reversal absent the defendant's affirmative showing of prejudice). And then the trial court has broad discretion in making this determination. *State v. Hutchinson*, 135 Wn.2d at 887.

The Defendant's complaint is that the jail deputy placed a hand on his arm and then escorted him, without touching him, out of the courtroom. CP 163. If any other person had ushered the Defendant aside, the Defendant would have no complaint. Therefore, the apparent offense is the jail deputy's person. The fact of the deputy's status alone is not sufficient to demonstrate restraint or custodial status. A communication with a person in uniform is not in and of itself offensive.

The trial court had tenable reason to deny the motion where no restraint was apparent and where the deputy's contact with the Defendant cannot be shown to have had a substantial or injurious effect or influence on

the jury's verdict.

**VI. CONCLUSION**

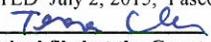
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: July 2, 2015.

Respectfully submitted:



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Teresa Chen, WSBA#31762  
Deputy Prosecuting Attorney

<p>Marie Trombley &lt;marietrombley@comcast.net&gt;</p> <p>Matthew Hastings DOC # 788621 - LEGAL MAIL - Washington State Penitentiary 1313 N. 13<sup>th</sup> Ave. Walla Walla, WA 99362</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 2, 2015, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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