NO. 46308-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTIAN BAILEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 13-1-02673-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the court heard argument from both sides, reviewed the relevant law, and weighed the impact on the jury before issuing a ruling, was the decision to exclude a statement of self-serving hearsay an abuse of discretion?

2. Where the court instructed the jury on the beyond a reasonable doubt burden, in accordance with pattern jury instructions and case law, including the optional abiding belief language, and elected to not give further definitional instructions for "abiding," has defendant shown the instruction was a constitutional error?

B. STATEMENT OF THE CASE.

1. Procedure

On July 3, 2013, Christian Bailey (hereinafter "defendant") was charged by information of two counts of unlawful possession of a stolen vehicle. CP 1-2; RCW 9A.56.068, RCW 9A.56.140.

The State moved in limine to exclude a statement of defendant that he had purchased one of the motorcycles found on his property. CP 7. The court granted the motion. 2RP 59-60.[1]

After both the State and defense rested, defendant objected to the "abiding belief" language in the court's instruction to the jury. 3RP 218. Defendant moved to strike the sentence or for the court to define "abiding belief" for the jury. 3RP 220. Defendant filed proposed instructions omitting the abiding belief language and including three alternate definitions for "abiding belief." CP 20-23. The court declined to alter or add to the pattern instructions. 3RP 227. Defendant reiterated that he took exception to the court not giving defense's proposed instructions. 4RP 243.

The jury found defendant not guilty of count I and guilty of count II. CP 51-52. Before sentencing, defendant moved for a new trial in light of a purported receipt found in defendant's home. 7RP 304. Defendant called witnesses, and took the stand himself, in support of the motion. 7RP 308-340. The court denied the motion for a new trial. 7RP 359. The court imposed a standard range sentence of 25 months. CP 97. Defendant filed this timely appeal. CP 106.

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[1] The verbatim report of proceedings will be referred to by the volume number, RP, and page number (#RP #).

2. Facts

In January 2013 Bambi Hope went to her business property in Spanaway, saw the locks had been pried off the barn door, and the side of the building had been cut into. 2RP 74. The Chevy pickup Hope used for business was missing. 2RP 76. After receiving two separate tips from people claiming to know where Hope's truck was, Hope went to an address at the intersection of 304th Street and Webster Road in Graham, WA. 2RP 79-82. Hope entered the property and found her missing truck. 2RP 83. She took photos of her truck with her cell phone. 2RP 83. Hope then called the Pierce County Sheriff's Department. 2RP 92.

On June 10, 2013, Douglas Laisy came home from work to find his shed had been broken into. 2RP 108. Two motorcycles belonging to his children were missing. 2RP 109. Laisy called 911. 2RP 109. There were motorcycle tire tracks leading out of the shed. 2RP 109. Laisy followed these tracks to the backside of his property, where he found his neighbor's fence had been cut in three places. 2RP 109.

Deputy Anthony Filing took a vehicle theft report from Hope on January 29, 2013. 2RP 117. Deputy Filing later responded to Hope's June 28, 2013 call. 2RP 120. When officers arrived to serve a search warrant on the property where Hope found her truck on July 2, 2013, defendant was present. 2RP 122, 124. Officers showed him the warrant because he was

the primary resident on the property owned by his family. 2RP 125. Officers read defendant his rights. 2RP 125. Then, defendant accompanied the officers on their search and used his keys to unlock various outbuildings. 2RP 126.

Inside a shed, officers found the stolen motorcycle belonging to Laisy. 2RP 131. Defendant told the officers that he owned the motorcycles. 3RP 157.[2] Officers then found Hope's Chevy truck on the property. 2RP 132. Deputy Jesse Holtz testified that defendant told him the truck had been brought to the property by a person named "Doc Dean." 3RP 171. Defendant was arrested and charged with two counts of unlawful possession of a stolen vehicle. 2RP 41.[3]

At trial, the State moved in limine to exclude defendant's statement to police that he purchased the motorcycles found on the property. 2RP 53. Defense counsel argued that if the previous statement, that defendant owned the motorcycles, was admitted, the door was opened for the statement regarding defendant's purchase of the motorcycles. 2RP 54. After recessing to consult relevant case law, the judge ruled that the second statement regarding the purchase was inadmissible under the hearsay rule unless defendant chose to testify. 2RP 59.

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[2] Following this statement, defendant told officers he had purchased the motorcycles, which the court excluded after the State's motion in limine. 2RP 59-60.
[3] Count I was based upon possession of Hope's truck; Count II was based upon possession of Laisy's motorcycle. CP 1-2.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING THE SELF-SERVING HEARSAY OFFERED BY DEFENDANT BECAUSE THE DECISION WAS MADE FOR TENABLE REASONS AND DEFENDANT HAS FAILED TO SHOW PREJUDICE.

A trial court's decision to admit or exclude evidence is reviewed for manifest abuse of discretion. ***State v. Pavlik***, 165 Wn. App. 645, 650, 268 P.3d 986 (2011) (citing ***State v. Luvene***, 127 Wn.2d 690, 706-707, 903 P.2d 960 (1995)). An abuse of discretion will only be found when the trial court based its decision on untenable grounds. ***Pavlik***, 165 Wn. App. at 651 (citing ***State ex. Rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Evidence Rule 801(c) defines hearsay as: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible, except as provided by the rules of evidence, by other court rules, or by statute. ER 802. Not all statements are hearsay; the Rules of Evidence enumerate certain excepted statements, including an admission by a party opponent who has manifested a belief in the statement's truth. ER 801(d)(2).

There is not a "self-serving hearsay" rule that excludes otherwise admissible evidence. ***Pavlik***, 165 Wn. App. at 651. However, courts have repeatedly recognized:

> Out-of-court admissions by a party, although hearsay, may be admissible against the party if they are relevant. However, if an out-of-court admission by a party is self-serving, and in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statements is not admissible under the admission exception to the hearsay rule.

State v. Finch, 137 Wn.2d 792, 824, 975 P.2d 967 (1999). The Court further explained that the problem with admitting such testimony is that the jury is presented the defendant's version of the facts without the defendant being subjected to cross-examination. *Id.* at 825.

In this case, defendant's statement that he had purchased the motorcycles was properly held to be inadmissible hearsay. 2RP 59-60. The statement was self-serving in the sense that it tended to aid his case and was offered for the truth of the matter asserted. Therefore, the statement was not admissible under the admission by a party opponent exception to the hearsay rule. ***Finch***, 137 Wn.2d at 824.

It has been recognized that when a party introduces part of a conversation, the opposing party may introduce the remainder of the conversation to "explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue

involved." ***State v. West***, 70 Wn.2d 751, 754, 424 P.2d 1014 (1967). This is true even if the evidence is otherwise inadmissible. *Id.* at 755. The trial court has "considerable discretion" when administering the open-door rule. ***Ang v. Martin***, 118 Wn. App. 553, 562, 76 P.3d 787 (2003), *aff'd* 154 Wn.2d 477 (2005). However, the open-door rule must also be weighed against the potential harm in admitting self-serving statements of the defendant without subjecting the defendant to cross-examination. *See* ***Finch***, 137 Wn.2d at 825.

Defendant has failed to show the trial court abused its discretion. First, the judge's decision was not based on untenable grounds evidenced by the judge, after hearing the State's motion, stating:

> I'm going to go ahead a take the luxury of looking up some case law regarding self-serving, allegedly, hearsay statements. And I'll give you a decision after lunch, but I want to – I want to take a look at Tegland and some other potential reference material before I make a decision.

2RP 57. These statements by the judge show that he did not make a decision for untenable reasons; rather, the judge researched and carefully considered the applicable law to make an informed ruling.

Additionally, it was within the trial court's discretion to determine the harm of admitting the statement outweighed any probative value. *See* ***Ang***, 118 Wn. App. at 562. In this case, defendant's statement that he purchased the motorcycles may have related to the same subject matter as

the previous statement of possession. *See* ***West***, 70 Wn.2d at 754. However, the statement, offered for the truth of the matter asserted, would have been put before the jury without opportunity for cross-examination. *See* ***Finch***, 137 Wn.2d at 825. The trial court expressed concern that admitting the statement would place "the defendant's version of the facts before the jury without subjecting the defendant to cross-examination . . . . den[ying] the jury an objective basis for weighing the probative value of the evidence." 2RP 60. The trial court did not abuse its discretion by excluding defendant's statement that he had purchased the motorcycle.

Assuming, arguendo, the trial court did err in excluding defendant's statement, the error was harmless. Non-constitutional error is harmless if it did not, within reasonable probability, affect the jury's verdict. ***Pavlik***, 165 Wn. App. at 655 (citing ***State v. Zwicker***, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986)). In the present case, defendant has not shown prejudice.

Even without the statement, defense counsel was still able to argue to the jury that he did not know the motorcycle was stolen. *See* 4RP 269-270. Defense counsel even argued that defendant, "In opening the door to his shed, pointed out – or at least the officers indicated that he pointed out my motorcycles, I own these. Ownership. What does it communicate;

what does it convey? That they were *purchased.*" 4RP 270 (emphasis added). Thus, defendant was still able to attempt to persuade the jury that he had purchased the motorcycle. Defendant has failed to show prejudice as a result of the exclusion of his statement to officers.

2. THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY IN ACCORDANCE WITH THE PATTERN JURY INSTRUCTION WHICH HAS BEEN UPHELD IN COURTS THROUGHOUT WASHINGTON.

Jury instructions, when read in their entirety, must inform the jury "the State bears the burden on 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) (citing ***In re Winship***, 397 U.S. 358, 367, 90 S. Ct. 1068 (1970)). A challenge to a jury instruction is reviewed de novo, evaluating the challenge within the context of the instructions in their entirety. ***Pirtle***, 127 Wn.2d at 656.

The jury instruction at issue in this case is instruction number three. In its entirety, instruction three reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find that 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.*

CP 58 (emphasis added). Defendant assigns error to the last sentence of the instruction, the "abiding-belief" language. Br. of App. at 9-15; CP 20-23 (defendant's proposed instructions).

The United States Supreme Court has held, "so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt," the federal Constitution does not require any particular form of jury instruction. ***Victor v. Nebraska***, 511 U.S. 1, 5, 114 S. Ct. 1239 (1994) (citations omitted). The standard is simply that, taken as a whole, the instructions properly convey the concept of reasonable doubt. *Id.* at 15.

Washington State uses pattern jury instructions. *See, e.g.*, 11 Wash. Prac., Pattern Jury Instr. Crim. 4.01 (3d Ed.) (hereinafter "WPIC 4.01"). The Washington State Supreme Court has made it clear, in exercising their

inherent supervisory power, Washington trial courts are to "use only the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving each and every element of the crime beyond a reasonable doubt." ***State v. Bennett***, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). The instruction given in this case follows WPIC 4.01. CP 58.

An instruction in accordance with WPIC 4.01, including the abiding belief language, has been approved repeatedly. *See, e.g.*, ***Pirtle***, 127 Wn.2d at 658 (finding the State's burden of proof was not misstated in the abiding belief instruction); ***State v. Kinzle***, 181 Wn. App. 774, 784, 326 P.3d 870 *review denied*, 337 P.3d 325 (2014) ("The phrase 'abiding belief in the truth of the charge' merely elaborates on what it means to be 'satisfied beyond a reasonable doubt.'"); ***State v. Lane***, 56 Wn. App. 286, 299-300, 786 P.2d 277 (1989) (finding WPIC 4.01 instruction to properly inform the jury of the State's duty to prove each element beyond a reasonable doubt); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988) (finding WPIC instruction with abiding belief language adequately instructed the jury); ***State v. Price***, 33 Wn. App. 472, 476, 655 P.2d 1191 (1982) (finding the abiding belief language could not have mislead or confused the jury and the WPIC 4.01 instruction was not an error). The United States Supreme Court has similarly upheld using abiding belief

language in a reasonable doubt instruction. ***Victor***, 511 U.S. at 5 ("[a]n instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof).

Despite the overwhelming approval of the abiding belief instruction in Washington courts, defendant attempts to persuade this court to instead use the Washington State Supreme Court's analysis in ***State v. Emery***, 174 Wn.2d 741, 278 P.3d 653 (2012) to strike down the abiding belief instruction. In ***Emery***, the Court found the prosecutor's argument that the jury was to "speak the truth" or "declare the truth" to be improper. *Id.* at 760. The argument raised by defendant was rejected by Division One of the Court of Appeals. ***State v. Federov***, 181 Wn. App. 187, 324 P.3d 784 *review denied*, 181 Wn.2d 1009 (2014). Federov similarly contended that the abiding belief instruction "improperly encourages the jury to undertake an impermissible search for the truth" as condemned in ***Emery***. ***Federov***, 181 Wn. App. at 200.

Division One of the Court of Appeals disagreed, holding that, when read in context, the abiding belief instruction accurately informed the jury of its job as stated in ***Emery***. ***Federov***, 181 Wn. App. at 200 (citing ***Emery***, 174 Wn.2d at 760 ("a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt")). This

court should follow Division One in affirming the Washington State Supreme Court's approval of the abiding belief language. *See* ***Pirtle***, 127 Wn.2d at 658.

Defendant further argues the trial court erred in not defining "abiding" in its instructions. Generally, trial courts must define technical words used in jury instructions, but words that are of common understanding require no definition. ***State v. Allen***, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). It is a matter of judgment for the trial court to determine whether a word requires definition. ***State v. Castro***, 32 Wn. App. 559, 565, 648 P.2d 485 (1982); ***State v. Humphries***, 21 Wn. App. 405, 411, 586 P.2d 130 (1978). In the present case, the trial court, as a matter of judgment, determined that given that the phrase "abiding belief" had been upheld by both Washington and federal courts, he was not going to define it absent legislative or judicial guidance. 3RP 226-227. The judge acted within his discretion in making this determination.

Even if this court were to find the abiding belief instruction erroneous, the error would be subject to a constitutional harmless error analysis. ***State v. Lundy***, 162 Wn. App. 865, 871, 256 P.3d 466 (2011) (citing ***State v. Brown***, 147 Wn.2d 330, 332, 58 P.3d 889 (2002)). An error is harmless if the court finds, beyond a reasonable doubt, that the jury verdict would have been the same without the error. ***Lundy***, 162 Wn.

App. at 873. Further, without a showing of prejudice by the defendant, even misleading instructions do not require reversal. *Id.* (citing ***State v. Aguirre***, 168 Wn.2d 350, 364, 229 P.3d 669 (2010)).

In his decision to not define "abiding," the trial court judge told counsel, "I'm not going to handcuff either one of you in terms of what you can say or not say regarding these instructions." 3RP 227. Accordingly, defense counsel in closing defined an abiding belief in the truth of the charge as "a belief that is steadfast . . . a belief that is not changing." 4RP 271. Given defense counsel's argument to the jury about the definition of abiding belief, defendant has failed to show prejudice as a result of the trial court's exercise of judgment to not define it.

D. CONCLUSION.

Defendant has failed to show the trial court abused its discretion by excluding the self-serving hearsay because the decision was made after carefully considering the law and balancing considerations of fairness and justice on both sides. Defendant has also failed to show that the trial court's abiding belief instruction in accordance with WPIC 4.01 was improper. Further, in both arguments, defendant has failed to show he was

prejudiced because defense counsel was still able to make the arguments during closing.

DATED: FEBRUARY 19, 2015

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