NO. 45998-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

LARRY TARRER,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

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# SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT IN REPLY

The State contends the invited error doctrine bars review because defense counsel proposed WPIC 4.01 without the abiding belief language. Suppl. Br. of Resp't at 1-2 (citing CP 443). Under the invited error doctrine, "a party who set up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed to prevent parties from misleading trial courts and receiving a windfall by doing so." State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009).

Here, counsel did not "set up" the articulation error when he proposed WPIC 4.01. Counsel did not mislead the trial court either. Rather, defense counsel was just unaware of the nature of the challenge to WPIC 4.01 that Tarrer raises now.

Moreover, the State's claim that Tarrer's challenge to WPIC 4.01 is procedurally barred is inconsistent with its acknowledgment that our supreme court requires trial courts to give the WPIC 4.01 instruction in every criminal case. Suppl. Br. of Resp't at 2-3 (discussing State v. Bennett, 161 Wn.2d 303, 318-19, 165 P.3d 1241 (2007)). Even if Tarrer's attorney had not proposed WPIC 4.01, the trial court would have given the instruction anyway. This situation is unique because, as the State recognizes, (1) trial courts must define reasonable doubt and (2) trial courts must use WPIC 4.01

to do so. In such circumstances, Pollock's purported invitation of the error should not bar review.

The State also asserts this court cannot address Tarrer's constitutional challenge to WPIC 4.01 because the supreme court required that the instruction be given in Bennett. Suppl. Br. of Resp't at 2-5. But Bennett does not preclude this court's review.

The Bennett court, though requiring WPIC 4.01, acknowledged WPIC 4.01 was not problem-free, noting WPIC 4.01 was required only "until a better instruction is approved." Bennett hardly provides a ringing endorsement for WPIC 4.01, particularly where it did not address the arguments raised here.

In addition to Bennett, Tarrer recognizes that this court considered a similar challenge to the WPIC 4.01 language in State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975).[1] There, Thompson argued "a doubt for which a reason exists" "infringe[d] upon the presumption of innocence" and "misle[]d the jury because it require[d] them to assign a reason for their doubt[] in order to acquit." Id. This court "recognize[d] that this instruction has its detractors" but felt "constrained to uphold it" because the instruction was specifically approved in State v. Tanzymore, 54 Wn.2d 290, 340 P.2d

[1] Tarrer was not aware of Thompson or the cases cited therein when he filed the supplemental brief of appellant.

178 (1959), State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973), and State v. Harras, 25 Wash. 415, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. These cases do not control, however.[2]

All these cases were decided more than 40 years ago and can no longer be squared with State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), and the other fill-in-the-blank cases. See Suppl. Br. of Appellant at 7-8. In Emery, our supreme court held that an articulation requirement "impermissibly undermine[s] the presumption of innocence." 174 Wn.2d at 759. Because WPIC 4.01 requires the jury to articulate a reason for its doubt, it "subtly shifts the burden to the defense." Id. at 760. Given that the State will avoid supplying jurors with reasons to doubt, WPIC 4.01 suggests that either the jury or the defense should supply them, which degrades the presumption of innocence. Id. at 759.

Nor can these older cases be reconciled with this court's recent decision in State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014), which recognized that

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[2] The State also relies on State v. Pirtle, 127 Wn.2d 628, 658, 904 P.2d 245 (1995), in which our supreme court stated WPIC 4.01 "passed constitutional muster." Suppl. Br. of Resp't at 4-5. But, as the State acknowledges, Pirtle was considering a challenge not to the articulation requirement in WPIC 4.01 but to its "abiding belief" language. 127 Wn.2d at 658; Suppl. Br. of Resp't at 4. Because Pirtle adds nothing of value to the articulation issue Tarrer has raised, the State's reliance on it is inapt. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").

the trial court's preliminary instruction on reasonable requiring articulation would have been error had the issue been preserved. If an articulation requirement is unconstitutionally unfair when the prosecutor argues it in closing or when the trial judge instructs jurors with it before trial, it is equally if not more unconstitutionally unfair to require it in the trial court's definitional instruction on reasonable doubt at the end of trial. See id. at 427 (Bjorgen, J., dissenting) ("[I]f the requirement or articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge."). In light of the fill-in-the-blank cases and Kalebaugh, which all stand for the clear proposition that an articulation requirement is constitutional error, the cases approving WPIC 4.01 cited by the State and disclosed by Tarrer in this brief no longer control.

B. CONCLUSION

Tarrer's jury was given a constitutionally defective reasonable doubt instruction. This error requires reversal and a new trial.

DATED this 24th day of April, 2015.

Respectfully submitted,

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| Appellant. | ) | |

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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 24TH DAY OF APRIL, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LARRY TARER
NO. 37606-086
FCI GREENVILLE
P.O. BOX 5000
GREENVILE, IL 62246

**SIGNED** IN SEATTLE WASHINGTON, THIS 24TH DAY OF APRIL, 2015.

X Patrick Mayovsky

# NIELSEN, BROMAN & KOCH, PLLC

## April 24, 2015 - 1:55 PM

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