NO. 46995-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

PATRICK L. PARNEL,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEPHEN E. BROWN, JUDGE

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF THE CASE

On April 5, 2013, a resident of Ocean Shores, while walking her dog, observed what appeared to be a newborn infant lying under some debris off the road near the airport in Ocean Shores. RP 38-40. Police officers responded to the scene and found a deceased newborn girl with apparent blunt force trauma to her head RP 26-27. The infant was on the ground, partially covered by leaves and twigs. RP 23-24, 44-46.

Law enforcement officers then began to conduct an investigation in an attempt to locate the mother of the child. Misty Landon, a supervisor at the Quinault Beach Casino, testified that an employee, Brittany Taylor, had called in during that time period and indicated that she was having a baby and that she was planning on putting the baby up for adoption. RP 114. She also testified that Taylor was known to be dating another casino employee, Patrick Parnel. RP 113.

Law enforcement officers went to the residence of Brittany Taylor and contacted Taylor and Parnel at that location. RP 162. Upon contact, Taylor told the officers that "we just didn't know what else to do" about the pregnancy. RP 163. Taylor testified that she lied to coworkers and family about the pregnancy because she was "trying to pretend it didn't

happen." RP 56-57. Taylor testified that, during her pregnancy, the baby had been kicking, usually at night or in the mornings. RP 57-58. She testified that she and Parnel had discussed putting the baby up for adoption. RP 58. Taylor testified that she and Parnel had specifically discussed Washington's law allowing a newborn to be left "at a hospital or a fire station or something like that." RP 59.

Taylor testified that on April 3, 2013, she began to feel like she was about to give birth. RP 60, 166-67. Rather than going to the hospital, she and Parnel went to the Oasis Motel in Ocean Shores. RP 62, 166. The baby was born while Taylor was sitting on the toilet. RP 65-66. Parnel assisted and used a pair of scissors to cut the umbilical cord. RP 66; 167-68. The child was delivered into the toilet and remained there for a period of time. RP 168. Parnel told Taylor the child wasn't alive and placed the baby in the garbage can in the bathroom. RP 67. Parnel then left with the baby while she stayed at the motel. RP 69. According to Ms. Taylor, when Parnel returned, he didn't tell her what he had done with the baby. RP 70.

Parnel told officers that he slapped the baby on the side a little but the baby did not appear to be alive. RP 170. Neither he nor Taylor made any attempt to give the child CPR, revive the child or call 911. RP 169-171.

Parnel told officers that he wrapped the baby in a towel, took the baby to his car, placed it on the passenger's seat and drove out to a wooded area near the airport where he took the baby and walked the baby out into the woods, set it down on the ground and covered it with some brush to camouflage it. RP 170.

Upon initial examination of the infant's body, officers noticed a laceration to the infant's head that appeared to have been caused either by great force as a result of a blunt blow to the head or by a sharp instrument. When they questioned Parnel concerning that laceration, Parnel told them that, in fact, he had caused the laceration by the scissors he had used to cut the umbilical cord and that he noticed the baby bled profusely when he made that laceration. RP 206.

Upon further questioning, Parnel told officers that when he arrived at the location where he intended to dump the infant, the infant began crying. Parnel told officers that he decided that he would not leave the infant like that in the brush. Parnel returned to his vehicle and obtained an object from the trunk which he used to strike the infant in the head, causing the infant's death. RP 276.

On April 7, 2013, an autopsy was performed on the newborn infant by Sigmund Menschel, M.D. Results of that autopsy indicate the child

was, in fact, alive at the time of birth and survived for some time after birth. RP 124-26. The pathologist also found evidence of multiple skull fractures from severe blunt force trauma to the head of the infant. RP 126.

Based on the above facts, the State charged the Appellant with one count of Murder in the First Degree. An additional allegation was made that the victim was particularly vulnerable. CP 26. The Appellant was convicted of Murder in the Second Degree at jury trial. The jury also found beyond a reasonable doubt that the child was a particularly vulnerable victim. CP 58-59.

On appeal, the Appellant challenges what was given as Instruction 3 to the jury. CP 48. The text of that instruction was:

> 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.

WPIC 4.01

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. Does WPIC 4.01 misstate the State's burden of proof?

No. WPIC 4.01 is a correct statement of the burden of proof.

The Appellant's sole contention is that the reasonable doubt instruction, WPIC 4.01, given in this case was improper as it "distorts the reasonable doubt standard, undermines the presumption of innocence, and shifts the burden of proof to the accused." Appellant's Brief at 2.

However, the Washington Supreme Court has mandated trial courts to use WPIC 4.01. The instruction has previously been challenged on numerous bases, including based on dilution of the burden of proof, and has been upheld. The instruction was a proper statement of the State's burden, and no error was committed by the trial court giving this instruction.

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, 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, 146 P.3d 423 (2006). Only the Supreme Court can overrule *Bennett*.

The appellant's argument, that the phrase "a reasonable doubt" misstates the standard of proof, has already been rejected by this Court, 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." *Thompson* 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."

The appellant also argues that the language of WPIC 4.01 is akin to the "fill-in-the-blank" arguments that have been disallowed by numerous opinions. *See State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). However, "fill-in-the-blank" arguments are improper precisely because they are **not** consistent with WPIC 4.01. If they were, there would be nothing objectionable about them.

> We do not agree that the judge's effort to explain reasonable doubt was a directive to convict unless a reason was given or akin to the "fill in the blank" approach that we held improper in *State v. Emery,* 174 Wash.2d 741, 759, 278 P.3d 653 (2012).

State v. Kalebaugh, 183 Wash. 2d 578, 585, 355 P.3d 253, 256 (2015).

a. The jury instructions as a whole properly informed the jury.

Jury instructions are evaluated in the context of the instructions as a whole. *State v. Sublett*, 176 Wn.2d 58, 78, 292 P.3d 715 (2012). Jurors are presumed to follow instructions. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). The same WPIC 4.01 explicitly informs the jury that the defendant bears no burden to prove that a reasonable doubt exists. Even if the sentence complained of, in isolation, is incorrect, the WPIC is

read as a whole, and properly informs the jury that the defendant had no burden to prove his innocence.

B. Can the Appellant raise this issue for the first time on appeal?

No. The Appellant did not object to the challenged instruction in the trial court, and it is not a "manifest error."

In order to be entitled to appellate review of an issue the appellant must either preserve the issue by objecting in the trial court, or meet one of the exceptions in RAP 2.5. The only possible exception relevant here is the one for "manifest error affecting a constitutional right." RAP 2.5(a)(3).

Both the terms manifest and constitutional have meaning. The "constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982)). "The exception actually is a narrow one, affording review only of certain constitutional questions." *Id.*

The Appellant alleges that using WPIC 4.01 was "structural error" and therefore a manifest constitutional error; however, he does not make the required showing to be entitled to the sought relief. Brief of Appellant at 21-22.

State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015) contains a summary of previous cases examining RAP 2.5.

> In *O'Hara* we held that under RAP 2.5(a)(3), manifestness requires a showing of actual prejudice. 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. Next, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

Id. (internal citations omitted)

To determine manifestness the appellate court must place itself in the shoes of the trial court to ascertain whether it could have corrected the error. The jury instruction Appellant is challenging is WPIC 4.01. This WPIC is generally accepted by the legal community. *See* Comment to 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01 (3d Ed). The Washington Supreme Court mandated the use of WPIC 4.01 in *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007) and noted it had been in use for over half a century. *Id*, citing *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959). Thus, the trial court was bound by precedent to use the WPIC, and could not have reasonably corrected the error. *See Kalebaugh*, 183 Wn.2d at 584-85.

In *Kalebaugh*, "[t]he jury instruction given was a misstatement of the law that the trial court should have known, and the mistake is manifest from the record. Thus, Kalebaugh's claim is a manifest constitutional error and can be raised for the first time on appeal." *Id.* Contrary to *Kalebaugh*, the alleged error here is not manifest because the jury instruction complies with clear, binding precedent, the trial court could not correct it and the appellate court should decline to review it.

C. If the jury instruction was error, is the Appellant entitled to relief?

No. If there was any error, it was not structural and was harmless.

Structural error is a special category of constitutional error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante,* 499 U.S. 279, 310, 111 S.Ct. 1246 (1991). Where there is structural error " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " *Id.* (quoting *Rose v. Clark,* 478 U.S. 570, 577–78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (citation omitted)); See *State v. Wise*, 176 Wash. 2d 1, 13-14, 288 P.3d 1113, 1119 (2012).

Reasonable doubt instructions, like most jury instructions, are subject to harmless error analysis. "An erroneous jury instruction ... is generally subject to a constitutional harmless error analysis. We may hold the error harmless if we are satisfied beyond a reasonable doubt that the jury verdict would have been the same absent the error. Misleading instructions do not require reversal unless the complaining party can show prejudice. " *State v. Lundy*, 162 Wn. App. 865, 871-72, 256 P.3d 466 (2011) (holding slight variations to WPIC 4.01, while error, were harmless) Because the jury was properly instructed, even if the instruction was error, it was harmless. *Kalebaugh* also applies a harmless error analysis to this issue, and holds the correct language overcame the trial judge's misstatement. The alleged error was not structural and is subject to constitutional harmless error analysis.

III. CONCLUSION

The State respectfully requests that, for the reasons stated above, the Appellant's appeal be denied and the trial court's verdict be affirmed.

DATED this 14th day of December, 2015.

Respectfully Submitted,

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GRAYS HARBOR COUNTY PROSECUTOR

December 14, 2015 - 5:01 PM

Transmittal Letter

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