

72304-9

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Court of Appeals  
Division I  
State of Washington

72304-9

NO. 72304-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY BEESON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE ELIZABETH J. BERNIS

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DENNIS J. McCURDY  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u> .....	1
B. <u>ARGUMENT</u> .....	1
THE DEFENDANT'S ARGUMENT THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR NOT SANDBAGGING THE STATE AND THE COURT IS WITHOUT MERIT .....	1
C. <u>CONCLUSION</u> .....	6

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 1

Washington State:

State v. Burdette, 178 Wn. App. 183,  
313 P.3d 1235 (2013)..... 3

State v. Kjorsvik, 117 Wn.2d 93,  
812 P.2d 86 (1991)..... 4

State v. Sublett, 176 Wn.2d 58,  
292 P.3d 715 (2012)..... 3

Constitutional Provisions

Federal:

U.S. Const. amend. VI ..... 2

Rules and Regulations

Washington State:

CrR 6.15..... 3

Other Authorities

WPIC 4.01..... 1, 2, 3, 4

**A. ISSUE PRESENTED**

The defendant raised a single issue on appeal, the validity of WPIC jury instruction 4.01. In the State's Brief of Respondent, along with addressing the fallacies of the defendant's argument that WPIC 4.01 provides an incorrect statement of the law, the State also argued that any error was invited by the defendant and thus appellate review was barred. The defendant then filed a supplemental brief raising a new issue. The defendant now claims that his trial counsel was constitutionally ineffective for agreeing to the jury instructions given by the court. The State's Supplemental Brief is limited to addressing the defendant's spurious claim that his trial counsel was constitutionally ineffective.

**B. ARGUMENT**

**THE DEFENDANT'S ARGUMENT THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR NOT SANDBAGGING THE STATE AND THE COURT IS WITHOUT MERIT**

To prevail in an ineffective assistance of counsel claim, a defendant must satisfy a two-pronged test.

First, the defendant must show that his counsel's performance was constitutionally deficient. Strickland v.

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984). This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Id. The test to determine whether counsel was constitutionally ineffective requires a showing that counsel's representation fell below an objective standard of reasonableness based on a consideration of all of the circumstances. Id. at 688. A reviewing court will presume until proven otherwise that counsel acted appropriately. Id.

Second, the defendant must show that the deficient performance prejudiced him. This requires a showing that counsel's errors were so serious that there is a reasonable probability that the outcome of trial would have been different. Id.

Incredulously, appellate counsel professes that he can find no reason why defense counsel would adopt the State's proposed jury instruction as his own. A few of those reasons would include being ethical, the court rule, case law, counsel's reputation, the fact that the trial court directly asked defense counsel and the fact that no court has ever held WPIC 4.01 to be unconstitutional.

Here, the State provided the court and defense counsel with a set of proposed jury instructions that included WPIC 4.01. CP 108-26; 3RP 57, 60. Defense counsel told the court, "Your Honor, I

have had a chance to look at the jury instructions, and we won't be offering any alternative instructions." 3RP 57.

CrR 6.15(a) requires the parties to submit proposed jury instructions in writing. State v. Burdette, 178 Wn. App. 183, 197, 313 P.3d 1235 (2013) (citing CrR 6.15(a) and State v. Sublett, 176 Wn.2d 58, 75, 292 P.3d 715 (2012)). "Any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review." Sublett, at 75-76.

Here, in going through the proposed instructions, the court stated that "I've presented you with the full copy set of what the State had proposed...what we'll do as – is go through each one, and I'll just – have Mr. Gillespie [defense counsel] confirm that he's reviewed, he has no exceptions, and he's willing to accept the instruction as if he had proposed that instruction, and is willing to approve that." 3RP 60-16. The court stated that it would go through each instruction one at a time in order for the defense to raise any objections it had. Id. at 61.

When the court came to WPIC 4.01 the following colloquy occurred:

The Court: The next instruction, Defendant has entered a plea of not guilty. I think it's appropriately numbered "Number 3," and Mr. Gillespie, you've had a chance to

review this instruction the Court has just marked as "Number 3." Do you have any exceptions to this instruction?

Mr. Gillespie: No, your Honor.

The Court: And are you adopting this instruction as your own, as if you had submitted this instruction?

Mr. Gillespie: Yes.

3RP 62.

According to appellate counsel no reasonable attorney ever would have answered like the defense counsel did here. Instead, despite the court rule, despite being directly asked by the court, despite the requirement that counsel place objections on the record, despite the requirement that counsel have and state a basis for an objection, despite no court having ever ruled WPIC 4.01 unconstitutional, and despite a duty of candor to the court, appellate counsel believes trial counsel should have sandbagged<sup>1</sup> the court and provided an answer such as: "Your Honor, I refuse to adopt the instructions as you have asked, I refuse to lodge a

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<sup>1</sup> Sandbagging refers to the practice for intentionally trying to set up an error for appeal while at the same time rolling the dice on the outcome of trial. For example, the validity of a charging document not objected to at the trial court level is reviewed under a much more liberal standard on appeal to prevent "sandbagging," a "potential defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading." State v. Kjorsvik, 117 Wn.2d 93, 103, 812 P.2d 86 (1991).

specific objection, and I refuse to say why.” In short, appellate counsel’s argument borders on being ridiculous.

Most trial attorneys care about their reputations, it is what allows them to have success and be respected by the court. Under appellate counsel’s theory, a defense attorney should never agree to anything, despite not having a known basis to object, otherwise they are constitutionally ineffective if at some later date an appellate attorney happens to find an issue they want to raise on appeal. Appellate counsel’s questionable theory would also result in the elimination of the invited error doctrine. Anytime an appellate attorney decides there is an issue that they want to raise but may be barred by the invited error doctrine, trial counsel would be deemed constitutionally ineffective. There is simply no support for such a proposition.

Finally, the defendant’s prejudice argument is misguided. The defendant claims that but for trial counsel’s adoption of the proposed jury instructions, he would be able to raise this issue on appeal. This is not the test for prejudice. If it were, then all the case law involving a trial attorney’s failure to object, and all the case law involving the invited error doctrine, would become nullities. What the defendant must prove is that but for counsel’s

alleged deficient performance, the outcome of trial would have been different. The defendant does not attempt to, and cannot show prejudice here based on trial counsel's adoption of a jury instruction that the Supreme Court has reviewed before and has never held to be unconstitutional.

**C. CONCLUSION**

For the reasons cited above and in the State's Brief of Respondent, this Court should affirm the defendant's conviction.

DATED this 20 day of May, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DENNIS J. McCURDY, WSBA #21975  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jared Steed at Nielsen, Broman & Koch, containing a copy of the Supplemental Brief of Respondent, in STATE V. BEESON, Cause No. 72304-9-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name  
Done in Seattle, Washington

05/20/15  
Date