69797-8

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NO. 69797-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SANDRA HIMMELMAN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY.

1. The failure to fully instruct the jury on the nature and scope of the knowledge element violated Ms. Himmelman's right to jury trial and due process of law

Ms. Himmelman requested the jury be instructed pursuant to WPIC 10.02 regarding the knowledge requirement with the additional explanation that notwithstanding what a "reasonable person" might have known under the circumstances, "that [the defendant] was less attentive or intelligent than the ordinary person and did not act with knowledge of that fact." CP 72-73; RP 146; State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980). This additional language was necessary and appropriate to explain clearly the difference between subjective and objective examination of what the accused would have known. RP 146.

The constitutional right to due process of law requires not just that the jury be instructed on each element of the offense, but that the instructions provide any necessary guidance in the jury's deliberations in order to arrive at a proper verdict. State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). The instructions must explain the law of the case, point out the essential elements, and

bring into view the relation between the evidence presented to the particular issues involved. Bird v. United States, 180 U.S. 356, 362, 21 S.Ct. 403, 45 L.Ed. 570 (1901).

Where, as here, there is substantial evidence in the record to sustain a theory on which an instruction is sought, it should be given. State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006). Ms. Himmilmen was, therefore, entitled to have the court instruct the jury on her theory of the case where there was ample evidence to support that theory. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); State v. Brown, 130 Wn.App. 767, 770, 124 P.3d 663 (2005).

While "knowledge" itself may be commonly understood, the presumptions and inferences related to knowledge are unique and require clear direction for the jury. See e.g. Shipp, 93 Wn.2d 515-17 (three potential interpretations of "knowledge" under the RCW 9A.08.010(1)(b)); Sandstrom v. Montana, 442 U.S. 510, 512-19, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (due process prohibits the use of a conclusive or irrebuttable presumptions); 13 Ferguson, WA PRAC. Criminal Practice and Procedure, § 4403 (2004). The trial court was,

therefore, required to give the instruction requested because it correctly stated the law, was supported by evidence, and was necessary to clarify the application of the presumptions and inferences of knowledge. State v. Adams, 31 Wn.App. 393, 396, 641 P.2d 1207 (1982); Ferguson, at § 4405.

In this case, the court's instruction allowed the jury to find the defendant had knowledge if a "reasonable person in the same situation [would] believe that a fact exists." CP 57. In the absence of the language requested by Ms. Himmelman, the jury was not required to find she personally had actual knowledge, rather than a form of constructive knowledge based on what the fictitious reasonable person would know. This is problematic, however, because "[t]he jury must still find subjective knowledge" on the part of the accused. Shipp, 93 Wn.2d at 517.

The prosecutor argues several appellate cases have failed to provide relief where the WPIC was given, however, material differences in the circumstances limit their application here. In Davis, this Court found no error in the failure to instruct using the language here, but Davis was implicated in the robbery by a co-

defendant and never defended based on the lack of understanding that Ms. Himmelman. State v. Davis, 39 Wn.App. 916, 919, 696 P.2d 627 (1985). Similarly, in Kees, a promoting prostitution case, the Court simply noted that jury was allowed to consider subjective intelligence or mental condition under the standard instruction, but never addressed the question presented here where the evidence indicated Ms. Himmelman was apparently on medication which appeared to impede her thought processes. State v. Kees, 48 Wn.App. 76, 737 P.2d 1038 (1987). Finally, in Barrington this Court again reiterates that a permissive inference in the knowledge instruction may avoid the constitutional problem identified in Shipp, but still does not address a circumstance such as this were the additional instruction is necessary because of the unique evidence presented. Cf. State v. Barrington, 52 Wn.App. 478, 485, 761 P.2d 632 (1988).[1]

Unlike the cases cited by the prosecutor, the absence of the language Ms. Himmelman's proposed materially limited her ability

[1] Reliance of State v. Rivas, 49 Wn.App. 677, 746 P.2d 312 (1987), appears misplaced because the Court notes that, "the jury was required to find the mental state of intent or intentional conduct, not the mental state of knowledge. Thus, the instruction on knowledge was superfluous." Id. at 689.

to argue her theory of the case because the knowledge instruction left the jury free to impute a form of constructive knowledge. Furthermore, it failed to make clear that whether that result was reached by direct or circumstantial evidence, that actual knowledge of the forgery and use of Ms. Rygg's account number was required. The instructions given instead allowed the jury to find knowledge if a reasonable person would have known, without regard to Ms. Himmelman's actual knowledge. Shipp, 93 Wn.2d at 517 ("The jury must still find subjective knowledge."); CP 57. That has the very real likelihood of producing a conviction without the jury finding the essential element of actual knowledge.

Failing to clearly define the actual subjective nature of the knowledge requirement effectively misled the jury regarding its responsibilities under the law. Where the jury was incorrectly instructed on the law, other instructions cannot negate the error. State v. Wanrow, 88 Wn.2d 221, 236, 559 P.2d 548 (1977). The failure to give the clarifying instruction resulted in the jury being effectively misled and constitutes reversible error because it severely

limited Ms. Himmelman's ability to present her theory of the case. Reversal and remand for a new trial is required.

2. The "abiding belief" instruction undercut the State's burden of proof by erroneously equating the jury's job with a search for the "truth" rather than a test of the prosecution's case.

Ms. Himmelman continues to believe the trial court's use of the "abiding belief" instruction was error. RP 144. It is clear now that a jury's role is to test the substance of the prosecutor's allegations, not to simplistically search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); State v. Berube, 171 Wn.App. 103, 120, 286 P.3d 402 (2012) ("... truth is not the jury's job."). Equating proof beyond a reasonable doubt with having a "belief in the truth" of the charge, blurs the critical role of the jury and encourages it to undertake an untethered search for "the truth." The presumption of innocence is, in turn, diluted or even "washed away" by this confusion created in the instructions. See State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

The prosecutor's reliance on outdated case-law ignores the more recent jurisprudence which clearly illustrates the problematic

nature of this language. See Emery, 174 Wn.2d at 759-60.[2] Emery clearly identifies the danger of injecting a "search for the truth" into the definition of the State's burden of proof. It 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. 174 Wn.2d at 760.

Because this language improperly instructs the jury on the meaning of proof beyond a reasonable doubt it is structural error. See e.g. Sullivan v. Louisiana, 508 U.S. 275, 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, at 757 (quoting Sullivan, 508 U.S. at 281–82). It was particularly important here that the jury clearly understand that its job was "to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

Ms. Himmelman, therefore, asks this Court to 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,"

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[2] Where the prosecution tells the jury that "your verdict should speak the truth," or "the truth of the matter is, the truth of these charges, are that" the

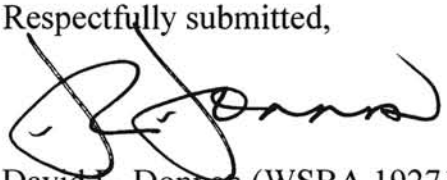
misstates the prosecution's burden of proof, confuses the jury's role, and denied her the fair trial by jury protected by the state and federal constitutions. U.S. amends. 6, 14; Const. art. I, §§ 21, 22.

B. CONCLUSION.

For the reasons stated herein, Ms. Himmelman respectfully asks this Court to reverse her conviction and remand to the superior court for further proceedings as appropriate.

DATED this 5th day of December 2013.

Respectfully submitted,



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defendants are guilty, they misstate the jury's role. Id. at 764 n.14.

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

STATE OF WASHINGTON, Respondent, SANDRA HIMMELMAN, Appellant.	)))))))))	NO. 69797-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	SANDRA HIMMELMAN 1426 136TH ST SE MILL CREEK, WA 98102	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 5TH DAY OF DECEMBER, 2013.

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