

FILED  
May 19, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 72921-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

NEMERI SOROR MONDO,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CAROL A. SCHAPIRA

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

On multiple occasions the Washington State Supreme Court has held that the language of WPIC 4.01 defining “reasonable doubt” provides an accurate statement of the law. Has the defendant shown that the Supreme Court got it wrong, that these cases are “incorrect and harmful,” the standard required to be met in order to overturn Supreme Court precedence?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

A jury found the defendant guilty as charged to one count of felony harassment. CP 1, 17.<sup>1</sup> The defendant received a standard range sentence of 3 months confinement. CP 33, 35.

**2. SUBSTANTIVE FACTS**

The only issue raised in this case is the propriety of a single sentence in a single jury instruction. Thus, the substantive facts are not relevant to this appeal.

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP—12/9/14 & 12/10/14, 2RP—12/11/14, 12/12/14 & 12/19/14.

**C. ARGUMENT**

**THE WPIC JURY INSTRUCTION DEFINING  
"REASONABLE DOUBT" IS A CORRECT STATEMENT  
OF THE LAW**

The defendant 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 has been waived. There are a plethora of Supreme Court and Court of Appeals cases that have upheld WPIC 4.01, and the language used therein; the defendant has failed to show that these cases are "incorrect and harmful," the standard required to overturn precedent.

**1. Facts**

Here, 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.

CP 24 (Instruction # 3) (emphasis added). It is the highlighted language to which the defendant complains. This language is from WPIC 4.01. It is also word-for-word the instruction proposed by the defendant. See CP 16.<sup>2</sup>

## **2. The Invited Error Doctrine Precludes Appellate Review**

Under the invited error doctrine, an appellate court will not review a claimed error if it was invited by the appealing party. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). This doctrine “prohibits a party from setting up an error at trial and then complaining of it on appeal.” Id. “Even where constitutional issues are concerned, invited error precludes judicial review.” Id. A party may not request a jury instruction and later complain on appeal that the instruction was given. State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979).

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<sup>2</sup> The court told the defendant that “I will be using the defense instruction on reasonable doubt” and gave the defense the opportunity to lodge any objection to the language of the instruction. Not unexpectedly since the defendant proposed instruction number 3, he did not object. See 1RP 101, 155-56; 2RP 104, 107, 129-30.

Here, the defendant proposed the very instruction he now objects. Thus, appellate review must be denied.

### **3. The Instructions Correctly State The Law**

Ignoring the instruction(s) as a whole, the defendant claims that the highlighted language actually shifts the burden of proof; in other words, that jurors would be led to believe that it is a defendant's burden to prove he or she is not guilty or that they must be able to write out their reason for acquittal. The Supreme Court has found otherwise.

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).

The latest Supreme Court case to hold that the language of WPIC 4.01 is an accurate statement of the law is State v. Bennett, supra. In addressing a challenge to a substitute instruction to WPIC 4.01, the Court stated the following:

We have approved WPIC 4.01 and concluded that it adequately permits both the government and the accused to argue their theories of the case. . . Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the Castle instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. ***Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.***

Bennett, 161 Wn.2d at 317-18 (emphasis added).

The Bennett case is not the first time that the Court has ruled on similar language in jury instructions. As far back as 1901, the Supreme Court addressed the following instructional language which defined reasonable doubt as "***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.” State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901) (emphasis added). In upholding the giving of the instruction, the Court stated that “[t]his instruction is according to the great weight of authority, and is not error.” Id.

In State v. Tanzymore, the Court addressed the then standard reasonable doubt instruction that provided in part that “[t]he jury is further instructed that the doubt which entitles the defendant to an acquittal **must be a doubt for which a reason exists.**” 54 Wn.2d 290, 291 n.1, 340 P.2d 178 (1959) (emphasis added). In rejecting a claim that the trial court should have given a different reasonable doubt instruction, the Court stated that “the court gave the standard instruction on reasonable doubt. This instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error] without merit.” Id. at 291; see also State v. Pirtle, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) (“the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster”), accord, State v. Nabors, 8 Wn. App. 199, 202, 505 P.2d 162 (1973).

In yet another case, State v. Thompson, the defendant challenged this exact same language “argu[ing] rather strenuously that this phrase (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.” 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975). In rejecting Thompson’s challenge the court stated:

Although we recognize that this instruction has its detractors, it was specifically approved in State v. Tanzymore, [...] and also in State v. Nabors, [...]. We are, therefore, constrained to uphold it. We would comment only that ***it does not infringe upon the constitutional right that a defendant is presumed innocent; but tells the jury when, and in what manner, they may validly conclude that the presumption of innocence has been overcome.***

***Furthermore, 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.*** A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.

Id. (emphasis added).

To make his argument, the defendant tries to apply a case involving misconduct that occurred during closing argument to a situation where the court is concerned with whether the jury instructions properly state the law. Specifically, he claims that the WPIC jury instruction improperly requires jurors to articulate a reason for having reasonable doubt — similar to the “fill-in-the-

blank” argument that the Court held improper in State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). But the defendant’s argument fails under Emery, the very case upon which he principally relies.

In Emery, the Court held that the prosecutor committed misconduct telling the jurors that they had to articulate a reason for any doubt they found, i.e., to fill in the blank what their doubt was. But in finding that the argument itself was misconduct, the Court specifically noted that the prosecutor had “properly describ[ed] reasonable doubt as a ‘doubt for which a reason exists[.]’” 174 Wn.2d at 760. Emery only prohibits the misuse of this instruction by prosecutors in closing argument; but in so doing, it starts with the premise that the definition of reasonable doubt employed by WPIC 4.01 is correct.<sup>3</sup>

Defendant’s reliance on State v. Kalebaugh, 179 Wn. App. 414, 318 P.3d 288 (2014), rev. granted, 180 Wn.2d 1013 (2014) is also unavailing. In Kalebaugh, the trial court added two additional sentences to the court’s preliminary oral instructions to the jury as

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<sup>3</sup> The Court also noted that had Emery objected, any misconduct regarding the burden of proof could be easily remedied by a proper instruction from the court. Emery, 174 Wn.2d at 763-64 (citing State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) (“prosecutor’s misstatements about the burden of proof undermined the presumption of innocence but were not incurable”).

contained in WPIC 4.01. Kalebaugh challenged the two added sentences, arguing, like the defendant does here, that the additional sentences were akin to the prohibited fill-in-the-blank closing argument found to be misconduct in Emery. The majority of the court found that the alleged error had not been preserved, i.e., the defendant had not shown that the error was manifest constitutional error. The dissent believed Kalebaugh had met this standard. However, the entire court was in agreement that WPIC 4.01, without the added sentences, was a correct statement of the law.

The doctrine of stare decisis requires a “clear showing that an established rule is incorrect and harmful” before precedent is abandoned. In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). “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). The defendant has failed to show that the Supreme Court’s multiple decisions are wrong.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 11 day of May, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, CHRISTOPHER GIBSON, of Nielsen, Broman & Koch containing a copy of the Brief of Respondent, in STATE V. MONDO, Cause No. 72921-7-1, 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.



Name  
Done in Seattle, Washington

05/19/15  
Date