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STATE OF WASHINGTON  
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No. 95194-2

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOHN CHACON  
Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge  
Cause No. 16-1-00266-34

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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court adequately instructed the jury as to the burden of proof and presumption of innocence.
2. Whether any error cause by not using the current version of WPIC 4.01 verbatim was harmless where the actual instruction given mirrored a prior version of WPIC 4.01 that was consistently held constitutionally adequate and permissible.

B. STATEMENT OF THE CASE.

1. Substantive facts.

For purposes of this Supplemental Brief, the State relies on the statement of substantive facts contained in the Respondent's Brief filed in the Court of Appeals.

2. Procedural facts.

Chacon was initially charged with one count of third degree assault on February 23, 2016. CP 4. A first amended information filed on February 29, 2016, charged second degree assault and first degree criminal trespass. CP 5. On the first day of trial, a second amended information was filed, charging the same offenses but correcting the dates. CP 9; RP 36.

There were no pretrial motions; trial began on June 27, 2016, and concluded on June 29. The jury found Chacon guilty on both counts. CP 38, 39. He was sentenced on July 14, 2016, to a

total of 18.5 months in confinement. CP 41, 44. Division II of the Court of Appeals affirmed. This Court accepted review on the issue involving the use of WPIC 4.01.

C. ARGUMENT.

1. While the trial court failed to use WPIC 4.01 verbatim, the instructions provided adequately instructed the jury as to the burden of proof and presumption of innocence.

In its instructions to the jury, the trial court gave WPIC 4.01 almost verbatim. WPIC 4.01 reads:

[The] [Each] defendant has entered a plea of not guilty. That puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving every element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].

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

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (4<sup>th</sup> ed. 2016).

The State proposed WPIC 4.01 verbatim, including the bracketed sentence in the third paragraph. Supp. CP 66. The instruction the court actually gave omitted the final sentence of the first paragraph. CP 30-31. The record lacks any discussion about that instruction, and presumably this was an oversight on the part of the court. Chacon excepted to the court's refusal to instruct the jury on the inferior degree crime of third degree assault, but he did not object to the reasonable doubt instruction as given by the court. RP 484-494.

Jury instructions are reviewed de novo, and considered in the context of the instructions as a whole. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Historically, this court has recognized,

"In every criminal case, there are indispensable functions that must be performed by the court's instructions to the jury: (1) To declare that each element of the crime must be proven beyond a reasonable doubt, and define the standard of reasonable doubt; and (2) To state that the burden is upon the "State to prove each element of the crime by that standard."

State v. Coe, 101 Wn.2d 772, 787, 684 P.2d 668 (1984), See also, State v. Cox, 94 Wn.2d 170, 174, 615 P.2d 465 (1980)(quoting State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 1988 (1977)).

In Coe, this court acknowledged that “Washington Courts have approved various forms of instructions, so long as a reviewing court can determine from the totality of the circumstances whether the jury was adequately informed of the allocation of the burden of proof.” State v. Coe, 101 Wn. 2d at 787, Citing, State v. Cox, *supra*; State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959); State v. Walker, 19 Wn.App. 881, 884, 578 P.2d 83, *review denied*, 90 Wn.2d 1023 (1978).

In Bennett, this court exercised its supervisory power to instruct trial courts to use WPIC 4.01 “until a better instruction is approved.” 161 Wn.2d at 318. In Bennett, however, the issue was the definition of “beyond a reasonable doubt,” particularly the “abiding belief” language, not which party bears the burden of proof. And even though the Bennett court disapproved the instruction given in that case, it nevertheless affirmed. Id. at 318. Prior to Bennett, it was recognized that “the specific language of the instructions is left to the discretion of the trial court.” State v. Coe, 101 Wn.2d at 787; Citing, Kjellman v. Richards, 82 Wn.2d 766, 768,

514 P.2d 134 (1973); State v. Biggs, 16 Wn.App. 221, 225, 556 P.2d 247 (1976), *review denied*, 88 Wn.2d 1007 (1977).

Here, when looking at the total context of the instructions, the trial court clearly met its indispensable function of adequately informing the jury regarding reasonable doubt and informing the jury that the burden of proof is on the State. Instruction No. 3, read,

“The defendant has entered a plea of not guilty to the charges. That puts in issue every element of the crimes charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt.

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.”

CP 30- 31. The instruction went on to define reasonable doubt using the verbatim language of WPIC 4.01 that this court has approved. The instruction given clearly stated that the State has the burden of proof and that the defendant is presumed innocent. The court’s instructions do not even hint, let alone imply, that the defendant has any burden.

The first paragraph of the court’s instruction in this case, is nearly identical to the first paragraph of the original WPIC 4.01 as it

appeared in 1977.<sup>1</sup> WPIC 4.01, 11 Wash.Prac. 38 (1977). The first paragraph of the 1977 WPIC 4.01 did not include the line that was omitted from the court's instructions in this case. The sentence did not appear in the pattern jury instructions until 1986, at which time it was introduced in the supplement to the WPIC in WPIC 4.01A. 11 Wash.Prac. 68 (2<sup>nd</sup> Ed. 1994). The comment to WPIC 4.01A in the Second Edition of the WPICs states, "In that supplement the committee presented "simplified" instructions as alternatives to instructions that seemed unnecessarily complex or confusing." Id. The comment noted that both the original and the alternative were retained when the committee could not reach a consensus. Id.

At the time of the addition of the language in WPIC 4.01A, WPIC 4.01 still did not include "The defendant has no burden of proving that a reasonable doubt exists." 11 Wash. Practice 65 (2<sup>nd</sup> Ed. 1994). In the 2005 Supplement of the Second Edition, WPIC 4.01 and WPIC 4.01A were merged.<sup>2</sup> The comment to the 2005 Supplement notes:

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1 The original 4.01 used the word "plaintiff" where the current instruction used the word "State." This change was recommended by this court in a footnote to the decision in State v. Cox, 94 Wn.2d 170, n. 2 ("Since a lay juror may not immediately recognize the State as 'the plaintiff', we recommend that trial judges modify this pattern instruction and instruct that 'The State has the burden of proving each element of the crime beyond a reasonable doubt.'").

2 The State was unable to locate a copy of the 1998 Supplement to the Second Edition of the WPICs. The comments to the 2005 Supplement suggest that the

“The primary difference between the two instructions in the previous editions was that WPIC 4.01 included an additional sentence on abiding belief, while WPIC 4.01A did not. Because both definitions have become generally accepted within the legal community and because they are easily expressed in a single instruction with a bracketed sentence, the committee has combined the two definitions in the instruction set forth above.”

11 Wash.Prac. 80 (2<sup>nd</sup> Ed. 2005 Supp). With regard to the specific line that currently appears at the end of the first paragraph, the comment noted:

“The committee has also incorporated into WPIC 4.01 a sentence from WPIC 4.01A (and the *Castle* Instruction) stating that the defendant has no burden of proving that a reasonable doubt exists as to the elements. Although this sentence may be omitted from the instruction without constituting reversible error, see State v. Adame, 56 Wn.App. 803, 785 P.2d 1144 (1990), the committee believes that the better practice is to include the sentence in order to clarify the burden of proof for jurors. The committee has added the bracket phrase “as to these elements” to remove potential confusion in cases that involve an affirmative defense, upon which the defendant has the burden of proof.”

11 Wash.Prac. 84 (2<sup>nd</sup> Ed. 2005 Supp).<sup>3</sup>

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change originally occurred in that Supplement (In addition to the merging of WPIC 4.01 and WPIC 4.01A, the committee has made additional smaller revisions for this 2005 update).

<sup>3</sup> It is unclear why the reference to the *Castle* instruction was included as the instruction given in *Castle* did not include the sentence. See, State v. Bennett, 161 Wn.2d at 313; State v. Castle, 86 Wn.App at 53.

Prior to the merger of WPIC 4.01 and WPIC 4.01A, WPIC 4.01 did not include the line stating the defendant has no burden of proving that a reasonable doubt exists. It is not a stretch to suggest that every case that utilized WPIC 4.01 between 1977 and the time WPIC 4.01A was merged into WPIC 4.01 did not include such a line. The State is aware of no case decided prior to State v. Bennett, in which the failure to include such a line constituted reversible error.

The United States Supreme Court has approved a reasonable doubt instruction that does not include the sentence at issue here. Victor v. Nebraska, 511 U.S. 1, 7, 18, 22-23, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). In that case, the issue was whether a definition of reasonable doubt, which included language regarding a “moral certainty,” lowered the State’s burden of proof, Id. at 22-23, and the Victor court did not decide whether the statement that the defendant has no burden to prove reasonable doubt is required for the jury to understand the correct allocation of the burden of proof. The United States Supreme Court was considering both Nebraska and California instructions and affirmed both. Id. at 7. With regard to burden of proof, the instruction at issue in that case stated:

“A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactory shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.”

Id. The court stated, “Indeed as long as the court instructs the jury on the necessity that the defendant’s guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof.” Id. at 5 (internal quotations omitted)(citing Jackson v. Virginia, 443 U.S. 307, 320 n. 14, 99 S.Ct. 2781 (1979) and Taylor v. Kentucky, 436 U.S. 478, 485-486, 98 S.Ct. 1930 (1978). The Victor court ultimately held that the instructions, “taken as a whole...correctly conveyed the concept of reasonable doubt to the jury.” 511 U.S. at 22.

Similar instructions regarding burden of proof have historically been approved in Washington State Courts. In State v. Tanzymore, the trial court rejected a proposed instruction from the defendant stating, “The burden is upon the State to prove the guilt of the accused beyond a reasonable doubt and to a moral certainty.” 54 Wn.2d at 291. This court stated, “we need not discuss that problem because the court gave the standard

instruction on reasonable doubt. This instruction has been accepted as a correct statement of the law for many years.” Id. The specific instruction that was provided appeared in a footnote and stated,

“You are instructed that the law presumes a defendant to be innocent until proven guilty beyond a reasonable doubt. This presumption is not a mere matter of form, but it is a substantial part of the law of the land, and it continues throughout the entire trial and until you have found that this presumption has been overcome by the evidence beyond a reasonable doubt.

The jury is further instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists. You are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely vague, imaginary, or conjectural. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence at the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.”

Id. at n.2.

When this court directed that trial courts use WPIC 4.01 in State v. Bennett, the specific issue the court was looking at was the use of the phrases “real possibility” and “every possible doubt,” in the alternative jury instruction that was commonly referred to as the

*Castle* instruction. 161 Wn.2d at 303, see also, State v. Castle, 86 Wn.App. 48, 53, 935 P.2d 656 (1997). The court noted that “every division of our court of appeals has reviewed this instruction and concluded it properly defines the standard of proof.” Bennett, 161 Wn.2d at 315. The court went on to note:

“Thus we conclude, as have other courts, that the *Castle* Instruction satisfies the constitutional requirements of the due process clause of the United States Constitution. However, this court has never placed its stamp of approval on the *Castle* Instruction. While the instruction may meet constitutional muster, it does not mean that it is a good or even desirable instruction. Although, we conclude that the *Castle* instruction is constitutionally adequate, we do not endorse the instruction.”

Id. at 315. The instruction that this court stated passed constitutional muster did not include the line at issue in this case.

The first paragraph of the *Castle* instruction read:

“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.”

Id. at 313; Castle, 86 Wn.App at 53. This is essentially the same as the first paragraph of the instruction that was given in this case and substantially similar to that which was contained in every version of

WPIC 4.01 from 1977 until WPIC 4.01A was merged with WPIC 4.01.

The failure to include the last line of the current version of WPIC 4.01 in the trial court's instructions to the jury did not rise to the level of reversible constitutional error. The instructions provided, taken in context, properly informed the jury that the State had the burden of proof and gave the correct standard or the State's burden to prove the case beyond a reasonable doubt. Similar instructions, without the line at issue here, have historically passed constitutional muster in this State.

2. To the extent that error occurred, it was clearly harmless in the context of this case.

Following this court's directive in State v. Bennett that trial courts utilize WPIC 4.01, a split has developed as to whether harmless error analysis can be utilized when a trial court fails to give WPIC 4.01. In State v. Castillo, 150 Wn.App. 466, 472-75, 208 P.3d 1201 (2009), Division I held that a failure to use WPIC 4.01 constituted reversible error and declined to apply a harmless error analysis. In that case, the trial judge crafted his own instruction over Castillo's objection stating, "There's no error in

giving the WPIC, I agree with you there, but the WPIC is goobley-gook in my mind. I'm not going to give it." Id. at 470.

In rejecting the State's harmless error argument, the court stated, "there can be no argument here that the court or counsel had insufficient time to learn of the express directive to lower courts to use WPIC 4.01." Id. at 472. The court found significance in the fact that the last line of the first paragraph of WPIC 4.01 was not given, stating, "the absence of this wording is significant in this case because the prosecutor's cross-examination and closing argument suggested Castillo needed to explain why [the victim] might be lying." Id. at 473. The court did not recognize that the sentence had not historically been included in WPIC 4.01 prior to 2005. In the context of the confusing instruction that the trial court provided, that may not have been necessary. Castillo, 150 Wn.App. at 471.

In State v. Lundy, 162 Wn.App. 865, 872, 256 P.3d 466 (2011), Division II applied a constitutional harmless error analysis to a failure to utilize WPIC 4.01. The instruction used in Lundy modified the WPIC by reversing the order of the first two paragraphs and modifying the three first sentences of the paragraph on the State's burden of proof. Id. at 871. The court

found that the failure to use WPIC 4.01 verbatim was harmless beyond a reasonable doubt. Id. at 872.

“Strong policy reasons support the use of harmless error analysis. A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.” State v. White, 72 Wn.2d 524, 531, 433 P.2d 692 (1967)(internal quotations omitted). This court has previously adopted the use of harmless error analysis in the context of instructions regarding reasonable doubt and burden of proof. State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015).

In Kalebaugh, this court considered whether a trial court’s preliminary instructions regarding reasonable doubt could be considered for the first time on appeal and whether the instructions were harmless. Id. at 580. This court noted, “We disfavor the judge’s offhand explanation of reasonable doubt at the beginning of the case and any subtle suggestion that a reason must be given to doubt a defendant’s guilt,” but found that the remarks were harmless beyond a reasonable doubt because the trial court properly instructed the jury throughout the remainder of the case. Id. at 586.

“Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); Lundy, 162 Wn. App. at 871-72 (“An erroneous jury instruction, however, is generally subject to a constitutional harmless error analysis. . . . Even misleading instructions do not require reversal unless the complaining party can show prejudice.”).

Here, the trial court’s instructions accurately described the State’s burden of proof by clearly stating that the State must prove each element of the crimes charged beyond a reasonable doubt. The trial court also instructed that the defendant is presumed innocent and the presumption continues throughout the trial unless the jury found that the presumption was overcome by the evidence beyond a reasonable doubt. While it was error not to follow this court’s directive to use WPIC 4.01 verbatim, it does not appear that this deviation was intentional. The State proposed WPIC 4.01 verbatim and there was no discussion regarding a modification, and no objections. Despite the apparent error in retyping the

instructions, the instruction that was ultimately given closely resembled the original version of WPIC 4.01 which has repeatedly been found constitutionally permissible. See State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995); Citing, State v. Mabry, 51 Wn.App. 24, 25 751 P.2d 882 (1988) (upholding the 1982 version of WPIC 4.01).<sup>4</sup>

Unlike the instruction given in Castillo, the trial court's instruction in this case was nearly identical to WPIC 4.01 and clearly put the burden of proof on the State. Chacon cannot show prejudice. Any error was harmless beyond a reasonable doubt.

#### D. CONCLUSION.

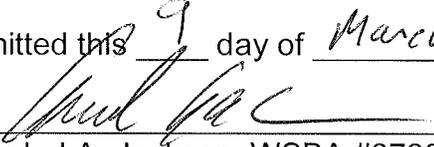
The trial court's instruction to the jury was erroneous only because it did not comply with this court's directive in State v. Bennett. The specific language that was given has historically been found to be constitutionally adequate. Any error that occurred was clearly harmless beyond a reasonable doubt considering the fact that the instructions that were given clearly indicated that the State had the burden of proof and adequately explained the

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<sup>4</sup> The instruction used in Mabry is essentially the same as the instruction given in this case. The only noticeable difference is the fact that Chacon had more than one charge. In Bennett, this court cited to Pirtle in support of its approval of WPIC 4.01. 161 Wn.2d at 317.

concept of reasonable doubt. This court should affirm the decision of the Court of Appeals.

Respectfully submitted this 9 day of March, 2018.

  
\_\_\_\_\_  
Joseph J.A. Jackson, WSBA #37306  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief of Respondent on the date below as follows:

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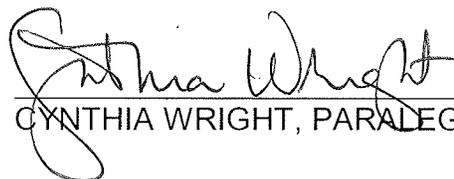
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9<sup>th</sup> day of March, 2018, at Olympia,

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CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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