

No. 74409-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

BERNABE JOHN LOVE,

Appellant.

FILED
November 7, 2016
Court of Appeals
Division I
State of Washington

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Even seasoned criminal law practitioners do not know the meaning of the word “abiding” as it is used in the reasonable doubt instruction. State v. Osman, 192 Wn.App. 355, 375, 366 P.3d 956 (2016). Bernabe Love’s proposed instruction, which would have had the trial court correctly explain to the jury that “Abiding means continuing without change; enduring; lasting,” was critical to the jury understanding the reasonable doubt instruction. CP 29.

“[L]awyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is.” In re Det. of Pouncy, 168 Wn.2d 382, 392, 229 P.3d 678 (2010). When requested, the trial court must provide an instruction that supports the defense theory as long as the instruction is an accurate statement of the law and is supported by the evidence. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Mr. Love’s proposed instruction should have been given.

“Trial courts must define technical words... but need not define words and expressions that are of ordinary understanding or self-explanatory.” State v. Brown, 132 Wn.2d 529, 611–12, 940 P.2d 546 (1997), as amended (Aug. 13, 1997). But, Mr. Love’s reliance on a

dictionary (rather than a statute) to arrive at a definition of “abiding” means does not transform the word into a phrase of ordinary understanding or something that is self-explanatory. Again, as State v. Osman shows, the word is archaic and confusing.

Additionally, it is worth observing that “abiding belief” – as used in the Washington reasonable doubt instruction – appears to be vernacular local to our courts. The phrase “abiding *conviction*” is more common. See e.g. People v. Covarrubias, 378 P.3d 615, 207 Cal. Rptr. 3d 228 (Cal. 2016); Nichols v. State, 2015 Ark. 274, 8, 465 S.W.3d 846 (2015); State v. Carson, 151 Idaho 713, 718, 264 P.3d 54 (2011).

In Illinois, the phrase “abiding belief” appears in the definition of the lesser “clear and convincing evidence” standard of proof applicable to an insanity defense. In re Timothy H., 301 Ill.App.3d 1008, 235 Ill.Dec. 370, 704 N.E.2d 943 (1998). Connecticut courts use the phrase, but bolster it with stronger language bracketed around it:

if ... the evidence ... produces in your mind a settled and abiding belief that you would be willing to act upon in matters of the highest importance relating to your own affairs, then in that event you would be free from a reasonable doubt.

State v. Zollo, 36 Conn. App. 718, 735, 654 A.2d 359 (1995)

(emphasis added).

And, Texas courts have declared it to be inadequate to convey the import of the reasonable doubt standard. Young v. State, 648 S.W.2d 2 (Tex. Crim. App. 1983) (reversing DUI prosecution because jury instruction that “abiding belief” in defendant's guilt would require a guilty verdict was tantamount to authorization of conviction on less than proof beyond reasonable doubt). But see State v. Parnel, 46995-2-II, 2016 WL 4126013 (Aug. 2, 2016) (one of several Washington State opinions holding that WPIC 4.01 is accurate and sufficient).

“No possible purpose is served by allowing juries to deliberate in ignorance of the law.” State v. Byrd, 72 Wn. App. 774, 778–79, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707, 887 P.2d 396 (1995). Here, the jurors were told to decide whether the State’s proof left them with an “abiding” belief as to Mr. Love’s guilt, but they were not told what “abiding” means. Mr. Love maintains this was error.

In In re Det. of Pouncy, 168 Wn.2d at 392, a trial court’s failure to define the term “personality disorder,” as it is used in the context of RCW 71.09 civil commitment, called for a new trial. Without a definition of “personality disorder,” the Supreme Court wrote, “we have no way of knowing what definition the jury used,” if they decided that Pouncy suffered from one. Id.

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874–76, 281 P.3d 289 (2012) further supports Mr. Love’s position. In Anfinson, the Supreme Court held that a jury instruction which included the word “common” in it was ambiguous because the term ‘common’ is subject to multiple definitions.

The Anfinson court noted the word “can mean either ‘shared by... all members of a group’ ... or ‘characteristic of a usual type or standard: representative of a type.’” Id. Because the first definition “limited the plaintiffs’ ability to rely on representative evidence,” it was misleading in the context of the class action lawsuit. The instructional problems identified in Pouncy and Anfinson apply to this case too.

There is no way of knowing what definition of “abiding” the jurors sitting in judgment of Mr. Love used. It could very well be that some of them asserted, as the prosecutor and trial judge in State v. Osman had, that the word means something other than “continuing without change; enduring; lasting.” CP 29.

But “abiding” most certainly means “great or lasting” and “continuing or persisting in the same state without changing or diminishing.” 192 Wn.App. at 375, fn. 10. See also Victor v. Nebraska, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (“abiding

conviction” defined as “settled” and “fixed.”). The possibility that the jury decided Mr. Love’s case with some other understanding of the term calls for reversal for a new trial.

G. CONCLUSION

Mr. Love’s proposed instruction was an accurate statement of the law and needed to ensure the jury properly understood the term “abiding belief” as used in the reasonable doubt instruction.

Based on the arguments above and those in the opening brief, Mr. Love asks that this Court reverse for a new trial.

DATED this 7th day of November 2016.

Respectfully submitted,

/s/ Mick Woynarowski

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF NOVEMBER, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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