72056-2

NO. 72056-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ADAN YUSUF,

Appellant.

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

The Honorable William L. Downing, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. WPIC 4.01 UNCONSTITUTIONALLY MISSTATES THE REASONABLE DOUBT STANDARD, IS STRUCTURAL ERROR, AND THUS MAY BE RAISED FOR THE FIRST TIME ON APPEAL

WPIC 4.01's articulation requirement undermines the presumption of innocence, eases the State's burden of proof, and misstates the reasonable doubt standard, which qualifies it as a structural error under United States Supreme Court precedent. Br. of Appellant at 12 (citing Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

"Nothing in our rules or our precedent precludes different treatment of structural error as a special category of 'manifest error affecting a constitutional right.'" State v. Wise, 176 Wn.2d 1, 18 n.11, 288 P.3d 113 (2012) (quoting RAP 2.5(a)(3)); see also State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012) (holding "there is good reason to treat structural errors . . . differently" because assessing the effects of a structural error are difficult and "[r]equiring a showing of prejudice would effectively create a wrong without a remedy"). The structural nature of the instructional error on reasonable doubt overcomes the State's RAP 2.5 waiver argument as a matter of law.

Furthermore, the rules of appellate procedure are to "be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). The determination of cases will not depend on compliance or noncompliance with the rules "except in compelling circumstances where justice demands . . . ." Id. The State does not attempt to make any showing of compelling circumstances that would support the avoidance of this case's merits. And even if the structural error in this case did not qualify as manifest constitutional error under RAP 2.5(a)(3), that rule is merely permissive rather than mandatory. See RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."). This court should reach the merits and reverse.

2. REQUIRING JURORS TO ARTICULATE THE REASON FOR THEIR DOUBT IS UNCONSTITUTIONAL

The State indicates that Yusuf's reading of WPIC 4.01 constitutes a "strained reading of [the] instruction." Br. of Resp't at 5. However, the State provides no analysis to support its mistaken claim that Yusuf's reading is strained or otherwise incorrect.

The difference between "reason" and "a reason" is obvious to any English speaker. The first requires logic and the second requires an explanation or justification. The plain language of WPIC 4.01 instructs jurors they must articulate the reason for their doubt. This is not a strained

interpretation of WPIC 4.01, but a commonsense recognition that placing the article "a" before the word "reason" invokes a different meaning in the English language. An instruction like "a reasonable doubt is one based in reason" means something entirely different than "a reasonable doubt is one for which a reason exists." The former does not require jurors to articulate their doubt; it requires only that their doubt be based on reason and logic, which properly comports with United States Supreme Court precedent. Br. of Appellant at 5-7; see, e.g., Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). WPIC 4.01 plainly engrafts an articulation requirement onto the reasonable doubt standard, and the State has not argued otherwise.

Instead, the State relies on several cases that have approved of WPIC 4.01's language. But none of these cases controls because none has addressed Yusuf's arguments or the more recent cases holding an articulation requirement to be unconstitutional.

The State relies on State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007), which required that WPIC 4.01 be given in every criminal case. Br. of Resp't at 6-7. However, the Bennett court acknowledged WPIC 4.01 was not problem-free, noting WPIC 4.01 was required only "until a

better instruction is approved." 161 Wn.2d at 318. Similarly, the State cites State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975), but there the court "recognize[d] that this instruction has its detractors" yet felt "constrained to uphold it." Bennett and Thompson hardly provide a ringing endorsement for WPIC 4.01, particularly where neither court addressed the arguments raised here.

In addition to Bennett and Thompson, the State also cites State v. Harras, 25 Wash. 416, 65 P. 774 (1901), State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973), for the proposition that courts have already considered and rejected the "reason to doubt" argument. But these cases, with the exception of Pirtle,[1] 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 Br. of Appellant at 8-10.

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

[1] The Pirtle court merely recognized that WPIC 4.01 had previously "passed constitutional muster" and was considering a challenge not to the articulation requirement in WPIC 4.01 but to its "abiding belief" language. 127 Wn.2d at 658. Pirtle adds nothing valuable to the State's claims.

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.

The State simplistically points out that the Emery court approved of WPIC 4.01's language. Br. of Resp't at 9. However, the State provides no response to Yusuf's observation that Emery did not explain why an articulation requirement is unconstitutionally unfair when the prosecutor argues it in closing but not unconstitutionally unfair when the trial court requires articulation in a jury instruction. Br. of Appellant at 11. Because the Emery court was not considering a direct challenge to WPIC 4.01's language, its approval of WPIC 4.01's language does not and cannot preclude Yusuf's argument that the articulation requirement is unconstitutional in all contexts.

Furthermore, the State's reliance on old cases is particularly feeble given that it does not once mention the most recent case on articulation, State v. Kalebaugh, 179 Wn. App. 414, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014). There, Division Two stated the articulation requirement in a trial court's preliminary instruction on reasonable doubt was error, but the error had not been preserved. Id. at 421-23. Although the Kalebaugh majority stated it could not analogize "a prosecutor's fill-in-the-blank argument during closing[] [to] a trial court's preliminary instruction

before the presentation of evidence," it provided no explanation or analysis to support this position. Id. at 423; Br. of Appellant at 11 n.2. A judge's erroneous instruction requiring articulation of a reasonable doubt more greatly damages the presumption of innocence than a prosecutor's closing argument ever could. See Kalebaugh, 179 Wn. App. at 427 (Bjorgen, J., dissenting) ("[I]f the requirement of 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 cited by the State approving WPIC 4.01 no longer control.

Finally, the State invokes the doctrine of stare decisis, arguing that Yusuf must show the cases approving WPIC 4.01 are incorrect and harmful. Br. of Resp't at 10 (citing In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). But, as discussed, none of the cases the State cites addresses the precise issue or arguments Yusuf raises, and therefore none of them needs to be overruled for Yusuf to challenge WPIC 4.01's articulation requirement. 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."). Moreover, given that this court

lacks the authority to overrule Washington Supreme Court cases, it would be counterproductive to ask this court to do so even if it were necessary.

Rather than address the substance of the articulation requirement issue, the State's tactic is to hope this court will not consider the serious flaw that a basic examination of WPIC 4.01's language reveals. This court should address the substance of Yusuf's arguments and reverse.

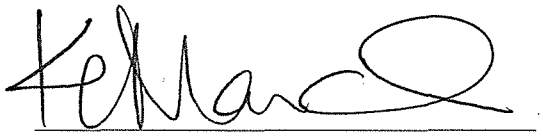
B. CONCLUSION

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

DATED this 20th day of April, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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	)	
Appellant.	)	

DECLARATION OF SERVICE

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 20TH DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ADAN YUSUF
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SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF APRIL 2015.

X Patrick Mayovsky