

FILED
Court of Appeals
Division III
State of Washington
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NO. 35368-1-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

PLAINTIFF/RESPONDENT,

V.

JONATHAN RAY THACKER

DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

1. Procedural History

Pre-Trial

The Defendant was originally charged in Okanogan County Superior Court case 17-1-00058-1 with one count of Possession of a Controlled Substance: Methamphetamine, Gross Misdemeanor Violation of a DV No Contact Order, and Obstructing a Law Enforcement Officer. Seven additional counts of Violating a DV No Contact Order were added based on a series of phone calls the Defendant made while he was in jail and awaiting trial.

Sentencing

On 5/11/2017 the Defendant was found guilty as charged on at a jury trial. The Court denied a defense motion to arrest judgement. At sentencing on June 2nd 2017, the State requested that the Defendant be sentenced to the high end of the standard range (24 months) because of the Defendant's high offender score. The Defense requested a Drug Offender Sentencing Alternative. The Court sentenced the Defendant to the mid-range of 18 months in prison.

Jury Trial

Both parties submitted proposed jury instructions to the Court in advance of the trial. (*See Appendix A: State's Declaration Regarding Defendant's Proposed Jury Instructions*).¹ The jury trial was held on May 10th and May 11th of 2017 before the Honorable Judge Henry Rawson.

The State's witnesses at trial were Omak Police Sergeant Tallant, Chief Corrections Officer Noah Stewart, Misty Waugh, and Forensic Scientist Devon Hause.

Misty Waugh testified that she knew the protected party, and that they lived in the same apartment complex. Misty Waugh said she knew that the Defendant was dating the protected party, and that she also knew there was a no contact order. [RP 58] She said that on February 13th 2017 she called the police because she heard loud music coming from outside her apartment. She looked out her window and saw the Defendant's car outside. She called the police to report this suspicious activity. Misty Waugh stated that sometime after she called the police, she heard yelling. She looked out her window and saw that the Defendant was fighting with Sergeant Tallant. [RP 59]

¹ Trial Counsel's proposed jury instructions are referenced in page 5 of the Defendant's Appellate Brief.

Sergeant Tallant stated that on February 13th 2017 he responded to Misty Waugh's complaint about a possible no order violation. Sergeant Tallant checked his records and saw that there was an active no contact order that prohibited the Defendant from coming within 300 feet of the protected party's residence. [RP 85- 87] Sergeant Tallant stated that he had prior contact with the Defendant and the protected party in August of 2016. During that contact the Defendant stated that the protected party was his wife. [RP 84]

Sergeant Tallant drove to the protected party's apartment and saw the Defendant standing alone next to a white car. [RP 88] Sergeant Tallant approached the Defendant, and the Defendant told him that he was more than 100 feet from the protected party's home. [RP 91] Sergeant Tallant estimated the Defendant was indeed just over 100 feet from the residence. Sergeant Tallant then confirmed with Dispatch that the Defendant was prohibited from being within 300 feet from the residence. Sergeant Tallant told the Defendant he was under arrest. [RP 93]

Sergeant Tallant testified that he placed the Defendant in handcuffs, and then began searching him incident to arrest. [RP 95] The Defendant started resisting once Sergeant Tallant began trying to look through a bulged coat pocket. The Defendant refused to separate his feet as instructed. [RP 99] To gain better control, Sergeant Tallant pinned the

Defendant against his car. The Defendant asked Sergeant Tallant to cut him a break. Sergeant Tallant explained that he didn't have that kind of discretion, and the resistance to the search continued. [RP 95]. Sergeant Tallant noticed that the Defendant had a syringe balled up in his hand. Sergeant Tallant told the Defendant he saw the syringe, and told him to stop moving. The Defendant continued moving his hand around. Sergeant Tallant thought the Defendant might be trying to poke him, and took the Defendant to the ground. After a continued struggle on the ground, the Defendant was subdued. Sergeant Tallant collected the syringe and a small vial that were located on the ground, right next to the Defendant's hands. [RP 99-100]

Sergeant Tallant later asked the Defendant if the Defendant was trying to poke him with the needle. The Defendant replied that he wasn't trying to poke Sergeant Tallant, he just didn't want him to find the needle and the vial. The Defendant said that the items weren't his, but thought that it was probably methamphetamine. [RP 127] Sergeant Tallant field tested the liquid substance that was within the vial. The field test indicated that this was methamphetamine. [RP 126] Sergeant Tallant explained that he had this substance sent for testing at the State crime laboratory. Crime laboratory analyst Devon Hause testified that she tested

the substance in this vial and determined that it contained methamphetamine.

Corrections Officer Noah Stewart authenticated the jail phone recordings, which were later played for the jury. The jury heard a number of these phone calls from the Defendant while he was incarcerated in the Okanogan County Jail. The Defendant was recorded speaking to the protected party and the protected party's sons.

Jury Instructions

The Court reviewed proposed jury instructions from both the Defendant and the State. The State provided a complete set of jury instructions that were pattern "WPIC" instructions. *Appendix B*. The Defense proposed some jury instructions. *Appendix A*.

The Defendant's proposed "to convict" jury instructions differed from the "to convict" proposed by the State in that they were missing the specific name of the drug (methamphetamine), and referred to the Defendant as "Mr. Thacker." [RP 137 – 140; RP 231 – 233]. Both proposed instructions included the "duty to convict" language contained in WPIC 50.02. After argument about whether or not the Court's instructions should deviate from the WPIC and refer to the Defendant as "Mr. Thacker," the Court adopted the State's proposed instructions. [RP 140; and CP 32]

The Defendant's proposed jury instruction regarding "unwitting possession" deviated from the State's in that they again referred to the Defendant as "Mr. Thacker." The Court noted that the Defendant's proposed jury instruction also contained a final sentence: "If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty." *Appendix A* and [RP 140- 142]. The Court noted that this was not a pattern jury instruction according to the most current version of WPIC 52.01. The Court adopted the State's proposed instruction, which was consistent with WPIC 52.01.

ARGUMENT

A. The Defendant was Not Denied his Right to Present a Defense of Unwitting Possession.

The Defendant argues on appeal is that he was effectively denied his right to assert an unwitting possession defense because the Court instructed the jury using pattern jury instructions. The Defense argument is that the pattern jury instruction of "duty to convict" conflicts with a separate pattern jury instruction regarding the defense of unwitting possession to such an extent that it denied his Constitutional right to present a defense. This is incorrect because the jury was instructed appropriately.

Jury instructions are “sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *State v. Douglas*, 128 Wn.App. 555, 562, 116 P.3d 1012 (2005).

In this case trial counsel elicited hearsay testimony from the arresting officer on cross examination that the Defendant said that the drugs were not his, and that they belonged to somebody else. [RP 126-127] The Defendant requested and received a jury instruction on the defense of unwitting possession. *Cf. State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400, 402 (2013); and *State v. George*, 146 Wn. App. 906, 916, 193 P.3d 693, 697 (2008). The Court adopted the State’s proposed instructions on both the “to convict” and “unwitting possession” instructions.

Washington Courts have repeatedly held that the “duty to convict” language is appropriate. *See State v. Wilson*, 176 Wn. App. 147, 150, 307 P.3d 823, 824 (2013); *State v. Brown*, 130 Wn. App. 767, 771, 124 P.3d 663, 665 (2005). The State is unaware of any Washington case law that supports the argument that “duty to convict” language in pattern instructions is misleading or conflicts with “unwitting possession” instructions.

The jury was instructed on the elements of the crime of possession of a controlled substance. They were instructed that they had a duty to convict if the elements were satisfied beyond a reasonable doubt. They were also instructed according to the pattern jury instruction of WPIC 50.03 on the term possession, and then according to the pattern instruction of WPIC 52.01 on the defense of unwitting possession. This instruction informed the jury that “a person is not guilty of a possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.” They were accurately instructed on the definition of “knowing.” [RP 239-241]

The jury instructions were proper. When read as a whole, the jury instructions were not confusing and do not conflict with one another. There is no misstatement of the law. The State was not relieved of its burden, nor was the Defendant barred from arguing that he did not knowingly possess a controlled substance. *Cf. State v. Carter*, 127 Wn. App. 713, 718, 112 P.3d 561, 564 (2005).

The jury was accurately presented with a situation where they were to decide if the Defendant knew the substance was in his possession, or if he did not. The Defendant elected to not testify, and relied on the

statements that he made to the arresting officer to support the unwitting possession defense. These statements were somewhat ambiguous. He stated that he struggled with the arresting officer because he didn't want the officer to find the needle and vial. He then said that these were not his, and belonged to someone else. He then said that the substance in the vial might be methamphetamine. Additionally, there was some testimony from the arresting officer that it appeared that the Defendant was cleaning out his car when he was contacted. [RP 103]

The jury made a determination that given the evidence, that the Defendant did not unknowingly possess methamphetamine. They were accurately instructed that they must find the defendant not guilty if they found that the defendant did not know he possessed the drug. [RP 241] There was however substantial evidence that the defendant knowingly possessed methamphetamine. He was found to be in actual physical control of the controlled substance. He asked the officer to give him a break. He violently struggled with the officer with the stated intent of hoping to conceal the liquid substance and needle. The Defendant accurately described the liquid in the vial as probably methamphetamine to the officer.

After being appropriately instructed, the jury weighed all of this testimony and found that the Defendant did *not* unknowingly possess methamphetamine. Their verdict should not be disturbed on appeal.

B. The Defendant Received Effective Assistance of Counsel.

The Defense argues on appeal here that trial counsel was ineffective because of a failure to make a questionable objection to pattern jury instructions. They argue further that if trial counsel was to object, then the Court might have sustained an objection, might have proposed a different jury instruction, which might have changed the outcome of the trial.

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993).

In this case, trial counsel actually did propose some unique jury instructions. *Appendix A*. One of these instructions regarding “unwitting possession” included special language that “If you find that the defendant

has established this defense, it will be your duty to return a verdict of not guilty.” On appeal, the Defendant argues that trial counsel should have asked for some kind of unusual instructions because there would be no downside. This is exactly what trial counsel did on the unwitting possession instruction. However, the Court stated that it intended to give the WPIC instruction. Likewise, there is no reason to believe that the Court would have granted a “to convict” instruction that was missing the language “duty to convict.”

Further, is quite speculative to believe that some other unproposed jury instruction would have resulted in a different verdict, even if adopted. The truth is that the evidence in the case was particularly strong regarding count one-possession of a controlled substance. The Defendant was caught with it in his hand, along with paraphernalia that could be used to inject that particular drug. The defendant’s own statements indicated a knowledge of the specific substance he possessed. It is unreasonable to think that tinkering with “to convict” language would have resulted in a different outcome. *Strickland* at 691.

Trial counsel argued in closing that the Defendant didn’t know he possessed the drugs, but understandably this argument was a difficult one to make. It was however defense counsel’s only option given the strength of the evidence. There has been no showing the trial counsel’s

performance “fell below an objective standard of reasonableness based on consideration of all the circumstances.” *Studd*, 137 Wn.2d at 551, 973 P.2d 1049 (1999); *State v. Carter*, 127 Wn. App. 713, 717, 112 P.3d 561, 564 (2005). There is no reason to believe that an objection to “duty to convict” language in the instruction would have been granted, or even if it was, that it would have impacted the jury’s verdict.

Trial counsel requested and received instructions on an unwitting possession defense. The Court instructed the jury appropriately using pattern instructions, and trial counsel then argued in accordance with these instructions tailored to their trial strategy. There is no basis to find that trial counsel was unreasonable in their crafting of jury instructions, which were in fact consistent with their defense of unwitting possession.

CONCLUSION

For the aforementioned reasons, the State asks that this Court affirm the Defendant’s conviction.

Dated this 15th day of February, 2018

Respectfully Submitted:


Leif Drangsholt, WSBA #46771
Deputy Prosecuting Attorney
Okanogan County, Washington

Appendix A:

State's Declaration Regarding Defendant's Proposed Jury Instructions

State of Washington)
 :
County of Okanogan) ss

Leif Drangsholt, under penalty of perjury under the laws of the State of Washington, hereby declares:

1. That I am a deputy prosecuting attorney for Okanogan County assigned to the case of Jonathan Thacker, Court of Appeals Div. 3 case 35368-1-III.
2. That I was the assigned deputy prosecutor and represented the State during all aspects of this case pre-trial and during the jury trial.
3. That it is customary in Okanogan County Superior Court for the parties to submit motions in limine and jury instructions to the trial judge prior to jury trial in email over email. These are typically in Microsoft word format, and are addressed to the opposing party and the judge. Although motions in limine and jury instructions submitted in advance over email, they are typically formally submitted at the beginning, or over the course of trial. When they are formally submitted they are signed by the submitting attorney, and filed with the Court.
4. That in reading the Appellate Brief in in Jonathan Thacker, there is reference on page 5 that the Judge received a copy of the Defendant's proposed instructions. Appellate counsel makes note that although this is not in the record, it is apparent that it was actually considered by the Court. Appellate counsel assigns significance to this proposed jury instruction, and the jury instructions are the central focus of both of appellate counsel's arguments.
5. That after reading the Appellate Brief, the State reviewed the trial transcript, and then double checked the Court database to verify that the Defendant's proposed instructions were not, for whatever reason kept on file with the trial court. The State was unable to locate these in the record, just as Appellate counsel indicated in their briefing.
6. That I then recalled that there may be some record of the Defendant's proposed instructions over email. I checked my email, and located an email from May 1st 2017 at 9.31 p.m. from the Defendant Jonathan Thacker's Attorney, Robert Schiesser. This email was from Robert Schiesser addressed to myself and the trial judge, Henry Rawson. The email was the Defendant's submission of their proposed jury instructions.

7. That after reviewing the attachments to this email, the verbatim report of proceedings for the trial, and my personal recollection, it is apparent that these jury instructions were those that were put forward by defense counsel and considered by Judge Henry Rawson at the jury trial.
8. The State attaches this email and with the Defendant's Proposed Jury Instructions in their entirety to this Response Brief.

DATED this 13th day of February, 2018.

By: 
Leif Drangsholt WSBA #46771
Criminal Deputy Prosecutor

Leif Drangsholt

From: Robert Schiesser <rmschiesser@gmail.com>
Sent: Monday, May 01, 2017 9:31 PM
To: Henry Rawson; Leif Drangsholt
Subject: State v. Thacker, 17-1-00058-1_Defendant's CITED and UNCITED Jury Instructions
Attachments: Thacker_JuryInst_Cited.docx; Thacker_JuryInst_Uncited.docx

Respectfully,

--

Robert Schiesser
Attorney at Law
116 Queen Street
Okanogan, WA 98840
(509) 826-5801

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON

Plaintiff,

vs.

JONATHAN THACKER,

Defendant.

NO. 17-1-00058-1

DEFENDANT'S PROPOSED
JURY INSTRUCTIONS- CITED

COMES NOW the Defendant, JONATHAN THACKER, by and through counsel,
ROBERT M. SCHIESSER, and proposes the attached Jury Instructions in the above-captioned
cause number.

DATED this 1st day of May, 2017.

Robert Schiesser, WSBA #49774
Attorney for Defendant

INSTRUCTION NO. _____

Mr. Thacker is not required to testify. You may not use the fact that Mr. Thacker has not testified to infer guilt or prejudice him in any way.

WPIC 6.31

INSTRUCTION NO. _____

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

The burden is on Mr. Thacker to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

WPIC 52.01

INSTRUCTION NO. _____

To convict Mr. Thacker of the crime of possession of a controlled substance, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 13th 2017, Mr. Thacker possessed a controlled substance;

and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

WPIC 50.02

INSTRUCTION NO. _____

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

WPIC 3.01

INSTRUCTION NO. _____

Mr. Thacker has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. Mr. Thacker has no burden of proving that a reasonable doubt exists.

Mr. Thacker is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that 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. A reasonable doubt is a doubt that 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

INSTRUCTION NO. _____

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

WPIC 3.01

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON

Plaintiff,

vs.

JONATHAN THACKER,

Defendant.

NO. 17-1-00058-1

DEFENDANT'S PROPOSED
JURY INSTRUCTIONS-
UNCITED

COMES NOW the Defendant, JONATHAN THACKER, by and through counsel,
ROBERT M. SCHIESSER, and proposes the attached Jury Instructions in the above-captioned
cause number.

DATED this 1st day of May, 2017.

Robert Schiesser, WSBA #49774
Attorney for Defendant

INSTRUCTION NO. _____

Mr. Thacker is not required to testify. You may not use the fact that Mr. Thacker has not testified to infer guilt or prejudice him in any way.

INSTRUCTION NO. _____

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

The burden is on Mr. Thacker to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. _____

To convict Mr. Thacker of the crime of possession of a controlled substance, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 13th 2017, Mr. Thacker possessed a controlled substance;
and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

INSTRUCTION NO. _____

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. _____

Mr. Thacker has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. Mr. Thacker has no burden of proving that a reasonable doubt exists.

Mr. Thacker is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that 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. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

INSTRUCTION NO. _____

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Appendix B:

State's Proposed Jury Instructions (Cited)

36
Record Certification: I certify that the electronic copy is a correct copy of the original, on the date filed in this office, and was taken under the Clerk's direction and control.
Okanogan County Clerk,
by CO\zvanbrunt Deputy - # pages 36 - 5/10/2017 11:27:29 AM

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MAY 10 2017

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COUNTY CLERK

CITED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON,)

Plaintiff,)

vs.)

JONATHAN R. THACKER)

Defendant.)
_____)

No. 17-1-00058-1

STATE'S PROPOSED
JURY INSTRUCTIONS

By:


Leif Drangsholt, WSBA #46771
Criminal Deputy Prosecutor

Submitted this 10th day of May, 2017.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON,)	
)	
Plaintiff,)	No. 17-1-00058-1
)	
vs.)	COURT'S INSTRUCTIONS TO THE
)	JURY
JONATHAN R. THACKER)	
)	
)	
Defendant.)	
_____)	

COURT'S INSTRUCTIONS TO THE JURY

DATE: _____

HENRY A. RAWSON

JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case. Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your

deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

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. WPIC 1.02

INSTRUCTION NO. 2

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

WPIC 4.01

INSTRUCTION NO. 3

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

WPIC 6.31

INSTRUCTION NO. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

WPIC 5.01

INSTRUCTION NO. 5

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

WPIC 3.01

INSTRUCTION NO. 6

It is a crime for any person to possess a controlled substance.

WPIC 50.01

INSTRUCTION NO. 7

To convict the defendant of the crime of Possession of a Controlled Substance as charged in count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 13th 2017, the defendant possessed a controlled substance, to wit: Methamphetamine; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 50.02

INSTRUCTION NO. 8

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

INSTRUCTION NO. 9

Methamphetamine is a controlled substance.

WPIC 50.50 & RCW 69.50.206(d)(2)

INSTRUCTION NO. 10

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

WPIC 10.02

INSTRUCTION NO. 11

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

WPIC 52.01

INSTRUCTION NO. 12

A person commits the crime of violation of a court order when he or she knows of the existence of a protection order and knowingly violates: restraint provisions of the order prohibiting acts or threats of violence against, or provisions of the order prohibiting contact with a protected party, or a provision of the order excluding the person from a residence or a provision of the order prohibiting the person from knowingly coming within or remaining within a specified distance of a location.

WPIC 36.50

INSTRUCTION NO. 13

To convict the defendant of the crime of violation of a court order as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 13th 2017, there existed a protection order applicable to the defendant;

(2) That the defendant knew of the existence of this order;

(3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting contact with a protected party or provision of the order excluding the defendant from a residence, or a provision of the order prohibiting the defendant from knowingly coming within or remaining within a specified distance of a location; and

(4) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

It is not a defense to a charge of violation of a court order that a person protected by the order invited or consented to the contact.

WPIC 36.53.01

INSTRUCTION NO. 15

A person commits the crime of obstructing a law enforcement officer when he or she willfully hinders, delays, or obstructs any law enforcement officer in the discharge of the law enforcement officer's official powers or duties.

WPIC 120.01

INSTRUCTION NO. 16

To convict the defendant of the crime of obstructing a law enforcement officer, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 13th 2017, the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official powers or duties;
- (2) That the defendant knew that the law enforcement officer was discharging official duties at the time; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

Willfully means to purposefully act with knowledge that this action will hinder, delay, or obstruct a law enforcement officer in the discharge of the officer's official duties.

WPIC 120.02.01

INSTRUCTION NO. 18

To convict the defendant of the crime of violation of a court order as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 9th 2017, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting restraint provision of the order prohibiting contact with the protected party; and
- (4) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

To convict the defendant of the crime of violation of a court order as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 9th 2017, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting restraint provision of the order prohibiting contact with the protected party; and
- (4) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

To convict the defendant of the crime of violation of a court order as charged in Count VI, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 14th 2017, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting restraint provision of the order prohibiting contact with the protected party; and
- (4) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

To convict the defendant of the crime of violation of a court order as charged in Count VII, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 28th 2017, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting restraint provision of the order prohibiting contact with the protected party; and
- (4) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 22

To convict the defendant of the crime of violation of a court order as charged in Count VIII, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 30th 2017, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting restraint provision of the order prohibiting contact with the protected party; and
- (4) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

To convict the defendant of the crime of violation of a court order as charged in Count IX, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 31st 2017, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting restraint provision of the order prohibiting contact with the protected party; and
- (4) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 24

To convict the defendant of the crime of violation of a court order as charged in Count X, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about April 4th 2017, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting restraint provision of the order prohibiting contact with the protected party; and
- (4) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

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. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

WPIC 1.04

INSTRUCTION NO. 26

You will also be given a special verdict form. If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," you must fill in the blank with the answer "no." If after full and fair consideration of the evidence you are not in agreement as to the answer, then do not fill in the blank for that question.

WPIC 160.00

INSTRUCTION NO. 27

For purposes of this case, "family or household members" means spouses or former spouses, or adult persons who are presently residing together or who have resided together in the past, or persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship.

"Dating relationship" means a social relationship of a romantic nature. In deciding whether two people had a "dating relationship," you may consider all relevant factors, including a) the nature of any relationship between them; b) the length of time that any relationship existed; and c) the frequency of any interaction between them.

WPIC 2.27

INSTRUCTION NO. 28

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

WPIC 151.00

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON,)	
)	
Plaintiff,)	No. 17-1-00058-1
)	
vs.)	VERDICT FORM A.
)	
JONATHAN R. THACKER)	
)	
Defendant.)	
_____)	

We, the jury, find the Defendant, JONATHAN R. THACKER, _____ ("Not Guilty or Guilty" of the crime of Possession of a Controlled Substance as charged in Count I.

We, the jury, find the Defendant, JONATHAN R. THACKER, _____ ("Not Guilty or Guilty" of the crime of Violation of a Court Order as charged in Count II.

We, the jury, find the Defendant, JONATHAN R. THACKER, _____ ("Not Guilty or Guilty" of the crime of Obstructing a Law Enforcement Officer as charged in Count III.

We, the jury, find the Defendant, JONATHAN R. THACKER, _____ ("Not Guilty or Guilty" of the crime of Violation of a Court Order as charged in Count IV.

We, the jury, find the Defendant, JONATHAN R. THACKER, _____("Not Guilty or Guilty" of the crime of Violation of a Court Order as charged in Count V.

We, the jury, find the Defendant, JONATHAN R. THACKER, _____("Not Guilty or Guilty" of the crime of Violation of a Court Order as charged in Count VI.

We, the jury, find the Defendant, JONATHAN R. THACKER, _____("Not Guilty or Guilty" of the crime of Violation of a Court Order as charged in Count VII.

We, the jury, find the Defendant, JONATHAN R. THACKER, _____("Not Guilty or Guilty" of the crime of Violation of a Court Order as charged in Count VIII.

We, the jury, find the Defendant, JONATHAN R. THACKER, _____("Not Guilty or Guilty" of the crime of Violation of a Court Order as charged in Count IX.

We, the jury, find the Defendant, JONATHAN R. THACKER, _____("Not Guilty or Guilty" of the crime of Violation of a Court Order as charged in Count X.

Date: _____

Presiding Juror

WPIC 180.01

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON,)	
)	
Plaintiff,)	17-1-00058-1
)	
vs.)	SPECIAL VERDICT FORM
)	
JONATHAN R. THACKER)	
)	
Defendant.)	
_____)	

We, the jury, answer the question submitted by the court as follows:

QUESTION: Were Jonathan Thacker and Linda Ottwell members of the same family or household?

ANSWER: _____ (*Write "yes" or "no"*)

DATE: _____

Presiding Juror

PROOF OF SERVICE

I, Julie M. Daigneau, do hereby certify under penalty of perjury that on the 15th day of February, 2018, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the **BRIEF OF RESPONDENT**:

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OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

February 15, 2018 - 1:43 PM

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Appellate Court Case Title: State of Washington v. Jonathan Ray Thacker
Superior Court Case Number: 17-1-00058-1

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