69797-8

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NO. 69797-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SANDRA HIMMELMAN,

Appellant.

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.

Ms. Himmelman was induced by a nefarious acquaintance to cash a check at her neighborhood grocery store and return the change to him. The check was a forgery and when Ms. Himmelman was charged she explained that she did not know the check was forged because it looked proper, and she had sought repeated assurances from the man from whom it was received. At her trial, however, the jury was not instructed with the language clarifying the subjective knowledge requirement. Furthermore, the jury was instructed in a manner that allowed it to return a guilty verdict if it simply believed in the truth of the charge, undercutting the constitutional reasonable doubt standard and the presumption of innocence. These instructional errors substantially undercut the reliability of the verdict, requiring reversal and remand for a new trial.

B. ASSIGNMENTS OF ERROR.

1. The trial court erred in denying Ms. Himmelman's request to instruct the jury, pursuant to State v. Shipp,[1] that it could find

[1] State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980).

"that [s]he was less attentive or intelligent than the ordinary person and did not act with knowledge of that fact."

2. 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. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The accused is entitled to have the jury fully instructed on the relevant legal standards related to the unlawful conduct alleged. Ms. Himmelman sought an instruction advising the jury that it was a defense "that [s]he was less attentive or intelligent than the ordinary person and did not act with knowledge of that [operative] fact." Did the trial court's failure to fully instruct the jury violate Ms. Himmelman's state and federal constitutional rights to due process of law and a fair trial by failing to adequately explain to the jury the law regarding knowledge?

2. 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 confuse the jury's constitutional function and undercut the prosecutor's burden so as to require reversal?

D. STATEMENT OF THE CASE.

Sandra Himmelman cashed a check at her neighborhood Fred Meyer store which she had received from an acquaintance. 7/6/12RP 34. The check was a forgery bearing the account number of Carolyn Rygg, but listing the payer as an unrelated business in Lake Stevens, "Westgate Business Services, LLC." RP 96-99.

James Philio, a loss prevention manager with Fred Meyer, testified regarding their standard business practices in accepting and cashing checks for customers. RP 101-26. Mr. Philio testified that based on their records, the check total was $457.89, it was used to purchase $87 worth of merchandise, and the balance was paid in cash. RP 109-13.

Everett Police Detective Steven Sieverson was assigned the case and contacted Ms. Himmelman by telephone. RP 129-38. They also met subsequently at the Everett Police station. The detective

described Ms. Himmelman as slow in processing and responding as if on some sort of prescription medication. RP 153, 166-67.

When asked about the check, Ms. Himmelman acknowledged she cashed the check and explained it had been given to her by an acquaintance, Mark Barthy. RP 137-40. Ms. Himmelman encouraged the police to find Mark and suggested where he might be found since his ex-wife and daughter lived across the street. RP 164-65. When the detective was unable to locate Mr. Barthy in a police database, however, he took no further steps toward locating him despite his being the source of the check, explaining that "some of the people that I try to locate are very difficult to find because they are into illegal drugs." RP 140, 165. Ms. Himmelman confirmed that Mark was "a doper," and went on to complain that "Mark is a low life with no job and owes me $5,800, but refuses to pay." RP 155.

When Ms. Himmelman was charged with forgery and identity theft in the second degree, she defended herself on the grounds that she did not know the check was a forgery. CP 84;[2] RP 183-200. She

[2] RCW 9A.60.020 defines forgery:

noted that the check looked proper on its face and contained no errors which might have raised her suspicions. RP 193-94. It was also illogical to believe she would have knowingly taken the forged check to her local supermarket where she would be known at the time she cashed the check and recognized whenever she returned. RP 183, 199. In light of Mark's reputation, she had questioned him

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(1) A person is guilty of forgery if, with intent to injure or defraud:
(a) He or she falsely makes, completes, or alters a written instrument or;
(b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.
(2) In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.
(3) Forgery is a class C felony.

RCW 9.35.020 defines the offense of identity theft, in pertinent part, as:

(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.
(2) Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.
(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.
....
(6) Every person who, in the commission of identity theft, shall commit any other crime may be punished therefor as well as for the identity theft, and may be prosecuted for each crime separately.

several times about the check in an effort to assure herself of its validity. RP 190. Unfortunately, she was "a poster child for gullibility." RP 191.[3] At the same time, the detective described Ms. Himmelman as slow in processing and responding as if on some sort of prescription medication. RP 153, 166-67. Ms. Himmelman simply reiterated therefore that she did not know the check was a forgery and had no intent to injure either Ms. Rygg or Fred Meyer. RP 195-200.

Nevertheless, the jury returned verdicts of guilty based in part on the arguably erroneous instructions on reasonable doubt and knowledge. RP 218-20; CP 35-36.

Ms. Himmelman now seeks relief in this Court. CP 2-13.

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[3] Illustrating this point, defense counsel noted that when Mr. Himmelman finally kicked Mark out of her house she still gave him gas money. RP 191.

E. ARGUMENT.

1. The failure to fully instruct the jury on the nature and scope of the essential element of knowledge violated Ms. Himmelman's right to jury trial and due process of law.

a. Appellant timely sought to have the jury fully instructed on the law regarding the knowledge element.

Ms. Himmelman requested the jury be instructed pursuant to WPIC 10.02 regarding the knowledge requirement with the additional explanation that the jury could find despite what a reasonable person might have known under the circumstances, "that he [the defendant] was less attentive or intelligent than the ordinary person and did not act with knowledge of that fact." CP 72-73; RP 146; Shipp, 93 Wn.2d at 516. Defense counsel explained that the additional language was appropriate and particularly helpful in explaining to the jury the difference between subjective and objective examination of what a reasonable person would have known. RP 146. The court rejected her request, concluding the defense could argue their theory of the case from the language regarding permissive inferences. Id.

b. The accused is entitled to have the jury fully and clearly instructed on the law applicable to her case.

In criminal cases, constitutional due process requires that the jury be instructed on each element of the offense charged. State v. Emmanuel, 42 Wn.2d 799, 820-21, 259 P.2d 845 (1953). Jury instructions are further intended to provide guidance to the jury in its deliberations and aid it in arriving at a proper verdict. State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). The instructions should explain the law of the case, point out the essentials to be proved on one side or the other, and bring into view the relation between the evidence presented to the particular issues involved. Bird v. United States, 180 U.S. 356, 362, 21 S.Ct. 403, 45 L.Ed. 570 (1901).

Each side in a criminal proceeding is, therefore, entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The jury instructions must allow the parties, prosecutor and accused, to argue their cases and properly inform the jury of the applicable law. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999); State v. Brown, 130 Wn.App. 767, 770,

124 P.3d 663 (2005). Where there is substantial evidence in the record to sustain a theory on which an instruction is sought, it must be given. State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006) (reversible error for failure to give voluntary intoxication instruction in child molestation prosecution); State v. Elder, 70 Wn.2d 414, 419, 423 P.2d 533 (1967).

There is no constitutional requirement that the jury be instructed on definitions of each element, unless that element is not a matter of common understanding. State v. Bledsoe, 33 Wn.App. 720, 727, 658 P.2d 674 (1983). While "knowledge" may be a term with a commonly understood meaning, the presumptions and inferences of knowledge which the law also recognizes are unique and require clear direction for the jury. See e.g. Shipp, 93 Wn.2d 515-17 (three potential interpretations of "knowledge" under the RCW 9A.08.010(1)(b)); 13 Ferguson, WA PRAC. Criminal Practice and Procedure, § 4403 (2004).

The trial court has, therefore, limited discretion in selecting or rejecting the instructions. The court is required to give instructions requested by either party which correctly

state the law and are supported by evidence at trial. Ferguson, at § 4405; State v. Adams, 31 Wn.App. 393, 396, 641 P.2d 1207 (1982).[4] Ms. Himmelman's requested instruction was a correct statement of the law and was amply supported by the evidence adduced at trial. The trial court abused its discretion in failing to give the instruction.

c. The knowledge instruction given failed to fully and fairly convey the law applicable to the issues in the case without the additional provision requested.

Whenever a presumption arises from the circumstances in a criminal case, the jury instructions must fully explain the nature and operation of the inference to the jury. Sandstrom v. Montana, 442 U.S. 510, 512-19, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (due process prohibits the use of a conclusive or irrebuttable presumptions); Connecticut v. Johnson, 460 U.S. 73, 85-88, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983). In this case, the court's instruction allowing the jury to find the defendant had knowledge if a "reasonable person in the same situation [would] believe that a fact exists." CP 57. In the

[4] A specific instruction should not be given when a general instruction adequately explains the law and allows the parties to argue their theories of the case. State v. Williams, 22 Wn.App. 197, 588 P.2d 1201 (1978).

absence of the language requested by Ms. Himmelman, the jury was not required to find she personally had actual knowledge, rather than a form of constructive knowledge based on what the fictitious reasonable person would know. This is problematic, however, because "[t]he jury must still find subjective knowledge" on the part of the accused. Shipp, 93 Wn.2d at 517.

The absence of the proposed language from Shipp materially limited Ms. Himmelman's ability to argue her case because the knowledge instruction left the jury free to impute a form of constructive knowledge, or not, but failed to make clear that whether that result was reached by direct or circumstantial evidence, that actual knowledge of the forgery and use of Ms. Rygg's account number was required. The instruction allowed the jury to find knowledge if a reasonable person would have known, without regard to Ms. Himmelman's actual knowledge. Shipp, 93 Wn.2d at 517 ("The jury must still find subjective knowledge.") The instruction given failed to make clear that even where a reasonable person might, it is free to find defendant did not have knowledge. CP 57.

That has the very real likelihood of conviction without a jury finding the essential element of actual knowledge.

d. Appellant was prejudiced by the failure to fully instruct the jury regarding knowledge.

The use of an improper instruction in a criminal case is presumed to be prejudicial and that prejudice is not overcome unless the State establishes it did not affect the jury's consideration of the charge. State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984); State v. Wanrow, 88 Wn.2d 221, 236-38, 559 P.2d 548 (1977) (limiting jury's consideration of relevant facts was an erroneous statement of the applicable law). In determining whether a party was prejudiced by improper jury instructions, the reviewing court must determine whether the instructions misled the jury as to its responsibilities under the law. State v. Hayes, 73 Wn.2d 568, 572, 439 P.2d 978 (1968). Failing to clearly define the actual subjective knowledge requirement served to mislead this jury as to its responsibilities under the law.

The failure to give an instruction which correctly states the law does not constitute error if the instructions given are sufficient when considered as whole. But where the jury is incorrectly

instructed on the law, other instructions cannot negate the error. Wanrow, 88 Wn.2d at 236. The refusal to give the requested instruction resulted in the jury being misled and constitutes reversible error because it severely limited Ms. Himmelman's ability to present her theory of the case. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 536 (1968); State v. Kidd, 57 Wn.App. 95, 99, 786 P.2d 847 (1990). Reversal and remand for a new trial is required.

2. The "abiding belief" instruction undercuts the State's burden of proof by erroneously equating the jury's job with a search for the "truth" rather than a test of the prosecution's case.

a. Ms. Himmelman timely objected to the "abiding belief" language.

Ms. Himmelman specifically objected to the Court's use of the "abiding belief" instruction. RP 144. Instead, Ms. Himmelman proposed an alternative without the problematic language. CP 68-69. The trial judge noted the objection for the record and gave the offending instruction. RP 144; CP 44.

b. The jury's role is to evaluate the State's case, not simply find "truth" as the instruction implies.

A jury's role is to test the substance of the prosecutor's allegations, not to simply search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn.App. 103, 120, 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 blurs 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, more recent cases show the problem with 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. Emery now demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language fosters confusion about the jury's role and serves as a platform for improper arguments about the jury's role in looking for the truth. 174 Wn.2d at 760.

Ms. Himmelman 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 144; CP 68-69. 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 it's true rather than whether the State proved its case. That is inconsistent with the constitutional standards outlined.

c. 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, 508 U.S. at 281–82).

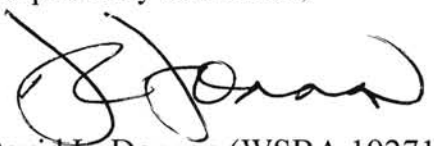
Moreover, the appellate courts have a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth 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, Ms. Himmelman respectfully asks this Court to reverse her conviction and remand to the superior court for further proceedings as appropriate.

DATED this 24th day of July 2013.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent/Cross-appellant, SANDRA HIMMELMAN, Appellant-Cross-respondent.	))))))))	NO. 69797-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH 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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SIGNED IN SEATTLE, WASHINGTON, THIS 24TH DAY OF JULY, 2013.

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