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DIVISION II

No. 38550-3-II

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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON,

Respondent,

Vs.

ROBERT DOBYNS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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STATEMENT OF THE CASE

Except as otherwise indicated in this brief, and without waiving the right to challenge any of the facts, Appellant's statement of the case is adequate for purposes of responding to this appeal.

Robert Dobyms was found guilty by a jury of three counts Rape of a Child in the First Degree, two counts Child Molestation in the First Degree, and five counts of Rape of a Child in the Second Degree on June 26, 2008. CP 21-38. The jury also found the aggravating factors by special verdict. Dobyms now appeals his conviction and sentence. CP 1-20.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WHEN IT DENIED DOBYNS' MOTION TO SUPPRESS THE RECORDING OF DOBYNS' TELEPHONE CONVERSATION WITH THE VICTIM.

Dobyms claims that the trial court erred when it denied his motion to suppress the electronic recording of his telephone conversation with the victim. There was no error.

A judge issuing an intercept order has "considerable discretion" to determine whether an intercept order satisfies the relevant statutes. State v. Porter, 98 Wn.App. 631, 634, 990 P.2d 460 (1999), *review denied*, 140 Wn.2d 1024 (2000)). Thus, the

reviewing court will not review the sufficiency of the application *de novo*. State v. Cisneros, 63 Wn.App. 724, 729, 821 P.2d 1262, *review denied*, 119 Wn.2d 1002, 832 P.2d 487 (1992). Rather, the reviewing court will affirm the application for an intercept order where the facts are minimally adequate to justify the need for the recording. Id. Thus, courts interpret this need requirement in a common-sense manner and do not apply the more stringent probable cause standard required in the context of obtaining a search warrant. Porter, 98 Wn.App. at 635; State v. D.J.W., 76 Wn.App. 135, 142, 882 P.2d 1199 (1994), *aff'd sub.nom.*, State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996).

RCW 9.73.090(2) allows law enforcement to intercept conversations with the consent of one party to the conversation. Law enforcement's application for an intercept order must make a particularized showing of need pursuant to RCW 9.73.130(3); State v. Porter, 98 Wn.App. 631, 635, 990 P.2d 460 (1999), *review denied*, 140 Wn.2d 1025 (2000). However, law enforcement officials do not have to prove "absolute necessity," nor are they required to exhaust all alternatives, to satisfy RCW 9.73.130(3)(f). Cisneros, 63 Wn.App. at 729, *citing State v. Knight*, 54 Wn.App. 143, 150, 772 P.2d 1042 (1989). Indeed,

[i]f the application for authorization from the officer required such a showing, the provision could never be utilized because under the statutory scheme an officer must always be a party to the communication and, therefore, could always testify about it. The recording would never be 'necessary' to acquire evidence.

State v. Platz, 33 Wn.App. 345, 349, 655 P.2d 710 (1982). Thus, officers must only "seriously consider other techniques, and the authorizing court must be informed of the reasons the alternatives have been or likely will be inadequate." Id.; Platz, supra, at 349,350 (noting that federal courts have also refused to require a showing of absolute necessity under a similarly worded federal statute)(citations omitted).

In deciding whether to authorize a recording, courts may consider the difficulties of proof inherent in the crime charged. State v. Lopez, 70 Wn.App. 259, 267, 856 P.2d 390 (1993), *review denied*, 123 Wn.2d 1002, 868 P.2d 871 (1994). For example, in State v. Kichinko, 26 Wn.App. 304, 312, 613 P.2d 792 (1980), "the court found that an application for authorization to record containing a statement that proof of a particular mental state is needed to convict for a crime and that 'unless it can be shown exactly what was said, the evidence . . . would be inexact, conflicting and confusing' was sufficient to show other normal investigative

procedures reasonably appear unlikely to succeed." Platz, supra, quoting Kichinko, 26 Wn.App. 304, 307-312, 613 P.2d 792 (1980).

RCW 9.73.090(2) states,

It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation *or one of the parties to the communication or conversation has given prior consent* to the interception, recording or disclosure: provided, that prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, *if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony. . . .*

Id. (emphasis added). RCW 9.73.130(3)(f) sets out the factors to be described in the application for authorization. Failure to comply with the procedures outlined in this chapter "would render an order based upon a faulty application unlawful, and an illegally obtained recording would be excluded from evidence." State v. Kichinko, 26 Wn.App. 304, 310-311, 613 P.2d 792 (1980), *citing* State v. Mayes, 20 Wn.App. 184, 579 P.2d 999 (1978); RCW 9.73.090; RCW 9.73.050; RCW 9.73.090.

In the present case, at the motion to suppress the recording of the intercept, the trial judge denied Dobyons' motion to suppress the recording. 11/28/09 RP 45,46. The trial court's reasoning and analysis on the suppression issue is set out in full as follows:

THE COURT: The statute is pretty specific, 9.73, and the requirements are set forth. I have had occasion over the years since I've been a judge to approve some of these intercept tape-recorded conversations, and I'm always amazed at realistically how few of these there really are, because as I mentioned earlier, one of the requirements of the statute is we have to make an annual report. And I think the last two years running, I've had no intercept requests that have been made of me. Of course, there's three judges in Lewis County. . . . But I think it goes without saying that we take the statute seriously and we take the statute's mandate seriously.

And if you look at the affidavit that was done by Detective Buster requesting this intercept, this was not, in my estimation, a mere recitation of boilerplate language set forth in the statute. Detective Buster was quite specific, quite case specific as to exactly what it was that led to the investigation getting started. Also what it was that the complaining party says that the defendant was doing to her. . . . [Detective Buster] says specifically, 'the investigative plan is for Nicole Madro to call Robert Dobyons at his home' . . . from her home phone.' . . . 'It's possible that Robert Dobyons will not want to talk to Nicole from his home phone. He may be uncomfortable talking with Nicole while she's calling him from her home phone, so there's a possibility that he might want to use a different telephone.'

Talks about how they might use other phone lines because he might be tipped off, as it were, if he found that Nicole was resistant to using other telephone

lines. And then we have the paragraph that we referred to earlier . . . 'I suspect if Nicole called Robert and confronted him about the sexual abuse under the pretext that she's been thinking about it, wants to tell her counsel, he will talk freely about the incidents with her and attempt to stop her from telling anyone.' We go on to the next page and we have the paragraph about normal investigative techniques.

When you put all of this together and you don't look at it in terms of an isolated focus on one paragraph or one reference, it's clear to me that, number one, Detective Buster made a great deal of effort in setting forth this affidavit to make this case specific. And secondly, that when he said in his affidavit, 'I can't use normal investigative techniques because'--and he sets forth the reasons--that again, those recitations are specifically case specific as to why he believes those would not work. And there's no requirement in the statute that the police agency actually has to go out and try these other investigative techniques, which in this case the detective thinks would have acted as a tip-off or a warning to the defendant that they were investigating this case.

I don't think Judge Hunt erred in any way, shape or form in approving this telephone intercept. In my mind, the statute was in fact complied with. The process is in fact highly regulated by the terms of the statute, and I know that, again, speaking for myself, when I have had these requests--and they do come in on occasion--but they're not that often. They're extremely rare. But I always get the statute out and I always specifically insist on following the statute, and I compare the statute with the affidavit when I do these to make sure that all of the statutory requirements and safeguards that are built in for the benefit of the defendant have in fact been complied with. I don't know that Judge Hunt did that. . . . but looking at this affidavit, I think that the--that in all likelihood, he may have done that because all of the

requirements of the statute, as far as I'm concerned, are in there.

And I also don't think that someone in the position of this defendant has a right to counsel at this point, that has to be announced in advance to him. Perhaps a prudent individual . . . might say, 'I'm not going to talk to you about that.' And frankly, I've seen over the course of years responses from these telephone intercepts where that's exactly what's happened is, "I don't know what you're talking about. I'm not going to talk to you about this. We're not going to have this conversation." . . . I also don't think that the mere fact that the victim is working with law enforcement necessarily makes the alleged victim a State's agent, and I don't think that the way the statute is written, that, as Mr. Hayes pointed out, if the detective could get on the phone and call the alleged defendant directly and ask him point blank, 'Did you or did you not do this. . . ' and the response from the defendant would be, 'I don't want to talk about it' and hang up, I don't think the fact that the alleged victim makes that phone call changes the situation at all.

So I don't think . . . that Mr. Dobyms is in a position to complain about the fact that he's not been Mirandized, and I don't think he's in a position to complain about the fact that he doesn't necessarily have counsel at the time that this intercept, which is done pursuant to a specific court order for a limited time and in a manner set forth specifically in the order, such that his constitutional rights have been violated.

So I'm denying the motion to suppress whatever it was, if anything, that was obtained as a result of the court-authorized telephone intercept recordings made for this case with respect to Mr. Dobyms.

11/28/09 RP 41-47.

Dobyns has not shown that the trial judge abused his discretion when it denied his motion to suppress the wire intercept. Here, Dobyns was accused of several felony offenses--child molestation and child rape offenses. These cases most often are difficult cases to prove and most often involve a "he-said-she-said" contest between the victim and the alleged perpetrator. Law enforcement gave its reasons for needing the intercept in the application, and two judges found their reasons adequate under the statute. Supp. CP. & 11/28/07 RP 41-47. Thus, in this case--just as the reviewing court noted in Platz-- "it is significant that both the authorizing judge and the trial court judge considered the statements sufficient." Platz, supra, 350, 351. As detailed above, there were two judges involved in this case, the judge granting the intercept, and the judge reviewing the granting of that intercept. Both judges found that all of the requirements of the statute had been met. The facts showing the need for the intercept need only be "minimally adequate." Cisneros, supra. For the reasons detailed in the reviewing judge's analysis as set forth above, this Court should agree that the wire intercept was valid, and should affirm the trial court's denial of Dobyns' motion to suppress.

II. THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED THE JURY TO HEAR THE RECORDING OF DOBYNS' TELEPHONE CONVERSATION WITH THE VICTIM WITHOUT ADMITTING THE TAPE ITSELF INTO EVIDENCE.

Dobyns claims that the trial court erred when it allowed the recording of Dobyns' conversation with the victim to be played for the jury but did not also admit that tape into evidence. This was not error.

First of all, Dobyns did not move to admit the tapes, nor did he object or complain that the tapes themselves had not been admitted. RP 178-207. Secondly, the evidence on the tape recordings were statements made by Dobyns and were thus admissible as admissions by a party opponent. ER 801(d)(2). Thirdly, Dobyns has not cited a single on-point case standing for his argument that the actual tapes of a conversation must be admitted before the content of the recording can be played, nor has he cited any on-point authority stating that it is otherwise improper to play such recordings for the jury. Brief of Appellant 31-33. The cases cited by Dobyns in this section of his brief do not support his allegations that there was no basis for playing the recordings for the jury or that the recordings were somehow "not evidence" and were "not testimony." Id. Furthermore, since Dobyns made no objection below when the tapes were not admitted, he should not be allowed

to complain of it now. In general, a reviewing court will not review an argument or theory that was not presented at the trial court level. Lindblad v. Boeing Co., 108 Wn.App. 198, 207, 31 P.3d 1 (2001). "The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials." Demelash v. Ross Stores, Inc., 105 Wn.App. 508, 527, 20 P.3d 447 (2001).

Dobyns claims that the playing of the recording of the phone conversation between Dobyns and the victim was somehow not "evidence" or was not "testimony." To read Dobyns' argument on this point, one would think that it is absolutely unheard of to play a tape recording for a jury as "evidence" in a jury trial. This is clearly not the case--as can be seen by reviewing a few cases in which tape recordings were indeed played for a jury. See e.g., State v. Williams, 49 Wn.2d 354, 360, 301 P.2d 769 (1956); State v. Smith, 85 Wn.2d 840, 540 P.2d 424 (1975); State v. Forrester, 21 Wn.App. 855, 587 P.2d 179 (1978); State v. Oughton, 26 Wn.App. 74, 612 P.2d 812 (1980).

And, while Dobyns claims now that it was error to play the tapes for the jury without actually admitting them, the fact of the matter is that had the tapes been admitted--Respondent has no

doubt that Dobyns would be complaining that it was improper for the tapes to be admitted because the jury should not be allowed the opportunity to listen to such tapes over and over again. Indeed, this is probably the most-commonly-raised issue by defense counsel on appeal in cases where tape recordings of statements made by a defendant are played for the jury--that the tapes themselves should not have been admitted and provided to the jury in deliberations. See, e.g., State v. Frazier, 99 Wn.2d 180, 187-191, 661 P.2d 126 (1983) and the cases cited therein discussing the propriety of admitting such tapes and sending the tapes with the jury for deliberations. And, while the State has found cases stating that tapes *may*, in the trial court's discretion, be admitted and provided to the jury, the State has not found any cases saying such tapes must be admitted or their content cannot be played for the jury. State v. Clapp, 57 Wn.App. 263, 273-274, 834 P.2d 1101 (1992)(tape recorded statement of the defendant may, within the discretion of the trial court, be admitted as an exhibit and reviewed by the jury during its deliberations).

Thus, the State expects that it simply could not "win" (in Dobyns' mind) on the issue of the admission of the tapes of Dobyns' conversations with the victim. If the tapes themselves had

been admitted, Dobyons would have protested that the tapes should not have been provided to the jury for the reasons mentioned above. Yet here the tapes themselves were not admitted (so no risk that the jurors would play them repeatedly)-- but Dobyons still protests. Be that as it may, the fact of the matter is that Dobyons has not cited any rule or any case that states it is improper to play a voice recording for the jury without also admitting the tape itself as an exhibit. As such, his argument simply has no basis in the law, and is utterly without merit. This Court should agree.

III. THERE WAS NO VIOLATION OF DOBYNS' RIGHT TO A PUBLIC TRIAL DURING THE VOIR DIRE PROCESS BECAUSE THE COURTROOM WAS NOT "CLOSED."

Dobyons claims that the trial court "closed the courtroom" during voir dire, and that this closure violated Dobyons' right to a public trial. Appellant's Brief (AB) 33. This issue is without merit because the trial court did not order that the courtroom be "closed." RP 76.

An appellate court reviews de novo "[w]hether a defendant's right to a public trial has been violated . . ." State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A criminal defendant has a right to a public trial under both the State and Federal Constitutions. Wash. Const. art. I, § 22; U.S. Const. amend VI; Brightman, 155

Wn. 2d at 514. The right to a public trial also applies during jury voir dire. Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 379, 99 S.Ct. 2898, 61 L.Ed. 2d 608 (1999). The seminal case on courtroom closure is State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). In Bone-Club, the trial court closed the courtroom by stating, "all those sitting in the back, would you please excuse yourselves at this time." Id. at 256. Similarly, in In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court ordered closure by stating, "*I am ruling* no family members, no spectators will be permitted in this courtroom during the selection of the jury because of the limitation of space, security, etcetera [sic]. *That's my ruling.*" Id. at 802 (emphasis in original). In State v. Brightman, the trial court told the attorneys in a pre-trial proceeding to: "tell the friends, relatives, and acquaintances of the victim and the defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that." Brightman, 155 Wn.2d at 511.

When determining whether a courtroom has been "closed," the reviewing court looks at the "plain language of [the trial court's] ruling" to determine whether the trial court has fully closed the courtroom, which triggers the Bone-Club analysis. Orange, 152

Wn.2d at 808. Likewise, the Brightman Court noted that, "once the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed." Brightman, 155 Wn.2d at 516.

Here, Dobyms claims his right to a public trial was violated because the courtroom was closed to individually question a potential juror without conducting the Bone-Club analysis. Brief of Appellant 33. This is not correct. The plain language of the transcript of proceedings in this case shows that there was no statement or order by the trial court that the courtroom was "closed" to any spectators or family members. RP 76. Because the trial court did not order the courtroom closed, the Bone-Club analysis was not required. In re Orange, supra; Brightman, supra. Accordingly, there is no burden on the State to prove that the proceeding was open. State v. Momah, 141 Wn.App. 705, 714, 715, 171 P.3d 1064 (2007)(courtroom was not closed where individual juror questioning took place in chambers while remainder of jury venire remained in the courtroom).

Dobyms relies on State v. Erickson, 146 Wn. App. 200, 189 P.3d 245 (2008). However, that case considers "whether a trial court must undertake a Bone-Club analysis before individual

questioning of prospective jurors outside the courtroom or in the jury room.” Erickson, 146 Wn. App. at 208(emphasis added). In Erickson, this Court found that the defendant was denied his right to a public trial because some prospective jurors were questioned privately in the jury room. *Id.* at 211. This Court noted “that the better practice is to question individual jurors regarding sensitive topics separate from the rest of the prospective jurors, but within the courtroom.” *Id.* at 211 n.8; see also State v. Vega, 144 Wn. App. 944, 184 P.3d 677 (2008).

That was exactly what was done here, and there was no closure of the courtroom. RP 76. Here, the trial court said,

I'm going to excuse the jury panel at this time to go back to the jury assembly room to wait for a few moments. I don't believe we'll take too long and then I'll have you come back and then we'll do the rest of the jury selection. Number 16 can stay here. All right, the jury panel has now been excused with the exception of number 16 who is here. Number 16, the panel has been excused. There are still a few other people in the courtroom. I can ask them to leave too. Do you --

JUROR NO. 16: I don't care, don't matter.

COURT: All right. Okay.

RP 76. Thus, the trial court in this case did not close the courtroom. Instead, the judge merely questioned Juror number 16 individually in the courtroom, but without closing the courtroom. In

fact, there were still some spectators remaining in the courtroom according to the above-cited portion of the record. RP 76.

Separately questioning individual jurors within the courtroom "is not a closure of the courtroom and thus requires no Bone-Club analysis." Erickson, 146 Wn. App. at 211. Furthermore, "a 'door' to a courtroom being closed, which occurs in most court proceedings, is not the same as a 'proceeding' in that courtroom being closed to the public." Momah, at 715. What happened in the present case is that the trial court conducted individual questioning of a potential juror in the courtroom apart from the other jurors but without closing the courtroom. We can see this by looking at the plain language in the record. Orange, 152 Wn.2d at 808. It is clear that the trial court did not order the courtroom closed. RP 76. There is no case or rule that says the courtroom is closed simply because some of the spectators "felt like" or "believed" it was closed--as argued by Dobyms. That is not the standard. The test is whether the trial judge ordered the courtroom closed. He did not do so here.

Therefore, no Bone-Club analysis was necessary, and Dobyms' argument to the contrary is without merit.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED DOBYNS' REQUEST TO STRIKE A POTENTIAL JUROR FOR CAUSE.

Dobyns claims that the trial court should have granted his request to strike a potential juror for cause. This argument is also without merit.

The decision to grant or deny a particular challenge of a potential juror for cause is a matter addressed to the discretion of the trial judge. State v. Gilcrist, 91 Wash.2d 603, 611, 590 P.2d 809 (1979). "Actual bias arises when the juror's state of mind relative to the case satisfies the trial judge that the challenged person cannot try the issues impartially and without prejudice to the substantial rights of the challenging party." State v. Wilson 141 Wash.App. 597, 606-608, 171 P.3d 501 (2007), *citing* Ottis v. Stevenson-Carson Sch. Dist. No. 303, 61 Wash.App. 747, 752, 812 P.2d 133 (1991); RCW 4.44.170(2). "Therefore, when a challenge for actual bias is made, the trial court must assess the prospective juror's state of mind." Wilson, *citing* State v. Jackson, 75 Wash.App. 537, 542-43, 879 P.2d 307 (1994), *review denied*, 126 Wash.2d 1003, 891 P.2d 37 (1995). This determination involves a question of preliminary fact, and the party challenging the juror on the ground of actual bias bears the burden of

demonstrating the facts necessary to sustain the challenge by a preponderance of the evidence. Wilson, supra, citing Ottis, 61 Wash.App. at 752-53, 812 P.2d 133. Actual bias exists when a juror's state of mind is such that he or she cannot 'try the issue impartially and without prejudice to' the challenger's substantial rights. RCW 4.44.170(2).

But even when a juror has "formed or expressed an opinion,' he or she need not be disqualified if he or she can 'disregard such opinion and try the issue impartially." RCW 4.44.190; State v. White, 60 Wn.2d 551, 569, 374 P.2d 942 (1962) (juror with preconceived notions need not be disqualified if he or she can 'put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court'), *cert. denied*, 375 U.S. 883 (1963). A juror is not disqualified by the "mere possibility of prejudice." State v. Noltie, 116 Wn.2d 831, 840, 809 P.2d 190 (1991), *aff'd*, 9 F.3d 802 (9th Cir.1993).

In the present case, it is not clear whether Dobyms has issues with one or two potential jurors. First he complains about potential juror number 43, but then he discusses number 35. Brief of Appellant 41. However, in the final paragraph of his argument

Dobyns seems to say that only potential juror 35 should have been stricken. Id.

As to juror number 43, here is some of the questioning of that juror:

NO. 43: I have a daughter the same age as the victim and I think I may have a hard time with this.

COURT: All right. Does the fact that you have a daughter--everybody has life experiences. Would you--could you listen to the evidence that's presented here from the witness stand and do you think you could follow the court's instructions about that?

NO. 43: I could listen to the evidence and I could follow the Court's instructions. But I have --you know, like I say, I may have a hard time with this so I don't know if I could be totally impartial. . . .

* * *

PROSECUTOR: Juror 43, as the Judge said, as you know potential jurors we all bring a little something different with out life experience to the table and everyone may have kids or may not. I guess the question is can you do your best to kind of be like a blank slate and look at what's presented to you in court and just make a decision based off that? Even though it may be difficult to. . . I guess to put it another way, no one--no line likes the subject matter. . . . Can you just do your best to just look at what's presented and ask--and, you know, make the decisions that the Court asks you to?

NO. 43: I could try but, like I say, I may have prejudices on this.

PROSECUTOR: Okay. But could you try?

NO. 43: I could try.
[RP 19-21]

* * *

DEFENSE COUNSEL: Is that--my understanding is that you would not be able to start out presuming my client innocent in your mind.

NO. 43: I would like to presume everyone innocent until proven guilty but my daughter is the same age as the victim and I think I would probably have prejudices.

DEFENSE COUNSEL: Okay. In this kind of a case you probably shouldn't sit on it; is that correct?

NO. 43: It might not be to your advantage.

DEFENSE COUNSEL: It's not an advantage. It's the truth.

NO. 43: yes.

DEFENSE COUNSEL: Your Honor, I would ask that he be excused. I think he's candid and forthright that he's starting out with a prejudice.

* * *

PROSECUTOR: You said you could go along with the notion in our system that people are presumed innocent until proven guilty.

NO. 43: Yes.

PROSECUTOR: And you could reserve making a judgment as to guilty or innocence [sic] until after you've heard all the evidence? Could you do that?

NO. 43: I would like to try to but --

PROSECUTOR: Okay. And like I said, given the subject matter isn't something maybe pleasant to think about, you could try to wait until you have heard all the evidence to make any decisions?

NO. 43: Yes. [RP 24]

DEFENSE COUNSEL: Could you assure us you will, not whether you would try to?

NO. 43: I don't know that.

DEFENSE COUNSEL: I would ask that he be excused.

PROSECUTOR: I would object to that.

COURT: Based on the answers that I have heard here I will not excuse 43. I will excuse 15 and I will excuse number 44.

RP 22-24. Thus, as to juror number 43, the trial court listened to the answers to the attorney's questions and decided that juror number 43 did not need to be excused. The trial court is in the best position to observe the juror's responses. A juror with preconceived notions need not be disqualified if he can put those notions aside and try the case on the evidence presented. White, supra. The trial court did not abuse its discretion when it denied Dobyns' challenge for cause as to juror number 43.

Nor was it error to allow juror number 35 to remain on the panel. Some of the questioning of juror number 35 went as follows:

DEFENSE COUNSEL: Does anybody here feel in this kind of case--and this is not a right or a wrong, it does not make you bad or good. It's just what we want is a fair 12 people that can come in unbiased. Is there anybody feel here [sic] that they cannot sit through a case like this because of the factual nature of it and not be fair? Do you feel that way?

NO. 35: I feel that way. I --sex crimes, I just -- that's --I don't like that at all. [RP 55]

DEFENSE COUNSEL: Even if it didn't occur you don't like it?

NO. 35: Right, you got it.

DEFENSE COUNSEL: You don't think you could be fair?

NO. 35: No.

DEFENSE COUNSEL: I'd ask that Number 35 be excused, your Honor.

* * *

NO. 35: For sex crimes, that's top of my list. You know, I just don't like that at all, you know, whole works. That's . . .

PROSECUTOR: Fair enough. Fair enough. I think everyone will agree that this is probably at the top of everyone's list as the most unpleasant thing that can happen and not going to dispute you there.

NO. 35: Yes.

PROSECUTOR: The question and another way to frame it is can you hold back making decisions about what may or may not have happened until you hear the whole story?

NO. 35: It's going to be hard.

PROSECUTOR: And can you try?

NO. 35: I don't know. I just --like I say, one of the top of the things I just --I just do not like at all.

PROSECUTOR: And I completely understand.[RP 56]

NO. 35: yes.

PROSECUTOR: And like I--like when we had the discussion with juror 43 --

NO. 35: Right.

PROSECUTOR: everyone brings something to the table. . . . but can you do your best to put that aside and just listen to what statements - -

NO. 35 I could try, yes. [RP 57]

PROSECUTOR: Okay. And that's --that's all we can ask.

* * *

DEFENSE COUNSEL: You say you can try. Can you assure us? If you can't assure us, I want to know.

NO. 35: No, I don't think so.

DEFENSE COUNSEL: Your Honor, I'm going to ask 35 be excused. I think he's saying he cannot be fair.

COURT: Denied.

RP 55-57. This record shows that the trial court gave the attorneys quite a bit of time to question juror number 35, and the trial court heard juror 35 respond to the questions and observed the juror's demeanor. The trial court obviously felt that juror number 35 could put aside his preconceived notions enough to listen to all of the evidence before making

a judgment. The trial court is in the best position to observe demeanor and to make credibility determinations. The trial court did not abuse its discretion when it refused to strike juror number 35 for cause.

V. DOBYNS' ARGUMENT THAT THE TRIAL JUDGE MISTREATED DEFENSE COUNSEL AND THEREBY "IMPROPERLY COMMENTED ON THE EVIDENCE" IS NOT SUPPORTED BY THE RECORD.

Dobyns claims that "the court erred in its treatment of defense counsel in the presence of the jury, thereby making an improper comment on the evidence and, potentially, improperly influencing the jury." Brief of Appellant 42. However, Dobyns does not cite to any part of the record whatsoever which supposedly shows that the trial court mistreated defense counsel. Brief of Appellant 42-44. And that is likely because the record simply does not support Dobyns' claim that he was mistreated by the trial judge. Accordingly, this argument is without merit.

But Dobyns claims that the trial court's treatment of his trial counsel constituted an "impermissible comment on the evidence." Again, the record does not support this argument. "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge

personally believed the testimony in question." State v. Gentry, 125 Wn.2d 570, 638, 888 P.2d 1105 (1995), *citing* State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1996), *cert.denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). Put differently, a judge's statement is a comment on the evidence "if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). It is not a comment on the evidence when it does not convey to the jury the personal attitudes of the judge toward the merits of the case. State v. Mak, 105 Wn.2d 692, 757, 718 P.2d 407, *cert.denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), *sentence vacated on writ of habeas corpus sub nom. Mak v. Blodgett*, 754 F.Supp. 1490 (W.D.Wash. 1991), *aff'd*, 970 F.2d 614 (9th Cir. 1992), *cert.denied*, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993).

Whether a comment on the evidence is improper depends on the facts and circumstances in each case. State v. Eaker, 113 Wn.App. 111, 117-118, 53 P.3d 37 (2002), *rev. denied*, 149 Wn.2d 1003 (2003). A trial judge's explanation or statement of reasons for his rulings on the admission or exclusion of evidence does not constitute impermissible comment on the evidence. State v. Cerny,

78 Wn.2d 845, 855-56, 480 P.2d 199 (1971), *modified on other grounds*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972).

More to the point, "the administration to counsel of a merited rebuke or warning in the presence of the jury is not improper."

State v. Levy, 8 Wn.2d 630, 641-648, 113 P.2d 306 (1941)(citations omitted).

In the present case, Dobyms does not cite to any specific comment or act in the trial record to support his argument that the trial judge mistreated him and thereby commented on the evidence. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." State v. Soper, 135 Wn.App. 89, 103, 143 P.3d 335 (2006), *citing*, State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). The only citation Dobyms makes to the record as to this argument is the page in the record where his defense counsel in a conclusory fashion accused the trial judge of "jumping" trial counsel in front of the jury. Brief of Appellant 43, citing RP 544. But this conclusory opinion by trial counsel is not enough to show that the trial judge "commented on the evidence" or otherwise mistreated trial counsel. Indeed, Dobyms does not point us to any particular remark or comment by the trial judge in support of his claim that the trial judge either

mistreated trial counsel or commented on the evidence. Brief of Appellant 42-44. Dobyons simply concludes that the trial court's "repeated comments, short retorts and attitude was a comment on the defense, his case and the veracity of the state's witnesses." Brief of Appellant 43. Dobyons does not cite to anywhere in the record where such conduct by the trial judge allegedly appears.

Indeed, far from the trial court mistreating trial counsel, it appears that Dobyons' trial counsel deserved to be rebuked by the trial court by conducting himself in an improper manner.

Specifically, the trial judge felt it necessary to rebuke Dobyons' trial counsel-- *outside the presence of the jury*-- as follows:

[o]ne thing before I do bring the jury in, there have been some noises being made and some demonstrations from counsel table during questioning during [sic] witnesses and I want it all to stop from --seeing it from [defense counsel's] table mostly, throwing pens down, sighing, making faces, and I'm just telling you now I want that to stop.

RP 143. Thus, the trial judge clearly saw some sort of improper conduct on the part of defense counsel. RP 143. Even so, the rebuking was done outside the presence of the jury, so this was not something the jury would have held against Dobyons' attorney.

In short, there is nothing in the record to support Dobyons' claims that the trial court mistreated him or otherwise "commented on the evidence" via the court's treatment of Dobyons' trial counsel.

And Dobyms does not cite to any facts in the record that support his allegation that the trial court mistreated his trial counsel.

Accordingly, there is no merit to this argument.

VI. THERE WAS NO PROSECUTORIAL MISCONDUCT..

Dobyms further claims that the prosecutor committed misconduct in closing argument. This argument is not persuasive.

To prove prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial; State v. Hughes, 118 Wn.App. 713, 727, 77 P.3d 681 (2003); State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing State v. Kwan Fai Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). "Prejudice is established only if there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995) *cert. denied* 518 U.S. 1026 (1996); State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 757 (1994). A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied* 523 U.S. 1007 (1998). Moreover, if the

prejudice could have been cured by a jury instruction but the defense did not request one, reversal is not required. State v. Dhaliwal 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Fiallo-Lopez, 78 Wn.App. 717, 726, 899 P.2d 1294 (2995). Additionally, "the absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d at 661; State v. Negrete, 72 Wn.App. 62, 863 P.2d 137 (2993), rev. denied, 123 Wn.2d 1030, 877 P.2d 695 (1994).

Prosecutors may properly argue inferences from the evidence, and prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. den.* 516 U.S. 1121, 133 L.Ed.2d 858, 116 S.Ct. 931 (1996), quoting State v. Sargent, 40 Wn.App. 340, 344, 698 P.2d 598 (1985). A prosecutor has wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991). Moreover, a prosecutor in closing may freely comment on the credibility of the witnesses based on the evidence. State v. Stenson, 132 Wn.2d

668, 727, 940 P.2d 1239 (1997). A prosecutor's remarks are not grounds for reversal if they were invited or provoked by defense counsel or are a pertinent reply to his or her arguments. State v. Carver, 122 Wn.App. 300, 306, 93 P.3d 947 (2004).

Claims of prosecutorial misconduct are also subject to a harmless error analysis. A harmless error under the constitutional standard occurs if the reviewing "court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1989).

In the present case, Dobyms has not met his burden to show that the prosecutor's remarks prejudiced him. All of the remarks set out by Dobyms as allegedly constituting misconduct were simply the prosecutor's arguing inferences from the evidence. See State v. Day, 51 Wn.App. 544 (1988)(Prosecutor's referring in closing to defendant's testimony as a "pack of lies" and "preposterous" and referring to state's witness as "believable" are not prohibited expressions of personal belief where context establishes that the argument asked the jury to draw inferences from the evidence). None of the allegedly improper comments by the prosecutor were

"clear and unmistakable expression[s] of personal opinion." See Brief of Appellant 45, citing "State v. Brett, 145 Wn.2d at 175." Other statements by the prosecutor in his closing remarks were in answer to some of the remarks made by defense counsel--and as such were proper responses. Furthermore, the jury is instructed that the closing remarks by the attorneys are not evidence --and the jury is presumed to follow the court's instructions.

The prosecutor's remarks in this case were nothing more than inferences from the evidence or were responses to defense counsel's own closing argument. This was not misconduct. However, should this court find that the prosecutor's remarks were improper, it should find any error harmless.

VII. THE JURY INSTRUCTIONS FOR THE AGGRAVATING SENTENCING FACTORS WERE CORRECT, AND THE EXCEPTIONAL SENTENCE WAS PROPERLY IMPOSED.

Dobyns claims the jury was incorrectly instructed as to the aggravating sentencing factors, and that the trial court also abused its discretion when it imposed an exceptional sentence. Brief of Appellant 49, 50. However, Dobyns cites absolutely no rule or case law in support of his conclusory opinion that "jury instruction number 27 potentially misled the jury." Brief of Appellant 49,50. Nor does he cite any rule or statute or case law in support of his

argument that the exceptional sentence imposed in this case "was clearly excessive and without justification."

RAP 10.3(a)(5) requires the appellant to present argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. Id. "Assignments of error unsupported by citation authority will not be considered on appeal unless well taken on their face." State v. Kroll, 87 Wash.2d 829, 838, 558 P.2d 173 (1976). A reviewing Court need not consider arguments that a party has not developed in the briefs, and for which the party has cited no authority. State v. Dennison, 115 Wash.2d 609, 629, 801 P.2d 193 (1990)(refusing to consider issues raised without citation to authority).

Given that Doby's argument as to this alleged error is neither "well taken" nor supported by citations to legal authority, this Court should hold that Doby's has waived this assignment of error and should not consider this issue any further. State v. Bello 142 Wash.App. 930, 932, 176 P.3d 554, 556 (2008). Doby's convictions should be affirmed.

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CONCLUSION

Dobyns' arguments on appeal are either not supported by authority and/or citations to the record, or are otherwise without merit, as previously argued by Respondent in the foregoing briefing. Accordingly, Dobyns' convictions should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 11th day of December, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

By: [Signature]
LORI SMITH, WSBA 27961
Deputy Prosecutor

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day a copy of this Response Brief was served upon Appellant by placing a copy of said document in the United States mail, postage prepaid, addressed to Appellant's Attorney, Jonathan Meyer, 207 West Main St., Centralia, Washington 98531.

DATED this 11 day of December, 2009.

[Signature]