Supreme Court No. 90457-0

(Court of Appeals No. 69797-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SANDRA J. HIMMELMAN,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

Ms. Himmelman was induced by a nefarious acquaintance to cash what appeared to be his payroll check at her neighborhood grocery store. She did not know the check was forged because it looked proper and she had sought repeated assurances of its authenticity. At trial, however, the jury was not adequately instructed with the language essential to clarifying the subjective knowledge requirement of forgery and identity theft. Furthermore, the jury was instructed in a manner that allowed it to return a guilty verdict if it simply believed in the truth of the charge, undercutting the constitutional reasonable doubt standard and the presumption of innocence.

These instructional errors substantially undercut the reliability of the verdict, however, the Court of Appeals affirmed the convictions opining simply that because the instructions were not incorrect that the failure to give the additional guidance she sought was not error. On the contrary, however, it is the failure to make the law clear that compromised Ms. Himmelman's rights to a fair trial and was inconsistent with this court's decisions.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Sandra J. Himmelman, through her attorney, David L. Donnan, asks this Court to review the unpublished opinion of the Court of Appeals in State v. Himmelman, No. 69797-8-I (Slip Op. filed May 5, 2014). A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The accused is entitled to have the jury fully instructed on the relevant legal standards related to the alleged unlawful conduct. U.S. Const. Amend 6, 14; WA Const. Art. 1, secs 3, 22. Ms. Himmelman sought an instruction advising the jury that it was a defense "that [s]he was less attentive or intelligent than the ordinary person and did not act with knowledge of that [operative] fact" based on State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980). Did the trial court's failure to fully instruct the jury, and the Court of Appeals affirmance of the ruling, violate Ms. Himmelman's state and federal constitutional rights to due process of law and a fair trial by failing to adequately explain to the jury the law regarding knowledge?

2. The jury is charged with determining whether the State has proved the charged offense beyond a reasonable doubt, not divining

"the truth" of the allegation. The jury was instructed to return a guilty verdict if it had an "abiding belief in the truth of the charge." Does this instruction confuse the jury's constitutional function and undercut the prosecutor's burden so as to require reversal?

D. STATEMENT OF THE CASE

Sandra Himmelman cashed a check at her neighborhood Fred Meyer store which she had received from an acquaintance. 7/6/12RP 34. The check was a forgery bearing the account number of Carolyn Rygg, whose purse and checkbook had been recently stolen, but listing the payer as an unrelated area business, "Westgate Business Services, LLC." RP 96-99.

A loss prevention manager with Fred Meyer, testified that based on their records, the check was for $457.89 and it was used to purchase $87 worth of merchandise, with the balance paid in cash. RP 109-13.

An Everett Police detective contacted Ms. Himmelman by telephone and they subsequently met at the Everett Police station. RP 129-38. The detective described Ms. Himmelman as slow in

processing and responding as if on some sort of prescription medication. RP 153, 166-67.

When asked about the check, Ms. Himmelman acknowledged she cashed the check and explained it had been given to her by an acquaintance, Mark Barthy. RP 137-40. Ms. Himmelman explained that his ex-wife and daughter lived across the street. RP 164-65. When the detective was unable to locate Mr. Barthy in a police database, however, he took no further steps toward locating him despite his being the source of the check. RP 140, 165. Ms. Himmelman described Barthy as "a doper," and complained that he "owes me $5,800, but refuses to pay." RP 155.

When Ms. Himmelman was charged with forgery and identity theft in the second degree, she defended on the grounds that she did not know the check was a forgery. CP 84;[1] RP 183-200. She noted

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[1] RCW 9A.60.020 defines forgery:

(1) A person is guilty of forgery if, with intent to injure or defraud:
(a) He or she falsely makes, completes, or alters a written instrument or;
(b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.
(2) In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or

that the check looked proper on its face and contained no errors which might have raised her suspicions. RP 193-94. It was also illogical to believe she would have knowingly taken the forged check to her local supermarket where she would be known at the time she cashed the check and recognized whenever she returned. RP 183, 199. In light of Barthy's reputation, she had questioned him several times about the check in an effort to assure herself of its validity. RP 190. Unfortunately, she was "a poster child for

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in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

(3) Forgery is a class C felony.

RCW 9.35.020 defines the offense of identity theft, in pertinent part, as:

(1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

(2) Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

....

(6) Every person who, in the commission of identity theft, shall commit any other crime may be punished therefor as well as for the identity theft, and may be prosecuted for each crime separately.

....

gullibility." RP 191.[2] Contributing to her lack of discernment, the detective described Ms. Himmelman as slow in processing and responding, indicative of being on some sort of prescription medication. RP 153, 166-67. Ms. Himmelman simply reiterated sincerely that she did not know the check was a forgery and had no intent to injure either Ms. Rygg or Fred Meyer. RP 195-200.

Nevertheless, the jury returned verdicts of guilty based in part on the arguably erroneous instructions on reasonable doubt and knowledge. RP 218-20; CP 35-36.

Ms. Himmelman sought relief in the Court of Appeal. CP 2-13. The Court of Appeals ruled, however, that the jury instructions correctly stated the law, and declined to provide relief. Slip op 7-8.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The failure to fully instruct the jury on the nature and scope of the essential element of knowledge violated Ms. Himmelman's right to jury trial and due process of law.

Constitutional due process requires that the jury be instructed on each element of the criminal offense charged. U.S. Const.

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[2] Illustrating this point, defense counsel noted that when Mr. Himmelman finally kicked Mr. Barthy out of her house she still gave him gas money. RP 191.

Amend 6, 14; WA Const. Art. 1, secs 3, 22; State v. Emmanuel, 42 Wn.2d 799, 820-21, 259 P.2d 845 (1953). Jury instructions are intended to guide the jury in its deliberations and aid it in arriving at a proper verdict. State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). Instructions should explain the law of the case, point out the essentials to be proved on one side or the other, and bring into view the relation between the evidence presented to the particular issues involved. Bird v. United States, 180 U.S. 356, 362, 21 S.Ct. 403, 45 L.Ed. 570 (1901).

In a criminal proceeding each side is, therefore, entitled to have the trial court instruct upon its theory of the case where there is evidence to support the theory. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The jury instructions must allow the parties to argue their cases and properly inform the jury of the applicable law. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Where there is substantial evidence in the record to sustain a theory on which an instruction is sought, it must be given. State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006) (reversible error for failure to give voluntary intoxication instruction in child

molestation prosecution); State v. Elder, 70 Wn.2d 414, 419, 423 P.2d 533 (1967).

The jury must be instructed on definitions of each element when that element is not a matter of common understanding. While "knowledge" may be a term with a commonly understood meaning, the presumptions and inferences of knowledge which the law also recognizes are unique and require clear direction for the jury. See e.g. Shipp, 93 Wn.2d 515-17 (three potential interpretations of "knowledge" under the RCW 9A.08.010(1)(b)); 13 Ferguson, WA PRAC. Criminal Practice and Procedure, § 4403 (2004).

The trial court has, therefore, limited discretion in selecting or rejecting the instructions. The court is required to give instructions requested by either party which correctly state the law and are supported by evidence at trial. Ferguson, at § 4405; State v. Adams, 31 Wn.App. 393, 396, 641 P.2d 1207 (1982).

Ms. Himmelman's requested instruction was a correct statement of the law and was amply supported by the evidence adduced at trial. Ms. Himmelman requested the jury be instructed

pursuant to WPIC 10.02 regarding the knowledge requirement with the additional explanation that the jury could find, notwithstanding what a reasonable person might have known under the circumstances, "that he [the defendant] was less attentive or intelligent than the ordinary person and did not act with knowledge of that fact." CP 72-73; RP 146; Shipp, 93 Wn.2d at 516. Trial counsel explained that the additional language was particularly necessary to explain to the jury the difference between subjective and objective examination of what a reasonable person would have known. RP 146.

The problem is significant here because whenever a presumption arises from the circumstances in a criminal case, the jury instructions must fully explain the nature and operation of the inference to the jury. Sandstrom v. Montana, 442 U.S. 510, 512-19, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (due process prohibits the use of a conclusive or irrebuttable presumptions); Connecticut v. Johnson, 460 U.S. 73, 85-88, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983). In this case, the court's instruction allowing the jury to find the defendant had knowledge if a "reasonable person in the same

situation [would] believe that a fact exists." CP 57. In the absence of the clarifying language requested by Ms. Himmelman, however, the jury was not required to find she personally had actual knowledge, rather than a form of constructive knowledge based on what the fictitious reasonable person would know. This is problematic, however, because "[t]he jury must still find subjective knowledge" on the part of the accused. Shipp, 93 Wn.2d at 517.

The absence of the clarifying language materially limited Ms. Himmelman's ability to argue her theory of the case because the knowledge instruction left the jury free to impute a form of constructive knowledge, or not, but failed to make clear that whether that result was reached by direct or circumstantial evidence, that actual knowledge of the forgery and use of Ms. Rygg's account number was required. The instruction allowed the jury to find knowledge if a reasonable person would have known, without regard to Ms. Himmelman's actual knowledge, contrary to Shipp. 93 Wn.2d at 517 ("The jury must still find subjective knowledge.") The instructions given failed to make clear that even where a reasonable

person might, they are free to find defendant did not have knowledge. CP 57.

Ms. Himmelman was prejudiced by the failure to fully and properly instruct the jury because the instructions misled the jury as to its responsibilities under the law. State v. Hayes, 73 Wn.2d 568, 572, 439 P.2d 978 (1968). The use of an improper instruction in a criminal case is presumed to be prejudicial and that prejudice is not overcome unless the State establishes it did not affect the jury's consideration of the charge. State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984); State v. Wanrow, 88 Wn.2d 221, 236-38, 559 P.2d 548 (1977) (limiting jury's consideration of relevant facts was an erroneous statement of the applicable law).

Failing to clearly define the actual subjective knowledge requirement served to mislead this jury as to its responsibilities under the law. While the failure to give an instruction which correctly states the law does not constitute error if the instructions given are sufficient when considered as whole, where the jury is incorrectly instructed on the law, other instructions cannot negate the error. Wanrow, 88 Wn.2d at 236. The failure to give the requested

instruction resulted in the jury being misled and constitutes reversible error because it unfairly limited Ms. Himmelman's ability to present her theory of the case. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 536 (1968).

2. The "abiding belief" instruction undercuts the State's burden of proof by erroneously equating the jury's job with a search for the "truth" rather than a test of the prosecution's case.

Ms. Himmelman specifically objected to the use of the "abiding belief" instruction. RP 144. Instead, Ms. Himmelman proposed an alternative without the problematic language. CP 68-69. The trial judge noted the objection for the record and gave the offending instruction. RP 144; CP 44.

A jury's role, however, is to test the substance of the prosecutor's allegations, not to simply search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). It is, in fact, the job of the jury "to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, this jury instruction blurs the critical role

of the jury. The "belief in the truth" language encourages the jury to undertake a misguided search for the truth and invites the error identified in Emery. The presumption of innocence may, in turn, be diluted or even "washed away" by such confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id.

In Bennett, the Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn.App. 48, 53, 935 P.2d 656 (1997), was "problematic" as it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases.[3] Id. at 318.

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[3] The pattern instruction reads:

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.

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].

The Bennett Court did not comment on the bracketed "abiding belief in the truth" language, however, more recent cases show the problem with such language. In Emery, the prosecutor told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. This Court noted that these remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the Court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995), cert den., 518 U.S. 1026 (1996). The Court ruled that "[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but was not an error." Id. at 658. The Pirtle Court did not address, however, whether this language encouraged the jury to view its role as a search for the truth aspect. Id. at 657-58. Instead, it

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11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3rd ed. 2008) ("WPIC").

was looking at whether the phrase "abiding belief" was different from proof beyond a reasonable doubt. Id.

Pirtle concluded that this language was unnecessary but not necessarily erroneous. Emery now demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language fosters confusion about the jury's role and serves as a platform for improper arguments about the jury's role in looking for the truth. 174 Wn.2d at 760.

Ms. Himmelman objected to the addition of this last sentence in the court's instruction defining the prosecution's burden of proof and proposed an instruction without the improper language. RP 144; CP 68-69. This "belief in the truth" language inevitably minimizes the State's burden and suggests to the jury they should decide the case based on what they think it's true rather than whether the State proved its case. That is inconsistent with the constitutional standards outlined.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan v. Louisiana, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

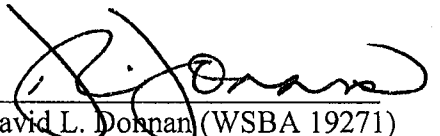
"[A] a jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." Emery, at 757 (quoting Sullivan, 508 U.S. at 281–82).

Moreover, this Court has a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. 6, 14; Const. art. I, §§ 21, 22.

F. CONCLUSION

Ms. Himmelman respectfully requests that this Court grant review, reverse her conviction and remand for a new trial at which the jury may be properly instructed on the law.

Respectfully submitted this 3rd day of June, 2014.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SANDRA JESSIE HIMMELMAN, Appellant.	)	No. 69797-8-I DIVISION ONE UNPUBLISHED OPINION FILED: May 5, 2014

SCHINDLER, J. — In a prosecution for forgery and identity theft, the court properly instructed the jury that it is permitted but not required to find that the defendant had knowledge if the jury finds the defendant had information which would lead a reasonable person in the same situation to believe the relevant facts exist. We affirm.

FACTS

On June 27, 2010, Carolyn Rygg's checkbook was stolen from her car. Rygg immediately reported the theft to the police and contacted her bank the next day. Rygg identified the missing checks that were still outstanding and the bank gave her a new account number.

On July 5, Sandra Jessie Himmelman cashed a check for $457.89 at the Fred Meyer in Mill Creek. Himmelman made a purchase of $87 and took the rest in cash. The check was made out to Himmelman, signed by Terry Jones, and identified the

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payor as Westgate Business Services LLC. The account number listed on the check was from one of the missing checks on Rygg's old account.

On July 13, the bank contacted Rygg and showed her a copy of the check. Rygg confirmed that she did not own a business named Westgate Business Services and did not know Terry Jones or Sandra Himmelman. Rygg also confirmed that she did not give permission for Westgate Business Services, Jones, or Himmelman to write checks on the account or possess her account number.

The case was assigned to Detective Steven Sieverson. Detective Sieverson called Himmelman to ask about the $457.89 check that she cashed at Fred Meyer. Himmelman immediately began to cry and admitted that she cashed the check. Detective Sieverson asked Himmelman where she got the check. Himmelman said that she got the check "from a guy [named] Mark" but that she did not know Mark's last name or phone number. Himmelman continued to cry and referred to Mark as "a doper" and "a low life." Himmelman said that Mark did not have a job, that he owed her $5,800, and that he refused to pay her. Himmelman told Detective Sieverson she would try to find out more information and call him back. Himmelman called back later and left a message that Mark's last name was Barthy but she did not have a phone number for him. Detective Sieverson was unable to locate Mark Barthy.

Detective Sieverson called Himmelman to set up a time to talk to her. Himmelman met with Detective Sieverson on October 6 and agreed to an audiotaped and videotaped interview. Detective Sieverson gave Himmelman a form advising her of her Miranda[1] rights. Himmelman read and signed the form and agreed to give a written statement.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The State charged Himmelman with forgery and identity theft in the second degree. Himmelman did not testify at trial. The court admitted evidence of Himmelman's phone conversation with Detective Sieverson, a redacted version of the taped interview, and her written statement.[2] Detective Sieverson also testified that Himmelman's responses seemed a little slow, as if she were taking prescription medication, but that her behavior was otherwise normal and she did not appear confused during the phone conversation or the interview. The jury found Himmelman guilty of forgery and identity theft in the second degree. Himmelman appeals.

ANALYSIS

Himmelman contends the trial court erred in giving the jury instruction on the knowledge element of the crimes of forgery and identity theft.[3] Himmelman argues the instruction prevented her from arguing her theory of the case by omitting language that the jury was permitted to find that she acted without knowledge if the jury found she was less attentive or intelligent than the ordinary person. We disagree.

" 'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.' " Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (quoting Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). If a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an abuse of discretion. State v. Aguirre, 168

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[2] Neither Himmelman's written statement nor the video of the interview was designated as part of the appellate record.

[3] As the trial court correctly instructed the jury, forgery requires proof that the defendant knew that the instrument was forged, and identity theft requires proof that the defendant knowingly obtained, possessed, transferred, or used a means of identification or financial information of another person. See RCW 9A.60.020(1)(b); RCW 9.35.020(1) and (3).

Wn.2d 350, 364, 229 P.3d 669 (2010). A trial court's refusal to give a jury instruction is likewise reviewed for an abuse of discretion. State v. Buzzell, 148 Wn. App. 592, 602, 200 P.3d 287 (2009).

Here, the court used the 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.02, at 206 (3d ed. 2008) (WPIC), to instruct the jury on the definition of "knowledge." The jury instruction states:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.
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> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
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> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

The trial court refused to give Himmelman's proposed knowledge instruction that included the following language:

> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that either 1) he or she acted with knowledge of that fact; or 2) that he was less attentive or intelligent than the ordinary person and did not act with knowledge of that fact.

Himmelman contends that it was error for the court to not give her proposed instruction. Himmelman asserts the instruction was supported by the record and required by State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980).

In Shipp, the court held unconstitutional an instruction that created a mandatory presumption that if the jury found that the defendant had information which would impart knowledge to a reasonable knowledgeable person, the defendant had knowledge.

Shipp, 93 Wn.2d at 514-15. The court concluded that a definition of constructive knowledge can only be constitutional if the jury is permitted but not required to find knowledge if the jury finds that the defendant had information which would lead a reasonable person in the same situation to believe that the relevant facts exist. Shipp, 93 Wn.2d at 516. As the court explained, the comparison to the ordinary person creates only an inference and the jury must still find subjective knowledge. Shipp, 93 Wn.2d at 517. Thus, the court concluded the jury may only be permitted, not directed, to find knowledge if the jury finds that the ordinary person would still have knowledge under the circumstances. Shipp, 93 Wn.2d at 516. The court noted that "[t]he jury must still be allowed to conclude that [the defendant] was less attentive or intelligent than the ordinary person." Shipp, 93 Wn.2d at 516.

Himmelman argues that by not including language that "[s]he was less attentive or intelligent than the ordinary person," she was prevented from arguing that she did not know the check was forged. Himmelman claims that based on the evidence, she was a "[p]oster child for gullibility." Himmelman also points to the testimony of Detective Sieverson describing her as slow in responding, as if she were on some kind of prescription medication, to argue the jury could have found she lacked the requisite knowledge because she was less attentive or intelligent than the ordinary person.

The trial court rejected the argument that the language was mandatory and ruled that the WPIC instruction allowed Himmelman to argue her theory of the case:

> [T]he Court looks carefully at State v. Shipp as well as the comment that accompanies the WPIC, and notes that considerable thought was given to the recommended language that is currently within the WPIC, that the inclusion of the phrase, "The jury is permitted but not required to find that he or she acted with knowledge of that fact" is the clause that is intended to reflect the Shipp decision, and from that the Court believes that the

> defense can certainly argue your theory of the case, which is reflected within the proposed jury instruction you submitted.

The trial court did not abuse its discretion in refusing to give the proposed jury instruction. As the trial court ruled, inclusion of this language is not required. In accord with Shipp, WPIC 10.02 allows the jury to consider the defendant's subjective intelligence or mental condition. Shipp, 93 Wn.2d at 516; see also State v. Barrington, 52 Wn. App. 478, 485, 761 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989); State v. Kees, 48 Wn. App. 76, 82, 737 P.2d 1038 (1987); State v. Rivas, 49 Wn. App. 677, 689, 746 P.2d 312 (1987); State v. Davis, 39 Wn. App. 916, 919, 696 P.2d 627 (1985). The WPIC 10.02 instruction does not impose a mandatory presumption but simply creates a permissive inference and, therefore, properly states the law. The instruction allowed Himmelman to argue her theory of the case that she acted without knowledge based on the evidence that she was less attentive than an ordinary person. In closing, Himmelman argued, in pertinent part:

> [The prosecutor] talked a lot about Instruction No. 17. That's the knowledge instruction where it says that the jury is committed but not required to think that someone has all these facts and a reasonable person would use those facts to make a judgment that you could if you wanted to presume that person innocent. But you don't have to. You could. There are a lot of reasonable people walking around in the world, a lot of people when they have these facts may be able to see the red flags and may be able to put them together. But there are also those that are not. . . .
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> . . . [Himmelman] was embarrassed. She kept saying I feel so stupid, I honestly believed him. I shop there. She felt so bad she initially felt like she was going to be responsible for it. . . . Her wanting to be a stand-up person does not mean she was guilty at the time the check was passed. That means she's a good person. That means she's gullible and willing to cover for someone else and pay for money down this $5800 hole. . . . She fell for his story. She fell for his getting his life together story. That's not a crime. It is sad. . . .
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> . . . .

> . . . Watch the video. She is clueless. She had no idea she was a suspect. Same gullibility to believe this check in July -- the same gullibility that thought she was a helpful citizen in October.
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> . . . .
>
> A sophisticated fraud. Not a very sophisticated Sandy.

Because the instruction was a correct statement of the law, Himmelman fails to show the trial court abused its discretion by refusing her proposed instruction.

Himmelman also challenges "Instruction No. 4" defining "reasonable doubt." Himmelman argues that the language, "an abiding belief in the truth of the charge," impermissibly directs the jury to search for the truth rather than evaluate the prosecution's evidence. Instruction No. 4 reads, in pertinent part:

> 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.

Instruction No. 4 mirrors WPIC 4.01, at 85. In State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), our supreme court expressly approved of WPIC 4.01 ("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."). In State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), the court held that the "abiding belief" language did not diminish the pattern instruction defining "reasonable doubt," concluding the additional language was "unnecessary but was not an error." Pirtle, 127 Wn.2d at 658.

Himmelman contends that approval of WPIC 4.01 in Bennett has been called into question by the recent decision in State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012). In Emery, the court held a prosecutor's argument that the jury verdict should " 'speak

the truth' " was improper, noting the jury's job was not to determine the truth of what happened but whether the offense was proved beyond a reasonable doubt. Emery, 174 Wn.2d at 760. Emery does not address the "abiding belief in the truth" language in WPIC 4.01 that simply elaborates on the meaning of being "satisfied beyond a reasonable doubt."

We affirm.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69797-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Joseph Juhl, DPA
[jjuhl@snoco.org]
Snohomish County Prosecutor's Office

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: June 3, 2014

WASHINGTON APPELLATE PROJECT

June 03, 2014 - 4:03 PM

Transmittal Letter

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Case Name: STATE V. SANDRA HIMMELMAN
Court of Appeals Case Number: 69797-8

Party Respresented: PETITIONER
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- ☐ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
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Importance: High

Attached is the Petition for Review filed in the above case on 6/03/14.

This is being sent per the (below) notice from the Court of Appeals.

Thank you,

Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

From: Prince, Eva [mailto:Eva.Prince@courts.wa.gov]
Sent: Monday, July 07, 2014 11:19 AM
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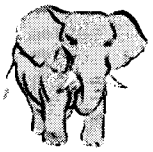
69797-8 Himmelman

Supreme Court said they did not get an entire copy of the prv. Only going to page 12

Can you e-mail them a copy.

Thank you



Eva-Marie
(206) 464-5367