NO. 33279-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN CASTRO,

Appellant.

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

The Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to sustain Benjamin Santos Castro's conviction for making or having burglary tools.

2. The prosecutor's misconduct in closing argument denied Castro a fair trial.

3. Washington's pattern jury instruction on reasonable doubt is unconstitutional.

Issues Pertaining to Assignments of Error

1. For the making or having burglary tools charge, the jury instructions required evidence of intent or knowledge of intent for the tools to be used or employed in the commission of a burglary. At most, the State's evidence showed the tools were used in vehicle prowls, not burglaries. Even when viewing the evidence in the light most favorable to the State, was the State's evidence insufficient to sustain a conviction for making or having burglary tools?

2. The prosecutor repeatedly asked jurors whether there was any reason to doubt Castro's guilt and answered that there absolutely was not any such reason. Given that the law is clear that jurors are not required to articulate a reason for their doubts and several cases have condemned similar articulation arguments as prosecutorial misconduct,

was the prosecutor's argument flagrant and ill intentioned misconduct requiring reversal?

3. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists," misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to Castro to provide a reason for why reasonable doubt exists?

B. STATEMENT OF THE CASE

The State charged Castro with possession of a stolen vehicle, possession of methamphetamine, second degree possession of stolen property (credit card/access device), and possession of burglary tools after his arrest on December 13, 2013. CP 1-2. The State amended the information prior to trial an additional count of second degree possession of stolen property for items amounting to more than $750. CP 10-11; 1RP[1] 6-7. In the midst of trial, the court granted the State's motion to amend the information a third time so that it recited the required "withhold or appropriate" language in the possession of a stolen vehicle charge. CP 12-13; 1RP 112-13.

In the early morning of December 13, 2013, Officer Nick Burson received a complaint about a car parked in a Cle Elum Best Western parking

[1] This brief will refer to the verbatim reports of proceedings as follows: 1RP—March 9 and 10, 2015; 2RP—March 11 and 12, 2015; 3RP—April 3, 2015.

lot. 1RP 50-51, 125-27, 129. Burson ran the car's license plate, which returned a stolen vehicle hit; Burson confirmed with dispatch that the vehicle was stolen. 1RP 51-52. Burson placed a spike strip behind the vehicle and waited for backup. 1RP 53-54. Other officers arrived, ordered the two occupants out of the vehicle, and confirmed the occupants were Castro and Kayla Clark. 1RP 55-56, 61.

Burson saw what appeared to be methamphetamine in the car. 1RP 56-58. He then took Castro out of the patrol car he was waiting in, arrested him, and searched him. 1RP 58-59. Burson found a used hypodermic needle in Castro's pocket along with a window punch device, a credit or debit card with the name Jessie Printz, and other gift cards and credit cards. 1RP 59-61.

Officers applied for and obtained a warrant to search the vehicle. 1RP 63. Inside the car they found several items, including a pocketknife, additional credit and debit cards, a taser, bolt cutters, female clothing, miscellaneous CDs, prescription glasses, a wallet, a black and purple bag containing a cut pad lock, a yellow gym bag containing Jessie Printz's pay stubs and checks, two laptops, a North Face backpack containing various tools, baggies containing methamphetamine, gift cards (to Starbucks, Guitar Center, and Walmart), an Arco pump card, jewels, Fred Meyer receipts showing use of Printz's credit card, a Coach purse, the passport for Maria

Luisa Fragon, prescription pills, a camera, an air soft pellet gun, a wooden dowel, a Blackberry smart phone, a fake Baume Mercier watch, among other items. 1RP 63-89, 130-36.

Ronald Friedman, a former Kirkland resident, testified two laptops found in the car, a Dell laptop and a blue laptop were stolen from his car a few days before December 13, 2013. 1RP 104-06. Friedman also indicated the Nikon camera and the fake Baume Mercier watch were also his. 1RP 106. Friedman indicated the Dell laptop was valued at $1400 and the other laptop and the camera were each $400. 1RP 106-07.

Sarah Beatty, a resident of Graham, testified her purse with her social security card, driver license, various credit cards, keys, and makeup were stolen from her car, which had been broken into while it was parked at a Graham gym. 1RP 115-16.

Tyler Schultz, a Des Moines resident, testified his North Face backpack was stolen out of his girlfriend's car parked in the Warwick Hotel parking garage in November 2013. 1RP 122. Schultz's had written his name inside the backpack. 1RP 122. Schultz said the backpack cost $150 to $200, but in used condition was probably worth $50 to $75. 1RP 124.

Jeffrey Hoy, an Auburn resident, testified his Mitsubishi Outlander was stolen from a YMCA parking lot while his wife, Denise Hoy, was

working out at the gym. 2RP 35. When it was stolen, the car contained a yellow gym bag with Denise Hoy's clothes. 2RP 39.

At the beginning of trial, the parties entered a factual stipulation given Jessie Printz's unavailability for trial. CP 14-15; 1RP 16-17. The stipulation provided,

> Jessie Printz . . . suffered a vehicle prowl, and her wallet, Gucci glasses, and restaurant book, among other things, had been stolen. These items were recovered from the vehicle. Also, her credit and debit cards, including that found in the defendant's pocket, had been stolen and used at Fred M[e]yer and T-Mobile. Receipts showing this were also found in the car.

CP 14. The court read this stipulation to the jury just before the end of the State's case. 2RP 48-49.

While the State's evidence might have supported an inference that various tools in the vehicle had been used for vehicle prowls, the State presented no evidence whatsoever that the tools had been used in the commission of any burglary.

Castro presented the testimony of Kayla Clark, who was incarcerated in the Washington Corrections Center for Women after having pleaded guilty to possession of stolen property in the second degree. 2RP 59, 64. Clark testified that she picked Castro up in the Mitsubishi Outlander in Tacoma sometime after December 9, 2013 and that she and Castro were travelling to Montana. 2RP 60-63. Clark stated she did not tell Castro the

car was stolen; nor did Clark tell Castro there was stolen property in the car. 2RP 63, 65. Clark also testified the meth baggies were hers. 2RP 66-67.

The trial court gave the jury the pattern instruction on reasonable doubt, which read in part, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 22; 2RP 93.

In closing, the prosecutor recited this instruction and then argued, "Do you think you have a reason to doubt in this case. He's got this car and he's got all this stolen property on him. Do you have any reason to doubt that he knew that it was stolen? Absolutely not." 2RP 142-43. The prosecutor proceeded to recount some of the evidence, asserting that there was no evidence Castro was not guilty or acted without knowledge and therefore there was no reason to doubt. 2RP 143.

The jury returned guilty verdicts on all five counts (possession of a stolen vehicle, second degree possession of stolen property (access device), second degree possession of stolen property (property of $750 value), possession of methamphetamine, and making or having burglary tools). CP 56-60; 2RP 164-69.

The trial court sentenced Castro to concurrent sentences of 50 months for possession of stolen vehicle, 24 months for the possession of methamphetamine, 18 months for each of the second degree possession of

stolen property charges, and 364 days for the making or having burglary tools. CP 93; 3RP 13-14. Castro timely appeals. 103.

C. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR MAKING OR HAVING BURGLARY TOOLS

The State failed to present any evidence that Castro's actions evinced any intent to use or employ burglary tools in the commission of a burglary. Nor was there evidence to conclude that Castro allowed or knew such tools were intended to be used or employed in the commission of a burglary. Therefore, this court must reverse Castro's conviction and remand for dismissal of this charge with prejudice.

Due process requires the prosecution to prove every element of a charged offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Appellate courts review the sufficiency of the evidence by asking whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, viewing all the evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Id. at 16. Such inferences must "logically be derived from the facts proved, and should

not be the subject of mere surmise or arbitrary assumption." Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

Jury instructions to which neither party takes exception become the law of the case and delineate the State's proof requirements. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Neither the State nor Castro had any exceptions or objections to the definitional or to-convict instructions with regard to having or making burglary tools. 2RP 87-88. These instructions became the law of this case.

In the jury instructions, the trial court defined the crime of making or having burglary tools as follows:

> A person commits the crime of making or having burglary tools when he or she makes, mends, or causes to be made or mended, or possesses any engine, machine, tool, false key, pick lock, bit nippers, or implement adapted, designed, or commonly used for the commission of burglary under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a burglary, or knowing that the same is intended to be so used.
>
> Burglary is the entering or remaining unlawfully in a building with intent to commit a crime against a person or property therein.

CP 36 (emphasis added); 2RP 100 (emphasis added). Consistent with this definition, the to-convict instruction required proof beyond a reasonable doubt "[t]hat the defendant's actions were under circumstances evincing an intent to use or employ, or allow the tools to be used or employed, or

knowing that the tools were intended to be used or employed in the commission of a burglary." CP 37 (emphasis added); 2RP 101 (emphasis added).

This court has established what qualifies as sufficient evidence to sustain a conviction for making or having burglary tools. In State v. Miller, Miller "used bolt cutters and other tools to remove the locks from coin boxes in three separate wash bays" of a Clarkston, Washington car wash. 90 Wn. App. 720, 723, 954 P.2d 925 (1998). On appeal, Miller contended his conduct did not constitute burglary. Id. This court agreed, and in a detailed opinion, concluding (1) that Miller did not enter or remain unlawfully in the car wash (which was open to the public) and (2) that breaking into small coin boxes could not constitute entering or remaining unlawfully in buildings for the purposes of the burglary statute. Id. at 724-30.

Because Miller's actions did not constitute burglary, this court likewise dismissed his conviction for making or having burglary tools for insufficient evidence:

> Under RCW 9A.52.060 (see WPIC 60.11), one of the elements of the crime of making or having burglar tools is that they are possessed under circumstances evincing an intent to use them in a burglary. The circumstances involved in the present case could not constitute burglary. Therefore, the defendant's possession of the tools for criminal purposes was insufficient to establish the crime of making or having burglary tools.

Id. at 730.

Miller's reasoning applies here. The State did not charge Castro with burglary or even theft, but only with possession of a stolen vehicle, possession of stolen property, and possession of methamphetamine. At most, the State's evidence supported an inference that the tools in Castro's possession were intended to be used in the commission of motor vehicle theft or second degree vehicle prowling, not burglary.[2] See 1RP 104-07 (laptops, camera, and watch stolen from car parked at gym); 1RP 115 (purse containing credits cards, driver's license, makeup, and other personal effects stolen from car parked at gym); 1RP 122 (backpack stolen from car in hotel parking garage); 2RP 35 (Mitsubishi Outlander containing gym bag stolen from YMCA parking lot); CP 14 (parties' stipulation stating Jessie Printz "suffered a vehicle prowl, and her wallet, Gucci glasses, and restaurant book, among other things, had been stolen"). Nothing the State adduced at trial remotely pointed to the use of the tools to unlawfully enter or remain in a building. While Castro's possession of the tools might have evinced an intent or knowledge of another's intent to use the tools in future vehicle prowls, "[t]he circumstances involved in the present case could not constitute burglary." Miller, 90 Wn. App. at 730. Because the State failed to adduce

[2] A person is guilty of vehicle prowling in the second degree, a misdemeanor, "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a vehicle other than a motor home . . . ." RCW 9A.52.100(1).

sufficient evidence that Castro intended, allowed, or knew of another's intent to use the tools in the commission of a burglary, it failed to prove an essential element of the crime of making or having burglary tools. Accordingly, this court must reverse Castro's burglary tools conviction and remand for dismissal of this charge with prejudice.

2. PROSECUTORIAL MISCONDUCT IN CLOSING DEPRIVED CASTRO OF A FAIR TRIAL

The prosecutor asserted that Castro was required to provide a reason in order for the jury to have a reasonable doubt that Castro was not guilty and that he knew the car and property were stolen. This argument ran afoul of several recent Washington Supreme Court and Court of Appeals decisions flatly barring such burden-shifting arguments. In light of these decisions, this court should hold the prosecutor's misconduct was flagrant and ill intentioned, and reverse.

Prosecutors are officers of the court and have an independent duty to ensure the accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When there is a substantial likelihood that improper comments affected the jury's verdict, the accused's rights to a fair and to an impartial jury are violated. U.S. CONST. amend. XIV; CONST. art. I, §§ 3, 22; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

It is improper for a prosecutor to argue that jurors must have a reason for having a reasonable doubt because the law does not require that a reason be given for a juror's doubt. State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015). This type of misconduct has typically occurred through so-called fill-in-the-blank arguments, "which implies that the jury must be able to articulate its reasonable doubt by filling in the blank" and, in turn, "subtly shifts the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Such misconduct is not limited to fill-in-the-blank arguments, however.

In State v. Walker, for instance, the prosecutor argued, "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, 731-32, 265 P.3d 191 (2011) (emphasis omitted) (quoting clerk's papers). Division Two held that "[e]ven if the prosecutor's comments did not qualify as a fill-in-the-blank argument, his PowerPoint slide told the jury it had to articulate a reason before it find Walker not guilty . . . ." Id. at 731. "This shifted the burden of proof to Walker. The prosecutor's comments were improper." Id. at 732.

In State v. Anderson, the prosecutor argued, "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank.'" 153 Wn. App. 417, 431,

220 P.3d 1273 (2009). Division Two stated that arguments telling jurors they must articulate a reason for having reasonable doubt constituted misconduct:

> The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find Anderson not guilty, the prosecutor made it seem as though the jury had to find Anderson guilty *unless* it could come up with a reason not to. Because we begin with the presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that Anderson was responsible for supplying such a reason to the jury in order to avoid conviction.

Id.

Here, the prosecutor argued,

> Evidence Instruction No. 3 says: A reasonable doubt is one for which a reason exists. Do you think you have a reason to doubt in this case? He's got this car and he's got all this stolen property on him. Do you have any reason to doubt that he knew that it was stolen? Absolutely not.

RP 142-43 (emphasis added). Like the improper fill-in-the-blank argument, this argument told jurors that, in order to have a reasonable doubt, they must be able to point to "a reason to doubt." In other words, the prosecutor told jurors acquittal required the articulation of a reason. The prosecutor then repeated this improper argument with respect to the mens rea knowledge element, asking jurors, "Do you have any reason to doubt that he knew it was stolen?" This again erroneously indicated to jurors that they were required to find Castro acted with knowledge unless they could articulate a

reason not to. This shifted the burden to Castro to supply the jurors with a reason to avoid conviction—otherwise, according to the prosecutor, the jury was required to return a guilty verdict.

The prosecutor then continued by pointing out to jurors the possible reasons that could amount to reasonable doubt, dismissing them:

> If he had not had a window punch in his pocket, if he had not had stolen credit cards in his pocket, and he was not in a stolen car, taking all those things as not true would make you think, well, you know, he just kind of got dragged along. There's no evidence of that.

RP 143. Thus, by telling jurors that she could not come up with a reason to have reasonable doubt, the prosecutor indicated that convicting Castro was the only option. The prosecutor's argument that jurors must be capable of articulating a reason to doubt undermined the presumption of innocence, shifted the burden of proof to Castro, and therefore constituted misconduct. Emery, 174 Wn.2d at 759-60; Walker, 164 Wn. App. at 731-32.

Where, as here, defense counsel does not object to prosecutorial misconduct, reversal is required when the misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Oddly, Division Two has indicated that arguments that require articulation of reasonable doubt are not per se flagrant and ill intentioned. Walker, 164 Wn. App. at 738 (citing State v. Emery, 161 Wn. App. 172, 195-96, 253 P.3d 413 (2011),

aff'd, 174 Wn.2d 741,278 P.3d 653 (2012)). But where "case law and professional standards . . . were available to the prosecutor and clearly warned against the conduct," such conduct meets the flagrant and ill intentioned standard. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). Here, the prosecutor had the benefit of Emery, Anderson, Walker, State v. Johnson, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010), and State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813 (2010), each of which held very clearly that articulation-of-reasonable-doubt arguments were improper. This court should hold the prosecutor to the knowledge these cases imputed to her office by reversing Castro's conviction based on the prosecutor's flagrant and ill intentioned misconduct.

In any event, the flagrant and ill intentioned standard requires reversal where no instruction could have cured the resulting prejudice. Emery, 174 Wn.2d at 760-61. "The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks." State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Here, no instruction was capable of curing the prosecutorial misconduct. As the following section details, the prosecutor's misconduct was invited by Washington's unconstitutional and misleading instruction on reasonable doubt, which itself imposes an articulation requirement on the reasonable doubt standard. In light of the

unconstitutional instruction, it was impossible to cure the prosecutor's misconduct. The prosecutorial misconduct requires reversal.

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

At Castro's trial, the court gave the standard reasonable doubt instruction, WPIC 4.01,[3] which reads, in part: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 22; 2RP 93. The Washington Supreme Court requires trial courts to give 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). This instruction is constitutionally defective for two reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Jurors must have more than just a reasonable doubt; they also must 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 undermines the presumption of innocence and is substantively identical to the fill-in-the-blank arguments, discussed above, that Washington courts

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

have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the exact same things.

For these reasons, WPIC 4.01 violates due process and the jury-trial right. U.S. CONST. amends. VI, XIV; CONST. art. I, §§ 3, 22. Instructing jurors with WPIC 4.01 is structural error and requires reversal.

a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, thereby undermining the presumption of innocence

Jury instructions must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar. See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction allowed jury to find actual imminent harm was necessary for self defense, resulting in court's determination that jury could have applied erroneous self defense standard), overruled in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217

P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying on grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785 (discussing different between use of "should" and use of word indicating "must" regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

In light of these principles, the error in WPIC 4.01 is obvious to any English speaker. 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 return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of "presume" to determine how jury may have interpreted instruction); Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition of "common" to ascertain the jury's likely understanding of the word in instruction).

"Reasonable" is defined as "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). For a doubt to be reasonable under these definitions it must be rational, logically derived, 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)).

Thus, an instruction defining reasonable doubt as "a doubt based on reason" would be proper. WPIC 4.01 does not do that, however. WPIC 4.01 requires "a reason" for the doubt, which is different than a doubt based on reason.

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01, 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 definitions employing the term

"reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington's pattern instruction on reasonable doubt is unconstitutional because its language requires more than just a reasonable doubt to acquit. It instead explicitly requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option. 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, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a

reason to doubt, shifting the burden and undermining the presumption of innocence.

The beyond-a-reasonable-doubt standard enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Winship, 397 U.S. at 363. The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Bennett, 161 Wn.2d at 316. The "doubt for which a reason exists" language in WPIC 4.01 does just that by directing jurors they must have a reason to acquit rather than a doubt based on reason.

In prosecutorial misconduct cases, appellate courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. As discussed above, fill-in-the-blank arguments "improper impl[y] that the jury must be able to articulate its reasonable doubt" and "subtly shift[] the burden to the defense." Emery, 174 Wn.2d at 760; accord Walker, 164 Wn. App. at 731; Johnson, 158 Wn. App. at 682; Venegas, 155 Wn. App. at 523-24 & n.16; Anderson, 153 Wn. App. at 431. These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at

759. Simply put, "a jury need do nothing to find a defendant not guilty." Emery, 174 Wn.2d at 759.

But, as this case itself demonstrates, these improper burden shifting arguments are not the mere product of prosecutorial malfeasance. The offensive arguments did not originate in the vacuum but sprang directly from WPIC 4.01's language. Taking this case as a prime example, the prosecutor explicitly recited WPIC 4.01 before asking jurors "Do you think you have a reason to doubt in this case" and answering, "Absolutely not." 2RP 142-43. The same occurred in Anderson where the prosecutor recited WPIC 4.01 before arguing, "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. at 424. In Johnson, likewise, the prosecutor told jurors "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. at 682.

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The misconduct cases make clear that WPIC 4.01 is the true culprit. Its "doubt for which a reason exists" language provides a

natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals—such as the prosecutor here—mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same hazard?

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). An ambiguous instruction that permits erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity—which Castro does not by any means concede—that is not the correct standard for measuring the adequacy of jury instructions. Courts have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01's infirm language affirmatively misdirects the average juror into

believing a reasonable doubt cannot exist unless and until a reason for it can be articulated. Instructions must not be "misleading to the ordinary mind." Dana, 73 Wn.2d at 537. WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, compels this conclusion.

Recently, in Kalebaugh, the Washington Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." 183 Wn.2d at 585. This conclusion is sound:

> Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction "a reasonable doubt is

such a doubt as the jury are able to give reason for" 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 which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case").

b. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01

In Bennett, the Washington Supreme Court directed trial courts to give WPIC 4.01, at least "until a better instruction is approved." 161 Wn.2d at 318. In Emery, the court contrasted the "proper description" of reasonable doubt as a "doubt for which a reason exists" with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. Emery, 174 Wn.2d at 759. In Kalebaugh, the court similarly contrasted "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists" with an improper instruction that "a reasonable doubt is 'a doubt for which a reason can be given.'" 183 Wn.2d at 585. The Kalebaugh court concluded the trial court's erroneous instruction—"a doubt for which a reason can be given"—was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here." Id.

The court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their doubt. The plain language of WPIC 4.01 requires this articulation. No Washington court has ever explained how this is not so.

Kalebaugh provided no answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case. In fact, none of the appellants in Kalebaugh, Emery, or Bennett argued the "a doubt for which a reason exists" language in WPIC 4.01 misstates the reasonable doubt standard. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord In re Electric Lightwave, Inc. 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue."). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control.

c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given

Forty years ago, Division Two addressed an argument that "'[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists' (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instruction). Thompson brushed aside the articulation argument in one sentence, stating "the 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." Thompson, 13 Wn. App. at 5.

Thompson's cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exit for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference in meaning between a doubt based on "reason" and a doubt based on "a reason." Thompson wished the problem

away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing "this instruction has its detractors" but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5.

In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated that the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without merit. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959). Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addressed the "doubt for which a reason exists" language in the instruction, so it was not at issue.

The Thompson court observed "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following language: "It should be a doubt for which a good reason exists,—a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one

you are now considering." Harras, 25 Wash. at 421. Harras simply maintained the "great weight of authority" supported it, citing the note to Burt v. State, 48 Am. St. Rep. 574, 16 So. 342 (Miss. 1894).[4] However, this note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[5]

So our supreme court in Harras viewed its "a doubt for which a good reason exists" instruction as equivalent to those instructions requiring a reason to be given for the doubt. And then Thompson upheld the doubt "for which a reason exists" instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01's "doubt for which a reason exists" language means a doubt for which a reason can be given. This is a serious problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper.

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[4] The relevant portion of the note cited by Harras is attached as the appendix to this brief.

[5] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt, gentlemen, 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, sensible 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, 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."); State v. Morey, 25 Or. 241, 255-59, 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.").

Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 759-60. The Kalebaugh court explicitly held, moreover, that it was a manifest constitutional error to instruct the jury that reasonable doubt is "a doubt for which a reason can be given." Kalebaugh, 183 Wn.2d at 584-85.

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), sheds further light on this dilemma. Harsted took exception to the instruction, "The expression, 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Id. at 162. The court explained the meaning of reasonable doubt:

> [I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given.

Id. at 162-63. In support of its holding that there was nothing wrong with the challenged language, the Harsted court cited a number of out-of-state cases upholding instructions defining a reasonable doubt as a doubt for which a reason can be given. Id. at 164. Among them was Butler v. State, 78 N.W. 590, 591-92 (Wis. 1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." While the Harsted court noted some courts had disapproved of similar

language, it was "impressed" with the view adopted by the other cases it cited and felt "constrained" to uphold the instruction. 66 Wash. at 165.

We now arrive at the genesis of the problem. More than 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation annihilates any argument that there is a real difference between a doubt "for which a reason exists" in WPIC 4.01 and being able to give a reason for why doubt exists. Our supreme court found no such distinction in Harsted and Harras.

This problem has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Harras and Harsted explicitly contradict Emery's and Kalebaugh's condemnation. The law has evolved, and what was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains stuck in the past, outpaced by this court's modern understanding of the reasonable doubt standard and eschewal of any articulation requirement.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable different between WPIC 4.01's doubt "for which a reason exists" and the erroneous

doubt "for which a reason can be given." Both require a reason for why reasonable doubt exists. This repugnant requirement distorts the reasonable doubt standard to the detriment of the accused.

d. This structural error requires reversal

Defense counsel did not object to the instruction at issue here. 2RP 87-88. However, the error may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as manifest constitutional errors for RAP 2.5(a)(3) purposes. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Id. at 279-80. 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. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

As discussed, WPIC 4.01's language requires more than just a reasonable doubt to acquit; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence, shifts the burden of

proof, and misinstructs jurors on the meaning of reasonable doubt. The trial court's use of WPIC 4.01 to instruct the jury in Castro's case was structural error and requires reversal of Castro's convictions and a new trial.

E. CONCLUSION

There was insufficient evidence to sustain a conviction for making or having burglary tools. Prosecutorial misconduct and an erroneous instruction on reasonable doubt otherwise deprived Castro of a fair trial. This court should reverse and dismiss the burglary tools conviction, reverse Castro's other convictions, and remand for a new and fair trial.

DATED this 29th day of October, 2015.

Respectfully submitted,

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APPENDIX

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; *Boulden* 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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State v. Benjamin Castro

No. 33279-9-III

Certificate 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 29th day of October, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 29th day of October, 2015.

x Patrick Mayovsky