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

STATE OF WASHINGTON,
Respondent,

v.

BRANDON L. DUGGER,
Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

Brandon L. Dugger files this brief to supplement Appellant's Brief, filed June 5, 2012. In this brief, Mr. Dugger argues the reasonable doubt jury instruction used in his case was erroneous because it omitted from the required instruction the sentence, "The defendant has no burden of proving that a reasonable doubt exists [as to these elements]." The erroneous instruction, which allowed the jury to infer Mr. Dugger was required to provide reasons to acquit, undermined the presumption of innocence, violated Mr. Dugger's due process rights, and requires reversal.

II. SUPPLEMENTAL ASSIGNMENT OF ERROR

A. Supplemental Assignment of Error

1. The superior court erred in giving an incomplete jury instruction on reasonable doubt, omitting the required sentence, "The defendant has no burden of proving that a reasonable doubt exists [as to these elements]."

2. The superior court erred in failing to instruct the jury the defendant had no burden of proving a reasonable doubt.

B. Issue Pertaining to Supplemental Assignment of Error

When the trial court's jury instruction on reasonable doubt followed the pattern instruction except it omitted the sentence, "The defendant has no burden of proving that a reasonable doubt exists [as to these elements]," allowing the jury to infer the defendant was required to establish reasonable doubt to acquit, did the instruction amount to constitutional error that was either structural or not harmless beyond a reasonable doubt, requiring reversal?

III. STATEMENT OF THE CASE

A. Procedural History

Mr. Dugger refers the Court to the procedural history contained in Appellant's Brief.

B. Supplemental Substantive Facts

The trial court gave the following instruction on reasonable doubt:

The defendant has entered a plea of not guilty to each of these charges. Those pleas puts in issue every element of the crimes charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

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. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 20 (Jury Instruction No. 3). This instruction was modified from the pattern instruction to omit the sentence, "The defendant has no burden of proving that a reasonable doubt exists [as to these elements]." See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. 2008) (WPIC 4.01). Plaintiff's Proposed Jury Instructions had included the sentence. CP 52-61 (Proposed Instruction No. 3). Mr. Dugger did not object to this instruction. TRP 281-82.

IV. ARGUMENT

The Trial Court's Erroneous Reasonable Doubt Jury Instruction, Omitting the Sentence Informing the Jury the Defendant Had No Burden to Prove Reasonable Doubt, Was Manifest Constitutional Error Requiring Reversal

A. The Instruction was Manifest Constitutional Error

The trial court violated Mr. Dugger's due process rights and committed manifest constitutional error when it failed to instruct the jury Mr. Dugger had no burden to establish reasonable doubt. The incorrect instruction shifted the burden of proof and undermined the presumption of innocence.

Jury instructions "must define reasonable doubt and clearly communicate that the State carries the burden of proof." State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). "A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole." *Id.* Although Mr. Dugger did not object to the jury instruction in this case, an incorrect instruction as to reasonable doubt is manifest constitutional error that may be heard for the first time on appeal. RAP 2.5(a); State v. Lundy, 162 Wn. App. 865, 870, 256 P.3d 466 (2011) (noting no trial objection and deciding

issue of nonconforming reasonable doubt instruction); see also State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (noting, "RAP 1.2(a) mitigates the stringency of [RAP 2.5(a)], providing that the RAPs are to "be liberally interpreted to promote justice and facilitate the decision of cases on the merits").

First, use of an incomplete WPIC 4.01 reasonable doubt jury instruction is error. Five years ago, our Supreme Court instructed trial courts to use "WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond a reasonable doubt." Bennett, 161 Wn.2d 303, 318. While the Court found the jury instruction at issue in Bennett passed constitutional muster, it exercised its inherent supervisory powers to require trial courts to use WPIC 4.01 until a better instruction is approved. 161 Wn.2d 303, 318.

After Bennett, a reasonable doubt instruction that does not follow WPIC 4.01 is per se erroneous. Lundy, 162 Wn. App. 865, 871 (holding instruction that modified WPIC 4.01 was error after Bennett); see State

v. Castillo, 150 Wn. App. 466, 472, 208 P.3d 1201 (2009) (State conceded nonconforming instruction was erroneous). Thus, the use of the instruction in this case, which omitted a sentence from the instruction mandated by the Supreme Court, was error.

Next, the error was of constitutional magnitude because an insufficient reasonable doubt instruction violates due process clause. U.S. Const. amend. XIV; Wash. Const. Art. I, Sec. 3; see Bennett, 161 Wn.2d 303, 315 (holding Castle instruction, which contained the sentence omitted here, satisfied the federal due process clause);¹ Lundy, 162 Wn. App. 865, 871-72 (applying constitutional harmless error analysis to nonconforming reasonable doubt instruction); see also State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (holding failure to define reasonable doubt and to instruct jurors that the prosecution must prove each

1. The so-called Castle instruction is named for the first Washington case in which it appeared, State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997). Bennett, 161 Wn.2d 303, 306 n.1.

element by this standard is a "grievous constitutional failure").

Further, the error was manifest. A constitutional error is manifest if the appellant can show "practical and identifiable consequences in the trial of the case" or the error was "so obvious on the record that the error warrants appellate review." State v. Gordon, 172 Wn.2d 671, 676, 676 n.2, 260 P.3d 884 (2011). Here, omitting the only sentence of the mandated WPIC 4.01 that explains the defendant does not have the burden of proving reasonable doubt was an obvious error warranting appellate review. Moreover, the error had practical and identifiable consequences in the trial as it left open the issue of how reasonable doubt is established and allowed a rational juror to infer that the State proves the elements and the defendant proves the reasonable doubt.

B. The Erroneous Reasonable Doubt Instruction Created Structural Error Because it Shifted the Burden of Proving Doubt to Mr. Dugger, Undermining the Presumption of Innocence

The omission of the sentence explaining Mr. Dugger was not required to prove reasonable doubt

fundamentally altered the meaning of WPIC 4.01, undermining the presumption of innocence and creating structural error. While minor changes to WPIC 4.01 may pass constitutional muster, the Court intended trial courts to use WPIC 4.01 verbatim, given the fundamental right at stake:

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.

Bennett, 161 Wn.2d 303, 318. Indeed, the Court approved WPIC 4.01 as a whole and in its entirety, cautioning trial courts against making *any* changes that would shift, however *slightly*, the emphasis of the instruction:

We recognize that the concept of reasonable doubt seems at times difficult to define and explain. We understand the temptation to expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction.

Bennett, 161 Wn.2d 303, 317.

Since Bennett, Washington courts have upheld jury instructions that deviated from WPIC 4.01, but no instruction lacking the sentence omitted in this case appears to have been approved. Bennett, 161 Wn.2d 303, 309 (Castle instruction the Court deemed constitutional contained the sentence omitted in this case, "The defendant has no burden of proving that a reasonable doubt exists."); Lundy, 162 Wn. App. 865, 871 (modified WPIC 4.01 instruction deemed constitutionally harmless included sentence, "The defendant has no burden of proving that a reasonable doubt exists."); see also State v. Dykstra, 127 Wn. App. 1, 10, 110 P.3d 758 (2005) (pre-Bennett case upholding Castle instruction because the instruction stated, *inter alia*, "the defendant has no burden to prove that a reasonable doubt exists"); but see Castillo, 150 Wn. App. 466, 473 (jury instruction omitting this sentence was deemed to "fall[] short of the full statement of the correct standard").

Under these circumstances, the error in this case is an error of a different magnitude than the one occurring in Lundy and Bennett. Omission of the sentence explaining the defendant is not responsible for establishing reasonable doubt shifted the emphasis of the instruction significantly, tipping the balance in favor of the State and undermining the presumption of innocence. The remainder of the instruction left the jury with the inference that while the State proves the elements, the defendant must establish enough doubt to acquit. But establishing reasonable doubt is not the defendant's burden. WPIC 4.01 ("The defendant has no burden of proving that a reasonable doubt exists [as to these elements]"); State v. Emery, ___ P.3d ___, 2012 WL 2146783, *8, No. 86033-5, (June 14, 2012) ("the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden"); State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (defendants are "entitled to the benefit of a reasonable doubt").

Yet, in this case, the jury was authorized to look to Mr. Dugger for reasons to acquit. While the instruction in this case told the jury the State had to prove each element beyond a reasonable doubt, it gave the jury the incorrect impression Mr. Dugger had to establish reasonable doubt. Thus, the verdict may have been based on some jurors' belief that Mr. Dugger failed to establish sufficient doubt to acquit. This possibility is a due process violation.

Indeed, the faulty reasonable doubt instruction in this case undermined the presumption of innocence as it allowed reasonable doubt to be perceived as Mr. Dugger's burden:

The presumption of innocence is the bedrock upon which the criminal justice system stands. The reasonable doubt instruction defines the presumption of innocence. The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.

Bennet, 161 Wn.2d 303, 315-16. Under these circumstances, given the significance of the omitted sentence, use of the instruction amounted to structural

error requiring automatic reversal. Cf. Lundy, 162 Wn. App. 865, 872 (declining to hold use of the rearranged WPIC 4.01 was structural error) and Castillo, 150 Wn. App. 466, 472 (holding automatic reversal required when instruction other than WPIC 4.01 used).

Structural errors are "error so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome" of the trial. Neder v. United States, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). "An error is structural when it 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" State v. Momah, 167 Wn.2d 140, 149, 217 P.3d 321 (2009), quoting Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Structural errors occur only in a very limited class of cases. Neder, 527 U.S. at 8. Nevertheless, a reasonable doubt jury instruction that could have been interpreted to lower the State's burden of proof has been held to be structural error. Sullivan

v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

The reasonable doubt jury instruction in this case, lacking the sentence explaining the defendant did not need to prove reasonable doubt, was structural error because it allowed the inference that reasonable doubt was Mr. Dugger's burden and, thus, undermined the presumption of innocence. Accordingly, this Court should reverse Mr. Dugger's conviction for structural error.

C. If Not Structural, the Error Was Nevertheless Not Harmless Beyond a Reasonable Doubt

If the Court holds the error was not structural, Mr. Dugger's conviction should be reversed because the error was not harmless beyond a reasonable doubt. Lundy, 162 Wn. App. at 871 (applying constitutional harmless error analysis to nonconforming reasonable doubt jury instruction); *but see* Castillo, 150 Wn. App. 466, 472 (Division 1 requires no finding of harm to reverse conviction when nonconforming reasonable doubt instruction used). "Constitutional error is presumed to be prejudicial and the State bears the burden of

proving that the error was harmless.” State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Under this standard, vacation of the conviction is required “unless it necessarily appears, beyond a reasonable doubt,” that the error “did not affect the verdict.” State v. Monday, 171 Wn.2d 667, 680, 297 P.3d 551 (2011). An error is harmless beyond a reasonable doubt if the evidence is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wn.2d 412, 425. In this case, the nature of the error prevents the State from meeting its burden of establishing harmlessness beyond a reasonable doubt and the evidence was not so overwhelming in this case to overcome the presumption of prejudice.

First, the error in this case was such a fundamental error that it cannot be shown harmless beyond a reasonable doubt. See, e.g., Monday, 171 Wn.2d 667, 680 n.4, 681 (when prosecutor appealed to racial bias in questioning and argument, Court did not consider strength of State’s case in finding error not harmless beyond reasonable doubt). As explained above,

omission of the sentence which explained the defendant need not prove reasonable doubt shifted the burden of proof, allowing a reasonable juror to infer Mr. Dugger bore the burden of establishing enough doubt to acquit. Under these circumstances, the instruction created the possibility that the verdict was based on the jury's incorrect belief that it was Mr. Dugger's burden to establish doubt. This possibility cannot be disproved or shown harmless beyond a reasonable doubt.

In addition, the evidence against Mr. Dugger was not so strong as to show that he would have been convicted without the erroneous instruction. The central question in the case was whether the sexual intercourse was forced. The determination of whether force was used essentially came down to a credibility contest between the victim and Mr. Dugger. Under these circumstances, the evidence Mr. Dugger used force was not so strong that the erroneous reasonable doubt jury instruction was harmless beyond a reasonable doubt.

For all these reasons, the error was either structural or not harmless beyond a reasonable doubt and this Court should reverse Mr. Dugger's conviction.

V. CONCLUSION

For all of these reasons, Brandon L. Dugger respectfully requests this Court to reverse his conviction.

Dated this 28th day of June 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 28th day of June, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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