

FILED
August 23, 2016
Court of Appeals
Division I
State of Washington

NO. 74246-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEVE YOUNG,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

On multiple occasions, the Washington State Supreme Court has held that the language of WPIC 4.01 defining “reasonable doubt,” provides an accurate statement of the law. Has the defendant shown that the Supreme Court got it wrong, that these cases are “incorrect and harmful,” the standard required to be met in order to overturn precedent?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with one count of Arson in the First Degree. CP 7. A jury found the defendant guilty as charged. CP 9. He received a standard range sentence of 23 months. CP 31, 33.

2. SUBSTANTIVE FACTS

The only issue raised in this case is the propriety of a single sentence in a single jury instruction. Thus, the substantive facts are not relevant to this appeal.

C. ARGUMENT

**THE WPIC JURY INSTRUCTION DEFINING
“REASONABLE DOUBT” IS A CORRECT STATEMENT
OF THE LAW**

The defendant asserts that the language of WPIC 4.01 defining “reasonable doubt” as “one for which a reason exists,” is a misstatement of the law and therefore his conviction (along with every other conviction where WPIC 4.01 has been given) must be reversed. This argument has no merit and was not raised below. A plethora of Supreme Court and Court of Appeals cases have upheld WPIC 4.01, and the language used therein, and the defendant fails to show that these cases are “incorrect and harmful,” the standard required in order to overturn precedent.

1. The Relevant Facts

Here, the trial court instructed the jury as follows:

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. 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.

CP 16 (Jury Instruction # 3) (emphasis added). It is the highlighted language of WPIC 4.01 to which the defendant complains.

When the parties first discussed proposed jury instructions during trial, the State indicated it would submit a set of proposed instructions to the court and counsel. 4RP¹ 248-49. Defense counsel stated that he would only submit supplemental instructions based on the State's proposed instructions. Id. The State proposed WPIC 4.01. CP ____, sub # 32. The defendant did not present a revised or amended WPIC 4.01 instruction.

When the court provided counsel with a set of instructions, the court gave the defendant the opportunity to object to the giving of WPIC 4.01. 5RP 297-99. The defendant did not raise an objection to the giving of the instruction or request a change in the language. Id.

¹ The verbatim report of proceedings is cited as follows: 1RP—10/13/15, 2RP—10/13/15, 3RP—10/19/15, 4RP—10/20/15, 5RP—10/22/15, 6RP—10/26/15, and 7RP—11/13/15.

2. The Alleged Error Is Not Manifest Allowing For Appellate Review Absent An Objection

An instructional error not objected to below may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on “knowledge” was not manifest error). To obtain review, the defendant must show that the claimed error is of constitutional magnitude and that it resulted in actual prejudice. State v. O’Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). A reviewing court will not assume that an error is of constitutional magnitude. Id. The court will look to the asserted claim and assess whether it implicates a constitutional interest as compared to another form of trial error. Id. If the claimed error is of constitutional magnitude, the court will determine whether the error is manifest. An error is manifest if it is “so obvious on the record that the error warrants appellate review.” O’Hara, 167 Wn.2d at 99-100. Manifest also requires a showing of “actual prejudice.” Id. To demonstrate actual prejudice there must be a “plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case.” Id.

The defendant never objected to the instructions given here. This bars review unless the defendant can prove the error is manifest constitutional error with identifiable consequences. See State v. Jacobson, 74 Wn. App. 715, 724, 876 P.2d 916 (1994); State v. Lynn, 67 Wn. App. 339, 342-44, 835 P.2d 251 (1992). Here, there can be nothing more than pure speculation that the alleged error -- the inclusion of the disputed language in the jury instructions -- had identifiable consequences. This is insufficient to allow for appellate review. State v. Donald, 178 Wn. App. 250, 271, 316 P.3d 1081 (2013), rev. denied, 180 Wn.2d 1010 (2014) (This Court refused to hear Donald's argument regarding the "to convict" jury instruction because Donald failed to object below and failed to demonstrate prejudice as required under RAP 2.5.).

3. The Instructions Correctly State The Law

Ignoring the instruction(s) as a whole, the defendant claims that the highlighted language actually shifts the burden of proof; in other words, that jurors would be led to believe that it is a defendant's burden to prove he or she is not guilty or that they must be able to write out their reason for acquittal. The Supreme Court has found otherwise.

Jury instructions are read as a whole and in a commonsense manner. State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). The instructions are legally sufficient if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The instructions must define reasonable doubt and convey to the jury that the State bears the burden of proving every essential element of the crime beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

The latest Supreme Court case to hold that the language of WPIC 4.01 is an accurate statement of the law is State v. Bennett, supra. In addressing a challenge to a substitute instruction to WPIC 4.01, the Court stated the following:

We have approved WPIC 4.01 and concluded that it adequately permits both the government and the accused to argue their theories of the case. . . Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore

exercise our inherent supervisory power to instruct Washington trial courts not to use the Castle instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. ***Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.***

Bennett, 161 Wn.2d at 317-18 (emphasis added).

The Bennett case is not the first time that the Court has ruled on similar language in jury instructions. As far back as 1901, the Supreme Court addressed the following instructional language which defined reasonable doubt as “***a doubt for which a good reason exists***, - a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering.” State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901) (emphasis added). In upholding the giving of the instruction, the Court stated that “[t]his instruction is according to the great weight of authority, and is not error.” Id.

In State v. Tanzymore, the Court addressed the then standard reasonable doubt instruction that provided in part that “[t]he jury is further instructed that the doubt which entitles the defendant to an acquittal ***must be a doubt for which a reason exists***.” 54 Wn.2d 290, 291 n.1, 340 P.2d 178 (1959) (emphasis

added). In rejecting a claim that the trial court should have given a different reasonable doubt instruction, the Court stated that “the court gave the standard instruction on reasonable doubt. This instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error] without merit.” Id. at 291; see also State v. Pirtle, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) (“the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster”), accord, State v. Nabors, 8 Wn. App. 199, 202, 505 P.2d 162 (1973).

In State v. Thompson, the defendant challenged this exact same language “argu[ing] rather strenuously that this phrase (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt in order to acquit.” 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975). In rejecting Thompson’s challenge the court stated:

Although we recognize that this instruction has its detractors, it was specifically approved in State v. Tanzymore, [...] and also in State v. Nabors, [...]. We are, therefore, constrained to uphold it. We would comment only that ***it does not infringe upon the constitutional right that a defendant is presumed innocent; but tells the jury when, and in what***

manner, they may validly conclude that the presumption of innocence has been overcome.

Furthermore, the 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. (emphasis added).

To support his argument, the defendant tries to equate a misconduct case involving improper closing argument with the statement of the law as contained in the jury instructions.

Specifically, he claims that the jury instruction improperly requires jurors to articulate a reason for having reasonable doubt — similar to the “fill-in-the-blank” argument that the Court held improper in State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). But the defendant’s argument fails under Emery, the very case upon which he principally relies.

In Emery, the Court held that the prosecutor committed misconduct telling the jurors that they had to articulate a reason for any doubt they found, i.e., to fill in the blank what their doubt was.

But in finding that the argument itself was misconduct, the Court specifically noted that the prosecutor had “properly describ[ed] reasonable doubt as a ‘doubt for which a reason exists[.]’” 174 Wn.2d at 760. Emery only prohibits the misuse of this instruction by prosecutors in closing argument; but in so doing, it starts with the premise that the definition of reasonable doubt employed by WPIC 4.01 is correct.

The doctrine of stare decisis requires a “clear showing that an established rule is incorrect and harmful” before precedent is abandoned. In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). “The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law.” State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981). The defendant has failed to show that the Supreme Court’s multiple decisions are wrong.²

² The most recent cases in which these same arguments have been soundly rejected are State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015); rev. denied, 185 Wn.2d 1022 (2016) and State v. Parnel, 46995-2-II, 2016 WL 4126013 (Div. 2, Aug. 2, 2016).

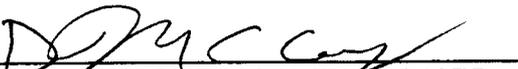
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 23 day of August, 2016.

Respectfully submitted,

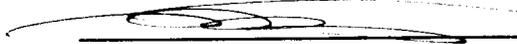
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jared Steed at Nielsen, Broman & Koch PLLC, containing a copy of the Brief of Respondent, in STATE V. YOUNG, Cause No. 74246-9-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

08-23-16

Date