69743-9 69743-9

NO. 69743-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VADIM FEDEROV,

Appellant.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUL -3 PM 4:50

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

When Mr. Fedorov was stopped for speeding he gave the officer a false name and date of birth. Rather than charging him with making a false statement, Mr. Fedorov was subsequently charged with second degree identity theft because the name and date of birth were the same or similar to another person. Mr. Fedorov defended on the basis that the evidence of insufficient. On appeal he continues to maintain the evidence was insufficient and that the trial court erred in failing to exclude certain evidence and improperly instructing the jury.

B. ASSIGNMENTS OF ERROR.

1. Trial court erred in failing to suppress the testimony of Sgt Hughes where Mr. Fedorov was in custody and asked questions regarding the alleged offense without a valid Miranda waiver in light of the staleness of prior warning.

2. The trial court erred in entering judgment in the absence of sufficient evidence to support all the elements of identity theft.

3. The trial court erred by failing to include the crime Mr. Fedorov allegedly intended to commit in the "to convict" instruction.

4. The trial court erred by instructing the jury in a manner which undercut the burden of proof and confused the jury's roll in the judicial process.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

1. Custodial interrogation must be preceded by a valid waiver of Miranda rights or the statements are presumed to be involuntary because of the inherently coercive nature of the situation. Mr. Fedorov arguably waived his rights during his initial detention and jail intake, but that warning and waiver were stale when questioning was resumed by a jail sergeant three and a half hours later and after he had been positively identified by his fingerprints. Did the trial court err in failing to suppress Mr. Fedorov's subsequent statements in response to Sgt. Hughes questions?

2. Due process requires the prosecution to prove all essential elements of the crime charged. Where Mr. Fedorov provided a fairly common name and the date of birth did not match any real person, did he use the identity of a real person within the meaning of the identity theft statute?

3. A "to convict" instruction must contain all the essential elements of a criminal charge. Where the identity theft statute requires the accused to have used the identity of a person to commit some other crime, must the jury find the specific intent to commit that alleged offense?

4. The jury is charged with determining whether the State has proved the charged offense beyond a reasonable doubt, not divining "the truth" of the allegation. The jury was instructed, however, to return a guilty verdict if it had an "abiding belief in the truth of the charge." Did this instruction serve to confuse the jury's function and undercut the prosecution's burden so as to require reversal?

D. STATEMENT OF THE CASE.

Mr. Fedorov was stopped for speeding in north Everett. He did not have a driver's license, vehicle registration or insurance. RP 105-07.[1] He told the officer instead that his name was Zachary Anderson and provided a birthdate of August 31, 1984. RP 109. A records check found no Washington driver with that name and date

of birth, but did include a Zachary Anderson born on August 30, 1984, with multiple outstanding warrants. RP 109-11. Although Mr. Fedorov continued to maintain he was Zachary Anderson, he insisted his birthdate was August 31, 1984. Despite this discrepancy he was arrested on the outstanding warrants of Zachary Anderson, dob 8/30/84. RP 111.

Jail personnel testified that Mr. Fedorov continued to maintain he was Zachary Anderson during the booking process. RP 129-32. As a result of doubts about his identity, however, he was fingerprinted and subsequently identified as Vadim Fedorov. RP 133-34.

Mr. Fedorov was subsequently charged with second degree identity theft, contrary to RCW 9.35.020.[2] RP 78.

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[1] The record on appeal includes three volumes of transcripts. The CrR 3.5 hearing is found in the verbatim report of proceedings dated December 6, 2012, and will be cited as 12/6/12RP. The trial is found in a single volume representing December 18-19, 2012, and will be cited simply as RP. The sentencing on December 20, 2012, is not otherwise referenced herein.

[2] RCW 9.35.020 provides in pertinent part:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.
>
> ....

E. ARGUMENT.

1. Trial court erred in failing to suppress the testimony of Sgt Hughes where Mr. Fedorov was in custody and asked questions regarding the alleged offense.

a. Fedorov was subject to custodial interrogation in the absence of a valid *Miranda* waiver.

At a CrR 3.5 hearing, Officer Christopher Reid testified he stopped Mr. Fedorov for speeding, but he identified himself as Zachary Anderson. 12/6/12RP 4. The birthdate he provided did not match state records but was close enough to an individual with outstanding warrants, that Officer Reid placed Mr. Fedorov under arrest. Id. at 5.

After he was arrested, Mr. Fedorov was advised of his Miranda rights by Officer Shane Nelson. 12/9/12RP 8-9.[3] Officer Nelson reported that Mr. Fedorov indicated he understood, but did not request an attorney. Id. at 9, 15-16. Officer Nelson testified Mr.

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(3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

[3] Mr. Fedorov was removed from his car, handcuffed and transferred to Officer Reid's patrol car before Officer Nelson advised him of his rights. 12/6/12RP 13.

Fedorov appeared to be under the influence because he had very constricted pupils, was very sweaty, unable to maintain eye contact and seemed very nervous overall. 12/6/12RP 16-17. Nevertheless, Officer Nelson testified that he asked Mr. Fedorov "if he understood his rights and I asked him if he was willing to answer questions and he answered yes to both." 12/6/12RP 19-20.

After he was advised of his rights, Mr. Fedorov continued to assert he was Zachary Anderson and provide the same August 31, 1984, date of birth, even as he was booked into jail.[4] 12/6/12RP 6-7, 22-25.[5]

When, after more than three hours, the fingerprint comparison was returned establishing Mr. Fedorov's identity, Sergeant George Hughes testified he called out in the jail booking area using the name

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[4] Officer Nelson testified, "I remember that he – the client was – he would not repeat his birthday. He provided a birthday that was I believe one digit off and he was adamant that that was his birthday." 12/6/12RP 13. Officer Nelson further testified:

A: I asked him what his birthday was.

Q: What did he say?

A: I can't remember the exact date.

Q: He was maintaining it was the same date he said before?

A: Correct.

12/6/12RP 15.

[5] Despite the clarity of their testimony at the CrR 3.5 hearing, according to Officer Reid's testimony at trial, once at the jail Mr. Fedorov "admitted to the real birthday of Zachary Anderson, 8/30/84." 12/18/12RP 16.

Anderson. Mr. Fedorov did not respond until Sgt. Hughes called him by the name Fedorov. 12/6/12RP 29. Sgt Hughes then testified,

> A: I asked him why you wasted our time earlier. I said that pisses me off. Why did you do that?
> Q: What was his response?
> A: He said, "I don't know. I didn't think you'd find out." I said, "Do you think we're stupid? And he said, "Yeah."

12/6/12RP 30.

The State argued for the admissibility of these statements made to booking sergeant at the jail after his identity had been established. 12/6/12RP 36-38; CP 63. Mr. Fedorov argued that the Miranda warnings were stale and in light of his apparent intoxication and the three and half hours which passed before Sgt. Hughes' contact. 12/6/12RP 38. His statements should have, therefore, been suppressed. CP 57-62.

Judge Richard Okrent found Mr. Fedorov was properly advised and knowingly, voluntarily and intelligently waived his rights. 12/6/12RP 40-42. Judge Okrent initially reserving ruling on the later statements to Sgt. Hughes, but following further briefing and argument he concluded the Miranda waiver was not stale and the statements were admissible.

b. The protection against self-incrimination required a valid *Miranda* waiver.

The Fifth Amendment of the United States Constitution, applied to the states through the Fourteenth Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." Griffin v. California, 380 U.S. 609, 615-16, 85 S.Ct. 1229, 14 S.Ed.2d 106 (1965). Article 1, section 9 of the Washington Constitution provides that "[n]o person shall be compelled in any criminal case to give evidence against himself." Both clauses are liberally construed to protect the right against self-incrimination. State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996).

"[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 475, 86 S.Ct 1602, 16 L.Ed.2d 694 (1966). This was based on the concerns for "the dual purposes of (1) protecting the individual from the potentiality of compulsion or coercion inherent in in-custody interrogation, and (2) protecting the individual from deceptive practices of interrogation." State v. Hensler, 109 Wn.2d 357, 362,

745 P.2d 34 (1987) (citing Heinemann v. Whitman County, 105 Wn.2d 796, 806, 718 P.2d 789 (1986)). In practice, this requires the State to prove voluntariness by a preponderance of the evidence. State v. Abdulle, 174 Wn.2d 411, 420, 275 P.3d 1113 (2012). In light of the concerns about the reliability of custodial confessions which have developed recently, it is imperative that the courts stridently maintain these safeguards.[6]

c. The trial court erred in failing to suppress the statements in response to Sgt. Hughes' questions.

"Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. Mr. Fedorov was plainly subject to custodial interrogation under the circumstances described at the CrR 3.5 hearing. He was in custody, initially

[6] A growing body of contemporary research and experience confirms there is a real risk of involuntary confessions by suspects in custody. *See, e.g.*, Saul M. Kassin et al., *Police–Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3 (2010) (finding that interrogation techniques produce high rates of involuntary confessions and advocating for the recording of all custodial interrogations); Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L.Rev. 1051, 1052–53 (2010) (finding that 42 of the 252 inmates exonerated by the innocence project had falsely confessed to their crime).

handcuffed and placed in a patrol car, and later transferred to the Snohomish County Jail. See Thompson v. Keohane, 516 U.S. 99, 102, 116 S.Ct 457, 133 L.Ed.2d 383 (1995); State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

Furthermore, Sgt. Hughes questions regarding Mr. Fedorov's motive and intent in using a false name are certainly "questioning" within the meaning of Miranda. State v. Wilson, 144 Wn.App. 166, 184, 181 P.3d 887 (2008). In fact, even the sergeant's calling out of the names, first Anderson and then Fedorov, were reasonably likely to lead to an incriminating response and constitute questioning under the Miranda rule. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) ("any words or actions on the part of the police…that the police should know are reasonably likely to elicit an incriminating response from the suspect.").

Ultimately, a court determines the voluntaries of a defendant's custodial statements by reviewing the totality of the circumstances. State v. Aten, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). Whether the prior Miranda warnings became stale and thereby

preclude a finding of a voluntary waiver is judged not by the mere length of time what has passed but by all the relevant circumstances. United State v. Rodriquez-Preciado, 399 F.3d 1118, 1128 (9th Cir. 2005). There is no rigid rule relating to the passage of time. United States v. Andaverde, 64 F.3d 1305, 1311 (9th Cir., 1995).

In Mr. Fedorov's case, Officer Nelson read the Miranda warning, however, it was Officer Reid that transported Mr. Fedorov to jail around 4:00 p.m. It was three and half hours later, at approximately 7:30 p.m. that Sgt. Hughes posed his questions. This is not a situation where the same officers arrested the defendant and later continued or resumed their questioning. Cf. e.g. State v. Blanchey, 75 Wn.2d 926, 929, 454 P.2d 841 (1968); LaFave, Israel, King & Kerr, Criminal Procedure, §6.8(b) (3d ed., 2007). Instead, the record indicates that the lapse of time, change in personnel questioning, and the securing of the fingerprint comparisons, are the sort of changed circumstances that should preclude a finding of waiver. Cf, e.g. Zappulla v. New York, 391 F.3d 462 (2d Cir. 2004) (24 hour interval, defendant was not in continuous custody and second interrogation concerned an unrelated crime required new

warning); State v. Andrews, 388 N.W. 2d 723 (Minn. 1986) (holding warnings did not need to be repeated in the absence of changed circumstances); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986) (same).

The circumstances in Mr. Fedorov's case fail to establish the voluntariness of his waiver after the passage for more than three hours in custody, his transfer from Officer Reid's custody to Officer Nelson, back to Reid and then on to jail staff, and the form of the inquiries after his true identity had been established. The trial court erred, therefore, in concluding new warnings were not required where the case mushroomed from a speeding ticket, to providing false information to felony identity theft. CP 56.

d. Suppression was required.

In the absence of a valid contemporary waiver of his Miranda rights, the trial court erred in finding the statements to Sgt. Hughes admissible. Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). The statements in question here go to Mr. Fedorov's motive and intent, and there improper admission was plainly prejudicial. Mr. Federov requests this Court find the

statements improperly admitted and remand to the trial court for further proceedings.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE MR. FEDOROV GUILTY OF IDENTITY THEFT IN THE SECOND DEGREE

a. Due process requires the State to prove all essential elements of the crime charged beyond a reasonable doubt.

Constitutional due process of law requires the State prove all essential elements of the crime charged beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Baeza, 100 Wn.2d 487, 490, 670 P.2d 646 (1983). A person challenging the sufficiency of evidence admits, for purposes of the challenge, the truth of the State's evidence and any reasonable inferences from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The statutory means of identity theft applied here requires proof only that the defendant used "a means of identification ... of another person ... with the intent to commit, or to aid or abet, any

crime." CP 38-40; State v. Presba, 131 Wn.App. 47, 55, 126 P.3d 1280 (2005).

b. There was insufficient proof that Mr. Fedorov committed identity theft.

The State failed to prove that Mr. Fedorov misused the identity of a person in light of his dogged insistence on a date of birth that did not match any of the more than 26 individuals with similar names found just within the Judicial Information System (JIS). RP 148-50. The crime of identity theft requires the defendant use the identification of a specific real person or corporation. State v. Evans, 177 Wn.2d 186, 203, 298 P.3d 724 (2013); State v. Berry, 129 Wn.App. 59, 62, 117 P.3d 1162 (2005), rev denied, 155 Wn.2d 1006 (2006). In light of his insistence on the birthdate that did not match anyone in the system, no reasonable trier of fact could have found, beyond a reasonable doubt, that he appropriated the identity of a real purpose for a specific criminal purpose.

c. Reveral and dismissal of Mr. Fedorov's identity theft conviction is required.

In the absence of evidence from which a rational trier of fact could find all essential elements beyond a reasonable doubt, a

conviction on the charge cannot stand. State v. Spruell, 57 Wn.App. 383, 389, 788 P.2d 21 (1990). The proper remedy for such an error is reversal and dismissal of the unproven charge. Any other alternative remedy would violate double jeopardy prohibitions. Burks v. United States, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

In this case, the State's evidence showed Mr. Fedorov gave a false name and date of birth to a police officer following a traffic stop. The evidence was insufficient to prove, beyond a reasonable doubt, that this was done with the intent to effectuate any specific crime, particularly following suppression of the testimony of Sgt. Hughes as argued above. The State's failure to prove all the essential elements of the charged offenses beyond a reasonable doubt requires vacation and dismissal of Mr. Fedorov's conviction for identity theft.

3. The "to convict" instruction omitted an essential element by failing to specify the crime Mr. Fedorov was alleged to have committed thereby, denying him his constitutional right to a jury and due process of law.

a. Mr. Fedorov timely objected to the failure to include all the essential elements in the "to convict" instruction.

In reviewing the instructions for the jury, Mr. Fedorov took exception to the proposed "to convict" instruction because it failed to require the specific offense he was alleged to have intended to commit through the identity theft. RP 158; CP 40. Unpersuaded, Judge Fair noted the objection for the record, but gave a "to convict" instruction which simply allowed the jury to find Mr. Fedorov "acted with the intent to commit or aid or abet **any** crime...." CP 40 (emphasis added).

b. The "to-convict" instruction must contain all essential elements of the charged offense.

Due process requires the State prove each essential element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 22; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Accordingly, the trial court must accurately instruct the

jury as to each essential element of a charged crime and the State's burden of proving the elements beyond a reasonable doubt. State v. Williams, 136 Wn.App. 486, 493, 150 P.3d 111 (2007).

The adequacy of a "to convict" jury instruction is reviewed *de novo*. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Because it serves as a "'yardstick by which the jury measures the evidence to determine guilt or innocence,'" the "to convict" instruction must generally contain all elements of the charged crime. DeRyke, 149 Wn.2d at 910, quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

The omission of an element from a "to convict" instruction is a constitutional error. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); State v. Chino, 117 Wn.App. 531, 538, 72 P.3d 256 (2003).

c. The underlying offenses the defendant intended to commit are essential elements of identity theft which must be included in the "to convict" instruction.

A person commits second degree identity theft by knowingly obtaining, possessing, using, or transferring a means of identification of another person, living or dead, with the intent to commit or to aid

or abet, any crime. RCW 9.35.020(1), (2).[7] Here, the State's theory was that Mr. Fedorov use of the name Zachary Anderson "with the intent to commit…a crime, to-wit making false or misleading statements to a public servant…" CP 78. Mr. Fedorov contends this specific intent to commit the underlying offense alleged is an essential element of identity theft as prosecuted here and must be included in the "to convict" instruction. RP 157-58.

This requirement is best understood by a comparison to the offense of second degree felony murder. A person is guilty of murder in the second degree when he commits or attempts to commit *any felony*, and, in the course of and in furtherance of such crime or in immediate flight therefrom, he causes the death of another. RCW 9A.32.050(1)(b). In this circumstance, the underlying felony is an essential element of felony murder which must be included in the "to convict" instruction. State v. Bryant, 65 Wn.App. 428, 438, 828 P.2d 1121 (1992), citing State v. Whitfield, 129 Wn. 134, 139, 224

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[7] Identity theft in the first and second degree share the same underlying elements. The difference between first and second degree is the requirement the State prove for first degree the value of the goods, etc. exceeds $1500. RCW 9.35.020(1), (2).

P. 559 (1924).[8] Following this logic, since the State was required to prove Mr. Fedorov intended to commit *any crime* to prove identity theft, the underlying crime he intended to commit is an element of the crime which must be included in the "to convict" instruction.

Although some may argue the more appropriate comparison is to the burglary statutes, Mr. Fedorov contends the felony murder analogy is more appropriate because of the unique history of burglary in Washington and the Supreme Court's decisions treating burglary significantly different than other offenses. In Bergeron, the Supreme Court held that for burglary, the specific felony intended to be committed need not be included in the "to convict" instruction. State v. Bergeron, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985). In so doing, the Court theorized that,

> the State Legislature has drastically changed the nature of the crime of burglary in this state to the point where it has become a different offense today than it was under either the common law or under our burglary statutes in 1890.

[8] While the State is not required to allege the specific means of the underlying offense, the State is required to prove beyond a reasonable doubt the elements of the underlying crime for felony murder. State v. Quillin, 49 Wn.App. 155, 164, 741 P.2d 589 (1987). Thus, as long as the State can prove the elements of the underlying felony and the elements of felony murder beyond a reasonable doubt, the State has met its burden.

Id. at 14. The Court noted that under the common law on which Washington's burglary statute was based, the specific crime intended to be committed was required to be pleaded and proved. Id. This continues to be the case in those states which still follow the common law. Id. at 15. But, the Bergeron Court noted that Washington's burglary offense is now a statutory offense, no longer based upon the common law, thus the crime intended to be committed need not be pleaded and proved. Bergeron, 105 Wn.2d at 15.

Given the unique nature of burglary in Washington as a creature of statute, it makes little sense to extend the holding of Bergeron. The underlying offense itself is an element of the separate offense of identity theft. As such, these elements were required to be in the "to convict" instruction. DeRyke, 149 Wn.2d at 910.

d. The error in failing to include the underlying offenses in the "to convict" instruction was not a harmless error

Jury instructions that misstate an element of the charged offense may be a harmless error if the element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58

P.3d 889 (2002), citing Neder v. United States, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

Here, the evidence was controverted to the extent that Mr. Fedorov challenged the assertion he used the identity of a real person to commit this felony. Given this controverted evidence, had the jury been properly instructed, it could have found Mr. Fedorov did not intend to use the identity of a real person to commit the underlying crime. As a consequence, the error in failing to properly instruct the jury was not harmless. Brown, 147 Wn.2d at 342-43.

4. The "abiding belief" instruction erroneously equates the jury's job with a search for the truth and that undercuts the State's burden of proof.

a. Mr. Fedorov timely objected to the "abiding belief" instruction.

Mr. Fedorov specifically objected to the Court's use of the "abiding belief" instruction. RP 157; CP 35. Instead, Mr. Fedorov proposed an alternative without the problematic language. CP 47. Judge Fair noted the objection for the record and gave the offending instruction. RP 158; CP 35.

b. The jury's role is to evaluate the State's case, not find truth.

A jury's role is not to search for the truth, but to test the substance of prosecutor's allegations. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn.2d 103, 286 P.3d 402 (2012) ("truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden"). It is, in fact, the job of the jury "to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the jury instruction confuses the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery. The presumption of innocence may, in turn, be diluted or even "washed away" by such confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id.

In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn.App. 48, 53, 935 P.2d 656 (1997), was "problematic" as it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. Id. at 318.

The pattern instruction reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the 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].

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3rd ed. 2008) ("WPIC").

The Bennett Court did not comment on the bracketed "belief in the truth" language. However, recent cases show the problematic nature of such language. In Emery, the prosecutor told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. The Court noted that these remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the Court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995), cert den., 518 U.S. 1026 (1996). The Court ruled that "[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but was not an error." Id. at 658. The Pirtle Court did not address, however, whether this language encouraged the jury to view its role as a search for the truth aspect. Id. at 657-58. Instead, it was looking at whether the phrase abiding belief was different from proof beyond a reasonable doubt. Id.

Pirtle concluded that this language was unnecessary but not necessarily erroneous. This is far from an endorsement of the language. Emery now demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language invites the jury to be confused about its role and serves as a platform for improper arguments about the jury's role in looking for the truth. 174 Wn.2d at 760.

Mr. Federov objected to the addition of this last sentence in the court's instruction defining the prosecution's burden of proof and proposed an instruction without the improper language. RP 157; CP 47. This "belief in the truth" language inevitably minimizes the State's burden and suggests to the jury they should decide the case based on what they think its true rather than whether the State proved its case. That is inconsistent with the constitutional standards outlined.

d. Error in the burden of proof instruction creates structural error and requires reversal.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan v. Louisiana, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

"[A] a jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice. Emery, at 757 (quoting Sullivan v. Louisiana, 508 U.S. at 281–82).

Moreover, the appellate courts have a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. 6, 14; Const. art. I, §§ 21, 22.

F. CONCLUSION.

For the reasons stated herein, Mr. Fedorov respectfully asks this Court to reverse his conviction and remand his case to the superior court for further proceedings as appropriate.

DATED this 3rd day of July 2013.

Respectfully submitted,

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Washington Appellate Project
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69743-9-I
	)	
	)	
VICTOR FEDEROV,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF JULY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	VICTOR FEDEROV 5132 S BRIGHTON SEATTLE, WA 98118	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON, THIS 3RD DAY OF JULY, 2013.

X

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