74401-1

NO. 74401-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL DAVID OSBORNE,

Appellant.

FILED
Apr 27, 2016
Court of Appeals
Division I
State of Washington

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

JANICE C. ALBERT
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. The Supreme Court has mandated that courts in criminal cases instruct jurors using WPIC 4.01 which defines reasonable doubt as a doubt for which a reason exists without any requirement that the jury be able to articulate any reason to doubt. Is WPIC 4.01 a correct statement of the law?

2. Should the court impose appellate costs when there is a realistic possibility that the defendant will have the future ability to pay?

II. STATEMENT OF THE CASE

On August 25, 2015, the defendant attempted to steal a motor vehicle. CP 38. At the time he was on community custody. 1 RP 13. The case went to trial in October.

The defense proposed only a few jury instructions and its packet did not include any instruction on reasonable doubt. CP 58-61. The court's proposed instructions included WPIC 4.01. CP 31. Asked if there were objections or exceptions to any of the court's instructions, the defense answered, "Your Honor, no objections or exceptions from the defense." 1 RP 94.

The jury found the defendant guilty of attempted theft of a motor vehicle. CP 38. The defendant stipulated that he had been

on community custody which added a point to his offender score of 14. 12/1/15 RP 2-3.

III. ARGUMENT

A. WPIC 4.01'S REASONABLE DOUBT DEFINITION DOUBT CORRECTLY STATED THE LAW AND IS CONSITUTIONALLY SOUND.

The defendant argues that the court erred when it instructed the jury on reasonable doubt using WPIC 4.01. His arguments have previously been rejected and should be rejected again.

The court instruction on reasonable doubt read as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> 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, after such consideration, you have an abiding belief in the truth of the charges, you are satisfied beyond a reasonable doubt.

WPIC 4.01; CP 43.

Every Washington court that has examined that reasonable doubt definition beginning 100 years ago and until today has found it correct and constitutionally sound. State v. Harras, 25 Wash. 416, 420, 65 P.2d 774 (1901); State v. Tanzymore, 54 Wn.2d 178, 178-79, 240 P.2d 290 (1959); State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975); State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007); State v. Kalebaugh, 183 Wn.2d 578, 585-86, 355 P.2d 578 (2015). In fact, the Supreme Court has mandated all courts in criminal cases to WPIC 4.01 as a correct statement of the law. Bennett, 161 Wn.2d at 306.

This defendant has provided no basis to depart over 100 years of precedent. Courts of appeal are bound to follow precedent of the Washington Supreme Court. State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006). WPIC 4.01 is "the correct legal instruction on reasonable doubt." Kalebaugh, 183 Wn.2d at 586.

The jury in the present case was correctly instructed and the conviction should be affirmed.

1. WPIC 4.01 Preserves The Presumption Of Innocence And Contains No Articulation Requirement.

WPIC 4.01 does not contain an articulation requirement. Thompson, 13 Wn. App. at 5. In fact, a prosecutor misstates the

law when he suggests otherwise. State v. Emery, 174 Wn.2d 741, 278 P3d 653 (2012); State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 926 (2012); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813, 170 Wn.2d 1003 review denied 170 P.2d 1003 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273, review denied 170 Wn.2d 1002 (2009).

In Emery, the prosecutor argued that a reasonable doubt was "a doubt for which a reason exists." That was a correct statement of the law. Error occurred when the prosecutor went farther and argued that the jury had to be able to articulate the reason for its doubt. 174 Wn.2d at 759-60.

2. WPIC 4.01 Is Not Misleading And Defines Reasonable Doubt In A Manner Understandable To The Average Juror.

"The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law." State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981); State v. Hayes, 73 Wn.2d 268, 572, 439 P.2d 978 (1968). Jury instructions "must make the relevant legal standard manifestly apparent to the average juror." State v. Smith, 174 Wn. App. 359, 369, 298 P.3d 785, review

denied, 178 Wn.2d 1008 (2013), quoting State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

As the United States Supreme Court noted:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 380-81, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

Defense asks this court to parse WPIC 4.01 to give it subtle shades in meaning that simply would not exist in the mind of a juror. There is no reason to believe that jurors would engage in that sort of technical hairsplitting.

The approach of other states is varied when it comes to defining reasonable doubt. Several court decline to give a definition because "reasonable doubt" is "self-defining." Broadnax v. State, 825 So. 2d 134, 198 (Ala. Crim. App. 2000), aff'd sub nom Ex parte Broadnax, 825 So. 2d 233 (Ala. 2001); Paulson v. State, 28 S.W.3d 570, 572 (Tex. Crim. App. 2000); Johnson v. State, 632 P.2d 1231 (Okl.Cr. 1981); People v. Johnson, 119 Cal. App. 4th 976, 986, 14 Cal. Rptr. 780 (2004).

Several states use language identical to or similar to Washington's "abiding belief" language, also given in this case. See State v. Sheahan, 139 Idaho 267, 273, 77 P.3d 956, 962 (Id. 2003). Montana has approved a definition that uses "proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs." State v. Flesch, 254 Mont. 529, 535-36, 48 St.Rep. 539 (Mt. 1992). Nebraska uses an "actual and substantial doubt" definition. State v. Putz, 11 Neb. App. 332, 342, 650 N.W.2d 486 (Neb. 2002). California courts have said reasonable doubt needs no definition but have approved an instruction, CALJIC 2.90 that says beyond a reasonable doubt means an abiding conviction of the truth of the charge. People v. Johnson, 119 Cal. App. 4th 14 Cal. Rptr. 780 (2004);

Other state courts recognize, as do Washington courts, that jury instructions are to be considered as a whole, not individually. Putz, 11 Neb. App. at 345; State v. Sheahan, 139 Idaho 267, 273, 77 P.3d 956 (Id. 2003); State v. Williams, 213 Or.19, 37-38, 828 P.2d 1006 (Or. 1992) (even if definition of reasonable doubt is "couched in phraseology which is, by chance, misleading",

instruction not erroneous unless it misleads jury to convict on less than reasonable doubt).

The United States Supreme Court agrees with that analysis.

> The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury."

Victor v. Nebraska, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citations omitted). The proper inquiry is not whether the instruction could have been misapplied but whether there was a reasonable likelihood the jury misapplied it and convicted on insufficient proof. Id.

The defendant in the present case suggests that the use of the article "a" is problematic. It is not. Jurors were instructed that on the State's burden and the defendant's lack of a burden.

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

CP 43 (emphasis added). They were instructed on the continuing presumption of innocence.

> This presumption [of innocence] continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

Id. (emphasis added). They were instructed that a reasonable doubt was one for which a reason existed.

> 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, after such consideration, you have an abiding belief in the truth of the charges, you are satisfied beyond a reasonable doubt.

Id. (emphasis added).

The instruction used the article 'a' each time it uses the phrase 'reasonable doubt'. It used the article 'a' when it defined a reasonable doubt as a doubt for which a reason exists. The use of the article does not change the meaning of the instruction.

There is no magic language that must be used to define reasonable doubt. Washington's definition is simple, easy to understand, and constitutional. It did not require the jury to articulate the reason for doubt. It did not require the jury to find a

reason to acquit. It did not suggest that the defense had a burden to supply a doubt. In short, it passed constitutional muster.

B. THE COURT SHOULD AWARD THE STATE APPELLATE COSTS.

When the defendant was sentenced, he told the court about his past and future ability to earn a living. Until about 2013, he had owned his own business doing car repair work "among other types of entrepreneurial jobs. He hoped to have the same type of work once released. He was a journeyman and an operating engineer. When the court said it sounded as if he had the ability to get out and make a living, the defendant said, "Of course." 12/1/15 RP 6, 8, 10. The court sentenced him to 40 months in prison and imposed only the mandatory financial obligations and reserved restitution which was not sought. Id.

The court also considered a motion for assigned counsel on appeal. In his declaration, the only information the defendant provided was that he was unmarried, employed, had a small bank account, a car, and two children. __ CP __ (sub. no. 45, Motion and Declaration). The court made a finding of indigence and approved the proposed order for an appeal at public expense. 12/1/15 RP 11; CP 16-18.

The authority to recover costs stems from the legislature. State v. Nolan, 141 Wn.2d 620, 627, 8 P.3d 300 (2000). The Rules of Appellate Procedure (RAP) direct courts of appeal to determine costs after filing a decision that terminates review (except for voluntary withdrawals). RAP 14.1(a). The panel of judges deciding the case has discretion to refuse costs in the opinion or order. RAP 14.1(c) and 14.2.

The current ability to pay costs is not the only relevant factor. State v. Sinclair, 192 Wn. App. 380, 389, 367 P.3d 612 (2016). The court may consider whether the defendant will have the ability to pay if and when the State attempts to sanction. State v. Blank, 131 Wn.2d 230, 246-47, 930 P.2d 1213 (1997). If costs are imposed and a defendant is unable to repay in the future, the statute contains a mechanism for relief. Id. at 250.

In the present case, the trial court authorized an appeal at public expense, apparently based on the defendant's current inability to finance an appeal. The order could not have been based on a determination of future ability to pay because the defendant insisted that he would be able to find employment in the future when released from custody.

In Sinclair, the defendant was 66-years old and sentenced to a minimum of 280 months in custody. 192 Wn. App. at 393. Sinclair was indigent at sentencing and there was no finding that his indigence was likely to improve. The court said there was "no realistic possibility" that Sinclair would ever be released and be able to find "gainful employment that will allow him to pay appellate costs." Id.

All of the information presented in the instant case leads to the opposite conclusion. The defendant was 38 years old, had owned his own business, and had other skills that made him employable. That information illustrates that he could look forward to many profitable years of employment. The defendant was sentenced to only 40 months in custody. Even if he served every day of his sentence, he would still be a relatively young man with many productive years of employment ahead of him when released.

There is no basis on this record to deny the imposition of appellate costs. Appellate costs should be imposed.

IV. CONCLUSION

For the foregoing reasons, the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on April 26, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: _____
JANICE C. ALBERT, #19865
Deputy Prosecuting Attorney
Attorney for Respondent

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

THE STATE OF WASHINGTON, Respondent, v. ISRAEL DAVID OSBORNE, Appellant.	No. 74401-1-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of April, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Casey Grannis, Nielsen, Broman & Koch, grannisc@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of April, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office