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COURT OF APPEALS

No. 33875-1-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

ROBERT L. INMAN

BRIEF OF APPELLANT

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A. Assignment of Errors

Assignment of Errors

1. Without a finding that a compelling individualized threat of injury, disorderly conduct, or escape was present, the trial court permitted the presence of extra courtroom security resulting in prejudice to the defense.
2. A less restrictive alternative to the presence of extra courtroom security was not presented in the trial court, resulting in error.
3. The instruction to the jury regarding the definition of knowledge was erroneous.
4. Mr. Inman was denied effective assistance of counsel when his attorney failed to object to the improper “knowledge” instruction.
5. The trial court erred by equating a “reasonable doubt” with “real possibility” that Mr. Inman was not guilty.
6. Without any clarification, the trial court erred by explaining “reasonable doubt” in terms of “possible doubt”.

Issues Pertaining to Assignment of Errors

Mr. Inman was charged with Taking a Motor Vehicle without the Owner’s Permission in the Second Degree, two counts of Unlawful Possession of a Firearm in the First Degree. Without holding a hearing and despite the absence of any evidence in the record, the trial court allowed three uniformed officers to stand guard near Mr. Inman and his codefendant. The trial judge did not consider less restrictive alternatives, and did not make any findings in support of this.

1. Must the conviction be reversed because the trial court allowed extra security to be posted without holding a hearing to determine if such measures were necessary? Assignments of Error Nos. 1-2.

2. Must the conviction be reversed because the trial court allowed extra security to be posted without considering less restrictive alternatives? Assignments of Error Nos. 1-2.
3. Must the conviction be reversed because the trial court allowed extra security to be posted without any indication in the record of a compelling and individualized threat of injury to people, disorderly conduct, or escape? Assignments of Error Nos. 1-2.

The court's "knowledge" instruction inappropriately included a mandatory presumption, requiring the jury to find knowledge if Mr. Inman acted intentionally (without explaining what kind of intentional act could give rise to the presumption). The instruction also misstated the law, defining knowledge to mean awareness "of a fact, circumstance or result which is described by law as being a crime." Defense counsel did not object to the erroneous instruction.

4. Using a *de novo* standard of review, did the trial court's "knowledge" instruction create an impermissible mandatory presumption? Assignments of Error No. 3.
5. Using a *de novo* standard of review, did the trial court's "knowledge" instruction misstate the law and mislead the jury? Assignments of Error No. 3.
6. Using a *de novo* standard of review, was Mr. Inman denied effective assistance of counsel by his lawyer's failure to object to the erroneous "knowledge" instruction? Assignments of Error Nos. 3-4.

At the beginning of trial, the judge told jurors they would be deciding whether Mr. Inman was "innocent" or guilty. At the end of trial, instead of giving the standard pattern instruction on reasonable doubt, the court gave an instruction which included the following language:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your

consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

7. Did the court's instruction erroneously equate a "reasonable doubt" with a "real possibility" that Mr. Inman was not guilty? Assignments of Error Nos. 5-6.
8. Did the court's instruction erroneously permit the jury to convict unless there was "substantial doubt" about Mr. Inman's guilt? Assignments of Error Nos. 5-6.

B. Statement of Facts

The Amended Information was filed by the prosecutor in Jefferson County Superior Court on August 24, 2005 alleging one count of Taking a Motor Vehicle Without Permission in the Second Degree, two counts of Unlawful Possession of a Firearm in the First Degree. CP, 20-21. He entered a plea of not guilty and proceeded to trial. A trial by jury delivered a guilty verdict with regards to one count of Taking a Motor Vehicle Without Permission in the Second Degree, two counts of Unlawful Possession of a Firearm in the First Degree. RP (8/23/05), 16.

On the first day of Mr. Inman's jury trial, counsel for the co-defendant objected to the extra security in the courtroom, noting there were three uniformed guards standing close to the defendant. RP(8-22-05) 10 – 11. Without holding a hearing, the trial judge indicated that he was not removing anyone, and allowed the guards to remain where they were. RP(8-22-05) 11 – 12.

In opening instructions to the jury the court told the jurors that their job was to "listen to the evidence in this case to determine whether the State's met the burden of

proof, whether these gentlemen are innocent or guilty.” RP(8-22-05) 27. At the close of trial, the court used the following “reasonable doubt” instruction:

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. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Instruction No. 4, Supp CP.

The court also used an instruction defining knowledge which was based on WPIC

10.02:

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Supp. CP, Instruction 20.

Mr. Inman appeals.

C. Argument

1. The Court imposed excessive courtroom security without holding a hearing and without finding a compelling individualized threat of injury, disorderly conduct, or escape.

The presumption of innocence is a fundamental attribute of due process under the Fourteenth Amendment to the U.S. Constitution. U.S. Const. Amend. XIV, *Estelle v. Williams*, 425 U.S. 501 at 503, 96 S.Ct. 1691 (1976). An accused in a criminal case has the right to be brought before the court “with the appearance, dignity, and self-respect of a free and innocent man.” *State v. Finch*, 137 Wn.2d 792 at 844, 975 P.2d 967 (1999). When a trial court imposes security measures that cannot be concealed from the jury, the judge must make a record of “a compelling individualized threat of injury to people in the courtroom, disorderly conduct, or escape” to justify use of those measures. *State v. Gonzalez*, 129 Wn.App. 895 at 902, 120 P.3d 645 (2005), citing *State v. Hartzog*, 96 Wash.2d 383, 635 P.2d 694 (1981) Furthermore, the court “must make every effort to minimize the impact on the jury of any unavoidable exposure.” *Gonzalez*, at 902. Erroneous imposition of courtroom security measures may be “structural error of the sort that defies analysis by harmless error standards,” because it abridges a fundamental trial right, the presumption of innocence. *Gonzalez*, at 904-905; U.S. Const. Amend. XIV.

In this case, over defense objection, the trial judge allowed the jail to place three uniformed guards near Mr. Inman and his codefendant. RP(8-22-05), 10 – 12. The decision was made without a hearing, without any individualized showing that this uniformed presence was necessary to protect courtroom security, without any effort to investigate less restrictive alternatives, without any instructions to mitigate the effect on the jury, and without entry of any findings to justify the decision. RP(8-22-05), 10 – 12.

The trial court’s decision to allow extra security under these circumstances violated Mr. Inman’s constitutional right (under the due process clause) to the presumption of innocence. It gave the jury the impression that he was a dangerous man

from whom the community must be protected. For these reasons, the conviction must be reversed and the case remanded to the superior court for a new trial. *Gonzalez, supra*.

2. The Court’s “knowledge” instruction violated due process because it created a mandatory presumption, misstated the law, and misled the jury regarding an essential element.

‘Knowledge’ is an element of Unlawful Possession of a Firearm; to obtain a conviction, the prosecution must prove that the defendant knowingly possessed a firearm. *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000). Under RCW 9A.08.010 (1)(b), “A person knows or acts knowingly or with knowledge when (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.”

Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction which misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade

the fact finding function of the jury. *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

Here, 'knowledge' was defined by Instruction No. 20 (based on WPIC 10.02) which included the following optional language (bracketed in WPIC 10.02): "Acting knowingly or with knowledge also is established if a person acts intentionally." Instruction No. 20, Supp. CP.

Inappropriate use of the last sentence relieves the prosecution of its burden of establishing the knowledge element, and is reversible error. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer. The trial court's "knowledge" instruction was the same as that given in this case. The Court of Appeals reversed the conviction because the last sentence of the instruction could be read to mean that an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer. *Goble*, at 203.

Here, as in *Goble*, the inclusion of the final sentence was erroneous; it allowed the jury to presume that Mr. Inman had knowledge of the firearm if he acted intentionally, but did not give any guidance as to what intentional act could trigger this mandatory presumption. Under the instruction as given, the jury could attribute knowledge of the firearm to Mr. Inman if he intentionally rode in the vehicle or intentionally accompanied his codefendants on their outing.

The instruction was also confusing and misleading; the court told the jury that a person "acts knowingly" when he "is aware of a fact, circumstance or result described by

law as being a crime...” This language differed from the statutory language of RCW 9A.08.010(1)(b); under Instruction No. 20, the information at issue—the “fact, circumstances or result”—must itself be described by law as a crime. This is nonsensical. See RCW 9A.08.010 (which requires that the fact be described by a criminal statute, not that the fact itself be described as a crime). The court criticized WPIC 10.02 on this basis as well. See *Goble* at 203 (“We agree that the instruction is confusing.”)

The end result was that the jury was unable to determine what was meant by the knowledge element of Instructions 14 and 17. The instruction defining knowledge created a conclusive presumption and violated due process. *Goble, supra; Savage, supra*; Because of this, the conviction must be reversed and the case remanded for a new trial. *Goble, supra*.

3. Defense counsel was ineffective for failing to object to the court “knowledge” instruction.

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998) *citing Strickland, d supra*. The defendant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Holm, supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong.

To establish deficient performance, a defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001) A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Here, ‘knowledge’ was an essential element of the crime charged. Despite this, Mr. Inman’s attorney failed to object to the court’s “knowledge” instruction, which was a distortion of the statutory definition found in RCW 9A.08.010 (1)(b). This failure to

object was deficient performance; a reasonably competent attorney would have been familiar with the statute, and would have known that the language of the instruction differed from the language of the statute. *See, e.g., State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) (“[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.”)

Mr. Inman was prejudiced by the error. The “knowledge” instruction was confusing and misleading, and it misstated the law. As a result, the jury would not have been able to properly interpret the “to convict” instructions. Defense counsel’s failure to object to the improper “knowledge” instruction denied Mr. Inman the effective assistance of counsel. *Strickland*. The conviction must be reversed, and the case remanded for a new trial.

4. The trial court’s “reasonable doubt” instruction violated due process and was unconstitutional (argument included to preserve any error).

In a criminal case, the jury must be instructed that the State has the burden to prove each essential element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Proper instruction on the reasonable doubt standard is crucial because that standard “provides concrete substance for the presumption of innocence” which is the cornerstone of our criminal justice system. *In re Winship*, 397 U.S. at 363. Failure to give clear instruction on reasonable doubt is not only error, it is a “grievous constitutional failure” mandating reversal. *State v. McHenry*, 88 Wn.2d 211, 214, 588 P.2d 188 (1977). An instruction is improper if it

serves to relieve the State of its burden. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).

In Washington, the traditional pattern instruction has defined reasonable doubt as “a doubt for which a reason can be given.” WPIC 4.01. The precursor of this instruction was specifically approved by the Washington Supreme Court in *State v. Tanzymore*, 54 Wn. 2d 290, 340 P.2d 178 (1959).

Instead of using the traditional WPIC instruction, the court here used an instruction derived from one accepted by Division I in *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, *review denied* 133 Wn.2d 1014 (1997). The instruction differed from the traditional instructions in its final paragraph:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.
Instruction No. 4, Supp. CP.

This instruction required the jury to find “a real possibility” that Mr. Inman was not guilty in order to acquit. In analyzing the instruction, the *Castle* court was asked to determine whether or not the phrase “real possibility” raised the standard for an acquittal, thus relieving the prosecution of its burden. Division I held that it did not, and has since been joined by Divisions II and III.

In construing an instruction defining reasonable doubt, a reviewing court should consider how reasonable jurors could have understood the instruction as a whole. *Cage v. Louisiana*, 498 U.S. 39 at 41, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990), *citing Francis*

v. Franklin, 471 U.S. 307, 316 (1985). In *Cage*, the U.S. Supreme Court unequivocally stated that reasonable doubt is not “substantial doubt.” 498 U.S. at 40-41. The Court held that the word ‘substantial’ “suggests a higher degree of doubt than is required for acquittal under the reasonable doubt standard.” 498 U.S. at 41.

When viewed from the standpoint of a reasonable juror, the “real possibility” language in this case is equivalent to the “substantial doubt” language rejected by the U.S. Supreme Court in *Cage*. Under the instruction given, the jury was obliged to find the defendant guilty unless the doubt was sufficiently substantial to be considered “real.” The term “real” was not defined for the jury. As a result, there is a grave possibility that the jury erroneously used a “substantial doubt” standard, and convicted Mr. Inman based on a lower standard than is constitutionally permissible under *In re Winship*.

The problem was compounded by inclusion of the following language: “There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.” The *Castle* court was not asked to address the difficulties raised by this sentence. This sentence is problematic for two reasons. First, the instruction creates a likelihood of confusion by injecting the words “possible doubt” into the jury’s deliberations. Defining the phrase “reasonable doubt” is a challenging undertaking. Adding a similar phrase without making any effort to define it or distinguish it does not help to clarify the subject.

Second, instead of defining the state’s burden in an affirmative manner, this portion of the instruction focuses on what the prosecutor need *not* do. The effect of this is to detract from the serious and heavy burden that the state does bear.

These problems render the instruction improper. An error in a reasonable doubt instruction can never be harmless error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Because of this, the conviction must be reversed.

D. Conclusion

This Court should reverse and remand for a new trial.

Dated this 10th day of May 2006.



Thomas W. McAllister, WSB# 35832
Attorney for the Appellant.



on Behalf of Tom Weaver

Thomas E. Weaver, WSBA# 22488
Attorney for the Appellant

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

STATE OF WASHINGTON,)	Case No.: 05-1-00102-5
)	Court of Appeals Cause No.: 33875-1-II
Plaintiff/Respondent,)	
)	AFFIDAVIT OF SERVICE
vs.)	
)	
ROBERT INMAN,)	
)	
Defendant/Appellant.)	
STATE OF WASHINGTON)	
)	
COUNTY OF JEFFERSON)	

THOMAS W. McALLISTER, being first duly sworn on oath, does depose and state:

I am a resident of King County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On May 11, 2006 I hand delivered an original and copy, of the BRIEF OF APPELLANT to the Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

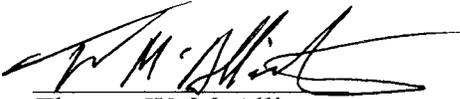
On May 11, 2006, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to the Jefferson County Prosecutor's Office, P.O. Box 1220 Port Townsend, WA 98368-0920.

On May 11, 2006, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to Robert Inman, #279847 at Coyote Ridge Correctional Facility, P.O. Box 769 Connell, WA 99326.

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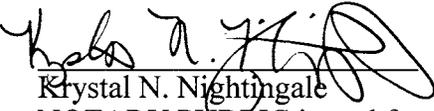
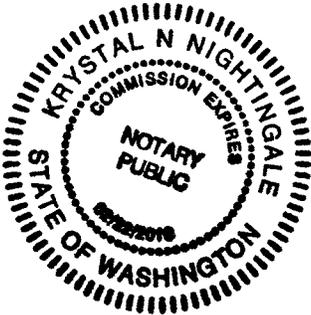
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Dated this 11th day of May, 2006.



Thomas W. McAllister
WSBA # 35832

SUBSCRIBED AND SWORN to before me this 11th day of May, 2006.



Krystal N. Nightingale
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 2/22/10