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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KATHERINE FRANCES WINFREY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 16-1-02647-0

Corrected Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly instruct the jury as to the State's burden of proof when it gave the mandatory WPIC 4.01 instruction, including the optional "abiding belief" language?
2. Did the trial court properly exercise its discretion in permitting the State to cross examine defendant on matters within the scope of direct, which also pertained to the defendant's credibility?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On June 28, 2016, the State charged Katherine Winfrey, hereinafter referred to as "defendant," with one count of theft in the second degree. CP 3. The case proceeded to jury trial on March 14, 2017, before the Honorable Kathryn Nelson. RP 3.¹

The jury returned a guilty verdict on March 16, 2017. CP 32. Defendant was sentenced to 24 months. CP 41-54. This timely appeal followed. CP 35.

¹ The verbatim report of proceedings are contained in 4 consecutively paginated volumes and will be referred to by page number.

2. FACTS

On June 27, 2016, a Tacoma Community College bookstore employee saw defendant and two others standing in a closed book aisle through the security surveillance camera. RP 43-45. Only bookstore employees are allowed in closed book aisles. RP 44. The employee called security and then went out to the sales floor. RP 45. She saw two of her coworkers talking to defendant and defendant's associates. RP 45-46. Defendant was holding two bags: a blue denim bag and a Hello Kitty backpack. RP 51-52, 72, 158-59. Video footage captured defendant placing six textbooks into her bags and leaving the store without paying. RP 47-49, 59-60; Exh. 17. Defendant walked quickly out of the bookstore, through the cafeteria, and finally outside, where she was detained by a security officer. RP 48-50, 59-60, 155.

At trial, a bookstore employee testified that she saw defendant and two others standing in a closed book aisle. RP 89-90. She saw the group taking textbooks off the shelves and placing them into bags. RP 91. She saw all three individuals leave the bookstore. *Id.* She followed them through the student center, then out the exit. RP 92. Defendant never put down the stolen merchandise. RP 93. After contacting witnesses and viewing the video surveillance footage, a police officer placed defendant

under arrest. RP 138, 149. Defendant testified at trial. RP 154. Despite the video evidence, defendant claimed that she had handed her bags off to her associate before leaving the store. RP 155, 168-69.

Defendant had nearly \$1,400 of stolen merchandise in her bags: two anatomy and physiology books, two chemistry books, and two college accounting books. RP 71-77. Video footage showed defendant exiting the bookstore holding the bags containing the stolen books. RP 59-60, 129, 140, 155; Exh. 17.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE STATE'S BURDEN OF PROOF WHEN IT GAVE THE MANDATORY WPIC 4.01 INSTRUCTION, WHICH INCLUDED THE OPTIONAL "ABIDING BELIEF" LANGUAGE.

"Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed *de novo*. *Id.*

Washington trial courts are instructed to use the approved Washington Pattern Jury Instruction, WPIC 4.01, to instruct juries on the State's burden to prove each element of the crime beyond a reasonable doubt. *Id.* at 306. WPIC 4.01 is stated as follows:

[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].

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (4th ed. 2016) (WPIC) (boldface omitted) (alterations original).

The bracketed abiding belief instruction has consistently been upheld in appellate cases. See *State v. Fedorov*, 181 Wn. App. 187, 199-200, 324 P.3d 784 (2014); *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 (2014); *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995); *State v. Lane*, 56 Wn. App. 286, 299-301, 786 P.2d 277 (1989); *State v. Mabry*, 51 Wn. App. 24, 751 P.2d 882 (1988); *State v. Price*, 33 Wn. app. 472, 655 P.2d 1191 (1982). In *State v. German*, No. 44870-0-II, 2015 WL

459344, at *4 (Wash. Ct. App. February 3, 2015) (unpublished),² this division ruled that the abiding belief language has never been held to be improper and that the Washington Supreme Court in *Bennett*, 161 Wn.2d at 318, directed its use. The United States Supreme Court has also upheld the use of traditional abiding belief instructions. See *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed.2d 583 (1994).

Here, the trial court gave the standard WPIC 4.01 reasonable doubt instruction with the abiding belief language. CP 19. Defendant claims that the abiding belief language misleads the jury by allowing it to convict based on a “nebulous, subjective, ‘belief in the truth of the charge’” and cites to *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), and *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012), in support. Brief of Appellant at 6-7. However, those cases dealt with the prosecutor’s statements during closing argument encouraging the jury to “speak the truth” and “search for the truth” through its verdict. *Emery*, 174 Wn.2d at 751; *Berube*, 171 Wn. App. at 120-21. Neither case challenged the WPIC instruction at issue here. *Id.* Defendant does not challenge any statements made by the prosecutor in closing argument. Defendant instead argues that

² GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

the abiding belief instruction itself, which has been upheld in appellate cases for over 50 years, was improper. See *Bennett*, 161 Wn.2d at 308 (citing *State v. Tanyzmore*, 54 Wn.2d 290, 340 P.2d 178 (1959)). Thus, both *Emery* and *Berube* are distinguishable. See, e.g., *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 (2014) (rejecting defendant's reliance on *Emery* to challenge the abiding belief language).

In *Bennett*, the court reaffirmed WPIC 4.01, explaining that it “has been accepted as a correct statement of the law for so many years, we find the assignment of error criticizing the instruction without merit.” 161 Wn.2d at 308 (discussing *State v. Tanyzmore*, 54 Wn.2d 290, 340 P.2d 178 (1959)). *Bennett* has not been overturned and WPIC 4.01 has not been replaced with a new reasonable doubt instruction. Given the extensive precedent supporting the use of the abiding belief instruction, defendant's argument is similarly without merit.

Further, the trial court here gave the abiding belief instruction in its opening instructions without objection. RP 25-26, 180. The court stated that it would give the instruction again at closing for consistency. RP 180.

The challenged instruction does not allow jurors to convict based on a “nebulous, subjective, ‘belief in the truth of the charge[.]’” Brief of Appellant at 6-7. It merely elaborates on what it means to be “satisfied

beyond a reasonable doubt.” Defendant’s claim that the abiding belief language was improper is without merit.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN PERMITTING THE STATE TO CROSS EXAMINE DEFENDANT ON MATTERS WITHIN THE SCOPE OF DIRECT, WHICH ALSO PERTAINED TO DEFENDANT’S CREDIBILITY.

“The trial court is generally in the best position to perceive and structure its own proceedings.” *State v. Dye*, 178 Wn.2d 541, 547, 309 P.3d 1192 (2013). Thus, a trial court enjoys broad discretion to make a variety of trial management decisions, including ‘the “mode and order of interrogating witnesses and presenting evidence[.]”’ *Id.* at 547-48; ER 611(a). Even if an appellate court disagrees with the trial court, it will “not reverse its decision unless that decision is ‘manifestly unreasonable or based on untenable grounds’ or reasons.” *Dye*, 178 Wn.2d at 548. “Where reasonable minds could take differing views regarding the propriety of the trial court’s actions, the trial court has not abused its discretion.” *State v. Quaale*, 177 Wn. App. 603, 610-11, 312 P.3d 726 (2013). Defendant has the burden of proving a manifest abuse of discretion. *State v. Asaeli*, 150 Wn. App. 543, 573, 208 P.3d 1136 (2009) (citing *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999)).

Under ER 611(b), a trial court has discretion to determine the scope of cross examination. Cross examination is generally limited to the

“subject matter of the direct examination and matters affecting the credibility of the witness.” *State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (1991). The court may, however, in the exercise of its discretion, permit inquiry into additional matters as if on direct examination. ER 611(b). Even if a party on cross goes beyond the scope of direct in its questions, such questions may be permitted if they go to the credibility of the witness or if the court otherwise allows them. ER 611(b).

If a defendant chooses to testify, she is subject to cross-examination regarding any material matters within the scope of her direct testimony. *State v. Olson*, 30 Wn. App. 298, 301, 633 P.2d 927 (1981). “[W]hen, in direct examination, ‘a general subject is unfolded, the cross examination may develop and explore the various phases of that subject.’” *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983). A trial court may “grant considerable latitude in cross examination.” *Id.* at 138-39; *Olson*, 30 Wn. App. at 301.

Defendant claims that the State went beyond the scope of direct in its cross examination of defendant. Brief of Appellant at 11-12. On direct, defense counsel opened up discussion about defendant’s bags by asking defendant about whether she had her bags of books with her as she exited the bookstore. RP 154-55. Counsel asked, “Did you, at any time, give the backpack and bag to Charmayne?” RP 154. Defendant responded

affirmatively, stating that she gave Charmayne the bags while the group was inside the store. RP 155. Counsel pointed out the contradictory video footage, stating, "So on the video, it looks like you're leaving that little convenience store and you have the bags with you." *Id.* Defendant responded, "No." *Id.* Counsel asked defendant for the third time, "You didn't have the bags on you when you left the little convenience store?" *Id.* Defendant again responded, "No. She had them." *Id.*

Finally, defense counsel played the video footage showing defendant leaving the store with her bags in hand. *Id.*; Exh. 17. For the fourth time, counsel asked, "So did you have both bags with you?" *Id.* Defendant replied, "Yeah. I did, but she had the bags." RP 156. For the fifth time, counsel asked defendant, "So what I'm asking you is when you walked out just then, you had both bags with you, correct?" *Id.* At that point, defendant contradicted herself, claiming that she handed the bags off after leaving the bookstore but prior to exiting the student center. *Id.*

On cross examination, the State showed defendant two chemistry books found in defendant's bags. RP 159-60. Defendant objected, arguing that the line of questioning would be "outside the scope of direct." RP 159. The State responded, "[B]y taking the stand, defendant has put her credibility into question, and this goes directly to the heart of the issue." *Id.* The court overruled the objection. *Id.* The State proceeded to ask

defendant questions regarding the books defendant placed into her bags. RP 160-62. The State showed defendant two anatomy and physiology textbooks also found in defendant's bags. RP 162-63. Defendant objected on the same grounds. RP 162. The court overruled the objection, and the State continued asking defendant questions about the books. RP 163.

The State was permitted to develop and explore the subject of defendant's bags, introduced by defense counsel, by inquiring about the contents of those bags, which is what made the bags significant in this case. *See Ferguson*, 100 Wn.2d at 138. The whole point of the case, and the basis of the charge, was that the bags contained stolen text books. Thus, the State's questions did not go beyond the scope of direct, and the court properly allowed the State to continue its line of questioning.

Further, the State's questions also went to the credibility of defendant. Defendant claimed that she was not the one who took the bags out of the store and that she was not the one who stole the books. RP 155, 168. Defendant claimed that Charmayne had the bags as they exited the store. RP 155. However, video footage showed defendant placing the books into her bags and leaving the store without handing the bags off to anyone. RP 155; Exh. 17. The trial court did not abuse its discretion by permitting further inquiry into the contents of defendant's bags on cross examination.

Defendant likens this case to *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017), where our Supreme Court affirmed the trial court's decision to exclude evidence of specific instances of conduct to impeach the witness. In that case, a witness testified that he was "not a fighting guy." *Id.* at 782. Defendant sought to challenge the witness's statement with the question: "Isn't it true you have a harassment order for pushing somebody down on the bed, getting control over them, wouldn't you call this a fight?" *Id.* The trial court denied defendant's request, reasoning that the allegations were irrelevant to the witness's credibility and collateral to the issues presented at trial. *Id.* at 786-87.

At the appellate court level, division I affirmed the trial court's ruling, holding:

Rowles did not testify that he was a peaceful person. ... Nor did he testify that he had never been aggressive or threatening, only that he was not a fighter. Therefore, Rowles's testimony would not have opened the door to evidence that Rowles is generally not peaceful or that Rowles is generally aggressive. It would have opened the door to only evidence that Rowles is a fighter or was the initial aggressor in the fight—evidence directly contradicting Rowles's testimony and challenging his credibility.

State v. Lile, 193 Wn. App. 179, 201, 373 P.3d 247 (2016). Accordingly, division I held that "it was not an abuse of discretion to conclude that the proffered evidence was not probative of whether Rowles was a fighter."

Id. at 202. The Supreme Court agreed, holding that “[w]hile this is perhaps a close call, we cannot say the trial court abused its discretion in limiting Lile’s cross examination of Rowles. A reasonable person may have decided the matter as Judge Garrett did.” *Lile*, 188 Wn.2d at 784.

This case is distinguishable from *Lile*. At issue in *Lile* was the trial court’s decision to *limit* the defendant’s cross examination of a witness. At issue in this case was the trial court’s decision to *permit* cross examination of defendant on areas discussed during direct. RP 158-59. *Lile* dealt with the admissibility of extrinsic evidence under ER 608 as it pertained to the witness’s character for truthfulness. 188 Wn.2d at 783. Here, the State did not seek to admit extrinsic evidence about defendant’s character for truthfulness. Rather, the State sought to explore a critical area of the case that was first introduced on direct: defendant’s bags and the contents of those bags. RP 155-59. Thus, the court did not abuse its discretion by permitting the State to inquire into the contents of defendant’s bags.

However, even if the trial court abused its discretion in allowing the State to cross examine defendant regarding the contents of her bags, any error was harmless. A nonconstitutional erroneous evidentiary ruling is not prejudicial unless, within reasonable probabilities, the trial’s outcome would have been different had the error not occurred. *State v. Brockob*, 159 Wn.2d 311, 351, 150 P.3d 59 (2006); *State v. Neal*, 144

Wn.2d 600. 611, 30 P.3d 1255 (2001). “Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole.” *Neal*, 144 Wn.2d at 611. Here, video footage showed defendant placing books into her bags and leaving the store without paying. RP 129, 140-41, 150, 155; Exh. 17. Additionally, witnesses testified to observing defendant taking the books without paying and leaving the store with them in her bags. RP 47, 91. Thus, even if the trial court improperly allowed the State to cross examine defendant about the contents of her bags, the evidence was of minor significance in reference to the evidence as a whole.

The trial court did not abuse its discretion by permitting the State to inquire into matters on cross examination that were relevant to the case as well as defendant’s credibility. Even if there was error, any error was harmless. This court should affirm defendant’s conviction.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court affirm defendant's conviction.

DATED: February 14, 2018.

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