73295-1

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October 23, 2015
Court of Appeals
Division I
State of Washington

No. 73295-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

LAURA REED, Appellant.

BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007 / ADMIN. #91075

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the defendant may raise an issue regarding the reasonable doubt instruction where she did not object below and where the instruction is the one the Washington Supreme Court has directed trial courts to use.

2. Whether this matter should be remanded for the sentencing judge to reconsider that portion of the sentence imposing a jury demand fee, attorney fees and a domestic violence assessment where the judge mistakenly believed such legal financial obligations were mandatory.

C. FACTS

1. Procedural facts

On Dec. 17th, 2013 Appellant Laura Reed was charged by information with one count of Assault in the Second Degree, Domestic Violence, in violation of RCW 9.94A.030, 10.99.020 and 26.50.010, for her actions toward her son on or about December 15th. CP 2-3. She was found guilty by a jury on February 20, 2015 and was sentenced to a standard range sentence, with the alternative of work release. CP 50, 51, 59. She posted a $20,000 appeal bond. Supp. CP __, Sub Nom. 73, 88.

2. Substantive Facts

The State is providing an abbreviated statement of facts because Reed is not challenging any aspect of the trial except for whether the

reasonable doubt instruction provided was an accurate and lawful definition of the term.

In the late evening of Dec. 15, 2013, Reed and her 13 year old son, K.S., were in the living room of their home along with K.S.'s friend Matt and Reed's boyfriend Johnny Murdock. 2RP 20, 22, 24, 28, 114, 117. Reed and K.S. began to "play fight" with one another, which apparently was something they had done before. 2RP 27, 118. However, Reed, who had been drinking, became upset when she thought that K.S. had kicked her in her private parts. 2RP 30, Ex. 20. She demanded that K.S. apologize to her. 2RP 30, Ex. 20. When K.S. didn't apologize, she became irate and continued to demand that he apologize to her. 2RP 30-31, 118, Ex. 20. She punched him and bit him. 2RP 118, 120. When K.S. went to the ground, she sat on top of him, bounced on him, and at one point took a hockey stick and tried to hit him with it, all the while demanding that he apologize. 2RP 31-32, 118; Ex. 20. At one point while she was sitting on top of him, she put her knee across his throat and put the weight of her whole body on him, making it difficult for K.S. to breathe and effectively strangling him. 2RP 32.

Matt recorded the incident on K.S.'s Ipod and the recording was played for the jury. 2RP 33, 36, 119. K.S. can be heard making rasping sounds indicating that he was having difficulty breathing. Ex. 20. At one

point Matt asked Johnny if they should do something. 2RP 122. Matt eventually went over and touched Reed on the shoulder, and she got off K.S. and left the room. 2RP 120. Matt recorded K.S.'s injuries when K.S. went into the bathroom. 2RP 34. K.S. had a red, swollen face, a few bite marks on his legs and upper arm, as well as a torn ligament in his thumb. 2RP 34-35, 84; Ex. 2, 4, 20. Johnny then took Matt and K.S. to Matt's house. 2RP 36, 124. Matt's mother convinced K.S. to allow her to call the police. 2RP 46 125-26, 130.

D. ARGUMENT

Reed asserts only two issues in this appeal, one regarding the legal sufficiency of the reasonable doubt instruction and the other regarding whether the judge misapprehended the law when she imposed certain legal financial obligations under the belief that they were mandatory. This Court should decline to review the issue regarding the reasonable doubt instruction, an instruction that was given pursuant to WPIC 4.01 and which the Washington Supreme Court in State v. Bennett directed trial courts to use. Reed has failed to demonstrate a manifest error of constitutional magnitude regarding use of the phrase "a reasonable doubt is one for which a reason exists…" in WPIC 4.01. On the other hand, the State concedes that it appears that the judge imposed the jury demand fee, the public defender fees and the domestic violence assessment under the

misimpression that they were mandatory fees. Those ones are not. This matter should be remanded to the sentencing judge for the sole purpose of permitting the judge to decide whether to exercise her discretion to impose those same fees.

1. Reed may not assert for the first time on appeal that language within the WPIC 4.01 reasonable doubt instruction was erroneous because the Washington Supreme Court has directed that trial courts not deviate from that instruction.

Reed asserts that the trial court erred in the WPIC 4.01 reasonable doubt instruction it gave. Specifically Reed now takes exception to the language in the instruction defining reasonable doubt: "a reasonable doubt is one for which a reason exists…" He argues this phrase imposes on juries the obligation to articulate a reason to doubt before finding a defendant not guilty and is error in light of cases that hold it is improper to argue that in order to acquit the jurors must be able to state a reason they believe the defendant is not guilty. The Washington Supreme Court has required courts to use the WPIC 4.01 instruction in defining reasonable doubt. Reed did not object below or offer an instruction with alternative language. Reed may not raise this issue for the first time on appeal, and

this Court must follow the Supreme Court's directive in State v. Bennett[1] to adhere to the WPIC 4.01 language.

Reed takes exception for the first time on appeal to the court's instruction defining reasonable doubt as set forth in WPIC 4.01. Generally a court will not consider an issue that has not been raised in the trial court. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The court may review an issue for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). "Manifest" requires the defendant show actual prejudice. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). There must be a plausible showing that the asserted error had a practical and identifiable consequence in the trial of the case. Id. The error must be so obvious on the record that the issue warrants appellate review. Id. at 100.

The Washington Supreme Court has directed that WPIC 4.01 be used to define reasonable doubt *as is*. The Supreme Court has warned against any attempts to improve this instruction:

> We understand the temptation to expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction.

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[1] State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007).

State v. Bennett, 161 Wn.2d 303, 317, 165 P.3d 1241 (2007). The Supreme Court exercised its supervisory authority in Bennett and has directed trial courts to use that instruction:

> Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the *Castle* instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

Id. at 318. To change any of the language in the instruction would require overruling Bennett. This court is required to follow controlling precedent from the Supreme Court. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006). Only the Supreme Court can overrule Bennett. Moreover, the reasonable doubt instruction given by the court has been repeatedly approved by courts as a correct statement of the law for more than 50 years. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959), State v. Olson, 19 Wn. App. 881, 884-85, 578 P.2d 866 (1978), *reversed on other grounds*, 92 Wn.2d 134 (1979), State v. Pirtle, 127 Wn.2d 628, 656-658, 904 P.2d 245 (1995), *cert denied*, 518 U.S. 1026 (1996).

The trial court here gave the reasonable doubt instruction set forth in WPIC 4.01. CP 32, Inst. No. 3; WPIC 4.01. The defense did not object or take exception to this instruction. 3RP 39. Defense did file a separate packet of instructions, but did not offer an alternative to WPIC 4.01. CP 15-26. Defense had an obligation to submit the jury instructions it wanted the court to adopt. CrR 6.15(a).

It is Reed's burden to demonstrate a manifest error of constitutional magnitude in order to assert his specific argument for the first time on appeal. He has failed to show how actual prejudice resulted from the alleged erroneous phrasing, particularly in context of the instruction as a whole. Moreover, the reasonable doubt definition was not erroneous and was one the trial court was required to give. Therefore there is no manifest error justifying review.

In any event, this court already rejected Reed's arguments, in State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975).

The court there explained:

> [T]he 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.

Id. at 5, *citing* State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901). Today, that statement could be changed to "over 110 years." Recently the court again approved the instruction as a correct statement of the reasonable doubt standard in State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015).

Despite this line of authority, Reed argues the instruction erroneously required the jurors to articulate a reason to doubt and that since this type of argument has been held to be improper, the jury instruction on which such arguments were based should likewise be held improper and erroneous. The court's reasoning in Kalebaugh forecloses this argument. There, in preliminary instructions, the trial court instructed jurors on reasonable doubt using WPIC 4.01. The court then went on to explain reasonable doubt as a doubt "*for which a reason can be given* as to the defendant's guilt." Kalebaugh, 183 Wn.2d at 582. (emphasis added). The court found this additional instruction was manifest error. Id. at 584. The court specifically found the trial court's additional instruction was not akin to the fill-in the blank arguments it previously found erroneous. Id. at 585. The court concluded the error was harmless however because the instruction did not lower the State's burden of proof and the court properly instructed the jury several times using WPIC 4.01. Because that

instruction cured any prejudice that could have occurred from the erroneous instruction, the error was harmless. Id. at 585-86.

Since the court has specifically approved the language in WPIC 4.01, and found that even a deviation from that language did not require jurors to articulate a reason for doubt, the phrase "a reason is one for which a reason exists" in the standard instruction likewise does not impose that requirement on jurors. This Court should decline to review this claim.

2. That portion of the sentence imposing a jury demand fee, attorney fees and a domestic violence assessment should be remanded for the judge to reconsider whether to impose them because she stated she imposed them because they were mandatory.

Reed asserts that the judge was incorrect in believing that all of the legal financial obligations she imposed were mandatory, and therefore remand for resentencing on the "LFO issue" is necessary. App. Brief at 26. Reed acknowledges that the victim assessment fee, the DNA fee and the court filing fee are mandatory. The State agrees that to the extent that discretionary fees were imposed with the misapprehension that they were mandatory, remand is appropriate. However, remand should be limited to addressing whether the judge should impose the discretionary fees that were previously imposed, i.e., the domestic violence assessment, the jury demand fee and the fees for court appointed counsel.

In general a standard range sentence cannot be appealed. RCW 9.94A.585; State v. Osman, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). Limited review is available, however, "if the sentencing court failed to comply with procedural requirements of the Sentencing Reform Act ("SRA") or constitutional requirements." Osman, 157 Wn.2d at 481-482. In order to appeal based on the court's failure to follow a procedural requirement, the appellant must show that "the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so." State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). While a defendant may not challenge the length of a standard range sentence, s/he may appeal a trial court's interpretation of the sentencing statutes. *See*, State v. Adamy, 151 Wn. App. 583, 587, 213 P.3d 627 (2009) (defendant permitted to appeal denial of SSOSA based on statutory interpretation of the SSOSA statute). Limited review is also permitted where a court refused to exercise any discretion at all or relied upon an impermissible basis. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). "Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law." State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). Remand is not necessary, however, if the appellate court

concludes that the trial court would have imposed the same sentence in correctly applying the law. Id.

Reed acknowledges that the Crime Victim Assessment, the filing fee and the DNA fee are mandatory fees. App. Brief at 25. She contends that the jury demand fee, the public defender fees and the domestic violence assessment are discretionary however. The State agrees that the jury demand fee and the public defender fees are discretionary. RCW 36.18.016(3)(b); *see*, State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013) (jury demand fee is discretionary); State v. Wimbs, 74 Wn. App. 511, 516, 874 P.2d 193 (1994)(repayment of attorney fees by indigent defender cannot be mandatory). The domestic violence assessment is also discretionary. RCW 10.99.080(1).

As set forth in Appellant's brief, the judge stated that she was imposing the fees because they were mandatory. While the judge would have been fully within her discretion to impose all the fees, particularly where Reed was employed and the sentence permitted work release, she apparently erroneously believed the jury demand fee, the attorney fees and domestic violence assessment were mandatory. The court therefore erred in believing she did not have the discretion not to impose them.[2] This

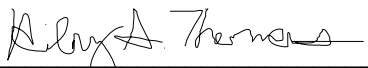
[2] To the extent that Reed makes some comments regarding the judge not considering Reed's ability to pay, the judge was aware that Reed was employed and granted her work

matter should be remanded only for reconsideration as to whether the jury demand fee, the public defender fees, and the domestic violence assessment should be imposed.

E. CONCLUSION

The State respectfully requests this Court to deny Appellant's appeal and affirm her conviction for Assault in the Second Degree.

Respectfully submitted this 23rd day of October, 2015.



HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent
Admin. No. 91075

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release, and specifically did consider Reed's ability to pay in setting the monthly amount for her to pay towards her legal financial obligations. 3RP 167-68.

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Casey Grannis
Nielsen, Broman & Koch, PLLC
1908 E Madison St
Seattle, WA 98122
grannisc@nwattorney.net
sloanej@nwattorney.net

TDAStavik _____ 10/23/15

Legal Assistant Date