

NO. 73401-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER HOOD,

Appellant.

FILED
Apr 29, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Hollis R. Hill, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. WASHINGTON'S PATTERN JURY INSTRUCTION ON REASONABLE DOUBT IS UNCONSTITUTIONAL

- a. If Hood's attorney invited the error by joining or endorsing jury instructions submitted by the State, he rendered ineffective assistance of counsel

The State fails to identify any reasonable defense strategy or tactic that could explain joining or stipulating to the State's proposed instructions.¹ There is no legitimate strategy in burdening a client's future challenges to jury instructions by stipulating to or joining instructions rather than just not objecting to them. The State has not argued otherwise.

Rather, the State suggests defense counsel must always invite instructional error by joining the State's instructions because "it is fair and efficient to allow the defense to satisfy its CrR 6.15(a) obligations by joining in the State's submission." Br. of Resp't at 11. However, no Washington court has ever held that CrR 6.15(a) obliges defense counsel to join the submission of the State's instructions. This is likely because the courts recognize that defense counsel has constitutional and ethical obligations to

¹ As discussed in Hood's opening brief, Hood does not concede his attorney actually joined or stipulated to the State's proposed instructions, given that he never submitted any instructions and did not expressly state he was joining the State's instructions on the record. Br. of Appellant at 23-24; RP 290, 415-16. At most, defense counsel failed to object to the reasonable doubt instruction. And where, as here, the State argues defense counsel's acquiescence in the State's proposed instructions is invited error, it "blur[s] the lines between the invited error doctrine and the waiver theory." State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999).

advance and protect their clients' current and future claims, not undermine them.

Criminal defendants are entitled to constitutionally effective counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Br. of Appellant at 25-27. There is no reasonable defense tactic in foreclosing or burdening a client's future appellate arguments by stipulating to or joining the State's proposed instructions rather than just not objecting to them. The only effect of joining an adverse party's instructions is to burden or foreclose a client's future claims under the invited error doctrine. No reasonable defense attorney would or could ever legitimately wish to harm his or her client in this way. To the extent Hood's attorney joined or stipulated to the State's instructions, he rendered ineffective assistance of counsel.

If CrR 6.15(a) required Hood's counsel to join the State's instructions, as the State argues, then CrR 6.15(a) plainly conflicts with Hood's constitutional right to effective counsel. Where a court rule conflicts with a constitutional provision, the court rule must give way. State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987) (noting court would not sustain interpretation of court rule that contravened the constitution); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007) (recognizing court rules "do not trump" constitutional requirements). If the State is correct that

CrR 6.15(a) requires defense counsel to join the State's proposed jury instructions, CrR 6.15(a) is unconstitutional because it requires defense counsel to render deficient performance. This court should reject the State's invited error argument and overreaching interpretation of CrR 6.15.

b. Hood did not waive any error because structural errors are treated differently

The State fails to acknowledge that the failure to properly instruct the jury on reasonable doubt is a structural error. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). “[T]here is good reason to treat structure errors . . . differently.” State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012). Requiring a definitive showing of prejudice as the State argues, Br. of Resp’t at 12-13, “would effectively create a wrong without a remedy.” Paumier, 176 Wn.2d at 37. The structural nature of the error Hood raises overcomes the State’s waiver argument as a matter of law.

Although the State quotes RAP 2.5 to make it seem that courts may not consider “errors not objected to,” Br. of Resp’t at 12, RAP 2.5 is wholly discretionary. Indeed, it provides, “the appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5 (emphasis added); see also State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015) (“[A]n appellate court may use its discretion to reach

unpreserved claims of error consistent with RAP 2.5.”). And RAP 1.2(a) requires that the rules be liberally interpreted to promote justice and facilitate decisions of cases on the merits. “Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands” *Id.* The State makes no attempt to show compelling circumstances that justly demand the avoidance of this issue’s merits. This court should reject the State’s unsupported procedural contentions, reach the merits of Hood’s challenge to WPIC 4.01, and reverse.

- c. The State fails to meaningfully respond to the substance of Hood’s arguments that WPIC 4.01 plainly and unconstitutionally requires the articulation of reasonable doubt

The State does not actually address the substance of Hood’s arguments. Instead, it recites several cases, old and new, that have approved of WPIC 4.01 or similar instructions. Br. of Resp’t at 14-17. But these cases did not address a direct challenge to WPIC 4.01’s articulation requirement.² These cases therefore do not fairly resolve Hood’s dispute.

² Hood acknowledges this court’s recent decision in *State v. Lizarraga*, 191 Wn. App. 530, 567, 364 P.3d 810 (2015). However, *Lizarraga* did not address Hood’s arguments and instead dodged them, predictably hiding behind *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). *Lizarraga*, 191 Wn. App. at 567. This court’s decision in *Lizarraga* only underscores Hood’s claim that no appellate court to date has been willing to meaningfully address the actual substance of Hood’s analysis. See Br. of Appellant at 16-17.

As Hood’s opening brief discussed in detail, the Washington Supreme Court recently drew a distinction between “a doubt for which a reason exists” and “a doubt for which a reason can be given,” approving of the former and rejecting the latter as a constitutionally infirm articulation requirement. State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015). The problem with the court’s analysis in Kalebaugh was that it failed to acknowledge other precedents that equated the instruction “a doubt for which a reason exists” with “a doubt for which a reason can be given.” Br. of Appellant at 18-22 & n.3 (tracing case law origins of WPIC 4.01). Thus, there is no meaningful distinction between the two instructions—both are unconstitutional because both require the jury to articulate why it has reasonable doubt.

The State suggests Hood is asking the 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 when they are given the definition.” Br. of Resp’t at 19. But it is not technical hairsplitting or engaging in subtle shades of meaning to acknowledge that the placement of the indefinite article “a” before the word “reason” alters the meaning of the noun “reason” in the English language. See Br. of Appellant 8. Hood merely recognizes the basic realities of English syntax—words matter. The only hairsplitting at issue

here is the State's reliance on Kalebaugh for the proposition that there is any meaningful distinction between a doubt "for which a reason exists" and a doubt "for which a reason can be given."

The State draws another hollow distinction between WPIC 4.01's language and prosecutorial arguments that jurors must be able to articulate a reason for having a reasonable doubt. Br. of Resp't at 17-19. It contends that "[o]nly when the prosecutor tells the jury that it must articulate a reason to doubt in order to acquit does error occur, precisely because that argument misstates what the instruction says." Br. of Resp't at 18. The State ignores that this prosecutorial misconduct did not materialize out of thin air, but arose directly from WPIC 4.01's articulation requirement. See Br. of Appellant at 12-13. If prosecutors believe WPIC 4.01 requires jurors to give a reason for having reasonable doubt, jurors surely come to the same conclusion. The prosecutorial misconduct cases are symptoms of WPIC 4.01's unconstitutional articulation requirement, not a valid basis for distinction.

This court should address the substance of Hood's challenge to Washington's pattern reasonable doubt instruction. WPIC 4.01 requires "a reason to exist" for having reasonable doubt. This articulation requirement undermines the presumption of innocence and shifts the burden of proof to

the accused. Because WPIC 4.01 is structural error, Hood asks this court to reverse.

2. THE BURGLARY AND VIOLATION OF NO-CONTACT ORDER CONVICTIONS WERE THE SAME CRIMINAL CONDUCT FOR THE PURPOSE OF CALCULATING HOOD'S OFFENDER SCORE

The State relies on the burglary anti-merger statute, RCW 9A.52.050, arguing it “gives the trial judge discretion to punish burglary separately, even if the burglary and another crime encompass the same underlying criminal acts.” Br. of Resp’t at 22. But, as the State acknowledges, the trial court did not rely on the burglary anti-merger statute and instead rejected Hood’s same criminal conduct argument because burglary and violation of a no-contact order “have different criminal intent,” giving no further analysis. RP 555; Br. of Resp’t at 22 & n.4.

Offenses have the same criminal intent when, viewed objectively, the intent does not change from one offense to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). Intent is not simply the mens rea elements of the particular crimes but the offender’s objective criminal purpose in committing the crimes. State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088, review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014). “The test takes into consideration how intimately related the crimes

committed are” and whether one crime furthered the other. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

As discussed in Hood’s opening brief, the burglary and no-contact order violation served the same objective—to assault Djohan. Br. of Appellant at 31-32. Hood’s intent was the same: he intended to have prohibited contact with Djohan by unlawfully entering her apartment to assault her. The crimes occurred at the same time, same place, against the same person, and furthered the same intent to assault. Thus, contrary to the trial court’s determination, the crimes had the exact same criminal intents. The offenses constituted the same criminal conduct, and the State presents no argument to the contrary.

The Washington Supreme Court’s recent decision in State v. Chenoweth, ___ Wn.2d ___, ___ P.3d ___, 2016 WL 1063228 (Mar. 17, 2016), does not alter this result. There, the court determined that incest and rape of a child in the third degree did not constitute the same criminal conduct because “[t]he intent to have sex with someone related to you differs from the intent to have sex with a child.” Id. at *3.

Here, by contrast, first degree burglary requires entering or remaining unlawfully “with intent to commit a crime against a person or property therein” and “assaults any person.” RCW 9A.52.020(1); CP 70. A felony violation of a no-contact order occurs when a person knows of a no-

contact order, violates the order, and assaults another in doing so. RCW 26.50.110(1)(a), (4); CP 83. Under these statutes, Hood's intent was the same—he intended to commit a burglary and violate the no-contact order by committing the crime of assault against Djohan at the same time and place. When Hood pushed the door open to Djohan's apartment, he acted with the singular intent to assault her. Both the first degree burglary conviction and the felony violation of a no-contact order conviction encompassed this singular intent to assault and furthered only this singular intent to assault. Even in light of Chenoweth, the burglary and no-contact order violation comprised the same criminal conduct because the intent behind both crimes was identical.

Because the trial court did not consider Hood's same criminal conduct claim under the correct legal standard—whether, viewed objectively, Hood's intent in committing the crimes was the same—the trial court abused its discretion. State v. Graciano, 176 Wn.2d 531, 535, 295 P.3d 219 (2013). This error requires remand for resentencing under the correct legal standard.

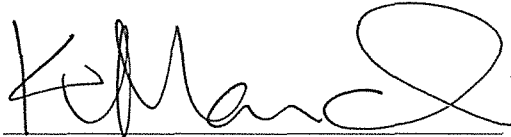
B. CONCLUSION

For the reasons stated here and in the opening brief, Hood asks that this court reverse his conviction or alternatively remand for resentencing.

DATED this 29th day of April, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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DIVISION ONE

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)	
Respondent,)	
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v.)	COA NO.73401-6-I
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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 29TH DAY OF APRIL 2016, 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] CHRISTOPHER HOOD
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CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF APRIL 2016.

x *Patrick Mayovsky*