73292-7

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Feb 29, 2016
Court of Appeals
Division I
State of Washington

NO. 73292-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GREGORY PARIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

The courts of Washington have consistently held that the language of WPIC 4.01 defining "reasonable doubt" provides an accurate, constitutional statement of the law. The trial court here provided that instruction and the defendant did not object. Has the defendant failed to preserve his constitutional challenge to that instruction? If not, has he failed to demonstrate that all cases upholding the challenged language are incorrect and harmful, the standard required to overturn precedent?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

The State charged Gregory Paris with Attempted Indecent Liberties against his 16-year-old niece, MRH. CP 1-2. The State alleged that Paris touched MRH "between her butt cheeks" while she slept. CP 4.

After a trial before the Honorable Catherine Shaffer, the jury convicted Paris as charged. 6RP 2[1]; CP 29. The court imposed a sentence of 340 days' confinement (with credit for 340 days served) and 12 months' community custody. CP 30-40.

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[1] The Verbatim Report of Proceedings consists of seven volumes, to which the State refers as follows: 1RP – 2/18/15; 2RP – 2/19/15; 3RP – 2/23-25/15; 4RP – 3/2/15; 5RP – 3/3/15; 6RP – 3/4/15; 7RP – 3/20/15.

2. SUBSTANTIVE FACTS

MRH's mother was sleeping on the couch when Paris, whom she considered a brother, knocked on her door about 3:00 a.m. 4RP 52-53. Paris was intoxicated and had a partially-empty bottle of liquor in his hand. 4RP 55-56. The two stayed up for a while to talk about a recently-deceased family member and eventually began drinking the liquor. 4RP 57-58. Paris made unexpected advances toward MRH's mother, who told him it was time to stop drinking and brought him some water and Gatorade. 4RP 59. When Paris went to use the restroom, MRH's mother went back to sleep. 4RP 60.

Not long after, MRH woke her mother. 4RP 62. MRH was distraught and said that Paris had been in her room. 4RP 62. Her mother could see that MRH's clothes and menstrual pad were in disarray and confronted Paris, who denied everything even though his pants were not completely up. 4RP 63. MRH's mother grabbed a gun and told Paris to leave. 4RP 64. MRH called 911, and an operator managed to dissuade her mother from shooting Paris. 4RP 64-65. Paris left before police arrived. 4RP 65.

MRH recalled that she was awakened that morning by a feeling of pressure between her "butt cheeks." 4RP 123-24. It felt

like "somebody tried to put something in [her] butt." 4RP 132. She turned around and saw Paris behind her. 4RP 123-25. Her pajamas and underwear had been pulled down. 4RP 125. Paris's pants were down to his thighs and his penis was out. 4RP 134, 146-47. MRH tried to leave the room and found the door locked from the inside. 4RP 126-27. Paris unlocked the door and she went to wake her mother. 4RP 142.

An officer took MRH and her mother to Harborview Medical Center. 4RP 66. MRH described the incident to a social worker; because there had been no penetration, no sexual assault examination was done. 5RP 11, 17-18.

C. ARGUMENT

Paris 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 never raised below. This Court is bound by precedent of the Washington Supreme Court upholding WPIC 4.01 and the language used therein.

1. RELEVANT FACTS.

The trial court did not require the defense to propose jury instructions. 2RP 49. The court proposed its own set of instructions, including the pattern "reasonable doubt" instruction, but invited the defense to propose something different. 4RP 111-12. Paris did not propose a different "reasonable doubt" instruction and did not object to the pattern instruction. 5RP 30.

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.
>
> 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 17 (Instruction No. 3) (emphasis added). It is the highlighted language of which Paris complains. This language is from WPIC 4.01.

2. THE ALLEGED ERROR IS NOT MANIFEST AND CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

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, Paris 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). To demonstrate actual prejudice there must be a plausible showing "that the asserted error had practical and identifiable consequences in the trial of the case." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.2d 125 (2007). The error must be "so obvious on the record that [it] warrants appellate review." O'Hara, 167 Wn.2d at 99-100.

Although the Washington Supreme Court recently reached an unpreserved challenge to the trial court's oral explanation of reasonable doubt, it did so because the court's erroneous statement was obvious in the record. See State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015) (trial court told the jury that reasonable doubt was a doubt for which a reason "can be given.").

Paris never objected to the instruction he complains of. The trial court's use of WPIC 4.01 is not an "obvious error," and there can be nothing more than pure speculation that the inclusion of the disputed language in the jury instructions had any identifiable consequences. This is insufficient to allow for appellate review. State v. Donald, 178 Wn. App. 250, 271, 316 P.3d 1081 (2013) (refusing to consider defendant's argument regarding the "to convict" jury instructions because he failed to object below and failed to demonstrate prejudice as required under RAP 2.5). This Court should refuse to address Paris's unpreserved argument regarding the reasonable doubt instruction.

3. THE INSTRUCTION CORRECTLY STATES THE LAW.

Paris argues that WPIC 4.01 is unconstitutional. He contends that the instruction required the jury to articulate a reason to doubt, thereby undermining the presumption of innocence. However, the instruction correctly states the law. It does not lead jurors to believe that they must be able to write out their reason for acquittal. Paris's arguments should be rejected.

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).

Over 100 years ago, the Washington Supreme Court approved a similar reasonable doubt instruction. State v. Harras, 25 Wash. 416, 420, 65 P.2d 774 (1901). There, the jury was instructed that a reasonable doubt was "a doubt for which a good reason exists." The Supreme Court said the instruction was correct "according to the great weight of authority" and was not error. Id. at 421.

Almost 60 years ago, the Supreme Court rejected a challenge to a similar reasonable doubt definition. State v. Tanzymore, 54 Wn.2d 178, 178-79, 240 P.2d 290 (1959). The challenged instruction defined reasonable doubt as:

> a doubt for which a reason exists .... A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced at the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

Id. The Supreme Court said that a challenge to that definition, which had been accepted as a fair statement of the law for "many years," was without merit. Id. at 179.

Forty years ago, Division Two of this Court reaffirmed the correctness of that definition in State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). Thompson argued that the phrase "a doubt for which a reason exists" required jurors to assign a reason for their doubt in order to acquit. Id. at 4-5. The court disagreed. Id. at 5. When read together with all of the instructions, the reasonable doubt instruction did not tell the jury to assign a reason for its doubts, but rather to base its doubts "on reason, not on something vague or imaginary." Id.

Within the last decade, the Washington Supreme Court has determined that the wording of WPIC 4.01's definition of reasonable doubt is constitutional. In Bennett, supra, the defendant had asked

the court to instruct the jury using WPIC 4.01. Instead, the court gave the so-called Castle[2] instruction which read, in part:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. . . . There are very few things in this world we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt.

161 Wn.2d at 309. The Bennett court said this instruction was constitutionally adequate but not necessarily "a good or even desirable instruction." Id. at 316. The court exercised its "inherent supervisory powers to maintain sound judicial practice" and mandated that every trial court define reasonable doubt using WPIC 4.01. Id. at 306. Even the four-justice dissent, which would have overturned the conviction based on the Castle instruction, agreed that WPIC 4.01's language was clear and appropriate. Id. at 320. Paris fails to acknowledge Bennett.

Most recently, in Kalebaugh, the Washington Supreme Court reaffirmed that WPIC 4.01 was "the correct legal instruction on reasonable doubt." 183 Wn.2d at 586. There, during its introductory remarks, the trial court orally paraphrased the term as "a doubt for which a reason *can be given*." Id. at 585 (emphasis in original). However, at the end of the case, the court provided "the

[2] The instruction first appeared in State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997).

complete and proper version of WPIC 4.01, the reasonable doubt instruction." Id. at 582. In concluding that error in the trial judge's "offhand" explanation was harmless beyond a reasonable doubt, the Court specifically disagreed that WPIC 4.01 requires the jury to articulate a reason for having a reasonable doubt or was akin to the improper "fill in the blank" argument made in State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). Id. at 585. Thus, Paris's reliance on Emery is undercut by Kalebaugh.

Only months ago, this Court added to the long list of cases upholding WPIC 4.01 in State v. Lizzaraga, __ Wn. App. __, 364 P.3d 810 (2015). This Court soundly rejected the very argument that Paris makes here: that the language "A reasonable doubt is one for which a reason exists" contains an articulation requirement that undermines the presumption of innocence and the burden of proof. 364 P.3d at 830.

Paris's argument that the language of WPIC 4.01 contains an "articulation" requirement is wrong. In fact, it is misconduct for a prosecutor to suggest that it does. Emery, 174 Wn.2d at 759-60; State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 926 (2012); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813

(2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). If WPIC 4.01 contained an articulation requirement, the prosecutors' statements in the above-cited cases would not have been misconduct because they would have been a correct statement of the law. The prosecutors' statements were erroneous precisely *because* WPIC 4.01 contains no articulation requirement.

For example, in Emery, the prosecutor argued that a reasonable doubt was "a doubt for which a reason exists." 174 Wn.2d at 760. That was a correct statement of the law. Id. The error came when the prosecutor argued that, in order to acquit, the jury had to articulate its reason to doubt, something not required under WPIC 4.01. Id. A prosecutor's statement that a reasonable doubt is one for which a reason exists is not error. Only when the prosecutor tells the jury that it must articulate a reason to doubt in order to acquit does error occur, precisely because that argument misstates what the instruction says.

Paris argues that it "makes no sense" to hold that the articulation requirement is unconstitutional when voiced by the prosecutor but not when given as an instruction by the judge. Brief of Appellant at 10. The answer is simple: a judge does not voice an articulation requirement when he/she reads WPIC 4.01 because

that instruction contains no articulation requirement. As the line of cases cited above states, it is error for a judge or prosecutor to suggest that it does.

WPIC 4.01 simply defines a reasonable doubt as a doubt for which a reason exists, with no further requirement. Paris asks this court to parse WPIC 4.01 to give it subtle shades in meaning that simply would not exist in the mind of a juror. There is no reason to believe that jurors would engage in that sort of technical hairsplitting when they are given the definition.

Paris has provided this Court with no basis upon which to depart from the holdings of the Washington Supreme Court in Bennett and Kalebaugh. See State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court). Even if this Court were inclined to entertain a challenge to controlling precedent, Paris bears the burden of making a "clear showing" that WPIC 4.01 is both "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). He has not done so. "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). Paris has failed to show that the Supreme Court's multiple decisions are wrong or that this Court should depart from its recent decision in Lizzaraga. This Court should affirm.

D. CONCLUSION

For the reasons expressed above, the State respectfully requests that this Court affirm Paris's conviction.

DATED this 29th day of February, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A. March (marchk@nwattorney.net), the attorney for the appellant, Gregory Paris, containing a copy of the Brief of Respondent in State v. Paris, Cause No. 73292-7-I, 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.

L Brame
Name

2/29/16
Date

Done in Seattle, Washington