SUPREME COURT NO. _____

NO. 33279-9-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN CASTRO,

Petitioner.

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

The Honorable Scott R. Sparks, Judge

PETITION FOR REVIEW

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RULES, STATUES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Benjamin Santos Castro, the appellant below, seeks review of the Court of Appeals decision in State v. Castro, 196 Wn. App. 1015, 2016 WL 5540223 (Sept. 29, 2016), following denial of his motion for reconsideration on December 1, 2016.

B. ISSUES PRESENTED FOR REVIEW

1. The prosecutor repeatedly asked jurors whether there was any reason to doubt Castro's guilt and answered that there absolutely was not any such reason. Given that the law is clear that jurors are not required to articulate a reason for their doubt and several cases have condemned similar articulation arguments as prosecutorial misconduct, did the prosecutor's argument constitute flagrant and ill-intentioned misconduct that requires reversal?

2. WPIC 4.01[1] requires jurors to articulate a reason for having reasonable doubt. Does this articulation requirement undermine the presumption of innocence and shift the burden of proof to the accused?

3a. In light of the invited error doctrine, can any legitimate trial strategy explain proposing a full set of jury instructions that almost entirely duplicates the State's rather than only those instructions necessary to advance the defense theory of the case?

[1] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

3b. Was defense counsel's submission of duplicative jury instructions prejudicial given that the Court of Appeals determined that it barred review of Castro's challenge to the reasonable doubt instruction?

C. STATEMENT OF THE CASE

The State charged Castro with possession of a stolen vehicle, possession of methamphetamine, second degree possession of stolen property, and possession of burglary tools. CP 1-2. The State amended the information to add a second count of second degree possession of stolen property. CP 10-11; 1RP[2] 6-7.

The charges arose from a complaint about a car parked in a Cle Elum Best Western parking lot. 1RP 50-51, 125-27, 129. Police arrived and ran the license plate, which returned a stolen vehicle hit. 1RP 51-52. Police ordered the occupants out of the car, one of whom was Castro. 1RP 55-56-61. Officers also saw methamphetamine in the car. 1RP 56-58. Castro was arrested and searched; police found a used hypodermic needle, a window punch device, another's credit or debit card, and other gift cards and credit cards. 1RP 58-61. Police obtained a warrant to search the vehicle, which disclosed several items, which several witnesses established had been stolen

[2] Consistent with the briefing below, this brief will refer to the verbatim reports of proceedings as follows: 1RP —March 9 and 10, 2015; 2RP—March 11 and 12, 2015; 3RP—April 3, 2015.

from them. 1RP 63-89, 104-07, 115-16, 122-124, 130-36; 2RP 35, 39; Br. of Appellant at 3-5.

At trial, the State presented no evidence that the tools in Castro's possession had been used in the commission of any burglary.

The trial court gave the pattern jury instruction on reasonable doubt, which read, in part, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 22; 2RP 93.

In closing, the prosecutor recited this instruction and then argued, "Do you think you have a reason to doubt in this case. He's got this car and he's got all this stolen property on him. Do you have any reason to doubt that he knew that it was stolen? Absolutely not." 2RP 142-43. The prosecutor proceeded to recount some of the evidence, asserting that there was no evidence Castro was not guilty or acted without knowledge and that, therefore, there was no reason to doubt. 2RP 143.

The jury returned guilty verdicts on all five counts. CP 56-60; 2RP 164-69.

The trial court sentenced Castro to concurrent sentences of 50 months for possession of a stolen vehicle, 24 months for the possession of methamphetamine, 18 months for each of the second degree possession of stolen property convictions, and 364 days for the making or having burglary tools. CP 93; 3RP 13-14.

Castrol appealed. CP 103. He argued (1) the State did not present sufficient evidence to sustain a conviction for making or having burglary tools, (2) the prosecutor's argument requiring jurors to articulate a reason for having reasonable doubt constituted flagrant and ill-intentioned misconduct, and (3) Washington's pattern reasonable doubt instruction was unconstitutional because it requires articulation of a reason for reasonable doubt. Br. of Appellant at 7-34. In supplemental briefing, Castro also argued that defense counsel's proposal of a set of jury instructions that duplicated the State's proposed jury instructions constituted ineffective assistance of counsel. Suppl. Br. of Appellant at 2-4.

The Court of Appeals agreed with Castro "that the State did not present sufficient evidence to support his conviction for making or having burglary tools because it only presented evidence that the tools were used for vehicle prowls." Appendix A at 7-9.

The Court of Appeals rejected Castro's prosecutorial misconduct argument, reasoning that the "prosecutor did not ask the jury to articulate a reason for doubt. The State's attorney merely declared that the jury lacked any reason to doubt." Appendix A at 11.

As for Castro's challenge to the reasonable doubt instruction, the Court of Appeals reached two conclusions. First, because "Castro requested the jury instruction he now challenges," the court refused to "address the

merits of his contention." Appendix A at 12-13. Second, the court rejected Castro's ineffective assistance of counsel claim because there was no error in giving the pattern instruction on reasonable doubt. Appendix A at 14-15. In reaching this second conclusion, the Court of Appeals relied exclusively on State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), which mandated that WPIC 4.01 be given, even though the Bennett court neither considered nor addressed any challenge to WPIC 4.01's articulation requirement. Appendix A at 14.

D. ARGUMENT

1. THE COURT OF APPEALS DECISION APPROVING OF THE PROSECUTOR'S ARGUMENT THAT JURORS NEEDED A REASON TO ACQUIT CONFLICTS WITH PRECEDENT

Numerous cases stand for the proposition that it is improper for the prosecutor to argue that jurors must have a reason for having a reasonable doubt because such arguments shift the burden of proof and production to the defense. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); State v. Walker, 164 Wn. App. 724, 731-32, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). Although many of these cases involved "fill in the blank" arguments—where the prosecutor argued that, to acquit, jurors

must fill in the blank with a reason for doing so—together they stand for the broad proposition that under no circumstances is it acceptable for the prosecution to argue that acquittal is conditioned on jurors' ability to articulate a reason for having reasonable doubt.

Here, the prosecutor asked, "Do you think you have a reason to doubt in this case? He's got this car and he's got all this stolen property on him. Do you have any reason to doubt that he knew that it was stolen? Absolutely not." RP 142-43. This argument erroneously indicated to jurors that they must return a guilty verdict unless they could point to a reason to doubt. Like the cases listed above, this argument shifted the burden to Castro to provide jurors with a reason to doubt. According to the prosecution, if the jurors could not come up with such a reason, they must convict. This misconduct requires reversal.

The Court of Appeals rejected Castro's argument because "unlike in [Emery], the prosecutor did not ask the jury to articulate a reason for doubt. The State's attorney merely declared that the jury lacked any reason to doubt." Appendix A at 11. This is a distinction without a difference. Castro has no dispute with prosecutors' arguments explaining why, based on reasoned consideration, the State's evidence supports conviction beyond a reasonable doubt. But that is not happened here. The prosecutor told jurors they must have "a reason" to doubt. This shifted the burden. Indeed, because the State

will avoid supplying a reason to doubt its own evidence, asserting that jurors must have a reason to doubt in order to acquit requires the defense or the jury to come up with a reason.

The articulation-of-reasonable-doubt arguments have been repeatedly held to qualify as misconduct in the case law. Thus, the prosecutor's articulation argument here was flagrant and ill intentioned. In re Pers. of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (finding flagrant and ill-intentioned misconduct when "case law and professional standards . . . were available to the prosecutor and clearly warned against the conduct").

Finally, as discussed in the following section, Washington's infirm pattern instruction on reasonable doubt invites the very kind of articulation arguments at issue here. In light of the problematic instruction, no curative instruction was available to remedy the prosecution's burden shifting argument. Because the Court of Appeals decision conflicts with Washington Supreme Court and Court of Appeals decisions, review is warranted under RAP 13.4(b)(1) and (2).

2. WPIC 4.01 DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

The pattern jury instruction requires the jury or the defense articulate "a reason" for having reasonable doubt. This articulation requirement distorts

the reasonable doubt standard, undermines the presumption of innocence, and shifts the burden of proof to the accused. Because it presents a significant constitutional question that has not been directly addressed by this court, and because it implicates jury instructions given in every criminal trial in Washington, this court should grant review under RAP 13.4(b)(3) and (4).

Jury instructions must be manifestly clear and not misleading to the ordinary mind. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). The error in WPIC 4.01 is readily apparent to the ordinary mind: having a "reasonable doubt" is not, as a matter of plain English, the same as having "a reason" to doubt. WPIC 4.01's use of the words "a reason" clearly indicates that reasonable doubt must be capable of explanation or justification.

Prosecutors have several times argued that juries must be able to articulate a reason for reasonable doubt, demonstrating that the reasonable doubt standard is not manifestly clear to legally trained professionals, let alone jurors. E.g., Emery, 174 Wn.2d at 760; Walker, 164 Wn. App. at 731, 265 P.3d 19; Johnson, 158 Wn. App. at 682; Venegas, 155 Wn. App. at 523-24 & n.16; Anderson, 153 Wn. App. at 431. Indeed, the prosecutors in Johnson and Anderson recited WPIC 4.01's text before making their improper fill-in-the-blank arguments. Johnson, 158 Wn. App. at 682; Anderson, 153 Wn. App. at 424. It makes no sense to condemn articulation arguments from prosecutors but continue giving the very jury instruction that gave rise to these

improper arguments. Because the Court of Appeals decision conflicts with these cases and cases requiring jury instructions to be manifestly clear, review is appropriate under RAP 13.4(b)(1) and (2).

Review is also appropriate because this court's own precedent is in serious disarray. In State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015), this court determined that the instruction "a doubt for which a reason can be given" was error, but that WPIC 4.01's "a doubt for which a reason exists" was not. This holding directly conflicts with this court's precedent that equated "for which a reason can be given" and "for which a reason exists."

In State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901), this court found no error in the instruction, "It should be a doubt for which a good reason exists." This court maintained the "great weight of authority" supported this instruction, citing the note to Burt v. State, 16 So. 342, 48 Am. St. Rep. 574 (Miss. 1894). This note, which is attached as Appendix B, cites cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[3]

[3] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt . . . is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious sensible doubt, such as you could give a good reason for."); Vann v. State, 9 S. E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 256, 36 P. 573 (1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not

In State v. Harsted, 66 Wash. 158, 162, 119 P. 24 (1911), the defendant objected to the instruction, "The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." This court opined, "As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given." Id. at 162-63. This court relied on out-of-state cases, including Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." This court was "impressed" with this view and therefore felt "constrained" to uphold the instruction. Harsted, 66 Wash. at 165.

More recently, in State v. Weiss, this court determined the instruction, "A reasonable doubt is a doubt for a which a sensible reason can be given," was "a correct statement of law." 73 Wn.2d 372, 378-79, 438 P.2d 610 (1968) (emphasis added). Although ultimately disapproving the instruction because it was too abbreviated, this court concluded "the trial court did not err in submitting the instruction given." Id. at 379.

Harras and Harsted viewed "a doubt for which a good reason exists" as equivalent to requiring that a reason must be given for the doubt. In Weiss,

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mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

this court determined that an instruction stating that a reasonable doubt was one for which a "sensible reason can be given," was a correct statement of the law. These decisions cannot be squared with Kalebaugh and Emery, both of which strongly rejected the concept that jurors must be able to articulate a reason for having reasonable doubt. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 760.

It is time for a Washington court to seriously confront the problematic articulation language in WPIC 4.01.[4] There is no meaningful difference between WPIC 4.01's doubt "for which a reason exists" and a doubt "for which a reason can be given." Both require articulation, and articulation of reasonable doubt undermines the presumption of innocence and shifts the burden of proof to the accused. Because this court's and the Court of Appeals' decisions are in disarray on the significant constitutional issue of properly

[4] The Court of Appeals determined Hood failed to preserve this issue for appellate review without addressing Hood's claim that failure to adequately instruct the jury on reasonable doubt is structural error under Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 125 L. Ed. 2d 182 (1993). Hood, 382 P.3d at 714; Br. of Appellant at 23. Contrary to the Court of Appeals decision, this court has held that structural errors qualify as manifest constitutional errors for RAP 2.5(a)(3) purposes. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012). In addition, the same division of the Court of Appeals has concluded that a challenge to WPIC 4.01 *does* constitute manifest constitutional error. State v. Paris, noted at 195 Wn. App. 1033, 2016 WL 4187765, at *1 (2016). The conflicts between the Court of Appeals decision in this case and other appellate decisions warrant review under RAP 13.4(b)(1) and (2).

defining reasonable doubt in every criminal jury trial, Hood's arguments merit review under all four of the RAP 13.4(b) criteria.

3. THE COURT OF APPEALS' SIMULTANEOUS REFUSAL TO ADDRESS THE MERITS OF CASTRO'S CHALLENGE TO WPIC 4.01 AND TO ADDRESS CASTRO'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM SUBJECTS CASTRO TO A CATCH-22

The Court of Appeals determined Castro's challenge to the reasonable doubt instruction was foreclosed by the invited error doctrine: "Benjamin Castro requested the jury instruction he now challenges. Therefore, we do not address the merits of his contention." Appendix A at 12-13. Castro alternatively argued that defense counsel rendered ineffective assistance of proposing a set of instructions that were entirely duplicative of the State's. The Court of Appeals rejected this argument: "Because there was no error, trial counsel did not perform deficiently by failing to propose instructions." Appendix A at 15 (amended per the Court of Appeals' December 1, 2016 order denying reconsideration). So, on the one hand, the Court of Appeals refused to address the merits of Castro's claim that WPIC 4.01 is erroneous because the invited error doctrine applied. On the other hand, the Court of Appeals refused to address the merits of Castro's claim that counsel performed deficiently by inviting error because the reasonable doubt instruction is not error. The Court of Appeals' complete avoidance of any legal analysis of Castro's arguments subjects Castro to a Catch-22.

Castro's claim of ineffective assistance of counsel merits this court's review. To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed."

Defense counsel proposed a full set of jury instruction identical to the State's proposed instructions "except for the definition of possession." 2RP 3; CP 136-56. There is no legitimate tactic or strategy that could explain submitting a full set of instructions almost identical to those an adverse party proposes, rather than just proposing those instructions necessary to assert the defense theory of the case. The sole consequence of proposing a duplicate set of instructions is risking the foreclosure of any future challenge to the instructions by way of post-trial motion, appeal, or collateral attack. Indeed, there is no conceivable benefit to a criminal defendant in joining the prosecution's jury instructions. No objectively reasonable defense attorney would willingly choose to bar or burden his or her client's future claim against the jury instructions that almost entirely duplicate the State's. By proposing a

duplicative set of instructions, rather than just not objecting to the State's instructions, counsel's performance fell below an objective standard of reasonableness.

Because the Court of Appeals determined Castro invited the error by proposing WPIC 4.01, Strickland's prejudice prong is self-fulfilling. Based on the invited error doctrine, the Court of Appeals refused to address Castro's good faith constitutional challenge to a reasonable doubt instruction that requires jurors to articulate the reason for their doubt. Appendix A at 12-13. Had defense counsel not proposed a duplicative set of instructions, the Court of Appeals could not have used the invited error doctrine to decline to reach the merits of Castro's claim. Had the Court of Appeals addressed the merits of Castro's claim, there is a reasonable probability that the outcome of this appeal—and therefore the entire prosecution—would differ. The constitutional issue of effective assistance of counsel, which is undermined by proposing duplicative instructions or stipulating to the State's instruction, merits this court's review under RAP 13.4(b)(3).

The instant Court of Appeals decision is also in conflict with the Court of Appeals decision in State v. Hood, 196 Wn. App. 127, 382 P.3d 710, 713 (2016), which established that defense counsel has no obligation to propose jury instructions or stipulate to the State's instructions:

> CrR 6.15(a) does not impose an obligation to propose jury instructions. If a party wishes to propose instructions, CrR 6.15(a) sets forth the timing an procedure to be followed. See State v. Sublett, 176 Wn.2d 58, 75-76, 292 P.3d 715 (2012). Since it is the State that wishes to secure the conviction, the State ordinarily assumes the burden of proposing an appropriate and comprehensive set of instructions. Just as a defendant has no duty to bring himself to trial, Barker v. Wingo, 407 U.S. 514, 527, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), a defendant has no duty to propose instructions that will enable the State to convict him.

Because the defense has no obligation to propose instructions at all, proposing exact copies of instructions that the State has already proposed constitutes ineffective assistance of counsel. There is no conceivable benefit to the client to propose duplicates of the State's jury instructions, but there is significant harm, as the foreclosure of appellate review in this case illustrates. See State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) ("Review is not precluded where invited error is the result of ineffectiveness of counsel."). Because the Court of Appeals decision places Castro in the limbo of an invited error Catch-22—based on reasoning that conflicts with the Hood decision—review is also appropriate under RAP 13.4(b)(2).

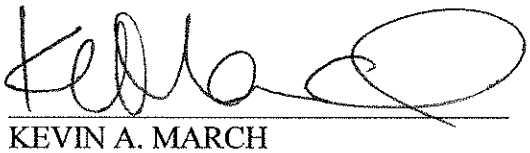
E. CONCLUSION

Because he satisfies all RAP 13.4(b) review criteria, Castro asks that this petition be granted.

DATED this 3rd day of January, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

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COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BENJAMIN SANTOS CASTRO, Appellant.	)	No. 33279-9-III ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

THE COURT has considered appellant's motion for reconsideration and the answer thereto, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of September 29, 2016, is hereby denied.

IT IS FURTHER ORDERED the opinion filed September 29, 2016, is amended as follows:

The third sentence on page fifteen that reads: Because there was no error, trial counsel did not perform deficiently by failing to propose another instruction.

shall be amended to read: Because there was no error, trial counsel did not perform deficiently by proposing instructions.

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:

George Fearing

GEORGE B. FEARING, Chief Judge

FILED
SEPTEMBER 29, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 33279-9-III
Respondent,	)	
	)	
v.	)	
	)	
BENJAMIN SANTOS CASTRO,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

FEARING, C.J. — Law enforcement officers arrested Benjamin Castro while he occupied a stolen car. Officers found methamphetamine and sundry burglary tools inside the car. A jury convicted Castro of possessing a stolen vehicle, making or having burglary tools, two counts of second degree possession of stolen property, and possession of a controlled substance. On appeal, Castro contends the jury heard insufficient evidence to convict him of possessing burglary tools, the prosecutor committed misconduct in her closing statement, and the trial court gave an erroneous jury instruction on reasonable doubt. We agree that Castro's conviction for possessing burglary tools must be dismissed for lack of evidence. We reject his other contentions and affirm the remaining convictions.

FACTS

Benjamin Castro and Kayla Clark met during a methamphetamine and alcohol party, on the evening of December 12, 2013. Both Clark and Castro imbibed methamphetamine at the gathering. That same night the two decided to travel from Tacoma to Montana to visit Clark's family.

At the end of the December 12 party, Benjamin Castro and Kayla Clark, with passenger Tiny Mack, journeyed in a stolen Mitsubishi Outlander, from Tacoma. According to Clark, she knew, but did not inform Castro, that the Outlander was stolen. Upon commencement of the lengthy trek, Clark placed two bags of methamphetamine on the front passenger seat.

Benjamin Castro and Kayla Clark left Tiny Mack in North Bend. The two, with Castro driving, traveled across Snoqualmie Pass and on to Cle Elum during the early morning of December 13. Castro and Clark stopped for the night in Cle Elum because the duo found no gas station in the Cascades foothills town open in the early morning hours. Castro pulled the Outlander into a Best Western Hotel parking lot.

Around 3:15 a.m., Cle Elum Police Officer Nicholas Burson responded to a request from the Cle Elum Best Western Hotel to direct the driver of a car parked in its parking lot to move the car. Officer Burson pulled his patrol car behind the white Outlander and typed the car's license plate into his computer. The computer replied with

a notice that the car was stolen. Officer Burson pulled his patrol car away from the Outlander and waited for assistance.

Kittitas County Sheriff Deputy Mike McKean, Washington State Troopers Paul Bloom and Don Farrell, and Ellensburg Police Officer Drew Haulk arrived at the Cle Elum Best Western. Deputy McKean blocked the egress of the stolen white Outlander with his patrol car, activated the patrol car's emergency lights, and ordered the occupants of the Outlander to exit the vehicle. Benjamin Castro placed the Outlander's keys on the roof of the car and exited the car through the driver's door. Officers restrained Castro and placed him in the back seat of a patrol car. Kayla Clark also exited the car from the passenger's side, and officers handcuffed her.

Officer Nicholas Burson approached the Mitsubishi Outlander to determine if other persons occupied the car. The car doors remained open. Burson espied, on the front passenger's seat, two small bags of a white crystal substance that he identified as methamphetamine.

Officers placed Benjamin Castro and Kayla Clark under arrest. When arresting Castro, Officer Burson asked Castro if he possessed any sharp objects in his pockets before frisking him. Castro stated he possessed a needle. Burson removed a capped used hypodermic needle in a Sharps container from Castro's front right pants pocket. Burson also found, in Benjamin Castro's pants pocket, a spring-loaded window punch. The

punch, when placed against a car window and released, shatters the window. Burson also removed, from Castro's pockets, credit cards and a debit card belonging to Jessie Prince.

Law enforcement contacted a tow truck company, and a tow truck removed the Mitsubishi Outlander from the hotel parking lot to the Cle Elum Police Department evidence lot. Officer Nicholas Burson sought and obtained a warrant to search the Outlander. Burson confiscated, from inside the car, a Taser stun gun, bolt cutters, a wallet belonging to Jessie Price, a purple bag with its padlock cut, two laptop computers, a Taurus Airsoft handgun with the orange tip removed, and a North Face backpack. Burson opened the backpack and discovered therein Benjamin Castro's credit cards, bolt cutters, pliers, handcuffs, various keys, a shim, colored stones, all-terrain vehicles (ATV) keys, receipts showing use of Jessie Prince's credit cards, binoculars, screwdriver, a leatherman tool, gloves, magnet, wrench, wire snips, a fixed-blade knife, wrenches, a pocketknife, and two bags of methamphetamine.

PROCEDURE

The State of Washington charged Benjamin Castro with possession of a stolen vehicle, possession of stolen property in the second degree, possession of methamphetamine, and possession of burglary tools. On the first day of trial, the State amended its information to add a second count of possession of stolen property in the second degree.

During trial, Officer Nicholas Burson listed all of the objects he found inside the Outlander, including the objects found in the North Face backpack. During direct examination, Officer Burson testified:

> Q. Do you have any training in able [sic] to recognize the types of tools that are used in burglaries?
> A. Yes.
> Q. Okay. Where did you get that training?
> A. In the Academy.
> Q. Okay. And are they consistent with the tools that are in this?
> A. Yes, they are. These would often be used to cut a padlock or some sort of wire of a larger gauge. This is for popping doors or getting in windows or anything like that.
> Q. And gloves?
> A. And these we use. Gloves, yeah, to conceal fingerprints.

Report of Proceedings (RP) (Mar. 10, 2015) at 88.

During trial testimony, Officer Nicholas Burson testified that one uses a window punch, such as found in Benjamin Castro's pocket, by placing the punch "to a window and pull[ing] and releas[ing] and it shatters the window." RP (Mar. 10, 2015) at 60. Officer Burson added that the punch breaks any window including house windows. Burson also declared that the confiscated bolt cutters "cut locks or a chainlink fence or anything metal." RP (Mar. 10, 2015) at 68. Officer Burson averred that "the edges [of found keys] . . . worn off them so they can be slipped inside more ignitions than they're supposed to, and you can kind of jiggle them and sometimes get cars to start with using a shaved key." RP (Mar. 10, 2015) at 85.

On the second day of trial, the court and counsel discussed jury instructions. During the conference, Benjamin Castro did not object to the use of 11 *Washington Practice*: *Washington Pattern Jury Instruction*: *Criminal* 4.01, at 85 (3d ed. 2008) (WPIC) as a jury instruction for the definition of reasonable doubt. The trial court instructed the jury on reasonable doubt:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you're satisfied beyond a reasonable doubt.

RP (Mar. 11, 2015) at 93-94. Castro proposed an instruction with the identical language.

During rebuttal in closing arguments, the State's attorney argued:

> Evidence Instruction No. 3 says: A reasonable doubt is one for which a reason exists. Do you think you have a reason to doubt in this case? He's got this car and he's got all this stolen property on him. Do you have any reason to doubt that he knew that it was stolen? Absolutely not.

RP (Mar. 11, 2015) at 142-43.

The jury found Benjamin Castro guilty on all five charges. The trial court sentenced Castro to fifty months in prison.

LAW AND ANALYSIS

Benjamin Castro asserts four errors on appeal. First, insufficient evidence supports his conviction for making or having burglary tools. Second, the prosecutor

committed misconduct during rebuttal argument. Third, the reasonable doubt instruction is unconstitutional. Fourth, his counsel was ineffective for proposing an erroneous jury instruction. The first argument attacks only the conviction for making or possessing burglary tools. The remaining arguments challenge all convictions. We agree with Benjamin Castro's first assignment of error and reverse his conviction for possession of burglary tools. We reject his other arguments and affirm the remaining four convictions.

Burglary Tools

Benjamin Castro contends that the State did not present sufficient evidence to support his conviction for making or having burglary tools because it only presented evidence that the tools were used for vehicle prowls. Evidence is sufficient if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Both direct and indirect evidence may support the jury's verdict. *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986).

The controlling statute, RCW 9A.52.060(1), declares:

> Every person who shall make or mend or cause to be made or mended, or have in his or her possession, any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary *under circumstances evincing an intent to use or employ*, or allow the same to be used or employed in the commission of a *burglary*, or knowing that the same is intended to be so used, shall be guilty of making or having burglar tools.

(Emphasis added.) A former statute contained a provision that imposed a presumption that possession of burglary tools "was had with the intent to use or employ . . . in the commission of a crime." Former RCW 9.19.050 (1909), *repealed by* LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.92.010. Gone is this presumption.

Under RCW 9A.52.060, one of the elements of the crime of having burglary tools is the accused's possession of tools under circumstances evincing an intent to use them in a "burglary." *State v. Miller*, 90 Wn. App. 720, 730, 954 P.2d 925 (1998). An accused is guilty under Washington statutes for "burglary" if he "enters or remains unlawfully" in a "building" or "dwelling other than a vehicle." RCW 9A.52.020, .025, and .030. Benjamin Castro contends that the State presented insufficient evidence to show he intended to commit a burglary, since the State presented no evidence of his seeking to unlawfully enter a building or dwelling. We agree.

A controlling decision is *State v. Miller*, 90 Wn. App. 720 (1998). James Miller entered an open self-service wash, used bolt cutters and other tools to remove the locks from coin boxes, and took money. The State charged Miller with burglary, having burglary tools, and theft. A jury convicted him on all three charges. On appeal, this court reversed Miller's burglary and possession of burglary tools convictions. The court found no circumstances that constituted burglary.

In this appeal, the State, at trial, presented strong evidence that Castro possessed tools that could be used to enter a dwelling. The State also offered evidence of vehicle prowls and car thefts. Nevertheless, the State offered no evidence that Benjamin Castro committed or attempted to commit any burglaries.

Prosecutorial Misconduct

Benjamin Castro next argues that the prosecutor committed misconduct in her closing argument by requiring the jury to articulate a reason to doubt his guilt. The State responds that the prosecutor simply addressed the defense's contention that Castro may not have known the property was stolen. We agree with the State.

This court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Nevertheless, a prosecutor's statements are improper if they misstate the applicable law, shift the burden to the defense, mischaracterize the role of the jury, or invite the jury to determine guilt on improper grounds. *State v. Emery*, 174 Wn.2d at 759-60; *State v. Boehning*, 127 Wn. App. at 522. Even if the defendant shows the comments were

improper, the error does not require reversal unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995).

If a defendant did not object to a prosecutor's alleged misconduct at trial, he or she is deemed to have waived any error, unless the misconduct was so flagrant and ill-intentioned that a jury instruction could not have cured the resulting prejudice. *State v. Gentry*, 125 Wn.2d at 596. Reviewing courts should then focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. *State v. Emery*, 174 Wn.2d at 762. Under this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury, and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d at 760. Benjamin Castro did not object during closing argument. He now bears the burden on appeal to demonstrate that the State's comments were so prejudicial that no curative instruction could have remedied their effect and that the comments had a substantial likelihood of affecting the jury's verdict.

We recognize that in many instances the term "prosecutorial misconduct" is a misnomer since the defense does not contend that the State's attorney consciously and flagrantly violated a code of conduct. In instances of negligence, use of the phrase

"prosecutorial error" fits better. Nevertheless, because Castro did not object to the prosecutor's closing remarks, he must show flagrant and ill-intentioned behavior. We hold that Castro does not even establish negligent behavior or prosecutorial error.

Benjamin Castro likens the prosecutor's argument to fill-in-the-blank statements like those in *State v. Emery*, 174 Wn.2d 741 (2012). In *Emery*, during closing, the prosecutor commented:

> [I]n order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in that blank.

174 Wn.2d at 750-51. The Washington Supreme Court held the State's reference to "fill in the blank" was improper. *State v. Emery*, 174 Wn.2d at 759. The court reasoned that the "argument subtly shifts the burden to the defense" because it requires the jury to articulate a reason to doubt. *State v. Emery*, 174 Wn.2d at 760.

Benjamin Castro's argument fails because, unlike in *State v. Emery*, the prosecutor did not ask the jury to articulate a reason for doubt. The State's attorney merely declared that the jury lacked any reason to doubt. The State agreed in its closing that it bore the burden of proof. The prosecutor repeatedly read verbatim a jury instruction imposing the burden of proving all elements on the State. Castro's argument, if accepted, could require the State not to address any of the purported weaknesses asserted by the defense.

Reasonable Doubt Instruction

Benjamin Castro contends that the reasonable doubt instruction unconstitutionally shifted the burden of proof from the State to him by requiring the jury to articulate a reason to doubt. The State responds that the instruction is proper and that the invited error doctrine applies and precludes review of this assignment of error. We agree that the invited error rule applies.

The invited error doctrine precludes a criminal defendant from seeking appellate review of an error he or she helped create, even when the alleged error involves constitutional rights. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996); *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). The rule is a strict one. *State v. Studd*, 137 Wn.2d at 547. In the criminal context, the doctrine of invited error is most commonly invoked when a defendant seeks to challenge a jury instruction that he or she proposed at trial. *State v. Studd*, 137 Wn.2d at 546; *State v. Henderson*, 114 Wn.2d at 870 (1990); *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979).

Benjamin Castro requested the jury instruction he now challenges. Therefore, we

do not address the merits of his contention.

Ineffective Assistance of Counsel

In his supplemental briefing, Benjamin Castro alleges that his counsel was ineffective for proposing the reasonable doubt jury instruction that allows the State to argue the invited error doctrine applies. We disagree that counsel was ineffective since the trial court was bound to give the proposed instruction.

A claim of ineffective assistance of counsel requires a showing that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011); *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). If one prong of the test fails, we need not address the remaining prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

We address only the deficiency of performance prong. Under the deficiency prong, this court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. *State v. West*, 185 Wn. App. 625, 638, 344 P.3d 1233 (2015). Trial strategy and tactics cannot form the basis of a finding of deficient performance. *State v. Johnston*, 143 Wn. App. 1, 16, 177 P.3d 1127 (2007). Deficient performance is performance that fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127

Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The defendant bears the burden to prove ineffective assistance of counsel. *State v. McFarland*, 127 Wn.2d at 335.

Invited error does not bar review of a claim of ineffective assistance based on an erroneous jury instruction. *State v. Bennett*, 87 Wn. App. 73, 76, 940 P.2d 299 (1997), *aff'd sub nom. State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999). Therefore, we ask whether the trial court's jury instruction on reasonable doubt constituted error.

In general, reviewing courts leave the specific language of jury instructions to the discretion of the trial court. *State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785 (2013). One exception to this rule of deference is the reasonable doubt instruction. *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007). The state Supreme Court has mandated use of WPIC 4.01. In *State v. Bennett*, the high court declared:

> Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the *Castle* instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

161 Wn.2d at 317-18.

Trial defense counsel proposed and the trial court gave the jury the standard WPIC

4.01. The trial court did not commit error by delivering the approved instruction. Instead the trial court would have erred by giving another instruction. Because there was no error, trial counsel did not perform deficiently by failing to propose another instruction.

CONCLUSION

We reverse Benjamin Castro's conviction for making or having burglary tools. We affirm his convictions for possession of a stolen vehicle, two counts of possession of stolen property in the second degree, and possession of methamphetamine. We remand for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

Fearing, C.J.

WE CONCUR:

Siddoway, J.

Siddoway, J.

Lawrence-Berrey, J.

Lawrence-Berrey, J.

APPENDIX B

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

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N. Y. 503; *Cohen* v. *State*, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State* v. *Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann* v. *State*, 83 Ga. 44, 52. And in *State* v. *Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry* v. *State*, 133 Ind. 677; *State* v. *Sauer*, 38 Minn. 438; *Ray* v. *State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan* v. *State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr* v. *State*, 23 Neb. 749; *Cowan* v. *State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray* v. *State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon* v. *People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn* v. *People*, 109 Ill. 635; *Wacaser* v. *People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Boulden* v. *State*, 102 Ala. 78; *Welsh* v. *State*, 96 Ala. 93; *State* v. *Gibbs*, 10 Mont. 213; *Miller* v. *People*, 39 Ill. 457; *Willis* v. *State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Jarrell* v. *State*, 58 Ind. 293; *Arnold* v. *State*, 23 Ind. 170; *State* v. *Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

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