NO. 46297-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY RICHTER,

Appellant.

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

The Honorable Michael Evans, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

MARY T. SWIFT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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1. The reasonable doubt instruction required more than a reasonable doubt to acquit and shifted the burden to appellant to provide the jury with a reason for acquittal.

Issue Pertaining to Supplemental Assignment of Error

1. The trial court instructed the jury that a "reasonable doubt is one for which a reason exists." Does this instruction require the jury to have more than reasonable doubt to acquit and impermissibly shift the burden of proof by instructing the jury it must be able to articulate a reason before it can have a reasonable doubt?

B. SUPPLEMENTAL STATEMENT OF THE CASE

At Randy Richter's trial, the court gave the standard reasonable doubt jury instruction, WPIC 4.01,[1] which reads, in 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." CP 21; 3RP 92.

[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01**Error! Bookmark not defined.**, at 85 (3d ed. 2008).

C. SUPPLEMENTAL ARGUMENT

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

Richter'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 21; 3RP 92; see also 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). The Washington Supreme Court requires that trial courts 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).

However, WPIC 4.01 is constitutionally defective for two reasons. First, it instructs 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 is identical to "fill-in-the-blank" arguments, which 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 the same thing.

Instructing jurors with WPIC 4.01 is constitutional error. This court should accordingly reverse and remand for retrial.

1. 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 acquit. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

"Reasonable" means "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). Thus, for a doubt to be reasonable, it must be logically derived, rational, and have no conflict with reason. See 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 improperly alters and augments the definition of reasonable doubt. In the context of WPIC 4.01, "a reason" 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 "reason," which refers to a doubt based in reason or logic, "a reason" requires reasonable doubt to be capable of explanation or justification. In other words, WPIC 4.01 requires not just a reasonable doubt, but also an explainable, articulable doubt.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). But, in order for the jury to acquit under WPIC 4.01, reasonable doubt is insufficient. Rather, Washington courts instruct jurors that they must also be able to point to a reason that justifies their reasonable doubt. A juror might have reasonable doubt but also have difficulty articulating or explaining the reason for that doubt. A case might present such voluminous and contradictory evidence that a juror with legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. But, despite having reasonable doubt, the juror could not vote to acquit under WPIC 4.01.

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, a juror 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; Wash. Const. art. I, § 3.

2. 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 safeguard the presumption of innocence in this case.

In the context of prosecutorial misconduct, courts have prohibited arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Therefore, such arguments are flatly barred "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759-60.

For instance, in State v. Walker, the court held improper a 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 ____.'" 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (quoting clerk's papers). Likewise, in State v. Venegas, the court found flagrant and ill-intentioned misconduct where the prosecutor argued in closing, "'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.'" 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (quoting report of proceedings); see also State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 936 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

Although it does not explicitly tell 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 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, then it makes no sense to allow the 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. Similarly, in considering a challenge to fill-in-the-blank arguments, the Emery court approved of defining "reasonable doubt as a 'doubt for which a reason exists.'" 174 Wn.2d at 760. But the Emery court made this statement without explanation or analysis.

And, neither the Emery nor the Kalebaugh court explained or analyzed why an articulation requirement is unconstitutional in one context but is not unconstitutional in all contexts.[2] Furthermore, neither court was considering a direct challenge to the WPIC language, so their approval of WPIC 4.01 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.").

Instead, just like fill-in-the-blank arguments, 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 just a reasonable doubt to acquit, WPIC 4.01 impermissibly undercuts the presumption of innocence and is therefore erroneous. WPIC 4.01 is unconstitutional.

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[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." 179 Wn. App. at 423. But 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." Id. at 427 (Bjorgen, J., dissenting).

3. 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). 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 (emphasis in original). Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as structural error." Id. at 281-82 (internal quotation marks omitted).

Richter's jury was instructed pursuant to WPIC 4.01 that it must articulate a reason for having reasonable doubt. This required more than just a reasonable doubt to acquit; it required a reasonable, articulable doubt. This articulation requirement undermined the presumption of innocence. It is structural error and requires reversal. This court should accordingly reverse and remand for retrial before a jury that is accurately instructed on the meaning of reasonable doubt.

D. CONCLUSION

Richter asks that this court reverse his convictions and remand for a new trial because the trial court gave a constitutionally deficient instruction on reasonable doubt.

DATED this 4th day of February, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051
Attorney for Appellant

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DIVISION TWO

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	)	
RANDY RICHTER,	)	
	)	
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 4TH DAY OF FEBRUARY, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RANDY RICHTER
DOC NO. 812747
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF FEBRUARY, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 04, 2015 - 2:43 PM

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