

FILED
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Court of Appeals
Division III
State of Washington

No. 33108-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ANITA VIRGINIA WHISLER,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable Evan E. Sperline, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

The court erred by giving a constitutionally defective reasonable doubt instruction. CP 40, Instruction No. 2.

Issues Pertaining to Assignments of Error

1. A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with “an abiding belief in the truth of the charge,” did the court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Ms. Whisler’s right to a jury trial?

2. A juror with reasonable doubt must acquit, even if unable to articulate a reason for the doubt. By defining a “reasonable doubt” as a doubt “for which a reason exists,” did the court undermine the presumption of innocence and impermissibly shift the burden of proof by telling jurors they must be able to articulate a reason to have a reasonable doubt?

3. Does erroneously instructing a jury regarding the meaning of reasonable doubt vitiate the jury-trial right, constituting structural error?

B. STATEMENT OF THE CASE

Police made a traffic stop for suspected driving while intoxicated. RP¹ 120–24. The officer was five feet ten inches tall and weighed 250 pounds. RP 168. 52-year-old Anita Whisler was the passenger. RP 127, 205. While the officer was tending to the driver outside, Ms. Whisler told him she was experiencing a nosebleed. RP 129, 154, 174, 214.

Ms. Whisler weighed 98 pounds, was on social security disability, had been diagnosed with a rare mood disorder cyclothymia, and post-traumatic stress and acute chronic anxiety disorders, and was taking medications to control mania and for depression and anxiety . RP 205–06, 226, 247. Having a family history of frequent nosebleeds, she'd learned for her the issue was best resolved by allowing a blood clot to form then blowing the clot out through her nose and disposing of the material. RP 211–13, 216–19, 237–38. She'd forgotten to bring her purse. RP 211. Ms. Whisler called out to the officer several times seeking a tissue or handkerchief. RP 129, 214–17, 222–23.

¹ The two-day jury trial, which took place January 22–23, 2015 and is transcribed in two volumes with consecutively numbered pages, will be cited to as “RP ____.” The sentencing proceeding will be cited using its date, i.e. “2/14/15 RP ____.”

Ms. Whisler blew the clot into her hand to avoid choking. RP 218, 237–38. Eventually she and the officer were located several feet apart. RP 138. From there the recollections diverged. The officer described Ms. Whisler making a threat to wipe blood on him and raising her bloodied hand within six inches of his face before he grabbed and restrained her arm. RP 137–38, 169. Ms. Whisler remembered being grabbed by her arm as she began standing from a kneeling position where she’d tried to rub and disperse the unsanitary blood clot into the ground. RP 218–20.

The Grant County Prosecutor charged Ms. Whisler with third degree assault (law enforcement officer) and obstructing a law enforcement officer. CP 1–2. Upon defense counsel’s motion the court dismissed the obstruction charge after the state’s case-in-chief. CP 55; RP 189–91, 193–96.

The court instructed the jury that a reasonable doubt was one “for which a reason exists.” CP 40, Instruction No. 2 at paragraph four. The instruction defined satisfaction beyond a reasonable doubt as an abiding belief “in the truth of the charge.” *Id.*

The jury found Ms. Whisler guilty of third degree assault. CP 50. The court imposed a first time offender sentence of ten (10) days (the

standard range is one to three months) and declined the prosecutor's request to impose community supervision. CP 52, 54, 56–57; 2/2/15 RP 3–5, 7–9.

Ms. Whisler appeals. CP 71–72.

C. ARGUMENT

The court's "reasonable doubt" instruction infringed Ms. Whisler's constitutional right to due process.

1. The instruction improperly focused the jury on a search for "the truth."

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Here, the trial court instructed the jury that proof beyond a reasonable doubt means having an abiding belief "*in the truth of the charge.*" CP 40, Instruction No. 2 (emphasis added). Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear

reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 40.²

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a “belief in the truth of the charge,” the court confused the critical role of the jury.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. Jurors were obligated to follow the instruction. CP 38, Instruction No. 1 at paragraph 2.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303,

² Ms. Whisler does not challenge the phrase “abiding belief.” Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. See *Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708(1887); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995)). Rather, Ms. Whisler objects to the instruction’s focus on “the truth.” CP 40.

315–16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.³ *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281–82. By equating that standard with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Ms. Whisler her constitutional right to a jury trial. U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 3, 21, 22.

2. WPIC 4.01’s language improperly adds an articulation requirement, requiring reversal.

a. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 3; *Sullivan*, 508 U.S. 275; *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *Bennett*, 161 Wn.2d at 307 (citing *Victor v. Nebraska*, 511 U.S. 1, 5–6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)).

³ Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the “truth” language in that instruction. *Bennett*, 161 Wn.2d at 315–16.

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. amends. VI, XIV; *Sullivan*, 508 U.S. at 278–81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty “vitiates *all* the jury’s findings.” *Sullivan*, 508 U.S. at 279–81.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *Emery*, 174 Wn.2d at 759–60 (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a reason for their doubt is “inappropriate” because it “subtly shifts the burden to the defense.” *Id.*⁴

Requiring articulation “skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit” *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997), on reh’g en banc, 138 F.3d 552 (5th Cir.

⁴ See also *State v. Walker*, 164 Wn. App. 724, 731–32, 265 P.3d 191 (2011), as amended (Nov. 18, 2011), review granted, cause remanded, 175 Wn.2d 1022, 295 P.3d 728 (2012); *State v. Johnson*, 158 Wn. App. 677, 684–86, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011).

1998).⁵ An instruction imposing an articulation requirement “creates a lower standard of proof than due process requires.” *Id.*, at 534.⁶

- b. The trial court erroneously told jurors to convict unless they had a doubt “for which a reason exists.”

Ms. Whisler’s jury was instructed, “A reasonable doubt is one for which a reason exists” CP 40, Instruction No. 2; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01, at 85 (3d Ed 2008) (“WPIC”). This suggested to the jury that it could not acquit unless it could find a doubt “for which a reason exists.” This instruction—based on WPIC 4.01—imposes an articulation requirement that violates the constitution.

A “reasonable doubt” is not the same as a reason to doubt. “Reasonable” means “being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous . . . being or remaining within the bounds of reason . . . Rational.” *Webster’s Third New Int’l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. Accord *Jackson v. Virginia*, 443

⁵ The Fifth Circuit decided *Humphrey* before enactment of the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Subsequent cases applied the AEDPA’s strict procedural limitations to avoid the issue. See, e.g., *Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000).

⁶ In *Humphrey*, the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as “a serious doubt, for which you can give a good reason.” *Humphrey*, 120 F.3d at 530.

U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum is one based upon ‘reason’”); *Johnson v. Louisiana*, 406 U.S. 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’” (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2nd Cir 1965))).

The article “a” before the noun “reason” in Instruction No. 2 inappropriately alters and augments the definition of reasonable doubt. “[A] reason” is “an expression or statement offered as an explanation of a belief or assertion or as a justification.” *Webster’s Third New Int’l Dictionary*. The phrase “a reason” indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

Thus, this language requires more than just a reasonable doubt to acquit. *Cf. In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.”). Jurors applying Instruction No. 2 could have a reasonable doubt

but also have difficulty articulating or explaining why their doubt is reasonable.⁷ For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 2 if jurors could not put their doubts into words.

As a matter of law, the jury is “firmly presumed” to have followed the court’s reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474–75, 285 P.3d 873 (2012). The instruction here left jurors with no choice but to convict unless they had a reason for their doubts. This meant Ms. Whisler could not be acquitted, even if jurors had a reasonable doubt.

The instruction “subtly shift[ed] the burden to the defense.” *Emery*, 174 Wn.2d at 759–60. It also “create[d] a lower standard of proof than due process requires” *Humphrey*, 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court’s instruction violated Ms. Whisler’s right to due process and her right to a jury trial. *Id.*; *Sullivan*, 508 U.S. at 278–81; *Bennett*, 161 Wn.2d at 307. Failing to

⁷ See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1213–14 (2003).

properly instruct jurors regarding reasonable doubt “undoubtedly qualifies as ‘structural error.’” *Sullivan*, 508 U.S. at 281–82. Accordingly, Ms. Whisler’s conviction must be reversed and the case remanded for a new trial with proper instructions. *Sullivan, Id.* at 278–82.

D. CONCLUSION

For the reasons stated, the court’s reasonable doubt instruction violated Ms. Whisler’s rights to due process and to a jury trial by easing the state’s burden of proof and undermining the presumption of innocence. The conviction must be reversed.

Respectfully submitted on October 25, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 25, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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