SUPREME COURT NO. 93765-0

NO. 73519-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON THOMAS,

Petitioner.

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

The Honorable Timothy Bradshaw, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Jason Thomas, the appellant below, seeks review of the court of appeals decision in State v. Thomas, noted at __Wn. App.__, 2016 WL 5373316, No. 73519-5-I (Sept. 26, 2016) (attached as Appendix A).

B. ISSUE PRESENTED FOR REVIEW

WPIC 4.01[1] requires jurors to articulate a reason for having reasonable doubt. Does this articulation requirement distort the reasonable doubt standard, undermine the presumption of innocence, and shift the burden of proof to the accused?

C. STATEMENT OF THE CASE

The State charged Thomas with one count of second degree assault, alleging he intentionally assaulted Kavit Sanghvi with a deadly weapon and recklessly inflicted substantial bodily harm. CP 11-12. A jury convicted Thomas as charged. CP 24. The trial court sentenced Thomas to an exceptional sentence of 53 months. 5RP 21; CP 55-57.

At Thomas's trial, the court gave the standard reasonable doubt instruction, WPIC 4.01:

> 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

[1] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

> 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 34 (Instruction No. 3); 4RP 111. On appeal, Thomas challenged this instruction, asserting it undermines the presumption of innocence and shifts the burden from the State to the accused. Br. of Appellant, at 3-20.

The court of appeals noted Thomas did not object to the instruction but, "[i]n any event, the trial court did not err in giving this instruction." Opinion, at 2. The court reasoned:

> In State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), our Supreme Court instructed that WPIC 4.01 be given. The propriety of this instruction was reaffirmed in State v. Kalebaugh, 183 Wn.2d 578, 585-86, 355 P.3d 253 (2015). We have recognized this controlling authority. State v. Lizarraga, 191 Wn. App. 530, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022 (2016). The trial court did not err by doing the same.

Opinion, at 2. The Lizarraga court relied only on the fact that "in State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), our Supreme Court expressly approves the WPIC as the correct statement of the law and directs courts to use WPIC 4.01 to instruct on the burden of proof and the definition of reasonable doubt." Lizarraga, 191 Wn. App. at 567. To date, however, no court has addressed the substance of any of Thomas's claims.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

WPIC 4.01 DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED.

Washington's pattern jury instruction on reasonable doubt requires the jury or the defense to articulate "a reason" for having reasonable doubt. This articulation requirement distorts the reasonable doubt standard, undermines the presumption of innocence, and shifts the burden of proof to the accused. Because Thomas's challenge to WPIC 4.01 presents a significant constitutional question that has not been directly addressed by this Court, and because it implicates jury instructions given in every criminal trial in the state, review is warranted under RAP 13.4(b)(3) and (b)(4).

Jury instructions must be manifestly clear and not misleading to the ordinary mind. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). The error in WPIC 4.01 is readily apparent: having a "reasonable doubt" is not, as a matter of plain English, the same as having "a reason" to doubt. WPIC 4.01's use of the words "a reason" plainly indicates that reasonable doubt must be capable of explanation or justification. Because jurors are not required to articulate a reason for having reasonable doubt, State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015), WPIC 4.01 fails to

make the reasonable doubt standard manifestly clear. On the contrary, WPIC 4.01 is misleading to the ordinary mind.

Prosecutorial misconduct cases illustrate this reality. Prosecutors have repeatedly argued that juries must be able to articulate a reason for reasonable doubt based on WPIC 4.01's language, demonstrating that Washington's reasonable doubt instruction is not manifestly clear to legally trained professionals, let alone jurors. E.g., State v. Emery, 174 Wn.2d 711, 760, 278 P.3d 653 (2012), State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

In Johnson and Anderson, prosecutors recited WPIC 4.01's text to the jury before making their improper fill-in-the-blank arguments. Johnson, 158 Wn. App. at 682; Anderson, 153 Wn. App. at 424. It makes no sense to condemn articulation arguments from prosecutors but continue to authorize the very instruction that gave rise to these improper arguments. Because the Court of Appeals decision conflicts with these prosecutorial misconduct cases as well as with cases requiring jury instructions to be manifestly clear, this Court should grant review under RAP 13.4(b)(1) and (b)(2).

Review is also appropriate because this Court's own precedent on reasonable doubt articulation is confused and contradictory. In Kalebaugh,

this Court determined the instruction "a doubt for which a reason can be given" was legal error, but WPIC 4.01's "a doubt for which a reason exists" was not. This holding directly conflicts with this Court's precedent that equated "for which a reason can be given" and "for which a reason exists."

In State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901), this Court found no error in the instruction, "It should be a doubt for which a good reason exists." This Court maintained that the "great weight of authority" supported this instruction, citing the note to Burt v. State, 16 So. 342, 48 Am. St. Rep. 574 (Miss. 1894). This note, which is attached as Appendix B, cites cases using or approving jury instructions that define reasonable doubt as a doubt for which a reason can be given.[2]

In State v. Harsted, 66 Wash. 158, 162, 119 P. 24 (1911), the defendant objected to the instruction, "The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." This Court opined, "as a pure question of logic, there can be no different between a doubt for which a reason can be given, and one for

[2] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt . . . is not a mere possible doubt, it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious doubt, such as you could give a good reason for."); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, no a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 256, 36 P. 573 (1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

which a good reason can be given." Id. at 162-63. This Court relied on out-of-state cases, including Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." This Court was "impressed" with this view and therefore felt "constrained" to uphold the instruction. Harsted, 66 Wash. at 165.

More recently, in State v. Weiss, 73 Wn.2d 372, 378-79, 438 P.2d 610 (1968), this Court determined the instruction, "A reasonable doubt is a doubt for which a sensible reason can be given," was "a correct statement of the law." (Emphasis added.) Although disapproving of the instruction because it was too abbreviated, this Court concluded "the trial court did not err in submitting the instruction given." Id. at 379.

In Harras and Harsted, this Court viewed "a doubt for which a good reason exists" as equivalent to requiring that a reason must be given for the doubt. In Weiss, this Court determined that an instruction stating that a reasonable doubt was one for which a "sensible reason can be given," was a correct statement of the law. These decisions cannot be squared Kalebaugh and Emery, both of which, in no uncertain terms, rejected the concept that jurors must be able to give a reason for having reasonable doubt. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 760.

It is time for a Washington court to confront the problematic articulation language in WPIC 4.01. There is no meaningful difference between WPIC 4.01's doubt "for which a reason exists" and a doubt "for which a reason can be given." Both require articulation of reasonable doubt. This articulation requirement distorts the reasonable doubt standard, undermines the presumption of innocence, and shifts the burden of proof to the accused. Because Washington's appellate decisions are in complete and total disarray on the significant constitutional issue of properly defining reasonable doubt in every criminal jury trial, Thomas's arguments merit review under all four of the RAP 13.4(b) criteria.

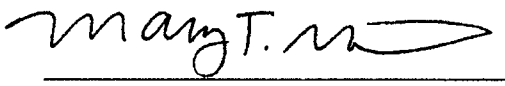
E. CONCLUSION

Because Thomas satisfies all RAP 13.4(b) criteria, this Court should grant this petition.

DATED this 10th day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JASON LARONE THOMAS, Appellant.	)	No. 73519-5-I DIVISION ONE UNPUBLISHED OPINION FILED: September 26, 2016

BECKER, J. — Because our Supreme Court has instructed that WPIC 4.01 be used to inform the jury on reasonable doubt, the trial court did not err in giving this instruction. The community custody statute, RCW 9.94A.701, is not ambiguous. We affirm and grant Thomas's request not to impose appellate costs.

FACTS

On November 19, 2014, Jason Thomas attacked his employer with a metal bar. The State charged him with second degree assault, and the jury found him guilty as charged. Thomas appeals.

WASHINGTON PATTERN JURY INSTRUCTION 4.01 (WPIC)

At Thomas's trial, the court gave the standard reasonable doubt instruction, WPIC 4.01. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 27 (3d ed. Supp. 2014-15). This instruction

reads, in relevant part, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." Thomas did not object. The State argues that because Thomas did not object, he cannot raise this error for the first time on appeal. In any event, the trial court did not err in giving this instruction. In State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), our Supreme Court instructed that WPIC 4.01 be given. The propriety of this instruction was reaffirmed in State v. Kalebaugh, 183 Wn.2d 578, 585-86, 355 P.3d 253 (2015). We have recognized this controlling authority. State v. Lizarraga, 191 Wn. App. 530, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022 (2016). The trial court did not err by doing the same.

COMMUNITY CUSTODY STATUTE

Thomas contends that the community custody statute, RCW 9.94A.701, is ambiguous as to the length of the community custody term for assault in the second degree because that crime is both a "violent offense" requiring 18 months of community custody under RCW 9.94A.701(2), as well as a "crime against persons" requiring 12 months of community custody under RCW 9A.94A.701(3)(a). We recently held that this statute is not ambiguous. State v. Hood, No. 73401-6-I (Wash. Ct. App. Sept. 26, 2016). Hood controls.

APPELLATE COSTS

In his opening brief, Thomas asks us not to impose appellate costs in the event that the State prevails on appeal and seeks costs. The State does not respond. Under RCW 10.73.160(1), this court has discretion to decline to impose appellate costs on appeal. State v. Sinclair, 192 Wn. App. 380, 385, 388,

367 P.3d 612 (2016). In light of Thomas's indigent status, our presumption under RAP 15.2(f) that he remains indigent "throughout the review" unless the trial court finds that his financial situation has improved, and the State's failure to respond, we exercise our discretion not to impose appellate costs.

STATEMENT OF ADDITIONAL GROUNDS

Thomas claims that the jury instructions and special verdict form did not properly define the requisite level of harm to find that "the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." RCW 9.94A.535(3)(y). To satisfy the elements of second degree assault, "substantial bodily harm" is the necessary level of harm. RCW 9A.36.021. The jury instructions and the special verdict form use "substantial bodily harm." This argument does not warrant review.

Affirmed.

Becker, J.

WE CONCUR:

Trickey, ACJ

Cox, J.

Appendix B

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

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N. Y. 503; *Cohen* v. *State*, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State* v. *Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann* v. *State*, 83 Ga. 44, 52. And in *State* v. *Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry* v. *State*, 133 Ind. 677; *State* v. *Sauer*, 38 Minn. 438; *Ray* v. *State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan* v. *State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr* v. *State*, 23 Neb. 749; *Cowan* v. *State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray* v. *State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon* v. *People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn* v. *People*, 109 Ill. 635; *Wacaser* v. *People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Bowlden* v. *State*, 102 Ala. 78; *Welsh* v. *State*, 96 Ala. 93; *State* v. *Gibbs*, 10 Mont. 213; *Miller* v. *People*, 39 Ill. 457; *Willis* v. *State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Jarrell* v. *State*, 58 Ind. 293; *Arnold* v. *State*, 23 Ind. 170; *State* v. *Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

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October 10, 2016 - 11:41 AM

Transmittal Letter

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