

Supreme Court No. 94465-2  
Court of Appeals No. 74409-7-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BERNABE JOHN LOVE,

Petitioner.

FILED  
May 02, 2017  
Court of Appeals  
Division I  
State of Washington

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

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Bernabe John Love, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision affirming his conviction designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Love seeks review of the Court of Appeals decision dated April 17, 2017 in an unpublished opinion.

C. ISSUE PRESENTED FOR REVIEW

Was it was error for the court to refuse to provide jurors with a definition of “abiding belief” as used in the standard “reasonable doubt” instruction? Did the court’s refusal to define a confusing aspect of the reasonable doubt instruction deprive Mr. Love of his constitutional right to a fair trial?

D. STATEMENT OF THE CASE

Mr. Love was charged with unlawful possession of a firearm in the first degree, driving under the influence, and hit and run of an unattended vehicle. CP 11-12. The State alleged that Mr. Love, while intoxicated, crashed his Honda into a parked Toyota, left the scene, and that that he unlawfully had possession of a working shotgun found in

the Honda after the accident. CP 5-6. No one saw who may have been in the Honda at the time of the impact. RP 346, 380.

Defense counsel requested that the court instruct the jury that “Abiding means continuing without change; enduring; lasting.” CP 29; RP 356. The request was denied. RP 470-71. Mr. Love was convicted of all three charges.

On appeal, Mr. Love argued that the trial court should have granted defense counsel’s request to instruct the jury on the definition of “abiding.” The Court of Appeals affirmed Mr. Love’s convictions. App 1.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

**Review should be granted to address whether the trial court’s refusal to allow the defense’s proposed definition of an ambiguous term in the most critical of jury instructions deprived Mr. Love of his constitutional right to a fair trial.**

Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art I, § 22; Jackson v. Virginia, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. 358, 365–66, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law,

not be misleading, and permit the defendant to present his theory of the case. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); State v. Gordon, 172 Wn.2d 671, 677, 260 P.3d 884 (2011).

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

The standard of review applicable to a denial of a jury instruction depends on the trial court decision under review. State v. Condon, 182 Wn.2d 307, 315–16, 343 P.3d 357 (2015) citing to State v. Walker, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). A decision regarding a jury instruction that is based on a legal conclusion, as here, is reviewed de novo. Id., Walker, Wn.2d at 772

Below, the State proposed the standard WPIC 4.01 reasonable doubt instruction, which ends with the sentence: “If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” CP 40. This instruction has been approved as the “proper” and “correct” reasonable doubt instruction for trial courts to give to the jury. State v. Parnel, 195 Wn. App. 325, 328, 381 P.3d 128, 130, review denied, 186 Wash. 2d 1031, 385 P.3d 107 (2016) (citing State v. Kalebaugh, 183 Wn.2d 578, 585–86, 355 P.3d 253 (2015)).

Nevertheless, the word “abiding” in that instruction remains confusing, even to lawyers. In State v. Osman, the court reviewed a trial court record where defense counsel, in closing argument, addressed the meaning of “an abiding belief in the truth of the charge.” State v. Osman, 192 Wn. App. 355, 366, 366 P.3d 956, 962 (2016).

Osman’s defense counsel discussed WPIC 4.01:

‘[I]f you have an abiding belief of the truth of the charge’ what does that mean? It means that if you find Harun 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. **A month from now** when maybe you’re talking to people about your experience you can’t go back and say maybe I made a mistake.

**A year from now –**

Id. at 374 (emphasis added).

As Osman’s defense counsel talked about the continuing, enduring, and lasting meaning of “abiding,” the prosecutor objected: “Your Honor, I’m going to object that’s not... accurate.” Id. The Superior Court judge presiding over that trial agreed that what Osman’s counsel argued was somehow inaccurate and sustained the prosecutor’s objection. Id. On appeal, lawyers for the State still “contend[ed] the defense argument is a misstatement of the law.” Id.

The court held that the trial “court erred in sustaining the objection as inaccurate and limited the scope of the defense closing argument.” Id. at 377. In pointing out the error, the court noted that the meaning of the phrase “abiding belief” had not yet been defined by Washington case law, but had been addressed by the United States Supreme Court. Id. at 374, citing Victor v. Nebraska, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); Hopt v. Utah, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708 (1887).

In Victor, the meaning of an “abiding conviction” was defined as “settled” and “fixed.” Id. The Osman court further noted that “Consistent with the description of ‘abiding conviction’ in Victor, Webster’s Third New International Dictionary 3 (2002) defines ‘abiding’ as ‘great or lasting’ and ‘continuing or persisting in the same state without changing or diminishing.’” Osman, at 375, fn. 10.

In correcting the Osman prosecutors and trial judge, the court approved of Osman’s defense counsel’s argument:

properly addressed the significance of having ‘an abiding belief in the truth of the charge’ by arguing jurors should not ‘look back’ the minute they walk out of the courtroom or a month or year later and ‘say maybe I made a mistake.’

Id. at 377.



State v. Osman confirms both that Mr. Love's proposed instruction was an accurate statement of the law and that such a definition is a necessary component of the "abiding belief" jury instruction. The fact that seasoned criminal law practitioners (like the Osman prosecutor and trial judge) could be wrong about the meaning of "abiding" validates Mr. Love's defense counsel's concerns that lay jurors would be confused by the same word.

Mr. Love's defense counsel acquiesced to the giving of the general WPIC 4.01, but did so subject to a necessary clarification:

I don't have a problem the way it's worded; however, I think it might be appropriate to include a dictionary definition of the word abiding... I'm concerned that the average juror may not know exactly know what that means.

RP 356.

Mr. Love's defense counsel proposed that the jury be given this additional instruction: "Abiding means continuing without change; enduring; lasting," which comes from a dictionary definition of the word. CP 29 (citing Webster's New World College Dictionary). The proposed definition was nearly identical to the dictionary definition used by this Court in Osman, 192 Wn. App. at 375, fn. 10 (relying on Webster's Third New International Dictionary 3 (2002) to define

“abiding” as “great or lasting” and “continuing or persisting in the same state without changing or diminishing”).

Below, the prosecutor agreed that “[o]bviously, reasonable doubt is one of the most crucial parts of the criminal trial.” RP 468. This is true; the reasonable doubt instruction is “perhaps the most important aspect of the closing instruction to the jury in a criminal trial.” Dunn v. Perrin, 570 F.2d 21, 25 (1st Cir.), cert. denied, 437 U.S. 910, 98 S.Ct. 3102, 57 L.Ed.2d 1141 (1978). This is precisely why the proposed instruction should have been given, not rejected.<sup>1</sup>

Osman confirms that Mr. Love’s defense counsel’s concerns that “abiding” should be defined to the jury in order to avoid confusion were well taken. RP 469-70. Under Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), “some defective reasonable doubt instructions would constitute plain error, since a ‘structural error’ of that kind undermines the ‘reliab[ility]’ and hence integrity of the criminal trial.” But, the Victor Court held that an instruction need not follow a prescribed formula, and rather required only that the trial court (1) convey to the jury that it must consider only

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<sup>1</sup> The trial prosecutor below deferred on what the court should do: “I think the safest position for me is to not object and just to strenuously make it clear that it is the defendant that is requesting this additional definition.” RP 468-69.

the evidence and (2) properly state the government's burden of proof.

Victor, 511 U.S. at 13.

The Court of Appeals noted that the trial court allowed Mr. Love's defense counsel to address the meaning of abiding belief in its closing. App. at 5. However, the fact that the trial judge below allowed defense counsel to argue that abiding meant enduring is not enough; the full weight of the instruction was needed. RP 471.

Especially with respect to the unlawful possession of a firearm count, the State's evidence was less than compelling. While Mr. Love stipulated that he was legally barred from possessing firearms, he was never seen handling the shotgun and there was no admission of its ownership. RP 463.<sup>2</sup> No fingerprints were recovered on the weapon. RP 486. Law enforcement made no effort to recover DNA. RP 491.<sup>3</sup>

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<sup>2</sup> The gun was located between the center console and the passenger side of the Honda and it was in working order. RP 393-95, 400, 403-04, 409.

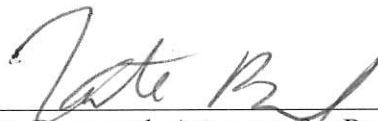
<sup>3</sup> The allegation that Mr. Love had driven the Honda was stronger. The police did detain him in the general vicinity, he was the car's registered owner, and he had keys to the vehicle on his person. RP 280-82; RP 283, 389; RP 397. A police officer testified that Mr. Love had volunteered to him in a holding cell "that he wasn't involved in a collision and that he only parked his car on the sidewalk." RP 427. And, the owner of the damaged Toyota identified Mr. Love in a field show-up as the man seen near the Honda. RP 327-28. On the other hand, a neighbor who spoke to someone apologizing for the crash, said that man was "between some kind of a white and Hispanic... [m]aybe something like a Puerto Rican or Latin American." RP 367, 376-77. Curiously, the police never asked this neighbor to attempt to identify Mr. Love, who is white. And, even though both witnesses remembered seeing a dog by the Honda, there was no dog with Mr. Love when he was stopped by the police sometime after the crash. RP 278, 316, 328.

Had the instruction been given, Mr. Love would have been in a stronger position to argue to the jury that the State's circumstantial case was insufficient to establish guilt beyond a reasonable doubt, a burden of proof satisfied only if the jurors belief in the strength of the State's case was truly continuing, enduring, and lasting.

F. CONCLUSION

Mr. Love requests the court grant review under RAP 13.4 to determine whether the trial court's denial of his request to define "abiding" in the reasonable doubt instruction deprived him of his constitutional right to a fair trial. This issue meets the standards for this Court to accept review. Mr. Love therefore requests review pursuant to RAP 13.4(b).

Respectfully submitted this the 2<sup>nd</sup> day of May 2017.



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## APPENDIX 1

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

THE STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. ) UNPUBLISHED OPINION  
 )  
 BERNABE JOHN LOVE, )  
 )  
 Appellant. ) FILED: April 17, 2017

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COURT OF APPEALS  
STATE OF WASHINGTON

SCHINDLER, J. — A jury convicted Bernabe John Love of unlawful possession of a firearm in the second degree, driving while under the influence, and hit and run. Love seeks reversal of the convictions, arguing the court erred in declining to instruct the jury on reasonable doubt by using the dictionary definition of an “abiding” belief. We disagree and affirm.

The State charged Bernabe John Love with unlawful possession of a firearm in the second degree in violation of RCW 9.41.040(2)(a)(i), count I; driving while under the influence in violation of RCW 46.61.502 and .506, count II; and hit and run in violation of RCW 46.52.010(1), count III. Love entered a plea of not guilty. At the conclusion of the evidence, the parties addressed the jury instructions. The State proposed giving a reasonable doubt jury instruction based on 11 Washington Practice: Washington

Pattern Jury Instructions: Criminal 4.01, at 79 (2d ed. Supp. 2005) (WPIC).<sup>1</sup> Consistent with WPIC 4.01, “Jury Instruction No. 3” states:

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

Defense counsel did not object to giving Jury Instruction No. 3—“[A]s to the reasonable doubt instruction, Your Honor, I don't have a problem with the way it's worded.” But defense counsel argued the court should also instruct the jury on the definition of “abiding.”

I think it might be appropriate to include a dictionary definition of the word abiding, because, of course, the agreed upon wording is abiding belief and I'm concerned that the average juror may not know exactly . . . what that means.

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<sup>1</sup> WPIC 4.01 states:

[The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [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. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]

(Alterations in original.)

The defense proposed an instruction that defines “abiding” using Webster’s New World College Dictionary (3d ed. 1996). The proposed instruction states, “Abiding means continuing without change; enduring; lasting.” The court declined to give the proposed instruction. The court ruled, “[T]he WPIC on this point is sufficient and has been approved repeatedly.”

Defense counsel then asked if he could address the definition of “abiding belief” during closing argument. In response, the court ruled, “Absolutely.”

During closing, defense counsel addressed an abiding belief and the meaning of an abiding belief as “continuing without change or enduring or lasting.”

Those two words, abiding belief, is something that you’re going to have to figure out as jurors as to what that means to you as individuals, what it means to you as jurors, and how it applies to this case.

The burden, of course, has always been on the State to show that this case has been established beyond a reasonable doubt, but abiding belief, the word abiding is one that is suggesting continuing without change or enduring or lasting. When the 12 of you folks get back in the back you’re going to have to make some decisions about somebody’s life and you have to be concerned about that and you’re told in the jury instructions that you don’t need to be concerned about punishment, only inasmuch as it makes you careful in the decision you make.

But an abiding belief is one where you’ve decided for yourself and then as a group, as a consensus, because this is a consensus decision, whether or not you’re comfortable with it now, after you’ve made your decision, next week, a year from now, two years. It needs to be enduring or lasting, continuing without change.

The jury convicted Love as charged.

Love contends he is entitled to reversal because the court violated his constitutional right to due process by declining to give a jury instruction defining “abiding” belief. Love claims the dictionary definition of abiding belief is necessary to define reasonable doubt.



We review challenges to jury instructions de novo. State v. Walker, 182 Wn.2d 463, 481, 341 P.3d 976 (2015). “[J]ury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof.” State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). “Instructions must also properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case.” Bennett, 161 Wn.2d at 307.

In Bennett, the Washington Supreme Court approved WPIC 4.01 as a complete and accurate definition of reasonable doubt that “adequately permits both the government and the accused to argue their theories of the case.” Bennett, 161 Wn.2d at 317. “[U]ntil a better instruction is approved,” the Supreme Court instructed trial courts 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 318. The court cautioned against attempting to improve or enhance WPIC 4.01 because “every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms, and shifts, perhaps ever so slightly, the emphasis of the instruction.” Bennett, 161 Wn.2d at 317.

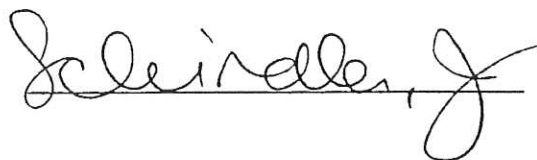
State v. Osman, 192 Wn. App. 355, 366 P.3d 956 (2016), does not support Love’s argument that the court erred in refusing to supplement WPIC 4.01 by instructing the jury on the dictionary definition of “abiding” belief. In Osman, defense counsel argued during closing that an abiding belief “ ‘means that if you find [the defendant] 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.’ ” Osman, 192 Wn. App. at 373-74. The court sustained the State’s objection to the argument as an incorrect

statement of the law. Osman, 192 Wn. App. at 374. We held the trial court erred in sustaining the objection as an inaccurate statement of the law and improperly limited the scope of the defense closing argument but concluded the error was harmless beyond a reasonable doubt. Osman, 192 Wn. App. at 377-79. Here, unlike in Osman, the court allowed defense counsel to address the meaning of abiding belief at length.

Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 874, 281 P.3d 289 (2012), is not analogous. Unlike in Anfinson, the WPIC defining the meaning of reasonable doubt was approved by the Supreme Court in Bennett.

We affirm.

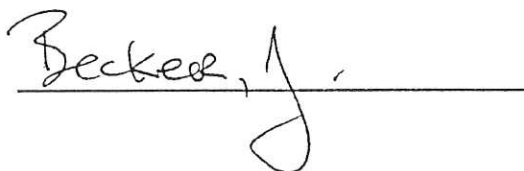
WE CONCUR:



Schneider, J.



Mann, J.



Becker, J.

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74409-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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