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Court of Appeals
Division III
State of Washington

No. 33672-7-III

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

KURTIS S. PHILLIPS,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The trial court erred by giving a constitutionally defective reasonable doubt instruction. RP 163, Instruction No. 2.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. 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 Phillips’ right to a jury trial?

2. 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?

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

C. STATEMENT OF THE CASE

Kurtis Phillips was convicted by a jury of second degree possession of stolen property, possession of a controlled substance and third degree

theft. RP¹ 214. The Court instructed the jury that a reasonable doubt was one “for which a reason exists.” CP 163. The same instruction defined satisfaction beyond a reasonable doubt as an “abiding belief in the truth of the charge.” *Id.*

D. ARGUMENT

The court’s “reasonable doubt” instruction infringed Phillips’ 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.*” RP 163 (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

¹ Citations to the record designated “RP” refer to the trial transcript transcribed by Tom Bartunek.

case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” RP 163.²

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 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 that instruction.

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

² Phillips 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, Phillips objects to the instruction’s focus on “the truth.”

presumption of innocence by ensuring that the appropriate standard is clearly articulated.³ *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 Phillips his constitutional right to a jury trial. U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 3, 21, 22.

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)).

³ 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.

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.*⁴

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 (5th Cir. 1997), on reh’g en banc, 138 F.3d 552 (5th Cir.

⁴ 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).

1998).⁵ An instruction imposing an articulation requirement “creates a lower standard of proof than due process requires.” *Id.*, at 534.⁶

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

Phillips’ jury was instructed, “A reasonable doubt is one for which a reason exists” RP 163; 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.” 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

⁵ 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 (5th Cir. 2000).

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 (2nd 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 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

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

doubt.”). Jurors applying the instruction, herein, could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable.⁷ 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, 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 Phillips 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 Phillips’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

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

⁷ 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).

properly instruct jurors regarding reasonable doubt “undoubtedly qualifies as ‘structural error.’” *Sullivan*, 508 U.S. at 281–82. Accordingly, Phillips’ 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 February 15, 2016,

s/David N. Gasch
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 15, 2016, 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:

Kurtis Scott Phillips
425 8th Ave SE
Ephrata, WA 98823-223

E-mail: kburns@grantcountywa.gov
Garth Dano
Grant County Prosecutor's Office

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com