

FILED
January 12, 2016
Court of Appeals
Division III
State of Washington

33253-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RUSSELL A. ROSIN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENT OF ERROR..... 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 2

 A. THE DEFENDANT, ALLEGING FOR THE FIRST TIME ON APPEAL THAT THE REASONABLE DOUBT INSTRUCTION GIVEN AT HIS TRIAL WAS CONSTITUTIONALLY DEFICIENT, HAS NOT DEMONSTRATED THE EXISTENCE OF A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT, NOR THAT GIVING THIS INSTRUCTION CONSTITUTES STRUCTURAL ERROR.....2

 1. No manifest error that would allow review of this unpreserved issue occurred because WPIC 4.01 has repeatedly been approved by Washington courts.4

 2. No structural error occurred when the trial court instructed the jury on reasonable doubt with WPIC 4.01.....5

 B. THE WASHINGTON SUPREME COURT HAS DIRECTED TRIAL COURTS TO GIVE WPIC 4.01 IN EVERY CRIMINAL CASE AND THIS INSTRUCTION DOES NOT VIOLATE DUE PROCESS OR A DEFENDANT’S RIGHT TO JURY TRIAL.....6

V. CONCLUSION 16

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009).....11, 12

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007).....5, 7, 8

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012).....10, 11

State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984).....15

State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015).....8, 9, 15

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756, 761 (2009), *as corrected* (Jan. 21, 2010)4

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995).....6, 7

State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988)3

State v. Strine, 176 Wn.2d 742, 293 P.3d 1177 (2013).....2, 3

State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975).....10

FEDERAL COURT CASES

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)..... 5

Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990)..... 6

Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)..... 6

Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182..... 6

United States v. Bright, 517 F.2d 584 (2d Cir. 1975)..... 15

RULES

RAP 2.5..... 3

OTHER

WPIC 1.04..... 15

WPIC 4.01..... 14

I. APPELLANT’S ASSIGNMENT OF ERROR

The trial court erred when it used a flawed reasonable doubt instruction in violation of due process and the right to trial by jury.

II. ISSUES PRESENTED

1. Whether the Defendant has demonstrated a manifest error affecting a constitutional right under RAP 2.5 or structural error such that he may raise this unpreserved “error” for the first time on appeal?
2. Whether Washington’s approved instruction on reasonable doubt, WPIC 4.01, violates due process or the right to trial by jury?

III. STATEMENT OF THE CASE

Defendant was charged with one count of possession of a controlled substance, methamphetamine, in Spokane county superior court. CP 1. The defendant was a passenger in a vehicle that was determined to be stolen, and he was not wearing a seatbelt at the time of the traffic stop. CP 2. Law enforcement placed defendant under arrest on outstanding warrants. CP 2. At the time of his arrest, defendant was clutching a large bag; law enforcement searched this bag incident to defendant’s arrest and located a cache of drug paraphernalia and a small brown bottle containing a clear crystalline substance that tested positive for methamphetamine. CP 2-3. Defendant was placed under arrest for possession of a controlled substance, and was charged with the offense. CP 1, 3. At trial, the defendant made no objection to the court’s proposed

instruction on reasonable doubt. RP 169. The defendant was found guilty by a jury on February 18, 2015, CP 19, and was sentenced to nine months of confinement. CP 27. He timely appealed, contending the trial court erred in instructing the jury on reasonable doubt by the use of Washington Pattern Jury Instruction (WPIC) 4.01.

IV. ARGUMENT

- A. THE DEFENDANT, ALLEGING FOR THE FIRST TIME ON APPEAL THAT THE REASONABLE DOUBT INSTRUCTION GIVEN AT HIS TRIAL WAS CONSTITUTIONALLY DEFICIENT, HAS NOT DEMONSTRATED THE EXISTENCE OF A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT, NOR THAT GIVING THIS INSTRUCTION CONSTITUTES STRUCTURAL ERROR.

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). RAP 2.5 “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749, quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys

will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.¹ Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Here, Defendant alleges that the trial court erred by giving the jury an approved instruction on reasonable doubt, even though defendant neither proposed a different instruction, nor took any exception to the instruction at trial. RP 168. The failure to assert this issue at the trial court

¹ An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

is not reviewable on appeal because there is not a showing that the alleged error is manifest, nor that any error actually occurred.

1. No manifest error that would allow review of this unpreserved issue occurred because WPIC 4.01 has repeatedly been approved by Washington courts.

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.” Here, any error relating to the trial court’s failure to supply an instruction on reasonable doubt other than WPIC 4.01 was not manifest or obvious, as is required by RAP 2.5.

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. *See Harclon*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756, 761 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant’s claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record,

such that the judge hearing the case should have clearly noted that WPIC 4.01 violated defendant's rights and *sua sponte* given another instruction. As discussed below, trial courts have been directed by our Supreme Court to give WPIC 4.01 in all criminal cases. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). There can be no obvious or flagrant error where a trial court follows a directive by the Supreme Court. Therefore, RAP 2.5 precludes review of the issue absent preservation of the issue by timely objection at trial.²

2. No structural error occurred when the trial court instructed the jury on reasonable doubt with WPIC 4.01.

The defendant's attempt to characterize the alleged error here as a "structural error" also fails. Structural error is a special category of constitutional error that "affects the framework within which the trial proceeds, rather than simply an error in the trial process itself" and where structural error exists, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

² See also, *State v. Jimenez-Macias*, 171 Wn. App. 323, 286 P.3d 1022 (2012) (trial court erred by giving *Castle* instruction on reasonable doubt rather than WPIC 4.01, but error was unpreserved and did not constitute an error that could be reviewed for the first time on appeal.)

In *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182, the United States Supreme Court found that structural error may exist in cases where a deficient reasonable doubt instruction is given. The instruction given in that case was nearly identical to a reasonable doubt instruction that previously was deemed unconstitutional by the Supreme Court. See, *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (holding that use of “grave uncertainty” and “moral certainty” in reasonable doubt instruction suggests a higher degree of doubt than is required for acquittal). It cannot be said that WPIC 4.01 poses the same problem. The use of WPIC 4.01 is neither manifest constitutional error nor structural error; defendant’s argument fails.

B. THE WASHINGTON SUPREME COURT HAS DIRECTED TRIAL COURTS TO GIVE WPIC 4.01 IN EVERY CRIMINAL CASE AND THIS INSTRUCTION DOES NOT VIOLATE DUE PROCESS OR A DEFENDANT’S RIGHT TO JURY TRIAL.

The court reviews a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In reviewing an instruction, the court considers whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

In a criminal case, the trial court must instruct the jury that the State has the burden to prove each element of the crime beyond a reasonable doubt. *Pirtle*, 127 Wn.2d at 656.³ An instruction violates the Constitution⁴ and constitutes reversible error if the instruction relieves the State of that burden. *Id.*

The language of WPIC 4.01 has repeatedly been approved by Washington courts.⁵ In *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), the Washington Supreme Court instructed trial courts to use WPIC 4.01 to instruct the jury on reasonable doubt in every criminal case:

We have approved WPIC 4.01 and concluded that it adequately permits both the government and the accused to argue their theories of the case. We recognize that the concept of reasonable doubt seems at times difficult to define and explain. We understand the temptation to

³ Whether courts should give an instruction on reasonable doubt (as some jurisdictions do not), and what instruction should be used, are topics regularly discussed by scholars. *See*, Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 Tex. L. Rev. 105 (1999); *Note, Reasonable Doubt: An Argument Against Definition*, 108 Harv. L. Rev. 1955 (1995) (concluding that courts should not attempt to define the term [reasonable doubt] in conveying the reasonable doubt concept to juries); Jessica N. Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept*, 22 Am. J. Crim. L. 677, 678 (1995) (arguing that “because reasonable doubt is a term of art it should be defined for the jury”); Henry A. Diamond, *Note, Reasonable Doubt: To Define, or Not to Define*, 90 Colum. L. Rev. 1716, 1716 (1990) (“[J]ury instructions defining reasonable doubt should always be given in criminal trials and are constitutionally required when requested by the defendant or the jury.”)

⁴ The due process clause requires proof beyond a reasonable doubt of every fact necessary to constitute a crime with which the defendant is charged. *In Re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

⁵ *See, e.g., State v. Pirtle*, 127 Wn.2d 628, 656–58, 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, 25, 751 P.2d 882 (1988); *State v. Price*, 33 Wn. App. 472, 475–76, 655 P.2d 1191 (1982).

expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction.... Unlike the United States Supreme Court, we do have supervisory powers over our State's courts. Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the *Castle* instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. **Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.**"

Bennett, 161 Wn.2d at 317-318 (internal citations omitted) (emphasis added).

In this case, as directed by the Washington Supreme Court, the trial court used WPIC 4.01 to instruct the jury on reasonable doubt and the State's burden of proof. CP 9; RP 174. Defendant now contends for the first time on appeal that this language adds both an articulation requirement for the jury to acquit the defendant and undermines the presumption of innocence. It does neither.

The Washington Supreme Court recently reaffirmed that WPIC 4.01 is the "correct legal instruction on reasonable doubt." *State v.*

Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). In *Kalebaugh*, the trial judge attempted to further explain the concept of reasonable doubt in its preliminary instructions by telling the jury that reasonable doubt is a “doubt for which a reason can be given.” *Id.* at 585. Although it affirmed the conviction, the Supreme Court stated: “[defendant] is correct that the law does not require that a reason be given for a juror’s doubt, and we have previously acknowledged is a difficult concept that can challenge lawyers and jurors alike.” *Id.* The Court, therefore, implicitly, but necessarily, found that WPIC 4.01 does not impose any articulation requirement. If WPIC 4.01 is a “correct legal instruction on reasonable doubt,” and the “law does not require a reason be given for a juror’s doubt,” the only legal and logical conclusion that may be reached is that WPIC 4.01 does not require a reason to be given for a juror’s doubt.⁶ *See*

⁶ Other jurisdictions that have confronted this argument have likewise found that similar instructions do not require any articulation for a jury’s doubts. *See, e.g., People v. Romero*, 354 P.3d 983, 1014, 62 Cal.4th 1 (2015) (California Pattern Jury Instruction 2.90, stating: “reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge” does not dilute the burden of proof, nor could be interpreted to mean that the jury “must articulate reason and logic for their doubt”); *People v. Lugo*, 232 A.D.2d 236, 236-237, 648 N.Y.S.2d 539 (1996) (“The trial court’s charge to the jury that for a doubt to be reasonable it ‘must be one for which some reason can be given’ did not impose any obligation upon the jurors to articulate reasons for such doubt but merely defined the degree of clarity and coherence of thought necessary for jurors to conclude they harbor a reasonable doubt.” (internal citations omitted)); *State v. Taylor*, 657 A.2d 659, 662, 37 Conn. App. 464 (1995) (reasonable doubt definitional instruction stating “a doubt for which you, in your own minds, can give a reason based upon the evidence or lack of evidence” did not require articulation, but

also, *State v. Thompson*, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (stating the phrase “the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists” does not infringe on presumption of innocence or mislead the jury by requiring them to assign a reason for their doubt in order to acquit, but merely points out that their doubts must be based on reason, not something vague or imaginary.)⁷

Defendant cites a number of cases in support of his argument that the language of WPIC 4.01 is “the true culprit for impermissible fill-in-the-blank arguments” and causes improper burden-shifting arguments by prosecutors. Appellant Br. at 9-10. Each of these cases involves prosecutorial misconduct claims, wherein the prosecutor improperly described the meaning of WPIC 4.01 to the jury.⁸

In *State v. Emery*, 174 Wn.2d 741, 749-751, 278 P.3d 653 (2012), the prosecutor argued in closing, “in order for you to find the defendant

“rather, makes clear that reasonable doubt should be based on reason rather than speculation.”)

⁷ *Thompson* cites *State v. Harras*, 25 Wash. 416, 65 P. 774 (1901), as approving of similar language. Defendant takes issue with the fact that similar language has been used in Washington for over a hundred years: “[w]hat seemed acceptable 100 years ago is now forbidden. But WPIC 4.01 has not evolved. It is stuck in the misbegotten past.” Appellant’s Br. at 21.

Defendant misconstrues cases such as *Kalebaugh* and *Emery* to support his argument, and ignores the fact that our Supreme Court reviewed the language of WPIC 4.01 as recently as 2015 in *Kalebaugh*, and has maintained its approval of the instruction’s use in all criminal trials.

⁸ No direct challenge was made to the language of WPIC 4.01 in any of these cases.

not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in that blank.”

The Court held:

[T]he State's fill-in-the-blank argument is improper. The argument starts with the phrase, “[I]n order for you to find the defendant not guilty.” 9 VRP at 830. **This is a bad beginning because a jury need do nothing to find a defendant not guilty. And although the argument properly describes reasonable doubt as a “doubt for which a reason exists,” it improperly implies that the jury must be able to articulate its reasonable doubt by filling in the blank.** This suggestion is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden. *State v. Camara*, 113 Wn.2d 631, 638, 781 P.2d 483 (1989) (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). By suggesting otherwise, the State's fill-in-the-blank argument subtly shifts the burden to the defense. *See State v. Gregory*, 158 Wash.2d 759, 859–60, 147 P.3d 1201 (2006) (arguments that shift the burden of proof to the defense constitute misconduct).

Emery, 174 Wn.2d at 759-760 (emphasis added).

In *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), the court held that a number of the prosecutor's statements in closing accurately stated the law on reasonable doubt and the presumption of innocence, but found the statement “in order to find the defendant not

guilty, you have to say ‘I don't believe the defendant is guilty because,’ and then you have to fill in the blank” to be improper, stating:

The jury need not engage in such thought process. **By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to.** Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

Anderson, 153 Wn. App. at 431 (emphasis added).⁹

The common theme in these cases is the prosecutor told the jury that in order to find the defendant *not guilty*, the jurors needed to be able to articulate a reason for *acquittal*. Such an argument is improper for two reasons: first, it fails to recognize that a jury need do nothing to find a defendant “not guilty,” as only evidence satisfying the “beyond a reasonable doubt” standard may overcome that presumption; and second, it requires the jury to be able to articulate a reason for acquittal by “filling in the blank,” which, of course, is not required by the jury instruction or the law.

⁹ Defendant also cites to *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010) and *State v. Walker*, 164 Wn.App 724, 265 P.3d 191 (2011). Each case is an example of an improper closing argument by the prosecutor in which the prosecutor made a “fill-in-the-blank” argument such as that discussed in *Anderson*, *supra*.

The Defendant's assertion that WPIC 4.01 is the root of these problems is inaccurate and unsupported; rather, prosecutorial misconduct cases¹⁰ in which the State inaccurately describes the burden of proof usually stem from those prosecutors' desire to further define the ever-difficult-to-explain concept of "reasonable doubt" to jurors. However, WPIC 4.01 instruction is clear -- in order for the jury to find the defendant *guilty* the jury must find the evidence proves guilt beyond a reasonable doubt. It does not say "in order to acquit the defendant," "in order to find the defendant not guilty," or insinuate that the jury must be able to state its reason for acquittal as was the issue in the impermissible burden shifting cases discussed above.

Contrary to defendant's assertions, a review of WPIC 4.01 as a whole, demonstrates that no articulation requirement is evident or even implied by the language of the instruction. The first two paragraphs make it clear that the burden of proof is on the State, not on the defendant and that the presumption of innocence is only overcome by evidence satisfying the jury beyond a reasonable doubt.¹¹

¹⁰ *Kalebaugh* was not a prosecutorial misconduct case, but involved a well-intentioned trial judge who inadvertently misstated the law.

¹¹ The defendant has entered a plea of not guilty. That plea puts in issue each 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.

The third paragraph of the instruction clarifies what a reasonable doubt is and does not require the jury or individual jurors to articulate anything in reaching a verdict:

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 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.

WPIC 4.01.

This language does not state that the jury must be able to articulate to one another the reasons for conviction or acquittal. Instead, it directs them that a reasonable doubt is one that would exist in the **mind** of a reasonable person after full consideration of the evidence or lack of evidence. In those cases where the “abiding belief” language is given to the jury, such as this case, the instruction is even clearer that no reason must be articulated to other members of the jury. Instead, the “abiding belief” language implies that the individual jurors must have enduring confidence, faith, or conviction in the truth of the charge.

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

While juries are instructed that they have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict, they are also directed that each juror must decide the case for him or herself, but only after fully considering the evidence with the other jurors. WPIC 1.04. The jurors are further directed not to surrender their “honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors.” *Id.*

WPIC 4.01 is an accurate statement of the law. *Kalebaugh*, 183 Wn.2d at 586. Its “abiding belief” language has been approved by federal courts as well. *See United States v. Bright*, 517 F.2d 584, 587 (2d Cir. 1975). It does not require the jury to articulate a reason to acquit the defendant and properly holds the State to its burden of proving a defendant’s guilt beyond a reasonable doubt. The trial court did not err by giving an instruction that accurately instructs the jury and has been approved by the Washington Supreme Court. Just as trial courts are bound by the Supreme Court’s decision in *Bennett* to give WPIC 4.01 in all criminal trials, that decision is binding on *all* lower courts unless the Supreme Court overrules *Bennett*. *See, e.g., State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

V. CONCLUSION

Defendant failed to preserve any objection to WPIC 4.01 at trial, and has not demonstrated that the instruction is constitutionally flawed. The Washington Supreme Court's mandate of the use of WPIC 4.01 in all criminal trials controls the issue here. The State respectfully requests this court affirm the trial court and jury verdict.

Dated this 12 day of January, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent