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Court of Appeals
Division I
State of Washington

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT NO. 91968-2

NO. 72056-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADAN YUSUF,

Petitioner.

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

The Honorable William L. Downing, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Adan Isack Yusuf, the appellant below, asks this court to review the Court of Appeals decision referenced in Section B.

B. COURT OF APPEALS DECISION

Yusuf requests review of the Court of Appeals decision in State v. Yusuf, noted at ___ Wn. App. ___, 2015 WL 3766831, No. 72056-2-I (Wash. Ct. App. Jun. 15, 2015).

C. ISSUES PRESENTED FOR REVIEW

1. Does a basic examination of WPIC 4.01's language demonstrate that jurors must articulate a reason before they may have a reasonable doubt?

2. Does WPIC 4.01's articulation requirement violate due process, undermine the presumption of innocence, and impermissibly shift the burden of proof?

3. Does erroneously instructing a jury regarding the meaning of reasonable doubt vitiate the jury-trial right, constituting structural error?

4. Is review appropriate under RAP 13.4(b)(1), (2), and (3) because the Court of Appeals decision conflicts with a decision of this court and with other Court of Appeals decisions, and because this case involves a significant constitutional question?

D. STATEMENT OF THE CASE

Yusuf's appeal stems from a judgment and sentence imposing a 156-month sentence consisting of concurrent, standard-rage sentences of 120 months for first degree assault, 15 months for second degree assault, and consecutive 36-month deadly weapon enhancements. CP 78; RP 658. Yusuf appealed. CP 84.

On appeal, Yusuf challenged the constitutionality of the pattern reasonable doubt instruction. Yusuf's jury was instructed: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 55; 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC 4.01). Yusuf argued WPIC 4.01 requires jurors to articulate a reason for having a reasonable doubt, the articulation requirement unconstitutionally shifts the burden of proof and undermines the presumption of innocence, and instructions erroneously defining reasonable doubt are structural errors requiring reversal. See generally Br. of Appellant; Reply Br.

The Court of Appeals rejected Yusuf's claim in a two-page per curiam opinion. Failing to address any of Yusuf's arguments, the Court of Appeals stated, "There is no articulation requirement in the instruction, which is taken from [WPIC 4.01]." Yusuf, slip op. at 1. The court noted the instruction had been repeatedly approved by Washington courts. Id. at 1-2.

The Court of Appeals also quoted State v. Thompson, 13 Wn. App. 1, 5, 533 P.2d 395 (1975), in which Division Two stated, "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason and not something vague or imaginary." Yusuf, slip op. at 2.

E. ARGUMENT

INSTRUCTING JURORS, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," UNCONSTITUTIONALLY IMPOSES AN ARTICULATION REQUIREMENT ON THE REASONABLE DOUBT STANDARD, NECESSITATING THIS COURT'S REVIEW

WPIC 4.01 instructs jurors a reason must exist for having a reasonable doubt. Jurors thus must have more than just a reasonable doubt; they must also have an articulable doubt. This articulation requirement undermines the presumption of innocence and is effectively identical to the fill-in-the-blank arguments Washington courts have invalidated in prosecutorial misconduct cases. Any instruction that erroneously defines reasonable doubt vitiates the jury-trial right, violates due process, and is structural error. This court should review this significant constitutional question and the unsatisfying case law that surrounds it, and reverse.

1. A basic examination of WPIC 4.01's language demonstrates the instruction requires articulation

The difference between "reason" and "a reason" is obvious to any English speaker. Having a "reasonable doubt" is not, as a matter of plain

English, the same as having "a reason" to doubt. WPIC 4.01 is gravely flawed because it requires both a reasonable doubt and a reason to doubt for a jury to acquit.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with *reason* : not absurd : not ridiculous . . . being or remaining within the bounds of *reason* . . . having the faculty of *reason* : RATIONAL . . . possessing good sound judgment . . ." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993) (emphasis added). This definition of reasonable doubt requires the exercise of reason, which best comports with the United States Supreme Court's definitions. E.g., Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

The placement of the indefinite article "a" before "reason" converts the meaning of the word "reason" into "an expression or statement offered as an explanation or a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to the United State Supreme Court's use of the term "reason" in a manner referring to doubt based on logic or rationality,

WPIC 4.01's use of "a reason" signifies a doubt capable of explanation or justification. WPIC 4.01 plainly requires more than just a reasonable doubt; it requires an explainable, articulable reasonable doubt.

The Court of Appeals opinion did not address these points. Instead, it merely cited several cases that have approved of WPIC 4.01. Yusuf, slip op. at 1-2 (citing State v. Emery, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012); State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007); State v. Tanzymore, 54 Wn.2d 290, 291 n.2, 340 P.2d 178 (1959); State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901); State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975); State v. Cosden, 18 Wn. App. 213, 221, 568 P.2d 802 (1977)).

Only one of these cases, Thompson, addressed anything close to the challenge Yusuf raises, and the Thompson court's cursory analysis on the reasonable doubt instruction was not satisfactory.

Thompson argued the instruction, "'The doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists' . . . . (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." 13 Wn. App. at 4-5 (quoting jury instructions). The Thompson court began its discussion by recognizing "this instruction has its detractors" but noted it was "constrained to uphold it" based on Tanzymore and State v.

Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5. This was hardly a ringing endorsement.[1]

In its one sentence on the articulation issue, the Thompson court stated, "Furthermore, the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Id. This is untenable. The first sentence on the meaning of reasonable doubt, read to every criminal jury, requires a reason to exist for reasonable doubt. This plainly directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court's suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference in meaning between "reason" and "a reason." And the Thompson court's explanation contradicts itself: on the one hand it asserts there is no articulation requirement; on the other hand it posits a reasonable doubt must be capable of at least some articulation given its statement that a reasonable doubt cannot be based on something vague.

---

[1] Likewise, this court in Bennett grudgingly "require[d] that [WPIC 4.01] be given until a better instruction is approved." 161 Wn.2d at 318. Washington appellate courts thus seem to concur that WPIC 4.01 has ample room for improvement. This is undoubtedly true given that its language plainly reveals an articulation requirement.

Thompson fails to adequately explain away WPIC 4.01's articulation requirement.

Very recently, this court addressed the issue of articulation with respect to a trial court's preliminary instruction that a reasonable doubt is "'a doubt for which a reason can be given.'" State v. Kalebaugh, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 4136540, No. 89971-1, slip op. at 3 (Jul. 9, 2015). This court held this instruction was erroneous because "the law does not require that a reason be given for a juror's doubt." Id. at 7. This court compared the instruction with WPIC 4.01: "The trial judge instructed that a 'reasonable doubt' is a doubt for which a reason can be given, rather than the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists." Id. at 6-7. But there is no appreciable difference between the acceptable "a doubt for which a reason exists" and the erroneous "a doubt for which a reason can be given." Both instructions require *a reason.* "A reason" means there must be articulation, explanation, or justification, regardless of whether it merely exists or can expressly be given.

WPIC 4.01's language unmistakably requires jurors to articulate a reason for having a reasonable doubt. No Washington court has ever explained how this is not so.

2. WPIC 4.01's articulation requirement violates due process and undermines the presumption of innocence

a. Violates due process

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In Washington, mere reasonable doubt is not enough. Instead, Washington courts instruct jurors a reason must exist justifying or explaining their reasonable doubt. A juror might have a reasonable doubt but also have difficulty articulating or explaining the reason for that doubt. A case might present such voluminous and contradictory evidence that jurors having a legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite the existence of reasonable doubt, acquittal would not be an option. This directly contravenes Winship.

Scholarship on the articulation requirement elucidates additional concerns:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.

> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' and obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt; jurors cannot vote to acquit in light of WPIC 4.01's direction that a reason must exist for having a reasonable doubt. By requiring more than a reasonable doubt to acquit, WPIC 4.01 violates the federal and state due process clauses. Winship, 297 U.S. at 364; U.S. CONST. amend. XIV; CONST. art. I, § 3. This court should grant review under RAP 13.4(b)(3).

b. Undermines the presumption of innocence

"The presumption of innocence 'is the bedrock upon which the criminal justice system stands.'" Kalebaugh, slip op. at 6 (quoting Bennett,

161 Wn.2d at 315). It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Bennett, 161 Wn.2d at 316. Washington courts have chosen to protect the presumption of innocence by rejecting the articulation of a reasonable doubt. This court should likewise safeguard the presumption of innocence in this case.

In prosecutorial misconduct cases, this court has flatly prohibited arguments that jurors must articulate a reason for having a reasonable doubt. Prosecutors' fill-in-the-blank arguments "improperly impl[y] that the jury must be able to articulate its reasonable doubt." Emery, 174 Wn.2d at 760. These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759.

The improper fill-in-the-blank arguments were not the mere product of prosecutorial malfeasance, however. The offensive arguments originated not in a vacuum but in WPIC 4.01's language itself. In State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009), the prosecutor explicitly recited WPIC 4.01 before her or his fill-in-the-blank argument: "A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." The same

occurred in State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), where the prosecutor told jurors,

> What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job.

These cases make clear that WPIC 4.01 is the true culprit: but for its articulation requirement, it is unlikely prosecutors would have taken improper license to argue that jurors must fill in a blank to have reasonable doubt.

As is true of the related prosecutorial misconduct, WPIC 4.01 requires the jury to articulate a reason for its doubt, which "subtly shifts the burden to the defense." Emery, 174 Wn.2d at 760. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, which directly shifts the burden and undermines the presumption of innocence. Id. at 759. As Judge Bjorgen correctly concluded in his dissent in Kalebaugh, "if the requirement of articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge." State v. Kalebaugh, 179 Wn. App. 414, 427, 318 P.3d 288 (2014) (Bjorgen, J., dissenting), aff'd, slip op. at 1, 9.

Nor is it any answer to claim that Emery, Bennett, or the other cases cited by the Court of Appeals approved of WPIC 4.01's language. See Yusuf, slip op. at 1-2. Those cases, with the exception of Thompson, discussed above, did not address a direct challenge to WPIC 4.01. Courts "do not rely on cases that fail to specifically raise or decide an issue." In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994). If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it shifts the burden and undermines the presumption of innocence, it makes no sense at all to allow the exact same undermining to occur through a pattern jury instruction on which that assertion is based.

Moreover, in Kalebaugh, this court concluded that the trial court's erroneous instruction, "a doubt for which a reason can be given" was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here . . . ." Kalebaugh, slip op. at 7. This court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts, in essence, to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors likewise are undoubtedly

interpreting WPIC 4.01 as requiring them to state a reason for their reasonable doubt.

WPIC 4.01 unconstitutionally shifts the burden of proof and undermines the presumption of innocence. Review is thus warranted under RAP 13.4(b)(3). The Court of Appeals' decision stating WPIC 4.01 contains no articulation requirement conflicts with how this court and the Court of Appeals have defined an articulation requirement in Emery and other fill-in-the-blank cases. And this court's recent decision in Kalebaugh adds uncertainty regarding what might qualify as improper articulation. Review is thus also appropriate under RAP 13.4(b)(1) and (2).

3. WPIC 4.01's articulation requirement is structural error that requires reversal

WPIC 4.01 is an instruction that eases the State's burden of proof and undermines the presumption of innocence. Such an instruction violates the right to a jury trial under the Sixth Amendment and article I, sections 21 and 22. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." Id. at 281. Failing to properly instruct Yusuf's jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

WPIC 4.01's articulation requirement undermines the presumption of innocence by shifting the burden to defendants to supply reasons to doubt. WPIC 4.01 fails to properly instruct jurors on the meaning of reasonable doubt and is therefore structural error that requires reversal.

F. CONCLUSION

Because WPIC 4.01 unconstitutionally requires jurors to articulate a reason for having reasonable doubt, Yusuf asks that this court grant review under RAP 13.4(b)(1), (2), and (3), and reverse.

DATED this 15th day of July, 2015.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 72056-2-I
v.	)	DIVISION ONE
ADAN ISACK YUSUF, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: JUN 1 5 2015

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STATE OF WASHINGTON

PER CURIAM — Adan Yusuf appeals his convictions for first and second degree assault, arguing that the court's reasonable doubt instruction is unconstitutional because it "tells jurors they must be able to explain or articulate a reason for having a reasonable doubt." We affirm.

There is no articulation requirement in the instruction, which is taken from 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008 (WPIC). The instruction simply states that "[a] reasonable doubt is one for which a reason exists . . . It is such a doubt as would exist in the mind of a reasonable person after . . . considering all of the evidence." Clerk's Papers at 55; WPIC 4.01 (emphasis added). The instruction has been repeatedly approved by the Washington State Supreme Court and this court. See e.g., State v. Emery, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012) (noting that prosecutor's argument properly described "reasonable doubt as a 'doubt for which a reason exists'"); State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007); State v. Tanzymore, 54 Wn.2d 290, 291 n.2, 340 P.2d 178 (1959); State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901); State v. Thompson, 13

Wn. App. 1, 4-5, 533 P.2d 395 (1975); State v. Cosden, 18 Wn. App. 213, 221, 568 P.2d 802 (1977). We are bound by the decisions of our Supreme Court. State v. Gore, 101 Wn.2d 481, 486–87, 681 P.2d 227 (1984).

In addition, in Thompson, Division Two of this court expressly rejected the precise argument made here, stating,

> Furthermore, the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary. A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years. State v. Harras, 25 Wash. 416, 65 P. 774 (1901).

Thompson, 13 Wn. App. at 5. We adhere to the decision in Thompson.

Yusuf's pro se statement of additional grounds for review raises no reviewable issues.

Affirmed.

FOR THE COURT:

Cox, J.

Schindler, J.

Leach, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. ADAN YUSUF, Petitioner.	SUPREME COURT NO. ______ COA NO. 72056-2-I

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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF JULY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ADAN YUSUF
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WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JULY 2015.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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