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STATE OF WASHINGTON

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BY: C. J. HERRITT

Supreme Court No. 78377-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Bruce Bennett, Jr.

Petitioner.

Clallam County Superior Court
Cause No. 04-1-00078-4
The Honorable Judge Craddock Verser

PETITIONER'S SUPPLEMENTAL BRIEF

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The facts and prior proceedings are set forth fully in the Opening Brief, the Court of Appeals' Opinion, and the Petition for Review, and will not be repeated here.

ARGUMENT

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. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *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; *see also Sullivan v. Louisiana, supra*. An instruction defining reasonable doubt is erroneous if there is a reasonable likelihood that the jury applied it in an unconstitutional manner. *Victor v. Nebraska*, 511 U.S. 1 at 6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). An error defining reasonable doubt can never be harmless error. *Sullivan v. Louisiana, supra*.

The constitution does not require a trial court to define reasonable doubt; however, any definition must not diminish the state's burden of proof. *Victor v. Nebraska*, at 5; *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990).

In *Victor v. Nebraska*, the Supreme Court made clear that the phrase "possible doubt" could be included in an instruction defining reasonable doubt so long as the context required the word "possible" to mean "imaginary" or "fanciful." The instruction in *Victor v. Nebraska* read:

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, 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, to a moral certainty, of the truth of the charge. *Victor v. Nebraska*, at 7.

The Court upheld the instruction, relying on the trial court's equation of "possible doubt" with "imaginary doubt:"

A fanciful doubt is not a reasonable doubt... That this is the sense in which the instruction uses "possible" is made clear from the final phrase of the sentence, which notes that everything "is open to some possible or imaginary doubt." *Victor v. Nebraska*, at 17.

Other portions of the Court's opinion also emphasized the necessity of defining ambiguous phrases. First, the Court clarified that

“substantial doubt,” which had rendered invalid an instruction in *Cage v. Louisiana*, was not fatal if the context required a constitutional understanding:

Any ambiguity... is removed by reading the phrase in the context of the sentence in which it appears: “A reasonable doubt is an actual and substantial doubt . . . as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.” ...This explicit distinction between a substantial doubt and a fanciful conjecture was not present in the *Cage* instruction. *Victor v. Nebraska*, at 20.

Second, the Court criticized but upheld the use of the phrases “moral evidence” and “moral certainty,” finding that they conveyed the proper standard when taken in context. *Victor v. Nebraska*, at 10-17; *see also* pp. 21-22.

Cases interpreting similar instructions have followed the Supreme Court’s requirement that the context clarify any ambiguities. *See, e.g., United States v. Rodriguez*, 162 F.3d 135 at 146 (1st Cir., 1998) (“[T]he instructions overall left the jury with an accurate impression of the presumption of innocence and of the substantial burden faced by the prosecution,” because the phrase “real possibility” was given substance in part by the sentence “Everything in our common experience is open to some possible or imaginary doubt”); *Tillman v. Cook*, 215 F.3d 1116 at 1125-1126 (10th Cir., 2000) (instruction explicitly distinguished a “real,

substantial doubt” from one that is “merely possible or imaginary”); *Commonwealth v. Murphy*, 559 Pa. 71 at 84, 739 A.2d 141 (1999) (the phrase “substantial doubt” was acceptable because it was “invoked only as a comparison to possible or imaginary doubt.”)

In this case, the trial court defined reasonable doubt as follows:

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, CP 27.

The court did not define “real possibility;” nor was the jury given a definition of “possible doubt.” Court’s Instructions, CP. The first of these two phrases calls to mind the instruction rejected by the Supreme Court in *Cage v. Louisiana, supra*, with its emphasis on “grave” or “substantial” doubt. The second phrase closely parallels the concept being defined-- “reasonable doubt” itself-- yet the instruction provides no guidance for distinguishing between a “reasonable doubt” and a “possible doubt.” Furthermore, instead of presenting the state’s burden in an affirmative manner, the definition focuses on what the prosecutor need *not* do (“the

law does not require proof that overcomes every possible doubt.”) The effect of this is to detract from the serious and heavy burden that the state does bear.

The instruction does not contain words like “imaginary” or “fanciful,” which saved similar language in *Victor v. Nebraska, supra*. Instead, the instruction relies on the phrases “firmly convinced,” “absolute certainty,” and “benefit of the doubt” to provide context to the “real possibility” and “possible doubt” language. These three phrases provide the context within which the questionable language should be analyzed. *Victor v. Nebraska, supra*.

To satisfy the reasonable doubt standard, the evidence must meet “the highest burden possible.” *In re Young*, 122 Wn.2d 1 at 39, 857 P.2d 989 (1993). Lower on the scale is proof by clear, cogent, and convincing evidence, “which is weightier and more convincing than a preponderance of the evidence, but which need not reach the level of beyond a reasonable doubt.” *In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175 at 181, 955 P.2d 369 (1998), *citations and quotation marks omitted*. At the bottom of the scale is proof by a preponderance of evidence, a standard directed to the quantity of the evidence rather than its quality. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 at 764, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). To adequately convey the reasonable doubt standard, any

definition must make apparent to the jury that conviction requires proof that is more than clear, cogent, and convincing.¹ *See Cage v. Louisiana, supra; In re Winship, supra; Santosky v. Kramer, supra.* The language here fails to meet that standard.

First, although use of the words “firmly convinced” does not necessarily reduce the prosecution’s burden (*see, e.g., Hunt, supra, at 539*), one may be “firmly convinced” by evidence that is merely “clear, cogent, and convincing.” *See, e.g., Cooke v. Cain, 35 Wash. 353 at 363-364, 77 Pac. 682 (1904)* (a factfinder may be “firmly convinced” by evidence that “is ‘clear, cogent, and convincing,’ even though it be the testimony of a party only”); *Lifescan, Inc. v. Home Diagnostics, Inc., 103 F. Supp. 2d 345 at 378 n. 6 (D. Del. 2000)* (quoting with approval an instruction reading in part “You must be firmly convinced that the fact is indeed true in order to meet the clear and convincing burden.”) Because of this, the phrase “firmly convinced” cannot be used to clarify what is meant by “real possibility” and “possible doubt.”

Second, to say that proof need not provide “absolute certainty” about a defendant’s guilt does nothing to distinguish between proof by a

¹ But see *State v. Hunt, 128 Wn. App. 535, 116 P.3d 450 (2005)*, in which Division III found that the instruction at issue here “accurately informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, but need not necessarily prove its case by an absolute certainty.” *Hunt, at 540.*

preponderance, proof that is clear, cogent, and convincing, and proof beyond a reasonable doubt. One need not have “absolute certainty” to meet any of these standards. Accordingly, the phrase “absolute certainty” may not be used to clarify what is meant by “real possibility” and “possible doubt.”

Third, the phrase “benefit of the doubt” conveys an idea disturbingly similar to the very low preponderance standard. Requiring jurors to give a defendant the “benefit of the doubt” suggests that close cases-- cases in which neither side has a clear preponderance-- must result in acquittals. The clear implication is that where the preponderance favors the state, a jury is permitted to convict, even in the absence of proof beyond a reasonable doubt. Thus the phrase “benefit of the doubt” cannot be used to clarify what is meant by “real possibility” and “possible doubt.”

When analyzed in context, the “real possibility” and “possible doubt” language do not adequately convey the meaning of the phrase “reasonable doubt.” This is further confirmed by substituting the “clear, cogent, and convincing” standard into Instruction No. 3:

Proof beyond by clear, cogent, and convincing evidence 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.

If the three phrases provide sufficient context to correctly explicate the reasonable doubt standard, the substitution would either be nonsensical, or it would raise the “clear, cogent and convincing” standard so that it is equivalent to the reasonable doubt standard. But the modified definition remains logical and coherent, and it does not elevate the “clear, cogent and convincing” standard to the highest standard of proof. The modified instruction could properly be given in a case where clear, cogent and convincing evidence is required.

Because the context does not properly clarify the phrases “possible doubt” and “real possibility,” and because the substitution example above reveals that the instruction cannot differentiate between reasonable doubt and a lower standard, the instruction is unconstitutional.

Two other courts have reached this result. First, in *State v. Perez*, 90 Haw. 65, 976 P.2d 379 (1999), the Hawaii Supreme Court found that an instruction nearly identical to the one given here was “prejudicially misleading.” *Perez*, 90 Haw. 65 at 76. The lower appellate court concluded that

The use of the words “real possibility” ...conflicts with the admonition to the jury that the nature of the doubt

with which the jurors must be concerned is one which is “reasonable.” Moreover, advising the jury its verdict of “not guilty” rests on whether it “think[s]” there is a “real possibility” the defendant is not guilty invites the jury to abandon the presumption of innocence. The jury here was apprised of its obligation to presume Defendant innocent until the prosecution had proven each element of the crime beyond a reasonable doubt. By tying a verdict of not guilty to the concept of “real possibility,” however, [the instruction] raises an unnecessary inconsistency with the court’s direction that the jury must presume the defendant innocent.

We also see no purpose for instructing the jury that it must give a defendant the benefit of the doubt. A defendant may not be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Therefore, a criminal defendant is unequivocally entitled to an acquittal if the State fails to prove any element of the crime beyond a reasonable doubt, and an instruction should not imply otherwise.

State v. Perez, 90 Haw. 113 at 127-128 (Haw. Ct. App. 1998), citations and quotation marks omitted.

Second, in *State v. Jackson*, 93 Conn. App. 671, 890 A.2d 586 (2006), the Connecticut Court of Appeals struck down a similar instruction, based in part on its failure “to distinguish the burden of proof beyond a reasonable doubt from the burden of proof of clear and convincing evidence.” *State v. Jackson*, at 678.²

² The Connecticut court implied that the instruction would have been improved by inclusion of the “real possibility” language, which was omitted, and from the inclusion of a definition of reasonable doubt as a doubt for which a reason can be given. However, the court did not indicate that the instruction would have been constitutional with this language. *State v. Jackson*, *supra*.

Many cases have erroneously upheld the instruction.³ For example, in *United States v. Artero*, 121 F.3d 1256 at 1257-1259 (9th Cir., 1997), the 9th Circuit found that the phrase “real possibility” accurately conveyed the reasonable doubt standard when coupled with the command to give the defendant “the benefit of the doubt:”

[The instruction] has the virtue of using the common phrase “give him the benefit of the doubt.” Most jurors are likely to have spoken that way themselves, when they mean “I think something is probably true, but I’m not sure, so I’ll give him the benefit of the doubt.”...[Under the instruction] used here, [a] juror would be led to say, correctly, “So I have to give him the benefit of the doubt, even though he probably did it.”
Artero, at 1258.

Artero’s focus on the “benefit of the doubt” language is demonstrably flawed. The language conveys only that a preponderance is insufficient-- where something is probably true, conviction is not required. The “benefit of the doubt” language does not require acquittal when someone is firmly convinced by clear, cogent and convincing evidence.

As used in the instruction here, the phrases “possible doubt” and “real possibility” are equivalent to the language rejected by the U.S. Supreme Court in *Cage*. The jury here was obliged to find the defendant

³ In Washington, all three divisions of the Court of Appeals have upheld the instruction. *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, review denied 133 Wn.2d 1014 (1997); *State v. Hunt*, supra; *State v. Bennett*, 131 Wn. App. 319, 126 P.3d 836 (2006).

guilty unless their doubt was sufficiently substantial to be considered “real.” As a result, it is reasonably likely that the jury used an unconstitutional standard to evaluate the evidence. Accordingly, the conviction must be reversed and the case remanded for a new trial.

CONCLUSION

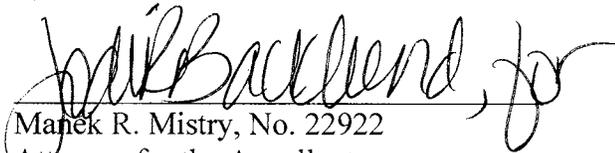
For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial. This Court should prohibit trial courts from defining reasonable doubt in terms of “possible doubt” and “real possibility.”

Respectfully submitted November 29, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Petitioner's Supplemental Brief, postage pre-paid, to:

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and to the office of the Clallam County Prosecuting Attorney, postage prepaid, both on November 29, 2006.

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 November 29, 2006.

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