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Court of Appeals
Division I
State of Washington

NO. 72921-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

NEMERI MONDO,

Appellant.

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

The Honorable Carol A. Schapira, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by giving a constitutionally defective reasonable doubt instruction. CP 24 (Instruction 3).

Issues Pertaining to Assignment of Error

1. Did the reasonable doubt instruction stating a “reasonable doubt is one for which a reason exists” tell jurors that they must have more than just a reasonable doubt to acquit?

2. Did the reasonable doubt instruction undermine the presumption of innocence and impermissibly shift the burden of proof by telling jurors they must be able to articulate a reason to have a reasonable doubt?

3. Does erroneously instructing a jury regarding the meaning of reasonable doubt vitiate the jury-trial right, constituting structural error?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Neneri Mondo with felony harassment. CP 1. The prosecution alleged that on September 25, 2014, Mondo repeatedly threatened to kill Sidney LaRock while she waited for a bus in downtown Seattle. CP 4.

A jury trial was held before the Honorable Carol A Schapira, in December 2014. 1RP-2RP.¹ Mondo was convicted as charged and a three-month standard range sentence was imposed. CP 17, 32-37; 2RP 179, 186. The court waived all non-mandatory fees. CP 34. Mondo appeals. CP 39-60.

2. Substantive Facts

At about 9 p.m. on September 25, 2014, Matthew Miller was part of a crowd of people waiting for busses at the 4th & Pike bus stop in downtown Seattle. 1RP 116. At some point Miller heard a man "screaming, threatening people." 1RP 121. Miller claimed that man was Mondo, and that he was "screaming in people's faces: I'm from Africa. I will fucking shoot you. I will fucking kill you." 1RP 122-23. Miller said Mondo would repeat the same three sentences to each person he approached at the bus stop. 1RP 123.

Miller noted most people ignored Mondo when he yelled at them. 1RP 123-24. After yelling in Miller's face, Miller recalled Mondo approaching Sidney LaRock and repeatedly told her how beautiful she was, but then repeated his earlier mantra - that he was from Africa and would shoot and kill her - at least ten times, seemingly focusing his

¹ There are two volumes of verbatim report of proceedings referenced as follows: 1RP - December 9 & 10, 2014; and 2RP - December 11, 12 & 19, 2014.

attention on LaRock to the exclusion of others. 1RP 128-29. Miller could tell LaRock was scared. 1RP 131-32.

Sympathetic to LaRock's predicament, Miller approached Mondo, which distracted him long enough for LaRock to flee onto a bus that was stopped at the bus stop. 1RP 130, 144. Mondo, however, followed her onto the bus, so Miller summoned police. 1RP 131, 144.

Officer Aaron Marshall responded to Miller's request for police assistance and went to the bus stop with other officers. 2RP 69-70. When they arrived they found Mondo sitting on a bus near the driver. 2RP 72-73. Marshall believed Mondo was intoxicated. 2RP 76. Mondo ignored police attempts to talk to him, so they eventually physically escorted him off the bus, a process in which Mondo was compliant. 2RP 74-77.

Police released Mondo after he was off the bus. Mondo started yelling again, this time at police, urging them to kill him, and taking a combative stance. 2RP 78-79. Mondo was arrested at that point without incident. 2RP 79.

At trial, LaRock testified that a man approached her at the bus stop on September 25, 2014, told her she was beautiful and asked why he would want to kill her, before proclaimed over and over again that he in fact was going to kill her. 2RP 46. According to LaRock, however, that man was not Mondo. 2RP 45, 58.

Mondo testified at trial and denied yelling at or threatening to kill anyone at the bus stop. 2RP 103. Mondo recalled getting on the bus when it arrived, but then being asked by the driver to get off. When Mondo asked why, the driver refused to give him a reason and told him that if he did not voluntarily get off the bus he would be removed. 2RP 100-01.

After police arrived, Mondo said they dragged him off the bus and immediately handcuffed him, despite his willingness to comply with their request. Mondo denied ever urging police to kill him. 2RP 102.

C. ARGUMENT

THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL

Mondo's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 24 (Instruction 3); 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). The Washington Supreme Court requires trial courts to provide this instruction in every criminal case, at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). A better instruction is needed because in its current form it is constitutionally defective because it requires the jury to articulate a reason to establish a reasonable doubt. In light of this serious instructional error, this Court must reverse.

WPIC 4.01 is invalid for two reasons. First, it tells jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement on reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt 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. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring exactly the same thing. Instructing jurors with WPIC 4.01 is constitutional error.

a. WPIC 4.01's language improperly adds an articulation requirement

Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . ." WEBSTER'S

THIRD NEW INT'L DICTIONARY 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. Accord Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01, means "an expression or statement offered as an explanation of a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Washington's reasonable doubt instruction is unconstitutional because its language requires more than just a reasonable doubt to acquit.

Cf. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt"). Indeed, under the current instruction, jurors could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option.

Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.

One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.

A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. By requiring more than a reasonable doubt to acquit a criminal defendant, WPIC 4.01 violates the federal and state due process clauses. Winship, 297 U.S. at 364; U.S. CONST. amends. V, XIV; CONST. art. I, § 3.

b. WPIC 4.01's articulation requirement impermissibly undermines the presumption of innocence

"The presumption of innocence is the bedrock upon which the criminal justice system stands." Bennett, 161 Wn.2d at 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. To avoid this, Washington courts have strenuously protected the presumption of innocence by rejecting an articulation requirement in different contexts. This court should similarly safeguard the presumption of innocence in this case.

In the context of prosecutorial misconduct, courts have proscribed arguments that jurors must articulate a reason for having reasonable doubt. Fill-in-the-blank arguments are flatly barred "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). The Court of Appeals has repeatedly rejected such arguments as prosecutorial misconduct. See, e.g., State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding improper prosecutor's PowerPoint slide that read, "If you were to find the defendant not guilty, you *have* to say: 'I had a reasonable doubt[.]' What was the reason for your doubt? 'My reason was ____.'"); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 936 (2010) (holding improper argument when prosecutor told jurors that they have to say, "I doubt the defendant is guilty and my reason is I believed his testimony that . . . he didn't know that the cocaine was in there, and he didn't know what cocaine was" and that "[t]o be able to find reason to doubt, you have to fill in the blank, that's your job" (quoting reports of proceedings)); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (holding flagrant and ill intentioned the prosecutor's statement "In order to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is"—blank'" (quoting report of proceedings)); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273

(2009) (finding improper prosecutor's statement that "'in order to find the defendant not guilty, you have to say 'I don't' believe the defendant is guilty because,' and then you have to fill in the blank'" (quoting report of proceedings)).

Although it does not explicitly require jurors to fill in a blank, WPIC 4.01 implies that jurors need to do just that. Trial courts instruct jurors that a reason must exist for their reasonable doubt—this is, in substance, the same mental exercise as telling jurors they need to fill in a blank with an explanation or justification in order to acquit. If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the exact same undermining to occur through a jury instruction.

Outside the prosecutorial misconduct realm, Division Two recently acknowledged that an articulation requirement in a trial court's preliminary instruction on reasonable doubt would have been error had the issue been preserved. State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014). The court determined Kalebaugh could not demonstrate actual prejudice given that the trial court instructed the jury with WPIC 4.01 at the end of trial. Id. at 422-23. The court therefore concluded the error was not manifest under RAP 2.5(a). Id. at 424.

In sidestepping the issue before it on procedural grounds, the Kalebaugh court pointed to WPIC 4.01's language with approval. 179 Wn. App. at 422-23. In considering a challenge to fill-in-the-blank arguments, the Emery court similarly approved of defining "reasonable doubt as a 'doubt for which a reason exists.'" 174 Wn.2d at 760. But neither Emery nor Kalebaugh gave any explanation or analysis regarding why an articulation requirement is unconstitutional in one context but not unconstitutional in all contexts.² Furthermore, neither court was considering a direct challenge to the WPIC 4.01 language, so their approval of WPIC 4.01's language does not control. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").

Just like a preliminary instruction to jurors that they must give a reason to have a reasonable doubt and just like a fill-in-the-blank argument, WPIC 4.01 "improperly implies that the jury must be able to articulate its reasonable doubt" Emery, 174 Wn.2d at 760. By requiring more than

² The Kalebaugh court stated it "simply [could not] draw clean parallels between cases involving a prosecutor's fill-in-the-blank argument during closing, and a trial court's improper preliminary instruction before the presentation of evidence." But drawing such "parallels" is a very simple task, as both errors undermine the presumption of innocence by misstating the reasonable doubt standard. As the dissenting judge correctly surmised, "if the requirement of articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge." Kalebaugh, 179 Wn. App. at 427 (Bjorgen, J., dissenting).

just a reasonable doubt to acquit, WPIC 4.01 impermissibly undercuts the presumption of innocence. WPIC 4.01 is unconstitutional.

c. WPIC 4.01's articulation requirement requires reversal

An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury-trial guarantee. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Indeed, where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

As discussed, WPIC 4.01's language requires more than just a reasonable doubt to acquit criminal defendants; it requires a reasonable, articulable doubt. Its articulation requirement undermines the presumption of innocence. WPIC 4.01 misinstructs jurors on the meaning of reasonable doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal. Because Mondo's jury was so misinstructed, reversal is warranted.

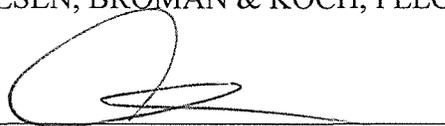
D. CONCLUSION

This court should reverse and remand for a new trial based on the trial court's constitutionally deficient instruction on reasonable doubt.

DATED this 1st day of April 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 72921-7-1
)	
NEMERI MONDO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1ST DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NEMERI MONDO
77 S. WASHINGTON ST.
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF APRIL 2015.

x *Patrick Mayovsky*