

FILED
Jan 29, 2016
Court of Appeals
Division III
State of Washington

NO. 33875-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

MARK COCKRUM,

Appellant.

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

The Honorable Scott Sparks, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
<u>THE JURY INSTRUCTION ON REASONABLE DOUBT</u> <u>IS UNCONSTITUTIONAL</u>	2
a. <u>WPIC 4.01's articulation requirement misstates</u> <u>the reasonable doubt standard, shifts the burden of</u> <u>proof, and undermines the presumption of innocence</u>	3
b. <u>No appellate court in recent times has directly</u> <u>grappled with the challenged language.</u>	13
c. <u>WPIC 4.01 rests on an outdated view of reasonable</u> <u>doubt that equated a doubt for which there is a reason</u> <u>with a doubt for which a reason can be given.</u>	15
d. <u>This manifest constitutional issue is properly before</u> <u>this Court.</u>	21
D. <u>CONCLUSION</u>	23

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Anfinson v. FedEx Ground Package System, Inc.</u> 174 Wn.2d 851, 281 P.3d 289 (2012)	5
<u>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1</u> 124 Wn.2d 816, 881 P.2d 986 (1994)	14
<u>In re Electric Lightwave, Inc.</u> 123 Wn.2d 530, 869 P.2d 1045 (1994)	15
<u>Kucera v. State</u> 140 Wn.2d 200, 995 P.2d 63 (2000)	15
<u>State v. Anderson</u> 153 Wn. App. 417, 220 P.3d 1273 (2009)	10
<u>State v. Anderson</u> 153 Wn. App. 417, 220 P.3d 1273 (2009) <u>review denied</u> , 170 Wn.2d 1002, 245 P.3d 226 (2010).....	9, 10
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007)	8, 13, 14
<u>State v. Borsheim</u> 140 Wn. App. 357, 165 P.3d 417 (2007)	11
<u>State v. Dana</u> 73 Wn.2d 533, 439 P.2d 403 (1968).	3, 12
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012)	9, 13, 14, 18, 20
<u>State v. Harras</u> 25 Wn. 416, 65 P. 774 (1901)	17, 18, 20
<u>State v. Harsted</u> 66 Wn. 158, 119 P. 24 (1911)	18, 19, 20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Johnson</u> 158 Wn. App. 677, 243 P.3d 936 (2010)	9, 10
<u>State v. Kalebaugh</u> 183 Wn.2d 578, 355 P.3d 253 (2015).	12, 13, 14, 18, 20
<u>State v. LeFaber</u> 128 Wn.2d 896, 913 P.2d 369 (1996)	4, 11
<u>State v. Lizarraga</u> _ Wn. App. _, _ P.3d _, 2015 WL 8112963 (filed 12/7/15)	22
<u>State v. Nabors</u> 8 Wn. App. 199, 505 P.2d 162 (1973)	16
<u>State v. Noel</u> 51 Wn. App. 436, 753 P.2d 1017 (1988).....	4
<u>State v. O'Hara</u> 167 Wn.2d 91, 217 P.3d 756 (2009)	4
<u>State v. Paumier</u> 176 Wn.2d 29, 288 P.3d 1126 (2012)	21
<u>State v. Pirtle</u> 127 Wn.2d 628, 904 P.2d 245 (1995).	22
<u>State v. Simon</u> 64 Wn. App. 948, 831 P.2d 139 (1991) <u>rev. in part on other grounds</u> , 120 Wn.2d 196, 840 P.2d 172 (1992) .	4
<u>State v. Smith</u> 174 Wn. App. 359, 298 P.3d 785 <u>review denied</u> , 178 Wn.2d 1008, 308 P.3d 643 (2013)	4
<u>State v. Tanzymore</u> 54 Wn.2d 290, 340 P.2d 178 (1959)	16

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Thompson</u> 13 Wn. App. 1, 533 P.2d 395 (1975)	15, 16, 17, 18
<u>State v. Venegas</u> 155 Wn. App. 507, 228 P.3d 813 (2010) <u>review denied</u> , 170 Wn.2d 1003, 245 P.3d 226 (2010).....	9
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	9
<u>State v. Watkins</u> 136 Wn. App. 240, 148 P.3d 1112 (2006)	11
 <u>FEDERAL CASES</u>	
<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	6, 8
<u>Jackson v. Virginia</u> 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)	5
<u>Johnson v. Louisiana</u> 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)	5, 6
<u>Sandstrom v. Montana</u> 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)	5
<u>Sullivan v. Louisiana</u> 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)	21
 <u>OTHER JURISDICTIONS</u>	
<u>Burt v. State</u> (Miss.) 48 Am. St. Rep. 574 (s. c. 16 South. 342)	17
<u>Butler v. State</u> 102 Wis. 364, 78 N.W. 590 (Wis. 1899)	19

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Hodge v. State</u> 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145 (Ala. 1893)	19
<u>People v. Guidici</u> 100 N. Y. 503, 3 N. E. 493 (N.Y. 1885)	19
<u>Siberry v. State</u> 33 N.E. 681 (Ind. 1893)	13
<u>State v. Cohen</u> 78 N.W. 857 (Iowa 1899)	13
<u>State v. Jefferson</u> 43 La. Ann. 995, 10 So. 199 (La. 1891)	17, 19
<u>State v. Morey</u> 25 Or. 241, 36 P. 573 (Or. 1894)	18
<u>State v. Patton</u> 66 Kan. 486, 71 Pac. 840 (Kan. 1903)	19
<u>State v. Serenson</u> 7 S. D. 277, 64 N. W. 130 (S.D. 1895)	19
<u>Vann v. State</u> 9 S.E. 945 (Ga. 1889)	18, 19

RULES, STATUTES AND OTHER AUTHORITIES

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. 2008)	<i>Passim</i>
Steve Sheppard, <u>The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence</u> , 78 Notre Dame L. Rev. 1165 (2003)	8
RAP 2.5	21
U.S. Const. amend. VI	3

TABLE OF AUTHORITIES (CONT'D)

	Page
U.S. Const. amend. XIV	3
Const. art. I, § 3	3
Const. art. I, § 22.....	3
Webster's Third New Int'l Dictionary 1892 (1993).....	5, 6

A. ASSIGNMENT OF ERROR

The trial court erred when it used a flawed reasonable doubt instruction in violation of due process and the right to trial by jury.

Issue Pertaining to Assignment of Error

Whether the reasonable doubt instruction, in stating “a reasonable doubt is one for which a reason exists,” misdescribes the burden of proof, undermines the presumption of innocence, and improperly creates a burden on the defendant to provide a reason for why reasonable doubt exists?

B. STATEMENT OF THE CASE

The Kittitas County Prosecutor’s Office charged Mark Cockrum with two counts of delivering a controlled substance and one count of possessing a controlled substance. All three charges involved methamphetamine. CP 6-7. The case proceeded to trial, where the jury was given the following instruction:

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 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 you find during your deliberations that 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, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 16 (emphasis added); see also RP 396-397 (instruction read to jury); RP 432 (prosecutor relies on language when urging jurors to convict).

The jury convicted Cockrum as charged, and the court imposed a standard range sentence totaling 30 months. CP 33-35, 44. The court subsequently reduced that sentence to 16 months based on a corrected offender score. CP 64. Cockrum timely filed his Notice of Appeal. CP 60.

C. ARGUMENT

THE JURY INSTRUCTION ON REASONABLE DOUBT IS UNCONSTITUTIONAL.

Cockrum's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 16. This instruction, based on WPIC 4.01,¹ is constitutionally defective for two related reasons.

¹ 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008).

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions.

Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same thing.

For these reasons, WPIC 4.01 violates due process and the right to jury trial. U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 3, 22. Use of this instruction in Cockrum's case is structural error requiring reversal of his convictions.

- a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence.

In order for jury instructions to be sufficient, they must be "readily understood and not misleading to the ordinary mind." State v.

Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev. in part on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). So in examining how an average juror would interpret an instruction, appellate courts rely on the ordinary meaning of words and rules of grammar in reaching a conclusion.²

With these principles in mind, the flaw in WPIC 4.01 reveals itself with little difficulty. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a "not guilty" verdict. Examination of the meaning of the words "reasonable" and "a reason" shows this to be true.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See

² See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, resulting in court's determination that jury could have applied the erroneous standard), overruled on other grounds, State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying upon grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785, (discussing difference between use of "should" rather than use of a word indicating "must" regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition to ascertain the jury's likely understanding of a word used in jury instruction); Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (in finding jury instruction on a presumption to be infirm, looking to dictionary definition of the word "presume" to determine how jury may have interpreted the instruction).

"Reasonable" is defined as "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 . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . ." Webster's Third New Int'l Dictionary 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 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. 356, 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 (2d Cir. 1965)).

An instruction that defines reasonable doubt as "a doubt based on reason" would be proper. But WPIC 4.01 does not do that. WPIC 4.01 requires "a reason" for the doubt, which is different from a doubt based on reason.

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01 means "an expression or statement offered as an explanation of a belief or assertion or as a justification." Webster's Third New Int'l Dictionary at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification to oneself or to other jurors. In other words, WPIC 4.01 requires more than just a doubt based on reason; it requires a doubt that is articulable.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Washington's pattern instruction on reasonable doubt is unconstitutional because its language requires more than just a reasonable doubt to acquit. Instead, the instruction requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have a reasonable doubt but also have difficulty articulating why their doubt is reasonable to themselves or others. Scholarship on the reasonable doubt standard explains the problem with requiring jurors to articulate their doubt:

An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.

One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.

A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a

doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.³

In these scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, which shifts the burden and undermines the presumption of innocence.

The standard of proof beyond a reasonable doubt enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Winship, 397 U.S. at 363. The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." State v. Bennett, 161 Wn.2d 303, 316, 165 P.3d 1241 (2007). The doubt "for which a reason exists" language in

³ 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) (footnotes omitted).

WPIC 4.01 does that in directing jurors to have a reason to acquit rather than a doubt based on reason.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. This fill-in-the-blank argument “improperly implies that the jury must be able to articulate its reasonable doubt” and “subtly shifts the burden to the defense.” State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). These arguments are improper “because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence.” Id. at 759. The Court of Appeals has repeatedly rejected such arguments as prosecutorial misconduct because they misstate the law on reasonable doubt.⁴ Simply put, “a jury need do nothing to find a defendant not guilty.” Id.

⁴ See, e.g., State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding improper prosecutor’s PowerPoint slide that read, “If you were to find the defendant not guilty, you have to say: ‘I had a reasonable doubt[.]’ What was the reason for your doubt? ‘My reason was _____.”); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 936 (2010) (holding improper argument when prosecutor told jurors that they have to say, “I doubt the defendant is guilty and my reason is I believed his testimony that . . . he didn’t know that the cocaine was in there, and he didn’t know what cocaine was” and that “[t]o be able to find reason to doubt, you have to fill in the blank, that’s your job”(quoting reports of proceedings)); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (prosecutor committed misconduct in stating “In order to find the defendant not guilty, you have to say to yourselves: ‘I doubt the defendant is guilty, and my reason is’ — blank”), review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (finding improper prosecutor’s statement that “in

The improper fill-in-the-blank arguments were not the mere product of invented malfeasance. The offensive arguments did not originate in a vacuum – they sprang directly from WPIC 4.01’s language. In State v. Anderson, for example, the prosecutor explicitly recited WPIC 4.01 before making the fill-in-the-blank argument: “A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank.” 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). The same occurred in State v. Johnson, where the prosecutor told jurors “What [WPIC 4.01] says is ‘a doubt for which a reason exists.’ In order to find the defendant not guilty, you have to say, ‘I doubt the defendant is guilty and my reason is’ To be able to find a reason to doubt, you have to fill in the blank; that’s your job.” 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

These misconduct cases make clear that WPIC 4.01 is the true culprit for the impermissible fill-in-the-blank arguments. Its doubt “for which a reason exists” language provides a natural and seemingly irresistible basis to argue that jurors must give a reason

order to find the defendant not guilty, you have to say ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank”), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010).

why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same pitfall?

Jury instructions “must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.” State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). Instructions must be “manifestly clear” because an ambiguous instruction that permits an erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity, that is not the correct standard for measuring the adequacy of jury instructions. Courts have an arsenal of interpretive tools at their disposal; jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01’s infirm language affirmatively

misdirects the average juror into believing a reasonable doubt cannot exist until a reason for it can be articulated. Instructions must not be “misleading to the ordinary mind.” State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, supports this conclusion.

In State v. Kalebaugh, the supreme court held a trial court’s preliminary instruction that a reasonable doubt is “a doubt for which a reason can be given” was erroneous because “the law does not require that a reason be given for a juror’s doubt.” 183 Wn.2d 578, 585, 355 P.3d 253 (2015). That conclusion is sound:

Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction, “a reasonable doubt is such a doubt as the jury are able to give a reason for”).

- b. No appellate court in recent times has directly grappled with the challenged language.

In Bennett, the supreme court directed trial courts to give WPIC 4.01 at least “until a better instruction is approved.” State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). In Emery, the court contrasted the “proper description” of reasonable doubt as a “doubt for which a reason exists” with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. 174 Wn.2d at 759. In Kalebaugh, the court contrasted “the correct jury instruction that a ‘reasonable doubt’ is a doubt for which a reason exists” with an improper instruction that “a reasonable doubt is ‘a doubt for which a reason can be given.’” 183 Wn.2d at 584. The court concluded that the trial court’s erroneous instruction – “a doubt for which a reason can be given” – was harmless, accepting Kalebaugh’s concession at oral argument “that the judge’s remark ‘could live quite comfortably’ with the final instructions given here.” Id. at 585.

The Kalebaugh Court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors likewise are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their reasonable doubt. WPIC 4.01 requires jurors to articulate to themselves or others a reason for having a reasonable doubt. No Washington court has ever explained how this is not so. Kalebaugh did not provide an answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case.

None of the appellants in Kalebaugh, Emery, or Bennett argued that the language requiring "a reason" in WPIC 4.01 misstates the reasonable doubt standard. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control. Cases that fail to specifically raise or decide an

issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

- c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which there is a reason with a doubt for which a reason can be given.

Forty years ago, the Court of Appeals addressed an argument that “[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists’ (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.” State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instructions). Thompson brushed aside the articulation argument in one sentence, stating “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.” Id. at 5.

That cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason

for their doubt and no further “context” erases the taint of this articulation requirement. The Thompson court did not explain what “context” saved the language from constitutional infirmity. Its suggestion that the language “merely points out that [jurors] doubts must be based on reason” fails to account for the obvious difference in meaning between a doubt based on “reason” and a doubt based on “a reason.” Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing “this instruction has its detractors,” but noted it was “constrained to uphold it” based on State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5. In holding the trial court did not err in refusing the defendant’s proposed instruction on reasonable doubt, Tanzymore simply stated the standard instruction “has been accepted as a correct statement of the law for so many years” that the defendant’s argument to the contrary was without merit. 54 Wn.2d at 291.⁵ Nabors cites Tanzymore as its support. 8 Wn. App.

⁵ The “standard” instruction at issue in Tanzymore read: “You are instructed that the law presumes a defendant to be innocent until proven guilty beyond a reasonable doubt. This presumption is not a mere matter of form, but it is a substantial part of the law of the land, and it continues throughout the entire trial and until you have found that this presumption has been overcome by the

at 202. Neither case specifically addresses the doubt “for which a reason exists” language in the instruction. There was no challenge to that language in either case, so it was not an issue.

Thompson observed “[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years,” citing State v. Harras, 25 Wn. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following instructional language: “It should be a doubt for which a good reason exists.” 25 Wn. at 421. Harras simply maintained the “great weight of authority” supported it, citing the note to Burt v. State (Miss.) 48 Am. St. Rep. 574 (s. c. 16 South. 342). Id. This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.⁶

evidence beyond a reasonable doubt.

‘The jury is further instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists. You are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely vague, imaginary, or conjectural. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced at the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.’” Tanzymore, 54 Wn.2d at 291 n.1.

⁶ See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 199 (La. 1891) (“A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good

So Harras viewed its “a doubt for which a good reason exists” instruction as equivalent to those instructions requiring a reason be given for the doubt. And then Thompson upheld the doubt “for which a reason exists” instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01’s doubt “for which a reason exists” language means a doubt for which a reason can be given. That is a problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Emery, 174 Wn.2d at 759-60; Kalebaugh, 183 Wn.2d at 584-585.

State v. Harsted, 66 Wn. 158, 119 P. 24 (1911) further illuminates the dilemma. Harsted took exception to the following instruction: “The expression ‘reasonable doubt’ means in law just what the words imply -- a doubt founded upon some good reason.” Id. at 162. The Supreme Court explained the phrase “reasonable doubt” means:

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, 255-59, 36 P. 573 (Or. 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.”).

[I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. 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 can be given.

Id. at 162-63. In support of its holding that there was nothing wrong with the challenged language, Harsted cited a number of out-of-state cases upholding instructions that defined a reasonable doubt as a doubt for which a reason can be given. Id. at 164. As stated in one of these decisions, “[a] doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given.” Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (Wis. 1899).⁷ Harsted

⁷ Additional citations include the following: State v. Patton, 66 Kan. 486, 71 Pac. 840, 840-42 (Kan. 1903) (instruction defining a reasonable doubt as such a doubt “as a jury are able to give a reason for”); Hodge v. State, 97 Ala. 37, 41, 12 South. 164, 38 Am. St. Rep. 145 (Ala. 1893) (“a reasonable doubt is defined to be a doubt for which a reason could be given.”); State v. Serenson, 7 S. D. 277, 64 N. W. 130, 132 (S.D. 1895) (“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 the jury are able to give a reason for.”); Vann, 9 S.E. at 947-48 (“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.”); People v. Guidici, 100 N. Y. 503, 510, 3 N. E. 493 (N.Y. 1885) (“You must understand what a reasonable doubt is. It is not a mere guess or surmise that the man may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence—a doubt for which some good reason arising from the evidence can be given.”); Jefferson, 43 La. Ann. at 998-99 (“A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for.”).

noted some courts disapproved of the same kind of language, but was “impressed” with the view adopted by the other cases it cited and felt “constrained” to uphold the instruction. 66 Wn. at 165.

Here we confront the genesis of the problem. Over 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation demolishes the argument that there is a real difference between a doubt “for which a reason exists” in WPIC 4.01 and being able to give a reason for why doubt exists. The supreme court found no such distinction in Harsted and Harras.

The mischief has continued unabated ever since. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. This is apparent because the supreme court in Emery and Kalebaugh, and numerous Court of Appeals decisions in recent years, condemn any suggestion that jurors must give a reason for why there is reasonable doubt. Old decisions like Harras and Harsted cannot be reconciled with Emery and Kalebaugh. The law has evolved. What seemed acceptable 100 years ago is now forbidden. But WPIC 4.01 has not evolved. It is stuck in the misbegotten past.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require a reason for why reasonable doubt exists. That requirement distorts the reasonable doubt standard to the accused's detriment.

- d. This manifest constitutional issue is properly before this Court.

Although defense counsel did not object below to the instruction on reasonable doubt, RP 376, the issue may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as manifest constitutional errors under RAP 2.5(a)(3). See State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012) (structural error is manifest constitutional error).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee.

Sullivan, 508 U.S. at 279-80. Indeed, where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

WPIC 4.01's language requires more than just a reasonable doubt to acquit criminal defendants; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence and shifts the burden of proof. Instructing jurors with WPIC 4.01 is both structural and manifest constitutional error.

Recently, in State v. Lizarraga, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 8112963 (filed 12/7/15), Division One of this Court upheld WPIC 4.01 against a challenge that it undermined the presumption of innocence and burden of proof. In doing so, this Court merely cited Bennett and State v. Pirtle, 127 Wn.2d 628, 656-658, 904 P.2d 245 (1995). Lizarraga, at *20. As discussed above, however, Bennett does not dispose of these arguments. Nor does Pirtle, which merely dealt with a challenge to the last sentence of WPIC 4.01, which provided that, if jurors did not have an "abiding belief" in the truth of the charge, they were not satisfied beyond a reasonable doubt. Pirtle, 127 Wn.2d at 656-658.

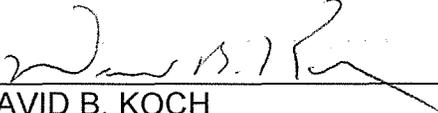
D. CONCLUSION

Instructing jurors with WPIC 4.01 is structural error and requires reversal of Cockrum's convictions and remand for a new trial.

DATED this 29th day of January, 2016.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. NELSON
JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT
OF COUNSEL
K. CAROLYN RAMAMURTI

State v. Mark Cockrum,

No. 33875-4-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 29th day of January, 2016, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Greg Zempel
Kittitas County Prosecutor's Office
prosecutor@co.Kittitas.wa.us
greg.zempel@co.kittitas.wa.us

Mark Cockrum
DOC No. 386292
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

Signed in Seattle, Washington this 29th day of January, 2016.

X  _____