No. 30750-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
May 29, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

PATRICK ROY TABLER,

Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Robert Lawrence-Berrey, Judge

RESPONSE TO STATE'S MOTION ON THE MERITS

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TABLE OF CONTENTS

I. IDENTITY OF RESPONDING PARTY....1

II. STATEMENT OF RELIEF SOUGHT....1

III. ARGUMENT IN RESPONSE....1

A. Consideration of the State's motion on the merits should be rejected outright....2

B. Appellant's issues have arguable merit and the State's MOTM should be denied....2

a. Concession....2

b. Remaining issue has not been addressed....2

c. Standard of review....3

d. Supplemental argument....3

IV. CONCLUSION....5

TABLE OF AUTHORITIES

Cases **Page**

Bellevue School Dist. v. E.S., 171 Wn.2d 695, 257 P.3d 570 (2011)..............................3

State v. Bagwell, 68 Wn. App. 891, 846 P.2d 587 (1993)...1

State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) , *overruled in part on other grounds*, 174 Wn.2d 707, ___ P.3d ___ (June 7, 2012).................................3

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009)...3

State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985)...1

State v. Smith, ___ Wn. App. ___, 298 P.3d 785 (2013)..4

State v. Vander Houwen, 163 Wn.2d 25, 177 P.3d 93 (2008).................................3

Court Rules

RAP 2.5(a)...3

RAP 18.14(a)..2, 5

RAP 18.14(c)..1

RAP 18.14(e)..5

RAP 18.14(e)(1)..1

RAP 18.14(f)..1

Other Resources

Division III, Washington Court of Appeals, General Court Order dated April 8, 2010........1, 2

I. IDENTITY OF RESPONDING PARTY

Patrick Roy Tabler, by and through his attorney, responds as follows to the state's motion on the merits (hereafter, "MOTM").

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 18.14(c), (e)(1) and (f), appellant seeks denial of the state's motion on the merits, a directive to the State to file a brief of respondent, and setting of the case for argument before a panel of judges. State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985).

III. ARGUMENT IN RESPONSE

In order for a case to be affirmed pursuant to a motion on the merits, the Court must first find the appeal to be "clearly without merit". RAP 18.14(e)(1). In making this determination, the commissioner

> will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

RAP 18.14(e)(1). When an appeal is shown to have arguable merit under the relevant factors, a motion on the merits to affirm must be denied. *See* State v. Bagwell, 68 Wn. App. 891, 893, 846 P.2d 587 (1993).

By General Court Order dated April 8, 2010,

> (1) The parties shall not file, and the Clerk of Court will not accept, a motion on the merits to reverse.
> (2) ...
> (3) The parties are discouraged from filing a motion on the merits to affirm in any case with a record exceeding 500 pages of combined clerk's papers and report of proceedings unless issues on appeal are limited to a narrow portion of the record and are dispositive of the case. The Commissioner shall have discretion to decline to consider any motion on the merits if the size of the record on review would have an adverse impact on the functioning of the Commissioner's office given limited resources.

A. Consideration of the State's motion on the merits should be rejected outright.

The record consists of 698 pages of transcripts and 189 pages of clerks papers. The combined total of 887 pages exceeds the presumptive limit set forth in the Court's General Court Order restricting motions on the merits practice. On this basis alone the court should decline to consider the State's MOTM.

Alternatively, in its MOTM the State "concedes" two of three issues raised by appellant. In effect, the State is asking this Court to reverse the trial court's actions based on the merits. This Court should refuse to encourage and/or condone this thinly-disguised end-run of the April 8, 2010 General Court Order prohibiting motions on the merits to reverse. The Court should decline to consider any State's MOTM, such as this one, which purports to concede issue(s) to obtain reversal on the merits while motioning to affirm on another issue or issues.[1]

B. Appellant's issues have arguable merit and the State's MOTM should be denied.

a. Concession. The State concedes as to appellant's issues two and three. Appellant accepts the concessions.

b. Remaining issue has not been addressed. Appellant raises the following issue:

> In a criminal trial, does a "to-convict" instruction, which informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt, violate a defendant's right to a jury trial, when there is no such duty under the state and federal Constitutions?

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[1] The April 8, 2010 General Court Order of Division III presumably negates the provision in RAP 18.14(a) stating that, "The appellate court may, on its own motion or on motion of a party, affirm *or reverse* a decision or *any part thereof on the merits* in accordance with the procedures defined in this rule. ... ." (emphasis added). Here, the State has, as a practical matter, presented a partial motion on the merits to reverse. This Court should decline to consider it.

Our Washington State Supreme Court has not ruled on the issue whether the language "it will be your duty to convict" in a jury instruction affirmatively misleads a jury about its power to acquit, in violation of a defendant's constitutional right to a jury trial. Nor have Divisions I and II ruled on the precise issue. Division III has not ruled on the precise issue *or* the peripheral issues ruled on by the Division I and II opinions.

c. Standard of review. As an initial matter, the State asserts that because appellant did not object to the "to convict" instruction, he has waived the right to contest it on appeal. However, Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed *de novo*. State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) , *overruled in part on other grounds*, 174 Wn.2d 707, ___ P.3d ___ (June 7, 2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The elements instruction given in this case affirmatively misled the jury to conclude it was without power to nullify, therefore, it was improper. *E.g.*, State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008) (explaining that jury instructions are improper if they mislead the jury). Moreover, because this error occurred in the elements instruction, which is the "yardstick" by which the Jury measures a defendant's guilt or innocence, the error directly prejudiced Mr. McGinnis' right to a fair trial and, thus, constituted a manifest constitutional error. RAP 2.5(a). The issue is properly before this Court for resolution.

d. Supplemental argument. Appellant has set forth his supporting arguments in the brief of appellant. The State responds that the law is "well-settled" in its favor. The State cites no Washington Supreme Court authority that has ruled on the issue, for there is none.

The State further argues that the Division I and II Washington appellate court cases cited by appellant support its position. However it does so without addressing the distinctions raised and addressed by appellant in his briefing, including appellant's conclusion that Divisions I and II have not addressed the issue on appeal herein.

Further, the State does not claim that Division III has in any manner ruled on the issue. Yet there is authority that recognizes that the choice of words does have subtle distinctions in the world of law. For example, "duty" is the challenged language herein. As this Court's very recent decision in State v. Smith, ___ Wn. App. ___, 298 P.3d 785 (2013) suggests, a more accurate and complete elements instruction would substitute the word "should" for "duty." For as this Court has recognized, the term "duty" is equivalent to the obligatory or mandatory terms "ought", "shall" or "must", while the term "should" strongly encourages a particular course of action but is still the "weaker companion" to the obligatory "ought". Smith, ___ Wn.2d ___, 298 P.3d at 790 (citations omitted). By substituting "should" for "duty", a trial court would be able to strongly suggest that the jury convict if it has found all the elements proved beyond a reasonable doubt. Indeed, as this Court recognizes, the language might even be considered to be nearly mandatory. Id. Yet, by using the term "should", the trial court would no longer be affirmatively misleading jurors about their power to nullify.[2]

The particular words used in law are critical. As is evident from the briefing of both parties and despite the State's assertions to the contrary, the law on the issue raised by appellant is not "well-settled" but instead is non-existent. This Court should deny the State's

[2] For example, a constitutionally proper instruction would read as follows:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then you should return a verdict of guilty.

motion on the merits summarily and refer the matter to the panel for a published opinion on the issue raised by appellant.

IV. CONCLUSION

The instant motion was not initiated by this Court pursuant to RAP 18.14(a). As the motioning party, the State therefore bears the burden of showing to the Court's satisfaction why the motion to affirm should be granted. The issues are not clearly controlled by settled law. RAP 18.14(e). For all the reasons stated above and in the initial brief of appellant, this Court should deny the state's motion on the merits to affirm. Appellant asks this Court to deny the motion on the merits, direct the State to file a brief of respondent, and set this case over for determination by a panel of judges so that Division III may take a position on the issue presented by appellant.

DATED: May 29, 2013.

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PROOF OF SERVICE

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 29, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's response to state's motion on the merits:

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Transmittal Letter

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Comments:

Appellant's response to State's motion on the merits

Proof of service is attached and an email service by agreement has been made to trefrylaw@wegowireless.com.

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