

COA No. 71844-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HARUN OSMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Mary Roberts

REPLY BRIEF

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TABLE OF CONTENTS

A. REPLY ARGUMENT 1

 1. Case law prohibiting prosecutors from numerically quantifying the burden of proof beyond a reasonable doubt do not apply to defense counsel’s argument that the word “abiding belief” in the jury instructions means an enduring belief in guilt that should last at least a month or a year. 1

 2. The criminal accused was prohibited from arguing that the State had failed to met the standard of proof of guilt beyond a reasonable doubt. 8

B. CONCLUSION 9

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009)	3
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007)	7
<u>Condon v. Condon</u> , 177 Wn.2d 150, 298 P.3d 86 (2013)	4
<u>State v. Curtiss</u> , 161 Wn. App. 673, 250 P.3d 496, <u>review denied</u> , 172 Wn.2d 1012 (2011)	5
<u>State v. Fuller</u> , 169 Wn. App. 797, 282 P.3d 126 (2012), <u>review denied</u> , 176 Wn.2d 1006 (2013)	4,5
<u>State v. Johnson</u> , 158 Wn. App. 677, 243 P.3d 936 (2010), <u>review denied</u> , 171 Wn.2d 1013 (2011).	3

CASES FROM OTHER STATE JURISDICTIONS

<u>People v. Light</u> , 44 Cal. App. 4th 879, 52 Cal. Rptr.2d 218 (1996) . . .	7
---	---

UNITED STATES COURT OF APPEALS CASES

<u>United States v. Bright</u> , 517 F.2d 584 (2d Cir. 1975)	2
--	---

UNITED STATES SUPREME COURT CASES

<u>Herring v. New York</u> , 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).	1
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)	7
<u>Victor v. Nebraska</u> , 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed 2d 583 (1994)	2,6,7
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) . .	1

COURT RULES

WPIC 4.01. 1

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 14 1

REFERENCE MATERIALS

11 Washington Practice: Washington Pattern Jury Instructions: Criminal
4.01 (3d ed. Supp.2011). 6

Burton's Legal Thesaurus, 4E (© 2007 McGraw-Hill) 1

Merriam-Webster Dictionary,
<http://www.merriam-webster.com/dictionary/abiding> 1

A. REPLY ARGUMENT

Defense counsel argued in closing that an “abiding belief” in the truth of the charge meant that the jurors shouldn’t find themselves wondering if they made a mistake, when they walked out of the courthouse, a month, or a year later. 3/26/14RP at 60-61. The trial court sustained the prosecutor’s objection that this was not accurate. 3/26/14RP 61. But counsel was attempting to argue an entirely proper aspect of the WPIC 4.01 standard for conviction of proof beyond a reasonable doubt. Appellant’s Opening Brief, at pp. 11-12 (citing U.S. Const. amend. 14; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-73, L. Ed.2d 368 (1970); WPIC 4.01); CP 69 (Instruction no. 3)). Closing argument was the defendant’s “last clear chance” to persuade the jury that Winship’s Due Process burden had not been met, Appellant’s Opening Brief, at pp. 15-16 (citing Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)), and the constitutional error requires reversal.

1. Case law prohibiting prosecutors from quantifying and trivializing the State’s burden of proof beyond a reasonable doubt do not prohibit defense counsel’s argument in this case. An “abiding” belief in proof beyond a reasonable doubt that the defendant

is guilty is necessarily a belief that is lasting and enduring - presumably for an undefined future much greater than that which was expressed by counsel as a month or a year.¹ Numerous courts have approved of definitions of the required belief in proof beyond a reasonable doubt as both durable, and durational – in other words, “abiding.”²

If “abiding belief” means anything, then, it must mean that at a minimum, it was entirely proper for defense counsel to argue that the jury should be careful enough that it not conclude a year later that it made a grave mistake. Preventing Mr. Osman from accurately arguing to the jury regarding the heavy burden borne by the State in his criminal case was error that requires reversal, in and of itself.³

In its Brief of Respondent, the State’s cited decisions of Johnson and Anderson do not control this case. This case is not akin to ones in

¹ Burton's Legal Thesaurus, 4E (© 2007 McGraw-Hill) (“abiding” means, *inter alia*, changeless, constant, continuing, durable, enduring); Merriam Webster Dictionary, <http://www.merriam-webster.com/dictionary/abiding> (defining abiding as “enduring, continuing.”).

² See Victor v. Nebraska, 511 U.S. 1, 5-6, 14-16, 114 S. Ct. 1239, 1248, 127 L. Ed. 2d 583 (1994) (discussed *infra*); United States v. Bright, 517 F.2d 584, 587 (2d Cir.1975) (explaining that conviction may not stand without “abiding belief” of defendant's guilt).

³ Mr. Osman relies on his arguments in the Opening Brief that the prosecutor also committed misconduct in closing argument by shifting the burden of proof, and his arguments that the errors, in addition to requiring reversal individually under either a non-constitutional or a constitutional harmless error standard, require reversal under the cumulative error doctrine. AOB, at pp. 1-3, 15-19

which it was deemed improper for a prosecutor to numerically quantify and minimize or trivialize the reasonable doubt standard. State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011) (prosecutor improperly described burden of proof as satisfied by adding a third piece of the puzzle which, although it completed only half the puzzle picture, allowed the jury to discern that the picture was the cityscape of Tacoma, i.e., guilt); State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010) (prosecutor improperly trivialized burden of proof as akin to the certainty needed for making important everyday decisions).

In these cases the impropriety of the prosecutor's arguments lay in their minimization of the high burden borne by the State, by analogizing it to some measurable fraction of complete certainty which, if the jurors reached that point, meant they should convict. The quantum of proof that equals proof beyond a reasonable doubt is highly fact-specific and credibility-dependent, and if a reasonable doubt remains in the jury's mind after all the evidence, the prosecution's burden of proof is not satisfied by some theory that a mathematical formula of the proof, or some 'magic number,' has been reached.

Of the cases cited by the State, this case is more like Curtiss and Fuller – cases where arguments by the prosecutor were deemed proper.⁴ Notably, in Fuller, the prosecutor argued to the jury (over defense objection) regarding the “concept of beyond a reasonable doubt,” stating,

Nothing in this world is 100 percent certain and
nothing in a courtroom is 100 percent certain.

State v. Fuller, 169 Wn. App. 797, 825-27, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006 (2013). There is no blanket rule against the use of specific discussions about the quantum of proof or certainty – as long as they do not misstate the burden. Here, defense counsel argued a variation of the obverse above, and if anything likely understated the opposing party’s burden, when he argued that an abiding belief should surely last a year. In Fuller, the Court of Appeals

⁴ The Respondent correctly points out that in the Opening Brief, undersigned counsel mistakenly cited to a unpublished portion of a Washington decision, in violation of GR 14.1(a). BOR, at p. 8 n. 1.

Further, in the Opening Brief, counsel cited to Rodriguez v. Uribe, C.D. Cal. 2013 (District Court No. CV 12–782–JSL (SH) (2013 WL 5329533), which is not citable to the Ninth Circuit (see Ninth Circuit Rule 21(c) which states that “(a) disposition which is not for publication shall not be regarded as precedent and shall not be cited to . . . this court.”), and People v. Yu, (Ct. App. CAL) (No. 01F04848, Dec. 13, 2005), which is not citable in that jurisdiction per California rule of court 8.1115. This violated GR 14.1(b). Counsel regrets these mistakes and asks that the Court disregard those citations. See Condon v. Condon, 177 Wn. 2d 150, 165, 298 P.3d 86 (2013) (Court would disregard citations in violation of GR 14.1, rather than impose sanctions, where appeal was not

also found no error in the prosecutor’s argument that beyond a reasonable doubt means “you just need enough pieces of the puzzle, enough evidence to have an abiding belief.”). Fuller, 169 Wn. App. at 824-25. The Court of Appeals found all these arguments proper, because they did not quantify and minimize or trivialize, the State’s burden. See also State v. Curtiss, 161 Wn. App. 673, 700-01, 250 P.3d 496, review denied, 172 Wn.2d 1012 (2011) (it was not improper quantification and trivialization of the State’s burden of proof for prosecutor to argue that it was “not an impossible standard,” but could be satisfied even with some pieces of the puzzle missing if the jury could say beyond a reasonable doubt what the puzzle is). The prosecutor in these cases did not (a) describe the level of proof beyond a reasonable doubt as a number or percentage which the jury, if it reached that number, should then convict, and (b) represent that number or percentage in a way that minimized or trivialized the State’s burden of proof.

Importantly, in any event, Mr. Osman’s attorney’s argument did not invoke any “quantification” at all of the amount of proof required to find guilt beyond a reasonable doubt, or to acquit. Mr. Osman’s

frivolous under CR 11).

counsel did not assign any number that represented a ‘reasonable doubt,’ or say, for example, that the jury must acquit if it ‘harbored even a 1 percent uncertainty as to guilt.’

Rather, counsel merely offered argument about what the jury instructions meant when they say that a jury’s belief in guilt must be abiding. The phrase “abiding belief” was taken directly from the approved jury instructions. CP 69 (Instruction no. 3); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. Supp.2011).⁵

As argued in the Opening Brief, an “abiding belief” is a certainty that is lasting, and this Court should hold that it is entirely proper for defense counsel to argue that the jury should be careful, and at least certain enough of its belief in the accused’s guilt, that it not walk out of the courtroom and, a month or a year later, think it made a mistake. This was an entirely unobjectionable conception of the Due Process standard of proof under Winship. Victor v. Nebraska, *supra*, 511 U.S. 1, 5-6, 14-16, 114 S. Ct. 1239, 1248, 127 L. Ed. 2d 583 (1994) (holding that although the phrase “moral certainty” might not be

⁵ In contrast, there is no word or phrase in Instruction no. 3 or WPIC 4.01 that can be said to be reasonably defined by announcing that it means the

recognized by modern jurors as a synonym for the “proof beyond a reasonable doubt” required by Winship, its use in the definition of reasonable doubt in conjunction with the “abiding” language impresses on the jury the need for a subjective state of near certitude of guilt) (citing Winship and Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 2786, 61 L.Ed.2d 560 (1979)); State v. Bennett, 161 Wn.2d 303, 308-15, 165 P.3d 1241 (2007) (discussing Victor v. Nebraska and finding similar descriptions of burden of proof to be proper).

Respondent erroneously characterizes the defense argument as being that an abiding belief must be one that “is carried in perpetuity” and one that is a “surety into perpetuity.” Brief of Respondent, at pp. 7-8. This is not an accurate description of the defense’s closing argument -- although it should remain an open question for examination by the Washington courts whether such argument on the part of a criminal defendant wouldn’t in fact be entirely proper. See People v. Light, 44 Cal. App. 4th 879, 883-89, 52 Cal. Rptr.2d 218 (1996) (stating that the well established meaning of the word “abiding” in the definition of proof beyond a reasonable doubt required by the Fourteenth Amendment properly referred to the permanent nature of reaching of a particular number, percentage, or fractional degree, of the possible

the belief as a lasting or enduring belief in the defendant's guilt) (citing Victor v. Nebraska, *supra*, 114 S. Ct. at 1246).

2. The criminal accused was prohibited from arguing that the State had failed to met the standard of proof of guilt beyond a reasonable doubt. Finally, of course, as noted, the Johnson and Anderson scenarios, and the Curtiss and Fuller cases, involve contentions that the party plaintiff in a criminal case was guilty of quantifying, minimizing and trivializing the burden of proof beyond a reasonable doubt. Arguably, reasonable doubt and its absence mean what they mean no matter what party is describing or attempting to define an aspect of the standard.

For purposes of this case, as stated in the Opening Brief, appellant's first position is that defense counsel, though he was indeed counsel for an accused, needed no special entitlement as such; his closing argument was not on the margin of propriety. But the case law does indicate that defense counsel is accorded latitude in closing argument because it is the accused's "last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." Herring v. New York, *supra*, 422 U.S. at 862; see also State v.

proof.

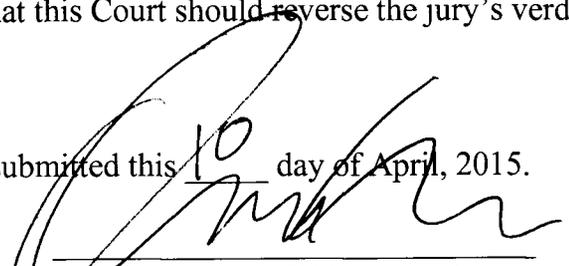
Perez-Cervantes, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000) (defense counsel must be afforded “the utmost freedom in the argument of the case” and even “some latitude” in doing so) (citing Sears v. Seattle Consol. St. Ry. Co., 6 Wash. 227, 33 P. 389, 33 P. 1081 (1893)).

Mr. Osman’s counsel, choosing to focus his argument on the “abiding belief” aspect of proof beyond a reasonable doubt (as defined by WPIC 4.01), attempted to communicate to the jury the care with which it should assess whether the high burden of proof borne by the State in a criminal case, imposed by the Constitution, was satisfied. When the trial court, in front of the jury, sustained the prosecution’s objection that it was not accurate to say that the jury shouldn’t think it made a mistake a year later, constitutional error occurred. Reversal is required for the reasons argued in the Appellant’s Opening Brief.

E. CONCLUSION

Based on the foregoing and on his Opening Brief, Harun Osman respectfully argues that this Court should reverse the jury’s verdict of guilty.

Respectfully submitted this 10 day of April, 2015.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 71844-4-I
)	
HARUN OSMAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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---	--

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF APRIL, 2015.

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