

No. 41275-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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SIGNED BY: [Signature]
CLERK

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL JAMES EPLETT,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Can Eplett challenge a jury instruction he proposed and ultimately given by the trial court to the jury?
- B. Did Eplett receive effective assistance from his counsel?
- C. Was Eplett denied a fair trial after the trial court refused to grant a mistrial or immediately admonish the jury after a handful of jurors saw Eplett in restraints?
- D. Did the trial court error when it determined Eplett's federal conviction counted towards his offender score?

II. STATEMENT OF THE CASE

The State filed an information, on May 5, 2010, charging Eplett with one count of Attempted Rape of a Child in the Second Degree. CP 1-3. The allegation came from a sting operation set up by Lewis County Sheriff's Detective Englebertson. 1RP 66-71¹. Detective Englebertson posted a fictitious Craigslist advertisement as a mother looking to prostitute herself and her 13 year old daughter. 1RP 63-110; 2RP 12-34. Eplett responded to the advertisement and began communicating with Detective Engelbertson, who was posing as "Gina". 1RP 63-110; 2RP 12-34. The culmination of the investigation was when Eplett agreed to come down to Centralia and pay "Gina" 80 dollars to have sex with

¹ There are two volumes of verbatim reports. The State will refer to the first volume from August 12, 2010 as 1RP. The State will refer to the second volume from August 13, 2010 and September 28, 2010 as 2RP.

her and her daughter. 2RP 26-31. Eplett arrived at the hotel room “Gina” directed him to in Centralia on May 4, 2010 with 80 dollars in his pocket and was arrested by Detective Engelbertson. 2RP 31.

On the second day of trial, after the morning recess five jurors using an elevator may have viewed Eplett, who was wearing street clothes but was handcuffed, being escorted by jail transport officers. 2RP 34. During the trial Eplett was not restrained while in the courtroom. 2RP 44. Eplett’s trial counsel requested a mistrial, or in the alternative, questioning of the jurors and immediate admonishment. 2RP 34, 48-51. The trial court gave a limiting instruction as part of the jury instructions later that same day. 2RP 109; CP 71.

The State and Eplett proposed the standard WPIC 100.05, which was ultimately given as jury instruction seven. CP 50, 63, 87. There was no objection or exception to jury instruction seven by Eplett. 2RP 98-99.

The jury convicted Eplett of Attempted Rape of a Child in the Second Degree. 2RP 134-135. After a sentencing hearing, Eplett was sentenced to 90 months in prison. 2RP 158; CP 4-18.

ARGUMENT

A. EPLETT IS PROCEDURALLY BARRED FROM CHALLENGING JURY INSTRUCTION SEVEN.

1. The Invited Error Doctrine Prevents Eplett From Challenging Jury Instruction Seven On Appeal.

The invited error doctrine prohibits a defendant from raising on appeal an issue with a jury instruction the defendant proposed and given by the trial court. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). Even if the jury instruction proposed by the defendant is erroneous, the Court held, “even if error was committed, *of whatever kind*, it was at the defendant’s invitation and he is therefore precluded from claiming on appeal that it is reversible error.” *Id.*, citing *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), (emphasis original).

Studd is a consolidation of six separate cases in which the defendants were arguing that the self-defense jury instruction erroneously states the law. In *Studd* three of the defendants, Studd, Cook and McLoyd all requested jury instructions modeled after the standard WPIC. The Court held that the doctrine of invited error prevented these defendants from complaining now that the trial court granted their requested jury instruction. *State v. Studd*, 137 Wn.2d at 547.

Eplett's situation is almost identical to the facts in *Studd*, with the only difference being that unlike the instruction given in *Studd*, the WPIC given in Eplett's case accurately states the law. CP 63. Eplett's trial counsel proposed the standard WPIC 100.05, definition of substantial step. CP 61. Eplett took no exception or objected to the trial court giving instruction seven, the substantial step definition. 2RP 98-99; CP 63. Given the conduct of Eplett and his trial counsel, any error in regards to instruction seven as given by the trial court was invited and Eplett is therefore prohibited from attacking it on appeal.

2. Eplett Is Barred From Raising For The First Time On Appeal Any Argument Regarding A Due Process Violation For Giving WPIC 100.05, Which Eplett Alleges Relieves The State Of Its Burden Of Proving A Substantial Step, Because He Failed To Preserve The Issue For Appeal.

Assuming, arguendo that it is not invited error, Eplett is still barred from raising issue with the jury instruction under RAP 2.5(a). An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *State v. O'Hara*, 167 Wn.2d

at 98. The exception to this rule is “when the claimed error is a manifest error affecting a constitutional right.” *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *State v. McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *State v. O’Hara*, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.*

Eplett is claiming the jury instruction for substantial step given by the trial court was erroneous and violated his Due Process rights under the 14th Amendment of the United States Constitution. Brief of Appellant 8. Eplett argues he can raise this matter for the first time on review because the alleged error affects his

constitutional right to have the State prove every element of the offense beyond a reasonable doubt. Brief of Appellant 7-8. While the alleged error does affect a constitutional right, no error occurred and therefore Eplett has not suffered any prejudice from the trial court's jury instruction on substantial step.

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Id.* "A person is guilty of attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step towards the commission of that crime." RCW 9A.28.020. The standard jury instruction defining substantial step states, "A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation." WPIC 100.05. The Washington State Supreme Court has held substantial step means the conduct "must be strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978). WPIC 100.05 is consistent with the language set forth by the Court in *Workman*. *State v. Gatalski*, 40 Wn. App. 601, 613, 699 P.2d 804 (1985).

Eplett claims WPIC 100.05, as given, relieves the State of its burden to prove each element beyond a reasonable doubt. Brief of Appellant 9-10. Eplett argues that the use of the word “indicate” rather than the word “corroborate” eliminates the State’s burden to prove criminal attempt. Brief of Appellant 9. Eplett further argues that the use of “a criminal purpose” instead of “the criminal purpose” similarly relieves the State of its burden. Brief of Appellant 9-10.

The trial court gave the standard jury instruction for substantial step. WPIC 100.05; CP 63. The use of “a criminal purpose” does not diminish the State’s burden to prove Eplett attempted to commit rape of a child in the second degree. Eplett is reading jury instruction seven in a vacuum without regards to the fact it is just a definition of substantial step and it is necessarily tied with jury instruction number five. CP 61, 63. Instruction five states, “A person commits the crime of attempted rape of a child in the second degree when, with the intent to commit **that** crime, he or she does any act that is a **substantial step towards the commission of that** crime.” CP 61 (emphasis added). Therefore, the argument that the jury could find Eplett guilty if they find there is

evidence that strongly indicates he committed any crime, is without merit.

The word indicate means, “show or make known with a fair degree of certainty: as to show the probable presence or existence or nature or course of : reveal in fairly clear way.” Webster’s Third New International Dictionary of the English Language, 1150 (2002 ed). Indicate and corroborate are substantially similar. The use of the word indicate does not negate or diminish the State’s burden to a substantial step beyond a reasonable doubt. Eplett’s conviction should be affirmed.

B. EPLETT’S TRIAL COUNSEL EFFECTIVELY REPRESENTED HIM THROUGHOUT THE TRIAL.

To prevail on an ineffective assistance of counsel claim Eplett must show that (1) the attorney’s performance was deficient and (2) the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney’s conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Deficient performance exists only if counsel’s actions were “outside the wide range of professionally competent assistance.” *Strickland*,

466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Eplett argues his trial counsel's proposal of WPIC 100.05, which ultimately became jury instruction seven, was ineffective assistance of counsel because the jury instruction improperly relieves the State of its burden to prove the crime charged beyond a reasonable doubt. Brief of Appellant 13; CP 61, 63. This argument fails for two reasons. First, the proposed instruction was a correct and accurate definition of the law as argued in the section above. Therefore, Eplett cannot overcome his burden to show his trial counsel's performance was deficient.

Second, if for the sake of argument, Eplett has shown that his trial counsel's performance was deficient for proposing the allegedly erroneous jury instruction, Eplett still cannot overcome the

burden of showing he was prejudiced by his trial counsel's actions. The State proposed the exact same instruction, the standard WPIC 100.05. CP 87. Even if Eplett's trial counsel had not proposed the instruction objected to the instruction, given that the instruction is the standard WPIC and the correct statement of the law, the trial court would have given the instruction. Therefore, Eplett cannot show, with reasonable probability that but for his trial counsel's deficient performance the result of the proceedings would have been different. *Horton, supra*. Eplett's claim of ineffective assistance of counsel fails and his conviction should be affirmed.

C. EPLETT RECEIVED A FAIR TRIAL AND HIS DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN A FEW JURORS POSSIBLY CAUGHT A GLIMPSE OF HIM IN HANDCUFFS.

A criminal defendant is entitled to appear free of shackles and restraints when on trial before the court. *State v. Williams*, 18 Wn. 47, 49, 50 P. 580 (1897). Appearing in shackles may deny a defendant due process because a jury may be more prejudiced against a shackled defendant thereby lowering or reversing the presumption of innocence. *State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998), *citing Jones v. Meyer*, 899 F.2d 883 (9th Cir. 1990). A defendant's claim that shackling violated his or her constitutional rights is subject to harmless error analysis. *State*

v. *Hutchinson*, 135 Wn.2d at 888. To succeed on a claim of unconstitutional shackling a defendant “must show the shackling has a substantial or injurious effect or influence on the jury’s verdict.” *Id.*

There is no per se rule requiring reversal due to a juror’s observation of a defendant in shackles. *State v. Rodriguez*, 146 Wn.2d 260, 270, 45 P.3d 541 (2002); *In re Crace*, 157 Wn. App. 81, 103, 236 P.3d 914 (2010). Jurors catching a glimpse of the defendant in restraints is insufficient to find prejudice. *In re Crace*, 157 Wn. App. at 103. It has also been held that prompt admonition cures the error of jurors observing the defendant in handcuffs. *State v. Sawyer*, 60 Wn.2d 83, 85-86, 371 P.2d 932 (1962). In *Sawyer* the defendant was handcuffed at the end of the first day of trial, presumably in front of some members of the jury panel. The following day the trial court admonished the jury and Sawyer was not restrained during the trial. The court affirmed Sawyer’s conviction stating, “in absence of an indication of prejudicial consequences, such an occurrence does not warrant the granting of a new trial.” *Id.* at 86.

In the present case after the morning recess on the second day of trial, August 13, 2010, Eplett’s trial counsel brought to the

court's attention that five jurors may have viewed Eplett handcuffed and being escorted by jail transport officers. 2RP 34. Apparently the jurors were using an elevator that is also used to transport people who are held in custody at the jail. The elevator doors opened and Eplett was waiting for the elevator, in street clothes, but handcuffed and escorted by jail guards. 2RP 44. Eplett was not restrained while in the courtroom. 2RP 44. Eplett's trial counsel requested a mistrial, or in the alternative, questioning of the jurors and immediate admonishment. 2RP 34, 48-51.

There is no record that any of the jurors were prejudiced by viewing Eplett in handcuffs for one brief moment. Further, the trial court gave a limiting instruction as part of the jury instructions. 2RP 109; CP 71. Instruction seven reads:

The fact that there have been guards in the courtroom or you have seen the defendant restrained in any manner is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberation.

CP 71. This instruction was given to the jury on August 13, 2010, the same day the jurors saw Eplett at the elevator. In *Sawyer* the court found an admonishment to the jury the next day was sufficient to curb any potential harm, therefore in Eplett's case, an

admonishment that very day should similarly suffice. Also, jurors are presumed to follow the instructions they are given. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). Eplett cannot show the jurors glimpse of him in handcuffs influenced the jury's verdict or had some other substantial or injurious effect, therefore Eplett's claim fails and his conviction should be affirmed.

D. EPLETT'S FEDERAL CONVICTION WAS PROPERLY ADMITTED DURING THE SENTENCING HEARING AND THE TRIAL COURT THEREFORE SENTENCED EPLETT USING THE CORRECT OFFENDER SCORE.

In a sentencing hearing, "[a] criminal history summary relating to the defendant from the prosecuting authority . . . shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.150. The State must prove a defendant's prior criminal convictions by a preponderance of the evidence. *State v. Jackson*, 129 Wn. App. 95, 105, 117 P.3d 1182 (2005), *citing State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); *State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1991). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004)(citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

When calculating a person's offender score for purposes of sentencing:

Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). "[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability or is unsupported in the record." *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999)(citations omitted).

A foreign conviction is equivalent to a Washington offense if there is either a legal or factual comparability. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). If the foreign statute is broader than the Washington definition of the particular crime, the sentencing court may look at the defendant's conduct, as evidenced by the indictment or the information, to determine whether the conduct would have violated the comparable Washington statute. *State v. Duke*, 77 Wn. App. 532, 535, 504 P.2d 1174 (1973).

At the sentencing hearing the State entered into evidence a copy of Eplett's prior federal court-martial, which showed Eplett plead guilty to the offense of Carnal Knowledge. 2RP 145, Ex. 1. Included in the exhibit was the plea, the specification listed on the court-martial order and stipulation of fact. Ex. 1. Eplett is claiming his prior federal conviction for Carnal Knowledge was not proven to be comparable to a Washington State felony offense and therefore it should not have been included in his offender score. Brief of Appellant 21-22. Specifically, Eplett asserts that because the court-martial exhibit does not contain the language that Eplett was 48 months older than the victim, K.S., DOB 03-15-1991,² that the offense is not comparable to the Washington offense of Rape of Child in the Third Degree, RCW 9A.44.079. Brief of Appellant 21.

A review of the court-martial record yields a number of facts which demonstrate the comparability of 10 U.S.C. § 920 and more specifically the acts that occurred which ultimately ended in Eplett tendering a plea to Carnal Knowledge, and the crime of Rape of a Child in the Third Degree. See Ex. 1 and RCW 9A.44.079. To be found guilty of Carnal Knowledge a person must:

² The State will refer to the victim in the court-martial as K.S.

Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person—

- (1) who is not that person's spouse; and
- (2) who has not attained the age of sixteen years;

is guilty of carnal knowledge and shall be punished as a court-martial may direct.

The elements of Rape of a Child in the Third Degree are:

A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

RCW 9A.44.079. While the elements are different, when you look to the other information contained with the court-martial exhibit, it becomes clear that the two offenses are comparable. Ex. 1. In the Stipulation of Fact offered in Eplett's court-martial, Eplett admitted to having sexual intercourse with K.S. when K.S. had attained the age of 12 but was under the age of 16. Ex. 1. Eplett, at the time he engaged in sexual intercourse with K.S., knew she was 15 years of age and he was not married to K.S. Ex. 1. The dates of the sexual intercourse were between July 19, 2006 and July 26, 2006. Ex. 1. While the State does agree that nothing in the court-martial exhibit states Eplett's age or that there was a 48 month age difference between Eplett and K.S., Eplett is the named person in the court-

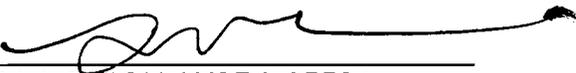
marital, he plead guilty to the conduct alleged and at the time of the act of Carnal Knowledge Eplett was 48 months older then K.S. Ex. 1; Trial Ex. Driver's License³. Eplett's driver's license, entered as an exhibit during the jury trial, states Eplett's date of birth is July 25, 1986, and therefore more than 48 months older than K.S. Trial Ex. Driver's License. This information is sufficient for the trial court to find Eplett's conviction for Carnal Knowledge comparable to Rape of a Child in the Third Degree. Eplett was appropriately sentenced and his sentence should be affirmed.

CONCLUSION

For the foregoing reasons, this court should affirm Eplett's conviction attempted rape of a child in the second degree. Eplett's sentence should also be affirmed because at the sentencing hearing the State sufficiently proved the comparability of Eplett's federal conviction.

RESPECTFULLY submitted this 6th day of May, 2011.

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Attorney for Plaintiff

³ The State will be filing a supplemental CP for inclusion of the trial exhibit of Eplett's driver's license.

MAY 15 2011

COURT OF APPEALS FOR THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)
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)

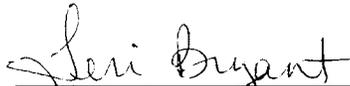
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NO. 41275-6-II
DECLARATION OF
MAILING

Ms. Teri Bryant, paralegal for Sara I. Beigh, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 6, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jodi R. Backlund
Manek R. Mistry
Backlund & Mistry
PO Box 6490
Olympia, WA 98507

DATED this 6th day of May, 2011, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

Declaration of
Mailing