NO. 72168-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW DEMPSEY,

Appellant.

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

The Honorable LeRoy McCullough, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE UNCONSTITUTIONAL "REASON TO DOUBT" JURY INSTRUCTION IS STRUCTURAL ERROR THAT REQUIRES REVERSAL.

In response to Dempsey's reason to doubt argument, the State asserts the invited error doctrine bars review because Dempsey proposed WPIC 4.01. Br. of Resp't, 15. Under the invited error doctrine, "a party who sets 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).

Dempsey proposed an altered WPIC 4.01 that omitted the "abiding belief" language. The proposed instruction still included the "reasonable doubt is one for which a reason exists" language. CP 20. Nevertheless, the invited error doctrine does not apply here. The Washington Supreme Court specified in State v. Bennett that "jury instructions *must* define reasonable doubt." 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (emphasis added). As such, the Bennett court instructed trial courts to give the WPIC 4.01 instruction in every criminal case, at least "until a better instruction is approved." Id. at 318. Therefore, even if Dempsey had not proposed the instruction, the trial court was required to give it under Bennett. Dempsey did not invite the error.

Typically a party cannot request a jury instruction and later challenge that instruction on appeal. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). However, this case is unique in that (1) trial courts *must* define reasonable doubt and (2) they *must* use WPIC 4.01 to do so. Given this unique situation, the State's claim of invited error should be rejected.

The Bennett court also emphasized that "[t]he presumption of innocence is the bedrock upon which the criminal justice system stands." Id. at 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. Courts must therefore vigilantly protect the presumption of innocence, id., and have done so in other contexts. See Br. of Appellant, 11-13.

In addition to the unconstitutional fill-in-the-blank arguments, Division Two recently acknowledged that an articulation requirement in a trial court's preliminary instruction on reasonable doubt would have been error had the issue been preserved. State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014). The court determined Kalebaugh could not demonstrate actual prejudice given that the trial court instructed the jury with WPIC 4.01 at the end of trial. Id. at 422-23. The court therefore concluded the error was not manifest under RAP 2.5(a). Id. at 424.

In sidestepping the issue before it on procedural grounds, the Kalebaugh court pointed to WPIC 4.01's language with approval. Id. at 422-23. The Kalebaugh court stated it "simply [could not] draw clean parallels between cases involving a prosecutor's fill-in-the-blank argument during closing, and a trial court's improper preliminary instruction before the presentation of evidence." Id. at 423. But the court did not explain or analyze why an articulation requirement is unconstitutional in one context but is not unconstitutional in all contexts. As the dissenting judge correctly surmised, "if 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." Id. at 427 (Bjorgen, J., dissenting).

The State argues Washington courts have already considered and rejected the reason to doubt argument, citing State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975), and State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959). Br. of Resp't, 16-18. The Thompson court concluded it was "constrained to uphold" the instruction, even though it "has its detractors." 13 Wn. App. at 5. This is hardly a ringing endorsement of the reason to doubt instruction.

Furthermore, Thompson and Tanzymore were decided over 40 years ago and can no longer be squared with Emery and the fill-in-the-blank cases. The Emery court held that an articulation requirement "impermissibly

undermine[s] the presumption of innocence." State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). WPIC 4.01 requires the jury to articulate a reason for its doubt, which "subtly shifts the burden to the defense." Id. at 760. Because the State will avoid supplying reasons to doubt in its own case, WPIC 4.01 suggests either the jury or the defense should supply them, "further undermining the presumption of innocence." Kalebaugh, 179 Wn. App. at 426 (Bjorgen, J., dissenting). "The logic and policy of the decision in [Emery] impels the conclusion" that the articulation requirement in WPIC 4.01 is "constitutionally flawed." Id. at 424. Thus, Thompson and Tanzymore no longer control.

Lastly, the State argues Dempsey's challenge to the reasonable doubt instruction is hypertechnical. Br. of Resp't, 18-19. The State is absolutely correct that courts "should be concerned with the meaning of the instruction . . . to a jury of ordinarily intelligent laymen." Br. of Resp't, 19 (quoting Wims v. Bi-State Dev. Agency, 484 S.W.2d 323, 325 (Mo. 1972)). That is precisely the problem with WPIC 4.01. The difference between "reason" and "a reason" is obvious to any lay person. 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.

Contrary to the State's argument, Dempsey's challenge is not hypertechnical merely because the use of the article "a" invokes different

meanings in the English language. For instance, an instruction like, "a reasonable doubt is one that is 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 comports with U.S. Supreme Court precedent. Br. of Appellant, 9-11; 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).

Scholarship also elucidates the problems with requiring jurors to articulate their doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.

> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, a juror could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt.

An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury-trial guarantee. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as structural error." Id. at 281-82 (internal quotation marks omitted); see also State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (error in defining reasonable doubt is "a grievous constitutional failure").

The articulation requirement in WPIC 4.01 undermined the presumption of innocence, and is therefore structural error. This Court should accordingly reverse and remand for retrial before a jury that is accurately instructed on the meaning of reasonable doubt.

2. JUROR ONE'S BIAS AND INATTENTION REQUIRED HER TO BE DESIGNATED AS AN ALTERNATE.

The State emphasizes that the trial court reminded jurors numerous times throughout trial of their duty to remain impartial and maintain an open mind. Br. of Resp't, 5. The State then points to the presumption that jurors follow the court's instructions. Br. of Resp't, 12 (citing State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)). But this is precisely the point of Dempsey's argument. With her crying and visual fixation on Dempsey, Juror One demonstrated she was unable to follow the court's instructions. CP 75-80; 7RP 7-11. Juror One's actions rebutted the presumption that jurors follow the court's instructions.

The State also emphasizes that defense counsel refused the trial court's offer to conduct further inquiry with Juror One. Br. of Resp't, 7, 9. For instance, the State asserts "because Dempsey had turned down the trial court's offer to inquire of juror number one, there was no real information about her opinions—i.e., no basis upon which to determine that she was biased." Br. of Resp't, 7. However, Washington case law is clear that there

is no mandatory format for determining a juror's inattention or bias. State v. Elmore, 155 Wn.2d 758, 774-75, 123 P.3d 72 (2005); State v. Jorden, 103 Wn. App. 221, 229, 11 P.3d 866 (2000). Rather, "the trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party." Jorden, 103 Wn. App. at 226; accord Elmore, 155 Wn.2d at 774-75.

Thus, it is not dispositive that defense counsel refused further inquiry with Juror One. Defense counsel explained, "I would have a concern that individual inquiry of the jury at this point in time would potentially result in creating more of a problem than perhaps it would solve, in terms of her attitude about the case, or where she's coming from at this point." 7RP 72. The court therefore acted within its discretion in not questioning Juror One individually, in order to prevent further prejudice to the defense.

The court did abuse its discretion, though, in refusing to designate Juror One as an alternate. The record sufficiently establishes Juror One's bias. Her crying,[1] followed by her visual fixation on Dempsey, demonstrated she already made up her mind about the verdict. This violated

[1] The State argues that "[t]he trial court did not find, as defense counsel below claimed, that juror number one appeared to have been crying." Br. of Resp't, 9 n.5. The State is correct that the judge did not see Juror One crying. 7RP 70. However, both defense attorneys saw Juror One "wiping her eyes as if she was crying." 7RP 69. The prosecutor also acknowledged there were tissues next to Juror One's seat. 7RP 72. Based on these facts, the State cannot legitimately claim there is no evidence of Juror One crying during closing argument.

the court's instructions and the presumption of innocence, which continues through deliberations until the jury reaches a unanimous verdict. WPIC 4.01. Washington case law is clear that a juror is unfit if she refuses to follow the court's instructions. Elmore, 155 Wn.2d at 773. This Court should reverse and remand for a new trial before an impartial jury.

B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse Dempsey's convictions and remand for a new trial.

DATED this 16th day of April, 2015.

Respectfully submitted,

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DIVISION ONE

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	)	
ANDREW DEMPSEY,	)	
	)	
Appellant.	)	

CORRECTED 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 16TH 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] ANDREW DEMPSEY
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SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF APRIL 2015.

X Patrick Mayovsky