

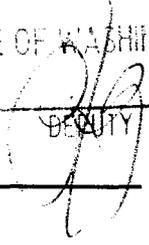
FILED  
COURT OF APPEALS  
DIVISION II

05 NOV -9 PM 2:25

No. 32896-8-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

BY   
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

**Bruce L. Bennett, Jr.,**

Appellant.

Clallam County Superior Court

Cause No. 04-1-00078-4

The Honorable Judge Craddock Verser

**Appellant's Reply Brief**

Manek R. Mistry  
Jodi R. Backlund  
Attorneys for Appellant

**BACKLUND & MISTRY**  
203 East Fourth Avenue, Suite 217  
Olympia, WA 98501  
(360) 352-5316  
FAX: 740-1650

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**ARGUMENT..... 1**

**I. Under the law of the case, the evidence was insufficient and the defendant was not guilty as a matter of law..... 1**

**II. The trial court’s “reasonable doubt” instruction violated due process and was unconstitutional. .... 2**

**CONCLUSION ..... 4**

**TABLE OF AUTHORITIES**

**STATE CASES**

*State v. Brown*, 60 Wash.App. 60, 802 P.2d 803 (1990), *review denied*,  
116 Wash.2d 1025, 812 P.2d 103 (1991) ..... 3

*State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, *review denied* 133 Wn.2d  
1014 (1997)..... 2, 3

*State v. Grewe*, 117 Wash.2d 211, 813 P.2d 1238 (1991) ..... 3

*State v. Harris*, 122 Wn.App. 547, 90 P.3d 1133 (2004)..... 2

*State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998)..... 1

*State v. O'Neil*, 74 Wash.App. 820, 879 P.2d 950 (1994), *review denied*,  
125 Wash.2d 1016, 890 P.2d 20 (1995) ..... 3

*State v. Perez-Cervantes*, 141 Wn.2d 468, 6 P.3d 1160 (2000) ..... 1

*State v. Thein*, 138 Wash.2d 133, 977 P.2d 582 (1999)..... 3

**OTHER AUTHORITIES**

RAP 13.4..... 3

## ARGUMENT

### **I. UNDER THE LAW OF THE CASE, THE EVIDENCE WAS INSUFFICIENT AND THE DEFENDANT WAS NOT GUILTY AS A MATTER OF LAW.**

Respondent contends that Instruction No. 5 “should not have been given.” Brief of Respondent, p. 4. Without citation to authority or to the record, Respondent also argues that the instruction “was not meant to and could not override the binding stipulation...” and claims that “common sense alone dictates that neither the trial court, nor the State, nor the defense understood Instruction No. 5 to intend an absurd result,” citing the lack of objection as proof.<sup>1</sup> Brief of Respondent, p. 4.

These arguments are without merit. First, the instruction *was* given, and so the contention that it should not have been is irrelevant. Presumably, no instruction that raises the state’s burden should ever be given; the law of the case doctrine gives these instructions legal effect nonetheless. *See, e.g., State v. Hickman*, 135 Wn.2d 97 at 100, 954 P.2d 900 (1998). Second, there is no authority for Respondent’s claim that the

---

<sup>1</sup> In fact, the lack of a state objection is what makes the instruction—erroneous though it may be under these circumstances—the law of the case. *State v. Perez-Cervantes*, 141 Wn.2d 468 at 476 n. 1, 6 P.3d 1160 (2000); *State v. Hickman*, 135 Wn.2d 97 at 100, 954 P.2d 900 (1998).

parties' intentions (rather than the plain language of the instruction) control its interpretation and legal effect. In fact, the meaning of an instruction is derived from its language. *See, e.g., State v. Harris*, 122 Wn.App. 547 at 554, 90 P.3d 1133 (2004) (language of instruction must be clear because jurors lack interpretive tools). The parties' intentions do not have any impact.

Curiously, Respondent also argues that the instruction was harmless error. Brief of Respondent, pp. 4-5. This argument is misdirected, since Mr. Bennett does not complain that the instruction was erroneous. Instead, the instruction was the law of the case. It prevented the jury from considering Mr. Bennett's prior conviction as substantive evidence, and the remaining evidence was insufficient for a conviction. *See* Appellant's Opening Brief, pp. 2-3.

**II. THE TRIAL COURT'S "REASONABLE DOUBT" INSTRUCTION VIOLATED DUE PROCESS AND WAS UNCONSTITUTIONAL.**

Without citation to authority, Respondent claims that the Supreme Court's denial of review in *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, *review denied* 133 Wn.2d 1014 (1997) means that the Court has "implicitly approved" the instruction at issue here. There is absolutely no basis for this claim. Acceptance of review is governed by RAP 13.4(b); none of the enumerated factors deals with the merits of the case. In fact,

the Supreme Court may deny review on a Court of Appeals case only to overrule it in another case. *See, e.g. State v. Brown*, 60 Wash.App. 60, 802 P.2d 803 (1990), *review denied*, 116 Wash.2d 1025, 812 P.2d 103 (1991), *overruled by State v. Grewe*, 117 Wash.2d 211, 219-20, 813 P.2d 1238 (1991); *State v. O'Neil*, 74 Wash.App. 820, 879 P.2d 950 (1994), *review denied*, 125 Wash.2d 1016, 890 P.2d 20 (1995), *overruled by State v. Thein*, 138 Wash.2d 133 at 149, 140, 977 P.2d 582 (1999).

Respondent next urges this court to follow Division I's lead in *Castle*, but provides no analysis of the instruction's language. Appellant's arguments regarding *Castle* are set forth in the opening brief, and will not be repeated here. Appellant's Opening Brief, pp. 3-7. Given the central importance of the reasonable doubt instruction, this court should conduct its own analysis and come to its own decision.

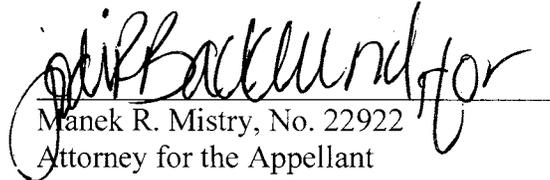
**CONCLUSION**

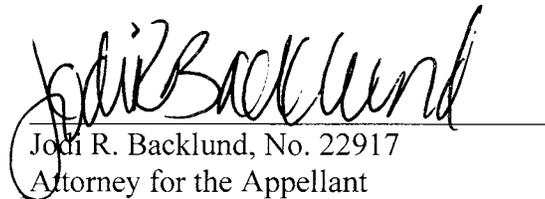
The evidence was insufficient under the law of the case, because the jury was instructed not to consider Mr. Bennett's prior conviction as substantive evidence. This requires reversal and dismissal of the case.

In the alternative, if the case is not dismissed, the faulty "reasonable doubt" instruction requires that the conviction be reversed and that the case be remanded for a new trial.

Respectfully submitted on November 8, 2005.

**BACKLUND AND MISTRY**

  
\_\_\_\_\_  
Manek R. Mistry, No. 22922  
Attorney for the Appellant

  
\_\_\_\_\_  
Jodi R. Backlund, No. 22917  
Attorney for the Appellant

FILED  
COURT OF APPEALS  
DIVISION II

05 NOV -9 PM 2: 25

CERTIFICATE OF MAILING STATE OF WASHINGTON

I certify that I mailed a copy of Appellant's ~~Opening~~ <sup>Opening</sup> Brief to:

Bruce Bennett, Jr., DOC # 990306  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

And to the office of the Clallam County Prosecutor, 223 East Fourth Street, Port Angeles, WA 98362, and that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 8, 2005.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington, on November 8, 2005.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant