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Court of Appeals
Division I
State of Washington

NO. 73123-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

GREG PARSON,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

Is it manifest constitutional error to use WPIC 4.01, the pattern instruction defining “reasonable doubt”?

II. STATEMENT OF THE CASE

The defendant (appellant), Greg Parson, was convicted of two counts of second degree burglary, with an aggravating circumstance of rapid recidivism. CP 39-49. These convictions arose out of his theft of liquor from Albertson’s on August 29 and 30, 2014.

On April 11, 2014, the manager of the Albertson’s grocery store in Mill Creek issued a trespass notice to the defendant. This notice advised him that he was not licensed, invited, or otherwise privileged to enter or remain in the store for one year. If he returned without specific permission, he could be arrested for criminal trespass. 2/9 RP 21-23.

The liquor sold at this store had locking caps attached. These caps bore the store name. They could not be removed without a special device. When a person bought liquor, the caps were removed at the register. 2/9 RP 75-76.

On August 28, 2014, the defendant was released from jail. 2/11 RP 8. On August 29, he entered the Albertson’s. He went to

the liquor aisle and removed a bottle of Kettle One vodka. He left the store without paying. These events were recorded by security cameras. 2/9 RP 51-55; ex. 7.

The next day, the defendant was contacted by a police officer. He was carrying a bottle of Kettle One vodka. The bottle was open and partially consumed. No locking cap was attached. The defendant claimed that he had purchased it from some people in a white car. The officer did not know about the theft the day before. He took a photograph of the bottle. He then poured out the liquor and threw the bottle away. 2/9 RP 84-87; 2/10 RP 9-10.

Later that day, the defendant again entered the Albertson's. A security camera showed him taking liquor from the shelves. He again left without paying. When store employees approached him outside the store, he ran away. 2/9 RP 67-68, 72-74; ex. 9.

The employees called police, who located the defendant nearby. When an officer tried to contact him, he put down a bag that he was carrying and ran away again. The bag contained six bottles of Evans Williams whisky and three bottles of Jägermeister. 2/10 RP 20-22. These bottles had locking caps marked with an Albertson's label. 2/9 RP 76. Police found the defendant hiding in a ravine and arrested him. 2/9 RP 89-90.

The parties stipulated to a bifurcated trial. The two counts of second degree burglary were first tried to a jury. The court's instructions included the standard definition of "reasonable doubt." CP 26, inst. no. 4; see WPIC 4.01. No objection was raised to any of the instructions. 2/10 RP 37. The jury found the defendant guilty on both counts. CP 18-19. At an ensuing bench trial, the court found that the aggravating factor was proved beyond a reasonable doubt. CP 16-17.

III. ARGUMENT

SINCE THE SUPREME COURT HAS REQUIRED TRIAL COURTS TO USE THE CHALLENGED INSTRUCTION, DOING SO IS NOT MANIFEST CONSTITUTIONAL ERROR.

The sole issue on this appeal involves the pattern instruction defining "reasonable doubt," WPIC 4.01. This instruction has a status that is unusual and possibly unique. Ordinarily, trial courts have discretion to decide how instructions are worded. State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). WPIC 4.01, however, must be used without change. The Supreme Court has warned against any attempts to improve this instruction:

We understand the temptation to expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined

terms and shifts, perhaps ever so slightly, the emphasis of the instruction.

State v. Bennett, 161 Wn.2d 303, 317-18 ¶ 19, 165 P.3d 1241 (2007).

The defendant now claims that WPIC 4.01 is erroneous. The Supreme Court, however, has required trial courts to use WPIC 4.01 without change. To change that instruction would require overruling Bennett. This court is required to follow controlling precedent from the Supreme Court. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578 ¶ 18, 146 P.3d 423 (2006). Only the Supreme Court can overrule Bennett.

In any event, this court has already rejected the defendant's arguments, in State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). The defendant there argued that WPIC 4.01 "misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." Id. at 5. Division Two upheld the instruction:

[T]he particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary. A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.

Id. at 5, citing State v. HARRAS, 25 Wash. 416, 421, 65 P. 774 (1901). Today, that statement could be changed to "over 110 years."

Because the defendant's challenge is being raised for the first time on appeal, he must demonstrate that the trial court's instruction contained "manifest error affecting a constitutional right." RAP 2.5(a)(3). The instruction was the standard one that is mandated by the Supreme Court. Giving it was not error.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on September 28, 2015.

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THE STATE OF WASHINGTON,

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 28th day of September, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Chris Gibson, Nielsen, Broman & Koch, gibsonc@nwattorney.net and Sloanej@nwattorney.net.

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

Dated this 28th day of September, 2015, at the Snohomish County Office.


Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office