

NO. 74409-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

BERNABE JOHN LOVE,

Appellant.

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FILED  
Oct 06, 2016  
Court of Appeals  
Division I  
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CHAD ALLRED

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

Should the defendant's conviction be reversed because the trial court declined to give his proposed non-WPIC jury instruction that provided the dictionary definition of the word "abiding"?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged and convicted by a jury with Second-Degree Unlawful Possession of a Firearm (Count I), Driving While Under the Influence – with a refusal to take a breath test allegation (Count II), and Hit and Run (Count III). CP 11-12, 58-61. He received a sentence of 5 months. CP 67-69, 73.

**2. SUBSTANTIVE FACTS**

The sole issue raised on appeal is whether the trial court was required to give a requested jury instruction defining a single word. Thus, the substantive facts are not relevant to this appeal.

**C. ARGUMENT**

**THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE LAW**

The defendant contends that his conviction must be reversed because the trial court declined to give his proposed non-WPIC jury instruction providing the dictionary definition of the word "abiding." This claim has no merit. The jury was properly

instructed on the law and each party was fully able to argue their theory of the case. While the trial court certainly could have given the defendant's proposed instruction defining the word "abiding" (as it could have defined any other word), there is no requirement that the court do so.

### **1. The Relevant Facts**

At the beginning of trial the court stated that it was not going to require the defense to propose jury instructions. 2RP<sup>1</sup> 30-31. Rather, the court stated that when the time came to go over the WPIC instructions provided by the State, if the defense had a problem with any of the proposed instructions, there was "no laying in the weeds," the defense would be required to object and have an alternative instruction proposed. Id. The defense responded, "I absolutely agree with that, that ruling." Id. at 31.

One of the instructions proposed by the State was the standard WPIC instruction defining "reasonable doubt."

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

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP—4/14/15, 2RP—10/14/15, 3RP—10/15/15 (volume 1), 4RP—10/15/15 (volume 2), 5RP—10/19/15, 6RP—10/20/15, 7RP—12/4/15.

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. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

WPIC 4.01; CP 90.

The defendant told the court that “as to the reasonable doubt instruction, Your Honor, *I don’t have a problem with the way it’s worded*, however, I think it might be appropriate to include a dictionary definition of the word abiding.” 5RP 356 (emphasis added). The defendant proposed the following instruction:

Abiding means continuing without change; enduring; lasting.

CP 29 (citing Webster’s New World College Dictionary, Third Edition, 1999). The defense felt that the court should give the instruction because WPIC 4.01, which “we’ve otherwise agreed to include the word abiding” and “I’m not so sure that folks know what abiding means.” 6RP 470.

The court declined to give the defendant's proposed instruction, noting that WPIC 4.01 has been "approved repeatedly" by the court and "is sufficient." 6RP 470. The defendant then asked if he could make the argument as to the meaning of the word abiding to the jury. 6RP 471. The court responded, "[a]bsolutely." Id. Formal exceptions to the jury instructions were then sought, to which the defendant had none. 6RP 473.

The court then instructed the jury using the standard WPIC 4.01 instruction. 6RP 501-02; CP 40 (Jury Instruction # 3).

**2. The Court Was Not Required To Provide The Jury With The Defendant's Proposed Instruction**

When read as a whole, jury instructions are legally sufficient if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007); State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Due process is "met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted." State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). That was done in this case.



To begin, although not directly challenged here, courts of this state have repeatedly found that WPIC 4.01 is a correct, complete, and sufficient statement of law satisfying due process concerns. For example, in Bennett, the Supreme Court stated:

We have approved WPIC 4.01 and concluded that it adequately permits both the government and the accused to argue their theories of the case. . . 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.

Bennett, 161 Wn.2d at 317-18, accord, State v. Pirtle, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) ("the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster"); State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959) ("the court gave the standard instruction on reasonable doubt. This instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error] without merit.");

see also State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901); State v. Parnel, 46995-2-II, 2016 WL 4126013 (Aug. 2, 2016); State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), rev. denied, 185 Wn.2d 1022 (2016); State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975); State v. Nabors, 8 Wn. App. 199, 202, 505 P.2d 162 (1973).

Despite the plethora of decisions holding that WPIC 4.01 is an accurate, complete and sufficient statement of the law (as the defendant admitted below), the defendant still asserts that the court was constitutionally required to separately define for the jury the word “abiding,” a word contained in WPIC 4.01. This assertion has no support.

In regards to providing definitional instructions, the Supreme Court has stated that, “we find nothing in the constitution, as interpreted in the cases of this or indeed any court, requiring that the meanings of particular terms used in an instruction be specifically defined.” Scott, 110 Wn.2d at 689-91; see also State v. Ng, 110 Wn.2d 32, 44, 750 P.2d 632 (1988) (quoting State v. Pawling, 23 Wn. App. 226, 232, 597 P.2d 1367, rev. denied, 92 Wn.2d 1035 (1979)) (“The constitutional requirement is only that the jury be instructed as to each element of the offense

charged. . . The failure of the court in the case at bench to define further one of those elements is not within the ambit of the constitutional rule”).

In order for there to be any requirement that a term be defined, albeit a non-constitutional requirement, a defendant must show that the so-called “technical term rule” applies. Scott, 110 Wn.2d at 690. Generally, a trial court must define technical words and expressions used in jury instructions, but need not define words and expressions that are of common understanding. Id. A term is “technical” when it has a meaning that differs from common usage. State v. Brown, 132 Wn.2d 529, 611, 940 P.2d 546 (1997); Scott, 110 Wn.2d at 694. However, the defendant’s own argument defeats his claim.

In Scott, the defendant argued that the statutorily defined term “knowledge” needed to be defined for the jury because it was a technical term. The Supreme Court disagreed. The Court compared the common dictionary definition of the word “knowledge” with the statutory definition of the term and found that the two definitions were not substantively different. Therefore, because the term was a term of common understanding, the trial court was not required to further it. Scott, 110 Wn.2d at 691-92.

Here, the defendant asks the very thing Scott says the trial court is not required to do – provide the jury with the common dictionary definition of a word.

Still, to support his argument, the defendant attempts to rely on a case involving alleged misconduct in closing argument, State v. Osman, 192 Wn. App. 355, 366 P.3d 956 (2016). However, Osman actually supports the conclusion that WPIC 4.01 sufficiently states the law and is all the instruction that the court is required to give.

In closing argument in Osman, defense counsel began giving examples of what it meant to have an abiding belief in guilt, stating, for example, that “[i]t means that if you find Harun [Osman] guilty the minute you walk out of this courthouse that’s your decision, you can’t change your mind and look back and say I wonder if I made a mistake.” The prosecutor objected that this was not an accurate statement of the law. Osman, 192 Wn. App. at 374. On review, the court agreed with Osman that the defense argument was not improper because the argument properly addressed the significance of having an abiding belief in the truth of the charge.

In reaching its decision, the Osman court stated that:

[T]he Constitution does not require any particular form of words be used in advising the jury of the government's burden of proof. The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.... Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, ... the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.... Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.

Osman, 192 Wn. App. at 369 (citing Victor v. Nebraska, 511 U.S. 1, 5-6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) and Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954)) (internal quotation omitted). In short, while the argument of defense counsel in closing was not a misstatement of the law, that does not mean that the court was required to instruct the jury beyond WPIC 4.01 -- an instruction deemed legally accurate, complete and sufficient.

As stated above, jury instructions are sufficient if, read as a whole, they properly state the law, are not misleading, and permit

each party to argue his or her theory of the case. Brown, 132 Wn.2d at 605. There is no constitutional requirement that definitions of terms be provided to a jury. As the Supreme Court has stated, when it comes to defining terms, a defendant can prepare a “well-crafted instruction, which the trial court may accept or reject.” Scott, 110 Wn.2d at 690-91.

In any event, the failure to define a term, even if required, is a non-constitutional error. Scott, 110 Wn.2d at 688 n.5. A non-constitutional error does not require reversal of a criminal conviction unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Crenshaw, 98 Wn.2d 789, 800, 659 P.2d 488 (1983). Here, the judge gave the defendant *carte blanche* to argue the meaning of the word “abide” to the jury. He cannot show the outcome of trial was affected by the failure of the court to provide the common dictionary definition of the word.


D. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 5 day of October, 2016.

Respectfully submitted,

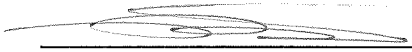
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Mick Woynarowski, of Washington Appellate Project, containing a copy of the Brief of Respondent, in STATE V. LOVE, Cause No. 74409-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Name  
Done in Seattle, Washington

10-06-16  
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Date