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April 13, 2016
Court of Appeals
Division III
State of Washington

NO. 33672-7-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KURTIS S. PHILLIPS, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

BRIEF OF RESPONDENT

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Table of Contents

I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR1

 A. *Does the phrase "an abiding belief in the truth of the charge" improperly focus the jury on a search for the truth? (Assignment of Error No. 1)*.....1

 B. *Is the phrase "a reasonable doubt is one for which a reason exists" constitutional and is it required to be given in all criminal trials by established Washington law? (Assignment of Error No. 1)*.....1

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

III. ARGUMENT..... 1

 A. *The phrase "an abiding belief in the truth of the charge" accurately informs the jury of the State's burden of proof and does not improperly focus the jury on a search for the truth. (Assignment of Error No. 1)*.....1

 B. *The phrase "a reasonable doubt is one for which a reason exists" is constitutional and is required to be given in all criminal trials by established Washington law. (Assignment of Error No. 1)*.....4

V. CONCLUSION.....6

Table of Authorities

State Cases

<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	1, 2, 4, 5
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995).....	2
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	2
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	2, 3, 4, 5, 6
<i>State v. Fedorov</i> , 181 Wn. App. 187, 324 P.3d 784, 790 (2014).....	3, 4
<i>State v. Flores</i> , 18 Wn. App. 255, 566 P.2d 1281 (1977).....	2
<i>State v. Kalebaugh</i> , 183 Wn.2d 578, 355 P.3d 253 (2015).....	5
<i>State v. Kirkman</i> , 159 Wn.2d 918, 935, 155 P.3d 125 (2007).....	5
<i>State v. Mabry</i> , 51 Wn. App. 24, 751 P.2d 882, 883 (1988).....	2, 3
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245, 262 (1995).....	3, 4
<i>State v. Tanzymore</i> , 54 Wn.2d 290, 340 P.2d 178 (1959).....	2
<i>State v. Thompson</i> , 13 Wn. App. 1, 533 P.2d 395 (1975).....	5
<i>State v. Walker</i> , 19 Wn. App. 881, 578 P.2d 83, review denied, 90 Wn.2d 1023 (1978).....	3

Statutes and Rules

RAP 2.5(a)(3).....	5
RAP 10.3(b).....	1
11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (WPIC 4.01).....	2

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

- A. *Does the phrase "an abiding belief in the truth of the charge" improperly focus the jury on a search for the truth? (Assignment of Error No. 1)*
- B. *Is the phrase "a reasonable doubt is one for which a reason exists" constitutional and is it required to be given in all criminal trials by established Washington law? (Assignment of Error No. 1)*

II. STATEMENT OF THE CASE

The State adopts and supplements the facts recited by appellant Kurtis S. Phillips in his Statement of the Case. RAP 10.3(b). Phillips did not object at trial to any of the State's proposed jury instructions, telling the court "they look fine." RP 156. Instruction No. 2 states, in pertinent part,

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 a consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt as to that charge.

CP 16.

III. ARGUMENT.

Jury instructions are proper and will be upheld on appeal if they inform the jury of applicable law, are not misleading, and allow each party to argue its theory of the case. *State v. Bennett*, 161 Wn.2d 303, 307, 165

P.3d. 1241 (2007). Claimed instructional errors are reviewed de novo, in the context of the instructions as a whole. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). Appellate courts reviewing “reasonable doubt” instructions¹ uniformly refuse to isolate a particular phrase. *See, e.g., State v. Coe*, 101 Wn.2d 772, 788, 684 P.2d 668 (1984); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882, 883 (1988); *State v. Flores*, 18 Wn. App. 255, 566 P.2d 1281 (1977).

A. *The phrase “an abiding belief in the truth of the charge” accurately informs the jury of the State’s burden of proof and does not improperly focus the jury on a search for “the truth.”*

Phillips relies on *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), to challenge the optional “abiding belief in the truth of the charge” language of the reasonable doubt instruction. He argues the phrase encourages the jury to undertake an impermissible search for the truth, inviting the error identified in *Emery*. Phillips’ argument is contrary to both long-established and recent Washington law.

In *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988), this Court upheld the almost identical concluding statement in WPIC 4.01. *Id.* The Court noted the instruction “was approved essentially in *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959) and was also approved as

¹ 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC 4.01).

modified in *State v. Walker*, 19 Wn. App. 881, 578 P.2d 83, review denied, 90 Wn.2d 1023 (1978).” *Id.* This Court concluded then, as it should now, “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.” *Id.* A few years later, the Washington Supreme Court concluded, “an instruction cast in terms of an abiding conviction as to guilt . . . correctly states the government’s burden of proof.” *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245, 262 (1995).

Emery, upon which Phillips relies, was decided in 2012, spurring a revival of “belief in the truth” challenges throughout Washington. These challenges uniformly fail because they uniformly fail to construe correctly the Supreme Court’s underlying reasoning and holding in that case. In *Emery*, the error identified occurred in closing argument when the prosecutor urged the jury to “speak the truth” by finding the defendants guilty. 174 Wn.2d at 751. The Court held the argument improperly misstated the jury’s role: “The jury’s job is not to determine the truth of what happened Rather, a jury’s job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Id.* at 760.

Two years ago, Division One of this Court examined the “abiding belief in the truth” language in the focused light of *Emery*’s holding. *State v. Fedorov*, 181 Wn. App. 187, 199–00, 324 P.3d 784, 790 (2014). Mr.

Fedorov asserted the “language is similar to the impermissible ‘speak the truth’ remarks made by the State in [Emery’s] closing.” *Id.* at 200.

Division One disagreed, affirming the continuing and controlling precedent of *Bennett, supra*, 161 Wn.2d 303 and *Pirtle, supra*, 127 Wn.2d 628, in a post-*Emery* environment. *Id.* Read in context, the “belief in the truth” phrase continues properly to inform the jury that its job is to determine whether the State has met its burden. *Id.*

B. The phrase “a reasonable doubt is one for which a reason exists” is constitutional and is required to be given in all criminal trials by established Washington law. (Assignment of Error No. 1)

Phillips contends the phrase, “A reasonable doubt is one for which a reason exists” impermissibly requires the jury to articulate a reason in order to establish reasonable doubt. Br. of Appellant at 3. He asserts the court erred in instructing the jury with that phrase because it “undermines the presumption of innocence and is effectively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases.” *Id.* Phillips argues the phrase requires the jury to articulate a reason in order to establish reasonable doubt, rendering the instruction constitutionally defective. *Id.* His assertions are without merit.

Phillips did not object to the propriety of this language at trial, waiving his right to object on appeal unless the error of which he

complains is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). “Manifest” error under RAP 2.5(a)(3) “requires a showing of actual prejudice.” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). To show prejudice, Phillips must plausibly demonstrate “the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* There is no error. There can be no prejudice.

Nine years ago, the Washington Supreme Court expressly approved WPIC 4.01 as a correct statement of the law that “adequately permits both the government and the accused to argue their theories of the case.” *Bennett, supra*. 161 Wn.2d at 317–18. As noted in numerous recent opinions, published and unpublished, for decades Washington courts have held the phrase “a doubt for which a reason exists” to be constitutionally sound. *See, e.g. State v. Thompson*, 13 Wn. App. 1, 533 P.2d 395 (1975) (the phrase does not direct the jury to assign a reason for their doubts, but merely points out their doubts must be based on reason, not something vague or imaginary); *Emery, supra*, 174 Wn.2d at 759-60 (prosecutor in closing argument properly described reasonable doubt as a doubt for which a reason exists). “A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.” *Thompson*, 13 Wn. App. at 5 (citing *State v. Harras*, 25 Wash. 416, 65 P.774 (1901)).

Four years ago, the Washington Supreme Court repudiated Phillips' assertion that the phrase is effectively identical to improper "fill-in-the-blank" argument. *Emery*, 174 Wn.2d at 460. The Court distinguished the phrase of which Phillips complains from the subtle burden shifting of "fill-in-the-blank" arguments, with their improper implication that the jury must be able to articulate its reasonable doubt. *Emery*, 174 Wn.2d at 760. *Emery* unambiguously held that while fill-in-the-blank argument is improper, it is proper to instruct the jury by defining reasonable doubt as "a doubt for which a reason exists." *Id.*

IV. CONCLUSION.

This Court should reaffirm the constitutionality of the reasonable doubt instruction and affirm Phillips' convictions.

DATED this 13th day of April, 2016.

Respectfully submitted,

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