

NO. 72019-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

STETSON G. TEDDER,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 6

 A. WPIC 4.01’S DEFINITION OF REASONABLE DOUBT
 CORRECTLY STATES THE LAW AND IS CONSITUTIONALLY
 SOUND. 6

 B. WPIC 4.01 HAS NO ARTICULATION REQUIREMENT AND
 DOES NOT LESSEN THE PRESUMPTION OF INNOCENCE..... 9

 C. WPIC 4.01 IS NOT MISLEADING AND DEFINES
 REASONABLE DOUBT IN A MANNER UNDERSTANDABLE TO
 THE AVERAGE JUROR. 13

 D. THERE WAS NEITHER MANIFEST CONTSTITUTIONAL
 ERROR NOR STRUCTURAL ERROR BECAUSE THE WPIC 4.01
 IS A CORRECT STATEMENT OF THE LAW. 18

IV. CONCLUSION..... 20

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273, <u>review denied</u> 170 Wn.2d 1002 (2009).....	10
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	8, 9
<u>State v. Brown</u> , 29 Wn. App. 11, 627 P.2d 132 (1981).....	13
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P3d 653 (2012).....	9, 10, 12
<u>State v. Harras</u> , 25 Wash. 416, 65 P.2d 774 (1901).....	7
<u>State v. Hayes</u> , 73 Wn.2d 268, 439 P.2d 978 (1968).....	13
<u>State v. Johnson</u> , 158 Wn. App. 677, 243 P.3d 926 (2012) ...	10, 14, 15
<u>State v. Kalebaugh</u> , 179 Wn. App. 414, 318 P.3d 288, <u>review granted</u> , 180 Wn.2d 1013 (2014).....	11, 12, 18
<u>State v. Kylo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009)	13
<u>State v. Nabors</u> , 8 Wn. App. 199, 505 P.2d 162 (1973)	8
<u>State v. Smith</u> , 174 Wn. App. 359, 298 P.3d 785, <u>review denied</u> , 178 Wn.2d 1008 (2013).....	13, 19
<u>State v. Tanzymore</u> , 54 Wn.2d 178, 240 P.2d 290 (1959)	7
<u>State v. Thompson</u> , 13 Wn. App. 1, 533 P.2d 395 (1975).....	8, 9
<u>State v. Venegas</u> , 155 Wn. App. 507, 228 P.3d 813, 170 Wn.2d 1003 <u>review denied</u> 170 P.2d 1003 (2010).....	10
<u>State v. Walker</u> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	9, 10
<u>State v. Watkins</u> , 136 Wn. App. 240, 148 P.3d 1112 (2006)	9
<u>State v. Wise</u> , 176 Wn.2d 1, 288 P.3d 1113 (2012).....	19

FEDERAL CASES

<u>Boyde v. California</u> , 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).....	14
<u>Holland v. United States</u> , 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954).....	16
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	16
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	16
<u>Sullivan v. Louisiana</u> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).....	19
<u>Victor v. Nebraska</u> , 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).....	16

OTHER CASES

Broadnax v. State, 825 So. 2d 134 (Ala. Crim. App. 2000), aff'd sub nom Ex parte Broadnax, 825 So. 2d 233 (2001) 14

Johnson v. State, 632 P.2d 1231 (Okla. 1981)..... 14

Paulson v. State, 28 S.W.3d 570 (Tex. 2000) 14

People v. Johnson, 119 Cal. App. 4th 976, 14 Cal. Rptr. 780 (2004) 14

State v. Flesch, 254 Mont. 529, 48 St.Rep. 539 (Mont. 1992)..... 15

State v. Putz, 11 Neb. App. 332, 650 N.W.2d 486 (Neb. 2002) 15

State v. Sheahan, 139 Idaho 267, 77 P.3d 956 (Idaho 2003) 15

State v. Williams, 213 Or. 19, 828 P.2d 1006 (Or. 1992) 15

OTHER AUTHORITIES

WPIC 4.01.....passim

I. ISSUES

The Supreme Court has mandated that courts in criminal cases instruct jurors using WPIC 4.01 which defines reasonable doubt as a doubt for which a reason exists. Is that a correct statement of the law?

WPIC 4.01's definition of reasonable doubt contains no explicit or implicit articulation requirement and it is error for a prosecutor to suggest that it does. Does WPIC 4.01 correctly define reasonable doubt?

Does WPIC 4.01 define reasonable doubt in a manner accessible to an average juror?

Does a constitutional or structural error occur when a trial court correctly defines reasonable doubt as a doubt for which a reason exists?

II. STATEMENT OF THE CASE

On March 28, 2014, after a five-day trial, a jury convicted the defendant of assaulting and unlawfully imprisoning his four-year old stepdaughter by shooting her with BBs from an airsoft rifle and hogtying her with zip-ties. CP 21-24. 6RP 113-14.

The crimes occurred between Dec. 25, 2012, and January 12, 2013. CP 21-24. The defendant was married to Mrs. T., M.T.'s

mother, and lived with her and her five children. Little M.T. was then four; her brother, B.T., was eight. 3RP 42-46.

One of B.T.'s Christmas gifts that year was an airsoft rifle that shot plastic BBs and was referred to during trial as a BB gun. 3RP 49, 79, 107, 167.

On January 12, 2013, both children went to visit M.T.'s paternal grandmother, Corrine Smith. 3RP 94-95. During bath time, Smith saw on M.T.'s body dozens of red marks, 36 little welts that looked like chicken pox. 3RP 96, 101. M.T. explained to Smith that she got the marks when the defendant punished her by shooting at her. 3RP 97, 104. Later, another relative asked M.T. about the marks. M.T. told her not to worry; the defendant did not spank her any more, but only hogtied her and shot her with a BB gun. 3RP 116.

On January 13, a forensic nurse interviewed and examined M.T. 4RP 40-47. The nurse saw multiple bruises on M.T.'s skin and abrasions on her wrists and ankles. 4RP 46. M.T. told the nurse that her dad shot her with a BB gun lots of times, even at Christmas because she was bad. 4RP 42, 43. M.T. said the bruises on her wrists and ankles came from her dad zip-tying her arms behind her back. 4RP 42.

M.T. talked to a CPS social worker. 4RP 123-125. She said the marks on her torso were from the defendant shooting her and those on her wrists from zip-ties. 4RP 124. She said the defendant hogtied her when she was in trouble. 4RP 125.

A Snohomish County deputy sheriff went to the ER and spoke to people there about M.T. 4RP 14. The deputy then went to the defendant's house and spoke to the defendant and Mrs. T. 4RP 17. The defendant produced a black airsoft rifle that was stored on a high shelf in the master bedroom closet. 4RP 17, 19.

On January 22, M.T. talked to a child interview specialist. 5RP 49; Ex. 1A. She said the defendant punished her with wall sits. He left set a timer that rang to let her know when she could move. Ex. 1A. She said the defendant was mean and shot her with her brother's BB gun, "like a million times." Asked when the defendant stopped shooting her, she said he had never stopped. She said the defendant tied her up with zip-ties and tape. She said her mother left when it happened because she did not want to hear M.T. crying. M.T. demonstrated the wall sits and the hog typing. M.T. also said there were several BB guns at the house, one of which was black. Id.

On January 22, law enforcement served a warrant on the defendant's home. 4RP 130. They found red plastic BBs behind the living room couch, in the vacuum cleaner, in B.T.'s room, and in the master bedroom. 4RP 135, 136, 149-50, 170-71. They found two rolls of duct tape and zip ties. 4RP 138, 152.

The trial began on March 24, 2014. M.T. testified first. She referred to the defendant as "our dad." 3RP 51.

M.T. described the methods of discipline the defendant used when she was naughty. 3RP 51-52, 56-58, 60-61. Sometimes she had to stand in the corner. 3RP 51. Sometimes she had to do wall sits. 3RP 52. Sometimes she was zip-tied. 3RP 55. The defendant would tie her wrists and ankles. 3RP 55-57. It hurt when it was too tight. 3RP 57-59. The zip-ties had to be removed with pliers. 3RP 64.

The defendant shot her with the BB gun, more than once. 3RP 61. It hurt. 3RP 62. When the defendant shot her, she was bruised. 3RP 61.

Her brother B.T. had also shot her with his BB gun. 3RP 60. He was punished for it and his BB gun was taken away. 3RP 69. B.T. testified that the rule about the BB gun was that he not to shoot *at* anyone. 3RP 81. He said he had accidentally shot M.T.

once. 3RP 82. He confirmed that the defendant, whom he also called Dad, shoot M.T. many times and zip-tied M.T.'s hands. 3RP 82, 84.

M.T.'s mother had seen the red marks. M.T. told her mother the marks were from getting shot with the BB gun. 3RP 67. She told her mother about one time the defendant had shot her. Id. Mrs. T. testified that she had seen M.T.'s red marks before she took M.T. to her grandmother's. 5RP 113. Mrs. T. did not think they were serious; they were just "little red dots", not like M.T. had been hit very hard. 5RP 114.

The defendant said he had seen M.T.'s marks, too; he "looked, saw, that was it." 5RP 173. He said he had taken B.T.'s airsoft gun away. 2RP 174. He denied shooting or hogtying M.T.; he said he only duct taped her. 5RP 184-47.

The defense proposed no reasonable doubt instruction; the State proposed and the court gave WPIC 4.01. CP 31. The jury rejected the defendant's version of events and convicted him of both counts Second Degree Assault of a Child and Unlawful Imprisonment, both crimes of domestic violence. CP 23, 24, 26.

III. ARGUMENT

A. WPIC 4.01'S DEFINITION OF REASONABLE DOUBT CORRECTLY STATES THE LAW AND IS CONSTITUTIONALLY SOUND.

The defendant argues that the trial court gave the jury an unconstitutional definition of reasonable doubt. He argues first that the instruction required the jury to articulate a reason to doubt. He argues next that the instruction undermined the presumption of innocence. Because the instruction correctly states the law, requires no articulation, and does not undermine the presumption of innocence, his arguments should be rejected.

WPIC 4.01 reads as follows:

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 proving that a reasonable doubt exists.

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, after such consideration, you have an

abiding belief in the truth of the charges, you are satisfied beyond a reasonable doubt.

6RP 57; CP 31.

Over 100 years ago, the Supreme Court approved a similar reasonable doubt instruction. State v. Harras, 25 Wash. 416, 420, 65 P.2d 774 (1901). There, the jury was instructed that a reasonable doubt was “a doubt for which a good reason exists.” The Supreme Court said the instruction was correct “according to the great weight of authority” and was not error. Id. at 421.

Almost 60 years ago, the Supreme Court rejected a challenge to a similar reasonable doubt definition. State v. Tanzymore, 54 Wn.2d 178, 178-79, 240 P.2d 290 (1959). The challenged instruction defined reasonable doubt as:

... a doubt for which a reason exists.... 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.

Id. The Supreme Court said that a challenge to the definition, which had been accepted as a fair statement of the law for “many years”, was without merit. Id. at 179.

Forty years ago, Division II reaffirmed the correctness of that definition. State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). Thompson argued that the phrase, “a doubt for which a reason exists” required jurors to assign a reason for their doubt in order to acquit. Id. at 4-5. The court disagreed. Id. at 5. When read with all of the instructions, the reasonable doubt instruction did not tell the jury to assign a reason for its doubts but rather to base its doubts “on reason, not on something vague or imaginary.” Id.; see also State v. Nabors, 8 Wn. App. 199, 202, 505 P.2d 162 (1973). The Court of Appeals was required to follow Supreme Court precedent. Id.

Within the last decade, the Supreme Court found constitutional the wording of WPIC 4.01’s definition of reasonable doubt. State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). There, the defendant had asked the court to instruct the jury using WPIC 4.01. Instead, the court gave the so-called Castle instruction which read, in part:

A reasonable doubt is one for which a reason exists and may arise from the evidence of lack of evidence... There are very few things in this world we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt...

Id. at 309.

The Bennett court said the Castle instruction was constitutionally adequate but not necessarily “a good or even desirable instruction.” Id. at 316. The court exercised its “inherent supervisory powers to maintain sound judicial practice” and instructed every trial court to define reasonable doubt using WPIC 4.01. Id. at 306. Even the four-person dissent, which would have overturned the conviction based on the Castle instruction, agreed that WPIC 4.01’s language was clear. Id. at 320.

In the present case, the defendant has provided this Court with no basis to depart over 100 years of precedent. Indeed, courts of appeal are bound to follow precedent of the Washington Supreme Court. State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006). The defendant’s argument should be rejected and his conviction affirmed.

B. WPIC 4.01 HAS NO ARTICULATION REQUIREMENT AND DOES NOT LESSEN THE PRESUMPTION OF INNOCENCE.

The language of WPIC 4.01 does not contain an articulation requirement. State v. Thompson, 13 Wn. App. at 5. In fact, it is misconduct for a prosecutor to suggest that it does. State v. Emery, 174 Wn.2d 741, 278 P3d 653 (2012); State v. Walker, 164

Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 926 (2012); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813, 170 Wn.2d 1003 review denied 170 P.2d 1003 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273, review denied 170 Wn.2d 1002 (2009).

If WPIC 4.01 contained an articulation requirement, the prosecutors' statements in the above-cited cases would not have been misconduct because they would have been a correct statement of the law. The prosecutors' statements were erroneous precisely *because* WPIC 4.01 contains no articulation requirement.

For example, in State v. Emery, the prosecutor argued that a reasonable doubt was "a doubt for which a reason exists." 174 Wn.2d at 760. Id. That, the court said, was a correct statement of the law. Id. The error came when the prosecutor argued that, in order to acquit, the jury had to articulate its reason to doubt, something not required under WPIC 4.01. Id.

A prosecutor's statement that a reasonable doubt is one for which a reason exists is not error. Anderson, 153 Wn. App. at 430. It is a correct statement of the law. Only when the prosecutor tells the jury that it must articulate a reason to doubt in order to acquit

does error occur, precisely because that argument misstates what the instruction says. Id. at 431.

In the present case, the defense argues that the instruction contains an articulation requirement. However, the very reasoning of the fill-in-the-blanks cases belies that argument. If WPIC 4.01 contained an articulation requirement, fill-in-the-blank arguments would not be error. They would be a correct restatement of the law as contained in the instruction. It is precisely because the instruction does not contain an articulation requirement that a prosecutor cannot argue that it does.

Nor does State v. Kalebaugh, 179 Wn. App. 414, 318 P.3d 288, review granted, 180 Wn.2d 1013 (2014), support the defendant's position. There, the trial court gave a preliminary instruction before the jury was even selected, first reading WPIC 4.01 but then adding two sentences:

If after your deliberations you do not have a doubt for which a reason can be given... you are satisfied beyond a reasonable doubt. On the other hand, if after your deliberations you do have a doubt for which a reason can be given... you are not satisfied beyond a reasonable doubt.

Kalebaugh did not object. Prior to closing argument, the court gave WPIC 4.01 without the extra sentences. On appeal, Kalebaugh

claimed that the pre-voir addition to the standard WPIC 4.01 was manifest constitutional error because it required the jury to fill-in-the-blank on reasonable doubt.

Division II agreed that the addition to WPIC given in the preliminary instructions was erroneous. Id. at 422-23. However, it did not find manifest constitutional error because of the later instruction, WPIC 4.01, given orally and in writing jury, at the close of evidence. Id. Even the dissenting judge, who believed the error was reversible, said that the correct WPIC 4.01 could not cure the error of the articulation requirement voiced by the judge in the opening instructions. Id. at 426. Implicit in the dissenting judge's decision is an understanding that WPIC 4.01 does not contain an articulation requirement.

Defense suggests that the courts in Emery and Kalebaugh failed to analyze why the articulation requirement was unconstitutional when voiced by a prosecutor but not when given by a judge. Defense brief at 12. The answer is simple: A judge does not voice an articulation requirement when he/she reads WPIC 4.01 because that instruction contains no articulation requirement. As the line of cases cited above states, it is error for a judge or prosecutor to suggest that it does.

WPIC 4.01 simply requires defines a reasonable doubt as a doubt for which a reason exists with no further requirement. The instruction does not undermine the presumption of innocence or shift the burden of proof and is constitutional.

C. WPIC 4.01 IS NOT MISLEADING AND DEFINES REASONABLE DOUBT IN A MANNER UNDERSTANDABLE TO THE AVERAGE JUROR.

“The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law.” State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981); State v. Hayes, 73 Wn.2d 268, 572, 439 P.2d 978 (1968). Jury instructions “must make the relevant legal standard manifestly apparent to the average juror.” State v. Smith, 174 Wn. App. 359, 369, 298 P.3d 785, review denied, 178 Wn.2d 1008 (2013), quoting State v. Kylo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

As the United States Supreme Court noted:

Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 380-81, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

Defense asks this court to parse WPIC 4.01 to give it subtle shades in meaning that simply would not exist in the mind of a juror. There is no reason to believe that jurors would engage in that sort of technical hairsplitting when they are given the definition.

The approach of other states is varied when it comes to defining reasonable doubt. Several courts decline to give a definition because “reasonable doubt” is “self-defining.” Broadnax v. State, 825 So. 2d 134, 198 (Ala. Crim. App. 2000), aff’d sub nom Ex parte Broadnax, 825 So. 2d 233 (Ala. 2001) (“Reasonable doubt” means a doubt for which a reason can be given and is self-defining); Paulson v. State, 28 S.W.3d 570, 572 (Tex. 2000)(defining “reasonable doubt” as “a doubt based on reason...” is not offensive, but rather, “useless... like saying, ‘A white horse is a horse that is white.’”); Johnson v. State, 632 P.2d 1231 (Okla. 1981) (“‘reasonable doubt’ is self-explanatory and definitions do not clarify its meaning...”). People v. Johnson, 119 Cal. App. 4th 976, 986, 14 Cal. Rptr. 780 (2004).

Several states use language identical to or similar to Washington’s “abiding belief” language, also given in this case.

State v. Sheahan, 139 Idaho 267, 273, 77 P.3d 956, 962 (Idaho 2003). Montana has approved a definition that uses “proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs.” State v. Flesch, 254 Mont. 529, 535-36, 48 St.Rep. 539 (Mont. 1992). Nebraska uses an “actual and substantial doubt” definition. State v. Putz, 11 Neb. App. 332, 342, 650 N.W.2d 486 (Neb. 2002). California courts have said reasonable doubt needs no definition but have approved an instruction, CALJIC 2.90 that says beyond a reasonable doubt means an abiding conviction of the truth of the charge. People v. Johnson, 119 Cal. App. 4th 14 Cal. Rptr 780 (2004).

Other state courts recognize, as do Washington courts, that jury instructions are to be considered as a whole, not individually. Putz, 11 Neb. App. at 345; State v. Sheahan, 139 Idaho 267, 273, 77 P.3d 956 (Idaho 2003); State v. Williams, 213 Or. 19, 37-38, 828 P.2d 1006 (Or. 1992) (even if definition of reasonable doubt is “couched in phraseology which is, by chance, misleading”, instruction not erroneous unless it misleads jury to convict on less than reasonable doubt).

The United States Supreme Court agrees with that analysis.

“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. (Citation omitted.) Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see Jackson v. Virginia, 443 U.S. 307, 320, n. 14, 99 S.Ct. 2781, 2789, n. 14, 61 L.Ed.2d 560 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. (Citation omitted.) Rather, “taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.” Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954).

Victor v. Nebraska, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d

583 (1994). The Court noted that:

... [t]he proper inquiry is not whether the instruction “could have” been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it. (Citation omitted.) The constitutional question... is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard.

Id.

Read as a whole, that is precisely what WPIC 4.01 did.

Jurors were instructed that the State had the burden of proving each element “beyond a reasonable doubt” and that the defendant had none.

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 proving that a reasonable doubt exists.

WPIC 4.01 (emphasis added).

Jurors were instructed that the presumption of innocence continued until the State reached that burden.

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.

WPIC 4.01 (emphasis added).

Jurors were instructed that a reasonable doubt was one for which “a” reason existed.

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

WPIC 4.01 (emphasis added).

WPIC 4.01 uses the article ‘a’ each time it uses the phrase ‘reasonable doubt’. To use the article ‘a’ in the definition of reasonable doubt does not change its meaning.

There is no magic language that must be used to define reasonable doubt. Washington's definition is simple, easy to understand, and constitutional. It did not require the jury to articulate the reason for doubt. It did not require the jury to find a reason to acquit. It did not suggest that the defense had a burden to supply a doubt. In short, it passed constitutional muster.

D. THERE WAS NEITHER MANIFEST CONSTITUTIONAL ERROR NOR STRUCTURAL ERROR BECAUSE THE WPIC 4.01 IS A CORRECT STATEMENT OF THE LAW.

Generally, reviewing courts will not consider an alleged error that was unchallenged at trial. State v. Kalebaugh, 179 Wn. App. 420-21. An exception exists when the error is of constitutional magnitude and actually affected the defendant's rights. Id. An error is manifest if it is "so obvious on the record that the error warrants appellate review." Id. The defendant bears the burden of showing not only that the error occurred but also that it affected his rights. Id.

In the present case, reasonable doubt was correctly defined in an instruction mandated by the Supreme Court. The defendant did not object at trial. There was no constitutional error. This court should not entertain his claim.

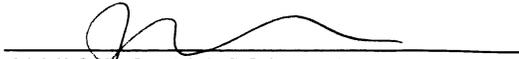
Nor was there a structural error. A structural error occurs when a trial court gives an unconstitutional reasonable doubt instruction. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). A structural error affects the entire trial proceeding. State v. Wise, 176 Wn.2d 1, 14-15, 288 P.3d 1113 (2012). A structural error is not subject to harmless error analysis. Id. For example, instructing a juror that it *should* convict if convinced beyond a reasonable doubt rather than that it *has a duty to convict* if convinced beyond a reasonable doubt is structural error. State v. Smith, 174 Wn. App. at 369. Supreme Court has mandated instructing the jury with WPIC 4.01; the court instructed the jury with WPIC 4.01. The definition of reasonable doubt therein upheld the concept of presumption of innocence and correctly explained “reasonable doubt” in a manner accessible to the average juror. No error occurred and the conviction should be affirmed.

IV. CONCLUSION

For the foregoing reasons, the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on April 21, 2015.

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April 22, 2015

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**Re: STATE v. STETSON G. TEDDER
COURT OF APPEALS NO. 72019-8-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

JANICE C. ALBERT, #19865
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cc: Nielsen, Broman & Koch
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IN THE COURT OF APPEALS
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DIVISION I

THE STATE OF WASHINGTON,

Respondent,

v.

STETSON G. TEDDER,

Appellant.

No. 72019-8-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 23rd day of April, 2015, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 23rd day of April, 2015.

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

DIANE K. KREMENICH
Legal Assistant/Appeals Unit