69797-8

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NO. 69797-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

SANDRA J. HIMMELMAN,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court abuse its discretion by declining to give a modified version of the standard WPIC knowledge instruction?

2. Was the jury properly instructed regarding reasonable doubt?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

On June 27, 2010, Carolyn Rygg's car was broken into and her checkbook was stolen. Rygg notified her bank. On July 5, 2010, defendant, Sandra Himmelman, cashed a check for $457.89 at the Mill Creek Fred Meyer, in Everett, Washington; the check was drawn on Rygg's account number. RP 94-95, 109, 111-114, 122, 135, 137, 152, 157.

On July 13, 2010, the bank contacted Rygg about a check that had been passed on her account number. The payor on the check was Westgate Business Services, LLC, it was signed "Terry Jones", and made payable to Sandra Himmelman. Rygg did not own a business called Westgate Business Services and did not know a Terry Jones or Sandra Himmelman. Rygg had never given Westgate Business Services, Terry Jones or Sandra Himmelman

permission to write checks on her account or use or possess her account number. RP 96-99, 132, 157.

On July 22, 2010, the case was assigned to Detective Sieverson and he contacted James Philio, the Loss Prevention Manager at Fred Meyer. On September 15, 2010, Detective Sieverson called the phone number he had obtained for defendant and the person who answered identified herself as Sandra Himmelman. Detective Sieverson told Himmelman that he wanted to talk to her about a $457.89 check she cashed at Fred Meyer. Himmelman started crying and admitted that she was the person who cashed the check. Himmelman said that she got the check from a guy named Mark, that she did not know his last name, that he was a doper low life, who did not have a job and owed her $5,800, but refuses to pay her. The call was terminated because Himmelman was crying while driving and talking on her cell phone. Himmelman called Detective Sieverson later and told him that Mark's last name was Barthy, but that she did not know his phone number. Detective Sieverson was unable to locate a Mark Barthy. RP 101, 132, 134, 136-140, 152, 154-155.

On October 6, 2010, Himmelman agreed to speak with Detective Sieverson in person at the police department. The

interview was audio and video recorded. Detective Sieverson thought Himmelman's responses seemed a little slow, similar to someone who was taking prescription medication, but that her behavior was normal and she did not appear confused during the phone conversation or interview and answered questions appropriately. A redacted audio/video recording of Himmelman's interview was played for the jury. RP 141-142, 149, 153, 166-167.

B. PROCEDURAL HISTORY.

Himmelman was charged with one count Forgery and one count Identity Theft in the Second Degree. CP 84-85. The case proceeded to trial and a jury found Himmelman guilty on both counts. CP 35-36; RP 218-221.

Defendant was sentenced 45 days on the forgery and 3 months on the identity theft, both counts to run concurrent. CP 14-22; 01/02/2013 RP 14-17. Defendant timely appealed. CP 2-13.

III. ARGUMENT

The State must prove every essential element of a crime beyond a reasonable doubt in order for the court to uphold a conviction. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). An instruction that relieves the State of its burden to

prove every element of a crime requires automatic reversal. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002), citing State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997) and State v. Byrd, 125 Wn.2d 707, 713–714, 887 P.2d 396 (1995). To be constitutional, jury instructions must instruct the jury about each element of the offense charged. State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988). Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

In the present case, defendant was charged with forgery and identity theft in the second degree; the trial court correctly instructed the jury on the elements of both offenses. CP 47 (Jury Instruction 7, WPIC 130.03), CP 49 (Jury Instruction 9, WPIC 131.06). Instruction 7 told the jury that a necessary element of the crime of forgery was that "defendant knew that the instrument had been falsely made, completed or altered." CP 47. Instruction 9 told the jury that a necessary element of the crime of identity theft in the second degree was that "defendant knowingly obtained, possessed, transferred or used a means of identification or financial information of another person." CP 49. The jury instructions clearly

required the jury to find beyond a reasonable doubt that the defendant knew or acted knowingly. The reference to knowledge in Instructions 7 and 9 directed the jury to the instruction defining that term. CP 57 (Instruction 17, WPIC 10.02). Because the knowledge instruction explains, but does not supply, an element of the offense, it is proper to consider it along with all the other instructions.

Instructions 7 and 9 also told the jury that each element had to be proved beyond a reasonable doubt. CP 47, 49. Nothing in these instructions, or any other instruction, informed the jury of any circumstance in which it could return a verdict of guilty on the charge of forgery or the charge of identity theft in the second degree without finding all of the elements were proved beyond a reasonable doubt. In this case, the jury was properly instructed regarding the elements and of the State's burden to prove each element beyond a reasonable doubt. CP 47, 49, 57.

A. THE JURY WAS CORRECTLY INSTRUCTED REGARDING KNOWLEDGE.

Defendant argues that the trial court's jury instructions failed to fully instruct the jury on the element of knowledge. Appellant's Brief 7-13. "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when

read as a whole properly inform the trier of fact of the applicable law." Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002), quoting Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996); State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Whether jury instructions as a whole correctly state the applicable law is a question of law reviewed de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); Pirtle, 127 Wn.2d at 656; State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011).

"Before addressing whether an instruction fairly allowed the parties to argue the case, the court must first determine whether the instructions accurately stated the law without misleading the jury." State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002). "However, not every omission or misstatement in a jury instruction relieves the State of its burden." Brown, 147 Wn.2d at 339. "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Smith, 131 Wn.2d at 264 (citations omitted). A constitutional error is harmless if the court is convinced beyond a

reasonable doubt that any reasonable jury would reach the same result absent the error. Linehan, 147 Wn.2d at 643; State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Even if an instruction may be misleading, it will not be reversed unless prejudice is shown by the complaining party. Keller, 146 Wn.2d at 249. "If, on the other hand, a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an abuse of discretion." State v. Aguirre, 168 Wn.2d 350, 363-364, 229 P.3d 669 (2010).

Here, citing State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980), defendant requested the trial court add the following language to instruction 17: [Defendant] "was less attentive or intelligent than the ordinary person and did not act with knowledge of that fact." CP 72-73; RP 146. The trial court denied defendant's request noting:

> that considerable thought was given to the recommended language that is currently within the WPIC, that the inclusion of the phrase, "The jury is permitted but not required to find that he or she acted with knowledge of the fact" is the clause that is intended to reflect the Shipp decision, and from that ... the defense can certainly argue your theory of the case ....

RP 146. A trial court's refusal to give a jury instruction is reviewed for abuse of discretion. State v. Buzzell, 148 Wn. App. 592, 602, 200 P.3d 287 (2009). Deciding whether defining the word "knowledge" will assist jurors in their decision-making is within the sound discretion of the trial court. Scott, 110 Wn.2d at 691-692 (conferring discretion, but also recommending that "knowledge" be defined in some cases, including cases involving accomplice liability). Jury instructions must be relevant to the evidence presented. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

A knowledge instruction that tracked WPIC 10.02, like one given here, allows the jury to consider the subjective intelligence or mental condition of defendant. State v. Barrington, 52 Wn. App. 478, 485, 761 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989). WPIC 10.02 has been construed in Barrington, 52 Wn. App. 485; State v. Kees, 48 Wn. App. 76, 82, 737 P.2d 1038 (1987); State v. Rivas, 49 Wn. App. 677, 689, 746 P.2d 312 (1987); and State v. Davis, 39 Wn. App. 916, 919, 696 P.2d 627 (1985). In all four cases the courts held that the instruction complied with the requirements established in Shipp because it allowed the jury to

consider the subjective intelligence or mental condition of the defendant.

Here, Instruction 17 correctly states the law. The instruction fairly allowed defendant to argue her theory of the case. Viewing the instructions in the present case as a whole and in the context of the testimony and arguments, the jury instructions correctly informed the jury of the applicable law, were not misleading, and allowed each party to argue its theory of the case. Further, defendant has not shown how she was prejudiced by Instruction 17. Therefore, defendant's argument that the trial court erred in giving the additional language in the knowledge instruction is without merit. Barrington, 52 Wn. App. at 485. There was no instructional error or due process violation.

B. THE JURY WAS PROPERLY INSTRUCTED REGARDING REASONABLE DOUBT.

1. The Trial Court Did Not Err In Giving WPIC 4.01.

Defendant argues that it was error for the trial court to include "an abiding belief in the truth of the charge" in the reasonable doubt instruction. Appellant's Brief at 13-18; see CP 44 (Instruction 4, WPIC 4.01). This phrase has been upheld in several appellate cases. Pirtle, 127 Wn.2d at 658 (does not diminish the definition of reasonable doubt given in the first two sentences);

State v. Lane, 56 Wn. App. 286, 299–300, 786 P.2d 277 (1989) (rejecting the argument that WPIC 4.01 dilutes the State's burden of proof); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988); State v. Price, 33 Wn. App. 472, 476, 655 P.2d 1191 (1982), review denied, 99 Wn.2d 1010 (1983). The Supreme Court has also upheld the use of traditional abiding-belief instructions. Victor v. Nebraska, 511 U.S. 1, 14-15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). See also 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01 (3d Ed) Comment. It was not error in the present case to include WPIC 4.01 in the court's instructions to the jury.

IV. CONCLUSION

For the reasons stated above, defendant's appeal should be denied and her conviction should be affirmed.

Respectfully submitted on October 15, 2013.

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