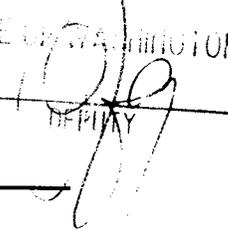


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STATE OF WASHINGTON

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No. 32896-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Bruce L. Bennett, Jr.,

Appellant.

Clallam County Superior Court

Cause No. 04-1-00078-4

The Honorable Judge Craddock Verser

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR iii

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR iv

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT 2

**I. Under the law of the case, the evidence was insufficient and
the defendant was not guilty as a matter of law..... 2**

**II. The trial court’s “reasonable doubt” instruction violated due
process and was unconstitutional. 3**

CONCLUSION 7

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Cage v. Louisiana</i> , 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990)	6, 7
<i>Francis v. Franklin</i> , 471 U.S. 307 (1985).....	6
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	5, 7
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).....	8

STATE CASES

<i>State v. Castle</i> , 86 Wn. App. 48, 935 P.2d 656, review denied 133 Wn.2d 1014 (1997).....	5, 6, 7
<i>State v. DeVries</i> , 149 Wn.2d 842, 72 P.3d 748 (2003).....	4
<i>State v. Dykstra</i> , 127 Wn.App. 1, 110 P.3d 758 (2005).....	6
<i>State v. McHenry</i> , 88 Wn.2d 211, 588 P.2d 188 (1977).....	5
<i>State v. Perez-Cervantes</i> , 141 Wn.2d 468, 6 P.3d 1160 (2000)	4
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995), cert. denied, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).....	5
<i>State v. Tanzymore</i> , 54 Wn. 2d 290, 340 P.2d 178 (1959)	5

STATUTES

RCW 9A.76.110.....	3
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ASSIGNMENTS OF ERROR

1. The law of the case prohibited the jury from considering the defendant's prior conviction for any purpose other than impeachment.
2. The conviction was based on insufficient evidence, because without the prior conviction, there was no evidence to establish that Mr. Bennett had previously been convicted of a felony.
3. Mr. Bennett's constitutional right to due process was infringed by the court's instruction on reasonable doubt.
4. The court erred by giving Instruction No. 3, which reads as follows:

The Defendant has entered a plea of not guilty. That plea puts in issue every 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.

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.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Instruction No. 3, Supp. CP.

5. The trial court erred by equating a "reasonable doubt" with a "real possibility" that Mr. Bennett was not guilty.

6. The trial court erred by explaining “reasonable doubt” in terms of “possible doubt” without clarifying that phrase.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Mr. Bennett was charged with Escape in the First Degree. The parties stipulated that Mr. Bennett had been convicted of a felony. The court instructed the jury that it could consider this conviction only “in deciding what weight or credibility should be given to the testimony of the Defendant and for no other purpose...” and that the prior conviction could not be used as “evidence of the Defendant’s guilt.” The prosecutor did not object to this instruction.

1. Did the court’s instruction prohibit the jury from considering Mr. Bennett’s prior conviction as substantive evidence of guilt? Assignments of Error Nos. 1, 2.
2. Without substantive evidence that Mr. Bennett had a prior felony conviction, was there insufficient evidence to convict him of Escape in the First Degree? Assignments of Error Nos. 1, 2.

Mr. Bennett proposed the standard pattern instruction on reasonable doubt. Instead of giving this instruction, the court gave an instruction which included the following language:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

The defense objected to this instruction.

3. Did the court's instruction on reasonable doubt violate Mr. Bennett's constitutional right to due process? Assignments of Error Nos. 3-6.
4. Did the court's instruction erroneously equate a "reasonable doubt" with a "real possibility" that Mr. Bennett was not guilty? Assignments of Error Nos. 3-6.
5. Did the court's instruction erroneously permit the jury to convict unless there was "substantial doubt" about Mr. Bennett's guilt? Assignments of Error Nos. 3-6.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Bruce L. Bennett, Jr. was charged by Information with Attempted Escape in the First Degree on February 19, 2004. CP 18. His case proceeded to a jury trial. CP 6.

The parties stipulated that Mr. Bennett had been convicted of a felony. Supp, CP, Exhibit 40; RP 40. The court gave the following instruction to the jury relating to Mr. Bennett's record:

Evidence that the Defendant has previously been convicted of a crime is not evidence of the Defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the Defendant and for no other purpose.

Instruction No. 5, Supp. CP.

Over defense objection, the court included the following language in its reasonable doubt instruction:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Instruction No. 3, Supp. CP.

The jury convicted Mr. Bennett as charged. CP 6-17. He was sentenced within his standard range and this timely appeal followed. CP 6-17, 5.

ARGUMENT

I. UNDER THE LAW OF THE CASE, THE EVIDENCE WAS INSUFFICIENT AND THE DEFENDANT WAS NOT GUILTY AS A MATTER OF LAW.

Under RCW 9A.76.110, defining Escape in the First Degree, “A person is guilty of escape in the first degree if he or she knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony or an equivalent juvenile offense.” RCW 9A.76.110(1). The statute requires that the prosecution establish that the accused was being detained pursuant to a conviction of a felony.

In this case, the trial court instructed the jury as follows:

Evidence that the Defendant has previously been convicted of a crime is not evidence of the Defendant’s guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the Defendant and for no other purpose.

Instruction No. 5, Supp. CP.

The prosecutor did not object to this instruction, and it became the law of the case. *State v. Perez-Cervantes*, 141 Wn.2d 468 at 476, 6 P.3d 1160 (2000). Under this instruction, the defendant’s prior convictions

were to be considered solely for impeachment, and not as substantive evidence of guilt. While in most cases such an instruction appropriately prohibits the jury from convicting the defendant based on criminal propensity, here, the prosecution took no steps to tailor the instruction to accommodate the fact that a felony conviction is a predicate to a charge of Escape in the First Degree.

Under the law of the case, the evidence was insufficient as a matter of law. Evidence of Mr. Bennett's prior felony convictions could not be considered on the question of guilt. Because of this, the conviction must be reversed and the case dismissed with prejudice. *State v. DeVries*, 149 Wn.2d 842 at 853, 72 P.3d 748 (2003).

II. THE TRIAL COURT'S "REASONABLE DOUBT" INSTRUCTION VIOLATED DUE PROCESS AND WAS UNCONSTITUTIONAL.

In a criminal case, the jury must be instructed that the State has the burden to prove each essential element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Proper instruction on the reasonable doubt standard is crucial because that standard "provides concrete substance for the presumption of innocence" which is the cornerstone of our criminal justice system. *In re Winship*, 397 U.S. at 363. Failure to give clear instruction on reasonable doubt is not only error, it is a "grievous constitutional failure" mandating

reversal. *State v. McHenry*, 88 Wn.2d 211, 214, 588 P.2d 188 (1977). An instruction is improper if it serves to relieve the State of its burden. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).

In Washington, the traditional pattern instruction has defined reasonable doubt as “a doubt for which a reason can be given.” WPIC 4.01; WPIC 4.01A. The precursor of this instruction was specifically approved by the Washington Supreme Court in *State v. Tanzymore*, 54 Wn. 2d 290, 340 P.2d 178 (1959).

Instead of using the traditional WPIC instruction, the court here used an instruction derived from one accepted by Division I in *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, *review denied* 133 Wn.2d 1014 (1997). The instruction differed from the traditional instructions in its final paragraph:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Instruction No. 3, Supp. CP.

This instruction required the jury to find “a real possibility” that Mr. Bennett was not guilty in order to acquit. In analyzing the instruction, the *Castle* court was asked to determine whether or not the phrase “real possibility” raised the standard for an acquittal, thus relieving the prosecution of its burden. Division I held that it did not; however, this decision was incorrect and should not be followed by this court.¹

In construing an instruction defining reasonable doubt, a reviewing court should consider how reasonable jurors could have understood the instruction as a whole. *Cage v. Louisiana*, 498 U.S. 39 at 41, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990), citing *Francis v. Franklin*, 471 U.S. 307, 316 (1985). In *Cage*, the U.S. Supreme Court unequivocally stated that reasonable doubt is not “substantial doubt.” 498 U.S. at 40-41. The Court held that the word ‘substantial’ “suggests a higher degree of doubt than is required for acquittal under the reasonable doubt standard.” 498 U.S. at 41.

When viewed from the standpoint of a reasonable juror, the “real possibility” language in this case is equivalent to the “substantial doubt” language rejected by the U.S. Supreme Court in *Cage*. Under the instruction given, the jury was obliged to find the defendant guilty unless

¹ See also *State v. Dykstra*, 127 Wn.App. 1, 110 P.3d 758 (Div. 3,2005).

the doubt was sufficiently substantial to be considered “real.” The term “real” was not defined for the jury. As a result, there is a grave possibility that the jury erroneously used a “substantial doubt” standard, and convicted Mr. Bennett based on a lower standard than is constitutionally permissible under *In re Winship*.

The problem was compounded by inclusion of the following language: “There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.” The *Castle* court was not asked to address the difficulties raised by this sentence. This sentence is problematic for two reasons. First, the instruction creates a likelihood of confusion by injecting the words “possible doubt” into the jury’s deliberations. Defining the phrase “reasonable doubt” is a challenging undertaking. Adding a similar phrase without making any effort to define it or distinguish it does not help to clarify the subject. Second, instead of defining the state’s burden in an affirmative manner, this portion of the instruction focuses on what the prosecutor need *not* do. The effect of this is to detract from the serious and heavy burden that the state does bear.

These problems render the instruction improper. An error in a reasonable doubt instruction can never be harmless error. *Sullivan v.*

Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

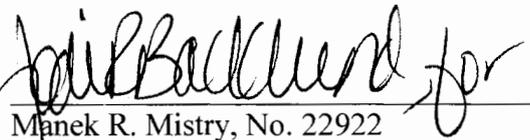
Because of this, the conviction must be reversed.

CONCLUSION

For the foregoing reasons, the conviction must be reversed. The case must be dismissed with prejudice because the evidence was insufficient under the law of the case. In the alternative, if the case is not dismissed, the faulty “reasonable doubt” instruction requires that the case be remanded for a new trial.

Respectfully submitted on August 26, 2005.

BACKLUND AND MISTRY


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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Bruce Bennett, Jr., DOC # 990306
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

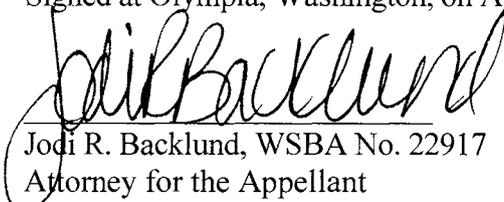
And to the office of the Clallam County Prosecutor,

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 26, 2005.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington, on August 26, 2005.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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