SUPREME COURT NO. 92350-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

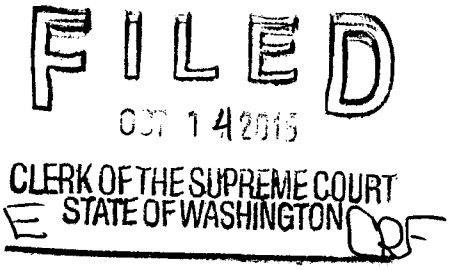
STATE OF WASHINGTON,

Respondent,

v.

CHRISTIAN BAILEY,

Petitioner.



ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 46308-3-II
Pierce County No. 13-1-02673-4

PETITION FOR REVIEW

CATHERINE E. GLINSKI
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FILED IN COA ON OCTOBER 9, 2015

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A. IDENTITY OF PETITIONER

Petitioner, CHRISTIAN BAILEY, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the September 9, 2015, unpublished decision of Division Two of the Court of Appeals affirming his conviction for unlawful possession of a stolen vehicle.

C. ISSUES PRESENTED FOR REVIEW

1. Bailey was charged with unlawful possession of a stolen vehicle. When the vehicle was found on his property, a deputy asked where it came from, and he responded that he owned it and had recently purchased it. Did the State's use of the first part of Bailey's statement open the door to the entire statement, so that exclusion by the court of the second part of the statement requires reversal?

2. The jury's role is to determine whether the State has proved the charged offense beyond a reasonable doubt, not to divine "the truth" of the allegation. Nonetheless, the jury was instructed 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 the prosecutor's burden so as to require reversal?

3. The trial court refused to give Bailey's proposed instruction defining "abiding belief," stating it had no authority to do so. Where the trial court has authority and discretion to define terms and expressions which may confuse the jury, did the court's refusal constitute an abuse of discretion?

D. STATEMENT OF THE CASE

In January 2013, a pickup truck Bambi Hope used in her business was stolen. RP 76-77. She reported the theft to the Pierce County Sheriff's Department. RP 77. Then, in late June 2013, acting on a tip, Hope located her truck on property in Graham. RP 82-83. She again called the sheriff's department. RP 92. Deputies obtained a search warrant based on the information from Hope. RP 120-22.

The warrant was executed on July 2, 2013. RP 122. Deputy Anthony Filing contacted Christian Bailey, who lived on the property. RP 124. Filing read Bailey his rights, and Bailey cooperated fully, escorting the deputies around the property. RP 36-37, 45, 125-26. When deputies asked about the truck, Bailey explained that a friend had dropped it off some months earlier. RP 39, 148.

Bailey had keys to the various outbuildings and sheds on the property, and he unlocked them for the deputies to search. RP 38, 126. One shed contained two motorcycles, and the deputy asked Bailey where the motorcycles came from. RP 57. Bailey said they belonged to him, and he added that he had recently purchased one of them. RP 38, 46, 57. The deputies checked the vehicle identification numbers on the motorcycles and discovered that one had been stolen about three weeks

earlier. RP 108, 157. Bailey was arrested and charged with unlawful possession of the stolen truck[1] and the stolen motorcycle. RP 41.

The court held a CrR 3.5 hearing prior to trial, and Bailey did not dispute that he spoke to the deputies voluntarily after being advised of his rights. RP 52. The State indicated that it planned to offer only the first part of Bailey's statement, that he owned the motorcycles, but it asked the court to exclude the second part, that he had just purchased the motorcycle in question, as hearsay. RP 52, 54-55.

Defense counsel argued that once the State introduced the topic of whether Bailey said anything about ownership of the motorcycles, the door would be opened to Bailey's entire statement that he owned the motorcycles because he purchased them. RP 54. Without the complete statement, there was a danger of misleading the jury. RP 56-57.

The court ruled that because Bailey's statement was not spontaneous but in answer to a question after he was advised of his rights, the statement was hearsay. The first part of the statement was admissible as a voluntary response to the deputy's question, but the second part was clearly self-serving and would not be admissible unless Bailey testified. RP 58-60.

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[1] The jury acquitted Bailey on the charge involving the truck. CP 51.

At trial, Deputy Filing testified that when Bailey opened the shed containing the motorcycles, he said he owned the motorcycles. RP 132, 156-57. Deputy Hotz also testified that Bailey said the motorcycles were his. RP 171.

The prosecutor argued in closing that Bailey was found in exclusive control of the motorcycle, that he claimed ownership of it, and that he admitted to possession. RP 249. The prosecutor further argued that Bailey's claim of ownership was made less than a month after the motorcycle had been stolen, when there had not been time for the motorcycle to move among a bunch of different people. RP 258.

Defense counsel pointed out, however, that there was no evidence that Bailey knew the owner of the motorcycle or that the motorcycle was stolen. RP 270. Bailey's cooperation with the deputies executing the search warrant demonstrated he had nothing to hide, and his statement that he owned the motorcycles conveyed that he had purchased them. RP 270.

At the close of evidence, defense counsel objected to the State's proposed reasonable doubt instruction, which included the optional language in WPIC 4.01: "If, from such consideration [of the evidence or lack of evidence], you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." RP 218; CP 58. Counsel argued that the term "abiding" is not commonly used and could mislead

the jury as to the State's burden. RP 218, 225. He proposed a reasonable doubt instruction without the optional language. CP 20. In the alternative, counsel proposed three alternate instructions defining abiding belief. RP 225-26; CP 21-23.

The court responded that it always gives the instruction proposed by the State, and it would do so in this case. RP 226. It refused to give an instruction defining abiding belief, however, stating that there is no pattern instruction defining that term and no statute or case law providing a definition. While the court said it understood counsel's desire to better define the term, it stated, "I don't believe I have legal authority to attempt to do that." RP 227. Defense counsel took exception to the court's refusal to give the proposed instructions. RP 243.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURT OF APPEALS. RAP 13.4(b)(1), (2).

It is a long established rule in Washington that a party may not bring up a topic, drop it at a point that seems advantageous to that party, and then preclude the other party from examining the topic further. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). For example, in Gefeller, on appeal the defendant challenged admission of a police detective's testimony that the defendant had taken a lie detector test and

the results were inconclusive. The record showed, however, that the defense had first introduced the matter of the lie detector test. Because the defense opened the door to the topic, the State's follow-up questions were permissible. This Court explained,

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn. 2d at 455. The trial court has discretion when administering the open door rule, and the focus must be on fairness and truth-seeking. Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787 (2003), aff'd, 154 Wn. 2d 477 (2005).

In this case, there was evidence that when Bailey unlocked the shed containing two motorcycles, one of the deputies asked him where the motorcycles came from. RP 57. Bailey responded that they belonged to him and he had recently purchased one of them. RP 57. The State introduced Bailey's statement that he owned the motorcycles, in addition to the fact that he had the key to the shed where they were stored, to show

guilty knowledge. The State's theory was that since he admitted possession, he must have known the motorcycle was stolen. When Bailey argued that admission of the first part of the statement opened the door to the second part, that he had recently purchased the motorcycle, the trial court ruled that the second part was inadmissible as self-serving hearsay. RP 59.

The Court of Appeals agreed with the trial court. See Opinion, at 4. It recognized that Bailey's acquisition of the motorcycle was relevant to the case, but it held that Bailey could not prove he purchased the motorcycle through self-serving hearsay. Id. at 4-5.

"There is no 'self-serving hearsay' bar that excludes an otherwise admissible statement." State v. Pavlik, 165 Wn. App. 645, 653, 268 P.3d 986 (2011). Thus, the fact that Bailey's statement was "self-serving" does not alone require its exclusion. Moreover, Washington courts have recognized that a party may open the door to otherwise inadmissible hearsay. See Ang, 118 Wn. App. at 562; State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995). By introducing the initial statement about ownership, the State opened the door to the complete statement, that Bailey owned both motorcycles and had recently purchased one of them. The complete statement gives the jury a context from which to evaluate the State's theory. But closing the door to the remainder of

Bailey's statement, because it was hearsay, gave the State an unfair advantage in arguing its theory of the case. See Gefeller, 76 Wn.2d at 455; Ang, 118 Wn. App. at 563.

The Court of Appeals' decision conflicts with Washington precedent regarding the open door doctrine, and this Court should grant review.

2. THE COURT'S DECISION REGARDING JURY INSTRUCTIONS PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE. RAP 13.4(b)(3), (4).

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 misstates the jury's duty and sweeps aside the State's burden."). In fact, it is the jury's job "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 an "abiding 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

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

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

WPIC 4.01.

The Bennett Court did not comment on the "belief in the truth" language. More recent cases demonstrate the problem with such language,

however. 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" is that the defendants are guilty. Emery, 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. denied, 518 U.S. 1026 (1996). The Court ruled that "[a]ddition of the last sentence [regarding an abiding belief in the truth] was unnecessary but 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. Instead, it looked at whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. Id. at 657-58.

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. Emery, 174 Wn.2d at 760. Division One of the Court of Appeals recently

held that the "belief in the truth" phrase accurately informs the jury of its duty to determine whether the State has proved the charged offenses beyond a reasonable doubt. State v. Kinzle, 181 Wn. App. 774, 784, 326 P.3d 870, review denied, 337 P.3d 325 (2014); State v. Fedorov, 181 Wn. App. 187, 200, 324 P.3d 784, review denied, 181 Wn.2d 1009 (2014). This Court should overrule Division One and hold that, like the impermissible argument in Emery, the contested language in the court's instruction inevitably minimizes the State's burden and suggests that the jury should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan v. Louisiana, 508 U.S. 274, 281-82, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993). "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." Emery, 174 Wn.2d at 757 (quoting Sullivan, 508 U.S. at 281-82). Moreover, 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 instructing 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 State's burden of proof, confuses the jury's role, and denies

the accused the right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22.

3. THE COURT OF APPEALS' FAILURE TO RECOGNIZE THAT THE TRIAL COURT ABUSED ITS DISCRETION CONFLICTS WITH PREVIOUS WASHINGTON DECISIONS AND PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE. RAP 13.4(b)(1), (2), (4).

The trial court in a criminal case is required to define technical words and expressions used in jury instructions, although it need not define words or expressions of common understanding. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984); State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485 (1982). Whether words used in an instruction require definition is necessarily a matter within the trial court's discretion. Castro, 32 Wn. App. at 565.

After determining that it would use the optional "abiding belief" language of WPIC 4.01, the trial court declined to give the defense proposed instructions defining "abiding belief." Defense counsel argued that that phrase is not commonly used or understood and could therefore lead to confusion in the jury as to the State's burden of proof. The court acknowledged counsel's desire to better define that phrase, but it concluded that it had no authority to give a definitional instruction where

none had been approved by the courts or adopted by the WPIC committee. Contrary to the court's understanding, defining words or expressions which could cause the jury confusion is within the trial court's authority and discretion.

A court's failure to exercise its discretion is an abuse of that discretion. State v. Elliot, 121 Wn. App. 404, 408, 88 P.3d 435 (2004) (refusal to hear expert testimony was a failure to exercise discretion); State v. Fleiger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (failure to determine whether defendant was security risk before ordering "shock box" was abuse of discretion), review denied, 137 Wn.2d 1003 (1999); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing exceptional sentence below standard range is reviewable error), review denied, 136 Wn.2d 1002 (1998); State v. Tharp, 96 Wn.2d 591, 598, 637 P.2d 961 (1981) (failure to exercise discretion in admitting ER 404(b) evidence).

The Court of Appeals' opinion sidesteps this authority. It acknowledged that the trial court had discretion to give the definitional instruction and that the trial court stated it did not have such discretion or authority, but it characterized the court's ruling as if there was an exercise of discretion: "Although the trial court did have authority to define abiding belief, it is clear that the court did not want to define the term

without clear guidance from the appellate courts or the WPIC committee." Opinion, at 7. It then stated that since the reasonable doubt instruction given by the court has been approved, the court did not err by instructing the jury on reasonable doubt without the additional definition. Opinion at 7-8.

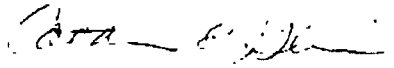
In failing to recognize and exercise its discretion, the trial court abused its discretion. The Court of Appeals' decision to the contrary conflicts with previous Washington decisions and presents an issue of substantial public importance, and review should be granted.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the Court of Appeals decision.

DATED this 9th day of October, 2015.

Respectfully submitted,



CATHERINE E. GLINSKI
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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of this Petition for Review directed to:

Christian Bailey, DOC#964582
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PO Box 777
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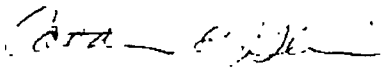

Catherine E. Glinski
Done in Port Orchard, WA
October 9, 2015

GLINSKI LAW FIRM PLLC

October 09, 2015 - 11:09 AM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTIAN REED BAILEY, Appellant.	No. 46308-3-II UNPUBLISHED OPINION

MELNICK, J. — Christian Bailey appeals his conviction for unlawful possession of a stolen vehicle.[1] He argues that the State's direct examination opened the door to an otherwise inadmissible hearsay statement and therefore, the trial court erred by refusing to admit the statement. He also argues that the trial court erred by instructing the jury on reasonable doubt. We disagree and affirm.

FACTS

On January 28, 2013, Bambi Hope reported her vehicle, a 1982 Chevy truck, stolen from her place of business in Spanaway. On June 10, Douglas Laisy reported two motorcycles stolen from his residential property in Eatonville.

In late June, acting on a tip, Hope located her truck on property in Graham. Hope took photographs of her truck and turned them over to law enforcement. Law enforcement obtained a search warrant for the Graham property based on the information Hope supplied.

When officers arrived to execute the search warrant, they contacted Bailey, the primary resident on the property, and showed him the warrant. An officer read Bailey his *Miranda*[2] rights.

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[1] RCW 9A.56.068, .140.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Bailey waived his rights and agreed to talk to the officers. Bailey accompanied the officers on their search and used his keys to unlock various outbuildings.

In one of the outbuildings, officers found two motorcycles—one belonging to Laisy. In response to a question about the motorcycles, Bailey told officers that he owned the motorcycles. He also stated that he had purchased one of the motorcycles.

Officers also found Hope's truck on the property. The truck looked like it was being scrapped—taken apart to be sold. Bailey told officers that David Dean brought the truck onto the property some time ago.

The State charged Bailey with two counts of unlawful possession of a stolen vehicle for possessing Hope's truck and Laisy's motorcycle.

Pretrial, the State moved to exclude Bailey's statement to law enforcement that he purchased one of the motorcycles.[3] The State argued the statement constituted inadmissible hearsay if offered by Bailey. The State indicated that it planned to offer Bailey's statement that he owned the motorcycles, but it would not offer Bailey's statement that he purchased the motorcycle. Bailey argued that once the State elicited Bailey's statement that the motorcycles were his, it opened the door for the remainder of Bailey's statement, *i.e.*, that he purchased the motorcycle. After a confession hearing pursuant to CrR 3.5, the trial court ruled against Bailey.

Bailey objected to the trial court's instruction on reasonable doubt, which was the standard WPIC 4.01 instruction with the optional abiding belief language included in the last paragraph. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 4.01, at 85 (3rd ed. 2008). The trial court rejected Bailey's request to omit the optional abiding belief

[3] Because the parties do not raise the issue, we assume for purposes of this opinion that the motorcycle that Bailey claimed to have purchased is the motorcycle underlying Bailey's unlawful possession of stolen property charge.

language from the WPIC 4.01 instruction or to provide an additional instruction defining "abiding belief." The trial court stated that it understood counsel's attempt to better define abiding belief, but that the court did not believe it had legal authority to do so.

The jury found Bailey not guilty of unlawful possession of Hope's stolen truck and guilty of unlawful possession of Laisy's stolen motorcycle. Bailey appeals his conviction.

ANALYSIS

I. EVIDENTIARY RULING

Bailey argues that the trial court erred by excluding his statement to officers that he purchased one of the motorcycles. He argues that the State opened the door to his complete response when it presented testimony that Bailey responded to an officer's question about the motorcycles by claiming ownership.[4]

A trial court has considerable discretion in administering the open-door rule. *Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787 (2003), *aff'd*, 154 Wn.2d 477, 114 P.3d 637 (2005). Therefore, we review a trial court's decision under the open-door rule for an abuse of discretion. *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

"[W]hen a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Under the "open door" rule, if one party raises

[4] Bailey's sole argument for admissibility to the trial court was the open-door rule; he did not argue that the statement was admissible under the rule of completeness.

a material issue, the opposing party is generally permitted to "explain, clarify, or contradict the evidence." *State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008), *abrogated on other grounds by State v. Mutch*, 171 Wn.2d 464, 254 P.3d 803 (2011); 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14, at 66-67 (5th ed. 2007). The doctrine promotes fairness and truth-seeking:

> "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths."

Ang, 118 Wn. App. at 562 (quoting *Gefeller*, 76 Wn.2d at 455).

Opening the door to otherwise inadmissible evidence is another way of saying that the scope of relevant evidence has been expanded. ER 401. It is done in the interest of fairness.

Here, one of the State's law enforcement witnesses testified that Bailey told him that he owned the motorcycles found in one of the outbuildings. Bailey sought to inquire on cross-examination about an additional statement that he made to the officer during the same conversation that he had purchased one of the motorcycles. The statement Bailey sought to admit is hearsay. He wanted to offer his out-of-court statement for the truth of the matter contained therein. ER 801. Hearsay is inadmissible absent an exception. ER 802. Self-serving out-of-court statements of a defendant are not admissible under the admission of a party-opponent exception to the hearsay rule, when offered on his own behalf. *State v. Bennett*, 20 Wn. App. 783, 787, 582 P.2d 569 (1978).

Bailey's acquisition of the motorcycle is extremely relevant to the case. There is no question that the trial court allowed Bailey to present evidence that he purchased the motorcycle.

The admissibility of this evidence does not depend on the State opening the door to this subject. Rather, evidence that Bailey purchased the motorcycle is admissible in its own right. The question presented here is whether the evidence is admissible in the manner Bailey sought to introduce it, *i.e.*, whether the State's introduction of Bailey's admission that he owned the motorcycle opened the door to Bailey's *hearsay* statement that he purchased the motorcycles. We conclude that it did not.

The proffered evidence does not fit within the open-door rule. First, the State introduced Bailey's statement admitting ownership of the motorcycle to prove possession. Bailey's proffered statement that he purchased the motorcycle does not "explain, clarify, or contradict" that evidence. *See Berg*, 147 Wn. App. at 939. Evidence that Bailey purchased the motorcycle is more detailed information about his ownership, but it is cumulative on the issue of possession.

Second, admitting the hearsay evidence is inconsistent with the open-door rule's purpose of promoting fairness and truth seeking. Presumably, Bailey sought to admit his statement that he purchased the motorcycle in order to argue that he did not know the motorcycle was stolen. But, because the State cannot compel Bailey's testimony, admitting Bailey's statement that he purchased the motorcycle would actually create the very problem that the "open-door" rule was meant to avoid.

Admitting the statement would allow Bailey to point to his statement as evidence that he did not know the motorcycle was stolen while also barring the State from inquiring about any of the details of the alleged transaction, *e.g.*, from whom he purchased it, the circumstances of the purchase, the purchase date, and the purchase price as compared to the market value. The trial court expressed its concerns with this very problem. The trial court explained that admitting Bailey's statement to law enforcement about purchasing the motorcycle was problematic because

it would place Bailey's version of the facts before the jury while depriving the State of the benefit of testing the credibility of the statements through cross-examination, and it would deny the jury an objective basis for weighing the probative value of the evidence.

Finally, it is important to note that the trial court did not bar all evidence of Bailey having purchased the motorcycle. Bailey could have submitted other evidence of the transaction or he could have decided to testify on his own behalf. Under these circumstances, the trial court did not abuse its considerable discretion in applying the open-door rule and excluding the evidence.

II. REASONABLE DOUBT INSTRUCTION

Bailey argues that the trial court's reasonable doubt instruction undercut the State's burden of proof by erroneously inviting the jury to search for the truth. He further argues that the trial court erred by refusing to define "abiding belief" in its jury instructions. We disagree.

"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). "It is reversible error to instruct the jury in a manner that would relieve the State of this burden." *Pirtle*, 127 Wn.2d at 656. "We review a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole." *Pirtle*, 127 Wn.2d at 656.

The instruction that Bailey complains of has never been held to be improper. To the contrary, our Supreme Court has directed the use of WPIC 4.01 to instruct juries of the nature of the government's burden. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). The trial court did exactly that, reproducing WPIC 4.01 verbatim. *See* 11 WPIC 4.01.

Bailey argues that WPIC 4.01 improperly suggests that the jury's role is to search for the truth. But WPIC 4.01 does not tell the jury to find the truth—it tells the jury to acquit the defendant

unless the government convinces the jury of the truth of the charge. WPIC 4.01 does not misstate the State's burden, and therefore, we hold that the trial court did not err by giving the WPIC 4.01 instruction.

Bailey also argues that the trial court erred by declining to define "abiding belief" based on its erroneous understanding that it lacked authority to do so.[5] It is within the trial court's discretion to determine whether words used in an instruction require definition. *State v. Castro*, 32 Wn. App. 559, 565, 648 P.2d 485 (1982). Although the trial court did have authority to define abiding belief, it is clear that the court did not want to define the term without clear guidance from the appellate courts or the WPIC committee. The reasonable doubt instruction the trial court used has been approved by our Supreme Court and upheld without the inclusion of additional instructions defining "abiding belief." *See Bennett*, 161 Wn.2d at 318. Therefore, we hold that

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[5] The trial court oral ruling is as follows:

> Definitions are also contained within the Washington Pattern Instructions. And at this point in time, there is no instruction for abiding belief. Counsel has proposed instructions that would help define abiding belief. I don' t have any authority under statute and/or case law where that issue has been tackled by the Court of Appeals or any trial court that I'm aware of where we've gotten some feedback other than to say that the use of that phrase has been upheld by our [U.S.] Supreme Court.
>
> But there's no definition in the WPICs that the committee who puts these instructions together meets on a regular basis, and as of this date, I'm not aware of any attempt to define "abiding belief." So I don't believe I have the authority to contain a definition of "abiding belief." I don't have any authority from any legislative or judicial decision. And I completely understand counsel's attempt to better define it, but I don't believe I have legal authority to attempt to do that.
>
> And it may be that our—the committee for these instructions will at some point allow a definition of "abiding belief" and/or our Supreme Court or Court of Appeals will help us define it, but I'm not going to make new case law when I don' t have any authority to do so. So I will respectfully decline to include the additional definitions as requested by counsel in Instructions 1 through 4.

RP at 226-27.

the trial court did not err by instructing the jury on reasonable doubt without defining "abiding belief."

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Johanson, C.J.

Bjorgen, J.