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NOVEMBER 2, 2015  
Court of Appeals  
Division III  
State of Washington

No. 33251-9-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

RICHARD A. TIGNER,

Defendant/Appellant.

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Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Tigner's request for a jury instruction on voluntary intoxication.

2. The trial court erred by giving a constitutionally defective reasonable doubt instruction. CP 28, Instruction No. 3.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was Tigner entitled to a voluntary intoxication instruction where the crime charged included a mental state, there was substantial evidence of drinking or drug use, and there was evidence that the drinking or drug use affected his ability to form the requisite intent or mental state?

2. A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Tigner's right to a jury trial?

3. A juror with reasonable doubt must acquit, even if unable to articulate a reason for the doubt. By defining a "reasonable doubt" as a doubt "for which a reason exists," did the court undermine the presumption of innocence and impermissibly shift the burden of proof by

telling jurors they must be able to articulate a reason to have a reasonable doubt?

4. Does erroneously instructing a jury regarding the meaning of reasonable doubt vitiate the jury-trial right, constituting structural error?

#### C. STATEMENT OF THE CASE

On the morning of September 13, 2014, Mark Huffman discovered his bicycle was missing. RP<sup>1</sup> 65. Huffman suspected Richard Tigner had taken his bicycle, since Tigner had requested permission to borrow the bicycle the night before and Huffman had refused. RP 62-64. Huffman borrowed his girlfriend's bicycle and went looking for Tigner. RP 66-67. He eventually located Tigner and his bicycle at the Pik-A-Pop Store, not far from his house. RP 67-68.

When Tigner saw Huffman, Tigner ran out into the street acting “real hyper and wanting to welcome me.” RP 68. Tigner tried to hug Huffman. RP 75. Huffman testified Tigner looked like he'd had a “rough night.” RP 68. Huffman said he needed his bike back. RP 68. Tigner started mumbling a bunch of things Huffman could not understand and then started punching Huffman. RP 68-69. Tigner pinned Huffman against the building and continued punching him. RP 69. Huffman tried

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<sup>1</sup> Citations to the record designated “RP” refer to the trial. Citations to the sentencing hearing will be “3/24/15 RP”

to get away by entering the store but Tigner grabbed him. RP 69. Tigner then entered the store and started yelling and cussing at the people inside the store. Huffman grabbed his bike and went home. RP 25-27, 40, 70, 88-89.

The store clerk, Robert Urbina, said Tigner entered the store acting crazy—very agitated yelling racial slurs about Mexicans. RP 51. Tigner punched Urbina in the stomach and “used him like a punching bag.” RP 42, 51. A customer called 911. RP 23-24.

Officer Jason McClintock arrived within minutes and arrested Tigner. RP 50. McClintock testified Tigner’s behavior was “like a crazy man would be.” He said Tigner was “screaming and sweating profusely.” RP 56. McClintock further testified this “very crazy-type behavior” continued at the jail and never really stopped. RP 56-57. He said Tigner’s behavior was consistent with someone under the influence. RP 57.

Officer Chris Caicedo arrived at the scene after McClintock already had Tigner on the ground. RP 80. Caicedo testified Tigner was resisting and cussing at him as he handcuffed Tigner and put him in the patrol car. RP 82. On the way to jail Tigner continued yelling and cussing at every person who came by on the street and called himself “Star.” When Caicedo asked Tigner who “Star” was, Tigner said that was “my

commander.” RP 82-83.

The Court denied Mr. Tigner’s request for a jury instruction on voluntary intoxication because he did not present any testimony. RP 101-04. The Court instructed the jury that a reasonable doubt was one “for which a reason exists.” CP 28. The same instruction defined satisfaction beyond a reasonable doubt as an abiding belief “in the truth of the charge.” *Id.*

Tigner was convicted of second degree robbery and fourth degree assault. CP 19-20. Tigner later revealed at sentencing that he was under the influence of methamphetamine on the date of the incident. 3/24/15 RP 4-5. This appeal followed. CP 4.

#### D. ARGUMENT

No. 1. Tigner was entitled to a voluntary intoxication instruction because the crime charged included a mental state, there was substantial evidence of drug use, and there was evidence that the drug use affected his ability to form the requisite intent or mental state.

RCW 9A.16.090 is the law at issue:

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

Diminished capacity from intoxication is not a true "defense." *State v. Coates*, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987). Rather, "[e]vidence of intoxication may bear upon whether the defendant acted with the requisite mental state, but the proper way to deal with the issue is to instruct the jury that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state." *Id.* (citing WPIC 18.10).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking [or drug use], and (3) there is evidence that the drinking [or drug use] affected the defendant's ability to form the requisite intent or mental state. *State v. Gallegos*, 65 Wn.App. 230, 238, 828 P.2d 37 (1992). Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (citing *In re Welfare of Snyder*, 85 Wn.2d 182, 185-86, 532 P.2d 278 (1975)), *cert. dismissed*, 479 U.S. 1050 (1987). In other words, the evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Kruger*, 116 Wn.App. 685, 691-92, 67 P.3d 1147 (2003) (citing *State v.*

*Gabryschak*, 83 Wn.App. 249, 252-53, 921 P.2d 549 (1996)). Physical manifestations of intoxication provide sufficient evidence from which to infer that mental processing also was affected, thus entitling a defendant to an intoxication instruction. *State v. Walters*, 162 Wash. App. 74, 83, 255 P.3d 835 (2011).

A typical voluntary intoxication instruction would read:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted] ... with [intent].

WPIC 18.10, cited with approval in *Coates*, 107 Wn.2d at 892, 735 P.2d 64; *State v. Hackett*, 64 Wn.App. 780, 786, 827 P.2d 1013 (1992).

Here, the crime of robbery has a requisite specific intent to commit a robbery. *In re Music*, 104 Wash. 2d 189, 192, 704 P.2d 144 (1985).

Similarly, intent is a non-statutory element of assault. *State v. Finley*, 97 Wash. App. 129, 135, 982 P.2d 681 (1999); WPIC 35.50.

The record reflects substantial evidence of Mr. Tigner's level of intoxication and there is ample evidence of his level of intoxication in both his mind and body. The testimony of the State's witnesses all confirm Officer McClintock's characterization of Tigner's behavior "like a crazy man would be." RP 56. This "very crazy-type behavior" continued at the jail and never really stopped. RP 56-57. McClintock said Tigner's

behavior was consistent with someone under the influence. RP 57.

In fact Tigner was so wacked out on methamphetamine that he was yelling and cussing at every person who came by on the street and calling himself “Star.” When Caicedo asked Tigner who “Star” was, Tigner said that was “my commander.” RP 82-83. Tigner’s degree of intoxication was equal to the same point on the scale discussed in *Gabryschak*, where a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state. See *Gabryschak*, supra. Based on the totality of the evidence, Tigner was entitled to the jury instruction on voluntary intoxication.

The trial court denied Tigner’s request for a jury instruction on voluntary intoxication because he did not present any testimony. RP 101-04. This was error. A defendant need not put on a case to introduce evidence of intoxication. *Gabryschak*, 83 Wn.App. at 253, 921 P.2d 549. Nor is the defendant required to present expert testimony to establish that he was too intoxicated to form the necessary mental state. *State v. Thomas*, 109 Wn.2d 222, 231, 743 P.2d 816 (1987). Therefore, the conviction should be reversed.

No 2. The court’s “reasonable doubt” instruction infringed Tigner’s constitutional right to due process.

a. The instruction improperly focused the jury on a search for “the truth.”

A jury’s role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Here, the trial court instructed the jury that proof beyond a reasonable doubt means having an abiding belief “*in the truth of the charge.*” CP 28 (emphasis added). Rather than determining the truth, a jury’s task “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 28.<sup>2</sup>

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable

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<sup>2</sup> Tigner does not challenge the phrase “abiding belief.” Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. See *Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708(1887); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995)). Rather, Tigner objects to the instruction’s focus on “the truth.”

doubt with a “belief in the truth of the charge,” the court confused the critical role of the jury.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. Jurors were obligated to follow the instruction. CP 23, Instruction No. 1

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315–16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.<sup>3</sup> *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281–82. By equating that standard with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Tigner his constitutional right to a jury trial. U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 3, 21, 22.

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<sup>3</sup> Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the “truth” language in that instruction. *Bennett*, 161 Wn.2d at 315–16.

b. WPIC 4.01's language improperly adds an articulation requirement, requiring reversal.

i. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 3; *Sullivan*, 508 U.S. 275; *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *Bennett*, 161 Wn.2d at 307 (citing *Victor v. Nebraska*, 511 U.S. 1, 5–6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. amends. VI, XIV; *Sullivan*, 508 U.S. at 278–81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty “vitiates *all* the jury’s findings.” *Sullivan*, 508 U.S. at 279–81.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *Emery*, 174 Wn.2d at 759–60 (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a

reason for their doubt is “inappropriate” because it “subtly shifts the burden to the defense.” *Id.*<sup>4</sup>

Requiring articulation “skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit . . . .” *Humphrey v. Cain*, 120 F.3d 526, 531 (5<sup>th</sup> Cir. 1997), on reh’g en banc, 138 F.3d 552 (5<sup>th</sup> Cir. 1998).<sup>5</sup> An instruction imposing an articulation requirement “creates a lower standard of proof than due process requires.” *Id.*, at 534.<sup>6</sup>

ii The trial court erroneously told jurors to convict unless they had a doubt “for which a reason exists.”

Tigner’s jury was instructed, “A reasonable doubt is one for which a reason exists . . . .” CP 28; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01, at 85 (3d Ed 2008) (“WPIC”). This suggested to the jury that it could not acquit unless it could find a doubt “for which a reason exists.”

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<sup>4</sup> See also *State v. Walker*, 164 Wn. App. 724, 731–32, 265 P.3d 191 (2011), as amended (Nov. 18, 2011), review granted, cause remanded, 175 Wn.2d 1022, 295 P.3d 728 (2012); *State v. Johnson*, 158 Wn. App. 677, 684–86, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011).

<sup>5</sup> The Fifth Circuit decided *Humphrey* before enactment of the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Subsequent cases applied the AEDPA’s strict procedural limitations to avoid the issue. See, e.g., *Williams v. Cain*, 229 F.3d 468, 476 (5<sup>th</sup> Cir. 2000).

This instruction—based on WPIC 4.01—imposes an articulation requirement that violates the constitution.

A “reasonable doubt” is not the same as a reason to doubt. “Reasonable” means “being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous . . . being or remaining within the bounds of reason . . . Rational.” *Webster’s Third New Int’l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. Accord *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum is one based upon ‘reason’”); *Johnson v. Louisiana*, 406 U.S. 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’” (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2<sup>nd</sup> Cir 1965))).

The article “a” before the noun “reason” in the instruction inappropriately alters and augments the definition of reasonable doubt. “[A] reason” is “an expression or statement offered as an explanation of a belief or assertion or as a justification.” *Webster’s Third New Int’l*

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<sup>6</sup> In *Humphrey*, the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as “a

*Dictionary*. The phrase “a reason” indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

Thus, this language requires more than just a reasonable doubt to acquit. *Cf. In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.”). Jurors applying the instruction, herein, could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable.<sup>7</sup> For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under this instruction if jurors could not put their doubts into words.

As a matter of law, the jury is “firmly presumed” to have followed the court’s reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457,

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serious doubt, for which you can give a good reason.” *Humphrey*, 120 F.3d at 530.

<sup>7</sup> See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1213–14 (2003).

474–75, 285 P.3d 873 (2012). The instruction here left jurors with no choice but to convict unless they had a reason for their doubts. This meant Tigner could not be acquitted, even if jurors had a reasonable doubt.

The instruction “subtly shift[ed] the burden to the defense.” *Emery*, 174 Wn.2d at 759–60. It also “create[d] a lower standard of proof than due process requires . . . .” *Humphrey*, 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court’s instruction violated Tigner’s right to due process and his right to a jury trial. *Id.*; *Sullivan*, 508 U.S. at 278–81; *Bennett*, 161 Wn.2d at 307. Failing to properly instruct jurors regarding reasonable doubt “undoubtedly qualifies as ‘structural error.’” *Sullivan*, 508 U.S. at 281–82. Accordingly, Tigner’s convictions must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, *Id.* at 278–82.

E. CONCLUSION

For the reasons stated, the convictions should be reversed

Respectfully submitted November 2, 2015,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on November 2, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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