Court of Appeals
Division I
State of Washington

NO. 72904-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JON DEL DUCA,

Appellant.

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

The Honorable Mary Roberts, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

OTHER JURISDICTIONS

TABLE OF AUTHORITIES (CONT'D)

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to the assistance of counsel.

2. The trial court erred when it failed to decide appellant's post-trial motions to reverse his convictions.

3. The trial court erred when it used a flawed reasonable doubt instruction that violated due process and the right to trial by jury.

Issues Pertaining to Assignments of Error

1. The federal and state constitutions guarantee the assistance of counsel in criminal cases. Under limited circumstances, this right can be waived or forfeited. Appellant did not waive the right, repeatedly and consistently demanding counsel's help. The trial court, however, found that appellant forfeited counsel because he disagreed with his attorney's assessment of the case and was likely to disagree with any appointed attorney. Where forfeiture requires a defendant's "extremely serious misconduct," and appellant did not engage in any misconduct, did the trial court deny appellant his constitutional right to counsel?

2. Prior to sentencing, appellant moved for reversal of his convictions on multiple grounds. The trial court heard argument on the claims and indicated it would issue a ruling. It never has. Should this case be remanded for a ruling on the claims?

3. The reasonable doubt instruction used at appellant's trial states, "a reasonable doubt is one for which a reason exists." Does this misstate the burden of proof, undermine the presumption of innocence, and improperly create a burden on the defendant to provide a reason for why reasonable doubt exists?

B. STATEMENT OF THE CASE

1. The Charges

In February 2012, the King County Prosecutor's Office charged Jon Del Duca with (count 1) Rape of a Child in the First Degree and (count 2) Child Molestation in the Second Degree, alleging that between January 1, 2001 and May 31, 2002, he committed the offenses against C.M., who was less than 12 years old at the time. CP 1-2. The case had originally been investigated and charges filed in 2005, but those charges were subsequently dismissed without prejudice. CP 3-6.

The Honorable Mary Roberts was assigned to Del Duca's case. CP 212. As discussed in detail below, over Del Duca's

repeated objections, Judge Roberts forced Del Duca to proceed without the assistance of counsel, ruling that he had forfeited his right to that assistance. CP 260.

2. Del Duca Is Denied A Lawyer

By the time charges against Del Duca were refiled in this matter, Del Duca was facing criminal charges in a second King County case – case no. 11-1-02184-6 KNT. CP 3. Attorney Brian Beattie already represented Del Duca in the 2011 case and he also was appointed in this case. Supp. CP ___ (sub no. 4, Notice of Appearance); 2RP[1] 12.

Del Duca was not pleased. On April 3, 2012, the Honorable Beth Andrus heard Del Duca's motion to discharge Beattie in both cases. 1RP 2-3. Del Duca felt that Beattie was not fulfilling his constitutional obligations because he refused to raise certain issues and conduct investigations Del Duca deemed critical. 1RP 3-6.

---

[1] This brief refers to the verbatim report of proceedings as follows: 1RP – 4/3/12; 2RP – 4/27/12; 3RP – 5/4/12; 4RP – 6/21/12; 5RP – 9/6/12; 6RP – 9/20/12; 7RP – 9/25/12; 8RP – 5/7/13; 9RP – 5/10/13; 10RP – 6/14/13; 11RP – 7/26/13; 12RP – 8/23/13; 13RP – 9/6/13; 14RP – 9/19/13; 15RP – 9/25/13; 16RP – 11/21/13; 17RP – 1/9/14; 18RP – 1/27/14; 19RP – 2/7/14; 20RP – 2/13/14; 21RP – 2/27/14; 22RP – 3/10/14; 23RP – 4/17/14; 24RP – 5/5/14; 25RP – 5/21/14; 26RP – 5/23/14; 27RP – 6/20/14; 28RP – 7/3/14; 29RP – 7/29/14; 30RP – 8/11/14; 31RP – 8/25/14; 32RP – 9/23/14; 33RP – 9/30/14; 34RP – 10/1/14; 35RP – 10/2/14; 36RP – 10/6/14; 37RP – 10/7/14; 38RP – 10/8/14; 39RP – 10/9/14; 40RP – 10/13/14; 41RP – 10/14/14; 42RP – 10/15/14; 43RP – 10/16/14; 44RP – 10/20/14; 45RP – 10/21/14; 46RP – 10/22/14; 47RP – 11/3/14; 48RP – 11/4/14; 49RP – 11/5/14; 50RP – 12/29/14; 51RP – 1/9/15.

When Judge Andrus denied the motion, Del Duca responded, "[t]hen I have to go pro se." 1RP 4. Judge Andrus indicated Del Duca should carefully contemplate the consequences of proceeding without counsel and, should he decide to go pro se, he would have to file a written motion requesting that status. 1RP 4-5, 7.

On April 27, 2012, Judge Roberts considered several arguments Del Duca made without counsel, including challenges to his current charges and issues concerning the circumstances of his confinement in the King County Jail. 2RP 12-50; CP 170-184. Del Duca made it clear he was not seeking to represent himself generally; only for the purpose of these particular arguments. CP 67. In his motions, Del Duca complained again about Beattie's representation specifically and public defenders generally, arguing they were county employees, not independent, and working for the state. 2RP 22-24; CP 174-183. Judge Roberts denied the motions and indicated counsel had to file any future motions. CP 508-511.

The parties appeared again on May 4, 2012, at which time Beattie and the prosecutor updated Judge Roberts on progress in both cases, and trial was continued. 3RP 3-4; Supp. CP ___ (sub no. 26, Order Continuing Trial).

On June 21, 2012, Del Duca again moved to discharge Beattie in his cases, citing Beattie's continuing refusal to do what was necessary for Del Duca's defense. 4RP 3-7. When Judge Roberts noted that this motion had previously been denied, Del Duca responded, "Well, he's not my attorney. Okay. I will have to go it alone with what we've got." 4RP 7. Judge Roberts again denied the motion to discharge Beattie and indicated that, if Del Duca decided to represent himself, he could bring an appropriate motion and the matter could be placed on the calendar. 4RP 7-8. When Judge Roberts claimed that Del Duca had, in the past, intimated he might want to represent himself, Del Duca denied this and Judge Roberts then agreed, noting that he had previously said he did not want to represent himself. 4RP 8. Del Duca reiterated, "I'm demanding assistance in my defense . . . per the constitution." 4RP 8.

By the time the parties met again on the 2012 case – September 6, 2012 – Del Duca had been tried and convicted of child molestation in the 2011 case. 5RP 3. Beattie informed Judge Roberts that Del Duca was unhappy with his services in both cases and requesting new counsel for trial in the 2012 case and for sentencing in the 2011 case. 5RP 4. Del Duca asked for the appointment of an attorney willing to work with him, represent his

interests, and act on his input. 5RP 4-10. Judge Roberts denied the motion to replace Beattie, noting that she did not think Del Duca would be satisfied with any attorney. 5RP 12.

The relationship between Beattie and Del Duca did not improve and, on September 20, 2012, Judge Roberts again addressed a motion to replace Beattie with new counsel. 6RP 55. Judge Roberts indicated she was now inclined to replace Beattie, and Del Duca responded that he did not want another public defender. 6RP 56. Del Duca indicated he was being pushed toward having to defend himself without an attorney willing to assist him and willing to give him "major say" in the case. 6RP 58-59. He made it clear, however, he did not want to go pro se. 6RP 59. But if he were forced to go pro se, he would need someone to assist him with the process or an attorney to act as standby counsel. 6RP 59-60. Judge Roberts indicated there would be no standby counsel. 6RP 60. She then began a colloquy with Del Duca designed to ensure he was knowingly, voluntarily, and intelligently waiving his right to counsel for trial. 6RP 63-70. After Del Duca explained that he had no legal training and indicated his need for counsel, Judge Roberts found that he had not made an unequivocal request to go pro se and instead appointed new counsel. 6RP 70; CP 11.

Thereafter, several attorneys from the Defender Association briefly represented Del Duca. Initially, it was attorney Rick Lichtenstadter. 7RP 74. Lichtenstadter was replaced by attorney Carey Huffman, and Huffman was replaced by attorney John Ewers. CP 206-208.

Del Duca became disenchanted with Ewers and, on May 7, 2013, moved to discharge him from the case. 8RP 3. He complained that the appointed attorneys were not pursuing relevant issues and evidence in his case and that they were excluding his participation. 8RP 3-7. Del Duca demanded counsel who would fully assist him with his defense. 8RP 8. He was unable to hire his own attorney, but the public defenders were refusing to do what was necessary on his behalf. 8RP 9. Judge Cheryl Carey found no legal basis to replace Ewers and told Del Duca he could hire private counsel or represent himself. 8RP 11. She also indicated he could set another hearing on the issue. 8RP 11-12.

Three days later, Del Duca renewed his motion before Judge Roberts. 9RP 3. He reiterated the failures of his appointed attorneys to comply with his constitutional right to the assistance of counsel by rejecting his input and ignoring his claims. 9RP 3, 8-10. Judge Roberts again expressed her concern that no appointed

attorney would satisfy Del Duca. 9RP 5. Judge Roberts confirmed that Del Duca had not previously wanted to represent himself, but felt like he was being pushed into pro se status by his attorneys' failures. 9RP 11. Del Duca then explained that this situation remained because Ewers was not pursuing valid issues and he needed counsel who would do what was necessary for a proper defense. 9RP 11-25. Judge Roberts ruled that Ewers would remain as counsel. 9RP 25.

At a hearing on June 14, 2013, Ewers indicated that Del Duca wanted to renew his motion for new counsel, a motion in which Ewers joined. 10RP 3. Judge Roberts declined to hear the matter, but indicated it could be addressed at a future hearing. 10RP 3.

Judge Roberts heard Del Duca's renewed motion for new counsel on July 26, 2013. Del Duca identified multiple deficiencies in Ewers' representation, including the failure to provide legal materials he had promised to Del Duca, ignoring legal arguments, failure to explain his legal reasoning, failure to seek relevant evidence and witnesses, and failure to deal with issues involving Del Duca's incarceration at the King County Jail. 11RP 81-90. Del Duca indicated his belief that there were good public defenders available, including previous counsel Carey Huffman. 11RP 91. Judge

Roberts denied the motion to replace Ewers. 11RP 92. Del Duca expressed his dislike for Ewers, indicated he could not communicate with him, and again emphasized the need for an attorney who would do what was necessary. 11RP 95, 98-99.

Del Duca sought new counsel again on August 23, 2013. After once again airing his complaints against Ewers specifically and public defenders generally, Del Duca asked the court to replace Ewers with an attorney who would assist him and litigate the issues he believed to be meritorious. 12RP 105-131. Del Duca noted that, although he had made it clear he was seeking the assistance of counsel, Judge Roberts had continually asked him if he was seeking to go pro se, which felt like harassment and made him question her independence. 12RP 124-127. Del Duca again made it clear that he wanted the assistance of an attorney and he would only go pro se if he were forced to do so. 12RP 128-139. When Judge Roberts denied the request for new counsel, Del Duca indicated he had to go pro se. 12RP 139. Ewers then indicated that, given the break down in communication and trust, he joined in Del Duca's request that he be discharged. 12RP 139. But Judge Roberts concluded no attorney would satisfy Del Duca and maintained her decision. 12RP 142. She also told Del Duca that, because they were out of time for

the day, she would ask him at the next hearing whether he wanted to waive counsel. 12RP 143.

The next hearing was September 6, 2013. Both the prosecutor and Ewers indicated they would be ready to start trial the week of September 26. 13RP 149-152. Judge Roberts then turned to the issue of representation and asked Del Duca what he wanted to do. 13RP 152-153. Del Duca maintained his demand for counsel to assist him with his defense and indicated "public defenders are not working." 13RP 155-157. Judge Roberts replied that he had two choices: stay with Ewers or indicate that he was going to represent himself, although she believed he did not want self-representation. But Del Duca would not be permitted to have another lawyer. 13RP 157. Del Duca stated he was being forced to defend himself, but when pressed on how he wished to proceed, maintained his request under the Sixth Amendment for counsel who would represent his interests. 13RP 159-165. Judge Roberts ruled that Del Duca had not made an unequivocal request to represent himself and, instead, was simply "expressing his ongoing unhappiness with his attorney." 13RP 166. Trial was set for September 26. 13RP 166.

At an omnibus hearing on September 19, 2013, Del Duca complained about a lack of communication and trust with Ewers and

maintained there were still relevant witnesses who needed to be located and interviewed before trial. 14RP 6-7. Del Duca indicated he would not go to trial with Ewers and would now sign paperwork waiving counsel because he had no other choice. 14RP 7-12. Judge Roberts then attempted to engage in a colloquy with Del Duca to determine whether his waiver was knowing, voluntary, and intelligent. 14RP 13. When it became clear Del Duca still sought different representation, Judge Roberts reiterated that Del Duca's choice was between going to trial with Ewers or self-representation. 14RP 17. Del Duca again stated that if he were to represent himself, it would be under duress. 14RP 19. He also threatened not to come to court if Ewers remained as counsel. 14RP 20.

At this point, for the first time, Judge Roberts mentioned the possibility of finding that Del Duca had forfeited his right to an attorney based on his inability to work with assigned counsel. 14RP 20-21. Del Duca refused to indicate that he wanted to represent himself and again cited his right to counsel. 14RP 23. Judge Roberts then found forfeiture:

> I am finding that Mr. Del Duca has forfeited his right to counsel, and I will allow him to go forward without an attorney even though he has not made a knowing, intelligent, and voluntary waiver of his right to counsel, but that he has forfeited it by his conduct and

> by refusing to work with any attorney who has been appointed by the Court. . . .

14RP 24. Judge Roberts filed a consistent written order. CP 260.

Uncertain of her legal footing, Judge Roberts indicated that if either the prosecutor or Ewers believed something more was required to support forfeiture, they could set the matter for a hearing. 14RP 25-26. She also ordered both counsel present for the next hearing, September 25, in case forfeiture were addressed. 14RP 31.

At the hearing on September 25, Judge Roberts noted that she had provided a "waiver of counsel form" to the parties, which apparently was a standard waiver form with some additional language added. 15RP 3. Judge Roberts then asked Del Duca whether "it is still your desire to represent yourself, given that the only other choice at this point is to have Mr. Ewers as your counsel." 15RP 3. After Del Duca responded this was not much of a choice, Judge Roberts asked him to look at the proposed waiver form and indicate whether it was something he was willing to sign. 15RP 3-4.

Del Duca indicated he would not sign away his constitutional right to counsel. 15RP 5, 7. Judge Roberts then changed the title of the document from "Waiver of Counsel" to "Order On Defendant's Request to Represent Himself" and added language making it clear

that if Del Duca later changed his mind, he might be forced to continue to represent himself. 15RP 8. Judge Roberts told Del Duca that if it was his desire to represent himself, he needed to state that clearly and sign the form. 15RP 9, 11. Del Duca again said that he would not sign away his rights when what he needed was an attorney's help. 15RP 11.

Judge Roberts then indicated that she would not make Del Duca sign the proposed waiver/order. 15RP 12. Instead, she intended to modify the order to reflect her understanding of what had happened. 15RP 12. The order would indicate that Del Duca had knowingly, intelligently, and voluntarily chosen to represent himself given the choice of being represented by Ewer or representing himself and his refusal to work with Ewer. 15RP 12-13, 22. No such written order was ever entered, however.

On more than one occasion thereafter, Del Duca asked Judge Roberts to explain her finding of forfeiture so that he could understand the basis for her ruling. 17RP 230; 18RP 10; 21RP 345, 358; 26RP 424-425, 453; 27RP 53; CP 307, 314. She indicated she would do so in a written ruling. 17RP 232; 18RP 10; 21RP 345, 358. She never did, however. Later, she would explain that he had forfeited his right to counsel because he would not accept Ewer's

assessment of the issues he wanted to raise and would have had the same problem with any appointed attorney. 50RP 7.

Although the parties had been on the verge of starting trial in September 2013, following the removal of counsel to assist Del Duca, the start of trial was delayed more than a year. 35RP 31. Recognizing he was not qualified to handle his own defense, over the course of that year, Del Duca repeatedly asked for the assistance of counsel or, at the very least, help from standby counsel. Judge Roberts agreed this was a very complicated case. 17RP 237. But every request was denied. See 16RP 176, 185, 187-188, 192; 17RP 230-231, 237-238, 247-248; 18RP 10, 24-25, 32; 19RP 277-280; 20RP 308-309, 311, 314-315, 319; 21RP 335, 341, 344, 346-347, 350, 358; 22RP 49, 66; 23RP 22-23; 24RP 16, 23-25; 25RP 369; 26RP 424-425, 452-453; 27RP 27, 33-35, 53, 55, 60-62, 64-65; 28RP 482; 29RP 502-503, 508, 513-515; 31RP 575-576, 579, 583, 595, 604, 623, 638-640, 652; 32RP 665, 692, 694; 33RP 10, 20-22, 38; 34RP 71, 83; 36RP 13, 46-47, 58-59, 75, 77-78; 37RP 6-7, 19; 40RP 27, 34; 43RP 14-16; 44RP 20; 45RP 15, 27, 42-45; 46RP 10; 47RP 57; CP 284-285, 289-291, 295-299, 325, 330-331, 333, 379-380, 390-391, 409-411, 413, 416-417, 425.

Del Duca had informed Judge Roberts that he had no legal

training whatsoever. 6RP 70. He filed motions for summary judgment under CR 56 and for default under CR 55. CP 261-274, 279-280, 284, 287, 292, 300, 320-321, 329-330, 376-379. He also relied on federal procedural rules, the Articles of Confederation, and what he called "legal law." 24RP 12-16; 26RP 421-422; 36RP 51-52; 37RP 16.

3. Trial Testimony

In February 2005, then nine-year-old C.M. claimed to an elementary school counselor that her mother's boyfriend had sexually assaulted her when she was four years old.[2] 42RP 30-32, 43; 44RP 74. C.M. said her mother's boyfriend was named "Jon" and people sometimes called him "the crocodile man." 42RP 38. CPS, police, and C.M.'s family were notified. 42RP 34.

By the time of this 2005 allegation, C.M. no longer lived in the same location where she claimed the abuse had occurred. 41RP 33. From approximately January of 2000 or 2001 until approximately May 2002, C.M., her older brother, and her younger sister had lived with their mother – Maria Vargas-Soto – at the Meadow Lane

---

[2] C.M.'s birthdate is March 3, 1995. 43RP 21. Thus, she would have turned four years old in 1999.

Apartments in Kent.[3] 41RP 21-22. Vargas-Soto's sister also shared the apartment with the family and, for about eight months, so did Vargas-Soto's boyfriend, although his name was "Juan" and not "Jon." 41RP 21-22.

Police investigating C.M.'s allegation focused on Jon Del Duca, who lived at Meadow Lane in an apartment one floor up from the unit where Vargas-Soto and her family had lived years earlier. 41RP 28-29; 44RP 63-64. Residents of the apartment complex had sometimes referred to Del Duca as "Crocodile Dundee," apparently because of a hat he wore and his appearance. 41RP 30; 44RP 33. Charges were filed against Del Duca in 2005, but they were dismissed after C.M. became hesitant to proceed and her mother decided they would not cooperate in the matter. 41RP 34-35.

The charges were refiled in 2012, and law enforcement renewed contact with the family. 41RP 35. By the time of trial, C.M. was nineteen-years-old. 43RP 21. She claimed that, while living at the Meadow Lane Apartments, she got to know Del Duca, who was friendly and would give her candy. 43RP 28-29. C.M. claimed that

---

[3] Vargas-Soto was uncertain of the precise move in and move out dates, but she testified they lived in the apartment complex a little over a year sometime between January 2000 and May 2002. See 41RP 21-22. The period charged ran from January 1, 2001 to May 31, 2002. CP 1-2

she was inside Del Duca's apartment three times. 43RP 30-31. She claimed that more than once, Del Duca had her sit in his lap and he rubbed her vaginal area over her clothing. 43RP 36-45, 51-53, 63. She also described one incident where Del Duca put his hand inside her pants and inserted his finger into her vagina. 43RP 50-51, 53-54. C.M. testified that Del Duca threatened to harm her younger sister if she told anyone about the touching, so she did not say anything at the time. 43RP 39-40, 46-47.

Attempting to bolster C.M.'s accusations, the prosecution called C.M.'s older cousin – Diane Vargas – as a witness. 40RP 65-66. Vargas had not lived at the Meadow Lane Apartments, but she had lived nearby and regularly visited C.M. there. 40RP 68-69. She recognized Del Duca as the man they called "Crocodile Dundee" and believed she had gone to his apartment twice. 40RP 70-72. She conceded her memory was "fuzzy," but she testified that, during one visit to the apartment – when she was between six and eight years old – she, C.M., and C.M.'s little sister were in Del Duca's bedroom. 40RP 72-73, 75. Vargas claimed Del Duca had the other two girls on the bed, he was holding them there, and all three girls were crying. 40RP 74-75. Everyone was fully clothed, and she could not see what was happening on the bed. 40RP 75, 84-85. Nor did she

recall how the three left the apartment. 40RP 77. According to Vargas, C.M. confided in her about the abuse years later. 40RP 77.

Both C.M. and Vargas testified that Del Duca had a couch in his apartment. 40RP 82. Indeed, C.M. alleged that Del Duca was sitting on the couch when he touched her. 43RP 37. But Del Duca's roommate at the time – Sue Frack – testified that they never had a couch in their apartment. 45RP 74. At the time of her initial allegations against Del Duca in 2005, C.M. accused Del Duca of using a whip, rubber gloves, and some kind of oil when he touched her. 47RP 19, 21-24. By the time of trial, however, C.M. claimed no knowledge of these assertions and no memory of these items being used. 43RP 64-66, 68.

Del Duca testified in his own defense and denied ever touching C.M. inappropriately. 47RP 98-125; 48RP 7-18, 114.

4. Jury Instructions, Verdicts, and Sentencing

To decide the issue of Del Duca's guilt, his jury was given the following instruction:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of

> proving that a reasonable doubt exists as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a 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.

CP 104.

The jury convicted Del Duca as charged. CP 96-97. Judge Roberts imposed standard-range concurrent sentences of 162 months for rape and 98 months for molestation. CP 133-134. Del Duca timely filed his Notice of Appeal. CP 143-156.

C. ARGUMENT

1. DEL DUCA WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL AT TRIAL.

Under both the Washington and United States Constitutions, a defendant facing criminal charges has the right to assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. 1, sec. 22 (amend. 10); City of Tacoma v. Bishop, 82 Wn. App. 850, 855, 920 P.2d 214 (1996). Moreover, indigent defendants are entitled to appointed counsel. State v. Osborne, 70 Wn. App. 640, 643-644,

855 P.2d 302 (1993) (citing Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)); CrR 3.1(d)(1).

Under certain limited circumstances, a defendant can lose the right to counsel through "waiver," "forfeiture," or "waiver by conduct." State v. Afeworki, 189 Wn. App. 327, 358 P.3d 1186, 1197-1198 (2015); Bishop, 82 Wn. App. at 858.

"Waiver" involves a knowing and intentional relinquishment of the right to counsel, which usually is indicated by the defendant's affirmative verbal request for self-representation. Bishop, 82 Wn. App. at 858 (citing United States v. Goldberg, 67 F.3d 1092, 1099 (3rd Cir. 1995)). To obtain a valid waiver, the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" City of Bellevue v. Acrey, 103 Wn.2d 203, 209, 691 P.2d 957 (1984) (quoting Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). The preferred method is a colloquy on the record where, minimally, the court informs the defendant of the nature of the charges, maximum penalty, and that the technical rules of court must be followed. Id. at 211. In the absence of such a colloquy, the record must still indicate the defendant knew this

information and was aware of the risks of self-representation. Id.

At the opposite end of the spectrum from waiver is "forfeiture," which results in the loss of counsel "'regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.'" Bishop, 82 Wn. App. at 858-859 (quoting Goldberg, 67 F.3d at 1100). Because of this "harsh result," forfeiture requires a showing that the defendant engaged in extremely serious misconduct.[4] Afeworki, 189 Wn. App. at 345; Bishop, 82 Wn. App. 859. An example of such misconduct is threatening an attorney with physical bodily harm. See State v. Fualaau, 155 Wn. App. 347, 360, 228 P.3d 771 (citing United States v. McLeod, 53 F.3d 322, 326 (11th Cir. 1995)), review denied, 169 Wn.2d 1023, 238 P.3d 503, cert. denied, 131 S. Ct. 1786, 179 L. Ed. 2d 657 (2011).

Finally, there is "waiver by conduct," sometimes described as a hybrid of the other two doctrines. Once a defendant has been warned that he will lose his attorney if he engages in misconduct – and warned of the risks of going pro se – "'any misconduct thereafter may be treated as an implied request to proceed pro se

---

[4] "Extremely dilatory conduct" also may result in forfeiture. Afeworki, 189 Wn. App. at 345. There is no indication of such conduct in this case.

and, thus, as a waiver of the right to counsel.'" Afeworki, 189 Wn. App. at 346 (quoting Goldberg, 67 F.3d at 1100); Bishop, 82 Wn. App. at 859. The misconduct leading to "waiver by conduct" can be less severe than that required for forfeiture. Id.

Judge Roberts ruled that Del Duca had forfeited his right to counsel because he repeatedly complained about his appointed attorneys and would not have been satisfied with any attorney. 14RP 24; 50RP 7. But dissatisfaction with one's counsel is not the "extremely serious misconduct" required for forfeiture.

In United States v. Thomas, 357 F.3d 357 (3rd Cir. 2004), the Third Circuit Court of Appeals affirmed a forfeiture finding where the defendant had *both* made unreasonable demands of his attorneys and subjected his last attorney to threatened physical harm and verbal abuse. In combination, this qualified as extremely serious misconduct warranting forced pro se status. Thomas, 357 F.3d at 363; accord McLeod, 53 F.3d at 325-326 (forfeiture based on threats of physical harm, verbal abuse, and efforts to make attorney engage in unethical behavior). Not one of Del Duca's attorneys claimed that he had used physical intimidation or threats of violence.

It appears that even Judge Roberts had doubts whether Del Duca had forfeited his right to counsel. First, she asked the

prosecutor and Ewers to set the matter for a hearing if either attorney believed something more was required for forfeiture. 14RP 25-26. Second, at the very next hearing following her forfeiture ruling, Judge Roberts proposed that Del Duca sign a voluntary waiver of counsel, a proposal he declined. 15RP 3-5, 7. And, third, despite repeatedly promising she would enter a written ruling explaining to Del Duca how he had forfeited his right to counsel, Judge Roberts never did so. 17RP 230, 232; 18RP 10; 21RP 345, 358.

Judge Roberts did not find that Del Duca had either voluntarily waived his right to counsel or that there had been a waiver by conduct – and rightfully so; neither doctrine was satisfied.

Regarding voluntary waiver, just as he did after the forfeiture ruling, prior to that ruling, Del Duca repeatedly requested a new attorney to replace Ewers. See 8RP 8; 9RP 11-25; 10RP 3; 11RP 81-91, 99; 12RP 105-139; 13RP 155-165. Judge Roberts properly recognized that, in seeking new counsel, Del Duca was not making a request to proceed pro se. Rather, he was "just expressing his ongoing unhappiness with his attorney." See 13RP 166; see also 14RP 7-20 (Del Duca again requests new counsel and, during colloquy on self-representation, indicates that any waiver of counsel would be the product of duress). Indeed, immediately after

finding Del Duca had forfeited his right to counsel, Judge Roberts indicated, "I am finding that he has not made a knowing, intelligent, and voluntary waiver of the right to counsel . . . ."[5] 14RP 24.

Regarding waiver by conduct, as discussed above regarding forfeiture, there was no misconduct. Compare Afeworki, 189 Wn. App. at 339-340, 346-351 (defendant's threats, which attorney interpreted as "a threat to his personal well-being" and that of his sister, were misconduct designed to delay trial and warranting waiver by conduct). Moreover, even assuming that repeatedly expressing dissatisfaction with counsel is misconduct, there was no warning prior to the forfeiture ruling that Del Duca risked such a complete denial of counsel for trial if he persisted in voicing his complaints about Ewers. Forfeiture was first mentioned at the same time it was found. See 14RP 20-24.

Prior to the forfeiture ruling, Judge Roberts had taken a different approach when denying Del Duca a new attorney. She had simply ruled that he could either (1) stay with Ewers or (2) indicate that he was going to represent himself. And, in the

---

[5] At the very next hearing, after Del Duca declined to sign a voluntary waiver of his right to counsel, Judge Roberts indicated she nonetheless intended to enter an order finding waiver. See 15RP 3-13, 22. She never did. Nor could she.

absence of (2), Judge Roberts left Ewers as counsel.[6] See 13RP 157; 14RP 17. Had Judge Roberts maintained this approach, there would not have been a denial of the right to counsel. But by subsequently denying Del Duca the assistance of counsel under the forfeiture doctrine, when Del Duca did not engage in misconduct, Judge Roberts erred and violated Del Duca's constitutional rights.

Judge Roberts did finally appoint counsel – attorney Juanita Holmes – to represent Del Duca for sentencing. 50RP 3. But Judge Roberts denied Del Duca's request that Holmes also represent him on his post-trial motions – even though those motions had been filed prior to sentencing. See 50RP 3-8, 14-15, 25, 33-45; CP 477-503. Included among the issues in Del Duca's post trial motions was an argument that Judge Roberts had improperly found a forfeiture of his right to counsel at trial. 51RP 6-8, 11, 31-32, 35, 45; CP 487-489.

---

[6] Judge Carey took a similar approach when denying Del Duca's motion for new counsel. She left Ewers on the case and indicated Del Duca could either hire private counsel or choose to represent himself. 8RP 11.

This denial of counsel for the post-trial motions also was a violation of the right to counsel. The Sixth Amendment and article 1, § 22 guarantee criminal defendants the right to representation at all critical stages of a criminal prosecution. State ex rel. Juckett v. Evergreen Dist. Ct., 100 Wn.2d 824, 828, 675 P.2d 599 (1984). A criminal defendant is merely considered an "accused person" – and therefore entitled to this right – until formal judgment and sentence have been entered. McClintock v. Rhay, 52 Wn.2d 615, 616, 328 P.2d 369 (1958). Thus, there is a right to counsel through sentencing. State v. Robinson, 153 Wn.2d 689, 698 n.7, 107 P.3d 90 (2005); State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988).

The remedy for a violation of the right to counsel is automatic reversal. State v. Heddrick, 166 Wn.2d 898, 910, 215 P.3d 201 (2009); City of Seattle v. Ratliff, 100 Wn.2d 212, 219, 667 P.2d 630 (1983); Bishop, 82 Wn. App. at 864. Therefore, Del Duca's convictions must be reversed.

2. THE TRIAL COURT ERRED WHEN IT FAILED TO DECIDE DEL DUCA'S POST-TRIAL MOTIONS.

As noted above, following the jury's verdicts, Del Duca – still without counsel – filed several challenges to his convictions in a document entitled, "Motion for Mistrial/Dismissal of Charges And Prejudice & Affidavit of Prejudice of Judge." CP 477-499. CrR 7.4 (Arrest of Judgment) and CrR 7.5 (New Trial) permit such post-trial motions. Although these motions are to be filed within 10 days of the verdicts, the trial court may extend that time period. CrR 7.4(b); CrR 7.5(b). Motions for new trial are to be decided prior to entry of judgment and sentence. CrR 7.5(e).

Judge Roberts did not decide the motions prior to entry of the judgment and sentence on December 29, 2014. 50RP 26-31; CP 130. Instead, she proceeded with sentencing and set a subsequent hearing for arguments on the motions. 50RP 3-6, 26, 43-45. At that hearing, which occurred January 9, 2015, both sides argued the post-trial challenges. 51RP 3-46. At the conclusion of the hearing, Judge Roberts indicated she would enter a written ruling later that day. 51RP 47. There is no indication, however, that she ever entered a ruling.

Leaving Del Duca's final motions unresolved for appeal is not appropriate. Appellate Courts do not find facts or assess credibility. See Boeing v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002), disapproved on other grounds in Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1, 201 P.3d 1011 (2009); State v. Bunch, 2 Wn. App. 189, 191, 467 P.2d 212, review denied, 78 Wn.2d 92 (1970). Nor do they engage in initial decision-making; they are courts of review. Wold v. Wold, 7 Wn. App. 872, 876, 503 P.2d 118 (1972).

The failure to exercise assigned discretion is an abuse of discretion. See State v. Tharp, 96 Wn.2d 591, 598, 637 P.2d 961 (1981) (failure to exercise discretion in admitting evidence under ER 404(b)); State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214 (failure to exercise discretion in determining whether offenses involved same criminal conduct for sentencing), review denied, 127 Wn.2d 1010, 902 P.2d 163 (1995), superceded by statute on other grounds by RCW 9.94A.364(6); Tacoma Recycling v. Capitol Material, 34 Wn. App. 392, 396, 661 P.2d 609 (1983) (failure to exercise discretion in denying motion for new trial).

In circumstances where the lower court was required to decide the matter in the first instance, the proper course is to remand for a ruling on the claims. See Wright, 76 Wn. App. at 829; Tacoma

Recycling, 34 Wn. App. at 396. Assuming this Court does not reverse Del Duca's convictions based on the outright denial of counsel, that is the proper course here.

3. THE JURY INSTRUCTION ON REASONABLE DOUBT IS UNCONSTITUTIONAL

Del Duca's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 104. This instruction, based on WPIC 4.01,[7] is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Jurors must have more than just a 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 undermines the presumption of innocence and is substantively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-

[7] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008).

blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same thing.

For these reasons, WPIC 4.01 violates due process and the right to jury trial. U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 3, 22. Use of this instruction in Del Duca's case is structural error requiring reversal of his convictions.

a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence.

In order for jury instructions to be sufficient, they must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev. in part on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). So in examining how an average juror would interpret an instruction, appellate courts rely on the ordinary meaning of words and rules of grammar in reaching a conclusion.[8]

[8] See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, resulting in court's determination that jury

With these principles in mind, the flaw in WPIC 4.01 reveals itself with little difficulty. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a "not guilty" verdict. Examination of the meaning of the words "reasonable" and "a reason" shows this to be true.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition to ascertain the jury's likely understanding of a word used in jury instruction); Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (in finding jury instruction on a presumption to be infirm, looking to dictionary definition of the word "presume" to determine how jury may have interpreted the instruction).

"Reasonable" is defined as "being in agreement with right

---

could have applied the erroneous standard), overruled on other grounds, State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying upon grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785, (discussing difference between use of "should" rather than use of a word indicating "must" regarding when acquittal is appropriate), review

thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . ." Webster's Third New Int'l Dictionary 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'") (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

An instruction that defines reasonable doubt as "a doubt based on reason" would be proper. But WPIC 4.01 does not do that. WPIC 4.01 requires "a reason" for the doubt, which is different from a doubt based on reason.

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01 means "an

---

denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

expression or statement offered as an explanation of a belief or assertion or as a justification." Webster's Third New Int'l Dictionary at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification to oneself or to other jurors. In other words, WPIC 4.01 requires more than just a doubt based on reason; it requires a doubt that is articulable.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington's pattern instruction on reasonable doubt is unconstitutional because its language requires more than just a reasonable doubt to acquit. Instead, the instruction requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have a reasonable doubt but also have difficulty articulating why their doubt is reasonable to themselves or others. Scholarship on the reasonable doubt standard explains the problem 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.[9]

In these scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a

---

[9] 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).

reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, which shifts the burden and undermines the presumption of innocence.

The standard of proof beyond a reasonable doubt enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Winship, 397 U.S. at 363. The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." State v. Bennett, 161 Wn.2d 303, 316, 165 P.3d 1241 (2007). The doubt "for which a reason exists" language in WPIC 4.01 does that in directing jurors to have a reason to acquit rather than a doubt based on reason.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. This fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt" and "subtly shifts the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of

innocence." Id. at 759. The Court of Appeals has repeatedly rejected such arguments as prosecutorial misconduct because they misstate the law on reasonable doubt.[10] Simply put, "a jury need do nothing to find a defendant not guilty." Id.

The improper fill-in-the-blank arguments were not the mere product of invented malfeasance. The offensive arguments did not originate in a vacuum – they sprang directly from WPIC 4.01's language. In State v. Anderson, for example, the prosecutor explicitly recited WPIC 4.01 before making the fill-in-the-blank argument: "A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. 417, 424, 220 P.3d 1273 (2009).

---

[10] See, e.g., State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding improper prosecutor's PowerPoint slide that read, "'If you were to find the defendant not guilty, you have to say: 'I had a reasonable doubt[.]' What was the reason for your doubt? 'My reason was ____.'"); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 936 (2010) (holding improper argument when prosecutor told jurors that they have to say, "'I doubt the defendant is guilty and my reason is I believed his testimony that . . . he didn't know that the cocaine was in there, and he didn't know what cocaine was'" and that "'[t]o be able to find reason to doubt, you have to fill in the blank, that's your job'"(quoting reports of proceedings)); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (prosecutor committed misconduct in stating "In order to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is' — blank"), review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (finding improper prosecutor's statement that "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank"), review denied, 170 Wn.2d

The same occurred in State v. Johnson, where the prosecutor told jurors "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

These misconduct cases make clear that WPIC 4.01 is the true culprit for the impermissible fill-in-the-black arguments. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same pitfall?

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). Instructions must be "manifestly clear"

1002, 245 P.3d 226 (2010).

because an ambiguous instruction that permits an erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity, that is not the correct standard for measuring the adequacy of jury instructions. Courts have an arsenal of interpretive tools at their disposal; jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01's infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist until a reason for it can be articulated. Instructions must not be "misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, supports this conclusion.

In State v. Kalebaugh, the Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." 183 Wn.2d 578, 585, 355 P.3d 253 (2015). That conclusion is sound:

> Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction, "a reasonable doubt is such a doubt as the jury are able to give a reason for").

b. No appellate court in recent times has directly grappled with the challenged language.

In Bennett, the Supreme Court directed trial courts to give WPIC 4.01 at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). In Emery, the

court contrasted the "proper description" of reasonable doubt as a "doubt for which a reason exists" with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. 174 Wn.2d at 759. In Kalebaugh, the court contrasted "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists" with an improper instruction that "a reasonable doubt is 'a doubt for which a reason can be given.'" 183 Wn.2d at 584. The court concluded that the trial court's erroneous instruction – "a doubt for which a reason can be given" – was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here." Id. at 585.

The Kalebaugh Court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors likewise are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their reasonable doubt. WPIC 4.01 requires jurors to articulate to themselves or others a reason for having a reasonable doubt. No Washington court has ever explained how this is not so. Kalebaugh did not

provide an answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case.

None of the appellants in Kalebaugh, Emery, or Bennett argued that the language requiring "a reason" in WPIC 4.01 misstates the reasonable doubt standard. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control. Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which there is a reason with a doubt for which a reason can be given.

Forty years ago, the Court of Appeals addressed an argument that "'[t]he doubt which entitled the defendant to an acquittal must be

a doubt for which a reason exists' (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instructions). Thompson brushed aside the articulation argument in one sentence, stating "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Id. at 5.

That cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference in meaning between a doubt based on "reason" and a doubt based on "a reason." Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing "this instruction has its detractors," but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5. In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without merit. 54 Wn.2d at 291.[11] Nabors cites Tanzymore as its support. 8 Wn. App. at 202. Neither case specifically addresses the doubt "for which a reason exists" language in the instruction. There was no challenge to that language in either case, so it was not an issue.

---

[11] The "standard" instruction at issue in Tanzymore read: "You are instructed that the law presumes a defendant to be innocent until proven guilty beyond a reasonable doubt. This presumption is not a mere matter of form, but it is a substantial part of the law of the land, and it continues throughout the entire trial and until you have found that this presumption has been overcome by the evidence beyond a reasonable doubt.

'The jury is further instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists. You are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely vague, imaginary, or conjectural. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced at the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.'" Tanzymore, 54 Wn.2d at 291 n.1.

Thompson observed "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wn. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following instructional language: "It should be a doubt for which a good reason exists." 25 Wn. at 421. Harras simply maintained the "great weight of authority" supported it, citing the note to Burt v. State (Miss.) 48 Am. St. Rep. 574 (s. c. 16 South. 342). Id. This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given. [12]

So Harras viewed its "a doubt for which a good reason exists" instruction as equivalent to those instructions requiring a reason be given for the doubt. And then Thompson upheld the doubt "for which a reason exists" instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation,

---

[12] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 199 (La. 1891) ("A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt. It is such a 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, 255-59, 36 P. 573 (Or. 1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

as it amounts to a concession that WPIC 4.01's doubt "for which a reason exists" language means a doubt for which a reason can be given. That is a problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Emery, 174 Wn.2d at 759-60; Kalebaugh, 183 Wn.2d at 584-585.

State v. Harsted, 66 Wn. 158, 119 P. 24 (1911) further illuminates the dilemma. Harsted took exception to the following instruction: "The expression 'reasonable doubt' means in law just what the words imply -- a doubt founded upon some good reason." Id. at 162. The Supreme Court explained the phrase "reasonable doubt" means:

> [I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. 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. In support of its holding that there was nothing wrong with the challenged language, Harsted cited a number of out-of-state cases upholding instructions that defined a reasonable doubt as a doubt for which a reason can be given. Id. at 164. As stated in one

of these decisions, "[a] doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (Wis. 1899). [13] Harsted noted some courts disapproved of the same kind of language, but was "impressed" with the view adopted by the other cases it cited and felt "constrained" to uphold the instruction. 66 Wn. at 165.

Here we confront the genesis of the problem. Over 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation demolishes the argument that there is a real difference between a doubt "for which a

---

[13] Additional citations include the following: State v. Patton, 66 Kan. 486, 71 Pac. 840, 840-42 (Kan. 1903) (instruction defining a reasonable doubt as such a doubt "as a jury are able to give a reason for"); Hodge v. State, 97 Ala. 37, 41, 12 South. 164, 38 Am. St. Rep. 145 (Ala. 1893) ("a reasonable doubt is defined to be a doubt for which a reason could be given."); State v. Serenson, 7 S. D. 277, 64 N. W. 130, 132 (S.D. 1895) ("a reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a reason for."); Vann, 9 S.E. at 947-48 ("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."); People v. Guidici, 100 N. Y. 503, 510, 3 N. E. 493 (N.Y. 1885) ("You must understand what a reasonable doubt is. It is not a mere guess or surmise that the man may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence-a doubt for which some good reason arising from the evidence can be given."); Jefferson, 43 La. Ann. at 998-99 ("A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for.").

reason exists" in WPIC 4.01 and being able to give a reason for why doubt exists. The Supreme Court found no such distinction in Harsted and Harras.

The mischief has continued unabated ever since. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. This is apparent because the Supreme Court in Emery and Kalebaugh, and numerous Court of Appeals decisions in recent years, condemn any suggestion that jurors must give a reason for why there is reasonable doubt. Old decisions like Harras and Harsted cannot be reconciled with Emery and Kalebaugh. The law has evolved. What seemed acceptable 100 years ago is now forbidden. But WPIC 4.01 has not evolved. It is stuck in the misbegotten past.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require a reason for why reasonable doubt exists. That requirement distorts the reasonable doubt standard to the accused's detriment.

d. This manifest constitutional issue is properly before this Court.

Although Del Duca did not object below to the instruction on reasonable doubt proposed by the State [43RP 80; 44RP 137-140, 45RP 4-6, 28-35], the issue may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as manifest constitutional errors under RAP 2.5(a)(3). See State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012) (structural error is manifest constitutional error).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). 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, 508 U.S. at 279-80. Indeed, 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.

WPIC 4.01's language requires more than just a reasonable doubt to acquit criminal defendants; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence and shifts the burden of proof. Instructing jurors with WPIC 4.01 is both structural and manifest constitutional error.

Recently, in State v. Lizarraga, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 8112963 (filed 12/7/15), this Court upheld WPIC 4.01 against a challenge that it undermined the presumption of innocence and burden of proof. In doing so, this Court merely cited Bennett and State v. Pirtle, 127 Wn.2d 628, 656-658, 904 P.2d 245 (1995). Lizarraga, at *20. As discussed above, however, Bennett does not dispose of these arguments. Nor does Pirtle, which merely dealt with a challenge to the last sentence of WPIC 4.01, which provided that, if jurors did not have an "abiding belief" in the truth of the charge, they were not satisfied beyond a reasonable doubt. Pirtle, 127 Wn.2d at 656-658.

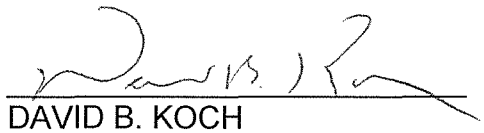
D. CONCLUSION

Del Duca was denied his constitutional right to assistance of counsel. His convictions must be reversed. Reversal is also required based on the faulty instruction defining "reasonable doubt." Assuming this Court does not reverse on these grounds, the case should be remanded so that the trial court can rule on Del Duca's post-trial motions.

DATED this 21st day of December, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 72904-7-I
	)	
JON DEL DUCA,	)	
	)	
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 21ST DAY OF DECEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JON DEL DUCA
DOC NO. 856708
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF DECEMBER, 2015.

X Patrick Mayovsky