

state of wasington
v.

No. 72 803-2-1

Ramon Brandon

Statement of additional
Grounds for review

I Brandon Ramon have received and reviewed the opening brief prepared by my attorney. Summarized pages are the additional grounds for review that are not addressed in that brief. I understand the court will review this. Statment of additional grounds for review when my appeal is considered on the merits,

2015 OCT -5 AM 11:41
COURT OF APPEALS
STATE OF WASHINGTON

Dated: 9-26-15

Signed: Ramon Brandon

Ground 1 ~~page~~ Due process 5th Amendment

Evidence insufficient: Petitioner's conviction was obtained as the result of evidence that is insufficient to persuade a properly instructed, reasonable jury of his guilt beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307 (1979)

Reasonable Doubt: Elements of charge

Petitioner's conviction was based on less than proof beyond a reasonable doubt of each and every element of the charged crime.

In re Winship 397 U.S. 358 (1970)

A jury found me not guilty of possession of a weapon, and not guilty of assault, ~~so~~ therefore minus two elements of the charge of Robbery in the first degree and no jury instruction of lesser charges, I feel that the ~~charges~~ conviction be overturned and have the case dismissed is the appropriate remedy

Grounds 1 and 2

Petitioners constitutionally guaranteed rights under the U.S.C., 6th and 14th, amended; U.S.C., art. 1 § 3, 21, 22 were violated due to ineffective assistance of counsel, and appellate counsel, for failing to challenge the jury instruction on reasonable doubt (w.p.c. 4.01) jury instruction NO. CP-23, as being unconstitutional.

Supporting facts:

Petitioners jury was instructed "a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence".

CP-23

(jury instruction NO. CP-23). See

also, II Washington Practice: Washington Pattern jury instruction: Criminal 4.01, at 85 (3d ed. 2008) (w.p.c.). The Washington Supreme Court requires that trial courts provide this instruction in every criminal case, at least - "Until a better instruction is approved". State v. Bennett, 161 Wn.2d 303, 318 (2007). However, W.p.c. 4.01 is constitutionally defective for two reasons. First it instructs jurors they must be able to articulate a reason for having a reasonable doubt. Because jurors must have more than just reasonable doubt - they must also have an articulable doubt - this makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt is identical to "fill-in-the-blank" arguments, which Washington courts have invalidated in prosecutorial misconduct case. If fill-in-the-blank arguments impermissibly shifts the burden of proof, so does an instruction requiring the same thing, W.p.c. 4.01's language improperly adds an articulation requirement. Having a reasonable doubt is not, as a matter of plain English, the same as having reason to doubt, but W.p.c. 4.01 requires both for a jury acquit. A basic examination of the meaning of the word "reasonable" and "reason" reveals the significant flaw in W.p.c. 4.01. "Reasonable" means "being in agreement with right thinking or right judgement; not conflicting with reason, not absurd; not ridiculous. being or re-

remaining within the bounds of reason. Having the faculty of reason; "Rational... possessing good sound judgment". *Id.* at Webster's Third Int'l Dictionary 1892 (1993) - Thus for a doubt to be reasonable, it must be logically derived, rational, and have no conflict with reason. See, *Jackson v. Virginia*, 443 U.S. 307, 317 (1979) "(A reasonable doubt; at a minimum, is based upon reason)"; *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972) (collecting cases defining reasonable doubt as one) "based on reason which arises from the evidence or lack of evidence" (Quoting *United State v. Johnson*, 343 F.2d 5, 6n.1 (2nd cir. 1965)).

The placement of the article "a" before "reason" in upic 4.01 "a reason" means "an expression or statement offered as a explanation of a belief or assertion or as justification". Webster's *Supra* at 1891. In contrast to "reason" which refers to a doubt based on reason or logic, "reason" requires reasonable doubt to be capable of explanation or justification.

In other words, upic 4.01 requires not just reasonable doubt, but also an explainable, articulable doubt. Due process "Protects the accused, against conviction except upon proof beyond a reasonable doubt." *In Re Winship*; 397 U.S. 358, 364 (1970). But in order for the jury to acquit under upic 4.01, reasonable doubt is insufficient. Rather, wash court instructs juries that they must be able to point to a reason that justifies their reasonable doubt. A juror might have reasonable doubt but also have difficulty articulating or explaining the reason for that doubt. A case might present such voluminous and contradictory evidence that a juror with legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. But despite having reasonable doubt, the juror could not vote to acquit under upic 4.01. Scholarship on the reasonable doubt standard elevates similar concerns 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) the State's witness was reliable", the juror might be expected to then

Day why the witness was not credible. The requirement for reasons can all too easily become requirement for reason, *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, 1213-1214 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, a juror could not vote to acquit in light of WPC 4.01's direction to articulate a reasonable doubt. By requiring more than reasonable doubt to acquit a criminal defendant, WPC 4.01 violates the federal and state due process clauses. Ulinship, 397 *U.S.* at 364; *U.S. Const. amends. V, XIV*; *Wash. Const. art 1 § 3*. WPC 4.01's articulation requirement impermissibly undermines the presumption of innocence "the presumption of innocence is the bedrock upon which the criminal justice system stands". Id., Bennett, 161 *Wn. 2d* 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be "illusory or too difficult to achieve". Id., at 316. To avoid this, Washington courts have strenuously protected the presumption of innocence by rejecting an articulation requirement in different contexts. This court should safeguard the presumption of inn-

erence in this case. In the context of prosecutorial misconduct co-
wits have prohibited arguments that jurors must articulate a
reason for having reasonable doubt. A "fill-in-the-blank argu-
ment" "improperly implies that the jury must be able to art-
iculate its reasonable doubt". State v. Emery, 174 Wn. 2d 741,
760 (2012). Therefore, such arguments are "flatly barred
"because they misstate the reasonable doubt standard and
impermissibly undermine the presumption of innocence". Id.,
at 756-760. For instance, in State v. Walker, Wn. 2d
____ (2015) case No. 89830-8, the court held improper a
prosecutor's powerpoint slide that read, "if you were to find
the defendant not guilty, you have to say: I had a re-
asonable doubt [.] what was the reason for your doubt
?" "my reason was _____". 164 Wn. app. 724, 731 (2011)
(Quoting clerk's paper). Likewise, in State v. Venegas, 155
Wn. app. 507, 523-524 (2010) the court found flagrant
and ill-intention misconduct where the prosecutor argu-
ed in closing "In order to find the defendant not
guilty, you have to say to yourselves, "I doubt that
the defendant is guilty, and my reasons _____ blank"
(Quoting report of proceedings); See also, State v. John-
son, 158 Wn. app. 677, 682 (2010); State v. Anderson,
153 Wn. app. 417, 431 (2000). Although it does not
explicitly tell jurors to fill-in-the-blank, WPIA 4.01
implies that the jurors need to do just that. Trial courts
instruct jurors that a reason must exist for their reason-
able doubt. This is, in substance, the same exercise as
telling jurors they need to fill-in the-blank with an
explanation or justification in order to acquit. If tell-
ing the jurors they must articulate a reason for reasonable
doubt is prosecutorial misconduct because it undermines the
presumption of innocence, then it makes no sense to allow
the same undermining to occur through a jury instruc-
tion... Outside the prosecutorial misconduct realm, this Div-
ision recently acknowledged that an articulation require-
ment in a trial court's preliminary instruction on reasonable
doubt would have been error had the issue been preser-
ved. State v. Kalebough, 179 Wn. 2d 414, 421-423, Review

granted, 180 Wn.2d 1013 (2014). The court determined Kalabaugh could not demonstrate actual prejudice given that the trial court instructed the jury with WPC 4.01 at the end of trial. Id., at 422-423. The court therefore concluded the error was not manifested under RAP rule 2.5(a). Id., at 424. In sidestepping the issue before it on procedural grounds, the Kalabaugh court pointed to WPC 4.01's language with approval. 179 Wn. app. at 422-423. By requiring more than just a reasonable doubt to acquit, WPC 4.01 impermissibly undercuts the presumption of innocence and is therefore erroneous, WPC 4.01 is unconstitutional. In response, the state may argue this issue was already decided in State v. Thompson, 13 Wn. app. 1, 4-5, (1975). (However, Thompson was decided over forty (40) years ago and can no longer be squared with State v. Emery, 174 Wn.2d 741, 760 (2012), and the fill-in-the-blank cases). (WPC 4.01 requires "the jury to articulate a reason for its doubt which" subtly shifts the burden to the defense") Id., Emery, at 760. Because the state will avoid supplying reasons to doubt in its own case, WPC 4.01 suggests that either the jury or the defense should supply them, "further undermining the presumption of innocence". Kalabaugh, 179 Wn. app. at 426 (Byzorgen J., dissenting). Therefore, "[T]he logic and policy of the decision in [Emery] impels the conclusion" that the articulation requirement in WPC 4.01 is constitutionally flawed" "Id." at 424. WPC 4.01's articulation requirement requires reversal. An instruction that eases the burden of proof and undermines the presumption of innocence violates the sixth amendment's jury trial guarantee. Sullivan v. Louisiana, 508 U.S. 275, 279-280 (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 (emphasis in original). Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as structural error", Id. at 281-282 (internal quotation marks omitted). as a struct-

ural error; this error qualifies as manifests constitutional error under Ray rule 2.5(a) and is properly raised for the first time on appeal. See, State v. Wise, 176 Wn. 2d 1, 18 no 11 (2012) ("nothing in our rules or our precedent precludes different treatment of structural error affecting a constitutional right.") Petitioner's jury was instructed pursuant to wpi's 4.01 that it must articulate a reason for having reasonable doubt. This required more than just a reasonable doubt to acquit, it required a reasonable, articulable doubt. This articulation requirement undermined the presumption of innocence. It is structural error and requires reversal. It was clearly ineffective assistance for trial counsel to fail to object and ineffective assistance of appellate counsel, for failing to raise on direct review.

This court should accordingly reverse and remand for retrial before a jury that is accurately instructed on the meaning of reasonable doubt. See, Strickland v. Washington, 466 U.S. 668 (1984); Smith v. Robbins, 528 U.S. 259 (2000).

Signed: Ramon Brandon

Dated: (9/2/15)

Certificate of Service

I Brandon Pamon, Declare I have caused

a copy of this (Additional Ground) statement to be sent to the court of appeals by way of (WSP) legal mail at:

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Address: Court of Appeals Division one

Dated: 9-2-15

Signed: Pamon Brandon