FILED
Apr 20, 2016
Court of Appeals
Division III
State of Washington

No. 33875-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MARK COCKRUM,

Defendant/Appellant

Brief of Respondent

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RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

The trial court did not err by using WPIC 4.01 as an instruction on reasonable doubt.

I. STATEMENT OF FACT

On May 18, 2015, Detectives Caillier and Bean went to see Steven King in the Kittitas County jail, where he was arrested for some criminal traffic violations. (RP September 14—hereafter RP I, p. 50) They asked him if he would make some drug buys for them, and they promised to speak to the city prosecutor to have his DWLS and ignition interlock charges dropped. (RP I, 52) Mr. King said he could buy drugs from Mark Cockrum. (RP I, 53) After everyone agreed, the detectives came back to the jail to get Mr. King on May 20. (RP I, 55) He was released from the jail, he was strip searched there at the jail, and he was issued some money to buy drugs. (RP I, 55-57) The police drove him straight from the jail to the area of Mr. Cockrum's house. (RP I, 57) They, or another unit, watched him go to Mr. Cockrum's house. (RP I, 62, 131) After a while, he came back and got into their car and provided a substance that turned out to be methamphetamine. (RP I, 62-66, 137) Mr. King testified that he bought the drugs from Mr. Cockrum. (RP II, September 16—hereafter RP II, 175)

After that, Mr. King told the officers he could buy more if they wanted. (RP I, 66) The officers decided to do another buy. They issued more

money and took him back to Mr. Cockrum's house. (RP I, 66-68) Once again, law enforcement watched while Mr. King walked to Mr. Cockrum's house. (RP I, 68-69, RP II 177-179) This time, Mr. King's girlfriend drove by as Mr. King was leaving Mr. Cockrum's house and heading for the police. (RP I, 71) She testified that she knew Mr. King was going to be getting out of jail on his District Court charges, and she wondered why he didn't call her. She decided to go see if he had gone over to get high at Mr. Cockrum's house. (RP II, 212) She did not realize she was finding him in the middle of a controlled buy, and had no idea the police were watching. (RP II, 213-216) Mr. King had the drugs in his hand and was trying to get her to leave, while she was driving next to him, yelling at him for not calling her. (RP I, 71, 181) Eventually, police stepped in and contacted him and pretended to arrest him so that she would leave. (RP I, 73, 138-140). Mr. King turned over the second round of methamphetamine and said he bought it from Mr. Cockrum. (RP I, 73-75, 140)

Later, when Mr. Cockrum was arrested, he had methamphetamine in his sock. (RP II, 257) The crime lab confirmed the samples from the buys and the sock were methamphetamine. (RP III, 316, 319, 320)

The jury was instructed on the law of the case, and was given WPIC

instruction 4.01. (CP 16) Mr. Cockrum was found guilty. (CP 33, 34, 35)

This appeal followed.

ARGUMENT

The trial court did not err by using WPIC 4.01 as an instruction on reasonable doubt.

The United States Supreme Court has held that the U. S. Constitution neither prohibits trial courts from defining reasonable doubt, nor requires them to do so as a matter of course. Victor v. Nebraska, 511 U.S. 1 (1994) Victor actually states, "The Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof...Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury." Victor at 9, also citing Jackson v. Virginia, 443 U.S. 307 (320) (1979). There are no magic or talismanic words that need to be used, other than to tell the jury that the burden of proof is guilt beyond a reasonable doubt.

The instruction given in this case, WPIC 4.01 is the instruction given in (nearly) every criminal case in Washington State, especially since the Washington State Supreme Court in State v. Bennett, 161 Wn.2d 303 (2007) instructed courts to do so. The Court in Bennett said specifically,

> "We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the Castle instruction. We have approved WPIC 4.01 and conclude that sound judicial practice **requires** that this instruction be given until a better instruction is approved. **Trial courts are instructed to use the WPIC 4.01 instruction** to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt." Bennett at 318. (emphasis added)

Having been so instructed, it would be odd indeed for the Court of Appeals to find that that exact instruction, required by the Supreme Court, is actually unconstitutional.

The defendant's argument of unconstitutionality was recently advanced in State v. Lizarraga, 2015 Washington App., slip opinion 71532-1-I. The Court in Lizarraga held, "But in State v. Bennett our Supreme Court expressly approves the WPIC as a correct statement of the law and directs courts to use WPIC 4.01 to instruct on the burden of proof and the definition of reasonable doubt. See also

State v. Pirtle, 127 Wn.2d 628 (1995) (concluding WPIC 4.01 adequately permits both the government and the accused to argue their theories of the case)." Lizarraga at 53.

It is simply not true that WPIC 4.01 requires the jury to articulate reasons to doubt. The instruction merely instructs the jury that:

> "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." (WPIC 4.01 in its relevant part)

No where in that statement is there a requirement that jurors must be able to articulate their doubts to other jurors. Nor is this akin to any of the "fill in the blank arguments" that counsel refers to.

The "fill in the blank" arguments of State v. Emery, 174 Wn. 2d 741 (2012) and State v. Anderson, 153 Wn.App. 417 (2009), are improper not because they discuss whether a reasonable doubt exists, or whether a reasonable doubt is one for which there is a reason. They are improper because they do not use the

language of our Supreme Court's direction in Bennett. They are improper because they suggest the defendant has to prove something. The WPIC 4.01 does not do that. Defining reasonable doubt is not the same as shifting the burden of proof. Merely defining reasonable doubt does not tell the jury they must convict unless they can articulate a reason to their fellow jurors. No such mental machination was expressed or implied by the prosecutor or the court.

In Emery, for example, the prosecutor began an argument with "In order for you to find the defendant not guilty…" and the court indicated this is a bad beginning because a jury need do nothing to find a defendant not guilty. State v. Anderson was also about that exact "fill in the blank" type argument.

In the present case, the prosecutor never argued that WPIC 4.01 required anything of the sort. The prosecutor never started any sentence with "in order for you to find the defendant not guilty." The prosecutor did not tell the jury, as in Emery, that their role was to solve the case or seek the truth. . Emery and Anderson are not applicable.

The prosecutor said, of Count one,

"There are three elements that we have to prove beyond a

> reasonable doubt." (RP III 404)
>
> And at the end of the first closing, said,
>
> "So, at the end of this case—and because I have the burden of proof, I—I will talk to you again—I'm going to ask you to find Mr. Cockrum guilty of two counts of delivery of methamphetamine and one count of possession." (RP III 416)

The prosecutor clearly did not shift any burden of proof to the defendant by her argument.

Then in the final closing argument, the prosecutor simply read aloud the instruction. Then the prosecutor said,

> "Think about it. Think [about] the situation, think of all the (inaudible) did…" and the prosecutor concluded, "If from such consideration you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt. So if after you think of it all, and you think about it all, and you say, 'Yeah, I believe he did it; I believe Mr. Cockrum did provide the baggies of methamphetamine, both times—I believe that he did pass around that pipe of methamphetamine to get Mr. King high,' if you have—if you have an abiding belief, if you still believe it, you are satisfied beyond a reasonable doubt." (RP III 432-433)

At no time did the prosecutor tell the jury they had to articulate some sort of doubt to each other. The prosecutor mentioned the "abiding belief" which has

passed muster with the U. S. Supreme Court in Victor. The U.S. Supreme Court said, "An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof." Victor at 14-15, citing all the way back to Hopt v. Utah, 120 U.S. 430 (1887) at 439.

In State v. Kalebaugh, 183 Wn. 2d 578 (2015), the Supreme Court in Washington held that the proper standard was "a doubt for which a reason exists" as opposed to "a doubt for which a reason can be given." Kalebaugh at 584-585. In the present case, the court never confused the two sentences, and gave only the one which was approved by the Supreme Court in Kalebaugh, namely, that a reasonable doubt is one for which a reason *exists*. (emphasis added) Since nobody told the jury that they needed to articulate a doubt or give a reason for doubt, the issues that appellate counsel complains of are not present in this case. Moreover, in Kalebaugh, the trial court had used the words "doubt for which a reason can be given," and the reviewing Court still held, "We do not agree that the judge's effort to explain reasonable doubt was a directive to convict unless a reason was given or akin to the "fill in the blank" approach that we held improper in State v.

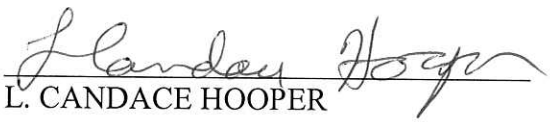
Emery." Despite the fact that it was not the best phrase, the Court refused to hold that the instruction was so unconstitutional as to deprive the defendant of a fair trial.

This case has even less reason for the reviewing Court to find that the instruction was so unconstitutional as to deprive the defendant of a fair trial. The Court simply gave WPIC 4.01 as directed, and nobody ever argued the jurors needed to find a reason to doubt.

CONCLUSION

Where the trial court used the expressly authorized WPIC 4.01, discussing reasonable doubt, which instruction was directed to be used by the Washington Supreme Court in State v. Bennett, where that instruction merely discusses the concept of reasonable doubt and where it does not ever actually tell the jury they must be able to come up with an articulable reason to doubt in order to find the defendant not guilty, the Court should not find the instruction to be unconstitutional and should not reverse the conviction of Mr. Cockrum.

Respectfully submitted,



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PROOF OF SERVICE

I, Jacob Schroeder, do hereby certify under penalty of perjury that on April 20, 2016, 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 the Response to Appellant's Assignment of Error:

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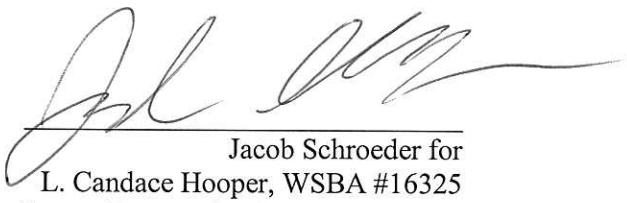

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