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Supreme Court No. (to be set)

Court of Appeals No. 32896-8-II

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,
vs.

Bruce Bennett, Jr.
Appellant/Petitioner

Clallam County Superior Court
Cause No. 04-1-00078-4
The Honorable Judge Craddock Verser

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PETITION FOR REVIEW

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 A. This Court should accept review of Issue 1 (and determine the constitutionality of the *Castle* instruction on reasonable doubt)

because it involves a significant question of law under the federal and state constitutions; it is also an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(3); RAP 13.4(b)(4). 4

B. This Court should accept review of Issue 2 (and determine how a conflict between the court’s instructions to the jury and a stipulation should be resolved in a criminal case) because it is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). 6

C. This Court should accept review of Issue 3 (and determine whether an appellant’s constitutional right to appeal includes the right to have meritorious issues properly raised in a Statement of Additional Grounds considered by an appellate court) because it involves a significant question of constitutional law and because it is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). 7

D. This Court should accept review of Issue 4 and determine whether or not Mr. Bennett’s Oregon convictions were properly included in his offender score, because the Court of Appeals Opinion is in conflict with a decision of this Court; in addition, Mr. Bennett has raised an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1); RAP 13.4(b)(4).
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I. IDENTITY OF PETITIONER

Petitioner Bruce Bennett, Jr., the appellant below, asks this Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Bruce Bennett seeks review of the Court of Appeals opinion entered on January 24, 2006. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the trial court's non-standard reasonable doubt instruction based on *State v. Castle* violate Mr. Bennett's constitutional right to due process?

ISSUE 2: When the law of the case (as set forth in a jury instruction) is in conflict with a stipulation entered by the parties, does the law of the case prevail?

ISSUE 3: Does the right to appeal include the right to have an appellate court review meritorious issues properly raised in the *pro se* Statement of Additional Grounds for Review?

ISSUE 4: Did the trial court erroneously include Mr. Bennett's Oregon convictions in his offender score where there was no evidence establishing their comparability to Washington offenses?

IV. STATEMENT OF THE CASE

A. Prior Proceedings

Bruce L. Bennett, Jr. was charged by Information with Attempted Escape in the First Degree on February 19, 2004. He was convicted following a jury trial, and sentenced within his standard range. The Court of Appeals affirmed his conviction and sentence in an opinion dated January 24, 2006.

B. Statement of Facts

Mr. Bennett was charged with Attempted Escape in the First Degree. At trial, a stipulation was read to the jury and admitted into evidence as Exhibit 40. The stipulation reads (in relevant part):

[The parties] stipulate as follows for purposes of establishing the elements of the crime of Attempted Escape in the First Degree: [That] Bruce L. Bennett, Jr. was being detained at a detention facility... pursuant to a felony conviction.
Exhibit 40, Supp. CP.

Without objection from either party, the court instructed the jury that it could not consider evidence of Mr. Bennett's prior conviction as substantive evidence of guilt. The instruction reads as follows:

Evidence that the Defendant has previously been convicted of a crime is not evidence of the Defendant's guilt. Such evidence may be considered by you in deciding what

weight or credibility should be given to the testimony of the Defendant and for no other purpose.
Instruction No. 5, Supp. CP.

Mr. Bennett asked the court to instruct the jury on reasonable doubt using the standard instruction, WPIC 4.01. Instead, over his objection, the trial court used the so-called *Castle* instruction, which reads as follows:

The Defendant has entered a plea of not guilty. That plea puts in issue every element of the 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 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. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.
Instruction No. 3, Supp. CP.

Mr. Bennett was convicted, and he appealed, arguing that the reasonable doubt instruction was unconstitutional and that the evidence was insufficient under the law of the case (given Instruction No. 5's

prohibition on using the prior conviction substantively). *Pro se* he filed a Statement of Additional Grounds for Review, objecting to the trial court's use of his out-of-state convictions without evidence that they were comparable to Washington offenses.

The Court of Appeals, Division II, affirmed the conviction and sentence in a partially published opinion dated January 24, 2006.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court should accept review of Issue 1 (and determine the constitutionality of the *Castle* instruction on reasonable doubt) because it involves a significant question of law under the federal and state constitutions; it is also an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(3); RAP 13.4(b)(4).

The reasonable doubt standard "provides concrete substance for the presumption of innocence," which is the cornerstone of our criminal justice system. *In re Winship*, 397 U.S. 358 at 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Failure to give clear instruction on reasonable doubt is a "grievous constitutional failure." *State v. McHenry*, 88 Wn.2d 211, 214, 588 P.2d 188 (1977).

In 1997, Division I approved a nonstandard "reasonable doubt" instruction that differs significantly from the standard instruction promulgated by the Washington Pattern Instruction Committee. *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, review denied 133 Wn.2d 1014

(1997). The so-called *Castle* instruction, used over objection in Mr. Bennett's trial,¹ includes the following language:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.
Instruction No. 3, Supp. CP.

With the published opinion in this case, all three divisions of the Court of Appeals have accepted the *Castle* instruction.²

This Court has never addressed the adequacy of the *Castle* instruction. Now that all three divisions of the Court of Appeals have approved the instruction, it is likely to be used with increasing frequency. Because the instruction defines reasonable doubt, it implicates the presumption of innocence which is at the foundation of our criminal justice

¹ Division II erroneously claimed that the instruction given at trial was WPIC 4.01A, and that WPIC 4.01A was based on *State v. Castle*. Opinion, p. 3-4. This is incorrect; WPIC 4.01A, the "simplified" version of WPIC 4.01, does not contain the offending language, and has been in existence at least since 1990, when it was cited in *State v. Adame*, 56 Wn.App. 803 at 809, 785 P.2d 1144 (1990). In the 2005 WPIC revision, WPIC 4.01A was merged with WPIC 4.01.

² See, e.g., *State v. Dykstra*, 127 Wn.App. 1, 110 P.3d 758 (2005) for a Division III case approving the instruction.

system. Problems with the instruction raise significant questions of law under the federal and state constitutions; these issues are of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3); RAP 13.4(b)(4).

B. This Court should accept review of Issue 2 (and determine how a conflict between the court's instructions to the jury and a stipulation should be resolved in a criminal case) because it is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

No published opinion has ever addressed how a conflict between the court's instructions to the jury and a stipulation should be resolved in a criminal case.³ Here, the parties' stipulation (Exhibit 40) was in clear conflict with Instruction No. 5. Supp. CP.

The written stipulation was "for purposes of establishing the elements of the crime of attempted escape in the first degree," and the parties agreed that Mr. Bennett "was being detained at a detention facility... pursuant to a felony conviction." Exhibit 40, Supp. CP. However, the court also instructed the jury that "Evidence that the Defendant has previously been convicted of a crime is not evidence of the Defendant's guilt. Such evidence may be considered by you in deciding

³ The portion of the opinion dealing with the issue in this case was not published. Opinion, p. 10.

what weight or credibility should be given to the testimony of the Defendant and for no other purpose.” Instruction No. 5, Supp. CP.

Instead of examining the legal effect of the conflict, the Court of Appeals theorized that the jury may have harmonized the instruction and the stipulation by deciding that the instruction did not apply to the stipulation. Opinion, p. 11.

This Court should accept review to determine how a conflict between a stipulation and the court’s instruction should be resolved. This is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

C. This Court should accept review of Issue 3 (and determine whether an appellant’s constitutional right to appeal includes the right to have meritorious issues properly raised in a Statement of Additional Grounds considered by an appellate court) because it involves a significant question of constitutional law and because it is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

A criminal defendant has a constitutional right to appeal his judgment and sentence. Wash. Const. Article I, Section 22. RAP 10.10 provides that an appellant may submit a “Statement of Additional Grounds for Review,” and implies that errors will be considered if the court is informed of their “nature and occurrence.” RAP 10.10(c).

Here, Mr. Bennett challenged the inclusion of foreign convictions in his offender score, and argued that the sentencing court did not “treat

prior out-of-state offenses to a full and complete comparison to Washington law for purposes of determining the defendant's SRA offender score." Statement of Additional Grounds for Review, Additional Ground 1.

An illegal or erroneous computation of an offender score may be challenged for the first time on appeal. *State v. Jackson*, 129 Wn.App. 95 at 103, 117 P.3d 1182 (2005). The state bears the burden of proving the existence and classification of convictions from other jurisdictions. *In re Cadwallader*, 155 Wn.2d 867 at 876, 123 P.3d 456 (2005). A defendant has no obligation to object when the state fails to do so. *Cadwallader*, at 876.

The trial court found Mr. Bennett's criminal history to include three Oregon convictions: "Burglary 1" and two counts of "Kidnapping 1." CP 7. These offenses were included in the offender score, despite the absence of any evidence establishing their classification under Washington law.

Mr. Bennett's "Additional Ground 1" clearly identifies this error, which is meritorious under *Cadwallader, supra*. Despite this, the Court of Appeals did not acknowledge the issue in its opinion, other than to note

there was no objection to the inclusion of foreign convictions at the sentencing hearing.⁴ Opinion, p. 3.

Instead, the court identified (but did not address) one argument related to the issue: Mr. Bennett's claim that Oregon's lack of a unanimity requirement precluded the sentencing court from finding his Oregon convictions (entered following a jury trial) comparable to Washington convictions. The Court of Appeals sidestepped this argument. The court noted that "nothing in the record shows that his Oregon convictions were not based on the unanimous verdict of 12 jurors," and declined to address Mr. Bennett's claim.⁵ Opinion, pp. 12-13.

This Court should accept review to determine whether or not an appellate court must consider meritorious issues properly raised by a criminal defendant in his Statement of Additional Grounds for Review. This issue involves a significant question of law under the state

⁴ The absence of an objection is irrelevant, since the issue may be raised for the first time on review under *Cadwallader*.

⁵ The court's decision not to address the issue was erroneous, since comparability issues can be raised for the first time on review, and the lack of an adequate record means that the state did not meet its burden of proving offenses comparable. *Cadwallader, supra*. In other words, the court should have reached the merits of the issue: if the lack of a unanimous jury precludes a finding of comparability as Mr. Bennett argues, then the absence of proof that the Oregon jury was unanimous means the state failed to carry its burden and the sentence must be vacated.

constitution; it is also an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4 (b)(3); RAP 13.4(b)(4).

D. This Court should accept review of Issue 4 and determine whether or not Mr. Bennett's Oregon convictions were properly included in his offender score, because the Court of Appeals Opinion is in conflict with a decision of this Court; in addition, Mr. Bennett has raised an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1); RAP 13.4(b)(4).

The Court of Appeals decision affirming Mr. Bennett's sentence is in conflict with *Cadwallader, supra*, which permits comparability issues to be raised for the first time on review. Nothing in the record establishes that Mr. Bennett's Oregon convictions were comparable to Washington offenses; because of this, the Court of Appeals should have vacated Mr. Bennett's sentence and remanded the case for a new sentencing hearing. Its failure to do so conflicts with this Court's decision in *Cadwallader*; this Court should therefore accept review under RAP 13.4(b)(1).

Furthermore, Mr. Bennett's argument that Oregon's lack of a unanimity requirement precludes a finding of comparability is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1)

VI. CONCLUSION

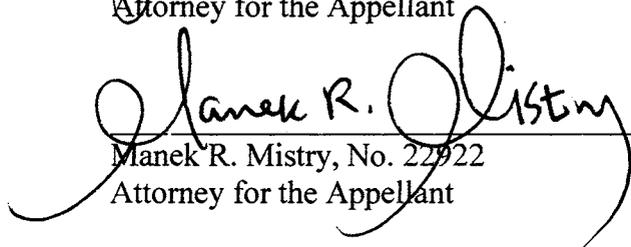
For the reasons stated above, this Court should accept review of Mr. Bennett's case to determine (1) the constitutionality of the *Castle* instruction, (2) how conflicts between the court's instructions to the jury and a stipulation admitted into evidence should be resolved, (3) whether or not the right to appeal includes the right to have meritorious issues properly raised in the Statement of Additional Grounds for Review addressed by the Court of Appeals, and (4) whether or not a foreign conviction based on a non-unanimous verdict is comparable to a Washington conviction. In addition, this Court should correct the Court of Appeals' error by vacating Mr. Bennett's sentence and remanding his case to the trial court for a determination of comparability.

Respectfully submitted February 23, 2006.

BACKLUND AND MISTRY



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DIVISION II

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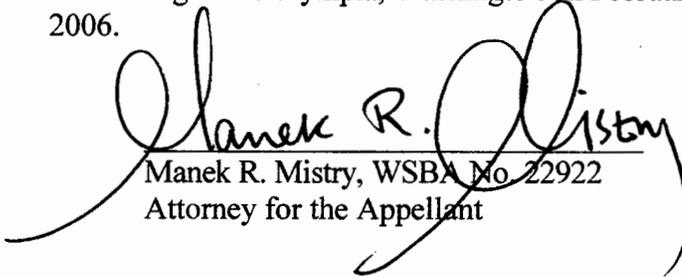
I certify that I mailed a copy of Appellant's Opening
Brief, postage pre-paid, to: BY DEPUTY

Bruce Bennett, Jr., DOC # 990306
CCA/FCC
PO Box 6900
Florence, AZ 85232

and to the office of the Clallam County Prosecuting
Attorney, postage prepaid, both on February 23, 2006.

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 February 23,
2006.


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

APPENDIX A: Opinion

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRUCE L. BENNETT, JR.,

Appellant.

No. 32896-8-II

PART PUBLISHED OPINION

HUNT, J. – Bruce L. Bennett, Jr., appeals his attempted first degree escape conviction and sentence. He argues that (1) the reasonable doubt instruction was improper; (2) the evidence was insufficient to convict because a limiting instruction precluded the jury's finding one element of the offense; and (3) the trial court erred in including his Oregon offenses in his offender score because Oregon law does not require a unanimous verdict by all 12 jurors to convict of a crime. Finding no error, we affirm.

FACTS

I. JURY TRIAL

The State charged Bennett with attempted first degree escape, which required the State to prove that, at the time of the attempted escape, he was being detained pursuant to a felony conviction or equivalent juvenile offense. RCW 9A.76.110(1). In order to avoid disclosing to

the jury that Bennett had attempted to escape while serving time for murder, the parties stipulated that, at the time of the attempted escape, Bennett was being detained at a detention facility pursuant to a felony conviction. The stipulation stated that the parties stipulated "for purposes of establishing the elements of the crime." Exhibit 40. The trial court read the stipulation to the jury and advised it that, as a result of the stipulation, the question of whether Bennett was being detained pursuant to a felony conviction was not at issue. Bennett did not object.

Bennett testified in his defense, denying any involvement in the attempted escape. The stipulation was the only evidence that Bennett had any prior convictions for any purpose, including impeachment.

After the parties rested, they discussed jury instructions. The State proposed an instruction modeled on Washington Pattern Jury Instruction -- Criminal § 4.01A. Bennett argued that this instruction was a comment on the evidence and that it was confusing because it used more than one example to help define reasonable doubt.¹ The trial court rejected Bennett's arguments and adopted the State's reasonable doubt instruction.

Additionally, in an apparent attempt to prevent the jury from using Bennett's prior felony conviction as propensity evidence, the trial court gave the following limiting instruction:

Evidence that the Defendant has previously been convicted of a crime is not evidence of the Defendant's guilt. Such evidence may be considered by you

¹ Bennett's counsel argued: "[I]nstead of a simple instruction that's been used for years, now there's one that says standard definition of reasonable doubt, it uses *firmly convinced* and if there is a *real possibility of being not guilty*." Report of Proceedings (RP) (7/20/2004) at 102 (emphasis added).

in deciding what weight or credibility should be given to the testimony of the Defendant and for no other purpose.

Instruction No. 5, Clerk's Papers (CP) at 29. Although the State asserts that both parties offered this instruction and that neither party objected, the record before us on appeal does not show who proposed this instruction; nor does it contain any objection by either party. Moreover, neither party mentioned this instruction in closing argument.

The jury convicted Bennett as charged.

II. SENTENCING

At sentencing, the parties and the court discussed Bennett's prior convictions, which included two Washington convictions (a second degree robbery and a second degree murder), and three Oregon convictions (a first degree burglary and two counts of first degree kidnapping). Bennett did not argue that the Oregon offenses were not comparable to Washington offenses, and the trial court did not address this issue. The sentencing court determined that Bennett had an offender score of four,² and sentenced him to a standard range sentence.

Bennett appeals his conviction and sentence.

ANALYSIS

I. REASONABLE DOUBT INSTRUCTION

Bennett argues that the trial court committed reversible error in giving the jury Instruction No. 3, a reasonable doubt instruction, taken from 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01A, at 68 (2d ed (1994)) (WPIC). We disagree.

Instruction No. 3 stated:

The Defendant has entered a plea of not guilty. That plea puts in issue every element of the 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 reasonable doubt exists.

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. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. *There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.* If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a *real possibility* that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

CP at 27 (Instruction No. 3) (emphasis added).

WPIC 4.01A is based on the reasonable doubt instruction that Division One of this court approved in *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, *review denied*, 133 Wn.2d 1014 (1997), as supplemented by the Washington Supreme Court Committee on Jury Instructions. WPIC, § 4.01A cmt. at 24-25 (Supp. 1998).

Asking us to reject *Castle*, Bennett argues that (1) the "real possibility" language in the last sentence of the instruction is equivalent to the "substantial doubt" language the United States Supreme Court rejected in *Cage v. Louisiana*, 498 U.S. 39, 41, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), *overruled in part by Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d

² The trial court found that the Washington convictions were the same criminal conduct under RCW 9.94A.589(1)(a) and, therefore, counted them as a single offense in calculating Bennett's offender score.

385 (1991) (rejecting the standard applied in *Cage*)³; and (2) the following language compounds the problem because the phrase “possible doubt” is not defined and the State’s burden is presented in the negative -- “There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.” Br. of Appellant at 5-6, citing a portion of Instruction No. 3.

A. Standards

In a criminal case, the trial court must instruct the jury that the State has the burden to prove each essential element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). It is reversible error if the instructions relieve the State of that burden. *Pirtle*, 127 Wn.2d at 656 (citations omitted). Such is not the case here, however.

Although no particular wording is required, the jury instructions must define reasonable doubt and clearly communicate the correct allocation of the burden of proof. *State v. Coe*, 101 Wn.2d 772, 787-88, 684 P.2d 668 (1984). This standard is not met if the defendant establishes that the wording of the challenged instruction misled the jury as to its functions and responsibilities under the law. *State v. Hayes*, 73 Wn.2d 568, 572, 439 P.2d 978 (1968).

³ *Tyler v. Cain*, 533 U.S. 656, 658 n.1, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) (citing *Victor v. Nebraska*, 511 U.S. 1, 6, 114 S. Ct. 1239 127 L. Ed. 2d 583 (1994); *Estelle*, 502 U.S. at 73 n.4):

In *Cage*, [the Supreme] Court observed that a reasonable juror “could have” interpreted the instruction at issue to permit a finding of guilt without the requisite proof. In *Estelle v. McGuire*, however, th[e] Court made clear that the proper inquiry is not whether the instruction “could have” been applied unconstitutionally, but whether there is a reasonable likelihood that the jury did so apply it.

We review a challenged jury instruction de novo, examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portion in the context of all the instructions given. *Pirtle*, 127 Wn.2d at 656.

B. *Castle*

The instruction at issue in *Castle* stated:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime 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.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a *real possibility* that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Castle, 86 Wn. App. at 53 (emphasis added).

The *Castle* court held that the term "real possibility" did not lower the State's standard of proof because it simply distinguished "reasonable from unfounded doubt" and referred "to the nature of the possibility, not to its quantum." *Castle*, 86 Wn. App. at 58. Comparing the instruction to the instruction at issue in *Cage*, the *Castle* court determined that *Cage* never addressed the "real possibility" language present in the instruction *Castle* challenged. *Castle*, 86 Wn. App. at 55.

Examining cases from a variety of jurisdictions, the *Castle* court noted that other courts had addressed similar language and that these courts had found the language permissible. *Castle*, 86 Wn. App. at 55 (discussing *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d

583 (1994); *United States v. Conway*, 73 F.3d 975 (10th Cir. 1995); *United States v. Williams*, 20 F.3d 125 (5th Cir. 1994), *cert. denied*, 513 U.S. 891 (1994); *United States v. Taylor*, 997 F.2d 1551 (D.C. Cir. 1993) (citing seven additional cases examining similar language and finding no reversible error)).

The *Castle* court also distinguished *United States v. Porter*, 821 F.2d 968, 973 (4th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988), holding that although the *Porter* court concluded the use of the phrase “real possibility” may not fully define “reasonable doubt,” the phrase did not shift the burden to the defendant, and other portions of the instruction clearly allocated the burden. *Castle*, 86 Wn. App. at 57-58. Additionally, the *Castle* court noted that the instruction at issue was very similar to the Federal Judicial Center model reasonable doubt instruction, which had been characterized as stating the reasonable doubt standard “succinctly and comprehensibly.” *Castle*, 86 Wn. App. at 55-56 (quoting *Victor*, 511 U.S. at 27 (Ginsberg, J., concurring)).

C. “Real Possibility”

As noted above, Bennett argues that the “real possibility” language in the last sentence of Instruction No. 3 here is equivalent to the “substantial doubt” language the United State Supreme Court rejected in *Cage*, 498 U.S. at 41. We disagree.

First, we agree with Division One’s conclusion in *Castle* that, as used here, the phrase “real possibility” simply distinguishes “reasonable from unfounded doubt” and refers “to the nature of the possibility, not to its quantum.” *Castle*, 86 Wn. App. at 58.

Second, the instruction at issue in *Cage* differed significantly from the instruction here. The *Cage* instruction stated in relevant part:

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.

Cage, 498 U.S. at 40 (quoting *State v. Cage*, 554 So. 2d 39, 41 (La. 1989)).

Focusing on *all* of the italicized language in the above instruction, the Supreme Court in *Cage* held that the instruction was error because, when read as a whole, a jury could have understood the instruction to lower the state's burden of proof to something less than beyond a reasonable doubt:

The [instruction] did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Cage, 498 U.S. at 41. Such is not the case here, however, where, in contrast, Instruction No. 3 does not use the term "substantial doubt" and does not refer to "grave uncertainty" or "moral certainty."

The terms "substantial doubt," used in the *Cage* instruction, and "real possibility," used here, are very different terms: "Substantial" refers to the degree or weight of doubt, while "real"

refers to the qualitative nature of the doubt. Furthermore, the Supreme Court in *Cage* did not hold that the phrase “substantial doubt” alone invalidated the instruction. On the contrary, it clearly considered this phrase in context with other significant language in the erroneous instruction, specifically, the terms “grave uncertainty” and “moral certainty,” terms not present in WPIC 4.01A that the trial court gave here.

Accordingly, we disagree with Bennett that WPIC 4.01A fails to comply with due process requirements under *Cage*, and we decline Bennett’s invitation to reject *Castle* on this basis.

D. “Every Possible Doubt”

Bennett next challenges the following portion of Instruction No. 3: “There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.” He argues that this language inadequately communicates the State’s burden of proof because it frames the standard in the negative and does not define “possible doubt.” *Castle* did not directly address this language.

Looking at the whole language of Instruction No. 3 here, we hold that it clearly instructed the jury that it was the State’s burden to establish guilt beyond a reasonable doubt and that the defendant is presumed innocent unless that burden is overcome. Merely stating the standard in the negative did not shift the burden of proof to the defense. Additionally, we conclude that the “possible doubt” language merely emphasized that a reasonable doubt is one based on a real possibility of innocence founded on reason and evidence, as opposed to any possibility of innocence, however far fetched. *See State v. Dykstra*, 127 Wn. App. 1, 9-11, 110 P.3d 758 (2005); *see also State v. Kuhn*, 85 P.3d 1109, 1111 (2003) (citing *State v. Sheahan*, 77 P.3d 956

(2003)). Other courts have also approved similar instructions. *See e.g., Victor*, 511 U.S. at 26-27 (Ginsburg, J., concurring); *Conway*, 73 F.3d at 980.

Accordingly, we adopt *Castle*, and we hold that the reasonable doubt instruction did not relieve the State of its burden of proof.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. SUFFICIENCY OF EVIDENCE

Bennett also argues that the evidence failed to establish he was being detained pursuant to a felony conviction because (1) Instruction No. 5 told the jury that evidence of a prior conviction could be considered *only* in deciding what weight or credibility to give his testimony, therefore the stipulation had no evidentiary value; and (2) the State did not object to Instruction No. 5, making the instruction the law of the case. In essence, Bennett argues that Instruction No. 5 precluded the jury from considering the stipulation, and arguably any other evidence of a conviction, as substantive evidence. Again, we disagree.

The State had the burden of proving that Bennett knowingly attempted to escape “while being detained pursuant to a conviction of a felony or an equivalent juvenile offense.” RCW 9A.76.110(1). The stipulation, which the trial court read to the jury, stated that the parties had entered the stipulation for purposes of establishing elements of the charged offense, namely the that, at the time of Bennett’s attempted escape, he was being detained at a detention facility pursuant to a felony conviction.

The existence of a prior conviction was an element of the charged escape attempt, and the trial court orally instructed the jury that whether Bennett was being detained pursuant to a felony charge was not an issue for it to decide because the parties had stipulated to its existence.⁴ Instruction No. 5 limited the jury's use of "[e]vidence that the Defendant has previously been convicted of a crime" to weight and credibility issues. CP at 5. This instruction did not, however, refer directly to the stipulation or expressly limit the jury's use of the stipulation. Additionally, Instruction No. 1, properly required the jury to read all the instructions together. *Pirtle*, 127 Wn.2d at 656 (jury instructions must be read as a whole). In light of these circumstances, it was not error for the jury to harmonize Instruction No. 5, the stipulation, and the definition of first degree escape and to decide that Instruction No. 5 did not relate to the stipulation.

Moreover, Bennett affirmatively agreed to the stipulation and did not object to its use in proving an element of the charged offense; nor did he request additional instructions limiting the jury's use of the stipulation. By stipulating to an element of the offense, he, in effect, waived his right to have the jury decide this element. *See United States v. Mason*, 85 F.3d 471, 472 (10th cir. 1996) ("[B]y stipulating to elemental facts, a defendant waives his right to a jury trial on that element.").⁵

⁴ The prosecutor reemphasized the court's oral instruction in his closing argument. RP (7/20/2004) at 115-16.

⁵ To the extent Bennett is also arguing that Instruction 5 was instructional error, as the State's arguments suggest, any error in giving this instruction was clearly harmless. An instructional error is harmless if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *See State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35

Accordingly, Bennett's argument fails.

III. OREGON OFFENSES

In his pro se statement of additional grounds,⁶ Bennett contends, for the first time, that the trial court erred by including his Oregon convictions in his offender score. He argues that these convictions should not have counted toward his offender score because Oregon law requires that only 10 of 12 jurors find him guilty,⁷ while Washington requires a unanimous verdict of 12 jurors to convict.⁸

Even assuming, without deciding, Bennett did not waive this argument by failing to raise this issue below and regardless of the merits of his legal argument, nothing in the record shows that his Oregon convictions were not based on the unanimous verdict of 12 jurors. Because this

(1999)). Put another way, "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

Here, the jury found Bennett guilty. In order to do so, it had to decide that Instruction 5 did not pertain to the stipulation. Thus, the verdict would have been same even without Instruction 5. Accordingly, any instructional error was harmless.

⁶ RAP 10.10.

⁷ Oregon Revised Statute § 136.450 provides:

(1) Except as otherwise provided in subsection (2) of this section, the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors.

(2) Except when the state requests a unanimous verdict, a verdict of guilty for murder or aggravated murder shall be by concurrence of at least 11 of 12 jurors.

⁸ *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (citing *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); *State v. Workman*, 66 Wash. 292, 295, 119 P. 751 (1911)).

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argument relies on matters outside the record, we do not address it. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Affirmed.

Hunt J

Hunt, J.

We concur:

Bridgewater P.J.

Bridgewater, P.J.

Penoyar, J.

Penoyar, J.