

**FILED**  
Jan 20, 2016  
Court of Appeals  
Division III  
State of Washington

**NO. 33108-3-III**

---

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

STATE OF WASHINGTON, RESPONDENT

v.

ANITA VIRGINIA WHISLER, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

---

BRIEF OF RESPONDENT

---

GARTH DANO  
Grant County Prosecuting Attorney

KATHARINE W. MATHEWS  
Deputy Prosecuting Attorney  
WSBA # 20805  
Attorneys for Respondent

P.O. Box 37  
Ephrata, Washington 98823  
PH: (509) 794-2011

**Table of Contents**

I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR ..... 1

A. The Washington State Supreme Court requires trial courts to use the challenged phrases when instructing the jury on reasonable doubt. Can Whisler demonstrate “manifest error affecting a constitutional right.” triggering review under RAP 2.5(a)(3), when a burden of proof instruction includes those phrases verbatim? (Assignment No.1)..... 1

B Have previous appellate courts approved the two phrases challenged here? (Assignment No. 1)..... 1

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

III. ARGUMENT..... 2

A. *Whisler fails to demonstrate “manifest error affecting a constitutional right.” precluding review under RAP 2.5(a)(3), because the Washington State Supreme Court requires trial courts to use the challenged language and doing so is not manifest constitutional error.* ..... 2

B. *The two phrases complained of have been examined and approved by previous appellate courts.* ..... 3

1. The phrase “the truth of the charge,” when construed as a whole with the language of WPIC 4.01, adequately instructs the jury on the State’s burden of proof. .... 3

2. “A doubt for which a reason exists.” when construed as a whole with the language of WPIC 4.01, does not direct jurors to assign a reason for their doubt. .... 4

IV. CONCLUSION..... 5

## Table of Authorities

### State Cases

<i>1000 Virginia Ltd. Partnership v. Vertecs Corp.</i> , 158 Wn.2d 566, 146 P.3d 423 (2006).....	3
<i>State v. Bennett</i> , 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).....	2, 3, 4, 5
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	4
<i>State v. Flores</i> , 18 Wn. App. 255, 566 P.2d 1281 (1977).....	4
<i>State v. Harras</i> , 25 Wash. 416, 65 P. 774 (1901).....	4
<i>State v. Kirkman</i> , 159 Wn.2d 918, 935, 155 P.3d 125 (2007).....	2
<i>State v. Lundy</i> , 162 Wn. App. 865, 871–72, 256 P.3d 466, 469 (2011).....	2
<i>State v. Mabry</i> , 51 Wn. App. 24, 751 P.2d 882, 883 (1988).....	3, 4
<i>State v. O'Hara</i> , 167 Wn.2d 91, 97–98, 217 P.3d 756 (2009).....	2
<i>State v. Pirtle</i> , 127 Wn.2d 628, 658, 904 P.2d 245, 262 (1995).....	3
<i>State v. Thompson</i> , 13 Wn. App. 1, 533 P.2d 395 (1975).....	4

### Statutes and Rules

RAP 2.5(a)(3).....	1, 2, 3
--------------------	---------

### Other

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (3d ed. 2008) (WPIC).....	2, 3
---	------

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

- A. The Washington State Supreme Court requires trial courts to use the challenged phrases when instructing the jury on reasonable doubt. Can Whisler demonstrate "manifest error affecting a constitutional right," triggering review under RAP 2.5(a)(3), when a burden of proof instruction includes those phrases verbatim? (Assignment No.1.)
- B. Have previous appellate courts approved the two phrases challenged here? (Assignment No. 1.)

II. STATEMENT OF THE CASE.

The State adopts the procedural facts and supplements the substantive facts recited by appellant Anita Virginia Whisler in her Statement of the Case. RAP 10.3(b).

The court instructed the jury about the burden of proof in language substantially adhering to Washington Pattern Jury Instruction 4.01, 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (3d ed. 2008) (WPIC), CP 40, inst. no. 2. The instruction included the following language:

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

CP 40. Whisler did not object.

III. ARGUMENT.

A. *Whisler fails to demonstrate “manifest error affecting a constitutional right,” precluding review under RAP 2.5(a)(3), because the Washington State Supreme Court requires trial courts to use the challenged language and doing so is not manifest constitutional error.*

The sole issue here involves language from the pattern instruction defining “reasonable doubt,” WPIC 4.01 (the “burden of proof” instruction). Whisler now claims two phrases from WPIC 4.01 violate her constitutional right to due process. The Washington State Supreme Court, however, requires trial courts to use WPIC 4.01 without change. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).<sup>1</sup>

Because Whisler raises this challenge the first time on appeal, she must demonstrate the trial court’s instruction contained “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. O’Hara*, 167 Wn.2d 91, 97–98, 217 P.3d 756 (2009). “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” *O’Hara*, 167 Wn.2d at 99 (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)) (internal quotation marks omitted). To show prejudice, Whisler must plausibly demonstrate “the asserted error had practical and identifiable consequences in the trial of the case.” *Id.*

---

<sup>1</sup> Whisler does not generally challenge the trial court’s modification of WPIC 4.01. While deviation from WPIC 4.01 is error, such error does not require automatic reversal and is subject to harmless error analysis. *State v. Lund*, 162 Wn. App. 865, 871–72, 256 P.3d 466, 469 (2011).

To change language expressly approved by the Supreme Court would require overruling *Bennett*. Only the Supreme Court can overrule *Bennett*. The trial court could not have modified or omitted the two phrases at issue. This court and the trial court are required to follow controlling precedent from the Supreme Court. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). The trial court did not commit error in its use of the mandatory phrases, much less the manifest constitutional error required to trigger review under RAP 2.5(a)(3).

*B. The two phrases complained of have been examined and approved by previous appellate courts.*

In any event, previous appellate decisions have rejected Whisler's arguments challenging the two statements at issue.

1. The phrase "the truth of the charge," when construed as a whole with the language of WPIC 4.01, adequately instructs the jury on the State's burden of proof.

The appellant in *State v. Pirtle* challenged the phrase "abiding belief" immediately preceding "in the truth of the charge," the phrase complained of here. 127 Wn.2d 628, 658, 904 P.2d 245, 262 (1995). Citing *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882, 883 (1988), the Supreme Court approved the entire phrase. *Id.* In *Mabry*, this court addressed the entire phrase: "abiding belief in the truth of the charge,"

holding “when construed as a whole, the instruction given adequately instructs the jury on the State’s burden of proving each element of the offense beyond a reasonable doubt.” 51 Wn. App. at 25. The court again emphasized that Washington courts have long “refused to isolate a particular phrase [in burden of proof instructions] and have instead construed them as a whole.” *Id.* (citing *State v. Coe*, 101 Wn.2d 772, 788, 684 P.2d 668 (1984); *State v. Flores*, 18 Wn. App. 255, 566 P.2d 1281 (1977)).

2. “A doubt for which a reason exists,” when construed as a whole with the language of WPIC 4.01, does not direct jurors to assign a reason for their doubt.

In *State v. Thompson*, the appellant argued the phrase “the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists” misled the jury because it required them to assign a reason for their doubt. 13 Wn. App. 1, 5, 533 P.2d 395 (1975). Division Two rejected the argument and upheld the language, holding:

[T]he particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary. A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.

*Id.* at 5 (citing *State v. Harras*, 25 Wash. 416, 421, 65 P. 774 (1901)). The phrase has now been declared satisfactory for 115 years.

Only the Washington Supreme Court may modify the language of the burden of proof instruction confirmed in *Bennett*. Whisler was not deprived of her constitutional rights. There was no error.

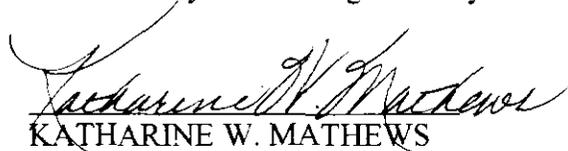
IV. CONCLUSION.

This court should affirm Whisler's conviction and sentence because Whisler waived objection to the challenged instruction when she failed to object at trial.

DATED this 20th day of January, 2016.

Respectfully submitted,

GARTH DANO  
Grant County Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Katharine W. Mathews", is written over a horizontal line.

KATHARINE W. MATHEWS  
Deputy Prosecuting Attorney  
WSBA # 20805  
Attorneys for Respondent  
kwmathews@grantcountywa.gov

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

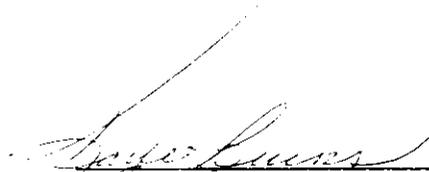
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 33108-3-III
	)	
vs.	)	
	)	
ANITA VIRGINIA WHISLER,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
<hr/>		

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Susan Marie Gasch  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

Dated: January 20, 2016.

  
\_\_\_\_\_  
Kaye Burns