

No. 74409-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BERNABE JOHN LOVE,

Appellant.

FILED
August 12, 2016
Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Appellant Bernabe Love’s trial counsel requested the jury be instructed that “Abiding means continuing without change; enduring; lasting.” CP 29.¹ Because the word “abiding” was a part of how reasonable doubt would be defined for the jury, Mr. Love’s trial counsel wanted the jurors to understand exactly what it means when used in this most critical of criminal jury instructions.

In State v. Osman, 192 Wn.App. 355, 375, 366 P.3d 956 (2016), this Court made clear that the word “abiding,” as used in the reasonable doubt definition, “connotes both duration and the strength and certainty of a conviction.” Osman confirms that Mr. Love’s proposed instruction correctly stated the law. The trial court’s refusal to give it was error.

The convictions should be reversed for a new trial.

B. ASSIGNMENT OF ERROR

In refusing to instruct the jury with the correct definition of the term “abiding” as proposed by Mr. Love, the trial court erred and violated Mr. Love’s constitutional right to due process. CP 29.

¹The requested instruction is attached as Appendix A.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Jury instructions 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. Osman shows that even seasoned criminal law practitioners need help understanding that “abiding belief,” as used in the standard “reasonable doubt” instruction, refers to a belief that is continuing, enduring, and lasting through time.

Was it error for the trial court to refuse to instruct the jurors with a correct statement of the law? Was Mr. Love deprived of his constitutional right to a fair trial because a confusing aspect of the critical reasonable doubt instruction went undefined?

D. STATEMENT OF THE CASE

Mr. Love was charged with three crimes in King County Superior Court: 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, had crashed his Honda into a parked Toyota, left the scene, and 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. CP 58-60.

E. ARGUMENT

The trial court should have defined the term “abiding” for the jurors because the proposed instruction was both a correct statement of the law and necessary to convey the meaning of the “reasonable doubt” definition.

1. To guarantee the constitutional right of a fair trial, jury instructions must correctly state the law, not mislead, and permit the accused to present his theory of the case.

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; Wash. 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).

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). This right to due process entitles the accused to have the jury fully instructed on the defense theory of the case. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). When requested, the trial court must provide an instruction that supports the defense theory as long as the instruction is an accurate statement of the law and is supported by the evidence. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

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 at 772.

2. The proposed instruction correctly stated the law, clarified an ambiguous term in the most critical of jury instructions, and was necessary to ensure a fair trial.

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 40.² This instruction has been approved as the “proper” and “correct” reasonable doubt instruction for trial courts to give to the jury. State v. Parnel, ___ Wn.App. ___, ___ P.3d ___ (2016) (No. 46995–2–II, issued August 2, 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, this 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.” 192 Wn.App. at 366. 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

² The instruction given is attached as Appendix B.

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.

This 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, this 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, this Court wrote that 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.³

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.

3. Reversal is required.

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 the evidence and (2) properly state the government's burden of proof. Victor v. Nebraska, 511 U.S. at 13.

Even if the error below is not viewed as a structural one, reversal is still necessary. The fact that the trial judge below allowed

³ 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.

Mr. Love's 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 463.⁴ No fingerprints were recovered on the weapon. RP 486. Law enforcement made no effort to recover DNA. RP 491.⁵

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.

⁴The 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.

⁵The 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.

G. CONCLUSION

Based on the foregoing, counsel for Mr. Love requests that this Court reverse and remand for a new trial.

Should this Court reject Mr. Love's argument on appeal, he asks that this Court issue a ruling refusing to allow the State to seek any reimbursement for costs on appeal due to his continued indigency.⁶ State v. Sinclair, 192 Wn.App. 380, 367 P.3d 612 (2016).

DATED this 12th day of August, 2016.

Respectfully submitted,

/s/ Mick Woynarowski

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Washington Appellate Project – 91052
Attorneys for Appellant

⁶ Record below indicates that at time of sentencing, Mr. Love was sporadically employed, receiving food stamps, and providing both for a minor child and an elderly grandmother. RP 595.

STATE OF WASHINGTON V. BERNABE LOVE

No. 74409-7-1

APPENDIX A – PROPOSED DEFENSE INSTRUCTION (CP 29)

No. _____

Abiding means continuing without change; enduring; lasting.

STATE OF WASHINGTON V. BERNABE LOVE

No. 74409-7-I

APPENDIX A – REASONABLE DOUBT INSTRUCTION AS GIVEN (CP 40)

No. 3

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.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 74409-7-I
)	
BERNABE LOVE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
---	-------------------	--

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF AUGUST, 2016.



X _____

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