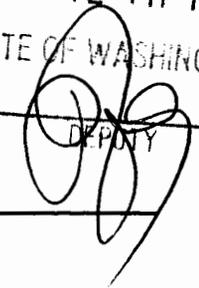


78377-2

FILED
COURT OF APPEALS
DIVISION II

05 OCT 12 PM 1:07

STATE OF WASHINGTON

BY  DEPUTY

No. 32896-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRUCE L. BENNETT, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Craddock Verser, Judge
Cause No. 04-1-00078-7

BRIEF OF RESPONDENT

CAROL L. CASE
Deputy Prosecuting Attorney
Attorney for Respondent
WSBA # 17052

TABLE OF CONTENTS

A. APPELLANT’S ASSIGNMENT OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT 3

E. CONCLUSION..... 7

TABLE OF AUTHORITIES

Washington Cases

Reilly v. State, 18 Wn.App. 245, 253, 566 P.2d 1283 (1977) 3

State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)..... 5

State v. Brown, 147 Wn.2d 330, 332, 58 P.3d 889 (2001)..... 4

State v. Castle, 86 Wn.App. 48, 58, 60, 946 P.2d 402, *review denied* 133
Wn.2d 1014 (1997) 5, 6

Statutes

RCW 9A.76.110..... 3

Rules

RAP 10.3(b) 2

Other

WPIC 401A.....6

WPIC 5.05..... 3

A. APPELLANT'S ASSIGNMENT OF ERROR

1. Bennett claims that the law of the case prohibited the jury from considering the defendant's prior conviction for any purpose other than impeachment.
2. Bennett claims that the conviction was based on insufficient evidence because without the prior conviction there was no evidence to establish that Bennett had previously been convicted of a felony.
3. Bennett claims his constitutional right to due process was infringed by the court's instruction on reasonable doubt.
4. Bennett claims that the trial court erred by giving Instruction No. 3 relating to reasonable doubt.
5. Bennett claims that the trial court erred by equating a "reasonable doubt" with a "real possibility" that Bennett was not guilty.
6. Bennett claims that the trial court erred by explaining "reasonable doubt in terms of "possible doubt" without clarifying that phrase.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Following a stipulation to a prior conviction, whether the court's instruction prohibited the jury from considering Bennett's prior conviction as substantive evidence of guilt? Assignments of Error Nos. 1 and 2.
2. Whether there was sufficient evidence to convict Bennett of Escape in the First Degree without substantive evidence that Bennett had a prior felony conviction? Assignments of Error Nos. 1 and 2.

3. Whether the court's instruction on reasonable doubt violated Bennett's constitutional right to due process? Assignments of Error Nos. 3, 4, 5, and 6.
4. Whether the court's instruction erroneously equated "reasonable doubt" with "real possibility" that Bennett was not guilty? Assignments of Error Nos. 3, 4,5, and 6.
5. Whether the court's instruction erroneously permitted the jury to convict unless there was "substantial doubt" about Bennett's guilt? Assignments of Error Nos. 3,4,5, and 6.

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts Bennett's recitation of the procedural facts set forth in his opening brief at pages 1 through 2 with the following addition:

In order to exclude evidence that Bennett was serving time on a murder conviction, Bennett, his attorney and the prosecuting attorney signed a stipulation that Bennett had been convicted of a felony and that between November 1, 2002 and January 13, 2003 Bennett was being detained in Clallam Bay Correction Center, a detention facility. RP 14-15.

Prior to the State's first witness, the Court read the following stipulation to the jury:

That in the County of Clallam, State of Washington, on or about a period of time from November 1st, 2002 to January 13th, 2003 Bruce L. Bennett, Junior, was being detained at a detention facility, to wit, Clallam Bay Correction Center pursuant to a felony conviction.

RP 40, Trial Day 1. The Court went on to advise the jury that both the attorneys and Bennett had stipulated to those facts and it was not an issue for the jury to determine. RP 40, Trial Day 1.

D. ARGUMENT

I. A COMMON SENSE APPROACH INDICATES THAT THE EVIDENCE WAS SUFFICIENT TO CONVICT BENNETT OF ESCAPE IN THE FIRST DEGREE.

A written stipulation signed by counsel for both parties is binding on the parties and the court. *Reilly v. State*, 18 Wn.App. 245, 253, 566 P.2d 1283 (1977).

Pursuant to RCW 9A.76.110, the State is required to prove that a defendant is being detained in a detention facility pursuant to a felony conviction. The State, defense counsel and Bennett signed a written stipulation to those requirements. RP 40 Trial Day 1. The parties stipulated to the elements of the crime. Based on that stipulation, the jury did not have to decide those elements. Obviously Bennett stipulated that he was a convicted felon being held in a detention facility because he sought to exclude prejudicial evidence about his prior convictions, i.e., Murder in the Second Degree and Robbery in the Second Degree. That stipulation is binding on the State, defense counsel, Bennett and the court.

The NOTE ON USE for WPIC 5.05 states:

Use this instruction only when a defendant is a witness and a prior conviction has been

admitted for impeachment purposes. It should not be given if the prior conviction was admitted only for substantive purposes.

Instruction No. 5, Supp. CP should not have been given. The prior felony conviction was an element of Attempted Escape in the First Degree and not an issue for the jury. Instruction No. 5 was not meant to and could not override the binding stipulation entered into before the State's first witness was called. RP 40, Trial Day 1. Common sense alone dictates that neither the trial court, nor the State, nor the defense understood Instruction No. 5 to intend such an absurd result. That understanding is manifested by the fact that the instruction was never objected to by either party; in fact it was offered by both parties.

Bennett contends that the State took no steps to tailor the instruction to accommodate the fact that a felony conviction is a predicate to a charge of Escape in the First Degree. To the contrary, counsel for both parties, as well as Bennett, signed a written stipulation to that effect.

An erroneous jury instruction may be subject to harmless error analysis if the error does not relieve the State of its burden to prove each element of the crime charged. An erroneous instruction is harmless if, from the record in a given case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

State v. Brown, 147 Wn.2d 330, 332, 58 P.3d 889 (2001).

The error in the instant case did not contribute to the verdict obtained; the jury relied on Bennett's stipulation for the elements of the crime.

Erroneous rulings are not reversible error "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). The evidence against Bennett was overwhelming; there was no reasonable probability, had the error not occurred, that the outcome of the trial would have been materially affected. To hold that the giving of Instruction No. 5 negated the written stipulation would produce an unjust, absurd result.

II. THE REASONABLE DOUBT INSTRUCTION NEITHER VIOLATED BENNETT'S DUE PROCESS NOR WAS UNCONSTITUTIONAL

Bennett attempts to convince this Court that it should not use a pattern jury instruction that has been implicitly approved by our own Supreme Court in denying review of *State v. Castle*, 86 Wn.App. 48, 58, 60, 946 P.2d 402, *review denied* 133 Wn.2d 1014 (1997). In *Castle*, the Court of Appeals noted that "the concept of reasonable doubt . . . defies easy explication," found "no constitutional flaw" in the instruction given.

The comment to the [simplified alternative] [revision] to WPIC 4.01A indicates “that the *Castle* instruction – supplemented by two additions recommended by the Court of Appeals – provides an accurate statement of the law and does so in a way that many practitioners and courts may also find to enhance the jurors’ understanding”. In fact, the [simplified alternative] [revision] *Castle* instruction is set forth in the pocket part of the Washington Pattern Jury Instructions at pages 24 and 25. That is exactly the instruction used in the instant case.

The *Castle* court concluded that the instruction as given did not lower the State’s standard of proof or shift the burden to the defendant. 86 Wn.App. at 58. Furthermore, the *Castle* court rejected the defendant’s constitutional challenge to the use of the phrase “real possibility.” There is no constitutional flaw; Bennett’s due process rights were not violated. Bennett’s argument is without merit.

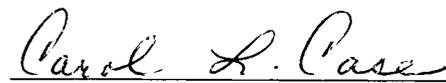
E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm Bennett's conviction.

DATED this 8th day of October, 2005 at Port Angeles,
Washington.

Respectfully submitted,

DEBORAH S. KELLY
PROSECUTING ATTORNEY



Carol L. Case, WABA # 17052
Deputy Prosecuting Attorney
Attorney for Respondent

