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September 29, 2016  
Court of Appeals  
Division I  
State of Washington  
NO. 74855-6-1

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

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STATE OF WASHINGTON,

Respondent,

v.

SARAH DREBEN,

Appellant.

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

The Honorable Marybeth Dingledy, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct in closing argument by lessening the state's burden of proof as to proof beyond a reasonable doubt.

2. The reasonable doubt instruction required more than a reasonable doubt to acquit and shifted the burden to appellant to provide the jury with a reason for acquittal.<sup>1</sup>

Issues Pertaining to Assignments of Error

1. Where the prosecutor argued in closing that the standard "beyond a reasonable doubt" is "not any higher than you decide it is, and you get to decide what is beyond a reasonable doubt," did the prosecutor commit misconduct depriving appellant of her right to a fair trial?

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

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<sup>1</sup> A petition for review raising this issue is pending in State v. Patrick Parnel, Supreme Court No. 93534-3; see State v. Parnel, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2016 WL 4126013.

B. STATEMENT OF THE CASE<sup>2</sup>

1. Procedural Facts

On March 13, 2015, the Snohomish County prosecutor charged appellant Sarah Dreben with three counts of second degree burglary. CP 115-16. The state alleged Dreben and her boyfriend Joseph Nasby burglarized a number of garages or out-buildings in Snohomish County and took power tools and other items. CP 117.

Before trial, the state was allowed to amend the information to add a fourth count of second degree burglary and a fifth count of residential burglary. CP 111-12. The state also amended count one from second to first degree burglary and added a firearm allegation. CP 111-12.

The state's theory was that Dreben acted as an accomplice to Nasby by dropping him off at the various locations and later picking him up (sometimes four or five hours later), after he called to say he was finished. CP 120.

The state proposed and the court gave the following instruction on reasonable doubt:

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<sup>2</sup> This brief refers to the transcripts as follows: "1RP" – CrR 3.5 hearing on August 13, 2015; "RP" – volumes 1-4 (trial on January 26-28, and volume 5 (sentencing on March 7, 2016).

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each 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 consideration all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 69 (Instruction 5); Supp. CP \_\_\_ (sub. no. 48, Plaintiff's Proposed Jury Instructions, 1/25/16) (WPIC 4.01). The defense did not propose a reasonable doubt instruction. CP 101-10.

In closing, the prosecutor characterized the reasonable doubt standard:

So much like the definition of "building," things are specific under the law. And the standard we apply is beyond a reasonable doubt, and that's not the same thing as beyond all possible doubt. I will be the first to concede it is a high standard. I'm not here to tell you that it is not that difficult to meet or it's not that high. I'm just here to tell you it's not any higher than you decide it is, and you get to decide what is beyond a reasonable doubt. Nobody is going to give you specific percentages. It's a high burden, but it's clearly met in this case.

RP 333-34 (emphasis added).

The jury acquitted Dreben of first degree burglary and the firearm enhancement, but convicted her of the remaining counts. CP 52-57. The court sentenced Dreben under the Drug Offender Sentencing Alternative (DOSA). CP 13. This appeal follows. CP 4.

## 2. Trial Testimony

Count I involved a burglary of Roger Ditto's garage at 7729 153<sup>rd</sup> St. S.E. in Snohomish. RP 58-59. Ditto testified that on the morning of August 19, 2014, he went out to his attached garage and was surprised to find the garage door and the door to his safe open with items strewn on the floor and items missing from the safe, including some guns and coins. RP 60-61, 67, 78. RP 71. Dreben was acquitted of this charge. CP 52-57.<sup>3</sup>

Count II involved a burglary of David Schwendtke's barn at 9910 163<sup>rd</sup> Avenue N.E., in Granite Falls. RP 79. Schwendtke testified that on November 29, 2014, he went out to get firewood and noticed his barn door was missing. RP 80. When he looked inside, he saw his 25" Stihl saw and weed whacker were missing. RP 80. It had snowed and Schwendtke could see footprints in the

snow. RP 80. Schwendke testified he had experienced another break-in about a month earlier. RP 83.

Count III involved a burglary of Branden Carnell's garage at 11319 Callow Road, in Lake Stevens. RP 86. Between December 28 and December 31, 2014, Carnell went out to his garage/shop and noticed one of the doors and one of the side rooms inside the shop had been broken into and multiple tools taken, including chainsaws, a weed eater, a concrete saw and a beam saw. RP 87. The Centennial Trail borders the back of his five-acre lot. RP 92.

Carnell recovered the concrete saw later that night when one of his neighbors – who has an old work truck parked on his property – found the saw inside the truck. Carnell's neighbor drove over and returned the saw. RP 91.

Count IV involved a burglary of James Miller's tree service property, a "[o]ne-acre property . . . that is fully fenced" and located at 14115 Seattle Hill Road, in Snohomish. RP 95-96. Inside the property are several trucks, trailers, and a work shed. RP 96. On January 7, 2015, Miller came to work with several of his employees who noticed saws were missing from their work trucks. RP 97-98. Miller testified the burglary must have happened between

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<sup>3</sup> Accordingly, this brief will not detail further testimony regarding this count.

December 30, 2014 and January 5, 2015. RP 99. A surveillance recording showed someone going into the shed. RP 102.

Count V involved the burglary of Brian Taylor's attached garage located at 7916 72<sup>nd</sup> Drive N.E., in Marysville. RP 107. On the morning of January 1, 2015, Taylor walked into his attached garage and noticed the overhead door was open and that the doors to his cars were open and items were scattered about. RP 107-08, 113. Taylor noticed a dremel tool and diamond bits for making jewelry were missing, as was a router and some collectable cigarette lighters and jewelry. RP 109-110. He was also missing a piece of luggage he and his partner used to store an emergency kit. RP 111.

Snohomish county sheriff's deputy Ryan Phillips was on patrol on January 3, 2015. RP 116. Around 2:15 p.m., as he was heading south on Highway 9, he observed Dreben whom he thought was a different woman he was investigating (Candra Trench). RP 117. Dreben was driving a Mustang and about to enter the roundabout at 84<sup>th</sup> Street. RP 117. Phillips decided to get a closer look. RP 117.

Phillips entered the roundabout first, but pulled over on 84<sup>th</sup> Street and allowed Dreben to pass him. RP 118. He supposedly wanted to run her license plate. RP 118.

Dreben pulled in front of a nearby residence and Phillips parked his patrol car a ways away and approached Dreben's car on foot. RP 119.

Before he reached the Mustang, Dreben had opened the driver's door. Phillips claimed he could see burned tinfoil on the floorboard of the back driver's side passenger seat. RP 120.

Dreben provided her license and her passenger Joseph Nasby provided his name. RP 120. As Phillips was running their names, Nasby ran away. RP 123. Phillips took Dreben into custody. When she asked why, Phillips told her it was because of the foil. RP 123. Once Dreben was handcuffed, Phillips also saw a brown substance he believed to be heroin on the passenger floorboard. RP 123. Phillips impounded the car to apply for a search warrant, but released Dreben in the meantime. RP 123.

When Phillips searched the car, he discovered what he characterized as a "stolen property ledger" in a bag on the backseat. RP 127. After searching the car, Phillips called the

registered owner and Dreben's father, Gary Stratton, to come pick it up. RP 130-31.

Stratton came to the North Precinct accompanied by Dreben. RP 131. Dreben agreed to a recorded interview with Phillips. RP 132-33. Phillips asked about the notebook and what Dreben knew about burglaries of saws in the area. RP 154-55.

Phillips also testified about a burglary call he responded to a while back. He testified that on November 29, 2014, he responded to 9910 163<sup>rd</sup> Ave N.E. in Granite Falls (Schwendtke's – count II). RP 79, 138. Phillips testified he saw footprints in the snow and followed them from the barn to 100<sup>th</sup> Street and then west for five blocks where the footprints just stopped. RP 139. In Phillips' opinion, the person must have gotten into a car at that point. RP 140.

Following his interview with Dreben, Phillips contacted detective Glenn DeWitt about the interview. RP 186-87. Dreben came into the Marysville police department on January 15, 2015, and agreed to talk to DeWitt. RP 187. DeWitt told her he was looking for information about stolen chainsaws and burglaries. RP 223. Dreben gave DeWitt and detective Margaret Ludwig a history

of burglaries she knew about that had occurred in the area. RP 187.

Dreben admitted she had stolen property in her garage she would like returned to the homeowners and agreed to a search of her house that day. RP 188. In the garage, the detectives recovered duffel bags, binoculars and flashlights, which Dreben said belonged to Nasby. RP 191. One of the bags contained Nasby's wallet, identification and some clothes. RP 193. There were pawn slips with Nasby's name on them. RP 225.

DeWitt testified they also recovered some jewelry. RP 190-91. According to DeWitt, Dreben said the jewelry came from a burglary she and Nasby did, just down the street. RP 193. DeWitt testified Brian Taylor's residence was just a few blocks away. RP 193.

After the search, Dreben agreed to drive around with the detectives and show them the locations of the burglaries she knew about. RP 162, 193. Ludwig drove, while DeWitt took notes. RP 162, 193.

DeWitt claimed that as they drove, Dreben explained her and Nasby's respective roles:

She told me that she dropped him off to do the burglaries, and she just drives. She says she'll drop him off in an area and wait four or five hours until he calls and says he's done and he needs to be picked up. She'll come pick him up. She'll pick him up, he'll have property with him, or he will have stashed it in certain areas, and they'll go pick it up where he stashed it.

RP 195.

According to DeWitt, Dreben said they typically would take the property to the "saw guy" because he was looking for chainsaws and other power tools. RP 194-96.

DeWitt testified Dreben took them to a house in Granite Falls at the corner of 100<sup>th</sup> and 169<sup>th</sup>. She reportedly said she and Nasby went there twice. RP 196.

DeWitt testified Dreben also mentioned the area near Callow Road in Lake Stevens. RP 198. She said she dropped Nasby off there more than once. She remembered that on one occasion Nasby told her about having left a saw in an old truck near the Centennial Trail. RP 198.

DeWitt claimed that when they passed by three houses, one of which was Brian Taylor's, Dreben said they had been to one of the houses. RP 196. According to DeWitt, Dreben said they were driving by, but stopped upon seeing the open garage door. Nasby

got out, went inside and came back out with jewelry and tools. RP 196-97.

Additionally, Dreben took the detectives to the home of the "saw guy" in Marysville. RP 199. Dreben told the detectives the "saw guy" takes the tools apart and sells them online. RP 202. Police were able to obtain a warrant to search the place. RP 237.

When the detectives dropped Dreben off, she agreed to meet with them the following day. RP 165, 203-04. DeWitt testified that near the beginning of the drive, Dreben told them about a tree service burglary near Seattle Hill Road. RP 205. Reportedly, Dreben described a property with a large fence and semi trailer box that Nasby had gone into. RP 207. Dreben reportedly said Nasby took chain saws. RP 207.

They also discussed the Taylor burglary. RP 209. DeWitt may have told Dreben the address and/or driven by the house. Dreben reportedly said she remembered that there were some other items in her garage, such as a box full of zippo lighters, that had been taken from the residence. Dreben agreed to give them to DeWitt to return. RP 209.

After the detectives dropped Dreben off, they returned the lighters to Taylor and confirmed it was his property. RP 209.

Taylor also mentioned an expensive dremel tool he was missing and diamond bits. DeWitt had seen those items in Dreben's garage. Ludwig drove back and Dreben gave her the dremel. RP 210.

Meanwhile, DeWitt learned Taylor was also missing a piece of luggage. RP 210. DeWitt communicated this to Ludwig and Ludwig was able to recover the luggage as well. RP 211.

Dreben testified that she knowingly possessed stolen property and helped sell it. RP 275. However, she did not participate in any of the charged burglaries. RP 270, 291. While she knew in general that Nasby was committing burglaries, and she also gave him rides, she did not know of any of the specific burglaries or drop him off at the locations that were burglarized. RP 270-75, 279.

When Dreben rode with the detectives, she showed them only general areas she had dropped Nasby off at. RP 281. She also repeated stories she heard from Nasby about the burglaries he committed. RP 294.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DEPRIVED DREBEN OF HER RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed her under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wash.2d 792, 843, 975 P.2d 967 (1999).

Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics.

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Monday, 171 Wn.2d at 676. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to

defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted); see also United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir.1988) (analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect).

Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578. Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct is both improper and prejudicial. Monday, 171 Wn.2d at 675, (citations omitted). Even if a defendant does not object, he does not waive his right to review of flagrant misconduct by a prosecutor. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

The presumption of innocence and requirement that the State prove every defendant's guilt beyond a reasonable doubt are bedrock principles of due process and fundamental to a fair trial. State v. McHenry, 88 Wn. 2d 211, 214, 558 P.2d 188 (1977) (citing

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). “The two principles are intimately related, as the proof beyond a reasonable doubt standard provides concrete substance for the presumption of innocence . . . .” McHenry, 88 Wn.2d at 214 (quoting Winship, 387 U.S. at 363). Indeed, the failure to properly instruct jurors on these principles is structural error and requires reversal. Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 192 (1993); McHenry, 88 Wn.2d at 212-215.

During closing argument, the prosecutor violated Dreben's right to due process by misstating the reasonable doubt standard.

Specifically, the prosecutor stated:

So much like the definition of “building,” things are specific under the law. And the standard we apply is beyond a reasonable doubt, and that's not the same thing as beyond all possible doubt. I will be the first to concede it is a high standard. I'm not here to tell you that it is not that difficult to meet or it's not that high. I'm just here to tell you it's not any higher than you decide it is, and you get to decide what is beyond a reasonable doubt. Nobody is going to give you specific percentages. It's a high burden, but it's clearly met in this case.

RP 333-34 (emphasis added).

This is an incorrect statement of the law because it characterizes “reasonable doubt” as an entirely subjective standard, which it is not. While undersigned counsel could find no

Washington case on point, the Indiana Court of Appeals has held it is fundamental error to instruct the jury it may determine a person's guilt beyond a reasonable doubt based upon the jurors' perception of "moral certainty," due to the fact that such impermissibly allows the jurors to rely upon their own subjective standards. Winegeart v. State, 644 N.E.2d 180 (Ind. App. 1994).

In Winegeart, the jury was instructed: "A reasonable doubt is such doubt as you may have in your mind when having fairly considered all of the evidence, you do not feel satisfied to a moral certainty of the guilt of the defendant." Winegeart, 644 N.E.2d at 181. Because "moral certainty" solely refers to what the jury determines to be reasonable doubt, and because what "moral certainty" is to each juror is completely subjective, the instruction was flawed. Id.

A reasonable doubt is not standard-less. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully consideration all of the evidence or lack of evidence. By telling the jurors that a reasonable doubt is "not any higher than you decide it is, and you get to decide what is beyond a reasonable doubt," the prosecutor essentially told jurors the standard is entirely subjective. This lessened the state's burden of proof to the same

degree as did the instruction in Winegeart. Argument lessening the state's burden of proof is misconduct.

The prosecutor's minimization is analogous to the prosecutor's misstatement in State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010). There, in addressing the "abiding belief" requirement of the reasonable doubt standard, the prosecutor argued:

I like to look at abiding belief and use a puzzle to analogize that. You start putting together a puzzle and putting together a few pieces, and you get one part solved. So with this one piece, you probably recognize there's a freeway sign. You can see I-5. You can see the word "Portland" from looking in the background. You may or may not be able to see which city that is, but it is probably near one that is on the I-5 corridor.

You add another piece of the puzzle, and suddenly you have a narrower view. It has to be a city that has Mount Rainier in the background. You can see it. It can still be Seattle or Tacoma, or if you weren't familiar, you might think that mountain might be Mt. Hood, and it could be Portland.

You add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.

Johnson, 158 Wn. App. at 682. Defense counsel did not object. Id.

On appeal, Johnson argued the prosecutor misstated the law by arguing that arriving at an abiding belief to satisfy the reasonable doubt standard was the same as intuiting the subject of

a partially completed puzzle. Id. Division Two of this Court agreed the prosecutor's argument trivialized and ultimately failed to convey the gravity of the state's burden and the jury's role in assessing the state's case against the defendant. Johnson, 158 Wn. App. at 684-85 (citing State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009) (discussing reasonable doubt standard in the context of everyday decision making was improper); see also State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009) (prosecutor's argument defendant not entitled to the benefit of the doubt was flagrant misconduct but cured by the court's thorough curative instruction).

And significantly, even though there was no objection in Johnson, the court found the prosecutor's misstatement was flagrant and ill-intentioned and required reversal:

[W]e follow our holding in Venegas<sup>4</sup> that such arguments are flagrant and ill-intentioned and incurable by a trial court's instruction in response to a defense objection. Although the trial court's instructions regarding the presumption of innocence may have minimized the negative impact on the jury, and we assume the juror followed these instructions, a misstatement about the law and the presumption of

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<sup>4</sup> State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010) (prosecutor's "fill-in-the-blank" reasonable doubt argument was improper because it subverts the presumption of innocence).

innocence due a defendant, the “bedrock upon which [our] criminal justice system stands,” constitutes great prejudice because it reduces the State’s burden and undermines a defendant’s due process rights. State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); Anderson, 153 Wn. App. at 432, 220 P.3d 1273.

In State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009), our Supreme Court declined to apply constitutional harmless error analysis to improper prosecutorial arguments involving the application and undermining of the presumption of innocence. Furthermore, even were we to do so, with conflicting evidence and a misstatement of the reasonable doubt standard and the presumption of innocence due Johnson, we cannot conclude that such misstatements did not affect the jury’s verdict. Thus, we reverse Johnson’s conviction and remand to the trial court for further proceedings.

Johnson, at 685.

Dreben is entitled to the same result. Considering the number of published decisions in which the courts have found prosecutorial misconduct when prosecutors attempt to further define the concept of reasonable doubt and thereby ease the state’s burden of proof, it is mind boggling that prosecutors still engage in this kind of argument.

Considering that Dreben denied knowledge or participation in the charged burglaries and the fact the jury acquitted her of one of them, it cannot be said the prosecutor’s misstatement did not

affect the jury's verdicts. This Court should therefore reverse her convictions.

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

The pattern jury instruction requires the jury or the defense 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.

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 to the ordinary mind: 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" clearly indicates that reasonable doubt must be capable of explanation or justification.

Prosecutors have several times argued that juries must be able to articulate a reason for reasonable doubt, demonstrating that the reasonable doubt standard is not manifestly clear to legally trained professionals, let alone jurors. E.g., State v. Emery, 174

Wn.2d 741, 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). Indeed, the prosecutors in Johnson and Anderson recited WPIC 4.01's text 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 giving the very jury instruction that gave rise to these improper arguments. The appellate courts therefore should reconsider their decisions on this issue. See e.g. Parnel, 2016 WL 4126013 (holding it is bound by Supreme Court's approval of WPIC 4.01).

Our state Supreme Court's own precedent is in serious disarray, mandating reconsideration. In State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015), the court determined that the instruction "a doubt for which a reason can be given" was error, but that WPIC 4.01's "a doubt for which a reason exists" was not. This holding directly conflicts with the court's own 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 Supreme Court found no error in the instruction, “It should be a doubt for which a good reason exists.” The court maintained 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, however, cites cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.<sup>5</sup>

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.” The court opined, “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

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<sup>5</sup> 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 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, 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.”).

can be given.” Id. at 162-63. The 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.” The Supreme Court was “impressed” with this view and therefore felt “constrained” to uphold the instruction. Harsted, 66 Wash. at 165.

Harras and Harsted viewed “a doubt for which a good reason exists” as equivalent to requiring that a reason must be given for the doubt. This view directly conflicts with Kalebaugh and Emery, which strongly reject any requirement that jurors must be able to articulate a reason for having reasonable doubt. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 760.

It is time for Washington to seriously confront the problematic articulation language in WPIC 4.01.<sup>6</sup> 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, and articulation of reasonable doubt

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<sup>6</sup> The Court of Appeals determined Belt failed to preserve this issue for appellate review without addressing Belt’s claim that failure to adequately instruct the jury on reasonable doubt is structural error under Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 125 L. Ed. 2d 182 (1993). See Br. of Appellant at 15. Contrary to the Court of Appeals decision, this court has held that structural errors

undermines the presumption of innocence and shifts the burden of proof to the accused. This Court of Appeals should reconsider its prior decisions on this issue.

3. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

The trial court found Dreben indigent for purposes of this appeal. CP 1-3. In the DOSA risk assessment report, the community corrections officer wrote:

Financial: Ms. Dreben is doing poor financially. She is mostly supported by her parents. She has been receiving public assistance in the amount of \$550 a month. She is not sure the amount of debt she owes as she has recently applied for bankruptcy.

Supp. CP \_\_ (sub. no. 65, DOSA/Risk Assessment Report, 3/3/16).

At sentencing, the court imposed only the \$500 VPA and \$100 DNA fee. CP 15.

Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

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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).

Under RCW 10.73.160(1), appellate courts “*may* require an adult offender convicted of an offense to pay appellate costs.” (Emphasis added). The commissioner or clerk “*will*” award costs to the State if the State is the substantially prevailing party on review, “*unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94.

Based on Dreben's indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

D. CONCLUSION

Prosecutorial misconduct and a flawed reasonable doubt instruction denied Dreben a fair trial. This Court should reverse her convictions. Alternatively, this Court should exercise its discretion and deny any request for costs.

Dated this 29<sup>th</sup> day of September, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH



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